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Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

SANJEEV GILL

Applicant

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Respondent

Indexed as
Gill v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: Michele A. Pineau, Vice-Chairperson

For the Applicant: Jacek Janczur, Public Service Alliance of Canada

For the Respondent: Amita R. Chandra, counsel

Heard at Vancouver, British Columbia,
April 24, 2007.

I. Application before the Chairperson

[1] Mr. Gill has applied to the Public Service Labour Relations Board ("the Board") for an extension of the time limit for filing a grievance challenging his termination because of mitigating circumstances. The respondent, Treasury Board (Department of Human Resources and Skills Development) ("the employer"), objects to the extension of the time limit.

[2] Under section 45 of the *Public Service Labour Relations Act* ("the new *Act*"), the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions under paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") to hear and decide any matter relating to the extension of time.

II. Background

[3] Mr. Gill is an investigation and control officer who works as part of a joint compliance team that investigates employment insurance fraud. He is a term employee and a member of the Program and Administrative Services group at the PM-2 level. He works in Vancouver, British Columbia.

[4] On August 27, 2003, Mr. Gill was terminated under subsection 11(2) of the *Financial Administration Act* on the basis that he no longer held a valid enhanced reliability status which is required for his position. This status was revoked in light of the circumstances that are detailed below.

[5] On February 12, 2003, Mr. Gill was arrested with regard to an alleged kidnapping and later released. The employer found out about his arrest. On April 24, 2003, the employer suspended Mr. Gill without pay indefinitely pending an investigation of criminal conduct outside the workplace. He filed a grievance at the third level of the grievance procedure on May 13, 2003, contesting the indefinite suspension.

[6] On August 26, 2003, Mr. Gill's enhanced reliability status was revoked as a result of the investigation, which concluded that he was actively associated with an organized crime gang. Mr. Gill was advised of the revocation on the following day, and his employment was terminated effective August 27, 2003. Mr. Gill received the letter of termination of employment on Friday, August 29, 2003. On October 1, 2003, he filed

a second grievance at the final level of the grievance procedure requesting the reinstatement of his enhanced reliability status.

[7] Even though Mr. Gill signed a third grievance challenging his termination within the 25-day time limit stipulated in the collective agreement, the Public Service Alliance of Canada ("the bargaining agent" or "the PSAC") did not file it until October 24, 2003. This date is three weeks, or 14 working days after the time limits stipulated in the collective agreement between Treasury Board and the PSAC for the PM group ("the collective agreement"). The circumstances of this delay are explained later in these reasons.

[8] At the beginning of October 2003, Mr. Gill requested that the Security Intelligence Review Committee ("the SIRC") investigate the revocation of his enhanced reliability status. On October 31, 2003, the SIRC acknowledged that it had received Mr. Gill's letter on October 23, 2003. The SIRC declined jurisdiction over the complaint, since it did not fall within the jurisdiction of the *Canadian Security Intelligence Act* (*CSIS*). The SIRC explained that the right of review or redress for an enhanced reliability status is governed by employer procedures and not by the SIRC.

[9] On July 19, 2004, the employer denied all three grievances. The employer also raised the issue that the termination grievance was untimely.

[10] All three grievances were referred to adjudication on August 25, 2004, along with an application to extend the time limit provided for in the grievance procedure in the collective agreement. The bargaining agent also requested, on behalf of the complainant, that the adjudication of his grievances and the application for the extension of time be held in abeyance pending the outcome of the criminal matter.

[11] On October 15, 2004, the employer objected to the matters not being scheduled, stating that the bargaining agent had not provided cogent reasons for its request and that the applicant had been terminated because of the loss of his enhanced reliability status, not because he had committed a criminal offence.

[12] On November 5, 2004, the bargaining agent replied to the employer's objection, alleging that the employer's decision to terminate was related to the criminal charges and that the employer would not be prejudiced by the passage of time. The bargaining agent stated that Mr. Gill's grievance had been delivered to its office within the time

limit specified in the collective agreement but that the filing of the grievance with the employer had been delayed for three weeks because of the absence of the president of the local. The bargaining agent requested that the extension of the time limits be granted because the delay was through no fault of the applicant and because he was terminated.

[13] On November 12, 2004, the Board granted the bargaining agent's request to hold the grievances in abeyance pending the outcome of the criminal charge. On November 15, 2005, the Board requested an update of the status of Mr. Gill's criminal case. On November 29, 2005, the bargaining agent replied that the criminal charge was still pending and that it would provide an update in March 2006, asking that the grievances be further postponed. On December 7, 2005, the employer consented to the request for postponement to the extent that it not be prejudiced by the delay and any order of corrective action. On December 9, 2005, the Board granted the bargaining agent's request that the grievances be held in abeyance. On March 31, 2006, the Board requested a further update from the parties. On April 6, 2006, the bargaining agent advised that criminal proceedings were scheduled for June 2006. On April 7, 2006, the Board granted a further extension of the abeyance until August 8, 2006.

[14] On May 18, 2006, the criminal charge against Mr. Gill was dismissed. On July 13, 2006, the bargaining agent advised the Board that the criminal matter had been concluded and requested that the grievances be scheduled for mediation. On July 31, 2006, the employer refused mediation. On August 2, 2006, the Board acknowledged the employer's refusal and scheduled a hearing.

III. Summary of the evidence

[15] Sam Wiese is a staff member of the bargaining agent and one of its national representatives. She assisted Mr. Gill with his grievances. At that time, she was acting in a replacement capacity for a one-year period. She testified that a week following Mr. Gill's termination, she contacted Joel Stelpstra, National Project Leader, Labour Relations and Compensation. Mr. Stelpstra, as representative of the employer, told her that the bargaining agent should wait for the outcome of the complaint made to the SIRC before filing a termination grievance, since the reinstatement of Mr. Gill's enhanced reliability status would render the grievance moot. On October 7, 2003, before receiving the SIRC's reply, Ms. Wiese sent a fax to local 0903's president, Patti Victor, about filing a grievance, as she anticipated that the reply from the SIRC

would likely be negative. Ms. Victor was absent and did not reply until October 24, 2003.

[16] Ms. Wiese explained that when she contacted Mr. Stelpstra, she had no reason to question his advice. She had dealt with him previously on many cases and she respected his knowledge about labour relations matters. They had resolved many issues in the past. She had no reason to doubt his authority to speak on behalf of the employer in his capacity as the most senior local labour relations representative.

[17] During the period that preceded the filing of his grievance, Mr. Gill contacted her once a week concerning the various steps he was taking to seek redress for his termination. He made a request to obtain his personal information under the *Privacy Act*, he filed a complaint with the SIRC and he inquired as to whether he could file a civil suit against the employer. Ms. Wiese acknowledged that she also provided moral support to Mr. Gill during this difficult period.

[18] Ms. Victor testified that she has been the president of her local for eight years and was in that position when Mr. Gill was terminated. She did not find out about the grievance faxed by Ms. Wiese until her return to work on October 20, 2003. Ms. Victor had been on vacation leave from October 3 to October 10, 2003, and then on sick leave from October 14 to 17 (the 13th being the Thanksgiving holiday). Ms. Victor provided a verification of these absences.

[19] On October 20, 2003, Ms. Victor sought an excluded first-level manager with whom to file the grievance, but found none. On October 24, 2003, she contacted Nancy Emery, the regional manager who agreed to receive the grievance, even though she was not Mr. Gill's immediate supervisor. On October 27, 2003, Ms. Victor faxed the grievance and transmittal form back to Ms. Wiese. Exhibits corroborate these dates.

[20] Mr. Gill testified that when he received the letter of termination, he had his father fax the letter to the bargaining agent's office the following day. He then contacted the bargaining agent's office and spoke to Ms. Wiese. He stated his intention to grieve what he believed to be an unwarranted termination. He did not recall precisely when he signed the grievance form because there is no space on the form to indicate the date of the applicant's signature, but he recalled that it was shortly after the termination and within the 25 days stipulated in the collective agreement.

[21] After his termination Mr. Gill stayed in frequent contact with Ms. Wiese by telephone or by dropping in at the bargaining agent's office.

[22] Mr. Gill testified that the employer's investigators were mistaken about the criminal charges that had been filed against him. There was only one count of kidnapping. The assault, attempted murder and other charges that appear on the indictment were against another person. He had difficulty obtaining his personal information. He requested access to his personal file twice, once at the time of his suspension in April 2003 and again when he was terminated. He had to file a request under the *Privacy Act* to obtain it.

[23] Mr. Gill stated that he relied on the bargaining agent to tell him the steps he needed to take after he was suspended and then terminated. He followed their advice implicitly. He did not keep a record of each step. He recalls faxing or personally delivering to the bargaining agent all the correspondence that he received so that its file would be complete.

[24] Nancy Emery is the Area Manager of Administrative Services. She manages 8 units in the Lower Mainland, which includes 1,500 employees, and two call centres. She has been in this position for 8 years and has been a manager for 17 years. Mr. Gill worked for a unit that reported to her. A newspaper article in April 2003 about the arrest of Mr. Gill was brought to her attention. She was concerned about the security of communications within the group that she managed. She consulted a labour relations advisor in the regional office about her concerns.

[25] Ms. Emery recalled that Ms. Victor approached her to file a grievance concerning Mr. Gill's termination on October 24, 2003. Ms. Emery noted that the grievance was outside the time limit stipulated in the collective agreement. She accepted the grievance and signed an acknowledgment of its receipt based on advice she had previously received that she could accept a grievance even though it was untimely, and that this type of issue would be dealt with later. The grievance was directed to the third level of the grievance procedure, causing it to be transmitted to the employer's national headquarters. Ms. Emery acknowledged that on October 24, 2003, Ms. Victor explained that the delay in filing the grievance had been due to her two–week absence. Ms. Emery did not inquire about the reasons for Ms. Victor's absence.

IV. Summary of the arguments

A. For the applicant

[26] The bargaining agent, on behalf of Mr. Gill, submits that the new *Act* allows the Board to extend the time limit for filing a grievance and asks that this discretion be exercised in this case based on the five criteria stated in *Shenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. Mr. Gill was not only diligent in exercising his rights, he also demonstrated a continued intention to grieve his termination by signing the grievance within the 25–day period, by staying in contact with the bargaining agent, by following its advice, by seeking redress before the SIRC and by obtaining his personal information under the *Privacy Act*. These steps should weigh in his favour for extending the time limit.

[27] Mr. Gill should not be penalized because Ms. Wiese relied on advice from Mr. Stelpstra to delay filing the grievance until the review by the SIRC was complete, and because the bargaining agent's president was not available to file his grievance. The bargaining agent argues that the employer complained that the applicant is three weeks late in filing his grievance, yet it took the employer several months to respond. In comparison, 14 working days' delay to file the grievance is negligible. The bargaining agent asks that I consider how much lengthier delays in other cases were decided in favour of the applicant, such as in *Rinke v. Canadian Food Inspection Agency*, 2005 PSSRB 23, *Trenholm v. Staff of the Non-Public Funds, Canadian Forces*, 2005 PSLRB 65, *Rabah v. Treasury Board (Employer of National Defence)*, 2006 PSLRB 101, *Palmer v. Canadian Security Intelligence Service,* 2006 PSLRB 9, *Richard v. Canada Revenue Agency*, 2005 PSLRB 180, or *Becker Milk Company Ltd.* (1978), 19 L.A.C. (2d) 217 (Burkett).

[28] Furthermore, Mr. Gill was unable to file the grievance himself because the employer had instructed him at the time of his indefinite suspension not to appear on its premises.

[29] Now that he has been acquitted of the criminal charge, Mr. Gill's grievance arguably has a chance to succeed. The revocation of his enhanced reliability status was founded on criminal charges that did not apply to him, and he was acquitted of the only indictment with which he was charged. Since he has been acquitted, the basis for revoking his enhanced reliability status no longer exists.

[30] A termination is the most compelling type of case for which the Board should extend the time limit to file a grievance. Mr. Gill's reputation in the workplace can only be cleared by the adjudication of his grievance.

[31] The employer was aware of his intention to grieve his termination since he had already grieved the revocation of his enhanced reliability status and had made a request for review by the SIRC.

[32] The prejudice to Mr. Gill outweighs the prejudice to the employer. While the grievances will be heard about three years after they were filed, the delay in filing the grievance was only three weeks.

[33] Accordingly, clear, cogent and compelling reasons have been presented to explain the delay. The extension of time for filing a grievance should be granted, and the grievance should be heard on its merits.

B. <u>For the respondent</u>

[34] The employer submits that the facts are not in dispute. Mr. Gill's suspension was the result of an investigation, and his enhanced reliability status was revoked.

[35] There are only two relevant dates: August 27, 2003, the termination date, and October 24, 2003, when the grievance was filed.

[36] Recent cases reinforce the principle that sound labour relations policy and other factors must influence how the *Schenkman* test is applied. The collective agreement provisions generally contribute to the stability of labour relations and should only be set aside for good reason. In *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813, (F.C.A.) (QL), the Federal Court held that the 25-day time limit started to run as soon as an employee learns of the facts on which his grievance is based.

[37] In this case, the employer would be prejudiced by the passage of time. On October 15, 2004, and December 7, 2005, the employer expressed its concerns about prejudice when the grievances were put in abeyance. As an adjudicator, I should take judicial notice of this.

[38] The employer raises the fact that there is no evidence to corroborate that Mr. Gill transmitted his termination to the bargaining agent within the time limit of

the collective agreement. The PSAC is an established bargaining agent that knows the grievance process well. Mr. Stelpstra's statement to Ms. Wiese does not alleviate the requirement to file a grievance within the time limit provided in the collective agreement. Ms. Wiese actions contradict her evidence that she was waiting to hear from the SIRC, since she sent the grievance form to Ms. Victor three weeks before the SIRC replied to Mr. Gill.

[39] The employer argues that as in *Guaiani v. Treasury Board (Employer of National Defence)*, PSSRB File Nos. 166-02-21358, 149-02-109 and 149-02-110 (19920807), an extension of time cannot be granted simply because the bargaining agent relied on the employer's advice. As stated in *Boulay v. Treasury Board (Correctional Services of Canada)*, PSSRB File No. 149-02-160 (19961125), the applicant cannot rely on the faulty actions or omissions of his or her lawyer or representative. There are several decisions in which the time for filing a grievance was not extended. As in *Cloutier v. Treasury Board (Employer of Citizenship and Immigration)*, 2007 PSLRB 15, there is a strong trend to enforce the terms of collective agreements.

[40] The employer takes the position that the lack of action during Ms. Victor's absence indicates communication difficulties within the bargaining agent's organization that are not attributable to the employer and makes the applicant's reasons for an extension less than compelling. Mr. Gill's right to grieve arose on the day of his termination and did not require more time for him to decide to file a grievance. Seeking other means of redress does not detract from this fact. In the case of an individual grievance, the burden is on the employee, and not the bargaining agent, to file his grievance in a timely manner.

[41] The employer further argues that Mr. Gill did not keep a record of what he sent to the bargaining agent and when he sent it. There is no evidence of Mr. Gill's intention to grieve before October 24, 2003, when the employer acknowledged the grievance. Ms. Wiese did not keep records either. This makes the applicant's evidence unreliable and demonstrates that he was reckless in pursuing his rights. The employer argues that the alleged conversation between Ms. Wiese and Mr. Stelpstra is not credible, since both knew about the time limits for filing a grievance in the collective agreement.

[42] The employer disputes that the reasons given by the bargaining agent for its delay in filing the grievance are compelling or that there are special circumstances that justify extending the time limits. An employee must be presumed to know his rights;

the bargaining agent's inability to act in a timely fashion is a ground for excluding due diligence. The employer does not see the absence of the local's president as a sufficiently valid argument for extending the time limits.

[43] Given that the events happened four years ago, balancing the prejudice should be in favour of the employer, as it will be difficult for it to prepare its case after such a long time. The employer has a right to closure and stability in the workplace. The employer argues that there is no reason to extend the time limits since it acted diligently by conducting its investigation once it became aware of the charges against Mr. Gill and since it made its objections know in its reply to the termination grievance.

C. Applicant's reply

[44] In its response to the employer's arguments, the applicant's representative did not disagree with the principle that time limits in collective agreements contribute to workplace stability. However, it stressed that the statute has remedial provisions that allow the extension of time.

[45] The applicant's representative also pointed out that the employer did not introduce any evidence at the hearing about the discussion between Ms. Wiese and Mr. Stelpstra and that a negative inference should be drawn from that omission. In the bargaining agent's view, the discussions between Ms. Wiese and Mr. Stelpstra were about the extension of the time limits even though there is no written record. The applicant's representative argues that it would be most problematic if a bargaining agent representative were not able to rely on the word or advice of an employer's labour relations representatives. Labour relations would fall apart if an applicant's representative had to question a senior official's authority to speak on behalf of the employer each time they discussed labour relations matters.

[46] Seeking a separate process for redress does not in itself waive the time limits of a collective agreement, but adjudicators have taken this into account as a means of assessing whether an applicant was diligent in pursuing his rights.

[47] Even if I find that the bargaining agent was negligent because of its internal processes, this should not be fatal to the applicant's case. Ms. Victor's absences were recorded in the employer's tracking system and were corroborated by Exhibit 2. The applicant's representative also stressed that Mr. Gill's evidence was not challenged on

the fact that he had contacted the bargaining agent and stayed in contact with Ms. Wiese until his grievance was filed with the employer. While Mr. Gill did not keep records, it cannot be said that he was "reckless" in pursuing his rights. The length of the employer's investigation into the matter and the time it took to respond to the grievances should also be taken into account and should weigh in the applicant's favour.

[48] Nor did the employer introduce any evidence of prejudice to the grievance being heard other than the letter it sent to the Board opposing the postponement. Prejudice is not a sum but rather a number of factors that should be given different weight. The applicant's representative takes the position that all of the requisite parts of the test have been met and that I should exercise my discretion to extend the time limits for filing the grievance.

V. Reasons

[49] Paragraph 61(*b*) of the *Regulations* provides that the Chairperson has the discretionary power to extend the time limits for presenting a grievance at any level of the grievance procedure "in the interest of fairness . . . .".

[50] The Board has reviewed its jurisprudence in matters where the applicant has asked to be relieved from a failure to comply with time limits in countless decisions. There are no hard and fast rules, nor is this a routine form of relief. Decisions have addressed both possible outcomes, as evidenced by the cases cited by the parties in an attempt to persuade me of their positions. The value of these decisions is that they have established a set of criteria that are now consistently used to assess how and when the Board should exercise its discretion to extend time limits. These criteria are:

a) clear, cogent and compelling reasons for the delay;

b) the length of the delay;

c) the due diligence of the applicant;

d) balancing the injustice to the applicant against the prejudice to the respondent in granting the extension; and

e) the chances of success of the grievance.

[51] These criteria are not always given equal importance. The facts of a given case will dictate how they are applied and how they are weighted relative to each other.

Each criterion is examined and weighed based on the factual context of the case under review. In some instances, some criteria may not be relevant or the weight may go to only one or two of them.

A. Clear, cogent and compelling reasons for the delay

[52] The reasons invoked for the delay are twofold. The first is that Mr. Stelpstra suggested, and Ms. Wiese agreed, that the bargaining agent should wait for the outcome of a complaint made to the SIRC because the reinstatement of Mr. Gill's enhanced reliability status would render the grievance moot. Ms. Wiese's testimony is unchallenged in that regard. The second is the absence of Ms. Victor, the local's president, during the period in question. Ms. Victor's testimony was also unchallenged. In fact, Ms. Victor provided verification for those absences from the employer's intranet site. Nor did the employer challenge Ms. Victor's testimony that she had been unable to contact an excluded manager before October 24, 2003.

[53] I find these two reasons to be clear and cogent, but are they compelling? In this case, the applicant relied entirely on the bargaining agent to process his grievance. He signed and dropped off his grievance within the 25-day period; he stayed in contact with the bargaining agent throughout the process; he followed the advice given to him by Ms. Wiese that he seek redress before the SIRC; and he sought to obtain documents from the employer through the Access to Information and Privacy process when the employer failed to provide access to his personnel file in a timely manner. There are other circumstances as well that merit consideration.

[54] Typically, in the private sector, the bargaining agent manages a grievance and has the last say as to whether it is filed and whether it is referred to arbitration. In the public service, however, the onus is on the grievor to present his grievance to the employer (see Article 18 of the collective agreement). In this regard, I agree with the conclusions of adjudicator Matteau in *Vidlak v. Treasury Board (Canadian International Development Agency)*, 2006 PSLRB 96, cited by the employer.

[55] Even so, the applicant in this case was in an unusual situation. In his letter of suspension dated May 29, 2003, he was instructed, "not to appear on HRDC premises…"and his contacts were limited to Drew Stewart by telephone at a specific telephone number. There is no evidence as to who Mr. Stewart actually was. There is no indication that he was Mr. Gill's immediate supervisor.

[56] Admittedly, Mr. Gill could have sent his grievance by mail as provided for in clause 18.06 of the collective agreement; however, this does not appear to have been the practice in cases of termination grievances and neither party raised this issue at the hearing or in the written evidence. From these facts, I conclude that it was appropriate for Mr. Gill to rely on a bargaining agent representative to file the grievance with the employer on his behalf. Therefore, the onus was on the bargaining agent to file the grievance in a timely manner on Mr. Gill's behalf. This is where the bargaining agent dropped the ball.

[57] The bargaining agent's explanation for the delay is tied to the next criteria, the length of the delay.

B. Length of the delay

[58] The length of the delay from the date the grievance should have been filed to the date it was presented to the employer was 3 weeks or 14 working days. Clause 18.16 of the collective agreement stipulates that the time within which an action is to be taken within the grievance procedure excludes Saturdays, Sundays and holidays. This leaves us with a grievance that, according to the collective agreement, was filed 14 days late. Is this an inordinate amount of time?

[59] There are no specific criteria for assessing what constitutes an unreasonable delay but, in this case, the calendar of events is revealing. Mr. Gill was suspended on April 24, 2003. The investigation was completed, and the employer wrote to Mr. Gill notifying him of the results of the investigation into his off-duty conduct on August 26, 2003, a delay of four months. His termination was effective August 27, 2003. Mr. Gill filed three grievances with respect to his suspension, the revocation of his enhanced reliability status and his termination, dated May 13, October 1, and October 24, 2003, respectively. The employer responded to all three grievances on July 19, 2004. In the case of the first grievance, it is a 14-month delay, and for the other two, it is a 9-month delay. On the other hand, Mr. Gill filed his first two grievances within the 25-day period provided in the collective agreement. The notice of reference to adjudication was received August 27, 2004, for all three grievances, which is within the delays provided for in the *Public Service Staff Relations Act*, as it applied at that time. Only his termination grievance is late. These circumstances differ significantly from those in *Wyborn v. Parks Canada Agency*, 2001

PSSRB 113, cited by the employer, where that applicant waited until he was cleared of criminal charges before filing a termination grievance.

[60] In light of these particular facts, it appears that the applicant was far more diligent in pursuing his rights than was the employer in asserting its rights. Fourteen days appears negligible compared to the employer's tardiness. Clause 18.13 of the collective agreement allows the employer 30 days to reply after the date on which the grievance is presented at the final level.

[61] The employer presented no evidence that explains its delay in responding to the grievances or that explains why it took four months to conduct its investigation. The time it took to respond to the termination grievance is a factor that I cannot ignore, particularly given the relative prejudice to each party.

[62] To the contrary, the bargaining agent was able to explain why it was unable to file the grievance within the time limit stipulated in the collective agreement. The employer did not dispute that it was appropriate for Ms. Victor, president of the bargaining agent, to present Mr. Gill's grievance. Ms. Victor was unable to present the grievance until October 24, 2003, because she was absent and because she could not find a manager to accept it. At the hearing, the employer did not question either reason. I must, therefore, find these reasons to be *bona fide*, and they should not be used to penalize the applicant.

[63] Finally, I am also persuaded that a delay of 14 days is not an inordinate delay in the circumstances of a termination grievance. In the following cases, delays of much longer than 14 days were not found to be unreasonable: *Rabah* —14 months; *Richard* — 6 and 8 months; *Trenholm* — 5 1/2 months; *Rinke* — *5* months; and *Palmer* — *6* months. I agree with the following statement by Vice–Chairperson Potter in *Rinke*: "There is no magic threshold where one can say that anything that is transmitted before the threshold is reasonable, but that something that is transmitted after is not. It depends on the facts of each case. . . ".

[64] In the following termination cases cited by the employer, the time limit was found to be excessive. However, they all were well beyond those of this case. In *Mbaegbu v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2003 PSSRB 9, the complainant waited two-and-a-half years before following up on a

grievance filed at the first level. In *Boulay*, there was a seven-year delay before that applicant filed her grievance.

[65] The employer cited a number of cases where the Board dismissed applications for an extension of time. In my view, they may be distinguished on their facts. In *Mark v. Canadian Food Inspection Agency*, 2007 PSLRB 34, the adjudicator found that that applicant's continuing contestation of the employer's decision not to grant him sick leave did not prevent him from filing a grievance within the prescribed time limits. In *Cloutier,* the adjudicator found that he did not have jurisdiction because the disciplinary grievance was untimely; under the new *Act*, an adjudicator does not have jurisdiction for relief against untimeliness. In *Price v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 47, the adjudicator found that he did not have jurisdiction over the substance of a grievance that alleged harassing and discriminatory treatment on the basis of physical disability. In *Rattew v. Treasury Board (National Defence)*, PSSRB File No. 149-02-107 (19920624), the delay in proceeding was two years and was the result of a resignation, not a termination. In *Moyes v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File No. 166-02-24629 (19940215), a grievance concerning retroactive pay was considered timely because it was a continuing grievance.

C. Due diligence of the applicant

[66] Due diligence refers to the applicant's efforts to address his dispute. The evidence of clear, cogent and compelling reasons that was addressed earlier also supports the fact that the applicant demonstrated a clear and sustained intention to address his dispute. The applicant signed the grievance forms within the time limit and followed the bargaining agent's advice. The only error in the process was made by the bargaining agent, and it has been explained.

D. Balancing the injustice to the employee and the employer

[67] Because the loss of employment is such a serious matter, few would disagree that an applicant should receive the benefit of the doubt where the delay has been short, where there is clear intention to grieve or where the omission to file is either an inadvertence or is supported by a reasonable explanation. In this case, the following factors must be considered persuasive. The applicant's loss of employment relates to off-duty behaviour for which he was cleared. The employer is the entity that controls

the granting of an enhanced reliability status, yet it has refused to review its position now that the applicant has been cleared of the criminal charge that was its basis for revoking it. Thus, unless this application is granted, Mr. Gill will not have the opportunity to challenge the employer's decision not to reinstate his enhanced reliability status or to clear his reputation and resume working.

[68] The employer has argued that the passage of time will cause it great prejudice in presenting its case to arbitration. However, the employer presented no evidence to support this statement, other than the passage of time itself. The employer's delay in conducting the investigation and its greater delay in responding to the grievances belie the argument that the delay is or was a serious consideration at the time the applicant was terminated. In any event, this matter could not have been adequately heard and decided by an adjudicator until the criminal hearing was concluded. I do not find that the matter has been made any worse than what it was at the time that the employer denied the grievance.

E. Chance of success

[69] This issue addresses whether the applicant has an arguable case. The parties did not address the chance of success of the grievance, and no evidence was adduced on this issue. Therefore, I am unable to make a finding in this regard.

F. Conclusion

[70] In these circumstances, I am of the view that there is more prejudice to the applicant if the matter does not proceed than to the employer if it does. There is no adequate alternative remedy in this case other than to have it decided at a hearing where the applicant can make his case for reinstatement. The important interest of the applicant in preserving his employment mitigates in favour of allowing this matter to proceed to adjudication.

[71] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[72] The application for extension of time is allowed.

[73] The Director, Registry Operations, is to contact the parties to set a date to resume the hearing on the merits.

August 2, 2007

Michele A. Pineau,
Vice-Chairperson