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Citation: 2014 PSLRB 48

Public Service Labour Relations Act

Before the Chairperson of the Public Service Labour Relations Board

BETWEEN

CONRAD McNEIL

Applicant

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
McNeil v. Treasury Board (Department of National Defence)

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: David Olsen, Acting Chairperson

For the Applicant: Amarkai Laryea, Public Service Alliance of Canada

For the Respondent: Pierre Marc Champagne, counsel

Heard at Toronto, Ontario,
December 17 and 18, 2013.

I. Application before the Chairperson

[1] On August 8, 2012, the Public Service Alliance of Canada referred three grievances of Conrad McNeil to adjudication. The grievor is a member of the Operational Services Group employed by the Department of National Defence at CFB Borden in Barrie, Ontario. The three grievances referred to adjudication were grievance number 0000004255, dated February 8, 2012, concerning a disciplinary termination and a contravention of article 19, the no-discrimination provision of the operational services collective agreement; grievance number 0000003354, dated February 4, 2011, concerning an indefinite suspension without pay; and grievance number 0000002753, dated August 11, 2010, concerning a contravention of article 19, the no-discrimination clause of the relevant collective agreement.

[2] On September 11, 2012, the respondent, the Department of National Defence, wrote to the Board, submitting that grievance number 0000004255, concerning the disciplinary termination and a contravention of article 19 of the collective agreement, was untimely as the grievance was filed beyond the time limits stipulated in the collective agreement, and consequently, an adjudicator appointed to hear the reference to adjudication was without jurisdiction to hear the matter.

[3] On September 28, 2012, the Public Service Alliance of Canada wrote to the Board, submitting that Mr. McNeil's grievance was not untimely and that Mr. McNeil filed his grievance within the 25-day time limit after first becoming aware of the circumstances giving rise to his grievance. In the event, however, that the Board deemed Mr. McNeil’s grievance to indeed be untimely, the bargaining agent requested that he be granted relief from the mandatory timelines under section 61 of the Board’s regulations.

II. Summary of the evidence

[4] With the agreement of the parties, the employer, who had raised the objection with respect to timeliness, adduced its evidence first in support of its position that the grievance was untimely.

A. Commander Lionel Smith

[5] Cmdr. Smith is presently the commander of military police in Ottawa. At all times relevant to this application prior to the summer of 2012, he was the provost

marshal at Canadian Forces Base Borden. He was the acting base administration officer from the spring of 2011 until the end of the summer of that year.

[6] In that capacity, he was responsible, *inter alia*, for the technical services branch, the base administration branch, as well as the ration and quarter section in which Mr. McNeil ("the grievor") was employed.

[7] He testified that Mr. McNeil, in his words, was *persona non grata* on the base as there had been some incidents and tensions with the staff resulting in his indefinite suspension without pay, pending investigation, from November of 2009.

[8] A letter under the signature of KE Murphy, rations and quarters support service officer, dated June 13, 2011, addressed to Mr. McNeil, was brought to Cmdr. Smith to arrange for delivery as the operational employees of the postal service were on strike. The letter advised Mr. McNeil that Mr. Murphy was recommending the termination of his employment as a result of alleged misconduct that occurred during the fall of 2009 and that he would be continued to be suspended without pay pending final determination.

[9] On June 15, 2011, Cmdr. Smith, together with Kevin Peach from human resources, drove to Mr. McNeil's residence. Mr. Peach went to the door and engaged in a discussion with Mr. McNeil's wife and daughter. He asked them to ensure that Mr. McNeil received the letter. This took place at approximately 9:20 a.m.

[10] The recommendation for termination was reviewed by the Office of the Commander, Canadian Defence Academy, in Kingston Ontario, and by letter dated June 21, 2011, and addressed to Mr. McNeil, the commander concluded that Mr. McNeil had breached the standards of conduct and the *Values and Ethics Code for the Public Service*, and he terminated his employment retroactive to the date of his suspension without pay pending investigation, which was November 20, 2009.

[11] The letter concluded in part: "Upon receipt of this letter you are no longer required to report to work. . . In accordance with your collective agreement you have the right to file a grievance." After the signature block, the letter reads as follows:

> *You will acknowledge receipt of this letter by endorsement below. Your signature does not imply agreement with this letter, but signifies that you have been briefed on the reason you are being disciplined.*

I acknowledge receipt of this letter on _____. Signed:

_____ _____

Date *Signature*

[12] This letter was remitted to Cmdr. Smith's office for delivery to Mr. McNeil. The base courier service arranged for the letter to be delivered to Mr. McNeil's home address by Dynamex, a courier company, due to the ongoing postal strike. The courier company made two attempts to deliver the letter, on June 24 and June 27, 2011. The attempts were unsuccessful as there was no one at McNeil's residence on both occasions. The letter was returned to Cmdr. Smith's office. The documentation filed in evidence from Dynamex indicates that the letter was to be delivered before 4:00 p.m. The actual time of the attempted delivery on June 24 is not noted; however, the time of the attempted delivery on June 27 is 2:22 p.m.

[13] Cmdr. Smith discussed other options for delivery with Ms. Lightheart, the base human resources officer. Those options included personal attendance at Mr. McNeil's residence, providing a copy of the letter to the president of the bargaining agent and sending the letter by registered mail to Mr. McNeil's residence.

[14] On June 28, 2011, Cmdr. Smith again drove to Mr. McNeil's residence for the purpose of delivering the letter; however, no one was at home. The documentary evidence indicates that this attempt at delivery was made at 10:00 a.m.

[15] Cmdr. Smith sent an e-mail to Jacques Seguin, the president of the bargaining agent, attaching the termination letter in portable document format or PDF. He stated that he sent the document to the bargaining agent as part of a broad-based approach to ensure that every attempt was made to provide the letter to Mr. McNeil.

[16] He sent a registered letter to Mr. McNeil; however, it was not delivered. The letter was returned to his administrative assistant by Canada Post as it was not claimed and signed for at the local post office.

[17] He advised that he had discussions with Mr. Seguin. Mr. Seguin had asked for background documents with respect to Mr. McNeil's termination, including the full results of the investigation report, as well as copies of the response/report for each of the four alleged incidents of misconduct of which Mr. McNeil was accused. Cmdr. Smith advised Mr. Seguin that he did not believe he had the authority to provide the requested documents. Subsequently, he advised Mr. Seguin that if he received the

written consent from Mr. McNeil to provide the documents to the bargaining agent, he would do so. He did not receive the consent.

[18] Cmdr. Smith and Ms. Lightheart decided to make one last attempt to deliver the letter to Mr. McNeil's residence. Again, there was no one at home when Cmdr. Smith and Mr. Peach attended at the residence on July 11, 2011, at 9:30 a.m. The letter was left between the screen and front doors. A hand written note to file indicates that the letter was “non-descriptive”. (See exhibit 2, tab 12)

[19] As Cmdr. Smith was in the process of being posted to another base, Ms. Lightheart took over the responsibility for delivering the letter to Mr. McNeil.

[20] In cross-examination, Cmdr. Smith acknowledged that he did not receive confirmation that Mr. McNeil had actually received the termination letter.

[21] He acknowledged that article 17.03 of the collective agreement that obligates the employer to notify the local representative of the bargaining agent as soon as possible that a suspension or termination has occurred was the reason he advised Mr. Seguin of Mr. McNeil’s termination.

[22] He also acknowledged that the space for acknowledging receipt of the termination letter after the signature block of Major Gosselin was the reason he wanted to serve the letter personally. He acknowledged that this part was not signed.

B. Louise Pepin

[23] Ms. Louise Pepin is the administrative assistant for the administration officer at base Borden, a position she has held since 2005. In 2011, she was supporting Cmdr. Smith. She testified that Cmdr. Smith instructed her to arrange for letters to be delivered to and signed for by Mr. McNeil through registered mail on June 14 and June 29, 2011.

C. Annette Lightheart

[24] Ms. Lightheart is the human resources officer at Canadian Forces Base Borden, a position she has held since 2011, and was responsible for Mr. McNeil’s personnel file.

[25] She was aware that several attempts have been made to deliver the letter of termination to Mr. McNeil.

[26] She was contacted by Mr. Larry Woodward, a representative of the bargaining agent on the base, who asked for copies of the letter recommending Mr. McNeil's termination and the letter of termination. She agreed to copy the letters and put them in an envelope in her office for pickup by Mr. Woodward. Mr. Woodward did not pick the letters up.

[27] She sent a copy of the letter of termination to Mr. Seguin. Mr. Seguin contacted her on 21 July 2011. She subsequently sent him e-mails on August 5, 2011, and August 8, 2011, outlining the attempts that had been made to deliver the termination letter to Mr. McNeil. She did not receive a response to her e-mails.

[28] She then arranged with her assistant to send the termination letter once again to Mr. McNeil by registered mail and by regular mail. Canada Post was unable to deliver the registered letter. It was returned by Canada Post unclaimed on August 18, 2011.

[29] She was asked in cross-examination whether she ever received confirmation that Mr. McNeil actually received the termination letter in 2011. She stated that all of the letters that were sent by registered mail were returned unclaimed.

D. <u>Kevin Peach</u>

[30] Mr. Peach is the coordinator of the Administration Branch at base Borden.

[31] On June 15, 2011, he was asked by Cmdr. Smith to accompany him to Ashburton to deliver a letter to Mr. McNeil. He accompanied Cmdr. Smith to Mr. McNeil's address. He went to the front of the residence and spoke with two ladies who were on the front porch. He asked for Mr. McNeil. He was advised that Mr. McNeil was at work. He gave the letter to one of the ladies and requested that the letter be given to Mr. McNeil. He made the assumption that the ladies were Mr. McNeil's wife and daughter. He had seen one of the ladies in the kitchen at the base prior to this occasion.

[32] On June 28, 2011, he again accompanied Cmdr. Smith to deliver another letter to Mr. McNeil's residence. He went to the house and knocked on the door. There was no answer.

[33] On July 11, 2011, he again accompanied Cmdr. Smith to deliver a letter to Mr. McNeil's residence. He remained in the vehicle while Cmdr. Smith went to the front

door. He knocked on the door; there was no answer. Cmdr. Smith wedged the letter between the doors. They then returned to their offices. In cross-examination, he was asked whether he ever confirmed that Mr. McNeil received the letter. He answered "No."

E. Conrad McNeil

[34] Mr. McNeil testified that he started working in the public service as a cook at base Borden in 1978. He started as a part-time cook, and it took him over 10 years to obtain a full-time position. He worked most of his life as a cook in the officer's mess. His position at the time of termination was that of class 5 cook.

[35] He identified a number of grievances that he had filed. Grievance number 2753 was signed on August 10, 2010. The details of the grievance read as follows:

> *Details of grievance*
>
> *In response to KE Murphy's e-mail of 12 July 2010, I grieve the employer's refusal to have me return to work and accommodate me as recommended in the Health Canada letter of 29 June 2010.*
>
> *Corrective action requested*
>
> *That I be returned to work and accommodated as recommended in Health Canada letter of 29 June 2010. That all pay and benefits be reinstated retroactive to my last day of work.*
>
> [*Sic* throughout]

[36] Grievance number 3354 was signed on February 4, 2011. The details of the grievance read as follows:

> *Details of grievance*
>
> *I grieve the letter dated 19 Jan 2011 number 6000 R & QSS0 [sic] In which he states that I shall continue to be suspended without pay*
>
> *Corrective action requested*
>
> *I want this letter to be rescinded. I want to be reinstated immediately to the workplace. I want pay and benefits retroactive to November 2009 and anything else I may be entitled to so I can feel whole again.*

[37] Mr. McNeil testified that he did not receive the termination letter from the employer during the summer of 2011. He did receive notices of registered mail to be picked up at the post office. He stated that he did not pick up the registered mail at the post office because he was working two jobs to try and supplement the income that he had lost and that the post office was not open by the time he returned home. His hours of work were from 6:30 in the morning until after 7:30 at night. He did not know the actual hours that the post office was open. He explained that he was told to leave the base without any explanation in 2009 and was suspended thereafter.

[38] He was asked whether he was avoiding receiving the termination letter. He answered "No," because he wished to get his case heard as soon as possible.

[39] He testified that he did receive the termination letter together with the final-level response to his grievance pertaining to his indefinite suspension on January 16, 2012, although he could not recall how he received it. He stated that this was the first time he saw the termination letter, and immediately after receiving this letter, he took steps to file a grievance and did so on February 8, 2012.

[40] He stated that he wished to challenge his termination and never had any intention of abandoning his right to grieve.

[41] Mr. McNeil was not cross-examined on his evidence.

III. Summary of the arguments

A. Argument of the employer

[42] Counsel for the employer reviewed the facts outlining the attempts to deliver the termination letter to Mr. McNeil during the summer of 2011 and argued that the employer had exercised due diligence. There was no evidence to suggest that Mr. McNeil did not receive the letter. Other than his own testimony, the grievor did not adduce other evidence to demonstrate that he did not receive the letter.

[43] The issue to be resolved is one of credibility. If one is to believe the grievor, one would have to set aside the following facts. Mr. McNeil's wife and daughter never received the letter of intention to terminate his employment; Mr. McNeil was never available to pick up the registered mail from the post office as he was working two jobs; the representatives of the bargaining agent did not provide a copy of the

termination letter to Mr. McNeil; no one found the letter between the two doors; and he did not receive the termination letter sent by ordinary mail in August 2011, yet he received a letter sent by ordinary mail in January 2012, including the grievance reply to his original grievances, together with the termination letter.

[44] Article 17.01 of the collective agreement provides that

> *[w]hen an employee is suspended from duty or terminated . . . the employer undertakes to notify the employee in writing of the reasons for such suspension or termination. The employer shall endeavor to give such notification at the time of suspension or termination.*

[45] There is sufficient evidence to determine that the grievor knew or ought to have known of his termination before January of 2012.

[46] In the alternative, there may be circumstances where it is impossible to notify an employee of the reason for his suspension or termination. Article 17.01 of the collective agreement obligates the employer to notify the employee in writing of the reason for the suspension or termination. It also states that the employer shall endeavor to give such notification at the time of suspension or termination. Article 17.03 states that the employer shall notify the local representative of the Alliance as soon as possible that such suspension or termination has occurred. This provision is in the collective agreement for a reason. The bargaining agent must exercise due diligence in bringing the letter of termination to the attention of the grievor.

[47] There is sufficient evidence to determine that the grievor ought to have known of the termination before January 2012. The employer was diligent in attempting to notify Mr. McNeil of his termination; however, Mr. McNeil and his bargaining agent were not diligent. Mr. McNeil was evading knowing of his termination.

[48] In terms of meeting the criteria for an extension of time to file a grievance, due diligence on the part of the grievor is necessary; see *Virdi v. Treasury Board (Department of Human Resources and Skills Development)*, 2006 PSLRB 124. In that case, the grievor was rejected on probation. He was represented by his bargaining agent throughout the grievance process. The final-level response was issued on August 25, 2005.

[49] The grievor personally filed a reference to adjudication on January 12, 2006, and sought an application for an extension of time. The application was scheduled for hearing. Having been notified of the hearing, the grievor did not appear. Counsel for the employer argued that the grievor had not met his onus as the grievor had not demonstrated due diligence in pursuing his rights, which included contacting his former employer and bargaining agent to determine if a decision had been made with regard to his grievance. Also, his failure to advise his former bargaining agent of his change of address demonstrated a lack of due diligence. The Board took these factors into consideration in dismissing the application.

[50] In the circumstances of this case, Mr. McNeil failed to exercise due diligence. He should have been attempting to contact the bargaining agent. Similarly, we do not know what, if anything, the bargaining agent did to exercise due diligence in bringing the letter of termination to Mr. McNeil's attention.

[51] In *Salain v. Canada Revenue Agency*, 2010 PSLRB 117, the applicant filed a grievance against the end of his term employment with the Canada Revenue Agency. The employer objected to the referral to adjudication on the basis that it was not timely. The applicant submitted that the grievance was timely and in the alternative requested an extension of time to file a grievance. Mr. Salain's reason for the delay in filing his grievance was that he was not aware of his right to grieve until he contacted the Public Service Labour Relations Board.

[52] The Board, in dismissing his application for an extension of time, stated as follows at paragraph 47 of the decision:

> *The due diligence of the applicant has not been demonstrated. On one hand, he did provide evidence that he followed up with a number of government agencies, including, eventually, the PSLRB. On the other hand, he was clearly aware that he was a unionized employee and that he had a bargaining agent. In fact, he had used the representational services of his bargaining agent. Had he acted diligently and raised his concerns with his bargaining agent, it could have advised him of his rights under the collective agreement. I do not find that the applicant acted diligently.*

[53] The fact that Mr. McNeil was evading knowing of his termination is relevant to whether the Board should extend the time limits to file a grievance, as it is clear that he was not exercising due diligence in pursuing his grievance.

[54] In *Tench v. Treasury Board (Department of National Defence) and Department of National Defence*, 2013 PSLRB 124, the Board determined, in the context of a complaint under section 133 of the *Canada Labour Code* and under section 190 of the *Public Service Labour Relations Act* concerning a complaint that the respondent employer had not complied with the terms of a memorandum of agreement, that the complainant, on the facts of that case, was responsible for not receiving a letter from his employer that had been sent to him by Express Post, which was unclaimed.

[55] By analogy, Mr. McNeil, in the circumstances of this case, was responsible for not receiving the termination letter that had been sent to him by registered mail, which was unclaimed.

[56] Mistakes made by the bargaining agent are not necessarily cogent reasons for extending time limits. There must be clear and compelling reasons for the delay. There must be stability in the labour relations regime, and time limits must be strictly adhered to save in exceptional circumstances, which are not present in this case.

B. Argument of the bargaining agent

[57] There are three related grievances: a termination grievance, a grievance with respect to an indefinite suspension without pay and a grievance relating to an alleged failure of the duty to accommodate.

[58] All three grievances stem from and are related to Mr. McNeil's removal from the workplace in November of 2009. The indefinite suspension and the duty-to-accommodate grievance were filed in a timely manner.

[59] The burden of proof lies with the employer to establish that the termination grievance was not filed in a timely manner.

[60] The bargaining agent submits that Mr. McNeil filed his grievance within 25 days of receiving the termination letter, in accordance with the collective agreement.

[61] The position of the bargaining agent is that the grievance is timely. Should the Board find that the grievance was untimely, it is requesting that the Board use its authority under paragraph 61(*b*) of the PSLRB's regulations to extend the time limit for filing grievances. Fairness is the guiding principle. Based on the evidence, it is in the

interests of fairness that the time limits be extended in order that Mr. McNeil can have the merits of his termination grievance heard.

[62] When does the time start ticking under article 18.15? This is not so much a legal but a factual determination. In the bargaining agent's view, the clock started ticking as soon as Mr. McNeil received the official termination letter. This is the point when he is notified. Article 17.01 of the collective agreement provides that when an employee is terminated, it is the employer that undertakes to notify the employee in writing of the reason for such termination.

[63] The article does not talk about the bargaining agent giving notice to the employee. Article 17.03 is a separate provision under the discipline section that obligates the employer to notify the local representative of the union as soon as possible that a termination has occurred. There are two separate obligations, both of which are the employer’s.

[64] An employee who has been terminated for disciplinary reasons can grieve his termination and proceed to adjudication without the approval of his bargaining agent. There must be independent notification to an employee of his termination apart from the bargaining agent because the employee has the right to proceed on his own.

[65] Mr. McNeil was entitled in his own right to be notified of his termination. When he actually received the notification is not something one can assume has or has not happened or similarly that he ought to have known of the termination. The notification must be clear. There were several attempts made to notify Mr. McNeil of the grounds for his termination. There was no confirmation that Mr. McNeil received the termination letter.

[66] Given the number of attempts to notify Mr. McNeil of his termination, this indicates that the employer understood the importance of providing notice.

[67] There was no evidence adduced that if Mr. Seguin was provided with a copy of the termination letter by e-mail that he in turn provided it to Mr. McNeil. There is no obligation in the collective agreement on the bargaining agent to provide a termination letter to an employee. The bargaining agent is not the employer’s agent. In any event, no request was made by the employer that the bargaining agent serves as an agent of the employer for the purposes of providing the letter to Mr. McNeil.

[68] In January 2012, the department issued a final-level response to the two other grievances that are considered timely. The termination letter was attached to the responses to the grievances. If it is the position of the employer that Mr. McNeil ought to have known of his termination, why would they send the termination letter again? The employer, by this action, acknowledges that it had not been successful in serving the termination letter.

[69] Mr. McNeil testified that he was not avoiding the service of the letter. He remembered receiving the notices of registered mail; however, he was not able to attend at the post office because he was working two jobs. He had no intention of withdrawing any of the grievances and wanted to move on with the process. From a common-sense perspective, Mr. McNeil already had two grievances related to the same matter, which led to his removal from the workplace. Why would he not want to grieve his termination, the most serious of the employer's actions?

[70] Mr. McNeil was not cross-examined. There is no issue as to his credibility. His testimony should be taken as fact. He had an independent right to be notified of his termination. He did not receive the notification until sometime in January of 2012. He grieved within 25 days of receiving the notification, in accordance with the time frames in the collective agreement.

[71] In the alternative, should the Board determine that the grievance was untimely, Mr. McNeil is requesting the Board use its authority under paragraph 61(*b*) of the Board's regulations to extend the time limits for filing his grievance with respect to the termination.

[72] Fairness is the guiding principle, based on the factors set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. These principles have been summarized in paragraph 61(*b*) of the regulations, which enables the chairperson or vice-chairperson to extend time limits "in the interest of fairness" (see *Richard v. Canada Revenue Agency*, 2005 PSLRB 180, at para 54).

[73] In that case, the grievor had been indefinitely suspended and ultimately terminated from her position. At the time of her dismissal, she had been an employee of the federal public service for 22 years. She sought to file grievances; however, they were some eight months late.

[74] The Board, while finding that the reviewer's medical condition was a factor which should be considered in the application, noted that it was one of many factors that needed to be considered in such an application. The Board considered the loss of employment as being a serious matter for the grievor and the fact that the grievor had been employed in the public service for 22 years should be taken into consideration. As well, the short time elapsed since the time limits ran out, some 8 months, was also an important consideration. The acknowledgment by the employer that the delay would not affect its ability to present its case in contesting the grievance while on the other hand, because of the nature of the disciplinary measure, denying the application, would have important negative consequences for the grievor. This led the Board to allow the application to extend the time limits.

[75] The employer did not identify the date on which the clock started for the purpose of calculating whether or not the grievance was timely. If one were to use the date of the termination letter, 21 June 2011, the worst-case scenario is a delay of eight months. In the context of this case, one must consider that the grievor has been suspended from employment since November of 2009 and the employer took in excess of one-and-a-half years to reach the conclusion that the grievor's employment should be terminated. The eight-month delay is a relatively short time in that context.

[76] As in the *Richard* case, in balancing the interests, there is little prejudice to the employer, while the nature of the disciplinary measure, termination, would have important negative consequences for the grievor. The loss of employment is tantamount to capital punishment in labour law. There are two other related grievances before the board arising from the same facts. The employer's evidence has not demonstrated how it would be prejudiced at all.

C. Reply argument of the employer

[77] The bargaining agent has argued that it does not have a role to play because this is a grievance related to discipline and the grievor can proceed on his own through the grievance process and to adjudication. In fact, the bargaining agent was aware of the termination since June of 2011 and followed up with the employer. The bargaining agent had a role to play. The employer did not know if the bargaining agent did play a role. The employer noted that the bargaining agent asked for more documents.

[78] The grievor was not diligent in pursuing his grievance. Both the bargaining agent and Mr. McNeil were aware that the termination letter was being circulated.

[79] During the summer of 2011, neither Mr. McNeil nor the bargaining agent were doing what they had to do to exercise due diligence.

[80] The bargaining agent has argued that there is no contradiction in the evidence and that Mr. McNeil was not cross-examined. There is no need to cross-examine. Mr. McNeil was not credible.

[81] No labour relations purpose would be served in granting an extension of time. There is great prejudice to the employer if the Board was to grant an extension of time as the fact that he did not grieve his termination rendered moot his two grievances.

IV. Reasons

[82] Was the grievance dated February 8, 2012, concerning the letter of termination of Mr. McNeil's employment effective November 20, 2009, presented in accordance with the time limits in the collective agreement?

[83] The relevant provisions of the collective agreement are as follows:

[84] Article 18.15 of the collective agreement provides in part as follows:

> *A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance…*

[85] Article 17.01 of the collective agreement, under the heading "Discipline," provides as follows:

> *When an employee is suspended from duty or terminated in accordance with paragraph 12(1)(c) of the* Financial Administration Act*, the Employer undertakes to notify the employee in writing of the reason for such suspension or termination. The employer shall endeavor to give such notification at the time of suspension or termination.*

[86] The action or circumstances giving rise to the grievance in this case refers to the receipt of the written notification of termination. The onus is on the employer to demonstrate on a balance of probabilities that it is more likely than not that Mr. McNeil

was served with the letter of termination during the summer of 2011. This is clear from article 17.01, which imposes an obligation on the employer to notify an employee of termination of employment in writing. It is strongly worded, referring to the employer's obligation in the form of an undertaking. The reference to the obligation that the employer "endeavor to give such notification" at the time of termination, must be read in that context.

[87] Article 17.03 of the collective agreement was also argued by the parties. It provides as follows:

> *The employer shall notify the local representative of the Alliance as soon as possible that such suspension or termination has occurred.*

[88] Article 17.03 is a separate and distinct obligation. I do not find that it establishes an agency relationship between the bargaining agent and the employer; nor does that provision impose an obligation of due diligence on the bargaining agent to fulfill what is the employer's obligation of notification to the employee who is the subject of termination.

[89] An employee who has been terminated for disciplinary reasons can grieve the termination and proceed to adjudication with or without the approval of the bargaining agent. In addition, it appears to me that the sole purpose of this provision is to allow the bargaining agent representative to prepare for the possibility of a meeting or hearing pertaining to the discipline. This is clear from the preceding article 17.02, for example, which provides the grievor with the right to have a representative of the bargaining agent present at meetings pertaining to the conduct of a disciplinary hearing.

[90] The parties were not able to assist me with respect to an appropriate framework for analysis of whether or not an employee has been effectively notified of the grounds for his termination or alternatively whether an employee should be deemed to have been notified of the grounds for his termination. Their argument was largely based on the facts before me and inferences I should draw from them. These facts will be discussed and I will make findings on them.

[91] I have found the following statutory provisions to also be of assistance in addressing this issue.

[92] Subsection 26(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 sets out the principles relevant to proof of mailing by departments or other branches of the federal public administration. It in essence provides that a post office receipt for the delivery of a registered letter in the absence of evidence to the contrary is proof of the sending of a notice, where a departmental matter requires that a notice be sent by mail in its legislation or regulations. That provision reads as follows:

> *Proof of mailing departmental matter*
>
> *(3) Where by any Act of Parliament or regulation made under an Act of Parliament provision is made for sending by mail any request for information, notice or demand by a department or other branch in the federal public administration, an affidavit of an officer of the department or other branch in the federal public administration, sworn before any commissioner or other person authorized to take affidavits, setting out that he or she has charge of the appropriate records, that he or she has a knowledge of the facts in the particular case, that the request, notice or demand was sent by registered letter on a named date to the person or firm to whom it was addressed (indicating that address) and that he or she identifies as exhibits attached to the affidavit the post office certificate of registration of the letter and a true copy of the request, notice or demand**, shall, on production and proof of the post office receipt for the delivery of the registered letter to the addressee, be admitted in evidence as proof, in the absence of evidence to the contrary, of the sending and of the request, notice or demand***.*
>
> [Emphasis added in bold]

[93] Section 40 of the *Canada Evidence Act* provides that the laws of evidence in force in the province, in which proceedings are taken, including the laws of proof of service of any document, apply to the proceedings over which Parliament has legislative authority. It reads as follows:

> Provincial Laws of Evidence
>
> ***40.*** *In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken**, including the laws of proof of service** of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.*
>
> [Emphasis added in bold]

[94] These proceedings occurred in Ontario. The Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 enacted in accordance with the *Courts of Justice Act*, R.S.O., c. C-43, provide for the manner of service of documents.

[95] Rule 16 deals with the service of documents: "Personal service: Where a document is to be served personally . . . service [is] made . . . by leaving a copy of the document with the individual . . . ."

[96] The rules provide alternatives to personal service. Service may be executed through:

> i) acceptance of service by a lawyer;
>
> ii) service by mail to the last known address with an acknowledgment of receipt card, but this is only effective as of the date the sender receives the acknowledgment card; and
>
> iii) leaving a copy in a sealed envelope addressed to the person, at the place of residence, with anyone who appears to be an adult member of the same household, and mailing another copy of the document to the person at the place of residence.

[97] There are also provisions for substituted service and for validating irregular service. Where a document has been served in a manner other than one authorized by the rules or any order, the court may make an order validating that service where the court is satisfied that

> i) the document came to the notice of the person to be served; or
>
> ii) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

[98] The jurisprudence decided under the validation provision indicates that there is an obligation upon a person applying for such an order to show that he or she is unable to carry out prompt personal service. Substituted service and validated service is not intended to spare a plaintiff the inconvenience or expense of personal service if

the latter can be affected. Mere difficulty in serving a defendant personally is not enough (See for example, *Laframboise v. Woodward*, [2002] O.J. No. 1590 (QL)).

[99] I find the material facts to be as follows. The bargaining agent referred three grievances of Mr. McNeil to adjudication, one concerning his disciplinary termination together with a contravention of the no-discrimination provision of the collective agreement dated February 8, 2012, and two other grievances, one concerning his indefinite suspension without pay dated February 4, 2011, and a grievance concerning the no-discrimination provision of the collective agreement dated August 11, 2010. In these grievances, he sought reinstatement to his employment.

[100] All of these grievances arise from the same fact situation that occurred in the fall of 2009 that led to Mr. McNeil's suspension without pay pending investigation that led ultimately to his termination, retroactive to the date of his suspension, which was November 20, 2009.

[101] The respondent submits that the grievance concerning the termination and the contravention of article 19 was untimely. The other two grievances were not objected to on the basis of timeliness. Those grievances were being pursued through the grievance process and were denied at the final level in January of 2012.

[102] During the summer of 2011, Mr. McNeil was working two jobs to try and supplement the income that he had lost. His hours of work were from 6:30 a.m. until 7:30 p.m.

[103] On June 15, 2011, Cmdr. Smith and Kevin Peach attended at Mr. McNeil's residence to personally deliver a letter recommending the termination of his employment, during which period he would remain suspended. They were advised that Mr. McNeil was at work by two ladies presumed to be his wife and daughter. They requested that the letter be given to Mr. McNeil. Mr. McNeil did not deny having received this letter.

[104] The department decided to terminate Mr. McNeil's employment. A letter dated June 21, 2011, addressed to Mr. McNeil and advising of his termination, was given to a courier company for personal delivery. The instructions given to the courier company directed that the letter was to be picked up after 1:30 p.m. and delivered before

4:00 p.m. Two attempts at personal delivery were made, on June 24 and June 27, 2011. The documentary record indicates that there was no one at home on both occasions.

[105] On June 28, 2011, Cmdr. Smith and Mr. Peach attended at Mr. McNeil's residence at or about 10:00 a.m. to personally deliver the letter; however, no one was at home.

[106] Cmdr. Smith sent an e-mail to Jacques Seguin, president of the bargaining agent, attaching the termination letter in PDF. Mr. Seguin requested the background documents with respect to Mr. McNeil's termination. Cmdr. Smith advised him that he did not believe he had the authority to provide the documents requested and would require Mr. McNeil's authorization.

[107] On June 29, 2011, Canada Post attempted to deliver the termination letter by Priority Post that required Mr. McNeil's signature of receipt. As there was no one at home, it was returned to the local post office. The letter was unclaimed and returned to the sender.

[108] On July 11, 2011, Cmdr. Smith and Mr. Peach attended at Mr. McNeil's residence for the purpose of personally delivering the termination letter at 9:30 a.m. No one was at home. The letter was left between the doors. I presume the envelope was not descriptive.

[109] On July 29, 2011, Ms. Lightheart sent the termination letter by Express Post that required a signature for receipt. Canada Post was unable to deliver the letter, as there was no one at home, and it was returned to the local post office. It was unclaimed and returned to the sender. Ms. Lightheart also sent the termination letter to Mr. McNeil's address by ordinary mail.

[110] Cmdr. Smith and Ms. Lightheart both acknowledged that they did not receive confirmation that Mr. McNeil had actually received the termination letter.

[111] Mr. McNeil testified that he did not receive the termination letter from the employer during the summer of 2011. He did receive notices of registered mail; however, he stated that he was unable to pick them up because he was working two jobs to try and supplement the income he had lost when he was indefinitely suspended without pay. His hours of work were from 6:30 in the morning until after 7:30 at night. He denied that he was trying to avoid receiving the termination letter, because he wished to get his case heard as soon as possible.

[112] Mr. McNeil received the termination letter together with the final-level response denying his grievance pertaining to his indefinite suspension on January 16, 2012.

[113] Mr. McNeil filed a grievance with respect to his termination on February 8, 2012.

[114] Article 17.01 of the collective agreement imposes an obligation on the employer to notify the employee in writing of the reasons for suspension or termination. The termination letter contemplates that Mr. McNeil would acknowledge personal receipt in writing of the letter.

[115] The attempts to serve the letter by courier, by Canada Post, Priority and Express Post and the personal attendance at Mr. McNeil's residence indicate that the respondent treated the obligation to notify Mr. McNeil of the reasons for his termination as one that requires personal service.

[116] The employer has made the objection based on jurisdiction. The onus is on the employer to demonstrate on a balance of probabilities that it is more likely than not that Mr. McNeil was served with the letter of termination during the summer of 2011 or in the alternative that he should be deemed to or ought to have knowledge of the letter of termination.

[117] I find on the facts that Mr. McNeil was not personally served with the notice of the reasons for his termination during the summer of 2011.

[118] There is also no evidence of proof of the post office receipt of the letters sent by registered mail. Neither the *Act*, nor the *Public Service Labour Relations Board Regulations* provide an express requirement for mailing of a notification of termination. In addition, the collective agreement article on notification does not expressly refer to mailing of a notice, but only of providing notice in writing. Subsection 26(3) of the *Canada Evidence Act* may not have direct application here, but nevertheless provides a framework by analogy for evaluating whether or not registered mail has been received. It was not.

[119] The employer argues that Mr. McNeil ought to or should be deemed to have been aware of his termination during the summer of 2011. In essence the employer is requesting that the Board validate the service of the notice on Mr. McNeil during the summer of 2011. There is not sufficient evidence to establish that the document came to the notice of the grievor, or that the grievor evaded service. In addition, the

employer had other options available to it to effect notification, which it did not exercise.

[120] Having regard by analogy to the Ontario *Rules of Civil Procedure*, service of a document may be validated where the document has come to the notice of the person to be served or the document was served in such a manner that it would have come to the notice of the person to be served except for the person's own attempts to evade service.

[121] Given the nature of termination of employment and the wording of article 17.01, the employer must take reasonable steps to notify an employee of his termination unless it is established that it is impossible to do so or the employee is evading notification. By analogy, the jurisprudence drawn from the Ontario *Rules of Civil Procedure* establishes that this type of validating service provision is not intended to spare an applicant the inconvenience or expense of personal service if the latter can be effected. Mere difficulty in serving a defendant personally is not enough. All reasonable steps must be taken to effect prompt personal service.

[122] Certainly the employer made a number of attempts to personally serve Mr. McNeil with the letter of termination. There were two attempts by courier, two attempts by Canada Post using Priority and Express Post, and two attempts by Cmdr. Smith and Mr. Peach. A letter was also sent by ordinary mail.

[123] In my view, it is significant that on June 15, 2011, Cmdr. Smith and Mr. Peach were advised by either Mr. McNeil's wife or daughter when they attempted to deliver the letter of recommendation of termination to Mr. McNeil at 9:20 in the morning that Mr. McNeil was at work. Yet, all of the attempts to personally serve Mr. McNeil with the letter of termination were made at his residence during daytime working hours.

[124] There was no attempt to serve Mr. McNeil during the evening or on the weekend. There was no attempt to contact him by telephone and arrange for service. I am not satisfied that all reasonable steps were taken by the employer to effect personal service.

[125] Nor am I satisfied that the employer has met its onus of establishing on a balance of probabilities that it is more likely than not that Mr. McNeil was evading service of his letter of termination. Given these facts I have not been provided with any

cogent basis to question Mr. McNeil's assertion that he did not receive the letter in the summer of 2011. There is no evidence to suggest that Mr. McNeil was aware that the respondent was attempting to personally serve him with the notice of termination. It was not suggested that the courier company left any notification of its attempt to personally serve him. Cmdr. Smith and Mr. Peach left no note of their first attempt to serve him. With respect to the second attempt, they testified a letter was left in the doors to his residence. I have no reason to disbelieve Mr. McNeil when he said he did not receive the letter. The pickup cards left by Canada Post, which he did receive, do not identify, as a matter of course, the sender.

[126] With regard to any of the letter sent by ordinary mail, the *Canada Evidence Act* does not provide for proof of mailing by ordinary mail. I note as well that the Ontario *Rules of Civil Procedure* provide for substituted service by mail to the last known address, but the sender must receive the acknowledgement of receipt. The employer never received the signed acknowledgement of receipt from the grievor. In his testimony, Cmdr. Smith acknowledged that the reason he wanted to serve the letter personally was in order to receive the acknowledgement of receipt. It is also noteworthy that the employer sent the notification of termination with the third level response to the grievor's indefinite suspension in January 16, 2012. I agree with the bargaining agent's submission in this regard, that the employer, by this action, acknowledged that it had not been successful in notifying the grievor of termination.

[127] The evidence also shows that Mr. McNeil had been suspended indefinitely in November 2009. He had grieved his suspension in a timely manner, and the grievance was being actively pursued in the grievance process during the summer of 2011. As he testified, it was in his interest to bring this matter to a conclusion as soon as possible.

[128] I agree with counsel for the employer that the fact that Mr. McNeil was not cross-examined does not necessarily lead to a presumption of truth with respect to his evidence. I agree that a decision maker may reject evidence which he disbelieves even if the witness was not cross-examined. See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, third edition, Lexis Nexus Canada Inc., at 1162. As stated, I do not find on the balance of probabilities that the employer has met its onus of establishing that it is more likely than not that Mr. McNeil was attempting to avoid service. Nor do I find that the bargaining agent was under any obligation to act as the employer's agent in serving Mr. McNeil with the letter of termination. Article 17.03 of the collective

agreement is a separate and distinct obligation on the employer to provide a copy of the termination letter to the bargaining agent. The fact that the bargaining agent inquired about the matter does not change this.

[129] Accordingly, I find that the grievance dated February 8, 2012, is timely and was filed in compliance with article 18.15 of the collective agreement not later than the 25th day after the grievor was notified of the reasons for his termination on or about the 16th of January 2012.

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

(The Order appears on the next page)

V. Order

[131] The preliminary objection by the employer that the grievance was not filed in time is rejected.

[132] I direct the Registry of the Board to schedule a hearing on the merits of the grievance together with the other related grievances.

April 28, 2014.

David Olsen,
Acting Chairperson