

IN THE MATTER OF AN ARBITRATION UNDER s.40
OF THE *POLICE SERVICES ACT* R.S.O. 1990 c.P. 15,
AS AMENDED

BETWEEN

THE CARLETON PLACE POLICE SERVICES BOARD

(the "Board")

- and -

INSPECTOR WAYNE DRUMMOND

BEFORE:

C. Gordon Simmons, Arbitrator

APPEARANCES ON BEHALF OF THE BOARD:

Ms Lynda Bordeleau, Counsel

APPEARANCES ON BEHALF OF INSPECTOR DRUMMOND:

Mr. Christopher E. Clermont, Counsel

A hearing into this matter was held in Ottawa, Ontario on September 3, 2003

The matter in dispute, as framed in the request for arbitration under s.122 of the *Police Services Act* is “issue of quantum of severance on disbandment of the service is still in dispute.”

The Town of Carleton Place decided to disband its municipal police force sometime in 2001. The Ontario Civilian Commission on Police Services approved the plan in December 2002. The effective date of the disbandment was April 29, 2003. The policing duties were assumed by the Ontario Provincial Police Force on April 30, 2003. At the time of disbandment the municipal police force consisted of a chief; one inspector (Inspector Drummond); two sergeants; 13 constables; and four full-time and three part-time civilians who were employed in administration and dispatch.

Inspector Drummond joined the force as a First Class Constable on May 1, 1975. At the time of disbandment he had 28 years service. He had his 59th birthday on March 22, 2003.

It is agreed Inspector Drummond was wrongfully dismissed because of the disbandment. He seeks the equivalent of 36 months compensation. He also seeks to be able to continue to contribute to his pension plan until he has 30 years service at which time he will be entitled to a full pension without reduction. Had disbandment not occurred he would have continued to be employed until at least age 60 which occurs on March 22, 2004. But he would still have been approximately 13 months short of 30 years service at that time. In order to obtain 30 years service he would have to be continued on the payroll until May 1, 2005 at which time he would have reached 61 years of age.

As far as I am aware this is the first case in which a police officer caught in the disbandment of a municipal police force seeks to have his pension entitlements enhanced through arbitration because of the disbandment of the force.

The Board does not accept Inspector Drummond's claim that he is entitled to 36 months compensation for the following reasons. First, Inspector Drummond and the Board executed an Employment Agreement on November 23, 1998 wherein they agreed that in the event of wrongful dismissal all his claims for wrongful dismissal would be bound by the *Employment Standards Act*. Article 3.02 of the Employment Agreement addresses the issue and reads (ex. 1):

The Inspector's employment, or the termination of such employment, including, without restricting the generality of the foregoing, all claims for wrongful dismissal or breach of contract, or claims arising with respect to pay in lieu of notice or severance pay shall be under the Employment Standards Act.

Second, and in the alternative, given the expectation that Inspector Drummond would retire at the normal retirement age of 60, the Board would continue his salary and benefits to age 60, which will occur on March 22, 2004. However, the Board stressed this continuation of salary and benefits was made in the form of an offer but there has been no formal agreement entered into (i.e., no acceptance of the offer) and no formal waiver of the provisions of the Employment Agreement of 1998.

Third, and in the further alternative, in the event I find Inspector Drummond is to be continued in employment until his normal retirement age of 60 but also find he is entitled to further damages then as I understand this argument, the Board would agree to pursue the possibility, along with Inspector Drummond, of applying those further damages toward the difference it would take to bring him to a full pension entitlement. That is, to purchase additional contributions in OMERS which would provide him with a pension equal to what he would have received had he worked 30 years. The Board did not mention anything about contributing money to assist Inspector Drummond

in bringing him to a full pension entitlement. In the event I were to adopt this alternative, it was asserted the matter be remitted back to the parties for resolution and I remain seized of my jurisdiction to assist the parties in its implementation should it be necessary. More will be said about this later in the award. In any event, the Board urged in the most strenuous terms that I ought not order that Inspector Drummond be continued on the payroll after he reaches his normal retirement age of 60. I was reminded that no police officer in the history of employment with the town has ever worked beyond age 60.

Counsel for Inspector Drummond argued art. 3.02 is inapplicable in the instant situation because it was never intended to be resorted to in the type of circumstances that occurred, namely that of disbandment. Further, Inspector Drummond never expressed an intention he planned to retire at age 60. If he were required to retire on March 22, 2004 he would have served 29 years and would be forced to receive a reduced pension. In order to receive a full pension at age 60 one must have served 30 years. I was informed the reduced amount of pension was thought to equal 2% but this is uncertain.

Counsel further argued there is no mandatory requirement to retire at age 60 in the *Police Services Act*. The *Act* addresses dismissals for cause and retirement due to poor performance, s.25(4)(1) and for medical disabilities, s.47(2) but is silent on a mandatory retirement age. Thus, the Board is restricted in mandatorily retiring the Inspector. It is exclusively his decision when he wishes to retire and not that of the Board. Thus when reasonable notice covers a span of time that takes one over the age of 60 the police officer is at liberty to take advantage of it. I understand this to mean in the instant situation that if Inspector Drummond's request for 36 months compensation were

awarded it would take him close to April 30, 2006. Even if he were awarded 28 months from the time of disbandment it would take him to August 30, 2005. In either case he would have attained 30 years service by May 1, 2005 which would enable him to a full pension without reduction.

While the *Police Services Act* may not contain any provision for mandatory retirement the Board led evidence on the practice that has been followed over the years.

Ms Mary Ascott, payroll and benefits administrator, carries out responsibilities in connection with, *inter alia*, group insurance and pension benefits. She reviewed the town records of police officers who had been employed as early as 1894. She reviewed the reasons why they had left the force, etc. and sought out if anyone had worked beyond age 60. Her search found no one had worked beyond age 60.

Moreover, Ms Ascott explained all police officers (and firefighters) are enrolled under the *Ontario Municipal Employees Retirement System Act* (OMERS) and are in the NRA 60 plan whereas other municipal employees are enrolled in the NRA 65 plan (NRA means normal retirement age); see O.Reg. 890, *Ontario Municipal Employees Retirement System Act*, s.12.(1).

Mr. Paul Knowles, chief administrative officer and secretary to the Police Services Board, testified the OMERS plan was passed and adopted by town council on December 31, 1962 as by-law no. 1662. Section 5 of the by-law reads (ex. 6):

5. The treasurer shall file a certificate with the Secretary-Treasurer of the Ontario Municipal Employees Retirement Board to the effect that employees who are policemen or firemen are entitled to retire at age 60.

PASSED this 31st day of December A.D. 1962.

Mr. Knowles could not recall any police officer having worked beyond age 60 nor any other municipal employee having been employed beyond age 65. While he knew of no existing policies in this regard he stated it had been the practice that had been followed.

Further, Inspector Drummond admitted in cross-examination that he knew he would be one year short of his full pension entitlement in 1975 when he joined the force. He further acknowledged he was aware at the time he joined the force in 1975 that the normal retirement age for police officers was age 60.

Having established the normal retirement age for police officers is age 60 and having established Inspector Drummond had been aware of that fact from the time he joined the Carleton Place Police Force and being informed that no police officer previously employed by Carleton Place ever worked beyond age 60 I find there could be no valid objection to the Board refusing to employ Inspector Drummond after March 22, 2004. That is, the Board has every right to insist on Inspector Drummond taking his retirement on his 60th birthday on March 22, 2004 subject to what follows.

The Board argues Inspector Drummond is only entitled to severance pay prescribed by the *Employment Standards Act* pursuant to art. 3.02 of the employment contract. If applicable this would entitle Inspector Drummond to eight weeks notice, see *Employment Standards Act* 2000, c.41, s.57(h). With respect, I am unable to follow the reasoning of this argument. The Board acknowledges it has breached the employment contract with the Inspector on the one hand and yet seeks to enforce one of its terms in its favour on the other hand. As I understand the law once one party breaches a contract the innocent party has several options available. One, he may accept the breach and seek damages. Two, by doing so, the innocent party has accepted the breach and the contract is no longer

enforceable. Of course there are exceptions such as where the contract expressly states that certain portions of the contract remain enforceable in the event of a breach. I see no such exceptions in the employment contract under discussion. Therefore, once having breached the employment contract with Inspector Drummond it is not open for the Board to select certain provisions or sections which are to its benefit and enforce them against him. This is especially so in the special circumstances existing in the instant situation. It was not due to any action on the part of Inspector Drummond that caused the breach. It was solely due to the action of the Board that brought about the breach by disbanding the police force. Accordingly, I find the Board is unable to rely on art. 3.02 of the Employment Agreement to enforce a reduction on any rights Inspector Drummond may otherwise possess.

Another option available to the innocent party is to accept a new offer from the offending party thereby mitigating his damages. This, in my view, is what happened in the instant situation. There is no dispute over the fact the Board breached its employment arrangement with members of its police force, including the Inspector. The Board acknowledges that Inspector Drummond has disagreed with its decision to disband the work force as well as with its severance offer. This is clearly acknowledged in a letter to Inspector Drummond from the Chairman of the Carleton Place Police Services Board and Mayor dated April 10, 2003. It reads (ex. 3):

April 10th, 2003

Inspector Wayne Drummond
85 William Street
Carleton Place, Ontario
K7C 1X9

Dear Inspector Drummond:

Further to our earlier correspondence, this will confirm that effective as of April 29th, 2003, the Carleton Place Police Service shall be disbanded in accordance with the consent of the Ontario Civilian Commission on Police Services. Accordingly, the Town of Carleton Place will be policed by the Ontario Provincial Police as of April 30th, 2003.

The Board acknowledges your request for arbitration under section 40 of the *Police Services Act*. Notwithstanding the arbitration process, the Board will continue your salary and benefits after the effective date of disbandment. Any payments made during this time will form part of your severance entitlements.

Yours truly,

Mayor Brian Costello

Mayor Brian Costello, Chair
Carleton Place Police Services Board

An interesting statement in the letter is that the Board will continue to pay the Inspector his salary and benefits after disbandment. But this is after the Inspector had applied for arbitration for the breach of the employment contract. Inspector Drummond is not obliged to accept this offer from the Board. However, the fact that the Inspector has accepted the salary payments is evidence that he accepted the offer. There are other statements in the letter which denotes the former employment contract had been terminated. It informs Inspector Drummond the force will be disbanded and the town will be policed by the OPP effective April 30. His duties and responsibilities as a police officer will no longer be required after April 29 because the town will no longer be policed by the Carleton Place Municipal Police Force. *A fortiori*, his employment has been terminated.

However, by cashing the salary cheques, he effectively has accepted the offer and therefore remains an employee of the Town of Carleton Place. This means, in my view, the last sentence in the April 10th letter is incorrect where it uses the words “severance entitlements”. With respect, it would more accurately reflect what is transpiring if it were to have read “notice requirements” instead of “severance entitlements”.

However, the Board also asserts that its obligation to continue to pay salary and benefits terminates with Inspector Drummond's 60th birthday. Unfortunately, the letter failed to place an expiry date on the continuance of his "salary and benefits after the effective date of disbandment."

For reasons that have been explained above, I agree with the position of the Board that while Inspector Drummond's present duties remain unexplained there was no suggestion he is being treated other than that of a police officer. The normal retirement age for police officers is 60. This is set out in the *Ontario Municipal Employment Retirement Systems Act*, R.S.O. 1990, ch. O.29 and Reg. 890. This has also been the practice followed by the Town of Carleton Place. Further, Inspector Drummond was aware of this practice when he joined the police force in 1975. He was also aware the formula for his pension contributions was based on NRA 60. Accordingly, the Board is not obligated to continue to employ Inspector Drummond beyond March 22, 2004 when he reaches his 60th birthday.

There remains the issue of reasonable notice. It is acknowledged the law is settled at this point in time that upon a disbandment of a municipal police force the Police Services Board is in breach of its employment contract with the members of its police force. See *The Town of Warton and Chief Constable Alfred Schultz*, an arbitration decision of Professor R.L. Jackson dated June 15, 1988 which sets out that a breach occurs when the Board terminates the employment contract without cause being established on the part of the police officer. This is best illustrated in the oft quoted *Warton* statement at pp. 27 *et seq*:

The principle of law upon which wrongful dismissal cases are decided in civil court is well known and a relatively simple one. Any employer (other than one whose employees are covered by a collective agreement with a 'just cause' provision) has an absolute right to discharge an employee. If the discharge is for 'cause', then the employee

is not entitled to notice or compensation in lieu of notice. On the other hand, if the discharge is without cause, then the employee is entitled to 'reasonable notice' or compensation in lieu of reasonable notice. It should be noted that 'cause' is related to some culpable behaviour or incompetence on the part of the employee and does not include redundancy or reorganization of the work force. The actual appropriate compensation, then, is whatever the dismissed employee could have reasonably been expected to earn, in terms of salary and benefits (including expected salary increases) during the term of reasonable notice, less anything s/he may have earned in any other employment.

The issue of compensation therefore turns on the question of what constitutes reasonable notice. That, in turn, is based on a second principle: given all of the circumstances pertaining in a particular case, what length of time is it likely to take for the employee to find work of a comparable nature and level? In determining the answer to this question, obviously, such factors as the **employee's** age, length of service, salary level, the nature of the work, condition of the market, and so on, would be considered. This idea was perhaps best articulated by Chief Justice **McRuer** in *Bardal v. Globe and Mail Ltd.* (1969) O.W.N. 253,24

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular **case**, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and **qualifications** of the **servant**.

I have concluded that this civil law principle of reasonable notice – adapted to special realities of policing and the peculiarities of this situation – is adequate and appropriate as a guide for a settlement in this case. There are three reasons for this, the first of which is captured in the rhetorical question, 'if not the principle of reasonable notice, than what?' Any decision regarding the quantum of compensation in an unjust dismissal situation must be based on some principle; it cannot be just random, or picked out of the air. I have been unable to come up with any better principled basis for a **decision**, nor have I heard a better suggestion.

Second, the principle of reasonable notice is not a blunt tool which makes an automatic decision. As suggested by Chief Justice **McRuer**, it is a concept which takes into account many disparate factors and (it is to be hoped) can be applied with both compassion and common sense. In short, it can be well adapted to the circumstances and, in this situation, its result made to reflect the unique aspects of policing and of the **Wiarion** situation.

Third, in essence, the parties are agreed that the reasonable-notice approach is appropriate, the only difference being that Mr. **Cork** argues that, in a case involving a Chief of Police, it should not be applied in exactly the same way as it might be in a civil court.

For all of the above reasons, then, this award will be based on the common law principle of reasonable notice, adapted to the extent possible to the unusual circumstances of Chief **Schultz** and the **Wiarion** situation.

In *Wiarthon* Chief Schultz was 57 years of age who had a total of 30 years service with the Town of South Hampton and Wiarthon. He received an amount equivalent to 30 months salary plus various benefits. In another arbitration involving police officers and the *Town of Parry Sound*, an unreported decision of Arbitrator Swan, December 14, 1989 won Constable Predie (who had 19 years of service), 19 months notice. Constable Mace in that case had 22 years service at the time of disbandment and was awarded 22 months notice. These are examples of what arbitrators consider reasonable notice. Counsel informed me that the one year, one month approach has been adopted in other arbitration decisions as well.

Counsel for Inspector Drummond argued he is entitled to a minimum of 28 months notice in keeping with the jurisprudence that has been established but he is also entitled to an extra eight months due to his loss in status. The Town of Carleton Place is a relatively small community. The Inspector has enjoyed considerable respect in the community. It is fitting he receive a measure of compensation for this loss he has sustained at age 59.


I am mindful of the abrupt impact that befalls any police officer when the police force is to be disbanded, especially in a relatively small community. I have no doubt Inspector Drummond feels he has suffered a loss in status but it is not peculiar to him. The entire police force was treated in a similar fashion due to the disbandment for reasons the Board and town council undoubtedly felt were advantageous to the town. The jurisprudence has acknowledged this throughout the development of disbandment of police forces through what is considered reasonable severance packages to police officers whose services are terminated by disbandments of police forces. However, I accept the approach that arbitrators have adopted which is one month for one year service. There may be

exceptions due to unusual circumstances but as a general rule this approach ought to apply. Accordingly, I award 28 months in the form of combined notice and severance as set out below.

I also recognize this is the first case which has included an attempt to bridge a pension entitlement to what has happened. I favour assisting Inspector Drummond in his attempt to obtain a full pension without reduction, if possible. He will be approximately one year short of his 30 year requirement by March 22, 2004.

Accordingly, Inspector Drummond is to receive a combined termination notice and severance pay of 28 months as follows. He is to continue to receive salary and benefits until March 31, 2004 (March 31 being the end of the month when he reaches 60). After March 31, 2004 he is to receive compensation in the form of severance allowance payments equalling salary and benefits for the remaining 17 months.

Further, I agree with the concept of contributing to the OMERS plan for the appropriate 13 months required to enable the Inspector to receive a pension without reduction. I was informed additional contributions to OMERS is not without precedent. It happened in 1975 when Inspector Drummond joined the police force. At that time there was a six month waiting period before being permitted to enroll in OMERS. Since that time, the six month waiting period has been revoked. In addition, those police officers who were caught by the six month waiting period were later given an opportunity to purchase those six months. Ms Ascot informed me Inspector Drummond later purchased the six months. I was not informed whether he purchased this six months on his own or whether it was with assistance of the Town. An answer to such a question might provide guidance in assisting the parties at this juncture in their relationships. However, the concept of making further

contributions was not explored in any detail by the parties and I accept the suggestion this issue be remitted back to the parties for resolution. I shall remain seized of my jurisdiction to resolve this issue in the event the parties are unable to do so. I further retain jurisdiction  to assist the parties in implementing this award in order to make it complete in all respects should the parties require assistance.

Dated at Kingston, Ontario, this 7th day of October, 2003.

C. Gordon Simmons
Arbitrator