

**IN THE MATTER OF AN ARBITRATION**

BETWEEN:

**THE TORONTO POLICE SERVICES ASSOCIATION**

(“The Association”)

AND

**THE TORONTO POLICE BOARD**

(“The Board” or the “Employer”)

GRIEVANCES OF SGT. FERGUSON, P. C. STEWART, P.C. RYAN, P.C. TURRELL, P.C. HISCOTT

**BEFORE:** Belinda A. Kirkwood (Sole Arbitrator)

**APPEARANCES FOR THE ASSOCIATION:**

Jessica Dowling, Counsel

Roger Aveling

George Tucker, Director

Sergeant Ferguson

Nigel Stewart, P.C.

Janis Ryan, P.C. Retired

(and others)

**APPEARANCES FOR THE BOARD:**

Michael Hines, Counsel

Wendy Ryzek, Acting Manager, Labour Relations

Mireille Khorayeh, Counsel

(and others)

**DAYS OF HEARING:**

The hearing was held in Toronto, Ontario on September 24, and 25, 2007, February 11, 2008, March 31, 2008 and May 5, May 13, and 20, 2008, October 1 & 2, 2008, November 28, 2008 and February 5, 2009 and April 24, 2009.

## AWARD

The Grievors are members of the Bail and Enforcement Unit (“the Bail and Enforcement Unit”).

As a result of a directive on March 3, 2005, the Grievors, Police Constables Stewart, Tyrell, Hiscott and Ryan were advised in writing by Inspector Kinsman that effective September 6, 2005, that each of them would be reclassified from the rank of Detective Constable to Police Constable as a result of organizational changes within the Toronto Police Service and the Provincial Community Safety Liaison Unit, and that they were to perform their duties in uniform. The Grievor, Sergeant Ferguson was advised that he was no longer to be designated as Detective, but was to be designated Sergeant, and was to perform his duties in uniform. The effect of these directives is, that the Grievors, with the exception of Sergeant Ferguson suffered a loss of income equivalent to 6.75% of the First Class Constable rate as they were then no longer in receipt of the premium set out in Article 16 of the Collective Agreement for performing plainclothes duties. Sergeant Ferguson did not suffer a loss of income as his rate of pay as a Sergeant was equivalent to that which he received as a Detective in the Unit. As the officers were no longer performing their duties in plainclothes, the officers no longer received clothing expense reimbursement, as set out in Article 6 of the Collective Agreement.

The Association claimed that the Bail and Parole Enforcement Unit was reclassified and unilaterally demoted by the Board when the Unit was changed from a plainclothes unit to a uniform unit on September 6, 2009 by reclassifying each of the Grievors. The Association claimed that the Board violated Article 3 of the Collective Agreement, the management rights clause, and reclassified or demoted the Grievors without just cause, Article 6, the Clothing Expense Reimbursement clause, colloquially called the “clothing allowance”, and Article 16, the Special Pay and Allowances, colloquially called the “plainclothes premium”.

The Board claimed that this case is simply about paying the officers the correct wage under the Collective Agreement for their work assignment. The Board claimed that there was no violation of the Collective Agreement. The Board is only required to pay the officers that to which they

are entitled under the Collective Agreement. Article 16 of the Collective Agreement provides a special pay or an allowance to a Constable for performing plainclothes functions. The Grievors were not performing plainclothes functions. The use of “detective” is a term used in the workplace and “detective constable” is not one of the permitted ranks set out in the Police Services Act. The Board submitted that there can be no demotion without a downward change in rank. There is no reclassification as reclassification has a specific meaning under the terms of the Police Services Act, which is thereby incorporated into the Collective Agreement.

### **Relevant Provisions of the Collective Agreement**

#### ARTICLE 3 – MANAGEMENT RIGHTS

3:01 (a) The Association and its members recognize and acknowledge that, subject to the provisions of the Police Services Act and the Regulations thereto, it is the exclusive function of the Board to:

- (i) maintain order, discipline and efficiency:
- (ii) discharge, direct, classify, transfer, promote, demote or suspend, or otherwise discipline any member;
- (iii) hire...

(b) If a member claims that the Board has exercised any of the functions outlined in paragraph (a) (ii) in a discriminatory manner or without reasonable cause, then such a claim may be the subject of a grievance under the provisions of the grievance procedure outlined in this Collective Agreement or dealt with under procedures within the exclusive jurisdiction of the Ontario Civilian Commission on Police Services, as prescribed by the Police Services Act.

(c) The Board agrees that it will not exercise any of the functions set out in this Article in a manner inconsistent with the provisions of this Collective Agreement or the Police Services Act of Ontario and the Regulations thereto.

#### ARTICLE 6 – CLOTHING EXPENSE REIMBURSEMENT

6:01 (a) On the submission of appropriate receipts for clothing required for the performance of his/her duty, each member who is required to perform police duties in plainclothes shall be reimbursed for such expenditure not to exceed \$1,050.00 per annum (\$1,125 per annum, effective January 1, 2007) if he/she performs such duties for a full calendar year and shall be issued

vouchers for the cleaning of plainclothes. If he/she performs such duties for less than a calendar year but for thirty (30) days (or 240 hours if that occurs first) or more in that year, he/she shall receive a proportionate part of the aforesaid reimbursement in the same ratio that his/her time so spent bears to the calendar year.

#### ARTICLE 16 – SPECIAL PAY AND ALLOWANCES

16.01 A constable who is assigned to perform his/her police duties (a)(i) in plainclothes for a minimum of thirty (30) days (or 240 hours if that occurs first) in a calendar year...  
Shall receive a salary of his/her rank plus 6.75% of the salary of a First Class Constable as set out in schedule A for the period of time during which he/she is so assigned and such salary shall be used for computing premium pay such as overtime.

#### **Background**

Evidence of the structure, focus and direction of the Bail and Parole Enforcement Unit in the period of 1991 to 2001 was given by Staff Superintendent Federico. Staff Superintendent Federico was Acting Commander of the Bail and Parole Enforcement Unit on or about 1998, and was promoted to Inspector in 1998/1999 and was put in charge of the Bail and Enforcement Unit as Unit Commander until 2000. He had contact with the Reporting Centre, which was the former name of the Bail and Parole Enforcement Unit in the 1970s and 1980s, and was able to give evidence on the history of the Unit during that period.

The Bail and Parole Enforcement Unit, the “Unit”, has been in existence since 1970 although the name of the Unit, the location of the Unit, some of the functions the officers performed, and the Unit’s placement on the TPS organization chart have changed.

The mandate of the Bail and Parole Enforcement Unit is Offender Management. The officers in the Unit register the attendance of individuals who are required to report to the police as a condition of their release, whether on bail or parole, under both provincial and federal statutes. Their functions include registering the individual’s attendance, the assessment of reasons provided by those who had failed to comply at an earlier time when they do attend, laying charges and arrest, if necessary. The officers’ duties also included the registration and collation

of information from sex offenders who are required after serving their sentences, to register annually with the police for both the Provincial and National Sex Offender Registry (SOR), which had been implemented in 2001 and in 2004. The officers forward the information they obtain from the SOR to the Sex Crimes Unit for possible use at a later time or to assist the Sex Crimes Unit in enforcement, if necessary. This information is retained on a data base which is shared with the courts, and other services and agencies.

Initially, the duties also included the enforcement of bail or parole conditions, such that if a person did not appear, the officers would conduct investigations outside the Reporting Centre and would search out the persons who failed to attend. However, by 1998, the Unit had many warrants of apprehension outstanding, but did not have the ability to act on them. In 1998, under Chief Boothby, the Repeat Offender Parole Enforcement ("ROPE") was initiated to investigate and enforce those who failed to report as required. ROPE, however, did not remain under the Bail and Parole Enforcement Unit, but was seconded to the Ontario Provincial Police ("OPP") in 2001, and became a province-wide system. As a result there have been no outside investigation and enforcement functions performed by officers working in the Unit since 2001.

When Staff Superintendent Federico took over the Reporting Centre in 1998, the purpose of the Reporting Centre was only to register those who had to report as a condition of bail or as a condition of parole. Uniform officers, Police Constables working at the Reporting Desk wore casual clothes, but were not paid as Plainclothes Officers. These officers registered those who attended, but did not seek out and find those who failed to comply with Orders to attend. ROPE had been initiated to enforce compliance, but was in its infancy. It was staffed by three officers who were Plainclothes Officers and received the plainclothes premium pay.

Staff Superintendent Federico wanted to enhance the image of the Reporting Centre, which was seen as a static unit and not particularly career enhancing and was used by officers near retirement, officers on medical or disciplinary restrictions. Staff Superintendent Federico envisaged an Enforcement Unit working hand in hand with the Reporting Desk. He wanted to recruit officers, who could investigate where an offender might go, identify associations that would lead to the offender and track the offender. He envisaged that officers would spend

time on the registration functions and then move into enforcement. He required officers with investigative skills, but he was also open to recruiting patrol officers. He wanted all the officers in the Unit, both on the registration side and the enforcement side to receive the plainclothes premium to attract better candidates to the Unit. In his view, the Detective Constable designation and the premium pay would be perceived by the officer in the field as a promotion from the perspective of staff development, although not rank. He obtained permission from Deputy Chief Joe Hunter to select and pay officers as detective constables or plainclothes officers. He told the candidates that he wanted them all to receive such pay, but could make no promises. It was unclear as to when all of the officers in the Unit began to receive the plainclothes premium.

In 2001, although the enforcement function left with the secondment of ROPE to the OPP, the scope of the registrations performed by the Bail and Parole Enforcement Unit broadened significantly. In April 2001, as a result of the proclamation of Christopher's Law, a provincial registry was established which required sex offenders who had completed their sentences to report annually. In 2004, Federal legislation came into effect, which required persons convicted of Criteria Offences, usually sex offences to register with the National Registry. The Bail and Parole Enforcement Unit became a designated site for Toronto. As a result of SOR, the registration of the sex offenders went to Bail and Parole Enforcement Unit and the enforcement and tracking aspect of those who failed to comply went to the Sex Crimes Unit. Since the commencement of SOR, the time spent on the SOR has grown to approximately 50% of each shift. Due to the time required on this aspect of the registration procedure, and the removal of the enforcement arm, there are fewer arrests from failure to comply, and fewer court appearances were required.

In 2004, Detective Superintendent Strathdee who was responsible for Provincial Community Safety Liaison and the Bail and Enforcement Unit, was touring the Unit and met Sergeant Ferguson. Detective Superintendent Strathdee was not familiar with the duties performed in the Unit and discussed the same with Sergeant Ferguson. He queried why the officers were all in plainclothes. Sergeant Ferguson explained that while they had been under Court Services,

but historically they had been Detectives and Detective Constables under Detective Command, and all employees in the building which included other Units were in plainclothes. Nothing further occurred, until late 2004, shortly after some of the officers were transferred out of the Unit to the Sex Crimes Unit, when Superintendent Strathdee visited again. This time Detective Superintendent Strathdee also met Sergeant Gataveckas. Sergeant Gataveckas approached him and asked why he was working in the Unit, but was not receiving a plainclothes premium and clothing allowance. Detective Superintendent Strathdee said he would look into it. Shortly after, Sergeant Ferguson was asked for a report on why the officers should perform their duties in plainclothes. Sergeant Ferguson obliged, and he heard nothing further until he and the other Grievors received the directive of March 3, 2005. After the directive was put in force the grievances were filed.

From an organizational perspective, there are two relevant branches, that of Detective Support and the other Operational Support. During the latter part of the 1980's, the Reporting Centre was seen as a support function for the Courts and for Correctional Services. It, along with Court Services, was attached to Support Operations on the organization chart of the Toronto Police Service ("TPS"). In the view of Staff Superintendent Federico, it was due to its apparent administrative links. However, in 1994, following the *Beyond 2000 Implementation Report*, the Unit was reassigned to the Detective Branch to reflect a change in emphasis. The links, Staff Superintendent Federico stated, were not detective functions, but were ones that are used by detectives, such as reliance on the records and data maintained and generated by officers in the Unit. On February 28, 2002 the Bail and Parole Enforcement Unit was moved from Detective Support to Operational Support reporting to Court Services. In 2004, it then became a sub Unit of Provincial Community Safety Liaison Group, which fell under Detective Command, although not the Detective Services Unit. In 2005, the Provincial Community Safety Liaison was to be disbanded and its functions dispersed through other groups under Detective Command. Bail and Parole Enforcement Unit has remained under Detective Command, and is now under the umbrella of ROPE, which although financed by the OPP is shown as part of the TPS organizational chart. The changes in the command structure have had no effect on the duties performed by the officers in the Unit.

## Submissions

### Association Argument

The Association submitted that “Detective Constable” is a wage structure within the rank of Police Constable. The Association acknowledged that there is no such rank as Detective Constable, but submitted that some kinds of work performed by Police Constables require more skill, and, as a result those members have been given a monetary value for performing that work. Historically, the Association submitted that the understanding in the Police Services is that a Detective Constable constitutes half a rank, and receives a wage premium of 6.75% of the First Class Constable salary, which reflects one half of the difference in rate between the rate received by a First Class Constable and a Sergeant, who receives 113% of the First Class Constable rate.

The Association submitted that the reclassification of the Unit by the Employer had the effect of depriving the Grievors of the premium associated with the wage structure and thereby demoted the Grievors, contrary to the Collective Agreement. The Association submitted that the Employer has the right to reclassify the Grievors, the right to remove the detective designation, and the right to require the Grievors to work in uniform, provided that the Employer did not demote the Grievors by removing their right to their premium pay.

The Association acknowledged that there is only one rank of Police Constable, but submitted that the payment of the premium and the designation of “detective” were perceived as an upward movement within a rank and therefore constituted a promotion, and accordingly, the corollary loss of the premium and the designation constituted a demotion.

The Association submitted that to change the status of the officers within the same rank constitutes a demotion, such as seen in the **Regional Municipality of York Police Services Board and Regional Municipality of York Police Association (Grievance of P.C. Amato) 2001 (Marcotte)** decision. The Association submitted that this decision was useful as it demonstrated that although the Grievor did not lose his rank when he was transferred out of

the Detective Constable position, a position recognized by that Collective Agreement, his loss of premium, which was associated with the Unit, and the loss of his designation resulted in a demotion.

The Association also submitted that the Grievors lost the status that flows from the Detective designation. The Association asserted that once adverse impact to the Grievors is shown within a classification, a demotion has occurred.

The Association asserted that the exercise of management's rights which includes the right to demote or the right to reclassify its employees, is subject to the standard of reasonable cause. The standard of reasonable cause as found in discipline cases is equally applicable to matters of promotion and demotion (**Regional Municipality of York Police Services Board and Regional Municipality of York Police Association (Amato Grievance)** (unreported) (December 20, 2001)(Marcotte) and **The Toronto Police Association and The Toronto Police Services Board (Grievances arising from the promotion process conducted by the Employer in the Spring and Fall of 2001)** (MacDowell) decisions.

The Association submitted that an issue is whether the functions performed by the Grievors at the time of the filing of the grievances had changed to warrant the Employer exercising its right to reclassify the Grievors, or the Grievors' Unit. The Association submitted that the nature of the functions carried out by the officers had been consistent, although the focus of the functions in the Unit had changed, and there was greater emphasis spent on interviewing sex offenders, rather than making charges and arrests associated with failures to comply to the release conditions.

The Association submitted that it was not reasonable for the Board to exercise its right to demote or reclassify the Grievors in September 2005, when there was no material change to the nature of the functions performed by the Grievors at that time.

The Association submitted that it cannot be established by applying the traditional principles of reclassification that the Grievors are Detective Constables by establishing that they are performing the duties of Detective Constables, as there are no criteria for the position of

Detective Constable. However, the Association submitted that **The Hamilton-Wentworth Police Services Board and the Hamilton-Wentworth Police Association (Grievance re BEAR Project Compensation) May 23, 1999** (Jackson) demonstrates that an officer does not have to be assigned to the higher ranked duties, but receives the premium if the officer is required to do the duties of a higher ranked job. In this case, the Association submitted, it is the Detective Command structure that defines the Grievor's position and their entitlements.

The Association submitted that the structure of the organization of the TPS and the placement of the Bail and Parole Enforcement Unit within that organization, and the Board's policies, created an entitlement to plainclothes pay. The Association submitted that in 1994, the Board policy created a basis for payment of the plainclothes premium by creating criteria based upon core functions of criminal investigation and apprehension of officers and the assistance in the prosecution of crimes. It stated that plainclothes duties were synonymous with the detective classification. The Board's policy of 2001 made no mention of the core functions, but directed that all units in Detective Support and those performing investigative functions in Court Services were permitted to have Detectives.

The Association argued that in 2001, when the Board removed the criteria it had included in its policy for payment for plainclothes duties, the payment for the plainclothes premium then flowed from the organizational structure. The Association submitted that the Command Structure replaced previous policies. In support, the Association submitted that every position under Detective Services Command received the plainclothes premium and the clothing reimbursement. The Association submitted that a reasonable reading of the Collective Agreement and the Board's policies is, that as long as the officers remain within the Detective Command, they remain designated as Detectives and are entitled to the premiums associated with that position and work.

The Association submitted that the Collective Agreement gives the Employer discretion over the placement of the officer for the first 30 days of an assignment, after which the entitlement is determined by the location of the Unit within the Command Structure. Once an officer is assigned for more than 30 days to plainclothes duties, the officer receives the plainclothes

premium and is a Detective. Most commonly, the officer will be in a detective division officer for more than 30 days to up to three years. The Association submitted that the assignment to the Bail and Parole Enforcement Unit is a permanent assignment, unlike the changes in positions that occur with the officers in a Criminal Investigation Bureau rotation.

The Association submitted that the issue is not whether plainclothes duties were investigative or not. That line is unclear. The answer is where the plainclothes duties fit within the police organization. The Association submitted that the Board did not define the duties of the Detective Constable in any way, and therefore it is the Command structure that determines their wage structure.

The Association submitted that the reclassification of the duties from plainclothes duties to uniform duties offended the Collective Agreement, as the Unit was under Detective Command, and the Grievors were entitled to receive the premium by virtue of the position of the Unit on the organizational chart.

The Association submitted that as there was no change in duties, the directive of March 3, 2005 effectively amended the structure of the police organization, and arbitrarily removed the premium from the Grievors. The Association submitted by reclassifying the duties performed by the Bail and Parole Enforcement Unit to duties performed in uniform, depriving the officers of such premium and designation effectively demoting the officers while the Unit remained under Detective Command was arbitrary and done without reasonable cause, and violated the Collective Agreement. The change did not occur as a result of a review such as had previously occurred in *2000 and Beyond* which had recommended that the Bail and Parole Enforcement Unit be relocated to Detective Command. The Association submitted that it was incumbent upon the TPS to support a change to the structure of the organization to avoid a finding of arbitrariness, to present a rationale to the Board to address the change in structure.

The Association submitted that an adverse inference ought to be made against the Board from its failure to call Superintendent Strathdee, who had now retired, and Chief Blair, as witnesses, as they had the information that resulted in the directive of March 3, 2005 which led to the

demotion or the reclassification of the Grievors. The Association therefore submitted that the Board failed to establish that it had reasonable cause for its actions.

The Association also relied upon the following cases: **The Hamilton-Wentworth Police Services Board and the Hamilton-Wentworth Police Association (Grievance re BEAR Project Compensation)** May 23, 1999 (Jackson); **United Electrical, Radio and Machine Workers of America in Re Canadian General Electric Co. (Davenport Works)**, [1951], 3 L.A.C. 991 (Laskin); **Re Richardson Terminals Ltd. and Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, Grain Elevator Division, Lodge, 650** [1973] 2 L.A.C. (2d) 371 (Aggarwal); **The Township of Innisfil Police Association for the Township of Innisfil Police Force and the Board of Police Commissioners for the Township of Innisfil** (unreported)(January 28, 1982) (Lerner); **Sault Ste. Marie Police Services Board and Sault Ste. Marie Police Association** [2005] 144 L.A.C. (4<sup>th</sup>) 221 (Trachuk); **United Parcel Service v. Teamsters, Local 362 (Furieux Grievance)** [2005] C.L.A.D. No. 491 (Francis); **Good Humor-Breyers, Simcoe and U.F.C.W. (Graham Grievance)** [2004] 126 L.A.C. (4<sup>th</sup>) 423 (Roberts); **Re Metropolitan Stores (M.T.S.) Ltd. and Retail, Wholesale and Department Store Union, Local 1065** [1979] 22 L.A.C. (2d) 186 (Yeoman).

### **Board Argument**

The Board submitted that the Grievors lost the premium pay associated with performing plainclothes functions and reimbursement for the clothes which they were no longer required to wear, but they were not demoted or reclassified. Demotion requires a downward movement between job classifications or ranks. There was no change in rank or job classification.

The Board submitted that “detective” is merely a term used in the workplace. The use of this term is not seen in the Collective Agreement. The only permitted ranks are set out in Section 4 of R.R.O. 1990, Regulation 929 under the Police Services Act, in which there is one rank of Police Constable in which four classes of Police Constables are found, and of the relevant ranks,

the Detective Sergeant is shown to be equivalent to the rank of Staff Sergeant and the rank of Detective is equivalent to that of a Sergeant. The Board submitted that reclassification has a specific meaning under the Police Services Act and accordingly under the Collective Agreement. It refers to the movement occurring on the anniversary day of the constable as the constable moves through the four classes recognized by the Police Services Act. The Board submitted that the Employer did not reclassify the Grievors.

The Board submitted that this case is not about demotion, or a loss of status. The Board submitted that compensation is not based upon the officers' qualifications, but for the work that they were assigned to and performed. The Board submitted that the Collective Agreement states that a special payment is paid to a constable who is assigned to specific work, plainclothes duties. Without denigrating the work done by the Grievors, it does not confer status, it merely provides payment for a work assignment in the same manner as Article 16 of the Collective Agreement also provides special pay to a dog handler.

The Board submitted that plainclothes duties are synonymous with detective duties. The Board recognized however, that there is a great deal of overlap among the various job assignments, and between police officers and detectives. Investigation is though, a fundamental part of the duties.

Detective duties are comprised of a complex series of functions from detecting a crime, investigating and reconstructing how it occurred, apprehending the offender and assisting in the preparation of the case for the prosecution. The degree of difficulty varies depending upon the circumstances of the crime. As many of the functions fall within the duties of a Police Constable, the payment of the plainclothes premium is based upon the more complicated duties of a detective, which is an investigative role, which takes the job beyond the role of the Uniformed Police Constable. The Board submitted that the role of the members working in the Bail and Parole Enforcement Unit is not complicated and the nature of the investigations performed by the officers in the Unit are simple, even simpler than those performed by the Uniformed Police Constable on patrol.

The Board submitted that the issue is whether the Grievors are performing the essential or core duties that attract premium pay. The Board submitted that the Employer is entitled to pay that which is required under the Collective Agreement, and when there has been an overpayment, to discontinue such payments (**Re Borden Chemical Co. (Canada) Ltd. and Allied and Technical Workers, Local 13491** [1973] 3, L.A.C. (2d) 383 (Weatherill); **Maple Leaf Mills Limited and United Packing House, Food and Allied Workers, Local 452** (unreported)(August 24, 1967) (Hanrahan).

The Board agreed with the Association that without the enforcement duties, there has been no change in the functions performed by the Grievors as they perform registry duties. Compensation is dependent upon what the officer does. The Employer is entitled to correct an error. The Board argued that the organizational structure has never been the driving force for payment.

The Board submitted that the Grievors were not demoted. The Board argued that “Detective Constable” is not a rank, nor a promotion or the loss thereof, a demotion, but is a change in work assignment which receives a premium. The Service has a very structured system of promotion, which is well known by the officers, and which was scrutinized by Arbitrator MacDowell in **The Toronto Police Association and The Toronto Police Services Board (Grievances arising from the promotion process conducted by the Employer in the Spring and Fall of 2001)**. The change to Detective Constable was not subject to this system and not a promotion, and therefore the corollary change to Police Constable is not a demotion. As there is no change in jobs, therefore there is no demotion.

The Board argued that the nature of this case is that of an assignment to perform duties and it is not a matter of reclassification, which is limited to the progress set out in Regulation 929. The Board argued that the Employer has the ability under the management’s rights clause to classify its employees. It merely has to be reasonable. Therefore it is incumbent upon the Association to demonstrate that any reclassification was done without reasonable cause.

The Board submitted that the actions of management are subject to the standard of “reasonable cause”. In matters of demotion, an arbitration board will scrutinize the actions of

management with more scrutiny than in matters of classification. The standard of reasonableness has only to fall within a range of reasonable actions and need not be correct. The Board submitted that the onus was on the Association to prove that the management acted without reasonable cause, or acted “obviously unreasonably” as in the **Toronto Police Services Board v. Toronto Police Assn. (Rossi Grievance)** [2001] O.L.A.A. No 800 (Brent) decision, or as referred to by the Supreme Court in the **Law Society of New Brunswick v Ryan: Federation of Law Societies of Canada, Intervenor** [2002] 223 D.L.R. (4<sup>th</sup>) 577 decisions. The Board submitted that deference be shown to the Board as it has the expertise in administering this unique working environment, in the same manner as was given by the Supreme Court when reviewing tribunal decisions for reasonableness, as opposed to when reviewing their decisions for correctness.

The Board submitted that Arbitrator Marcotte’s decision in **York** (supra) was wrongly decided, in that Arbitrator incorporated factors relating to the assessment of the reasonableness of discipline into matters of the Employer’s general managements right which in that case was to promote, and submitted that the analysis by Arbitrator Devlin in **Toronto Police Services Board and Toronto Police Association (Grievance of Detective Alex Belgrade)** December 5, 2001 (Devlin) ought to be followed.

The Board relied on the following cases: **Re Borden Chemical Co. (Canada) Ltd. and Allied and Technical Workers, Local 13491** [1973] 3, L.A.C. (2d) 383 (Weatherill); **Maple Leaf Mills Limited and United Packing House, Food and Allied Workers, Local 452** (unreported)(August 24, 1967) (Hanrahan); **Toronto Police Services Board and Toronto Police Association (Grievance of Detective Alex Belgrade)** December 5, 2001 (Devlin); **Toronto Police Services Board v. Toronto Police Assn. (Rossi Grievance)** [2001] O.L.A.A. No 800 (Brent); **The Toronto Police Association and The Toronto Police Services Board (Grievances arising from the promotion process conducted by the Employer in the Spring and Fall of 2001)** (partial case presented, without citation. Decision rendered post October 2006); **Law Society of New Brunswick v Ryan: Federation of Law Societies of Canada, Intervenor** [2002] 223 D.L.R. (4<sup>th</sup>) 577; **Vancouver Police Board v. Vancouver Police Union** [1993] B.C.C.A.A.A. (Thompson); **Toronto Police**

**Services Board and Toronto Police Association (Grievance of Transfer of 14 Grievors)** April 17, 2006 (Surdykowski); **Brookfield Management Services Ltd. and Canadian Union of Operating Engineers and General Workers (Miller Grievance)** [1999] O.L.A.A. No. 481 (Davie); **Quality Meat Group Ltd. and Teamsters, Local Union No. 419 (Luborsky)**; **Toronto Police Services Board and Toronto Police Association (Grievance RE: Reimbursement of OPC Costs to Selected Members)** (unreported) August 28, 2007 (Tacon); **Re Metropolitan Authority of Halifax Dartmouth and Halifax County and Correction Officers Association of Nova Scotia** [1983] 10 L.A.C. 3d) 265 (Outhouse); **Re University of Ottawa and Association of Professors of The University of Ottawa** [1979] 22 L.A.C. (2<sup>nd</sup>) 192 (Weatherill); **Brookfield Management Services Ltd. and Canadian Union of Operating Engineers and General Workers (Miller Grievance)** [1999] O.L.A.A. No. 481 (Davie); **Windsor Public Utilities Commission v International Brotherhood of Electrical Workers, Local 911 (Peacey Grievance)** [1974] 7 L.A.C. (2d) 380 (Adams); **Westcoast Energy Inc. v Energy & Chemical Workers' Union, Local 862** [1994] 46 L.A.C. (4<sup>th</sup>) 88 (Coleman); **Wellesley Central Hospital v. Service Employees International Union, Local 204 (Ross Grievance)** [1998] O.L.A.A. No. 438 (Brown) **Re Metropolitan Stores (M.T.S.) Ltd. and Retail, Wholesale and Department Store Union, Local 1065** (supra).

## **Decision**

As a result of the March 3, 2005 directive which was ultimately put into force on September 8, 2005, each of the Grievors lost their "Detective" designation, and was no longer permitted to perform their duties in plainclothes. They were required to perform their duties in uniform, and lost a significant income, 6.75% of a First Class Constable's salary, which had previously been given to them as a result of the application of Article 16.01 of the Collective Agreement, and, reimbursement for the clothing expense under Article 6.01 of the Collective Agreement. The Association suggested that the loss of income may result in a loss in their pension entitlement.

The Association approached many of the issues on the basis that the Employer had reclassified the Unit, and by the Unit's reclassification it had the effect of demoting the Grievors. The Association submitted that having done so summarily, without any change in the functions performed by the Unit, the Employer violated the reasonable cause provision of the Collective Agreement. Although it is true, that after September 6, 2005, the result of the directives to the Grievors was that none of the officers in the Unit performed their duties in plainclothes, the Unit itself was not reclassified, it rather was a matter affecting each individual. This is not a systemic issue, but an issue whether the actions toward the individuals violated the Collective Agreement.

Under Article 3 of the Collective Agreement, management has the right to demote or reclassify its employees; provided that it has reasonable cause to do so. In this case, the determination of whether a demotion or reclassification had occurred is in issue. It is first incumbent upon the Association to prove that such a change has occurred. The Board asserts that it is only a change in work assignment. Once the Association has proven that a demotion or reclassification has occurred, the onus falls upon the Board to establish that it had reasonable cause to make such a change.

The Association established that there has been loss of income through the loss of the plainclothes premium, and loss of the detective designation, and asserted that the loss of designation was a loss of status, but the question is whether such a loss constitutes a demotion or reclassification.

In order to determine whether the Grievors have either been demoted or reclassified, their "status" or "position" and its entitlements must be considered.

It was common ground that there was no rank as Detective Constable. Regulations to the **Police Services Act Regulations**, R.R.O 1990, Regulation 929, 4(1) legislate the only permissible ranks. The relevant ranks in this case are that of Staff Sergeant, Sergeant and Constable. In practice, these are the terms used in the uniform branch of the Service when designating rank. The Regulation recognizes in s. 4(2) that where a force has a detective branch, that the rank of Detective Sergeant is equivalent to that of Staff Sergeant and the rank of Detective is equivalent

to that of Sergeant. No recognition is given to the term "Detective Constable" in the regulations and the term "Detective Constable" is also not found in the Collective Agreement.

The TPS has an extensive detective branch, which is found under Detective Command on the organization chart, and the Bail and Parole Enforcement Unit fell under Detective Command at the time of the directive and therefore the Unit was entitled under the Regulation to have two detective ranks, that of Detective Sergeant and that of Detective.

Since the ranks of Detective Sergeant and Sergeant are equivalent under Regulation 929, when Sergeant Ferguson's designation was changed from "Detective Sergeant" designation, to "Sergeant", Sergeant Ferguson still held an equivalent rank after the directive.

The remaining Grievors were called "Detective Constables", but as there was no such rank, applying section 4(1) of Regulation 929, they were "Police Constables", the applicable recognized rank and therefore they did not lose rank by the change.

Therefore there is no change in rank affected by the directive.

The next question is what classification did the Grievors hold and was that classification changed.

The Board claimed that by virtue of Section 4(3) of Regulation 929, the classification of its employees was restricted to the four levels that the Police Constables are eligible to pass through on the anniversary date of their service and consequently the effect of the directive did not create a reclassification. The practice of the Board and the documentation presented do not support that position.

"Detective constable" was used in common parlance. Staff Superintendent Federico sought to enhance the image of the Unit and invited candidates to apply for the position of "detective constable" with the result that the Grievors were referred to by that designation. Inspector Kinsman in his directive to the Grievors, other than Sergeant Ferguson, refers to them not only as "detective constables" but as being "reclassified" from the "rank" of "detective constable"

even though there was no such rank permitted by statute or any such classification referred to in the Collective Agreement.

Although the term “detective constable” is not a rank or a position recognized by either the statute or the Collective Agreement, it is a term used in the Service, and the term “detective” is referred to by the Service in its documents as a “classification”. The term first appeared in the 1994 Board Policy 14-17, which outlined the Detective Classification and Plainclothes Assignment and directed that plainclothes duties was synonymous with a “detective classification” and set out the necessary criteria for classifying police officers as detective sergeants, detectives or detective constables. In order to be so classified, the officers primary duties had to be, criminal investigation, apprehension of offenders and the assistance in prosecution of offenders, and, where the working conditions prevailed, working in plainclothes was necessary to safeguard police identity or to were required by the working environment.

The Board again referred to “detective constables” in their Board Policy 14-17, TPE Policy & Procedural Manual, for Detective Classification and Plainclothes Assignment in 2001, when issuing a similar policy deleting the criteria set out in 1994, but setting out the Sections of the Service which were permitted to have detectives. There was no evidence that this policy has been superseded by another policy. The policy stated:

#### Procedure

For administrative purposes, **plainclothes duties will be synonymous with detective classification** (my emphasis). Detective Sergeants and detectives are entitled to the provisions contained in the Collective Agreement for clothing expense reimbursement. In addition to the clothing reimbursement, plainclothes officers (**detective constables** (my emphasis)) are entitled to the provisions contained in the Collective Agreement for plainclothes allowance....

Only the areas of the Service outlined below are permitted to have “**detective status** (my emphasis)”:

- |                                  |  |
|----------------------------------|--|
| Officer of the Chief of Police - | - ....                                 |
| Policing Operations Command      | - Divisional detective offices only    |
| Policing Support Command         | - Traffic Services (Detective section) |

**Court Services (Investigative function)**

**Detective Support (all units within this area)** (my emphasis)

Corporate Support Command

...

In addition, **police officers may be classified as detectives** (my emphasis) when the unique circumstances of their duties dictate, when approved by the Chief of Police....

Uniform Personnel

All police officers holding the rank of constable, Sergeant or Staff Sergeant are considered “uniform personnel” and will not be entitled to plainclothes pay or clothing expense reimbursement.

**Detective constables** (my emphasis) (permanent or non-permanent) are the exception to the foregoing and shall be entitled to the provisions in the Collective Agreement.

The policy therefore sets out a “detective classification”, and demonstrates how the Board has interpreted Article 16 of the Collective Agreement by distinguishing “detectives” from uniform personnel as those performing plainclothes duties, and recognizing that in addition to Detective Sergeants and Sergeants, recognized ranks under the Police Services Act that another group of constables, “detective constables” were entitled to receive the plainclothes allowance and could in some circumstances be classified as detectives. This policy set out Sections in the organization where a detective classification could be found, not that it was mandated to be there. The policy was consistent with Article 16 of the Collective Agreement.

However, as there is a stipulated equivalence in ranks as set out in Regulation 929, the detective classification cannot be ranked higher than the uniform classification, rather, the classification describes a type of work generally performed by its officers.

Then next matter that arises from the policies is whether it is within management’s rights to create classifications.

Unlike the issue of “rank” where the regulations set out the only permissible ranks, the classification of officers by the Employer is not restricted in that manner. Regulation 929 sets out one way in which reclassification does occur, by setting out the upward change in classification that the constables pass through as they gain experience. Regulation 929 does not prohibit the creation of any other classifications.

As in **Re Hamilton Wentworth Police Services Board** (supra) decision, the Employer is free to make adjustments to classifications provided that they do not contravene the Collective Agreement, and they can establish rates of pay for and within classifications, provided that the Collective Agreement is not contravened. Therefore, when the Collective Agreement refers to the right of management to classify its employees, it provides a right to reclassify constables as they pass the anniversary marks of their service, and provides the Employer the right to manage its workforce as it deems necessary to run its organization effectively. As such, that right can include the right to create classifications and reclassify constables, provided that it has reasonable cause to do so, a requirement under this Collective Agreement.

The Board’s policy was a manifestation of the Board exercising its right to classify its employees by creating a Detective Classification, as distinguished from the Uniform Personnel or Uniform Classification, which incorporated those Police Constables who were performing detective functions and who therefore fell under a Detective Classification.

The next matter that must be dealt with that flows from the policies, is the Association’s assertion that as the criteria for being considered a detective was no longer included and the policy referred to the Sections where detectives could be found, that the policy together with the Command Structure determined that as long as the officer fell within a Detective Command that the officer was entitled to be considered a Detective and receive the plainclothes premium. The Association also asserted that the Command Structure replaced the policy.

These assertions cannot be accepted for several reasons: The Collective Agreement is the governing contract which determines when the plainclothes premium is to be paid. Article 16 does not determine the status of the claimant, whether the claimant is a detective or not, but centres on the functions performed by the claimant. Therefore a police officer of any rank who

performs plainclothes duties is entitled to the plainclothes premium pay, whether or not the officer is a detective or police constable. It does not define the functions, but leaves that to the interpretation and application of the Article. The policies set out the Sections where the Board wants to allow those functions to occur and where they are most likely to be found.

A basic tenet of labour relationship is that compensation is based upon the functions and skills required to perform the duties of a position. For instance, the various classifications within the Police Constable rank reflect a growing skill with the experience of the officer, and accordingly the pay rate increases as the officer moves up through the classifications. Further the parties at one time negotiated a special pay or premium pay in Article 16.01 to compensate an officer when that officer is performing plainclothes functions.

To rely on the Command Structure as driving the pay rate could very well lead to constant insecurity, and would be unfair. The officers would have no assurance of what he or she would be paid in the following year. As has been seen, the Bail and Parole Enforcement Unit was under Detective Command in 1998 and then moved to Court Services in 2002, and then moved to the Provincial Community Safety Liaison, under Detective Command. The Provincial Community Safety Liaison was subsequently disbanded, and the Bail and Parole Enforcement Unit is now under the umbrella of ROPE, under Detective Command. If the Association's submission were accepted it would have meant that the Grievors ought to have lost their plainclothes premium for the period that they were under Court Services, by virtue of the change.

Most importantly, compensation and wages are complex issues, and are determined through collective bargaining after taking into account a variety of factors, such as the nature of the job, the conditions or work, the complexity of the work to name only a few factors. The structure reflects how the Chief views the organization could best be run. To have compensation determined as a result of the Chief's decision as to where he thought the Unit would best serve the organization, could result with the Association giving up its position to bargain wages. It is inconceivable that that is the intention of the Association.

Therefore, in summary, prior to the directive, the Grievors were designated as Detective Constables, in the Detective Classification, holding the rank of Police Constable. The parties however, have not created a wage structure that is attached to a Detective Classification such has been negotiated for each rank in the Collective Agreement. The income received from the 6.75% of the First Class Constable rate was received as a result of the application of the plainclothes premium set out in Article 16 of the Collective Agreement. The entitlement to that premium must be established.

Whether the Grievors were performing plainclothes functions is the essential test that must be met in order to receive the plainclothes premium as set out in Article 16, as the payment of the premium is dependent upon an interpretation of “plainclothes duties performed”. In order to receive such payment, the onus is on the Association to prove that the Grievors performed plainclothes duties, which the Association acknowledged was synonymous with detective duties. This is analogous to the traditional test used to determine if an employee is entitled to the wages of a higher rated position, such as was expressed in **Re Richardson Terminals Ltd.** (supra). If the Grievor can establish that he or she has been doing substantially, although not necessarily identical work of the higher rated classification, the Grievor is entitled to the wages of the higher rated classification. The lack of a job description does not eliminate this obligation.

Although I have found that the payment for a Detective Constable is not a wage structure, nor that the Detective Classification is a higher rated classification than the Uniform Classification, those performing plainclothes or detective functions, had an augmented income as they are paid the plainclothes premium for performing those duties. The onus remains on the Association to establish that the Grievors are entitled to the payments that they are seeking.

The patrol officer or the uniformed officer, per se, is not entitled to the plainclothes premium under Article 16 of the Collective Agreement. It does not depend upon whether the officer is a patrol officer or is a uniformed officer or how the officer is dressed when performing his or her duties, but the duties performed. As there is additional compensation given for “plainclothes duties” it must have a meaning, and it must be shown that the duties that are required are

more than those required of a Police Constable. Since it is agreed that plainclothes duties are synonymous with detective duties, the duties required therefore must include investigations greater than that required of a patrol or uniformed officer. The correlation between “detective” designations and investigative functions was borne out by the lengthy testimony by the witnesses on the comparisons between various functions carried out by officers performing different tasks within the Service.

The Grievors registered and inputted the attendance of those on bail or parole. They questioned the bailees and parolees if they had failed to attend on previous occasions, assessed the lawfulness of their reasons, and had the ability to arrest them for failure to comply. These were strict compliance offences, such that the failure to attend constituted an offence. The computer correlated any missed attendances daily and a list of absentees was available to the officers in the Unit each day. As such, the skills required did not require investigations into whether or not an offence occurred. Any corroboration or exploration as to the validity of the reasons was done solely by telephone and was performed in the office. Staff Superintendent Federico testified that the duties required of the Reporting Desk could be done by a relatively junior constable or a constable with specialized skills.

The purpose of the interviews with the sex offenders was to register the individual and to obtain as much information about the individual that might be useful at a later time if required by various agencies. It was not to gather intelligence on a possible crime, or a crime which was in issue, but to obtain information where a crime has occurred and time had been served.

The interviews of the sex offenders were initially done over the counter, but greater privacy was accorded with the construction of interview rooms. The interviews were initially based upon a handwritten set of questions, but with computerization, a very detailed list of questions and extensive possible answers was used to collate information from a sex offender. The responses went into minute detail and provided a detailed description of the sex offender. The interviews were for the most part scripted by the questionnaire, but it was up to the skill and style of the officer conducting the interview to obtain further information which was then passed on to the Sex Crimes Unit. There was no outside investigation made to verify any

information or to obtain any further information. The investigation and enforcement of lack of compliance by sex offenders was removed when the officers performing those duties were transferred to the Sex Crimes Unit.

The nature of the officers' duties, therefore, was to meet and interview the registrant, and based upon a scripted set of questions to obtain information that might be useful to the police and other agencies at a later time. Although the skills required of the officer interviewing the sex offender were greater than those required registering the bailees or parolees, such that some questions outside the scripted questionnaire were required, they were not of the depth required of an officer investigating an offence and establishing that an offence had been committed.

The number of arrests had declined, partly as the role of the officers in the Unit was to ensure compliance and partly due to the success of their skills in establishing rapport with the registrants to maximize compliance. The majority of arrests occurred when the interviewing officer was not satisfied with the reasons given for missed attendances.

Another distinction between the roles of the officers in the Bail and Parole Enforcement Unit from uniformed or patrol officers and detectives is their involvement with the cases leading up to conviction. The uniformed officer was often involved from the point committing the offence to its prosecution. The degree of investigation required was a reflection of the nature of the offence committed. The detective was not always involved at the initial arrest, but was heavily involved in the investigation to support the charges laid, and in the preparation for the cases for the prosecutor to present to Court. The number of cases prepared for Court also differed. The statistics showed a marked decline in the number of court attendances required by the officers in the Unit which was substantiated by the Grievors' testimony. The complexity of their involvement was simpler as it related to strict compliance offences.

The functions performed by Sergeant Ferguson and Sergeant Gataveckas, who is not a grievor, are not investigative in nature. The nature of their work is administrative. Sergeant Ferguson no longer performs interviews, but administers personnel. Sergeant Gataveckas testified that his role was not to solve and prosecute crimes, but to set schedules and to ensure that his

subordinates are fit for work. I have no doubt that the nature of their duties is broader than were expressed at the hearing, but the essential criteria that of an investigating officer was not met.

A great deal more evidence was lead on the degree of investigative skills required of the officers in this Unit as compared to officers performing other duties. The evidence did show that often there was an overlap in duties and officers of differing ranks and officers from different units worked side by side assuming different functions depending upon the assignment. Nevertheless, although there was no job description of a "detective constable", the Board was able to demonstrate, that on a scale of investigative functions, that those required of officers in the Unit were less than that required for the most part of a police officer on patrol, let alone a Detective. That is not to say that the role that the officers in the Bail and Parole Enforcement Unit was not important and their years of experience, no doubt added to the accuracy of the information obtained, but acquiring such information did not require the degree of investigation that a uniformed officer may require when confronted with a perceived offence, which the uniformed officer would then need to explore and establish with sufficient information to support a prosecution. The role of the Detective went beyond the role of the Police Officer.

Therefore, I find that the Association was not able to establish that the investigative duties that the Grievors performed, were such that they akin to the investigative functions performed by detectives or any other police officers who received plainclothes premium pay and as a result the Association meet the criteria set out in Article 16 of the Collective Agreement.

The Association asserted that mere adverse impact on an individual constituted a demotion, and alleged that as a result of the loss of income occasioned by the loss of the plainclothes premium, and the loss of the detective status, the Grievors were demoted without reasonable cause. The Association submitted that a Detective had higher status than a Sergeant, and Detective Constables had higher status than Police Constables. The Association relied in part on the **Amato** (supra) decision in support.

Demotion is based upon a loss of position, or a downward movement in the organizational structure. It is the corollary to a promotion. In the police service, promotion, the movement upwards through the ranks only occurs through a formalized process, which requires an officer to pass through a selection process of examinations, interviews and formal selection. Only after this process has been successfully completed, is an officer promoted to a higher rank, and then those officers that are promoted, are placed on a list to be posted to vacancies as they arise. Sergeant Ferguson has passed through this process and did not lose rank when he was changed from Detective to Sergeant, and the other Grievors had not passed through this formalized process and as a result did not lose rank by the removal of the Detective designation and therefore cannot be said to have been demoted by a loss of position.

Status is an amorphous concept, and the term “detective” may very well carry with it a sense of specialized work which distinguishes it from the uniform personnel, as premium pay is given for carrying out detective or plainclothes functions under Article 16 of the Collective Agreement, and may be perceived by others as being a higher level work than that performed by the uniformed personnel. A demotion however, cannot be based solely on a general perception that some may have of another’s position. Loss of status, combined with a loss of income, are indicia that a deemed demotion may taken place if there has been no loss of position. However, in order to prove that there was a deemed demotion it is necessary to establish that the individual was entitled to have the benefits of the position that were lost, which the Association has not been able to do.

The **Amato** (supra) decision is not applicable. In the **Amato** (supra) decision, the grievor was transferred out of a unit but retained his same classification. Arbitrator Marcotte found that the transfer constituted a demotion as he lost the premium that was associated with his unit, and that he had lost career opportunities. Although there are certain similarities with the case at hand, such that there was no downward change in classification and no change in wage rates, and the grievor lost opportunities to earn additional monies, in the **Amato** (supra) case, the right to the premium was attached to the Unit. The Grievor was removed from the Unit that entitled him to receive the premium. In the case before me, the premiums were not

attached to the unit, but to the functions that were performed by the individual. The Grievors' functions did not change and therefore they were not deprived of the opportunity to receive the premium by any change or transfer away from the Unit.

In this case the Association failed to establish that a demotion or a deemed demotion has occurred, as it was necessary for the Association to establish that the Grievors were performing investigative duties to the degree performed by detectives, thereby entitling them to plainclothes premiums. A perception of loss of status is insufficient to establish deemed demotion in this case.

The Association was, however, able to demonstrate that the Employer changed the classification of the Grievors from the Detective Classification to the Uniform Classification. The Employer has a right to reclassify the Grievors provided that it has reasonable cause to do so. Whether it has reasonable cause to do so includes an examination as to whether the action was done arbitrarily.

Pursuant to Article 3.01, the Employer has exclusive rights to promote, demote and classify its employees, but such rights are subject to a standard of reasonable cause. As the standard of reasonable cause set out in subsection (b) is applicable to all management rights set out in subsection (a) such a standard is applicable to both disciplinary matters, which are not within my jurisdiction and are not relevant to this matter, and non-disciplinary matters, as asserted by the Association in the matter of this alleged non-disciplinary matter. "Without reasonable cause" is not an exact objective standard, but one in which the actions of management must be considered in the context of its actions and the circumstances surrounding those actions. Management has latitude and flexibility to manage its workforce, subject to the restraint that it cannot so without reasonable cause. "Reasonable cause" involves a range of reasonableness in its application, not that the decision be correct.

The Supreme Court in **Law Society of New Brunswick v Ryan: Federation of Law Societies of Canada, Intervenor** (supra) found that a standard of reasonableness was to be applied when reviewing a tribunal's decision, after taking into account given the expertise of the tribunal, the

purpose of its enabling statute, and the nature of the questions in dispute. In so doing, the Supreme Court held at page 597, paragraph 55, that:

A decision will be unreasonable only if there was no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion it reached. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if it was not one which the reviewing court found compelling (see *Southam, supra*, at para. 79).

Arbitrator MacDowell, applied the **Ryan** (*supra*) decision to the standard of reasonable cause at pages 89 and following of his Award, and he held that reasonable cause must be interpreted to mean more than an connection with the outcome, and that it was more than a reason for the decision, but after so finding, an arbitrator should give a degree of deference to the reason and to the weight that management has accorded it.

The loss of the detective designation and the loss of the plainclothes premium was a harsh consequence not only because of its economic consequences, but because it was not expected. Federico had hired detectives to improve the image of the Unit, and it was the officers' expectations, other than Turrell's, who came to the Unit just before the change was implemented, that the Unit would be a Detective Unit, and for 5 years, that in fact occurred. Even when the Unit moved in a structural sense on the organizational chart to Court Services, the officers within the Unit carried the "detective" designation and were treated as "detectives" by continuing to receive the plainclothes allowance. When the Unit reverted to Detective Command, there was no change. These officers were therefore treated as if they were performing plainclothes duties even after the enforcement duties were no longer part of the Unit's functions with the departure of ROPE and when the enforcement functions for non-compliance by sex offenders was given to the Sex Crimes Unit.

The nature of the duties performed by the officers had not materially changed for approximately four to five years. At first blush, it would appear that a directive removing their detective designation and creating such economic loss would appear to be arbitrary and

without reasonable cause. The decision of the Board appeared to be arbitrary, as there were no changes in job functions at that time that triggered the change. There were no disciplinary issues. On the contrary, the officers were very experienced, long standing officers, performing their job without any problems. Their jobs were important to the smooth running operation of the registries.

The only basis provided in the evidence for the Board's decision was that the decision by the Board was made after a review of the job functions performed at the Unit, which it found not to be investigative in nature. There was no further rationale provided to support the decision.

There is a distinction that must be considered when applying a standard of reasonableness to a tribunal which is quasi-judicial in nature, and which is expected to provide a rationale for an employer. The standard of reasonableness remains, but management is expected to lead and to make decisions that are reasonable in the context of the work environment. It is clear from decisions such as **Re Brookfield** (supra) that an employer can exercise its management rights to achieve a valid business objective. Management is not required in conducting their operations to provide a rationale for all their decisions, but should they be challenged, it is incumbent upon them to show, that they had reasonable cause to do so.

It would be easier for an arbitrator to make a decision as to whether the Employer had reasonable cause to make its decision if there was evidence of the decision making process and the factors that were taken into account in reaching a decision, but it is not fatal if the decision and the reason behind the decision still meet the standard of reasonableness.

There was no evidence of the decision making process that lead to the decision made in the March 3, 2005 directive. The reason given was that the duties were not investigative.

As has been expressed by Arbitrator MacDowell in the **Toronto Police Promotion Grievance** (supra), cognizance has to be taken of the nature of the particular working environment. The evidence has shown that the nature of the functions performed by many of the officers in different divisions and roles overlap. There is a general classification between those performing their duties in uniform and those performing their duties in plainclothes. Some officers were

uniformed officers who were permitted to work in plainclothes, but did not attract plainclothes premium pay, and other officers performed plainclothes duties and attracted such premium pay. There is also a formalized system of promotion over very few ranks, and a formalized Command Structure. In addition, there is fluidity in assignments between the various divisions and classifications which are designed in part to provide comprehensive training to officers and to also provide challenging career opportunities, some of which are the result of an assignment, and others which are a result of an individual applying to work in a particular area. Some of those assignments are for brief periods of times, and others have permanence, even though the officer cannot claim ownership of a position. The past experience of the Grievors demonstrated that they had changed positions or assignments during the course of their careers without affecting the status of such individual. What happened to the Grievors was harsh because of its economic consequences, but it was not out of line with the way the organization functioned.

Further, I do not construe the Employer as emptying the classification of its contents as the Unit was not investigating non-compliance by bailees and parolees when ROPE was established. It was a function that was theoretically required of the Unit, but was not being performed. Its inability to be effective led to the development of ROPE. Those investigative and enforcement functions remained with ROPE. The officers in the Unit who were responsible for the outside investigation and for the enforcement of compliance of sex offenders were transferred to the Sex Crimes Unit. Once the officers performing the investigative and enforcement functions left the Unit, the functions that the officers working in the Bail and Parole Enforcement Unit did, were not investigative, not to the level required of a patrol officer or a detective and therefore Grievors were not performing plainclothes duties. As such the evidence supported the application of Article 16 of the Collective Agreement and the Board established that the Employer had reasonable cause to make the changes set out in the directives.

As shown in the **Re Borden Chemical Co. (Canada) Ltd.** (supra) and **Maple Leaf Mills Limited** (supra) an employer is entitled as it did, to apply the Collective Agreement and correct an error, taking aside any issue of estoppel, which was not an issue in this case.

Accordingly, these grievances are dismissed.

I would like to thank counsel for their thorough presentation of the evidence and issues. The cases were useful in presenting general principles, and helpful in their application to police services, although I have only drawn upon a few to highlight the relevant principles or applications.

Dated at Toronto, this 11th day of September, 2009

---

Belinda A. Kirkwood, Arbitrator