IN THE MATTER OF AN ARBITRATION

BETWEEN:

Toronto Police

and

Toronto Police Association

(Grievance of Johnstone)

Before: William Kaplan
Sole Arbitrator

Appearances

For the Employer: Michael Hines
Hicks Morley
Barristers & Solicitors

For the Association: Timothy Danson
Danson Schwarz Recht
Barristers & Solicitors

This matter proceeded to a hearing in Toronto on August 12 and November 12, 2009.

Introduction

On December 11, 2003, Quintin Johnstone, ("the grievor") through legal counsel, made application to the Toronto Police Service ("the employer") for indemnification following his acquittal on criminal charges about which more will be said below. On April 28, 2004, a grievance was filed seeking payment. On July 29, 2004, the grievor was formally advised that his request had been denied. On September 13, 2005, the grievance was referred to arbitration. It proceeded to a hearing held in Toronto on August 12 and November 12, 2009.

In brief, the employer takes the position that this is not an appropriate case for indemnification. Although the grievor was acquitted of criminal charges brought against him, those charges, in management's view, do not meet the indemnification criteria set out in the collective agreement as they arose out of his personal life and his activities as a private citizen and not directly from the good faith performance of his duties as a police officer. The Association takes the opposite view. This is an extremely unique and unfortunate case involving two police officers. Various exhibits were introduced and one witness was called to give evidence, the grievor.

Background to the Case

The grievor is a long-serving, award-winning police officer. In late 1998, while attending a course at the Ontario Police College, the grievor met another police officer, T.D. The grievor and T.D. began dating. They then began cohabiting and in or around July 2000 they jointly purchased a condominium in Toronto. Disagreements began over marriage

and children and then escalated to other things as the relationship deteriorated and degenerated into open hostility. In February 2001, the grievor agreed to purchase T.D.'s share of their condominium. Around this time, T.D. purchased her own unit in the same building.

On March 27th, the date T.D.'s interest in the condominium was transferred to the grievor, he asked her to leave the unit. Matters escalated with a heated exchange over who owned what and possible damage to the unit as T.D. was moving out. A scuffle ensued between the two in one of the showers as T.D. attempted to remove a showerhead. The police were called and attended at the apartment. T.D.'s move then proceeded without further incident. However, acts of vandalism against the grievor's apartment door and car followed. The grievor suspected T.D. who, he testified, wished to rekindle the relationship. In the meantime, the grievor started to see someone else and T.D. became aware of that. The grievor reported the various acts of vandalism to the local division without naming T.D. because, he testified, he had no proof that she was the culprit.

All of that changed the night he arrived home in late May and found his door lock crazy glued. The grievor had earlier installed a secret pinhole camera in order to determine who was vandalizing his property. The video tape revealed that T.D. had done it. The grievor then called the Duty Inspector to report her vandalism because, he said, it presented clear proof that she had committed a criminal act. He testified that had he been a private citizen, he would have never reported T.D. as he considered her to be volatile, erratic and depressed. He believed that reporting her would result in her unacceptable behaviour

escalating. However, as a police officer, he stated that had no choice but to comply with the governing rule requiring him to formally report the discreditable conduct of another police officer. He was certain when he did that there would be negative fallout. It was noteworthy to the grievor that when T.D. was arrested she told the arresting officer that the grievor had trapped her – with the secret camera – and had abused her. From his policing experience in domestic disputes, the grievor was well aware of the possibility that charges are often followed by counter-charges.

According to Superintendent N. T. Tweedy, the Hearing Officer who later sentenced T.D. for Discreditable Conduct, "the videotape revealed Sergeant [T.D.] stood outside the door for a few seconds short of a full minute, as she carefully ensured a thorough job." T.D. was charged with the criminal offence of Mischief Under $5000. Some fourteen months after T.D. was charged, her case proceeded to trial. She agreed to make restitution for the lock and to enter into anger management counseling. In the result, she avoided, over the objections of the grievor, a criminal disposition and entered into a peace bond. As soon as the criminal proceedings were completed, T.D. attended at Internal Affairs and provided them with a lengthy written complaint accusing the grievor of rape and assault, not to mention controlling behaviour and sexual deviance. The grievor was, forthwith, charged with sexual assault and assault and those charges proceeded to trial in June 2003. The grievor pleaded not guilty.

On September 29, 2003, Mr. Justice P.J. Wright acquitted the grievor of both charges. In his reasons for decision, the experienced trial judge referred to the "surprisingly brief investigation by the police," and he went on to observe that it was not the job of the court to speculate on motive. Nevertheless, he concluded that it would be reasonable to infer that "once clear of the criminal charges herself, the complainant launched a criminal complaint against the defendant to punish him." The judge found the grievor "truthful and believable" and stated: "I do not think the events T.D. described happened, although in her mind she honestly believes that they did. Obviously something was going on in T.D.'s life which caused her to behave and say the things that she did, but whatever it was it did not involve the accused in the fashion that she alleges."

The grievor testified that had he not reported T.D.'s discreditable conduct, he himself could and would have faced discipline given the mandatory requirements of the applicable rule:

Rule 4.2.3 DISCREDITABLE ACTS TO BE REPORTED

Members shall inform a supervisor forthwith or, if not practicable, a member of the Internal Affairs unit:

…

- details of any instances where other members act or conduct themselves in a manner which will, or is likely to, bring discredit to the reputation of the Service.

The grievor was acutely aware, he indicated, of the importance of this rule because of different roles he had played over the years while assigned to Professional Standards and Corporate Planning. He also pointed to a communication from the chief that stated, among other things:

Rule 4.2.3 requires members to report acts of discreditable conduct, whether criminal in nature, related to the Police Services Act, or within labour practices.

…

No unprofessional behaviour, corrupt practice, compromises to the moral and ethical code of conduct demanded of the policing profession, abuses of power and authority, racial intolerance or discriminatory conduct, on or off the job, will be tolerated.

…

The citizens of Toronto must be confident that the Service will not tolerate domestic violence….

Another letter from the chief, this one dated June 19, 2002, stated: "Domestic violence is a Criminal Offence and must never be viewed as a *private matter*." The grievor testified that, in these circumstances, and given the mandatory nature of the rule requiring reporting – he pointed to the use of the word "shall" – he had no choice but to act as he did.

In cross-examination, the grievor was questioned about why he called the Duty Inspector to report T.D., instead, for example, the local division or Internal Affairs. It was not practicable or possible, he testified, to notify a supervisor at 2 a.m. when he discovered his door crazy glued. The grievor was also questioned about some of his evidence about possible sanctions he could have faced had he not reported T.D. and had that been discovered. It was also suggested to him that having consensual sex with T.D. in March may not have been all that wise as it might have conveyed to T.D. that he was open to rethinking the break-up. According to the grievor, T.D., when calm, accepted that the relationship could not and should not continue. It was further suggested that changing the door locks in T.D.'s presence as she was moving out might have aggravated her. The point was made that establishing a relationship with another woman might have also been

upsetting to T.D when she became aware of it, which she did. The grievor did not disagree with any of these propositions.

The grievor was also asked in cross-examination why, if as he testified at trial, T.D. had assaulted him during the showerhead incident and committed a ”criminal offence”, he did not report that as required by Rule 4.2.3? When that same question was asked at trial, the grievor testified as follows:

> T.D. had a lot of problems at the time, an awful lot of problems at the time, and I - - by her own admission, they were psychologically based.
>
> …
>
> I am very keenly aware that putting somebody through the criminal justice system for a minor matter - - I shouldn't call it minor but to me it was - - would only exacerbate her problems. Plus the fact, her being a police officer, it would be a detriment to her lifestyle and her career, and I didn't want to do that. I was hoping there was other resolutions.

In response, the grievor indicated that he called the police at the time of the incident and T.D. did leave the unit. He did, however, agree that in cases of domestic assault, a police officer had an absolute obligation to report it and lay charges. It was pointed out that in his evidence, the grievor indicated that he gave T.D. a break in not reporting her, notwithstanding his absolute obligation to do so. He responded that he did not think the assault was sufficiently serious, or that there was intent, and that it was clear that T.D. was extremely frustrated. Nevertheless, it is clear that this is not what he said at his trial.

The grievor also testified that all of the other reports to the police, for example, about damage to his apartment door and other incidents, were made in his capacity as a property owner and private citizen. It was also in that capacity, after receiving

professional advice, that the grievor installed the pinhole video camera. He suspected T.D. was behind the sabotage but had no proof. His efforts to get her to stop had been unproductive. Accordingly, he installed the camera to determine who was consistently damaging his property. When it turned out to be T.D. he realized that he had conclusive evidence of a crime and an obligation to report. In re-examination, the grievor contrasted the minor scuffle over the showerhead with the video evidence of a crime and testified that the crazy glue incident was completely different from what had occurred in the shower as it obviously involved planning, preparation and deliberation, in effect, an operating criminal mind not someone who was merely acting badly as a result of an unwanted end to a romantic relationship. No one up the chain of command ever suggested to the grievor that he was wrong to have reported T.D.

The Indemnification Provisions of the Collective Agreement

23.01 (a) Subject to the other provisions of this Article, a member charged with but not found guilty of a criminal or statutory offence, because of acts done in the attempted performance in good faith of his/her duties as a police officer, shall be indemnified for the necessary and reasonable legal costs incurred by the member during the investigation of the incident that resulted in those charges being laid and for the necessary and reasonable legal costs incurred by the member in the defence of such charges.

…

23.02 Notwithstanding paragraphs 23.01 (a), (b) and (c), the Board may refuse payment otherwise authorized under paragraph 23.01 (a), (b) or (c) where the actions of the member from which the charges or investigation arose amounted to a gross dereliction of duty or deliberate abuse of his/her powers as a police officer.

…

23.08 For greater certainty, members shall not be indemnified for legal costs arising from:

…

(b) the actions or omissions of members acting in their capacity as private citizens.

Association Submissions

Association counsel began his submissions by reviewing the evidence which, he argued, left no doubt but that the grievor was required to report T.D. The consequence of him

doing so was being falsely charged with sexual assault and assault. In the Association's view, the only question in this case was whether the mandatory, non-discretionary obligation to report T.D.'s discreditable conduct led to retaliatory criminal charges? The answer to that question, Association counsel submitted, was clearly "yes." And it was also obvious that the report had been made in good faith in the grievor's performance of his duties as a police officer. When the grievor saw the video tape demonstrating T.D. committing a crime, he was back on duty with a mandatory obligation to report.

It was important to recognize, the Association argued, that the grievor reported T.D. even though he was certain, from experience, that it would result in some form of retaliation. In these circumstances, the Association suggested, it could not be fairly said that the grievor benefited personally from reporting her or that his motives were mixed. His uncontradicted evidence was that he knew he would suffer as a result of doing his duty, but he still did what he was required to do.

Because the grievor was a police officer, he had no choice but to hand over the evidence that illustrated another police officer committing a crime. This established, Association counsel submitted, that the matters in dispute were not purely personal and thereby the criminal charges that resulted were properly eligible for indemnification. Mr. Justice Wright concluded that there was a direct link between the report and the filing of the criminal charges. That fact having been established, and the grievor having not just been acquitted but exonerated, he was, the Association submitted, entitled to indemnification.

The Association reviewed some of the public policy purposes behind the indemnification provision of the collective agreement and referred to a number of cases where the point is made that indemnification clauses, because of the purpose they serve, must be read broadly, liberally and generously. If a police officer is performing his or her duties in good faith and is then exposed to criminal charges, he or she, if acquitted of those charges, is entitled to indemnification. The moment when the grievor's obligation to report under the rule arose, he had no choice. There was a direct causal link between the reporting and the laying of criminal charges. There was a connection between the criminal charges and the grievor's obligations and actions as a police officer. The facts, as found by the trial judge, established that T.D. acted out of revenge to punish the grievor for reporting her discreditable conduct. Absent that report, T.D. would not have made her false criminal complaints and the grievor would not have been charged. The nexus was both obvious and accepted by the trial judge. Various authorities were reviewed in support of these and other submissions. The Association concluded by asking that the grievance be allowed and that I remain seized with the implementation of my award.

Employer Submissions

In the employer's submission, the collective agreement provisions were never intended to provide indemnification to police officers for criminal charges brought against them arising out of their personal lives. The challenge in this case, employer counsel observed, was that 99.99% of the grievor's relationship with T.D. was personal and completely voluntary and had nothing to do whatsoever with good faith performance of police duties.

One small aspect of it was professional, when the grievor reported T.D. pursuant to the rule. However, that report had to be considered in the context of a long toxic relationship which is what really led to the criminal complaint. Considered in context, what occurred here was the result of a personal relationship gone bad. The indemnification provisions of the collective agreement were explicitly not intended to provide protection for unfortunate events that occurred in an officer's personal life.

This case, employer counsel argued, fit none of the established paradigms. What happened here arose because of the long-standing and troubled relationship between the grievor and T.D. and had little or nothing to do with the fact that the grievor and T.D. were police officers. At best, as employer counsel had argued in his opening statement, the grievor, "for one split second" was engaging in an official capacity when he reported T.D.'s discreditable conduct. However, considered in the context of their relationship – which employer counsel reviewed – that was insufficient to attract the indemnification provisions.

Indemnification was simply not available because the grievor made a bad relationship choice, or exacerbated an already volatile situation by his own conduct and treatment of T.D., for example, by engaging in consensual sex when he knew she wanted to get back together or having the apartment door lock changed in her presence or beginning to date another woman right after T.D. moved out. These activities could have been anticipated to anger T.D. and they apparently did. Considered in the overall, the hostility and toxicity had nothing to do with official police business. The crazy gluing of the grievor's door

was not related to police duties. Just about everything arose out of the personal relationship between the grievor and T.D. It was noteworthy that the grievor, just like any other private citizen, involved the police as appropriate in response to the various acts of vandalism that occurred. Absolutely none of this involved either the grievor or T.D. as members of the police force.

While the Association had tried to make something out of the fact that the employer called no evidence, the fact was that the Association had the onus and the only evidence that could come came from the grievor. That evidence, management argued, was entirely self-serving. Employer counsel observed that the grievor described the showerhead incident one way while at trial – as a criminal act – but in these proceedings asserted that it was different from the crazy glue incident which he, all of a sudden, claimed to have a professional obligation to report. This was, the employer suggested, a distinction without a difference and rendered all of the grievor's evidence suspect. Even if the grievor did have an obligation to report the crazy glue incident, that was a weak link in the chain. When all of the events were considered in context, it was insufficient to attract indemnification given the overwhelmingly personal nature of the interaction. While Justice Wright may have concluded that the criminal charges resulted from T.D. seeking to punish the grievor, he also found that she honestly believed the events to have taken place. It made no sense to conclude that she honestly believed certain events but had also fabricated them to punish the grievor. The employer urged me not to accept these findings as sufficient to establish a nexus between an obligation to report and the criminal charges that later followed.

Indemnification provisions, employer counsel argued, were placed in collective agreements for certain types of foreseeable circumstances in order to protect police officers from the risk of legal action taken against them for acts done in the ordinary good faith performance of their duties. Employer counsel reviewed those circumstances and some of the governing authorities. In marked contrast to those cases where indemnification was established, arising one way or the other out of good faith police work, what took place in this case could have happened to any citizen.

Indemnification was to be reserved for "proper cases and not extended to doubtful ones" (*Metropolitan Toronto Board of Commissioners of Police and The TPA*, unreported decision of P. Picher, November 13, 1985 at p. 6). The indemnification provision was to be applied "strictly" (*Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association*, unreported decision of Swan dated January 12, 1987 at p. 21.). "Great care" needed to be exercised in ensuring indemnification for proper cases (*The Metropolitan Toronto Police Association and Metropolitan Toronto Board of Commissioner of Police*, unreported decision of Mitchnick dated February 28, 1990 at p. 16). And indemnification must be reserved for those clear cases, especially the off duty cases, where the criminal charges flowed directly and exclusively from the performance of good faith police duties. Applying those legal principles to this case led inevitably to the conclusion that a case for indemnification had not been made out. Accordingly, and for all of these reasons, and other submissions, the employer asked that the grievance be dismissed.

Decision

Having carefully considered the evidence and arguments of the parties, I am of the view that the grievance should be allowed and the employer directed to indemnify the grievor as provided for in the collective agreement.

To be sure, the factual underpinning of this case was almost certainly never contemplated by the parties when they negotiated the indemnification provisions. There is no other case presenting circumstances even remotely similar to this one. Indeed, as both parties agreed, this is a unique situation. However, there is nothing in the indemnification provision that indicates it does not cover totally unanticipated and unusual circumstances (See *Saskatoon (City) Commissioners of Police v. Saskatoon City Police Assn.* [1995] S.J. No. 295 (COA) at para. 9) This case attracts indemnification because, even assuming, as is likely, that the grievor had mixed motivations in reporting T.D.'s misconduct over the crazy glue incident, there is no question, none whatsoever, that he was obligated under the then governing Rule 4.2.3 to do so. The result of his doing so was the laying of criminal charges that were followed by an acquittal. A direct casual link justifying indemnification and taking this case out of a purely personal realm was persuasively established at the hearing.

The collective agreement sets out the bargain between the parties and it requires indemnification when a member is charged and acquitted for some act arising out of the good faith performance of his or her duties. The collective agreement specifically rules out entitlement where the member was acting in his or her personal capacity. It is

conceded by the employer that the grievor was acting in the performance of his duties when he reported T.D. He cannot be automatically disentitled to indemnification because he may have also been acting in his personal capacity or derived some personal benefit from making the report. Quite clearly, the grievor had a personal interest in having the harassment stop and in T.D. leaving him alone. However, the provision does not disentitle indemnification because of mixed motives. The case must, therefore, be decided by determining whether he was predominately acting as a police officer or as a private citizen. If acting predominately as a police officer, did the performance of his duties lead to the criminal charges? If the answer to that question is "yes" then entitlement to indemnification is established.

As a result of the grievor reporting T.D., she pled guilty to a charge of Discreditable Conduct laid under the *Police Services Act*. In the decision that followed this plea, Hearing Officer Superintendent Tweedy, in his March 25, 2003 sentence, made the following observations:

> …I find the destruction of personal property in the context of a former domestic relationship to be serious misconduct and in fact shameful criminal behaviour. Entering into a Peace Bond recognizance with conditions, to avoid a criminal conviction does not minimize the seriousness of the act and Sergeant [T.D.] should consider herself fortunate that she does not now hold a criminal record.
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> The act was not spontaneous in the heat of an emotional exchange, but two months after the separation during the evening hours when Sergeant [T.D.] was about to leave for work. The evidence against her was overwhelming, the very act fortunately being captured on videotape, exhibit 4…When confronted by police she lied about her involvement…I find this misconduct is on the higher end of the serious continuum, it was planned, deliberate and was conducted in stealthy fashion to avoid detection.
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> …
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> General deterrence and the protection of the public are important elements in denouncing violence or property damage in the domestic context. The Toronto Police Service has made it very clear through procedures, routine orders and training that domestic crimes will be dealt with

severely and police officers will be held to a higher standard that members of the general public. Sneaking through the building, delivering revenge and then reporting for work to supervise police subordinates demonstrates a Jekyll and Hyde character that will not be accepted, minimized or tolerated. Protection of the public considerations demand, the public be assured those holding public office with special authority and supervisory rank, do not behave criminally, are on the right side of the law, and internalize the values of their profession.

…

…I find Sergeant [T.D.] was emotionally ill, when she committed this act of revenge, however, the medical evidence while explaining her behaviour, does not excuse her behaviour. If not for this mitigation, I would consider demotion the appropriate penalty.

In the result, Superintendent Tweedy imposed a penalty of "Forfeiture of 15 days or 120 hours off."

The findings of Superintendent Tweedy make it completely clear that the employer did not consider the matter trivial, or personal, but a matter that went directly to the heart of T.D.'s employment relationship. Not only did the grievor have the conceded obligation to report the eventually admitted misconduct, but when he did, the employer took it very seriously and imposed upon T.D. a significant sanction.

It should be noted that another police officer, who supposedly received information that the grievor had assaulted T.D., was himself subject to proceedings for failing to report that information as required by Rule 4.2.3. The conclusion is, therefore, inescapable, and conceded by the employer, that the grievor was performing his job as a police officer when he reported T.D. for sabotaging his condominium door. Justice Wright, in his reasons for decision, described the insertion of crazy glue into the locking mechanism as "a deliberate and intentional act." It was, Justice Wright said, "a crime." The grievor had no choice but to report it.

The crazy glue incident was quite different than any of the other issues that had arisen between the two as their romantic relationship came to an end. A portion of the transcript of the grievor's trial transcript was introduced into evidence. It is absolutely clear that many events attributed to T.D., albeit the grievor's account, have arguably criminal overtones, e.g. throwing water on the grievor, assaulting him over the shower head, damaging his property when moving out, taking things that did not belong to her, repeatedly creating a ruckus in the hallway outside his apartment and in the lobby and so on. However, these events were predominately personal – the sad acts of a distraught and disturbed person – and the grievor, just like any other member of the public, acted like any other member of the public in bringing them to the attention of the local police division. He had his suspicions that T.D. was responsible for various acts of vandalism, but no proof and there was, therefore, no obligation to report anything to anyone. That changed when he saw the videotape. What that videotape revealed was in character and seriousness completely different than anything that had occurred to that point including the showerhead incident.

While employer counsel contrasted the grievor's failure to report the showerhead assault with his having reported the crazy glue incident, I cannot conclude, even assuming that the grievor should have reported the showerhead incident under Rule 4.2.3, that his failure to do so in one case deprives him of entitlement to indemnification in another. This then leads to the next question: did the exercise of his duty under the rule lead to the criminal charges?

Employer counsel suggested in argument, that given her behaviour and history, it was more likely than not that criminal charges would have ensued even if the grievor had not videotaped T.D. committing a crime and reported her under the rule. With respect, that submission is speculative. What is established is that T.D., caught in the act of committing a crime, decided to exact revenge. As soon as she no longer faced criminal liability, she immediately turned on the grievor. The grievor is entitled to indemnification because, even if, as the employer conceded in opening, the grievor, for a split second, acted as a police officer, and even if his motives were mixed – undoubtedly the case – he had an obligation to report T.D. when he had video tape evidence of her committing a crime. The grievor testified, and this was uncontradicted, that he would preferred not to report that crazy glue incident as he anticipated a response. His predominate motive in reporting T.D., the evidence establishes, was pursuant to his duties under the rule as a police officer. And it was the exercise of that function that led to the criminal charges that followed right after T.D. avoided criminal consequences for her own misconduct by entering into a peace bond.

This conclusion is reinforced by the fact that Justice Wright heard T.D. testify. He concluded that she made the criminal complaint to punish the grievor. The timing of her reporting the alleged sexual assault and assault is also noteworthy. As soon as T.D. was free from criminal jeopardy arising out of the grievor having reported her under Rule 4.2.3, she made a criminal complaint about him. Finding that the criminal charges arose because of the grievor having discharged his duty under Rule 4.2.3 is completely in

accord with all of the evidence and with the probabilities. A chain of events began with the grievor doing his duty and ended with him being falsely criminally charged.

Ultimately, it is legally and factually immaterial whether the grievor reported T.D. to the right or wrong person. He had an obligation to report. Likewise, it is irrelevant whether he exaggerated in his evidence what possible sanctions he might have faced had he failed to report. He had an obligation to report and the employer took his report very seriously.

The indemnification provision must be strictly construed especially in a case like this one, where the motives were undoubtedly mixed and where the grievor's personal activities and actions figure so substantially in the contextual background. An extremely high level of scrutiny, strict construction, not broad and expansive generosity, but great care is required before concluding that an entitlement to indemnification has been established. To make such a finding in a case like this, one must conclude that the grievor's predominate motive for reporting T.D. was his obligation as a police officer and that the criminal charges followed as a result of him performing his duty. In this case, the evidence establishes as much.

Accordingly, and for the foregoing reasons is allowed and the employer is directed to indemnify the grievor for the reasonable costs of successfully defending the criminal

charges brought against him. I remain seized with respect to the implementation of this award.

DATED at Toronto this 24th day of November 2009.

"*William Kaplan*"

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William Kaplan, Sole Arbitrator