

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TORONTO POLICE SERVICES BOARD

("the Employer")

AND:

TORONTO POLICE ASSOCIATION

("the Union")

IN THE MATTER OF:

GRIEVANCE OF IMANTS KARKLINS

ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE EMPLOYER:

Michael Hines	- Counsel
Deirdre Ostrom-Peake	- Labour Relations Analyst
Melissa Roth	- Articling Student

APPEARANCES FOR THE UNION:

Jessica Kearsey	- Counsel
Imants Karklins	- Grievor

A hearing in this matter was held on April 24, 2012 in Toronto, Ontario.

AWARD

The Union grieves in this matter that Police Constable (PC) Imants Karklins has been denied payment of his sick leave gratuity upon retirement in contravention of article 14.02 of the collective agreement.

Article 14.02 of the collective agreement provides for the payment of one half of a member's cumulative sick pay credits upon "termination of employment." However, article 14.01 stipulates that "the words termination of employment shall mean separation from employment with the Service by retirement on pension or by resignation, but shall not include dismissal." The issue here concerns the manner in which PC Karklins' employment with the Service was terminated. The Union takes the position that PC Karklins retired from employment on pension such that the termination of his employment triggered an entitlement to sick leave gratuity under article 14.02. The Employer, on the other hand, takes the position that PC Karklins was "dismissed" from his employment and, therefore, given article 14.01, did not terminate his employment within the meaning of article 14.02 such that he is not entitled to sick leave gratuity. There is no dispute with respect to my authority to hear and determine this matter.

The parties tendered an agreed statement of facts, as follows.

1. PC Karklins was hired April 20, 1982, as a fourth class probationary constable.
2. PC Karklins spent his career at 55 division, where he primarily performed traffic enforcement duties.
3. On January 18, 2006, Superintendent Tweedy determined that PC Karklins was guilty of discreditable conduct under the Police Services Act Code of Offences s. 2(1)(a)(xi).
4. On June 27, 2006, Superintendent Tweedy also determined that the penalty for this offence would be dismissal, unless PC Karklins resigned within seven (7) days. The Hearing Decision of Superintendent Tweedy dated June 27, 2006 is attached as Addendum A.
5. On September 25, 2007, the Ontario Civilian Commission on Police Services (OCCOPS) dismissed PC Karklins' appeal of these decisions (both the finding of conviction and the penalty).
6. On January 29, 2010 the Divisional Court dismissed PC Karklins's appeal of the OCCOPS decision.
7. Prior to this event, the Toronto Police Service ('Service'), mistakenly believing that the appeal had formally been dismissed on January 15, 2010, wrote to PC Karklins by letter dated January 28, 2010 and advised him that, effective January 22, 2010, his employment would terminate. Attached hereto as Appendix B is a true copy of this letter.
8. This correspondence of January 18, 2010 was corrected by letter dated January 21, 2010, when the Service wrote again to PC Karklins advising that: "once the appeal is formally dismissed and your termination is finalized, or in the event you resign, you can expect that pay and benefits will terminate immediately." Attached hereto as Appendix C is a true copy of this letter.
9. As stated, the Divisional Court dismissed PC Karklins's appeal on January 29, 2010, which was a Friday. On Friday, February 5, 2010, PC Karklins wrote to the Service indicating that he was retiring: "I am giving notice that I wish to retire from the Toronto Police Service

effective immediately. I am not retiring by choice but only because I have been ordered to resign within seven (7) days or be dismissed." Attached hereto as Appendix D is a true copy of this letter.

10. On February 12, 2010, the Service again wrote to PC Karklins indicating that: "As retirement is not an option available to you pursuant to the Hearing Officer's Order, I hereby confirm your dismissal effective February 5, 2010, upon expiry of the seven (7) days provided for in the Order, counted from the date of the Divisional Court decision upholding that Order." Attached hereto as Appendix E is a true copy of this letter.

11. The 2005-2007 Uniform Collective Agreement is Addendum F. The 2005-2007 Civilian C Collective Agreement is Addendum G.

12. The Toronto Police Association filed a grievance on March 25, 2010 claiming that the Toronto Police Services Board had breached Article 14 of the Uniform Collective Agreement when it refused to pay PC Karklins his sick pay gratuity. Attached hereto as Appendix H is a true copy of this grievance.

13. A copy of the OMERS member information guide together with the applicable TPS Policy is attached as Appendix I. The grievor's Record of Employment (ROE) is also attached.

14. PC Karklins' sick pay gratuity is valued at approximately \$30,000.00.

15. PC Karklins was suspended with pay January 24, 2006 and remained so until his separation on February 5, 2010. He received seven pay rate increases between 2006 and his date of separation pursuant to collective agreement adjustments.

The circumstances surrounding PC Karklins' separation from employment require careful consideration in light of the statutory overlay. As set out in the agreed facts, PC Karklins was found guilty under the Police Services Act with major misconduct and in a hearing decision dated June 27, 2006, he had imposed upon him

the penalty prescribed under Section 68(1)(b) (as it then was) of the Police Services Act; that is, that "the police officer be dismissed in seven days, unless he or she resigns before that time." PC Karklins appealed the decision of the hearing officer to the Ontario Civilian Commission on Police Services. His appeal was dismissed. PC Karklins then appealed to the Divisional Court as he was entitled to do. In a judgement dated January 29, 2010, the Divisional Court dismissed the appeal. It is important to note that under Section 25(1) of the Statutory Powers Procedure Act, an appeal from a decision of a tribunal to a court or other appellate body operates as a stay of the hearing decision under the Police Services Act. Accordingly, PC Karklins remained on leave with pay from 2006. However, the judgement of the Divisional Court dated January 29, 2010 dismissing his appeal from the 2006 decision of the hearing officer had the effect of activating that decision as of that date with the result that the time frame within which he would be permitted to resign commenced to run from the January 29, 2010 issuance of that judgement.

The Employer was under the mistaken belief that the Divisional Court judgement dismissing PC Karklins' appeal had issued on January 15, 2010 and, consistent with that belief, wrote to PC Karklins by letter dated January 18, 2011 advising that he would be dismissed effective January 22, 2010, the seventh day following what it thought to be the date of the Divisional Court judgement, unless he resigned before that date. Accordingly, a second letter, dated January 21, 2010, was sent to PC Karklins advising that his pay and benefits were being reinstated but

putting him on notice that "once the appeal is finally dismissed and your termination is finalized or in the event you resign, you can expect that pay and benefits will terminate immediately, without further notice to you."

On February 5, 2010, PC Karklins provided the Employer with a letter of the same date (the seventh day following the date of the judgement of the Divisional Court) that reads as follows:

Toronto Police Service
450 College Street
Toronto, Ontario

By Hand

Dear Sir/Madam

I am giving notice that I wish to retire from the Toronto Police Service effective immediately.

I am not retiring by choice but only because I have been ordered to resign within seven (7) days or be dismissed.

Retirement is of less financial hardship to me than resignation and for that reason I am submitting this notice of retirement.

I do not accept the correctness of the decision ordering me to resign or be dismissed and will seek leave appeal.

I preserve my right to seek leave to appeal, and if leave be granted, to appeal, notwithstanding my compelled retirement.

Dated at Toronto this 5th day of February 2010

Imants Karklins

Finally, the Employer, by letter dated February 12, 2010, advised PC Karklins "that effective February 5, 2010, you were dismissed from employment in accordance with the decision of a Professional Standards Tribunal."

To repeat, Section 68(1)(a) and (b) (now Section 85(1) of the Police Services Act) provides the Chief of Police with the following remedial authority where it is found, as here, that an officer has engaged in major misconduct.

68.(1) The chief of police may, under subsection 64(10),

- (a) dismiss the police officer from the police force;
- (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;

It is useful to reproduce the corresponding predecessor regulation, i.e. Regulation 291 under the Police Services Act RSO 1980, that reads:

20.(2) A person found guilty of a major offence is liable to,

- (a) dismissal, or
- (b) be required to resign, and in default of resigning within seven days, to be summarily dismissed from the force or,

The Legislation Act, 2006, that applies in the interpretation of all statutes, including the Police Services Act, speaks to the computation of time as follows:

Holidays

89.(1) Time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday. 2006, c. 21, Sched. F, s. 89 (1).

Days on which offices closed

(2) Time limits for registering or filing documents or for doing anything else that expire on a day when the place for doing so is not open during its regular hours of business are extended to include the next day the place is open during its regular hours of business. 2006, c. 21, Sched. F, s. 89 (2).

Number of days between events

(3) A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days. 2006, c. 21, Sched. F, s. 89 (3).

Specified day included

(4) A period of time described as beginning or ending on, at or with a specified day includes that day. 2006, c. 21, Sched. F, s. 89 (4).

Specified day excluded

(5) A period of time described as beginning before or after a specified day excludes that day. 2006, c. 21, Sched. F, s. 89 (5).

There are two overriding issues. The first is whether PC Karklins' February 5, 2010 communication to the Employer that he would be retiring under duress was within the time frame provided for electing to resign under both the decision of the hearing officer and the Police Services Act, failing which he would be dismissed. The second issue is whether, even if within the time frame, the decision to retire in the circumstances constituted a resignation within the meaning of article 14.01 and hence a "termination of employment" within the meaning of article 14.02 of the collective agreement as would entitle PC Karklins to payment of his sick leave gratuity. The parties have agreed to proceed with the first issue without prejudice to the right of either party to proceed on the second issue at a later date should it be found, in

disposing of the first issue, that the purported resignation dated February 5, 2010 met the time requirements for that election.

There is no dispute between the parties that by operation of Section 89 of the Legislation Act the date on which the judgement of the Divisional Court dismissing PC Karklins' appeal was issued (January 29, 2010) does not count for purposes of determining the time given to PC Karklins to resign his employment prior to having a dismissal effected. The issue between the parties is whether, as the Employer asserts, PC Karklins had six days from January 29, 2010 within which to exercise his election to resign or whether, as the Union asserts, PC Karklins had a full seven days within which to exercise this option. When reference is had to the fact that PC Karklins advised of his decision to retire on February 5, 2010 (the seventh day), it can be seen that, if the Employer is correct with respect to the duration of the mandated time frame, his decision (whether voluntary or involuntary and whether a "resignation" or not) would not have been made before the expiry of the time frame.

The Employer emphasizes the importance of establishing a clear understanding of when it is that a dismissal occurs because of the extraordinary powers and obligations that attach to a police officer. The Employer asserts, firstly, that on the plain meaning of Section 68(1)(b) of the Police Services Act a "dismissal in seven days" from the date of a hearing decision means that the dismissal occurs at the commencement of the seventh day, absent the intervening event of a resignation "before that time." It is argued that the application of the Legislation Act to the

statutory language produces the same result. The Employer argues that applying Section 89 of the Legislation Act to the language of Section 68(1) of the Police Services Act requires the subject officer to resign before the seventh day following the issuance of a hearing officer's report; that is, by the end of the sixth day that, in this case, would have been February 4, 2010. I am asked to find, because PC Karklins did not act to resign until February 5, 2010, the seventh day after the effective date of the issuance of the hearing officer's decision, that the dismissal had already occurred when he provided notice of his intention to retire.

The Union argues that "in seven days" must mean "within seven days" such that under Section 68(1) of the Police Services Act, PC Karklins had seven days, i.e. up to and including February 5, 2010, within which to resign. The Union asserts that this is clear on the plain meaning and, in support, points out that the parties used the phrase "within seven days" at paragraph 4 of the agreed statement of facts. It is argued that Section 68(1)(b) creates a deadline that triggers at the end of the seventh full day following the issuance of the hearing officer's decision. The Employer's theory, it is argued, distorts the timing of the prescribed event (dismissal) by making the deadline midnight February 4, which the Union maintains is nothing more than a deadline in anticipation of the intended midnight February 5 deadline. The Union finds support for this position in the Legislation Act that it argues requires that the full last day in the sequence be counted as it is when, under Section 89(1), time limits that would otherwise expire on a holiday are extended to include the full next day. The Union

asks me to find that the Police Services Act prescribed an event (dismissal) that is to occur in the seven days unless an intervening event (resignation) occurs before the expiry of that time. It is suggested that where the Police Services Act provides for a period of time in which a police officer may resign in order to avoid dismissal, so that the officer can leave with dignity, an expansive interpretation of the time frame for taking advantage of this option ought to be applied. I am asked to find that PC Karklins had until midnight on February 5, 2010 to resign and that he communicated his intention in this regard prior to that deadline.

The Employer argues in reply that the Union has in effect relied upon the statutory language that existed in 1980 and concedes that on this language the Union position would prevail. However, it is submitted that the issue must be decided on the current language that is framed differently in that it inverts the events by providing not for resignation within seven days, but for dismissal in seven days. It is argued that a dismissal "in" seven days means that the dismissal occurs on the seventh day, i.e. February 5, 2010, unless the resignation occurs "before that time," which the Employer reiterates must be the sixth day from the date of the hearing decision, i.e. February 4, 2010. The Employer maintains that this interpretation is consistent with Section 89(3) of the Legislation Act that stipulates that where there is a reference to a number of days between two events, i.e. the decision of the hearing officer and the actual dismissal, the day on which the first event happens is excluded and the day on which the second event happens is included. I am asked to find that PC Karklins had

until midnight on February 4, 2010 to resign and having failed to do so by that time, his dismissal, by force of law, became effective at 12:01 a.m. on February 5, 2010.

This is a case of first impression. There is no case law directly on point nor is there case law that gives rise to a presumption in favour of a particular interpretation. Whereas it is important, for the reasons advanced by the Employer, to know precisely when an individual ceases to be a police officer, the task is simply to interpret the plain language of Section 68(1)(b) of the Police Services Act read in the context of a finding of major misconduct.

Section 68(1) of the Police Services Act clothes the chief of police with the authority to select from a hierarchy of described penalties up to and including outright dismissal where an officer has been found to have engaged in major misconduct. The next most severe penalty in the hierarchy of penalties, at Section 68(1)(b), is to "direct that the police officer be dismissed in seven days, unless he or she resigns before that time." These words, given their plain meaning, effect the dismissal on the seventh day following the issuance of the decision of the hearing officer unless there is a resignation before that time. The resignation, therefore, must occur before the seventh day, i.e. by the end of the sixth day, if it is to pre-empt the dismissal. These words, read in context, do not admit to any other meaning.

Section 89(3) of the Legislation Act, when applied to Section 68(1)(b) of the Police Services Act, produces the same result. Section 89(3) stipulates that a reference to a number of days between two events excludes the day on which the first event

happens and includes the day on which the second event happens. If the first event is the issuance of the decision of the hearing officer, that event occurred on January 29, 2010 and, by operation of Section 89(3), that date is excluded. If the second event is the dismissal, that event is to occur in seven days and the seventh day in that sequence, starting from the day after the decision of the hearing officer, i.e. January 30, 2010, would be February 5, 2010 and, by operation of Section 89(3) of the Legislation Act, that day would count. In the result, the dismissal takes effect on February 5, 2010 unless there has been a resignation before that time, i.e. by February 4, 2010. Whereas Section 89(1) of the Legislation Act extends time limits that expire on a holiday to include the next day, which clearly means all of the next day, this section has no direct application here nor can the concept of an extension somehow be applied here to extend the time for the effecting of a resignation beyond midnight February 4, 2010.

The Union argues that Section 68(1)(b) of the Police Services Act should be interpreted to allow for a resignation "within" seven days. The language of Section 68(1)(b), when given its plain meaning and when read in light of the Legislation Act, as I have found, does not allow for this result. However, the predecessor provision, that was framed differently, contemplated a resignation "within seven days." The predecessor provision provided that "a person found guilty of a major offence is liable to,

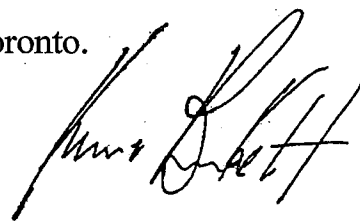
- (a) dismissal, or

(b) be required to resign, and in default of resigning within seven days, to be summarily dismissed from the force..."

The effect of specifying under Section 68(1)(b) a dismissal in seven days (failing a resignation before that time), as distinct from allowing a resignation within seven days (failing which a dismissal is triggered), is to require that a resignation be tendered before the seventh day – not within seven days. The practical effect is to reduce the time allowed for the tendering of a resignation from seven full days to six full days. If the language of the predecessor regulation had not been changed, the Union would be correct in its position that an officer is entitled to resign within seven full days following the issuance of the decision of a hearing officer. However, on the language of Section 68(1)(b) of the Police Services Act, which governs in this matter, the time for the tendering of a resignation, for the reasons given, is six full days following the issuance of the decision of the hearing officer. The reference to a dismissal within seven days in the agreed statement of facts (paragraph 4) does not affect the analysis or change the result.

Having regard to all of the foregoing, I must find that not having resigned before midnight on February 4, 2010, PC Karklins was properly dismissed on February 5, 2010 pursuant to the June 27, 2006 decision of the hearing officer. Accordingly, he does not qualify for a sick leave gratuity under article 14.02 of the collective agreement such that this grievance must be dismissed.

Dated this 8th day of May 2012 in the City of Toronto.

A handwritten signature in black ink, appearing to read "Kevin Burkett", written in a cursive style.

KEVIN BURKETT