

IN THE MATTER OF AN ARBITRATION UNDER SECTION 40 OF THE *POLICE
SERVICES ACT*

BETWEEN:

OFFICER M

AND

LEAMINGTON POLICE SERVICES BOARD

Arbitrator:	Laura Trachuk
For Officer M:	Jim Mauro Christina D'Alessio Luigi D'Alessio
For Leamington Police Services Board:	Patrick Milloy Brian Sweet

The arbitration of this matter took place in Windsor on November 24, 2014.

AWARD

I was appointed by the Minister of Community Safety and Correctional Services to determine the amount of severance to be paid to Officer M by the Leamington Police Services Board (the "Board") upon the abolition of the Leamington Police Service (the "Service"). Officer M passed away on January 4, 2014 and a representative of his estate is participating in this litigation. The Board has not suggested that the estate would not be entitled to any severance payment that was owing to Officer M.

My appointment with respect to the above matter states as follows:

Pursuant to subsection 124(3) of the Police Service Act, R.S.O. 1990, c P.15 as amended and the Delegation of Authority, dated September 23, 2009, wherein the Minister of Community Safety and Correctional Services has delegated to me his powers under the subsection, I hereby appoint Laura Trachuk to act as the Arbitrator who will hear and determine a "Rights" Dispute between [Officer M] and the Municipality of Leamington Police Services Board with respect to section 40 – *outstanding severance issues arising from the disbandment of the Leamington Police Service*. [emphasis added]

I issued an earlier award with respect to the production of documents in which I said the following about the issues in dispute and my jurisdiction:

Officer M's family and friends are devastated by his death. It is apparent from the materials filed by the estate's representative that they are also angry and hold the Board responsible for Officer M's failure to gain employment with the OPP and perhaps for the despair that followed. They are looking for justice for the wrongs they believe to have been imposed upon him. It is understandable that they are looking for a way to achieve restitution for the injustices they believe Officer M suffered. However, this process cannot provide the answers or the remedy they seek. My authority under s. 40 of the PSA is only to determine the severance pay to which Officer M was entitled as a result of the abolition of the Leamington Police Service. The issue before me is not whether or not Officer M should have been charged criminally, charged under the PSA or hired by the OPP. The only matter before me is the amount of severance pay to which he was entitled as a result of the termination of his employment that resulted from the abolition of the Leamington Police Service. Officer M's estate is only entitled to the production of documents that are arguably relevant to that issue.

An arbitrator appointed under section 40 of the PSA must determine the severance owing to a member of a police force whose employment has been terminated as the result of the abolition of the force. It is assumed that the termination of such an officer is without cause and the approach used by arbitrators is the same as that used in wrongful dismissal cases at common law. (see *Point Edward Police Services Board and Leo Mayer (5/12/2000 (Kirkwood))*) The same factors are considered to determine the amount of severance pay to which a member of an abolished force is entitled. Those factors include the nature of his or her employment, length of service, position, age, and the likelihood of finding comparable employment. If a member of an abolished police service is hired by the OPP that is taken into account only as mitigation income,

i.e. the amount the member earns from the OPP during the severance period is deducted from the amount owing from the former service. There is no continuity of employment from the abolished service to the OPP. The member is terminated from the abolished service and entitled to severance. Earnings from the OPP may be set off against severance owing from the abolished service. That is the only way in which an arbitrator determining severance under s. 40 considers employment with the OPP.

In *Point Edward Police Services Board (supra)* the arbitrator set out the jurisprudence applicable to the determination of appropriate severance under s. 40 of the PSA:

As in the *Warton* decision, the appropriate criteria for determining the compensation for Mayer is that of reasonable notice as seen in the civil law as applied to the unique aspects of policing and that of the circumstances of Mayer. The basic principles stem from *Bardhal v. Globe and Mail Ltd.* (1969) O.W.N 253, 24 D.L.R. (2d) 140 (Chief Justice McRuer):

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

As quoted in the *Orillia* decision (*supra*) from the *Warton* decision (*supra*) at p.6:

The principle of law upon which wrongful dismissal cases are decided in civil court is well known and has its roots in contract law. The court deems an implicit employment contract to exist between the employer and employee and, should the employer break that contract by terminating the employee without cause, then that employer is held liable for the obvious and foreseeable economic consequences to the employee flowing out of his termination.

Put another way, the implied contract is deemed to include an understanding that the employee will not be terminated except for cause. Accordingly, when an employee is terminated without cause, there is an obligation on the employer to take into account the economic consequences to that employee and to shield him from them....

Shielding the employee from the foreseeable economic consequences of the dismissal has been taken by the courts to mean giving that employee reasonable notice of the termination (or pay in lieu of notice); "reasonable notice", in turn, has been interpreted to mean whatever time it could be expected for the

employee to attain similar employment. The question is, in other words, how long it will take the employee to put himself back into the approximate economic position he would have been in had the discharge not occurred...

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

Second, the principle of reasonable notice is not a mechanistic formula. As suggested by Chief Justice McRuer, it is a concept which takes into account many disparate factors and can be applied with common sense...

Fourth, the basis of this principle – the shielding of the dismissed employee from the inevitable economic consequences of his being terminated – seems appropriate and consistent with the goal of determining a fair, reasonable and equitable settlement....

For all the above reasons, then this award will be based on common-law principle for reasonable notice, adapted to the unusual circumstances of policing, Chief Schultz and the Warton situation.

The underlying rationale behind the principle of reasonable notice and the principle of damages applicable to breach of contract is to shield the employee from economic loss and to make the employee whole, to put the employee in the situation as if he had not been terminated. By disbanding the police force and terminating Mayer’s employment with the Board, the Board has breached Mayer’s employment contract and has exposed itself to this liability.

In addition to considering the determination of economic loss, there is a corresponding obligation on the employee to mitigate the losses. (*Red Deer College v. Michaels et al.* 57 D.L.R. (3d) 386, (*Neilson v. Vancouver Hockey Club* (supra). This duty has also been applied to policing situations (for example, *The Town of Kapuskasing Police Services Board and Ohinski, Daigle, Boyer, Robert, McLeod, Nolet (Civilian Members)* (October 27, 1994) (E. Marszewski). The duty to mitigate has been applied and satisfied where there was no comparable position available, such as in the *Warton* decision (supra), and where police officers have taken other positions, even when the alternative position led to a

reduction of rank and loss of prestige and income (Kingsville decision (supra)).

In this case, it appears that Officer M's estate wants to demonstrate that Officer M was poorly treated by the Board and/or the Chief prior to his termination and that treatment prevented him from obtaining employment with the OPP. However, as noted above, in this process it is assumed that there was *no cause* for Officer M's termination and that is why he was entitled to severance. The only issue is the amount of severance. Officer M's inability to obtain employment with the OPP is a factor that can be considered in determining whether he was likely to obtain comparable employment after his termination but it is unnecessary for the estate to prove that the charges against him were unfounded in order to make that argument. There is no dispute that the *Police Services Act* charges were never proved but, because they and the *Criminal Code* charges were outstanding in 2010, they prevented Officer M from being hired by the OPP. The Board would not be permitted to argue that Officer M would have been terminated had the Service not been abolished. The Board accepts that its allegations against Officer M are not relevant to this proceeding and has stated that it will not seek to raise them.

I note that although the quotation included in the above decision refers to "reasonable notice", section 40 of the *Police Services Act* (the "PSA") refers to "severance". The amount of severance to which the member of a disbanded force is due is not reduced by the amount of notice provided for the abolition of the service. It is really the factors that courts use to determine how much notice is reasonable that have been adopted into the jurisprudence under section 40 of the PSA.

FACTS

The following facts are not in dispute. Officer M was a police officer with the Leamington Police Service. He was accused of wrongdoing with respect to expenses related to his position as President of the Leamington Police Association (the "Association") and was suspended with pay on May 13, 2009. Officer M always denied any wrongdoing. He was eventually charged under the *Criminal Code* but those charges were withdrawn in 2011. Officer M was never convicted of any criminal offence. He was also charged with discreditable conduct under the *Police Services Act*. The Leamington Police Service was abolished on December 3, 2010 and the proceedings under the PSA could no longer proceed because the Hearing Officer lost his jurisdiction to hear the matter. The Ontario Provincial Police (the "OPP") took over responsibility for policing in the jurisdiction formerly served by the Service. All of the Leamington police officers that applied were offered positions with the OPP except for Officer M. He was not offered a position because of the outstanding *Criminal Code* charges. It is unclear whether the PSA charges or the fact that the Board intended to continue to employ Officer M so that it could continue the prosecution were also factors.

On February 5, 2010, the Chief of the Leamington Police Service sent Officer M a letter advising that his suspension would continue indefinitely until the resolution of the PSA matter.

In the decision dated July 27, 2010 permitting the abolition of the Service, the Ontario Civilian Police Commission (OCPC) stated:

As a result, subject to the conditions set out below, we consent to the Municipality's request under section 40 of the Act to abolish the Service to permit policing under contract with the OPP. To this end, we consent to the termination of the current members of the Service.

This consent is subject to the following conditions:

1. The OPP shall provide uniform members of the Service with applications for employment within 30 days of the date of this decision and complete the processing of the applications of those seeking employment within 75 days.
2. The OPP shall finalize the process for filling the ten full time civilian positions and advise eligible candidates of the procedure to be followed within 60 days of the date of this decision.
3. The Board and the Association shall continue their negotiations with respect to severance. If no agreement is concluded within 60 days of the date of this decision, we direct that any unresolved matters proceed forthwith to arbitration.
4. The Municipality shall initiate the process to complete the identified renovations to 7 Clark Street West. Such renovations must be substantially completed prior to the final transition to OPP contract policing.

On November 5, 2010 the Board asked the OCPC to delay the abolition of the Service or to permit it to continue in a limited way so that it could continue the PSA process against Officer M. The letter provided:

We are the solicitors for the Corporation of the Municipality of Leamington and the Leamington Police Services Board and in that capacity, we are writing to request that the Commission issue a further Decision, either amending its Decision of July 27, 2010 consenting to the disbandment of the Leamington Police Service, pursuant to Section 40 of the ***Police Services Act*** (the "***Act***") or providing an Addendum to same.

Orders Requested

We are requesting that the Commission issue a decision allowing the Leamington Police Services Board:

1. to operate as a Board pursuant to Section 10 of the ***Act*** following the date that the OPP assumes responsibility for policing in the Municipality; and
2. to continue to operate simultaneously as a Board pursuant to Section 31 of the ***Act*** for the purpose of appointing a Chief to Police to finalize all matters arising out of the operation/disbandment of the Leamington Police Service, including the finalization of all disciplinary matters that have arisen or might arise prior to the date of disbandment pending the completion of all prosecutions under the ***Act*** or the ***Criminal Code***.
3. In the alternative, an order allowing the Leamington Police Services Board, as a Board under s. 10 of the ***Act*** to take the steps outlined in paragraphs 2 above;

4. Any order that might be required pursuant to Rule 3.4 of the Commission's Rules of Practice waiving or varying time limits.

Our clients are requesting that the Commission issue the orders outlined above on an expedited basis given that the anticipated date on which the OPP will take over policing in the Municipality is December 3, 2010. We note that it is not possible to delay the OPP takeover date for any substantial period of time given the steps taken by the Police Services Board to wind up operations.

Reasons for the Request

These orders are being requested as a result of a situation that has arisen which make same necessary. On February 19, 2010, Dean Gow, Chief of the Leamington Police Service issued a Complaint under s. 76 of the **Act** alleging that [Officer M], a member of the Leamington Police Service, was guilty of misconduct under s. 80 of the **Act**. A copy of this Complaint and the letter appointing a Hearings Officer are attached.

The Hearings Officer has conducted in excess of 12 days of hearings to date. It is possible however that the hearing will not be finalized until after the effective date that the OPP assumes responsibility for policing in the Municipality.

In addition, [Officer M] has been charged under s. 380(1) (fraud over \$5,000.00) of the **Criminal Code** and it is anticipated that the trial in that matter will not take place until sometime in 2011. A copy of the Criminal Information and Summons are attached.

[Officer M's] employment as a suspended officer will continue until the completion of the hearing of the charges under the Act. We understand that the OPP will not make a decision on [Officer M's] application for employment with the OPP until the current **Code** charges are resolved.

In view of the above, it is our position that the Leamington Police Services Board should continue to function as a Board under s. 31 only for the purpose of appointing a Chief and having the Chief continue to exercise his duties to the extent necessary to finalize all matters arising out of the operation of the Service including all disciplinary matters. In the alternative, that the Leamington Police Services Board, operating as a Board under s. 10 of the **Act**, be allowed to appoint a Chief to carry out these functions. In this regard and notwithstanding the disbandment of the Leamington Police Service, the Board requires the Chief of Police to deal with issues related to the continuation and/or revocation of any suspensions in place after the date of disbandment and to deal with any discipline issues under the **Act** that might arise subsequent to the completion of the current charges against [Officer M] under the **Criminal Code**.

Our clients are concerned that if the current Leamington Police Services Board act to terminate [Officer M's] employment on the disbandment date pursuant to the Consent granted in the Commission's Decision of July 27, 2010, that it may inadvertently limit the Hearings Officer's Decision on sentencing should [Officer M] be convicted.

It is our position that the Commission has the jurisdiction to order the issues requested pursuant to its statutory authority to consent to the disbandment of the Leamington Police Service, as the orders requested deal with transitional issues ancillary to the consent to the disbandment and are necessary to ensure a proper and orderly finalization of issues that arose before the date of disbandment.

We note that as the anticipated disbandment date is only one month away, our clients are requesting that consideration of this application be expedited and as such request that same be dealt with in writing pursuant to Rule 10.2 of the Commission's Rules of Practice. In the alternative, if a hearing is required, our clients would be willing to travel to Toronto to accommodate the Commission's schedule.

Should the commission require further particulars or documents, we would be pleased to provide the same forthwith.

Finally, we note that we have provided the Leamington Police Association and the Ontario Provincial Police with a copy of this correspondence.

On November 23, 2010 the OCPD requested that the Board provide the following:

I write further to your letter dated November 5, 2010 and subsequent correspondence. I have been directed to communicate with you by email.

The Commission directs that **by 5pm on Friday, November 26, 2010**, you provide full particulars and written submissions with respect to the following questions:

- 1) Why were the outstanding disciplinary and criminal proceedings against [Officer M] not brought to the Commission's attention at any time during its process under section 40 of the *Police Services Act*?
- 2) What is the source of the Commission's legal authority to grant the relief requested? Assuming it has such authority, why should the Commission grant the extraordinary relief requested?
- 3) Cannot the relief requested be obtained by the Municipality deciding to delay implementation of the Commission's Decision dated July 27, 2010 until after the completion of the proceedings against [Officer M]?

The Commission directs that upon receipt of this email you forthwith forward it to counsel for the Association and to [Officer M] in the event they have any submissions on the questions listed above.

On December 2, 2014, the OCPD refused the Board's request to continue as a board under section 31 of the PSA or as a board under section 10 with the authority to continue the prosecution of Officer M stating:

Decision:

On December 9, 2009 the Commission was advised that the Municipality was proposing to abolish the Service and terminate all of its employees.

As a result, it initiated the process under section 40 of the Act. Detailed information on the proposal was sought and a public meeting scheduled. Notice of that public meeting was published in local newspapers on June 13 and 23, 2010. That notice made it clear that at issue was the Municipality's request to abolish the Service.

The meeting was held and the decision released on July 27, 2010. Consent to the abolition was granted subject to certain conditions being satisfied.

Now, almost 11 months after the initial application; 4 months after public notice and the holding of a public meeting; 3 months after release of a decision; and weeks before the scheduled abolition, we are being requested to modify the nature of our proceedings.

Essentially, we are being requested to convert an application for abolishment to one of reduction. To grant such a request at this late date would not be fair, transparent or reasonable.

There is a significant difference between an application to reduce the size of a police service and one requesting its abolishment. If the municipality was seeking a reduction it should have done so in its initial application.

Certainly, [Officer M's] situation was well known at that time. He had been suspended with pay for almost seven months before that application was filed. Further, he was served with a Notice of disciplinary hearing and charged criminally, almost five months before the scheduled public meeting.

In the alternative, we are requested to direct that the Board be allowed to continue to operate pursuant to section 10 of the Act for the express purpose of finalizing all disciplinary matters that may have arisen prior to disbandment.

Section 10 of the Act deals with the powers of OPP contract boards. Section 10(9) states such board shall:

- a) participate in the selection of the detachment commander of the detachment assigned to the municipality or municipalities;
- b) generally determine objectives and priorities for police services after consultation with the detachment commander or his or her designate;
- c) establish, after consultation with the detachment commander or his or her designate, any local policies with respect to police (but the board or joint board shall not establish provincial policies of the Ontario Provincial Police with respect to police services);
- d) monitor the performance of the detachment commander;
- e) receive regular reports from the detachment commander or his or her designate on disclosures and decisions made under section 49 (secondary activities);
- f) review the detachment commander's administration of the complaints system under Part V and receive regular reports from the detachment commander or his or her designate on the administration of the complaints system.

It is clear that the powers of section 10 boards differ from those for municipal police service boards established under section 31.

A section 31 board is an employer. It appoints members, hires the chief and deputy chiefs, may give orders or directions to a chief, sets a budget and has the power to contract. A section 10 board has none of these powers.

We do not have the authority to confer on a section 10 board powers which at law it does not have. Indeed, section 10(10) of the Act states: "If one or more municipalities enters into an agreement under this section, section 31 (responsibilities of board) ... do not apply to the municipality or municipalities."

In the alternative, it is suggested that we have the authority to make the requested amendment because at the conclusion of that decision we stated that "We remain seized of this matter until there is full compliance with all of the above conditions."

On the face of it, the relevant conditions have been met and any authority which we may have reserved, is spent.

[Officer M's] application for employment with the OPP has been processed. Unfortunately, not with the result that he was seeking. As the Divisional Court indicated in Prescott (Town) and Ontario (Provincial Police) we have no role in such employment decisions.

As well, the Board and the Association have proceeded to arbitration with their unresolved issues. It would seem to us that this would be the appropriate forum for [Officer M] to raise some of his concerns.

The Hearing Officer did stay the PSA proceeding upon the disbandment of the Service suggesting that he has lost jurisdiction. Nevertheless, and in spite of the OCPC decision, the Board took the position that Officer M continued to be an officer under suspension and continued to pay him his salary. Statutory deductions continued to be made from his salary and remitted. Union dues were also deducted and were, apparently, paid into a trust account, as the Association no longer existed.

The Board and the prosecutor it had hired to prosecute the PSA charges against Officer M, applied for judicial review of the December 2, 2010 OCPC decision denying the Board's status to continue the PSA disciplinary proceedings. For his part, Officer M filed suits against the Association, the Board and a variety of individuals.

On April 27, 2013, the Superior Court of Justice sitting as the Divisional Court issued a decision with respect to applications for judicial review filed by Officer M against the Corporation of the Municipality of Leamington and others and the application for judicial review filed by the Board and its Prosecutor. The Court found that the Hearing Officer lost the jurisdiction to continue the PSA proceedings upon the dissolution of the Service. It said:

[5] It is irrelevant whether it is in the public interest for the charge against [Officer M] to be resolved on its merits. There must be jurisdiction in the Hearing Officer,

or else the hearing simply cannot proceed. The Hearing Officer obtains jurisdiction only as the delegate of the Chief of Police. It is clear from a review of the *Police Services Act* (“PSA”) that the Chief of Police is not *functus officio* upon appointing the hearing officer and prosecutor. In the usual course, a Chief of Police has a continuing role in the processing of the discipline charges. The Chief of Police would remain the representative of the employer of the police officer and would continue to have involvement in respect of possible settlements and the implementation of remedies ordered. Further, the continued interest of the Chief of Police is demonstrated by the fact that he retains the authority to “remove” the Hearing Officer (see: *Legislation Act, 2006*, S.O. 2006, c. 21 Sched. F, s. 77(a)). Prior to December 3, 2010, the Leamington Police Services Board and its uniformed officers were joined in an employment relationship. That relationship, which underlies the whole proceeding, no longer exists. Prior to the disbandment of the Leamington Police Service, it would have to be open to the Hearing Officer to order reinstatement. Obviously, that is a remedy that is no longer possible.

[6] Prior to its disbandment, the Leamington Police Services Board obtained its authority under s. 31 of the *PSA*. Its replacement police services board holds its responsibilities under s. 10, is no longer the employer of police officers, and no longer has the jurisdiction to employ a Chief of Police. The former Chief of Police has been terminated and his office no longer exists. There is no one to supervise the discipline proceeding commenced under s. 64 of the *PSA* and delegated to the hearing officer, pursuant to s. 76(1).

[7] This Court has no authority to issue a declaration that the disbanded Police Services Board, promulgated under s. 31, may continue to operate pursuant to that section or that the new Police Services Board (that relies on s. 10 for its powers) has the authority to finalize any disciplinary matter that arose prior to disbandment. The authority of a municipal police services board and of a chief of police must be found in the *PSA*. They can have no authority beyond that granted by the statute. On this basis, the Hearing Officer no longer had jurisdiction to continue after December 3, 2010.

Officer M had asked the court to dismiss the PSA charges against him but the court said that was not possible because the PSA hearing had not been concluded. It stated, “In our view, the appropriate order is that the proceedings under the PSA are permanently stayed, a disposition that is neutral as to the merits of the discharge.”

Officer M also asked the court to quash the two OCPC decisions permitting the disbandment of the service. The court said:

[26] We see no basis for setting aside the orders of the Commission, dated July 27, 2010 and December 2, 2010. There was no breach of natural justice or procedural fairness. Section 5(1) of the *PSA* provides that a municipality shall provide policing in *one* of a listed number of ways, a s. 31 Board and a s. 10 Board being two of the available options. There is no option that would permit a municipality to operate two types of police boards. The commission has no jurisdiction to resolve individual employment issues. However, it provided for a process whereby unresolved employment matters would be arbitrated. [Officer M] still has available the rights afforded to him by the process that led to the

abolition of the Police Service and the transfer to the OPP. He can have his severance rights arbitrated, with his own legal representation. He just has to ask.

Officer M had also filed an application with the Ontario Police Arbitration Commission seeking broad damages and including the OPP and others who would not be parties to such an application. The Deputy Minister refused to send the application to conciliation. The Superior Court declined to quash that decision. It noted that Officer M's severance issues could be dealt with under s. 40 of the PSA.

On May 13, 2013 the Board sent a letter to counsel for Officer M that set out its position as follows:

In view of the Divisional Court's decision that the Leamington Police Services Board had no jurisdiction to exercise the powers of a Police Services Board under s. 10 of the *Police Services Act* after December 3, 2010 it had no authority to continue the employment of [Officer M]. As such, the Police Services Board has ceased the continuation of your client's salary and health and welfare benefits. [Officer M's] salary continuation ceased effective April 27, 2013 and the continuation of health and welfare benefits ceased on April 30, 2013, with the exception of the life insurance benefit which will end on May 31, 2013.

As you are aware, our client continued your client's salary for a period of two years and five months following December 3, 2010. This continuation far exceeds the severance provisions provided to other members of the Leamington Police Association as agreed in the Memorandum of Agreement between our client and the Association dated August 3, 2012 which, in our view is the appropriate severance period. As such it is our position that your client was paid excessive severance as follows:

• amount of salary continuation paid to [Officer M]	\$207,000.00
• amount payable to [Officer M] pursuant to the Agreement with the Leamington Police Association (1 ¼ month per year of service)	<u>-\$137,000.00</u>
	\$ 70,000

Therefore, we request repayment to our client by [Officer M] of the sum of \$70,000.00 forthwith. In the event that this repayment is not made, we will seek an Order from the Arbitrator in the s. 40 hearing for repayment of same.

It is also our position that no vacation pay is owing to [Officer M] on the severance payments made to him commencing December 3, 2010.

The Board requested that this section 40 application be scheduled for hearing. It was scheduled to be heard on January 30, 2014 but Officer M passed away on January 4, 2014 and it was adjourned.

The Leamington Police Association and the Board negotiated an agreement on August 3, 2011 with respect to severance payable to the Association's members (except Officer M) that included the following:

1. The terms “member” and/or “members” when used in this Agreement shall mean all members of the Leamington Police Service represented by the Association who are employees of the Service as of the date that the Service is disbanded (hereinafter referred to as the “disbandment date”) save and except [Officer M], [two other names] and any other member who is or becomes subject to a separate severance agreement between the Board and the Association or approved by the Association.
 2. This Memorandum of Agreement represents an agreement on all severance pay issues for all members with respect to the disbandment of the Leamington Police Service, and is binding on the Board, the Association and all of its members. This Memorandum is entered into without prejudice to the right of the Association or [Officer M] to negotiate/arbitrate severance pay provisions for [Officer M] and without prejudice to any position the Board may take with respect to same.
 3. Severance pay for all members who may be entitled to severance, shall be calculated on the basis of 1.25 month’s salary (at the member’s rate of pay as of the disbandment date pursuant to the Collective Agreement between the Board and the Association), for each year of completed service and part year of completed service with the Board and its predecessors, as of the disbandment date, to a maximum of twenty-four (24) months pay. Payment for a part year of completed service shall be paid on a pro rata basis, calculated on completed months of service. This severance pay formula is inclusive of any obligation to pay a member pay in lieu of notice of termination and/or severance pay pursuant to the provisions of the Employment Standards Act, 2000. A month’s severance pay for a part-time member shall be calculated in the basis of the part-time employee’s actual hours worked during the period from January 1, 2010 to and including November 30, 2010 divided by eleven.
 4. Any member who applies for continued employment with the OPP but who is not offered any continued employment shall be paid severance pay in accordance with paragraph 3 of this Memorandum of Agreement, subject to income earned by the member through other employment during the appropriate severance period as calculated pursuant to paragraph 3 above and subject to any interim payments provided to members by the Board.
- ...
8. Full-time members shall be paid the vacation pay that the member would otherwise be entitled to be paid in calendar year 2011, in accordance with Article 8 of the Collective Agreement on the payment of 11/12ths of the hours of vacation with pay as set out in Article 8 of the Collective Agreement. These payments shall be made, subject to all required statutory deductions, within forty-five days of the date of this Agreement.
 9. Members of the Association employed in part-time positions as of the date of disbandment, who are otherwise entitled to severance pay pursuant to paragraph 4 of this Agreement, shall be paid 12% of their salary in lieu of benefits. A part-time member’s salary and the appropriate severance period shall be determined in accordance with paragraph 3 of this Agreement.

10. Members of the Association employed in full-time positions as of the disbandment date who are otherwise entitled to severance pursuant to paragraph 4 of this Agreement shall continue to be enrolled in the health and welfare benefits set out in Article 15 (except for LTD) during their severance period as calculated pursuant to Article 3 of this Agreement. This enrollment shall cease in the event the member obtains employment with similar benefits. Members who obtain such benefits through other employment are required to immediately advise the Board of this entitlement.

On August 6, 2013 the Canada Revenue Agency (CRA) ruled that Officer M was an employee of the Corporation of the Town of Leamington (the "Town") up until April 27, 2013 and was, therefore, eligible to receive employment insurance benefits after that date. The Town appealed that decision and the Minister of National Revenue upheld the original ruling on October 31, 2013. The Town has appealed that ruling to the Tax Court of Canada.

Officer M had applied for benefits under the *Workplace Safety and Insurance Act* (WSIA) and was supposed to be assessed at the Psychological Trauma Program at the Centre for Addiction and Mental Health on January 6 and 7, 2014.

SUBMISSIONS OF THE ESTATE

Officer M's estate submits that members of the Leamington Police Service targeted Officer M, were determined to destroy his career and drove him to the despair that led to his death. It contends that the Chief and/or other members of the Service, Board and City timed the investigation, the laying of the criminal and PSA charges and the application to the OCPC so that it would be impossible for Officer M to obtain employment with the OPP upon the abolition of the Service. The estate maintains that the Association had a conflict of interest and did not represent Officer M who was, therefore, required to retain his own counsel and incurred great expense. It insists that the Board withheld the information that Officer M was facing charges that would not be resolved until after the abolition of the force from the OCPC until it was too late to delay the disbandment. The estate also asserts that the Board must have known that the criminal charges against Officer M were weak since that would explain why it was so determined to continue the PSA prosecution after the Service was abolished.

The estate argues that the severance awarded to Officer M should include compensation for the Board's actions. It says that those actions are directly related to Officer M's termination and are, therefore, compensable under s. 40. It maintains that the purpose of severance pay is to make the terminated employee whole and that these circumstances require a unique remedy in order to accomplish that.

The estate argues that Officer M was not terminated on December 3, 2010 as the Board contends. It says that the Board did not tell Officer M that he had been terminated after the Service was disbanded. On the contrary, he was told that he continued to be under suspension. The estate claims that Officer M was always treated like an officer under suspension and was paid as one. He continued to contribute to his pension and was entitled to other benefits. The estate asserts that a severance payment is a lump sum and not the ongoing salary that Officer M received. The estate contends, further, that Officer M continued under the Board's control because it continued to employ him. The

estate claims that control limited his ability to seek other employment. It also asserts that Officer M was required to report to City Hall for a period of time after December 3, 2010.

The estate also argues that the Divisional Court did not say that Officer M had been terminated on December 3, 2010 in its decision dated April 27, 2013. It submits that this s. 40 arbitrator is, therefore, not bound by such a finding. The estate maintains that the court found that the City could not have two police services at the same time, not that Officer M was not an employee. It asserts that the court found that the Board could not continue to prosecute Officer M but it did not find that he was not an employee. The estate relies upon the CRA decisions that found that Officer M was an employee until April 27, 2013.

The estate submits, further, that the Board treated Officer M as an employee for two and a half years and cannot now insist that he was not one. It argues that the Board is trying to change reality. It maintains that no one ever told Officer M that the money he was receiving from the City was severance pay and that he never agreed to that. The estate insists that a severance payment requires some sort of agreement. It says that if Officer M had received severance pay it would have been a lump sum payment with one-time deductions and then he would have been able to get on with his life. Instead, he received a salary with employee CPP and EI contributions deducted from each cheque. The City also deducted dues for the Association.

The estate contends that the Board continued to control Officer M's life from December 3, 2010 to April 27, 2013 and it refers to sections 49 (1) and 89 (7) of the PSA which provide as follows:

49. (1) A member of a police force shall not engage in any activity,
- (a) that interferes with or influences adversely the performance of his or her duties as a member of a police force, or is likely to do so;
 - (b) that places him or her in a position of conflict of interest, or is likely to do so;
 - (c) that would otherwise constitute full-time employment for another person; or
 - (d) in which he or she has an advantage derived from being a member of a police force.

...

89 (7) If a chief of police, deputy chief of police or other police officer is suspended with pay, the pay for the period of suspension shall be reduced by the amount that he or she earns from other employment during that period.

The estate asserts that Officer M understood that he was an employee of the Board and was, therefore, prohibited from engaging in other employment. Furthermore, it claims that the suspended officer of one service cannot seek employment with another service. The estate argues that even if Officer M had obtained employment elsewhere, any money he made would have been deducted from his salary.

The estate is seeking the following:

Severance Pay

The estate argues that the severance pay awarded to Officer M should reflect the Board's wrongdoing in failing to delay the abolition of the Service until the PSA and criminal proceedings had been completed. The estate submits that Officer M could have been hired by the OPP if the Board had waited. The estate says that the Board did not meet the standard of care and, therefore, two months per year of service is the appropriate severance. It maintains that Officer M's service includes the period from December 3, 2010 to April 27, 2013.

Vacation pay for the period between December 3, 2010 and April 27, 2013.

The estate argues that Officer M never received any vacation from 2009 to 2013 and that the Board should, therefore, be required to pay vacation pay in the same manner as it was payable in the agreement between the Board and the Association.

Life Insurance

The estate submits that it is entitled to the life insurance that was part of the package of benefits covering Officer M prior to April 27, 2013. The estate says that it is entitled to the insurance payment as part of Officer M's severance entitlement or because the City should have continued to employ him.

Legal Costs

The estate is seeking reimbursement of \$65,000.00 for Officer M's legal costs in defending the PSA prosecution. It argues that those costs should be part of the severance payment because the Association did not represent Officer M in those proceedings and he was, therefore, required to retain his own counsel. It is also seeking \$8,500.00 for expenses related to this proceeding.

Damages and Penalty

The estate submits that it is seeking damages that reflect the bad faith that led to Officer M's termination. It argues that it is entitled to damages even if the arbitrator determines that Officer M's employment ended in December 2010. The estate says that the Board made false accusations and damaged Officer M's prospects of finding another job. It also alleges that the Board misrepresented the basis for Officer M's termination because it now says that it took place in December 2010.

The estate submits, further, that even if it were determined that Officer M was treated fairly up until December 2010, he is entitled to damages for how he was treated after that date since he was not allowed to get on with his life.

The estate also submits that the Board should never have terminated Officer M. It should have continued to employ him after the court issued its decision.

The estate also contends that if Officer M had been awarded WSIA benefits, the City of Leamington would have had to continue to pay him until his retirement. It says that the

City should have, at least, offered Officer M employment in a capacity other than a police officer.

The estate submits that it is, therefore, seeking continuation of Officer M's 1st class Constable salary for 11 years. It says that Officer M was 35 when he started his career and that he would have had to work until 2020 for his full pension. He could have worked five years beyond that. Therefore, his salary should have been continued for 11 years and that amount should be awarded to his estate.

The estate refers to the following awards: *The Town of Kapuskasing Police Services Board and Ohinski et. al.* (Unreported, October 27, 1994, Marszewski); *Orillia Police Services Board and Orillia Police Association* (Unreported, June 12, 1997, Jackson); *Goderich Police Services Board and Lonsbury et.al* (Unreported, October 15, 1999, Burkett); *North Glengarry Police Association and The Stormont, Dundas & Glengarry Police Services Board* (Unreported, March 22, 2001, Kirkwood).

SUBMISSIONS OF THE BOARD

The estate sometimes referred to Officer M's post December 2, 2010 employer as the City and sometimes as the Board. The Board advises that it, not the Corporation of the Town of Leamington is the party to this application. It says that Officer M was only ever employed by the Board and that the "City" has no authority to employ police officers.

The Board denies that its actions with respect to Officer M were improper in any way. It asserts that, in any case, the estate's allegations about what occurred prior to the abolition of the Service are irrelevant. The Board contends that the jurisdiction of an arbitrator under s. 40 is limited to determining appropriate severance upon the abolition of a service. It maintains that this arbitrator has no jurisdiction to determine whether the criminal or PSA charges should have been laid or whether the Board's actions with respect to those charges and the OCPC application were appropriate.

The Board acknowledges that it took the position up until April 27, 2013 that Officer M continued to be employed and was an officer under suspension. It insists, however, that the decision of the Superior Court on April 27, 2013 means that Officer M had, nevertheless, been terminated on December 2, 2010. The Board contends that since Officer M was terminated on December 3, 2010, the money it paid him from that day to April 27, 2013 was severance pay for the purposes of s. 40. It argues, further, that the appropriate amount of severance pay owing to Officer M was the formula negotiated between the Association and the Board in August, 2011, i.e. 1.25 months per year of service. According to the Board, Officer M was, therefore, entitled to 17 months of severance pay. As he was paid until April 27, 2013, he received 2.5 years of severance pay. The Board asserts that Officer M was, therefore, overpaid by \$70,000 and it seeks an order that the estate repay that amount.

The Board also argues that Officer M took the position before the Divisional Court that he had been terminated on December 3, 2010 and that the estate cannot resile from that.

In the alternative, the Board submits that if the money paid to Officer M after December 3, 2010 was not severance pay, it was earnings during the severance period. As he had earnings during the severance period he suffered no loss.

The Board argues that an arbitrator under s. 40 does not have jurisdiction to order damages. It also maintains that there is no vacation pay owing to Officer M's estate because vacation under the collective agreement is an entitlement to paid weeks off of work and Officer M was paid for over two years without having to work at all. The Board denies that Officer M had to report to City Hall for some period after December 3, 2010.

In the further alternative, the Board argues that no evidence was submitted demonstrating that Officer M attempted to mitigate his damages and it asks that I find that he failed to do so.

The Board refers to the following awards: *The Corporation of the Town of Prescott and the Prescott Police Services Board v. Her Majesty The Queen in the Right of Ontario as represented by the Ontario Provincial Police and The Ontario Civilian Commission on Police Services*, 2003 CanLII 14700 (ON SCDC); *The Town of Warton v. Chief Constable Alfred Schults* (OPAC 88-021) (February 23, 1988, Jackson); *Kingsville Police Services Board v. Chief Nick Kuipers*, (Unreported, November 15, 1999, Knopf); *Point Edward Police Services Board v. Leo Mayer*, (unreported, May 12, 2000, Kirkwood); *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 49 (S.C.C.); *Vilven v. Air Canada* (2012), 222 L.A.C. (4th) 319 (F.C.A.).

The estate replies that Officer M did try to mitigate his losses. He applied for a position with the OPP twice and was turned down. The estate asserts that Officer M could not have found a job with any other police service in the circumstances he found himself in. It also argues that he was diagnosed with Post Traumatic Stress Disorder after April 27, 2013 and was not able to work in a comparable position.

DECISION

The Leamington Police Services Board is the party to this application even though the Municipality of Leamington paid Officer M both before and after December 3, 2010.

Officer M's family and friends blame the Board for his failure to obtain employment with the OPP and for his death, which they believe was caused by the loss of his profession. The estate wants this arbitrator to order the Board to pay for all of that. However, the estate's case is based on some fundamental claims and assumptions that are beyond my jurisdiction to determine. The estate asks me to find that the Chief acted improperly in charging Officer M under the *Criminal Code* and under the PSA. While it is true that the Code charges were withdrawn after Officer M paid some money back to the Association, I have no jurisdiction to determine whether there was any impropriety in laying them in the first place. I also have no jurisdiction to determine whether the Hearing Officer would have found that Officer M should be disciplined or terminated. If I attempted to do so I would, essentially, be assuming the jurisdiction that the Hearing Officer lost.

The estate's case is also based on the assumption that if the OCPC had known about the charges against Officer M before it made its original decision, it would have refused or delayed the abolition of the service. However, I cannot know whether the OCPC would have done that or what, if any, difference it would have made. That would have depended on what the Hearing Officer decided.

My jurisdiction is set out in the appointment from the Minister. It says that I am appointed to “hear and determine a “Rights” Dispute between [Officer M] and the Municipality of Leamington Police Services Board with respect to section 40 – outstanding severance issues arising from the disbandment of the Leamington Police Service”. That jurisdiction does not extend to adjudicating disputes between Officer M and the Board that predated the disbandment. My jurisdiction is limited to determining the severance to which Officer M was entitled as a result of the abolition of the Service. In this case, although Officer M was not bound to the agreement with the Association, the package that the Board and Association negotiated for the other officers is a reasonable one that is consistent with the jurisprudence. I find that the package agreed to by the Association and the Board should apply to Officer M as well.

The issue, then, is whether Officer M was terminated on December 3, 2010 or April 27, 2013. If he was employed until April 27, 2013, he was entitled to the severance package for the period subsequent to that date.

The Board argues that the Divisional Court determined that Officer M was terminated on December 3, 2010 and that I am estopped, or otherwise precluded, from finding otherwise. However, the Court was not asked to determine what Officer M’s status had been since the abolition of the Service and it did not rule on that. The court essentially found that the current Board, being a section 10 Board, did not have the authority to continue to prosecute Officer M under the PSA. However, while that prompted the Board to discontinue its employment relationship with Officer M by ceasing to pay him, it did not change the reality of what had occurred over the prior two and a half years. The Board may have been acting without authority when it continued to employ Officer M after December 2, 2010 but it employed him, nevertheless. The court did not consider the implication of the fact that Officer M had been considered an officer under suspension since December 3, 2010. It certainly did not decide that the salary that Officer M had received was actually severance pay, thus, leaving him with no further entitlement. The court was not asked to rule on that and did not do so. However, those are the issues before me. They are outstanding severance issues arising from the disbandment of the Service and, therefore, within my jurisdiction.

After considering all of the relevant facts, I find that the Board employed Officer M until April 27, 2013. That was the Board’s position until that date and it, therefore, conducted itself as an employer until then. There is no dispute about that. It took the position that Officer M continued to be an officer under suspension because it wanted to continue the prosecution against him. A police services board is required to pay an Officer under suspension and it did so. The decision of the court did not change the nature of that relationship retroactively. The Board, having failed to persuade the court to overturn the OCPC decision could not then erase the fact that it had been employing Officer M. It could not change the salary it had paid him for the past two years into severance pay. Severance pay under section 40 is a matter of agreement or arbitrator order. A board cannot unilaterally declare the amount to be already paid. The Board is not just proposing a particular legal characterization of an acknowledged relationship between it and Officer M. For example, it is not asserting that Officer M was a dependant contractor rather than an employee. The Board is asserting that it did not have a relationship with Officer M at all after December 3, 2010. I cannot draw that conclusion given the undisputed facts before me.

The Board asserts that Officer M took the position in various pieces of litigation that it could not continue to employ him and that he had been wrongfully dismissed. Nevertheless, the Board did continue to pay him and to take the position that he was under suspension and that it should be able to continue the PSA prosecution against him. Thus, Officer M had that suspension hanging over his head for two and a half years impacting his ability to find employment as a police officer. If the Board had been permitted to continue the prosecution and the Hearing Officer had found that there was cause to dismiss Officer M, no severance would have been payable. However, if the Hearing Officer had found that there was no cause to dismiss him, there would have been no question that he was entitled to severance because the Service had been abolished and he could not be reinstated. The Board was, therefore, prepared to pay Officer M for a long time even though there was a chance that it would still owe him severance pay. Indeed, the amount of severance pay potentially owing was increasing the longer he was employed. There is no evidence that the Board ever advised Officer M that if it were not permitted to continue the prosecution it would take the position that the salary it was paying him was severance pay.

The Board contends, in the alternative, that even if the money it paid to Officer M was not severance, it should be set off against any severance owing to him. The Board is, essentially, arguing that it terminated Officer M on December 3, 2010 but that the money it paid him when it continued to employ him should reduce his severance entitlement. The inherent conflict in that position highlights the problem with the Board's claim that it terminated Officer M on December 3, 2010. In any case, I have found that Officer M was employed until April 27, 2013. The severance period, therefore, started after that date. The salary paid to him prior to April 27, 2013 was employment income from an earlier period. It was not income earned during the severance period and cannot be set off against any monies owing.

In summary, I find that Officer M was terminated when the Board stopped paying him after April 27, 2013. Therefore, his service continued to that date. I also find that he was entitled to the same severance package as that negotiated between the Association and the Board. That package is a reasonable one given Officer M's age, length of service, rank and the unlikelihood that he could find comparable employment.

The severance package between the Association and the Board includes 1.25 months of severance pay per year of service to a maximum of 24 months. However, Officer M died eight months after his termination. Pursuant to the Agreement, officers were entitled to continue their benefits during the severance period. It appears that life insurance was part of the benefits package and the estate contends that it is entitled to the life insurance benefit. However, the submissions I received from the estate on this issue were very limited. I was not even provided with a copy of the life insurance policy. I received no submissions at all on this issue from the Board. Neither party made submissions about the relationship between any severance that might be payable and the entitlement to life insurance, if any. I also find that I require more detailed submissions on the other aspects of the severance package such as benefits and vacation pay.

Other Severance Issues

Mitigation

The Board alleges that Officer M's estate failed to demonstrate that he mitigated his losses. However, I find that Officer M would have had great difficulty finding comparable employment. He did reapply to the OPP when the criminal charges were withdrawn but was refused employment anyway. It was highly unlikely that he would have obtained employment as a police officer anywhere else. Furthermore, there was some evidence that he was suffering from Post Traumatic Stress Disorder and that his mental health was deteriorating. He did not, therefore, fail to mitigate his losses.

Legal Fees

My jurisdiction is limited to determining the severance payable to Officer M as a result of the abolition of the Leamington Police Service. I have no jurisdiction to order the Board to reimburse his estate for the costs he incurred in defending himself against the PSA charges. I also have no jurisdiction to order the Board to pay expenses related to this proceeding. The arbitrator in *Goderich Police Services Board (supra)*, one of the awards referred to by the estate, did find that costs were payable under section 40 of the PSA. However, the majority of awards have found that arbitrators do not have the jurisdiction to make such an order. (see *Kingsville Police Services Board (supra)* and *Point Edward Police Services Board (supra)* as examples) Section 124 (6) of the PSA provides:

(6) The following rules apply with respect to the costs and expenses of the arbitration:

1. The Arbitration Commission shall pay the fees of any person the Solicitor General appoints to the arbitration board.
2. Each party shall pay its own costs incurred in the arbitration, including the fees of any person it appoints to the arbitration board.
3. The parties shall share equally the costs and expenses for matters shared in common, including the fees of any person whom they jointly appoint to the arbitration board,

I find, like the majority of arbitrators, that the above provision requires the parties to pay their own costs and expenses of this proceeding.

Association Dues

The Board deducted Association dues even though there was no longer an Association to remit them too. It is possible that those deductions should not have been made. However, that is an issue related to the income earned by Officer M when he was still an employee of the Board. It is not an outstanding severance issue arising from the abolition of the Service and is not within my jurisdiction to determine.

Damages and Penalty

The estate argues that the Board breached a duty of care by proceeding with the abolition of the service before the *Criminal Code* and PSA charges were determined, thus, making it impossible for Officer M to obtain employment with the OPP. It argues that Officer M is entitled to damages for the Board's actions. However, as I stated at the beginning of this section of the award, the estate's position relies on assumptions that I

cannot make. I do not know what the result would have been if the abolition of the service was delayed until the PSA charges were determined. Furthermore, I cannot determine whether the Chief acted properly in laying the PSA or the criminal charges. Therefore, even if I had the jurisdiction to award such damages, I have no basis to find that the Board breached a duty of care to Officer M and that any damages are owing to him.

Conclusion

I find that Officer M was entitled to the same severance package as the Association negotiated for its other members. That package included 1.25 months of severance pay for each year of service to a maximum of 24 months as well as vacation pay and benefits. Officer M died during the severance period raising the possibility of entitlement to life insurance. There are also outstanding issues with respect to other benefits and vacation pay. I, therefore, direct the parties to make submissions on how the terms of the severance package negotiated between the Association and the Board should be applied and quantified in these circumstances.

The parties should provide their submissions to each other and to me on or before February 10, 2015. The parties may respond to each other's submissions but such responses must be provided on or before February 25, 2015. After considering the parties' submissions I will determine the severance payment to be paid to Officer M's estate.

I remain seized.

Dated at Toronto, January 20, 2015



Laura Trachuk
Arbitrator