OPC AWARD

TORONTO | DFR | #16-005
Anderson | H. Alessandroni | July 15/16

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *POLICE SERVICES ACT*, R.S.O. 1990, C. P.15

BETWEEN:

Henry Alessandroni

(The "Complainant")

-and-

Toronto Police Association

(The "Association")

-and-

Toronto Police Services Board

(The "Board")

AND IN THE MATTER OF A COMPLAINT BY MR. ALESSANDRONI ALLEGING A BREACH OF THE ASSOCIATION'S DUTY OF FAIR REPRESENTATION

Ian Anderson, Sole Arbitrator

APPEARANCES:

For the Complainant:
Jonquille Pak, Counsel
Henry Alessandroni

For the Association:
Nini Jones, Counsel
Anne Cumming, In-House Counsel, Toronto Police Association
Ed Costa, Director of Civilian Field Services, Toronto Police Association

For the Board:
No one appearing

Hearing held in Toronto, July 7, 2016.

Award issued July 15, 2016.

1. The Complainant alleges that the Association breached the duty of fair representation it owes him when it failed to advance a grievance of his dated June 5, 2014 to arbitration. In his written complaint, the Complainant essentially alleged that the Association abandoned his grievance without explanation. However, during the consultation he agreed the Association had, with his agreement, settled his grievance. He alleged, however, that the Association failed to represent him adequately in the discussions giving rise to the settlement and that he did not understand that the settlement precluded the grievance from going to arbitration.

Jurisdiction

2. Outside of the police sector, the *Labour Relations Act, 1995* (the "OLRA"), generally applies to duty of fair representation complaints. Section 74 of the OLRA contains an express duty of fair representation and section 114 gives the Ontario Labour Relations Board (the "OLRB") exclusive jurisdiction to determine whether the duty has been breached. The OLRB does not have jurisdiction over the labour relations of the police and the *Police Services Act* does not contain an express duty of fair representation. There is, however, no dispute that the Association owes the Complainant a duty of fair representation or that I have jurisdiction, as a "rights" arbitrator appointed pursuant to the *Police Services Act*, to hear and determine this complaint. In any event, that duty and jurisdiction have been recognized by the Court of Appeal for Ontario: see *Renaud v. Lasalle (Town of) Police Assn.* (2006), 216 OAC 1 (CA); *Cumming v. Peterborough Police Association*, 2013 ONCA 670.

Process

3. On the agreement of the parties, the hearing of this complaint was conducted by means of the consultation process used by the OLRB (of which I was previously a Vice Chair) when it hears duty of fair representation complaints under the OLRA. In essence, counsel for the Complainant was asked to state all material facts which the Complainant alleged gave rise to a breach of the duty of fair representation by the Association. Counsel for the Association was asked to indicate areas of agreement and disagreement and to state any other material facts on which the Association relied. Counsel for the Complainant was given an opportunity to indicate any areas of disagreement with the material facts stated by the Complainant. The process is somewhat less formal than the preceding description might suggest. For example, points of clarification and agreement were sought throughout, rather than waiting for one side or the other to finish its representations as to the facts. Further, in this case I specifically asked the Complainant if there was anything he wished to add to the statements made by his counsel and he availed himself of that opportunity. At the end of this part of the process I was satisfied that there were no material facts in dispute on which I required evidence and directed the parties to proceed with their submissions. By adopting this procedure the parties were able to conclude the case within one day.

Legal Framework

4. There is no dispute about the principles applicable to duty of fair representation complaints. They have been developed in the jurisprudence of the OLRB. They have been adopted in an arbitration under the *Police Services Act* to determine a duty of fair representation complaint: *LaFrance v. North Bay Police Association*, unreported, September 27, 2009 (Starkman). The duty of fair representation does not require an association to be correct with respect to a decision not to proceed to arbitration. It only requires that the decision not be arbitrary, discriminatory or made in bad faith. The meaning of those terms was summarized in the oft cited *Switzer v. National Automobile Aerospace Transportation and General Workers Union of Canada*, [1997] OLRB No. 2605, as follows:

> (a) "arbitrary" means conduct which is capricious, implausible, or unreasonable in the circumstances. This is often demonstrated by a failure by the union to properly direct its mind to a situation, or to conduct a proper and meaningful investigation when one appears to be called for;
>
> (b) "discriminatory" means distinguishing between or treating employees differently without good reason;
>
> (c) "bad faith" is conduct motivated by hostility, malice, ill-will or dishonesty.

5. There is no allegation in this case that the Association acted in a manner that was discriminatory or in bad faith. The only allegation is that the Association acted in an arbitrary manner.

6. There is also no dispute that the OLRB dismisses applications on the basis of delay. Arbitrators appointed under the *Police Services Act* have also held that they have discretion to dismiss grievances on the basis of delay: see *Sault Ste. Marie Police Services Board v. Sault Ste. Marie Police Association*, unreported, March 21, 2006, (Starkman) and the cases cited therein. The Complainant does not challenge that this discretion exists. He simply argues that it should not be exercised.

Facts

7. The facts were not in dispute unless otherwise noted.

8. The Complainant has 26 years of service in the civil bargaining unit. During the period of his employment he progressed through a variety of positions and wage Classes. In or about 2005, the Complainant obtained the position of an "eCops Planning Analyst" in Records Management Services. This is a Class 10 position for the purposes of the salary grid.

9. Commencing in or about 2010, the Complainant had interactions with certain of his supervisors which ultimately prompted him to file two applications with the Human Rights Tribunal of Ontario. The first application alleged discrimination on various

grounds. The second application alleged the Complainant had experienced reprisals as a result of filing the first application. By decision dated March 10, 2014, the Tribunal dismissed both applications on the basis of delay and that there was no reasonable prospect that they would succeed.

10. eCops was a data management system with respect to interactions of police with the public. In 2012 and 2013, the Board introduced a new data management system, called IRIS. This technological change resulted in numerous employees being displaced from their jobs, including the Complainant. There are no bumping rights under the applicable collective agreement. Rather Article 21.01 provides affected employees with a more limited right:

> It is the policy of the Board to endeavour to place in other positions any permanent service members who may be displaced by technological improvements in the operation of the Service ....

11. By letter dated May 21, 2014, the Board gave the Complainant formal notice that as a result of technological changes, his position as an eCops Planning Analyst was being eliminated. The May 21 letter noted that he had met with the Board's Employment Unit on November 27, 2013 for the purposes of having his skills assessed to determine a comparable placement. The letter advised him the position which had been identified was that of an Emergency Planner, a Class 7 position. The movement from a Class 10 to a Class 7 position meant the Complainant's annual salary would be reduced from $87,548.01 to $68,169.02. The May 21 letter indicated that the Complainant, however, would be red-circled at the higher rate for a period of six months, expiring December 30, 2014. The May 21 letter asked that the Complainant sign and return a copy to indicate his acceptance of these terms.

12. The Complainant contacted the Association. He expressed concerns about signing the May 21 letter to indicate his acceptance of the terms given the significant financial impact this would have on him. He noted that he had been denied positions on the basis of a ""core value" clause that sits on my file". The Complainant also raised concerns about the assessment of his skills, noting that he had in the past performed higher rated positions not identified by the assessment. He stated: "I can't help but wonder if this is a reprisal as a result of my exercising my rights under the HRTO." No particulars were ever articulated in support of this allegation.

13. The reference to the HRTO relates to the Complainant's applications to the HRTO already discussed.

14. The reference to the ""core value" clause that sits on my file" relates to the Complainant's disciplinary record. In 2012 and 2013 the Complainant had been assessed a one day suspension and demotion and a three day suspension respectively. Grievances were filed by the Association on behalf of the Complainant with respect to both of these disciplinary actions. Both grievances were resolved by Minutes of Settlement dated September 13, 2013 signed by the Complainant, the

Association and the Board. The settlement provided in part that the three day suspension, dated May 13, 2013, would be reduced to a two day suspension. The significance of this is that the applicable collective agreement contains a two year sunset clause. As a result the Complainant would have discipline on his record until May 13, 2015.

15. On the advice of the Association, the Complainant added the following words to the May 21 letter prior to signing it back:

> I, Henry Alessandrini, have read and understood the terms and conditions of this offer of employment. While I accept the offer of employment, I do not necessarily accept the terms and conditions and have raised this matter with the Toronto Police Association. The Toronto Police Association will take up this matter with labour relations shortly.

16. The Association filed the grievance dated June 5, 2014 which gives rise to these proceedings. The grievance alleged that the Complainant had been improperly reclassified and demoted. The grievance asserted that the Board's actions were in breach of Article 3 of the applicable collective agreement (management rights) and constituted a reprisal against the Complainant for filing his human rights complaints.

17. On July 21, 2014, a Step 2 Meeting was held in relation to the Complainant's grievance. In attendance on behalf of the Association were Tom Froude, then Director of Civilian Field Services for the Association, and Anne Cumming, In-House Counsel for the Association. The Complainant was present for part of the meeting. The Association then met privately with the Board and subsequently reported back to the Complainant as to the substance of its discussions. The Association's plausible assertion that this was its usual practice was not challenged.

18. At some point, the Association orally presented the Complainant with a settlement proposal. The Complainant states that it was on July 21, 2014; the Association states that it was in fact in August, 2014 following further discussions between Mr. Froude and his counter part at the Board. The settlement provided that the Complainant would move to the same Class 7 position, but that his salary would be red-circled at the Class 10 rate for a period of 17 months, ending November 30, 2015. The significance of this was that there would now be the period from May 13, 2015 until November 30, 2015 during which the Complainant could apply for positions without discipline on his record while continuing to receive his Class 10 rate of pay.

19. There is no dispute that the Complainant accepted this settlement proposal.

20. The Complainant alleges that the Association did not adequately represent him in the discussions with the Board and that it presented the settlement to him as the only option. The Complainant also alleges that he did not understand that the settlement precluded the grievance from being advancing to arbitration. However, he also alleges that the day after he accepted the settlement (i.e. July 22, 2014 on his version of the facts), he contacted Mr. Froude and asked that the grievance

proceed to arbitration. The Complainant alleges that Mr. Froude told him it was too late because he had already accepted the settlement.

21. For its part, the Association alleges that it did very good job in representing the Complainant, obtaining a real and substantial benefit for the Complainant in relation to a grievance with no merit. It also states that Mr. Froude, had retired from the Association in October, 2014. Mr. Froude "cleaned out his desk" when he retired and the Association is unable to find Mr. Froude's notes with respect to all of his interactions with the Complainant. Although in attendance at the hearing, Mr. Froude has no recollection of the Complainant calling to resile from the settlement.

22. I do not find it necessary to resolve these differences. There is no dispute that on August 29, 2014 the Association sent a letter to the Board, copied to the Complainant, withdrawing the grievance. The Board provided a revised version of the May 21 letter, dated September 9, 2014. The September 9 letter was identical in all material respects to the May 21 letter except that it now stated: "As agreed, your salary will be red-circled for a period of 17 months, to expire on November 30, 2015." As with the May 21 letter, the September 9 letter asked the Complainant to sign and return a copy to indicate his acceptance of the terms and conditions of the offer of employment. The Complainant did so on September 24, 2014. Unlike his execution of the May 21 letter, he did not add any qualifying text to the letter when he signed.

23. The Complainant continued to be paid at the Class 10 rate until November 30, 2015. During the red-circling period, the Complainant applied, unsuccessfully, for positions. He did not seek to file grievances with respect to any of these denials.

24. On August 27, 2015, the Complainant contacted Ms. Cumming, concerned that the period of red-circled pay would soon be coming to an end. He asked Ms. Cumming if he could sue for constructive dismissal. She explained, correctly, that he could not. He advised Ms. Cumming that he had applied for other positions, but had been "shut out". Ms. Cumming advised the Complainant, correctly, that if he felt that there had been a breach of the collective agreement it was his responsibility to approach the Association about filing a grievance. Notably, the Complainant did not ask Ms. Cumming about taking his June 5, 2014 grievance to arbitration.

25. On January 14, 2016, by letter from his counsel, the Complainant advised the Association that he was alleging it had breached its duty of fair representation in failing to advance the grievance to arbitration. On February 19, 2016, the Complainant filed the application with the Ontario Police Arbitration Commission which ultimately gave rise to these proceedings.

26. The Complainant stated that when he was presented with the settlement of 17 months of red-circled salary continuance before facing a reduction of 22%, his priority became one of financial survival. He had to re-arrange his finances. For this and other reasons this was an extremely stressful period causing him to seek

psychological help. The Complainant alleges that only after the 17 months, when he had sorted out his finances, did he realize that he had another option: to bring this complaint against the Association. The Complainant emphasizes the significant impact which the movement from his Class 10 position to the Class 7 position has had on him financially, emotionally and psychologically.

Analysis and Decision

27. On the Complainant's facts, he was advised by Mr. Froude on July 22, 2014 that the Association would not be proceeding to arbitration. On the Association's facts, the Complainant learned no later than his receipt of a copy of the letter dated August 29, 2014 withdrawing his grievance that the Association would not be proceeding to arbitration. In either case, the Complainant did not give notice to the Association of his allegation that it had breached its duty of fair representation with respect to its processing of the grievance until January 14, 2016. This is at least 16 months after the Complainant knew that the Association was not proceeding to arbitration with his grievance. It is also at least 16 months after the Complainant alleges the Association failed to adequately represent him with respect to the discussions with the Board which gave rise to the settlement. The complaint itself was not filed until one month later. This is very significant delay by any labour relations measure.

28. Counsel for the Complainant argues that dismissal for delay is not automatic. She argues that the Complainant is unsophisticated, did not understand his options and was under overwhelming stress during the 16 (or 17) month period.

29. I agree that dismissal for delay is not automatic. I do not agree that the Complainant is unsophisticated with respect to asserting his rights. He has approached the Association on multiple occasions about his rights; the Association has filed several grievances on his behalf; he has agreed to settlements of other of those grievances; he has, on his own accord, initiated and prosecuted legal proceedings.

30. I accept that the Complainant was under a great deal of financial and psychological stress. There is, however, nothing before me to suggest that stress would have precluded the Complainant from filing this complaint at an earlier point in time.

31. Finally, the Association has demonstrated some actual prejudice as a result of the retirement of Mr. Froude, the destruction of his notes and his diminished recollection of events.

32. The Association's decision not to proceed to arbitration was a result of the settlement. This decision cannot be said to be arbitrary as the term is used for the duty of fair representation. Just the opposite: it would have been entirely unreasonable and capricious for the Association to attempt to advance to arbitration a grievance which had been settled. The Complainant attacks the settlement itself, but only after taking full advantage of its terms. He signed back the Board's September 9 letter accepting the terms of the revised offer it made pursuant to the

settlement. He did so without reservation, in marked contrast to the manner in which he signed back the May 21 letter. He received the Class 10 rate of pay for seventeen months instead of the six originally offered by the Board. He had the period of May 13, 2015 until November 30, 2015 during which he could apply for positions without discipline on his record while continuing to receive his Class 10 rate of pay. Only after all of these advantages of the settlement had been received by the Complainant did he file this complaint. It would be inequitable to allow him to proceed in these circumstances.

33. These reasons, taken together, cause me to dismiss the complaint without inquiring further into its merits.

Dated this 15th day of July, 2016.

"Ian Anderson"
Ian Anderson
Arbitrator