

NON-OPAC AWARD

ORANGEVILLE Kaplan	SECTION 40 Member Severance	#21-009 Nov 5/21
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IN THE MATTER OF AN ARBITRATION
PURSUANT TO *THE POLICE SERVICES ACT*

BETWEEN:

The Orangeville Police Services Board

and

The Orangeville Police Association

Before: William Kaplan
Sole Arbitrator

Appearances

For the Board: Glenn Christie
Hicks Morley
Barristers & Solicitors

For the Association: Nini Jones
Paliare Roland
Barristers & Solicitors

The matters in dispute proceeded to a hearing by Zoom on November 4, 2021.

Introduction

On August 10, 2020, I issued an award (the award) which, among other things, set out the terms and conditions that would apply to the severance of Orangeville Police Service Board (Board) members who were being transferred to the Ontario Provincial Police (OPP) coincident with the Service's disbandment at the end of October 2020. At the request of the parties, I remained seized with respect to the implementation of the award. And, as it happens, two issues arose relating, broadly speaking, to the costs associated with the transfer of member's pension from OMERS to the Public Service Pension Plan (PSPP). The parties filed detailed written submissions, and the matters in dispute proceeded to a hearing held by Zoom on November 4, 2021. It was quite clear that the outstanding issues had to be expeditiously decided. Both parties agreed that I had the jurisdiction to deal with the matters in issue.

The Award

Paragraph 6 of the award provides:

The Board will pay all pension contribution costs for members employed by the OPP to ensure that the member has the same pensionable service under the Public Service Pension Plan as under the OMERS pension plan. I leave it to the parties to determine how to specifically implement this provision, in keeping with the rules of the Public Service Pension Plan.

The First Issue in Dispute

Summarily and broadly stated, the first issue to be resolved is whether the Board has any responsibility to pay any increase in any shortfall that arises from the fact that the OPP has given a member an increase in salary.

The Second Issue in Dispute

The second issue relates to the administrative process for transferring the funds. The Board cannot directly pay any shortfall amounts. Only former members can make these payments, so the Board would have to pay the member who would then have to remit the funds.

Position of the Parties

The First Issue

In the Board's submission, it is responsible for any shortfall amount on transfer based on the wage rate at departure. However, the Board is not responsible for making up any (additional) shortfall amount arising from an increase in salary resulting in an increase in pensionable earnings leading to a higher cost to replicate the previous pensionable service. Any increase in salary – and pensionable earnings – following transfer post-dates the member's termination with the Board and cannot be part of the obligation set out in the award. Why, Board counsel asked, should Orangeville be responsible for impacts arising from former employees receiving increases in their salaries from their new employer? That would not be a reasonable outcome in the Board's submission.

In the Association's view, the Board's position was completely untenable. The fact of the matter is that at the time of disbandment, OPP wages were higher than those in Orangeville, as was well known. It was, accordingly, both understood and in the contemplation of the parties that any shortfall would have to be calculated based on the higher salary received immediately on transfer. The whole point of the award was to put the member – pension-wise – in the same position she would have been in but for the disbandment insofar as the calculation of pensionable service was concerned. That is what the award required by its clear language. The Board was, therefore, responsible for any increased shortfall amount arising on transfer to give effect to the award's requirement that the member have the same pensionable service under the PSPP as they did under OMERS. In the Association's submission, it was as simple and as straightforward as that.

The Second Issue

In the Board's view, any member receiving a shortfall payment must provide written proof of forwarding the funds or lose entitlement to the funds altogether.

In the Association's view, this matter was already resolved by amendments following the award to both the uniform and collective agreements:

The Board will pay all pension contribution costs for members employed by the OPP to ensure that the member has the same pensionable service under the Public Service Pension Plan as under the OMERS pension plan. Such contribution costs shall be payable directly to the member following receipt by the Board of written confirmation of the contribution amount from the pension plan administrator.

Decision

Having carefully considered the submissions of the parties, it is my view that the Board must make up the entire shortfall on transfer. The award states: "The Board will pay all pension contribution costs for members employed by the OPP to ensure that the member has the same pensionable service under the Public Service Pension Plan as under the OMERS pension plan." This language is clear and categorical. The Board must pay "all" the pension contribution costs "to ensure the *same* pensionable service" under the new plan as was enjoyed under the old plan (emphasis mine). This language, including the word "all" is dispositive.

The award requires that the member receive the same pensionable service under the PSPP as was enjoyed under OMERS. One can readily understand why the Board might not consider itself responsible for an increased shortfall resulting from an increased OPP salary with its consequent cascade on the calculation of pensionable service, something over which it had no control. Nevertheless, that increased shortfall remains a Board responsibility because the overriding awarded entitlement is no diminution in pensionable service.

This conclusion gives effect to the general principle that Section 40 awards, like the award at issue here, are intended to compensate members for their losses resulting from termination of their employment. This conclusion is also consistent with rules of statutory interpretation and with the long history of full compensatory adjustments upon disbandment of municipal police forces when employees are transferred

to the OPP, not to mention legitimate member expectations that informed pension elections. This is also reflected in the numerous authorities on point setting out governing principles most notably that members who have had their employment terminated due to disbandment have an entitlement to be compensated for their losses. In this case, that entitlement means making up the shortfall on transfer even where an increase to it is even in large measure the result of a salary increase on joining the OPP. Notably, increased salary is not the only driver of increased shortfalls on transfer. In any event, the member must end up with the same pensionable service under PPSP that was enjoyed under OMERS because that is what the award requires. The costs of maintaining a member's pension service must be borne by the disbanding Board, and those costs are the ones determined by the administrator (as is also reflected in the language of both collective agreements).

Quite clearly, any member receiving shortfall funding must, as a condition of that receipt, provide written proof that the shortfall amounts were appropriately remitted. This requirement has already been memorialized in both the civilian and uniform collective agreements. Accordingly, the Board shall, immediately advise the administrator of this award and make whatever arrangements are necessary to arrange for the expeditious transfer of the funds to members, and then the members must send the funds to the administrator. Members must provide written confirmation of receipt of these payments and their transfer to the administrator. Any member who does not transfer the payment to the administrator must return all transferred funds to the Board.

Conclusion

Accordingly, and for the foregoing reasons, the Board's obligation is to pay the full shortfall amount required to ensure that the member enjoys the same pensionable service under the new plan as they did under the old. The payment process is as set out above unless the parties otherwise agree. At the request of the parties, I continue to remain seized with respect to the implementation of this award.

DATED at Toronto 5th day of November 2021.

"William Kaplan"

William Kaplan, Sole Arbitrator