

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GODERICH POLICE SERVICES BOARD

AND:

LONSBARY AND BROWNLEE

IN THE MATTER OF GRIEVANCE:

RE: Severance Dispute Referred under S.40 of the
Police Service Act R.S.O

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARING FOR THE EMPLOYER:

Ben A. Jetten - Counsel
And others

APPEARING FOR THE UNION:

David S. Thompson – Counsel

Hearing in this matter was held in Goderich, Ontario September 16, 1999

A W A R D

Prior to April 6, 1998 the Town of Goderich provided its own policing. Effective from that date the Goderich Police Service was abolished and policing was assumed by the Ontario Provincial Police (O.P.P.) pursuant to a proposal submitted to the Town by the O.P.P. Prior to the takeover by the O.P.P. the Goderich Police Service consisted of a chief (George Lonsbary), two sergeants (including Ken Brownlee), ten constable, one special constable and ten part-time civilian guards. Under Section 40 of the Police Services Act R.S.O., “a board may terminate the employment of a member of the police force for the purpose of abolishing the police force ... if the Commission consents and the abolition or reduction does not contravene this Act”. Section 40(2) stipulates that “the commission shall consent to the termination of the employment of a member of the police force under subsection (1) only if (a) the member and the board have made an agreement dealing with severance pay or agreed to submit the matter to arbitration”. Finally, Section 40(4) provides that “Section 124 applies to an arbitration referred to in this section with necessary modifications”. Neither former Chief Lonsbary nor Sergeant Brownlee reached agreement with the board with respect to severance pay, with the result that these issues have been referred to me by the parties pursuant to Section 124 of the

Police Services Act R.S.O. There is no dispute between the parties with respect to my authority to hear and determine these matters.

The facts are essentially uncontroverted. Former Chief Lonsbary, who is 53 years of age, joined the Goderich Police Service in 1973, after serving as a constable on the Norwich Police Force from 1968 to 1972, became Acting Chief of the Goderich Police Service in January 1996 and assumed the position of Chief in July 1996. He was employed as the Chief of the Goderich Police Service under a contract of employment between himself and the Goderich Police Services Board, dated July 9, 1996. The contract provided for a termination date of July 31, 2002 subject to automatic renewal year to year thereafter to age 60 (February 28, 2006). There is no dispute that the normal retirement age for a police officer is age 60.

The terms of employment, contained in Appendix A of former Chief Lonsbary's contract of employment, provide, in part, for an annual salary of \$59,500 or at a minimum a salary 26% greater than the salary for the first class constable; the pension plan currently in force with the municipality (OMERS), with an early retirement benefit pension retirement age of 60; and the payment of legal fees in respect of any civil, criminal or disciplinary proceeding "that is brought against him or involving him in his capacity as Chief of Police". Mr. Lonsbary, as the Chief of the Goderich Police Service, had full responsibility for policing within the Goderich geographical confines. Former Chief Lonsbary applied for the rank of staff sergeant with the O.P.P. and following the standard rank assessment process that is undertaken by the O.P.P. when replacing a municipal police service, he was given that rank at an annual salary of \$68,433 (increased

to \$69,425 effective December 1, 1998 and \$72,043 effective April 1, 1999). It is to be remembered that Mr. Lonsbary was earning \$61,825 annually (plus a \$350 one time payment in 1998) at the time that the Goderich Police Service was abolished. It is fair to say that Mr. Lonsbary has accepted a position of lesser stature with less responsibility. However, notwithstanding the higher salary, he works fewer hours. He now works from the Clinton detachment, which is within commuting distance of Goderich. However, he has relocated there. It is agreed between the parties that the present value of the pension loss incurred by Mr. Lonsbary as a result of not remaining in the OMERS plan to normal retirement age is \$41,820. It is further agreed that the present value of former Chief Lonsbary's wage gain to age 60, as a result of transferring to the O.P.P. as a staff sergeant, is \$53,000.

The issues between the parties as they relate to the severance owed to former Chief Lonsbary are: firstly, whether he is entitled to the equivalent of both notice and severance; secondly, whether the amount of the salary gain should be offset against the amount of the pension loss; thirdly, whether an amount to reflect the loss of rank should be included; and fourthly, whether an amount to reflect legal fees should also be included.

Mr. Brownlee, who is 47 years of age, joined the Goderich Police Service in 1981. He had previously spent nine years as a first class constable with the Metropolitan Toronto Police Service. He was promoted to the position of acting sergeant in 1995 and to the position of sergeant in 1996. He went through the same rank determination process with the O.P.P. as had former Chief Lonsbary. However, whereas he had sought

The rank of sergeant, he was offered a placement at the rank of senior constable, which he accepted. Mr. Brownlee had worked under the terms of a collective agreement between the local police association and the local board of police services that expired on December 21, 1998 or at the date of disbandment. He was paid \$62,995 per annum and, in addition, the one-time lump sum of \$350, at the time of accepting the senior constable position with the O.P.P. The senior constable position with the O.P.P. paid \$54,532 effective April 4, 1998, \$56,950 effective December 1, 1998 and \$57,409 effective April 1, 1999. It is agreed that the present value to age 60 of the wage gain to Mr. Brownlee as a result of his transfer to the O.P.P. is \$14,685. However, the Police Services Board considers the collective agreement under which he worked to be a term definite contract that should restrict his entitlement to the period prior to December 21, 1998. It is further agreed that the present value of the pension loss to Mr. Brownlee, as a result of not remaining within OMERS pension plan to age 60, is \$29,850. This calculation includes the value of the spousal survivor's benefit, even though Mr. Brownlee is presently not married. The Police Services Board takes the position that because he was not married at the time of disbandment, the value of the spousal survivor's benefit should not be included. Mr. Brownlee also seeks inclusion of legal fees in the calculation of his severance.

The issues as they pertain to the severance owed to Mr. Brownlee are: firstly, whether he is entitled to the equivalent of both a notice period and severance; secondly, whether the value of the spousal survivor's benefit should be included in the present value of the pension loss; thirdly, whether this present value of the salary gains should be offset

against the present value of the pension loss; fourthly, whether an amount should be included to reflect the loss of rank; and fifthly, whether an amount should be included to reflect legal fees.

I have considered both the submissions of counsel and the authorities submitted in support of these submissions. I accept, as do counsel, that in deciding the question of severance in connection with the disbandment of a police service pursuant to Section 40 of the Police Services Act R.S.O., the common law principles that apply in cases of unjust dismissal, as adapted to the special circumstances of both policing and the disbandment of a police service, should govern. In this regard, as a general statement I adopt the reasoning of Arbitrator Jackson in *re: Orillia Police Services Board and the Orillia Police Association* (June 12, 1997) (unreported) (Jackson) as follows:

Turning to the law applicable to this situation, it is now accepted that the arbitration of severance disputes under Section 40 disbandments should be decided on the basis of the civil-law principles of unjust dismissal. The following excerpt from *Re Town of Warton and Chief Constable Alfred Schultz* (1988), a decision rendered by the arbitrator, discusses these principles and their application in the disbandment of police forces.

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

(See also *Kingsville Police Services Board and Kingsville Police Association* (May 3, 1999) *Unreported* (Knopf).

However, while the overriding objective of shielding the affected employee from the economic consequences of termination has application in all cases, the concept of reasonable notice does not have application in those cases, as here, where there is continuity of employment. Reasonable notice is intended to compensate the affected employee who, as a result of the termination, suffers a hiatus in employment (as in the case of Chief Schultz after he was terminated by the Town of Wiarnton). Where the affected employee accepts alternate employment, as here, with no break, the effect of providing reasonable notice, in addition to protecting the employee from all of the other adverse economic consequences of his/her termination, is to create a windfall. Rather, keeping in mind the overriding objective of making the employee economically whole, severance is based on “the obvious and foreseeable economic consequences ... flowing out of his/her termination.” Accordingly, absent any statutory or contractual requirement to provide a payment in lieu of notice, the calculation of severance, where there is continuity of employment, must be limited the foreseeable and reasonable economic consequences of the termination.

When reference is had to the legal texts and to the judicial authority submitted by the Police Services Board, it is clear, firstly, that in making a plaintiff whole (i.e. protecting the affected employee from the foreseeable economic consequences of the termination), it is the complete economic package that must be weighted in assessing the extent of any loss and, secondly, that there is a duty upon a plaintiff to mitigate, such that

any loss must be offset by amounts earned through alternate employment. (See: *McGregor on Damages*, 16th edition, 1997, pp.185-6, 188, 219; S.M. Waddams, *The Law of Contracts*, 4th ed., 1999, pp.552-554, 558-559; Waddams, *The Law of Damages*, 2nd ed., updated looseleaf, pp.5-54 to 5-55, 5-58; *Red Deer College v. Michaels*, [1976] 2 SCR 777; *Neilson v. Vancouver Hockey Club Ltd.*, 1988, 51 DLR (4th) 40 (BCCA), leave to appeal to the Supreme Court of Canada refused, (1988) 92 NR 240 (note); *Wilson Crown Trust Co.*, 1992, 44 CCEL 123 (Ont. S.C.).) This principle was succinctly put by the British Columbia Court of Appeal in *Re: Nelson v. Vancouver Hockey Club Ltd* (*supra*) which held that “whether a contract of employment is for a fixed period or an indefinite time, the usual rules of mitigation and earnings from other sources after termination are taken into account unless the contract provides otherwise”. Accordingly, absent special circumstances that would apply here, the severance calculation must be based on the net effect upon the individual, taking into account the whole package of employment related benefits and the impact of any mitigation.

Two arguments are made on behalf of the affected individuals in support of special consideration. The one is based on the loss of rank and the other is based on the security of tenure enjoyed by a police officer. Dealing firstly with the impact of the loss of rank. I accept that a loss of rank is of special significance in policing. However, it is difficult to quantify the impact in circumstances where, notwithstanding a loss of rank, there is a substantial increase in pay. One would normally expect that a loss in rank would be accompanied by a decrease in pay with the result that the affected individual could rightfully claim the difference as constituting an economic loss. Accordingly, in

circumstances where, notwithstanding the loss of rank, there is a substantial increase in pay, a question arises as to whether there is a quantifiable loss. This is especially so where the individual sought the rank of staff sergeant within the O.P.P. and now works fewer hours. In my view, the calculation of an amount to compensate for the loss in rank in all the circumstances here would be both speculative and inconsistent with the objective of making the individual economically whole.

In so far as the grievors rely on the awards in *Re: Town of Wiarton and Chief Constable Alfred Schultz* (*supra*) and *Kingsville Police Services Board and Kingsville Police Association* (*supra*) in support of the awarding of compensation for loss of rank, these awards do not support their claim. Both of these awards stand for the proposition that the initial refusal of a police officer to take an alternate position of a substantially lower rank cannot be used as evidence of a failure to mitigate. These awards do not stand for the proposition that, notwithstanding the acceptance of a position of lower rank with higher pay, the affected officer should nevertheless be compensated for his/her loss of rank. The jurisprudence supports the conclusion that the analysis be an economic one, such that the higher pay negates any claim for additional compensation for loss of rank or, conversely, negates any claim that because of the loss of rank the higher pay not be offset against the pension loss.

It is clear to me that were it not for the statutory right to terminate in connection with the disbandment of the Goderich force, both grievors, based on their records, would, in all likelihood, have remained to the normal retirement age of 60. It seems to me, therefore, that this is the age that should be used for purposes of making the severance

calculations here. However, in circumstances where the objective is to make the grievors economically whole, where they have accepted alternate policing employment (in contrast to the situation in *Re: Penetanguishene Police Services Board and Penetanguishene Police Association* (*supra*), where there was no comparable employment for the affected civilian employee) and, most importantly, where there is an increase in salary, the security of tenure enjoyed by police officers does not assist them. This is so because even though it can reasonably be concluded that the grievors would have remained with the Goderich force to age 60, the higher salary that they are now paid is an economic gain that must be used to offset other losses.

The Police Services Board seeks to have Mr. Brownlee's pension loss reduced by the amount of the survivor's benefit. It seeks to do so by reason of the fact that presently Mr. Brownlee does not have a spouse. However, regardless of his marital status, he would have been covered by a pension with a survivor's benefit if he married at any time while a member of the Goderich Police Service. He may marry in the future. Accordingly, his pension loss should reflect the loss of the survivor's benefit if he is to be made economically whole.

Finally, I turn to the question of legal fees. The Police Services Board relies on Section 40 of the Police Services Act R.S.O. in support of its position that all costs including legal fees are to be paid by the respective parties. Section 40, which stipulates that the commission shall consent to the termination of a member if the member and the Board have agreed to submit a severance dispute to arbitration, incorporates Section 124 as governing such arbitration. Section 124(6) provides that "each party shall pay its own

costs incurred in the arbitration, including the fees of any person it appoints to the arbitration board”. The Police Services Board argues that the statutory requirement for each party to pay its own costs provides a complete answer to the claim for legal fees.

This argument has a surface attraction and, indeed, is supported on a technical reading of the statute. However, Section 124(6)2 refers to “each party” assuming its own costs. Clearly, the contemplation is that the institutional parties (the “Association” and the “Board” as defined in Section 2 of the Act), whose disputes are the ones normally submitted to arbitration under the section (i.e. the parties), would each assume their own costs. This as it should be, such that if this had been a dispute between the Goderich Police Association and the Police Services Board, I would have no hesitation in rejecting a claim for legal fees. The issue here is more difficult because it involves a dispute between two individuals and the Police Services Board in respect of their individual severance. The issues raised are complex and some are issues of first impression involving the application of legal principles that reasonably require the retention of counsel. I do not consider the claims before me to be in any way frivolous. Were it not for the disbandment of the Goderich Police Service and the attendant termination of their employment, these individuals would not have had to incur the significant cost of retaining counsel. Clearly, it is a cost that is a direct and foreseeable result of the disbandment of the Goderich Police Service that would not otherwise have been incurred.

While Section 40 refers to a dispute between a “member” and the board and whereas Section 124 is incorporated “necessary modification”, I have a great deal of difficulty accepting that the legislature, having given me a broad discretion to decide

matters of severance, would have intended that legal fees incurred in the circumstances here could not be included in calculating the amount necessary by way of a severance payment to make these individuals economically whole. The legislature would not have intended that individual police officers (not represented by a police association) should be detrimentally affected by reason of the cost of the legal representation necessary to pursue reasonably based severance claims in connection with the disbandment of a police force. Accordingly, having regard to the remedial purpose of Section 40 and to the broad discretion therein to have all severance claims resolved at arbitration on a fair and economically sound basis and to the jurisprudence (relied upon here) that holds that affected officers should be made economically whole, I find that I have discretion to include the cost of reasonably incurred and charged legal fees in the calculation of an appropriate severance payment.

Having regard to all of the foregoing, it is my award that both former Chief Lonsbary and former Sergeant Brownlee be paid a severance allowance based on the present value of the pension loss at age 60, as agreed by the respective actuaries, plus the reasonable costs of legal representation in this matter, less the present value of the salary gain to age 60, as agreed by the respective actuaries. In the case of former Chief Lonsbary, the amount owing, therefore, is \$41,820 plus reasonable legal costs, less \$53,500. In the case of former Sergeant Brownlee, the amount owing, therefore, is \$29,850 plus reasonable legal costs less \$14,685. These amounts are to be paid forthwith.

I will remain seized in the event of any difficulty with the implementation of my award.

Dated at Toronto this 15th day of October 1999.

KEVIN M. BURKETT