

IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ISHAQ SYED ABUTALIB

- The Complainant

- and -

TORONTO POLICE ASSOCIATION

- The Union

AND IN THE MATTER OF a request for costs following an award of damages in a complaint of unfair representation

Arbitrator: Howard Snow

Appearances:

On behalf of the Complainant:

Ira E. Book - Counsel

On behalf of the Union

Michael N. Freeman - Counsel (until February 27, 2011)

Caroline V. (Nini) Jones - Counsel (after February 27, 2011)

Hearing held by way of written submissions.

AWARD

INTRODUCTION

This award deals with the Complainant's request for costs following an award for damages for the Union's failure to represent him fairly in a dismissal arbitration.

BACKGROUND

Ishaq Syed Abutalib, the Complainant, was a civilian parking officer employed by the Toronto Police Services Board. Following the Complainant's dismissal from employment, the Toronto Police Association, the Union, represented him at arbitration. When the Union settled his dismissal grievance, the Complainant alleged that the Union had not represented him fairly. I found in favour of the Complainant and awarded him damages December 17, 2010.

Ira Book, counsel for the Complainant, then sought an award of costs. In response, Michael Freeman, counsel for the Union, said that the Union intended to seek judicial review of the award and submitted that the question of costs should be deferred until after the judicial review.

Before dealing with the Union request to defer consideration of costs, I asked counsel to address the fundamental issue of whether I had jurisdiction to award costs. My January 10, 2011, letter to them was, in part, as follows:

Before considering any specifics related to costs, I would appreciate knowing your client's position on the question of whether I have jurisdiction to award costs in this matter. On this, I especially seek input on the impact of Section 124(6)(2) of the *Police Services Act* which states, in part, "Each party shall pay its own costs"

Counsel disagreed on my jurisdiction to award costs, each made written submissions on this issue, and each agreed in separate e-mails February 16 that I should make a decision based on those submissions, without the need for a hearing.

Caroline V. (Nini) Jones advised February 28, 2011, that she had been retained by the Union as counsel in this matter and she asked for an opportunity to make further submissions. Mr. Book agreed to that request and the further submissions were completed April 12, 2011.

A major issue regarding costs was whether the *Arbitration Act* applied. For this reason I outline the details as to how I came to be arbitrator in this dispute.

The Ontario *Police Services Act* does not include an explicit duty for this Union to represent its members fairly.

Following the Union's settlement of his dismissal grievance, the Complainant began this complaint of the Union's failure to represent him fairly in Court. However, in 2006 the Ontario Court of Appeal affirmed the commonly held view that the *Police Services Act* includes an implicit duty of fair representation, but the Court held that this implicit duty of fair representation should be enforced through conciliation and arbitration under the *Police Services Act*, rather than through the courts (see *Renaud v. Town of Lasalle Police Association*, below).

Following the *Renaud* decision, the Ontario Police Arbitration Commission arranged for the appointment of arbitrators in fair representation cases.

Mr. Book, counsel for the Complainant, wrote the Ontario Police Arbitration Commission January 13, 2010, and enclosed the Commission's "Request for Appointment of Arbitrator"

form and sought the appointment of a single arbitrator under Section 124. I note that both Sections 124 (3) and (6) were reproduced in full on the Commission's form.

January 26, 2010, John S. Burke, Deputy Minister of Community Safety, appointed me as arbitrator as follows:

Pursuant to subsection 124 (3) of the Police Services 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 Howard Snow to act as the Arbitrator who will hear and determine a "Rights" Dispute between Ishaq Syed Abutalib and the Toronto Police Association with respect to Duty of Fair Representation.

Mr. Burke also advised counsel of my appointment. The two letters are very similar. After specifying the dispute, the letter to Mr. Book was as follows:

I am pleased to advise that under a Delegation of Authority made by the Minister, I have today appointed Howard Snow, pursuant to subsection 124 (3) of the Police Services Act as the Arbitrator who will deal with this matter. A copy of the appointment is enclosed for your information.

I ask that you cooperate with and assist the Arbitrator in conducting the arbitration proceedings pursuant to the relevant provisions of the Police Services Act.

THE COLLECTIVE AGREEMENT AND STATUTE

Although the Complainant's employment was governed by a collective agreement between the Toronto Police Services Board and the Union, neither party relied upon any provision of that collective agreement.

As for this issue of costs, the key sections of the *Police Services Act* are as follows:

PART VIII LABOUR RELATIONS

114.

...

124.

...

(3) The following rules apply to the composition of the arbitration board:

1. . . .
 2. If the arbitration board is to consist of one person, the parties shall appoint him or her jointly. If they are unable to agree on a joint appointment, the person shall be appointed by the Solicitor General.
 3. . . .
- ...
- (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. . . .
- ...
127. The *Arbitration Act, 1991* does not apply to arbitrations conducted under this part.
- ...
131. . . .

COMPLAINANT'S POSITION

Counsel for the Complainant made his submission in a letter January 19, 2011, as follows:

. . . With respect to Mr. Freeman's [Union counsel's] comments, [reproduced below] I take issue with same. I submit *that s. 124 (6) (2) of the Police Services Act* is not applicable to this matter.

This is not a case of a complaint or grievance under a collective agreement as contemplated by the *Police Services Act* where a well financed union is litigating against a well financed police services board. It is a case against a union for failure to fairly represent its member at a grievance. As you are aware, this case was commenced in the Superior Court as a case for damages. It was only with the decision of the Ontario Court of Appeal in *Renaud* . . . that the matter was referred to arbitration.

A review of the decision of your brother arbitrator, D. Starkman in the matter of *North Bay Police Association and the City of North Bay Police Services Board*, a copy of which is enclosed, seems to indicate that since the courts will not accept jurisdiction in matters such as this (initially arising out of a collective agreement) and since the Ontario Labour Relations Board is ousted by the *Police Services Act*, the employee, (Mr. Abutalib) had only one forum where he could seek redress against his union, namely the Ontario Police Arbitration Commission. [Note: The enclosure was not the award itself but rather appears to be a summary of the award taken from the Ontario Police Arbitration Commission web-site.]

By applying the decision of the Ontario Court of Appeal in *Renaud v. LaSalle*, Mr. Starkman stated:

"Therefore in Renaud the Court explicitly accepted arbitration as the forum with the legal authority to adjudicate complaints of unfair representation by police associations. The Arbitrator had jurisdiction to determine Ms. Lafrance's complaint that the Association breached its duty of fair

representation.”

I submit that what this means is that Mr. Abutalib, just as Ms. Lafrance, has access to the arbitration process to deal with his complaint against his own union, otherwise he would be totally without a remedy.

Having concluded that arbitration is the appropriate forum, the *Arbitrations Act 1991, S.O. 1991 c.17* would apply.

Section 54(1) of the Arbitration Act 1991 clearly gives an Arbitrator the jurisdiction to award costs of an arbitration. A copy of s. 54(1) which is enclosed

This would make sense because if an employee could not expect to recover costs of the Arbitration as any other successful litigant he would be discouraged from pursuing his remedy because of the inherent costs associated with the arbitration. Further, costs sanctions would be an appropriate deterrent for frivolous claims.

Inherent in the right of access to justice is the right of every litigant to seek costs of the litigation if successful.

I submit that you certainly do have jurisdiction to award costs in this matter and Mr. Abutalib is seeking his costs of this entire proceedings.

Following the Union’s submissions, counsel for the Complainant repeated his view in a letter dated April 12. He submitted “that the *Police Act* [sic] does not apply to [the Complainant] however the collective agreement does.” Counsel for the Complainant suggested that there is nothing about costs in the collective agreement.

Complainant’s counsel also submitted that there are exceptions “to the general rule that costs are not awarded in the context of labour relations disputes.” He submitted that one exception arises in the context of a “make whole” order and submitted that an award of costs was required to make the Complainant whole.

UNION POSITION

The Union’s initial submission in Mr. Freeman’s letter of January 13, 2011, follows:

I think that the section of the *Police Services Act* which you quoted [124 (6) 2] in your letter disposes of this issue. This was an arbitration under the *Police Services Act* and not the *Arbitration Act*. That being the case, it is the position of the Association that you do not have jurisdiction to make a Costs Award.

March 17 Ms Jones made additional submissions which she summarized as follows:

. . . an arbitrator appointed under section 124 of the *Police Services Act (PSA)* is without jurisdiction to make the costs award requested. The *PSA* explicitly provides that parties bear their own costs incurred in arbitration. Further, there are no rules established pursuant to Section 17.1 and Section 25.1 of the *Statutory Powers and Procedures Act* permitting an arbitrator appointed under the *PSA* to award costs. Finally, the policy considerations raised by the Applicant do not favour departing from established Ontario labour relations jurisprudence.

Ms Jones expanded on each of her three points.

First, under the *Police Services Act* an arbitrator has no inherent jurisdiction. The *Act* specifies that each party to an arbitration bears its own costs, the Complainant is a party, and so the Complainant must bear his own costs.

Secondly, contrary to the Complainant's submission, the *Arbitration Act* has no application to *Police Service Act* arbitrations such as this one because of Section 127 of the *Police Services Act* (above). Instead of the *Arbitration Act*, the *Statutory Powers and Procedures Act (SPPA)* applies, but an arbitrator has no authority under Section 17.1 of the *SPPA* to award costs as the conditions for such an award had not been met.

Thirdly, the Union outlined the situation regarding the award of costs in other labour matters, including in the duty of fair representation cases considered by the Ontario Labour Relations Board under the *Labour Relations Act, 1995*, where complainants cannot recover costs. The Union submitted that policy considerations do not suggest any reason in this case for departing from the common Ontario practice.

The Union relied upon the following: *Bellai Brothers Ltd.* [1994] OLRB Rep. January 2; *Kimberly-Clark Corporation* [2008] CanLII 23941 (OLRB); *Renaud v. Town of Lasalle Police Association* [2006] CanLII 23904, 216 O.A.C. 1 (Ont. C.A.); *Berlinguette v. O’Ryan* [2010] ONSC 4266 (CanLII); *National Grocers* [2003] CanLII 35708 (OLRB); *Inergi LP* [2009] O.L.R.D. No. 3418 (OLRB); and Brown and Beatty, *Canadian Labour Arbitration* (2011: Thomson Reuters Canada Limited, 4th edition) Section 2:1430, “Ordering Costs”.

CONCLUSIONS

The *Police Services Act* regulates Ontario municipal police services including collective bargaining for the employees of those municipal police services. The Complainant worked for the Toronto Police Services Board which operates the Toronto Police Service, a municipal police service. The Complainant’s employment was regulated by a collective agreement reached pursuant to the *Police Services Act* and his original dismissal grievance alleged that his dismissal violated that collective agreement.

Turning to the duty of fair representation, in interpreting the *Police Services Act* the Court of Appeal concluded in *Renaud*, above, that “party” should be given a “broad and liberal interpretation” so that an employee can be a “party” who can pursue a duty of fair representation complaint to conciliation and arbitration. The Complainant has availed himself of that right and is a “party” to this arbitration.

I was appointed under the rights arbitration section, Section 124, of the *Police Services Act*. In my earlier award I found in favour of the Complainant, awarded him damages, and now deal with his request for costs. What does that *Act* say about costs?

Section 124 (6) (2) of the *Police Services Act* states that “each party shall pay its own costs”.

The Legislature could have given arbitrators the authority to award costs, but it did not do so. Instead of leaving costs to be resolved by the arbitrator, the Legislature has considered and resolved the issue of costs. Since the Legislature decided that each party shall pay its own costs, I therefore conclude that I have no jurisdiction under the *Police Services Act* to award costs.

But does the *Arbitration Act* apply?

Section 127 of the *Police Services Act* (above) states that the *Arbitration Act, 1991* “does not apply” to any arbitration “conducted under this Part.”

The *Police Services Act* is divided into several “Parts.” Part VIII of the *Police Services Act* is titled “Labour Relations,” and Section 127 is found in Part VIII. I find that “this Part” in Section 127 means the Labour Relations Part, or Part VIII, of the *Police Services Act*.

Was this arbitration “conducted” under Part VIII of the *Act*? The way this arbitration came about and the way I was appointed are outlined above. The Complainant requested the appointment of an arbitrator under Section 124. The Complainant was advised of such an appointment having been made under Section 124 and, in that same letter, was asked to cooperate in conducting the arbitration proceedings “pursuant to the relevant provisions of the Police Services Act.”

There are numerous provisions in Part VIII of the *Police Services Act* concerning the conduct of arbitrations. In general terms, I conclude that when the Minister, or delegate, appoints an arbitrator in a rights dispute under the statutory authority in Section 124 (3), that arbitration is conducted under Part VIII, Labour Relations. In particular, I find that this arbitration, conducted following a Section 124 appointment, is included when Section 127 speaks of

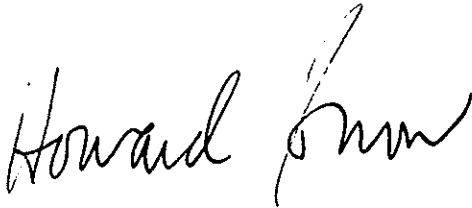
“arbitrations conducted under this Part.”

It follows that I find the *Arbitration Act* “does not apply” to this arbitration so that I have no jurisdiction under the *Arbitration Act* to award costs.

Each year in Ontario there are many labour disputes decided in which the successful party has no right to seek an award of costs. I find that an award of costs is not inherent in the notion of justice in the context of Ontario labour relations. In any event, the Legislature expressed a conclusion about costs in the *Police Services Act*. As arbitrator acting under the *Police Services Act* I am bound by that clear legislative direction.

The Complainant’s request for an award of costs is denied.

Dated at London, Ontario, this 31st day of May, 2011.

A handwritten signature in cursive script that reads "Howard Snow". The signature is written in black ink and is positioned above a horizontal line.

Howard Snow, Arbitrator