

IN THE MATTER OF ARBITRATION PURSUANT TO THE PROVISIONS OF SECTION
40 OF THE *POLICE SERVICES ACT*, R.S.O. 1990, CHAPTER P.15 AS AMENDED

B E T W E E N:

THE MEAFORD THORNBURY POLICE ASSOCIATION
(Hereinafter referred to as the “Association”)

-and-

THE MEAFORD THORNBURY POLICE SERVICES BOARD
(Hereinafter referred to as the “Board”)
“Respondents” in this Proceeding

-and-

FORMER ACTING CHIEF STEPHEN BIRCHALL
(Hereinafter referred to as the “Grievor”)
“Applicant” in this Proceeding

SOLE ARBITRATOR: Richard H. McLaren, C.Arb.

COUNSEL FOR THE GRIEVOR: Douglas M. Bryce

COUNSEL FOR THE BOARD: Kees Kort

APPLICATION FOR CONTINUATION OF ADJOURNED HEARING IN RELATION TO
INTERIM ARBITRATION AWARD ISSUED 23 DECEMBER, 2002.

SUPPLEMENTARY AWARD by way of INTERIM ORDER

1. An arbitration hearing took place and an interim award was issued on 23 December 2002 involving a matter arising out of the disbandment of the municipal Police Services of the Joint Meaford-Thornbury Police Services Board, whose policing functions had been outsourced to the Ontario Provincial Police (“O.P.P.”).
2. Acting Chief Birchall, as a result of the disbandment, requested the appointment of an arbitrator to carry out an arbitration proceeding under s.40 of the *Police Services Act* R.S.O. 1990, Chapter P.15 as amended (hereafter “the Act”). I was duly and properly appointed by the Minister of Public Safety and Security. The parties to that proceeding agreed that I had been properly appointed and had jurisdiction to act as the arbitrator in the matter and issue a final and binding determination of the dispute between the parties. It is pursuant to that jurisdiction that the present proceeding arises.
3. The decision that was issued was an “Interim Award” and provided that:

“... [being] unable to determine certain facts which are necessary in order to consider the separation agreement under Section 40(2), it is hereby ordered that the matter be adjourned sine die. ...On the event that the facts do become sufficiently clear to enable the parties to proceed with the arbitration, the matter may be brought on for further hearing and determination of the Arbitrator ...”

Pursuant to this retention of jurisdiction, counsel for the parties began to have discussions in December of 2008 regarding the reconvening of the arbitration hearing. For a variety of reasons, those discussions between counsel, with from time to time, intervening correspondence from the Arbitrator, continued into the summer of 2012. At that time, I was advised that counsel was unable to come to an agreement regarding the resolution of the matter and requested that an arbitration hearing be scheduled. It was determined that before an arbitration hearing could be scheduled, it was necessary to resolve certain preliminary matters by way of an Interim Order. The essence of this Supplementary Award is to deal with that issue.

Background:

4. The Meaford-Thornbury Police Service amalgamation was finalized in November of 1997. From that time forward, Stephen Birchall was Acting Chief of the amalgamated service whenever the Chief was away on vacation or otherwise. From September of 2000, when the then Chief of the joint amalgamated service left on long term sick leave, Birchall was the permanent Acting Chief. Birchall became ill and by 27 February 2002,

he was placed on long term disability (“LTD”). During the time that Birchall was the full time Acting Chief, the decision was taken to outsource the Meaford-Thornbury Police Service to the Ontario Provincial Police (“O.P.P.”).

5. At the time of the hearing convened under Section 40 of the *Police Services Act* (“the Act”) on 29 November 2002, Acting Chief Birchall “*was still an employee of the Meaford Thornbury Police Services Board although he was on a long term disability.*”
6. While he remained on LTD, he was to be paid in accordance with a formula described in the Interim Award. At the time of the hearing, on the original application, there was a possibility that Acting Chief Birchall might remain on long term disability until 30 June 2004. During this period, there was a possibility that he might receive an offer of employment from the O.P.P. However, he could only receive such an offer if he:
 - a. *was no longer on long term disability; and*
 - b. *provided satisfactory evidence from a medical practitioner of his suitability to return to duty as a police officer.*

These facts were unknown at the time of the hearing and the issuance of the Interim Award on 23 December 2002. For these reasons, the matter was adjourned *sine die*.

7. By correspondence dated 20 May 2011, the Municipality of Meaford advised Birchall that as of 13 July 2011, he was no longer eligible to receive LTD benefits. That date corresponded with Birchall’s 60th birthday. At that time, Birchall transitioned to an Ontario Municipal Employees Retirement System (“OMERS”) pension. After that event, the request to reactivate the adjourned arbitration was made.

Current Proceedings

8. At the direction of the Arbitrator and with the agreement of the parties’ counsel, the following procedure was prescribed to deal with the preliminary issue. On 29 October 2013, the Municipality of Meaford and the Town of Blue Mountains (the “Respondents”) filed their initial submissions on the preliminary issue of whether or not Birchall should be permitted to continue to pursue his claim for compensation against the Respondents. On 15 November 2013, counsel for Birchall supplied his submissions on the continuation of Birchall’s claim for compensation. The Reply of the Respondents was filed on 25 November 2013.
9. The Respondents submit that in order to reconvene the arbitration, the two conditions precedent from the Interim Award (set out at paragraph #6 above) must be met. There is an underlying fundamental foundation requirement implicit in the conditions precedent. The purpose of a section 40 arbitration under the Act is to determine compensation for a

Police Officer's appropriate severance package. Therefore, it is necessary that Birchall be in a position to return to work as a Police Officer and if he is unable to do so, he suffers no loss.

10. The Respondents submit that since 2002, Birchall has never been medically capable of performing the duties of a Police Officer. He transitioned from LTD to OMERS pension and thus, his employment was never terminated. He retired from his most recent position as Acting Chief with the Board. Therefore, he is prevented from having the determination of s. 40 of the Act.
11. In the alternative the Respondents submit that Birchall has not met the requirements of s. 40 of the Act in that he has not been terminated from employment and has not suffered any loss. He is in the same position he would have been had the Police Service not been abolished and was still in operation today; in receipt of LTD benefits until he transitioned to OMERS pension.
12. In support of the foregoing propositions the decisions in *Town of Warton and Chief Schultz* (Jackson, 15 June 1988) and *Kingsville Police Services Board and Kuipers* (Knopf, 15 November 1999) were cited.
13. Birchall as the Applicant in this proceeding submits that on 17 January 2002, the Ontario Civilian Commission on Police Services ("OCCPS") rendered a decision on the abolishment of the Meaford-Thornbury Police Service. In so doing, OCCPS directed that unresolved severance or termination issues including that of Birchall be resolved in 90 days or proceed to arbitration.
14. It is submitted by the Applicant that the agreement by the Meaford-Thornbury Police Association that I had jurisdiction in the original proceeding implicitly meant that he had his employment relationship brought to an end by the disbandment. Therefore, the conditions required to permit an arbitration proceeding had been satisfied and this was acknowledged by the parties when they agreed that I had jurisdiction. A credible claim for economic loss existed. What remained to be determined at arbitration were questions of mitigation and the final quantum of loss and severance.
15. Birchall submits that the conditions precedent of the Interim Award have been satisfied. The employment was terminated with the disbanding of the Police Service. See *Prescott (Town) v. Ontario Civilian Commission on Police Services* (2003), 233 DLR (4th) 93 (SCJ-Div. Ct), leave to appeal refused 17 March 2004 [2004] OJ 1245 (QL) (CA); and *Point Edward Police Services Board and Point Edward Police Association* (Welling, 21 September 1999); and *Point Edward Police Services Board v. Leo Mayer* (Kirkwood, 12 May 2000).

16. It was further submitted that under s. 47 of the Act there is imposed upon a Police Services Board a duty to accommodate an employee's disability as contemplated by the *Human Rights Code, R.S.O. 1990*, and Chapter P.15 as amended ("HRC"). There was no accommodation because of the disbandment which had the effect of terminating his employment. This matter will have to be addressed on the merits under the principles of *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359.
17. It is submitted that the application was to determine issues on reasonable and appropriate severance, benefits and other economic losses arising from Birchall's termination of employment. The facts are now sufficiently clear to permit the parties to continue with the arbitration on a matter they were unable to do at the time of the *sine die* adjournment in December of 2002.
18. In Reply to the submissions of the Applicant the Respondents submitted that the second condition precedent to the continuation of the arbitration hearing has not been met because Birchall acknowledges that he is not now, nor ever was, medically suitable to return to duty as a Police Officer. It was further submitted that while the jurisprudence surrounding disbandment might conclude that termination from employment necessarily follows disbandment, Birchall's claim is unique and not comparable to the cited cases.

Decision on the Merits

19. The Respondents raised for the first time, an allegation that Chief Birchall was never terminated from his employment and therefore, on his retirement is not entitled to any compensation. As indicated in the Interim Award, the counsel for the parties at the time (which is none of the present counsel) agreed that "... *I had been properly appointed and that I had jurisdiction to act as the Arbitrator in the matter and make a final and binding determination of the matters in dispute between the parties.*" Therefore, the matter of termination is decided and the Respondents are estopped from now arguing otherwise.
20. Much of the submissions of the parties' center upon the two conditions precedent set out in the Interim Award. The first condition is satisfied. As of 13 July 2011 Birchall is no longer eligible, nor receiving LTD benefits. As such, after that date he is retired. The second condition was that Birchall's health be such that medically, he was in a position to return to work. That was a necessary condition for the O.P.P. to make an offer for full-time employment as a result of the disbanding of the Meaford-Thornbury Police Service. Therefore, that condition was inserted in the Interim Award to reflect the fact that from 2002 onwards there might be a time when he would be medically fit to return to work. The condition required him to provide satisfactory evidence in that eventuality during the period in which the O.P.P. might make him an offer of employment. That period has

now expired upon the retirement of Birchall on the discontinuance of the LTD benefits. His counsel advises that: “*He is not now, nor was he ever, medically suitable to return to duty as a Police Officer*”. Therefore, this uncertainty has now been removed from the contingencies at the time of the Interim Award and is therefore satisfied. He never did return to work between 2002 and July of 2011. Based upon the foregoing, I find that the two conditions precedent to the continuation of the arbitration hearing have now been satisfied and are no longer an impediment to proceeding under s. 40 of the Act.

21. The alternate submission of the Respondents is that Birchall has not met the requirements of s. 40 of the Act that he has been terminated from employment and has not suffered any loss. The issue of loss is not before me on the current application and is related to the merits if there are to be any substantive proceedings in this matter.
22. For a s. 40 arbitration to proceed, the applicant police officer must have been terminated from his employment. An arbitrator possesses jurisdiction under s. 40 only following a termination and a resulting unresolved severance dispute. At the time of the hearing, Birchall was on LTD and he was receiving that benefit because he was an employee of the Meaford-Thornbury Police Service. That Police Service was disbanded by a decision of OCCPS subject to unresolved severance or termination issues being settled or arbitrated. Section 40 of the Act has as one of its purposes that current members of the police force are dealt with fairly, as is indicated in the Div. Ct. decision of *Town of Prescott*, supra. The effect of disbandment has been held to be that the police officers of the disbanded service have been “dismissed,” to use the language of Arbitrator Welling in the *Point Edward Police Services Board* case, supra or terminated to use the language of s. 40(2). Birchall was terminated by operation of the OCCPS decision to disband the force and the decision directs that the matter of compensation for Birchall proceed to arbitration. We now know how all of the contingencies played out that were unknown at the time of the initial hearing and issuing of the Interim Award. It is now incumbent on the parties to proceed to complete the arbitration hearing commenced in 2002 and concerning which the Interim Award was issued in December of 2002.

Order

23. For all of the foregoing reasons, it is hereby ordered that the matter of the arbitration which was adjourned *sine die* at the time of the Interim Award is now to be continued. The parties' counsels are directed to co-operate with the Arbitrator to establish a date for the continuation hearing.

DATED at LONDON, ONTARIO this 14th DAY of JANUARY 2014



Richard H. McLaren
Arbitrator