

IN THE MATTER OF AN ARBITRATION UNDER SECTION 40 OF THE *POLICE SERVICES ACT*

BETWEEN:

THE LEAMINGTON POLICE SERVICES BOARD

-AND-

OFFICER M

## PRELIMINARY AWARD RE: PRODUCTION OF DOCUMENTS

I was appointed by the Minister of Community Safety and Correctional Services to determine the amount of severance pay to be paid to Officer M by the Leamington Police Services Board (the "Board") upon the abolition of the Leamington Police Service (the "Service"). Officer M passed away in January 2014 and a representative of his estate is participating in this litigation.

This arbitration of this matter has been adjourned on a number of occasions pursuant to Officer M's and then his estate's request. It is now scheduled to proceed on November 24, 2014. Officer M's estate is seeking the production of documents and particulars prior to that hearing. The Board is also seeking production of documents prior to the hearing.

**Facts**

It is necessary to set out a few facts that are not in dispute to put the production requests in context.

Officer M was a police officer with the Leamington Police Service. He was accused of wrongdoing with respect to expenses related to his position as President of the Leamington Police Association. Officer M always denied any wrongdoing. He was suspended with pay from the Service in May 13, 2009. He was charged under the *Criminal Code* but those charges were withdrawn in 2011. He was also charged with discreditable conduct under the *Police Services Act* (the "PSA"). The Leamington Police Service was abolished on December 3, 2010 and the proceedings under the PSA could no longer proceed as the adjudicator had lost his jurisdiction to hear the matter. The Ontario Provincial Police (the "OPP") took over responsibility for policing in the jurisdiction formerly served by the Service. All of the Leamington police officers that applied were offered positions with the Ontario Provincial Police except for Officer M. He was not offered a position because of the outstanding *Criminal Code* and *Police Service Act* charges.

In the decision dated July 27, 2010 permitting the abolition of the Service the Ontario Civilian Police Commission (OCPC) stated:

As a result, subject to the conditions set out below, we consent to the Municipality's request under section 40 of the Act to abolish the Service to permit policing under contract with the OPP. To this end, we consent to the termination of the current members of the Service.

This consent is subject to the following conditions:

1. The OPP shall provide uniform members of the Service with applications for employment within 30 days of the date of this decision and complete the processing of the applications of those seeking employment within 75 days.
2. The OPP shall finalize the process for filling the ten full time civilian positions and advise eligible candidates of the procedure to be followed within 60 days of the date of this decision.
3. The Board and the Association shall continue their negotiations with respect to severance. If no agreement is concluded within 60 days of the date of this decision, we direct that any unresolved matters proceed forthwith to arbitration.
4. The Municipality shall initiate the process to complete the identified renovations to 7 Clark Street West. Such renovations must be substantially completed prior to the final transition to OPP contract policing.

The Leamington Police Service continued to pay Officer M until April 27, 2013.

#### **The Request for Production and Particulars**

The estate of Officer M is seeking the following production:

1. A list of Officers and their respective hire dates (seniority dated) as of November 30, 2010 who were employed by the Leamington Police Service.
2. The records of any former Leamington Police Officer who had been convicted of any criminal or Police Act offences between the periods of January 1, 2005 and November 30, 2010 who were hired by the OPP. The officers do not have to be named. They can be identified by any other method. I would however request the rank of the officer involved, the accusation or finding under the PSA and the penalty that was imposed.
3. The approximate date when either the City of Leamington, or the Leamington Police Service began the discussions to consider a formal request to the Ontario Provincial Police to take over policing services in Leamington. Not the formal date of the request, but the earlier date when this process was first being considered. If there are minutes of these meetings either through City Council or the Leamington Police Services Board, I would request a copy of only those minutes dealing with the subject at hand.

4. The names of officers not hired by the Ontario Provincial Police upon takeover. Please provide the information as to whether or not these officers were not taken by the OPP, or if the officers involved took a buyout/severance and/or retired from policing.
5. A copy of [Officer M's] personnel file including all records of commendation and discipline.
6. Any correspondence between the former Leamington Police Association and the former Chief of the Leamington Service and/or Leamington Police Services Board concerning [Officer M] from the period October 2008 to the present.
7. Bank records with respect to Association dues paid by [Officer M] between the periods of January 1, 2009 and April 30, 2013. I am not looking for confidential financial information of the Association or the city/police service. I am trying to determine where the Association dues deducted from the cheques of [Officer M] was deposited to, who had access to those funds and what if anything was done with those funds.
8. Any transcripts that may exist with regard to the Police Service Act matters of Officer M.

In November 2013, subsequent to a conference call, I ordered Officer M to produce the following documents to the Board prior to the hearing that was scheduled for January 30, 2013:

Income Tax Returns and Notices of Assessment for 2010, 2011, 2012. [Officer M] must also provide his Return and Assessment for 2013 if he has it by then.

If [Officer M] will be asserting that he has been seeking employment since December 3, 2010 he should provide any documents relevant to that job search.

If [Officer M] will be asserting that he is unable to work or seek employment for medical reasons he should provide a report from his doctor.

[Officer M] is also directed to provide particulars of any issues, other than severance issues, that he will be raising at the arbitration on January 30, 2014.

### ***Police Services Act***

40. (1) A board may terminate the employment of a member of the police force for the purpose of abolishing the police force or reducing its size if the Commission consents and if the abolition or reduction does not contravene this Act.
- (2) 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; or
  - (b) the Commission has made an order under subsection (3).

(3) If the member and the board do not make an agreement dealing with severance pay and do not agree to submit the matter to arbitration, the Commission if it is of the opinion that it would be appropriate to permit the abolition of the police force or the reduction of its size, may order the member and the board to submit the matter to arbitration and may give any necessary directions in that connection.

(4) Section 124 applies to an arbitration referred to in this section with necessary modifications.

### Decision

Officer M's family and friends are devastated by his death. It is apparent from the materials filed by the estate's representative that they are also angry and hold the Board responsible for Officer M's failure to gain employment with the OPP and perhaps for the despair that followed. They are looking for justice for the wrongs they believe to have been imposed upon him. It is understandable that they are looking for a way to achieve restitution for the injustices they believe Officer M suffered. However, this process cannot provide the answers or the remedy they seek. My authority under s. 40 of the PSA is only to determine the severance pay to which Officer M was entitled as a result of the abolition of the Leamington Police Service. The issue before me is not whether or not Officer M should have been charged criminally, charged under the PSA or hired by the OPP. The only matter before me is the amount of severance pay to which he was entitled as a result of the termination of his employment that resulted from the abolition of the Leamington Police Service. Officer M's estate is only entitled to the production of documents that are arguably relevant to that issue.

An arbitrator appointed under section 40 of the PSA must determine the severance owing to a member of a police force whose employment has been terminated as the result of the abolition of the force. It is assumed that the termination of such an officer is without cause and the approach used by arbitrators is the same as that used in wrongful dismissal cases at common law. (see *Point Edward Police Services Board and Leo Mayer* (5/12/2000 (Kirkwood))) The same factors are considered to determine the amount of severance pay to which a member of an abolished force is entitled. Those factors include the nature of his or her employment, length of service, position, age, and the likelihood of finding comparable employment. If a member of an abolished police service is hired by the OPP that is taken into account only as mitigation income, i.e. the amount the member earns from the OPP during the severance period is deducted from the amount owing from the former service. There is no continuity of employment from the abolished service to the OPP. The member is terminated from the abolished service and entitled to severance. Earnings from the OPP may be set off against severance owing from the abolished service. That is the only way in which an arbitrator determining severance under s. 40 considers employment with the OPP.

In *Point Edward Police Services Board (supra)* the arbitrator set out the jurisprudence applicable to the determination of appropriate severance under s. 40 of the PSA:

As in the *Warton* decision, the appropriate criteria for determining the compensation for Mayer is that of reasonable notice as seen in the civil law as applied to the unique aspects of policing and that of the circumstances of Mayer. The basic principles stem from *Bardhal v. Globe and Mail Ltd.* (1969) O.W.N 253, 24 D.L.R. (2d) 140 (Chief Justice McRuer):

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

As quoted in the Orillia decision (supra) from the Warton decision (supra) at p. 6:

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 is 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 could 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 discharge 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 in 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 the above reasons, then this award will be based on common-law principle for reasonable notice, adapted to the unusual circumstances of policing, Chief Schultz and the Warton situation.

The underlying rationale behind the principle of reasonable notice and the principle of damages applicable to breach of contract is to shield the employee from economic loss and to make the employee whole, to put the employee in the situation as if he had not been terminated. By disbanding the police force and terminating Mayer's 11 employment with the Board, the Board has breached Mayer's employment contract and has exposed itself to this liability.

In addition to considering the determination of economic loss, there is a corresponding obligation on the employee to mitigate the losses. (*Red Deer College v. Michaels et al.* 57 D.L.R. (3d) 386, (*Neilson v. Vancouver Hockey Club* (supra)). This duty has also been applied to policing situations (for example, *The Town of Kapuskasing Police Services Board and Ohinski, Daigle, Boyer, Robert, McLeod, Nolet (Civilian Members)* (October 27, 1994) (E. Marszewski)). The duty to mitigate has been applied and satisfied where there was no comparable position available, such as in the Warton decision (supra), and where police officers have taken other positions, even when the alternative position led to a reduction of rank and loss of prestige and income (*Kingsville* decision (supra)).

In this case, it appears that Officer M's estate wants to demonstrate that Officer M was poorly treated by the Board and/or the Chief prior to his termination and that treatment prevented him from obtaining employment with the OPP. However, as noted above, in this process it is assumed that there was *no cause* for Officer M's termination and that is why he was entitled to severance. The only issue is the amount of severance. Officer M's inability to obtain employment with the OPP is a factor that can be considered in determining whether he was likely to obtain comparable employment after his termination but it is unnecessary for the estate to prove that the charges against him were unfounded in order to make that argument. There is no dispute that the *Police Services Act* charges were never proved but, because they and the *Criminal Code* charges were outstanding in 2010, they prevented Officer M from being hired by the OPP. The Board would not be permitted to argue that Officer M would have been terminated had the Service not been abolished. The Board accepts that its allegations against Officer M are not relevant to this proceeding and has stated that it will not seek to raise them.

In his submissions dated September 20, 2014, the representative of the estate asserts that the documents and information he is seeking are relevant for the following reasons:

However to be more specific: if it was found that the actions of Leamington Police were what caused [Officer M] to not be hired by the OPP, then the circumstances of that action are relevant to the level of severance that [Officer M] should receive. I believe an arbitrator has the authority to determine if circumstances beyond the control of [Officer M] ultimately led to his severance. There is nothing an arbitrator can do to correct that situation, but certainly an arbitrator has the ability to base any award on the totality of the circumstances that led to it.

If Mr. Milloy needs further clarification, I offer this example. A non-union employee, employee X with 15 years service is advised on a Friday that they are being dismissed and are provided one months pay in lieu of notice. The arbitrator would not be able to rectify the situation that employee X is now unemployed, but the arbitrator most certainly has the ability to award severance and damages. This situation is no different.

The representative of Officer M's estate is correct that the considerations in this process are the same as in the wrongful dismissal case in his example above. However, I need not determine whether circumstances beyond his control led to Officer M's severance because there is no dispute that they did. His termination arose from the abolition of the Leamington Police Service and that was beyond his control.

Officer M's estate appears to want to use this process to clear Officer M's name. It is concerned that some of the documents produced by the Board include the allegations against Officer M. Those appear to be documents related to prior proceedings in which Officer M was involved. However, the Board is not alleging that it had any cause to terminate Officer M. It does not dispute that he was entitled to severance pay. It only disputes the amount of severance owing. It claims that he was paid more than the severance to which he was entitled pursuant to an agreement with the Association. It is not relying in any way on the charges against Officer M or the circumstances that led to them. The documents it produced have not been entered into evidence or made exhibits in this process. If it seeks to introduce them at the hearing on November 24, 2014 it will have to demonstrate that they are relevant to the issue of the amount of severance to which Officer M was entitled. The Board has advised in correspondence dated September 16, 2014 that the documents were prepared on the basis of, and in response to, positions taken by Officer M's counsel at Conciliation and are not "submissions" on which it is relying.

In his reply submissions, the representative of the estate argues that the documents he seeks are relevant "to outline specifically the entire circumstances involved in [Officer M] being severed, not simply the homogenized version currently before us. They are also relevant to the level of severance that should be awarded". However, section 40 of the PSA provides for an arbitration to determine severance pay. It does not cloak an arbitrator with the authority to hear and remedy all of the outstanding issues, or even grievances, of members of an abolished police service.

However, there is another issue in dispute that *is* relevant to the issue of the appropriate severance to which Officer M was entitled. Officer M continued to be paid by the Board until April 2013 and deductions, including Association dues, were made. The Board claims the monies it paid Officer M were his severance pay and that it overpaid him. The estate asserts that Officer M was being paid wages until April 2013 and that he never

received any severance pay. That is an outstanding issue and the parties are entitled to any documents arguably relevant to it.

*The Estate's Requests for Production*

1. A list of Officers and their respective hire dates (seniority dated) as of November 30, 2010 who were employed by the Leamington Police Service

In correspondence dated August 21, the representative of the estate says that he wants this information in case he wants to refer to the officers in his submissions or in case he needs to contact them for information.

The estate has not established that the information it is seeking is relevant to the issue of the amount of severance pay owing to Officer M and I decline to order that the information sought be produced.

2. The records of any former Leamington Police Officer who had been convicted of any criminal or Police Act offences between the periods of January 1, 2005 and November 30, 2010 who were hired by the OPP. The officers do not have to be named. They can be identified by any other method. I would however request the rank of the officer involved, the accusation or finding under the PSA and the penalty that was imposed.

In correspondence dated August 21, 2014 the representative of the estate states that he wants the information because the accusations against Officer M were referred to in one of the documents that the Board had provided. The estate's representative says that it is relevant to his preparation to know whether Officer M was the only officer facing discipline issues at the time of amalgamation.

As explained previously, it is not disputed that the OPP did not accept Officer M's application because of the outstanding criminal and PSA charges. The fact that Officer M was unable to obtain employment with the OPP is a factor upon which the estate may rely in asking me to find that Officer M would not have been able to obtain comparable employment and that the amount of severance awarded to him should reflect that. However, it is beyond the jurisdiction of this arbitrator to determine whether the OPP acted properly in rejecting Officer M's application. The documents sought are not relevant to the issues in this proceeding and I decline to order that they be produced.

3. The approximate date when either the City of Leamington, or the Leamington Police Service began the discussions to consider a formal request to the Ontario Provincial Police to take over policing services in Leamington. Not the formal date of the request, but the earlier date when this process was first being considered. If there are minutes of these meetings either through City Council or the Leamington Police Services Board, I would request a copy of only those minutes dealing with the subject at hand.

In correspondence dated August 21, the representative of the estate submits that the information he is seeking is relevant because this "entire matter is based upon a decision of the City Of Leamington and the Leamington Police Services Board to disband their service".



In correspondence dated September 4, 2014, the representative of the estate advises that he wants information about when the OPP takeover process started because he will be presenting a time line of events that led to Officer M "being let go" by the Leamington Police Service.

The information sought by the estate is not relevant to the issue of the amount of severance pay to which Officer M was entitled. Furthermore, the OCPC made the decision to permit the abolition of the Service and inquiring into that decision is beyond my jurisdiction. There is no dispute that the abolition of the service while the *Criminal Code* and PSA charges were outstanding meant that Officer M's application was rejected by the OPP. The documents sought by the estate are not relevant to the issues in dispute in this proceeding and I decline to order that they be produced.

4. The names of officers not hired by the Ontario Provincial Police upon takeover. Please provide the information as to whether or not these officers were not taken by the OPP, or if the officers involved took a buyout/severance and/or retired from policing.

In correspondence dated August 21, the representative of the estate submits that the above information is relevant because it relates to two of the documents provided to him by the Board. He says that one of the documents "referred to the application process to the number of officers that would be taken by the OPP" and the other to "the severance agreement that was agreed upon by the employer and the Association". He also advises that he wants to know whether all of the Leamington officers were hired by the OPP and if not, what severance agreement was reached for them. He asserts that the reasons why those officers were not hired by the OPP are also relevant.

In correspondence dated September 4, 2014, the representative of the estate contends that the estate should know who received severance and how much, whether it was more or less than the agreement between the Board and the Association, and if so, why.

The representative of the estate also argues that the estate is entitled to know if Officer M was the only member of the Service not taken on by the OPP and, if others were not taken on, whether it was the OPP's decision or whether they retired and received severance. He asserts that is related to the amount of severance that should be paid.

The Board advises in correspondence dated September 16, 2014 that Officer M was the only officer who applied for, and was not offered, employment by the OPP.

In his reply submissions dated September 20, 2014, the representative of the estate argues that he is entitled to know the severance provided to any officers who did not apply to the OPP as well as the circumstances for which they received that severance.

There is no dispute that Officer M was the only Leamington officer whose application was not accepted by the OPP. However, if the Board is asserting that an agreement between it and the Association with respect to the amount of severance to be paid to members of the abolished service is binding in this process, then it should disclose if it has agreed to pay any member pursuant to a more generous formula. I, therefore, order the Board to provide particulars to the representative of the estate with respect to the amount of any severance agreement that exceeded the formula to which the Board is

arguing Officer M was bound by virtue of the agreement. The particulars need not include the name of the individual(s) at this time.

5. A copy of [Officer M's] personnel file including all records of commendation and discipline.

In his reply submissions, the representative of the estate advises that he does not need the file if the Board will confirm that Officer M's record was clear of any convictions under any statute.

There is no dispute that Officer M was not convicted of any offence related to his suspension. The Board is directed to confirm that, as well as whether Officer M was convicted of any other offence.

6. Any correspondence between the former Leamington Police Association and the former Chief of the Leamington Service and/or Leamington Police Services Board concerning [Officer M] from the period October 2008 to the present.

In correspondence dated August 21, 2014, the representative of the estate argues that the information should be provided because the Board had provided the statements of claim and defence between Officer M and the Leamington Police Association to him. He asserted that the Board was attempting to use the "issue" to further its position at arbitration and that the documents are relevant because "these matters" first generated from the Association to the Police Service.

In correspondence dated September 4, 2014 the representative of the estate argues that the estate needs the information because the actions by the Association and Chief of Police led to Officer M not being hired by the OPP. He states "While you can only deal with severance, I do not believe that there is anything legislatively that prevents the circumstances of this severance from being presented. Certainly, anything that caused [Officer M] to be severed from his employment is relevant to this hearing".

As I explained previously, Officer M's employment was not severed by his inability to obtain employment with the OPP. His employment, like the employment of everyone else who was employed by the Leamington Police Services Board was severed because the Service was abolished. If he had obtained employment with the OPP his earnings would have been set off against any monies owing from the Board. As I also stated earlier, the estate may rely on Officer M's inability to obtain employment with the OPP as evidence that he would be unable to obtain similar employment. However, it is beyond the jurisdiction of this proceeding to inquire into what led to the charges being laid against Officer M. It is understandable that his family and friends feel that he was deprived of the opportunity to clear his name because the PSA process was never concluded. However, this proceeding cannot be used to review that process or what led to it. No one is alleging that the Board had cause to terminate Officer M and the decision as to the appropriate severance pay to which he was entitled will be decided in accordance with the usual considerations taken into account in such cases.

7. Bank records with respect to Association dues paid by [Officer M] between the periods of January 1, 2009 and April 30, 2013. I am not looking for confidential financial information of the Association or the city/police service. I am trying to determine where the Association dues deducted from the cheques of [Officer M] was

deposited to, who had access to those funds and what if anything was done with those funds.

In correspondence dated August 21, 2014 the representative of the estate asserts that the above information is relevant to documents provided to him by the Board. He also states that the estate wants to know where the dues deducted from Officer M's wages went and who had control of them since the Association was disbanded at the same time as the Service. He asks, further, for Officer M's last 10 cheque stubs outlining his "hourly rate, all deductions, employee number etc."

In correspondence dated September 16, 2014, the Board advises that Officer M's dues for the period December 2010 to April 27, 2013 totaled \$2,389.48. It states that the dues were deducted from the ongoing payments made to Officer M but were not forwarded to the Association because its account was frozen by a Court Order. The Board advises that funds are being held in trust pending the outcome of this proceeding.

The Board also advises that it will provide the last 10 pay stubs for Officer M once the estate clarifies whether it is seeking the last 10 pay stubs prior to disbandment or some other period. The estate is directed to clarify the period for which it is seeking the pay stubs.

8. Any transcripts that may exist with regard to the Police Service Act matters of Officer M.

The Board advises in its submissions dated September 16, 2014 that there are 2,134 pages of transcripts from the uncompleted PSA hearing. It submits that the evidence given at that hearing is irrelevant to this proceeding.

In his reply submissions dated September 20, 2014, the representative of the estate requests that he be provided the opportunity to review the transcripts at noon the day before the arbitration. He asserts that they are relevant as they cover "the entire event that led to [Officer M] being severed from his employment".

For the reasons set out previously and in particular under the section dealing with the request for correspondence between the Board and the Association, the transcripts of the PSA proceedings are not relevant to this proceeding and I decline to order that they be produced.

*The Board's request for production*

The Board alleges that Officer M failed to mitigate his losses by seeking comparable employment. The estate will argue that he was unable to gain comparable employment because of the outstanding charges. However, the following documents are arguably relevant to the issue of whether Officer M mitigated his losses and the estate is hereby ordered to produce them if they are in its care and control:

Income Tax Returns and Notices of Assessment for 2010, 2011, 2012. If there is a Return and Assessment for 2013 it should also be produced.

Any documents related to Officer M's job search since December 3, 2010.

If the estate will be asserting that Officer M was unable to work or seek employment for medical reasons it should provide any medical documentation upon which it will be relying.

Dated at Toronto, September 30, 2014

A handwritten signature in cursive script, appearing to read "L. Trachuk".

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Laura Trachuk  
Arbitrator