

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

BETWEEN:

OFFICER M

AND

LEAMINGTON POLICE SERVICES BOARD

SUPPLEMENTARY AWARD

Arbitrator: Laura Trachuk

For Officer M: Jim Mauro

For Leamington Police
Services Board: Suzanne Porter

The final submissions with respect to this supplementary award were received on
March 30, 2015.

SUPPLEMENTARY AWARD

I was appointed by the Minister of Community Safety and Correctional Services to determine the amount of severance 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 on January 4, 2014 and a representative of his estate is participating in this litigation. The Board has not suggested that the estate would not be entitled to any severance payment that was owing to Officer M.

I have issued a number of previous awards with respect to this matter. On September 30, 2014 I issued an award with respect to production and particulars in which I set out the issues in dispute. On January 20, 2015 I issued an award in which I found that Officer M had been terminated by the Board on April 27, 2013 and that he was entitled to severance pay for a period following that date. Subsequent to the January 20, 2015 award, the Board requested that this matter be adjourned *sine die* while it applied for judicial review. That request was denied by way of a decision dated February 9, 2015. The parties' submissions with respect to this supplementary award were made without prejudice to any positions that they take in the judicial review application.

In the January 20, 2015 award I stated:

In summary, I find that Officer M was terminated when the Board stopped paying him after April 27, 2013. Therefore, his service continued to that date. I also find that he was entitled to the same severance package as that negotiated between the Association and the Board. That package is a reasonable one given Officer M's age, length of service, rank and the unlikelihood that he could find comparable employment.

The severance package between the Association and the Board includes 1.25 months of severance pay per year of service to a maximum of 24 months. However, Officer M died eight months after his termination. Pursuant to the Agreement, officers were entitled to continue their benefits during the severance period. It appears that life insurance was part of the benefits package and the estate contends that it is entitled to the life insurance benefit. However, the submissions I received from the estate on this issue were very limited. I was not even provided with a copy of the life insurance policy. I received no submissions at all on this issue from the Board. Neither party made submissions about the relationship between any severance that might be payable and the entitlement to life insurance, if any. I also find that I require more detailed submissions on the other aspects of the severance package such as benefits and vacation pay.

And at the conclusion of the award I stated:

I find that Officer M was entitled to the same severance package as the Association negotiated for its other members. That package included 1.25 months of severance pay for each year of service to a maximum of 24 months as well as vacation pay and benefits. Officer M died during the severance period raising the possibility of entitlement to life insurance. There are also outstanding issues with respect to other benefits and vacation pay. I, therefore, direct the parties to make submissions on how the terms of the severance package

negotiated between the Association and the Board should be applied and quantified in these circumstances.

Thus, I found that Officer M was entitled to a severance package equivalent to that negotiated for other members of the bargaining unit and I asked for submissions on how that package should be applied and quantified in Officer M's circumstances.

The severance package negotiated between the Association and the Board provided:

1. The terms "member" and/or "members" when used in this Agreement shall mean all members of the Leamington Police Service represented by the Association who are employees of the Service as of the date that the Service is disbanded (hereinafter referred to as the "disbandment date") save and except [Officer M], [two other names] and any other member who is or becomes subject to a separate severance agreement between the Board and the Association or approved by the Association.
 2. This Memorandum of Agreement represents an agreement on all severance pay issues for all members with respect to the disbandment of the Leamington Police Service, and is binding on the Board, the Association and all of its members. This Memorandum is entered into without prejudice to the right of the Association or [Officer M] to negotiate/arbitrate severance pay provisions for [Officer M] and without prejudice to any position the Board may take with respect to same.
 3. Severance pay for all members who may be entitled to severance, shall be calculated on the basis of 1.25 month's salary (at the member's rate of pay as of the disbandment date pursuant to the Collective Agreement between the Board and the Association), for each year of completed service and part year of completed service with the Board and its predecessors, as of the disbandment date, to a maximum of twenty-four (24) months pay. Payment for a part year of completed service shall be paid on a pro rata basis, calculated on completed months of service. This severance pay formula is inclusive of any obligation to pay a member pay in lieu of notice of termination and/or severance pay pursuant to the provisions of the Employment Standards Act, 2000. A month's severance pay for a part-time member shall be calculated in the basis of the part-time employee's actual hours worked during the period from January 1, 2010 to and including November 30, 2010 divided by eleven.
 4. Any member who applies for continued employment with the OPP but who is not offered any continued employment shall be paid severance pay in accordance with paragraph 3 of this Memorandum of Agreement, subject to income earned by the member through other employment during the appropriate severance period as calculated pursuant to paragraph 3 above and subject to any interim payments provided to members by the Board.
- ...
8. Full-time members shall be paid the vacation pay that the member would otherwise be entitled to be paid in calendar year 2011, in accordance with Article 8 of the Collective Agreement on the payment of 11/12ths of the hours of vacation with pay as set out in Article 8 of the Collective Agreement. These

payments shall be made, subject to all required statutory deductions, within forty-five days of the date of this Agreement.

9. Members of the Association employed in part-time positions as of the date of disbandment, who are otherwise entitled to severance pay pursuant to paragraph 4 of this Agreement, shall be paid 12% of their salary in lieu of benefits. A part-time member's salary and the appropriate severance period shall be determined in accordance with paragraph 3 of this Agreement.

10. Members of the Association employed in full-time positions as of the disbandment date who are otherwise entitled to severance pursuant to paragraph 4 of this Agreement shall continue to be enrolled in the health and welfare benefits set out in Article 15 (except for LTD) during their severance period as calculated pursuant to Article 3 of this Agreement. This enrollment shall cease in the event the member obtains employment with similar benefits. Members who obtain such benefits through other employment are required to immediately advise the Board of this entitlement.

Pursuant to my direction in the January 20 award, the parties have made submissions on the outstanding quantum issues. This is my award with respect to those issues.

The thrust of the estate's arguments continues to be that the severance awarded to Officer M should reflect what it perceives to be the Board's improper actions. It has now focused much of its submissions on the perceived mistreatment of Officer M in the period between December 3, 2010 and his termination. However, as I stated in my January 20, 2015 award and the production award dated September 30, 2014 before that, my jurisdiction is limited to determining the appropriate severance payable to Officer M as a result of the abolition of the Service. This process is not about reviewing Officer M's terms and conditions of employment prior to April 27, 2013. If Officer M had a dispute about those terms he should have raised it during his employment. I made that determination with respect to the requested repayment of Association dues in my prior award as follows:

The Board deducted Association dues even though there was no longer an Association to remit them too. It is possible that those deductions should not have been made. However, that is an issue related to the income earned by Officer M when he was still an employee of the Board. It is not an outstanding severance issue arising from the abolition of the Service and is not within my jurisdiction to determine.

This proceeding is about Officer M's severance entitlement, not what he should have received while he was employed. Thus, the estate's claims that he never took vacation and that he should have had a raise are not relevant to my consideration nor are they within my jurisdiction.

The estate also asserts, repeatedly, in its submissions that Officer M could not seek other employment while he was under suspension because of the provisions of the *Police Services Act* (PSA). The Board disputes that interpretation of the PSA and that Officer M could not seek other employment. There is no evidence as to whether Officer M ever sought consent to work during the suspension. However, that dispute also

pertains to the time that Officer M was employed and is not relevant to issue of the amount of severance payable to Officer M when his employment was terminated.

Furthermore, the estate asserts that Officer M was entitled to 1.25 months of severance per year of service as well as any other entitlement under the collective agreement that was in place upon abolition of the Service. That is not what I previously decided. I have determined that Officer M is entitled to a severance package equivalent to that negotiated between the Association and the Board on behalf of the other officers. Some of the terms of that agreement must be adjusted to the practical reality that Officer M was not terminated until 2013 and the arbitration took place 19 months later but the same principles should be applied.

LIFE INSURANCE

The agreement negotiated between the Association and the Board included the following provision:

10. Members of the Association employed in full-time positions as of the disbandment date who are otherwise entitled to severance pursuant to paragraph 4 of this Agreement shall continue to be enrolled in the health and welfare benefits set out in Article 15 (except for LTD) during their severance period as calculated pursuant to Article 3 of this Agreement. This enrollment shall cease in the event the member obtains employment with similar benefits. Members who obtain such benefits through other employment are required to immediately advise the Board of this entitlement.

The collective agreement between the Association and the Board in December 2010 when the Service was abolished contained the following provision with respect to life insurance:

16.02 The Board shall pay one hundred percent (100%) of the premiums for Members who are eligible to be enrolled and who are in fact enrolled in the Life Insurance Plans presently in effect. These plans, subject to and in accordance with the provisions thereof, provide life insurance in an amount equal to two (2) times the Members annual salary to a maximum of two hundred and fifty thousand (250,000), double indemnity and disability coverage in an amount equal to sixty-six and two-thirds (66 2/3%) of the Member's regular monthly earnings subject to a maximum of six thousand dollars (\$6,000) per month with a ninety (90) day qualifying period and disability must prevent Member from performing the regular duties of the occupation in which the Member participated just prior to the commencement of the disability.

Officer M was covered by a group life insurance policy in accordance with the above. The Board continued to pay the premiums for the policy on behalf of Officer M after the abolition of the Service. However, in September 2012, the insurer advised the Board that it could not continue Officer M under the group policy. The Board then arranged for an individual policy for him. Officer M was advised that this was occurring and filled out the insurance policy application. He had his doctor fill out the requisite health information form. It was clear that the policy was being treated as a new policy for a death benefit of \$170,000.00 to which he would have to be accepted. One of the terms of that policy was

that no benefit would be payable if the insured took his own life within two years of the commencement date. The new policy provided:

When we will not pay the principal insurance death benefit (exclusions and reductions of coverage)

We will not pay the principal insurance death benefit if the insured person dies before reaching the age of 15 days.

We will not pay the principal insurance death benefit, if the insured person takes their own life, while sane or insane, within 2 years of the later of:

The date the application for this policy was signed

The policy date, or

The most recent date your policy was put back into effect, if your policy has been reinstated.

The policy ends on the date the insured person dies and instead of paying the death benefit, we will refund:

All the premiums you paid. If your policy has been put back into effect, we'll refund the premiums you paid since the most recent date the policy was reinstated plus the balance of any premium fund on the date the insured person dies.

[Emphasis in original]

On April 26, 2013, Brian Sweet, Secretary to the Leamington Police Services Board sent a letter to Officer M advising him that his benefits would cease on April 30, 2013 but that he could assume his life insurance policy if he chose to do so. A representative of the life insurance company also contacted Officer M. However, Officer M did not assume the life insurance policy and ceased to be insured on June 30, 2013.

The estate submits that the severance agreement between the Association and the Board provided for the continuation of benefits, including life insurance, during the severance period and that the Board should have continued to provide those benefits, including the insurance policy *in effect in December 2010* to Officer M. The estate asserts that under that policy, Officer M had long passed the two year suicide exclusion and his estate would have been entitled to the insurance set out in the collective agreement i.e. "an amount equal to two (2) times the Members annual salary to a maximum of two hundred and fifty thousand dollars (250,000)". The estate maintains that the Board must pay that benefit in order for it to be made whole.

The estate also argues that the Board did not negotiate a severance package with Officer M that included a premium in lieu of benefits so he must be treated as if he were still employed during the severance period. If he had still been employed, he would have been entitled to the life insurance stipulated in the collective agreement.

The Board submits that Officer M's estate is not entitled to any life insurance benefit. It argues that Officer M was offered the opportunity to take over his life insurance policy when he was terminated and that he chose not to do so. The Board says that Officer M could have avoided the loss of the insurance policy and that it is not required to pay for avoidable losses. It refers to *A. Estate v. B.C. Rail Ltd.*, [1999] B.C.J. No. 2941 and *Lee v. Bank of Nova Scotia*, [2004] O.J. No. 3505.

The Board argues, in the alternative, that even if it were responsible for the loss of benefits, Officer M's estate would not be entitled to the death benefit under the policy because he committed suicide within two years of the policy taking effect.

In the further alternative, the Board submits that any payment to Officer M's estate for the loss of the life insurance benefit should be limited to the premium cost that the employer would have paid during the severance period.

The estate replies that the Board should not be in a better financial situation because of Officer M's death. It maintains that Officer M could not afford to take on the insurance policy as a result of the Board's actions and that it would be unjust to find that he was responsible for the fact that he was not insured. The estate contends that the Board was responsible for Officer M's inability to pay the life insurance premiums because it terminated him without severance and then stated in his Record of Employment that all of his earnings since 2010 had been severance pay. The estate asserts that that information was false and led to Officer M being refused employment insurance. He appealed that refusal and won but by the time he received the benefits it was too late to assume the life insurance policy. The estate also argues that the Board put financial pressure on Officer M by taking the position that he would have to repay \$70,000 for an alleged overpayment of severance pay.

The estate also replies that the jurisprudence referred to by the Board does not relate to the police sector and does not involve collective agreements. It says that the police sector is unique in that legislation governs all aspects of the employment relationship, including this process. The estate asserts that the jurisprudence upon which the Board relies is, therefore, of limited relevance to this case. The estate refers to *Olquin v. Canac Kitchens*, 2011 ONSC 1011 (CanLII).

The estate replies, further, that any argument that the Board was only required to pay the life insurance premiums cannot stand in the face of the triggering event of Officer M's death. It asserts that that event triggered the coverage that the premiums were supposed to be providing pursuant to the collective agreement and, therefore, it is entitled to the benefit not just the premiums.

The estate also argues that it is entitled to both the full severance payment and the full payment from the life insurance policy that should have been in place. It argues that Officer M and the Board never reached a severance agreement so he was entitled to severance plus anything provided by the terms of the collective agreement for the period of severance.

Decision

As noted in my earlier awards, the approach used by arbitrators to determine severance under section 40 of the PSA has been informed by the common law jurisprudence on wrongful dismissal. That jurisprudence supports the Board's claim that an employer is not responsible for paying the death benefit to which a terminated employee would have been entitled under an insurance policy if the employee had the opportunity to assume or convert the policy and chose not to do so. In *A. Estate and B.C. Rail Ltd. (supra)*, A was terminated without cause and was advised that his life insurance policy would expire but that he could convert it to an individual policy. He did not do so and died soon afterwards. A's estate argued that if A had been given proper notice of termination he

would have been employed on the date of his death and covered by the policy. It also argued that A was not in a condition to make a decision about converting the policy. The B.C. Court or Appeal found that the employer was not responsible for paying the benefit because A should have mitigated his losses by converting the policy and that he was capable of making that decision for at least part of the period prior to his death. In that case, A knew that he was ill and the court found that a reasonable person would have converted the policy. It said:

What falls to be considered is not what he might have done, but whether what he did do was reasonable having regard to all of the circumstances. Even if one leaves aside the trial judge's reasoning, I am persuaded the evidence in this case led inexorably to her conclusion. For whatever reason, perhaps simple inattention, A did not minimize his damages. His failure to take a simple step in mitigation of them in the face of his rapidly declining health when he was dealing with his will and his claim for a severance payment was the cause of his loss. In my view the trial judge was right not to visit the loss of insurance proceeds on the respondent.

In *Lee v. Bank of Nova Scotia (supra)* the plaintiff was constructively dismissed. The employer advised him that he could convert the group life insurance policy covering him and his wife to a personal policy but he did not do so, although he did at one point consult with a representative of the insurer. Mr. Lee's wife died during the notice period and he sought the death benefit under the previous policy. He argued, as the estate does here, that impecuniosity resulting from his termination made it impossible for him to continue the insurance payments. The court said:

Mr. Lee had a duty to act reasonably in mitigation of his loss in relation to his insurance coverage. He was fully informed of his options and the conversion time frames. He rejected attempts to keep the coverage in force. He accused Mr. Clarke of acting in bad faith. By failing to convert group coverage to individual coverage Mr. Lee failed to mitigate his loss *E.E. v. E.R.* (1997) 44 B.C.L.R. (3d) 168 (B.C.S.C.) *Thom v. Good Host Foods Ltd.* [1987] O.J. No. 560.

However, in *Olguin v. Canac Kitchens (supra)*, the court found that the plaintiff was entitled to the full notice period even though he became disabled and did not buy an insurance policy to replace the one that ended with his termination. It also found that the employer was required to continue paying him the equivalent of Long Term Disability benefits after the notice period ended and until the age of 65. However, there are three distinguishing features of that award. Firstly, that decision relates to Long Term Disability payments. Secondly, the court finds in *Canac Kitchens* that benefits were payable, at least partly, because the plaintiff contributed to the costs of coverage. The Board paid Officer M's life insurance premiums. Thirdly, and most importantly, the court said that there was insufficient evidence to show that a comparable policy providing comparable benefits would have been available. Replacement insurance for LTD benefits is not as accessible as converting a life insurance policy. I note that the severance package negotiated between the Board and the Association did not include LTD benefits and Officer M lost that coverage in 2012. The *Canac Kitchens* decision was upheld by the Court of Appeal 2012 ONCA 61 (CanLII) although it does not appear that the argument that the plaintiff had failed to buy a replacement policy was presented. An earlier Ontario Superior court decision had found that an employer was not responsible for the failure to continue life insurance coverage in circumstances in which the employee had been

advised upon termination that coverage would end. The court in *Piolo v. Calian Technology Services Ltd.*, 2000 CanLII 22362 (ON SC) found that the onus was on the terminated employee to find replacement coverage and that he should have made inquiries of the employer or the insurer and learned that he could convert the life insurance policy.

I have found that the agreement negotiated between the Association and the Board should be applied to Officer M but it has to be modified to reflect the fact that Officer M was not terminated until April 2013. Another distinction is that the agreement between the Association and the Board was negotiated in 2011. The Board had continued to pay the premiums for benefits and life insurance for former members of the bargaining unit while the package was being negotiated and had agreed to continue them until the severance period ended. However, in Officer M's case, the benefits were not continued and the arbitration was scheduled to take place nine months after the termination and ultimately took place 19 months later. It is not possible to order the continuation of the benefits retroactively so the issue is how Officer M's estate should be compensated instead. With respect to life insurance, the issue is whether the Board should bear the cost of paying a death benefit for which Officer M was no longer insured when he had the opportunity to assume the policy and did not do so. The courts have said that the employer is not responsible for paying a benefit in those circumstances and I adopt their reasoning.

Officer M did have the opportunity to assume the policy. An employer that terminates an employee can limit its potential liability for the failure to provide insurance by ensuring that the employee has the opportunity to continue the policy or convert it to an individual one. Officer M was advised by a letter dated April 26, 2013 that his life insurance would end on May 31 but that he could assume it. (In fact it apparently continued until June 30, 2013.) He was also provided with the name and contact information for a representative of the insurer who subsequently contacted him. Officer M, therefore, could have remained insured and the Board is not required to pay his estate the equivalent of the death benefit in those circumstances. The estate points out that it would be difficult for Officer M to pay the premiums when he had no income. Nevertheless, the principle that such a significant loss could have been avoided had Officer M taken advantage of the opportunity to take over the policy is applicable and persuasive in this case.

In any case, Officer M's estate would not have been entitled to the life insurance payout because of the terms of the policy in which he enrolled in September 2012. The Board did initiate the new policy and asked Officer M to apply. It said it was necessary because the insurer would no longer continue him under the old group plan. Officer M filled out the application including the medical documentation of insurability and was accepted for a \$170,000.00 policy. The Board continued to pay the premiums until his termination. Thus, Officer M agreed to a new insurance policy and that constituted a variation of that term of his employment. I understand that this will seem harsh and unfair to the estate because the suicide exclusion is, presumably, intended to prevent someone who intends suicide from taking out a policy. Officer M had been enrolled under the old plan for years and was long past the exclusion period. There could be no claim that he was taking out a new policy with suicidal intentions. Nevertheless, the policy under which Officer M was insured at the time of his death included that exclusion and he had applied and been accepted for it less than two years before his death. The Board is not required to pay the death benefit when the insurer would not have had to pay. Officer M knew that he had a new individual life insurance policy and took no action to protest the modifications of its

terms at the time it was taken out. On the contrary, the Board paid the premiums and Officer M had the benefit of coverage until June 30, 2013.

The estate also argues that the Board must pay the insurance referred to in the collective agreement i.e. two times his salary. The estate assumes that Officer M continued to be covered by the collective agreement from December 2010 up to and including the post April 2013 severance period. However, the collective agreement was between the Leamington Police Association and the Leamington Police Services Board and expired on December 31, 2010. I have no information as to whether the "Leamington Police Association" continues to exist although it seems unlikely. Nevertheless, Officer M was either an employee under contract and the terms of that contract reflected the terms of the collective agreement, except to the extent that they had been changed between December 2010 and the date of his termination, or he was the only person in the bargaining unit of one and could negotiate changes to the replacement collective agreement. Most of Officer M's terms of employment had not changed but he stopped being covered for Long Term Disability benefits in 2012 and he also, albeit at the Board's instigation, applied for and was accepted for a new life insurance policy. That was the insurance policy in place when he was terminated and the one for which the Board should have continued to pay premiums during the severance period. Even if the collective agreement became a series of one year agreements after its expiration, Officer M was the only person in the bargaining unit and he accepted changes to the agreement.

For all of the above reasons I find that the estate is not entitled to be paid the death benefit set out in either of the life insurance policies or referred to in the collective agreement.

BENEFITS

The severance agreement between the Association and the Board included the following provisions with respect to benefits:

9. Members of the Association employed in part-time positions as of the date of disbandment, who are otherwise entitled to severance pay pursuant to paragraph 4 of this Agreement, shall be paid 12% of their salary in lieu of benefits. A part-time member's salary and the appropriate severance period shall be determined in accordance with paragraph 3 of this Agreement.

10. Members of the Association employed in full-time positions as of the disbandment date who are otherwise entitled to severance pursuant to paragraph 4 of this Agreement shall continue to be enrolled in the health and welfare benefits set out in Article 15 (except for LTD) during their severance period as calculated pursuant to Article 3 of this Agreement. This enrollment shall cease in the event the member obtains employment with similar benefits. Members who obtain such benefits through other employment are required to immediately advise the Board of this entitlement.

The collective agreement in place in December 2010 provided as follows:

15.01 The Board shall pay on behalf of all Members eligible to be enrolled and who are in fact enrolled under any of the plans listed herein one hundred percent

(100%) of the premiums payable under the said plans or under such other plans as may be issued, at the discretion of the Board, in replacement of or in substitution for any of these plans, provided however that any plan issued in replacement of or in substitution for any of the following shall provide equivalent coverage to that provided by the plans.

...

15.04 In the event of a Member's death or the death of a Member who retires on or after January 1st 1999, the Board shall continue to pay premiums to provide extended health, dental and vision coverage for the Member's/retiree's spouse and dependents, provided they continue to satisfy the requirements for enrollment in the plans, for the earlier of a period of time equivalent to the Member's full time length of service, the Member's/retiree's spouse takes a spouse or if the spouse is or becomes actively employed and a benefit plan is available to the spouse at place of employment.

The estate submits that pursuant to the collective agreement, Officer M's dependents were entitled to continue to receive health and welfare benefits after his death for the period of his service, i.e. for 18 years. It asserts that the benefits should be provided to them as long as they continue to be dependents and that they should be compensated for any health expenses they have incurred since the termination. It also contends that Officer M's dependents may have made health care related decisions due to the lack of benefits and should be paid for two dental visits per year. The estate has not provided any health care receipts for the benefit period.

The Board submits that if Officer M was entitled to any award for loss of health and welfare benefits, that amount is limited to the pecuniary loss to the employee which is the premium cost paid by the employer for the benefits. It contends that Officer M should have mitigated those losses by securing alternate comparable benefits or by finding alternate employment with benefits. As he did not do so, he was not entitled to any payment for loss of health and welfare benefits.

The Board submits, further, that Article 15.04 of the collective agreement provides for the continuation of benefits after a "member's" death and that Officer M was not a "member" after the disbandment of the Service.

In the further alternative, the Board argues that any entitlement Officer M's dependents have with respect to health and welfare benefits is subject to eligibility and it questions the eligibility of the individuals named.

Decision

Officer M is entitled to the severance package negotiated between the Association and the Board but that package must be modified to reflect the facts that Officer M was terminated several years after the abolition of the Service and that the matter is being litigated 19 months after the termination. It is not possible to retroactively provide benefits for Officer M and his dependents during the severance period that has now passed. It is appropriate, therefore, to compensate them for the loss of those benefits.

The collective agreement between the Board and the Association provides that part-time members will receive 12% in lieu of benefits so that is the valuation that those parties

placed on the benefits to which Officer M and his family would have been entitled. That is, therefore, a reasonable percentage to use to compensate them for the loss of those benefits. I, therefore, find that the estate is entitled to 12% of the amount of the severance payment awarded for loss of salary in lieu of benefits.

The severance package negotiated between the Association and the Board does not provide for the continuation of Article 15.04 of the collective agreement during the severance period and I do not find it appropriate to order that benefits be reinstated and then continued for Officer M's dependents beyond the severance period.

MITIGATION

The severance agreement negotiated between the Association and the Board includes the following provision:

1. Any member who applies for continued employment with the OPP but who is not offered any continued employment shall be paid severance pay in accordance with paragraph 3 of this Memorandum of Agreement, subject to income earned by the member through other employment during the appropriate severance period as calculated pursuant to paragraph 3 above and subject to any interim payments provided to members by the Board.

The Board submits that Officer M was required to attempt to secure alternative employment even if such employment meant a reduction of rank and loss of prestige and income. It claims that there is no evidence that Officer M made any effort to mitigate his losses other than applying to the OPP. It refers to *Sandy Bay Ojibway First Nation and MGEU* (2012), 222 L.A.C. (4th) 435 (Deeley).

The estate argues that the agreement between the Association and the Board does not apply to Officer M but that even if it does, it does not require mitigation. Furthermore, the estate submits, the Board has the onus of demonstrating that Officer M failed to mitigate his damages and it has not done so.

Decision

The severance agreement between the Association and the Board does not require mitigation with respect to loss of salary. It says that any earnings during the severance period are set off against the severance pay but does not include any requirement that the severed employees seek or accept alternative employment. The only requirement is that they apply to the OPP and not be offered a position. That is exactly what happened to Officer M. In fact, he applied twice and was rejected. Officer M should not be subject to more demanding mitigation terms than the other former members of the service. Therefore, I do not find that Officer M was required to mitigate his losses other than to apply to the OPP.

In any case, even if there was a broader obligation on Officer M to mitigate his losses, the Board has the onus of proving that he failed to do so. In my award dated January 20, 2015 I stated:

The Board alleges that Officer M's estate failed to demonstrate that he mitigated his losses. However, I find that Officer M would have had great difficulty finding

comparable employment. He did reapply to the OPP when the criminal charges were withdrawn but was refused employment anyway. It was highly unlikely that he would have obtained employment as a police officer anywhere else. Furthermore, there was some evidence that he was suffering from Post Traumatic Stress Disorder and that his mental health was deteriorating. He did not, therefore, fail to mitigate his losses.

I find that there was no requirement upon Officer M to mitigate his lost salary but if there were, the Board has failed to demonstrate that he did not do so.

THE IMPACT OF OFFICER M'S DEATH ON SEVERANCE ENTITLEMENT

The Board submits that any severance payable to Officer M would cease as of the date of his death on January 4, 2014. It argues that there can be no further obligation for severance, or the corresponding duty to mitigate, in the event of his death.

The estate submits that the Board's liability for severance for Officer M should not be reduced by his death because it bears responsibility for that death. It asserts that if the Board had not insisted that he was not an employee and, therefore, not entitled to severance he would still be alive. Furthermore, the estate argues, the Board's liability cannot be reduced by Officer M's death because he and the Board had not reached an agreement about severance.

Decision

The Board's argument that its severance obligation ended with Officer M's death is based upon its assertion that he had a duty to mitigate his losses and that he could no longer do so. However, as noted previously, Officer M was not required to seek employment other than applying to the OPP. In any case, Officer M would not have found comparable employment during the severance period so it would be artificial to find that his entitlement ended because he could not mitigate. Furthermore, the Board has the onus of proving a failure to mitigate and it has provided no evidence that there were any policing or comparable positions available to Officer M.

Neither party referred to any awards related this issue but the courts have considered it at least twice. In *McMaster Estate v. Imark Corp.*, 2000 CanLII 22740 (ONSC) the Ontario Superior court found that pay in lieu of notice is damages for breach of contract and that the cause of action for such damages survives the death of the plaintiff. The judge stated:

Nor do I believe counsel for the defendant is correct in his submission that the existence of a duty to mitigate implies that the death of the employee during the period of the notice that should have been given will reduce the liability of the employer. No doubt the obligation to mitigate damages presupposes an ability to do so but it would be a *non sequitur* to hold that the employer's liability – rather than the employee's duty – is conditional upon the existence of such ability.

The court in *McMaster Estate v. Imark* also finds that the severance entitlement crystallized on the termination of employment and should not be reduced by the amount of any death benefit. On the actual facts of that case, the court found that the estate had

accepted a settlement offer made by the employer after the employee's death but that if it had not the court would have awarded severance of 12 months.

In *Rickards (Estate of) v. Diebold Election Systems Inc.*, 2007 BCCA 246 (CanLII) the B.C. Court of Appeal held that a severance agreement reached with an employee was frustrated by his death because it specifically provided that he promised to seek an equivalent, alternate position. He was to receive salary continuance for 17 months but was required to conduct a reasonable search for equivalent, alternate employment. The court found that the severance contract was the relevant one, not the employment contract, and that the terms of the severance contract were frustrated by the plaintiff's death because he could no longer seek the employment that was consideration for the salary continuance. The court found that the contract the parties had negotiated after Rickards' termination required personal performance from him and that became impossible.

There is no severance agreement frustrated by Officer M's death and the Board has not claimed that there is. The employment contract was breached when the Board terminated Officer M's employment and at that moment the obligation to pay reasonable severance pay crystallized. If Officer M had been able to mitigate his losses before the matter of quantum was resolved or if the parties had reached an agreement such as the one in *Rickards*, the Board's liability might have been reduced. However, Officer M was not able to mitigate as there were no jobs available. Dying made it impossible but as the judge said in *Imark* "the obligation to mitigate damages presupposes an ability to do so but it would be a *non sequitur* to hold that the employer's liability – rather than the employee's duty – is conditional upon the existence of such ability." Furthermore, I have found that Officer M should not be placed in a worse position than the other former members of the Service and the severance agreement negotiated between the Association and the Board does not contain any requirement to seek employment other than applying to the OPP.

For the above reasons I find that the Board's obligation to pay severance to Officer M did not cease with his death and the estate is, therefore, entitled to 22.5 months severance pay.

OMERS

The estate submits that Officer M's severance entitlement includes remittances to his OMERS (Ontario Municipal Employees Retirement System) pension plan from April 27, 2013 to the date of his death. It acknowledges that Officer M's half of the remittances must come from any severance monies paid to him. It refers to the following award: *The Carleton Place Police Services Board and Inspector Wayne Drummond* (Unreported, October 7, 2003, Simmons).

The estate also contends that the Board has refused to provide information to OMERS and as a result, the estate has not been able to confirm Officer M's pension entitlement. It asks that I order the Board to provide OMERS with all pertinent information.

The Board submits that the severance agreement between it and the Association did not provide for contributions to the pension plan and that pursuant to my January 20, 2015 award, Officer M was not entitled to it either. The Board argues that a severance

calculation of 1.25 months per year of service contemplates the loss of any and all contributions to the pension plan and is, as such, a global payment. It says that the only exception is the continuation of health and welfare benefits.

Decision

The severance agreement negotiated between the Association and the Board does not provide for ongoing contributions to OMERS. For the reasons set out previously, I have found that Officer M is entitled to the equivalent severance package as the other former members of the Service so I decline to include pension contributions in the severance package for Officer M.

I do not have sufficient information to know whether an order should be made to the Board with respect to providing information to OMERS but it is doubtful that I have the jurisdiction to do so in any case.

VACATION PAY

The agreement negotiated between the Association and the Board includes the following provision:

8. Full-time members shall be paid the vacation pay that the member would otherwise be entitled to be paid in calendar year 2011, in accordance with Article 8 of the Collective Agreement on the payment of 11/12ths of the hours of vacation with pay as set out in Article 8 of the Collective Agreement. These payments shall be made, subject to all required statutory deductions, within forty-five days of the date of this Agreement.

Thus, members were to be paid out the vacation pay that they had accumulated from January 1 2010 to the end of November, 2010 that they would normally have used the following year.

The collective agreement in place on December 3, 2010 provided:

8.02 For the purpose of this Article, the vacation year shall be the yearly period commencing January 1st of each year and ending December 31st of the same year. Annual vacation entitlement shall be determined on the basis of a Member's continuous service as of December 31st of each year less one twelfth (1/12) of the amount for each calendar month, consecutive or intermittent, the member is absent. Approved absence on vacation, bereavement, pregnancy or parental leave shall be considered days worked for the purpose of this Article. The amount of vacation so determined shall be taken in the following vacation year.

The collective agreement then provides that an officer with between 13 and 21 years of service in 2009 is entitled to 208 hours of vacation with pay.

The estate claims that Officer M was entitled to a payout of six years of vacation pay upon termination. It says that vacation was an entitlement under the collective agreement but that Officer M never took any after he was suspended in 2009. The estate claims that Officer M was entitled to be paid the six years of accrued vacation pay

plus vacation pay earned throughout the notice period. It asserts that Officer M was required to report to Headquarters twice a day from the day he was suspended until some time after the disbandment of the Service. It says that he was not permitted to take any vacation because vacation was not mentioned in the suspension letter. The estate refers to the following award: *Temiskaming Shores Police Services Board and Chief Douglas H. Jelly* (Unreported, June 17, 2008 (Snow)).

The Board submits that Officer M is not entitled to any payment for vacation pay. It says that vacation is covered by Article 8 of the collective agreement and that Officer M's entitlement was based on years of continuous service. It contends that he did not report for work after the date of disbandment and, therefore, did not accrue vacation. The Board maintains that Officer M received all of the vacation pay owing to him prior to December 3, 2010. In any case, according to the Board, Officer M continued to receive his salary and had no obligation to report for work so he could take his vacation and did not suffer any loss. The Board denies that he was not permitted to take vacation.

The Board also contends that where an award is made providing for full salary in the notice period there should be no additional award for vacation pay. It refers to *Dunning v. Royal Bank*, 1996 CanLII 8159 (ON SC). The Board maintains that awarding vacation pay to Officer M would provide double indemnity for a loss he has not suffered.

The estate replies that the decision to which the Board refers is distinguishable on the facts and because it does not relate to the police sector.

Decision

Pursuant to the collective agreement, vacation was accumulated in one year to be taken the next. Therefore, the severance agreement between the Association and the Board provided that the members should be paid the vacation that they had accumulated from January 1, 2010 to the disbandment i.e. 11/12s of their annual entitlement. Officer M is entitled to the same payment adapted to the date of his termination. He is, therefore, entitled to the vacation pay he earned in 2013 for 2014. In Officer M's case that is 4/12s of his entitlement or 69.3 hours.

Officer M is not entitled to vacation pay for the period of severance as the severance payment will provide full payment for that period.

The estate also claims that it is entitled to be paid for vacation that had accumulated since Officer M's suspension began. It submits that he was prevented from taking vacation for all of those years. It is hard to see what was preventing Officer M from taking vacation. Suspended Officers required to report can usually take vacation and do not report during that time. If Officer M asked for vacation and was refused he should have taken action at that time. Officer M is entitled to be paid vacation on the same principle as the other members of the service were paid when they were terminated and in his case that is for 69.3 hours.

The estate also claims that Officer M should be compensated for having had to report while on suspension. However, severance pay does not include damages for an alleged violation of the collective agreement that occurred several years before the termination.

REPAYMENT OF EMPLOYMENT INSURANCE, WORKPLACE SAFETY INSURANCE BOARD OR OTHER INCOME.

The Board submits that any amounts received from Employment Insurance (EI), the Workplace Safety and Insurance Board (WSIB) or other sources of income should be deducted from any amount owing. However, EI will be repayable from any severance payment for loss of employment income but it is not deducted from that amount. Officer M did not receive any WSIB benefits. The estate has advised that Officer M received no employment income after his termination. I, therefore, find that there should be no deductions from any severance payment for loss of income other than the usual statutory ones.

SICK BANK

The estate submits that Officer M was entitled to be paid out half of the days in his sick bank when he was terminated. It claims that his sick bank was a kind of disability insurance and was, therefore, a benefit covered by the award of January 20, 2015.

The Board submits that no other member of the Service received any payout of accumulated sick leave and, therefore, Officer M was not entitled to it either. It argues, further, that the collective agreement did not require such a payout. The Board refers to *Point Edward Police Services Board and Point Edward Police Association* (Unreported, September 21, 1999, Welling).

Decision

I have found that Officer M was entitled to the same severance terms as the other members of the Service. There is nothing in that agreement that provides for a payout of banked sick leave credits. Furthermore, there was nothing in the collective agreement that provided for a payout of banked sick leave credits so that was not a term of employment that applied to Officer M upon termination. I decline to include banked sick leave credits in the severance package.

CONCLUSION

For all of the above reasons I find that Officer M was entitled to 1.25 months of severance pay plus 12 percent in lieu of benefits plus 69.3 hours of vacation. The calculation is as follows:

Severance pay

18 years of service x 1.25 months per year of service = 22.5 months i.e. to February 14, 2015.

Biweekly salary = \$3,237.52.

47 Biweekly pay periods between April 27 and February 14, 2015 X \$3,237.52 = \$152,163.00

12% in Lieu of Benefits

\$152,163 X 12% = \$18,259.56

Vacation Pay

\$3,238.52 divided by 80 hours biweekly = \$40.48 per hour
\$40.48 per hour X 69.3 hours = \$2,805.26

Total severance owing = \$173,227.82

I hereby order the Board to pay to Officer M's estate the amount of \$173,227.11 minus applicable statutory deductions.

I remain seized with respect to any issues that arise with respect to the implementation of the above order.

Dated at Toronto, May 11, 2015



Laura Trachuk
Arbitrator