



Police Law Update

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We welcome your ideas, suggestions and feedback regarding this newsletter. Please direct your comments to Barrie Cherver or Natasha De Menna. We also welcome your contributions and will happily consider publishing suitable short pieces.

Individual member can't pursue her own grievance to arbitration But she can have her duty of fair representation complaint dealt within a PSA arbitration.

BY ANTONY SINGLETON

An arbitrator has refused to hear an individual police employee's claim for legal indemnification against her Board, because her Association did not consent to her pursuing a grievance to arbitration. However, he ruled that he will hear her related duty of fair representation ("DFR") complaint against her Association.

The decision, in a case called *Christi-Anne Marie Lafrance v. North Bay Police Services Board*, is important because it is the first time an arbitrator has considered the consequences of the Ontario Court of Appeal's decision in *Renaud v. LaSalle*.

ISSUES RAISED BY THE LAFRANCE CASE

Two years ago, the Court held in *Renaud v. LaSalle* that DFR complaints must be dealt with under the conciliation/arbitration regime set out in the PSA. Previously, DFR complaints against Police Associations were heard by the courts.

The Court decided that DFR complaints should be governed by the dispute resolution mechanism established in the *Police Services Act* ("PSA"), on the basis that the legislature intended the PSA to provide a comprehensive scheme governing all aspects of a police employee's employment relationship. In order to achieve this result, the Court interpreted the word "party" in s. 123(1) of the PSA, the provision that commences the conciliation/arbitration system, to include the individual employee in that case. The relevant provisions of the statute read:

123(1) The Solicitor General shall appoint a conciliation officer, at a party's request, if a difference arises between the parties concerning an agreement or an arbitrator's decision or award made under this Part, or if it is alleged that an agreement or award has been violated....

124(1) If the conciliation officer reports that the dispute cannot be resolved by conciliation, either party may give the Solicitor General and the other party a written notice referring the dispute to arbitration....

One of the things that worried Associations most about *Renaud v. LaSalle* was that, because s. 123(1) is the provision that allows an Association, as a "party" to a collective agreement, to commence grievance arbitration proceedings under the PSA, the Court seemed to open the door for individual employees to pursue their own grievances to arbitration without the consent of their Association. That would severely undermine their Association's authority as the exclusive bargaining agents of its members.

The *Lafrance* case raised exactly this issue. The Board had refused to indemnify Ms. Lafrance for the legal costs she incurred defending a criminal charge. Without the Association's consent, Ms. Lafrance pursued her claim for legal indemnification from the Board to arbitration. She also brought a claim against the Association alleging that the Association had breached its DFR by not assisting her in her claim for indemnification. The Board objected that the arbitrator did not have jurisdiction to consider any of Ms. Lafrance's claims against them.

In a preliminary award, Arbitrator Starkman ruled that he had jurisdiction to hear Ms. Lafrance's DFR complaint. This was expected—the Court of Appeal was explicit in its ruling that DFR issues must be dealt with under the PSA—and that aspect of the case continues. Less expected, however, was Starkman's ruling on Ms. Lafrance's claim for legal indemnification against the Board. He ruled that he did not have jurisdiction to adjudicate her claim against the Board, because the Association is Ms. Lafrance's exclusive bargaining agent and did not consent to her pursuing the grievance to arbitration.

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Individual member can't pursue her own grievance to arbitration, rules arbitrator.

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THE CLAIM AGAINST THE BOARD

Starkman's decision not to hear Ms. Lafrance's claim for legal indemnification against the Board without the consent of the Association is based on a number of cases, including Supreme Court of Canada cases, that stand for the proposition that, in the collective bargaining regimes governed by the Quebec *Labour Code* and the Ontario *Labour Relations Act*, a union is the exclusive bargaining agent of its members.

However, his decision raises a perplexing question of statutory interpretation about the specific language of the *PSA*. The implication of Starkman's decision is that the word "party" in s. 123 (1) includes an individual employee if the claim is against the Association, but does not include an individual employee if the claim is against the Board. Can the same word in the same place in the statute have two different meanings? Unfortunately, the decision does not address this issue directly.

As it stands, Starkman's decision explicitly recognises and protects an Association's authority as the exclusive bargaining agent of its members—a pleasing result for every Association. However, because of the question of statutory interpretation raised by that decision, it's highly likely this ruling will be challenged in the courts by way of an application for judicial review—if not by Ms. Lafrance, then certainly in a future case where an arbitrator follows Starkman's approach. At best, this aspect of the law is in a state of confusion, so we won't speculate what ultimate result will be. *Police Law Update* will keep you up-to-date with developments as they occur.

THE DUTY OF FAIR REPRESENTATION CLAIM

Unless it settles, the *Lafrance* case will be the first in which a *PSA* arbitrator hears a DFR complaint on its merits. As such, it will be observed closely by Associations and their lawyers, as we try to determine what the consequences of moving DFR complaints into the *PSA* arbitration system will be.

There may be advantages. *PSA* arbitrators tend to have more

expertise in police labour relations than judges, so the move to arbitration has the potential for fairer, more realistic results. Also, arbitration is a less expensive process than a court proceeding, so it will likely cost an Association less to defend individual complaints.

On the other hand, because arbitration is less expensive, costs may now be less of a disincentive to disgruntled members considering legal action. Associations may find themselves the subject of an increasing number of complaints, which may lead to greater legal costs overall.

There is also considerable uncertainty about the remedial authority of a *PSA* arbitrator hearing a DFR complaint (i.e. whether, or to what extent, an arbitrator's authority to award damages and make orders against an Association differs from that of a judge). The *PSA* is silent about remedies, so the arbitrators who hear the next few cases will have to decide this for themselves.

The Court of Appeal's decision in *Renaud* to hand off DFR proceedings to an arbitrator is part of a general trend over the last two decades, whereby the courts have reduced their involvement in labour relations disputes as much as possible, preferring them to be dealt with by statutory tribunals and arbitrators.

In the case of police DFR disputes, the Court achieved this by stretching the definition of the word "party" in a way that raises other problems (such as whether an individual member can pursue her own grievance) that have yet to be resolved. These problems may result in the court or the legislature revisiting the DFR issue, but the general trend suggests that DFR claims will ultimately fall somewhere within the *PSA* regime. If that is so, arbitrators present the best option for Associations, as they have the greatest understanding of labour relations; the expertise of the other possible *PSA* tribunal, OCCPS, lies elsewhere.

In any case, you can expect further developments in the law on this issue; again, *Police Law Update* will keep you up-to-date as

Workplace Safety & Insurance Appeals Tribunal recognizes PTSD in 911 Dispatchers

BY ANDY EMMINK

Two recent decisions of the Ontario Workplace Safety & Insurance Appeals Tribunal (WSIAT) have endorsed the concept that the calls to which 911 Dispatchers may be exposed, qualify as a "sudden, unexpected traumatic event", for the purposes of Section 13(5) of the Workplace Safety & Insurance Act.

There has long been controversy over the manner in which claims for 911 Dispatchers are adjudicated by the WSIB. For the most part, the thinking that prevails at the WSIB is that disturbing calls are the nature of the communications operator job, and as such, they cannot be considered "unexpected". There is also a tendency to isolate the "event" to the call only, when frequently — especially in the case of fatalities — there are follow-up internal investigations, SIU investigations and even civil litigation. All of

these are factors that produce anxiety and stress in an individual who is already vulnerable because of the traumatizing effect of the precipitating incident.

In Decision 933/07, the Tribunal considered the case of a dispatcher who had taken a number of traumatic calls over a period of 12 years. These included a shooting / homicide, officers being shot, a barricaded suspect and a motor vehicle accident with multiple fatalities. The culminating event was relatively benign, when she heard about a home invasion where the victims were known to her personally. Following that event, the communicator was unable to continue at work.

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WSIAT recognizes PTSD in 911 Dispatchers

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In its reasons, the WSIAT said, at par. 12:

To say that traumatic calls were part of her job does not detract from the fact that nevertheless, we would consider them to be objectively traumatic events and to be sudden and unexpected. By “objectively traumatic”, we mean that the average person taking such a call would in our view be traumatized. We conclude that the calls, in addition to being traumatic, were sudden and unexpected. We accept the worker’s testimony that she could not predict the type of emergency calls she would receive. Each call was, in effect, a surprise.

Far from becoming “used to” these trauma calls over time, the psychological evidence referred to in the Board’s policy on cumulative trauma and Dr. Diane Whitney in her Discussion paper on Post Traumatic Stress Disorder, prepared for the Workplace Safety and Insurance Appeals Tribunal (May 2002), suggests that persons exposed to a series of traumatic events may likely at some point suffer an acute traumatic reaction although they have not done so before.

In a more recent decision, (Decision No. 1839/07) the WSIAT agreed with the approach taken in 933/07. However, the panel in 1839/07 acknowledged that the issue of whether the events described by the worker were “sudden and unexpected” was more troublesome. While clearly one incident, in which the worker had been on the radio with an officer who was fatally injured in a motor vehicle accident, would meet those criteria, the remaining incidents would be more difficult to so categorize. Instead, the Panel relied upon the “cumulative effect” provisions of the WSIB’s policy which provides:

Due to the nature of their occupation, some workers, over a period of time, may be exposed to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment, or horrific accidents. If a worker has an acute reaction to the most recent unexpected traumatic event, entitlement may be in order even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. A final reaction to a series of sudden and traumatic events is considered to be the cumulative effect.

The WSIB recognizes that each traumatic event in a series of events may affect a worker psychologically. This is true even if the worker does not show the effects until the most recent event. As a result, entitlement may be accepted because of the cumulative effect, even if the last event is not the most traumatic (significant).

In considering entitlement for the cumulative effect, decision-makers will rely on clinical and other information supporting that multiple traumatic events led to the worker’s current psychological state. Also, there may be evidence showing that each event had some effect or life disruption on the worker, even if the worker was not functionally impaired by the effect or life disruption.

The Panel interpreted this portion of the policy as a recognition that some workers are engaged in work in which they may be exposed to multiple traumatic events, and that the purpose of this portion of the policy was to ensure that such workers would receive benefit coverage.

In par. 34, the Panel concluded in part:

In our view, the cumulative effects provision should be interpreted so as to grant entitlement to benefits to workers who, because of the nature of their work, experience traumatic events which are not entirely unexpected. If the cumulative effect provision is read so as to require each discreet traumatic incident to be “sudden and unexpected” there would be little use for the provision. Each such incident would be compensable in and of itself without recourse to the cumulative effects provision. In our view, the cumulative effects provision only makes sense if it is read as a recognition that in certain lines of work by their “nature” expose a worker to a higher preponderance of traumatic events. It is expected that such workers will face a higher incidence of traumatic events than regular workers. Thus, to predicate entitlement to benefits under the cumulative effect provision on traumatic events that must still be “unexpected” appears to render nugatory the remedial intent of the provision.

The importance of this decision is that it will no longer be necessary for 911 operators to establish that each and every disturbing call meets the strict policy criteria for a “sudden, unexpected traumatic event”. Rather, as pointed out by the Panel at par. 36 “the accumulation of them must cause the worker to suffer an acute reaction.”

It would be comforting if the Tribunal’s decisions were taken into account by WSIB decision-makers. Unfortunately, this does not appear to be the case. After the publication of 933/07 and 1839/07, a further claim for post traumatic stress disorder in a 911 dispatcher was denied, on the same basis as the others: the events were not considered to be “sudden and unexpected”.

We have now made a complaint to the WSIB’s Fair Practices Commission. Hopefully, this will result in an Adjudicative Guideline for decision makers that reflects the prevailing jurisprudence.

Editor’s Note:

The issues discussed in this paper about the recognition of Post Traumatic Stress Disorder in 911 Dispatchers will also be of value to police officers facing similar circumstances as those described in the paper.

We have always been receptive to contributions from friends and colleagues and once again want to express our appreciation to Andy Emmink of A. Emmink Associates Limited for this interesting piece.

Dunsmuir v. New Brunswick: Can we now grieve the dismissal of probationary police officers?

BY ANTONY SINGLETON

A Police Services Board has the authority under the *Police Services Act* to dismiss a probationary police officer at its discretion, the only restriction being that it must first advise the officer of its reasons and give him the opportunity to reply. Until now, a dismissed officer has had no means of challenging the dismissal on its merits or seeking damages. At best, the officer could apply to the Divisional Court for judicial review of the Board's procedure; if the Board failed to give the officer proper reasons or an opportunity to reply, he would be reinstated, but the Board could simply correct its procedure and dismiss him again unless the statutory probationary period had by then expired.

However, a recent Supreme Court of Canada case, *Dunsmuir (Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9)*, raises the possibility that Associations can now grieve the dismissal of probationary officers on the merits and/or seek damages on their behalf.

Explaining how *Dunsmuir* raises this possibility requires a brief history lesson. In *Nicholson, (Nicholson v. Haldimand Norfolk (Regional) Police Commissioners, [1979] 1 S.C.R. 311)*, a case decided in 1978, the SCC held that, under the common law, a probationary police officer has the status of a public "office holder." By virtue of that status, he is entitled to a minimal degree of procedural fairness before he is dismissed, namely the officer "should ... [be] told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond." Beyond that, however,

Once it had the [officer's] response, it would be for the Board to decide on what action to take, *without its decision being reviewable elsewhere*, always premising good faith [emphasis added].

Subsequently, the legislation was amended, codifying the procedural requirements set out in *Nicholson* as a statutory right (now found in s. 44(3) of the *Act*). The *Act* does not state that the decision cannot be reviewed elsewhere, but in practice that rule has been carried over from *Nicholson* too.

Thirty years later, the SCC in *Dunsmuir* rejected the idea that the status of public "office holder" determines a public-sector employee's rights to fairness at the termination of his employment. Rather, the starting point of the analysis is the contractual relationship between the employer and employee:

Disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder.... Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

An argument can be made that this reasoning overturns *Nicholson* completely: if the common-law status of "officer holder" is abandoned, so too are the rules that the Court in *Nicholson* tied to it—including the rule that the merits of the decision are not reviewable elsewhere. Probationary officers are employed under

collective agreements, the argument would go, so disputes relating to dismissal should be resolved in accordance with the collective agreement and the relevant provisions of the *Act*. Section 44(3) sets out the minimum permissible protection for probationary officers, but the collective agreement may contain additional protections that fetter the Board's discretion to dismiss probationers and can be the subject of a grievance.

Precisely what this argument gets you, should it succeed, remains to be seen. Typically, a uniform collective agreement will contain a "management rights" clause stating that the Board has the right to take various actions, including dismissing employees, but which then goes on to allow the Association to grieve if the Board exercises those rights in certain impermissible ways. The strongest protection is offered by language allowing the Association to grieve "unjust" or "unreasonable" actions; less protection is offered by language such as "arbitrary," "discriminatory," "capricious" and "bad faith." Even the weaker language, however, would allow for a grievance where the Board must present evidence going to the merits of the dismissal for scrutiny by an arbitrator.

The argument that the merits of a dismissal can be arbitrated is novel and would face a number of significant counterarguments, so its chances of success are far from certain. However, *Dunsmuir* suggests that it may still be possible to seek damages akin to reasonable notice for the dismissal through the grievance procedure. The argument would be that damages flowing from dismissal are a different issue from the *decision* to dismiss. Section 44(3) deals with the decision-making process, but makes no reference to damages; while the decision-making process may be excluded from arbitral review by virtue of its inclusion in the *Act*, the same cannot be said of damages flowing from the dismissal. Arbitrator Knopf accepted an analogous line of reasoning in a *Kenora* case (*Kenora Police Services Board and Kenora Police Assn. (2001), 102 L.A.C. (4th) 439*), holding that the decision to lay-off police officers (which is covered by the *Act*) is a different issue from the entitlement to "severance benefits" upon lay-off (which is not referred to in the *Act*, and is a legitimate subject of a collective agreement).

Ultimately, there is no issue with greater importance to a member than his or her rights when subject to dismissal. *Dunsmuir* opens a new line of argument that the dismissal of probationary officers can be subject to review by an arbitrator, or at least form the basis of a claim for damages. Although the chances of success are highly uncertain, it is worth considering grieving if and when your Board next dismisses a probationary officer.

Dunsmuir involved the termination of a lawyer from a government position and maintained a substantial damage award in favour of a very short term employee, recognizing the impact of such a termination on *Dunsmuir*. Probationary police officers have usually completed post graduate education in law enforcement and have successfully completed Police College. The impact of termination on such a person may well make continuation of a career in law enforcement impossible and could give rise to similar damages. The risk of facing a substantial damage claim should make Board's think twice before terminating probationary officers.

G & C Profiles... Natasha De Menna



Natasha attended Osgoode Hall Law School at York University and obtained a Bachelor of Laws in 2003. While attending law school, Natasha was involved in Osgoode's Community and Legal Aid Services Programme (CLASP) and LEAF's Early Teen Outreach Project. Prior to attending law school, Natasha obtained an Honours B.A. in Political Science and Sociology from the University of Toronto.

Natasha articulated with the Canadian Auto Workers Union and Green & Chercover. She was called to the bar in 2004. Natasha joined Green & Chercover as an associate in July 2004. She practices labour law and civil litigation on behalf of trade unions and associations.

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