



Police Law Update

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

Demands and Stress of Collective Bargaining

BY BARRIE CHERCOVER

The demands of association leadership are daunting indeed. Association officers spend countless hours listening to membership issues, dealing with discipline, assisting on SIU investigations, public and internal complaints, running the association and dealing with the management of your police service.

When you are ready to call it quits and retire in exhaustion it's time to negotiate a new collective agreement. Members present a list of contract demands that may run for pages, and the employer may seek take aways and claims to have no time to meet.

In policing, the compensation issues are often easy to identify and are sometimes easy to resolve, because comparability is so well established. Not only are your members entitled to a compensation package similar to those of your comparables, but police management may accept this reality. If not, an arbitrator will.

Whether your collective bargaining proceeds expeditiously or whether management makes you jump through hoops to get where you need to go with compensation, you must not neglect the language issues. To save time, effort, frustration and costs down the road, the question of dotting your i's and crossing your t's is crucial to success in bargaining a collective agreement.

Notwithstanding membership pressure to get bargaining completed and notwithstanding the possibility that a suitable financial package may be on the table, the failure to address troublesome language issues will inevitably create problems and costs in the future.

The following examples demonstrate only some of the issues that require attention during collective bargaining:

1. **Job Share**
2. **Parental leave**
3. **Updating your benefit package**
4. **What speciality assignments should attract premiums**
5. **Vacation selection**
6. **Distribution and assignment of overtime**
7. **Who should receive premiums for training and what should that premium be**
8. **Who should receive premiums as a result of speciality assignments and what should their premiums be**
9. **Course reimbursement**
10. **Protocols for legal indemnifications claims and/or S.I.U. representation**

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Stress of Collective Bargaining

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11. **Promotions, job posting, career development**
12. **The necessary changes to account for the abolition of mandatory retirement**
13. **W.S.I.B. coverage for members reporting to work on a call-back (members are not usually covered until arrival at work on regular shifts)**

Your membership will not be happy with the results if issues like those set out above are left to management.

If you have access to experienced advisors you can send some of these language matters to committee to avoid clogging discussions at the bargaining table, especially where limited time is available for bargaining, but you should not think that an appropriate financial settlement is all you need to do. If you fail to look after the details they will come back to haunt you in member complaints, grievances and member dissatisfaction sooner than you think.

Bargaining Members Need Time Off Work— Why is the Association Involved

BY DIJANA SIMONOVIC AND BARRIE CHERCOVER

Have you ever needed a day off work to attend to a legitimate personal matter but were reluctant to ask your employer for the time off in the fear that your request would be denied? Have you instead chosen to call in sick rather than telling your employer the real reason for which you required the time off? Most collective agreements contain provisions detailing leaves of absence for which employees can apply. These provisions recognize that members may legitimately require time off, while trying to minimize the disruption that such leaves may cause to an employer.

Although the provisions are often specific and detail the circumstances for which a member may obtain leave, collective agreements also commonly contain general provisions that would allow leaves for personal reasons such as family responsibilities. The provisions providing for leave from work may be automatic or discretionary. Even when leave provisions give the employer discretion as to whether to grant or deny a request for leave, members are entitled to insist that their employers consider the individual circumstances of their request. In exercising their discretion, employers must observe the spirit of the clause which is intended to create entitlement to leave and comply with the law of the land (including the *Human Rights Code*) as well as consider whether and to what extent the leave will actually interfere with scheduling, staffing, or other needs of the employer.

Arbitrators have found that leave should be granted when the member has reasonable justification for what otherwise would be an unauthorized absence. Arbitrators have also required that employers exercise any discretion reasonably. In considering a request for leave, an employer must balance its own interests against the member's legitimate need to have the time off. To properly deny a request for a leave of absence, the employer must establish that granting a leave would be too costly or would unreasonably interfere with their interests. Furthermore, arbitrators have found it improper for employers to deny requests for leave where the reason for the absence is to attend to important personal matters, where granting the leave would entail only minor administrative problems or costs or would not otherwise unreasonably interfere with the employer's operation.

This all seems to be common sense, making one wonder why Associations need to be involved.

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Why is the Association Involved

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There are reasons for this. In the first place, some employers consider only their own interests when a request for leave of absence is made or when the member requesting leave of absence is disliked by management. It goes without saying that this may be worse when the employer perceives itself as fulfilling a public responsibility and where financial constraints may result in understaffing even before the request for leave is made.

The issue raised in the last paragraph demonstrates the need for Associations to negotiate leave clauses in their collective agreements to provide members with an enforceable contractual right to such leaves in appropriate circumstances.

Unfortunately, many members don't plan ahead or find their need for time off is immediate. In addition, members sometimes don't think about their employer's needs or anything beyond their own desire for time off work.

While many leave of absence grievances succeed, members recognize that it might take too long to file a grievance and take it to arbitration if their request for leave is improperly denied. In some cases, members may not be honest about their circumstances. For example, members may call in sick in order to attend a family function. If caught, the member will face discipline, invariably requiring Association support.

There is absolutely no way that Associations can guarantee common sense will prevail in all circumstances, but an Association can fulfill an important role to ensure its members obtain legitimate time off and avoid unnecessary discipline by taking steps like those which follow:

1. **Make sure you have negotiated adequate leave of absence provisions to be incorporated into the collective agreement.**
2. **Maintain a constant vigil to ensure that management considers more than their own needs in responding to requests for leave and that your members consider more than their own needs in requesting a leave of absence, and that they act honestly in applying for leave. (Where leave requests are made early, most employers should be able to plan around them without undue hardship).**
3. **Where the employer has acted unreasonably and in violation of the collective agreement, file the grievance and take it as far as necessary (even when an arbitrator's decision would be too late for the specific situation facing your member). A successful arbitration may make it easier next time for the member and the Association.**

Following these steps will put Associations in the best position to assist members to obtain legitimate time off and to avoid situations where legitimate needs result in member discipline.

Congratulations, Terri



Green & Chercover would like to congratulate Terri Hilborn on her new position as legal counsel for the York Regional Police Association. Terri has written a number of articles for the Police Law Update and has been an important part of the Police Law Practice Group at Green & Chercover. We will miss Terri as both a colleague and friend. We wish Terri much success in her new position.

Canadian Civil Liberties Assn. v. Ontario Civilian Commission on Police Services opens up Police Conduct to Greater Levels of Public Scrutiny

BY RON FRANKLIN

On January 4, 2003, a complaint was made under Part V of the *Police Services Act*, R.S.O. 1990, c. P.15 (the *Act*) alleging that an officer used excessive force in escorting a woman out of a store. What made this complaint unique was the fact that the complainant was not the woman who was allegedly injured but, a man who had witnessed the alleged incident.

Section 57(1) of the *Act* clearly establishes that a member of the public can make a complaint about police officer misconduct under Part V. But it also establishes that such a complaint can only be made if the person was directly affected by the conduct complained of, intuitively indicating that only victims and not witnesses can bring a complaint.

That's why it wasn't surprising when the complainant was advised that his complaint would not be treated as a formal complaint by the Chief of Police and when the Ontario Civilian Commission on Police Services (the Commission) subsequently upheld the Chief's decision on the basis that a witness, was not a person directly affected for the purposes of Part V of the *Act*. What was surprising, however, was what happened when he applied to the Divisional Court for judicial review of the Commission's decision.

The complainant testified that despite the fact that the woman was much smaller than the police officer, had her hands cuffed behind her back and was passive when being escorted out of the store, the police officer slammed the woman to the ground with such force that she struck her head on the pavement, leaving a large pool of blood on the sidewalk. He also testified that he was so disturbed by the incident that he spoke to the police officer directly and told him that he believed his actions were unwarranted. He also told the Court that he continues to experience considerable anxiety and difficulty sleeping as a result of the incident.

The sole issue before the Court was whether or not the complainant was a member of the public who was "directly affected" by the alleged misconduct for the purposes of Part V of the *Act*. In a split decision, the majority of the Court held that he was. The Court set aside the Commission's decision and ordered the Chief of Police to deal with the complaint in compliance with Part V of the *Act*.

The majority of the Court acknowledged the risk of interpreting the phrase "directly affected" so broadly so as to vest the right to complain in anybody who is unhappy with the police. However, the majority concluded that to limit access to the complaints process to the person who was injured by the police officer's conduct was far too restrictive an interpretation in light of the remedial and public interest nature of the *Act* and the unique circumstances surrounding the complaint.

The majority found as fact that the complainant's experience was first hand and that he witnessed the assault and its aftermath at close range. They pointed out that he was disturbed by what he saw and even after he had spoken to the police officer directly, he remained shaken by the incident.

The majority held that these considerations established a direct link between the complainant and the alleged police conduct that was sufficient to distinguish his interest from that of any other member of the general community.

The Commission subsequently appealed the Divisional Court's decision to the Court of Appeal. Although the Court of Appeal disagreed with the majority in the Divisional Court and concluded that the complainant did not have the requisite personal and individual interest to bring himself within the ambit of those "directly affected", it left open the possibility that under a certain set of circumstances another "witness" might.

While it is unclear how these principles will play out in practice and how the anticipated changes to the *Act* will deal with such circumstances, these decisions, at least in theory, may have opened up police conduct to greater levels of public scrutiny than any of us thought was the case. Proponents might argue that this decision is a positive step towards greater accountability. Opponents will say that it provides those with an anti-policing animus with the ability to "arm-chair quarterback" police officers' use of discretion in difficult situations.

We'll keep you aware of how the legal principles in this area are refined and applied as time goes on.

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.

Natasha is a member of the Canadian Association of Labour Lawyers and the Ontario Bar Association.

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