

IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEMISKAMING SHORES POLICE SERVICES BOARD
- The Employer

-and-

CHIEF DOUGLAS H. JELLY
- The Employee

AND IN THE MATTER OF severance pay for Chief Jelly following the disbandment of the
Temiskaming Shores Police Service

Arbitrator: Howard Snow

Counsel:

On behalf of the Employer:
Peter A. Downard

On behalf of Chief Jelly:
David Migicovsky

This matter proceeded by way of written submissions without a hearing. The final
submission was received May 21, 2008.

AWARD

I. INTRODUCTION

The sole issue in this arbitration was how the Chief of the former Temiskaming Shores Police Service was to be paid his vacation credits when the Service was abolished. As the issue was a narrow one, the parties proceeded on the basis of written submissions without holding a hearing.

II. THE FACTS

June 15, 2007, the Ontario Civilian Commission on Police Services, acting under the *Police Services Act*, consented to the disbandment of the Temiskaming Shores Police Service and the Commission directed that all outstanding severance issues were to proceed to arbitration. The Service was disbanded by the Temiskaming Shores Police Services Board, the Employer, September 23, 2007. Thereafter the policing was done by the Ontario Provincial Police (OPP).

Douglas H. Jelly had been employed by the Employer or its predecessor since July 1973, and had been Chief of Police of the Service since June 1, 1995. Under Chief Jelly's contract of employment any outstanding severance pay issues following the abolition of the Service were to be resolved by arbitration (see Article 15 of that contract, below).

Although many police officers sought employment with the OPP, Chief Jelly indicated that he would not pursue such employment. The Employer decided that Chief Jelly was "retiring" and advised Chief Jelly July 25, 2007, that his "effective date of retirement" would be September 23, 2007. August 14, 2007, the Employer approved a resolution that "the last day of employment for Chief Doug Jelly" would be September 23, 2007.

Prior to September 23 there were discussions between the parties about severance and it appears that one of the issues raised was the impact upon Chief Jelly's pension if his contributions to the Ontario Municipal Employees Retirement System, OMERS, were to cease September 23, 2007. Chief Jelly, who had more than 34 years of service toward the maximum 35 year OMERS pension, was concerned that if he did not achieve 35 years of credited OMERS service his pension would be adversely affected. If the disbandment of the Service led to a reduced pension entitlement, Chief Jelly would claim his future lost pension income as part of his severance. September 21, 2007, the Employer agreed to maintain Chief Jelly "on the payroll" while the parties discussed a possible full resolution of the severance issues. The relevant portion of the September 21, 2007, letter from Mr. Downard, Employer counsel, to Mr. Migicovsky, Chief Jelly's counsel, was as follows:

I confirm that we are engaged in discussions with a view to a possible resolution of the pending arbitration of this matter. As you know the police force of the City of Temiskaming Shores will cease to exist at midnight on Sunday, September 23. Chief Jelly's job will no longer be in existence and there will be nothing for him to do.

Notwithstanding those circumstances, Chief Jelly will for the time being continue on the payroll while we pursue our discussions with a view to a resolution. This is being done on the basis that it shall be without prejudice to whatever legal position either party may subsequently wish to take.

The "pending arbitration" was an October 4 arbitration hearing scheduled to deal with any unresolved severance issues for Chief Jelly. The hearing was later rescheduled for February 14 and 15, 2008.

As a result of the September 21 interim settlement, Chief Jelly continued to accrue pensionable service for OMERS purposes and to receive payments in the amount of his salary. As the Employer expressed it in its submission to me:

By continuing on the payroll it remained possible for Chief Jelly to maximize his period of service for the purpose of the calculation of the amount of the OMERS pension benefit he would ultimately receive. From the perspective of the Board, the agreement made it unnecessary to arbitrate a claim on account of pension benefits by Chief Jelly. (At paragraph 5)

Discussions continued regarding a resolution of the severance issues and February 13, 2008,

the parties negotiated a settlement in which Chief Jelly was to be paid his regular salary and benefits until July 31, 2008. That date allowed Chief Jelly to obtain the maximum 35 years of pensionable service toward his OMERS pension. In addition, Chief Jelly was to be paid a lump sum amount equal to the salary he would have earned in the 18 months between August 1, 2008, and January 31, 2010.

The only issue the parties did not resolve was the issue of vacation - that matter was left to be determined by arbitration.

The normal practice of the Employer and its police officers, including Chief Jelly, had been to take vacation earned in the previous year. Under this practice, the vacation taken in 2005 was the vacation earned in 2004 and the vacation taken in 2006 was that earned in 2005. As of September 23, 2007, the day the Service was disbanded, Chief Jelly had vacation credits of 385.5 hours (10.28 weeks), being his unused vacation earned in 2006, plus his vacation earned between January 1 and September 23, 2007. (See Article 2 of the contract of employment, below.)

On the issue of vacation, I note that there was nothing which addressed vacation in the Employer's motion establishing September 23 as Chief Jelly's "last day of employment." Nor was there anything on vacation in the Employer's July 25 letter advising Chief Jelly that September 23 would be his "effective date of retirement."

Finally I was provided with a copy of the September 25, 2007, settlement between the Employer and the Temiskaming Shores Police Association regarding severance for several members of that Association. The settlement set out specific severance amounts owing to eight named employees, one of whom was Carole Brown. The provisions regarding Ms Brown are as follows:

8. Carole Brown, who has service of 31 years with the Police Service and is currently at a rate of pay of \$25.54 per hour and working 173.33 hours per month, will receive the following amounts:
 - a. An amount equal to fifteen months' salary which can be paid, as determined and communicated in writing by Ms Brown to the Board by October 1, 2007:
 - i. in one lump sum payment; or
 - ii. in two lump sum payments (i.e. one in 2007 and one in 2008); or
 - iii. by salary continuation to the end of the fifteen-month period;
 - b. Benefit continuation until she reaches age 65;
 - c. Continued use of City facilities as is currently provided to her under the collective agreement between the parties for a period of fifteen months from the date of disbandment;
 - d. A maximum of \$3,000 for re-training costs for the purposes of re-employment ("re-training allowance") subject to the provision of receipts to the Board, with any amounts remaining to be forfeited . . . [reasons for forfeiting omitted]

That settlement also included the following general provisions:

9. For the purposes of the above calculations, September 9, 2007 is established as the date of severance from the Police Service. Calculations will be effected in whole months and not in parts thereof.
10. All civilian and clerical employees will also be paid any entitlements to which they are owed effective the disbandment date, such as outstanding overtime payments **and vacation**. Such payments will be made on or before September 21, 2007. (my emphasis)

III. THE AGREEMENT

The key provisions of the parties' contract of employment for 2006-2007 are as follows:

Article 2 Annual Vacation

2:01 The Chief shall be entitled to annual vacation with pay in each subsequent year in accordance with Article 13.01 of the Temiskaming Shores' Police Association Working Agreement, and as amended from time to time, as follows:

Six (6) weeks in the twenty-fifth (25th) year of service; An additional day for every year after the twenty-fifth (25th) year, to a maximum of five (5) additional days.

2:02 When exigencies of the Service do not permit the taking of the aforementioned vacation by the Chief, a maximum of one week may be carried forward, at the discretion of the Board, to the following year or paid at the normal rate of pay. Such pay out to be received on December 15th of the current year.

...

2:05 Should the Chief's employment with the Board be terminated at any time other than on the anniversary date of his employment, his vacation entitlement shall be prorated to the date of termination and any vacation outstanding shall be paid to the Chief forthwith.

Article 15 **Severance**

15:01 In the event that the Temiskaming Shores Police Service is disbanded, the parties shall submit any outstanding dispute with respect to severance entitlements which may be owing to the Chief to binding arbitration. The parties will agree on the appointment of a sole arbitrator to adjudicate the dispute. The Temiskaming Shores Police Services Board will pay the fees for the arbitrator and will reimburse the Chief for his reasonable legal expenses incurred for the arbitration.

IV. CHIEF JELLY'S POSITION

Counsel for Chief Jelly submitted that it is a "fundamental principle that an employee who is wrongfully terminated (as legally Chief Jelly was on September 23, 2007) is always entitled to be paid out their earned vacation . . ." (at paragraph 19). Counsel said that Chief Jelly's employment had been terminated September 23 and he was entitled to his vacation earned prior to that termination.

Relying on the September 25 settlement between this Employer and the Police Association under which "All other police officers and civilians who were terminated by the Board received their accumulated vacation pay as of the date of termination" (submission at paragraph 20), counsel submitted that Chief Jelly should also be paid his vacation pay.

In reply to the Employer submission, counsel for Chief Jelly disputed the Employer's suggestion that Chief Jelly had taken his vacation after September 23, 2007. Counsel for Chief Jelly asserted that the last day of employment had been September 23. Moreover, counsel submitted that the Employer approach would mean that any employee who was off work on sick leave, workers compensation, etc., would first have to exhaust any outstanding vacation. Counsel for Chief Jelly submitted that such a suggestion resulted in absurd results. In any event, one must look to the specific facts to determine whether an individual was

using vacation entitlement. On the facts of this case, Chief Jelly was not using his vacation.

Counsel reviewed the facts and submitted it was clear that Chief Jelly had ceased to be employed as of September 23, 2007. If he had remained employed he would have continued to earn vacation credits after that date until his employment ceased.

Counsel also submitted that the Employer submissions failed to address why Chief Jelly should be treated differently from the other employees. Counsel noted that the settlement with the Police Association had provided for payment of vacation pay in addition to other severance entitlements. Counsel reviewed the situation of Carole Brown (see above) who could have elected to maintain salary payments, as did Chief Jelly, but was expressly also entitled to her vacation pay.

As for remedy, counsel sought payment for Chief Jelly's 10.28 weeks vacation earned prior to September 23, 2007.

V. EMPLOYER POSITION

The Employer submitted that the purpose of the vacation provisions in Chief Jelly's contract of employment was to provide Chief Jelly with a period of time each year in which he could receive salary and benefits while not being required to perform his duties. The Employer submitted that under the September 21, 2007, interim arrangements and the February 13, 2008, settlement, Chief Jelly continued to receive salary and benefits without having to perform his duties. The Employer submitted it had fulfilled its obligations regarding vacation and that Chief Jelly "has had every day of vacation time that he could possibly be entitled to under the Employment Agreement." (at paragraph 10)

The Employer also disputed the date that Chief Jelly's employment was terminated. The Employer said that Chief Jelly's employment continued after September 23 by way of the September 21 letter maintaining his salary. In response to the submissions for Chief Jelly, the Employer noted that there was no agreement that the amounts paid to Chief Jelly after September 23 would be credited toward any severance entitlement. The September 21 letter was expressly without prejudice to each party's legal position.

Employer counsel submitted that it was unreasonable for Chief Jelly to take the position that he was in the service of the Board for purposes of accruing OMERS pension but not in the service of the Board for purposes of taking vacation.

The Employer asked that the claim for vacation pay be dismissed.

VI. CONCLUSIONS

I begin with the employment contract between the Employer and Chief Jelly which established the basic terms of the employment relationship between the parties. In Article 15 the parties clearly contemplated the possibility of the termination of Chief Jelly's employment due to disbandment of the Police Service. In Article 2 the parties specifically addressed the issue of vacation and provided that any outstanding vacation was to be paid forthwith if the Chief's employment was terminated.

Two questions arose:

1. When was Chief Jelly's employment terminated? And,
2. How much vacation was he owed when terminated?

1. When was Chief Jelly's employment terminated?

Relying upon the interim settlement of September 21, 2007, the Employer said that the termination date was later than September 23, although it did not suggest another specific date for the termination. The Employer said that Chief Jelly had taken all his vacation at some point after September 23, but before his termination, such that nothing was owed for vacation.

The fact that Chief Jelly received money after September 23 while doing no work does not mean he was necessarily an employee on vacation. Of course an employee in receipt of money while doing no work may be on sick leave, vacation, or compassionate leave, etc. Alternatively, as his counsel submitted, Chief Jelly might not have been an employee but rather a former employee in receipt of periodic severance payments. Ultimately the issue is one of the intention of the parties. The parties' intention must be determined from the documents and the submissions.

What then was the parties' intention as to when Chief Jelly's employment ended?

The September 21 settlement must be interpreted in the context of the other events and statements. Given the view previously expressed by the Employer that Chief Jelly was retiring September 23, and given the Employer motion establishing September 23 as Chief Jelly's last day of employment, and given the Employer's statements in that same September 21 interim settlement that the police force "will cease to exist at midnight on Sunday September 23" and that the Chief's job "will no longer be in existence and there will be nothing for him to do" after September 23, I have difficulty concluding from this letter that the parties' intended that Chief Jelly would, instead of being terminated as planned, remain an employee after September 23, let alone an employee who would then take 10 plus weeks of vacation. If that had been the parties' intention, I would have expected something to have been said about Chief Jelly being retained as an employee, or delaying his retirement, or even

working past that date. But nothing of that nature was said and instead it appears that the parties simply intended that Chief Jelly be kept “on the payroll” through periodic severance payments in order to protect his pension entitlements, and to protect the Employer from liability for the reduced pension if he did not achieve 35 years pensionable service, all while the parties continued their severance pay discussions. This view is supported by the parties’ final settlement which kept Chief Jelly on the payroll until he had 35 years of service, i.e., until July 31, 2008. The final settlement also provided that Chief Jelly would be paid a further lump sum on July 31, 2008.

Based upon the documents exchanged between the parties, I conclude that the parties intended that Chief Jelly’s employment end September 23 and that the money paid after September 23, 2007, was intended by the parties as part of the total severance amount, recognizing that in these circumstances Chief Jelly, a Police Chief with 34 years of service with the Employer and its predecessor, would be entitled to considerable severance payment when the Service was disbanded.

My above conclusion is reinforced when I consider the settlement between this Employer and the Police Association. That settlement supports my conclusion that these parties did not intend that Chief Jelly remain an employee and use his vacation. While that settlement is dated September 25, 2007, it appears to have been reached in principle earlier, as the settlement records that another arbitration hearing scheduled for September 11 “will be cancelled.” If so, the substance of the settlement was known well before September 21. All those employees received payment for their earned vacation, in addition to their individual severance packages. Clearly the Employer knew how it was treating its other employees and I have no doubt that, in this small police force, Chief Jelly was aware how the Employer was treating its other employees. I would think that if the Employer and Chief Jelly had intended that Chief Jelly would be treated differently with respect to vacation than all those other

employees who were also losing their jobs through this same disbandment, the parties would have expressed that intention.

In particular, I note that Carole Brown could receive “salary continuation” for 15 months, as compared to Chief Jelly’s 10 months. Had Carole Brown received salary continuation through 2008, the date of her severance from the Service was expressly established as September 9, 2007, and she was explicitly also entitled to be paid her vacation pay. If the Employer and Chief Jelly had intended that his salary continuation (or, as it was expressed in Chief Jelly’s case, “continue on the payroll”) would have had such a different impact than for Ms Brown, I would have expected that outcome to have been clearly expressed. Instead, by failing to indicate in any way that they intended a different outcome, I conclude that they intended a result similar to that of Ms Brown, an outcome with which I conclude both parties were familiar.

I find that Chief Jelly’s employment was terminated September 23, 2007.

2. *How much vacation was Chief Jelly owed as of September 23?*

At his termination Chief Jelly was entitled to be paid for his outstanding vacation. Based on the submissions I find the amount of outstanding vacation at that time to be 10.28 weeks.

ORDER

Since Chief Jelly’s vacation entitlements were to be paid forthwith under his contract of employment, and since I find that after the date of his termination Chief Jelly has not taken his vacation and the Employer has not paid him for his vacation entitlement, I direct the

Employer to make that payment promptly. In particular, I direct the Employer to pay to Chief Jelly 10.28 weeks vacation pay, less any required statutory deductions. Under the parties' practice, vacation pay is based on the salary at the time of the receipt of the vacation. I therefore direct that the vacation pay is to be calculated using Chief Jelly's 2008 salary, an amount that is specified in the parties' February 13 settlement.

I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 17th day of June, 2008.

Howard Snow, Arbitrator