Green & Chercover

Police Law Update

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A Collective Bargaining Issue—When is an Officer to Be Considered on Duty for Call-Backs?

BY GARY HOPKINSON

When an off-duty officer receives a call or is paged to return to duty, how should that officer be remunerated? While collective agreements in the policing sector commonly specify the appropriate rate by which call-backs are to be paid, usually there is no mention of when duty commences for purposes of the call-back. The implicit assumption is that it only starts when the officer arrives "on site". There are, however, compelling reasons for Associations to reassess this issue and to consider bargaining for specific provisions in their collective agreements specifying that officers are to be considered on duty once the call-back has been received and not off duty again until they return home. Travelling to and from site for purposes of responding to the call back would then be covered.

First, there is a fundamental difference between travelling to and from work for regularly scheduled shifts and time spent travelling in response to a call-back. The timing for call-backs cannot be anticipated or controlled by the officer and the travelling to get to the work site is solely in response to the employer's requirement of the off-duty officer's services. Thus, travelling in response to a call-back is at the expense of off-duty time in a way travelling to and from a regular shift is not. Collective agreements should, arguably, reflect this reality.

Second, if the officer is to be covered for any injury sustained while travelling to and from site on a call-back under the *Workplace Safety and Insurance Act* ("the WSIA"), it is useful that the collective agreement specify that the officer is considered to be on duty at the point the call-back is received and not off duty until he or she returns home again. Out of their considerable sense of duty and service, officers frequently respond to call-backs when they are not, at the time they receive the calls, functioning at full capacity physically or mentally. An officer may, for example, be suffering from sleep deprivation. The officer is, however, expected to respond immediately to the call-back and travel without delay to a work location. In such a situation, the officer is increasingly vulnerable to injury while driving. The situation will be exacerbated for the journey home after the on-call shift. However, unless police service policy or the collective agreement specifies that the officer is on duty, the officer might not be entitled to compensation under the *Workplace Safety and Insurance Act* for any injury sustained while travelling to and from site.

The Workplace Safety and Insurance Appeals Tribunal has ruled that a police officer is not considered to be "in the course of employment" while proceeding to and from work unless the officer is involved in some specific police activity en route or sustains injuries by reason of being a police officer. It has been specifically determined that an officer will not be considered to be on duty simply by reason of being on call. However, police service policy or other documents structuring terms and conditions of employment will be considered in the adjudication to determine whether the activity in which the officer was engaged at the time of the accident involved something for the benefit of the employer and whether the activity occurred during a time period when the worker was being paid. The rate for which travel time is to be paid can be worked out between the parties in bargaining. It is none-

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

An Interest Arbitration Award Worth Noting

BY BARRIE CHERCOVER

A recent North Bay interest arbitration award addressed several issues of significance for Police and Civilians. As you, know the members of Police Services are forced to interest arbitration if unable to reach agreements in bargaining.

It is a well-settled principle that interest arbitrators should replicate what the parties would have agreed upon had they achieved their own settlement. In the police sector the proof is in the pudding, and most interest arbitrators accept what other police services and police unions have agreed upon as convincing evidence of what the litigating parties would have agreed upon had they achieved their own settlement.

In a decision delivered February 9, 2005, arbitrator Howard Snow issued an interest arbitration decision to set the terms and conditions of employment for members of the North Bay Police Service for the calendar year 2004. The case was heard and the decision rendered after the year of operation of the collective agreement and thus was entirely retroactive.

Most interest arbitrations don't make for interesting reading, but this award decides a number of disputes in a way worth noting.

Salary Increase

> The employer demonstrated the average differential between North Bay police officers and a group of Northern Ontario or other Ontario police forces of similar size. Over a 12 year period, North Bay First Class Constables got 97.62% of the average of the others. The arbitrator accepted that evidence of a reducing differential in the last 6 years demonstrated that the litigating parties were attempting to catch up and had done so by 2003.
>
> Arbitrator Snow **rejected the historical comparison and accepted that his award should maintain the more recent relative position**, which was almost parity with the comparables.

New Provincial Salary Standard

> Arbitrator Snow noted the change in salary structure for sworn police officers which commenced in 2003 when the Toronto Police Service and Toronto Police Association agreed to an additional retention allowance for experienced officers, while making some compensating changes elsewhere in the collective agreement to help pay for the new allowance.

The North Bay Police Association proposed a similar retention allowance and to make similar compensating changes to help pay for the allowance. The North Bay Police Association offered the removal of their existing service pay and Senior Constable premiums in this regard.

Only 4 ½ months earlier, Arbitrator Snow had issued an award declining a similar request by the Oxford Community Police Association, in part because that force did not have a retention problem and in part because Arbitrator Snow was unconvinced that this change in salary structure benefited anyone.

In the North Bay case, Arbitrator Snow said:

> **However, my concerns about the wisdom of the new system have not been widely shared in the Ontario police community which has embraced this change. There are now so many police forces with this new salary system that I accept that it is the new salary norm, quite apart from any impact it may have upon any alleged retention problem. That is, while it was intended in Toronto to combat a retention problem, it has now simply become the new salary structure for police officers in Ontario. I conclude that my concerns should not prevent the employees in this force from having the benefit of this new allowance and therefore I award an allowance of the type first introduced in Toronto.**

My clients in the police sector have all been advocating that the bonus system is the new salary structure for police officers in Ontario whether there is a retention problem in the community or not. Hopefully Arbitrator Snow's decision will put this debate to rest.

Civilian Increase

The arbitrator had already noted an element of catch-up for sworn police officers in the previous 6 years. The 2004 salary increase awarded to the Uniform Officers contained no element of catch-up.

Although the salary increases for civilian employees in North Bay had lagged behind Uniform Officers during the period of catch-up, the arbitrator saw no justification for a smaller increase for civilian employees in comparison with sworn officers in 2004.

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WSIB Loss of Earnings (LOE) Reviews—Its all in the Timing!

BY ANDY EMMINK*

In 1998, the former Worker's Compensation Act was replaced with the new Workplace Safety and Insurance Act (WSIA). Among the new provisions was one that limited the power of the Workplace Safety and Insurance Board (WSIB) to review a worker's loss of earnings.

Section 44 of the new WSIA stipulates that the Board "shall not review the payments more than 72 months after the date of a worker's injury."

This means that if a worker suffers a work-related loss of earnings *after* the six-year anniversary of their injury, the WSIB is unable to determine what the loss is and compensate the worker for it. However, in a somewhat perverse application of the legislation, the WSIB is equally unable to review claims where a loss of earnings existed at the 72-month point, after that point passes. This means that if an injured worker is in receipt of a full LOE benefit at the six year point, the WSIB may not review it; the LOE benefit is then "locked in" to age 65, even if the worker returns to work in the 73rd month after the accident.

There are only two circumstances where the "lock-in" may be set aside and a further review conducted:

1) If, before the 72 month period expires, the worker failed to notify the WSIB of a material change in circumstances or has engaged in fraud or misrepresentation in connection with his or her claim for benefits; or

2) If the worker has a permanent impairment and there is a deterioration that results in an increase in the worker's Non Economic Loss (NEL) benefit.

The WSIB may also defer a final LOE review if the worker is, at the time of the review, engaged in a Labour Market Re-entry Program (LMRP).

Clearly, Section 44 as it stands is capable of causing inequities – both in terms of under and over-compensation. The first claims affected reached the six year mark in January of 2004. No doubt it will spawn a flood of new appeals to the already-overburdened Workplace Safety and Insurance Appeals Tribunal. One case that is sure to end up there, is a client who, at the time of the 72 month review was engaged in a gradual return-to-work program. At the time, he was working half days with the accident employer, with the objective of gradually increasing his hours to a full 10 hour shift. In an astounding display of administrative sleight-of-hand, the WSIB declared that the gradual return-to-work program was really a LMR program, and used that to defer the final LOE assessment until the worker returned to working full hours. The same week he returned to full hours the WSIB carried out the final LOE review and lo and behold, there was no loss of earnings! The "$0.00" loss of earning in now locked in.

Unfortunately, the worker was unable to continue working full hours, and is now off work completely. Because of Section 44, he is not entitled to any further WSIB benefits, and must now claim under his employer's long-term disability insurer.

To fully appreciate the absurd nature of Section 44, consider two police officers injured in a high-speed pursuit. Officer A suffers a neck strain, and Officer B undergoes a second surgery for his knee. He happens to be off work for the surgery at the 6th anniversary date of his accident. As a result, the WSIB is unable to review his loss of earnings again when he returns to work. His full LOE benefit is locked in to age 65, even though he is again receiving his full wage from his employer.

Officer A suffers a recurrent bout of neck problems in the 73rd month post accident. This leads to further medical investigation and ultimately, surgery in the 75th month post accident. Because he was not incurring any loss of earnings at the 6th anniversary of his accident, the WSIB cannot consider his loss of earnings for the surgery and recovery period.

Two officers, both injured in the same accident, both requiring further medical care and off work within a matter of weeks of one another. One receives income replacement benefits; the other does not. Is this equitable legislation?

Is seems to me Section 44 serves neither the worker nor the employer community very well. Once wonders, though, what impact the legislation had on the WSIB's unfunded liability (that is, the amount by which its financial obligations for current claims exceed the assets it has to pay out those obligations). Presumably, an exposure to future claim costs that is limited to a six year period as opposed to age 65 can only have a beneficial effect on the WSIB's debt. But then, I'm not an actuary…

* Andy Emmink is the founder of A. Emmink Associates Ltd., a firm that specializes in assisting members of law enforcement agencies in resolving disputes with the WSIB. For more information, please visit their website at: emminkassociates.com

Chercover's Notebook

BY BARRIE CHERCOVER

Do We Use a Lawyer or Consultant?

Many small associations are reluctant to retain lawyers or consultants for fear of the costs. While those fears are quite legitimate, my experience is that there are many occasions that clients contact me too late because the grievance or issue has been inadequately or inappropriately structured without advice and in a way that makes it impossible to resolve the problem satisfactorily.

It may be more useful to discuss the problem with your lawyer or consultant before filing the grievance and to get advice on how to phrase the issue and what to do about it or about the problem.

Some of my clients take their own arbitration hearings but use me to assist them to identify the problem and to develop strategy around the complaint or grievance. Others will discuss their issues with me and then use our firm throughout the process. Still others retain us once the hearing is scheduled.

The earlier you discuss the problem the more helpful the lawyer can be.

Worth Noting

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He noted that the more common practice in Ontario policing is that both **civilian employees and sworn officers receive the same salary increase.**

Equity Adjustment Increase For Court Security Employees

Both parties acknowledged that court security employees in North Bay had fallen behind similar employees in other police services. Notwithstanding this, the employer resisted an additional increase for these employees on the basis that the Association had historically agreed to lower salaries for court security employees in North Bay and because any special increase might have an impact on the salaries of female dominated groups of employees through pay equity.

The arbitrator found that the employer's argument was not a reason to pay a group of employees less than their work merited.

The arbitrator noted that these employees had fallen about 12% behind their colleagues in the rest of Ontario and that a correction of the magnitude of 12% was inappropriate to make in a single year. The arbitrator ordered an adjustment of about half of what these employees had fallen behind as reasonable to make up in a single year. Thus the **civilian court security employees received an additional increase of 6% over the general increase awarded in 2004.**

Interest arbitration awards are rarely worth comment. They are useful in that they define the comparables. Arbitrator Snow took the time and made the effort to give all of us an insight into the reasoning behind his award on the issues reviewed in this paper. What Arbitrator Snow has said will be useful for all Police Associations at the bargaining table.

Call-Backs?

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theless important, for the reasons canvassed above, that the collective agreement reflect that the officer commences duty at the time the call-back call is received and is paid for the time travelling to and from site.

G & C Profiles... Gary Hopkinson

Gary's practice encompasses all areas of advocacy on behalf of unions and workers, including Labour Board matters and labour arbitrations, as well as human rights, employment standards and occupational health and safety complaints and workers' compensation claims. His practice also includes professional discipline and criminal defence work and civil litigation.

Gary's publications include, "Constructive Lay-Off in the Unionized Workplace: Assessing the Impact of the Canada Safeway and Battlefords Decisions" (1999) 7 Canadian Labour and Employment Law Journal, p.297; "Disability and the Duty to Accommodate: A Union Viewpoint", Labour Arbitration Yearbook 1998 (Toronto: Butterworth's/Lancaster House, 1998), p.143; and "Holding the Line: A Defence of Anti-Scab Laws" (1996) 4 Canadian Labour and Employment Law Journal, p.137.

Gary attended the Faculty of Law at the University of Toronto, obtaining his LL.B. in 1995, and was called to the Bar in 1997. Prior to law school, Gary completed a B.A. in English Language and Literature at University College, University of Toronto, did graduate work in English at both Queen's University and U. of T. and taught literature and effective writing at both university and community college.

Gary originally hails from Sheffield, England where he was born into a long line of manual labourers, steel workers and soccer players.

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