

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**Toronto Police Services Board**

**and**

**The Toronto Police Association**

**(Caribana Scheduling Grievance)**

**Before:** William Kaplan  
Sole Arbitrator

**Appearances**

**For the Board:** Michael Hines  
Hicks Morley  
Barristers & Solicitors

**For the Association:** Mark Wright  
Sack Goldblatt Mitchell  
Barristers & Solicitors

Eli Gedalof  
Sack Goldblatt Mitchell  
Barristers & Solicitors

This matter proceeded to a hearing in Toronto on June 20 & 21, 2005,  
February 1, 2006 and May 9, 2006.

## **Introduction**

The Toronto Police Services Board (hereafter “the Board” or “the employer” and the Toronto Police Association (hereafter “the Association”) are parties to a collective agreement. That collective agreement provides for a compressed work week for many members of the Association, mainly those police officers with front line duties. This compressed work week provides the employer on the one hand, and the Association and its members on the other, with certainty as the schedule is, in effect, permanently fixed and runs without regard to weekends and statutory and other holidays. Under the compressed work week schedule, every day is treated the same, and the schedule runs in fixed cycles. This schedule has been in place for many years and its operation is well understood by the parties. There have, historically, been disputes arising under the compressed work week schedule. However, those disputes have largely centered on Association assertions that changes to the compressed work schedule attract call back pay.

The dispute in this case relates to the decision of the Chief of Police to make a number of changes to the compressed work week schedule for the period July 25 to July 31, 2005 in order to respond to the extraordinary policing

demands associated with Caribana. While some further details will be provided below, suffice it to say that the Chief decided, in order to meet those policing demands, to change the compressed work week schedule largely through the institution of a number of eight hour shifts. The result of this decision was that many police officers on that compressed work schedule lost scheduled days and weekends off. Only modest overtime compensation was earned by some officers. One platoon in particular, “A”, was most adversely affected losing what would have been an extra long holiday weekend.

When the impact of the scheduling change become known, the Association raised its concerns and filed a grievance. In brief, the Association takes the position that the employer must be held to a standard of reasonableness in making changes to negotiated collective agreement provisions such as the agreed-upon compressed work week schedule. In the Association’s view, the employer’s actions in this case did not meet that reasonableness test. For its part, the employer takes the position that the Chief’s action were reasonable in the circumstances and that there is no basis, none whatsoever, to conclude otherwise. That being the case, the employer submits that the grievance must be dismissed. The employer, however, also took the position, based on a

review of authorities and the particular and unique provisions of the collective agreement, that there was no arbitral jurisdiction to review the decision of the Chief of Police, the parties having agreed in the collective agreement that this discretionary decision was beyond arbitral oversight. Having carefully considered these latter submissions, and having regard to the authorities; in particular, the decision between these parties: *The Metropolitan Toronto Police Services Board and The Metropolitan Toronto Police Assn. (Grievance re Shift Schedule -31 Division)*, unreported decision of Jackson dated December 20, 2000) (affirmed by the Div. Ct. March 25, 2003), (hereafter “the Jackson award”), I am of the view that this is a proper case for arbitral review as set out in the Jackson award and that the employer’s submission that the Chief’s decision is not subject to review is not sustainable.

### **The Collective Agreement**

Article 5:02 provides:

Subject to the requirements of the Service, in the discretion of the Chief of Police:

(a) The normal tours of duty will be as follows ...

provided that the Chief of Police shall continue to have the right to change the starting time of a tour of duty.

...

APPENDIX “B”

ACCORD ON COMPRESSED WORK WEEK

...

### 3. WORKING CONDITIONS

The implementation of the Cycle is not intended to increase premium pay of members affected nor to reduce their regular salary but is intended to rearrange their working schedule as set out in paragraph 2. To that end for members assigned to the Compressed Work Week Cycle this Accord takes precedence over the terms of the uniform collective agreement and during the term of this Accord the following articles of the collective agreement shall bear the interpretation as set out below:

(a) Sub-clause 5:01(a), (b), (c) and (d) are inapplicable

...

(d) Sub-clause (a) of 5:02 shall be amended in accordance with the Cycle as set out in paragraph 2 hereof provided, however, that the Chief of Police in his/her discretion shall continue to have the right to change the starting time of a tour of duty, including the right to vary the starting time of a tour for overlapping at four times.

### **Background**

In anticipation of Caribana 2005, the employer and the Association met to discuss the scheduling requirements. The Caribana festival is an annual summer event celebrating Caribbean and other cultures involving, among other things, music, outdoor concerts, food, dance, costumes and a parade. Officially, the festival, quite possibly the largest Caribbean festival in North America, lasts two weeks. However, festival activities and attendance are concentrated over a four-day period straddling the weekend. In 2005, that four-day period was over the July long-weekend, July 25-31. In anticipation of the policing challenges posed by the festival, discussions were held with the Association in November 2004 and January and February 2005.

Different scheduling models and approaches were canvassed. There is agreement between the parties that in order to insure public and officer safety additional police must be deployed during the peak period.

Ultimately, a routine order was issued changing the compressed work week. On April 13, 2005, a grievance was filed alleging that the changes to the compressed work week violated the collective agreement as they constituted an impermissible “exercise of discretion of the Chief of Police, in that they alter the Compressed Work Week Schedule in a manner which is not necessary in order to meet the requirements of the Service and improperly interferes with the schedules of certain members, including the members in A platoon, who stand to lose highly valuable weekend days off and family time during the summer.” To be sure, members of “A” platoon were the most adversely affected by the scheduling change losing one of only three scheduled summer weekends off. The adjustments to the schedules of the other platoons were less severe. And, as noted above, there were some minimal overtime opportunities.

With respect to the Chief’s decision, Sergeant Warren Wilson, the person in charge of scheduling, testified about his work in Special Event Planning.

Suffice it to say that Sergeant's Wilson evidence establishes that following a review and consultation with officers involved in policing Caribana in previous years, a great many options were considered in order to determine how best to meet the policing challenges. In his evidence, Sergeant Wilson reviewed those options. The one most favoured by the Association would have resulted in significant overtime compensation to meet desired staffing levels as it did not, without voluntary callback, generate sufficient human resources. It also involved, among other things, deploying many officers who were not on the compressed work week schedule, officers working Monday-Friday mostly in various administrative capacities.

The Association's preferred choice, which while it did not affect the compressed work week schedule, did not make a lot of sense to the Chief for a number of operational reasons one of which included the obvious benefits in ensuring that frontline police officers, already equipped with radios and used to working together, continued to work together in this challenging policing environment. Deploying non-front line police officers did not, in management's view, make much sense. Incurring unnecessary overtime expenses added a further disincentive. Materials introduced into evidence canvass the detailed pros and cons of the different options.

## **Argument**

In the Association's submission, applying the conclusions of the Jackson award, the Chief did have discretion to amend the compressed work week schedule, but that discretion had to be exercised for a *bona fide* requirement of the service and must not be in bad faith or otherwise unreasonable. This was the standard, Association counsel argued, that was set out in the Jackson award, a decision that was upheld by the Divisional Court when judicially reviewed.

The Jackson award, Association counsel observed, dealt with an issue identical if not very similar to the one here: an Association challenge to the decision of the Chief to change the compressed work week schedule.

Arbitrator Jackson concluded that the Chief did have the discretion to change the compressed work schedule to meet the requirements of the service, a point the Association conceded. Arbitrator Jackson, however, went on to make the following comments:

But this is not to argue that the Chief's discretion is unlimited. Clearly, it is limited to applications for purposes of "requirements of the service." That condition is satisfied in this case; the evidence was consistent that all parties acknowledged that the need to adapt the shift system was genuine and, while there was some debate as to whether or not the needs of the service might have been satisfied with fewer detectives on duty (that is, as there would be under the six-week cycle), there was no question that, at the heart of the matter, lay the needs of the service.

...

Under the language of the collective agreement, the Chief of Police has some degree of discretion which can be applied to the Compressed Work Week. However, there are some limits, the first of which is that discretion must be exercised for *bona fide* requirements of the service...As well, the Chief's discretion must be exercised in a non-capricious, non-arbitrary, and good-faith manner (at 40, 43).

In this case, the Association did not disagree that additional officers were necessary during the peak period. What it took issue with was revising the compressed work week schedule, something of great importance to members of the Association and their families, when other viable alternatives were available. The alternative the Association preferred was redeploying some officers who were not on the compressed work week, but who worked regular days, and suggested that any shortfall be made up through voluntary callback. This would have been, in the Association's view, a better way to balance the interests of everyone concerned, especially given the disproportionate and negative effects of the rescheduling on the members of "A" platoon, and to a somewhat lesser degree, "C" platoon.

The operative principle, in the Association's view, given the importance of the compressed work week schedule, should be "minimal impairment." To the extent possible, the Chief, in exercising his or her discretion should, the Association argued, be governed by this principle. In the Association's view, implementation of this principle in this case would have and should have led

to its preferred alternative being chosen. Obviously, it was too late to change the 2005 schedule. However, the Association asked that I issue a declaration of collective agreement breach.

In management's view, the collective agreement was clear: the Chief had the discretion, where he or she was of the view that it need be exercised, to change the shift schedule to meet the requirements of the service. As noted above, in the Board's view, the Chief's discretion was not even reviewable, given the language of the collective agreement. However, for the reasons that follow, I find that this submission is not tenable. With respect to review of the Chief's decision, in management's submission arbitrators should not substitute their views for those of the employer. Was the decision in this case reasonable and taken for *bona fide* purposes? If the answer to that question was yes, then the work of the arbitrator was over. And this, employer counsel argued, was exactly such a case.

With respect to the various alternatives considered by the Chief, the one chosen, in management counsel's view, was the one that made the most sense providing as it did, the maximum number of qualified officers at the lowest cost. Redeploying Monday-Friday officers was not a sensible

alternative to deal with this most difficult policing challenge. Employer counsel also observed that officers on a Monday-Friday schedule also enjoyed scheduling predictability.

Very simply, employer counsel argued, the decision in this case was rational. It was *bona fide*. It was reached after consultation with the Association. Relevant factors were considered and no irrelevant factors were considered. The fact that the Chief did not give paramountcy to one factor identified by the Association; namely, recognition of a supposedly governing principle of “minimal impairment” was not, in management’s view either here or there. There was no such principle agreed to by the parties in any event. What the parties had agreed to was that the Chief could exercise discretion to change the schedule. The decision was, in short, a proper exercise of the Chief’s discretion and in the interests of the requirements of the service. It should not, therefore, employer counsel concluded, be interfered with. And to the extent there was arbitral review, it should be limited, employer counsel argued, to determining if there was bad faith or an improper purpose. If neither could be found, the grievance, counsel argued, must be dismissed.

## **Decision**

Having carefully considered the evidence and arguments of the parties, I am of the view that this grievance must be dismissed.

It is well-established in the authorities that the Chief may change the schedule. It has been done in the past and it was done in this case. The collective agreement requires that the exercise of discretion be subject to the requirements of the service. In this case, there is no doubt whatsoever that changes were required to meet the policing challenges of Caribana. Indeed, the Association does not dispute this. The only real issue in this case is whether the exercise of discretion was somehow tainted, unreasonable, irrational, or made in bad faith.

Employer counsel invited me to conclude, having reviewed a number of authorities, that the exercise of discretion described herein was somehow beyond arbitral review. With the greatest of respect, this is not a conclusion I can reach. The law is settled between these parties as set out in the Jackson award, quoted above, a decision which was confirmed by the Divisional Court. The Jackson award sets out the principles to be applied in a review exercise of this kind. In applying those principles to these facts one is

inevitably led to the conclusion that the exercise of discretion was not only, as conceded, required for the service, but that it was not tainted in any way by the kind of factors identified in the Jackson award and other authorities that might lead to the questioning of the exercise of discretion. The evidence establishes that the decision was completely *bona fide*. It was made after consultation with the Association. It was made following a careful review of the alternatives. The fact that the Association's preferred alternative, which did not interfere with the compressed work week schedule but which involved significant additional overtime expenditures and deployment of Monday-Friday personnel, was not chosen does not vitiate the decision.

There is nothing about the Chief's exercise of discretion, and the balancing of interests attendant thereto, that requires that the Association's desired outcome be given preference. There may very well be disputes between these parties as to which of the alternatives are to be preferred in a case of this kind. But the fact is that the collective agreement gives the Chief the discretion, where the requirements of the service demand, to make the decision, to choose among options where they exist. That is what happened here. There was nothing improper about the process leading to the exercise of the discretion or about the decision itself.

Accordingly, and for the foregoing reasons, the grievance is dismissed.

DATED at Toronto this 17<sup>th</sup> day of May 2006.

*“William Kaplan”*

---

William Kaplan, Sole Arbitrator