IN THE MATTER OF: ***The Law Enforcement Review Act*** Complaint #3704

AND IN THE MATTER OF: An Application pursuant to s.17(1) of ***The Law Enforcement Review Act*** R.S.M. 1987, c.L75

B E T W E E N:

J.W.P.	)	T. Valgardson, Counsel for
Complainant/Appellant	)	the Complainant/Appellant
	)	
- and –	)	
	)	
Cst. R.L.,	)	
Respondent	)	
	)	Hearing date September 13, 2004
	)	Decision delivered November 15, 2004

Chartier, P.J.

INTRODUCTION

[1] Law Enforcement Review Act Complaint No. 3704 was filed by J.W.P. (hereinafter called the "Complainant") on March 4, 1999 against a member of the Winnipeg Police Service, Constable R.L.(hereinafter called the "Respondent").

[2] The matter was referred to the Provincial Court on August 23rd, 2000 for a hearing on the merits of the complaint pursuant to s.17 (1) of the Law Enforcement Review Act, CCSM. c.L75 (hereinafter called the "Act"). The matter was adjourned from time to time pending the outcome of other matters.

[3] By letter dated January 22nd, 2004, Mr. Paul R. McKenna, counsel for he Respondent police officer, advised the Court that the Respondent had since retired from the Winnipeg Police Service and that the Respondent would not be attending the hearing. Mr. McKenna also advised that he was no longer acting on the Respondent's behalf and that he, as well, would not be in attendance.

THE ABSENCE OF THE RESPONDENT

[4] The hearing process under the Act is initiated by the laying of a complaint by an aggrieved person against a specific police officer or officers. This process, though being specific complaint driven, can also result in recommendations that will impact an entire police force. As was mentioned by Associate Chief Judge Giesbrecht in a decision that was later upheld on appeal by Justice Mykle in Court of Queen's Bench on November 4, 1999 in L.E.R.A. case B v. S, "…the Act may appear to be purely disciplinary in nature, but it has a much broader public purpose as well." Associate Chief Judge Giesbrecht further stated at page 3, the complaint can not only result in discipline to an individual police officer, "…it can also result in recommendations for systemic change."

[5] I point this out because the Court is now being called upon to consider a matter without any participation whatsoever from the Respondent. The Court's decision risks not only affecting the Respondent, it risks affecting future police conduct or practice on the basis of a one-sided version of impugned police conduct. The integrity and legitimacy of the Court's work is potentially undermined when it may not be given an accurate and complete factual foundation.

[6] In light of the above, there may be situations and circumstances where the Court should either;

a) refuse to proceed without the Respondent. A decision not to proceed should be understood as not a decision to immunize or protect the non-appearing Respondent, but rather as an effort to protect the accuracy and completeness of the fact finding component of the hearing. In such situations, the only remaining remedy for the Complainant may be in the civil courts; or

b) delimit the impact of its pronouncement. By restricting the consequences and effect of its pronouncement, the Court may state that it does not intend its decision to be a recommendation for future changes to police practice or procedure or that it be in any way considered a precedent.

[7] These situations would almost always occur in circumstances where there are no independent neutral third parties who witnessed the incident that gives rise to the complaint.

[8] Section 24(9) of the Act permits a hearing to proceed in the absence of the Respondent where "the Respondent absconds, or refuses or neglects without good and sufficient cause to attend the hearing". In light of the letter mentioned above at paragraph [3], I find that the Respondent refuses without good and sufficient cause to attend the hearing and pursuant to s.24 (9) of the Act, the hearing will proceed in the Respondent's absence.

[9] I make this decision with some regret as it forces me to consider this matter without the benefit of the Respondent's version of the incident. Had he attended, he could have stated his side of the story, with or without the assistance of counsel. He has now made it impossible for me to consider his version of the incident, if, indeed it differs from that of the Complainant. In these circumstances, the Complainant is entitled to have the matter determined and I will make my finding based on the evidence that is before me. Having said that, I will however delimit the impact of my pronouncement.

THE COMPLAINT

[10] The Complainant alleges the commission of certain disciplinary defaults, as defined under s.29 of the Act, namely that the Respondent did:

> 1. On or about February 23, 1999 abuse his authority by using oppressive or abusive conduct or language towards the Complainant contrary to s.29 (a) (iii) of the Act;
>
> 2. On or about February 23, 1999 abuse his authority by failing to promptly inform the Complainant, upon his detention, of the reasons therefore, as required by s.10(a) of the Charter of Rights and Freedoms, contrary to s. 29(a) of the Act;
>
> 3. On or about February 23, 1999 abuse his authority by failing to allow the Complainant, upon his detention, to retain and instruct counsel without delay and to be informed of that right as required by s.10(b) of the Charter of Rights and Freedoms contrary to s.29(a) of the Act.

THE EVIDENCE

[11] As indicated previously, the Respondent chose not to be in attendance at the hearing. Therefore, the only evidence before me is that of the witnesses called on behalf of the Complainant; being the Complainant and his wife.

[12] Police were called upon to investigate two incidents that occurred at the Complainant's home. The first incident was on January 18, 1999 and related to an attempt arson investigation. An incendiary device had been set up and activated in the Complainant's home. Fortunately, it was discovered before it caused any significant physical damage. The Complainant and his wife were however left understandably unnerved.

[13] The second incident occurred approximately two weeks later on January 31, 1999. Again it related to another incendiary device being set up in the Complainant's home. This time the device ignited and essentially gutted the Complainant's home. The Complainant and his wife were forced to extract themselves from the burning home through the bedroom window. Both were hospitalized for a number of days as a result of smoke inhalation and superficial burns.

[14] Shortly after both incidents, police questioned the Complainant and his wife as to who might have set both fires. The Complainant and his wife advised the police that they did not have any enemies and could not understand who would have done this to them. They also advised the police officers that none of their three sons would have done this.

[15] This is the extent to which the police questioned the Complainant and his wife with regard to the person or persons who may have set the fire. Though the Complainant repeatedly tried to get a hold of the police to be able to further discuss the incidents, he was unsuccessful. Finally, on February 23, 1999, the Complainant and his wife were summoned by the Respondent to attend the Public Safety Building to discuss both incidents.

[16] When they attended the Public Safety Building on February 23, 1999, both testified that they believed they were attending for a police update and the mutual sharing of information to try to get to the bottom of the incident. Instead of being treated as victims, the Complainant and his wife testified that they were treated as

suspects. Both confirmed that the police had never given them any indication they were considered suspects. What happened next is what leads to the complaint.

[17] The Complainant and his wife were placed in separate interview rooms. The Complainant's wife was advised by two Winnipeg police officers, neither of which are the Respondent, that she may be charged with arson. Her Charter rights were then read to her. They also advised that she didn't have to say anything and proceeded to ask questions about the incident.

[18] While nothing untoward occurred with respect to the police's conduct with respect the Complainant's wife, what happened to the Complainant was very different. When he was placed in the meeting room, he testified that he was not advised that he may be charged with an offence, nor read his rights or given the police caution.

[19] The Complainant testified that the Respondent, immediately upon entering the interview room, went into a tirade, by slamming a six inch thick file on the table, by pointing his finger at the Complainant and by swearing and ranting at the Complainant. More specifically, he says that the Respondent called him a fucking alcoholic, a fucking idiot, that he had a mental condition, that he is unemployable and that he is a fucking gambler who has financial difficulties. The Complainant says the Respondent told him to admit that he set the fire and that if he didn't he would charge his wife with arson.

[20] He also testified that he was kept in a locked interview room from 11 a.m. until 1:30 or 2:00 p.m. When he inquired as to whether he would be able to make a 3:00 p.m. medical appointment, he was advised by the Respondent that he didn't know as he might arrest him.

[21] A little over a week later, on March 4th, 1999, the Complainant filed this complaint with the Law Enforcement Review Agency. A year and one half later, on September 25th, 2000, both the Complainant and his wife were arrested on arson charges. These charges have since been stayed by a Crown Attorney.

[22] I find that both the Complainant's testimony and that of his wife certainly rang true and were without any noticeable inconsistencies. Both were credible witnesses. As well, as the Respondent was absent from this hearing, their evidence is un-contradicted.

THE ISSUE

[23] Counsel for the Complainant contends that his client was detained upon being placed in the interview room at the Public Safety Building. He states the Respondent did not have reasonable and probable grounds to detain the Complainant. He argues that because of this, the Respondent abused his authority contrary to s 29(a)(i) of the Act (arrest without reasonable and probable grounds) by failing to promptly inform the Complainant:

a) of the reasons for the detention as required pursuant to s.10(a) of the Charter; and

b) of his right to retain and instruct counsel as required pursuant to s.10(b) of the Charter.

[24] Counsel further argues, as a result of the Respondent's aggressiveness and constant use of profanities toward the Complainant, that he abused his authority contrary to s 29(a)(iii) of the Act (oppressive or abusive language).

[25] The issues therefore are:

1. Was the Complainant detained by the Respondent?

2. If the Complainant was indeed detained, was he detained without reasonable and probable cause contrary to s. 29 (a) (i)?

3. Does the fact that the Complainant was not informed of the reasons for his detention and of his right to retain and instruct counsel constitute an abuse of authority and a disciplinary default under the Act?

4. Did the Respondent use oppressive or abusive conduct or language towards the Complainant?

THE DECISION

Was the Complainant detained?

[26] When one is placed by police in a locked interview room for over two and one half hours and told that they may not be able to make a scheduled doctor's

appointment later in the day because of possibly being placed under arrest, one is clearly being detained by the police.

Did the Respondent have reasonable and probable ground to detain the Complainant?

[27] During the course of submissions, Counsel suggested the Respondent committed an abuse of authority contrary to s. 29(a) (i) for having made an arrest without reasonable or probable grounds. The following two points were made:

a) that the concepts of "detention" and "arrest" are interchangeable with respect to most Charter arguments; and

b) that in Counsel's view the Respondent did not have reasonable and probable ground to detain the Complainant.

[28] Counsel I am sure knew he was walking on thin ice when making this argument. The Complainant had loss his job and was having difficulty finding employment. He had then partnered with others to start up a business. This business was not doing as well as planned. He was encountering certain financial difficulties. Life insurance was taken out on his life. He had no known enemies. No explanation or theory was provided or offered as to who would be able to enter the home on two different occasions and set up a timed incendiary device in the home.

[29] In my view, it was certainly within the realm of reasonable possibility that the police might consider the Complainant as a suspect. Therefore the Respondent would have had reasonable and probable cause to detain him in order to question him further. If the Complainant relies on s. 29(a) (i) with respect to a disciplinary default, he would fail.

Does the Respondent's omission to inform the Complainant of his s. 10 Charter rights constitute an abuse of authority under the Act?

[30] The preliminary determination to be made is whether a police officer can commit the disciplinary default of "abuse of authority" if the alleged act or omission does not fall within one of the seven described categories (i) to (vi) under s. 29(a).

[31] I did not receive the benefit of argument on this point, nor was I able to find another decision on this point. I believe however that because the word "including"

is found right after the term “abuse of authority” and immediately preceding the seven described categories, that a reasonable interpretation would be that the described categories in no way limit an act or omission that may be an “abuse of authority”.

[32] I have already found that the Complainant was detained by the Respondent and that this detention was prima facie reasonable under the circumstances. The question I must now answer is whether the Respondent’s omission to inform the Complainant of his s. 10 Charter rights constitutes an abuse of authority?

[33] Clearly such an omission brings about legal consequences; specifically what may very well have been admissible evidence, had it not been for the Charter breach, could now be rendered inadmissible in a court of law. The Respondent’s superiors may also be concerned by his mistake.

[34] I find the fact that the Respondent did not inform the Complainant of his Charter rights to be a professional error with important legal ramifications. It is not however an abuse of authority.

Did the Respondent use oppressive or abusive conduct or language towards the Complainant?

[35] I have already stated that I accept the Complainant’s testimony that the Respondent, immediately upon entering the interview room, went into a tirade, by slamming a six inch thick file on the table, by pointing his finger but a few inches away from the Complainant and by swearing and ranting at him. More specifically, I accept that the Respondent called him a fucking alcoholic, a fucking idiot, that he had a mental condition, that he is unemployable and that he is a fucking gambler who has financial difficulties.

[36] Though the Respondent first saw the Complainant and his wife as the victims of arson, he clearly came to see them as the prime suspects in the case. The Complainant was unaware of this shift. He thought he was attending the police station to receive an update and share information. He found himself completely shocked and astonished by the Respondent’s tirade.

[37] I can come to no other conclusion, based on the evidence before me, that the Respondent’s language and conduct was abusive or oppressive language or conduct. Therefore I find that there is clear and convincing evidence that the Respondent did, on or about February 23rd, 1999, abuse his authority by using

oppressive or abusive conduct or language towards the Complainant, contrary to s. 29 (a) (iii) of the Act. With respect to the other two complaint allegations, I find that there is no clear and convincing evidence that a disciplinary default has occurred.

[38] As mentioned earlier, I wish to delimit the impact of my pronouncement to this specific case and this Respondent. I do not intend this decision to be the basis for any future changes to police practice or procedure.

[39] Pursuant to s 28 (1) of the Act, I now ask that Ms. M.B., the Court's assistant for these matters, arrange for the setting of a penalty hearing to determine the penalty to be ordered against the Respondent.

DATED at Winnipeg, Manitoba, this 15 day of November 2004.

Original signed by:
Judge Richard Chartier