

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 79  
5414474

BETWEEN           DEREK COFFEY  
Applicant

AND                 COMMISSIONER OF POLICE  
Respondent

Member of Authority:   P R Stapp

Representatives:       Geoff O’Sullivan, Counsel for Applicant  
Peter Churchman QC, Counsel for Respondent

Investigation Meeting:   11 July 2014 at Wellington

Determination:         23 July 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     This is an employment relationship problem in regard to the implementation of a reinstatement order made by the Authority in an earlier determination.<sup>1</sup> In the Authority’s determination dated 25 November 2013 there was an order (*inter alia*) for:

*Mr Coffey to be reinstated to New Zealand Police in a position not (sic) less advantageous than his previous position.*

[2]     It is an issue between the parties as to the meaning of “*no less advantageous*” in regard to an offer by Police of a position for Mr Coffey in Otahuhu.

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<sup>1</sup> [2013] NZERA Wellington 152

**The matter before the Authority**

[3] The parties have jointly applied for a reopening of the Authority's investigation, but limiting the matter to the sole question of how to apply reinstatement to a position no less advantageous than the position previously occupied by Mr Coffey.

[4] By consent, there has been agreement reached between the parties on what the Authority is to decide.

[5] There is a matter between the parties in regard to their employment relationship on sorting out a role for Mr Coffey in terms of the Authority's determination that the Police reinstate Mr Coffey to a position no less advantageous than the previous position that he held in the Police. I am satisfied there is an employment relationship between the parties and that a determination is required. I considered mediation, but decided without a determination it would not be constructive. The parties and their representatives have tried, and consider that the best way forward is with the Authority's intervention.

**The issue**

[6] The parties have jointly requested the Authority to make a determination on whether or not a position offered to Mr Coffey in Otahuhu is a position no less advantageous than his previous position.

[7] Incidentally, there are a number of other matters that have come to the fore in the matter and I am hopeful that the determination will provide the parties with some guidance and assistance in their future relationship in trying to resolve their current difficulties. I will return to this shortly.

**The Law**

[8] The leading case in regard to the definition of "no less advantageous" is *Hennessy v. Auckland City Council* [1983] ACJ 593. The Arbitration Court said:

*On this point we adopt the view taken by the Court, presided over by Chief Judge Horne, in Auckland Clerical IUOW v. Vacation Hotels Ltd (1979) ACJ 313 at p.315, that the comparison must be made in broad terms with particular reference to "no loss of income and no deprivation of conditions". We agree that it is a question of broadly comparing one position against the other without an item by item*

*identification but having regard to the broad principle that the substituted position must be no less advantageous to the particular employee than the position from which the employee has been unjustifiably dismissed...*

[9] That is there can be no loss of income (the salary must be the same), and there must not be any deprivation of conditions. It involves a broad comparison of the positions.

[10] Locality is a factor associated with redundancy situations. In *New Zealand Printing and Related Trades IOUWV v Sigma Print Ltd* [1979] ACJ 297 the Court referred to reinstatement as it applied to the change of place of operation and said:

*The reinstatement of his operations in a place different from Petone as to Featherston is, we think, an offer of new employment under entirely different conditions and entirely different circumstances and geographical locality.*

[11] Also, the Court in *Westpac Banking Corporation v Money* [2004] 1 ERNZ 576 considered “reasonable commuting distance” in the event of redundancy.

[12] The above cases applied to redundancy and reinstatement, but the general principle is clear to include locality as a factor in changed arrangements, but relating to redundancy. It could also include any cost, time and disruption as factors in regard to personal grievances about relocation (*National Distribution Union v Gordon and Gotch (NZ) Limited* AA 242/08 10 July 2008.)

## **Background**

[13] Mr Coffey held the position of Business Services Manager, Tasman Region, but that position was disestablished in a restructure that occurred in 2012. The position was a non-sworn position. His ordinary base pay was \$126,345 per annum in Band 1.

[14] The Authority made the order for Police to reinstate Mr Coffey in a position not less advantageous than his previous position. Parts of the Authority’s determination have been challenged *non de novo* to the Employment Court. The Authority’s order as to reinstatement has not been challenged.

[15] Difficulties have emerged between the parties in implementing the Authority’s order. The parties have not been able to agree on a position for Mr Coffey and as to the whether or not it is no less advantageous.

[16] Mr Coffey was reinstated to the payroll on 14 January 2014 with backdating to 26 November 2013. Mr Coffey had been paid severance pay. It has been agreed that Police will provide a reconciliation of payments and any money due to Mr Coffey. This is to assist reconciling the amount involved. At the current time Mr Coffey has not been reinstated by Police in a position by agreement. Both parties have not been able to agree on a position for Mr Coffey to resume work, although he is being paid.

[17] In the background to this matter the parties have had discussions which have ranged over different positions and the reasons as to why they have been deemed to have been unsuitable. In particular, the current focus is now on an offer of a position of Business Services Advisor in Otahuhu. That position has a job description, but Mr Coffey says that the functions and duties do not encompass the features of his previous (“District Business Service Manager”) position that was disestablished.

[18] There have been difficulties in the parties’ communication, including them meeting and in the written correspondence. Jenny Williams, the National Employee Relations Manager, has acknowledged that the proposed Otahuhu position is a Band 1 position and that there would be no salary maintenance because Mr Coffey’s existing salary would apply. She says that there has been no job sizing and job evaluation done on the position. Also, Ms Williams confirmed that the re-evaluation of the position to make it a Band 1 position came about in discussions. She did not think there was anything in writing.

### **Determination**

[19] In essence, the Police say that the Otahuhu position that has been offered to Mr Coffey is a position that is no less advantageous. It has submitted that there is sufficient developed case law providing some principles to help determine that matter. I have been requested to consider the matter in a broadly focused way and to consider that there will be no loss of income because the salary is the same and no deprivation of any conditions even with the proposal for Mr Coffey to move to Otahuhu.

[20] It is accepted by Police that that the factors of income, taking into account the variety of tasks and job satisfaction, the loss of allowances and how well the position suited the employee’s preferences will affect the situation. Mr Churchman has submitted that where the law provides clarity and is well settled the following could affect the situation:

- (a) *A more junior position is likely to be less advantageous;*
- (b) *A position remunerated at a lower level is likely to be less advantageous;*
- (c) *A position which involves markedly different hours or patterns of work is likely to be less advantageous;*
- (d) *A position which can be regarded as a reasonably significant demotion, particularly in terms of intensive supervision, or, lack of any management responsibilities, is likely to be less advantageous;*
- (e) *A position which does not use the employee's skills and experience or qualifications is likely to be less advantageous.*

[21] In this regard the factors in (a)-(d) do not affect the situation. There is no disagreement that the proposed position in Otahuhu is not more junior, does not have less salary, does not have markedly different hours of work and does not appear to be a demotion. However there are issues that arise about the pattern of work and the use of Mr Coffey's skills and experience and qualifications.

[22] Mr O'Sullivan has submitted that whilst the law is relatively old, there are precedents that relate to situations involving redundancy/restructuring where the Court has considered distance as a factor in relocation and reinstatement to come to the conclusion that distance can determine what no less advantageous means to an employee.<sup>2</sup>

[23] The factors that both Police and Mr Coffey have focused on for what it means to be no less advantageous are:

- (a) The Band, levels and duties for the positions;
- (b) The geographical location (from Nelson to Otahuhu);
- (c) The availability of positions elsewhere in other regions such as Nelson, Wellington, Porirua.
- (d) The differences on the duties, functions and responsibilities of the position offered in Otahuhu.

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<sup>2</sup> *New Zealand Printing and Related Trades IOUWV v. Sigma Print Ltd* [1979] ACJ 297 and *Counties Manukau District Health Board v. Trembath* AC 85/01, Travis J 14 December 2001

[24] I have some observations to make in this matter first in order to try and be helpful.

- (a) The Police must reinstate Mr Coffey in a position with the same salary. It is not able to insist on Mr Coffey accepting a role with reassignment conditions including salary maintenance, lump sum offsets and the length of time for any equalisation, without Mr Coffey's agreement.
- (b) Mr Coffey is obliged to communicate with people authorised to act for the Commissioner despite any feelings he may have about the people involved and the role of the Commissioner over his individual terms and conditions of employment. In addition, the parties are entitled to use their representatives for any communication (although it is highly preferable that the parties work together in their own employment relationship). There has been correspondence that has left what they are saying open to negative interpretation and claims that are getting in the way of a positive relationship. Both parties need to approach their discussions in a responsive manner.
- (c) Police is not required to revisit the restructure arrangements and to put back Mr Coffey's previous position. Mr Coffey must be mindful that since he was successful with his claim to be reinstated, he needs to be responsive and to cooperate in developing arrangements because his original position has been disestablished and that may well have to involve relocation and different arrangements around the job functions. Indeed the signal from him is that he does accept this.
- (d) Mr Coffey has been offered a role in accordance with the standard Police salary on the same band. In this regard, Ms Williams has indicated that there has been no job evaluation done on the position at Otahuhu. Originally the offer was made to Mr Coffey on the basis that salary maintenance would apply. Now it has been clarified that the position is a permanent Band 1 position at his salary, without salary maintenance provisions. There are some issues around the duties and responsibilities and Mr Coffey says they are not the same and that as such the position may not be truly a Band 1 position. This would require a job evaluation and job sizing. It seems only fair for both

parties that such an evaluation is done to derive a proper result on differences between them on the functionality arising out of the different described duties. This is especially so considering both parties have different views about what duties will be done and what will be required in the position. This will assist any future discussions and if there is going to be any further meaningful discussion about a proposed role there. However, the locality of the position may affect the effectiveness of doing this because Mr Coffey will have to agree to move to Otahuhu. I will return to this shortly.

- (e) My last point is that Mr Coffey is entitled to work and that Police is correct in wanting value for the salary Mr Coffey receives.

[25] The development of a position for Mr Coffey to be reinstated to relates to redundancy and restructuring with the disestablishment of his previous position. Thus it is proper that consideration be given to geographical locality. Without Mr Coffey's agreement a move to Otahuhu is a deprivation of his conditions (location being a condition) given the distance (from Nelson), I hold. I am further supported by the untested functionality of the proposed position and whether or not it truly meets the requirements for Band 1 because it has not been sized. In this regard there is no certainty that the use of Mr Coffey's skills and experience or qualifications is going to arise out of the proposed position. Thus this disadvantages Mr Coffey in regard to how the role may work out.

[26] Mr Coffey works for a national organisation so it is reasonable that choice and relocation are involved in the development of a position as it was in the reassignment process. It seems that there are no other positions available in Nelson, Wellington and Porirua at this time, unless something is worked out. Any positions that have been considered do not seem to meet the parties' requirements to agree on, and as such a position will need to be developed in a reasonable location, considering that Mr Coffey has accepted that he may need to move, which includes Wellington and Porirua, and a position developed for the value of the salary that is being paid. Any such position must include value for the salary he is earning (as he has argued about in regard to the functionality of the Otahuhu position). This means that the parties may have to accept some changes around the arrangement of the duties and functions

and to seriously consider the outcome of a job size and evaluation, as well as the issue of job location.

**Authority's conclusion**

[27] I conclude that the proposed position in Otahuhu does not meet the test of being "no less advantageous" for Mr Coffey because of the locality and the differences in its functionality as it has not been job sized and evaluated.

**Costs**

[28] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority