

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 152  
5414474

BETWEEN

DEREK COFFEY  
Applicant

AND

COMMISSIONER OF POLICE  
Respondent

Member of Authority: P R Stapp

Representatives: G J O'Sullivan, Counsel for Applicant  
P B Churchman QC, Counsel for Respondent

Investigation Meeting: 2 September 2013 at Wellington

Submissions Received: 6 September 2013

Date of Determination: 25 November 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Coffey's employment relationship problem relates to restructuring and redundancy in his employment with New Zealand Police as the Business Services Manager for the Tasman Police District based in Nelson. He claims:

- (a) That his employment was unjustifiably terminated because of an invalid redundancy;
- (b) That he was unjustifiably disadvantaged because of the restructure;
- (c) That he was unjustifiably disadvantaged because he was not redeployed to an available suitable position;
- (d) That his terms of his employment agreement were breached;

- (e) That Police breached the duty of good faith under s4 of the Employment Relations Act 2000 (the Act).

[2] Mr Coffey's claims have been pleaded in the statement of problem and the final written submissions presented to the Authority. Mr Coffey claims that the police have not acted in accordance with his employment agreement and the Policing Act 2008 in as much as there were no delegations for the authority to terminate his employment. Further he claims that the process adopted by police disadvantaged him and his notice was defective.

[3] Mr Coffey is seeking a determination that he was unjustifiably dismissed by Police on 4 February 2013. Further, he is seeking a determination that his employment was affected to his disadvantage because of the restructure and through the failure of police to redeploy him. Also, he is seeking:

- (a) Reinstatement to his position with police.
- (b) Reimbursement of lost salary.
- (c) Compensation pursuant to s 123 (1) (c) (i) for humiliation loss of dignity and injury to feelings he has suffered as a result of the police actions.

[4] Both parties are seeking costs.

[5] Penalties for the breach of his employment agreement and a breach of duty of good faith under s.4 of the Act were part of the original claims. Now the matter of penalties is not being pursued (given away during submissions). The lost wages have been quantified in the sum of \$73,701.25 gross for seven months since the termination of Mr Coffey's employment with Police. Mr Coffey accepts that if the redundancy is not justified and unlawful he will be required to repay the severance payment.

### **The issues**

[6] The issues are:

- i. What terms of employment apply to Mr Coffey?
- ii. Are the restructuring provisions of the 1998-2000 collective employment contract (the 1998-2000 CEC) or the 1999-2000 collective employment

agreement (the 1999-2000 CEA) imported in Mr Coffey's terms and conditions by virtue of a variation set out in a letter dated 27 March 2009? Was the employment agreement attached to that variation signed off?

- iii. Was the redundancy valid?
- iv. Was Mr Coffey disadvantaged in his employment because of the approach to the restructuring and he was not redeployed?
- v. Was agreement required to be reached with Mr Coffey for him to be made redundant?

### **The facts**

[7] This matter relates to a Finance Group review and restructure undertaken as part of a review called "Policing Excellence". It had the full support of police executive, including the Commissioner and Deputy Commissioners. Further the review had Government approval. While it had been approved and authorised by the police management, this was without detailed delegations for the delivery of the review and dismissal. It was about a programme focused on preventing crime before it occurs and putting victims at the centre of police thinking. There were goals set to be achieved by 30 June 2014 to increase preventative policing by 4%, reduce crime by 13% and reduce prosecutions by 19% (supported by a document called Excellence Implementation Overview). Across the organisation ways had to be found to achieve and identify how police could work more effectively and efficiently. This included the Finance Group and Human Resources workstreams, including the 'Support Services for the Frontline' (SSFL).

[8] The process included a briefing as a first step to scope the SSFL Finance Group and Human Resources workstream. The result was a "Work Brief" and a potential was identified for significant change to both the finance and human resources groups and there was the possibility of centralising functions identified.

[9] On 11 April 2012 decisions were made:

- i. That SSFL would remain.
- ii. That there were benefits that could be derived involving SSFL.

- iii. That SSFL restructuring would be involved.
- iv. That further clarity regarding governance, benefits and timeframes were to be obtained.

[10] After further meetings involving police senior management, decisions were made for consultation with staff, and a finance review consultation document released. This included the proposal to centralise district human resources and finance functions and some streamlining work. Mr Coffey's role and function were potentially affected.

[11] Consultation, including communicating the proposals and review occurred between 27 July 2012 and September 2012, including the Tasman district where Mr Coffey was located to work. A decisions document was released on 27 September 2012. This provided a summary of the submissions received during the review on the proposed restructure and the key themes. As a result of feedback changes were made before the final decision. Mr Coffey did make a submission. The final decision was signed off in April 2013.

### **Mr Coffey's employment**

[12] Mr Coffey was employed first by police in January 1990 and had a change of role to the Tasman district on 4 July 1999. He was employed as the Business Services Manager for the Tasman Police District based in Nelson.

[13] Mr Coffey's contract was an individual employment contract, but he and Police disagree on their understanding of the employment arrangements. Mr Peter Harvey's (Principal Advisor Industrial Relations) and Mr Coffey's evidence differs as to the terms that apply.

[14] On 12 October 1999 Mr Coffey signed an individual employment agreement dated October 1999 (the 1999 IEC-document 7 BD) under the Employment Contracts Act. At the time he was the business services manager in Tasman based in Nelson. This followed a restructure called the 'Review of Police Administration and Management Structures'.

[15] Clause 3.5 of the 1999 IEC applied the parts of the Police Act 1958 and the Police Regulations covering non-sworn members, until the Act was replaced by the

Policing Act 2008, and the regulations replaced by the Police Regulations 2008. Under the 1999 IEC any personnel manual applying to non-sworn members applied other than to the extent that they were inconsistent with the terms of the IEA.

[16] Clause 10 of the IEC made provision for termination in the event of restructuring. The provision says that:

*“In the event of the position ceasing to exist during the term of this contract through restructuring, the Appointee will have available to negotiate with the Commissioner the relevant options applying in the Police Non-Sworn Collective Employment Contract at the time the contract was agreed.”*

[17] Also the 1996 ‘Policy for People in Restructuring’ applicable at the time made provision for severance happening by agreement and was voluntary.

[18] Clause 12.5 of the 1999 IEC said that the contract was the full and the entire agreement, and clause 12.6 required any variation to be in writing and signed.

[19] In addition to three variations (documents 10 [2007], 11 [2009] and E [2010] attached to the statement of problem (SOP)) another variation exists dated 23 March 2011 and signed on 29 March 2011 (BD 15).

[20] An individual employment agreement used for Remuneration Bands One, Two and Two A Employees dated 1 December 2008-30 November 2009 (the REM agreement) under the Employment Relations Act applies.

[21] The terms of the 2008-2009 Bands One and Two and Two A agreement applies to Mr Coffey on the terms of the variation. This applied by way of the written variation dated 27 March 2009 and signed on 31 March 2009.

[22] The parties differ on whether or not the ‘Police Restructuring Policy’ or the 1996 ‘Policy for People in Restructuring’ applied to Mr Coffey at the time of the ‘Financial Group Review’ and restructure.

[23] The 2010-2012 collective employment agreement did not apply to Mr Coffey because he was on an individual employment agreement, the CEA applied to Police and three service organisations and Mr Coffey was not a member of any of them. Mr Coffey says that instead the 1998-2000 CEC must apply.

[24] Mr Harvey says that the 1999-2000 CEA applied including its restructuring provisions because of the expiry of the prior CEC and the variations incorporated the restructuring provisions and applied to Mr Coffey. Mr Harvey says Mr Coffey's assertion is wrong that the 1998-2000 CEC applied.

[25] Despite Mr Harvey's analysis I hold that Mr Coffey was covered by the terms of the individual employment agreement and its imported terms except for the key changes made by variation. Although I do not disagree with Mr Harvey's holistic approach to the application of the enforcement of the various CEAs and their succession and referred to extensively in the Police submissions, terms can still remain imported after the life of an agreement. In essence that is what happened here, I hold. My reasons are:

- i. The 1998-2000 terms were imported because there was no variation revoking that arrangement notwithstanding what happened to subsequent collective employment agreements. Mr Coffey never signed the terms of attached collective employment agreement in 2008-2009 (BD 11) and 2010-2011, and in any event there was no mention of changes to section 7 in the covering variations for it to be confirmed. Thus, the words "*Police Non-Sworn Collective Employment Contract at the time the contract was agreed*" import the terms from the 1998-2000 CEA that apply. He was also given an opportunity to elect to join the Sworn or Non-Sworn Collective Employment Agreement at any time subject to joining the one of the union's party to the agreement. He never did which supports him protecting the imported terms in his contract applying the *Collective Employment Contract at the time the contract was agreed*.
- ii. There was no date attached to the collective and Mr Coffey says he never saw it. In some cases I accept that the generic reference to the terms of a collective applying which could change as the collective changes over time, but the words in Mr Coffey's IEA pertain to the CEC at the time Mr Coffey's contract was agreed.
- iii. Upon signing his variations he was never advised of any other key change in arrangements pertaining to the variations. That is to say that the variations were purposeful about for example Bands One and Two for REM pay, sick leave and long service leave. There was no comment identifying any change

on the termination in the event of restructuring provision. Indeed that matter was never raised again to support the police position.

- iv. The key people involved including Mr Bole never read Mr Coffey's employment agreement.
- v. The rest of Mr Coffey's agreement (IEA) remained unchanged. This includes the application of section 7 and the continuation of the reference to the 1996 'Policy for People in Restructuring'.
- vi. There does not appear to have been any consultation with and participation by the State Services Commission as required under s 66 (1) of the Policing Act 2008 in regard to the negotiation of terms and conditions of employment. Any consultation could not be confirmed during the Authority's investigation meeting.
- vii. The police at first accepted that the 1998-2000 terms applied and changed their mind as the matter progressed in the claims now before the Authority.

### **Mr Coffey and the restructuring**

[26] Mr Coffey was advised in writing on 3 October 2012 that his position would be disestablished as a result of a restructure within the finance section of the New Zealand Police. Mr Coffey's employment agreement sets out the options to be considered for surplus employees and that the Commissioner would meet with him.

[27] If I am wrong in my decision that section 7 in the 1998-2000 IEC and the 1996 'Policy for People in Restructuring' were imported and remain affective for Mr Coffey, redundancy can occur without requiring an agreement. However, Mr Coffey's challenge to this is that the decision in regard to his terms was unlawful and in breach of the Policing Act 2008 because Mr Bole, his superior, had no delegated authority to terminate his employment. Mr Bole was the decision maker and signed the decision off. He was genuinely relying on advice, without the detailed knowledge of what he was required to do in regard to any terms of employment applying to Mr Coffey. Only the Commissioner could dismiss.

[28] Under the terms of the 2008-2009 CEA employees can be made redundant if the options of reconfirmation and reassignment are not available. There is an

entitlement to redundancy compensation. The options of reconfirmation and reassignment were available under the 2008-2009 CEA and are the same in section 7 of the 1998-2000 CEC. Mr Coffey was considered for reassignment on the papers, but he was not successful in an outcome for another job with police.

[29] The Commissioner has the power to delegate under s 17 of the Policing Act 2008. This is also supported by Mr Alan Cassidy's evidence of his role and delegations. Mr Coffey says that he did not meet and discuss the issues with the Commissioner and that there was no delegated authority for anyone else to assume that role and dismiss him. There was no meeting. It seems any delegations were implied and/or assumed as part of the whole process. There certainly was no written delegation in regard to Mr Bole's role.

[30] The difference between Mr Coffey and the police is that he has claimed that there were no written delegations of authority. Under s 17 it is enough for the delegation from the Commissioner to be made generally. Police rely upon the Commissioner's and Deputy Commissioners' approval in principle to the review and restructuring and their involvement particularly with Messrs Cassidy and Bole on a personal basis communicating what was happening to affected employees, such as Mr Coffey. The Commissioner never personally met with Mr Coffey, and instead all the dealings were through either Mr Cassidy and/or Mr Bole. Given the written delegations that applied it remains unexplained what the proper delegations were in this instance because Mr Bole confirmed he did not provide his delegation on the matter, despite having written delegations on other matters.

[31] Mr Coffey applied for a senior business manager role that was vacant during the restructure. This was a merit vacancy. He says he has the technical competencies for that position and was granted an interview for the vacancy. He was unsuccessful and the details considered at the time have only emerged during this matter. He says he received no written advice of his failure to secure the position at the time. He says that that failure to get advice on the outcome disadvantaged his right of appeal. He says he should not have been terminated before he was properly advised of the outcome of his application or able to review the decision as with normal appointment processes, and that in any case he says that his agreement was required.

[32] Mr Coffey applied for 4 positions in both Nelson and Wellington via reassignment and vacancy applications out of eleven positions available and which were identified by police for him.

[33] Mr Coffey says he was not properly considered for the 4 roles he applied for. There was no interview and the panels considered applications only on the papers. Mr Coffey says that his former superior in charge, upon moving during the restructure to a position superior to his former position, created a vacancy, and Mr Coffey was not offered it. He says it has not been advertised. He says he was disadvantaged by the lack of advertisement as it prevented him from taking steps to secure the position. Further, he says that he has not had an opportunity for his non-appointment to be reviewed and that the review was not carried out in accordance with the policy and procedure. Police did not answer this claim.

[34] Mr Coffey's employment was terminated for redundancy on 1 February 2013. His compensation amounted to \$126,992.21 upon termination from police. His ordinary base pay was \$126,345 per annum. It was common ground that 2 months' notice was required.

[35] Mr Coffey's disagreement with police in regard to the restructure involved him raising his personal grievance and requesting mediation. The latter was agreed to. The parties met in mediation held on 30 January 2013. Their differences have not been resolved, and it now falls on the Authority to make a determination.

### **Determination**

[36] Mr Coffey's terms of employment under his individual employment agreement import the 1998-2000 CEC terms for restructuring. This means that once the options have been applied, reassignment being unsuccessful, Mr Coffey's agreement was required for severance. This never happened.

[37] Mr Coffey was covered by the terms of an individual employment agreement. The 1998-2000 terms were imported because there was no variation revoking that arrangement notwithstanding what happened with subsequent collective employment agreements. The 1998-2000 terms were personal to Mr Coffey. The Commissioner was required to get mutual agreement on the option of termination for the reason of severance. That never happened.

[38] Next, Mr Bole did not have proper delegated authority to dismiss Mr Coffey. It is not enough to assume it and/or infer it. Only the Commissioner could dismiss under the Policing Act 2008. Mr Bole had no knowledge of the detail of Mr Coffey's terms of employment when he was signing off Mr Coffey's dismissal and he confirmed that he was acting under advisement from human resources, which I accept was genuine. Mr Bole and Mr Cassidy say they were in contact with the Commissioner personally about Mr Coffey's situation and that the Commissioner was being kept in the loop. This should be of some reassurance for Mr Coffey. I have no reason to doubt that the communication occurred because Mr Cassidy and Mr Bole say it did. They say the Commissioner had concerns for the people affected, but did not have any direct involvement in Mr Coffey's actual departure. This is unfortunate especially given Mr Coffey's 23 years of loyal and unblemished service. I accept officers and senior managers are busy and have many things to do, but since the Commissioner should have been involved with the dismissal in the absence of a proper delegation in regard to Mr Bole, a fair and reasonable employer could have done more than just rely on Mr Bole being advised (by human resources) and inferring delegations. This is especially so given the seriousness and impact of the restructuring on Mr Coffey, and his employment.

[39] I am supported in my conclusions by the lack of fairness in the reassignment process. I accept that there were different panels set up. I accept that a mistake was picked up about Mr Coffey's circumstances and this involved Mr Coffey being re-evaluated for reassignment, albeit without him being successful. He was the only applicant for four positions and he was not interviewed. He did provide a written submission on options. Police could have interviewed Mr Coffey to give him a chance given the skills requirements for the positions had changed, and could have explored more thoroughly with him the retraining and skill development, as a good employer, and before marking him given the divergence in the marking for different positions. He was entitled in best practice to have some direct input and not just to be dealt with on the papers considering the skill requirements. His direct input would have helped to ensure there was no chance of any lost opportunity in the relationship. The police did not have to accept Mr Coffey's submissions on options and indeed I hold it reasonably rejected his suggestions particularly on retraining as it would not be aligned to reasonable outcomes.

[40] Mr Coffey's complaint about not getting selected and raising a number of other matters were not fully dealt with. I accept the former was picked up, but the other matters have not been. This was unfair.

[41] Mr Coffey has a personal grievance because the terms of his employment were not applied once the decisions had been made in regard to the restructuring and that he was disadvantaged in the reassignment process when a fair and reasonable employer could have interviewed him personally or have the proper delegations in place in the process. The Commissioner was required to get Mr Coffey's agreement for severance, but did not do so. I accept that that restructuring was genuine, but not carried out properly in regard to Mr Coffey. I hold that police will have to reinstate Mr Coffey because the decisions made about his dismissal were invalid having regard to his terms of employment. I accept that there will be some difficulties about this considering the restructure and that Mr Coffey's position has been disbanded. However given the resources of police and the nature of the positions available for reassignment and their scope with training given Mr Coffey's performance appraisals means that police should be able to find and develop a position not less advantageous. In this regard Mr Coffey has expressed his willingness to be relocated and I am sure he will cooperate with any negotiations required.

[42] Mr Coffey is entitled to the lost wages and entitlements with continuous service claimed because he has a personal grievance. He has mitigated his lost wages. He has not contributed to his personal grievance. Police is required to pay him lost wages from the date of termination of his employment to continue with his reinstatement, and because the dismissal was invalid Mr Coffey will have to repay a balance on the redundancy pay, which I leave to the parties to calculate.

[43] I now turn to compensation for the impact the dismissal has had on Mr Coffey. I accept as Mr Coffey says the dismissal had a significant impact on him and I have no doubt the impact affected his feelings given his length of service, the organisation and the community. I award him \$15,000 compensation under s 123 (1) (c) (i) of the Act for humiliation loss of dignity and injury to feelings.

## **Orders**

[44] Mr Coffey is to be reinstated to New Zealand Police in a position not less advantageous than his previous position.

[45] The police must pay Derek Coffey:

- i. The lost wages from the date of termination and continuing with his reinstatement including the preservation of any entitlements. Leave is granted for the parties to return to the Authority if it is necessary.
- ii. \$15,000 compensation for humiliation loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Act.

[46] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority