IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 57
3019098

	BETWEEN	EMMANUEL DRELIOZIS Applicant
	AND	COMMISSIONER OF POLICE Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Kerry Ansell, Advocate for Applicant Cathryn Curran-Tietjens, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	9 March and 12 April 2018 from applicant 5 April 2018 from respondent
Determination:	29 June 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Emmanuel Dreliozis is a frontline Public Safety Team constable. He seeks a compliance order to enforce a term of a Record of Settlement ('ROS' or 'the settlement agreement') he and his employer agreed in 2014. He also seeks the imposition of a penalty and costs.

[2] Mr Dreliozis is employed by the Commissioner of Police ('the Commissioner' or 'Police'). The Commissioner denies breaching the settlement agreement and says there is, therefore, no basis for a penalty to be imposed.

[3] In the course of a telephone conference with the Authority on 19 February 2018 the parties agreed there were no facts in dispute in this matter and that their preference was for the Authority to determine it on the papers following submissions by them.

Issues

[4] The Authority must determine:

1. Whether the Commissioner has breached a term of the Record of Settlement; and, if so
2. Whether a compliance order is appropriate; and
3. Whether a penalty should be imposed.

The Record of Settlement

[5] Mr Dreliozis and the Commissioner reached agreement on terms of settlement of an employment relationship problem on 17 October 2014. The ROS they entered into under s.149 of the Employment Relations Act 2000 ('the Act') was signed by a mediator employed by the Ministry of Business, Innovation and Employment. The agreed terms of settlement included that the terms were confidential to the parties; and were in full and final settlement of all matters between them arising out of the employment relationship up to and including 17 October 2014.

[6] Each party signed its understanding that, once the mediator had signed the agreed terms of settlement, those terms would be final and binding on, and enforceable by, them and that, except for enforcement purposes, neither party was permitted to bring the terms before the Authority or Court.

[7] The term of the ROS over which the parties are in dispute is as follows:

> (5) The parties agree that the Employee will be transferred to the Feilding station on welfare grounds. There will be no relocation costs applicable to this transfer. The parties will agree the details of a suitable transition plan for this to occur as soon as practicable.

[8] It is not necessary to disclose the other 12 clauses of the ROS in detail, although some of them will be referred to when discussing the context for clause 5.

Relevant facts

[9] Mr Dreliozis was transferred to Feilding Police Station in December 2014 approximately two months after the mediation that resulted in the parties entering into the ROS. The current situation has arisen from a restructuring process undertaken by Police within the Central District in 2016. As a result of that restructuring, known as Project Balance, Police wrote to Mr Dreliozis in February 2017 reconfirming him in his position. The letter included the advice that his position "…will now deploy to cover Feilding and Palmerston North locations" and that it was "subject to rotation"[1].

[10] Following the intervention of the New Zealand Police Association (the Association) on his behalf, Police advised in a letter dated 10 March 2017 it had in good faith removed the requirement for Mr Dreliozis' position to be subject to rotation to Palmerston North and Marton specifically. However, the letter informed Mr Dreliozis of Police's expectation "… that through shift deployment…you may be required to work across Palmerston North and Feilding if the need arises, however your home location will remain Feilding."

[11] A meeting between the parties in late April 2017 failed to resolve the matter. Police clarified that "working across Palmerston North and Feilding if the need arises" meant that Mr Dreliozis would be required to work in Palmerston North as and when directed. On 15 May 2017 the Commissioner, through the National Employee Relations Manager for New Zealand Police, Jenny Williams, stated the Police's position was:

> …that the purpose of a settlement agreement is to remedy the past and set a course for the future. It doesn't however, mean that future is set in stone and an employer is prevented from making change to its workplace. Police is entitled to restructure its organisation as it sees fit, as long as it follows the right process, and ensures you are appropriately consulted.

[12] Ms Williams' letter went on to advise Mr Dreliozis that Police acknowledged his concerns about working from Palmerston North were genuinely held. It saw those concerns as arising from Mr Dreliozis' view that the circumstances existing in October 2014 when the parties reached the settlement agreement still existed in 2017.

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[1] As sanctioned by s.65(1)(d)(v) of the Policing Act 2008.

[13] While its view was that it was legally justified in enforcing the outcome of Project Balance, Police were willing to consider maintaining the status quo and allowing Mr Dreliozis to be based out of Feilding. He would not work a shift from Palmerston North as it had proposed, on a trial basis.

[14] Ms Williams' letter made clear, however, that Mr Dreliozis would be required to work in Palmerston North, or other locations as required, in certain situations. These were specified as:

> 1. Attending urgent jobs, or non-urgent jobs as required;
>
> 2. Working night shift in the cells in Palmerston North when it would be with your section;
>
> 3. Attending training days, briefings and meetings as required by your supervisors;
>
> 4. For any short operations that are planned for the Area, such as warrant days, prevention operations.

[15] Police proposed the arrangement be reviewed every six months and could be cancelled by either party if it was not working. Ms Williams referred to issues of fairness within the team with which Mr Dreliozis worked. She raised the potential for his not being subject to the same duties and requirements to cause divisiveness within the station. Ms Williams noted that, if the arrangement had a negative impact on the section, Police would consider what alternatives were available, including implementing the outcome of the restructuring.

[16] Mr Dreliozis regards the requirement to work in Palmerston North or "other locations as required" as a breach of clause 5 of the ROS. He does not consider clause 5 to be time bound. In his view there was no suggestion at the time of entering into the ROS that it was a temporary move or one that could be subject to unilateral change by his employer. The compliance order he seeks is to allow him to continue performing his duties from Feilding.

[17] Mr Dreliozis is realistic about the need to attend Palmerston North Station for training days or for the purpose of attending an operation briefing or taking arrests into cells there. He attends that police station for those purposes but views this as different from potentially being rostered to work in Palmerston North (or other stations) for a shift as envisaged by Police.

Meaning of clause 5

[18] Mr Dreliozis regards the clause as an enduring condition. On his interpretation, his place of work can be changed only with his agreement, or on his seeking to work from a location other than Feilding.

[19] Mr Ansell submits on behalf of Mr Dreliozis that, at the time the settlement agreement was reached, there was a clear understanding it was to be a long term and enduring solution to provide Mr Dreliozis with a safe workplace. In Mr Ansell's submission, that understanding has been confirmed by Mr Dreliozis having, since 24 October 2014, performed his duties from the Feilding Station.

[20] His submissions refer to the background to the parties agreeing the ROS and to the serious issues that it resolved. Those issues and their impact on the applicant were acknowledged in the ROS and by the various terms agreed by Police in the 13 clauses of that document.

[21] The Commissioner's view is that Police fulfilled its obligations under clause 5 fully and finally by transferring Mr Dreliozis to Feilding Station in December 2014 and his welfare considerations at the time were fully addressed. The Commissioner disputes Mr Dreliozis' submission that the purpose and intent of transferring him to Feilding was a long term and enduring solution to provide him with a safe workplace.

[22] Ms Curran-Tietjens submits, for the Commissioner, the intent and purpose of the transfer was to resolve the employment relationship problem. The transfer to Feilding was seen as giving the parties the best chance of moving forward with a "clean slate". In her submission Police have discharged all its obligations under the ROS and there has been no breach of any of its terms.

[23] Additionally, Ms Curran-Tietjens says Mr Dreliozis currently remains located in Feilding. In the Commissioner's view, asking Mr Dreliozis to attend a location other than Feilding, but within the wider Central District, for genuine work purposes is not a breach of the settlement.

[24] If the parties had intended the agreed terms of settlement to have the enduring effect the Association contends, Police submit a further clause would have been required. That clause would have stated that Mr Dreliozis was to remain in Feilding "in perpetuity for the rest of his employment". Ms Curran-Tietjens submits the

Authority has no jurisdiction to supplement the original ROS with a clause of this nature.

[25] Mr Ansell rejects her analysis and submits the Commissioner's view is too narrow and simplistic. He says, if the Commissioner's interpretation of clause 5 is correct, it would have been open to the Commissioner unilaterally to transfer Mr Dreliozis out of Feilding the week after transferring him to that location, or the following month or year. In his submission the transfer was deemed to be a more permanent outcome and, if it was intended to have a finite term, that would have been specified in the ROS.

Interpretation of settlements

[26] This matter was considered by the Employment Court in *Marlow v Yorkshire New Zealand Ltd* in which then Chief Judge Goddard stated:

> "A…settlement is a contract and, like any other, is capable of disagreement as to its meaning and effect."

and

> "…if the agreement has been reduced to writing, the intention of the parties must be construed in the usual way by reference to the document itself, without regard to the subjective understanding of the parties or other extrinsic evidence of what may or may not have been in the minds of the parties."[2]

[27] The issue was also considered in 2017 by then Chief Judge Colgan in *Edminstin v Sanford Ltd* where he referred to an agreement to settle litigation as being "*…a contract (but not an employment agreement) to be interpreted as such*."[3]

[28] The former Chief Judge went on to refer to the judgments of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[4] as the leading New Zealand authority on contract interpretation. He summarised the principles, which he described as "*both uncontroversial and binding*" in the following way:

> 1. The starting point is an assessment of the natural and ordinary meaning of the words themselves.

[2] [2000] 1 ERNZ 2006 at 214.
[3] [2017] NZEmpC 70.
[4] [2010] NZSC 5, [2010] 2 NZLR 444.

2. Not only if there is ambiguity, but even if the words uses are apparently plain and unambiguous, there should be a cross-check of their interpretation by reference to the context in which the contract was entered into.

3. Arriving by this methodology at a different interpretation than was produced by the preliminary assessment, may arise occasionally but not commonly. This is because plain words are not generally intended to be understood in any other sense.

4. The Court will ascribe to the contracting parties a common intention that a sufficiently informed and reasonable person would ascribe to those words when aware of the circumstances in which the contract was made.

5. If other than an apparently plain and ordinary meaning may be arrived at by the cross-checking process, this should not lead to a nonsensical result contrary to commercial (or other relevant) commonsense. (footnote omitted)

6. On occasions, however, words may be construed as having another meaning if parties have adopted a special meaning or where there is an estoppel.

7. An objective approach requires an examination of facts, circumstances and conduct leading to the contract illustrating objectively the meaning the parties intended to convey.

8. Evidence of post-contractual performance conduct may be relevant if this is capable of demonstrating objectively a commonality of application of the contractual words in practice.[5]

Application of the principles

[29] Both parties have made reference to the principles of interpretation set out in *Vector Gas Ltd* to support their respective submissions as to the proper interpretation of clause 5.

[30] In this instance the plain and ordinary meaning of the words in clause 5 do not appear to be ambiguous. The parties agreed that Mr Dreliozis would be transferred to the Feilding Station on welfare grounds. There would be no relocation costs applicable to the transfer. A transition plan would be agreed between them for the transfer to take place as soon as practicable. No words in the clause specifically indicate an agreed intention over the length of time the transfer is to remain in place.

[31] On the face of it, the Commissioner appears to have complied with clause 5 by transferring Mr Dreliozis to Feilding Station in December 2014. There has been no suggestion that the parties did not agree the details of a suitable transition plan for the

[5] n4 at [37].

transfer to take effect. It may be inferred from the reasonable timeframe within which it occurred following the mediation that they did agree the details.

[32] The inclusion in the clause of the sentence that no relocation costs were applicable to the transfer is of little consequence, given that another agreed term of the ROS specifically addresses the reimbursement of relocation costs. Neither party made particular submissions on that point and I find nothing in the sentence about relocation costs that is relevant to the question of whether the transfer was to be enduring or not.

[33] A cross-check of the words of clause 5 against the context in which the ROS was entered into is relevant when it comes to interpreting the clause. The inclusion of the words that Mr Dreliozis' transfer was on "on welfare grounds" provides some context and other clauses of the ROS provide further context to the clause.

[34] It is not necessary to disclose the entire background situation that led to the ROS, and nor is it necessary that all terms of that settlement agreement be disclosed. However, it is necessary to an understanding of the context of the agreement to transfer Mr Dreliozis, to know there were allegations made, and a personal grievance raised, by him in relation to being the recipient of unacceptable treatment from some Police managers in certain stations in the Central District.

[35] It is also relevant to note the ROS included an apology by Police for that treatment over the previous two years and an acknowledgement of its impact on Mr Dreliozis and his family. The transfer to Feilding Police Station on welfare grounds was one part of the settlement agreed by the parties to resolve the issues raised by Mr Dreliozis. Other remedial and compensatory terms were included in the settlement agreement.

[36] Taking this context into account, and noting the ongoing nature of the employment relationship, I am not persuaded the Commissioner's interpretation of clause 5 is correct. If it were, the Commissioner would be able to relocate Mr Dreliozis any time after his transfer to Feilding station had been physically accomplished.

[37] In the context of a settlement reached to resolve an employment relationship problem that had adversely impacted the employee over a two year period an

interpretation of clause 5 that would allow such further relocation to occur would render the clause meaningless. Nor would such an interpretation further promote the positive and on-going employment relationship submitted by the Commissioner to be intent of the transfer. I accept the submission made for Mr Dreliozis that the Commissioner's interpretation of the clause is too narrow.

[38] I prefer the interpretation submitted on behalf of Mr Dreliozis. I accept his submission that clause 5 needs to be seen in the wider context of the settlement agreement and the reasons for entering into that agreement. When viewed against that background it is clear the clause intended more than a temporary move of stations for Mr Dreliozis.

[39] In practical terms, that entails the transfer to Feilding remaining in place until otherwise agreed between the parties. That could be, for example, as a result of a request from Mr Dreliozis or if Police determined there was no longer a need for a station there. I accept the submissions for Mr Dreliozis that, in the latter circumstance, the parties would be expected to mutually agree on an alternative place of work.

[40] Police submit the effect of the transfer to Feilding is that Mr Dreliozis' work shifts begin and end at Feilding station and that a PST constable, by the nature of the job, is geographically mobile over the course of a shift and will not be restricted to remain physically at a station throughout a shift.

[41] I do not consider clause 5 restricts Mr Dreliozis to working at Feilding station or from fulfilling the requirements of his position by attending stations other than his home station for operational and training purposes. I understand Mr Dreliozis accepts he the need to attend other police stations for training, operational briefing, and taking persons into custody. In my view clause 5 does not bar Police from requiring him to attend other police stations for other work purposes provided Feilding remains his home station.

[42] I do not accept, however, the Commissioner's submission that it is open to Police in the future to relocate or rotate Mr Dreliozis from Feilding station as long as that occurred in accordance with employment law and Police policies and procedures. I would regard such action, if it were done without Mr Dreliozis' agreement, and if it

entailed his being required to relocate to another station for the length of a rotation, as a breach of clause 5 of the ROS.

Have Police breached clause 5?

[43] Submissions for Mr Dreliozis refer to three breaches of the settlement agreement by Police, the first of which, or possibly the first and second of which, were addressed in mediation in November 2015. No details of the breach or breaches were provided and I will not consider them further.

[44] The other alleged breach relates to the correspondence from Police in February 2017 in which Mr Dreliozis was advised his position would be rotational. While acknowledging Police modified its stance on that matter, Mr Dreliozis submits the Police position still required him to work across Palmerston North and Feilding if the need arose.

[45] He acknowledges, however, that since transferring to Feilding in December 2014 he has not been required to work at Palmerston North. In any event, as noted in paragraph 41, above I consider clause 5 does not bar Police from requiring his attendance at other police stations for work purposes provided his home station remains Feilding.

[46] I find no breach has occurred and decline to make a compliance order for a future potential breach.

Penalty

[47] There is no justification for the imposition of a penalty in the absence of a breach of the settlement agreement.

Summary

[48] The Commissioner of Police's obligations under clause 5 of the Record of Settlement entered into with Mr Dreliozis in October 2014 were not fully and finally discharged in December 2014 when Mr Dreliozis transferred to Feilding police station.

[49] Notwithstanding that, no breach of the mediated settlement has been established and accordingly there is no reason to impose a compliance order or penalty.

Costs

[50] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority