



New Zealand Employment Relations Authority Decisions

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Dunn v The Commissioner of Police [2011] NZERA 77; [2011] NZERA Auckland 57 (11 February 2011)

Last Updated: 6 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 57 5164309

BETWEEN

AND

LYON DUNN Applicant

THE COMMISSIONER OF
POLICE
Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Vicki Campbell

Applicant in person

Antoinette Russell for Respondent

5 and 6 July 2010

5 & 17 August 2010 from Applicant

23 July 2010 from Respondent

Determination:

11 February 2011

DETERMINATION OF THE AUTHORITY

A Mr Dunn's personal grievance for unjustified disadvantage is barred by operation of [s 114](#) of the [Employment Relations Act 2000](#).

B Mr Dunn's claim that he was discriminated against has not been upheld.

C Mr Dunn's claim that the Commissioner of Police breached it's obligations of good faith toward him has not been upheld.

D Mr Dunn's claim that the Commissioner of Police breached it's EEO Policy has not been upheld.

[1] Mr Lyon Dunn immigrated to New Zealand from South Africa in January 1999. Prior to coming to New Zealand Mr Dunn had completed 14 years and 4 months service as a sworn Police Officer in the South African Police Service rising to the rank of Superintendent.

[2] Mr Dunn moved to New Zealand where he took up employment as a security Officer. Mr Dunn then made a successful application to join the New Zealand Police (the Police). He commenced employment with the Police on 14 June 1999. He was required to go through the normal recruitment process including the successful completion of a recruit course from which he

graduated on 11 November 1999.

[3] At the time of Mr Dunn's recruitment and his graduation from the recruitment course, the applicable collective employment agreement provided for appointments to be made to remuneration bands which had an upper and lower limit. The agreement provided for appointment to a specific level between the upper and lower limits taking into account:

- Previous work or other relevant experience; and/or
- Relevant educational or other qualifications; and/or
- The difficulty of recruiting including recruiting the skill or experience required for a particular position and/or;
- Any other relevant factors.

[4] On 17 February 2000 Mr Dunn wrote to Police headquarters, outlining his previous experience with the Police in South Africa and sought consideration to being placed on a higher salary.

[5] From the notes written on the letter it seems Mr Dunn made several enquiries about his previous service being taken into account during the recruitment process and prior to becoming a sworn Officer of the Police. He was advised not to continue seeking an increase in his salary level.

[6] On 7 February 2001 Mr Dunn completed a Report Form applying for appointment to a higher remuneration band. In his application Mr Dunn set out the responsibilities and training he had had during his career as a Police office in South Africa. In response Mr Dunn was advised that clause 2.2 of the collective agreement required remuneration to be commensurate with the position to which a member is appointed. At the time of his application Mr Dunn was working as a Band G Emergency Response Constable.

[7] Mr Dunn was advised that consideration may be given to putting him on a higher salary within his current band but he would need to make a separate application, supported by his District Commander.

[8] On 14 January 2002 Mr Dunn was promoted to Sergeant and was placed on the bottom of the salary band. The appointment was temporary until such time as Mr Dunn completed his Sergeant's qualifying course. This was completed by 8 October

2002.

[9] The following year, in 2003, the Police implemented a recruitment drive to obtain the services of current serving members of the UK Police (the UK Scheme). Special arrangements were negotiated for those recruited under the UK scheme which included an accelerated recruitment course and probationary arrangements.

[10] In October 2003 Mr Dunn made a third application, this time to the Deputy Commissioner, to be placed on a higher salary band in recognition of his prior service. In doing so he relied on the UK scheme and he cited the fact that he had had to apply for his own residency and had completed the six month recruitment course. Mr Dunn contended that he had been disadvantaged compared to the recruits employed pursuant to the UK scheme. On 5 December 2003 Mr Dunn was advised that his application had been considered and was declined.

[11] Section 22(2) of the Policing Act requires the Police Commissioner to certify that sworn Officers are properly trained. During the time Mr Dunn was contesting his salary the policy regarding recruits to the Police was such that people who applied to become a sworn Officer through the usual process attended a 19 week recruit course. This included people with previous policing experience in other countries and those with previous non-sworn experience. All recruits were placed on the same salary band both during their recruit training and after graduation. This was irrespective of any previous policing experience.

[12] The exception to this policy was the 2003 UK scheme, where UK Police Officers were specifically targeted. Those recruits underwent a conversion course of 6 weeks, underwent a different testing process in the UK, and were deployed to specified areas in which the Police had difficulty filling vacancies and the recruits were bonded to their district for a period of two years. In recognition of these requirements previous service of the UK recruits was recognised.

[13] In 2005, 2006 and 2008 further targeted recruitment was undertaken to encourage sworn Officers trained in the UK to relocate to New Zealand.

Mr Dunn's personal grievance

[14] In 2007 the Police extended the recognition for prior learning scheme which it had developed for the UK scheme to include Australian trained police Officers. This was done on the basis that the Australian Police Officer training was closely aligned with that of the New Zealand Police training.

[15] In April 2008 Mr Dunn enquired again about the possibility that his service with the South African Police be recognised. At this time Mr Dunn had also completed a Bachelor of Arts degree and a post graduate diploma in psychology. Mr Dunn was

advised to make an application to the College for recognition of prior learning. He was later advised that prior learning would only be taken into account for promotional purposes.

[16] On 13 May 2008 Mr Dunn lodged a further formal application for a review of his salary. His application referred to the UK scheme and the fact that those Officers recruited under the UK scheme were appointed to a higher salary scale based on the number of years experience as a UK Police Officer. Mr Dunn's application was supported by Mr Dunn's Area Commander. Mr Dunn's application was once again denied.

[17] Mr Dunn, after receiving advice from the Police Association, then made direct contact with the Commissioner Board, outlining his concerns with respect to equity with the UK recruits who had prior service recognised for remuneration purposes.

[18] The answer, as relayed to Mr Dunn, was that Mr Dunn's situation could not be compared with the situation of the UK recruits as they were employed under different terms and conditions. Mr Dunn was employed under the standard recruitment agreement.

[19] In September 2008 Mr Dunn raised the question of his prior learning with Mr Wayne Annan, the Human Resources Manager for the Police. Mr Annan advised Mr Dunn of the difference between the collective agreement and the arrangements entered into individually with the UK recruits.

[20] On 15 October 2008 Mr Dunn raised a personal grievance claiming he had been disadvantaged in his employment by an unjustifiable action on the part of the Police. To resolve his personal grievance Mr Dunn requested that his previous service in South Africa be recognised for movement to a higher remuneration band in the same way as the UK recruits were recognised. Further he requested that such recognition be back dated to 2003 when the first UK recruits received recognition.

[21] Ms Catran, Legal Advisor Employment Relations, emailed Mr Dunn and advised him that his grievance was raised outside the 90 day period on the basis that he had sought a review of his remuneration in May 2008. The Police view was that Mr Dunn's salary was set through the terms of the collective agreement which were being applied correctly.

[22] Mr Dunn was not happy with the response and wrote back to Ms Catran expressing his disappointment at what he viewed as salary discrimination between the UK recruited Officers and himself.

[23] On 7 May 2009 Mr Dunn met with representatives from the Police and discussed the issue of his salary and his desire to have his 14 years service recognised. Ms Catran explained about the difference between the UK recruits and all other Police recruits. Mr Dunn considered the UK scheme to be discriminatory, out of line with the Police EEO policy, a breach of good faith and a breach of the [Employment Relations Act](#).

[24] This was disputed by Ms Catran who explained to Mr Dunn that his salary was subject to the collective agreement. Ms Catran explained her view that the UK scheme did not discriminate on any of the grounds set out in [section 104](#) of the Act as the offer to move from UK to New Zealand was available irrespective of race, ethnic origins or gender.

The collective agreement

[25] The remuneration entitlements of sworn police Officers are contained in the Constabulary Employees Collective Agreement ("CECA"). At the time of Mr Dunn's appointment to the Police the applicable collective agreement was the 1998 - 2000 CECA. Clause 2.2 of that document states:

All members will be appointed to the appropriate remuneration band according to the evaluation of the position to which they are appointed. On appointment members will be remunerated between the upper and lower remuneration limits for the appropriate remuneration band.

Criteria

Members will be appointed to a remuneration level at or between the upper and lower remuneration limit of the remuneration band.

Factors to be taken into consideration by the Police in determining the rate payable

are:

- i. previous work or other relevant experience and/or;
- ii. relevant educational or other qualifications and/or;
- iii. the difficulty of recruiting including recruiting the skill or experience required for a particular position and/or;
- iv. any other relevant factors.

Note: in lieu of application of the above criteria members may be appointed to a remuneration level in accordance with administrative arrangements and minimums developed in consultation with the Police Association. [my emphasis]

[26] This clause has remained relatively unchanged and continues to be part of the 2009-2010 CECA but is now numbered 2.3. The 1998-2000 CECA provided for a range of salary's to be paid to recruits however, that changed in 2000 when the new CECA ratified one starting rate for all recruits.

[27] What is clear from the clause as it is set out, is that the clause applies only when an Officer is "appointed" to a new role. Mr Dunn was appointed to a new role, in November 1999 when he was appointed to the role of traffic constable and 14 January 2002 when he was appointed section supervisor (and promoted to the rank of sergeant).

[28] The "Note" provided at the end of clause 2.2 provides the police with the discretion to either recognise the criteria listed within the clause, or not. This was agreed between the Police and the Police Association in 1998 when the clause first became operative.

The United Kingdom Scheme

[29] Budgetary constraints imposed in 1999 saw three recruit wings (courses) deferred. By 2003 Police numbers had reached a low point with 200 less sworn Officers than was needed. A decision was made to recruit Officers already serving in the United Kingdom (UK) directly into the New Zealand Police. The UK was chosen due to having a similar legal system and Policing procedures to those in New Zealand.

[30] Initially this scheme was to be a "one-off, however, it proved so successful that it was used as a source of recruitment again in 2006, after the Government announced that an additional 1250 sworn Officers were to be recruited to the Police over three years. The UK scheme was used to assist the Police to meet the recruitment numbers required. The Police ran 12 conversion courses with 486 recruits coming from the UK into New Zealand.

[31] After the introduction of the UK scheme Mr Greg Fleming, an Industrial Advocate employed by the New Zealand Police Association ("NZPA") began fielding enquiries from sworn New Zealand Officers who had previous service in a jurisdiction outside of New Zealand, seeking equivalent salary recognition as those recruited under the UK scheme.

[32] Despite approaches from the Association, the Police stood firm on its refusal to agree to any requests for recognition of prior service. The issue was raised as part of the employment agreement negotiations in 2006 and again through an approach to Mr Annan in 2007.

Disadvantage grievance

90 day issue

[33] Mr Dunn has raised a personal grievance for disadvantage. In response the Police argue that Mr Dunn is statute barred from taking a personal grievance as he failed to raise his grievance within the requisite 90 day period. Mr Dunn claims his employment or one or more conditions of his employment were subject to disadvantage when his applications for salary reviews were denied by the Police.

[34] Mr Dunn made applications on:

- 17 February 2000
- 17 February 2001
- 3 October 2003
- 18 April 2008
- 15 May 2008

[35] Mr Dunn raised a personal grievance with respect to the Police's last refusal to increase his remuneration in October 2008. Mr Dunn then lodged a statement of problem in the Authority on 3 June 2009.

[36] [Section 114](#) of the [Employment Relations Act](#) (the Act) requires personal grievances to be raised within 90 days of the action giving rise to the grievance. Given that Mr Dunn did not raise a personal grievance until October 2008 I find the

Authority has no jurisdiction to consider Mr Dunn's claims relating to the Police's refusal to grant an increase in salary for those applications made prior to 2008.

[37] Even if Mr Dunn had raised a personal grievance with regards the applications made prior to 2008, any action by Mr Dunn with respect to pursuing his personal grievance is caught by [s 114\(6\)](#) of the Act. That section prohibits any action from being commenced more than three years after the date on which a personal grievance is raised. It follows that Mr Dunn's grievances with respect to his applications prior to 2008 not only fall outside the 90 day period, but also outside the three year commencement period.

[38] Therefore the only action that is possible for Mr Dunn to challenge by way of personal grievance is the refusal by the Police to review his salary, which was conveyed to Mr Dunn on 11 June 2008. However, there continues to be a 90 day barrier with respect to this action. As already set out Mr Dunn did not raise a personal grievance until October 2008. The 90 days

started on 12 June 2008 and ended on 9 September 2008.

[39] Mr Dunn's personal grievance is statute barred and I can be of no further assistance to him with regards a personal grievance for unjustified disadvantage.

Disparity

[40] I have considered this aspect of Mr Dunn's claim for the sake of completeness. Mr Dunn claims he was subject to disparity with those recruited on the UK scheme. Mr Dunn was recruited from a civilian position in New Zealand. After completing the required Course and after graduating from the Police College, Mr Dunn, along with all other Police recruits, was appointed as a probationary constable on the bottom of the applicable salary range.

[41] Mr Dunn says that when he made applications for a review of his salary, his prior service with the South African Police ought to have been taken into account. He says that the failure by the Police to do so, caused him disparity with other members of the Police who were also recruited in New Zealand.

[42] Mr Dunn provided evidence to show that the Police have approved recognition to several sworn Officers formerly from the UK, who were not part of the UK scheme. These Officers were recruited in New Zealand in the same way as Mr Dunn.

[43] I have already found that Mr Dunn's personal grievances with respect to the actions prior to 2008 are time barred. Mr Dunn was appointed to the rank of Sergeant in January 2002. At the investigation meeting it was confirmed that by the time he achieved that rank, he was, in fact, on the same salary as other sworn Officers of that rank, irrespective of whether they had any prior service counted.

[44] It was common ground that during the recruitment process Mr Dunn was informed, and understood, that his previous service with the South African Police would not be recognised. Mr Dunn entered into his employment agreement on that basis and must have been satisfied with that explanation because he then entered into a contract with the Police on the basis of the written offer made to him, which included the specific salary and remuneration band to which he would be appointed, following his graduation from the recruitment course.

[45] Even if I had been satisfied that the personal grievance was within time, I find the refusal by the Police to agree to Mr Dunn's applications for recognition of his service with the South African Police for remuneration purposes was not an action affecting a term or terms of Mr Dunn's employment to his disadvantage.

[46] I find Mr Dunn has been treated consistently with the wording in the collective agreement. All changes to Mr Dunn's remuneration were made in accordance with the collective agreement. That is, Mr Dunn received pay increases based on his performance. Clause 2.4 of the agreement provides for progression with the bands to be on the basis of competency and service based on the anniversary of appointment to the Police.

Discrimination

[47] Mr Dunn claims he was offered different terms and conditions of employment to those Officers recruited through the UK scheme. He says that the fact that all UK recruited Officers normally lived and worked in the UK when recruited, means that they are all of UK National origin despite the odd person also being of a different race or ethnicity. [Section 104](#) of the Act sets out the prohibition on discrimination in employment and states:

(1).. an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination^[1]...

a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

[48] In considering an action with regards [s 104](#), Mr Dunn must establish that:

- he has been refused the same terms and conditions of employment, or opportunities for promotion and transfer;
- as are made available for other employees with the same or substantially similar qualifications, experience or skills;
- who are employed in the same or substantially similar circumstances; and
- by reason directly or indirectly of Mr Dunn's ethnic or national origin.

[49] Mr Dunn's national origins are South African. From the evidence produced at the investigation meeting I am satisfied that the national origins of those recruits who came from the UK scheme were varied and not just British. It seems to me that if Mr Dunn had moved to the UK in 1999 instead of New Zealand, and was serving as a sworn member of the UK Police in 2003, he would have been entitled to make application under the UK scheme along with all the other sworn Officers.

[50] The reason for the Police not to increase Mr Dunn's salary had nothing to do with his national origins but had more to do with the fact that he was already a sworn Officer in the rank of sergeant before the UK scheme was implemented. He was

already subject to the terms and conditions of employment set out in the collective agreement.

[51] I am satisfied those Officers employed under the UK scheme were not employed in the same or substantially similar circumstances as Mr Dunn. The UK scheme was implemented to assist the Police to recruit large numbers of Officers to fill a gap in the recruitment of Officers within New Zealand.

[52] The offers made to those recruited under the scheme were incentivised to encourage the Officers to give up their homes and job security to move to New Zealand. Their training in the UK was similar and largely conducive to New Zealand conditions. This is why those recruits only had to undertake a six week conversion course, rather than the usual 19 week recruitment training course.

[53] Further, the recruits were subject to limits on the location at which they could be posted. UK recruits were required to serve in difficult-to-fill locations for at least two years before they could apply for a post in a new district.

[54] By contrast, Mr Dunn did not require an incentive to move from South Africa to New Zealand. He did that of his own accord. He waited until he had received his residency before applying to join the Police. His application could have been turned down, but wasn't. In submissions, Mr Dunn told the Authority that joining the Police was only one of many options he considered.

[55] Mr Dunn was engaged by the Police, undertook the full recruit course and accepted the terms and conditions offered to him at the time, which included the remuneration package set out in the collective agreement.

[56] I find Mr Dunn has not been discriminated against in his employment. There is no evidence that, but for his ethnic or national origins Mr Dunn's service with the South African Police would have been recognised.

Breach of good faith

[57] Mr Dunn says that the refusal by the Police to consider his previous service in South Africa for remuneration purposes was a breach of good faith and was deceptive. Mr Dunn also says that recognizing service for recruits who were not part of the UK scheme also amounts to a breach of good faith.

[58] The statutory duty of good faith applied to the Police only after 1 October 2008. All of Mr Dunn's applications and the refusal's by the Police to increase his salary occurred prior to 1 October 2008. I find therefore that the actions of the Police relevant to the allegations raised by Mr Dunn, were not covered by the statutory obligation.

[59] However, for the sake of completeness, I am satisfied that the evidence does not disclose conduct which would meet the stringent tests associated with the obligations of good faith. There is no evidence to support a finding that the Police misled or deceived Mr Dunn as to its remuneration policy and the reasons why it refused to review his remuneration. The evidence shows that every time Mr Dunn raised the matter communications in response were clear and speedy. The evidence also shows that meetings were held to discuss the issues directly with Mr Dunn which provided adequate opportunity for discussion.

Breach of the Police EEO Policy

[60] The respondent is required to operate a personnel policy that complies with the principle of being a good employer.^[2] The evidence does not establish any breaches of the respondents obligations to be a good employer.

Costs

[61] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, the Police may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Dunn will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[62] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell

Member of Employment Relations Authority

[1] Nationality is a prohibited ground of discrimination.

[2] [State Sector Act 1988](#) ss 56 & 58.

