

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 110
5564112

BETWEEN KEVIN GUTHRIE
Applicant

A N D COMMISSIONER OF POLICE
Respondent

Member of Authority: Helen Doyle

Representatives: Anjela Sharma, Counsel for Applicant
 Nicola Ridder, Counsel for Respondent

Investigation Meeting: 5 July 2016 at Nelson

Submissions Received: At the investigation meeting
 Further information supplied by both counsel on 5 and
 6 July 2016

Date of Determination: 14 July 2016

DETERMINATION OF THE AUTHORITY

- A There has not been compliance with clause 3 of the record of settlement between the parties because the Statement of Service does not detail Kevin Guthrie's length of service.**
- B There is no order for compliance at this stage. The Commissioner of Police has two weeks to provide a Statement of Service that details Mr Guthrie's length of service from 1992. Ms Sharma may return to the Authority if required after that time should an order be necessary.**
- C The circumstances do not call for an award of a penalty.**
- D Costs are reserved and a timetable set failing agreement.**

Employment relationship problem

[1] Kevin Guthrie entered into a record of settlement under s 149 of the Employment Relations Act 2000 with Commissioner of Police (Police). The day and place of the agreement is left blank but the month is December 2015. Nothing particularly turns on that. Mr Guthrie's employment ended by way of resignation under the agreed terms of settlement on 8 or 9 January 2016.

[2] Mr Guthrie claims that clause 3 of the record of settlement was breached by Police.

[3] Clause 3 provides as follows:

Police will provide Kevin with a Statement of Service detailing his length of service, his rank, and that the reason for cessation was resignation.

[4] I prohibit from publication all other provisions of the agreed terms of settlement.

[5] Mr Guthrie seeks an order that the Police comply under s 137 of the Act with clause 3 of the settlement agreement and that the Authority award a penalty for the breach of an agreed term of settlement under s 149 (4) of the Act of \$20,000.

[6] Police do not accept that there has been a breach of the settlement agreement and say that the Authority should decline to make a compliance order and decline to impose a penalty.

[7] Under s 149 (3) (b) of the Act a party can only bring the terms of settlement before the Authority for enforcement purposes

The issues

[8] The issues for the Authority are as follows:

(i) What does clause 3 require the Police to provide to Mr Guthrie?

(ii) Did the statement of service provided by Police meet the obligations under clause 3 of the record of settlement?

(iii) If it did not then should the Authority make an order for compliance?

(iv) If there has been a breach of clause 3 then should a penalty be awarded?

What does clause 3 require the Police to provide?

[9] Before the matter proceeded to an investigation meeting Ms Sharma raised concerns about documents that she said were *without prejudice*. The Authority Officer put the documents before another Authority Member. A number of documents were removed from the file and accordingly I have not seen them. I understand they pertain to negotiations between the parties leading to the signing of the agreed terms of settlement.

[10] I record Ms Ridder expressed some concern during the investigation meeting because she says Police are not able to respond to submissions from Ms Sharma by referring to the removed material which contained without prejudice communication leading up to the record of settlement being signed.

[11] Clause 3 provides that Police will provide Mr Guthrie with a Statement of Service detailing his length of service, his rank and that the reason for his cessation was resignation.

[12] Ms Sharma submits that it was a reasonable expectation that under clause 3 that Police will provide Mr Guthrie with details of the duties he undertook. I have considered from a reading of clause 3 whether the words that follow statement of service are illustrative only of what the statement of service may provide or whether the words limit what is to be provided by way of an exhaustive list.

[13] Clause 3 does not use words such as *including* after statement of service which may support an incomplete list. Clause 3 is written to support a complete list of what will be detailed in the statement of service.

[14] I find that the words in clause 3 limit what is to be provided in the statement of service. That does not include duties.

[15] I do not find that I need to consider anything other than the plain words of clause 3. Police were required to provide to Mr Guthrie a statement of service detailing his length of service, his rank and the reason for the cessation was

resignation. There was nothing in the agreed terms of settlement about who should sign the statement of service.

Did the statement of service provided by Police meet the obligations under clause 3 of the record of settlement?

[16] There is background to this matter. The first statement of service dated 21 January 2016, did not comply with clause 3. It did not correctly detail Mr Guthrie's length of service. There were also some spelling errors. Mr Guthrie telephoned the signatory of the statement of service payroll officer, Mr Lewis, and left a message about the errors in the statement of service on 26 January 2016. On that same day, Mr Lewis returned Mr Guthrie's call and said that he would amend the statement of service and forward the amended copy of the statement of service as soon as possible.

[17] Mr Guthrie did not hear further from Mr Lewis and on 5 February 2016, he left a message on Mr Lewis's voicemail inquiring as to the statement of service and its whereabouts together with another question about his superannuation.

[18] By early March 2016, Mr Guthrie had had enough and contacted his legal representative, Ms Sharma, and showed her Mr Lewis' statement of service.

[19] A statement of problem was lodged with the Authority on 23 March 2016.

[20] It did occur to me that before the lodging of proceedings it would have been a useful step for Ms Sharma to have made some form of contact with the Police legal team. Lodging proceedings in the Authority is a serious first step and can sometimes put a barrier in the place of resolution as positions become polarised and fixed.

[21] Upon receipt by Police of Mr Guthrie's statement of problem on 24 March 2016, inquiries were made of Mr Lewis about the statement of service. Mr Lewis had forgotten to check and post Mr Guthrie's updated and amended statement of service.

[22] On 29 March 2016, Mr Lewis posted an amended and updated statement of service to Mr Guthrie and emailed that to Ms Sharma. Mr Lewis' explanation to Ms Ridder for the delay with the statement of service was provided by email to Ms Sharma. Mr Lewis explained that he had the statement on his desk waiting to check the dates and it got buried. He apologised to Ms Ridder for that.

[23] In an email dated 29 March 2016 to Ms Sharma, Ms Ridder advised that she had hoped to have the opportunity to check the content of the statement of service with Ms Sharma and Mr Guthrie before it was finalised but it had already been sent. Ms Ridder advised there was no problem to make any changes and to forward another copy if there were issues and she asked Ms Sharma to let her know whether the attached document was in order.

[24] There are two areas in which Ms Sharma submits that the statement of service is defective. The first area I have dealt with above was about a description of duties. The second is that the statement of service did not contain details of Mr Guthrie's length of service.

[25] Mr Guthrie said that he commenced service as a non-sworn employee of the Police in or about July 1992. The second statement of service provides that the employment by New Zealand Police was from 1 July 1993 to 8 January 2016. Mr Guthrie became a sworn police officer in 1997 and his earlier service was according to Police *Peoplesoft records* recognised but only from 1 July 1993. The first and second statements of service detail the rank Mr Guthrie attained and held prior to his resignation of Senior Constable, Nelson. There is also clear reference to his resignation.

[26] Mr Guthrie has been unable to obtain IRD or bank statements from 1992 given the passage of time to establish he was employed by Police at that time. He has produced a staff photo from 1992 that is in the Police Bar in Nelson. He recalled being present when the photo was taken but although invited to participate could not because he was undertaking his guard duties.

[27] The only other information pertaining to Mr Guthrie having been employed by Police since 1992 and not 1993 is a file note dated 13 October 1997 from Constable GJ Pitcaithly which was sent to the recruiting co-ordinator at Police Headquarters about Mr Guthrie. The file note provided amongst other matter that Mr Guthrie has been employed by NZ Police at Nelson since 1992 as a jailer, prisoner escort and latterly a firearms licensing officer.

[28] A question mark therefore remains over whether the statement of service correctly details Mr Guthrie's length of service. There is some information before the Police to support Mr Guthrie's evidence that he commenced his employment with

Police before July 1993 in 1992. I cannot find therefore that there has been strict compliance with clause 3 because the statement of service does not detail Mr Guthrie's length of service.

Should there be an order for compliance?

[29] I do not intend to make an order for compliance in the circumstances set out above. The Commissioner of Police has two weeks from the date of this determination to provide a statement of service that details Mr Guthrie's length of service. It seems appropriate that this be from 1992. Mr Guthrie says that he commenced employment sometime in July that year with Police. There is no reason why he would not have the best knowledge of anyone about his start date. I reserve the right for Ms Sharma to return to the Authority if an order is required after that time.

If there has been a breach of clause 3 then should a penalty be awarded?

[30] The breach in this case was unintentional. There was some unfortunate delay initially but I accept that was inadvertent and not deliberate. Difficulty then arose because Police do not have records of Mr Guthrie's service before July 1993 and only limited information to suggest a commencement date in 1992. The situation and delay caused Mr Guthrie some distress and inconvenience. He felt I accept that he was not shown the respect he should have been as a long serving employee of Police. Standing back however the circumstances in this case do not call for the award of a penalty. I do not find a penalty should be awarded.

One further matter

[31] In submissions received after the end of the investigation meeting from Ms Sharma issues were raised of a failure to negotiate the settlement in good faith and that the Authority should direct a Commissioner's Certificate of Service be provided to Mr Guthrie.

[32] Section 149(3)(b) of the Act provides that except for enforcement purposes no party may bring the terms of settlement before the Authority. The record of settlement was expressed in clause 8 to be *in full and final settlement of all claims, complaints or grievances Kevin may have against Police, or any of its employees arising out of, or in relation to, his employment relationship with Police including its termination.*

[33] I do not find the Authority in these circumstances can review the negotiations leading to the settlement to ascertain if there has been a breach of good faith and/or direct that a different certificate be provided.

Costs

[34] I reserve the issue of costs. I would encourage the parties to reach agreement failing which Ms Sharma has until 12 August 2016 to lodge and serve submissions as to costs and Ms Ridder has until 26 August 2016 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority