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Hawkins v Commissioner of Police WC 29/07 [2007] NZEmpC 149 (30 November 2007)

Last Updated: 7 December 2007

IN THE EMPLOYMENT COURT

WELLINGTONWC 29/07WRC 38/05

IN THE MATTER OF proceedings removed from the Employment Relations Authority

BETWEEN ROBERT CRAIG HAWKINS
Plaintiff

AND THE COMMISSIONER OF POLICE
Defendant

Hearing: 1, 2, 3, 4, 5 and 10 October 2007

(Heard at Wanganui and Wellington)

Appearances: C P Brosnahan, Counsel for the Plaintiff
Joanna Holden and Aaron Martin, Counsel for the Defendant

Judgment: 30 November 2007

JUDGMENT OF JUDGE C M SHAW

[1] The plaintiff's personal grievance alleging constructive dismissal was removed from the Employment Relations Authority to the Court. By agreement, the hearing was limited to liability. The question of remedies was reserved for later evidence should it become necessary.

[2] The plaintiff claims that he was constructively dismissed from his employment as a police officer at the time he voluntarily disengaged from his employment (colloquially known as perfering)^[1] because of the actions of the defendant. He seeks reinstatement, loss of salary from the date of disengagement to his reinstatement plus interest, reinstatement of his superannuation entitlements, compensation, annual leave entitlements, and costs. The defendant claims that the

plaintiff's personal grievance was raised out of time; that a police officer who has voluntarily disengaged from the police on medical grounds cannot claim for constructive dismissal; and, in any event, alleges that the plaintiff has not established that the defendant is responsible for his resignation.

[3] The parties have been to mediation but this was not successful.

The issues

[4] The factual and legal issues in dispute in this case are:

1. Was the plaintiff's grievance raised within 90 days as required by [s114](#) of the [Employment Relations Act 2000](#) and, if not, did the defendant consent to the grievance being raised out of time?
2. Can a police officer who has voluntarily disengaged from the police on medical grounds bring a claim of constructive dismissal, with remedies of reinstatement, and loss of income from the date of disengagement?
3. Whether the elements of constructive dismissal have been made out where the allegation is a combination of an alleged course of conduct and a breach of the duty by the defendant. These elements are:

(i) That the defendant breached his duty as Mr Hawkins's employer; and if so

(ii) That Mr Hawkins's resignation was caused by the defendant's breach.

(iii) That the defendant should have known that such a breach would lead to Mr Hawkins resigning.

4. Whether the dismissal was justified.

1. Was the grievance raised within time?

The facts

[5] The starting date from which the 90-day period for raising a personal grievance of unjustified dismissal under the Act is the last date of employment.^[2] In this case it is calculated as 21 June 2001, the date on which Mr Hawkins officially disengaged from his employment as a police officer.

[6] A letter purporting to raise a grievance on behalf of Mr Hawkins was sent to the New Zealand Police on 18 September 2001, 87 days after his disengagement. The first question is whether that letter met the purpose of raising the grievance as required in [s114](#) of the [Employment Relations Act 2000](#).

[7] The letter advised that Mr Brosnahan had been retained in relation to a personal grievance on behalf of Mr Hawkins, that it was putting the police on notice that Mr Hawkins was raising a personal grievance and, because of recent instructions and counsel's involvement in a trial, he would provide full details on his return.

[8] Receipt of the letter was acknowledged the next day by Mark Lammas, now retired but then the district commander of the central district. He noted without protest that further details would be provided after 1 October 2001.

[9] On 4 October 2001 Mr Hawkins's solicitor gave particulars of the personal grievance. It was said to be based on a continuing course of unsatisfactory conduct by the New Zealand Police as Mr Hawkins's employer, specifically the disclosure of confidential information about Mr Hawkins by Detective Inspector Brew; the disclosure at a staff meeting at the Taumarunui police station of information about pending charges against him for criminal offences; undue pressure on Mr Hawkins to resign; and the lack of adequate information being provided to him.

[10] District Commander Lammas replied asking for further particularised details or clarification of those matters. He said that the solicitor's letter had been general and non-specific and did not allow him to reasonably inquire into the matters alleged.

[11] In the meantime, Mr Hawkins was committed for trial on criminal charges arising from events that had occurred in the course of his employment as a police officer. He was discharged under [s347](#) of the [Crimes Act 1961](#) 2 years later. Mr Brosnahan then wrote a detailed letter on 7 November 2003 to Russell Gibson, human resources manager, who had taken over from District Commander Lammas, in which he provided the details requested in 2001 and specified the remedies sought including reinstatement.

[12] The parties then attended mediation which was unsuccessful and Mr Hawkins commenced proceedings in the Employment Relations Authority. The first time the question of whether the grievance had been raised out of time was in the defendant's statement of reply to the plaintiff's statement of problem in the Authority.

[13] The defendant argues that the contents of the 18 September 2001 letter were insufficient to raise a grievance and the defendant did not consent to any waiver of the 90-day period.

1. Sufficiency of the first letter

[14] [Section 114\(2\)](#) provides that a grievance is raised with an employer for the purpose of calculating the 90 days as soon as the employee has made, or taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wishes the employer to address. The test is objective and requires a communication sufficient to enable the employer to address and remedy the grievance or for the parties to settle it in discussion.^[3]

[15] The best indication that the letter of 18 September 2001 did not meet this test is in District Commander Lammas's request for further details so that he could inquire into the matters alleged. This was obviously because the letter was no more than a formal notice that a grievance, in the sense of a particularised set of allegations, was to be raised in the future. Proper notice of the grievance was not given within the 90-day period.

2. Consent

[16] Pursuant to [s114\(1\)](#) a grievance must be raised within time unless the employer consents to the personal grievance being raised after the expiration of that period. It is the defendant's case that [s114\(1\)](#) statutorily requires actual consent, not acquiescence and, in the absence of explicit consent, the Court should not find that the defendant consented.

[17] Authorities have established that consent requires a positive affirmative act such as written or oral acceptance. It may also be impliedly accepted by conduct.^[4] Whether a defendant has consented is a matter of fact judged against that test.

[18] I do not accept the submission for the defendant that because [s114](#) statutorily imposes the need for consent such consent must be expressly given. The section does not abrogate the common law tests for consent. The narrow interpretation proposed by the defendant does not accord with the authority in *Phillips v Net Tel Communications*^[5] where the Court recognised that an employer could impliedly consent to the late submission of a grievance by replying to it and initiating an attempt at mediation.

[19] I find that by his written responses and his subsequent willingness to engage in mediation with Mr Hawkins without raising the 90-day issue the defendant impliedly consented to the grievance being raised after the expiry of the 90-day period.

[20] I conclude that the grievance was not properly raised before the expiry of the statutory 90-day period but the defendant's lack of protest and his active engagement with Mr Hawkins in relation to the grievance after that date is sufficient evidence of implied consent. In those circumstances the question of whether there are exceptional circumstances to grant leave to extend the time for filing does not arise.

2. Does statutory disengagement from the police on medical grounds preclude a claim for constructive dismissal?

[21] It was argued for the defendant that Mr Hawkins's disengagement was justified since the statutory criteria for his disengagement on medical grounds were satisfied by the obtaining of medical certificates and the like. The termination of his employment could therefore not be "unjustifiable" although the events preceding the disengagement could amount to unjustifiable disadvantage. In such circumstances the remedy of reinstatement was not available. Counsel relied on the Court of Appeal decisions in *Commissioner of Police v Cartwright*^[6] and *Attorney-General v B*^[7] to support this submission. However, these need to be read in the context of the relevant statutory scheme.

[22] By s87 of the [Police Act 1958](#), the personal grievance provisions in [Part 9](#) of the [Employment Relations Act 2000](#) apply to personal grievances by sworn members of the police.

[23] The [Police Act](#) contains statutory procedures by which officers cease to be members of the police meaning their employment comes to an end. These include compulsory disengagement where the Commissioner is satisfied that the member is incapable of performing police duties (s28C) or by way of application by a member for voluntary disengagement (s28D). In the case of compulsory disengagement, s28C(3) provides that the member ceases to be a member of the police when the notice period expires or is waived. Under both ss28C and 28D the Commissioner's decision is made after considering medical reports. Under s28D which applies in this case, the Commissioner may permit such an application if he or she is satisfied that the member is incapable of performing police duties competently.

[24] There are two material differences between s28C and s28D. First, a disengagement under s28C is compulsorily imposed on a police officer whereas under s28D disengagement only occurs if the officer initiates an application which is accepted by the Commissioner.

[25] Second, in the case of compulsory disengagement s28C(4) provides:

Where the member takes a personal grievance action under section 87 of this Act in respect of the requirement to leave the Police, the member shall remain a member of the Police until the action is disposed of; but if reinstatement is not ordered, the member shall cease to be a member of the Police on the date on which written notice of the decision disposing of the action is given to the member.

[26] There is no similar provision in s28D.

[27] In the *Cartwright* case the officer had been forced to disengage under s28C. He claimed his stress related illness was caused by the Commissioner breaching the terms of his employment and brought a personal grievance claiming unjustifiable dismissal. He did not seek reinstatement.

[28] The Court of Appeal found that the real nature of his claim was for unjustifiable action rather than unjustified dismissal because it was based on the events preceding the disengagement process. As there was no contest to the validity of that process the disengagement itself was justified.^[8]

[29] Counsel for the defendant relied on this as authority for the proposition that where an officer voluntarily disengages from the police he or she is precluded from bringing a claim for constructive dismissal.

[30] I do not accept that submission for the following reasons:

- *Cartwright* concerned compulsory not voluntary medical disengagement. There is no equivalent of s28C(4) in s28D and

the bar to bringing a personal grievance for unjustified dismissal which effectively arises by reason of s28C(4) does not apply to s28D. Section 28C(4) precludes a personal grievance for unjustified dismissal because, notwithstanding the expiry of a notice to compulsorily disengage, where a member challenges that disengagement he or she is deemed by statute to continue in their employment until the action is disposed of.

- Section 28C contemplates that a member who has been compulsorily disengaged may wish to bring a personal grievance to challenge the Commissioner's decision. Section 28C(4) is necessary in those circumstances to negate the effect of s28C(3) which would otherwise end the member's employment. Section 28D is silent as to the possibility of a personal grievance being raised following a voluntary disengagement and it does not prevent the officer ceasing to be a member even though a personal grievance is taken. There is no statutory prohibition on such proceedings being brought and there is no reason why members of the police should be deprived of the right to make such a claim to which they are entitled under s87.
- While a personal grievance for unjustified dismissal requires the grievant to show that there has been a dismissal, in the case of constructive dismissal this is not so. A person who apparently voluntarily resigns or otherwise leaves their employment is not precluded from bringing a claim for constructive dismissal by reason of that action. That is because the very nature of a claim for constructive dismissal is dependent on the events which preceded it. It is artificial to separate the events leading up to a constructive dismissal and the way in which an employee actually left their employment. As the Court of Appeal said in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*^[9] it is necessary to examine all the circumstances of the resignation, not just the terms of the notice or the way the employee has tendered the resignation.
- Claims for constructive dismissal do not require an analysis of the method of the dismissal because the employee invariably makes the decision to leave in such cases. The focus of such claims is on the employee's motivation for that decision; whether the motivation arises from the breach of the employer's duty or other actions by the employer; and whether the leaving was reasonably foreseeable to the employer. The mode of leaving is not part of the inquiry into whether the constructive dismissal occurred. It is therefore possible for a claim for constructive dismissal to be brought even where the procedure leading to an application for disengagement is not challenged.

[31] While the judgment in *Attorney-General v B* concerned police officers who had perfered, the similarity to the present case goes no further. The police officers in *B* had sued the Commissioner for compensatory special damages, aggravated general

damages, and exemplary damages. In the context of a strike out application, the Court of Appeal held that their claims for damages arising directly or indirectly out of personal injury were barred by s14 of the [Accident Rehabilitation and Compensation Insurance Act 1992](#).

[32] In obiter remarks, the Court questioned the viability of certain causes of action in the light of the substantial benefits received by virtue of s28 including s28D in consequence of their inability to perform police duties. The case is not authority for the proposition that an officer who has perfered is unable to bring a claim for constructive dismissal but may be relevant to the question of remedies should such a claim be successful.

[33] I conclude that Mr Hawkins's voluntary disengagement from the police does not bar him from bringing a claim for constructive dismissal. The issue is whether that claim can be made out.

3. Constructive dismissal

Facts

[34] Taumarunui police station is in the Ruapehu police area which is part of the central police district. When Mr Hawkins transferred to Taumarunui in January 1996 he knew that Detective Sergeant Webb who was officer in charge of the CIB there had a reputation as a bully but he believed that Detective Sergeant Webb had only about 18 months left to serve and on that basis decided to take appointment there.

[35] In March 2000, the officer in charge of the station was Senior Sergeant Buchanan. Other NCOs were Detective Sergeant Webb and Sergeants Hawkins and Craig who dealt with general police duties. The Ruapehu area controller from 2000 was Inspector Don Allan who dealt with most operational matters relating to the Taumarunui police station. The district commander of the central police district was stationed at Palmerston North.

[36] I am satisfied from the evidence that, at all relevant times to this case, the Taumarunui police station was not a happy working environment. There was tension between Detective Sergeant Webb and other staff because of his bullying and intimidation of them.

[37] Complaints about Detective Sergeant Webb came from more than one officer. For example, former police officer Mark Anderson raised concerns with Inspector Allan in 2001 when he was told that arrangements were being put in place to sort it out. Evidence was given of problems other officers had as well.

[38] In 2002 there was an external inquiry into the state of the Taumarunui police station known as Operation Plateau. As part of that inquiry, Ms Duckworth, a clinical psychologist, reported to police that over 2 years in 2000 and 2001 she counselled seven Taumarunui officers because of concerns including morale at the station.

[39] Mr Hawkins believes he got on Detective Sergeant Webb's wrong side when in 1997/98 he successfully took

control of an investigation into a number of arsons while Detective Sergeant Webb was away.

[40] Another officer was so dissatisfied with the treatment she was receiving by Detective Sergeant Webb that Detective Inspector Doug Brew from central police headquarters visited the station in 1999 to investigate. What happened at that time gave rise to one of Mr Hawkins's claims against the police.

[41] In the course of his investigation, Detective Inspector Brew interviewed Mr Hawkins who revealed his issues with Detective Sergeant Webb. These included the way he overloaded female staff with work, that he was a bully, and was difficult to work with. Detective Inspector Brew had no doubt that Mr Hawkins had genuine concerns that his life had become difficult in Taumarunui because of Detective Sergeant Webb and gave him an assurance of confidentiality. He told him that if there were any backlash from Detective Sergeant Webb he was to advise him so he could formalise an investigation. At that stage he had nothing specific to start an inquiry.

[42] Contrary to his assurances, Detective Inspector Brew revealed to Detective Sergeant Webb Mr Hawkins's concerns about him. From then on, Detective Sergeant Webb's behaviour to Mr Hawkins became even more difficult. A colleague told Mr Hawkins that Detective Sergeant Webb was serious about getting him for what he had said.

[43] Mr Hawkins also raised his issues with Senior Sergeant Buchanan but, because of lack of action, he sought and was granted leave to breach the chain of command and to speak directly to Superintendent Lammas. Mr Hawkins believed he was missing out on positions of responsibility and on being involved in serious crime investigations. Inspector Allan had told him he was not up to being acting officer in charge.

[44] District Commander Lammas now has no recollection of disharmony between Detective Sergeant Webb and Mr Hawkins being raised and Detective Inspector Brew had not reported to him in writing about the issues in the CIB. Although Mr Hawkins was extremely unhappy at that stage about the way Detective Sergeant Webb was treating him, I am satisfied that his immediate concern conveyed to District Commander Lammas at that time was about the level of responsibility he should be given and, at this stage, District Commander Lammas did not have a full appreciation of staff discontent at Taumarunui. On the other hand, Senior Sergeant Buchanan and Detective Inspector Brew did know there were real problems but because they perceived them to be about attitudes rather than identified actions, they felt they had nothing concrete to investigate.

[45] Mr Hawkins became increasingly nervous of Detective Sergeant Webb. He and Sergeant Craig experienced annoying behaviours from him. They believed that Detective Sergeant Webb was trying to get things on them. After a row between Mr Hawkins and Detective Sergeant Webb in front of Senior Sergeant Buchanan in June 2000, Detective Sergeant Webb said he would never forgive Mr Hawkins.

[46] Later in the year, Mr Hawkins made notes of several meetings with Senior Sergeant Buchanan in which Detective Sergeant Webb's behaviour was discussed. These notes record that Senior Sergeant Buchanan agreed that Detective Sergeant Webb was being vindictive, "*stirring*", and going behind people's back. He said he would speak to Inspector Allan to get Detective Sergeant Webb to leave the general duties officers alone. Mr Hawkins recorded in his notes that he believed that the administration, by which he meant Inspector Allan and Detective Sergeant Webb, would fit him up for not following the corporate plan.

[47] Senior Sergeant Buchanan spoke to Inspector Allan at least a half a dozen times about the conflict of personality between Detective Sergeant Webb and Mr Hawkins but there was no response and matters did not improve for Mr Hawkins.

[48] Inspector Allan accepted in evidence that he knew of conflicts between Detective Sergeant Webb and Mr Hawkins but, when he asked people for specifics about Detective Sergeant Webb, often the matter was hidden as innuendo and rumour. When he asked for substance the persons were at times hesitant about coming forward because they feared the consequences. In late 2000, because of concerns about his management style, Detective Sergeant Webb was required to attend an external management support programme. He was unhappy about this and only attended two sessions.

[49] About Christmas 2000, Mr Hawkins spoke again to Inspector Allan. He expressed the hope that he would sort out Detective Sergeant Webb once and for all. He said he was so uptight when talking to Inspector Allan he was physically shaking. He left the station that day believing that Inspector Allan would finally sort out Detective Sergeant Webb. However, nothing changed.

[50] When Senior Sergeant Buchanan retired in January 2001, Mr Hawkins was appointed acting officer in charge until the position had been advertised and filled. He says that in addition to those senior sergeant officer in charge duties he was also required to perform the majority of his sergeant's duties as well and the heavy workload caused him further stress. Although witnesses for the defendant believed that Mr Hawkins's acting promotion was evidence that he was not being disadvantaged in his workplace and that matters between he and Detective Sergeant Webb were behind him, Mr Hawkins certainly did not see it that way.

[51] In April 2001, Mr Hawkins contacted the police welfare officer, Janet Baker, and asked how he could go about seeing a counsellor. By then he felt overworked and was consumed by fear that Detective Sergeant Webb would get him. Mr Hawkins was referred by Ms Baker for trauma-related counselling by Ellen Duckworth who he saw on 28 April 2001. She identified that he was highly anxious and very concerned about confidentiality. She noted his high level of stress created largely through conflict with a colleague and his fruitless attempts to resolve the matter. Ms Duckworth counselled him about sleep patterns and relaxation exercises. He was not assessed with a view to psychological disengagement.

Complaint to Police Complaints Authority and criminal charges

[52] In March 2000 there was an allegation that two youths who had been arrested had been assaulted by Mr Hawkins at the police station. Although this incident was referred to by speakers later in 2000 at a powhiri to welcome Inspector Allan to Taumarunui and was the subject of discussions between Inspector Allan and some kaumatua after that powhiri, no formal complaint was received by the police at that stage and it was not investigated.

[53] In March 2001, the sister of one of the youths made a formal complaint about the incident to the Police Complaints Authority (PCA). District Commander Lammas directed Inspector Allan to have the complaint investigated and to provide an initial report as to whether there was justification for the complaint.

[54] Inspector Allan appointed Detective Sergeant Webb to investigate the complaint. He was challenged as to the appropriateness of this in light of his knowledge of the conflict between Detective Sergeant Webb and others including Mr Hawkins. Although Detective Sergeant Webb's instructions were to interview the complainants and report back, I find that putting even this preliminary inquiry into Mr Hawkins into the hands of a person who was known to be bullying him was not only unwise, it was insensitive and inflammatory.

[55] Detective Sergeant Webb interviewed the person who had made the complaint, the two complainants, and a dentist and doctor who had examined one of the complainants. He decided that it was not a matter that could be resolved informally as the allegations of assault on the two boys in police custody were serious and local Maori believed that there had been a police cover up. He sent the file back to Inspector Allan.

[56] Detective Sergeant Webb was challenged for not interviewing more witnesses including other officers present and Mr Hawkins. However, I am satisfied that, unlike previous PCA inquiries he had conducted, he had been directed to do only preliminary inquiries.

[57] Mr Hawkins was not formally advised that he was being investigated although he suspected something was up when he noted that the behaviour between Detective Sergeant Webb and Inspector Allan had become secretive, for example they had stopped talking when he came into Inspector Allan's office.

[58] The first indication Mr Hawkins had that he was being investigated was when Detective Sergeant Webb approached him and Sergeant Craig and told them that he was going out for a while and that there was something on his desk that Mr Hawkins needed to look at. What they found were the statements of the complainants. Detective Sergeant Webb acknowledged that these actions were inappropriate because the complaint should not have been shown to anyone.

[59] As a result of what he read, Mr Hawkins had grave concerns about how Detective Sergeant Webb would use the complaint against him. In spite of examples where other such reports by Detective Sergeant Webb had exonerated him, he believed that an investigating officer in a PCA complaint could write the report to direct the outcome. He felt powerless. His stomach ulcer flared up and, after seeing his doctor on 3 May 2001, went on sick leave. The medical certificate from Dr Sivakumar on the same day said that he should be fit to resume work on 25.5.01.

[60] His doctor later reported to the police medical officer that Mr Hawkins was very depressed and facing a lot of stress. Among other symptoms, he had some ideas of harming himself. He was prescribed anti-depressants. He told the doctor that he had organised counselling for himself.

[61] On 7 May 2001 Inspector Allan sent the pro-forma medical certificate to police human resources with the note "*Given the background circumstances, which I believe you are aware, I do not anticipate Sergeant HAWKINS returning to work after this time.*" This is evidence that, before the criminal investigation even began, Inspector Allan assumed that Mr Hawkins would not be returning to Taumarunui.

[62] Detective Inspector Brew was assigned to conduct a criminal investigation into the alleged assault by Mr Hawkins. He read the PCA file in Palmerston North and went to Taumarunui on 9 May. He told the Court that at that stage he had not decided that Mr Hawkins would be charged as the investigation had not begun.

[63] On 7 May Mr Hawkins saw Ms Duckworth again to tell her of the re-emergence of his stomach ulcer which he attributed to the intense stress engendered by the conflict and the workload he had at the Taumarunui station. There is nothing in Ms Duckworth's report that indicates that he was considering per핑 on 7 May. She counselled him about ways to manage the stress that he was experiencing but again did not assess him with a view to psychological disengagement.

[64] Mr Hawkins returned to Doctor Sivakumar on 8 May for a follow-up. By then he felt much better in spite of knowing of the PCA investigation although he had some physical symptoms related to the stress and he was given medication for this. He wanted to continue his counselling. He continued on sick leave.

[65] After his doctor's appointment Ms Baker spoke to Mr Hawkins by phone on the same day. He made a note book entry of their conversation. Ms Baker advised him that Detective Inspector Brew was in Taumarunui regarding a PCA criminal investigation into him and asked if he had been informed. Mr Hawkins said that he had not been formally told. She told him she thought this was odd as it had been going on for some time. Mr Hawkins told her he would talk to Detective Inspector Brew and tell him what had happened even though he was on sick leave. He said he was happy to get on with it as he knew he had done nothing wrong. In that same conversation, Mr Hawkins says that she spoke about the then current political climate about per핑. This is also an important

part of his claim.

[66] Mr Hawkins already understood before talking to Ms Baker that, if an officer were convicted of an offence, he or she would lose their superannuation contributions. He rang her to find out how to go about perfig because he believed that if he didn't before he was charged he would not get his lump sum entitlement.

[67] Apart from diary entries which recorded dates and contact details of people she was dealing with, Ms Baker made no notes of any conversation she had with them. Because of the passage of time, she had little or no memory of the conversations she had with Mr Hawkins. For example, she accepted that she could have spoken with Detective Inspector Brew on 7 May before she rang Mr Hawkins on 8 May about the PCA inquiry but couldn't recall any conversation with Detective Inspector Brew or details of the conversation with Mr Hawkins. The best she could do was to speak about her normal practice when officers inquired about the disengaging process.

[68] Ms Baker accepted that at the end of April and the beginning of May the question of convicted officers applying to perfig was in the news. The then Minister of Police and representatives of the Commissioner's office were publicly commenting on the issue. This adds credence to Mr Hawkins's recollection that she spoke to him about the political climate in relation to perfig when they talked on 8 May.

[69] Ms Baker was adamant that she would not be in a position to tell officers whether they should or shouldn't proceed with their application and that her role was only to ensure that they were aware of the process and that they got the necessary health support and assessments done. In contrast, Mr Hawkins recalled much of their conversations. He said that before he applied to perfig Ms Baker impressed on him the need to put the papers in before being charged and gave him examples of officers' applications being turned down or being put on hold because of pending charges. He recalled her saying "*You've got to get the green stuff.*" Ms Baker denied saying this.

[70] From her diary entries it is clear that from 8 May Ms Baker was in very regular contact with Mr Hawkins including the period from when he put his perfig application in until after he was disengaged on 21 June. I find that it is highly probable that she discussed with him the implications of a conviction on his ability to perfig during that time.

[71] On 9 May 2001 at about 8am, while Mr Hawkins was still on sick leave, Inspector Allan held a station meeting at Taumarunui. There was a dispute about whether Detective Inspector Brew was there and what was said by Inspector Allan at the meeting but Sergeant Craig, at that time a close friend of Mr Hawkins, was certainly present. After the meeting, he phoned Mr Hawkins at 8.10am and later visited him at about 10am. Mr Hawkins made notes of what he was told by Sergeant Craig which Sergeant Craig signed.

[72] Sergeant Craig was called by the defendant to give evidence. He presented as being extremely uncomfortable. His written brief of evidence focused on his views that Detective Sergeant Webb had not bullied Mr Hawkins and there was no conspiracy against Mr Hawkins or an attempt to run him out of town. He defended Inspector Allan's behaviour at the 9 May meeting. Under cross-examination, when challenged on what was said at that meeting, his position was either that he did not recall because it had been 6 years ago, or what was written in Mr Hawkins's notes was taken out of context, or not a true record of what he had actually said.

[73] The notes record that at 8.10am when he phoned Mr Hawkins, Sergeant Craig spoke about whether another officer who had been present during the police cell incident would be charged. He told him that at the morning meeting staff handling was discussed and staff believed Detective Sergeant Webb was trying to fit Mr Hawkins up. After the staff meeting, Inspector Allan had told Sergeant Craig that he was surprised Mr Hawkins was still in the country, that he couldn't see him returning to Taumarunui as the community wouldn't put up with it particularly in the light of what had happened to the officer involved in the then recent Waitara shooting, and, based on the evidence, it would be foolish for Mr Hawkins to defend the charges.

[74] Inspector Allan accepted he had expressed reservations about Mr Hawkins returning to the community but vigorously denied referring to him leaving the country or being foolish to defend the charges as it would have been inappropriate for him to have said these things. He did not agree that he had spoken privately to Sergeant Craig after the meeting but knew that what he said to Sergeant Craig was likely to be reported to Mr Hawkins.

[75] There are, therefore, two very different accounts of what Inspector Allan said about Mr Hawkins on 9 May before he was charged with any offences. For reasons of his own which were not apparent to the Court, Sergeant Craig was clearly attempting to resile from his original account of the meeting given to Mr Hawkins.

[76] The only contemporaneous record is Mr Hawkins's notes of what Sergeant Craig reported to him. Because Sergeant Craig had come directly from the meeting, I accept those notes to be a fair account of what was said both at the meeting and to Sergeant Craig by Inspector Allan after the meeting. It is also more likely than not that Inspector Allan spoke to Sergeant Craig with the intention of sending a message to Mr Hawkins about the strength of the police case.

[77] I find that Mr Hawkins was devastated by what Sergeant Craig told him. He believed that Detective Sergeant Webb had won. Sergeant Craig was so concerned about Mr Hawkins's mental health and sanity that he returned the next day to uplift some of his firearms to ensure Mr Hawkins's safety.

[78] Mr Hawkins sat down and cried and then rang Janet Baker. He then immediately rang his friend Paul Bass, a former police officer and good friend of his who lived in Wanganui. Mr Bass described him as being in a blind panic about being arrested and charged. Mr Hawkins told him a police welfare officer had told him that he had to get his perfig papers in before he was charged or he wouldn't be able to put them in after that. Mr Bass told him to get into the car and drive straight down. Mr Hawkins said that he drove down to Wanganui around the back ways

for fear of being apprehended.

[79] Mr Bass also arranged for him to see a Police Association representative, JJ Taylor, because he was concerned that the police welfare officer would have the interests of the police before those of Mr Hawkins. On the evening of 9 May, Mr Taylor confirmed to Mr Bass and Mr Hawkins his advice that if he was charged before he had lodged his perf papers then under the political climate his perf entitlements were at risk. Mr Taylor had copies of the complainants' statements which he showed to Mr Hawkins.

[80] Mr Hawkins spoke again to Ms Baker the next day and decided to go ahead with the application. The application to perf was faxed to Mr Hawkins at Mr Bass's address, filled in, and by late morning on Thursday, 10 May 2001 it had been filed. Mr Hawkins returned to Taumarunui the same day.

[81] Mr Bass was very concerned that Mr Hawkins was so depressed he was likely to kill himself. At that stage, it was the common belief of Mr Hawkins and his associates based on what had been said at the meeting by Inspector Allan and the statements he had been shown that the evidence against him was strong and that he was likely to be convicted.

[82] Because Mr Hawkins's brother in Australia was concerned about his decision to perf, Mr Bass sent him an e-mail setting out the advice Mr Hawkins had had. In summary, he said that the union representative had advised that he had to put the papers in before he was interviewed and charged. He said that no matter what the outcome was, Mr Hawkins would not be a policeman in Taumarunui again but could work in other places in New Zealand even if demoted. He said the police administration were confident a conviction was highly likely and therefore the statements of the other officers who were present during the incident involving the two youths (which had not yet been seen by Mr Hawkins) must support the allegations.

[83] He reported that the Taumarunui area controller had said that he did not know why Mr Hawkins hadn't left the country and that Mr Hawkins's blatant and outspoken criticism of Detective Sergeant Webb had all gone against him. He talked of alternative occupations that Mr Hawkins could take up and concluded "*Basically they (Police admin) have him by the short & curlyes – how hard they squeeze remains to be seen ...*".

[84] I conclude that, while Ms Baker most probably spoke to Mr Hawkins about the need to perf before he was charged, this was not the only information he was acting on. Mr Hawkins, like a lot of police officers at the time, already believed that a charge would mean that a perf application would not be granted. Also, from Mr Bass's contemporaneous and relatively objective report of what was in Mr Hawkins's mind at the time, it is apparent that it was Mr Taylor from the Police Association who gave the strong message which eventually persuaded Mr Hawkins to put in his application.

[85] On 10 May, Mr Hawkins visited Doctor Sivakumar again. His mood had gone downhill, he spoke of resigning from his job. The doctor diagnosed severe depression as a result of a lot of stress.

[86] Mr Hawkins was then charged with the criminal offences and was stood down from his duties on 18 June. On 21 June his application for voluntary disengagement was approved by the Assistant Commissioner.

[87] Before that, Mr Hawkins had told Mr Bass that the allegations made against him were "*bullshit*" and that he was thinking of withdrawing his perf application. The reasons were that he was concerned that both alleged victims were extremely intoxicated at the time; there had been a long delay in the complaint being made; and the complaint came from a relative of the complainants who herself had had a problem with the police over another matter. He also had doubts about the adequacy of the police investigation, the involvement of Detective Sergeant Webb, and the withholding of important statements from him. In spite of this, he did not withdraw his application before it was approved.

[88] In the course of preparing for the criminal trial, further evidence came to light which had not been shown to Mr Hawkins before he made his decision to disengage. Materially, these were an earlier statement from one of the complainants which was inconsistent with the statement that had been shown to Mr Hawkins and statements from the two other police officers who were present during the incident which cast doubt on the account of the complainants. When the matter came to the trial, the presiding District Court Judge directed the jury that the position had been reached where there was a clear conflict between the evidence of the Crown witnesses including between two constables. There were significant areas of discredit and credibility. The Crown did not oppose Mr Hawkins's counsel's application for a discharge under [s347](#) of the [Crimes Act 1961](#) and accordingly Mr Hawkins was discharged.

Application for voluntary disengagement

[89] The application for voluntary disengagement which Mr Hawkins submitted on 10 May 2001 was summarised in his letter of that date. In it, he set out his history with the police and the development of a stress-related stomach disorder while working in the Wanganui CIB. He then described how, between 1995 and 2001, he became increasingly frustrated with the manner in which the Taumarunui station was being run by senior management and the development of his stress-related illnesses during this time. He outlined the history of his employment from 2000 to 2001 including his suspicions of senior Taumarunui police management, his attempts to get assistance, and his workload issues.

[90] He concluded:

I feel overwhelmed and due to the chronic nature of my stress have been unable to work through these strategies.

(iv) I feel I am no longer able to perform my Police duties due to the above mentioned chronic stress related illnesses.

(v) My alienation and mistrust of the Police Management/Administration peaked in the 1999-2000 over the Christmas period when I spoke in confidence to senior management in respect of my concerns surrounding Detective Sergeant Derek Webb of the Taumarunui Police.

It became evident that my confidence had been breached, by Senior Police Management/administration, as a result of Detective Sergeant Webb's actions the following day which continued unabated for several months eventually resulting in a verbal altercation between myself and Detective Sergeant Webb.

This verbal and heated altercation took place in Senior Sergeant Buchanan's office at the Taumarunui Police Station.

Detective Sergeant Webb has openly bragged about his past achievements in fitting up a fellow Police officer.

[91] Attached to this application were medical certificates from Doctor Sivakumar and Ellen Duckworth.

[92] Ms Duckworth said that his decision to disengage in the week after the second interview came as something of a surprise. By then she found that he was suffering from untenable stress that had built up over a period of about 18 months resulting in both psychological and somatic disorders consistent with a DSM IV diagnosis of adjustment disorder, with anxiety as well as psychological factors which affected his medical condition. On 1 June 2001 she recommended that he be permitted to disengage from the New Zealand Police.

Decision

[93] Mr Brosnahan submitted that the plaintiff's case is that the criteria for medical disengagement were met by Mr Hawkins's ill-health in May 2001 which had been brought on initially through inaction and ineptitude in the management of the Taumarunui police station. This culminated in him taking sick leave commencing on 3 May 2001. With medical help he began to improve but the actions of Inspector Allan and Ms Baker, which were in breach of the defendant's duties to Mr Hawkins, left him with no alternative other than to apply to perf.

[94] The defendant's case is that it was the stressful prospect of the criminal prosecution against him which caused him to perf. The defendant denies that he has committed any breaches which led to that decision.

[95] Based on the well-established elements of constructive dismissal in the *Auckland Electric Power Board* case, the first question is whether Mr Hawkins's decision to resign by perfg was caused by a breach of duty by the defendant. Such a duty may be express or implied. The implied duty relied on in this case is that an employer must not conduct itself in a manner calculated to or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The issue is one of causation.

[96] Mr Hawkins alleges that he resigned because of advice given by Ms Baker and by the actions and statements of Inspector Allan but I do not find that Ms Baker was causative of Mr Hawkins's resignation. She certainly facilitated it and enabled him to get it processed with great urgency. No doubt the sense of urgency that Mr Hawkins felt was due to his belief that it had to be done before he was charged but that belief was not based solely on what Ms Baker had told him.

[97] I find that Ms Baker was an important part of the police process. Although a welfare officer, she is employed by the New Zealand Police and was given access to high level confidential information about police officers. For example, she had knowledge of the PCA investigation into Mr Hawkins before he did. Police officers who wish to perf, particularly for reasons of stress, are very reliant on the advice of police welfare staff. In the present case, Ms Baker's efforts on behalf of Mr Hawkins reinforced his decision to resign but were not the predominant reason for it.

[98] The prime responsibility for Mr Hawkins's resignation lies with Inspector Allan. I find that by 8 May 2001, although Mr Hawkins was still in a fragile condition, he was on the mend and had not indicated a wish to perf to Ms Duckworth even though he knew he was subject to a PCA investigation.

[99] The defendant argued that it was the knowledge that he was to be charged with a criminal offence that led him to his decision to perf. It was submitted that the timing and impetus for the application arose because he was facing criminal charges which he felt might jeopardise his ability to later apply and be accepted for medical disengagement. But for the impending charges, the plaintiff would not have applied to disengage. If this is the case, the disengagement was not caused by a breach of the employer's duty.

[100] That submission is correct as far as it goes but does not take into account the dynamics which existed at the Taumarunui police station at the time which are relevant and important in establishing the cause of Mr Hawkins's resignation.

[101] The first relevant matter is the history of Detective Sergeant Webb's attitude to Mr Hawkins among others. Although they were of similar rank, Mr Hawkins felt intimidated and bullied by him. The fact that Detective Sergeant Webb was assigned to do the initial investigation into the PCA complaint undermined Mr Hawkins's confidence that he would get fair treatment in the course of the investigation. Whether that was a correct assumption or not, it was a reasonable one in the light of what had gone before.

[102] The effect of Detective Sergeant Webb's behaviour over the years on Mr Hawkins's state of mind is revealed in Ms Duckworth's report. Although he is not named, it is obvious that Mr Hawkins was referring to him and I find was an important element which contributed to Mr Hawkins's decision to apply to perf.

[103] Next, I am satisfied that, although Mr Hawkins initially believed that the evidence against him in support of the criminal charges would not support a successful prosecution, that belief was completely undermined by the statements made by Inspector Allan as reported to Mr Hawkins by Sergeant Craig. These statements fuelled his fears that, because of Detective Sergeant Webb's involvement, he was being "*fitted up*". This led to such an immediate decline in his mental health that his friends held real fears that he may commit suicide.

[104] Given Mr Hawkins's improving medical condition up to 8 May 2001, even the prospect of facing criminal charges would not necessarily have led him to apply to perf as a matter of extreme urgency. It was the knowledge that his area controller believed that his days of policing in Taumarunui were over and that the evidence against him was very strong that led him to believe that no matter what happened the police administration had made up its mind to get rid of him. He said that he had reached the conclusion that his life as he knew it and his prospects in the police were at an end. Although prospects of work other than in Taumarunui were raised by Mr Bass, Mr Hawkins's personal family circumstances made working elsewhere an unrealistic alternative.

[105] The actions of Inspector Allan broadcasting his views on the likely outcome of the prosecution and Mr Hawkins's future were responsible for destroying what remained of any trust and confidence Mr Hawkins had in his employer. This trust and confidence had already been severely tested principally through the actions of Detective Sergeant Webb and the failure of Senior Sergeant Buchanan and Inspector Allan to take any effective steps to mitigate the damage inflicted on Mr Hawkins. However, the last straw was Inspector Allan's premature and overstated pronouncements about the criminal charges that led to Mr Hawkins's decision to resign.

[106] The next element of constructive dismissal is whether a substantial risk of resignation was reasonably foreseeable to the defendant having regard to the seriousness of the breach.

[107] I find that the defendant, through his agents at the Taumarunui police station and indeed at police national headquarters, should and would have foreseen the resignation and the reasons for it.

[108] First, I am satisfied that Inspector Allan deliberately set about undermining the prospect of Mr Hawkins continuing his employment with the police when he announced the criminal investigation before Mr Hawkins was informed. His letter to HR on 7 May 2001 confirms his view. By talking privately to Sergeant Craig in the knowledge that what he said would be conveyed to Mr Hawkins, Inspector Allan took positive steps towards encouraging Mr Hawkins to leave the police.

[109] Inspector Allan accepted in evidence that such actions were inappropriate but denied making the statement. I find, however, that they were made and Inspector Allan must have known of the effect of those statements on Mr Hawkins who was already on stress leave as a result of work-related problems.

[110] Secondly, Mr Hawkins's application to perf was unequivocal notice to police national headquarters of his intention to resign and the reasons for it. In particular, his description of feeling anxious and alienated from the support of police management and his mistrust of police management and administration can have left the defendant in no doubt not only as to his intention to resign but to the actions of the defendant's officers which caused it.

Justification

[111] It is implicit in these conclusions that Mr Hawkins's constructive dismissal was unjustified. Occurring as it did before the enactment of s103A, the test is whether it was open to the employer, acting fairly and reasonably, to have taken the approach it did to Mr Hawkins in the light of the complaints made against him.^[10]

[112] While there can be no criticism of the police for the decision to lay criminal charges against Mr Hawkins, it is incumbent on the Commissioner to ensure that the presumption of innocence applies to police officers as it does to all citizens.

[113] In addition, senior officers knew that Mr Hawkins, among others, was very unhappy about the way he was being treated at the Taumarunui police station. I find that the defendant was not justified in allowing that situation to reach such a state of fear and animosity without early and appropriate intervention.

Conclusion

1. Mr Hawkins was constructively and unjustifiably dismissed from his employment as a police officer.
2. The cause of Mr Hawkins's resignation was the ongoing betrayal of his trust and confidence in the police administration through its failure to address the systemic dysfunction in the Taumarunui police station which caused Mr Hawkins to become seriously unwell.
3. His resignation was actively and wrongly encouraged by the actions of Inspector Allan. Both his impending resignation and the reasons for it were foreseeable to the defendant.
4. The question of remedies, including reinstatement, are reserved. Counsel are requested to make arrangements for the disposition of those matters.

Judgment signed at 11.30am on 30 November 2007

^[1] Perf: Police Employment Rehabilitation Fund

^[2] *Charlton v Colonial Homes Ltd* [2001] ERNZ 759

^[3] *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60

^[4] *New Zealand Fisheries Ltd v Napier City Council* CA173/88 and CA199/88, 24 November 1989 as referred to in *Harman & Co Solicitor Nominee Company v Secureland Mortgage Investments Nominees Ltd* [1992] 2 NZLR 416, 421

^[5] [2002] NZEmpC 138; [2002] 2 ERNZ 340

^[6] [2000] NZCA 225; [2000] 2 ERNZ 106

^[7] [2002] NZAR 809

^[8] At para [21]

^[9] [1994] NZCA 250; [1994] 1 ERNZ 168, 172

^[10] *W & H Newspapers Ltd v Oram* [2001] NZCA 142; [2000] 2 ERNZ 448 (CA)

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