

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 169/07  
File Number: 5080702

BETWEEN RODGER HOUGH  
(Applicant)

AND THE COMMISSIONER OF POLICE  
(Respondent)

Member of Authority: P R Stapp

Representatives: Ian Hard and Nathan Bourke, for Applicant  
Raewyn Tretheway, for Respondent

Investigation Meeting: Wellington, 6 December 2007

Determination: 17 December 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Sergeant Rodger Hough has filed an employment relationship problem challenging a written adverse report dated 14 October 2005. He has challenged the delays associated with the Police disciplinary process, and the time that it took to issue him with the adverse report on 20 December 2005. He claims that he has been disadvantaged in his employment, particularly over career advancement.

[2] The Police denied the claims and contended that it was justified in issuing the adverse report and that it followed a fair process. It denied any delays caused any disadvantage to Sergeant Hough.

**The Issues**

[3] Was the issuing of an adverse report justified? What information did the decision maker have when reaching the decision to issue the adverse report? Was the applicant disadvantaged in his employment or career advancement? Prior to the investigation meeting there was the possibility of an issue that related to disparity of

treatment. During the course of the Authority's investigation meeting the Applicant decided not to pursue that issue.

### **The Facts**

[4] Sergeant Hough has over 35 years of service with the New Zealand Police. At the time of his employment relationship problem he was employed in the rank of Sergeant at Upper Hutt in the Road Policing Unit.

[5] On 31 January 2004 there was a fatal crash on Parks Line Road, Upper Hutt. Sergeant Hough had no involvement with the original investigation on the day of the accident, but became involved for the first time several days after the incident. The crash involved a fatality. On 3 February 2004 Sergeant Hough made contact with the family of the deceased.

[6] One of Sergeant Hough's tasks was to consider what charges if any should be laid against the driver. Charges were not laid. He says he exercised his discretion properly.

[7] During this time, Sergeant Hough says that he was waiting on the serious crash unit's (SCU) investigation report for the findings on the crash.

[8] On 5 March 2004 Inspector Peter Cowan took up a position as relieving Area Commander at the Upper Hutt area. He received a briefing from senior staff on a variety of matters, including a briefing from Sergeant Hough regarding the status of the fatal crash investigation. There is a dispute between Sergeant Hough and Inspector Cowan over whether Inspector Cowan directed Sergeant Hough to urgently obtain the serious crash report and to summarise the file for him to review. Inspector Cowan denied making any directions on the attention required on the file. Sergeant Hough says that he kept in contact with the SCU and did liaise with it prior to the SCU making its report and findings available.

[9] Inspectors Cowan's secondment to Upper Hutt lasted for seven weeks. When he departed the Upper Hutt Area on 30 April 2004 he had not received any further briefing or update or summary on the file from Sergeant Hough. The crash investigator's report became available on or about the 17th May 2004. Sergeant Hough handed the file over to a Constable who he was responsible for supervising. He says the matter needed to wait on a Coronial enquiry.

[10] The decision was made that the driver of the vehicle would not be prosecuted for the fatal crash. There is a dispute that the decision not to prosecute the driver was made by Sergeant Hough in conjunction with either other senior officers or Inspector Cowan. Inspector Cowan denied the claim and says he never saw the file again. The file remained on the Constable's desk in the meantime.

[11] On 24 November 2004 the fatal crash investigation file was located in the Constable's file tray without any action being taken on it. It was found following the family of the deceased requesting the crash report.

[12] On or about 21 December 2004 Inspector Paul Berry, Operations and Planning, was appointed to carry out an investigation into the file management of the fatal motor vehicle crash. Inspector Berry was asked to investigate three issues:

- *To ascertain whether the crash investigation was promptly investigated;*
- *To ascertain why the driver was not promptly charged;*
- *To ascertain which member or members were responsible for the management or supervision of this investigation.*

[13] Inspector Berry says that he used the Christmas/New Year period to review the file during his holiday. On 2 January 2005 he identified the issues that needed further investigation and the people that he needed to interview. Sergeant Hough, the Constable, and five other officers, including Inspector Cowan, were subsequently interviewed by Inspector Berry. He also interviewed a parent of the deceased.

[14] His interview with Sergeant Hough occurred on 1 February 2005. A statement was produced that Sergeant Hough signed.

[15] Inspector Berry produced his written report dated 14 April 2005. He outlined the issues involved, what steps had been taken, the conclusion, the Police regulations applicable in the case and made a recommendation. He found that the initial fatal crash scene attendance and investigation by the patrol group staff was carried out correctly and promptly although the CIB On-call should have been called out.

[16] Inspector Berry concluded that the file was transferred to Sergeant Hough on 4 February 2004 as the officer in charge of the Upper Hutt road policing unit. He made the finding that the file remained on Sergeant Hough's desk until 17 May 2004 when

the CSU's report became available and Sergeant Hough handed the file over to the Constable. Inspector Berry also found that there were no notebook entries or jobsheets on the file as there should have been, in his opinion. Sergeant Hough accepted that, but explained that in the normal process those matters would have been completed when the file moved to its next stage and that the file was waiting on the CSU's report and the Coroner's inquest. Inspector Berry found that the Constable was not provided with any directions or guidance on the next steps that were required to be taken.

[17] Inspector Berry also found that the driver should have received as a minimum infringement notices for the following:

- *Breaching the conditions of his restrictive drivers' licence;*
- *No warrant of fitness;*
- *No registration;*
- *Not wearing a seatbelt;*
- *Cut-down suspension springs.*

[18] He also found and made a conclusion that the driver could have faced a charge of careless use of a motor vehicle causing death but the time for doing that had expired due to the inaction on the file. No charges were laid and there was no documented information as to why the decisions had been made.

[19] Inspector Berry recommended that the inaction of Sergeant Hough in the discharge of his duties appeared to be in the mid to serious range. He also reached conclusions about the Constable's performance slipping below what was required and that that fell within a performance management regime for counselling.

[20] Inspector Berry recommended that the file be sent to the Police legal advisor to provide independent legal oversight on the appropriate level of any disciplinary action in respect of the Constable and Sergeant Hough.

[21] On 1 June 2005, Sergeant Hough was advised that pursuant to regulation 12 of the Police Regulations 1992, he would be reported to the District Commander, Wellington District for failing to take due and prompt measures for the investigation of a matter requiring to be investigated or for the arrest of any offender (regulation 9(22) Police Regulations 1992). Inspector Berry recommended a reprimand under the Police

Regulations. Inspector Berry advised Sergeant Hough that he had five days to provide either an explanation or submission to the District Commander, Wellington District. Sergeant Hough requested further disclosure of information and requested further time to complete his submissions over Queens Birthday. He was provided with that time until Monday 13 June 2005 to provide his submissions.

[22] Sergeant Hough's written submission dated 12 June 2005 was received by Deputy Commissioner Robert Pope (then the district Commander of Wellington).

[23] Sergeant Hough replied:

- That the SCU report was not accurate.
- That the SCU report failed to take into account the statement of the driver.
- That the SCU was of little help and its delays were prejudicial and that he did liaise with it.
- That he kept Inspector Cowan informed of developments prior to receiving the SCU report.
- That he made decisions that involved discussions with Inspector Cowan.
- That Inspector Berry's investigation was not fair and not impartial.

[24] Deputy Commissioner Pope decided to seek an independent peer review by the District Commander of Central District, Superintendent Mark Lammas. He asked Superintendent Lammas to review all the information that had been received which included Sergeant Hough's written submission. He requested Superintendent Lammas to make a recommendation in relation to what he considered would be an appropriate outcome. Superintendent Lammas completed his peer review but came to a different conclusion to the one Deputy Commissioner Pope was considering. Superintendent Lammas recommended reducing the disciplinary outcome from a reprimand to an adverse report.

[25] Sergeant Hough had no idea or knowledge that this peer review had taken place. Sergeant Hough's written submission was not given to Inspector Berry to reply to. Instead Deputy Commissioner Pope used the report to come to his own conclusion and

on the basis of the peer review made his own decision on the matter. He says he looked at the actions that Sergeant Hough had control over and could have and should have actioned. He also considered what he expected of an officer of Sergeant Hough's experience would do. He concluded that Sergeant Hough failed to perform at a satisfactory level expected for a member of Police with his years of experience. In considering Sergeant Hough's written submission, he took into account that Sergeant Hough had acknowledged that he should have done things differently. Sergeant Hough accepted that he should have documented actions and steps taken.

[26] An issue was raised about Sergeant Hough stating that others were at fault and blamed the Constable for the lack of action from May 2004 until the file was located in November 2004. Sergeant Hough denied that he blamed others or claimed that others were at fault.

[27] In October 2005 Deputy Commissioner Pope made his final decision. His decision was that an adverse report was appropriate and should be issued to Sergeant Hough. The adverse report was prepared and dated 14 October 2005. The reasons for the decision were set out in the report. The adverse report was given to Sergeant Hough on 20 December 2005.

### **Determination**

[28] Sergeant Hough was a member of the New Zealand Police Association at the time which provided him with assistance with the preparation of his written submission to then District Commander Pope. He could have also had the Association or a representative present during the investigation but chose not to do so.

[29] Sergeant Hough never complained about any delays during the investigation and the disciplinary notice. He was able to provide a written submission and when he asked for an extension of time it was provided to him as it should have been. Indeed I am satisfied that Inspector Berry and Deputy Commissioner Pope were acting in accordance with the disciplinary action standards that require 5 days to provide a submission and make provision to grant an extension of time to provide a submission. I accept that Sergeant Hough may have been inconvenienced with the time he was required to provide his written submission, but that is not the same as being treated unfairly.

[30] Sergeant Hough has contrasted the time he had available to make his submission and what he sees was a delay in getting a decision. It would have been preferable for the disciplinary process to have been done in less time. However, I accept that the timing did not involve any deliberate delay and that there was no time limit on a decision being provided. In such circumstances any problem was that Sergeant Hough did not know what was happening until he asked and was told of the decision upon returning from leave in late November. I am not satisfied the delays complained about by Sergeant Hough on the disciplinary process disadvantaged him.

[31] The disciplinary process was dealt with on the papers and whilst that is not desirable, it is not necessarily fatal. This apparently is the accepted custom and practice about how the process is done. Sergeant Hough had access to the Police Association and no issue was taken by him at the time about the process.

[32] However, I find that a fair and reasonable employer would have met with Sergeant Hough. A fair and reasonable employer would have clarified the information being relied upon from Inspector Berry's report because of the matters Sergeant Hough had provided in mitigation and whether Inspector Cowan was involved to the degree that Sergeant Hough claimed. I have reached this conclusion because of the seriousness of the outcome that could impact on Sergeant Hough's employment, such as an adverse report remaining on his personal file for 4 years. This is because Sergeant Hough called into question factual matters used in the summary of facts and there emerged a direct conflict between Sergeant Hough and Inspector Cowan over Inspector Cowan's role in any decision making on the file. That conflict remains unexplained. Sergeant Hough was entitled to an explanation on how they were resolved if they were being relied upon. It is fundamental that in usual circumstances the accused is permitted to have access to the decision maker. Here the bare minimum for access to the decision maker occurred with the written submission, which Sergeant Hough accepted at the time. Deputy Commissioner Pope was relying only on the matters that in his policing experience he determined involved actions and omissions causing delay on the file that Sergeant Hough accepted he could have handled differently as the responsible O/C in charge.

[33] Deputy Commissioner Pope says it was up to Sergeant Hough to ask for a meeting in the disciplinary process if he wanted one because Sergeant Hough was an experienced police officer and Police Association member. There is no evidence that

Sergeant Hough ever wanted a one on one meeting or knew that he could ask for one. Such a meeting is not mandated under the regulations or general instructions that I can find. However, a fair and reasonable employer would have ensured that proper notice would be given to an employee of the right to have such a meeting.

[34] While there has been an omission on that point the process was not unfair overall. I am satisfied that Sergeant Hough was not disadvantaged considering that it was open to Deputy Commissioner Pope to decide that there had been delays in moving the file, a lack of supervision and issues on Sergeant Hough's responsibilities in the absence of note book entries and job sheets that were not put on the file by Sergeant Hough.

[35] Deputy Commissioner Pope obtained a peer review on all the information including Sergeant Hough's written submission. It is accepted that Sergeant Hough had no input to the peer review directly with Superintendent Lammas. Superintendent Lammas was not the decision maker and there is no law that prevents peer reviews from taking place. Indeed Superintendent Lammas recommended to Deputy Commissioner Pope to make a lesser finding. Sergeant Hough was not disadvantaged. Ultimately the decision rested with Deputy Commissioner Pope. Deputy Commissioner Pope says he made his own decision and did not need to make that decision on the basis of Sergeant Hough's challenge to the SCU report and the substance of Inspector Berry's report and its findings on some of the facts because he was prepared to decide on a lesser penalty that related to delays associated with the file, supervision and the exercise of policing responsibilities. I am prepared to accept that it was open to Deputy Commissioner Pope to make the decision he did on the basis of his experience in policing and on, overall, the fairness of the process he employed.

[36] I am supported in this conclusion by the evidence that there were issues around delays involving the possibility of infringement notices, charges and Sergeant Hough's explanations that he was waiting for the SCU report, that he had regard to the attitude of the family of the deceased not to prosecute the driver, that allegedly he kept Inspector Cowan informed and that he says he liaised with the SCU and says he informed the Constable on what to do with the file. However the absence of note book entries and job sheets has not assisted Sergeant Hough on the matters he challenged and the claims he made. I am satisfied that Sergeant Hough's failure to ensure note book entries and job sheets were on the file was a causal link to:

- The dispute over the acts and omissions that existed on the management of that file.
- That there was a conflict between Sergeant Hough and Inspector Cowan on whether Inspector Cowan was involved in any decisions taken.
- Whether or not Inspector Cowan was kept informed of developments.
- Issues about infringement notices and charges.

[37] There are no records that Sergeant Hough could rely upon that he regularly discussed the matter with his superiors and that Inspector Cowan was involved in the decisions and what directions he gave to the Constable. This has not helped Sergeant Hough. Furthermore, Sergeant Hough accepted that he could have done things differently. Thus, it was open to Deputy Commissioner Pope to make his decision based on Inspector Berry's report, Sergeant Hough's signed statement from the Berry investigation and Sergeant Hough's acknowledgement that he could have handled things differently.

[38] For completeness I find there was no predetermination because:

- There were different officers involved such as Inspector Berry carrying out the investigation, Police legal, Deputy Commissioner Pope the decision maker on the disciplinary part of the process, and Superintendent Lammas involved with the peer review.
- There was a peer review.
- Deputy Commissioner Pope decided on a lesser penalty than the penalty that was recommended.

[39] I now turn to any remaining issues on disadvantage. Sergeant Hough did not apply for any other positions during the time that he has challenged the adverse report. He could not provide any details of a causal link for any humiliation, loss of dignity and injury to feelings other than disagreeing with the adverse report. As such these cannot relate to the disadvantage part of the test as they have more to do with the impact on him of any unjustified disadvantage. The adverse report was issued by his superiors in private and Sergeant Hough has never claimed that the failure of the Police to advise him of a right to meet "one on one" disadvantaged him.

[40] I accept that the issuing of an adverse report would put Sergeant Hough's employment at some risk, but this is at the very low end of the scale because it is the first stage of the disciplinary process, although under the Police regulations the adverse report must remain on Sergeant Hough's file for 4 years.

[41] Sergeant Hough did not provide a further submission or comment to put on his file as he was entitled to do after being issued with the adverse report. However I do note that his written submission prepared for mitigation on the notice of the adverse report has been placed on his personal file and provides information on his point of view.

[42] Sergeant Hough also took annual leave during the period Deputy Commissioner Pope made his decision. Sergeant Hough says he only found out about the adverse report when he enquired about what happened. I have no reason not to accept the explanation for the delay in delivering the adverse report given that Sergeant Hough accepted that he was on annual leave. His line manager was also on annual leave at the time. It is entirely reasonable to expect Police to wait until the line manager was present when the adverse report was given to him. Also, I accept that the adverse report was going to be delivered and not just left on his file.

[43] It is my decision to dismiss Sergeant Hough's claims.

[44] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority