

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 107
5356056

BETWEEN JANINE McLEES
 Applicant

AND THE COMMISSIONER OF
 POLICE
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Marty Braithwaite Advocate for Applicant
 Karen Sagaga Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions received: 7 June 2012 and 3 July 2012 from Applicant
 25 June 2012 from Respondent

Determination: 24 September 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Janine McLees, claims that she was underpaid severance compensation and long service leave on the termination of her employment. She claims, respectively, underpayments of \$53,706, and \$16,430.77 plus superannuation.

[2] The Respondent, the Commissioner of Police (“the Commissioner”), asserts that the terms and conditions of Ms McLees’ employment agreement were correctly applied and that she received her entitlements in full following termination of her employment.

[3] The parties have agreed that the matter should be determined without an investigation meeting, on the basis of documents submitted. In addition to the

statement of problem and statement in reply, those documents comprise evidence sworn by affidavit, an agreed bundle of documents, and submissions from the parties.

Issues

Whether:

- Ms McLees was entitled to a severance payment based on clause 7.12.1 or clause 7.12.2 of the relevant collective agreement for non-sworn Police employees;
- Ms McLees' long service leave entitlement was calculated correctly;
- Clause 7.16, Service Recognition, was applied correctly.

The Facts

[4] Ms McLees had been a sworn member of the New Zealand Police (a constable) from March 1989 to April 1999, at which time her employment ceased under the provisions of section 28D of the Police Act 1958, a process commonly referred to as "PERFing".

[5] Within three weeks of the cessation of that employment, Ms McLees commenced temporary employment with the New Zealand Police as a non-sworn employee. Her temporary contract of employment was extended at least twice before she was confirmed as a permanent, non-sworn, employee by letter dated 22 September 2000. Ms McLees' employment ended when she opted for voluntary severance in December 2009 following a restructuring.

[6] The Review and Restructuring provisions of the Police Employee Agreement 2009-2010 (the Agreement) provide that, in the event of severance, payment shall be made in accordance with the provisions of clause 7.12. That clause provides four different options for the calculation of the severance payment, only two of which are relevant for the purpose of this application. The two relevant options depend on whether the employee was an existing employee employed by the Police prior to 1 June 1993, or whether the employee was a new employee employed with the Police

on and from 1 June 1993. If the former, the provisions of clause 7.12.1 apply, and if the latter, the provisions of clause 7.12.2 apply.

[7] A different formula applies for calculating severance payments under each of the clauses. A significant difference between the two formulae is that, under clause 7.12.1, there is no maximum amount payable, whereas under clause 7.12.2, a maximum amount (a cap) applies. The severance payment cap under clause 7.12.2 is \$58,610.

[8] Ms McLees was paid severance under clause 7.12.2, in the amount of \$58,610.

[9] The Agreement also provides, at clause 4.9, an entitlement to long service leave based on whether the employment with Police commenced prior to, or after, 1 July 2003, and on the employee's years of qualifying service. A note under the long service leave table which sets out the entitlements clarifies that *...qualifying service includes all recognised service with qualifying employers.*

The Positions of the Parties

Severance Payment

[10] With respect to the severance payment, Ms McLees claims that the provisions of clause 7.12.1 apply to her because her employment as a sworn member of the Police pre-dated 1 June 1993. In essence she says that her service as a constable and her service as a non-sworn Police employee were recognised as continuous by virtue of clause 7.16.2 of the Agreement, and by virtue of the fact that she rejoined the Police within one month of her sworn service ending.

[11] Ms McLees claims that she was entitled to receive \$112,316 in severance payments, in accordance with the provisions of clause 7.12.1, rather than the \$58,610 that she received under the capped provisions of clause 7.12.2.

[12] The Commissioner's view is that clause 7.12.2 applies because Ms McLees' employment as a non-sworn police employee commenced after 1 June 1993. Accordingly Ms McLees received a severance payment on the basis of clause 7.12.2.

[13] The Commissioner also submits that that Ms McLees' severance calculation should include only service from the time she rejoined the Police as a non-sworn employee and not her previous service as a constable. This is because she received an enhanced early retirement payment when she exited from the Police under the PERFin provisions, and it would not be appropriate that her sworn service was recognised again and she received another payment in recognition of the same service.

[14] In the alternative, the Commissioner argues that, if the Authority accepts that the Applicant's service as a sworn member of the Police should be recognised, then it should be recognised for leave purposes only, and not for severance. The Commissioner asserts that clause 7.16 (Service Recognition) is for the purpose of leave only.

[15] However, in the event that the Authority rejects those arguments, the Commissioner submits that Ms McLees total service of 20 years has in fact been considered and that the amount Ms McLees was paid out was the maximum amount payable under clause 7.12.2.

Long Service Leave

[16] With respect to the claim for long service leave, Ms McLees was granted 4 weeks long service leave in 2003, which she took in 2008. She claims that she became entitled to further long service leave in 2004 and 2009, totalling 8 weeks, prior to the termination of her employment in December 2009.

[17] The Commissioner asserts that:

- Ms McLees was erroneously granted 4 weeks long service leave in 2003;
- Ms McLees was entitled, pursuant to clause 4.9 of the Agreement, to 12 weeks long service leave;
- the 12 weeks long service leave entitlement was subject to deduction of the 65 days retiring leave she had been paid upon the cessation of her employment as a sworn member of Police;

- Ms McLees received a payout of 4 weeks (20 days) long service leave on termination of her employment as a non-sworn Police employee in December 2009; and
- Ms McLees received long service leave/pay above and beyond her actual entitlement.

Findings

Severance Payment

[18] Section 7 of the Agreement deals specifically with Review and Restructuring Provisions. Clause 7.16.2, upon which Ms McLees relies for her claim to have had continuous service from 1989 to 2009, provides that:

Commissioner shall recognise previous service with crown agencies established to undertake the functions previously undertaken by departments of state and with the organisations listed below provided that the employee joined the Police within one month of leaving his/her previous employer:

A list of organisations follows, starting with *Post Office (prior to 1.4.1987)* and ending with *Transit NZ*. Included in the list is:

New Zealand Police (Constabulary and Police Employees)

[19] Ms McLees has interpreted this clause to mean that the service that the Commissioner shall recognise, that is, her service as a constable, is to be recognised as continuous with her service as a non sworn Police employee.

[20] However, that is not what the clause provides: it simply provides that the service shall be recognised. In contrast, the preceding clause, 7.16.1, which applies to the recognition of service in departments of the Public Service and the Parliamentary Service, does provide that the service shall be recognised as continuous. That provision is not applicable to Ms McLees as the New Zealand Police is not a department of the Public Service.

[21] It cannot be inferred from clause 7.16.2 that, because service as a sworn member of the NZ Police is to be recognised, it is to be treated as continuous. If that

was the intention of the clause, there would be no need to have created a separate clause to deal with the treatment of service with the Crown agencies and listed organisations referred to in clause 7.16.2. The service recognition provision for those organisations could have been included in clause 7.16.1.

[22] Alternatively, if the intention was to treat service with those Crown agencies and listed organisations in the same manner as service in departments of the Public Service and Parliamentary Service, the wording in clause 7.16.2 would have reflected that intention by following the wording in clause 7.16.1. It does not, leading to the conclusion that there is an intention to distinguish between the manner in which service in those departments, Crown agencies and listed organisations are to be treated.

[23] The first three sub clauses of 7.16 provide a descending ranking of recognition of service. If that service was with a Public Service department or Parliamentary Service (clause 7.16.1), then the service is to be recognised as continuous. If the service was with a Crown agency established to take over the functions previously undertaken by a department of state, or with one of the organisations listed in clause 7.16.2 (including NZ Police (Constabulary and Police employees)), then the service is to be recognised. If the service was with an organisation such as those listed in clause 7.16.3, and provided other specified conditions were met, the service “may” be recognised at the discretion of the Commissioner.

[24] Clause 7.16.4 deals with the treatment of service specifically for cessation leave purposes, and provides that the Commissioner will recognise service with the NZ Police, departments of the Public Service and the Parliamentary Service, and may recognise service with a number of listed organisations, provided that particular conditions are met. It is significant that, while that service is to be recognised, there is no provision for it to be recognised as continuous. The inclusion of the NZ Police in the organisations for which service recognition is mandatory, rather than discretionary, is consistent with the approach in the earlier sub clauses.

[25] Ms McLees submits that her service was continuous from the date she commenced as a sworn member of the Police on 20 March 1989, and that it was not broken in 1999. She points to the Certificate of Service she received on 20 March

2003 “In appreciation of 14 years long and meritorious service in the New Zealand Police”.

[26] I do not accept Ms McLees’ view that her service has been continuous since 20 March 1989. There is a difference between recognition of service for specified purposes, and recognition of service as constituting continuous employment. I find that Ms McLees’ service as a sworn member of the New Zealand Police was recognised for various purposes specified in the Agreement, but the fact that her service was recognised did not mean that her employment was continuous from 1989.

[27] I note that the Commissioner did not challenge Ms McLees’ assertion regarding the continuity of her employment over the 20 years and 8 months of her combined service. Instead the Commissioner raised an issue over the application of “employee” in clause 7.12 of the Agreement to non-sworn Police employees only. I did not find the respondent’s arguments compelling or consistent with the wording of the Agreement.

[28] I find that Ms McLees’ had two distinct periods of employment with the Police and that her service was not continuous. The first period commenced on 20 March 1989 and ended on 23 April 1999. The second period commenced on 10 May 1999 and ended on 18 December 2009.

[29] Under the provisions of clause 7.16 of the Agreement, Ms McLees was entitled to have the earlier period recognised for specified purposes. One of those purposes was the length of service to be included in the calculation of severance, and another was the length of service to be included in the calculation of long service leave.

[30] However, that entitlement to recognition of service did not change the commencement date of her employment for the purpose of clause 7.12, and I find that clause 7.12.2 was correctly applied to her for the purpose of the severance calculation and the capping of that calculation. Ms McLees was an employee who came within the category of a new employee employed with the Police on and from 1 June 1993.

Long Service Leave

[31] As I have already determined, Ms McLees' service as a sworn member of the Police was qualifying service for the purpose of long service leave. I do not accept the Commissioner's view that the long service leave granted to Ms McLees in 2003 was granted to her erroneously.

[32] Ms McLees became entitled to long service leave of four weeks in March 2003, after 14 years' recognised service, which included her service as a constable, under the collective agreement applicable at the time to non-sworn Police employees. Under those provisions, long service leave was a one-off entitlement of four weeks.

[33] From 1 January 2009 the long service leave provisions in the applicable collective agreement changed to incorporate retiring leave. The applicable parts of the provision are as follows:

4.9 Long Service Leave

With effect from 1 January 2009, long service and retiring leave provisions are combined. Resigning leave provisions cease from this date.

Transitional:

These transitional arrangements are designed to minimise any disadvantage.

On 1 January 2009 all Police employees with 10 years or more service will be granted Long Service Leave as per the 'Total Received' column from the entitlement table below. This leave will be 'banked', that is the member does not need to take this leave before their next entitlement is granted or before they leave Police.

Where an employee has already been granted Long Service Leave or Anticipated Retirement Leave under previous conditions, including leave granted by other qualifying employers, then the amount of this leave granted shall be deducted from this allocation.

If an employee has an existing Long Service Leave balance from previous conditions then this leave should be taken in accordance with the conditions under which it was granted.

Entitlements

Every employee who completes a continuous period of service with NZ Police, or a qualifying employer, will be entitled to long service leave as below,

<i>Completed years of qualifying service</i>	<i>Employed by Police prior to 1 July 2003</i>		<i>Employed by Police after 1 July 2003</i>	
	<i>Received on their anniversary date</i>	<i>Total Received</i>	<i>Received on their anniversary date</i>	<i>Total Received</i>
	<i>(weeks)</i>		<i>(weeks)</i>	
10	4	4	N/A	N/A
15	4	8		
20	4	12		
25	5	17		
30	6	23		
35	5	28		
40	3	31		
45	1	32		

Note: for this table qualifying service includes all recognised service with qualifying employers.

...

Payment on exiting NZ Police

On exiting NZ Police staff will be paid a lump sum superable payment of the cash value of any outstanding Long Service Leave, both that which has been banked and any other Leave Service Leave (sic) owing which has not yet been taken

.....(paragraph omitted as not relevant to the Applicant's situation)

Savings Provisions:

On leaving Police under the following conditions employees are covered by savings conditions:

- *Any member who leaves Police prior to 1 July 2013.*
- *(omitted as not relevant to Applicant)*
- *(omitted as not relevant to Applicant)*

On leaving Police and employees covered by these savings conditions are entitled to the greater of:

1. *Total accrual under these Long Service Leave provisions, less any Long Service or Anticipated Retiring Leave taken during their period of working for Police or any other qualifying employer.*
2. *Total accrual of Long Service Leave and Retirement Leave that they would have been eligible for under the conditions of the 2006-2008 collective employment agreement, less any Long Service or Anticipated Retiring Leave taken during their period of working for Police or any other qualifying employer.*

[34] Under the revised Long Service Leave Provisions of the Agreement, Ms McLees was entitled to four weeks' long service leave on completion of 10 years' qualifying service; four weeks' entitlement on completion of 15 years' qualifying service, and four weeks on completion of 20 years' qualifying service.

[35] That entitlement was subject to the transitional arrangements, which provided for a deduction of the amount of any Long Service Leave or Anticipated Retirement Leave under previous conditions. Ms McLees had already taken four weeks' Long Service Leave in 2008, which had become due on 20 March 2003 on completion of 14 years' service (in accordance with previously applicable conditions). Her 12 week entitlement to long service leave was, therefore, was reduced to 8 weeks.

[36] However, that 8 week entitlement was also subject to the deduction of any anticipated retiring leave taken under previous conditions, including by other qualifying employers.

[37] Ms McLees received 65 days retiring leave as part of her PERFinG arrangement under section 28D of the Police Act 1958 when she disengaged from the

Police in April 1999. That leave must be deducted from the 8 weeks' long service leave to which Ms McLees was entitled at the time of the termination of her employment in December 2009. Accordingly, I find that she had a negative entitlement to long service leave on termination of her employment in December 2009.

[38] I note that the result is the same whether the Transitional Arrangements or the Savings Provisions applicable to an employee exiting the Police before 1 July 2013 are applied. In both cases, the result is that Ms McLees had a negative entitlement to long service leave on termination of her employment.

[39] I do not accept the Commissioner's submission that Ms McLees was paid four weeks (20 days) long service leave in her final pay, and find that to be contradicted by the Commissioner's own evidence that Ms McLees was paid out (in addition to any salary, holidays and time in lieu owing) retiring leave of 32 hours, cessation leave of 160 hours and a severance payment. Ms McLees received no long service leave payment on termination of her employment in December 2009.

[40] The cessation leave payment made to her was a separate entitlement under clause 7.13 of the Agreement. Service for cessation leave was to be calculated in accordance with clause 7.16.2. Under that provision, Ms McLees was entitled to have her service as a sworn member of the Police recognised, giving her an entitlement to 65 days' cessation leave for 20 years recognised service.

[41] However, the entitlement was subject to the proviso "*that all resigning leave, retiring leave, marriage leave, and also "release leave" granted to Regular Defence Force personnel, paid in respect of any period of previous service, is to be deducted from the cessation leave due.*"

[42] As Ms McLees had previously received payment for 65 days' retiring leave in 1989, her entitlement to 65 days' cessation leave in 2009 was cancelled out. The submissions made on behalf of Ms McLees quite properly acknowledged that she had no expectation of receiving cessation leave.

[43] Therefore in paying Ms McLees for 160 hours, or four weeks, cessation leave, the Commissioner paid her in excess of her contractual entitlements. I note that the Commissioner has accepted that the calculation was incorrect, but has indicated that he is not seeking to recover any over payments to Ms McLees that are associated with cessation leave.

[44] The payment of 32 hours retiring leave may also be an overpayment although I make no finding on that. I merely note that a separate payment of retiring leave appears to be inconsistent with the applicable Agreement which contains a combined entitlement to long service and retiring leave.

Determination

[45] It follows from my finding that Ms McLees was correctly paid her severance payment under clause 7.12.2 of the Agreement, and that she had no outstanding entitlement to long service leave, that her applications for remedies do not succeed.

Costs

[46] In respect of costs, which are reserved, I note that Ms McLees received conflicting and confusing responses from the respondent to queries she made regarding her severance and long service leave entitlements following the termination of her employment in December 2009. That is a matter which may be taken into account in the event that the Commissioner seeks costs.

Trish MacKinnon
Member of the Employment Relations Authority