

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 146
3021053

BETWEEN DENE MILLER
 Applicant

AND COMMISSIONER OF POLICE
 Respondent

Member of Authority: Peter van Keulen

Representatives: Anna Oberndorfer, Advocate for Applicant
 Greg Cain and Renee Butler, Counsel for Respondent

Investigation Meeting: 12 and 13 June 2018

Submissions Received: 18 June 2018 and 3 July 2018 for Applicant
 25 June 2018 for Respondent

Determination: 10 October 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Timing of written determination

[1] This determination, reserved at the conclusion of a two day Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties.

[2] I advised the Chief Delegate of the Authority of this delay. The Chief Delegate decided, as she is permitted by s174C(4) of the Employment Relations Act 2000 (the Act) to do, that exceptional circumstances existed for providing the written determination of my findings later than the latest date specified in s174C(3)(b) of the Act.

Non-publication

[3] Given the nature of this claim and the confidentiality around the policies and processes for Police safety it is appropriate that I prohibit from publication certain matters that the parties presented as evidence and the witnesses discussed in the investigation meeting.

[4] Pursuant to clause 10 of the Second Schedule of the Act 2000 I prohibit from publication:

- (a) The evidence given in my investigation, in the context of the claims, as that evidence pertains to Police policies and practices relating to safety of staff, except for anything that I specifically set out in this determination; and
- (b) The information contained in documents 24, 29, 31 and 32 of the Agreed Bundle of Documents and the names of the individuals recorded in document 53 of the Agreed Bundle of Documents, except for Senior Constable Miller.

[5] This non-publication necessarily means that I will not address in detail all of the evidence including some matters that are relevant to my determination. As far as I am able to, and in accordance with s 174E of the Act, my written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but for the reasons stated above, it does not record all of the evidence and submissions received.

Employment relationship problem

[6] The Commissioner of Police employs Senior Constable Dene Miller; he works within the Highway Patrol Division of Police.

[7] On 15 October 2016, Senior Constable Miller was assaulted while on duty.

[8] Senior Constable Miller says Police failed to take reasonable steps to protect him at work, this failure leading to his assault. And he says Police failed to provide support and assistance to him immediately after the assault, allowing him to drive home whilst suffering from various injuries sustained in the assault.

[9] Senior Constable Miller seeks damages and a penalty for these alleged breaches of implied and express contractual obligations.

[10] Then in May 2017, Senior Constable Miller attended a Family Group Conference with one of the individuals involved in the assault. Arising out of that Family Group Conference, Police received complaints about Senior Constable Miller's behaviour at the conference.

[11] Senior Constable Miller says that Police failed to deal with the alleged complaints about his behaviour at the Family Group Conference appropriately. He raised a personal grievance for unjustified action causing disadvantage and seeks remedies for this grievance. Specifically he complains about Police:

(a) Announcing that a complaint had been made against him in an open forum;

(b) Imposing an employment investigation with the threat of disciplinary sanction.

[12] In a third matter, Senior Constable Miller says Police breached the duty of good faith owed to him when his manager suggested he take a break from working with the Highway Patrol Division of Police, suggesting he was no longer wanted by Police.

[13] Police denies that it has any liability for what occurred, it says it met its contractual obligations, it did not act in an unjustified manner nor did it breach the duty of good faith.

[14] I have investigated the three sets of claims raised by Senior Constable Miller; breaches of contractual obligations, an unjustified action causing disadvantage grievance and a breach of the duty of good faith.

[15] The issues for the breach of contract claims are:

- (a) Did Police fail to provide a safe work place for Senior Constable Miller in respect of the assault, this being the implied contractual duty;
- (b) Did Police fail to provide support and assistance for Senior Constable Miller immediately after the assault, this being the express contractual duty?

[16] The issues for the unjustified action causing disadvantage grievance are:

- (a) Did the actions complained of occur;
- (b) If so, did these actions cause disadvantage to Senior Constable Miller's employment or a condition of his employment; and
- (c) If so, were Police's actions justified?

[17] The issue for the breach of duty of good faith is whether the actions complained of occurred and if so whether they amount to a breach of the statutory duty of good faith set out at s 4 of the Employment Relations Act 2000 (the Act).

[18] If Senior Constable Miller is successful with any of his claims, I will then need to consider what remedies he may be entitled to.

Safe work environment

[19] Senior Constable Miller claims Police has breached the implied contractual obligation owed to him in terms of providing a safe work environment.

[20] In *FGH v RST*¹ the Employment Court summarised the basis for an alleged breach of the implied contractual obligation relating to the provision of a safe work environment as follows:

[195] But, as the Court of Appeal explained fully in *Attorney-General v Gilbert*, the relevant obligations are actually spelt out in some detail in the health and safety legislation – the Health and Safety in Employment Act 1992. This statute of course applied until 3 April 2016; the Health and Safety at Work Act 2015 (HSW Act) governed the position thereafter. The Court of Appeal went on to acknowledge that the duty to take reasonable steps to maintain a safe workplace is also a term now implied by common law into employment contracts, in recognition of their special nature.

[21] Applying this to Senior Constable Miller's claim, Police had an implied contractual obligation to take reasonable steps to maintain a safe workplace, one that meets health and safety requirements.

[22] The question of what are reasonable steps is informed by foreseeability and the circumstances prevailing at the time. As the Court of Appeal said in *Attorney-General v Gilbert*² at [83]:

... The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[23] Or as the Employment Court stated in *Alan Robinson v Pacific Seals New Zealand Limited*³:

¹ [2018] NZEmpC 60

² [2002] 1 ERNZ 1

³ [2014] NZEmpC 99

[29] The requirement to take all practicable steps to ensure an employee's safety only arises where an employer knows, or ought reasonably to know, about the circumstances giving rise to the risk of harm.

[24] So first, an employer need only protect employees against risk of harm that is foreseeable. Then, second, what the employer must do to protect employees against that harm is take steps that are proportionate to the known risk, i.e. do what is reasonably practical in the circumstances.

[25] In *Pacific Seals*, the Employment Court went on to say:

[31] ... Rather the plaintiff asserts that the defendant has breached its implied HSE obligations to him. It is for the plaintiff to satisfy the Court (on the balance of probabilities) that a compensatable breach has occurred, not for the defendant to establish that it has not.

[26] To succeed in his claims relating to the assault Senior Constable Miller will need to show that, on the balance of probabilities, Police breached its implied contractual obligation by failing to take reasonably practical steps, in the circumstances, to protect him from a foreseeable risk of harm.

[27] On the evening of 15 October 2016, Senior Constable Miller was on patrol in a police car on his own. Senior Constable Miller stopped a car that had been speeding and arrested the driver for dangerous speed. In the course of doing this two other occupants of the car got out of the car and approached Senior Constable Miller, an altercation occurred and one of the occupants then assaulted Senior Constable Miller.

[28] The risk of assault, such as this, on a Police officer whilst on duty is foreseeable. So the question to be resolved is did Police fail to take reasonably practical steps in the circumstances to protect Senior Constable Miller from an assault, with the onus on Senior Constable Miller to prove this on the balance of probabilities.

[29] Police have identified the risk of assault on officers in its hazard and risk register and it has a number of systems, policies and practical measures in place to protect officers. This includes:

- (a) Extensive training on how to deal with and protect themselves, when placed in a situation of risk;
- (b) A risk assessment framework that officers are trained in and instructed to use;
- (c) Various communication systems and policies around the use including the appropriate channels to use on the radio system and when and how to use the radio system, for example when and how to log a vehicle stop so the communications centre is aware of an officer's status;
- (d) Backup from other units, coupled with appropriate rostering of staff and supervision; and
- (e) Various types of personal protective equipment with extensive training and refresher courses in the use of such equipment.

[30] I do not need to set out all of the evidence I heard in respect of these matters. I am satisfied that the systems, policies and measures adopted by Police to protect officers are sophisticated and comprehensive and are the result of ongoing research, monitoring and review. These are reasonably practical steps to prevent assaults on officers.

[31] All of these tools were available to Senior Constable Miller and he was trained in the appropriate use of the systems and equipment.

[32] Senior Constable Miller's main complaint in terms of the Police obligation is that he should not have been operating on his own. I have considered all of the evidence on this issue. Again, I do not need to set out the detail of what procedures Police has in place to protect an officer operating alone or the actual staffing numbers on the evening of 15 October

2016. It is sufficient to say my conclusion on this point is there is no obligation on Police to ensure that officers work in pairs. The systems and equipment in place include specific measures to protect officers acting alone, particularly in terms of staffing numbers, available back up, communications and requirement for the personal assessment of any activity such as stopping a vehicle as Senior Constable Miller did.

[33] I am not satisfied from the evidence I heard that the assault occurred because of lack of staff or because the systems or equipment available to Senior Constable Miller failed or were inadequate. Rather it appears to me that Senior Constable Miller did not appropriately deploy the systems or equipment available.

[34] In conclusion, on this claim, I am not satisfied, on the balance of probabilities that Police failed to take reasonably practical steps to protect Senior Constable Miller from the assault.

Reasonable care

[35] Clause 5.14.8 of the New Zealand Police Constabulary Collective Agreement for 1 July 2015 to 30 June 2018 (the Collective Agreement) states, in part:

Police acknowledges its obligation to be a good employer and recognises it has a responsibility to offer support and assistance to employees who become ill or injured.

[36] Senior Constable Miller says that Police breached this express contractual obligation by not providing him with medical assistance immediately after the assault and then allowing him to drive himself home when he was suffering from various injuries sustained in the assault.

[37] The express obligation that Senior Constable Miller relies on is part of a wider clause relating to the management of sickness or injury absence. The complete clause deals with the obligation on Police to help manage and facilitate recovery where an officer is sick or injured and as a consequence is absent from work. Arguably, Clause 5.14.8 of the Collective

Agreement applies only to employees who are absent from work and relates to the obligations on Police to those employees during their absence (for sickness or injury). I question whether the clause imposes the obligation on Police to provide immediate care and assistance as Senior Constable Miller alleges. So as a first step I do not accept that Clause 5.14.8 imposes the obligation on Police to act as Senior Constable Miller alleges.

[38] However, if I put this conclusion to one side and consider what the obligation imposed by Clause 5.14.8 of the Collective Agreement might be in relation to an officer who has sustained an injury at work, I read Clause 5.14.8 as obligating Police to *offer support and assistance*.

[39] The events that occurred after the assault include:

- (a) Senior Constable Miller was driven back to the Central station by a colleague;
- (b) At the station three colleagues discussed the assault with Senior Constable Miller;
- (c) In the course of this discussion, when he was asked about any injuries Senior Constable Miller advised that his jaw was a bit sore and his leg was worse;
- (d) As a result, one of the colleagues, Sergeant Paul Robertson, offered to take Senior Constable Miller to accident and emergency but Senior Constable Miller assured him he was okay;
- (e) Sergeant Robertson also offered to drive Senior Constable Miller home but Senior Constable Miller insisted he was okay to drive.

[40] On a simplistic and straight forward application of the Clause 5.14.8 of the Collective Agreement and assuming it does apply to an officer who has sustained an injury at work and is not yet on sickness or injury related absence, then I find that Police discharged the

obligation by offering support and assistance, which Senior Constable Miller refused. So as a second step I find that Police met its obligation under clause 5.14.8.

[41] However, there is a further aspect to this claim. Senior Constable Miller's claim is really that Police was obligated to do more than simply make a cursory offer of assistance but rather it should have properly assessed him and established what care he needed if any, and then provided that care. I do not believe Clause 5.14.8 of the Collective Agreement extends this far but, in any event, I will consider Police's actions in light of this extended obligation.

[42] In this regard, Sergeant Robertson has been trained as a Combat Lifesaver Instructor. In the course of his discussions with Senior Constable Miller he used his knowledge and experience to assess Senior Constable Miller's health including whether he was in shock or suffering from some form of concussion. Based on his assessment and Senior Constable Miller's assurances he believed Senior Constable Miller was okay to drive himself home.

[43] I conclude that Police has discharged this obligation – Sergeant Robertson made an informed assessment and concluded that he should respect Senior Constable Miller's desire not to go to accident and emergency and simply to drive himself home. Based on this I do not accept that Police should have done more.

[44] I conclude that Police did not breach clause 5.14.8 of the Collective Agreement.

Unjustified action causing disadvantage

[45] Senior Constable Miller says Police announced that a complaint had been made against him, in an open forum, and then Police imposed an employment investigation on him with the threat of disciplinary sanction. He says both of these steps caused disadvantage to his employment and were unjustified actions.

[46] The issues for me to consider are:

- (a) Did the actions complained of occur;

(b) If so, did these actions cause disadvantage to Senior Constable Miller's employment or a condition of his employment; and

(c) If so, were Police's actions justified?

Announcing complaint

[47] I am satisfied that this event did occur. On 13 June 2017, Senior Sergeant Philip Dean was discussing unrelated matters with Senior Constable Miller. That conversation took place in an open area of the station although there were no other staff around. At the end of that conversation, Senior Sergeant Dean mentioned that he understood a complaint had been received in connection with the Family Group Conference that Senior Constable Miller had attended.

[48] I am not satisfied that this action caused disadvantage to Senior Constable Miller's employment. First, there is no evidence that anyone else was in the immediate area where the conversation took place and therefore no one else heard the conversation. So there is no basis for any assertion that Senior Constable Miller's employment was disadvantaged because other staff knew of this private and confidential matter. Second, being advised of the complaint by way of a "heads up" did not cause disadvantage to Senior Constable Miller's employment.

[49] In conclusion, Senior Constable Miller's grievance for unjustified action causing disadvantage based on the announcement of the Family Group Conference complaint is dismissed.

Employment investigation

[50] Police did initiate an investigation into the complaint about Senior Constable Miller's behaviour at the Family Group Conference.

[51] This action did cause disadvantage to Senior Constable Miller's employment in that it made it less secure pending the outcome and possible disciplinary sanction.

[52] However, I conclude that Police's actions in doing this were justified:

- (a) An employer is entitled to investigate and take disciplinary actions over events that occur outside of work⁴, as was the case here as Senior Constable Miller was not on duty when he attended the Family Group Conference.
- (b) This is even more apposite in the case of a Police officer as given the nature of their role officers must ensure the public has confidence in them and that their conduct is above scrutiny at all times – this is set out in the Police's Code of Conduct.
- (c) The confidentiality restrictions imposed on Family Group Conferences did not prevent Police investigating the complaint nor do the statutory limitations around publication set out in the Oranga Tamariki Act 1989 prevent the investigation⁵.
- (d) Police had genuine concerns about Senior Constable Miller's behaviour.
- (e) The conduct or process of the investigation was justified – on review it was what a fair and reasonable employer could have done in the circumstances⁶. I accept that the process may have become extended but in the circumstances, this was acceptable.
- (f) Having undertaken preliminary investigations and having considered submissions from Senior Constable Miller's advisor, Police decided not to progress the investigation further, this being a conclusion a fair and reasonable employer could have come to in all the circumstances⁷.

⁴ *Smith v The Christchurch Press Co Ltd* [2001] ERNZ 624

⁵ *ASG v Harlene Hayne, Vice Chancellor of the University of Otago* [2017] NZSC 59.

⁶ Section 103A Employment Relations Act 2000.

⁷ Section 103A Employment Relations Act 2000.

[53] In conclusion, Senior Constable Miller's grievance for unjustified action causing disadvantage based on the investigation into the complaints arising out of the Family Group Conference is dismissed.

Good faith

[54] Senior Constable Miller says that in response to him raising safety concerns Police encouraged him to leave the Highway Patrol division. He says this occurred on more than one occasion but the first instance was in a meeting on 30 January 2017 with Senior Sergeant Dean. He accepts that Senior Sergeant Dean only suggested that he take a break from the Highway Patrol division but he says the way it was delivered and repeated to him he felt he was no longer wanted in the Highway Patrol division.

[55] I do not accept what Senior Constable Miller says. I have read the transcript of the 30 January 2017 meeting and considered the evidence of Senior Sergeant Dean and Senior Constable Miller. It appears to me that Senior Sergeant Dean was concerned about Senior Constable Miller's state of mind and approach to work – he appeared fixated with safety and continually concerned with protecting himself, by for example, recording meetings within Police and all interactions with drivers. And, as a consequence Senior Sergeant Dean was raising his concern and exploring whether a break from Highway Patrol would benefit Senior Constable Miller.

[56] I believe the subsequent two discussions in the same vein were also motivated by this desire to address issues that Senior Constable Miller appeared to have with his work.

[57] I conclude that there was no intention on the part of Police to have Senior Constable Miller leave the Highway Patrol division or even Police but rather it was a well-intended gesture to let Senior Constable Miller know there were options to assist him in dealing with the stress of work if he felt he needed to do something.

[58] It follows that I conclude that there was no breach of the duty of good faith by Police as alleged.

Recommendation

[59] Senior Constable Miller has also sought a recommendation from me that Police should destroy all documents in its control that relate to the Family Group Conference that Senior Constable Miller attended.

[60] I accept counsel for Police's submission that I do not have jurisdiction to make such a recommendation and therefore decline this request.

Conclusion

[61] Police did not breach the implied contractual obligation to take reasonably practical steps to protect Senior Constable Miller from an assault.

[62] Police did not breach the express contractual obligation to offer support and assistance to Senior Constable Miller in relation to the injuries he suffered from the assault.

[63] Senior Constable Miller's personal grievances for unjustified action causing disadvantage relating to the manner in which Police dealt with the alleged complaints arising out of Senior Constable Miller's attendance at a Family Group Conference are dismissed.

[64] Police did not breach the duty of good faith by suggesting to Senior Constable Miller that he could take a break from working in the Highway Patrol division.

[65] I do not have jurisdiction to make the recommendation requested by Senior Constable Miller.

Costs

[66] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[67] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority