

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 56/09  
5160184

BETWEEN JONATHON MARK PERSICO  
Applicant  
AND COMMISSIONER OF POLICE  
Respondent

Member of Authority: James Crichton  
Representatives: Marcus Elliott, Counsel for Applicant  
Inspector Brigitte Nimmo with Wayne Annan, Counsel for  
Respondent  
Investigation Meeting: On the papers and oral telephone submissions on 30 April  
2009  
Determination: 30 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Persico) seeks, in effect, two compliance orders, the first allowing Mr Persico to deliver surveillance training on 1 May 2009, 3-16 May 2009 and 18 May 2009. The second compliance order sought by Mr Persico seeks a direction requiring the respondent (the Police) to comply with the terms of a mediated settlement agreement dated 18 September 2008.

[2] Mr Persico holds the rank of sergeant in the Police and for a number of years, he has worked in the specialised field of surveillance. The surveillance squad in Christchurch comprises 12 staff broken into two teams of six each directed by a sergeant. Mr Persico was one of those sergeants. In charge of the squad as a whole was a detective senior sergeant, Mr Fitzgerald.

[3] The Police apparently became aware of certain complaints about the management of the Christchurch surveillance squad. Those complaints were

addressed by a complex and extensive mediation process which culminated in a settlement agreement, the terms of which I am now invited to order compliance in.

[4] As noted above, Mr Persico seeks compliance in respect of the terms of the settlement agreement to which I have just referred, wherein he claims a breach or breaches by the Police, and he seeks a compliance order also in respect of an allegation that his employment agreement has been breached by the Police's failure to allow him to present surveillance training to other Police officers on the dates I detailed above.

[5] It is only in respect of the alleged breach of the employment agreement and the consequential inability of Mr Persico to deliver that surveillance training that this determination is concerned. As to the other, and wider matter, at a telephone conference with the parties' representatives this morning, I directed that the parties return to mediation, preferably with the support of the mediator who presided over the original mediation which settled matters on 18 September 2008, with a view to trying to get resolution of those issues.

[6] In the event that that mandated mediation process does not successfully resolve matters, I have undertaken to deal with the matter by urgently convening an investigation meeting.

[7] The issue before me for determination in the instant case then is exclusively about the complaint by Mr Persico that he has been prevented from delivering surveillance training to New Zealand Police officers on the dates that I referred to earlier.

### **Issues**

[8] In order to identify the differences between the parties on the only issue for determination, it will be useful to briefly sketch their individual positions.

[9] It follows that the succeeding sections of the determination will be as follows:

- (a) Mr Persico's position; and
- (b) The Police's position.

**Mr Persico's position**

[10] Mr Persico alleges that he has been refused permission to deliver surveillance training to other Police officers and, as the first of the sessions in which he is to deliver such training is due tomorrow, he has not unnaturally sought urgency.

[11] It follows that the determination of the Authority on the present matter is, of necessity, brief and relies to a greater extent than would normally be contemplated, consideration of untested evidence and/or bare submission of the parties. That being the position, the Authority will be more than usually cautious about disturbing what is perceived to be the status quo.

[12] Mr Persico says that immediately after the mediated settlement, agreement was reached between himself and the Police which enabled him to deliver some surveillance training. This happened in October 2008.

[13] It is clear that an application for Mr Persico to assist in the most recent training application was made in March 2009 and was approved by the District Commander, Canterbury District of the Police later that same month.

[14] However, by letter dated 14 April 2009, Mr Persico was advised that the permission previously granted was withdrawn.

[15] In the affidavit filed by Mr Persico in support of his application, he described himself as being *very upset* by the withdrawal of permission for him to be engaged in this training.

[16] Not surprisingly, Mr Persico also draws attention in his affidavit to the similarity between the present training proposal and the previous occasion in October 2008 and makes the observation that:

*... the current position is no different ... and I see nothing in that agreement (the mediation agreement) that precludes me from conducting the training I have been delivering for the past five years or so. I have been left with the very strong impression that Mr Annan's decision in this regard has only been occasioned because of my apparent temerity in now seeking assistance from the Court to seek compliance with the agreement.*

[17] Mr Persico considers that his reputation has been *badly tarnished by these decisions*.

**The Police's position**

[18] It is appropriate to note that the Police have had less opportunity than Mr Persico to present their position to the Authority. At the time of my preparing this determination, the Police have not yet filed a full statement in reply to Mr Persico's application nor have they been able to file anything other than the barest sketch of the documentary position in defence of their position. It follows that I again must express caution about taking any steps to disturb the status quo.

[19] Notwithstanding those caveats, the Police have indicated to me in a general way what their position is on this matter. They say, in effect, that the fundamental term of the mediated settlement agreement is to require the management of the Christchurch surveillance unit to be rotated out of the surveillance area into other areas of Police work and that the effect of that provision ought to be to exclude Mr Persico from delivering training in the surveillance area.

[20] The Police acknowledge that there is no explicit referral to training in the mediation agreement. Amongst other things, they say that that is in part because Mr Persico never raised it as an issue during the mediation, although one could equally retort that there must be some obligation on the Police to ensure that all ancillary matters are dealt with in a matter of this kind.

[21] In any event, the Police say that, by implication, any association of the management of the surveillance unit with surveillance issues in the Police, would be a breach of the spirit of the agreement and would reflect badly on the Police in their obligations to provide a safe workplace.

[22] In this latter regard, the Police drew my attention to the fact that the whole purpose of the settlement agreement was to deal with concerns by some staff in the surveillance unit about the management of that unit, which management included Mr Persico.

[23] The Police acknowledge that Mr Persico was originally to be allowed to participate in the forthcoming surveillance training and the paper trail available to the Authority suggests that a request for Mr Persico's involvement was made by a senior officer responsible for the training, that the request was considered at Canterbury District and approved by the District Commander, Canterbury. Mr Persico was then advised, and the email traffic suggests that he was genuinely pleased with that advice.

[24] What happened next was that the matter came to the attention of Police National Headquarters and the decision made at Canterbury District was overturned, apparently as a consequence of the advice of Mr Wayne Annan, General Manager, Human Resources for the Police.

[25] While Mr Persico claims that Mr Annan is simply in effect retaliating because of Mr Persico's application to the Authority for these orders, Mr Annan himself told me that he had arranged to have the decision overturned because he considered it was inconsistent with the terms of the mediation agreement.

### **Determination**

[26] I have reached the conclusion that it would not be proper for me to exercise my discretion in granting the compliance order sought by Mr Persico. While I can readily understand Mr Persico's frustration at the attitude of the Police and particularly at the change in the authorisation for Mr Persico to be involved in the surveillance training, I confess I am most reluctant to exercise my discretion in Mr Persico's favour because of the paucity of evidence before me and the very limited opportunity for the Police to respond appropriately to Mr Persico's application.

[27] I accept without reservation that that is no fault of Mr Persico's (or indeed of anybody else for that matter), but it nonetheless encourages me to be more conservative than might have been the case if I had heard evidence in the usual way and had a more extensive opportunity to reflect on such evidence.

[28] While I accept as a matter of law that the Authority has the discretion to reach a conclusion that an employer has not complied with the terms of an employment agreement in circumstances such as this, I consider that, based on the very limited opportunity to hear argument and to assess evidence in the present case, I conclude that there has, in truth, been no breach of Mr Persico's employment agreement by the Police in declining to allow him to participate in surveillance training.

[29] However, I remain ready to deal expeditiously with the balance of Mr Persico's application, in the event that the parties are unable to deal with the matter by agreement in the mediation that I have directed.

[30] For the reasons that I have advanced in this brief determination, I decline to require the Police to allow Mr Persico to deliver surveillance training on 1 May, 3-16 May and 18 May all 2009.

## **Costs**

[31] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority