

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT TRIBUNAL
AUCKLAND OFFICE**

BETWEEN Neil Jonathan Roberts (Applicant)
AND Commissioner of New Zealand Police (Respondent)
REPRESENTATIVES David Feist for Applicant
Charlotte Parkhill for Respondent
MEMBER OF AUTHORITY R A Monaghan
DATE OF DETERMINATION 2 August 2007

DECISION OF THE TRIBUNAL ON APPLICATION TO STRIKE OUT

[1] In September 2005 the Employment Relations Authority issued a determination concluding that Neil Roberts could not proceed with his personal grievance because it had been brought to the Authority outside the 3-year time limit contained in s 114(6) of the Employment Relations Act 2000.¹ The determination was the subject of a challenge in the Employment Court. The court found the proceeding was brought within the time allowed for doing so, and the matter was now to be decided on its merits.

[2] The court also indicated that it may be appropriate for the Chief of the Authority to appoint a member of the Authority under s 252 of the Act to exercise the jurisdiction of the Employment Tribunal in the matter.² The Chief has done so, and I am hearing and determining this matter as a member of the Employment Tribunal.

[3] Mr Roberts' representative filed an amended statement of claim in January 2007. The statement of claim identified two causes of action, as follows:

- (a) unlawful suspension disadvantaging Mr Roberts and amounting to an unjustifiable action on the part of the employer; and
- (b) unjustified dismissal.

[4] The matter was to be heard in March 2007, but in late February 2007 the Commissioner of Police ("the Commissioner") filed an application for orders striking out parts of the amended statement of claim. The hearing was adjourned so the application could be argued and considered.

[5] This determination addresses that application. I have heard it as a separate matter from the substantive proceedings at the request of the parties, and because the parties say the outcome will determine in a material way their approach to presenting evidence and arguing their cases.

¹ **Roberts v Commissioner of New Zealand Police** Member Wilson, 15 September 2005, AA 360/05

² **Roberts v Commissioner of Police**, Chief Judge Colgan, 27 June 2006, AC 33/06

[6] There has been some further delay while I awaited a judgment of the Court of Appeal which was likely to answer a key point, and which will be discussed in this determination. The parties have been given an opportunity to address me on that judgment.

The application to strike out

1. Unlawful suspension

[7] The Commissioner says the grievance alleging Mr Roberts' suspension was unlawful was raised out of time, without the consent of the employer and without the leave of the Tribunal.

[8] Mr Roberts was 'stood down' or suspended on 22 May 1998. Nothing in the papers filed indicated any personal grievance was submitted in respect of that action within the 90-day period contained in s 33 of the Employment Contracts Act 1991. Since the claim based on the suspension seemed to be an entirely new one, I asked Mr Feist for information about when and how it had been raised with (or submitted to) the employer. It transpired that Mr Feist was relying on a document dated 13 January 1999. He sought to argue that the document raised a grievance in respect of the suspension, which is doubtful but there is no need to determine that matter because there was still no application for leave to submit the grievance out of time.

[9] As a result it was obvious that no grievance based on the suspension was raised within the requisite 90-day period. Despite prompting, no application was made for leave to submit the grievance out of time. Mr Feist has since indicated that he has no intention of making such application.

[10] In the absence of any request for, or grant of, leave, the grievance has not been submitted and is not properly before the Employment Tribunal.

[11] Further references to the suspension were contained in the pleadings regarding the second cause of action. The Commissioner asked that they be struck out too. The references in question are:

- '17
 (i) The suspension by Inspector Burgess was predetermined;
 ...
 (iii) The investigation both before suspension and before the Tribunal hearing was inadequate and unfair;
 ...'

[12] The above pleadings are struck out to the extent that they relate to the justification for Mr Roberts' suspension.

2. Unjustified dismissal

[13] In August 1998 the Police Disciplinary Tribunal, established under s 12 of the Police Act 1958, found Mr Roberts guilty of three charges of misconduct. The tribunal recommended to the Commissioner that Mr Roberts be dismissed. After hearing submissions, the Commissioner dismissed Mr Roberts in October 1998.

[14] According to the amended statement of claim, Mr Roberts' claim that he was unjustifiably dismissed rests substantially on his view of the fairness of the procedure used by the Police Disciplinary Tribunal, and the conclusions the tribunal reached. Further to that, the Commissioner sought orders striking out the following paragraphs:

'17 ...

- (ii) The Applicant was wrongfully and unfairly entrapped;
- (iii) The investigation both before the suspension and before the Tribunal hearing was inadequate and unfair;
- ..
- (v) The Tribunal was biased against the Applicant by judging him for hiring a stripper;
- (vi) The Tribunal hearing was unfair in that it was misled by incorrect transcript B;
- (vii) The Tribunal hearing was unfair in that alternatives to termination were not considered;
- (viii) The Tribunal hearing was duplicitous and unfair in that there was disparity of treatment;'

[15] The Commissioner says an investigation of the allegations in 17(ii) and (iii), to the extent that they relate to the tribunal hearing, would undermine the findings and decision of the tribunal. He says further that an investigation of the allegations in 17 (v) – (viii) would require the Employment Tribunal to review the process of the Police Disciplinary Tribunal, which is not within the jurisdiction of the Employment Tribunal.

[16] The judgment of the Court of Appeal in **Commissioner of Police v Creedy**³ bears directly on the point. The court was addressing on appeal whether:

“... the proceedings of the [Police Disciplinary] tribunal were part of the Commissioner’s employment inquiry so that the actions of the tribunal are subject to review as part of the respondent’s personal grievance.”

[17] It said:

[35] ... if the actions of the tribunal, including the process adopted and the conclusions reached, cannot be attributed to the Commissioner, criticisms of those actions cannot be deployed by Mr Creedy in support of his claim that he was constructively and unjustifiably dismissed by the Commissioner.

[36] It follows that it would not be open to the Employment Relations Authority to review the actions of the tribunal as part of the personal grievance proceedings unless the actions of the tribunal can be attributed to the Commissioner.”

[18] The Court of Appeal found the Chief Judge was wrong to conclude the actions of the tribunal could be attributed to the Commissioner, and thus wrong to conclude that they were open to review in personal grievance proceedings.⁴ I do not believe there was anything in the court’s reasoning, and nor was anything pointed out, to suggest in general that the Employment Tribunal has any more power than the Employment Relations Authority to review the actions of the Police Disciplinary Tribunal, or in particular that the present circumstances are distinguishable from those in **Creedy**.

[19] Turning to the pleadings at paragraph 17, it is not clear what was intended by the reference to ‘entrapment’ in subparagraph (ii). My reading of the papers overall suggests the reference is to one of Mr Roberts’ defences to the allegations of misconduct. If that is so, then the matter was heard and determined by the Police Disciplinary Tribunal and asking the Employment Tribunal to reconsider it in that context amounts to something of an appeal against the original finding. There is no such right of appeal, but in any event by applying the reasoning in **Creedy** I conclude that the tribunal’s treatment of allegations to the effect that Mr Roberts was entrapped cannot be attributed to the Commissioner.

[20] Paragraph 17 (ii) is therefore struck out to the extent that it is a reference to the defence of entrapment raised in the Police Disciplinary Tribunal, and the way in which the matter was dealt with in the tribunal;

[21] To the extent that subparagraph (iii) concerns the justification for the suspension, it is struck out. To the extent that the words ‘before the Tribunal hearing’ refer to the investigation conducted

³ [2007] NZCA 311

⁴ At [50]

in or by the Police Disciplinary Tribunal, they amount to a review of the tribunal's process and are struck out.

[22] It is hard to argue anything other than that subparagraphs 17 (v) – (viii) amount to an attempted review of the proceedings in the Police Disciplinary Tribunal. In reliance on the reasoning and conclusions in **Creedy**, I find it is not open to the Employment Tribunal to proceed in that way and strike out subparagraphs (v) – (viii).

Summary of orders

[23] The first cause of action is not properly before the Employment Tribunal and cannot proceed.

[24] The second cause of action will proceed subject to the following orders;

- (a) paragraph 17 (i) is struck out to the extent that it relates to the justification for Mr Roberts' suspension;
- (b) paragraph 17 (ii) is struck out to the extent that it is a reference to the defence of entrapment raised in the Police Disciplinary Tribunal, and the way in which it was dealt with in the tribunal;
- (c) paragraph 17 (iii) is struck out to the extent that it relates to the justification for Mr Roberts' suspension, and to the extent that it relates to the investigation by or in front of the Police Disciplinary Tribunal;
- (d) paragraphs 17 (v)-(viii) are struck out.

Costs

[25] Costs are reserved pending the final disposition of this matter.

R A Monaghan
Member of Employment Tribunal