

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 90  
3024837

BETWEEN JASON TE HUIA  
Applicant  
AND THE COMMISSIONER OF  
POLICE  
Respondent

Member of Authority: T G Tetitaha  
Representatives: S Hornsby-Geluk and Barnaby Locke , Counsel for  
Applicant  
R Brown and M Bialostocki, Counsel for Respondent  
Investigation Meeting: 14 – 15 August 2018 at Wellington  
Submissions Received: 22 August and 3 September 2018 from Applicant  
29 August 2018 from Respondent  
Date of Determination: 18 October 2018

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**DETERMINATION OF THE AUTHORITY**

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- A. Jason Te Huia was unjustifiably disadvantaged by the Police actions in:**
- a) Proposing to permanently withhold multiple competency service payments without any opportunity to correct concerns;**
  - b) Removing him from the career progression framework;**
  - c) Preventing him from applying to re-join the armed offenders squad post October 2017; and**
  - d) Allowing Superintendent Basham to speak publically about this decision if he determines it appropriate to do so.**
- B. I order the Commissioner of Police to pay \$11,250 to Jason Te Huia pursuant to s.123(1)(c)(i) and s.124 of the Employment Relations Act 2000. The payment is to be made within 28 days of the determination.**

**C. Costs are reserved. If the parties are unable to agree costs, they are to file submissions within 14 days of the determination.**

**Employment relationship problem**

[1] Jason Te Huia is employed as a police constable stationed at Invercargill. Constable Te Huia was disciplined for an off-duty incident and issued with a final warning. He alleges the final warning was unjustifiably disadvantageous to his employment.

**Relevant facts**

[2] On 3 September 2016 whilst off duty on a rugby trip, Constable Te Huia went to the Sky City Casino in Queenstown. He was heavily intoxicated at the time. He made insulting racial comments to an Asian Security Guard. As a result he was charged with the summary offence of insulting language pursuant to s.4(1)(b) of the Summary Offences Act. The maximum penalty was a \$1,000 fine.

[3] On 5 September 2016 the police became aware about a complaint by Sky City management regarding Constable Te Huia's behaviour. He was placed on restricted duties while the matter was being investigated on 5 October 2016. These continued for a period of approximately 13 months.

***Criminal proceeding***

[4] Constable Te Huia pled guilty at the first opportunity to the summary offence charge. As he had no prior offending the matter was referred to the police for consideration of diversion. Diversion was usually available for offences of this nature.

[5] A diversion report was prepared. The victim's views and the officer in charge of the case supported diversion being offered to Constable Te Huia. However the Southern District Commander of New Zealand Police, Superintendent Paul Anthony Basham wrote a letter that did not support the granting of diversion. The final decision about diversion was made by the Deputy Commissioner of Police whom refused diversion.

[6] The matter proceeded to sentencing before the District Court on 10 May 2017. Constable Te Huia was granted a discharge without conviction and ordered to pay \$1,000 to the victim.

***Preliminary decision about employment***

[7] Earlier on 21 April 2017 the police notified Constable Te Huia that an employment investigation was to commence. Superintendent Basham was appointed as the decision maker regarding Constable Te Huia's employment matters.

[8] On 30 May 2017 the police notified Constable Te Huia that they intended to move "to a preliminary view of the outcome based on the facts as found by the Court." Constable Te Huia's (then) Police Association representative indicated his consent to this process.

[9] On 20 July 2017 Superintendent Basham advised his preliminary view was that the behaviour amounted to serious misconduct and that Constable Te Huia was to be dismissed. He sought a further meeting with Constable Te Huia. Copies of some of the documents Superintendent Basham had at the time he made the preliminary decision were provided to Constable Te Huia's representative on 20 July 2017.

***Final Warning***

[10] On 25 August 2017 Superintendent Basham, Constable Te Huia and his police association representative, Harley Dwyer met.

[11] Following that meeting Superintendent Basham advised by letter dated 2 October 2017 of the Police's final decision. He intended issuing a final written warning for 3 years upon the following conditions:<sup>1</sup>

- (a) Reference to an initial screening and assessment at the drug and alcohol specialist services at the Southland DHB within one month of the date of the letter;
- (b) Take active steps to address the lost trust and confidence as a result of the actions including hui at a local marae;

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<sup>1</sup> ABD pp 366 to 369.

- (c) Allow Superintendent Basham to speak publically about this decision if he determines it appropriate to do so;
- (d) Standing down from the armed defenders' squad with the ability to reapply after the final warning had expired;
- (e) Ineligibility to receive the competency service increment payment (CSI) until the expiry of the warning;
- (f) Inability to engage in the career progression framework (CPF) until the final warning has expired;
- (g) Inability to relieve any acting Sergeant role without the express authority of the area commander; and
- (h) Appointment of a direct supervisor and positioning in that supervisor's section to have oversight of his rehabilitation.

[12] The letter then concluded with the following:

Next steps – I would like to hear if you are agreeable to the proposed conditions of the final warning set out above. Please provide me with your response within seven days of the date of this letter. If [you] are not willing to undertake the conditions I have set out then police cannot have the necessary trust and confidence in you to continue being employed.

***Acceptance of warning and personal grievance***

[13] Mr Dwyer emailed the Police on 2 October 2017 raising concerns about the 36 month time frame of the warning and the non-payment of the CSI. He noted that the time frame should have a maximum of 24 months and the non-payment of the CSI has a “huge compounding affect/penalty of tens of thousands of dollars.”<sup>2</sup>

[14] The Police replied that same day. It advised the disciplinary policy and process does not refer to any specific time frames for warnings, pointed out that a breach of the Code or values can impact upon an employee's competency and eligibility for a CSI and referred to cl 2.4 of the collective agreement and page 16 of the disciplinary process.

[15] Mr Dwyer then wrote to Police on 9 October 2017 advising Constable Te Huia accepted the conditions of the warning noting he “has no choice at all” and raising a

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<sup>2</sup> ABD p370.

personal grievance about the conditions of the final warning. The concerns raised were the duration of three years and the financial costs of withholding three years of CSI payments.

[16] On 12 October 2017 Mr Te Huia was notified that he was no longer on restricted duties and returned to work undertaking his full range of duties.

[17] A statement of problem was filed on 22 February 2018.

[18] The parties continued to exchange correspondence. On 11 April 2018 Superintendent Basham reconsidered his decision about the CSI payment advising:<sup>3</sup>

In terms of the CSI payment, I have reconsidered my decision in this regard. I have decided that you will be eligible to receive the CSI payment in two years from the date I issued my final decision letter to you. That is, you will be eligible for CSI's on 2 October 2019 (or earlier depending on the Employment Authority's determination).

[19] This was unacceptable to Constable Te Huia and the parties were unable to resolve their differences. The matter now requires determination.

**Was Constable Te Huia unjustifiably disadvantaged by the final warning decision dated 2 October 2017?**

[20] Constable Te Huia does not take issue with the sanction of the final warning. Rather he submits the warning contained unfair and unreasonable conditions regarding the length, ineligibility to receive the Competency Service Increment (CSI), ineligibility to engage in the Career Progression Framework (CPF), removal from the Amred Offenders Squad (ASO) and the Police being able to speak publically breaching his privacy about the final warning.

[21] He further submits the decision maker exhibited predetermination and cross contamination by his involvement in the decision to refuse diversion; and was excessively influenced by applicant's statement "he would do anything to keep his job". Concerns were also raised about the delay in resolving this matter.

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<sup>3</sup> ABD p389.

## Law

[22] Section 103A(1) of the Employment Relations Act 2000 (Act) provides that whether an employee has been subjected to unjustified disadvantage is to be determined objectively applying the test set out in s103A(2). That test is:

... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the ... action occurred.

[23] Section 103A(3) then prescribes four requirements for an employer to justify any disadvantaging action it may take. This includes having regard to available resources sufficiently investigating allegations, raising the concerns with the employee, giving the employee a reasonable opportunity to be heard about those concerns and genuinely considering the employee's explanation about the allegations before taking action.

[24] The effect of Act is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. The requirement is for an assessment of substantive fairness and reasonableness rather than "minute and pedantic scrutiny" to identify any failings.<sup>4</sup>

### Was there serious misconduct?

[25] The starting point for assessing unjustified disadvantage is the seriousness of the conduct giving rise to the concerns. There is no disagreement about the conduct that Constable Te Huia made racial comments to an Asian security guard whilst off duty and heavily intoxicated. Superintendent Basham found this was serious misconduct that breached the Police Code of Conduct.

[26] Serious misconduct involves deliberate action that is adverse to an employer's interests.<sup>5</sup> It is conduct that "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship".<sup>6</sup>

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<sup>4</sup> *A Ltd v H* [2016] NZCA 419 at [46] citing *Angus v Ports of Auckland Limited (No. 2)* [2011] ERNZ 466.

<sup>5</sup> *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 (EmpC at 319).

<sup>6</sup> *Northern Distribution Union v BP Oil NZ Limited* [1992] 3 ERNZ 483.

[27] It is well established that conduct outside of work may give rise to disciplinary action. It is not necessary that the conduct itself be directly linked to the employment but rather that it have the potential to impact negatively on it.<sup>7</sup>

[28] All Police employees are governed by a Code of Conduct that sets out the common standards of behaviour regardless of position or rank. This included the expectation employees “treat all people respectfully, with empathy and dignity” and that “there is no place in Police for racial or sexual harassment, or discrimination against anyone for any reason including colour, race, ethnicity or nationality.”<sup>8</sup> This conduct did not meet the standards of behaviour expected of a Police employee.

[29] Police employees are expected to conduct themselves in a manner that maintains public trust and confidence in policing, even whilst off duty. The Police are required to make judgment calls about criminal offending. When their employees have erred and committed criminal offences and are charged, there is potential to undermine public confidence in the ability of the Police generally to discharge their duties. This incident was clearly adverse to the Police’s interests. The finding of serious misconduct was available to Superintendent Basham on the evidence before him.

### **Was the process leading to the final warning defective?**

[30] Constable Te Huia submits Superintendent Basham evidenced pre-determination and cross-contamination from his involvement in the diversion decision and Superintendent Basham had been unduly influenced by the his statement he would do anything to retain his job. He also submits the conditions attached to the warning were excessive, unreasonable and unfair in the circumstances.

### ***Were the concerns sufficiently investigated?***

[31] Constable Te Huia did not raise any issue about the adequacy of the Police investigation of the allegations. This may have been due to the fact he pleaded guilty to using insulting language in the District Court. A copy of the summary of facts was available to Superintendent Basham. This set out the conduct he had admitted guilt to in the criminal proceeding.

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<sup>7</sup> *Hallwright v Forsyth Barr* [2013] NZEmpC 202 at [48] to [49] citing *Smith v The Christchurch Press Ltd* [2001] 1 NZLR 407.

<sup>8</sup> ABD at 158.

[32] Where serious misconduct is admitted by an employee, it is not necessary for the employer to spend more time investigating the matter.<sup>9</sup> On these facts sufficient investigation had occurred.

***Was there a genuine opportunity to be heard?***

[33] The parties agreed to dispense with any hearing prior to the preliminary decision even though the disciplinary policy provided for this. Superintendent Basham gave a preliminary decision of serious misconduct and recommended dismissal. Constable Te Huia was then given an opportunity to address the finding at a subsequent meeting.

[34] There was information before or known to Superintendent Basham when he made the decision that were not given to Constable Te Huia for comment. The information was the outcome for two other Police officers in similar circumstances and a letter Superintendent Basham wrote supporting the declining of diversion. The relevance of this information and the impact of any failure to provide it to the applicant upon the fairness of the disciplinary process is discussed further below.

***Was there genuine consideration of the employees responses?***

***Predetermination/cross-contamination?***

[35] The policy in respect of diversion for Police employees allowed for comment by the Southern District Commander, Superintendent Basham. He provided comment by way of a letter dated 2 February 2017 recommending the declining of diversion.

[36] His letter included both positive and negative comment about Constable Te Huia. There is nothing in the letter itself or Superintendent Basham's evidence at hearing that indicated he was acting with predetermination in the employment context as a consequence. The diversion decision was a separate matter relating to criminal conduct. Superintendent Basham was not the decision maker in respect of diversion. His involvement was a required part of the Police policy pertaining to diversion.

[37] The outcome of a final warning indicated Superintendent Basham was capable of genuinely considering Constable Te Huia's submissions irrespective of his views

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<sup>9</sup> *Murphy and Routhan t/a Enzo's Pizza v van Beek* [1998] 2 ERNZ 607 (EmpC).

regarding diversion. This was a different and lesser sanction than the preliminary decision that proposed dismissal.

[38] The purpose of a warning is to give the employee an opportunity to improve or otherwise allay the employer's concerns. It is a step to try to avert dismissal.<sup>10</sup> This is what Superintendent Basham appeared to be doing. There was little (if any) connection evidenced between his involvement in the diversion decision and the outcome of the disciplinary process.

***Did the applicant's agreement "he would do anything" excessively influence the decision making?***

[39] Constable Te Huia's above statement does imply a willingness to go above and beyond to preserve employment but this does not demonstrate excessive influence or unfairness by Superintendent Basham. The evidence is speculative at best.

***Did the conditions of the warning comply with the parties terms and conditions of employment?***

[40] These parties are governed by a collective employment agreement (CEA). The CEA incorporates Police policies as part of the terms and conditions of employment:

An employee's personal terms and conditions of employment comprise this Agreement and any additional terms and conditions confirmed in their appointment letter. Other Police policies and procedures also apply. Such policies and procedures may be amended by Police from time to time, but may not be inconsistent with this Agreement. Where substantive amendments are proposed which affect terms and conditions of employment, such amendments will be consulted on with the Association before any change is made.

### ***Disciplinary Policy***

[41] One of the relevant policies that applied here was the disciplinary policy, in particular the outcomes set out below:<sup>11</sup>

#### **Outcomes**

#### **Options**

In your role as the decision maker you need to decide based on the seriousness of the conduct and the appropriate sanction.

<sup>10</sup> *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 at 680.

<sup>11</sup> ABD p295.

Outcome such as no further action, performance management and professional conversation are available for findings of low level or no misconduct. These are not disciplinary outcomes. For the main part there are two main types of disciplinary outcomes:

- Warning/final warning
- Dismissal.

If there are additional outcomes under consideration as a consequence of the disciplinary process (e.g. a delay to awarding long service medals, revocation of good conduct medals, ineligibility for a CSI, change of duties, removal from specialist squads or demotion etc) then further advice must be sought from HR or ER.

### **Warnings**

A warning serves to reiterate the conversations that have been had through the disciplinary process with the employee, outlining the conduct that police finds unacceptable in clarifying the level of conduct expected in the future.

There are two levels of warning – warning and final warning however, for serious matters a final warning may be appropriate as a first response.

- **Warning:** generally for misconduct
- **Final Warning:** generally for misconduct matters or where previous warnings have already been issued. A final warning is a step away from dismissal and could be considered a last chance for an employee to demonstrate the expectations of police.

A warning must always be recorded in writing. It is effective from the date it is issued and should:

- Specify the period the warning is effective for
- Detail future action or behaviour expectations
- Include any other elements considered appropriate as mentioned above
- Be placed on the employee's personnel file (once a warning has expired, it remains on their personnel file).

*Was the length of warning (3 years) compliant with the Police policies/terms of employment?*

[42] The applicant submits that the current disciplinary policy limits warnings to 2 years maximum duration. He points to the “guideline template letters” for warnings that refer to a final warning for a period of 3-24 months. Previous iterations of this

policy limited warnings to 2 years. He submits there has been no indication the Police intended departing from this policy.

[43] Previous disciplinary policies set out a hierarchy of warnings from no disciplinary sanction, to first, second and final warnings and dismissal. There was a continuum of seriousness of conduct and possible outcomes. These ranged from low level misconduct with no disciplinary outcome; low level misconduct with first warnings for 3 to 12 months; misconduct with second warnings 6 to 12 months and final warnings for 12 to 24 months; serious misconduct final warning of 12 to 24 months or dismissal.<sup>12</sup>

[44] On 3 August 2015 the Police proposed changes to the disciplinary policy. This removed the hierarchy of warnings including any time limitations. It also added “other outcomes” including “ineligibility for CSI and removal from specialist squads.”<sup>13</sup>

[45] Consultation with the Union was undertaken at that time. The Union expressed concerns on a number of items including duration of warnings stating “It is important that this is specified clearly. In our submission, this must be included to avoid ongoing time consuming issues.”<sup>14</sup>

[46] By July 2016 the Police had issued the current Disciplinary Policy that was before the decision maker. This provided two main types of disciplinary outcomes being warning/final warning and dismissal. It also referred to “ineligibility for a CSI” and “removal from specialist squads”.

[47] There is no limitation on the length of a final warning in the current Disciplinary policy. The guideline letter templates appended do not assist in determining length of warning. One template headed the “Notice of Final Decision”. This does not limit the duration of a warning to 3-24 months at all. It tells the writer to “insert period” for the warning.<sup>15</sup>

[48] Constable Te Huia relies upon another warning template as creating an expectation this warning would be limited to 2 years. This template contains the

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<sup>12</sup> ABD pp73ff and pp134 ff.

<sup>13</sup> ABD pp171ff.

<sup>14</sup> ABD p207.

<sup>15</sup> ABD p308.

notation “This [final] warning will be placed on your personnel file and is valid for a period of [3-24] months.”<sup>16</sup>

[49] This inclusion in the warning template of a reference to 3-24 months must be a drafting error. This is in view of the substantive changes to the main body of the disciplinary policy in 2015 that removed the hierarchy of disciplinary outcomes and various time limitations for warnings. The main body of the policy does not limit the maximum duration of any warning. This template cannot reasonably be taken as continuing previous policies.

[50] However this is not the end of the matter. This is because the conditions of withholding CSI, and removal from CPF and AOS have been imposed for the length of the warning. The length of the warning in these circumstances may be unreasonable and unfair.

***Was the removal of the Competency Service Increment (CSI) compliant with the Police policies/terms of employment?***

[51] Clause 2.4 of the CEA sets out the basis for CSI payments:

**2.4 Progression within Total Remuneration Structures**

Progression within remuneration bands is on the basis of competency and service. Employees who were not at or above the maxim of their band will receive a competency/service increment (CSI) on their anniversary of appointment to police. This is deemed to be start date as a recruit or in the case of former TSS staff the date of appointment to the TSS or in the case of staff who have been employed on a temporary basis prior to permanent appointment the date of appointment as temporary staff. Those employees at the top of their band will receive on their anniversary date a one-time superable payment equivalent to one step.

It is expected that in excess of 98% of eligible employees will receive these permanent increases. An employee will not receive a CSI where there is an unresolved competency (including certification) issue that has been advised to the employee and is not likely to be met within a reasonable time frame. Employees will receive advance advice if their eligibility to a CSI is in doubt to allow an opportunity to correct the issue of concern.

To be eligible for a CSI an employee must have been on active duty for at least four months of the twelve-month period preceding their anniversary. Active duty excludes LWOP and Parental leave and

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<sup>16</sup> ABD p309.

extended sick leave but includes periods of annual, long service and bereavement leave.

Police undertakes to (once annually) to provide a complete remuneration and performance appraisal profile of employees within each remuneration band during the operation of same.

[52] A competency service increment policy (CSIP) was introduced on or about 1 December 2003. CSIP included guidelines for HR practitioners issued in September 2014 that detailed how clause 2.4 was to be applied:<sup>17</sup>

#### **4. POLICY**

##### **4.1 Unresolved Performance/Certification Issues**

District HR staff are responsible for completing the performance, certification and approval columns of the Monthly CSI Report.

This requires districts to consider and apply the organisation's policy on eligibility for payment of CSI's.

“Members not eligible for payment ... (those) who have unresolved performance and certification issues and are unlikely to meet them within a reasonable timeframe and have accordingly been advised they are not eligible for a CSI.” [Section 2.1.5 “Competency Service Increment Policy Statement 1 December 2003” dated 26 November 2003.]

##### **4.2 Intention of CSI Policy**

It is anticipated that the majority of staff will be eligible for CSI payments. The Wage Round Settlement 2003 summary included a Questions and Answers section which confirmed that it is not the intention to make CSIs difficult to receive.

“Generally it is expected, and hoped, that nearly all staff who are eligible will receive payments. As the new arrangements settle in it is expected that staff who consistently fail to meet certification criteria for example will have to pass such criteria to receive further increases.” [Wage Round Settlement 2003]

##### **4.3 Performance management policy**

The performance management policy describes the circumstances in which a CSI payment may not be authorised.

“This (CSI) increment may not be authorised where an individual has an unresolved competency based performance issue or where an individual has not met all certification and qualification requirements. Performance notings, appraisal documentation and information from the HR information system should be used to inform this decision.”[Section 6.6 “Performance Management Policy”]

[53] A “performance issue” was assessed against the organisational policy and the “police core values and competencies” that “defines desired behaviours”. It then

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<sup>17</sup> ABD p57.

referred to section 7 of the policy for factors to be considered in deferring payments temporarily or permanently.<sup>18</sup>

[54] Section 7 Deferment of CSI Decisions/Payments set out further details about decisions to defer or withhold temporarily or permanently CSI payments:<sup>19</sup>

## **7 DEFERMENT OF CSI DECISIONS/PAYMENTS**

### **7.1 *Deferment of CSI Decision***

Where the anniversary date coincides with

- An investigation into some aspect of a member's behaviour or any action that is in its early stages of investigation, and may include consideration of:
  - Disciplinary actions that have been invoked;
  - Suspension and/or stand down in place;
  - Incidents of harassment or other inappropriate behaviour; and/or
- Consideration of a performance issues where some issues have yet to be clarified; and/or
- Uncertainty about the status of a member's certification;

District management, in consultation with HR, should determine whether the decision to pay a CSI is deferred.

The deferral of the CSI payment decision would apply only until the outcome of the investigation or further consideration provides a clearer indication of whether to pay a CSI or to temporarily or permanently withhold a CSI payment.

### **7.2 *Withholding of a CSI Payment***

A CSI payment can be withheld on the grounds that a member has not:

- Met the agreed to required competency based performance standards, resulting in an unresolved performance issue; and/or
- Has not achieved and/or maintained a required certification.

### **7.3 *Factors to Consider in Withholding CSI Payment***

In each case the District has to determine whether the resolved performance and/or lack of certification justifies the withholding of a CSI payment (on a temporary or permanent basis) and be able to prove due process has been followed.

District management, in consultation with HR, has to consider whether any penalties already imposed (e.g. adverse reports) have resolved the performance issue satisfactorily or whether there is a need for a performance improvement plan. The CSI payment can only be withheld for unresolved performance issues.

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<sup>18</sup> ABD p58.

<sup>19</sup> ABD p60-61.

Factors that may be considered in determining whether there are unresolved performance and/or certification issues may justify the temporary or permanent withholding of a CSI payment may include:

- Issues documented in performance appraisal;
- Investigation into performance issues;
- Incidents of policy breaches.

[55] Several strands emerge from the above documentation. Firstly all staff can expect to receive CSI payments, except where there is an “unresolved competency (including certification) issue.” Secondly where competency issues arise only one CSI or “a CSI” may be deferred at a time. Thirdly employees will receive advance notice if their eligibility to a CSI is in doubt to allow “an opportunity to correct the issue of concern.” Fourthly if the competency issue remains unresolved or following outcome of an investigation the district may determine whether to withhold “a CSI” on a temporary or permanent basis. Fifthly there is no process that provides for withholding several CSI.

[56] The outcome of his investigation process was the final decision to withhold multiple CSI payments. The Police have subsequently determined to withhold two payments only. This does not accord with the above CSIP. The Police cannot determine in advance of his eligible anniversary date to withhold more than one CSI.

[57] The final decision from his disciplinary investigation indicated an unresolved performance issue. There was sufficient evidence to withhold a CSI either temporarily or permanently. Therefore the only CSI payment affected should have been that due in 2018. It is understood this has been withheld permanently as a consequence.

[58] However it is a breach of the parties terms of employment to permanently withhold future CSI entitlements without giving Constable Te Huia any opportunity to correct the issue of concern or in lieu of another disciplinary investigation.

***Was the removal from CPF compliant with the Police policies/terms of employment?***

[59] The Career Progression Framework Policy (CPF) sets out the requirements and process for the promotion of constabulary employees. A participant who is the subject of performance issues, including Code of Conduct proceedings may be

suspended from the CPF. This decision is to be made by the School of LMC in consultation with the relevant development board.<sup>20</sup>

[60] The disciplinary policy does not allow for the removal of an employee from the CPF as a disciplinary outcome. The decision making power resides with the School of LMC and the relevant development board, not Superintendent Basham.

[61] The removal from CPF also means he cannot seek any promotion for three years. This is a harsher outcome than if he had been demoted. This condition requires he remain at the same rank. This is both demotivating and demoralising. There is no motivation to excel because he cannot be recognised for his efforts by promotion. Younger less experienced employees may be promoted in advance of Constable Te Huia. There is little evidence to suggest he should be prevented from seeking promotion for a period of three years.

[62] The imposition of a condition for removal from the CPF was a breach of Police policies. There was no justification for this as a disciplinary outcome in the circumstances.

***Was the removal from AOS compliant with the Police policies/terms of employment?***

[63] The final decision states he was “stood down from [the] AOS and may be able to apply to re-join the squad (only) after the final warning has expired.” The disciplinary policy does refer to an additional outcome to the disciplinary process of “removal from specialist squads”. I understand Constable Te Huia was in fact removed from the AOS. However the condition makes him ineligible to apply to re-join the AOS for three years.

[64] There is an Armed Offender Squads Policy (AOSP) that applies to removal or suspensions. The AOSP provides that squad members “who fail to meet the required standards at any time must be suspended from the squad until the standards are met or the District Commander or the National Manager; Response and Operations removes them from the squad.”<sup>21</sup> Superintendent Basham was the District Commander who

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<sup>20</sup> ABD pp43 ff.

<sup>21</sup> ABD pp35 ff.

could remove Constable Te Huia in these circumstances. The “required standards” are not defined within the AOSP.

[65] Superintendent Basham’s reasons for Constable Te Huia’s removal from the AOS were alcohol consumption and its impact upon his decision making and judgment; the AOS Squad loss of confidence and unwillingness to work with him following the incident; and his personal issues.

[66] The admitted level of intoxication leading to the incident was concerning. Constable Te Huia cannot recall most of the incident as a result. At hearing there was no evidence about the drug and alcohol counselling he had been required to complete. Correspondence from his Drug and Alcohol Counsellor was appended to his final submissions filed after hearing. He completed drug and alcohol counselling four months after the final decision on 13 March 2018.

[67] There is evidence the AOS members have concerns if he was to be immediately reinstated to the squad. I am satisfied the concerns expressed by the Southland AOS Commander evidence his reinstatement would be both impractical and unreasonable at this time. This squad requires a high level trust and confidence between its members given the dangerous situations they are often involved in. However this does not mean he cannot in future apply to re-join the AOS. The Southland AOS Commander suggests he “start at the bottom and work his way back” to regain the trust of his team. His suitability for re-joining the AOS would be more appropriately a decision for the Southland AOS Commander, not the Authority.

[68] There was evidence his personal life was in turmoil at the time of the incident. The incident provided a catalyst for him to regain control over those issues. This may now have been addressed.

[69] There was sufficient evidence for Superintendent Basham to exercise his power to remove him from the AOS. However there is no express power for the Police to forbid a future application to re-join the AOS for any period of time. To do so was unfair and unreasonable. Given the recent developments, he may be suitable to re-join the squad but that should be a matter for Southland AOS Commander to determine upon application. Whether he is accepted and the terms that may apply are a matter for the AOS.

***Was the publication condition compliant with the Police policies/terms of employment?***

[70] The condition allowing Superintendent Basham to speak publically about Constable Te Huia’s disciplinary process is unusual. The disciplinary policy specifically provides that its guidelines “ensure privacy of Police employees and the confidentiality of the investigation is maintained.”<sup>22</sup> This condition does not preserve anyone’s privacy including the victims. It is not an outcome referred to at all within the disciplinary policy itself. This condition was an unjustified action.

***Was there unjustified delay in resolving the disciplinary process?***

[71] The Police acknowledge delay in the disciplinary process. It decided not to commence the disciplinary process until the criminal investigation was complete. This was conveyed to the applicant and he took no issue with it.

[72] The disciplinary process provides for the employee seeking to delay the employment investigation where there is “potential prejudice to their defence in the criminal proceedings.”<sup>23</sup> The respondent submits the applicant knew and approved of the delay. Although this resulted in Constable Te Huia being subject to restricted duties for 13 months, given he knew and approved of the delay he cannot complain he has been prejudiced by it now.

***Was there disparity of outcome?***

[73] Disparity of outcome can be relevant to justification of an employer’s action. The tests to be applied in cases of disparity are:<sup>24</sup>

- a) Is there disparity of treatment?
- b) If so, is there an adequate explanation for the disparity?
- c) If not, is the action justified, notwithstanding the disparity for which there is no adequate explanation?

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<sup>22</sup> ABD p 279.

<sup>23</sup> ABD p 285.

<sup>24</sup> *Chief Executive of the Dept of Inland Revenue v Buchanan* [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA) at para 45

[74] If there is an adequate explanation for the disparity, it becomes irrelevant. Even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is forever after bound by mistaken or overgenerous treatment of a particular employee on a particular occasion.<sup>25</sup>

[75] The disciplinary policy required the decision maker “consider all the facts and relevant information”. Relevant information included “any available information on how similar matters have been treated.”<sup>26</sup> Information before Superintendent Basham about similar cases involving a Constable A was produced at hearing. This was not given to Constable Te Huia prior to the final warning. No reason for this omission was given.

[76] Constable Te Huia’s case appears similar to Constable A. The circumstances of Constable A were racially offensive language used towards a taxi driver while off duty. The outcome was a finding of serious misconduct and a final warning of 2 years. The disparity here is the length of the warning of three years and the additional conditions.

[77] When pressed about the differences between Constable A and the applicant, Superintendent Basham admitted he did not have the specifics of the case before him when he made the decision about the warning. He did have the brief factual description of Constable A’s circumstances set out above. He stated he made the decision based upon the facts of this case and HR advice. Superintendent Basham had no knowledge of disciplinary matters involving warnings with the conditions he had decided to impose here.

[78] When asked about the justification for the length of 3 years and the conditions Superintendent Basham pointed to the incompatibility of Constable Te Huia’s admitted conduct with the Police values and code of conduct. While this may explain why the Police considered this type of behaviour serious misconduct, it did not explain the length or conditions in the warning.

[79] I have addressed the justification for the length of the warning given its connection with the other conditions. There is no justification for the length of three

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<sup>25</sup> *Samu v Air New Zealand Ltd* (1995) 4 NZELC 98,334; [1995] 1 ERNZ 636 at 639  
<sup>26</sup> ABD p293.

(or even two) years for the warning if the duration is linked to the additional conditions. Some of the conditions in their current form also breached Police policies.

*Are the above defects minor and did were they unfair to Constable Te Huia?*

[80] Even if there were defects in the process, if they were minor and did not cause unfairness to Constable Te Huia, I must not determine that an action was unjustifiable.<sup>27</sup>

[81] There was evidence that the loss of three CSI is a severe financial penalty cumulatively estimated to be worth over \$17,953 over 5 years and \$55,751 when Constable Te Huia reaches the top of his existing band in 11/12 years. Withholding two CSI payments equates to \$13,464 and \$37,164 respectively. This indicates this disadvantage was not minor and was financially unfair.

[82] There was no basis for Superintendent Basham to remove Constable Te Huia from the CPF given he had no power to do so. To allow this breach of the parties employment agreement to continue would be unjust.

[83] The prohibition on applying to re-join the AOS for three years is also not a disciplinary outcome the Police could have imposed. It may have been a minor issue that did not create unfairness if there was evidence the AOS were unlikely to accept his application to re-join but the evidence shows that is not the case. There are also financial rewards for being available for the AOS that flow. To prevent him re-applying to join is unfair in the circumstances.

**Findings**

[84] Standing back I have determined Jason Te Huia was unjustifiably disadvantaged by the Police actions in:

- a) Proposing to permanently withhold multiple competency service payments without any opportunity to correct concerns;
- b) Removing him from the career progression framework;
- c) Preventing him from applying to re-join the armed offenders squad post October 2017; and

- d) Allowing Superintendent Basham to speak publically about this decision if he determines it appropriate to do so.

[85] However Constable Te Huia was not disadvantaged by the Police actions:

- a) Imposing a final warning of three years for his conduct if the term was not linked to the additional conditions as set out above;
- b) Removing a competency service payment for 2018; and
- c) Removing him from the armed offenders squad.

### **Remedies**

[86] Constable Te Huia has a proven personal grievance. He is entitled to seek remedies of lost wages and compensation.

[87] Given he has remained paid throughout this period of time, there is no lost remuneration.

[88] Constable Te Huia seeks \$20,000 compensation. The Court has provided a stepped approach in assessing compensation.<sup>28</sup> I have considered this case using a similar approach set out below:

#### *Step 1: Harm*

There is evidence of harm in the form of financial losses and emotional harm.

#### *Step 2: Extent of Loss*

[89] The Applicant's evidence was:

- a) He spent the greater portion of 2017 away from work on stress leave as a result of the disciplinary process. He has been under medical care for most of this time. At times he described himself as being unable to get out of bed. He did not return to work until after the decision had been made;
- b) He has three children to support and has paid significant legal fees (over \$10,000) and compensation to the victim (\$1,000) in his criminal matter;

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Section 103A(5) of the Act.

- c) Combined with the immediate and prospective financial losses of the CSI and the consequences of removal from CPF he has suffered emotional stress;
- d) The inability to achieve any higher ranking has been embarrassing especially when at times, he was the most experienced officer at the station but had to defer to younger less experienced colleagues;
- e) He has always been driven in his career. The conditions were demotivating making him at times feel like he should do the bare minimum; and
- f) He accepts he needs to rebuild trust and confidence but needs “a light at the end of the tunnel”.

*Step 3: Where on the spectrum of cases does this case sit in terms of harm suffered?*

[90] Relevant recent cases in the Authority include:

- a) *Newman v Solid Roofing Ltd* [2018] NZERA Auckland 214 \$1,500 for an unjustifiable warning. Employee impacted physically, mentally and went from being a confident person to being apprehensive;
- b) *Asiata v New Zealand Post Ltd* [2017] NZERA Auckland 187 unjustified disadvantage of a final warning \$10,200 (\$12,000 reduced by 15% for contribution). No direct financial loss but impact of allegations made against employee;
- c) *Reid v Wellington City Transport Ltd* [2017] NZERA Wellington 86 global award of \$6,000 for constructive dismissal and unjustified disadvantage of final warning. Employee embarrassed when he told his partner about dismissal and felt he had let her down.

*Step 4: Where on the spectrum of cases does this case sit in terms of quantum?*

[91] I would place his loss at the top end of the spectrum of cases and award \$15,000.

*Step 5: What is a fair and just award in the present case?*

[92] Under this heading I have considered the issue of contributory conduct. The conduct leading to dismissal was both causative and blameworthy. Under s124 of the Act I must consider the extent to which the applicant's actions contributed to the situation and reduce remedies accordingly.

[93] Constable Te Huia agreed to accept the conditions of the final warning whilst at the same time raising a personal grievance. I understand this was to prevent the police from re-considering his outcome including imposing dismissal. I also have to take the fact that his offending caused the making of the warning. The conduct was both causative and blameworthy. However he has already paid a significant price for his offending and the loss of one CSI payment. Although some reduction is required, I decline to make a significant reduction of 50% or more in the circumstances. A 25% reduction is appropriate in the circumstances.

[94] Accordingly I order the Commissioner of Police to pay \$11,250 to Jason Te Huia pursuant to s.123(1)(c)(i) and s.124 of the Employment Relations Act 2000.

[95] Costs are reserved. If the parties are unable to agree costs, they are to file submissions within 14 days of the determination.

**T G Tetitaha**  
**Member of the Employment Relations Authority**