

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 62
5599537

BETWEEN DAVID TEMPLETON
 Applicant

AND COMMISSIONER OF POLICE
 Respondent

Member of Authority: James Crichton

Representatives: Susan Hughes QC, Counsel for Applicant
 Karen Radich and Natalie Shaw, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 17 July 2017

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A statement of problem was filed in the Authority on 4 August 2016 raising an unjustified disadvantage to the applicant (Mr Templeton) by the respondent (the Commissioner or Police).

[2] Police filed a statement in reply on 1 September 2016 which, while responding to the elements of the unjustified disadvantage claim raised by Mr Templeton, also alleged, critically for our present purposes, that the personal grievance had not been raised by Mr Templeton within the justiciable period.

[3] A case management conference was convened by the Authority on 2 December 2016 and dates for a substantive investigation meeting were canvassed with counsel.

[4] Then by email dated 16 December 2016, Police advised of difficulties in getting one of their key witnesses to give his evidence on the dates suggested for the investigation meeting and also indicated Police's wish to be heard on the jurisdictional question whether the grievance was raised within time. In the alternative, Police wondered whether the matter could be dealt with as a preliminary issue on the papers.

[5] By letter dated 21 December 2016, counsel for Mr Templeton proposed a process for dealing with the jurisdictional matter and that was accepted by Police on 23 December 2016. Amongst other things, that process suggested by counsel for the applicant included the timetabling of submissions and a timetable was agreed to by the parties on 10 January 2017.

[6] Submissions from both parties were then received in the Authority in accordance with the timetable and an earlier proposal that the Authority convene a further telephone conference was vacated by agreement between the parties on the footing that the Authority would deal with the jurisdictional question on the papers and other consequences (if any) would follow from then.

[7] For the purposes of the present determination, concerned as it is exclusively with the question of whether Mr Templeton raised his grievance within the justiciable period or not, it is enough for me to briefly sketch the elements of the dispute between the parties.

[8] Mr Templeton is a sworn Police officer. From 1985 approximately to date, Mr Templeton has served continuously as a member of the Auckland Dog Squad rising to the rank of sergeant in April 2005.

[9] On 31 March 2014, Mr Templeton says that he was advised by his supervisors that it had been decided that non-commissioned officers (sergeants and senior sergeants) would no longer have operational Police dogs and where they had an operational Police dog (as Mr Templeton did), they would have to relinquish that dog to a constable or senior constable. It is alleged that the basis for this change was to improve the management and supervision of the Dog Section and to have non-commissioned officers more effectively employed in operational management.

[10] It is the essence of Mr Templeton's personal grievance that he was subject to disparate treatment by the Commissioner because he discerned that other sergeants

were able to keep their dogs. The reason that the disparate treatment allegation arises is because Mr Templeton alleges that in December 2014 he was given the option of being demoted to the rank of senior constable and being allowed to keep a working dog. That demotion took effect in February 2015.

[11] The personal grievance was filed on 9 September 2015. Mr Templeton says that he contacted the Police Association on 23 July 2015 because by that date he had satisfied himself that other sergeants of Police were being treated differently from him in the Dog Section and the personal grievance was raised some six weeks after that initial contact with the Police Association.

Mr Templeton's submissions

[12] Mr Templeton relies on s.114(1) of the Employment Relations Act 2000 (the Act), the effect of which is to require a person raising a personal grievance to do so within 90 days of the events complained of **or coming to the notice of the employee.**

[13] It follows that the operative question is when the events giving rise to the personal grievance became known to the complaining employee.

[14] It will be remembered that Mr Templeton was in March 2014 a sergeant of Police in the Dog Section with an operational dog. He was then told by his supervisors that in order to retain his rank of sergeant he must relinquish his dog.

[15] Mr Templeton did that and for the balance of that calendar year retained his rank but operated without his dog. Then, at the end of 2014, Mr Templeton was given the option of accepting a demotion to senior constable and being given back an operational dog. He chose that option and the change was effected in February 2015.

[16] Mr Templeton effectively submits that from that date until the date that he consulted the Police Association on 23 July 2015, he was obtaining information about the way in which Police had treated other sergeants in the dog section. In particular, his statement of problem identifies three other sergeants in the Dog Section who retained their dogs. One of those was actually promoted from the rank of senior constable to the rank of sergeant to replace Mr Templeton when he relinquished his non-commissioned officer rank and yet Mr Templeton's replacement as sergeant still retained his working dog.

[17] Put shortly, Mr Templeton says that the crystallising point of assessing this material around the disparity was when he visited the Police Association for the first time on 23 July 2015 and that the passage of time from that date through until the date that the personal grievance was raised is well within the 90 day period.

[18] Mr Templeton argues his case in the alternative. In addition to maintaining that he did raise his grievance within time, Mr Templeton also alleges that in any event, even assuming that he had not met the statutory obligation, Police condoned the default by engaging with him in a large number of different ways and over a significant period of time and in none of these engagements did Police ever raise the allegation that the personal grievance had not been raised within the justiciable period.

[19] Those engagements between the parties commenced on 1 October 2015, continued on 6 October 2015, 5 November 2015, 25 November 2015, 15 January 2016, 4 March 2016, 8 April 2016, and right down to the filing of the statement of problem in the middle of 2016 Police chose never to take the point.

The Commissioner's submissions

[20] Police say that the individual elements of the grievance must be considered separately and that time should run individually in respect of each individual element.

[21] Accordingly, on that footing, I am invited to conclude that the 90 days in each case would run from the date that the individual element complained about was effected. That would mean that the 90 day period expired on various dates commencing with 29 June 2014 and continuing through various dates down to 28 May 2015.

[22] On the basis of that analysis, it is suggested that the case law on the point, properly construed, would not allow of a conclusion that the grievance was raised within the justiciable period.

[23] Amongst other relevant factors are the significant delay that is alleged to have occurred from the end of the justiciable period down to the date that the grievance was actually filed, the suggestion that the various engagements between the parties were not so much about the substance of the personal grievance as they were concerned with issues around access to Mr Templeton's Official Information Act request and the

ongoing exchanges between the parties were concerned with that aspect rather than the substance of the grievance as pleaded.

[24] I am referred to the leading cases on implied consent in these circumstances. *Anna Ale v Kids At Home Ltd* [2015] NZEmpC 209 may be taken as authority for the proposition that attending mediation is not necessarily evidence of implied consent to an extension of time because in this jurisdiction, effectively mediation is mandatory.

[25] *Vulcan Steel Ltd v Kieran Wonnocott* [2013] NZEmpC 15 is authority for the proposition that a delay of a few days in meeting the deadline for raising a personal grievance may not preclude a finding of implied consent but if the delay is months rather than days, consent would not have been implied.

[26] *New Zealand Fisheries Ltd v Napier City Council* [1990] 1 NZConvC 342 at p.190 is authority for the view that mere acquiescence is not enough and in *Commissioner of Police v Hawkins* [2009] NZCA 209, the Court of Appeal indicated that the test had to be whether the Commissioner had “*so conducted himself that he can reasonably be taken to have consented to an extension of time*”.

Determination

[27] I am satisfied on the balance of probabilities that the personal grievance was raised within time and that therefore it is available to this Authority to conduct an investigation into the merits of Mr Templeton’s claim to have suffered a personal grievance by way of disadvantage occasioned by unjustified actions of the Commissioner.

[28] The first reason that I advance for reaching this conclusion is that I am not persuaded that the analysis provided by Police in support of their view that the raising of the grievance was out of time, can be supported. What Police say in effect is that the various elements of the grievance (a single personal grievance) must be broken down and each of them assessed separately as to their compliance or otherwise with the justiciable period. That may be the appropriate way of assessing matters I conclude if each of those elements were pleaded as a separate personal grievance.

[29] But that is not the position here. What Mr Templeton has done is raise a single personal grievance in which he identifies a number of elements and it is his submission, which I prefer, that the totality of those elements of the personal

grievance crystallised with him by the time he involved the Police Association and the running time from that date through to the date of the personal grievance being raised is well within time. While I have not heard evidence on the point by virtue of the nature of this interim proceeding, I discern that Mr Templeton's position is that he may not have appreciated the significance of the various elements of his case until he engaged with the Police Association or indeed, may not have known precisely when various changes had actually been made.

[30] The difficulty with the analysis provided by Police is that the assumption is made that Mr Templeton would have found out about the various elements that he subsequently relied upon at the very point at which those decisions were taken by Police or implemented by Police. On the information before me, that is not an assumption which I think can validly be made and I prefer the view advanced for Mr Templeton that he effectively assembled these disparate elements over time and the conviction that he had suffered a personal grievance by way of disadvantage crystallised on 23 July 2015 when he first involved the Police Association.

[31] Even if that conclusion is mistaken, I am also satisfied on the balance of probabilities that by his actions, the Commissioner must be taken to have consented to an extension of time assuming one was necessary: *Hawkins* applied.

[32] I reach this conclusion because I am not persuaded on the submissions before me that all that Police were doing was engaging with Mr Templeton in respect of his Official Information Act request. That claim is not consistent with the submissions of senior counsel for Mr Templeton, where at para.9 of those submissions counsel sets out in some degree of particularity the exchanges between Mr Templeton and his advisers on the one hand and Police on the other and as I read those particulars in the submission, they contemplate a far wider engagement between the parties than simply one involving the Official Information Act.

[33] It seems to me that the very length of time involved in the parties' engaging on the issues between them supports the conviction that the Commissioner was consenting to an extension if one was required. This is because those engagements began on 1 October 2015, effectively less than 14 days after the grievance was raised, and run through until the pleadings were filed in the Authority commencing in August 2016. And as I understand the position, it was not until the statement in reply was

filed and served on 6 September 2016 that the Commissioner identified this preliminary issue.

[34] Put shortly, it seems to me that the material I have been asked to consider suggests that for fully nine months after the personal grievance was raised, the parties engaged with each other in good faith in trying to address that matter and it is difficult to see how that process can be honestly and openly undertaken by parties informed by the good faith principle of the Act if, after nine months of such engagement, it is available to one of them to say that there is no jurisdictional basis on which they need to address these matters at all.

[35] To put the point another way, it would appear that the parties genuinely sought to engage with each other around the concerns identified by Mr Templeton and yet the effect of the Commissioner deciding some months down the track to raise the jurisdictional point would suggest that the earlier discussions were not conducted in good faith. Presumably, if the matter had settled as a consequence of the engagement between the parties from October 2015 down to August 2016, then that would have been an end of it but what is proposed for Police now is that they be allowed to engage with Mr Templeton and his advisers for many months, not resolve matters, and then indicate that actually they do not need to engage at all because the matter in question has not been raised in time.

[36] I now confirm my decision that the Authority should proceed to investigate Mr Templeton's personal grievance with the Commissioner. I direct that the Authority Officer is to stay her hand for 28 days from the date of this determination to give the parties the opportunity of challenging this determination if they see fit but once that challenge period has passed, the Authority Officer is to convene a further telephone conference with counsel so that the Authority's investigation can be undertaken.

James Crichton
Chief of the Employment Relations Authority