

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gina Cameron (First Applicant)
AND Vaughan Kyne (Second Applicant)

AND New Zealand Police (Respondent)

REPRESENTATIVES Ian Thompson, Advocate for Applicants
Raewyn Gibson, Advocate for Respondent

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING 25 May 2006

DATE OF DETERMINATION 12 July 2006

DETERMINATION OF THE AUTHORITY

Personal matters

[1] When the statement of problem was filed, it was filed in the name of Ms Cameron and Mr Kyne as first and second applicants but effectively, given the nature of the factual matrix, Ms Cameron and Mr Kyne are in effect joint applicants and the determination proceeds on that basis.

[2] In the intervening period between the filing of the statement of problem and the investigation meeting, Ms Cameron and Mr Kyne have married and Ms Cameron has taken her husband's name. However, to avoid any possibility of confusion between the two applicants, I have chosen to continue to refer to them in this determination by the names they were using when the proceedings were first commenced.

Employment relationship problem

[3] The applicants (Ms Cameron and Mr Kyne) allege that they have been subjected to an unjustifiable action of the respondent employer (Police) which has resulted in disadvantage to them.

[4] Police resist that allegation, first on the footing that the alleged grievance has been raised out of time and second on the basis that there is no evidence of a disadvantage having been suffered.

The environment

[5] Ms Cameron and Mr Kyne were, at the time the alleged grievances arose, serving Police officers working in what is known as the *Beat Section* of Police in Christchurch city. As such, Ms Cameron and Mr Kyne were based at the Kiosk at Cathedral Square.

[6] At the relevant time, the Christchurch City Council had imposed a liquor ban which applied to large sections of the inner city. The Beat Section was required to police that liquor ban and in particular to confiscate liquor from persons who were carrying it in a public space within the area that the ban applied to.

[7] In mid-January 2004, Police became aware of an allegation that liquor which was confiscated from members of the public by members of the Beat Section was being improperly dealt with by members of the Beat Section. Specifically, the allegation was that Police were confiscating liquor from persons within the liquor ban area and then drinking it themselves.

[8] That allegation (which had been made by other members of Police), was referred to the District Commander of Police for a decision as to the appropriate action.

[9] In February 2004, the District Commander made a decision to institute a criminal investigation in respect of the allegation with the purposes of establishing, first if there had been criminal offending by members of Beat Section, and second to establish if the procedure for dealing with confiscated liquor was appropriate or needed rectification.

[10] As part of that decision taken by the District Commander, it was determined that there be effectively an audit of the liquor held in the Cathedral Square Kiosk. Amongst other things, this audit was to establish ownership of the subject liquor.

[11] The essence of the applicants' first complaint which results in their disadvantage claim revolves around the investigation by Police to which I have just referred. It is something of an over-simplification but nonetheless helpful shorthand to identify this investigation from Police's perspective as a *criminal* investigation whereas the applicants' argument is essentially that Police, in pursuing a criminal investigation, ignored or minimised their employment obligations.

[12] The applicants relied particularly on a meeting that they attended on 24 February 2004. Also present at that meeting were other members of the Beat Section. The meeting was held in the office of Acting Inspector Greg Williams who gave evidence at the investigation meeting.

[13] The applicants say that this meeting was a *disciplinary meeting*. Inspector Williams resists that claim and said in his evidence that the meeting was primarily to introduce himself to staff as the Acting Area Commander and in relation to the Beat Section particularly, to indicate the deficiencies that the audit and investigation process had thrown up in respect of the treatment of confiscated alcohol.

[14] Inspector Williams specifically denied allegations made by the applicants that, for instance, he planned to execute search warrants of staff's homes and/or that he blamed one or more of them for the prank perpetrated by someone placing a quantity of surplus alcohol on his desk.

[15] The applicants also contend that they suffered disadvantage as a consequence of a rotation policy implemented by Police which the applicants say was effectively retrospective in its action. The investigation conducted by Police in respect of the allegations made about the Beat Section commenced in January of 2004 and concluded on 18 August 2004. On 13 August 2004, the

applicants became aware of a new Police policy requiring staff to rotate through the various specialised areas of policing.

[16] It is alleged that this policy required the applicants to find alternative positions (that is, alternative positions within Police but alternative to the Beat Section deployment) within a short number of weeks. The applicants' evidence was that they felt failure to find such a fresh position might result in them being deployed in a section they did not wish to work in.

[17] The applicants further allege that the juxtaposition of this new rotation policy with the end of the investigation into the alleged misuse of confiscated alcohol was more than coincidence.

[18] Both applicants found alternative positions as a consequence of this rotation policy, although neither applicant is particularly happy to have been forced to leave the Beat Section. Both applicants continue to be serving Police officers.

Issues

[19] I propose to consider the questions posed in this case under the following headings:

- (a) The 90 day rule;
- (b) The investigation;
- (c) The rotation policy.

The 90 day rule

[20] Police say that the matter was not brought to their attention within 90 days and therefore given they did not consent to the matter being raised outside the 90 days, in the absence of an exceptional circumstance claim, the matter fails.

[21] Remembering that the complaint alleging improper treatment of confiscated liquor was raised in January of 2004 and resulted in decisions being taken to investigate in February 2004, a letter from the Police Association's Mr Dave McKirdy dated 31 March 2004 is relevant to the question of whether the personal grievance was raised in time.

[22] In that letter, Mr McKirdy sets out over four pages a detailed complaint about the criminal investigation and audit process initiated by Police against the Beat Section's handling of confiscated liquor, that action taking place on 13 February 2004.

[23] At the end of the letter, after a detailed analysis of what the writer thought was wrong with Police's actions, and what Police needed to do to put those wrongs right, the following words appear:

Until this action is taken and outstanding issues resolved satisfactorily then I also reserve personal grievance rights on behalf of members of the Beat Section, Sergeant Hurst and Team Policing staff.

[24] Police say that *reserving* personal grievance rights does not constitute raising a personal grievance within the meaning of the law. In the context of this letter, I do not agree with that assessment.

[25] In my view, this letter plainly constitutes the raising of a personal grievance in respect of a series of specific and carefully documented allegations against Police. The employees whose personal grievances are raised by the letter are clearly identified and the details about what they complain of are, in my opinion, set out with sufficient particularity in the body of the letter.

[26] I accept that it might be neater in terms of syntax for Mr McKirdy to use a less discursive layout but I cannot conceive how Police could form the view that no grievance has actually been raised.

[27] In my opinion, it is clear that a grievance has been raised in respect of the named officers (either named by surname or by position); it is clear what the subject-matter of the grievance is; and it is plain that the referral of the grievance by letter dated 31 March 2004 is within 90 days of the events complained of which principally are events on 13 February 2004 (the actual search of the Kiosk premises) and the subsequent meeting in Acting Inspector Greg Williams' office on 24 February 2004.

[28] It follows that I do not accept Police's contention that that letter does not constitute the raising of a grievance in respect of the issues identified in the letter and in particular issues from February 2004 pertaining to the search and the interview in Inspector Williams' office.

[29] Having said that, I accept there is force in Police's submission that simply *reserving* personal grievance rights **without more** does not go far enough and may indeed be comparable (as Police contend) to situations where an employee says they are contemplating raising a grievance.

[30] However, that is not the situation here. This was more than a situation where personal grievance rights were just reserved. They were reserved after an extensive analysis in a detailed piece of correspondence about what was wrong and what Police needed to do to put things right. Certainly I think it would be better if Mr McKirdy used the word *raised* rather than the word *reserve* when he seeks to tell the employer about a member's difficulty, but I do not propose to strike the grievance down for that alone.

[31] Of course, that letter can only raise a grievance in respect of the matters referred to therein. It is necessary to look at another letter in respect of the applicants' grievance about the rotation policy. By letter dated 24 August 2004, Mr Ian Thompson who by then was acting for the applicants, wrote to Police and in another lengthy letter he carefully sets out the complete grievance, including the grievance relating to the rotation policy.

[32] I am satisfied that in this letter dated 24 August 2004, the subsequent elements to the applicants' grievance and in particular their complaints about Police's rotation policy, are properly raised with the employer.

[33] It follows that in my judgement, all of the elements of the applicants' personal grievances have been properly raised within time with Police.

The investigation

[34] After Police received a complaint from other serving Police officers that confiscated alcohol was being improperly handled by Beat Section staff, a decision was taken to conduct an investigation.

[35] As I have already made clear, this investigation was designed to establish first whether there had been criminal offending and second whether there had been failures in Police procedure which needed to be remedied. As a subset of those two principal requirements of the investigation, Police

decided that there would effectively be an audit of the liquor that was actually held on site at the Kiosk at Cathedral Square, Christchurch.

[36] A search of the Police Kiosk at Cathedral Square, Christchurch was undertaken on 13 February 2004 and liquor then at the Kiosk was seized and removed to the Central Police Station in Christchurch.

[37] The applicants' initial position was that this whole investigation was improper because it breached their rights as employees and they also contended, for instance, that the search of premises at the Kiosk at Cathedral Square was improper because there had been no search warrant obtained.

[38] Their complaints about the nature of the inquiry and the alleged breach of their employment rights concerned matters such as the failure of Police to provide all the usual safeguards that would be expected in an employment investigation, like a proper putting of the allegation, a proper opportunity to be heard and proper consideration of any explanation offered.

[39] Police, in response, point out that the investigation was a criminal investigation designed to establish whether there had been criminal offending by members of the Beat Section of Police. They argued, inter alia, that it was inappropriate to treat serving Police officers any differently from other members of the community and if there were allegations of potential criminal offending, those allegations had to be investigated in accordance with proper policing practice, and of course without fear or favour.

[40] It follows that if that view of matters is to prevail, then there is no obligation on the part of Police to alert Police staff to the inquiries being made or to provide any of the usual protections of an employment investigation because any of those usual protections would be absolutely counter-productive in terms of a criminal investigation conducted on a proper basis.

[41] Both of the applicants indicated in their evidence that it was some time after the visit to the Cathedral Square Kiosk by the investigating officers that they established (rather informally it seems) what was going on.

[42] I am satisfied there is no reasonable basis on which Ms Cameron and Mr Kyne can object to the Police inquiring into the allegation that they had been presented with. I am not even sure that one could say there was in truth a conflict between the duty of Police to honour their obligations as an employer to their staff and their professional obligation to pursue inquiries into alleged criminal offending.

[43] What I think is determinative of the issue is what the nature of the Police's inquiries were. Clearly, the evidence all supports Police's contention that they was conducting a criminal inquiry into allegations that there had been a breach of the criminal law. The persons potentially *in the frame* for that criminal offending, to use a vulgarism, were serving Police officers and it would clearly completely defeat the purpose of that criminal investigation to alert any or all of those serving Police officers about the nature of the inquiries being made.

[44] Accordingly, I find that the Police were indeed conducting a criminal inquiry and as a consequence were not under any obligation to fulfil their normal obligations to their employees as a good employer would be expected to in the normal course of events.

[45] I now need to consider the effect of the interview between Acting Inspector Greg Williams and Ms Cameron and Mr Kyne. This interview took place in Inspector Williams' office on 26 February 2004 and involved Inspector Williams talking to members of Section 2 of the Beat Section.

[46] Section 2 included Ms Cameron and Mr Kyne but also other serving Police staff.

[47] As I have already indicated, Inspector Williams' evidence was that this meeting was one of a number where he sought really to introduce himself to Police officers who would now be under his command while he was relieving in the position of Acting Area Controller. The applicants' evidence was that Inspector Williams spoke only to Section 2 of the Beat Section but I accept Inspector Williams' evidence that he spoke to other sections as well.

[48] The evidence from both Ms Cameron and Mr Kyne is that this meeting was *disciplinary* in nature and allegedly came about because of the allegation which Mr Kyne describes in his evidence as *theft as a servant*. By this he refers to and means the alleged consumption by Beat Section staff of confiscated alcohol.

[49] Both Ms Cameron and Mr Kyne gave evidence of the allegedly intimidatory nature of this interview with Inspector Williams and both say that Inspector Williams made allegations that confiscated alcohol had been consumed by Beat Section staff and that Inspector Williams contemplated out loud the prospect of conducting searches of Police members' homes and/or of conducting covert operations against staff.

[50] Then there was the issue of the liquor left on Inspector Williams' desk. Inspector Williams' evidence is that he arrived at work on the morning of 23 February 2004 (three days before the meeting with Beat Section staff) to find a bag on his desk containing various items of liquor. The source of the liquor or any identifying information as to whose property it was, was absent.

[51] Inspector Williams said that he dealt with this issue by speaking to his immediate subordinates about the need to tighten up on procedures for dealing with confiscated alcohol.

[52] His evidence was that the meeting he held with Beat Section staff on 26 February 2004, while it had its genesis in his desire to have staff reporting to him know him a little better, did in fact concentrate on the procedures around the seizing and disposing of confiscated liquor. He describes the liquor issue as *my primary focus* at the meeting. He says that he emphasised the need for staff to follow procedure. Inspector Williams emphasised to the staff, he said, that their failure to follow Police procedure in respect of confiscated alcohol was the proximate cause of the complaint having been received and he encouraged staff to return to following correct procedure.

[53] Inspector Williams denies absolutely that the meeting was disciplinary, either in purpose or in character, denies threatening to search members' homes and/or conduct covert operations, although he accepts that he mentioned that in the context of saying that those courses of action had been considered and rejected.

[54] Inspector Williams absolutely denied the suggestion that he had sought a culprit from Beat Section 2 for the alcohol put on his desk three days previously. He says that that issue simply was not the focus of the meeting on 26 February 2004.

[55] In particular, Inspector Williams denied saying at the meeting that *he wanted someone to own up by the end of that day to putting the alcohol on my desk*. This was a specific allegation made by Ms Cameron and Mr Kyne.

[56] I need to make findings in relation to this meeting and it is more than usually difficult because I am being invited to prefer the evidence of one Police officer over the evidence of others.

[57] I am satisfied that the evidence suggests that the meeting was not disciplinary in nature. Inspector Williams was not personally in charge of the criminal inquiry; he had delegated that

inquiry to Senior Sergeant Paynter. There was, as Inspector Williams said in his evidence, no reason at all for him to *conduct interviews* with staff over the criminal allegation.

[58] Notwithstanding that, Ms Cameron and Mr Kyne's evidence is that they felt threatened or intimidated by Inspector Williams' manner. Inspector Williams said in his evidence that he could not understand how that could be; he said that his discussion was essentially about matters of procedure in dealing with confiscated alcohol and that his reference to covert surveillance and searching of Police members' houses was a reference to a course of conduct which had been rejected rather than one which was in contemplation.

[59] On the balance of probabilities, I incline to the view that Ms Cameron and Mr Kyne might have felt threatened by Inspector Williams. Inspector Williams, when he gave evidence before the Authority, was an impressive witness. He has a cultivated Police manner which might well be seen somewhat negatively by junior staff who were tired at the end of a long shift.

[60] Even if Inspector Williams was so forthright in his approach as to create diffidence or intimidation in his audience, I am not persuaded that that constitutes a disadvantage to Ms Cameron or Mr Kyne in the legal sense of that term. The law seems to me to be clear that while courtesy is a virtue much desired in the workplace, its absence or the presence of its opposite does not, by itself, create a personal grievance: *New Zealand Woollen Workers IUOW v. Distinctive Knitwear New Zealand* [1992] 2 NZILR 438.

The rotation policy

[61] As I have already mentioned, the investigation into alleged wrongdoing by members of the Beat Section concluded on 18 August 2004. The evidence suggests that on 13 August 2004 the applicants became aware of what Ms Cameron referred to as a *retrospective rotation policy* which required that Beat Section staff could not work in that area for more than two years.

[62] The nub of the grievance about this rotation policy is the allegation that it is retrospective in nature and that the policy had its genesis in the failure of Police to find evidence against Beat Section members for the alleged misuse of confiscated alcohol. Both these aspects need to be examined in turn.

[63] As to the retrospective nature, both Ms Cameron and Mr Kyne gave evidence that when they were appointed to the Beat Section, they were appointed on in effect an open-ended basis. For instance, Mr Kyne has this to say in his brief of evidence:

5. *When I was advised of my transfer to Beat Section I was not made aware in writing or verbally that the position carried with it a two year rotation policy.*

[64] The point about this paragraph from Mr Kyne's brief of evidence is simply that it confirms that his appointment (and likewise Ms Cameron's appointment to the Beat Section) was on the footing that there was, at the time of appointment anyway, no requirement that the officer move on to another section of policing work within a span of time.

[65] Then, immediately after the investigation into the alleged misuse of confiscated alcohol was concluded, it is alleged that Police introduced this retrospective policy. For instance, Ms Cameron puts the juxtaposition this way in her evidence:

- After failing to gather any evidence implicating me in the theft of alcohol my employer introduced a retrospective rotation policy ...*

[66] I am satisfied on the evidence that the policy which was introduced by Police was in fact retrospective, although I am also satisfied that Police may not have actually intended that. The evidence which I heard suggested that the policy which created the rotational practice was a draft document only which emanated from the District Commander and when Police began receiving complaints about the new policy setting, they promptly revisited the matter and clarified the situation though the policy was never in fact implemented.

[67] Unfortunately, both applicants had acted in response to the enunciation of the new draft policy and changed their position, they say, to their disadvantage. What they did was they sought alternative positions within Police in the mistaken belief that they were required to remove themselves from the Beat Section.

[68] While I am satisfied that there was no mischief intended by Police in this promulgation of a possible new arrangement, it seems to me plain on the evidence that the applicants believed that the policy was a firm and formal change, believed that they had to respond to it by removing themselves from the Beat Section or risk being allocated a job they did not want and actually acted so as to obtain an alternative position within Police to avoid being allocated a position they did not want.

[69] On the other issue that troubled the applicants, namely the contention that Police had deliberately created this rotational policy in order to remove staff from the Beat Section having failed to identify the wrongdoing in respect of the disposal of confiscated alcohol, I am absolutely satisfied on the evidence that nothing could be further from the truth.

[70] The rotational policy which was proposed was for a wider span of staff than simply those employed in the Beat Section and there is simply no credible evidence to suggest a policy link between the end of the investigation into the alcohol issue and the arrival of the new draft rotation policy.

Determination

[71] In all but one particular respect, I am satisfied that the applicants have suffered no disadvantage. However, in relation to the promulgation of the draft rotational policy, the evidence is clear that the applicants changed their positions in reliance on that policy and removed themselves from the Beat Section which, on their evidence, was work that they enjoyed and were good at. Further, their evidence suggested that the new jobs they were employed in were not as enjoyable.

[72] It follows that in that particular regard alone, I am satisfied that both Ms Cameron and Mr Kyne have suffered a disadvantage by an unjustifiable action by Police, namely by Police promulgating a draft rotation policy in circumstances where a competent employee would develop a reasonable apprehension that their continued employment in their present work environment was in jeopardy and required them to act promptly to obtain an alternative position which was at least partially suitable to their requirements.

[73] I am not satisfied that the extent of the personal grievance which I have now identified justifies a significant award of compensation, but I am satisfied with the evidence I have received that the applicants were disadvantaged by the actions of Police in this way. I think an award of \$2,500 per applicant under section 123 (c) (ii) of the Employment Relations Act 2000 would be an appropriate response to the disadvantage grievance and I make that order accordingly.

[74] I have considered the question of contribution and I find no evidence of contribution by either applicant.

Costs

[75] Costs are reserved.

James Crichton
Member of Employment Relations Authority