

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 540
5385042

BETWEEN JAMES CASSON
 Applicant

AND THE COMMISSIONER OF
 POLICE
 Respondent

Member of Authority: P R Stapp

Representatives: Alan G Taylor, Advocate for Applicant
 Michael Witt, Counsel for Respondent

Investigation Meeting: On the papers

Submissions: On the papers

Date of Determination: 25 November 2013

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The key document in this matter is Mr Casson’s representative’s letter dated 6 February 2012 to police. In the letter Mr Casson claims unjustified disadvantage and constructive dismissal. In essence Mr Casson says that there are 13 separate events over time that he is relying on in regard to raising a personal grievance that police “closed ranks” against him and that he felt the need to resign as a consequence of bullying and threatening behaviour, although he refers to his resignation being for personal reasons at the time.

[2] Mr Casson is pursuing a personal grievance for unjustifiable disadvantage in the statement of problem. He claims that he has raised his personal grievance for unjustified disadvantage, and the police claim that his causes of action for such a personal grievance are not within the requisite period of 90 days (beginning with the

date on which the action(s) alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later), in accordance with s.114 of the Employment Relations Act 2000 (the Act). Mr Casson has not sought leave pursuant to s 114 (3) and s 115 of the Act as to any exceptional circumstances to bring a personal grievance out of time. The parties have attended mediation services provided by the Ministry of Business, Innovation and Employment (MBIE).

[3] Police provided a statement in reply on 3 October 2012. In the statement in reply Police have claimed that all of Mr Casson's unjustified action disadvantage claims are outside the timeframe of 90 days and denies any of the claims should the Authority find in Mr Casson's favour. It further denies that any of the unjustified disadvantage claims meet the requirements under s 114(1) of the Act. It has been agreed that before the Authority continues to deal with the claims in Mr Casson's statement of problem that the preliminary issue on the raising of the personal grievances in time should be dealt with first. I have agreed to do so as a preliminary matter.

The issues

[4] The preliminary issue for me to decide is whether or not Mr Casson raised his alleged personal grievance for unjustified disadvantage within 90 days in accordance with s 114 of the Act.

[5] In particular the issues are

- (a) Did Mr Casson raise any personal grievance in the required time?
- (b) Did he meet the requirements to raise any personal grievance?
- (c) Did Police consent to any personal grievance being raised out of time?

[6] Mr Casson has requested me to consider that there are three scenarios to consider in the matter. First, that the list of 13 matters be treated as a single pattern of actions/inactions with the final action occurring immediately prior to him resigning from the police. Second, that as the 13 individual events occurred Mr Casson brought them to the attention of the relevant inspector or senior sergeant to raise his personal grievances. Third, that Mr Casson's personal grievance came to his notice when he approached his representative for advice and the letter dated 6 February 2012 was sent

to Police. Mr Casson's claim is predicated on the basis that the police officers involved over time "closed ranks" in their treatment of him and he felt the need to resign from his employment (effective from 18 January 2012).

[7] There are a total of 13 separate allegations that need scrutiny. These are as follows:

- (i) The employment investigation in July 2012;
- (ii) The alleged criticism by the police in relation to Mr Casson's concerns regarding the policy decision to centralise firearms.
- (iii) The alleged threats by Inspector Karen Henrikson regarding the status of Mr Casson's position.
- (iv) The alleged failure to appoint a relieving Sergeant for the period of Mr Casson's leave from 13 November 2010 to 14 February 2011.
- (v) The allegation instruction by Inspector Lindsay to Senior Sergeant Tebbutt on 2 March 2011 to *sort you* [the applicant] *out*.
- (vi) The informal meeting between Mr Casson, Inspector Lindsay and Sergeant Banfield on 1 April 2011 and an alleged comment by Inspector Lindsay during that meeting.
- (vii) The applicant being assigned court escort duties.
- (viii) The applicant's performance appraisal report 2010/2011.
- (ix) The processing and forwarding of Mr Casson's performance appraisal report 2010/2011.
- (x) The welfare transfer application that Mr Casson made and which was declined by police.
- (xi) The reference made by Inspector Henrikson in relation to Mr Casson's application for a position in Huntly.
- (xii) The alleged breach of confidentiality in relation to Mr Casson's welfare transfer application.

- (xiii) The alleged bullying and threatening.

The Law

[8] The Court held in *Gates v Air New Zealand Limited* (2009) 7 NZELR 41 that the personal grievance must satisfy the requirements of s 103(1) (b) of the Act, which is:

103 Personal grievance

(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim-

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or

[9] Also the Court held that a personal grievance has to satisfy the requirements of s 114 (2) of the Act, which is:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

...

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[10] In *Gates* the Court held that it was sufficient to describe the personal grievance in the nature of s 103 (1) (b) as an unjustified disadvantage claim and to refer to the grievance generically such as 'bullying', but there had to be events and examples of the employer's alleged behaviour and conduct. Any such events without being properly raised as separate grievances could only be by way of background to the personal grievance. In *Gates* no specific events were identified and the claim for 'bullying' was out of time.

The Facts

[11] Mr Casson joined the New Zealand Police (police) as a recruit on 1 April 1986. He was employed as a constabulary employee. Until 31 July 2011 Mr Casson was employed as a community policing team sergeant at the North Hamilton police station in the Waikato district.

[12] From 1 August 2011 until his resignation on 18 January 2012 Mr Casson held the position of Section Sergeant in Nelson in the Tasman district.

[13] He resigned from the police on 22 December 2011, when he submitted his resignation to take effect from 18 January 2012. Mr Casson took annual leave from 25 December 2011 to 17 January 2012. Subsequently he has secured employment with a new employer and commenced his new work on 23 January 2012. His resignation was solely for personal reasons.

[14] A personal grievance letter was sent to Police dated 6 February 2012 on behalf of Mr Casson by his representative. There was a meeting between Mr Casson's wife and Superintendent Winston van der Velde on 20 February 2012 where some issues were discussed, but clearly that meeting did not involve any personal grievance being raised further than the information in the letter dated 6 February 2012 that involved Mr Casson's representative's opinion and claims. Mr Casson contacted Superintendent van der Velde for a meeting involving his representative on or about 29 February 2012 at which he claims that his complaints were raised and his issues, in particular; that Inspector Karen Henrikson had threatened to transfer him and threats were allegedly made to his staff for them to distance themselves from him. There were other matters raised about Facebook and what other people were allegedly saying. Mr Casson deposed that he did speak with Superintendent van der Velde about what he wanted and included reinstatement. Superintendent van der Velde confirmed that the meeting held on 29 February 2012 took place and that Mr Casson did touch on various issues and that Mr Casson believed that he had been treated unfairly by his supervisors and/or police management. Superintendent van der Velde also noted that Mr Casson did confirm what he was seeking and these remedies included reinstatement, reimbursement of legal fees, an apology and a review of his performance appraisal. The outcome of the meeting was that Mr Casson and/or his

representative clearly raised Mr Casson's personal grievance on the basis of the discussion and all Superintendent van der Velde was required to do was pass it on if he did not have any responsibility over it. I hold he was an officer in a responsible position in regard to the matter. How the personal grievance was to be treated is another matter.

[15] On 13 April 2012 Police replied to Mr Casson's personal grievance and expressly referred to the requirements of the 90 days to raise a personal grievance. Police have denied all the grounds for any remedies sought to be awarded in the personal grievances. It has not consented to the grievances being raised out of time.

[16] Mr Casson's case essentially rests on the differences of opinion that he holds in regard to affidavits sworn by Sergeant Gordon Grantham, Inspector Karen Henrikson, Inspector Robert Lindsay, Sergeant Robyn Banfield, Mr David Kettle, Senior Sergeant Lance Tebbutt, Senior Sergeant Peter Simpson, Ms Stacey Scott and Superintendent van der Velde. Mr Casson has maintained emphatically that he has raised a personal grievance, but his evidence has to be weighed by the evidence of the Police witnesses who have refuted his claims.

[17] Mr Casson has submitted that:

- (i) The grievances were raised immediately before he resigned from the police in January 2012, and supported by his letter sent by his representative to Superintendent van der Velde.
- (ii) The first time he became aware that there was a combined pattern of action and events constituting a personal grievance occurred was when he met his representative in February 2012. In other words when Mr Casson outlined the events to his representative it came to his notice that he was advised of the existence of a personal grievance by his representative. This is supported by the personal grievance letter dated 6 February 2012.
- (iii) The raising of a personal grievance as a matter of custom and practice with one member of police means raising it with the police as a whole. Mr Casson relies on raising his personal grievance with individual Police middle management. Further he relies on the meeting held

between his wife and Superintendent van der Velde on 20 February 2012 that resulted in an enquiry being set up into a complaint she raised in regard to Inspector Lindsay. He says that the case of *Commissioner of Police v Hawkins* [2009] NZCA 209; [2009] 3 NZLR 381 supports him where the Court held that there can be implied consent to a personal grievance being raised outside the 90 days.

Authority's determination of the preliminary matter

[18] Mr Casson did not raise any personal grievance prior to contacting and getting advice from his representative. He has made that concession, despite his firmly held belief that what he raised at the time was sufficient to constitute raising a personal grievance. His evidence in his affidavit dated 28 February 2013 is abundantly clear, that “[T]he 90 day rule was never mentioned to either myself or my Employment Representative, before, during or after this meeting [20 February 2013]. Again, I had not been aware of this rule and did not know it existed”. Therefore, it is more likely than not, that Mr Casson did not know of the requirements to properly raise a personal grievance at the time, although he did express some intentions on what he might do.

[19] However this matter turns on two events. First his representative's letter dated 6 February 2012 (after his employment with police ceased on 18 January 2012) and second, a meeting he attended with his representative and Superintendent van der Velde on 29 February 2012.

[20] For completeness I will deal with each of the separate issues/events in turn first. (Issue 1) Mr Casson deposed that he raised a personal grievance with Sergeant Grantham on 15 July 2010 in regard to matters associated with an employment investigation in July 2010 (Casson 16). He deposed that he said to Sergeant Grantham that he was “*extremely unhappy that [he] had been accused of something that he had never been involved in... and... that [he] wanted something done about it*”. First, his contention is not supported by evidence that he raised this as a personal grievance at the time. Sergeant Grantham says that there were never any details and remedies proffered by Mr Casson to construe raising a personal grievance. Second, the complete transcript of the meeting does not identify any comments about a personal grievance and any remedies.

[21] (Issue 2) Mr Casson deposed that he voiced his opposition to the Police operational decision to centralise arms. There is no evidence providing any details as to whom he raised such a grievance with. At best he advised Inspector Lindsay and Sergeant Banfield on one or more specific occasions that he had an issue, but having an issue is not the same as meeting the requirement of raising a personal grievance. The comments he made were more of an expression of disagreement with an operational decision.

[22] (Issue 3) Mr Casson alleged Inspector Henrikson threatened him in regard to his position and that her response to him on different occasions was sufficient to raise a personal grievance. Inspector Henrikson denies the allegations being made by Mr Casson. First Mr Casson has no details of dates and time. Second Inspector Henrikson denies the allegations in her evidence. Third any comments attributed to him are more likely than not to have been expressions of possible intention only, before actually taking any appropriate action.

[23] (Issue 4) Mr Casson requested a reliever be appointed during his leave taken from 13 November 2010 to 14 February 2011. A reliever was not appointed. There is no evidence that Mr Casson raised a personal grievance on this matter.

[24] (Issue 5) Mr Casson deposes that he raised a personal grievance about Inspector Lindsay's comment to Senior Sergeant Tebbutt "*to sort him out*". The allegation refers to a meeting dated 2 March 2011. There is no evidence of a personal grievance being raised. If he told Senior Sergeant Tebbutt that he was not happy that the comment was made it only constitutes an expression of how he felt, without any notice of how he wanted the matter resolved.

[25] (Issue 6) Mr Casson deposed that at an informal meeting on 1 April 2011 Inspector Lindsay made a comment to Sergeant Banfield about Mr Casson. Mr Casson expressly and explicitly confirmed that he did not speak to anyone in relation to the matter apart from his subordinate, who he has not arranged an affidavit to support him. In any event what he may have told his subordinate is not proof of what he may have said to anyone else, and it was not raised with anyone in authority in the Police.

[26] (Issue 7) Mr Casson has deposed that he was assigned Court escort duties on or about 28 June 2011, but accepted that he did not speak to anyone on the matter

apart from his subordinate. There are no details to support a claim for personal grievance, let alone how it would be resolved.

[27] (Issue 8) Mr Casson has raised matters to do with his performance appraisal in 2010/2011. It is common ground that a dispute/disagreement existed on the appraisal. Emails (25 August 2011, 15 September 2011, and 20 September 2011) in regard to the matter do not identify a personal grievance being raised and how it would be resolved. The matter was not pursued again by Mr Casson until 6 February 2012.

[28] (Issue 9) Mr Casson had an issue about the processing of his performance review 2010/2011 in August 2011. He conceded that he did not raise a personal grievance with Inspector Lindsay (Casson 28). If he raised it with Senior Sergeant Tebbutt there is no evidence of his doing that. Emails available (for example 20 September) do not support the raising of a grievance.

[29] (Issue 10) Mr Casson made a welfare transfer application which was declined on 29 September 2011. Mr Casson deposes that he made it very clear to the human resources manager in the Tasman district, Mr Dave Kettley that he was “*very unhappy about the whole situation*”. It is common ground that Mr Casson was disappointed with the decision, but disappointment does not represent raising a personal grievance, nor how it could be resolved. Furthermore Mr Kettley has deposed that Mr Casson did not complain and/or request his assistance in the matter beyond the comment made at the time. Also Mr Casson’s brief comment that he would take this further never occurred until February 2012.

[30] (Issue 11) Mr Casson deposed that he raised a personal grievance about an application for a position at Huntly. He says he raised it with Senior Sergeant Simpson by drawing to Sergeant Simpson’s attention that he was unhappy and wanted something done about it. This was too general and lacked specificity in regard to how he may have wanted it resolved. He never identified any ways to resolve the problem in the context of a personal grievance.

[31] (Issue 12) This is about an alleged breach of confidentiality in relation to Mr Casson’s welfare transfer, but he confirms that he did not bring the matter to the attention of anyone at the time. He cannot possibly have raised a personal grievance in regard to this.

[32] (Issue 13) Mr Casson has alleged bullying and threatening behaviour in his employment by members of the Hamilton police management. These allegations have been denied. The first time this was cast in such a way was in Mr Casson's representative's letter of 6 February 2012. It was linked to his resignation and at the time the claim for constructive dismissal in the same letter. It related to the 12 incidents referred to and that had occurred earlier in his employment.

[33] It follows that Mr Casson has not met the requisite requirements to prove that he raised each of the first twelve issues and/or matters as personal grievances at the time. First he concedes that he was aware of the matters at the time they occurred. Second the supporting evidence indicates that Mr Casson was involved in each of the matters, had complaints about each of them and he expressed intentions although they were not followed through with at the time in formulating an individual grievance in regard to them. He cannot claim being unaware of the matters, and does not do so. He deposed that he decided not to raise them because he says he felt intimidated and was afraid of retaliation; at least until after he had resigned.

[34] Next, I am left with whether or not the alleged actions constituted a continuing cause of action upon each of the 13 matters raised by Mr Casson. This is a matter of fact and degree. There is timing and the quality of each of the matters to be assessed. This involves assessing whether or not there is any connection between each of them and the final claim. The existence of such events has been confused between raising each of them as personal grievances and then trying to get them all in as a group when in fact they are the background to the nature of the personal grievance of unjustified disadvantage that Mr Casson says he has with police. The onus of proof is upon Mr Casson to establish that he raised the personal grievance. Factors for consideration are:

- (i) That the period goes back to July 2010-October/November 2011.
- (ii) That some of the people involved are the same in different events, and whether or not there is any link between the people and the events.
- (iii) That Mr Casson left the police voluntarily and has not brought a constructive dismissal claim before the Authority associated with all of the matters in his employment as raised in the statement of problem.

This is of little significance, however, because a party can form the nature of a claim for personal grievance in any way so long as it meets the requirements of s 103 of the Employment Relations Act. Thus his leaving voluntarily does not prevent a disadvantage grievance in regard to bullying and intimidation.

[35] I hold that each of the separate events were not raised as personal grievances at the time and that they did not come to Mr Casson's notice to raise a personal grievance much later because he knew about them at the time. He had been involved in them at the time. He had time to get advice to act accordingly if he intended to take further action. He expressed some intentions, but did not follow through on what he might have done about his concerns at the time. Thus, I hold that the letter raising his personal grievance and the discussion at the meeting on 29 February 2012 in respect to each separate event, and the statement of problem, cannot purport to be the dates on which the action alleged to amount to a personal grievance occurred or came to his notice.

[36] The connection between each of the events relates to the people involved and the locality of work involved having regard to a serious allegation that the officers were all "closing ranks" by the time Mr Casson's employment ended on 18 January 2012. Indeed the claim for bullying and threatening behaviour (being the most recent event for a cause of action) at the time his employment ended relies on each of the matters in the background. As such they are matters relating to the substance of Mr Casson's complaint. Therefore given the content of the letter dated 6 February 2012 and the meeting on 29 February 2012 Mr Casson through his representative sufficiently put Police on notice of his personal grievance for bullying and threatening behaviour, culminating in his employment ending.

[37] Mr Casson does have the right to pursue an unjustified action disadvantage claim that does not have to be tied and/or concurrent with a constructive dismissal claim. However, the focus of the cause of action has to be limited because all of the matters he had issues about during his employment are outside the 90 days, and that any of the claims involved can only be used as background to his employment relationship problem. On 6 and 29 February 2012 Mr Casson had clearly identified that he had been treated unfairly, alleging that he had been isolated and targeted (in

his employment) and any disadvantage associated with his employment ending by resigning together with the remedies he was seeking.

[38] If I am wrong then I need to comment on the issue that police did not consent to permit the personal grievance being raised out of time, although this has no application given my finding above. This is supported by the following:

- a. That police at no time consented explicitly.
- b. That there is nothing in any of the meetings referred to that implies consent.
- c. That attending mediation did not imply consent.

[39] First, police did object to the alleged grievances being raised out of time. This is supported by the letter dated 13 April 2012. It was specifically referred to in response to the letter purporting to raise a grievance. The protest occurred sufficiently in advance of the proceeding not to imply consent.

[40] Second, there was no implied consent at any time by any members of Police in management positions dealing with Mr Casson. This is because of the following:

(a) The meeting on 20 February 2012 was initiated by Mrs Casson who was not a party in the relationship. The purpose of the meeting was entirely different (I do not need to go into the detail) and not related to representing Mr Casson to raise a personal grievance, but to follow up on the employment relationship.

(b) There was no discussion of raising a personal grievance during the meeting of 20 February 2012. It already had been raised on 6 February 2012 and then on 29 February 2012. From the date of Mr Casson's employment ending of course his personal grievance was in time; some 20 days and/or 43 days, respectively.

(c) The meeting of 29 February 2012 did involve ample discussion and put the employer on sufficient notice of a personal grievance to be resolved given the remedies talked about, even although at that meeting Superintendent van der Velde was not prepared to address resolving Mr Casson's issues because he had no full appreciation of the facts and would not have committed Police to anything. Instead his purpose was to listen, which I accept. This is supported by the police needing to

formally reply to the letter purporting to raise the personal grievance. There was no further contact until 13 April 2012 when Police did reply by letter. Thus it follows there could not have been any expectation that the matter would be resolved between Mr Casson and Superintendent van der Velde in a very short period of time. However, what is clear is that the information conveyed was sufficient to put police on notice of a personal grievance in sufficient terms of a problem and that it needed fixing, because remedies were discussed and what was involved could not have been clearer. Also, Superintendent van der Velde was a responsible officer with seniority to have the problem put to him. As I have already said what he had to do with it and how it was treated are entirely separate matters. It was enough for Mr Casson and his representative to raise the personal grievance with Superintendent van der Velde, and they met with him and did that, I hold.

[41] Third, mediation was initiated by Mr Casson's representative. Police agreed to attend. Mediation took place on 20 July 2012. This was some time after police protected its position of not consenting to the personal grievance being allowed in time. The letters are very clear with this intention. On 13 April police's intentions, defence and objections were set out. They could not have been misunderstood. This included a reference explicitly to the 90 day matters because Mr Casson was purporting to include all his matters in the background as personal grievances.

Conclusion on the preliminary matter

[42] Mr Casson's preliminary matter on the raising of personal grievance is only successful in as much as the raising of the personal grievance is a narrow claim of unjustified disadvantage for allegedly being treated unfairly, targeted for no reason and made to feel marginalised and bullied. This was raised on 6 February 2012 (personal grievance letter) and reiterated on 29 February 2012 (meeting with police). This was within 90 days of the employment ending whether or not the personal grievance came to his notice through his representative. It still was within 90 days and claimed in sufficient detail with background information to support his claims. Mr Casson can refer to the various events (they are not personal grievances on their own) he has alleged, but the events will only be background to his claim to try and prove that he was isolated and targeted. Obviously considering the evidence from the police officers involved and the submissions made on each of the events, Mr Casson will have to establish his claims and make the linkages that will be required, but he

has to get over the timing and the connectedness of the people involved and their roles in the events to have any success.

[43] If there is any disadvantage in the alleged actions of being isolated and targeted it may relate to employment ending when he decided to resign (which was originally claimed as a constructive dismissal on 6 February 2012 and reclaimed as an unjustified disadvantage in the statement of problem), which is a different, but permissible, cause of action instead of claiming a constructive dismissal. Much of the arguments already heard and the evidence deposed will be featured in the substantive hearing, and should not take a great amount of time. The right to claim unjustified disadvantage survives the employment ending so long as it is in 90 days, as this is.

[44] I suggest the parties seriously consider going back to mediation before the next step, but I will convene a further telephone conference for case management as soon as practicable and subject to the parties' availability.

[45] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority