

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 56
3171122

BETWEEN DEREK HEWSON COFFEY
Applicant

AND COMMISSIONER OF POLICE
Respondent

Member of Authority: Helen Doyle

Representatives: Nikkii Flint, counsel for the Applicant
Hamish Kynaston and Louise Robertson, counsel for the
Respondent

Investigation Meeting: 29 and 30 June 2023 in Nelson
14 August 2023 by audio-visual link

Submissions Received: 30 June and 14 August 2023 from the Applicant
30 June and 14 August 2023 from the Respondent

Further information
received: 3 November and 15 December 2023 from the respondent
15 November 2023 from the applicant

Date of Determination: 2 February 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Derek Coffey is employed by the Commissioner of Police (Police) as an Arms Officer in Nelson. He has been an employee with Police since January 1990 and is party to an individual employment agreement (the employment agreement).

[2] The employment relationship problems arise from review processes undertaken and implemented by Police in October 2021 and September 2022. The review processes resulted from the Arms Transformation Programme (the Programme). The Programme has as its aim the improvement of the robustness of firearm regulation in New Zealand in line with

recommendations from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 and legislative change.

[3] Mr Coffey says that Police breached the terms of his employment agreement when it undertook the review of the Arms Division. He says that Police failed to consult with him about the planning and implementation of both change processes. Further Police failed to consult with him about reassignment into the role of Arms Manager, Tasman. Mr Coffey says that Police made unilateral and significant alterations to his position of Arms Officer and failed to address his concerns or consult with him regarding the proposed changes and reconfirmed him into the changed role.

[4] Mr Coffey seeks an order that Police breached the terms of his employment agreement and a finding that he was unjustifiably disadvantaged in his employment. He seeks a payment of compensation.

[5] A finding is sought that Police breached the duty of good faith owed in accordance with s 4(1)(a)(b) and Schedule 1C of the Employment Relations Act 2000 (the Act) by:

- (a) Failing to actively and constructively maintain a productive employment relationship with Mr Coffey; and
- (b) Failing to be responsive and communicative with him or to respond in a timely manner throughout the tiered restructuring process.

[6] Mr Coffey seeks penalties for breach of his employment agreement and for a breach of good faith. An order is sought that any penalty awarded for the breach of Mr Coffey's employment agreement and for a breach of good faith be paid to him.

[7] Mr Coffey seeks an order that he be reassigned to the role of Arms Manager, Tasman on the basis that but for the breaches of his terms of employment by Police, he would have been consulted with, and found suitable for, reassignment into the position of Arms Manager, Tasman.

[8] Police say that the claim concerns a dispute about the interpretation of the terms of Mr Coffey's individual employment agreement that relate to restructure. They do not accept that the restructuring and surplus staffing provisions in the employment agreement were engaged in either change process.

[9] They say that the first process was a change to the national reporting line which had minimal impact on Mr Coffey. Police say that there was appropriate consultation. Whilst Police accept later change was anticipated they say it was not inevitable that Mr Coffey's role would be disestablished. Police do not agree it was a cascading restructure similar to that in a previous case that Mr Coffey took successfully against the Police in 1999.¹

[10] Police say the second change process resulted in Mr Coffey's role remaining unchanged aside from the minor changes to the position description that applied to all Arms Officers. Police say that there was consultation with Mr Coffey and he was reconfirmed appropriately in his existing role.

[11] Police do not accept that they breached the terms of Mr Coffey's employment agreement or that he was unjustifiably disadvantaged and say they acted lawfully, fairly, and reasonably throughout. Police oppose any order compelling the reassignment of Mr Coffey to the Arms Manager role. Amongst other matters Police say that there is no positive contractual obligation to reassign Mr Coffey to the Arms Manager role or any other role and that at most Police were contractually obliged to consult about reassignment.

[12] The statement of problem was lodged on 29 April 2022 and the matter set down for an investigation meeting in late January 2023. The statement of evidence lodged on behalf of Mr Coffey referred to alleged breaches resulting from the September 2022 change process.

[13] Mr Coffey considered the additional evidence was within the claim as part a tiered restructure of the Arms Division. Police raised concerns and a further case management conference was held with counsel and the Authority. After discussing the matter with counsel the Authority directed that Ms Flint lodge a memorandum confirming the breaches alleged after 1 September 2022 and the basis for a penalty for the breaches of good faith. Ms Flint lodged a memorandum dated 30 November 2022 setting out the alleged breaches after 1 September 2022 and also the basis for the penalty for alleged breaches of good faith. Ms Flint had been directed earlier to clarify the basis for the compliance order that Mr Coffey be reassigned to the role of Arms Manager, Tasman. This was provided on 7 November 2022 and it was accepted that this clarified that claim.

¹ *Coffey v Commissioner of Police* [1999]1 ERNZ 414.

[14] Police did not lodge an amended statement in reply to the content of the memorandum. Instead, the response was dealt with by way of an exchange of additional statements of evidence directed to the second process. Mr Kynaston and Ms Robertson asked that the Authority not draw any adverse conclusions from the absence of an amended statement of reply. It has not. The evidence and submissions which was timetabled to address both the initial and subsequent breaches alleged clearly put Mr Coffey's and Police's position in relation to the second change process.

[15] The investigation meeting set from January 2023 was rescheduled because of a bereavement impacting one of the witnesses.

[16] The two change processes have been variously described as a review, restructuring and change process. Those terms are used interchangeably in this determination.

Investigation Process

[17] The investigation meeting took place in Nelson on 29 and 30 June 2023 and submissions were completed by audio visual link on 14 August 2023.

[18] The Authority heard sworn evidence from Mr Coffey.

[19] The Authority heard sworn evidence from Angela Brazier, Executive Director, Firearms Safety and Control. Ms Brazier was the decision-maker in relation to the first and second change process.

[20] The Authority heard sworn evidence from Richard Wilson, who is employed by Police as Director Operations, Firearms Safety and Control. He holds the rank of Superintendent. Superintendent Wilson is part of the Arms Leadership team and as such was involved in and assisted with the national reporting line change. His evidence was mainly focussed on the Police recruitment process for the Arms Manager roles.

[21] The Authority heard affirmed evidence by audio visual link from a previous employee of Police who was in the position of Executive Director People Operations until 30 September 2022 and involved with Mr Coffey's review of his appointment. I shall refer to that witness as Christine.

[22] The Authority asked Police during the investigation meeting whether some information was available about the level of approval for licensing endorsements and the timing of additional Arms Officers being appointed in the Tasman Area, including the West Coast and Marlborough.

[23] The information was provided in a memorandum dated 3 November 2023 from Mr Kynaston together with a position description that Police, having reviewed the situation said appeared to have been the version in force when Mr Coffey became an Arms Officer in early 2015. Mr Coffey had said in his evidence that he never saw a position description until September 2022. Ms Flint responded to the memorandum and Police replied.

[24] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[25] The Authority needs to determine the following issues:

- (a) What guidance is there from earlier Employment Court judgments concerning Mr Coffey and Police?
- (b) How did Mr Coffey come to be offered an Arms Officer role?
- (c) What was the impact on Mr Coffey of the first change process?
- (d) What was the impact on Mr Coffey of the second change process?
- (e) What principles should guide the Authority for contractual interpretation?
- (f) What provision imported section 7 of the 1998-2000 collective contract into Mr Coffey's employment agreement?
- (g) Was there a breach of clause 7.1.4 of the employment agreement about consultation?
- (h) Did both or either of the change processes engage the surplus staffing provisions in Mr Coffey's employment agreement?

- (i) If the surplus staffing provisions in the employment agreement were engaged by both or either of the change processes were Police:
 - (i) required to consult with Mr Coffey in relation to reconfirmation options?
 - (ii) required to consult Mr Coffey about reassignment to the Arms Manager role and reconfirmation to the Arms Officer role?
 - (i) required under clause 7.5 of the employment agreement to reach an agreement with Mr Coffey as an affected person regarding his skills and the process for reassignment to new positions under clause 7.5.2.
- (j) Should Mr Coffey have been reconfirmed into the Arms Officer position without agreement?
- (k) Was the review of the provisional appointment to Tasman District Arms Manager role undertaken in accordance with the review of appointments policy?
- (l) Was there a breach by Police of the duties of good faith in s 4(1A)(b) of the Act considered with schedule 1C?
- (m) If there is a breach of good faith and/or of the employment agreement then should penalties be awarded, and if so, who should they be paid to?
- (n) If there were breaches of the employment agreement were they unjustified and did they cause disadvantage to Mr Coffey?
- (o) Should an order be made that Mr Coffey be reassigned into the role of Arms Manager Tasman?
- (p) Should costs be reserved?

Earlier Employment Court judgments concerning Mr Coffey and Police

Coffey v Commissioner of Police 1999

[26] In 1998 Mr Coffey was employed by Police as District Finance and Asset Manager in Palmerston North. Police undertook a review of its structure and implemented restructuring initiatives involving a complete reorganisation of policing districts. The new structure involved the creation of a number of financial management positions including positions known as business services manager. It was clear by late 1998 that although the changes had not been implemented, Mr Coffey's position was likely to disappear.

[27] Mr Coffey wanted to be consulted about reconfirmation or reassignment to the new business services manager position. Police would not apply the reconfirmation and reassignment provisions to enable Mr Coffey to obtain a more senior position however there was agreement to consider his application to the role on merit. Mr Coffey applied to the Employment Tribunal for the Police to comply with his employment contract provisions where there are surplus staffing situations. The Employment Tribunal removed the matter to the Employment Court.

[28] The judgment from the Employment Court refers to the restructure being implemented by a “cascade method.” Police argued Mr Coffey was employed in his current position and he had not been told for certain that he can no longer be employed. That argument did not find favour. The then Chief Judge Goddard stated the impact of the cascading approach was to exclude Mr Coffey from being reassigned to a higher ranked position on the basis that the proper time for him to be considered for reassignment had not been reached.² There was some inevitability about Mr Coffey’s position being disestablished.

[29] It was found there was a surplus staffing situation in existence in relation to Mr Coffey. The Commissioner was found to be obliged to consult with Mr Coffey and others to place as many employees as possible with positions that required similar skills. There was a breach in relation to reassignment. Parties were asked to provide appropriate wording in respect of the compliance order. It appears no compliance order was required to be made.

[30] Mr Coffey was reassigned to the Business Services Manager Tasman District role from July 1999. He entered into a new individual employment agreement at that time.

[31] Mr Coffey says that Police undertook a similar cascading restructure to that undertaken in 1998/1999 with the recent change processes.

Coffey v Commissioner of Police 2013 and 2014

[32] On 4 February 2013 Mr Coffey was dismissed for reason of redundancy from his role of Business Services Manager Tasman District after a review process resulted in the position being disestablished in October 2012. He was unsuccessful in his applications for reassignment.

² Above n 1.

[33] The Authority needed to determine the terms of Mr Coffey's employment agreement to resolve his claims that he was unjustifiably dismissed and disadvantaged. It found that Police did not apply the terms of Mr Coffey's employment agreement once decisions had been made in regard to the restructuring. Further that he was disadvantaged in the reassignment process. Proper delegations were not in place and Mr Coffey could not be made redundant without his consent or agreement, which was not forthcoming.

[34] The Authority ordered that Mr Coffey be reinstated to Police in a position not less advantageous than his previous position, he was awarded \$15,000 and there was reimbursement of wages.³

[35] There was a further Authority determination about whether in implementing reinstatement, a position offered by Police of a business services advisor position in Otahuhu was "no less advantageous." The Authority held that it did not meet the test of being "no less advantageous."⁴

[36] The Police in the meantime had challenged the substantive determination of the Authority and the finding made by the Authority that Police could not terminate Mr Coffey's employment for redundancy without his agreement. The Court upheld the finding of the Authority about that and the terms and conditions of Mr Coffey's employment.⁵

[37] The findings by the Authority upheld by the Employment Court in 2014 confirmed the terms and conditions of employment for Mr Coffey are those in an individual employment contract dated 11 October 1999, as modified by subsequent variations (the employment agreement). Clause 10 of the employment agreement imports the restructuring provisions in section 7 of the 1998-2000 Non-Sworn Collective Contract into the terms and conditions of Mr Coffey's employment. A significant aspect of the finding was that Mr Coffey had to agree before he could be made redundant.

How did Mr Coffey come to be offered an Arms Officer role?

[38] Although reinstated by the Authority and the Court to a position no less advantageous with Police, Mr Coffey remained away from the workplace for a period of time whilst a suitable

³ *Coffey v Commissioner of Police* [2013] NZERA Wellington 152.

⁴ *Coffey v Commissioner of Police* [2014] NZERA Wellington 79.

⁵ *Coffey v Commissioner of Police* [2014] NZEmpC 194.

position to offer him was found. In early February 2015 he was offered and accepted reinstatement to the position of Firearms Officer based in the Tasman District where he was the sole Arms Officer on his current terms and conditions of employment. The letter dated 5 February 2015 offering Mr Coffey reinstatement was provided as part of the documentation. The reporting line in the letter was to an Inspector position.

Acting up in Arm Supervisor role

[39] From March 2021 to September 2022 Mr Coffey acted up from his Arms Officer role and undertook the duties of an Arms Supervisor role with another person.

The first change process and its impact on Mr Coffey?

[40] Before the first change process the Firearms teams in the twelve districts reported to the operations managers. The operations managers were responsible for other core policing activities within their respective districts. What prompted the change process was that the Firearms staff were transitioning to an independent Arms business unit, which would mean a separation of regulatory work and core Police work. The change proposed was seen to provide the benefit of a dedicated leadership for firearms regulation.

[41] Ms Brazier has delegated authority from the Commissioner in her role to oversee the changes needed to implement the Programme. She was appointed to the role in September 2021 but had worked prior to that appointment in Police for 18 years.

[42] On 11 October 2021 a consultation document was circulated to staff about the proposed national reporting line for arms safety and control. It was a sizable document that included the context of the change, purpose and scope, diagrams of the existing and proposed changed structure and the proposed impact on roles, including Mr Coffey's.

[43] The proposal was to establish twelve new roles in each district called Arms Manager. These new roles would report to one of two proposed new operations manager roles, one Northern and one Southern. The proposed operations manager roles would report to the Director Operations within the Arms Business Unit. It was proposed that all existing and new Firearms staff would report through to the proposed new Arms Manager role in their district.

[44] In introductory comments before assessing impact on different roles the consultation document stated:

As has already been signalled the impact of this proposed change is minimal, no roles are surplus to requirements, this is a change to reporting lines only.

No roles are surplus to district or national requirements. This is a change to reporting lines only and will not result in any job loss.

[45] Reassignment was stated to not be applicable to the process.

[46] Draft position descriptions for the proposed Arms Manager (Band J) and Operations Manager – Districts (Northern and Southern) were attached.

[47] Feedback and submission closed on 26 October 2021 and a decision document was to be released on 4 November 2021.

Was further change indicated in the consultation document?

[48] Further change was indicated in the consultation document. The consultation proposal referred to the proposed change being the first step in bringing focus to operate an efficient Arms regulation and control system. In her evidence Ms Brazier said that whilst there was awareness by Police that a second change stage was likely to be necessary, the detail of this and what it would look like had not been worked through.

Mr Coffey alleges breach of contract by Police about first change process

[49] In an email to Police dated 26 October 2021 Mr Coffey set out his employment agreement provisions. He wrote that he currently reported to the Tasman operations manager by agreement from the Employment Court judgment and Authority determinations (2013 and 214 litigation). He stated that Police were supposed to consult with him before any restructuring takes place by virtue of his employment agreement. Further that several matters need to be agreed on before any restructuring processes commence. He stated this had not happened and the Commissioner was in breach of contract.

[50] Mr Coffey wrote in his email that the Commissioner is undertaking a similar unlawful process to that in the 1999 litigation. He wrote that he had previously raised concerns with an Inspector and others about the issue of restructure by stealth. He stated that processes, responsibilities, and position requirements he now undertakes have been regularly changing over the last year without consultation. As a result his position was now significantly different to the one that he was appointed to and it is clear the Commissioner is not acting in good faith. Mr Coffey provided feedback to the proposal. In the feedback he referred to the national

reporting structure and amongst other matters wrote that he had no concerns regarding that part of the proposal.

Email dated 3 November 2021 to Mr Coffey

[51] Ms Brazier involved human resources and responded to Mr Coffey in an email dated 3 November 2021. The email stated that under section 7 consultation could take place through delegated authority from the Commissioner and that Ms Brazier had this authority. Further that the current proposal was a reporting line change and there was no prospect of Mr Coffey's role ceasing to exist. Ms Brazier wrote that agreement between Mr Coffey and the Commissioner or those with delegated authority is not required but there had been consultation to obtain feedback and take account of feedback. Mr Coffey was asked to refer to any specific contractual provision if he did not agree with this. In relation to the restructure by stealth statement, the response was that this was consultation about a national reporting line transition only and any past changes needed to be discussed with his local manager. Mr Coffey said in evidence that he did talk to his manager but was told the matter was at a national level.

[52] Ms Flint submits that Police were clearly aware that Mr Coffey had a unique restructuring provision requiring more engagement. Reliance is placed on a disclosed email between Ms Brazier and the Commissioner dated 3 November 2021. I accept that there was reference in that email to the unique provisions that Mr Coffey has in his employment agreement but the focus was on the 2014 judgment and the need to establish delegated authorities. Ms Brazier's email to the Commissioner confirmed Police's view that there was not a restructure of Mr Coffey's role but a change in reporting line.

Decision made to proceed

[53] Aside from a few minor changes the proposal was implemented on 4 November 2021 and the decision document distributed to all Firearms staff on 4 November 2021.

Impact on Mr Coffey

[54] Mr Coffey says that the first review process removed his previous reporting line. Mr Coffey now reports to the Arms Supervisor and through them to the Arms Manager and then to the District Operations Manager. He says that this impacts his reporting line and visibility

in the chain of command and further that it changed the function of various roles directly above him.

[55] For completeness it was stated in the statement of problem and in final submissions lodged on behalf of Mr Coffey that the first process resulted in the disestablishment of positions below Mr Coffey. Police deny this first process resulted in any disestablishment of positions below Mr Coffey. I am not satisfied from the proposal document or the decision that flowed that the first process resulted in the disestablishment of positions below Mr Coffey.

The second change process and its impact on Mr Coffey

[56] Ms Brazier was the decision maker for this change process as well which was called “Setting ourselves up for success.”

[57] There were emails from Ms Brazier to all Firearms staff including Mr Coffey from mid July 2022 to advise that work had begun on the organisational design for the new Unit and feedback would be sought once work is completed and there is a proposed structure. Ms Brazier set out in a July email that the business was growing and it was not about reducing headcount or making wholesale changes to jobs.

Consultation

[58] On 1 September 2022 Matthew Boddy, the Operations Manager Southern sent an email to Mr Coffey ahead of the consultation to wider staff later that same day. He set out in the email that [Police] wanted him to know in advance, recognising that he had raised a personal grievance and issued legal proceedings about the first change process.

[59] One of the relevant aspects of the change process for the Arms Officer role was to strengthen the operational workforce by proposing in the first instance to increase the number of Arms Officers by 31. There was also to be updating of the Arms Officer position description with the adding of a new bullet point and additional wording to existing bullet points. Mr Coffey said in his evidence he was never provided with a copy of the Arms Officer position description that was reviewed and implemented to apply to all Arms Officers in March 2021. It was that position description to which the changes set out above were proposed.

[60] Mr Boddy attached the proposed Arms Officer position description in his communication with Mr Coffey and advised from Police’s perspective the proposed changes

were minor and did not create a surplus staffing situation for Mr Coffey or anyone else. Mr Coffey was asked to keep the documentation confidential until consultation to the wider business later that same day.

[61] The Arms Leadership team and Ms Brazier met with all Firearms staff on 1 September 2021 and circulated wider the consultation document. There were facilitated half hour 'Ask me Anything' sessions for Firearms staff on 5,7,9 and 12 September and the consultation period ended at 5 pm on 15 September 2022.

Mr Coffey provides feedback

[62] On 22 September 2022 Mr Coffey emailed Mr Boddy with concerns that the email he had been provided with on 1 September 2022 and attached position description confirmed breaches that had occurred earlier in the review. He wrote that the proposed position description for the Arms Officer role is significantly different from the duties he had been undertaking in the role and set out some of the main changes but that these were not exhaustive. He also noted that the proposed position description sets the salary for the role at Band D which would represent a significant drop in salary for him. He referred to the absence of agreement with him about an employee representative who could be involved for consultation under clause 7.1.4 of his employment agreement and a failure to agree processes for reconfirmation or reassignment. Mr Coffey wrote that if the proposal was confirmed in light of the substantive changes to the Arms Officer role, it would appear contrary to assurances that he would not become surplus to requirements as the new position would not be suitable for reconfirmation.

[63] On 28 September 2022 Mr Boddy responded to Mr Coffey by email. He noted that while the consultation period had ended before the email, the feedback in it was considered. He confirmed that even if the proposed changes are confirmed Mr Coffey would continue to be remunerated at his existing level. Further that whilst the role of Arms Officer had undergone updates, the position description was written to cover a scope of duties to bring national consistency. Mr Boddy referred to the four tasks Mr Coffey had referred to and responded that they were not new and had formed part of the Arms Officer position description for some time. He did not accept that the change to the role was anything other than minor and stated there was no surplus staffing situation to trigger section 7 obligations. Mr Boddy also wrote that it was considered that reconfirmation was appropriate in line with the New Zealand Police restructuring policy and did not agree that Mr Coffey's role would become surplus to

requirements if proposed changes were confirmed. Mr Coffey was invited to contact him or Police representatives at Buddle Findlay if he wanted to discuss further the letter from Mr Boddy.

[64] There were some changes to the original proposal. It was decided though to proceed largely as proposed. The number of additional roles was increased from 31 to 43 and these could be a range of roles, not simply Arms Officer roles up to Band D.

[65] A decision document was provided to Firearms staff including Mr Coffey dated 12 October 2022.

Confirmation into the Arms Officer role

[66] On 13 October 2022 Ms Brazier wrote to Mr Coffey providing him with a copy of the updated Arms Officer position description and a letter for him to sign. She wrote that as stated in the decision document his position had been confirmed as having only minor impacts on it and he was asked to sign an acknowledgement of the letter advising of the changes and the updated position description.

[67] Mr Coffey responded to this in a letter dated 26 October 2022 to Mr Boddy. Ms Flint was copied into the exchange. Mr Coffey advised amongst other matters that he had considered the contents of the correspondence and declined to accept the changes to his terms and conditions of employment. Mr Coffey asked his counsel to bring the “continued breaches to his employment agreement” to the attention to the Authority. There was also reference to the failure to advise him of his right to obtain independent advice.

[68] By letter dated 2 November 2022 Mr Coffey’s counsel, Ms Robertson responded to Ms Flint and advised amongst other matters that the purpose of Police request that Mr Coffey sign and return a copy of the reconfirmation letter was to confirm that he was aware of and understood that the updated position description would apply to him from that date on. Police did not accept that they were seeking to vary his terms and conditions by agreement. Given that the expectations were now clear to Mr Coffey, it was stated that Police did not see a need for him to sign and return a copy of the reconfirmation letter unless he wished to do so.

Impact on Mr Coffey of the second change process.

[69] There were three changes made to the Arms Officer position description at the time of the second change process. Mr Coffey agreed when questioned about one of these changes that he already undertook front counter enquiries relating to all firearm regulatory activities. The second change involved some wording added to an existing bullet point about managing through handling and exhibit management of all non-police firearms, including all processing and related activities. Mr Coffey agreed that he already undertook that work. The one new duty was the issuing of improvement notices to licence holders which was a new statutory form.

[70] Mr Coffey said that he had not been provided with a position description until the second change process. He said that the new position description for the Arms Officer role is a reduction of his original duties and takes no account of additional duties that he had completed as the only Arms Officer in the Tasman district for many years. Mr Coffey said that changes to his duties had occurred incrementally over the “last three years” until the change processes and the influx of staff in the Tasman region when they became sudden and significant. He said the position description he was provided with bore little resemblance to the role he had been undertaking.

Principles of contractual interpretation

[71] There is a need to interpret what the parties agreed in their employment agreement. The Supreme Court has confirmed that the interpretation principles relating to contracts also apply to employment agreements.⁶

[72] There should be an objective approach to ascertain what is the meaning the agreement would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation they were at the time of the agreement. This objective meaning is deemed to be what the parties intended. Meaning is informed by context and a provisional conclusion as to meaning is to be cross checked against the context provided by the agreement as a whole with relevant background.⁷

⁶*New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd* [2017] NZSC 111 at [74] to [78].

⁷ *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 at [60] to [63] upheld in *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC.

[73] These principles were confirmed by the full Court of the Employment Court when interpreting employment agreements.⁸ I have applied them in interpreting the relevant provisions of the employment agreement in order to determine this matter.

What provision imported section 7 of the 1998-2000 contract into Mr Coffey's employment agreement?

[74] After the 1999 litigation Mr Coffey entered into the employment agreement with Police. Mr Coffey signed the employment agreement on 12 October 1999.

[75] Clause 10 of the employment agreement imported section 7 of the 1998-2000 Non-Sworn Collective Employment Contract (the collective contract):

10 TERMINATION OF CONTRACT IN THE EVENT OF RESTRUCTURING

In the event of the position ceasing to exist during the term of this contract through restructuring, the Appointee will have available to negotiate with the Commissioner the relevant options applying in the Police Non-Sworn Collective Employment Contract at the time the contract was agreed.

[76] It is common ground that this clause was not modified by subsequent variations.

Section 7 of the collective agreement

[77] The provisions in section 7 provide under the heading "consultation" some relevant definitions. Section 7 provides when and how the Police must engage with the Association in relation to a review likely to be conducted at National or District level with an opportunity to be involved in the consultation on the detailed planning and implementation of the process.⁹

[78] There is a clause that provides for the application of the provision to employees who are or may be affected by a restructuring situation.¹⁰

[79] There is a clause dealing with technical redundancy situations.¹¹

⁸ *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] ERNZ 304 at [27] – [31].

⁹ 1998-200 collective employment contract - causes 7.1 – 7.1.5. The Association is defined in the employment contract in clause 1.5 as the New Zealand Police Association and the New Zealand Public Service Association.

¹⁰ Above n 13 clause 7.2 of the collective contract.

¹¹ Above n 13 clause 7.3 of the collective contract.

[80] In the event of a surplus staffing situation the Commissioner may reconfirm in either the same or similar position.¹² If there is a surplus of staff, several options that include retraining, redeployment and severance are set out.¹³

Was there a breach of the consultation provisions in section 7 of the collective agreement?

[81] Clause 7.1 provides as follows:

7.1 Consultation

7.1.1 The parties agree that the principles of the consultative clause (7.22) of this Contract will apply to reviews of the Police. In reaching this agreement, the parties acknowledge their respective rights and obligations under clause 7.22.

7.1.2 The following definitions will apply in respect of this clause:

A "review" for the purposes of this clause refers to a process controlled by the Commissioner and is likely to impact significantly on organisational structure, staffing or work practices affecting employees. A review for the purposes of this clause does not include any Government generated processes that are subject to confidentiality requirements. The Commissioner acknowledges the obligation to continue consultation on the Martin/Police Review.

"The Commissioner" means the Commissioner or any officer holding delegated senior management authority on the Commissioner's behalf, including a District Manager or other officer at an equivalent level in the Police.

"The National Secretary of the Association" means the National Secretary of the Association or a member of the staff of National Office with designated authority for restructuring issues. The Association undertakes to nominate local representatives for consultation on being advised of a review.

7.1.3 Initial advice: The Commissioner will advise the National Secretary of the Association if the Commissioner considers that a review is likely to be conducted at National or District level.

7.1.4 Formal consultation: If it is determined that the proposed review is to proceed, the Commissioner will provide the National Secretary of the Association the opportunity to nominate a representative(s) who will be involved in consultation on the detailed planning and implementation stages of the process.

7.1.5 The aim of the consultative process, in accordance with clause 7.21 of this contract, will be to reach agreement and make recommendations or submissions to the Commissioner. If agreement is not reached the Association may make submissions to the Commissioner outlining the Association's concerns. The Commissioner in reaching a final decision will take into account any such submissions.

¹² Above n 13 clause 7.5. of the collective contract.

¹³ Above n 13 clause 7.7 of the collective contract.

[82] Mr Coffey and other Firearms staff were provided with comprehensive consultation documents for both change processes. There was an opportunity for feedback for each process of two weeks and the evidence supports that the feedback was considered.

[83] Mr Coffey says that there was a breach of clause 7.1 of the employment agreement because of the absence of advance advice and consultation required in clause 7.1.4 for a proposed review and the opportunity for him to nominate a representative.

[84] I accept the submission on behalf of Police that the reference in clause 7.1.5 of the employment agreement to clause 7.21 is clearly an error, as that clause is concerned with superannuation. The correct reference is clause 7.22 which is a clause concerned with industrial democracy and consultation. Clause 7.22 includes a statement about the mutual interest that the Police and Association have in maintaining productivity in the Police and the contribution that the parties jointly can make to ensuring this.

[85] Mr Coffey says that the reference to the Association in clause 7.1 should be modified to refer to him and he should have had the opportunity to have a representative and be consulted with about the planning and implementation stages of each change process.

[86] Clause 7.1 is different to the consultation clause considered in the 1999 litigation. That provided as below:

7.1 Consultation

The Employee will be advised by the Commissioner of any review (prior to commencement) which is likely to result in significant changes to either the organisational structure, staffing or work practices affecting the employee.

[87] There has been consideration by the Employment Court about modification to the provisions of a collective agreement to recognise that it is an individual employment agreement and that the employee is not a member of the union. The Court of Appeal in *United Food & Chemical Workers Union of NZ v Talley* considered this in the context of the expression “based on” in s 19(4) of the Employment Contracts Act 1991.¹⁴ The Court of Appeal held that the starting point is the collective award or contract which is modified to recognise that it is an individual employment contract. In such modification the Court of Appeal held a sensible and

¹⁴ *United Food & Chemical Workers Union of NZ v Talley* [1993] 2 ERNZ 360 at pg 370.

practical approach is called for. Although the Authority is considering an employment agreement, I conclude the same sensible and practical approach is appropriate.

[88] Modification of references to the Association in some clauses in section 7 such as options of reconfirmation and reassignment is sensible and practical and in accordance with clause 10. Such modification is also consistent with the approach taken in the 2014 litigation.

[89] Clause 7.22 is concerned with industrial democracy and recognises amongst other matters the relationship between the Association and Police and the mutual interest they have in maintaining productivity in the Police and the contribution both can have to jointly ensuring this happens. The aim of the consultation clause in 7.1 and its purpose is set out in clause 7.1.5 for the Association to reach agreement and make recommendations to the Commissioner. If agreement is not reached the Commissioner may make a final decision under clause 7.1.5 taking into account any submission from the Association. The clause has at its heart the relationship with the Association and the mutual interests the Association has with Police to maintain productivity. To modify clause 7.1.4 and replace Mr Coffey in the place of the Association to be consulted with at the planning and implementation stages of a review would not be sensible or practical or in line with the purpose of the clause.

[90] Clause 10 that imported section 7 into Mr Coffey's individual employment agreement refers to section 7 applying in the event of Mr Coffey's position "ceasing to exist". A reasonable person with the requisite background knowledge at the time of the agreement would understand that to mean that the parties intended that section 7 was engaged after and not before a change process when it would not be known what the effect on Mr Coffey's position would be.

[91] For the above reasons I do not conclude that Police breached clause 7.1.4 of the employment agreement.

Did both or either change process engage the surplus staffing provision in Mr Coffey's employment agreement?

[92] Whether the change processes engaged the surplus staffing provisions is the key issue for determination. Mr Coffey said that the surplus staffing provisions were engaged in both change processes. Police say no surplus staffing situation arose from either change process separately or viewed together.

[93] A surplus staffing situation exists as set out below in clause 7.4 of the employment agreement:

Staff Surplus Situation

A surplus staffing situation exists when, as a result of the review referred to in 7.1 and at the conclusion of the consultative processes, the Commissioner requires a reduction in the number of employees; or; employees can no longer be employed in their current position, at their current grade (salary grouping) or work location (i.e. the terms of appointment to their present position are altered).

[94] In the 1999 litigation the then Chief Judge Goddard stated when considering section 7.3 in the applicable individual employment contract to which Mr Coffey and Police were party at that time:¹⁵

- (1) Section 7.3 is perfectly general. A surplus staffing situation exists when, as a result of a review, there is to be a reduction in numbers or a change in functions. So long as any employees are affected, there is a surplus staffing situation for all employees to whom the review extends.
- (2) The portions of the review already adopted include the template for district organisation and the abolition of regions with the result that the RFAM positions and the DFAM positions cannot continue for long, as current positions are to be disestablished. The fact that disestablishment lies a short time in the future does not alter the fact that it has been decided upon and therefore a surplus staffing situation exists.¹⁶

[95] Ms Flint submits that neither the disestablishment of Mr Coffey's role nor a direct effect on his role is required for a surplus staffing situation to exist under clause 7.4.

[96] The statement made by the then Chief Judge in the 1999 judgment "so long as any employees are affected, there is a surplus staffing situation for all employees to whom the review extends" appear to support Ms Flint's submission. The reference to "all employees to whom the review extends" should be read with the second statement made by the then Chief Judge. It is clear that the decision about disestablishment of Mr Coffey's role whilst it had not yet occurred would almost inevitably occur within a short time frame. That was the basis for

¹⁵ Above n 1 – Non-Sworn Members of Police individual employment contract June 1996. Clause 7.3 is identical to clause 7.4

¹⁶ Above n 1 at pg. 31.

the finding that a surplus staffing situation existed because the review extended to and affected Mr Coffey.¹⁷

[97] Clause 7.4 refers to a surplus staffing situation existing when, as a result of the review referred to in clause 7.1 and at the conclusion of the consultation processes, the Commissioner requires a reduction in the number of employees, or employees can no longer be employed in their current position, at their current grade or work location.

[98] I have considered what meaning clause 7.4 would convey to a reasonable person with background knowledge at the time it was imported into Mr Coffey's employment agreement. The language in clause 7.4 should also be considered in the context of section 7 as a whole and its purpose. The broad thrust or scheme of the provisions of the almost identical section 7 was stated as below in the 1999 judgment:¹⁸

...to maximise the retention by employees of their employment, notwithstanding that the particular function that they were fulfilling may no longer be required by their employer.

[99] Mr Kynaston and Ms Robertson referred the Authority to another Employment Court judgment where the section 7 restructuring and surplus staffing provisions in the Non-Sworn Members of Police Collective Employment Contract 1998-2000 was considered in relation to reconfirmation. Similar statements were made about the broad purpose of such a provision being promotion and enhancement of job security and maintaining a skill base.¹⁹

[100] The interpretation advanced by Ms Flint would mean that Police would be required to consult with Mr Coffey about the options in section 7 such as reconfirmation, reassignment, and redeployment when he could continue to be employed in his role, at his current grade and in the same work location. That could potentially reduce the job security and increase the possibility of redundancy for other employees when their position had been or were likely to be disestablished. Objectively assessed I do not conclude that is what the parties could have intended. Such an interpretation would also be inconsistent with importing clause 10 which has an individual focus on Mr Coffey's position.

[101] I conclude the proper, sensible, and practical interpretation of clause 7.4 is that it applies to Mr Coffey rather than "employees."

¹⁷ Above n 1 at pg 444 lines 22 -31.

¹⁸ Above n1 at pg 450 lines 40 – 43.

¹⁹ *Commissioner of Police v New Zealand Police Association* [2000] 1 ERNZ 189 at pg 200.

Affected person

[102] Ms Flint submits that even if the Authority finds that the correct interpretation of clause 7.4 is that employees are read as relating only to Mr Coffey, Police accepted that Mr Coffey was an affected person.

[103] Ms Flint places reliance on the reference to affected staff in a letter from Ms Brazier to Ms Flint dated 21 December 2021 in which it was stated “The Proposed Consultation Document was released to all affected staff including Derek on 11 October ...” Ms Brazier also used the word affected in her oral evidence.

[104] Clause 7.2 of the 1998 – 2000 collective contract provides:

7.2 Application

These provisions relate to employees who are or may be affected by a restructuring situation. They will apply to all employees who for all intents and purposes have an ongoing expectation of employment.

[105] Clause 7.2 is identical to that considered in the 1999 litigation. Police accepted in 1999 that Mr Coffey “is or may be affected by a restructuring situation.” It was quite clear at that time that there was a restructuring situation that affected or may affect Mr Coffey. Police argued in the 1999 litigation that it had not got to the point of a surplus staffing situation. The then Chief Judge as set out earlier was able to ascertain from portions of the review already adopted that the position that Mr Coffey held could not continue for long and disestablishment was only a short time in the future and was in that way a surplus staffing situation.

[106] The use of the word affected by itself does not mean there is a surplus staffing situation. An employee can be affected by change that should reasonably and fairly be the subject of consultation without there being a surplus staffing situation. I am not persuaded in the current matter that the word affected automatically leads to the existence of a surplus staffing situation. In the 1999 judgment there was separate consideration whether a surplus staffing situation existed.

[107] I am further strengthened in that view when section 7 is considered in its entirety. In clause 7.5 which is concerned with reconfirmation and reassignment the first sentence begins with the words “When a surplus staffing situation exists” then refers to reconfirmation or

reassignment for “those employees affected by the above.” The words link back to the surplus staffing situation.

[108] A surplus staffing situation arises for Mr Coffey if there is a reduction in the number of Arms Officers in the Tasman area or that Mr Coffey can no longer be employed in his current position at his current grade (salary grouping) or work location which is Nelson and the terms of his appointment to his present position are altered.

[109] Mr Coffey was appointed in 2015 to his Arms Officer position reporting to an Inspector level. The change in the national reporting line in 2021 impacted this and Mr Coffey said reduced his visibility and seniority. Objectively assessed, the words in clause 7.4 when considered in the context of each other and with the words in clause 10 support some reasonably significant change is required for a surplus staffing situation to exist. I do not find that the first change process which changed the national reporting line was a significant change so as to result in a surplus staffing situation for Mr Coffey.

[110] Mr Coffey says that the potential impact of further change cascading from the first change process meant that he had a right to be consulted with, and considered for, reassignment to the new Tasman Arms Manager role created at the time of the first change process.

[111] The relevant section relating to reconfirmation and reassignment in section 7 are set out below:

7.5 Reconfirmation and Reassignment

When a surplus staffing situation exists the Commissioner may, following consultation and agreement with the Association, either reconfirm in the same or similar position, or reassign to an alternative position for which they are suitable, those employees affected by the above.

This may include placement to a suitable position in an existing agency or in a new structure or agency, which may be within the state sector or private sector, established as part of the restructuring. Where employees are transferred by placement into such a new structure or agency, and all the provisions of clause 7.3 are met, they will not be entitled to a severance payment under clause 7.8.6.

Where reconfirmation or reassignment takes place the following provisions will apply.

7.5.1 Reconfirmed in position

The parties agree that use of the Reconfirmation provisions will be maximised in terms of the following principles:

- (a) Where a position is to be transferred into a new structure or new agency, or there is a position in an existing agency, and where there is one employee who is a clear candidate for that position and the criteria below are met, then that employee is to be confirmed in it.
- (b) The criteria for reconfirmation shall be as follows:

- (i) The new job description is the same (or very nearly the same) as what the employee currently does;
 - (ii) The salary for the new position is the same;
 - (iii) The new position has terms and conditions of employment (including career prospects) agreed with the Association which are no less favourable;
 - (iv) The location of the new position is the same; (note: this need not necessarily mean the same building and/or the same street).
- (c) In those situations where there is more than one clear candidate, the Commissioner will consult to reach agreement with the Association, and either
- (i) the position will be advertised, with appointment made as per normal Police appointment procedures;
 - or,
 - (ii) agreement will be reached amongst the candidates on which candidate(s) will transfer if there is a clear preference amongst potential candidates to uplift other options under this contract.
- (d) Proposed reconfirmation will be advised to all affected employees to enable them to assess whether they meet the criteria, for those employees who meet the criteria and do not wish to be reconfirmed the only option available will be leave without pay.
- (e) Job descriptions (current and proposed) shall be available to those employees who are to be reconfirmed at the time that the reconfirmation list is published.
- (f) The Association may propose that an employee be reconfirmed where that employee believes his or her current job is sufficiently similar to a new job.

7.5.2 Reassignment

Following Reconfirmation and where under 7.5 agreement has been reached between the Commissioner and the Association on reassignment, if there are positions still vacant, then the Police and the Association will meet to assess the skills of all the employees still left without a position and to reach agreement on the process for appointment to new positions.

In determining the parameters for Reassignment the employer and the Association will deal with cases on an individual basis, with a view to placing as many employees as possible by matching individual skills with positions which require similar skills. This exercise may involve individuals undertaking some on-the-job training or attending training courses (e.g. keyboard skills). Such training needs will be identified prior to the individual being reassigned.

Employees to be reassigned under this process shall be consulted prior to any appointment being made.

Did the first change process extend to the second so as to be a cascading restructure?

[112] Further change was indicated from the first process but it was not known what impact there may be in the future on the Arms Officer roles.

[113] Work on the second change process began in or about July 2022 and the proposal was consulted about from September 2022. In relation to Arms Officers this included a proposed increase in numbers nationally and there were the amendments to the position descriptions set out earlier. The process was consulted on almost a year after the first change process.

[114] The second change process was under the umbrella of the Arms Programme. I am not however satisfied the increase in Arms Officer roles which were stated in the consultation proposal document to be the bolstering of resources on the front line to meet the new regulatory responsibilities was decided at the time of and flowed from the first change process. I reach the same view with respect to the amendments to the Arms Officer position description. These were set out in the consultation proposal document to identify specific responsibility in the role of Arms Officers in terms of compliance work and for strengthening the area of firearms handling.

[115] Mr Coffey has been critical that Police denied there was a surplus staffing situation on a narrow view that his role was not being disestablished. In the 1999 litigation the then Chief Judge did conclude there was a surplus staffing situation even though Mr Coffey's role had not been disestablished. This was on the basis that the portions of the review already adopted by Police made it clear that Mr Coffey's position could not continue for long and disestablishment lay a short time in the future.

[116] The situation in this matter is distinguishable. The first change process did not result in a surplus staffing situation for Mr Coffey and was not a restructure that cascaded to the second change process.

[117] As a result of this finding Police were not obliged to consult Mr Coffey about reassignment into the Arms Manager role at the time of the first change process in anticipation of subsequent change or hold off filling the Arms Manager role in the event that a surplus staffing situation may exist in the future for Mr Coffey.

[118] I set out briefly what occurred with the new Arms Manager roles.

Interviews

[119] The Arms Manager roles were advertised from 17 to 26 November 2021. The process for all twelve Arms Manager roles was led by Superintendent Wilson. The vacancies were

advertised internally. Two external agencies were engaged; however Superintendent Wilson did not consider this attracted as much talent from the market as he had expected. The interview panel was led by Superintendent Wilson. Also on the panel was a person from human resources and a manager external to Firearms and the district.

[120] Interviews took place for the role of Arms Manager in the Tasman District on 9 December 2021. There were five applicants for the Tasman district, however one withdrew. The panel recommended a Sergeant for provisional appointment to the role.

[121] The Sergeant was notified about this on 22 December 2021 and received an offer on 14 January 2022 and was provisionally appointed to the Arms Manager role on 11 March 2022. This provisional appointment was notified as required by s 61 of the Policing Act 2008.

Mr Coffey did not apply for the Arms Manager role

[122] Mr Coffey said in his evidence that if he had applied for the position of Arms Manager on merit he would have suffered financial loss because of a reduced salary and reduction to his Government Superannuation Fund pension. He considered that would be unfair when Police were required to consider him for reassignment which would not have impacted his remuneration. The reason for the concern about a reduced salary was because when Mr Coffey was reinstated to the Arms Officer role it was on his existing terms and conditions as a senior manager including preservation of his salary level. The effect of that with increases from time to time by way of variation was that he was paid at a higher level than the band attributed to the Arms Officer and Arms Manager roles. Mr Coffey accepted he had not raised concerns about a salary reduction if he applied on merit for the position with Police to ascertain if there were other options.

[123] Mr Coffey was also concerned that having invested a significant financial amount in his litigation previously he did not want to allow the Commissioner to arbitrarily change or ignore the terms and conditions of his employment. He did not apply for the Arms Manager Tasman role although considered he was a strong candidate for reassignment and had the required skills and attributes for the role.

Did the second change process give rise to a surplus staffing situation?

[124] Mr Coffey says that a surplus staffing existed for him from the second change process because his role, duties and responsibilities has changed considerably, and the role downsized.

[125] Mr Coffey's view is that there had been inadequate consultation with him at the time of the second change process and there has been a unilateral variation to his role. Police consulted quite comprehensively about what was proposed with the increase in Arms Officers and the three minor changes to the position description implemented in March 2021 before the decision was made. There were opportunities for feedback.

[126] Mr Coffey provided feedback a week after consultation period closed in an email dated 22 September 2022 having taken time to consider the situation and the potential outcome. Police accepted the late feedback and considered it.

[127] Mr Boddy responded to Mr Coffey's feedback but did not agree that there was a surplus staffing situation arising for Mr Coffey or that any impact on Mr Coffey's role was other than minor. It was confirmed that salary would stay the same for Mr Coffey. Mr Coffey was advised in the response that he could contact Mr Boddy or Buddle Findlay with any concerns or questions. There was no evidence of such further contact at that time.

[128] Ms Flint submits that there was no consultation made with Mr Coffey about what he actually did in his role and about its scope being reduced by virtue of a position description he had not seen or agreed to. Mr Coffey had an opportunity and did raise those matters. I conclude that there was appropriate consultation of the type a fair and reasonable employer could be expected to undertake bearing in mind the nature of the proposal and the potential impact for Arms Officers for both the first and second change process.

[129] Police say that for the most part Mr Coffey has been operating in accordance with the duties and responsibilities of an Arms Officer to ensure the legislation is adhered to and administered. It is accepted that he may have when instructed undertaken other duties from time to time above and beyond the Arms Officer role and that previously he had enjoyed some autonomy in the role. Police say that the additional duties were on an ad hoc basis as contemplated by his employment agreement in clause 3.3 and as directed by his manager under clause 3.2(g) and (h) of the employment agreement. I accept that the clauses were not modified by subsequent variations to his employment agreement.

[130] Police say that the Arms Officer position description in 2021 was developed for and applies to all Arms Officers within Police. As such it captures a broad range of tasks which will inevitably be allocated and performed differently within different districts depending on operational need and individual capabilities which is not unusual where there are roles performed by a number of employees in medium to large organisations.

[131] The three changes to the position description by virtue of the second change process were minor as set out earlier. Mr Coffey said only one was an additional duty. Mr Coffey refers more broadly to “restructure by stealth” to his duties and responsibilities over the previous three years and particularly so over recent years including with the permanent appointment of more Arms Officer in the Tasman area.

[132] Ms Flint submits that Mr Coffey was entitled to expect that his position of Arms Officer would continue unchanged unless he was consulted with, and consented to, the change. Ms Flint draws a parallel with the finding in *Commissioner of Police v Coffey* that a variation cannot be imposed unilaterally and that there cannot be agreement in the absence of full knowledge as to what the variation is about.²⁰

[133] The Employment Court has in *Sanson v Auckland Regional Council* found that an employee cannot expect their duties will remain unchanged from the commencement of employment even in the absence of a contractual provision.²¹ A change in duties is a different situation to that of a variation to an employment agreement considered in the 2014 litigation.

[134] Often cases that consider whether a role is the same or similar or less favourable involve situations where an employee’s role is disestablished and another role is offered to an employee. I accept Police’s submission that clause 10 of Mr Coffey’s employment agreement would require a significant change to the role for the options in section 7 to be negotiated. It is appropriate to approach the matter with that in mind.

²⁰ Above n 5 at [47].

²¹ *Sanson v Auckland Regional Council* [1999] 1 ERNZ 708 at pg 719 with reference to *Group Rentals NZ Ltd v Canterbury Clerical Workers IUOW* [1987] NZILR 255. The Employment Court judgment was upheld on appeal *Auckland Regional Council v Sanson* [1999] 2 ERNZ at pg 597. Police say in any event clause 3.2(p) in Mr Coffey’s employment agreement enabled them to require Mr Coffey to do any incidental thing consistent with the position for its proper performance.

[135] In *Sanson* the Employment Court adopted the formulation used in another Employment Court judgment to determine whether Mr Sanson's proposed position could be seen as a change in his job description or another appropriate position in terms of his employment agreement.²²

[136] I consider it would be appropriate to consider the matter on the same basis:

Would a reasonable person, taking into account the nature, terms and conditions of each post and the characteristics of the affected employee, consider that there was sufficient difference to break the essential continuity of the employment?²³

[137] Such an approach was used to determine an issue as to whether employment was offered on less favourable terms in a more recent Employment Court judgment *Waikato District Health Board v Archibald*.²⁴ The test in determining whether two positions were substantially the same is an objective one. It has been applied in several Employment Court judgments.

[138] In *Archibald* there was a travel component introduced of two hours and 45 minutes travel each day in a car that made the offered role less favourable. It was held that Ms Archibald was entitled to reject the role and be paid severance.²⁵

[139] In *Sanson* it was held that what was offered was a new position and not a change in a current job description because Mr Sanson's former position had been disestablished and ceased to exist. The differences in the offered role including the removal of management responsibilities were such that it broke the continuity of employment and was not a suitable transfer role. The redundancy agreement therefore applied.²⁶

[140] In *Wallis* it was held that there were several major dissimilarities between a mill position and a mine position including that it was not reasonable to compel a person who had spent their entire working life outside to work indoors and there was a diminution of status in the mill job. The employee was entitled to refuse the position and was superfluous to the company needs and entitled to redundancy.²⁷

²² Above n 21 at pg 719 lines 20 - 25 with reference to the test in *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984 at 995.

²³ Above n 21.

²⁴ *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [39].

²⁵ Above n 24.

²⁶ Above n 21.

²⁷ *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984 at pg 995 and 997.

[141] There will be some roles in which duties remain largely unchanged over time. The nature of the Arms Officer role is about the day-to-day delivery of the regulation and administration of the Arms Act and its Regulations. It is a role in the regulatory framework and operates in the context of broader regulatory reform moving from being “an administrator enforcer of the Arms Act to an effective regulator.” Duties in the Arms Officer role are more likely to change over time as a result.

[142] There was considerable evidence about the changes to the role. At the time of the investigation meeting Mr Coffey’s evidence was that amongst other matters, he spends about forty percent of his time reviewing and approving standard firearms licensing work which was previously undertaken by the District Licensing Manager and a team of clerks. He said that he was rarely involved in any standard firearms license processing and did not undertake approval of standard firearms licenses. Mr Coffey describes that as a new duty for him.

[143] Mr Coffey said that he no longer does tasks such as range inspections and is not the liaison person between clubs and Police for the Tasman area. Mr Coffey is no longer the sole Arms Officer in the Tasman area and says the appointment of an additional Arms Officer initially on a casual or fixed term basis since 2020 and then on a permanent basis from late 2021, increasing the number of Arms Officers to seven has impacted on his role. Some of the duties in the new position description have been allocated to individual Arms Officers. Mr Coffey also says that a number of duties have been transferred to others such as import permits, endorsement approvals, management of pistol clubs and others to national specialist sections. Mr Coffey says that his status and visibility have been diminished and the role was not the same as that he had been undertaking but rather downsized.

[144] Ms Brazier said in her evidence that the approval task was more important and moved into Band D as a result. Her view was that the changes were minor and the nature of the work has not really changed as it is still work focussed on activities about licensing. Ms Brazier also said that Mr Coffey has access to position descriptions online. Superintendent Wilson said that there was an operational push to get the approvals done and the level of work for approvals which he described as a “backlog surge” was not permanent and he wanted the Arms Officers including Mr Coffey in the community. He referred to the Arms Officers visiting ranges on Club Day and that was an expectation for Mr Coffey going forward.

[145] The Authority questioned Superintendent Wilson about the level of licensing approval changes at the investigation meeting. He did not have that information to hand but in a memorandum dated 3 November 2023 Police set out that prior to 15 March 2019 Arms Officers could approve licensing endorsements. Shortly after that the Deputy Commissioner sent an internal directive that all licensing endorsements need to be approved by a Police Officer holding the rank of Senior Sergeant or above. Once appointments were made that duty became part of the Arms Manager role.

[146] Ms Flint in her memorandum in response set out that Mr Coffey was unaware of the removal of this function from his role and his superiors were aware that he continued to approve licensing endorsements. The point is that the change in levels of approval in this regard arose following the events of 15 March 2019, even if it only came to the attention of Mr Coffey at a later time. This is illustrative that not all of the change arose at the time of the implementation of the position description in March 2021. The position description updated in March 2021 confirmed the position with the removal of that duty.

[147] The starting point is that Mr Coffey cannot expect that his duties remain unaltered from the time he was appointed. The purpose of the Arms Officer role very broadly is to lead the day-to-day effective delivery of the Arms Act and Arms Regulations.

[148] There are core duties that an Arms Officer needs to perform. Police say the position description was drafted in 2021 to reflect these duties with a view to national consistency. Some duties or the way they are undertaken have changed but those changes need to be seen in the nature of the role and the regulatory reform. There was also the impact of additional funding for more Arms Officers and this changed the way work was allocated and undertaken. Ms Brazier in her evidence explained that in the past the Arms Division was not staffed appropriately for the work required to be done and additional resource was bought in on a temporary basis.

[149] Mr Coffey had been asked on occasion to undertake tasks at a higher level than the Arms Officer role. He was clearly regarded as having the skills and experience to assist with these higher-level projects. As set out earlier in a broad sense his employment agreement contemplated these types of duties from time to time. These were not viewed by Police as the main duties of an Arms Officer.

[150] Mr Coffey is firmly of the view that the position description for Arms Officer does not reflect duties he had been undertaking before the restructure and that the role is substantively different and downgraded. The duties in Mr Coffey's role have changed over the eight years he has been in the substantive role particularly after 15 March 2019. I would need to be satisfied that there was sufficient difference in line with clause 10 of the employment agreement between the position description and the role Mr Coffey had been undertaking. I accept as more likely the submission of Police that Mr Coffey for the most part has been operating in accordance with the core duties and responsibilities of an Arms Officer but that it is a role that has evolved and will no doubt in the future continue to do so.

[151] Having heard the evidence I am not satisfied that a surplus staffing situation exists from the second change process for Mr Coffey.

Should Mr Coffey have been reconfirmed into the Arms Officer position following both change processes without his agreement?

[152] Mr Coffey was reconfirmed into his position after the first and second change processes. Police adopted the approach in its Policy for People and Restructuring (the Policy) on the basis that the role was the same or substantially the same.

[153] Reconfirmation without agreement but with notification is not unusual. On 26 October 2022 Mr Coffey wrote to Mr Boddy advising amongst other matters that he would not be accepting what he considered to be arbitrary changes to his terms and conditions of employment. He had asked for further correspondence to be sent to Ms Flint. Ms Robertson responded on 2 November 2022 and confirmed that there was no need for Mr Coffey to sign and return a copy of the reconfirmation letter which was simply to confirm that he was aware and understood the updated position description would apply to him from 7 December 2022.

[154] I conclude it was appropriate to reconfirm Mr Coffey after the first change process and after the second change process.

Was the review of the provisional appointment in accordance with the review of appointment policy?

[155] Mr Coffey reviewed the provisional appointment made to the Arms Manager Tasman role under the review of appointment policy (the policy). The provisional appointment to the

position was advertised on 11 March 2022. Mr Coffey advised of his intention to apply for review of the appointment on 17 March 2022 and submitted his application for review on 25 March 2022. The policy provided that any employee could file a review of an appointment where a candidate has been provisionally appointed.

[156] There was an initial assessment of the application for review undertaken by a human resource advisor and a change human resource leader. They assessed Mr Coffey's application and concluded with an initial assessment that the process of appointment did not identify flaws. If an employee is not an applicant for a position and seeks to review an appointment it must be considered by the Deputy Chief Executive People. Christine was in that position.

[157] In a memorandum dated 8 April 2022 to Christine from the human resource advisor and leader there was reference to the relevant aspects of the policy, the initial assessment as to the appointment process and their view that Mr Coffey's application did not appear to relate to any aspect of appointment. There were two options set out. The first was to decline Mr Coffey's application on the basis there were no grounds for a review and the second was to initiate an appropriate review.

[158] The outcome of the review was that whilst Mr Coffey was entitled to apply for a review, his application was declined on the basis there are no grounds for review as it did not relate to any aspect of an appointment. The decision noted that it related to the personal grievance and breach of contract and not the Sergeant's suitability for the position or the process Police followed to appoint her.

[159] Mr Coffey said that there were breaches of the policy. He says that he should have been provided with relevant appointment papers. The policy refers to the provision of "relevant documentation within 2 working days after receipt of the submission." Christine said in her evidence that she was not involved at that part of the process but her view was that the policy contemplates the human resource advisor providing information to the review applicant about the panels assessment of their own application compared with the provisionally appointed applicant. She would not have expected that Mr Coffey, because he did not apply for the role would have been provided with the panel's assessment of the Sergeant or other candidates. I am not satisfied that there was a breach of this part of the policy in the circumstances.

[160] Mr Coffey is on stronger grounds that there should have been a review. Firstly the policy refers quite broadly to what a review application "may relate to." The use of the word

“may” does not limit a review to grounds of merit and process relating to an appointment although those would ordinarily be the basis for review. Secondly the policy provides where an employee is not an applicant the appropriate person, in this case Christine, “will initiate an appropriate review based on the substance of the concerns.” That does not support that it is open to simply decline the application because there are no grounds for review. There is however a discretion as to the type of review that may be initiated. Christine said in evidence that an appropriate review may have been to address Mr Coffey’s concerns as an employment relationship problem which was already underway.

[161] I find that there was a breach in respect of the review policy when the application for review was declined. It was unjustified and Mr Coffey was disadvantaged as a result because he was entitled to conclude that Police would follow its policy.

Was there a breach of good faith by Police?

[162] In a memorandum dated 30 November 2022 Ms Flint set out the basis for a penalty for the alleged breaches of good faith. In relation to s 4 of the Employment Relations Act 2000 (the Act) it was alleged that Police had failed to be constructive in maintaining a productive employment relationship in which they considered and applied the terms of Mr Coffey’s employment agreement relating to a restructure despite being on notice to do so. Further that Police failed to be responsive and communicative and refused a request to meet and discuss Mr Coffey’s situation and his terms of employment and failed to respond in a timely manner.

[163] Ms Flint refers in submissions to schedule 1(c) of the Act that provides a code of good faith for employment relationships for Police in relation to provision of services by the obligations in clause 4(2) (c) to “create and maintain open, effective and clear lines of communication, including providing information in a timely manner.

[164] Police do not accept that it breached good faith obligations.

[165] I do not find a breach of good faith on the basis that Police did not agree that section 7 of Mr Coffey’s employment agreement was engaged by the first and second change process. There was a genuine dispute about whether the section 7 provisions of Mr Coffey’s employment agreement were engaged. The findings in this determination are consistent with Police’s interpretation of the employment agreement in the context of the two change

processes. Police did not simply disregard Mr Coffey's employment agreement provisions but considered them and did not conclude they applied.

[166] There was some delay in Police's responding at times over the period between 30 November 2021 and 9 March 2022. I accept Mr Kynaston's submission that outside of this period there was no issue of delay.

[167] Ms Flint acknowledges an error in a letter sent by her on 30 November 2021 that Mr Coffey wanted to explore the possibility of a permanent transfer to the Arms Supervisor role, being the role he was acting up in and was enjoying. Mr Coffey said that the letter should have referred to the Arms Manager role. Ms Flint had to follow up with Ms Brazier for a response on 13 December 2021 and in that letter there was reference to the interviews for the Arms Manager role occurring. An injunction was threatened in relation to any appointment. Ms Flint sent a further email on 22 December 2021 to Ms Brazier that no response had been received and her office would close for Christmas at 5pm on 22 December 2021 and would not reopen until 10 January 2022. Ms Brazier was asked to ensure that Mr Coffey was copied into any response during that period.

[168] A letter from Ms Brazier was not received at Ms Flint's office until 5.31 pm on 22 December 2021. Ms Brazier said that the delay was because she was taking advice and there were some different issues in each of Ms Flint's letters to consider. There was a concern that the response letter dated 21 December 2021 was delayed until after Police had been advised that Ms Flint's office had closed for Christmas. Mr Coffey was however copied in as Ms Flint had asked. It would be less likely that would have occurred if there had been some deliberate attempt to wait until Ms Flint's office closed for the summer holidays to gain some advantage.

[169] Ms Brazier's response on 21 December 2021 was quite comprehensive including the background to the proposed first change process being the weaknesses identified from 15 March 2019 terrorist attack and the Royal Commission recommendations. In relation to the roles referred to Ms Brazier said that there was still someone in the supervisor role on a substantive basis and to appoint Mr Coffey to the Arms Manager position two appointments above his substantive role would breach internal policies and the Policing Act.

[170] Ms Flint then wrote a further letter dated 13 January 2022 to Commissioner of Police. There was some delay in that letter reaching Ms Brazier and she did not see it until 18 January 2023. Police say that this was the first time that Mr Coffey maintained he was entitled to be

reassigned into the Arms Manager Tasman role. That is not Mr Coffey's view, he said that he raised it earlier with his previous manager and Superintendent Wilson. On 9 February 2022 Police briefed the matter to Buddle Findlay.

[171] On 9 February 2022 Ms Robertson advised Ms Flint that Buddle Findlay had been instructed and she noted there was some history to the matter and they were taking instructions and would be in touch. A substantive response was received on 9 March 2022 which was a period of two months from Ms Flint's letter of 30 November 2021. Ms Flint submitted that it is notable that the provisional appointment to the Arms Manager Tasman role was made on 10 March 2022 the following day. I could not be satisfied from the evidence that correspondence was delayed deliberately on this basis.

[172] The delays were unfortunate. There was historical complexity which Police and counsel needed to carefully consider. Mr Coffey had had two previous successful judgments against Police and they required some careful consideration in the context of the current change process. I do not conclude that lack of timeliness was deliberate. From 9 March 2022 the communication was timely, and the parties agreed to and attended mediation on 17 March. On 23 March 2022 Police provided an undertaking that Mr Coffey's role would not be affected by the restructure process although did not agree to halt the process in respect of the Tasman District Arms Manager role.

[173] To the extent that the issue of timeliness breaches good faith for the period before 9 March I do not conclude the threshold in s 4A is reached that the failures were deliberate, serious and sustained or intended to undermine the employment relationship or employment agreement for a penalty to be awarded.

[174] I am not satisfied from consideration of the communication that Police refused to meet with Mr Coffey. The communication whilst initially in writing, it did include from early March an indication that Police wanted to engage and resolve Mr Coffey's issues and there was mediation and an undertaking.

Remedies

[175] Mr Coffey has been successful with a personal grievance that he was unjustifiably disadvantaged when Police did not follow its review policy. It was not the action of a fair and reasonable employer. Mr Coffey is entitled to consideration of a remedy. I accept that Mr

Coffey was upset when his application for a review was declined. He had decided to review the provisional appointment rather than pursue an interim injunction.

[176] If there had been a review undertaken where there was not an issue with the appointment process, an independent reviewer would have investigated the appointment process and would have prepared a report with findings and recommendations and referred that back to Christine. The outcome may not have advanced matters but there is no certainty about that.

[177] In all the circumstances I consider an award of \$5000 compensation is appropriate. There are no issues of contribution. The award is not reduced.

Findings and orders made

[178] The Authority has made the following findings and orders:

- (a) Clause 7.1.4 of the employment agreement was not breached.
- (b) The existence of a surplus staffing position is to be assessed in relation to Mr Coffey's position.
- (c) The use of the word "affected" does not by itself give rise to a surplus staffing situation.
- (d) A surplus staffing situation under clause 7.4 did not exist for either the first or second change processes.
- (e) The first change process did not give rise to a cascading restructure to the second change process.
- (f) Police were not required to consult with Mr Coffey about reassignment to the Arms Manager Tasman role or leave that role unfilled in the event that a surplus staffing situation may arise in the future after the first change process.
- (g) Consultation was appropriate for both change processes considering their nature and potential impact.
- (h) Reconfirmation of Mr Coffey into his role as Arms Officer was appropriate at the conclusion of each change process and did not require agreement.

- (i) The review of the provisional appointment to the Arms Manager Tasman role was not conducted in accordance with the review of appointments policy.
- (j) Police are ordered to pay to Mr Coffey the sum of \$5000 under s 123(1)(c)(i) of the Employment Relations Act 2000. There is no issue of contribution.
- (k) To the extent there was a breach of good faith about the timeliness of communications by Police it was not to the threshold required for a penalty.

Costs

[179] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Flint may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Kynaston and Ms Robertson have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[180] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²⁸

Helen Doyle
Member of the Employment Relations Authority

²⁸ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1