

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 5
5390831

BETWEEN CHRISTOPHER DAVID
 GRAVESON
 Applicant

AND COMMISSIONER OF POLICE
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Peter Brosnahan, Counsel for Applicant
 Peter Churchman QC, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 15 January 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Christopher Graveson was employed as a sworn Police Officer in the New Zealand Police for 36 years until his retirement in 2012. Mr Graveson says his retirement was in fact a constructive dismissal brought about by a sustained campaign by Police to prevent him from doing his job. This occurred after he had made a complaint of bullying about the officer to whom he reported.

[2] Mr Graveson originally commenced proceedings in the Employment Relations Authority on 3 August 2012 and filed an amended statement of problem on 16 January 2013. He now applies for an order under s. 178 of the Employment Relations Act 2000 (the Act) for the removal of the matter to the Employment Court for hearing and determination of his personal grievance.

[3] The Commissioner notes that Mr Graveson has not identified which important questions of law are likely to arise and says there are no grounds for removal as this is

a straightforward claim of constructive dismissal. He has, however, indicated his willingness to abide by the decision of the Authority over the removal application.

Grounds for removal

[4] Section 178 (2) of the Act provides that:

The Authority may order the removal of the matter, or any part of it, to the court if –

- a. an important question of law is likely to arise in the matter other than incidentally; or
- b. the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
- c. the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- d. the Authority is of the opinion that in all of the circumstances the Court should determine the matter.

[5] Mr Graveson's application is made on two grounds, the first being that the proceedings raise serious allegations against senior officers of the New Zealand Police. He asserts that it is in the public interest for these allegations to be determined by the Court and invites the Authority to exercise its discretion under s. 178(2)(d) to remove the matter.

[6] The second ground of Mr Graveson's application is that important questions of law are likely to arise about the scope and jurisdiction of the Authority or Court to revisit reports of independent investigations and Code of Conduct complaints carried out during Mr Graveson's employment. Mr Graveson alleges deficiencies in the investigations, including impropriety or bias in the way in which investigations were carried out by persons engaged by the Commissioner.

[7] He also says important questions of law are likely to arise in respect of the admissibility of evidence in relation to those investigations. Mr Graveson further cites difficult and complex questions about evidence management as a reason for the matter being better suited to the more formal information management regime of the Court.

Is it in the public interest for serious allegations against senior Police officers to be determined by the Court?

[8] Mr Brosnahan has not claimed that urgency attaches to Mr Graveson's situation. He therefore implicitly acknowledges that the application does not satisfy both limbs of s. 178(2)(b). Instead, he asks the Authority to consider the public interest in having the Court determine the matter and to exercise its discretion under s. 178(2)(d).

[9] In his submissions in support of Mr Graveson's application, Mr Brosnahan cites other instances involving the Commissioner where removal has occurred.¹ He submits that the allegations will undoubtedly generate stark conflicts of evidence and that it would be more appropriate for cross examination to occur in the more formal adversarial setting of the Court.

[10] The Authority has exclusive jurisdiction to make determinations about employment relationship problems including personal grievances.² It is an intrinsic part of the Authority's investigative function to assess allegations made by employees and employers against each other. Mr Graveson's case is no different in that respect from many other cases investigated by the Authority.

[11] I have considered Mr Brosnahan's submissions about the suitability of the allegations being subject to the formality of cross examination in the Court. I note that the cases he has cited were decided before the Act was amended to give parties the right to cross examination in Authority investigations.³

[12] The Authority is an investigative body which is quite capable of determining the factual issues before it in this case. It will be assisted by competent cross examination from the experienced counsel representing each party in these proceedings. I am not persuaded by Mr Brosnahan's submissions that removal to the Court is necessary for dealing with conflicts of evidence in this matter.

¹ Including *Andrew v Commissioner of New Zealand Police*, [2003] 2 ERNZ 514; *Hawkins v Commissioner of Police*, EmpC Auckland WC19/05, 1 September 2005; *Waugh v Commissioner of Police*, ERA Wellington, WA30/03, 10 March 2003; and *Coy v Commissioner of Police*, ERA Christchurch, CA46/07, 19 April 2007

² Section 161 of the Act

³ Section 160 (2A) of the Act, inserted by section 29(1) of the Employment Relations Amendment Act 2010 No 125

[13] Nor am I persuaded by his submission that the seniority of the Police personnel against whom allegations have been made lends weight to Mr Graveson's application. The Authority is not restricted to considering matters involving only the lower ranks of the Police, or any other organisation.

[14] The Act does not differentiate between classes of employees or relationships in its personal grievance provisions, as noted by Shaw J in *Centre for Advanced Medicine Limited v Sprott*⁴. Those provisions "afford legal remedies to all employees and employers. The scheme of the Act presumes that these cases are to be dealt with by the Authority in the first instance unless one or more statutory criteria for removal are made out"⁵.

[15] I do not accept that valid reasons exist for the exercise of my discretion under s. 178(2)(d) to remove this matter to the Court for hearing and determination in the first instance.

Is an important question of law likely to arise other than incidentally?

[16] Mr Graveson's application for removal refers to questions of law arising in relation to investigation reports. These questions relate to the scope and jurisdiction of the Authority or Court to revisit reports that are the subject of allegations from Mr Graveson about the report writer's failure to take salient matters into account. The application also raises the likelihood of important questions of law arising in relation to admissibility of evidence relating to those investigations.

[17] In his submissions on the application, Mr Brosnahan refers to an important question of law likely to arise in relation to the scope of the power to review an appointment under s. 65 of the State Sector Act 1988. He also refers to the scope of a disadvantage grievance in the context of a promotion or new appointment. The questions of law likely to arise are not specified, but Mr Brosnahan notes their possible implication for other employees of the Police, the state sector, or employees in general.

[18] I have difficulty in assessing the likelihood of important questions of law arising from these two areas, other than incidentally, in the absence of any indication of what those questions may be or how they relate to Mr Graveson's personal

⁴ Unreported, EC, AC 20/05, 10 May 2005

⁵ Ibid at [19]

grievance claim. Mr Graveson's amended statement of problem makes no reference to review of appointment procedures.

[19] It is unclear whether Mr Brosnahan's submissions refer to the engagement of independent investigators by the Commissioner. If so, I do not accept that important questions of law are likely to arise, although it may be that issues of statutory interpretation may arise in relation to relevant provisions of the State Sector Act. These are matters that are within the capability and experience of the Authority to determine.

[20] The current proceedings do not relate to a personal grievance for disadvantage in the context of a promotion or new appointment. It seems unlikely, therefore, that such matters are central to Mr Graveson's claim to have been constructively dismissed, or that they would give rise to important questions of law other than incidentally.

[21] Mr Graveson claims to have been forced to retire by the actions of his employer. Accordingly, he has the onus of establishing a prima facie case that his retirement was a dismissal. Then the evidential burden shifts to the Commissioner to justify that dismissal. The focus of any investigation or hearing will be on the conduct of the employer.

[22] The Commissioner of Police (the Commissioner) says Mr Graveson's complaints were thoroughly investigated, both internally and by senior independent counsel engaged by Police. His complaints were not upheld in those investigations. The fact that investigations took place, both internally and by engagement of senior external counsel, will be relevant. Also relevant will be any consideration by the employer of the particular findings and conclusions of those reports, and any reliance it placed on them.

[23] Issues relating to the reports may form part of the context but I do not accept that important questions of law will arise other than incidentally in relation to the jurisdiction of the Authority or Court revisit those reports. I agree with Mr Churchman's view that any complaints about the authors of the reports, or their actions, are incidental to Mr Graveson's claim of constructive dismissal.

[24] Mr Graveson states the likelihood of important questions of law arising in relation to the admissibility of evidence concerning the investigations. In Mr

Brosnahan's submissions he has referred to those questions relating to evidence showing impropriety or bias in the conduct of the investigations. For the same reason given above, I do not accept that important questions of law will arise other than incidentally. I note also that the Act gives the Authority⁶ similar powers to the Court⁷ to take into account such evidence and information as in equity and good conscience it sees fit, whether strictly legal evidence or not.

Other factors

[25] Mr Graveson has raised an issue over evidence management as favouring removal to the Court. He has referred to current issues over requests for disclosure of documentation that have not been adequately responded to by the Commissioner. It is my view that such issues are capable of resolution by the Authority which has the power to call for evidence and information from the parties⁸. It may also require the attendance of a person to produce any necessary documents in their possession or under their control if it deems that necessary.⁹ I do not accept that evidence management is a reason favouring removal of this matter to the Court.

Determination

[26] I decline to order the removal of this matter to the Court for hearing and determination, for the reasons given above.

Costs

[27] Costs are reserved until the conclusion of the Authority's substantive determination of the matter.

Trish MacKinnon
Member of the Employment Relations Authority

⁶ Section 160(2)

⁷ Section 189(2)

⁸ Section 160(1)(a)

⁹ Schedule 2, clause 5