

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 52
5400006

BETWEEN GRAHAM HOWSE
 Applicant

AND COMMISSIONER OF POLICE
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Scott Jefferson, Counsel for the Applicant
 Eleanor Lennie, Counsel for the Respondent

Investigation Meeting: 18 February 2014 at Napier

Determination: 22 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Howse was a sworn Police Officer for 15 years before his resignation on 11 November 2011. Mr Howse claims he was constructively dismissed and his personal grievance was raised within the 90 days required by law. In the event the Authority finds his grievance was not raised in accordance with that time frame, Mr Howse applies for leave to raise his grievance out of time.

[2] The Commissioner of Police (“the Commissioner” or “Police”) says Mr Howse failed to raise his personal grievance within 90 days and he does not consent to the grievance being raised out of time. The Commissioner says there were no exceptional circumstances that justify the Authority granting leave to Mr Howse to raise his personal grievance out of time. Furthermore, the Commissioner says Mr Howse voluntarily resigned and denies he was constructively dismissed.

[3] The Authority's investigation meeting was solely for the purpose of determining the preliminary issue of whether Mr Howse's personal grievance had been raised within 90 days or, if not, whether the delay was occasioned by exceptional circumstances and it would be just for leave to be granted for Mr Howse to pursue his grievance.

Relevant Facts

[4] Mr Howse consulted a lawyer, Andrew Gallie, on 19 December 2011. Mr Gallie wrote a short letter, dated 22 December 2011, addressed to the Commissioner, and marked for the attention of Lynne Harrison, Human Resources Manager. He advised he had instructions to act for Mr Howse who considered he had a personal grievance and that his resignation on 11 November 2011 amounted to a constructive dismissal.

[5] Mr Gallie's letter noted he had only recently received instructions from Mr Howse and was not in a position to provide "*a full factual statement outlining the circumstances on which Mr Howse relies in raising his grievance*". It also noted that Mr Gallie would be discussing matters further with Mr Howse in the New Year "*in order to arrive at the point where we are able to provide you in writing with a detailed synopsis of these matters together with an indication of the remedies sought*".

[6] Mr Gallie did not contact Police again with details of Mr Howse's personal grievance until 6 September 2012. At that time he enclosed a synopsis prepared by Mr Howse which detailed the chronology of events leading up to his resignation. The letter stated that Mr Howse relied on that chronology in support of his claim to have been constructively dismissed. Mr Gallie set out the remedies sought by Mr Howse and ended by observing that the matter seemed suited to discussion at mediation. He sought an indication from Police whether it would be prepared to attend mediation.

[7] Ms Harrison responded on 17 September 2012 noting that the personal grievance had not been raised within time and New Zealand Police did not consent to it being raised after the expiration of the 90 day period.

The Authority's investigation

[8] The parties initially agreed that the Authority would determine this preliminary matter on the papers following their filing of affidavits and submissions. After all documents had been filed, counsel for Mr Howse successfully sought a hearing due to conflicts of evidence over facts relevant to the primary issue of whether a grievance had been submitted within 90 days.

[9] The investigation meeting was set down twice, and adjourned twice, for good reasons relating to a bereavement affecting counsel for one party in the first instance, and a serious health condition affecting a key witness in the second instance before the investigation was finally able to proceed on 18 February 2014.

Issues

[10] The issues for determination are:

- (i) Whether Mr Howse raised his personal grievance within 90 days; and, if not,
- (ii) Whether leave should be granted to Mr Howse to raise his personal grievance outside the 90 day period.

The law

[11] Where a grievance is not raised with the statutory 90 days and the employer does not consent to the employee raising the matter after the expiry of that period, the employee may apply to the Authority for leave to raise the grievance outside the statutory time frame. The Authority may, after giving the employer an opportunity to be heard, grant leave if it is satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances and considers it just to do so¹.

[12] The Act provides examples of exceptional circumstances at section 115:

For the purposes of section 114(4)(a), exceptional circumstances include-
(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

¹ Section 114 Employment Relations Act 2000 (the Act)

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

Was the grievance raised within 90 days?

[13] Mr Howse now accepts that the letter of 22 December 2011 on its own is insufficient to meet the requirements of s.114. It fails to meet the Creedy test of specifying the grievance “*sufficiently to enable the employer to address it.*”²

[14] However, he submits the totality of communications between him and his employer suggests the employer would have been well aware of the circumstances surrounding his claim of constructive dismissal. Support for the proposition that the Authority may consider the totality of communications between the parties in its assessment as to whether a grievance has been sufficiently raised comes from *Liumaihetau v Altherm East Auckland Ltd*³.

[15] Mr Howse notes in particular the following information available to the Commissioner, submitting it was sufficient to enable Police to be aware of the circumstances regarding his claim and to respond to his grievance:

- Various meetings he attended with his employer during which he raised his ongoing concerns over what he considered to be workplace bullying;
- His written response to the Performance Implementation Plan, in which he raised the same theme;
- His extended medical leave and the reasons he gave his employer for his requirement for that leave;
- His exit interview form in which he expressed his reasons for resigning as being workplace bullying; and the discussions held in the exit interview.

² *Creedy v Commissioner of Police* [2006] ERNZ 517 at 529

³ [1994] 1 ERNZ 958 at 963

Meetings

[16] In the course of the investigation meeting Mr Howse acknowledged he may have first raised the issue of workplace bullying in writing in his exit interview. He said he had mentioned it “*casually*” before raising it when he was put on a Performance Improvement Plan (a “PIP”).

[17] Sergeant Ross Gilbert, who was Mr Howse’s supervisor, recalled Mr Howse using the phrase “*workplace bullying*” for the first time after a meeting on 21 September 2011. Sergeant Gilbert had organised the meeting to discuss the implementation of the PIP that had resulted from a June 2011 employment investigation concerning Mr Howse. The outcome of the employment investigation had been that Mr Howse was required to attend a formal counselling meeting with the District Commander. In the course of the meeting he agreed to being placed on a PIP. This was recorded in a letter from the District Commander to Mr Howse dated 15 August 2011.

[18] The letter recorded the purpose of the PIP was to monitor Mr Howse’s compliance with an 8 Point plan. The District Commander noted it was Mr Howse’s failure to comply with the original 8 Point plan, dating from November 2006, which was largely why his conduct had been the subject of the employment investigation.

[19] Sergeant Gilbert did not recall Mr Howse referring to workplace bullying in the meeting of 21 September 2011, but said he had mentioned it at some time afterwards. Inspector Christopher Wallace also attended the 21 September 2011 meeting and gave evidence that Mr Howse did not raise any issue of workplace bullying in the meeting.

[20] At some point after the meeting on 21 September 2011 when Mr Howse did refer to workplace bullying in conversation with Sergeant Gilbert, the sergeant recalled responding that it was not workplace bullying just because Mr Howse disagreed with the process.

Mr Howse’s written response to the PIP

[21] In his evidence Sergeant Gilbert noted that Mr Howse was “*a little surly*” about the PIP because, in his view, there were no issues with his performance requiring him to be placed on it. Sergeant Gilbert signed the PIP as supervisor but

Mr Howse did not sign it. Mr Howse recorded on the “*Comments*” section of the form that “*I would prefer to speak to my Union rep (name omitted) before signing this document*”.

[22] Sergeant Gilbert noted in evidence that neither Mr Howse, nor the Police Association which represented him, complained or raised anything they wanted Sergeant Gilbert to follow-up on in the nature of any grievance.

Mr Howse’s extended medical leave and the reasons he gave for requiring it

[23] The requirement for Mr Howse to provide medical certificates for each absence on sick leave was imposed in January 2011 on the basis of the amount and regularity of his sick leave usage. There is no evidence that Mr Howse raised concerns with his employer over this during his employment.

[24] Mr Howse stated in evidence that the “*ongoing and sustained bullying*” took a toll on his health and he was prescribed three weeks off work by his doctor. He said in his written evidence that he spoke to Sergeant Gilbert and told him why he needed the time off work. Sergeant Gilbert’s evidence is that when Mr Howse texted him to tell him of his sick leave he asked him to bring in his medical certificate. Mr Howse came in and simply handed him the medical certificate without any discussion. He then left.

[25] Mr Howse acknowledged under questioning that Sergeant Gilbert “*might be right*” that he (Mr Howse) had simply handed the medical certificate to him without discussion. I note at this point that I found Sergeant Gilbert to be more consistent in the evidence he gave on this and other matters and I prefer his account of receiving the medical certificate without discussion.

The exit interview form and the exit interview

[26] Inspector Wallace gave evidence that the first time he was aware of Mr Howse referring to workplace bullying was on 9 November 2011 in his exit interview. Mr Howse had handed Inspector Wallace his completed exit interview form at the beginning of the interview and had recorded workplace bullying as one of his reasons for leaving NZ Police.

[27] Inspector Wallace said he asked Mr Howse what he meant by “*workplace bullying*” and in his reply Mr Howse referred to the PIP; his performance appraisal in August 2011; a meeting he had had with the Employee Practices Manager which made him feel “*fobbed off*”; and the requirement that he supply a doctor’s certificate for every occasion of sick leave. He referred to this as unreasonable and “*bully boy*” tactics.

[28] Inspector Wallace said the exit interview was amiable with Mr Howse making some constructive comments about opportunities for improving policing in Waipukurau. He did not have the understanding that Mr Howse was lodging a complaint or wished him to follow up on these matters. Mr Howse did not dispute this and said he had “*given up by then*” and had “*pretty well no faith in the Police and had decided to follow up outside of Police*”. He acknowledged that he did not expect Inspector Wallace to follow up from the exit interview.

[29] Inspector Wallace sent the Exit Interview form to the Human Resources Manager but did not recall whether he included a copy of the notes he took during the interview. He had weekly meetings with Ms Harrison and thought he had discussed the exit interview with her at some stage but could not recall the details. Ms Harrison had no recollection of the discussion taking place.

[30] Neither Sergeant Gilbert nor Inspector Wallace was aware of Mr Gallie’s letter of 22 December 2011 until they were asked to prepare affidavits in 2013 in relation to the Authority’s investigation.

[31] Ms Harrison received Mr Gallie’s letter in December 2011 and said she took no action other than alerting the National Manager Employee Relations at Police Headquarters. This was because the letter stated Mr Gallie’s intention to provide a full factual statement, outlining the grounds relied on by Mr Howse, “*in the new year*”. She did not think it necessary to raise the matter with Sergeant Gilbert until that further information was provided about Mr Howse’s grievance.

[32] Ms Harrison said she did not know what matters Mr Howse would be relying on for his constructive dismissal claim as there were potentially several such issues including the PIP. She had had correspondence with Mr Howse during his employment over issues concerning time off in lieu and sick leave and was aware Mr Howse held different views from her over those issues. However, it was not

uncommon for her to bring up leave issues with employees and she had no idea Mr Howse regarded her raising these matters as bullying.

[33] When asked why she had not contacted Mr Gallie, Ms Harrison responded that it was his responsibility to follow up on his initial letter as he had indicated he intended. She was aware of Mr Howse's exit interview form and thought it possible the issues he raised in the form may be part of his grievance but it was also possible the exit interview was the end of that matter. She did not think it was her role to second-guess what Mr Howse's grievance was about and she awaited the clarification that was to be provided in the promised follow-up letter.

[34] I have considered counsel for Mr Howse's submissions that the totality of the communications listed above and relied on by Mr Howse were sufficient to alert his employer to the nature of his personal grievance, such that the employer could address it. I am not persuaded that they were sufficient for that purpose.

[35] Mr Gallie's letter of 22 December 2011 gave no indication why Mr Howse considered his resignation to be a constructive dismissal. Mr Howse's reference to workplace bullying in discussion with Sergeant Gilbert seemed more an expression of disgruntled displeasure than an indication of a significant problem. His written response to the PIP, that he would prefer not to sign it until he had spoken with his union representative, signalled he was taking a cautious approach and would not have given his employer cause for concern. He gave Sergeant Gilbert no reasons for wishing to take extended sick leave.

[36] I find the only communications that could have given the Commissioner an idea of the reason for Mr Howse's belief that he had been constructively dismissed were the exit form and the exit interview with Inspector Wallace on 9 November 2011. On balance I do not accept that it was reasonable to expect the Commissioner, through Ms Harrison for whose attention the letter was marked, to deduce from Mr Gallie's letter and the exit interview form what Mr Howse was relying on to sustain his claim to have been constructively dismissed. Ms Harrison was aware of a number of instances during Mr Howse's employment in which he disagreed with his employer's approach.

[37] I agree with Ms Harrison that it was not up to her to anticipate which particular matter or matters Mr Howse might be relying on for his grievance. It was

up to Mr Gallie to provide that information as he indicated he would. I find there was no onus on the Commissioner to take any further action until such time as Mr Howse or his representative disclosed the particular matters relied on as grounds for the grievance and I am not satisfied that the letter of 22 December 2011 and the other information available to Police were sufficient to allow the Commissioner to know the nature of Mr Howse's personal grievance sufficiently to address it.

[38] In short I find Mr Howse did not raise his personal grievance within 90 days as required by s.114 of the Act.

Should leave be granted to Mr Howse to raise his grievance after the expiration of the 90 day period?

Exceptional circumstances

[39] The Supreme Court in *Creedy*⁴ considered “*exceptional circumstances*” as treated by the Court of Appeal in *Wilkins and Field Ltd v Fortune*⁵ as those which are “*unusual, outside the common run, perhaps something more than special and less than extraordinary*”. The Supreme Court preferred the first part of that meaning, i.e. “*unusual, outside the common run*”, or “*the exception to the rule*”.

[40] The Employment Court has noted, for example in *McMillan v Waikanae Holdings (Gisborne) Ltd (trading as McCannics)*,⁶ that the examples of exceptional circumstances in s.115 are not intended to be exhaustive, and may include one or more of the circumstances.

[41] Mr Howse relies on s115(b) of the Act. He says he made reasonable arrangements to have the grievance raised on his behalf by Mr Gallie who unreasonably failed to ensure that it was raised within the required time. I note that Mr Howse's statement of problem also relied on s.115(a). However, he abandoned reliance on that subsection during the investigation meeting. Counsel for Mr Howse submits Mr Howse instructed Mr Gallie to raise his personal grievance for him and that Mr Gallie failed unreasonably to do so. Mr Howse said he was aware of the 90 day time frame for raising his grievance before instructing Mr Gallie.

⁴ *Creedy v Commissioner of Police* [2008] ERNZ 109 at 119

⁵ [1998] 2 ERNZ 70

⁶ (2005) 7 NZELC 97,859

[42] Mr Gallie's evidence was that he received instructions to act for Mr Howse on 19 December 2011. In the course of their meeting Mr Howse gave him details of the circumstances leading to his decision to resign and why he considered himself to have a personal grievance arising from that decision. Mr Howse gave him a written synopsis of the key events. Mr Gallie was to raise Mr Howse's personal grievance with Police, and would do so before Christmas. They discussed the requirement to raise a personal grievance within 90 days.

[43] Mr Gallie says at the time of sending his letter of 22 December 2011 to Police he was unaware of the requirement set out in the *Creedy* case for sufficient detail to be included to enable the employer to respond. He had not practised employment law for some years but had been confident of his knowledge of the law relating to the raising of a grievance. He believed his letter to have been sufficient to raise Mr Howse's grievance.

[44] He remained of that view until he updated his knowledge of current requirements for raising a grievance after receiving a letter from Police dated 17 September 2012. This was in response to Mr Gallie's letter of 6 September 2012 which had had enclosed Mr Howse's synopsis of events leading up to his resignation.

[45] Mr Gallie's reason for not providing the detail of Mr Howse's grievance in the New Year of 2012, as he had indicated he would, was that a conflict of interest had arisen for him sometime after Christmas 2011. The conflict related to his appointment by the Family Court to act as counsel for the children of Mr Howse's partner. Mr Gallie said he explained to Mr Howse that he could not act for him while that matter was under way.

[46] Mr Gallie said he told Mr Howse he could "*rest*" the employment matter until the family issue had been resolved or he could instruct different counsel to progress his grievance. Mr Howse took the latter option. He had no further discussions with Mr Howse regarding his employment matter until July 2012 when the family situation was resolved.

[47] Counsel for Police submits Mr Howse did not make reasonable arrangements to raise his personal grievance within the statutory timeframe and his circumstances do not fall within the exception of s.115(b) of the Act. Mr Howse was aware that further information was required from that provided in Mr Gallie's letter of 22

December 2011 and it was his decision to instruct his solicitor to put any further action on hold until the resolution of the family court matter.

[48] I find that Mr Howse did make reasonable arrangements for his grievance to be raised. He was aware of the 90 day time limit and instructed a lawyer in a timely manner to raise his grievance with Police. He formulated a chronology of events to assist the lawyer to understand the events he considered salient to his grievance. Mr Gallie had sent him a copy of the 22 December 2011 letter he sent to the Commissioner and I accept Mr Howse's evidence that he believed, as did Mr Gallie, that the letter satisfied the requirement for raising his grievance.

[49] While he was aware of Mr Gallie's intention to send further information about the detail of his grievance early in 2012, and knew Mr Gallie had not done so because of the conflict of interest that arose, that knowledge does not alter the situation. Mr Howse decided to put his grievance on hold in the honestly held but mistaken belief that his grievance had already been properly raised in accordance with statutory requirements.

[50] I accept that Mr Howse did not know his lawyer's letter of 22 December 2012 was insufficient to raise his grievance. I also accept his evidence of having been assured by Mr Gallie that "*it was all in hand*". I find he was entitled to rely on his legal representative to know the relevant law and to carry out his clearly expressed instructions to raise his personal grievance. That was, after all, the point of instructing Mr Gallie to act on his behalf.

[51] Counsel for Police also submits that Mr Gallie did not "*unreasonably fail*" to ensure Mr Howse's personal grievance was raised within time, and that ignorance of the law does not amount to exceptional circumstances. I disagree when, as in this instance, the ignorance is that of the agent who has been properly instructed to raise a grievance. I find the requirements of s.114(4)(a) and s.115(b) have been satisfied by Mr Howse making reasonable arrangements to have his personal grievance raised, and by Mr Gallie unreasonably failing to ensure the grievance was properly raised within the statutory time frame.

Is it just to grant leave?

[52] Having satisfied the first part of s.114(4), I am required to consider whether it would be just to grant leave for Mr Howse's grievance to be raised out of time. As noted by Chief Judge Colgan in *Austin v Silver Fern Farms Limited*⁷

[73] *"This test amounts essentially to a balancing of the justices and injustices to the parties of permitting a late raised grievance to proceed."*

[53] Mr Howse submits he has a genuine personal grievance and that a failure to grant leave will result in his having no recourse to have that grievance resolved. The Commissioner takes a different view and submits it would be unjust for leave to be granted. Among the reasons cited are that, as a result of the long delay in correctly raising a grievance, many personnel are no longer working for Police or have no recollection of events. That will create difficulties for Police in terms of obtaining and briefing witnesses. Mr Howse had the opportunity to raise complaints and grievances during his employment but failed to do so.

[54] I accept there may be difficulties for Police but do not consider these to constitute good reason to deny Mr Howse the opportunity to pursue his grievance. I am satisfied it is just to give leave for him to do so and to have it determined on its merits.

[55] The next step is to refer Mr Howse and the Commissioner to mediation, as is required by s.114(5) of the Act.

Determination

[56] Mr Howse is granted leave to pursue his personal grievance. The parties are directed to mediation in the first instance.

Costs

[57] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

⁷ [2014] NZEmpC 30