

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Leonard Abner Johnson (Applicant)
AND The Commissioner of Police (Respondent)
REPRESENTATIVES Samuel Hood, Counsel for Applicant
Emma Bassett, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 2 August 2005
SUBMISSIONS AND FURTHER INFORMATION RECEIVED 8, 17, 23 August, 9 September, 20 and 28 September 2005
DETERMINATION 20 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Leonard Johnson is a senior police constable. He entered the police in 1982 and is currently based at Manurewa in the Counties Manukau police district. In November 2000 Constable Johnson applied for a position as the Area Youth & Community Services Supervisor, Papakura (Vacancy 1657). Vacancy 1657 was one of seven newly created Youth Services Sergeant positions in Counties Manukau. The vacancies were advertised on 6 October and 3 November 2000 in the police personnel bulletin "Ten-One".

[2] Constable Johnson's application for vacancy 1657 was unsuccessful and another applicant was provisionally appointed to that position. On 19 December 2000 Constable Johnson sought a review of that appointment. The review was upheld and the provisional appointment cancelled. The position was re-advertised as vacancy 2210. Constable Johnson applied for this position. This application was also unsuccessful.

[3] Constable Johnson says the appointment process for vacancies 1657 and 2210 was unfair and that unfairness has unjustifiably disadvantaged him in his employment. The specific grounds of alleged disadvantage are:

- (i) the appointment process to vacancy 1657 was flawed and Constable Johnson was not advised of the appointment method used by the selection panel;
- (ii) if the selection panel had used the proper process for vacancy 1657 then it is likely Constable Johnson would have been appointed;
- (iii) Constable Johnson's application for vacancy 2210 was not considered; and

- (iv) Constable Johnson was the best applicant for vacancy 2210 and should have been appointed.

[4] Constable Johnson seeks the following remedies; compensation to the sum of \$15,000 pursuant to section 123(1)(c)(i) of the Act, appointment to a sergeant's position, reimbursement of lost wages and costs.

[5] The Commissioner of Police says in relation to vacancy 1657, that there was no unfairness to Constable Johnson because the provisional appointment was overturned and re-advertised and any disadvantage to Constable Johnson was caused by his decision to apply for only one of the seven advertised sergeant positions. In relation to vacancy 2210 the Police say that Constable Johnson was not treated unfairly because his application was considered and that an applicant with sergeant's examinations was appointed in accordance with the terms of the vacancy advertisement.

General instructions and guidelines for selection

[6] The process to be used by the Police to select appointees for vacancies is set out in a framework of general instructions and guidelines enabled by the Police Act 1958. Appointments are merit based and must be completed in a timely manner by a duly constituted selection panel. Following are the relevant extracts from the Police guidelines:

“Appointment Procedures: Annex 1

...

2. Definition of merit

For the purposes of Section 8 of the Police Act 1958, the person best suited to the position is the applicant, who in the opinion of the Commissioner, is the person:

- 2.1 who closest meets the requirements of the person specification; and
- 2.2 who shows the potential to perform well in the position, given a reasonable period of time for familiarisation and/or training; and
- 2.3 who displays the personal attributes and temperament relevant to the position; and
- 2.4 whose general health will allow for the performance of all duties and functions of the position.

3. Timeframe

- 3.1 It is essential to complete the appointment process in as short a time as possible.
- 3.2 The selection panel should complete the validation of the job documentation and the weighting exercise prior to the vacancy being notified in Ten-One.
- 3.3 The preliminary assessment should be completed within one week of receipt of the schedule of applicants.
- 3.4 If interviews are necessary, a further two weeks should be sufficient for completing the exercise and making a recommendation.
- 3.5 The chairperson is to advise the recommended applicant and unsuccessful applicants of the recommendation as soon as possible after the recommendation is made. The advice to the successful applicant is to make it clear that the panel made only a recommendation, and no transfer action of any sort should be taken until the appointment is confirmed and the applicant formally advised by the Manager: HRSC

4. Composition and Appointment of Selection Panel

4.1 The role of the selection panel is to consider all applicants for a vacancy and recommend the appointment of the applicant best suited to the position.
....”

[7] The general instructions include a review process for unsuccessful applicants. An application for review must be lodged with the Manager: HRSC within seven days of the date the provisional appointment was published in Ten-One (general instruction AO76).

90 day issue

[8] In closing submissions, Ms Bassett on behalf of the Commissioner of Police, raised a challenge to jurisdiction based on a 90 day issue and Sergeant Johnson’s first and second grounds of personal grievance (refer para 3 above). She relies on evidence adduced at the investigation meeting that Sergeant Johnson was advised of the vacancy 1657 selection process in a letter dated 18 September 2001. Ms Bassett submits that the personal grievance was not raised with the Police until May 2005 and that consent has not been given to raise the personal grievance out of time.

[9] In reply, Mr Hood submits that the Commissioner of Police is estopped from challenging jurisdiction on these grounds because no objection was made prior to the filing of closing submissions and the Police advised no challenge to jurisdiction would be raised in relation to the personal grievances raised on 29 July 2004 which relate to vacancy 1657.

[10] In July 2004 the Commissioner of Police was advised Sergeant Johnson was raising personal grievances based on the vacancy 1657 selection process (refer para 4, 29 July 2004 letter Alex Hope to Emma Basset) and that the late raising was occasioned by Sergeant Johnson’s only recent knowledge of that selection process. Ms Basset wrote to Mr Hope:

“1. I confirm that the Commissioner of Police will not raise any limitation objection to Mr Johnson raising as a new head of grievance the matters referred to in your letter of 29 July and agrees that both matters should be dealt with together.”

[11] The 29 July 2004 notice of the grounds of the new head of personal grievance and the consequent waiver to any challenge to jurisdiction on the basis of the 90-day statutory time limit is wide enough to extend to the first and second grounds of personal grievance. The Authority has jurisdiction to determine Sergeant Johnson’s first and second personal grievances.

Vacancy 1657

[12] Vacancy 1657 provides:

“Area Youth & Community Services Supervisor, Papakura

PD Ref: Police Corporate Intranet

Band 1

(Staff members qualified will be given priority, however due to the specialist nature of this position members not qualified by way of promotional exams are invited to apply)”

[13] One selection panel was convened to consider the applications for all seven Youth Services Supervisor vacancies, including vacancy 1657, and recommend appointees. The decision to convene one selection panel was made because a significant number of the applicants had applied for more than one position and it was important that the best appointments were made to the respective positions. The members of the selection panel were: Snr Sergeant Mike Fulcher, panel chair and Community Services Manager, Counties Manukau, Christine Bryan-Wells, Human

Resources Officer, Counties Manukau, Snr Sergeant Dave Tomoana, Iwi Liaison Officer, Auckland City and Snr Sergeant Mark Richards, Area Manager, Mangere.

[14] The selection panel meet on 27 November 2000 and 29 November 2000. Each applicant was given a matrix score which was made up of individual scores for specific competencies, marked out of five, then multiplied by a specific weighting and tallied. This matrix score did not include a weighting for those applicants who had completed sergeant exams. The applicants were then ranked against all the positions for which they had applied and priority was given to candidates who had completed sergeant exams.

[15] Sergeant Bromwyn Marshall had the highest matrix score of the candidates for vacancy 1657. She was also the only candidate who had completed sergeant exams. The selection panel recommended Sergeant Marshall's appointment to vacancy 1657. Sergeant Johnson achieved the second highest matrix score from the candidates for vacancy 1657.

[16] Sergeant Marshall had also applied for the equivalent vacancies located in Otara and Howick. She achieved the highest matrix score from the candidates to the Otara position and was ranked third from the seven candidates for the Howick position. Snr Sergeant Fulcher said Sergeant Marshall's appointment to the Otara position had not been recommended because he had telephoned her to ascertain her preference from the three she had applied for and she advised her preference was vacancy 1657. Snr Sergeant Fulcher said he went through this process with each of the top ranking candidates who had applied for more than one position.

[17] The exception to this process was Sergeant Mike Ley - the highest ranking candidate overall. Sergeant Ley only applied for the position located in Howick, was the highest ranking candidate for that position, but was not offered it. Snr Sergeant Fulcher accepted he telephoned Sergeant Ley and offered him the Mangere position. He said he did this because he was anxious to secure the best possible candidate for that position. As Sergeant Ley was reluctant to accept the Mangere position Snr Sergeant Fulcher offered Sergeant Ley an increased remuneration package to accept the Mangere position.

[18] Sergeant Johnson was not advised that all the vacancies would be considered at the same time or what the ramifications of such a process would be for applicants. Those ramifications were that the appointments to individual positions were necessarily linked to the selection process used and subject to manipulation to achieve the best appointment to each position. Not being advised of the process was unfair and disadvantaged Sergeant Johnston because he was unable to initiate a review of all the recommended positions. Issues around communications with Sergeant Ley do not in themselves give rise to an actionable disadvantage for Sergeant Johnson.

[19] But for the failure to advise Sergeant Johnson of the selection process it was not unreasonable for the Police to convene one selection panel to consider all the vacancies and to take steps to secure the best possible candidates for each position. The guidelines require the appointment process be to merit based and completed in as short a time as possible (refer para 6 above).

[20] Mr Hood submits that if a fair and consistent process had been used then Constable Johnson would have been appointed to the Papakura vacancy, or Mangere or Otara. He submits the following process is fair and transparent should have been used:

- (i) each vacancy considered separately;
- (ii) each vacancy considered in a predictable order eg, in vacancy order number; and
- (iii) qualified applicants considered first.

[21] The employment agreement, general instructions and guidelines do not provide for such a process. While the process suggested by Mr Hood may meet the required standards of fairness there is no contractual obligation binding the employer to that process. I have identified where the selection process has not met the requirement of fair treatment and found that grounds for a disadvantage grievance exists¹ This does not give rise to a finding that Sergeant Johnson should have been appointed to vacancy 1657. The Authority cannot substitute its judgement for that of the employer².

Vacancy no. 2210

[22] Following Sergeant Johnson's successful review of vacancy 1657 the vacancy was re-advertised as vacancy 2210 in identical terms. Sergeant Johnson and Detective Constable Marshall applied.

[23] A new selection panel was convened for vacancy 2210; Snr Sergeant Steve Neild, panel chair, area controller, Papakura, Snr Sergeant Karen Wilson, O/C Station, Onehunga, Snr Sergeant Paul Marshall, O/C Station, Newmarket and Veronica Atherton, Safer Papakura Community Council co-ordinator. The applicants were advised of the panel members and given an opportunity to raise any concerns prior to the panel convening. Sergeant Johnson did not raise any concerns regarding the make-up of the panel.

[24] This was a fresh selection process. There is no evidence that the flaws in the selection process for vacancy 1657 tainted or influenced the selection process for vacancy 2210.

[25] Snr Sergeant Neild wrote to the District Commander on 4 July 2001 setting out the process used to select Sergeant Marshall as the recommended candidate:

- (i) matrix scores were completed for each candidate;
- (ii) Detective Constable Marshall received the highest matrix score;
- (iii) Detective Constable Marshall was then identified as the only candidate who had completed sergeant exams; and
- (iv) the panel then considered whether, Detective Constable Marshall, as the only candidate with sergeant exams, had the skills for the position and concluded she did.

[26] Detective Constable Marshall's provisional appointment was advertised in Ten-One on 27 July 2001. Sergeant Johnson did not lodge a review of the provisional appointment within the seven day time frame provided in the General Instructions (refer para 6 above). I accept there is no discretion to extend the review period and that this advice to Sergeant Johnson does not give rise to a disadvantage.

[27] In relation to vacancy 2210 I do not accept that Sergeant Johnston has suffered any disadvantage in his employment as a consequence of any breach of the terms of his employment agreement. The process used was not unreasonable or unfair and did not breach the terms of the employment agreement. Snr Sergeant Neild's report shows Sergeant Johnson's application was considered in the terms of the vacancy and a candidate who had completed sergeant's exams was given priority. Such a prioritisation was required by the terms of the vacancy.

¹ *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139

² *Tawhi v Tokoroa Central School Board of trustees, Yvonne Oldfied*, AA210/03, 9 July 2003

Remedies

[28] The disadvantage suffered by Sergeant Johnson amounted to a loss of a chance to have a fair opportunity to apply for vacancy 1657. For the reasons set out above I am unable to find Sergeant Johnson should have been appointed to the positions for which he applied.

[29] As a consequence of his dissatisfaction with his non-appointment to vacancies 1657 and 2210 Sergeant Johnson has uncovered aspects of the selection process which have understandably caused him disappointment and undermined his confidence that his employer will deal with him in a fair and reasonable manner. He gave evidence of the consequences of this disadvantage on his health and his perception of his professional standing. He is entitled to be compensated for the effects of this disadvantage under section 123(i)(1) of the Act to the sum of \$6000.

Costs

[30] The issue of costs is reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so, they may file memorandum for the Authority to determine the issue.

Marija Urlich
Member of Employment Relations Authority