

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 258
3110358

BETWEEN PAUL LEON
Applicant

AND COMMISSIONER OF POLICE
Respondent

Member of Authority: David G Beck

Representatives: Paul Mathews, advocate for the Applicant
Nicola Cuervo, counsel for the Respondent

Investigation Meeting: 14 April 2021 in Christchurch

Submissions Received: 19 April from the Applicant
14 April from the Respondent

Date of Determination: 17 June 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paul Leon worked for New Zealand Police - Nga Pirihimana o Aotearoa (the Police) as a probationary constable in Christchurch from 16 March 2019 until 1 May 2019.

[2] In an application received on 13 July 2020, Mr Leon claims that the Police acted in a manner that disadvantaged him that then led to him being constructively dismissed when he resigned on 15 April 2019. Mr Leon contends that he had no option to resign due to what he considers was a failure to provide him with sufficient support and/or alternative placement options to cope with workplace stressors he says he identified to the Police whilst he was still employed.

[3] Mr Leon sought reinstatement but is no longer pursuing this claim as he has secured alternative employment and he seeks compensation for the disadvantage and/or dismissal claims and lost wages.

[4] The Police assert that Mr Leon's employment ended by voluntary resignation and that the personal grievance was raised out of time having only become aware of such on 21 March 2020 when Mr Leon sought mediation assistance.

The preliminary issue

[5] Pursuant to s 174E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline a conclusion on a single issue but I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, the parties' submissions and attached documentation.

[6] The sole question to be addressed at this stage is whether pursuant to s 114 of the Act Mr Leon has established sufficient exceptional circumstances to make it just that I grant him leave to have his grievance proceed.

[7] At the investigation meeting I heard considered and helpful evidence from Paul Leon, his Mother, Margaret Head, Catherine McEvedy (a Police Association Christchurch field officer) and Detective Senior Sergeant, Nicola Reeves who all provided written briefs of evidence.

What caused the employment relationship problem?

[8] After completing a course at the NZ Police College and field training, Mr Leon began working as a probationary Police Constable on 16 March 2019 at Christchurch South Police Station. Mr Leon was a member of the NZ Police Association and his position was covered by the New Zealand Police Constabulary Collective Employment Agreement (1 July 2018 – 30 June 2021). As context, the day Mr Leon commenced work was the day after the Christchurch Mosque shootings. Mr Leon was initially placed with an experienced field training officer but then he says problems emerged because he was placed with another

probationary constable and located in a contingent of ten officers of which five were still probationers and two senior officers were respectively on leave and seconded elsewhere.

[9] Mr Leon began to struggle with administrative tasks and what he saw as lack of support from co-officers. On 27 March 2019 after completing an initial eight shifts, Mr Leon sought the help of a Police Wellness Officer and explained to him that he was anxious and not coping. After giving the wellness officer permission to contact his Senior Sergeant (Nicola Reeves) he met with Sergeant Reeves on 28 March at a local café. Mr Leon explained his anxieties and the impact upon him, concentrating upon his difficulties with administration tasks. He described Sergeant Reeves as being empathetic but blunt about the importance of getting on top of administrative requirements and the likely increasing scope of such as his career progressed.

[10] Sergeant Reeves approved a two late shifts' break for Mr Leon and suggested he return for the coming weekend night shifts (30 and 31 March). However on the 30th March, Mr Leon texted Sergeant Reeves to indicate he felt in no fit state to return to work and that he was accessing support of a police clinical psychologist on a referral from the wellness officer. Sergeant Reeves acknowledged the text, told him to take care of himself and said she would contact him the next day. Sergeant Reeves texted the next day and inquired of the time Mr Leon was seeing the police psychologist and Mr Leon advised his appointment was the following day.

[11] On 2 April Mr Leon had the Psych consult and he texted Sergeant Reeves shortly afterwards indicating the view of the psychologist that he not immediately return to work and that he had given permission for a discussion between the psychologist and the police wellness officer with a view to a further discussion between Mr Leon, the wellness officer and Sergeant Reeves. Sergeant Reeves' text responded "that sounds good to me".

[12] The psychologist then emailed the police wellness officer on the evening of 2 April indicating she had just seen Mr Leon and wanted to discuss his situation further but in the interim, emphasised: "I am really alarmed by how poorly Paul is doing" and she boldly indicated: "I DO NOT SEE HIM AS SAFE TO BE AT WORK".

[13] A meeting between Mr Leon, the wellness officer, and Sergeant Reeves occurred on 4 April at which Mr Leon says he expressed his ongoing anxiety and the reasons for such. After traversing options it was resolved that Sergeant Reeves would ascertain if it were feasible for Mr Leon to be transferred to a non-sworn role (“Authorised Officer”) at Mr Leon’s suggestion.

[14] Mr Leon remained on leave and the next day Sergeant Reeves texted suggesting the transfer was looking feasible but was still subject to HR approval on one unspecified matter before being, in Sergeant Reeves’ opinion, possible to be actioned “quite quickly”. However, no decision was arrived upon until 15 April.

[15] In the interim, on 11 April, Mr Leon had had a second appointment with the police psychologist who indicated she would intercede on his behalf to try and move the decision on him being transferred along.

15 April 2019 resignation

[16] In a pre-arranged morning telephone call of 15 April Sergeant Reeves advised Mr Leon that his transfer request had been turned down as no position was currently available. Mr Leon says that upon perceiving that there was no other alternative, he signalled his resignation and asked Sergeant Reeves if she was authorised to accept it. Sergeant Reeves says she affirmed a belief that she could accept his resignation. She acknowledged in the conversation she did not try to dissuade Mr Leon from resigning, believing the reasons for such had been well traversed in the earlier meetings with herself and the wellness officer.

[17] Just prior to communicating that no alternative authorised officer position was available, Sergeant Reeves got an email from her Inspector indicating:

He now needs to make a decision as to whether he resigns or not. If he chooses to resign please facilitate that through MYPolice. He is able to apply for any AO vacancies that are advertised in future.

[18] At 9:37 am on 15 April Mr Leon emailed his resignation to Sergeant Reeves; he expressed the reason as:

Unfortunately I have struggled to adapt quickly enough to the file management, taskings and paperwork load which are required of a Constable. This has led to stress and anxiety for me which has resulted in this early resignation.

I have otherwise enjoyed my time with the New Zealand Police. I wish the organisation all the best for the future.

[19] Mr Leon had no further approach from his employer seeking to question his resignation decision and although Police HR were involved in attempting to find an alternative role, no one from HR contacted Mr Leon to discuss his resignation.

[20] By text of 17 April to Sergeant Reeves, Mr Leon indicated his GP would like to speak to her and Sergeant Reeves consented to this. Sergeant Reeves recalled the GP in a telephone conversation of the same day, indicating that Mr Leon “had had a significant mental health episode and had been really unwell” and being asked by the GP if he took time off to get well could he re-join the Police. On the latter question, Sergeant Reeves responded that although she was not in a position to make this decision, she indicated his application would be considered by recruitment taking into account his mental health and the circumstances of his resignation.

[21] When asked what she did with the information gleaned from the GP, Sergeant Reeves indicated she referred it to her Inspector and was not aware of any follow up from him or involvement of Police Human Resources, and she was not consulted further over whether Mr Leon should be re-engaged.

[22] I observe that Sergeant Reeves displayed empathy toward Mr Leon but I found it curious that no HR involvement occurred or assessment of Mr Leon’s known state of distress and he was not approached to reconsider his resignation. I also observe that an investigation of what was going on in his unit did not occur beyond an informal approach by Sergeant Reeves after Mr Leon resigned.

[23] Sergeant Reeves indicated her main task was to ensure Mr Leon got appropriate counselling support and that a month or so after he resigned she recalled an unacknowledged text she made checking on his well-being, but otherwise no suggestion from Mr Leon to her that he wanted to raise a personal grievance.

[24] Mr Leon indicated that although he was unfamiliar with the term, he recalled his GP suggesting that he may have been ‘constructively dismissed’ but his initial view at the time of resignation was just relief at Sergeant Reeves’ comment that he would “be able to get my career back in future by using the internal rejoining process”.

[25] In addition, Mr Leon sought advice from the Police Association local branch chair by email of 29 April detailing relevant background factors at some length and indicating “I felt like I had no option but to resign as my needs were not being facilitated by police, and this could be grounds for a constructive dismissal”. The Association chair responded on 3 May referring Mr Leon to Catherine McEvedy, the Association’s local field officer.

[26] Mr Leon recalled a first phone conversation with Ms McEvedy of 7 May, that he says discouraged him from a view that he been constructively dismissed but he acknowledged that Ms McEvedy indicated she could assist him in seeking to return to the police through an initial informal approach. The conversation was left with Mr Leon agreeing to consider his options and get back to Ms McEvedy.

[27] Ms McEvedy rang Mr Leon on 21 May but says in the subsequent conversation when he called back, he felt discouraged by a lack of enthusiasm to pursue his constructive dismissal claim and he emailed Ms McEvedy that day in unequivocal terms:

I’ve given it some thought after our last conversation and I’ve decided that I’ll move on from Police. I won’t be seeking re-employment.

I thank you for your time and advice.

[28] Ms McEvedy gave evidence that her initial consult with Mr Leon was characterised by his uncertainty on what he wanted to do to resolve his situation and she received no instruction to approach police management and, she did not do so without such permission. Ms McEvedy recalled being surprised by Mr Leon’s subsequent 21 May email. She emailed him back suggesting a further discussion to understand his perspective but received no further contact until being approached by Mr Leon’s advocate in February 2021 to give evidence at the Authority.

Application to re-join NZ Police

[29] Mr Leon submitted a formal application to re-join the police on 11 August 2019 seeking a position in the Wellington District. The application form expanded upon Mr Leon's concerns about why he resigned including unwelcoming treatment from colleagues. The application was declined on 3 September 2019 and disclosed documentation suggests that negative feedback from Christchurch staff led to this decision.

[30] In the interim, in early August 2019 Mr Leon returned to his former occupation as a rescue fire fighter at Christchurch airport where he is currently employed.

[31] On 14 October 2019, Mr Leon wrote to the Police Commissioner, Mike Bush, candidly setting out his experience whilst employed by the police in considerable detail. The letter did not specifically request reconsideration of his application to re-join NZ Police and simply concluded "I thank you for taking time out of your busy schedule to read my experience working for New Zealand Police". A response from the Commissioner's executive assistant of 24 October 2019 indicated Mr Leon's letter had been passed to the office of Deputy Chief Executive, People and Capabilities "for information and consideration".

[32] No swift response was forthcoming until 10 December 2019, when the National Manager, Constabulary Recruitment from the Police People and Capability Group rang Mr Leon requesting what he was seeking from his correspondence. Mr Leon says he indicated he wished to be "reinstated". Mr Leon followed this up with an email of 12 December to the aforementioned manager, suggesting that he had apprised the Commissioner, in the absence of an exit interview, of his specific reasons for resigning. Mr Leon then detailed the result he had hoped for was to be rehired but "as my rejoin aspirations have been denied, now I want to know specifically why the application was declined" and he then asked for clarity why he was "still being negated from rejoining as a sworn member of staff".

[33] I observe that Mr Leon did not use the term personal grievance in this communication with the Commissioner or the 12 December email but broadly he was seeking to be reinstated and he had set out in some detail why he felt let down by the Police in the events leading up to his resignation that he made clear was involuntary.

[34] In an email of 15 January 2020, the constabulary recruitment manager provided a formal response to Mr Leon's 14 October letter to the Commissioner. The response acknowledged that there were "likely variations in support" provided to newly graduated recruits in Christchurch due to the environment surrounding the 15 March Mosque incident and its aftermath. The letter then detailed the reasons and process adopted for Mr Leon's re-join application being denied solely on the grounds of a perception communicated by Canterbury feedback sources that Mr Leon displayed a lack of resilience and coping mechanisms.

[35] In late January 2020, Mr Leon made a complaint to the Ombudsman and was advised that they lacked jurisdiction and directed him to the Employment New Zealand website for advice and/or a local community law centre. Subsequently, whilst still unrepresented, Mr Leon set out a constructive dismissal and disadvantage claim in an application for mediation dated 21 March 2020. The Police in response, objected to the matter as being outside the 90 day time limit specified in s 114 of the Act.

[36] Upon a request for additional information, in an email to the Police's principal legal advisor of 16 April 2020, Mr Leon initially stated:

It was never my intention to raise a personal grievance against police but as I have exhausted all internal avenues of resolution to be re-employed as a police officer I feel I now have no choice.

[37] Mr Leon then suggested "I was in mentally no position in the 90-days after I felt forced to resign from police to lodge any PG claim", and he went on to describe "on record circumstantial depression" being caused by his loss of position and the impact of him losing an apartment due to the unexpected loss of employment.

The law and what Mr Leon has to establish

[38] An employee failing to raise a personal grievance within the 90 day time limit where the employer has refused to grant leave for it to be raised out of time, may apply to the Authority to have the matter heard out of time as set out in s 114(3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it

- i. is satisfied that the delay in raising the personal circumstance is occasioned

by exceptional circumstances;

- ii. considers it just to do so.

[39] Exceptional circumstances are defined in *Wilkins v Field & Fortune*¹ as being those which are “unusual, outside the common run, perhaps something more than special and less than extraordinary”. The Supreme Court in *Creedy v Commissioner of Police*² addressing “exceptional circumstances” also stated:

“[31] In *Wilkins & Field*, the Court of Appeal treated ‘exceptional circumstances’ as those which are ‘unusual, outside the common run, perhaps something more than special and less than extraordinary’. This formulation appears to combine two different meanings, the first being that of being unusual (the ‘exception to the rule’) and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.

[32] First, it accords with ordinary English usage. As *Lord Bingham of Cornhill said in R v Kelly* [1999] 2 All ER 13 (CA) , when construing a reference to ‘exceptional circumstances’:

‘We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.

“Secondly, it will be easier to apply. The very language of *Wilkins & Field* implies both uncertainty (‘perhaps’) and lack of precision (‘Something more than special and less than extraordinary’). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.”

Mr Leon’s claim of timeliness in raising the grievance

[40] Mr Mathews initially conceded after hearing Ms McEvoy’s evidence, that Mr Leon could not rely upon a contention that he had instructed the Police Association to raise his personal grievance “on or around, 7 May 2019” and that they had failed to do so. I concur with this analysis as it is evident that Mr Leon gave no specific direction for a grievance to be raised. I also conclude that the Police Association offered to assist in trying to explore

¹ *Wilkins v Field & Fortune* [1998] 2 ERNZ 70.

² *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

constructive low level engagement with Police management and Mr Leon did not pursue this offer.

[41] Mr Mathews then suggests that a personal grievance was raised by Mr Leon in his 14 October 2019 letter to the Commissioner and that the Police engaging with Mr Leon implied consent to the grievance being dealt with out of time despite it being six months after Mr Leon had resigned.

Discussion

[42] I am not convinced by either the timing of the grievance as suggested or that the Police consequently could be held to have impliedly consented to the grievance being dealt with out of time. This is because it was evident by the content of the letter to the Commissioner of 14 October 2019, that Mr Leon was only seeking to have his earlier 11 August 2019 re-join application reconsidered. I prefer the formulation that the Police only became aware of Mr Leon's desire to pursue a personal grievance at or around 21 March 2020 when he sought mediation and the details of why he was seeking mediation were forwarded to the Police. This 'starting point' would make the grievance almost nine months beyond the 90 days deadline. I will now proceed to consider, notwithstanding this delay, whether any exceptional circumstances prevail.

Exceptional circumstances

[43] Examples of what broadly constitute exceptional circumstances are set out in s 115 of the Act which states they "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
- (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.

[44] In addition, it has been held by the Employment Court in *Austin v Silver Fern Farms Ltd*³ that s 115 of the Act is not an exclusive list of factors - the Authority can take into account any other relevant matters that Mr Leon has identified provided they are deemed to be unusual occurrences. As Mr Mathews asserted the Court in *Austin* whilst describing the narrow focus on s 115 in *Creedy* as “unusual”, held that additional cumulative factors it considered relevant to allowing Mr Austin to pursue his grievance ‘out of time’ could be taken to meet the test because they were illustrative of the requirements to be met in s 114(4)(a) of the Act.

Did Mr Leon’s situation involve exceptional circumstances that justified late notification of his grievance?

[45] Whilst suggesting Mr Leon’s case is “entirely analogous with *Austin*” or appearing stronger, Mr Matthews’ submission identified the following factors (in bold) that I assess with comment that significantly diverges from this assertion:

Mentally distressed – Suffering from depression and under the care of mental health professionals

Comment

[46] My assessment of the extent of Mr Leon’s mental distress and impact upon his decision-making capability was hampered by no expert medical evidence being led. All I had in evidence was Mr Leon and Sergeant Reeves’ written and oral evidence, the Police Psychologist correspondence to the Police Wellness Officer of 2 April 2019 and Mr Leon’s brief GP consultation notes of 17 April 2019. Together, they show a picture of Mr Leon being ‘overwhelmed’ by the administrative demands of his policing role and not coping with such.

[47] Mr Leon’s GP described “mild depression, mainly circumstantial” with Mr Leon being anxious at times and having a low mood. Mr Leon detailed how he dealt with these symptoms by ongoing counselling between April and August 2019, which is commendable

³ *Austin v Silver Fern Farms Ltd* [2014] NZEmpC 30 at [67].

and displayed insight. Whilst I do not question Mr Leon's distress at the time and could reasonably conclude that he was not in a 'good space' to make a decision to resign, what I have to assess is did this impact so significantly upon his ability to raise his personal grievance in a timely manner.

[48] On the latter I remain unconvinced on the evidence before me, that Mr Leon's ability to seek and comprehend his options within 90 days after his resignation and thereafter, was impaired to the extent that it constitutes an exceptional circumstance. I conclude this because Mr Leon did seek assistance and advice from the Police Association on 29 April and 21 May and objectively had sufficient time to reflect on his situation after he resigned.

[49] Whilst Mr Leon indicated he believed that he had been constructively dismissed (on advice from his GP), his ignoring of Police Association advice to first explore reconciling with his employer after his resignation, is consistent with his stance, at the time, that he was not seeking a return to work. At this point, Mr Leon had an opportunity to seek alternative legal advice and he provided no compelling evidence that his state of mind at the time significantly incapacitated him from doing so.

Nicky Reeves conversation with Paul's doctor as it was relayed to him – the belief that the re-join process would be sufficient.

Comment

[50] From Mr Leon's GP notes, it is apparent that all the GP asked Sergeant Reeves was whether if at some future point Mr Leon concluded he regretted his decision to resign, he could seek to return to the Police. Sergeant Reeves' answer as supported by her evidence, is that she said she was aware this was possible and would be considered "on a case by case basis". I had no evidence from Mr Leon's GP on how he relayed this to Mr Leon. Mr Leon merely indicated after talking to his GP: "I felt some relief as I thought that I would be able to get my career back in the future by using the internal rejoining process".

[51] I have no jurisdiction to rule on whether the Police treated Mr Leon's re-join request fairly or otherwise. Objectively, I reasonably assume that at some point in time, Mr Leon

decided to not pursue his personal grievance for constructive dismissal on the evident premise that this may impact upon his application to re-join the Police.

[52] I do not find it was reasonable for Mr Leon to rely upon Sergeant Reeves' comment to his GP that his re-joining was only a formality. I note Mr Leon could have sought specific advice from the Police Association on his prospects of re-joining at a later point in time given the circumstances of his resignation or then approached the Police Association for assistance in formulating his re-join application in August 2019 and/or to deal with his concerns on how his this application was dealt with.

No exit interview where Paul could raise concerns.

Comment

[53] Whilst I consider this to be a valid contention as it was allied with an inexplicable failure of the Police to constructively engage with Mr Leon after he resigned (given the content of his resignation email and the fact he was undergoing internal counselling), it would only be a relevant factor if I was considering a constructive dismissal claim and has no bearing on establishing an extraordinary circumstance.

Failure of the Police Association to give him meaningful advice to preserve his position.

Comment

[54] I prefer Ms McEvedy's evidence that the Police Association gave Mr Leon appropriate and practical advice which was that he should in the first instance seek to engage with this former employer with their assistance. Mr Leon's final email to Ms McEvedy of 21 May 2019 was unequivocal in indicating: "I've decided that I'll move on from Police. I won't be seeking re-employment". Ms McEvedy sought to engage further with Mr Leon and he did not reciprocate, thus no obligation rests upon the Police Association to give further advice. Even if I were to accept Mr Leon's view that he was discouraged from pursuing a personal grievance for constructive dismissal and had no confidence in Ms McEvedy, he still had other options of seeking alternative independent legal advice.

[55] Essentially, in advancing a suggestion that his agent (the Police Association) failed to properly progress the matter, Mr Leon is asking me to consider whether s 115(b) of the Act applies. There are two limbs to the test in s 115(b) of the Act. The first limb concerns whether Mr Leon made reasonable arrangements to have the matter raised by an agent on his behalf and the second limb is whether the agent failed unreasonably to ensure that the grievance was raised within the requisite time limit. I have found that Mr Leon cannot rely upon this provision as he did not specifically instruct the Police Association to pursue his personal grievance and therefore they did not fail to pursue it in a timely fashion.

No copy of the Collective Employment Agreement was available to Paul for grievance consideration.

Comment

[56] I do not find that Mr Leon had restricted access to his collective employment agreement despite the Police referencing it in his appointment letter but not providing him with an individual copy. In giving evidence Mr Leon demonstrated he was aware of his right to pursue a personal grievance.

August 2019 recruitment re-join application process.

Comment

[57] As above, I have no jurisdiction to consider the fairness or otherwise of the actions of the Police in how they dealt with Mr Leon's re-joining application but I do note that in his submission, Mr Mathews indicates that in late July 2019 Mr Leon decided to abandon his notion of having been constructively dismissed in favour of seeking to re-join the Police. As such, Mr Leon is now asking if he can be allowed to return to a situation where he can pursue his personal grievance based on a perception that the Police has misled him into believing he could re-join without any complications. I have already found that Mr Leon was not objectively misled.

Engagement with the Police Commissioner’s Office from December 2019 to January 2020.

Comment

[58] As above I have no jurisdiction to determine whether the Police acted appropriately in exercising their discretion to not allow Mr Leon to re-join the Police force and reiterate my view above that Mr Leon made a choice to pursue this course of action rather than pursue a personal grievance in a timely manner.

Finding

[59] For the reasons briefly traversed above, I have found on balance that no exceptional circumstances exist sufficient to allow Mr Leon to have his grievance heard out of time.

Is it just to grant leave?

[60] If I had found exceptional circumstances s 114(4)(b) of the Act requires that I also have to be sure that in granting the leave for Mr Leon to be heard, that I consider “it just to do so”. In this respect, for completeness, I will briefly traverse if it would otherwise be “just” to allow Mr Leon’s grievance to proceed.

The length of the delay and prejudice to the Police

[61] Mr Leon resigned on 15 April 2019 and I have found the Police were not placed on notice of the existence of a personal grievance until he sought mediation assistance on 21 March 2020. I accept this delay is not minimal but the reasons for such have been explored above. Given the size of the Police as an employer and their current recruitment needs, I do not consider that the delay, if I had found exceptional circumstances, would have prejudiced the Police as the case was not particularly complex.

Merits of Mr Leon’s claim

[62] Whilst the Employment Court in *Austin v Silver Fern Farms* granted leave for Mr Austin to raise a grievance where ACC matters were at issue, it did so after carefully analysing a situation where the employer had deceived him of his ACC entitlements and

adopted a strategy to divest itself of rehabilitation responsibilities⁴. Here, I do not see a parallel situation of deception. The Police promptly put in place appropriate supporting measures once Mr Leon raised a concern about not coping with administration matters, including free counselling. Mr Leon chose to resign after he was not redeployed to a non-sworn position and only provided a partial explanation for this decision.

[63] Mr Leon could have continued to engage with available support services and maintained his ongoing employment. Good faith communication is a ‘two way street’ and Mr Leon did not properly identify his additional concerns of co-worker conflict whilst he was on sick leave.

[64] By contrast, I observe the Police can only be the subject of legitimate criticism in not following up on the reasons for Mr Leon’s resignation that, had he sought to raise a grievance immediately on the grounds of it being a ‘heat of the moment’ resignation, may have got some traction and preserved Mr Leon’s ongoing employment. I am astonished by the Police’s lack of HR involvement given Mr Leon’s relative inexperience, the circumstances of his resignation after only a brief period of sick leave and the money invested in his training. I do question why Mr Leon was allowed to leave without any further intervention. I do however, take into account the extraordinary circumstances facing the Police at this time but evidence showed Sergeant Reeves’ senior officer was fully apprised of the situation yet he took a passive approach.

[65] Crucially, I do not believe that Mr Leon identified a compelling breach of duty by the Police in them responding to his expressed concern that administration tasks were getting too onerous for him. The Police acted reasonably and with some significant care providing such promptly. Mr Leon would have been unlikely to reach the threshold required to establish that a dismissal had occurred in all the circumstances. I also have made it clear that the Authority has no jurisdiction to determine whether the Police subsequently acted unfairly in not re-engaging Mr Leon.

[66] I find that on the evidence provided, that Mr Leon’s prospects of establishing that he was unjustifiably “constructively” dismissed are so remote as to make it unjust to allow this

⁴ At [67].

matter to proceed and I am not convinced that the Police acted in a manner that disadvantaged Mr Leon. In concluding this, I am mindful that Mr Leon has objectively made reasonable efforts to engage with the Police after he resigned and he did not pursue a personal grievance in favour of a polite and reasoned approach to re-engage that frustratingly for him was unsuccessful. I wish him well in his current position and note that he presented his case well and engaged in a respectful manner with his former employer.

Finding

[67] I have found that Mr Leon has not demonstrated exceptional or unusual circumstances which prevented him from raising his personal grievance for unjustified dismissal within 90 days. I also find that in the totality of his circumstances it would not be just to grant the application for leave to have this matter proceed further.

Conclusion

[68] Mr Leon's application under s 144 of the Employment Relations Act 2000 for leave to raise a personal grievance out of time is declined.

Costs

[69] Whilst I have found in favour of the Police I also made the observation that the manner of handling Mr Leon's resignation was less than ideal and they have some matters to reflect upon with respect to how this situation was handled.

[70] I suggest that the parties explore settling costs by agreement. If no agreement can be reached, I invite the Police to make a submission within 14 working days of his determination being issued and I will provide Mr Leon a further 14 days to respond.

David Beck
Member of the Employment Relations Authority

