

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 383/08  
5097589

BETWEEN                      CHRISTOPHER PAINTER  
   Applicant  
  
AND                              THE COMMISSIONER OF  
   POLICE  
   Respondent

Member of Authority:      Philip Cheyne  
  
Representatives:            Alex Hope, Counsel for Applicant  
   Rachael Schmidt, Counsel for Respondent  
  
Investigation Meeting:      28 & 29 July and 18 August 2008 at Auckland  
  
Determination:              7 November 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Christopher Painter was a sworn member of New Zealand Police from 2000 until he was dismissed on 7 June 2007 following an investigation into alleged misconduct relating to his handling between March 2004 and September 2005 of complaint reports, found property reports, traffic crash reports and exhibited property. Mr Painter says that he was unjustifiably disadvantaged in his employment in various ways. These grievances cumulatively are the grounds on which Mr Painter also says he was unjustifiably dismissed. The personal grievances were raised in correspondence from Mr Painter's solicitor dated 22 August 2007.

[2] The context of the dismissal included other disciplinary action in June 2005 in respect of Mr Painter's conduct between April 2004 and July 2004, relationship difficulties between Mr Painter and his former partner culminating in him being charged with assaulting her and being suspended from duty as a result, as well as his ill health. To resolve the personal grievances I must explain in greater detail the contextual issues including those just mentioned before outlining what gave rise to the

misconduct investigation and how that was dealt with by New Zealand Police. Having done that, I must then apply the law relating to justification for dismissal.

### **Background**

[3] Mr Painter satisfactorily completed his training then commenced duties as a front-line constable in 2000. Nothing of significance for present purposes happened until after his leave without pay between April 2003 and March 2004 when Mr Painter returned to work in South Auckland in a front-line response role.

[4] As the time of Mr Painter's return to duty, he was having relationship problems with his now former partner. In March 2004 she spoke with Senior Sergeant Kluessien alleging an assault on her by Mr Painter, but she declined to sign any statement. Soon after, the Senior Sergeant became Officer in Charge at the Otahuhu Police station where Mr Painter was based.

[5] From about April 2004 when Senior Sergeant Kluessien went to Otahuhu he had discussions with Mr Painter about confrontations between Mr Painter and his partner outside the Police station, the difficulties of that relationship generally and Mr Painter's appearance, grooming and punctuality for work. These last mentioned issues eventually formed the basis of a performance improvement plan discussed between the Senior Sergeant and Mr Painter. This was done either a little before or just after Mr Painter went on light duties as a result of some health problems, more about which shortly. New Zealand Police have not been able to locate a copy of this plan but it is common ground that Mr Painter improved on these matters in due course.

[6] Between April and July 2004, Mr Painter's work performance was such that there was an investigation which resulted in charges of neglect of duty and misconduct. The initial investigation was concluded by 2 August 2004. In about April 2005 Mr Painter was served with and he pleaded guilty to five charges of neglect of duty and misconduct. The decision regarding penalties was conveyed to Mr Painter by letter dated 2 June 2005. The letter included the following:

3. *Your conduct over a period of three months was well below the standard I would expect of a sworn member of Police. Your neglect of duty in respect of the first charge, relating to failing to investigate a serious assault, was verging on disgraceful conduct by which your dismissal from the New Zealand Police may have been considered to be justified and*

*appropriate. The circumstances of the other charges demonstrated irresponsibility and disregard for the Police and management requirements which are essential to the functions of the New Zealand Police.*

4. *I have taken into account the explanation and submissions provided by your lawyer. I have considered your previous work history, the information you have provided concerning your medical condition, and have particularly noted that your performance has improved significantly in recent months.*

...

8. *Should your conduct again fall below an unacceptable level then your suitability to remain in the Police will be in question.*

[7] By August 2004, Mr Painter had developed a medical condition that necessitated an assignment to light duties under a rehabilitation plan. Mr Painter was transferred to the position of watch house assistance at Otahuhu Police station where he worked under Elizabeth Pomare, a non-sworn member of the Police who was watch house officer. Lucy Adams was the Police District Wellness and Safety adviser at the time. Mr Painter was referred to Ms Adams to develop the rehabilitation plan in light of the medical condition. The first rehabilitation plan is dated 14 August 2004 and followed a meeting involving Mr Painter, Ms Adams, Senior Sergeant Kluessien, Inspector Bird (the Area commander) and a Police HR manager.

[8] Two plans have been exhibited as part of the evidence. They both record the following:

	<b>WHAT HAPPENS</b>	...	...
<b>MEDICAL:</b>	<i>Follow medical recommendation from Dr Macedo, Specialist Appointment at 0930 1st September.</i>	...	...
<b>WORK:</b>	<i>Notify GP, D R Hodder if symptoms worsen or if requires time off work  <b>Supervisor:</b> S/Sgt Kluessien  Report to Liz Pomare  <b>Restrictions:</b> No driving, no use of firearms, no use of batons, no heavy lifting  <b>Hours:</b> Monday to Friday 0800 – 1600  <b>Activities:</b> Sedentary  Taking complaints and working in the watch house  Follow-up calls – investigation work</i>	...	
<b>OTHER:</b>	<i>Exercise routine: persist with swimming and stretching  Healthy eating  Limit alcohol</i>		

[9] In the evidence there are some disputes about the extent to which there was adherence to and regular review of the rehabilitation plan by NZ Police. For reasons set out later I do not accept that these disputes are at all relevant to the personal grievance.

[10] On 23 May 2005, Mr Painter transferred from the Otahuhu watch house to the Papakura watch house.

[11] Sometime in August 2005, Mr Painter was charged with assaulting his partner. He was initially stood down from duty on about 30 August 2005 and on 13 September 2005 was served with a notice of proposed suspension and then suspended on pay on 11 October 2005. It is common ground that this stand down and suspension related solely to the criminal charges then faced by Mr Painter. Mr Painter defended the assault charges and on 12 October 2006 he was discharged pursuant to s.347 of the Crimes Act 1961. By October 2006 Mr Painter was subject to a suspension in connection with the misconduct charges that resulted in his dismissal so he did not return to duty despite the acquittal on the criminal charges.

### **The disciplinary charges**

[12] After Mr Painter's transfer to Papakura, it emerged that there were complaint files, lost property reports, exhibit sheets and correspondence files not actioned by him during his time at Otahuhu. Sergeant Curtain reported these concerns to Inspector Bird who in turn referred the concerns to the District Professional Standards Office. Inspector Brady of that office recommended that Inspector Bird commence an internal disciplinary investigation in respect of the concern. On or about 27 September 2005, Mr Painter was formally advised of this investigation.

[13] As part of the investigation, Inspector Bird interviewed Mr Painter on 19 November 2005. Mr Painter was supported by a Police Association representative. There is a transcript of the interview signed by Mr Painter as correct. During the interview, Mr Painter confirmed that his duties were attending the public counter, taking complaints from members of the public, taking statements, taking fingerprints and looking after exhibits. He acknowledged that his duties were to complete and forward files within 24 hours of receiving them at the front counter but could not recall instructions from Ms Pomare not to put files in personal drawers/boxes or to advise her of delays with file management. Mr Painter could not recall discussions

with Ms Pomare with respect to him forwarding files for completion, nor an instruction to have files up-to-date before transfer to Papakura, nor a discussion with her about Otahuhu files after the transfer to Papakura. Inspector Bird referred Mr Painter to a number of specific files which were incomplete. In general, Mr Painter's explanation on those files that required further action was that he had too much work to do. That was because the required workload exceeded the watch house capacity to deal with it, especially given new staff in the watch house.

[14] At some point after this first interview, Inspector Bird became aware of other over-held files allocated to Mr Painter that had been located at the Papakura Police station. Inspector Bird then re-interviewed Mr Painter on 29 December 2005. There is a transcript of this interview and Mr Painter was again represented. To the extent that these files were incomplete, Mr Painter's explanation in summary was that he was too busy attending to other responsibilities. He also gave some specific responses in relation to particular files as to why inquiries or actions were incomplete.

[15] The two formal interviews and information available to Inspector Bird from other inquiries gave rise to several inconsistencies or contradictions that were raised with Mr Painter in February 2006 for his further comment. Following that third interview, Inspector Bird compiled a report in which he recommended that Mr Painter be charged with breaches of a number of Police regulations.

[16] There is an evidential conflict arising from the interviews that can be dealt with now. When Mr Painter was stood down in August 2005, he was asked by Inspector Brady whether there were any urgent correspondence matters which required attention. When interviewed on 29 December 2005, Mr Painter claimed to have told Inspector Brady that he had no Court files but had other files at Papakura that required attention. When interviewed on 9 February 2006, Mr Painter claimed that he had told Inspector Brady that there were two Court files and denied not mentioning the Papakura files to him. However, I prefer Inspector Brady's evidence to the effect that Mr Painter said nothing to him about the over-held files at the time he was stood down on 30 August 2005. If something had been said, Inspector Brady probably would have made appropriate arrangements and the Papakura files would have been located well before the first interview on 19 November 2005.

[17] Between May and August 2006, New Zealand Police completed formalities in respect of charging Mr Painter with these breaches and suspending him on full pay in

relation to those charges. It should be remembered that Mr Painter was at that time still on suspension in connection with the unrelated criminal charges. During this time, counsel for Mr Painter also wrote to New Zealand Police seeking a penalty indication. As he was entitled to do, the Commissioner declined to give a penalty indication. Subsequently Mr Painter pleaded guilty to seven disciplinary charges and declined an election to have the charges dealt with by the Police Disciplinary Tribunal. The matter was then referred to Police National Headquarters, District Management having decided to seek Mr Painter's removal from New Zealand Police.

[18] Consideration at Police National Headquarters involved receipt of submissions from Mr Painter's counsel, the District Commander, the Crown Solicitor and a reply from Mr Painter's counsel. As is usual, the Commissioner's power to dismiss was delegated to another, in this case Deputy Commissioner Pope. He wrote to Mr Painter on 19 April 2007 formally advising him of his view that the charges related to serious misconduct of such gravity that he must consider Mr Painter's suitability to remain a member of the Police. Mr Painter was given a time limit for further submissions on this point. Counsel then wrote to the Deputy Commissioner on 11 May 2007 setting out further submissions. Next, the Deputy Commissioner decided to dismiss Mr Painter for the reasons set out in his letter of 29 May 2007 that was personally delivered to Mr Painter on 7 June 2007.

### **Justification for dismissal**

[19] To justify the dismissal, New Zealand Police must show that the decision to dismiss and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time. Mr Painter raises a number of points which he says establish that New Zealand Police fell short of the required standard. These points separately and collectively comprise the grounds of his grievance.

[20] It is said that New Zealand Police took into account irrelevant considerations in reaching the decision to dismiss. I am referred to *Ashton v. Shoreline Hotel* [1994] 1 ERNZ 421 where it was held at [430] that *if an employer has waived the right to react to misconduct, the instance of misconduct cannot later be revived to be taken into account if further offending occurs*. In the present case, it is said that New Zealand Police took into account the criminal charges against Mr Painter, his drinking, lateness for work, unkempt appearance and the destructive relationship with his former girlfriend. These matters were not dealt with as they arose as misconduct

so it is said that they should not have been considered as part of the dismissal decision.

[21] A difficulty with this submission is that there is no evidence or reason to indicate that Deputy Commissioner Pope, in deciding to dismiss Mr Painter, did rely on any issues other than the matters referred to in his letter dated 29 May 2007 which comprehensively explains the reasons for dismissal. The letter referred to the outcome of the earlier disciplinary charges which was considered relevant, a position that any fair employer would take. However, the letter does not establish that the Deputy Commissioner considered as misconduct the previous behavioural difficulties with Mr Painter or the criminal charges.

[22] What is clear is that the District Commander (Superintendent Shortland) had regard to some of these historical matters but mostly in the context of responding to things said by or on behalf of Mr Painter in the disciplinary process. In evidence, Superintendent Shortland and Inspector Brady advanced the idea that the historical issues made Mr Painter unsuitable to remain in the New Zealand Police but I take that as the sort of *ex post facto* justification that *Ashton* excludes as relevant for present purposes. These views expressed in evidence by Superintendent Shortland and Inspector Brady do not taint the decision to dismiss Mr Painter.

[23] I am referred to *Quinn v. BNZ* [1991] 1 ERNZ 1060 where the Labour Court held that the employee's right to be heard before dismissal is a right to be heard by the decision-maker. In the present case, it is argued that New Zealand Police did not afford or advise Mr Painter of that right. I do not accept that submission. Mr Painter was represented throughout by experienced counsel who three times wrote to the Commissioner of Police to make submissions on behalf of Mr Painter. It was well known that there was a right of a personal audience if that was wanted. Indeed, counsel did actually meet with Assistant Commissioner Marshall at an earlier stage before the guilty plea. What happened was that Mr Painter availed himself of the opportunity to address the decision maker to the extent he thought appropriate at the time and he cannot now raise as a procedural criticism that he did not meet face-to-face with Deputy Commissioner Pope.

[24] It is submitted that New Zealand Police failed to take into account Mr Painter's previous good work record and his medical condition. Both points are without merit. Mr Painter's medical condition had him placed on light duties rather

than front-line Police work. There is no medical evidence to indicate that he was not fully fit for the assigned watch house role. The disciplinary charges arose from his failure to perform these light duties for which he was fully fit. Mr Painter's continuing medical condition was irrelevant to the outcome of the second set of disciplinary charges.

[25] It is clear from the Deputy Commissioner's dismissal letter that he had regard to the submissions made on Mr Painter's behalf which included mention of satisfactory aspects of Mr Painter's service. However, the more significant factor arising from Mr Painter's service record was the earlier disciplinary charges, in part similar to the issues arising in the second set of charges. That is a point that any fair employer would take from a consideration of the whole of Mr Painter's service.

[26] It is submitted that New Zealand Police gave insufficient training and inadequate supervision to Mr Painter. On the first point, I am referred to the report dated 2 August 2004 in which Inspector Bird recommended that Mr Painter be placed on a performance improvement plan partly to remedy defects in his file handling. That was never done, the implication for present purposes being that, if it had been done, Mr Painter would have developed better file handling skills. The matters referred to in Inspector Bird's report substantially formed the basis of the first disciplinary charges faced by Mr Painter. In other words, New Zealand Police treated Mr Painter's failings not as a training deficit but as misconduct. I infer that lack of training was not raised as a substantive defence to the first disciplinary charges. It was not raised in defence of the second set of charges. There is no reliable evidence that Mr Painter had not received sufficient training to equip him with the skills necessary to properly meet his file handling responsibilities. To the contrary, Mr Painter when interviewed confirmed knowing the requirements. The decision of New Zealand Police to treat the failings on both occasions as misconduct rather than as a training deficit is what any reasonable employer would have done.

[27] More must be said about the supervision point. Inevitably it must be right that Mr Painter was not closely supervised because otherwise the failings that comprise the set second of disciplinary charges would have been identified earlier. However, I accept the evidence of Ms Pomare, Inspector Bird and Senior Sergeant Kluessien that Mr Painter never raised with them any problems he was having with workload but instead assured them on any inquiry that he had his work under control. In that

circumstance I do not accept that the dismissal is unjustified because the NZ Police's supervision regime did not pick up Mr Painter's failings earlier.

[28] It is submitted that there was disparity between the treatment of Mr Painter and that of another constable who, in 1997, was fined rather than dismissed for conduct relating to file handling that was arguably worse than Mr Painter's misconduct. In *Chief Executive of Department of Inland Revenue v. Buchanan* [2005] 1 ERNZ 767, the Court of Appeal identified three issues that arise in disparity cases:

- (a) Is there disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity?
- (c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[29] The reliable evidence of disparity is limited. The following about the earlier case is undisputed:

*There were two charges relating to 45 files. One of destroying the files, the other of altering computer entries relating to them in the document locater records.*

*The member had seven years' service. He pleaded guilty. He had otherwise favourable comments from district management, and the penalty decision records "if it were not for the recommendation of Detective Inspector Copper and Superintendent Long, I would have instituted the removal of Mr ... from that member's employment". A fine of \$500 "the maximum I am able to impose" on each charge by Assistant Commissioner Trendle on 08/09/97.*

[30] I am not convinced that the two situations are analogous to create a true disparity. Mr Painter faced seven charges not two, and many more than 45 files were involved. However, even if disparity is assumed, there is an adequate explanation. Mr Painter did not have seven years' service with otherwise favourable comment and supportive recommendations. Mr Painter had less than five years' active service. More significantly, these were his second set of disciplinary charges and his District supported his removal from New Zealand Police. It is clear from the undisputed evidence that the other case would have resulted in removal but for the favourable comments and recommendation. There is sufficient explanation for any disparity.

[31] I am referred to *NZ Amalgamated Engineering etc IUOW v. Fletcher Construction Co Ltd* [1989] 3 NZILR 279 in support of the submission that it was

unwise for a person directly involved in disputed events to make the employer's decision whether to dismiss an employee in connection with those events. In the present case, it is said that Inspector Bird conducted the misconduct investigation and recommended charges against Mr Painter but was involved indirectly and directly in supervising him and monitoring his rehabilitation programme. The grievance includes criticisms on both fronts of Inspector Bird. The difficulty with the point is that Mr Painter pleaded guilty to the disciplinary charges and there was therefore no dispute about what happened. In the cited case there was from the outset a significant dispute about the relevant incident. I have already found that the supervision and rehabilitation plan points give no basis for challenging the dismissal. I also note that the decision to dismiss Mr Painter was made by Deputy Commissioner Pope who was unconnected with the circumstances of Mr Painter's misconduct.

[32] There are some other points from the evidence that should be dealt with. Mr Painter's current partner is Louise Draper. On 9 November 2006 she was part of a conversation with Sean Coutts, a former police officer. Mr Coutts left NZ Police in 1997. I prefer Ms Draper's account of the exchange which has Mr Coutts suggesting that that he knew from Superintendent Shortland of disciplinary and criminal charges against Mr Painter. Superintendent Shortland's evidence is that he said nothing to Mr Coutts about Mr Painter and had no opportunity to do so anyway. Superintendent Shortland had a brief chance encounter with him in June 2007 at an airport, their first contact for at least three or four years. On Superintendent Shortland's evidence Mr Coutts could not have heard anything about Mr Painter's situation from him. I accept Superintendent Shortland's evidence on the point. That leaves unexplained the source of Mr Coutt's information but his reported comments do not impugn Deputy Commissioner Pope's dismissal decision. It is suggested that Superintendent Shortland was motivated by this matter to recommend Mr Painter's removal from NZ Police. I do not accept that view. In his report recommending Mr Painter's removal Superintendent Shortland simply denied the suggestion that he had passed information to Mr Coutts. The point needed a response. It must also be remembered that in June 2005 it was made clear to Mr Painter that further misconduct would result in his suitability being questioned. That is all that happened.

[33] The evidence of Mr Painter is that Inspector Bird made comments after one of the transcribed interviews downplaying the significance of the overholding concern by referring to it as *housekeeping* or something similar. Those interviews were on 3

November 2005 and 29 December 2005. Mr Painter was formally cautioned about the seriousness of the situation at the start of each interview so potentially he received an inconsistent message. Counsel's evidence is that he spoke with an Assistant Commissioner sometime before 16 August 2006 because of his concern about hardened attitudes towards Mr Painter particularly from Superintendent Shortland and Inspector Brady. The managers involved are entitled to have different views about the situation and no unfairness arises from that. Given counsel's evidence, Mr Painter must have known before pleading guilty in December 2006 that it was not just a matter of *housekeeping*. I do not accept that any unfairness arose even if Mr Painter did receive an inconsistent message in late 2005 about the seriousness of the situation.

### **Summary**

[34] Deputy Commissioner Pope says in the dismissal letter that he considered Mr Painter's actions serious and destructive of trust and confidence so that he could not be relied on in future to carry out his duties; that his admitted conduct was incompatible with the maintenance of good order and discipline and brought the Police into disrepute; and that Mr Painter's removal was required. Those are conclusions that any fair and reasonable employer would have come to in light of Mr Painter's serious and substantial failings.

[35] It will be apparent from the foregoing findings that NZ Police acted in a way that a fair and reasonable employer would have acted.

[36] It follows that Mr Painter's dismissal was justified and no personal grievances arise.

[37] Costs are reserved. Any application must be made within 21 days and responded to within a further 14 days.