

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 426
5334690

BETWEEN

LI YU
Applicant

AND

THE COMMISSIONER OF
POLICE
Respondent

Member of Authority: Yvonne Oldfield

Representatives: John Dewar for applicant
Peter Churchman for respondent

Investigation meetings 29 and 30 June 2011, 19 July 2011

Determination: 30 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Yu, was accepted to join the New Zealand Police in 2008. She participated in recruit training between October 2008 and March 2009 but because of an allegation that she had cheated on an assessment she was not permitted to graduate with her class. She was placed on alternative (non-sworn) duties while the allegation was investigated. The initial outcome was a recommendation that she be dismissed for serious misconduct. After input from Ms Yu's representatives and a review by Human Resources Director Wayne Annan this was abandoned. Instead in December 2009 it was agreed that her employment would continue subject to Ms Yu repeating recruit training.

[2] Ms Yu started training with a new group of recruits in February 2010. She went through to the end of the course (Wing 261) but once again she was unable to graduate, this time because (even after resits and appeals) she consistently failed one critical assessment. Ms Yu says it was never her understanding that repeating the

training meant that she had to pass everything again. Her position is that she was being asked to return to college to attend a “refresher course not a qualifying course.” She says she should have been able to graduate because she passed the assessment in question first time round.

[3] The respondent (also referred to here as the Police) says that this was not what was agreed and notes that the assessment in question was associated with the original cheating allegation. Section 22 of the Policing Act 2008 provides as follows:

“Police employee becomes constable by taking constable’s oath

...

(2) Before administering the constable’s oath under this section, the Commissioner or person authorised by the Commissioner to administer the oath must be satisfied that the Police employee is-

(a) adequately trained to exercise the powers of a constable; and

(b) capable of exercising the powers of a constable.”

[4] The respondent says it proceeded in good faith on the basis that Ms Yu agreed to undertake the entire second training programme including both instruction and assessments. It says that the Police College went to great lengths to support her and provide every opportunity for her to pass the required examinations but in the end, she did not successfully complete all the training requirements and it was impossible for the Commissioner of Police to be satisfied that the requirements of the Policing Act 2008 had been met.

[5] Since leaving the Police College Ms Yu has been offered the opportunity to be considered for non-sworn vacancies but has not been prepared to accept any non-sworn duties. She is currently on unpaid leave.

Issues

[6] Although Ms Yu is still very aggrieved about what happened in relation to the cheating allegation, she accepts that all associated matters were resolved by the agreement that she should repeat the training. The current employment relationship problem relates to the fact that she was not sworn as a constable at the conclusion of the second training course. Ms Yu alleges unfair treatment during Wing 261 and says

that being prevented from being sworn amounts to an unjustified disadvantage and/or a breach of contract on the part of the respondent. She also alleges breaches of good faith.

[7] Ms Yu purports to have raised a grievance in July 2010 in a letter she wrote to Police Conduct Manager Inspector McKeown. The respondent says that while that document referred to a number of concerns (including being refused graduation and unfair treatment on Wing 261) it was not clear that it was raising a grievance. A subsequent letter in December 2010 (from her current representative) did appear to raise a grievance but is said by the Police to be out of time. The Police also point out that although the December letter refers to not being permitted to graduate it makes no mention of mistreatment on Wing 261.

[8] Ms Yu is still employed by the respondent. It can be said that her being refused permission to graduate and take the constable's oath is an ongoing situation. For this reason I am satisfied that this part of the employment relationship problem is not out of time and can be the subject of an Authority investigation.

[9] As for her treatment during Wing 261 I accept that the letter of 8 July 2010 does not make it clear that she was raising a grievance about these matters. Not having been raised in time these concerns cannot be addressed as stand alone grievances. They are however relevant to the question whether she was given a fair and reasonable opportunity to demonstrate that she was capable of exercising the powers of a constable. For that reason I have considered evidence about what happened during Wing 261.

[10] The specific questions for determination are therefore:

- i. What were Ms Yu's terms and conditions of employment and did they include an agreement that Ms Yu would repeat and pass all assessments?
- ii. If so, was she subjected to unfair treatment during the course of the 2010 training programme, and did the respondent properly address concerns raised by her at that time?

- iii. Was the assessment she failed (including resits and appeals) conducted fairly?
- iv. Overall, did Ms Yu suffer any unjustified disadvantage/breach of contract associated with not being sworn at the end of the 2010 recruit course (including being in any way denied a fair and reasonable opportunity to demonstrate that she was capable of exercising the powers of a constable)?
- v. Were there any other breaches of good faith associated with the respondent's treatment of Ms Yu?

[11] If a disadvantage grievance or breach of good faith is made out the question of remedies will also fall to be determined.

(i) The terms of employment and the agreement of 10 December 2009

[12] In 2008 the Police became subject to the same employment obligations as other employers. At that time they negotiated a standard disciplinary procedure with the Police Association. This involved a two step approach: a preliminary investigation by the relevant manager followed by an independent review. In Ms Yu's case these two stages were completed during 2009. The matter was then referred to Mr Annan (who, in line with his normal practice, had had very little involvement with the case up until then.)

[13] Two separate allegations of cheating had been levelled against Ms Yu. When Mr Annan re-assessed the investigation into these allegations he decided that one could not be sustained. Nothing more needs to be said about that. He felt the other (which involved writing a helpful acronym on her hand) amounted to serious misconduct but was concerned that at the time the conduct was observed she had been allowed to continue the assessment. Mindful that this could give rise to an impression that the misconduct was not serious he perceived a risk that a dismissal might not stand up to outside scrutiny.

[14] Ms Yu attended the meeting of 10 December 2009 with her support person Mike Lockett and her solicitor Geoff O'Sullivan. The respondent was represented by Mr Annan, Mr McKeown and John McLachlan, Deputy National Manager, Teaching and Learning.

[15] Ms Yu was present for the first part of the meeting (about half an hour). She answered questions from Mr Annan about the alleged wrongdoing and gave her thoughts about the disciplinary process and the way the allegations were handled. There was no discussion during this part of the meeting about the possibility of repeating the training.

[16] Mr Annan told me that after hearing from Ms Yu he was confirmed in the view that dismissal was probably not appropriate. Equally however he felt that Ms Yu's earlier conduct demonstrated that she was not ready to take up the duties of a police officer. He told me that he was seeking some means of addressing these issues. For her to repeat the course seemed the most practical solution. He took a short adjournment in which he discussed this idea with his colleagues. He decided that repeating the course would ensure that Ms Yu knew what was expected of her and provide her with an opportunity to refresh any areas where she had lost skills, as well as giving her a way of demonstrating that the respondent could have trust and confidence in her.

[17] The meeting resumed without Ms Yu. Mr Annan told Mr Lockett and Mr O'Sullivan of his proposal. Mr Lockett and Mr O'Sullivan suggested that the course could be truncated but Mr Annan rejected this saying he wished her to do the whole course in order to ensure her competence and re-establish trust and confidence. Mr Annan said that although some details remained to be finalised (in relation to salary and the location of some of the training) the meeting ended on the understanding that Mr Lockett and Mr O'Sullivan would recommend the proposal. There is no evidence of any discussion, on 10 December or at any other time, of assessments. Mr Annan's view is that if the passing of assessments was an issue, it should have been raised with him then.

[18] Mr Lockett told the Authority that he did not believe words like redo, retrain, and refresh (the sort of language used by the parties in referring to what was

proposed) imported obligations to pass the assessments again. He says he would not have recommended that Ms Yu retrain if he had known she was expected to pass again.

[19] Shortly after the meeting Mr Lockett and Mr O’Sullivan put the proposal to Ms Yu. She agreed almost immediately. At no time did she personally discuss the proposal or what it meant with any representative of the respondent. She told the Authority that although she did not believe that she had lost skills in the period since completing the first course, she understood that the intention was to address any risk that she had, and accepted that it could only be useful to her. However she says her agreement was based on an understanding that she would not be subject to pass/fail requirements and she would not have agreed otherwise.

[20] There was no further discussion except to finalise Ms Yu’s pay rate (she was to receive a higher pay rate than other recruits) and to confirm that all the training would take place at the college on “Wing 261”.

[21] The documentation recording the outcome of the meeting of 10 December contains no reference to the question of assessment. A 21 December memorandum from Assistant Commissioner Nicholls rescinded an earlier notice of restricted duties. It recorded:

“...a decision has been made to retain you in the Police.

I advise that pursuant to my authority under Section 17(1) of the Policing Act 2008... Notice of Restricted Duties is hereby rescinded.

I direct that you will commence with the next recruit Wing beginning on the 1st February 2009 [sic] at the Royal New Zealand Police College.”

[22] On 13 January 2010 Ms Yu was sent a letter headed “*Offer of Employment – New Zealand Police.*” It was later replaced by yet another letter in May 2010 (amended to record the agreement about Ms Yu’s enhanced pay rate.) Ms Yu did not countersign either letter. Each contained the following paragraph:

“Upon successfully completing the training requirements and having been assessed as capable of exercising the powers of constable pursuant to Section 22(2) (a) & (b) of the Policing Act 2008 you will take the constable’s oath and become a constable and graduate from the RNZPC.”

[23] This provision was also substantially similar to what was set out in the offer Ms Yu received when she was first accepted as a recruit in 2008.

[24] The only time it appears the question of assessment was ever raised was by Ms Yu's support person Mr Lockett in an email of 25 January to Inspector McKeown. The final paragraph of that email read:

"The other thought that has occurred is for example bearing in mind I gather [she] has already previously passed [her] exams & other related tests in the College if for some other remote reason [she] failed the same exam etc this time round where would this actually place [her]"

[25] It is submitted for the respondent that:

"There would have been no reason for Mr Lockett to have asked this question if, as Ms Yu now maintains, it was expressly agreed on 10 December... that she did not need to pass the examinations in order to graduate."

[26] Mr Lockett did not receive a response from Inspector McKeown.

[27] Shortly afterwards Ms Yu began the training and started to undertake assessment procedures. I asked her why, if she believed that she should not have to sit assessments, she sat all the assessments (including resits) during the course without protest. She reiterated that she did not feel she should have to sit them (because she believed she passed the course the first time) but she said she did them because she was asked to.

Determination

[28] It is the respondent's position that the letter of 13 January makes it clear that Ms Yu had to pass the 2010 course.

[29] Ms Yu disputes this. She says that (except insofar as it related to her rate of pay) her employment was still governed by the terms of the 2008 letter which she did countersign. She maintains that, pursuant to that contract, she successfully completed

the training requirements first time round and was assessed as capable of exercising the powers of constable.

[30] I find that Ms Yu's terms and conditions are as set out in the 2008 letter but subject to modifications pursuant to the agreement of 10 December 2009.

[31] The agreement of 10 December 2009 made no express reference to the question of assessments. The argument for Ms Yu is that in the absence of such express reference, she should not have to sit them. The argument for the respondent is that this is inconsistent with the plain meaning associated with the word "training", which is normally understood to include assessment. The respondent also says it is inconsistent with her behaviour given that she sat the assessments, and the only purpose for doing so was to pass them.

[32] I prefer the respondent's argument on this point. I conclude that the agreement reached in December 2009 must be construed to mean that she would repeat all aspects of the recruit training, both instruction and assessment, and pass. This modified the existing terms of employment in that the training requirements to be completed successfully included those she was asked to sit as part of the 2010 training.

(ii) Treatment during "Wing 261"

[33] It follows from the foregoing discussion that the end of Wing 261 in 2010 was the relevant point at which to assess whether Ms Yu was adequately trained to exercise the powers of a constable and capable of exercising those powers.

[34] As we know, it was decided that she was not. The next question for determination is therefore whether the Police were unfair or unreasonable in coming to that decision. That requires consideration of whether Ms Yu was fairly treated during Wing 261.

[35] Recruit Training is one of several programmes within the Police College. When Ms Yu was on Wing 261 the recruit programme was overseen by Senior Sergeant McCarthy. His role was to supervise instructors and instructor development,

and provide some input into programme design and development. He had not taken up that role when Ms Yu was on her first recruit course (Wing 255) and had no involvement with her training at that time.

[36] On a day to day basis a principal instructor looked after the Wing. I was told that the College made sure that Ms Yu had a different instructor on Wing 261 from the one she had on wing 255.

[37] Ms Yu told the Authority of issues with her classmates saying she felt that she was treated as the butt of class jokes however she did not provide details to the Authority and did not ask the College (at the time) to follow up on those issues. For that reason, and because they do not appear to go to the question of whether she was given a fair opportunity to reach and demonstrate competence, they are of no further relevance here.

[38] Ms Yu also gave two examples of allegedly poor treatment by College staff. One concerned an incident when an instructor in a computer class rebuked her for looking at someone else's screen (she says she was not doing so.) She was also reprimanded by the same instructor for failing to report in. Ms Yu felt that she was unfairly singled out and that the reporting requirements were unreasonable.

[39] The respondent says strict reporting requirements were in place to develop appropriate habits and practices for later on (it being essential that a constable's whereabouts be known at all times.) As a result of the fact that Ms Yu did not seem to have taken on board his feedback about her behaviour, the instructor concerned asked Senior Sergeant McCarthy to facilitate a meeting between him and Ms Yu.

[40] This took place on 26 February with another woman officer present also. Senior Sergeant McCarthy described the meeting as being in the nature of a coaching session. The instructor expressed his concerns about Ms Yu's behaviour and attendance and the importance of reporting in was stressed.

[41] The other example involved Senior Sergeant McCarthy himself. On 21 March Ms Yu emailed Inspector McKeown to express concern about certain comments Senior Sergeant McCarthy had made to her during a class. Her concern centred on an

assertion that she had been singled out and told not to refer to a book during an exercise when all students were in fact doing the same (and, as it turned out, there had been misinformation about what reference material was permitted.)

[42] There is no dispute that Ms Yu's email was neither intended nor treated as a formal complaint. Ms Yu told the Authority that she did not want Inspector McKeown to do anything in particular, she just wanted him to be aware of her view, which she told me was that certain people were "*out to get her.*"

[43] For his part, Inspector McKeown took the contents of the email to indicate that Ms Yu was feeling over-sensitive and fearful. Within a couple of days of the email he had facilitated a meeting between himself, Sergeant McCarthy and Ms Yu. Inspector McKeown told me his intention was that he and Senior Sergeant McCarthy would put Ms Yu at ease. Senior Sergeant McCarthy apologised to Ms Yu for the incident in class. Ms Yu said this helped somewhat but she still felt that she should have received a public apology.

[44] Inspector McKeown also had a short one on one meeting with Ms Yu at which he sought to reassure her by telling her "*I will attend your graduation with Mike [Lockett.]*" Ms Yu interpreted these words as some sort of guarantee that she would pass the course but (given that Inspector McKeown does not work at the college and cannot pass or fail anyone) I am satisfied that they were simply to encourage her and should have been construed that way.

[45] Although Ms Yu does not recall this, Inspector McKeown also says he told Ms Yu that henceforth she should go to Senior Sergeant McCarthy with any problems. After this, he says, he left matters with the College. I accept that this is more likely to be the correct recollection because it was not the Inspector's role to continue to be involved with her case by that stage.

[46] As well as hearing the respondent's point of view about these two specific incidents I also heard from Mr McLachlan who told me that he believed everything possible was done to assist Ms Yu. He noted that she was given additional remedial support upon request and that additional ESOL funding was obtained to ensure that she had access to assistance in that area.

Determination

[47] During the investigation meeting I asked Inspector McKeown about the way in which he responded to Ms Yu's concerns. It is fair to say he did not seriously consider the possibility that Sergeant McCarthy was acting in anything other than good faith towards Ms Yu. It is also the case however that Ms Yu had chosen not to make a formal complaint of any sort and appeared to want some sort of informal intervention. Given those facts I do not find anything unreasonable about the way Inspector McKeown approached the matter.

[48] As for the two incidents Ms Yu recounted to the Authority, I am not satisfied that they were sufficient to establish that she was subjected to unfair treatment during her time on Wing 261. In relation to the matter involving the computing instructor I conclude that he appears to have been justified in raising the issues he did. As for the other incident, Senior Sergeant McCarthy did Ms Yu the courtesy of an apology in recognition of the fact that there had been some misinformation about what was required that day.

[49] I am not satisfied that Ms Yu was subjected to unfair treatment during Wing 261.

(iii) The assessment process

[50] Senior Sergeant McCarthy told the Authority that recruits go through a rigorous selection process. Once accepted, he said, they will be given every opportunity for re-training and re-assessment with the goal being for every recruit to successfully complete the course. However such opportunities are not unlimited and a few recruits do fail for whatever reason. It was estimated that approximately five percent of recruits might not pass (some for medical or fitness reasons) although I was told that this figure varies from Wing to Wing. I was also told that this figure has increased slightly since the passing of the Policing Act 2008. Prior to that, recruits took the oath at the start of their training making it much harder to dismiss a recruit who was not making the grade.

[51] At my request Senior Sergeant McCarthy gave evidence about the assessment and moderation procedures for practical and written assessments. For reasons of economy I do not set out what he described however I record that the procedures are thorough and rigorous. Wherever possible there will be a different assessor for each resit although with multiple resits this cannot always be guaranteed. Between Wing 255 and Wing 261 changes had been made to control mechanisms to ensure consistency but there were no changes to the nature of the assessments themselves.

[52] All candidates are ranked. On Wing 255 Ms Yu had been near the bottom of the class. On Wing 261 what let her down was one relatively small, but important section of paperwork: the Caption Summary sheet. This was part of the same assessment to which the original allegation of cheating on Wing 255 had related. In total Ms Yu sat the Caption Summary assessment six times, and appealed the outcome three of those times, as set out in the following table:

27 May	Fail	
4 June	Fail	Appealed (declined)
6 June	Retraining offered to Ms Yu and other recruits who failed first two attempts: Ms Yu declined to participate	
7 June	Further offer of retraining before resit: accepted this time. Instructor brought in at additional cost on morning of public holiday so that Ms Yu would have the benefit of someone independent.	
7 June	Fail	
8 June	Fail	Appealed (declined)
9 June	Fail	
10 June onwards	Emphasis up to this point was on trying to get Ms Yu through in time to graduate with the rest of the class. Once this deadline was missed Ms Yu was given a week's leave to rest before undergoing a further week of remedial training and a final resit.	
28 June	Fail	Appealed (declined)

[53] Many different assessors and instructors were involved in the course of this process. Senior Sergeant McCarthy also gave Ms Yu the opportunity of an external appeal to NZQA however she did not take this up.

[54] Respondent witnesses told me that after 28 June the decision was made that there was nothing to be gained from further resits.

[55] I was shown one of the appealed assessments. Despite the fact that the assessment was “open book” with reference materials supplied Ms Yu had failed to identify the correct statute. In response to questioning by the Authority Ms Yu demonstrated that she still did not understand what was wrong with the answer she had given.

Determination

[56] Given the number of different assessors, instructors and moderators who worked with Ms Yu in an attempt to get her through the Caption Summary assessment there would have had to have been a college-wide conspiracy for there to have been any unfairness in this process. There is no evidence to suggest that. Instead the evidence indicates rather that the College did, as it asserted, go out of its way to assist Ms Yu to pass.

[57] I consider the foregoing summary of facts speaks for itself. I am not satisfied that there was any unfairness arising out of the assessment process.

(iv) Unjustified disadvantage/breach of contract

[58] I am satisfied that Ms Yu was given more than adequate training. She was also given a fair and reasonable opportunity to demonstrate that she was capable of exercising the powers of a constable. The evidence has shown that the respondent was acting within the terms of the employment agreement, and was justified, in concluding that she was not capable.

[59] It was most unfortunate, after all the effort both she and the Police had gone to, but the constable’s oath could not be administered to her.

[60] She has made out neither a grievance nor a breach of her terms and conditions of employment.

(v) Other breaches of good faith

[61] Two final issues remain to be addressed.

[62] The first concerns the fact that there were instances where Inspector McKeown failed to address issues raised by Ms Yu or her representative (examples including those discussed above on 25 January 2010 and 8 July 2010.)

[63] It is accepted that Inspector McKeown was somewhat hit and miss in his responses. It appears that it was not part of his responsibilities to continue to be involved in her case but for a while, rather than make this clear, he continued to try to help when he could. This was obviously not good practice but it has not been established that it amounted to a breach of good faith, or that there was any prejudice to Ms Yu's position as a result.

[64] The other relates to suggestions that the respondent failed to be sufficiently proactive in the period after Ms Yu returned to Auckland and that she should have been redeployed to a non-sworn role rather than having to submit to a contestable process.

[65] Once Ms Yu returned to Auckland her case became the responsibility of the Waitemata District human resources manager, Mr Pieters. He had been briefed by Mr Annan and understood that when Ms Yu came back she would be offered opportunities to apply for vacant positions, with any appointment to be on merit. Should that not work out, he understood that an exit package would be considered.

[66] Mr Pieters met with Ms Yu and Mr Lockett when she first came back to Auckland. From then until late 2010 she was advised of potential vacancies as they arose. Meanwhile she was on sick leave. After her entitlements to paid leave ran out (in August 2010) she went on to unpaid leave.

[67] Three months later, Mr Pieters had had no further contact from her except to be supplied with medical certificates. As far as he knew she had not applied for any jobs. He therefore referred the matter back to head office. Shortly after that further steps were taken to raise a grievance and these proceedings followed.

[68] I received no evidence about Ms Yu's skills or about what non-sworn jobs she might have been qualified for. I am unable to say whether there were any suitable jobs to which it might have been feasible to simply redeploy her. Even if there had been, it is the respondent's position that it was entitled to expect her to go through a normal interview and appointment process in respect of any vacancies that were available. I was not given any developed argument, on Ms Yu's behalf, as to why the respondent's approach on this point was unfair or unreasonable.

[69] It has not been established therefore that any unfairness or breach of good faith arises out of the respondent's treatment of Ms Yu in the period after she left the Police College.

Summary

[70] Ms Yu's claims of unjustified disadvantage and breach of good faith have not been made out. There is nothing more I can do to assist with her employment relationship problem.

Costs

[71] The question of costs is reserved. The parties have a period of 28 days from the date of this determination in which to make any application for costs.

Yvonne Oldfield

Member of the Employment Relations Authority