IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 103
CRC 12/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	CHRISTINE LORRAINE COY Plaintiff
AND	COMMISSIONER OF POLICE Defendant

Hearing: 2 August 2010
(Heard at Wellington-Christchurch (by video link))

Appearances: Scott Fairclough, Counsel for Plaintiff
Antoinette Russell and Sally McKechnie, Counsel for Defendant

Judgment: 9 August 2010

INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE GL COLGAN

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[1] This judgment decides a number of challenges to the admissibility of evidence intended to be called at the trial of this proceeding in Christchurch beginning in a little more than a week.

[2] First, I set out the principles by which the admissibility of the evidence intended to be called by the plaintiff, and which is challenged, will be determined. The starting point as always is the pleadings, the most up to date statements of claim and defence. Ms Coy's case consists of a number of personal grievances against her former employer. These include unjustified disadvantage in employment and unjustified constructive dismissal. A constructive dismissal is a resignation or abandonment of employment but which is alleged to be, in reality, a termination of employment at the initiative of the employer. Circumstances that can constitute a

constructive dismissal include a fundamental breach or breaches by the employer of the employment agreement, an ultimatum delivered to the employee to resign or be dismissed, and circumstances of that sort. In this case, Ms Coy alleges that treatment over a lengthy period by her supervisors as managerial representatives of the Commissioner, breached a number of express or implied terms of her contract of employment leading her to elect not to accept those breaches but to treat the contract as having been at an end.

[3] Many of the same historical events which are said by Ms Coy to have provided grounds for an unjustified constructive dismissal of her are also alleged to have been the unjustified disadvantages perpetrated upon her during her employment, a separate grievance or grievances.

[4] As I have already concluded in an earlier interlocutory judgment in this proceeding, although the legislation places time limits on what events may be actionable by an employee bringing a personal grievance, earlier events may nevertheless inform the Court of relevant background to those which are sued on. So there is a balance to be struck between not permitting every complaint or grievance that may have occurred over sometimes very lengthy employment being litigated or re-litigated, on the one hand, and, on the other, allowing the Court to understand the context in which the justiciable grievances occurred by reference to earlier events.

[5] The next criteria are statutory. First, pre-eminently and most generally, s 189(2) of the Employment Relations Act 2000 (the Act) permits the Court to accept, admit and call evidence in equity and good conscience even where this may not be strictly admissible in other courts. In exercising that broad discretion the Court may, nevertheless, be guided by the rules of evidence in other civil proceedings: *X v Auckland District Health Board.*[1]

[6] Ms McKechnie, who argued this interlocutory application for the defendant, emphasised that despite the breadth and predominance of s 189(2), the Court should nevertheless be guided strongly by the general rules of evidence in civil litigation. Counsel emphasised statements in judgments of this Court such as at para [14] of

[1] (2006) 7 NZELC 98,104.

Maritime Union of New Zealand Inc v TLNZ Ltd:[2] "[The principles and contents of the Evidence Act are] an important source of reference whenever the admissibility of evidence is challenged or otherwise in question." Even more directly, the following appears at para [10] of *X*:

> … the rules of evidence in civil proceedings in the High and District Courts are considered and applied but may, on a case by case basis, be modified in circumstances where to do so will promote the ends of employment justice and where rigid adherence to rules might have the opposite result in the unique circumstances of an employment case.

[7] There are, of course, different classes of case determined by this Court. For example, in a common law action for breach of contract or one of the limited range of tort proceedings available or in judicial review proceedings, all of which are otherwise indistinguishable from civil litigation in other courts, recourse to the general rules of evidence (but subject to s 189(2)) will be both more frequent and more strongly determinative. On the other hand where, as in this case, the cause of action is the statutory personal grievance or a dispute about the interpretation, operation or application of a collective agreement, decisions under s 189(2) will be less influenced by the general rules of evidence including the Evidence Act.

[8] Nevertheless, Ms McKechnie is correct that the fundamental principle of admissibility of evidence is relevance. Applicable also to decisions under s 189(2) as general principles, are the stated purposes of the Evidence in s 6:

> … to help secure the just determination of proceedings by—
> (a) providing for facts to be established by the application of logical rules; and
> …
> (c) promoting fairness to parties and witnesses; and
> …
> (e) avoiding unjustifiable expense and delay; …

[9] In addition, s 7 of the Evidence Act provides that it is a fundamental principle that all relevant evidence is admissible in a proceeding with the statutory exceptions and, under subs (3) "[e]vidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding."

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[2] [2007] ERNZ 593.

[10] The defendant also relies on the provisions of s 8 of the Evidence Act that:

> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
> …
> (b) needlessly prolong the proceeding.

[11] The defendant invokes several specific evidential rules, either individually or in combination, in his challenge to particular parts of the evidence. These categories can be listed under the following shorthand titles:

- opinion evidence;
- expert evidence;
- advocacy;
- hearsay evidence;
- scope of evidence filed in reply

[12] As to opinion evidence, Ms McKechnie argued, citing s 23 of the Evidence Act, that this is inadmissible, except to the extent that there may be exceptions as illustrated by ss 24 and 25. The former section (s 24) allows for limited opinion evidence where it is necessarily required for a witness to give direct evidence and for the fact finder to understand it. Section 25 deals expressly with opinion evidence from experts. None of the plaintiff's witnesses purports to be an expert as that term is defined by lawyers. Ms McKechnie again referred to the *TLNZ* case (above) saying that this is the leading judgment on the admissibility of expert evidence in this Court. In *TLNZ* this Court considered whether an expert's evidence was inadmissible because of a conflict of interest and, in particular, whether the expert's opinion is independent of both parties and of the pressures of the litigation. There was reference in that judgment to the Court's expectation of compliance with Schedule 4 to the High Court Rules (now incorporated by s 26(1) of the Evidence Act).

[13] *TLNZ* was a case in which an employer's drug testing policy that was not in a collective agreement or otherwise agreed to by employees authorised lawful and

reasonable compliance instructions to employees and examined the consequences in employment of either a refusal to comply with such instructions or a deemed failure of a test by an employee. In particular, the case turned on an assertion that drug analysis by oral saliva sample was a preferable employment practice and at least as efficacious scientifically as urine sample testing. It was clearly a case in which expert evidence on these questions would play a significant part.

[14] Next, Ms McKechnie submitted, correctly, that in most proceedings, this Court is cautious about accepting expert opinion evidence on the ultimate issue for the Court's decision. Such evidence will be allowed where it will assist the Court: *X* at para [37] adopting the approach of the Court of Appeal in *Attorney-General v Equiticorp Industries Group Ltd (in statutory management)*.[3]

[15] Ms McKechnie submitted, however, that advocacy masquerading as evidence will not assist the Court and should not be given. Again in *X* the Court stated that "[e]vidence should not become advocacy for a particular point of view: that is the role of counsel/advocates in submissions but ultimately left by our system of law to the Court for decision."[4]

[16] That is so but, equally, this Court has traditionally allowed litigants or those whose decisions are crucial to the outcome of a case, a degree of latitude to express their views in a way that, a generation ago in criminal trials, would not have been permitted. There is greater latitude nowadays for such expressions by witnesses, however, and judges are well able to differentiate between advocacy and evidence and to ignore the former in their fact finding roles. Trials will often run more smoothly and sometimes even more expeditiously if lay witnesses are allowed an appropriate and limited opportunity to express views that might be categorised strictly as advocacy. As in all questions of admissibility of evidence, there is a balance to be struck in each case in the promotion of a just hearing and a just result.

[17] Turning to the defendant's objection to hearsay evidence, Ms McKechnie referred to the presumption of inadmissibility of such evidence under s 17 of the

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[3] [1995] 2 NZLR 135.
[4] At [16].

Evidence Act. Counsel identified the two part test for admissibility of hearsay. The first is a requirement that the circumstances relating to a statement provide reasonable assurance of its reliability: s 18(1)(a). Counsel submitted that the recent judgment of the Supreme Court in *R v Gwaze*[5] highlights the significance of the requirement for reliability of the statement. The second test is cumulative on the first. Once the Court is satisfied that the statement is reliable, either its maker must be unavailable as a witness or the Court considers that undue expense or delay would be caused if the maker of the statement were required to be a witness: s 18(1)(b).

[18] Ms McKechnie submitted that a number of the statements in the plaintiff's intended evidence are objected to because they are double hearsay. Counsel submitted that the Court should approach double hearsay with additional caution even though such statements may be admitted under the limited circumstances in s 18 of the Act. Counsel pointed out that in *X* this Court disallowed hearsay which was provable by witnesses available to be called at the hearing.

[19] Finally, Ms McKechnie dealt with the scope of the plaintiff's proposed evidence in reply. She criticised two of the briefs of that evidence as being too wide ranging. Counsel invoked the position in the High Court where the High Court Rules do allow affidavits in reply although not, at least expressly, briefs of evidence in reply. Ms McKechnie relied on the judgment of the High Court in *McDougall v Council of CIT*[6] which addressed then r 510, now r 9.76. Counsel submitted that, referring to briefs instead of affidavits in reply, these "should be confined to matters strictly in reply … although they may include reconfirmation by the plaintiff of material previously stated but contested by the defendant.

[20] Ms McKechnie submitted that no affidavit in reply should be permitted by the Court where it:

- extends the evidence beyond the present scope of the dispute;

[5] [2010] NZSC 52, (2010) CRNZ 702.
[6] 5 PRNZ 672

- repeats or comments on the statements in the statement of defence, amounting therefore to pleading, without stating facts or rebutting facts pleaded by the other party;
- covers facts not in issue;
- is essentially a matter of substance rather than evidence;
- repeats uncontested material; or
- expresses an opinion on a matter on which the opponent is not competent to give an opinion and is therefore irrelevant.

[21] Mr Fairclough emphasised generally the following passage from this Court's judgment in *X* at para [10]:

> The Employment Court enjoys a very broad discretion to admit evidence including evidence that might be inadmissible elsewhere. Section 189(2) provides that the standard by which the court may accept, admit or call for evidence is "equity and good conscience". That power has not, however, been interpreted or applied by the court or its predecessors to permit evidential open slather. Rather, the rules of evidence in civil proceedings in the High and District Courts are considered and applied but may, on a case by case basis, be modified in circumstances where to do so will promote the ends of employment justice and where rigid adherence to rules might have the opposite result in the unique circumstances of an employment case.

[22] Mr Fairclough makes the valid point that opinion evidence per se should not necessarily be inadmissible. Where care needs to be taken, however, is where an opinion is not that of an expert witness and is tendered to establish either or both of an element of proof on which expert evidence would usually be required and in relation to the ultimate issue that the Court has to decide.

[23] So, to use simple examples not at issue in this case, while a witness may express his or her own opinion as to whether a signature appears to be his or hers, another non-expert witness cannot purport to identify whose signature it is to the appropriate level of probability required to establish that fact where the authenticity of the signature is in contest. A witness may, nevertheless, give evidence of his or her opinion of that fact where it caused that person to do or omit to do something. In this circumstance the opinion will not be one going to the authenticity of the

document but, rather, to the veracity of an explanation of something done in reliance of the opinion.

[24] The second instance in which opinion evidence will not generally be permitted is on the ultimate issue for decision by the Court. So, whilst a grievant in a personal grievance may depose to his or her belief that he or she was dismissed unjustifiably and give evidence of the grounds for that belief, the same witness, or any other, may not present opinion evidence as to the ultimate issue in the case, the justification for the dismissal. Ultimately, of course, it is for the Judge to be alert to evidence that comes close to that boundary and, even if it may be given inadvertently, to exclude or at least diminish its weight significantly in the judgment.

[25] As to the plaintiff's objection to "advocacy" through evidence, this is also often a matter of fine judgment. Human litigants, and often the human decision makers within corporations, have much invested in their earlier acts and omissions and a very real interest in persuading a court that these were justifiable. So it is inevitable human nature that when they are witnesses, such persons will wish to give more than a neutral dispassionate account of events but will seek to advance their cause by what might be categorised strictly as advocacy of it. Again, as with issues of opinion evidence, for example, judges are well aware of the reality of that position. They often consider it preferable to allow some tolerance of what might be thought strictly to be advocacy to ensure a hearing at the end of which people (who are not always completely rational beings or automatons) consider fairly that they have had an opportunity for their case to be heard.

[26] In the case of opinion evidence also, it is a question of the Judge filtering out elements that might be described strictly as advocacy and focusing on the relevant facts. The difficulty of attempting to draw a bright defining line in this area is compounded by the relevance and admissibility of evidence of non-economic consequences such as stress, hurt, humiliation, embarrassment, stigma, and the like. Evidence of these is, of course, relevant and admissible but it is often difficult to differentiate self-advocacy by a witness when giving such evidence.

[27] Finally, as Mr Fairclough notes correctly, unless evidence is excluded completely, it is really a matter of the weight that the Judge ascribes to any contested evidence that is material in the outcome.

[28] Many of the rules of evidence have been developed for trials by juries and although predominantly for criminal cases, until recently at least with the demise of personal injury litigation, in the civil arena as well. Such rules of evidence as the plaintiff seeks to have this Court adopt in this case are more appropriate to such trials than to judge alone hearings.

[29] Mr Fairclough makes the valid point that an analysis of much of the evidence of the defendant's witnesses indicates what might be said strictly to be hearsay, opinion, and even advocacy evidence of the sort to which objection is taken by the defendant himself.

[30] With that general background as to how challenged evidence in this case will be approached under s 189(2), I now turn to the particular objections.

[31] Between paragraphs 137 and 153 of Ms Coy's brief of her evidence-in-chief, the defendant says that this both repeats evidence previously given by her directly and is unacceptable opinion evidence. These paragraphs consist of the plaintiff's comments on what Ms Penn reported she was told by other police staff. Ms Penn had been engaged by the defendant to conduct an initial investigation into her disadvantage personal grievance and related management issues.

[32] Mr Fairclough submits that these passages, amounting to about 8,600 words over about 14 closely typed pages, are intended to provide an insight into Ms Coy's perceptions of Ms Penn's investigation and the effect of the latter's report on the plaintiff. Mr Fairclough submits that the Penn report illustrates significant antipathy towards Ms Coy by colleagues and supervisors, both professionally and personally, and the receipt of the report and its contents were said to have resulted in the raising of a personal grievance on about 11 November 2003. Mr Fairclough submits that these paragraphs are relevant to an understanding of the totality of what occurred to the plaintiff.

[33] Whilst I am not prepared to rule all of these passages inadmissible, the evidence in them must be tightened and focused on Ms Coy's grievances. Whilst she may comment on the accuracy or otherwise of what others were reported to have told Ms Penn, the plaintiff's evidence should be focused on her own case and not that of others and, in particular, of Mr Ramsay. The evidence in these passages should have deleted from it what might be described as editorial comment on the issues for decision by the Court. These changes will require significant deletions and a greater conciseness of language.

[34] The next challenged passage is paragraph 158 of the plaintiff's brief of evidence. This single numbered paragraph, which occupies almost 10 closely typed pages and 6,000 words, is objected to on the ground that it amounts to a repetition of direct evidence and opinion. It consists essentially of the plaintiff's comments on Sergeant Smith's letter to Inspector Gaskin of 27 June 2003 in which Sergeant Smith responded to the allegations raised in Ms Coy's grievance.

[35] Mr Fairclough submits that the plaintiff's responses to Sergeant Smith's account of events raised by her personal grievance cannot be put before the Court by any other means. Counsel submits that the plaintiff's comments are on matters within her knowledge. Detailed comment is provided because of the extent of Sergeant Smith's advice to Inspector Gaskin and because Ms Coy is the only person who claims to have been able to relate Sergeant Smith's explanations to other events which involved her.

[36] Again in this instance, I do not consider that the evidence should be excluded altogether but, as previously, it needs to be made more concise, shorn of editorial comment, and directed to events that are relevant to the proceeding. So amended, its extent should be reduced significantly.

[37] I make a further comment here that applies generally to the format of the plaintiff's briefs, particularly the lengthier ones. As with other very long paragraphs, it will be difficult both at trial and in preparing a judgment, to identify readily where a passage of evidence occurs. The only markers, using this as an example, will be to the paragraph number (158) and the page number but even then the latter will

contain about 600 words in which it may be difficult and time consuming to find a reference. The plaintiff really needs to attend to this task of reducing to more numerous but manageable numbered paragraphs the whole of her brief of evidence.

[38] The next objection taken by the defendant is to paragraph 174 of the plaintiff's brief. The passage identified from this lengthy paragraph, said to amount to about 1,500 words, repeats primary evidence and contains unacceptable comments on personal grievance documentation.

[39] Although this may to an extent repeat evidence given earlier in her brief, it is related to the May 2003 personal grievance that the plaintiff submitted.

[40] Mr Fairclough submits, somewhat enigmatically, that "[m]uch of this section can be entered as read on the day". If, by this, counsel means that he does not propose to have Ms Coy read parts of the evidence, that must raise a question as to the relevance and value of it for the plaintiff. However, Mr Fairclough submits that it is "part of the lineage" leading to Ms Coy's application to disengage from the police and, as leading to the next section of the evidence, it provides a synopsis of events. Admitting that it is repetitive, counsel submits that this will relieve me of the requirement to try to remember the detail of what had occurred up to that time.

[41] This passage must also be substantially reduced by eliminating repetitive evidence which can be briefly referred to by the witness by previous paragraph number where it is necessary to explain what was said to the welfare officer or otherwise done in relation to that personal grievance. This also should reduce significantly the length of the current intended evidence.

[42] Regressing to paragraph 77 of the plaintiff's brief of evidence, the defendant submits that this is submission masquerading as evidence. I do not agree and conclude that the paragraph as written is admissible.

[43] The defendant submits that part of paragraph 81 dealing with her meeting with Inspector Gaskin in November 2002 is both submission and opinion evidence. I agree that some of the intended evidence might be seen as submission but consider

that this objectionable element can be filtered out easily in the decision making process and so do not direct any deletion from that paragraph.

[44] Next, paragraphs 35, 97 and 175 are objected to because they are said to contain hearsay evidence of Constable Hampton who is now to give evidence for the plaintiff in the proceeding. Mr Fairclough submits that Ms Coy's recitation of what she was told by Constable Hampton is not intended to prove the truth of its content but, rather, to explain the impact of his comments on her and the way that this information shaped her perceptions and further actions. On the basis of that assurance of the relevance of Ms Coy's evidence and the fact that Constable Hampton will himself give evidence, these passages are unobjectionable.

[45] Next, paragraphs 99, 108 and 120 are said to contain hearsay about what Detective Sergeant Burt (who is also intended to give evidence for the plaintiff) said and did. Further, the plaintiff's evidence at paragraph 99, contains hearsay about Detective Sergeant Burt's treatment by Inspector Gaskin.

[46] I agree with the defendant that it is irrelevant to the case now before the Court whether and how Detective Sergeant Burt was treated by Inspector Gaskin and both Ms Coy's evidence and Detective Sergeant Burt's evidence should omit such references. Otherwise, however, if Detective Sergeant Burt is to give evidence which the plaintiff repeats to explain her own actions, then this will not be inadmissible.

[47] Into the same category of objection to hearsay fall several further paragraphs, 53, part paragraph 73, part paragraph 91 and part paragraph 108. These passages in Ms Coy's evidence are said to be hearsay to the extent that they repeat what she was told by Constable Mawhinney. Constable Mawhinney is now giving evidence and in these circumstances I do not propose to exclude portions that are repeated by the plaintiff. The position is likewise with part of paragraph 69 where what would otherwise be a hearsay statement by Sergeant Lowry, who is now giving evidence, may be referred to by the plaintiff in these circumstances.

[48] The position is different in relation to hearsay attributable to a Ms Hewitson who was a watch house keeper at the police station at which Ms Coy was based at relevant times. Comments attributable to Ms Hewitson appear at paragraphs 28, 50 and 137. Although Ms Hewitson is said to reside in Temuka and there is nothing to suggest that she could not give evidence in the case, in the absence of her doing so the defendant submits that this hearsay should not be admitted.

[49] I agree with the defendant's submission and references to what Ms Hewitson may have said in these paragraphs are to be deleted unless she is to give evidence and can therefore confirm or deny them.

[50] A similar situation arises in relation to part of paragraph 10 of the plaintiff's brief in relation to hearsay by Constable Moore. Constable Moore is not giving evidence and I consider therefore that the last four sentences of paragraph 10 of the plaintiff's brief should be deleted if they are the only evidence of what Constable Moore may have said.

[51] A similar criticism arises in respect of paragraph 11 of the plaintiff's brief. There is a reference to a comment that was made by acting Sergeant Pullin. Paragraph 11 should be revised to delete references to hearsay by acting Sergeant Pullin in the absence of direct evidence of those matters.

[52] Likewise, at paragraph 23 of the plaintiff's brief, there are hearsay references attributable to acting Sergeant Hamilton. Those references appear in the final paragraph of that passage of evidence at the top of page 15 of the brief and, in particular, the sentence beginning: "Sergeants Hamilton and Sharp advised me …". They are inadmissible.

[53] Next challenged is a passage in paragraph 65 of the plaintiff's brief. This relates to unattributable comments of other staff about the disparity of treatment received by the plaintiff by Sergeant Smith. Although strictly hearsay, I think the better course in this instance is to allow the evidence but to weigh it carefully given the unattributable sources if there is no other evidence to support the plaintiff's contention.

[54] Next, at paragraph 91, the defendant complains about the propriety of Ms Coy's evidence of comments attributable to Constable Stephens allegedly disputing the accuracy of Inspector Gaskin's records. I agree with the defendant that this appears to be an account of events obtained by the plaintiff for the purpose of its presentation in evidence to dispute part of the defendant's case. There is no suggestion that Constable Stephens may be unavailable to give evidence about these matters and in these circumstances the statements attributable to him at paragraph 91 of the plaintiff's brief are inadmissible through the plaintiff and should be deleted.

[55] Next, at paragraph 87 of the plaintiff's brief, the defendant objects to the plaintiff's attribution of comments of Wayne Van Vwran about prosecutions known as Hines/Thompson. This paragraph is a mixture of references to correspondence which speak for themselves and hearsay attributed to defence counsel Mr Van Vwran. If Ms Coy is unable to corroborate what she attributes to Mr Van Vwran by hearsay evidence, that must be excluded from this paragraph of her brief.

[56] Next challenged is part of paragraph 155 in which the plaintiff relates a conversation between her husband and Inspector Schwartfeger at which the plaintiff was not present. The short answer to this objection is that Mr Langbehn will now give evidence first hand about that conversation so that it is not inadmissible for Ms Coy to address it in the way intended.

[57] Next at paragraph 74 objection is taken to the plaintiff's evidence about the complaint of another officer, Constable Ramsay, about Sergeant Smith's allegedly substandard work in respect of a named file. Again, in this case, Mr Ramsay is to give evidence and although the defendant asserts that this deals with the dispute between Mr Ramsay and the Commissioner, I do not think it is sufficiently discrete to exclude it as inadmissible in Ms Coy's case.

[58] The next challenge is to a passage of approximately 3,700 words beginning part way through paragraph 83 and extending through to paragraph 90 of the brief and dealing with Sergeant Smith's response to Mr Ramsay's complaint of his (Mr Ramsay's) treatment. This evidence is said to be irrelevant to the issues at the trial, opinion evidence, and repetitive. It is also said to contain Ms Coy's opinion on the

veracity of Sergeant Smith's response and is repetitious of her earlier direct evidence.

[59] I agree with the defendant that this evidence is inadmissible. It deals with Ms Coy's views about the treatment by Sergeant Smith of a complaint made by former Constable Ramsay whose proceedings in this Court addressing those, among other, issues, have already been determined. The impugned passage contains Ms Coy's critical assessment of Sergeant Smith's response by way of comment and it must be deleted from her brief.

[60] Next, at paragraph 105, the defendant challenges the intended evidence commenting on Inspector Lennan's letter to Inspector Gaskin about Mr Ramsay's complaints containing the plaintiff's opinion on the legitimacy of Inspector Lennan's views. I agree and, for the same reasons as just set out, find that this intended evidence is inadmissible.

[61] Next, at paragraph 104, objection is taken to evidence to be led of a statement by a former Member of Parliament purportedly about Sergeant Smith's views of workplace drug testing. I agree that this is irrelevant to the matters at issue in this case and the final sentence and quotation about this matter should be deleted from the plaintiff's evidence.

[62] At paragraph 106 objection is taken to Ms Coy's evidence of Ms Hewitson's note on a complaint that she took at the Temuka police station. I agree that it is irrelevant to the matters at issue in this proceeding and therefore inadmissible and must be deleted from the plaintiff's intended evidence.

[63] Finally in relation to Ms Coy's evidence, issue is taken at paragraph 181 with Ms Coy's evidence about document disclosure in this case and her complaints to the Privacy Commissioner in the same connection. That is a matter that, even if strictly irrelevant to the personal grievances dealing with the ending of Ms Coy's employment, may nevertheless relate to costs. Although perhaps dealt with unusually in evidence at the substantive hearing, it cannot be said to be inadmissible. Paragraph 181 may remain in the plaintiff's brief as presently drafted.

[64] That concludes the challenges to Ms Coy's evidence.

[65] Next, the defendant objects to portions of the intended evidence of the plaintiff's husband, John Langbehn. The first is an objection to a number of passages in which Mr Langbehn purports to comment on the evidence of Inspector Gaskin to be called by the defendant. These are at paragraphs 4 to 28, part of paragraph 30, paragraphs 31 and 32, the majority of paragraph 33, paragraphs 34 to 39, paragraphs 41 to 43, paragraph 46, the majority of paragraph 47, part of paragraph 48, and paragraph 49 of Mr Langbehn's brief. The objection is on the grounds of opinion evidence and that it is "not direct evidence".

[66] I agree with the defendant that Mr Langbehn's analysis of his wife's treatment whilst a police officer is generally inadmissible for a number of reasons. It is an attempt to give evidence about some of the ultimate issues to be decided by the Court. Mr Langbehn is not an expert witness. Many of the issues about which he purports to give evidence must be decided on their merits and the Court will not be assisted by the subjective views of Mr Langbehn or indeed others about what are essentially the merits of the plaintiff's case.

[67] That said, however, Mr Langbehn is of course entitled to give evidence of matters within his direct knowledge affecting these proceedings and which occurred after November 2000 when he first met the plaintiff. So, for example, it is in order for Mr Langbehn to refer to matters, as he does in paragraph 6 of his brief of evidence, about his observations of the plaintiff in Timor L'Este. With such exceptions, however, the great majority of the evidence objected to by the defendant and described above by reference to paragraph numbers is inadmissible and Mr Langbehn's brief of evidence will have to be recast and reduced significantly to fall within the parameters just described. Mr Langbehn is entitled to give factual evidence of events or matters within his direct knowledge. He may not, however, proffer his opinion about the ultimate issues of the propriety of what the defendant's supervisory staff did in relation to the plaintiff.

[68] This decision applies also to the next identified challenge to Mr Langbehn's evidence, the paragraphs in which he purports to comment on Inspector

Schwartfeger's brief, paragraphs 52, 53, the majority of paragraph 54, paragraphs 55 to 59, and paragraph 61. I agree with the defendant that these passages are similar opinion and indirect evidence and are inadmissible except to the extent that Mr Langbehn may give evidence of matters of fact within his direct knowledge. So, too, are the challenged passages at paragraphs 62 to 64 of Mr Langbehn's brief inadmissible for the same reasons. The position is likewise in respect of his intended comments on the evidence of Dawn Bell set out at paragraphs 65 to 74 of his brief.

[69] Although I accept that Mr Langbehn has strong and sincere views about the way in which his wife was treated, the Court will not be assisted in its task of determining the proceedings by receiving these views on the ultimate issues it has to decide.

[70] Mr Langbehn's intended evidence commenting on the brief of Superintendent Manderson at paragraphs 75 (except for the first five sentences) and 76 is similarly inadmissible.

[71] So, too, is the commentary intended to be given by Mr Langbehn at paragraph 78 of his brief responding to the evidence of Inspector Coulter. This is inadmissible for the same reasons just given.

[72] Paragraphs 79 to 80, although they purport to be "my personal observations" on how the defendant dealt with the plaintiff's personal grievances, are in fact veiled submissions and commentary, and are therefore inadmissible.

[73] Mr Langbehn's brief intends to deal with the impact of these events on the plaintiff. In general, that is properly the subject matter of evidence and particularly for people who know grievants well and are in a good position to give such evidence. I consider, on balance, that although, in some respects, this intended evidence between paragraphs 81 and 94 may be criticised, it should nevertheless be permitted, although in modified form, to clarify those matters which are within Mr Langbehn's direct knowledge and those on which he draws inferences from his observations.

[74] The defendant challenges parts of the intended evidence of Mr Ramsay, a colleague of the plaintiff, whose similar claims against the Commissioner were heard and decided by this Court in *Ramsay v Commissioner of Police*.[7]

[75] The defendant objects to Mr Ramsay's intended evidence in its entirety. This is on the following grounds. First, the defendant says that Ms Coy seeks to have Mr Ramsay reiterate much of his own grievance by way of collateral attack on the findings of this Court's judgment against him. The defendant says that Mr Ramsay's experiences are not relevant to Ms Coy. Next, the defendant says that Mr Ramsay's intended evidence seeks to challenge the appropriateness of Inspector Gaskin's inquiry into Mr Ramsay's complaints, which matters are both irrelevant to Ms Coy's case and are res judicata, that is, they have already been determined by this Court and cannot be reopened.

[76] The defendant says that much of Mr Ramsay's intended evidence is opinion, especially in relation to the roles of Sergeant Smith and Inspector Gaskin and their asserted shortcomings.

[77] The defendant says that this intended evidence, if given, will be an abuse of the process of the Court by requiring him to respond again to a case already determined. The defendant says that any evidence that might possibly be relevant to Ms Coy's case can be given directly by her in any event and it will be unfairly prejudicial to the defendant and will prolong needlessly the hearing to allow Mr Ramsay to give such evidence as may be strictly relevant.

[78] Finally, the defendant objects to Mr Ramsay's intended evidence being filed as evidence in reply and says that there is no reason his witness statement could not have been provided as part of the plaintiff's evidence-in-chief.

[79] I do not propose to exclude Mr Ramsay's evidence completely. Although filed as evidence in reply, if it contains relevant and admissible elements I consider that these may be heard. It cannot, however, be used to either re-litigate Mr Ramsay's complaint or otherwise than is relevant to support Ms Coy's case.

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[7] [2009] ERNZ 81.

[80] I deal with Mr Ramsay's intended evidence by identifying the following passages which must be deleted from it and the reasons for so doing. Except as is otherwise expressly deleted or the subject of directed amendment, Mr Ramsay's intended evidence is admissible.

[81] First, except as to essential matters of background, Mr Ramsay's evidence must be confined to events that occurred after Ms Coy commenced duties as a police officer at the Temuka station. The only exception to this requirement is where Mr Ramsay contradicts Sergeant Smith's general evidence about states of affairs or events which occurred before Ms Coy was first stationed at Temuka.

[82] Next, Mr Ramsay's evidence should be shorn of critical editorial comment. One example of this, to illustrate the point for revision of the brief by the plaintiff, is the second sentence of paragraph 16 of Mr Ramsay's brief. This follows an opening paragraph which reads: "Sgt Smith also talks about the station being [quiet]." The next sentence which exemplifies the modifications required reads: "This may have been the perspective of an officer who did nothing and reported very little." Rather, the Court will be assisted not by such pejorative comments but by a statement of Mr Ramsay's contrary experience. There are many other similar examples that will require revision in this way.

[83] Mr Ramsay's evidence is not to contain references to events that have no apparent connection to Ms Coy's grievance. Again, to use an example, paragraph 19 of Mr Ramsay's brief appears to address a number of incidents dealt with by Sergeant Smith of which Mr Ramsay was critical but there is no reference to Ms Coy being involved in those incidents. Such evidence is inadmissible except where, for example, there is probative evidence relating to Ms Coy. One example of that exception may be the incident numbered (6) ("Hines/Thompson wilful damage and theft") at page 7 of Mr Ramsay's brief. There are other similarly admissible portions of paragraph 19 of Mr Ramsay's brief.

[84] Statements of opinion about the justification for matters such as appear in paragraph 20 of Mr Ramsay's brief are inadmissible and must be deleted. Likewise paragraph 21 is inadmissible. Paragraphs 24, 25 and 26 of the brief are inadmissible.

So too is the second paragraph of paragraph 27. Likewise inadmissible are paragraphs 30, 31 and all but the last sentence of paragraph 32.

[85] Paragraphs 33 and 34 of the brief are likewise inadmissible. Paragraphs 36 and 37 are inadmissible except to the extent that Mr Ramsay is entitled to respond to Inspector Gaskin's references to him in paragraph 94 of the Inspector's brief. Another example of inadmissible comment and opinion is the last sentence of paragraph 43 of Mr Ramsay's brief which, along with other similar expressions of opinion, should be deleted from his brief of evidence.

[86] Paragraphs 55, 58 (there appears to be no paragraph numbered 57) and 59 are also inadmissible.

[87] It will be clear that careful and extensive redrafting of Mr Ramsay's brief will have to be undertaken and this should be done by counsel, Mr Fairclough. As with all briefs of evidence intended to be used by the plaintiff at the hearing, revised copies so identified and dated should be supplied to the Registrar and to the defendant no later than three working days before the commencement of the hearing in Christchurch on Monday 16 August 2010.

[88] Finally, there are two further matters which are able to be dealt with more expeditiously. The first relates to presentation of the documents at the hearing. Despite the desirability of having a single bundle of relevant documents in chronological order, that is not able to be achieved between these parties in the case. Accordingly, each party will compile her or his own bundle of indexed and sequentially numbered documents which will attempt to avoid duplications where possible. Each bundle (in reality, more than one bundle because of size constraints) should be identifiably separated even although the same consecutive document tagging and page numbering system may be used.

[89] All counsel agree that the parties will require further time after the hearing of the evidence is concluded to prepare and present their submissions. Although this is less than ideal and will mean a significant delay before a judgment can be released, the following timetable is made to suit the convenience of the parties and by consent.

[90] The defendant will file and serve his written submissions no later than Wednesday 22 September 2010 with the plaintiff doing likewise by Friday 22 October 2010 and the defendant having until Monday 15 November 2010 to file and serve any further written submissions strictly in reply. Because I consider it very desirable to be able to have an interchange with counsel about submissions in the case, I reserve to myself or the opportunity to any counsel to arrange thereafter for a further hearing (perhaps by video conference call) to deal with any matter that may require further discussion arising from those submissions.

[91] I regret the delay in determining these matters. As will be clear from the length of this interlocutory judgment and references to the very substantial body of evidence and exhibits to be called at the hearing, it has been necessary to attempt to read and analyse this material during a time when the Court has been sitting on other cases. I am confident, however, that, with the assistance that Mr Langbehn is clearly able to provide to the plaintiff and with the advantages of word processing software, the necessary changes can be made to the relevant briefs of evidence of the plaintiff's witnesses in time to be made available to the Court and to the defendant before the start of the hearing.

[92] I reserve costs on the interlocutory hearing on 2 August 2010.

GL Colgan
Chief Judge

Judgment signed at 11.50 am on Monday 9 August 2010