

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 104
ARC 130/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN MARK RAYMOND CREEDY
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

Hearing: By memoranda of submissions filed on 10 and 30 March 2011 and a
hearing on 20 July 2011 (by telephone conference call)

Counsel: Alex Hope, counsel for plaintiff
Sally McKechnie, counsel for defendant

Judgment: 11 August 2011

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This challenge to a determination¹ of the Employment Relations Authority about the nature and scope of its investigation and determination, poses interesting and difficult issues. These arise where a former employee has what is known colloquially as a disadvantage grievance connected closely to a subsequent resignation said to have been an unjustified constructive dismissal but in respect of which the former employee is precluded from bringing an unjustified dismissal grievance.

[2] Mark Creedy's proceedings relating to the end of his career as a police officer have already been the subject of decisions and judgments in the Employment

¹ AA491/10, 22 November 2010.

Relations Authority,² this Court,³ the Court of Appeal,⁴ and the Supreme Court.⁵ The outcome of that litigation was that Mr Creedy was found to have failed to raise his personal grievance of unjustified constructive dismissal with his employer within the statutory period and was unable to get leave to raise that grievance out of time on the statutory grounds for doing so. It is, however, conceded by the Commissioner that Mr Creedy still has an earlier personal grievance claim relating to his treatment by his employer with regard to the events that led to his resignation. Mr Creedy claims, as remedies for those alleged unjustified disadvantages suffered by him in his employment, reinstatement to his former position as a police officer, lost remuneration, and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), known colloquially as distress compensation.

[3] The Commissioner says that Mr Creedy's claims to these remedies amount to a collateral attack on the judgments of the Courts in the previous cases and an attempt to obtain, through the back door, the relief from which he was previously disqualified. The Commissioner's concerns also relate to the nature and scope of evidence that Mr Creedy may be permitted to put before the Employment Relations Authority in its investigation of his disadvantage grievance.

[4] This led the Commissioner to ask the Authority to limit the nature and scope of its investigation of Mr Creedy's disadvantage grievance and, after written submissions from the parties, the Authority did so. It is that determination that is now challenged by Mr Creedy and so raises again for consideration the nature and extent of the surviving personal grievance and of the remedies that may be available to him if he is successful.

The Authority's determination

[5] In its determination, after receiving written submissions, the Employment Relations Authority concluded at paras 12-14:

² *Creedy v Commissioner of Police* AA151/05, 27 April 2005.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517.

⁴ *Commissioner of Police v Creedy* [2007] ERNZ 505.

⁵ *Creedy v Commissioner of Police* [2008] ENRZ 109, [2008] 3 NZLR 7.

[12] Mr Creedy is no longer an employee. For a reinstatement claim to be successful he would need to show that he had been unjustifiably dismissed, which he is unable to do.

[13] There is no connection between the disadvantage grievance and reinstating Mr Creedy to a position from which he disengaged, a matter which he cannot contest.

[14] Mr Creedy was suspended on full pay and cannot have lost any wages or benefits as a result of his alleged disadvantage. Such a claim could only arise from an unjustified dismissal grievance which Mr Creedy cannot pursue. Any remedies must flow from the grievance.

[6] As to the scope of permissible evidence to be led in respect of Mr Creedy's personal grievance, the Authority concluded at paras 9 and 11:

[9] I agree with the respondent that the Statement of Problem attempts to present the post 4 April 2001 events as part of a chain of events integral to the events which Mr Creedy is able to have heard as personal grievance. The post 4 April 2001 events relate to the alleged constructive dismissal. Although the applicant's submissions state that Mr Creedy does not seek remedies for the dismissal it is evident that is exactly what he does wish to do.

...
[11] ... what Mr Creedy seeks to have introduced is evidence post the grievance. While evidence about the effect of a grievance on a person is admissible in terms of assessing a claim for humiliation and distress and loss of wages, in this case the evidence would necessarily need to deal with the alleged constructive dismissal and that is where the applicant faces the problem that that matter cannot be heard. I will hear evidence regarding the effect of the unjustified disadvantage upon the applicant but that cannot be regarding the alleged dismissal.

Is the plaintiff's claim to "reinstatement" justiciable?

[7] The following is uncontroversial as I understand the position. Mr Creedy raised a personal grievance alleging unjustified disadvantage in employment. His employment continued and although he was suspended from performing the duties of it, he continued to be paid. Mr Creedy subsequently resigned (or, using the terminology of the then applicable Police Act, disengaged) on medical grounds so that the employment relationship ceased. Although he claimed that his disengagement or resignation amounted to an unjustified constructive dismissal, the effect of his earlier litigation is that he is precluded from establishing that position in law. So the legal position now is that Mr Creedy ended his employment as a constable by medical disengagement.

[8] Reinstatement is a remedy available to an employee who has been disadvantaged unjustifiably in employment. It is considered and ordered more commonly where an employee has been dismissed from employment unjustifiably, but is not limited to that sort of personal grievance. Any order for reinstatement must be practicable. What reinstatement means in the case of an unjustified disadvantage grievance is not the same as its meaning as a remedy for unjustified dismissal. In the latter situation, an order for reinstatement revives the previously severed employment relationship between employer and employee by requiring that relationship to be resumed with the employee continuing to be employed in the same position, or one no less advantageous, to that held before dismissal.

[9] That is not, however, the position where reinstatement is a remedy for unjustified disadvantage. In many, perhaps most, cases of this type of grievance, an employee may be disadvantaged unjustifiably in employment but the employment relationship continues. The Authority or the Court may find that there was an unjustified disadvantage in that continuing employment for which the remedy should be reinstatement. In these circumstances reinstatement is a remedy to redress the disadvantage and to put the ongoing employment back on the same footing as it was before the disadvantage occurred. An example might include a unilateral demotion of an employee by an employer involving loss of responsibility, loss of status and loss of income. If this is found to have been unjustified, an order for reinstatement will have the effect of re-placing the employee in the position and employment circumstances as they were before the disadvantage occurred. In other circumstances an employee may complain of an unjustified disadvantage in employment but subsequently resign in circumstances in which there can be no claim to an unjustified dismissal, whether constructive or not. That is Mr Creedy's position in this case. In such cases any order for reinstatement cannot include the replacement of the employee in the previous employment relationship with the employer that was ended by resignation or other circumstance except unjustified dismissal.

[10] There are other ways of reaching the same conclusion about Mr Creedy's claim that he be reinstated in his former position as a police officer as a remedy for his unjustified disadvantage grievance. The first is that "reinstatement" for such a

grievance can only be to the pre-disadvantage terms and conditions of his employment if that is ongoing, which it is not. The second answer to the claim is that even if the first analysis of the true meaning of reinstatement in these circumstances is not correct, it will nevertheless not be practicable to reinstate Mr Creedy to the position of a police officer several years after he terminated that employment relationship by disengagement and in circumstances where he is not able to contend that this amounted to unjustified constructive dismissal.

[11] In these circumstances, the remedy of reinstatement theoretically available to him for his justiciable personal grievance (unjustified disadvantage) is impractical in the sense that it would require his re-engagement by the Commissioner as constable. It is also impracticable as a remedy for unjustified disadvantage in the sense that, although suspended for the period until he disengaged, Mr Creedy continued to receive his salary and other benefits of his employment so that there was no demotion or other loss which might have been amenable to a remedy of reinstatement for unjustified disadvantage. If the Commissioner is unable to justify the disadvantage to Mr Creedy of his suspension and other treatment, that may leave open the remedy of monetary compensation contemplated by s 123(1)(c)(i) of the Act.

[12] For these reasons, I agree with the Authority, although for other reasons, that reinstatement in employment as a police officer is not a remedy available to Mr Creedy for his remaining personal grievance, unjustified disadvantage in employment.

Is nature and scope of Authority evidence justiciable by the Court?

[13] Ms McKechnie submitted, as a preliminary point to the second limb of Mr Creedy's challenge about the nature and scope of the evidence that it proposes to investigate, that s 188(4) of the Act precludes the Court from directing or advising the Authority about these matters. Section 188(4) provides:

- It is not a function of the Court to advise or direct the Authority in relation to—
- (a) the exercise of its investigative role, powers, and jurisdiction; or
 - (b) the procedure—

- (i) that it has followed, is following, or is intending to follow;
or
- (ii) without limiting subparagraph (i), that it may follow or adopt.

[14] Also relevant is s 179(1) and (5). These provide:

(1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the Court.

...

(5) Subsection (1) does not apply—

- (a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and
- (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[15] Although, in the course of the hearing, I was initially reluctant to accept that Mr Creedy's rights of challenge to a determination of the Authority might be so confined, upon reflection I consider that Ms McKechnie is correct. To determine the nature and scope of the evidence that the Authority is entitled to consider and, in effect, to direct it to investigate matters that it has determined it will not, would amount to advising or directing the Authority in relation to the exercise of its investigative role, powers and jurisdiction.

[16] Although there is a practical and sensible argument for the plaintiff that, if the Authority has erred in a determination about these matters before commencing its investigation, it would be in the interests of all that the case should now be put back on the correct tracks, Parliament has determined that this should not occur. The scheme of the 2000 Act, as reinforced in its 2004 amendments, is that cases in the Authority should be permitted to run their course unaffected by procedural challenges to the Court.

[17] Once a case is determined by the Authority on the merits it permits to be investigated, the statutory scheme is that a party dissatisfied with the result may challenge that in the Court by hearing de novo. This will mean that any errors made by the Authority will be neutralised by that very broad right of appeal. Presumably the philosophy of the legislation is that although putting such errors right by a

subsequent challenge by hearing de novo will be more time consuming and expensive than attempting to right the wrong at an early stage, the public interest of allowing most cases to proceed to determination in the Authority outweighs the injustice of a few flawed cases continuing in that forum.

[18] In addition to those rights of challenge, it is also of course open to a party in Mr Creedy's position to seek to persuade the Authority to remove the case to the Court for hearing at first instance under s 178. In that regard, the proper nature and scope of the evidence to be heard might be argued to be an important question of law arising in the case other than incidentally, or that one or more of the other grounds under s 178 is satisfied.

[19] In these circumstances, and for the reasons set out above, Mr Creedy's challenge as to the nature and scope of evidence that the Authority will investigate must be and is dismissed.

[20] In respect of the reinstatement ground of challenge, I consider it is inappropriate to either uphold or set aside the Authority's determination. Rather, s 183(2) of the Act provides, as a matter of law, that whatever decision the Court makes on a challenge such as this, the Authority's determination is set aside and the Court's judgment stands in its place. That is an appropriate way of disposing of the challenge in this case. Mr Creedy cannot claim the remedy of reinstatement for his personal grievance of unjustified disadvantage in employment.

[21] I reserve questions of costs.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on Thursday 11 August 2011