

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2013] NZEmpC 226
CRC 31/13**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

BETWEEN STEPHEN DAVIS
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

Hearing: By memoranda of submissions filed on 11, 18, 25 and 29
November 2013

Representatives: Jeff Goldstein, counsel for plaintiff
Edrick Child, counsel for defendant

Judgment: 4 December 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] Stephen Davis's several personal grievances alleging unjustified disadvantage in employment go to hearing in February 2014. The defendant (the Commissioner) contends that one of the plaintiff's causes of action was not raised as a grievance within time and, because of uncertainty, seeks to put Mr Davis to proof that he raised another of his grievances within time. These jurisdictional challenges need to be dealt with as preliminary issues because, depending on the decision, they will affect the scope of a number of the grievances the plaintiff has brought against the defendant. The issues arise from a time when Mr Davis was unrepresented or, at least when he was not represented by his current counsel, Mr Goldstein.

[2] Unless an employee raises a personal grievance with his or her employer within 90 days of the occurrence of the event or events constituting the grievance, or within 90 days after the grievant first became aware of them, the grievant cannot take proceedings in respect of that complaint. This is a statutory time limitation

which can only be circumvented either by the employer waiving the breach of the statute by the grievant, or by the Employment Relations Authority (the Authority) or the Court allowing the grievant leave to do so on strict prescribed grounds. In this case there is no consent from the Commissioner and no application has been made (now to the Court where these proceedings are) for such leave if a grievance or grievances were not raised by Mr Davis in time. An employer's consent or waiver may, in some circumstances, be implied by acquiescence.

[3] The relevant law just summarised is contained in s 114 of the Employment Relations Act 2000 (the Act). That provides materially:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[4] Subsections (3) and following are not relevant, at this stage at least, because no application for leave has been made to proceed with a grievance that may not have been raised within time.

[5] As already noted, all of Mr Davis's grievances are what are known as unjustified disadvantage grievances. That is, under s 103(1)(b) of the Act, they are claims "... that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer ...".

[6] Until recently, counsel for the parties and the Court had labelled the two grievances now at issue the plaintiff's "16 July 2010 grievance" and the plaintiff's "1 November 2011 grievance". Mr Goldstein, counsel for the plaintiff, has now

confirmed that the plaintiff did not raise discrete personal grievances on either of these dates but did so on 13 September 2010 and 30 April 2012, respectively. Counsel explained that the dates of 16 July 2010 and 1 November 2011 were the dates on which circumstances occurred which caused the grievances to be raised on those later dates. I will therefore refer to them as the “13 September 2010” and the “30 April 2012” grievances.

[7] Mr Goldstein complains that the defendant purports now to broaden unjustifiably its original application requiring Mr Davis to prove that he raised these grievances. The plaintiff says that the defendant is now asking the Court to refuse to hear evidence relating to the events leading up to the 13 September 2010 and 30 April 2012 grievances but which evidence is of events which occurred before the 90 day period. The plaintiff’s position is, however, that such evidence is crucial to those claims because it was causative of them being made. Mr Goldstein submits that the Court can hear evidence of events which occurred earlier than the start of the period of 90 days before each grievance was raised, so long as those earlier events are able to be connected to other events within the 90 day period to establish a course of conduct that can be evaluated in determining the grievance. In particular, Mr Goldstein relies on the following passage from the judgment in *Premier Events Ltd v Beattie (No 3)*.¹

It cannot be right that an employee who alleges he or she is suffering an ongoing disadvantage must raise a personal grievance every 90 days while the claim is considered then dealt with by the employer or the employment institutions. Rather, one raising of a personal grievance should be sufficient to cover one related and continuous cause of action, provided the events complained of outside the 90 days all relate to events contained within the 90 day period and form a cause of related conduct.

Background

[8] The following background information is necessary to understand the circumstances in which multiple grievances had been claimed by Mr Davis.

[9] The plaintiff is a police officer. He was originally stationed at a small rural police station in Northland but fell out with his supervisor there over a number of

¹ [2012] NZEmpC 79 at [20].

operational and employment issues. These led the plaintiff to complain to area and district management and what he then alleges was an inadequate and flawed investigation and response to his complaints. Mr Davis raised a personal grievance about those matters which he subsequently took to the Authority. A challenge from its determination finding against him on those complaints is to be dealt with by the Court at the same time as these subsequent grievances. It is unnecessary to set out any more detail about the merits of those earlier events at this stage.

[10] During and immediately following the Authority's investigation of his first grievance or grievances, Mr Davis held discussions with Police senior managerial personnel about what should happen to his career irrespective of the outcome in the Authority which had given the parties an indication at the investigation meeting that he would not be successful. As a result of these discussions, the plaintiff transferred from Northland to the Canterbury Police District in a role based at the Christchurch Central Police Station. There, however, Mr Davis had a falling out with his supervising sergeant and, having been placed on a Performance Improvement Plan (PIP), he complained about his supervising sergeant and senior sergeant. It is the personal grievances arising out of these events which brought about his transfer to Christchurch and about his complaints against his supervisors there, that are the subject of this proceeding and judgment.

The 13 September 2010 grievance – the pleadings

[11] The plaintiff's first amended statement of claim in CRC 31/13 filed on 2 October 2013 sets out the allegations against which the parties' contentions must be judged. What is now re-labelled the 13 September 2010 grievance is covered by paras 10-19 of the plaintiff's first amended statement of claim. I summarise those allegations as follows.

[12] Mr Davis says that on the final day of the investigation meeting in the Authority on 20 April 2010, the Police's then General Manager of Human Resources, Wayne Annan, spoke to him. Mr Davis says that Mr Annan made him an offer about his future employment in the Police. Because the defendant says this was a "without prejudice" proposal to settle litigation that cannot be put before the

Court, I will not refer to its details alleged by the plaintiff until its admissibility is determined. Mr Davis alleges that later, in June 2010, Mr Annan questioned his ability to continue to work within the Northland Police District as a result of the plaintiff's allegation of corrupt behaviour by senior police staff in that District.

[13] The Authority issued its determination on 5 July 2010 finding against the plaintiff.² The plaintiff claims that there was then a meeting held on 16 July 2010 attended, for the defendant by Mr Annan and the Employee Practices' Manager for the Northland District, Korina Pascoe. The plaintiff claims that during this meeting, Mr Annan threatened to move to dismiss the plaintiff if he did not agree to a transfer to a metropolitan station. The plaintiff says that as a result of these threats and the manner in which they were portrayed, he had no choice but to elect to transfer to a metropolitan station and, in these circumstances, chose Christchurch.

[14] The plaintiff says that on 28 July 2010 he wrote to the Minister of Police, setting out his concerns in this regard. Although he originally contended that the contents of this letter raised his grievance about his treatment, he has now resiled from that assertion.

[15] Mr Davis says that on 30 August 2010 he was provided with details of his transfer to Christchurch but that these showed a significant reduction in his remuneration, contrary to what he had previously assumed would be the case as a result of his knowledge of other communications within the Police.

[16] The plaintiff says that on 13 September 2010 he raised his grievance following which he transferred to Christchurch in mid-December 2010, thus incurring a significant and sustained loss of remuneration.

Raising the 13 September 2010 grievance

[17] Whether this grievance was raised by Mr Davis on that date and, if so, what it encompasses needs to be seen in the context of events leading up to it. These events

² ERA Auckland AA 313/10, 5 July 2010.

begin in Northland. The following is taken from copies of correspondence supplied to the Court by the plaintiff, the sending, receipt, and contents of which are not disputed. However, counsel for the Commissioner, Mr Child, makes the valid point that documents supplied selectively by the plaintiff evidence only some of the dealings between the parties during 2010 on the topic of his transfer from Northland. Counsel says, and I accept, that there were numerous correspondences between the parties on this general topic between April and November 2010. Eventually, however, counsel submits that the decision to transfer the plaintiff was not made until November 2010 when Mr Davis elected Christchurch as the metropolitan area to which he was to be transferred.

[18] It is important, however, that the Court should not be drawn into determining the merits of Mr Davis's complaints when all that is required at this stage is to determine when he raised his grievances and what is encompassed legitimately within them. In these circumstances, it is permissible to have regard to some of the correspondence to determine whether there is a sufficiency to the plaintiff's raising of a grievance so that the merits of it can be considered.

[19] Although counsel for the defendant emphasises that Mr Davis's concerns appeared then to be his loss of remuneration, I regard those as being the consequences to him of a transfer so that the unjustified act or omission alleged was the transfer which had those consequences.

[20] On 28 July 2010 the plaintiff wrote to the defendant's Employee Relations Manager (Ms Williams) about proposals for his relocation away from the Mangonui Police Station to another Northland base. He complained that Police management's suggested medium term placement at the Kaeo Station was undermined by two supervisory officers which he said led to his declining the defendant's proposal to do so. His letter appears to also complain about the consequence of the Authority's determination, that he was considering appealing (challenging) that determination, and that he declined to pay a contribution to the Commissioner's costs.

[21] On 30 July 2010 Mr Davis wrote to Ms Pascoe, saying that the defendant had given him the option of either moving away from the Northland District or being

“taken down the road towards dismissal because of ‘incompatibility’ with Northland’s management ...”. Mr Davis said that, in those circumstances, the only viable option open to him would be a move to Christchurch.

[22] By letter dated 2 August 2010 Ms Pascoe wrote to Mr Davis in response to his letter of 30 July 2010. This letter advised the plaintiff of some proposed arrangements for a move to the Christchurch metropolitan area later in 2010.

[23] On 3 August 2010 Mr Annan wrote to Mr Davis referring to the plaintiff’s letters of 28 and 30 July 2010. Mr Annan’s letter contained a sentence that reads:

It is clear that there are some serious issues regarding your compatibility with Northland District, and perhaps with Police as a whole. However, I acknowledge that you are willing to transfer to Christchurch and take up the opportunities available to you there.

[24] The letter also advised that in an effort to provide the plaintiff with a fresh start and as a sign of good faith, the Commissioner would not be pursuing an award of costs in the Authority.

[25] On 30 August 2010 Ms Pascoe emailed Mr Davis with some suggested roster alternatives for duties in Christchurch and outlined details of his proposed remuneration. The plaintiff replied by email on the same date. He wrote that the proposed remuneration was significantly below his current level. He said that he had not willingly elected to transfer so that he could not be said to have agreed to this remuneration reduction, but expressed the hope that this matter could be remedied to ensure that a transfer to Christchurch was still a viable option.

[26] Ms Pascoe responded to the plaintiff by email on 3 September 2010. This included the following advice.

... As discussed in the meeting with you, your continued employment within the Northland District is felt to be no longer tenable as the result of your actions.

We agreed to transfer you to another district to enable you to remain in our employment. As a result of this change there are a number of terms and conditions that will as a reflection of that transfer, also change.

Your choice of District was Canterbury, and they have advised that the vacancies they currently have are both working out of Christchurch Central Station. Both roles are completely different to the one you are currently remunerated for, and as such to ensure consistency and to be fair and reasonable your remuneration also needs to change.

[27] The letter identified a number of other changes which it inferred might be advantageous to the plaintiff. It offered additional leave in addition to Mr Davis's current entitlement, and offered payment of the costs of moving him and his family to Christchurch.

[28] By email of 13 September 2010 Mr Davis replied to Ms Pascoe. He complained that his prospective remuneration loss was contrary to a memorandum sent earlier in the year by her to the Acting District Commander which had said, among other things, that:

... Police have no power or wish to disadvantage Constable Davis in terms of his remuneration/terms and conditions. Therefore it is proposed to grandparent his remuneration and allowances for the period of placement (2yrs).

[29] The plaintiff complained that he was aggrieved about the defendant's proposed actions being contrary to that memorandum and about what he said would be the substantial disadvantage inflicted on him. He complained that a transfer to Christchurch was the only location allowed for by Police management in July 2010 which would permit him to continue to meet his financial obligations, although his duties, environment and lifestyle would be substantially altered. The email letter concluded:

Please be advised that this is a further grievance to that which is currently being challenged.

Remedies

- No remuneration, terms and conditions disadvantage.
- Revisit transfer, consider delay.

[30] The foregoing is the letter that is said to have raised the plaintiff's grievance. The period of 90 days before the date of that email means that events on and after 16 June 2010 are covered by the grievance so raised.

[31] Mr Goldstein submits that the email of 13 September 2010 makes it clear that the plaintiff was very dissatisfied with being transferred to Christchurch from his position in Northland. Counsel submits that this clearly identified to the defendant that this dissatisfaction arose from the plaintiff being given only one effective option by Police management as an alternative to the termination of his employment. In these circumstances Mr Goldstein submitted that the plaintiff discharged the obligation on him to make his employer “aware sufficiently of the nature of the grievance so that the employer is able to address the substance of it”.³

[32] Further, counsel for the plaintiff says that the events of the important meeting of 16 July 2010 occurred within the period of 90 days before the grievance was raised on 13 September 2010 so that the events set out in paras 10-15 of the plaintiff’s first amended statement of claim are within the scope of the grievance raised on 13 September 2010.

[33] This ‘transfer grievance’ which was raised by the plaintiff with his employer on 13 September 2010, covers events which occurred in the period of 90 days before that date, that is from mid-June 2010. Mr Davis is also entitled to call evidence of earlier relevant events to put later events into context, but the justification for which earlier events will not be for decision.

The 30 April 2012 grievance – the pleadings

[34] The particulars of this grievance are set out in paras 20-32 of the plaintiff’s first amended statement of claim filed on 2 October 2013. Whereas the first grievance dealt with what the plaintiff says was his forced and unjustified transfer from Northland to Christchurch, this second grievance deals with unjustified disadvantages that the plaintiff alleges he suffered at the hands of supervisory staff in Christchurch.

[35] The plaintiff claims that on 14 September 2011 he was directed by his sergeant to attend a performance meeting to address the manner in which he had dealt with a particular incident on duty on 28 August 2011. He says that on 16

³ *Ramkissoon v Commissioner of New Zealand Police* [2013] NZEmpC 147 at [13].

September 2011 he was told that the consequence was that he would be placed on a PIP and that the defendant purported to do so on 23 October 2011 although the plaintiff challenged this. Mr Davis says that on 30 October 2011 he wrote to his senior sergeant complaining about the way in which his sergeant had treated him and challenging the issuing of the PIP. He says that on 1 November 2011 he met with the senior sergeant and subsequently sent in writing further examples of what he alleged was his sergeant's mistreatment of him.

[36] The plaintiff says that from March until December 2011 he was subjected to ongoing and unjustified ill-treatment from his sergeant which he reported both in writing and in person on 30 October, 1 November and 6 December 2011. The plaintiff says that no action was taken in response to his complaints although they were eventually discussed at a meeting with the senior sergeant and the Human Resources Manager for the Canterbury District on 9 February 2012. He says that he was told at that meeting that it was he who was the problem and that if he continued to behave in that manner, his days in Christchurch would be "numbered". He claims that, despite requesting his senior sergeant and the Human Resources Manager to address properly his complaint against the sergeant, that was not done.

Raising the 30 April 2012 grievance

[37] Counsel for the plaintiff submitted that this grievance concerning his treatment by supervisors in Christchurch, which he raised with the defendant on 30 April 2012, was the culmination of events that included some that had occurred before early November 2011. The plaintiff says there was a meeting on 1 November 2011 between him and his senior sergeant about his treatment by his sergeant. The plaintiff says that during the period from 1 November 2011 until 30 April 2012, he wanted the defendant to investigate the allegations that he had made against his supervisors, but that the defendant failed to properly investigate those allegations and to do so in good faith. The plaintiff says that the outcome of the Commissioner's allegedly improper investigation was first made known to him on 9 February 2012, so that his grievance relating to that outcome was raised within 90 days after 9 February 2012. The plaintiff says that his grievances raised on 30 April

2012 meet the tests for doing so set out by the Court in *Creedy v Commissioner of Police*⁴ including the grievant's concerns and the remedies sought.

[38] Alternatively, the plaintiff submits that even if these grievances were not raised within time, the defendant has nevertheless consented to them being raised out of time. This implied consent is said to be illustrated by two letters. The first is from the Canterbury District Commander to the plaintiff dated 22 May 2012 headed "Personal Grievance" which refers to the latest personal grievance having been received on 30 April 2012⁵ and which was then forwarded to Police National Headquarters. The letter concludes:

Your grievance is of a similar nature in terms of the one you have previously made in the Northern District and I am therefore seeking national clarification in relation to your concerns.

[39] The District Commander's letter was copied to the Police's Human Resources Manager for Canterbury. Second, on 26 June 2012, the Canterbury District Commander wrote to Mr Davis substantively in response to the plaintiff's letter of 30 April 2012 "notifying a personal grievance". The District Commander summarised the plaintiff's complaints but expressed his confidence that the supervisory staff the subject of them had handled matters correctly. The District Commander's letter noted that the Canterbury District Employee Practices Manager was continuing to investigate issues and that in these circumstances the District Commander was not prepared to comment on the validity of the plaintiff's grievance at that time. The District Commander also denied categorically that Canterbury District staff had interfered in negotiations that Mr Davis was having about his Northland grievance. The District Commander concluded: "Based on this I do not believe that your second grievance is valid. Accordingly I deny it."

[40] Mr Goldstein submitted that no issue was taken with the timeliness of raising this grievance until after the plaintiff's statement of problem was filed with the Authority. There is no evidence to contradict this submission. The plaintiff relies on the judgment of the Court of Appeal in *Commissioner of Police v Hawkins*⁶ that

⁴ [2006] ERNZ 517.

⁵ The letter says "13 April" but this should probably be 30 April.

⁶ [2009] NZCA 209, [2009] 3 NZLR 381 at [24].

whether an employer has consented to the late raising of a grievance is a matter of fact and degree and that:

The real issue is not whether, in formal terms, the Commissioner 'turned his mind' to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[41] Mr Goldstein submits that in the context of this case, the sending of the letter of 26 June 2012 to the plaintiff constituted or evidenced consent to any late raising of the grievance and that it is now too late for the Commissioner to resile from that.

[42] The defendant admits that the plaintiff raised his disadvantage grievance on 30 April 2012 so it is not a question of whether the plaintiff did so. Rather, the debate is about what the personal grievance, as raised, encompasses by reference to events both within, and earlier than, the period of 90 days preceding 30 April 2012.

[43] The plaintiff's letter of 30 April 2012 to the Canterbury District Commander raising his grievance is said to include two elements. The first, described as "Problem 1" was said to be "the poor way [the Human Resources Manager] and [the Senior Sergeant] have handled my complaint against [the Sergeant's] behaviour". The letter of 30 April 2012 asserts that the plaintiff became aware of the facts giving rise to this grievance on 9 February 2012 although the plaintiff's allegations of "mistreatment" by his sergeant in the letter say that this commenced in March 2011 and continued until December 2011. The significance of that date (9 February 2012) is when the plaintiff met with the Canterbury District Human Resources Manager and discovered that his previous complaints had not been investigated or actioned, at least adequately and properly.

[44] Mr Davis's second subset of his 30 April 2012 grievance (labelled by him "Problem 2") said to have been discovered by him on 2 April 2012, was described as "Canterbury staff interfering with my Northland Personal Grievance situation".

[45] The plaintiff's complaint included that he had been "discriminated at work on the basis of my religious/ethical/cultural beliefs and unduly disadvantaged at progressing forward in the workplace". The remedies sought were, in effect, that the

grievances should be addressed properly, holding responsible staff accountable, and generally rectifying the situation.

Raising the grievances - decision

[46] As noted at the outset of this judgment, the acts or omissions of the Commissioner alleged to constitute unjustified disadvantage are only justiciable in two circumstances: first, if they occurred within the period of 90 days preceding the raising of the grievances; or, second, if earlier acts or omissions of the Commissioner only became known to the plaintiff after they occurred, then the 90 day period for raising a grievance about them begins to run from that later date.

[47] As the case law establishes, particularly in relation to unjustified disadvantage grievances, the relevant evidence to be considered by the Court is not necessarily confined to events in those 90 day periods. Disadvantageous acts or omissions in employment frequently do not occur in isolation but as part of a continuum of conduct which needs to be understood to determine whether the employee has suffered an unjustified disadvantage in respect of what has happened to that employee within the 90 day period. Remedies for unjustified disadvantage can, however, only relate to the grievance, that is to the events occurring within the relevant 90 day period, but the nature and scope of such remedies may need to be informed by a broader background to the events that should be compensated for.

[48] It is not disputed that this personal grievance can encompass events which occurred 90 days immediately preceding it being raised with the defendant on 30 April 2012, that is after about 1 February 2012. Whether events which occurred before that date and, if so, how long before, are justiciable issues in the personal grievance, is the real issue between the parties. The first relevant pre-February 2012 date is 1 November 2011. The plaintiff claims that on this date (as well as on 30 October and 6 December 2011), he complained of ill-treatment by his sergeant but that no proper or adequate response to those complaints was forthcoming from the defendant.

[49] If, as he asserts, Mr Davis can establish in evidence that he first became aware, on 9 February 2012, of the defendant's response to his earlier complaints, then the acts or omissions of the defendant, as a result of the plaintiff's earlier complaints to him, can be encompassed in this grievance, even if those acts and omissions occurred (unbeknown to the plaintiff) before 1 February 2012. That is not, however, a question that the Court can determine on the evidence currently before it. It will be an issue for the trial.

[50] Even if, however, I am wrong in that conclusion, I consider that the Commissioner has consented impliedly to, or acquiesced in, the grievance being raised by the plaintiff in respect of acts or omissions which occurred earlier than 90 days before they were raised or were known to Mr Davis. The Canterbury District Commander's letter to Mr Davis of 22 May 2012 in response to the plaintiff's letter of 30 April 2012 raising his grievances which complained of events going back as far as March 2011, did address the grievances, albeit to a limited extent, but made no mention of any breach of time limitations. It is significant, also, that the District Commander's letter was copied to the Police's Human Resources Manager for Canterbury who might have been expected to have appreciated and, thereafter, taken the point of time, but did not. There is also the District Commander's second letter written to Mr Davis on 26 June 2012 which was the defendant's substantive response to the plaintiff's letter of 30 April 2012. In this letter the merits of the plaintiff's grievances were addressed and although the defendant did not accept the validity of the plaintiff's complaints, no point of timeliness of them was taken.

[51] In these circumstances, I consider that by the time the defendant first took the point of the plaintiff's alleged non-compliance with s 114 of the Act when he filed a statement of defence to the proceedings removed to this Court on 14 August 2013,⁷ it was then too late to assert that Mr Davis was not entitled to rely on a number of the events that he alleged constituted his Christchurch treatment grievance or grievances. Mr Davis was by then entitled to consider that the Commissioner had consented to any late raising of the grievance.

⁷At (33)-(34).

[52] Standing back and looking at the position overall, I do not consider that it will be unfair to exclude from consideration of the plaintiff's claims, any relevant events that occurred about his treatment by supervisory staff after his transfer to the Canterbury District, the circumstances of which transfers are themselves the subject of another justiciable grievance.

[53] So, as the 30 April 2012 grievance is pleaded by the plaintiff's amended statement of claim, I find against the defendant's contention that the grievances are confined to acts or omissions which took place only after about 1 February 2012.

[54] I reserve costs on this application by the defendant, to be dealt with at the same time as the Court decides costs on the substantive proceeding.

GL Colgan
Chief Judge

Judgment signed at 10.15 am on Wednesday 4 December 2013