IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 147
ARC 60/12

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	DANIEL SEAN RAMKISSOON Plaintiff
AND	COMMISSIONER OF NEW ZEALAND POLICE Defendant

Hearing:	By written memoranda filed on 5 and 17 July, and 2, 5 and 6 August 2013
Appearances:	Peter Brosnahan, counsel for plaintiff Edrick Child, counsel for defendant
Judgment:	7 August 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

---

[1] This case is to go to hearing in Rotorua over seven days commencing 19 August 2013. Arising out of the plaintiff's memorandum of issues for decision by the Court in this proceeding, counsel for the defendant has sought a ruling about the proper scope of the issues in the case and the evidence able to be called by the plaintiff.

[2] This is a proceeding that was removed to the Court for hearing at first instance by the Employment Relations Authority under s 178 of the Employment Relations Act 2000 (the Act).[1] It is not a challenge on which the issues for decision would have been confined to the matter or matters that were before the Authority. Rather, the issues are defined by the pleadings in this Court including, in particular, the plaintiff's amended statement of claim dated 25 January 2013.

[1] [2012] Auckland NZERA 316.

[3] The plaintiff was formerly a police officer. He has raised three personal grievances arising out of that employment. The first he has labelled the "Opotiki grievance". He says that he was disadvantaged in his employment unjustifiably by the Commissioner's revocation of his appointment to the rank of sergeant and to the position of officer in charge of the police station at Opotiki in 2009. The remedies he seeks for this disadvantage grievance include compensation for lost salary, compensation for humiliation, loss of dignity and injury to feelings, interest, and costs.

[4] The plaintiff's second personal grievance is described in his pleading as his "rehabilitation management grievance". The plaintiff says that, as a consequence of his treatment and non-appointment to the Opotiki role, he suffered distress and psychological injury and went on sick leave in mid-2009. He claims that a rehabilitation plan was provided for him permitting him to go on alternative duties to allow for his need for certainty and stability. He says that these alternative duties included a secondment to CIB duties for a period of 12 months from mid-2010 to mid-2011. He claims, however, that the defendant (through his managerial and supervisory personnel):

- disadvantaged him unjustifiably by asserting that he was not genuinely ill;
- subjected him continually to undue pressure to return to front line/shift work duties;
- contacted him at home while he was on sick leave in that regard and required him to provide further details of his illness;
- falsely asserted that he was using industrial blackmail;
- allowed an identified human resources manager to have an active role in his rehabilitation management and grievance when that person had a conflict of interest, having been the object of his earlier grievance;

- instigated an investigation against him while he was on sick leave;

- failed to relieve the stress which disadvantaged his rehabilitation; and

- used unjustifiably a medical certificate to require him to attempt to return to front line/shift work duties when he was not, and was known not to be, fit for such duties.

[5] The remedies for this second disadvantage grievance are of the same nature as for the Opotiki grievance.

[6] Finally, there is what the plaintiff describes as his "constructive dismissal grievance". In this, he relies again on the particulars of the defendant's conduct which he says disadvantaged him unjustifiably (his second personal grievance) and claims that his resignation by medical disengagement in August 2011 was an unjustified constructive dismissal. The remedies claimed for this grievance include an order for reinstatement to the rank of sergeant, compensation for lost income from the date of the disengagement and a time when he became fit to resume work, compensation for lost income, compensation for humiliation, loss of dignity and injury to feelings, interest, and costs.

[7] Mr Ramkissoon's first issue that he says should be determined by the Court is set out in his memorandum of issues filed on 5 July 2013 as follows:

> Was the Plaintiff subjected to an unreasonable and unfair continuing course of conduct, prejudicing his position as a Police officer following his involvement in the "Whakatane four" incident and, in particular, his involvement as a witness to that incident?

[8] The phrase "Whakatane four" refers to the prosecution and trial of four Whakatane police officers (not including the plaintiff) accused of assaulting a prisoner at the Whakatane police station in 2006. Mr Ramkissoon was at the police station when that incident occurred, was interviewed in relation to it, and gave evidence at the trial of those police officers. He links his subsequent treatment by police managerial and supervisory officers and other staff, as outlined in his grievance, to the antipathy towards him exhibited by a number of senior police

officers involved in the "Whakatane four" investigation and prosecution, and says in effect that he was marked out for, and received, prejudicial and disadvantageous treatment by his employer over the subsequent course of his employment and, in particular, in relation to each of his grievances.

[9] The defendant says, however, that the "Whakatane four" events came to an end with the acquittals of the accused officers in mid-April 2009.[2] Mr Child, for the Commissioner, emphasises that there was no mention of the "Whakatane four" investigation or trial in the grievances raised by Mr Ramkissoon with his employer or in any of the various pleadings that have been filed in the Employment Relations Authority and subsequently in this Court. Mr Child submits that it was only for the first time in the plaintiff's statement of issues for decision by the Court that these events were first mentioned.[3]

[10] Counsel also submits that, pursuant to s 114(1) of the Act, any claim in relation to those events by Mr Ramkissoon is out of time. Mr Child accepts that, at most, the "Whakatane four" events "may be regarded as background context". Counsel accepts that they may be referred to by the plaintiff "in seeking to attribute motives to individuals who took the within-time and within-scope actions" but they cannot, themselves, be a basis for findings of liability.

[11] Next, para 22.1 of the plaintiff's statement of issues says that the Court will need to consider and determine, in relation to his constructive dismissal grievance:

> Whether the actions of the Defendant following the Plaintiff's involvement in the Whakatane Cells incident through the Opotiki grievance and subsequent grievance involving the rehabilitation processes amounted to breach of duty to the Plaintiff.

[12] Mr Child argues that neither of the two earlier incidents (Whakatane cells[4] and Opotiki) can be regarded properly as a key issue for determination. They too, at best, provide some historical or background evidence by way of context but they are also said to be outside the scope of this proceeding.

---

[2] There was, nevertheless, a subsequent civil proceeding for damages in the High Court resulting in a judgment, *Falwasser v Attorney-General* [2010] NZAR 445 (HC).

[3] Counsel has now identified a brief mention of this issue in correspondence between the parties in May 2011.

[4] I assume that this refers to the events at the start of the "Whakatane four" events

[13] The merits or otherwise of the incident in the Whakatane cells and the subsequent trial and acquittal of four police officers are not for examination and determination in this proceeding in this Court. It is also correct, as Mr Child submits, that the Court may, and indeed in some instances must, have regard to the personal grievance raised by the employee with the employer which is the first step in the process of adjudication of that grievance as is now the Court's function:[5] see *Creedy v Commissioner of Police*.[6] That judgment confirms that an employee purporting to raise a personal grievance must make the employer aware sufficiently of the nature of the grievance so that the employer is able to address the substance of it.

[14] It is, therefore, appropriate to look at the content of the grievance or grievances as raised to discern what they were about, at least initially. The letters raising the grievances have been made available to the Court and it is correct, as Mr Child submits, that there is no reference, express or implicit, to the "Whakatane four" investigation or trial or, in particular, to Mr Ramkissoon's involvement in those events, or any suggestion that they were connected with the grievances that he raised.

[15] Further, as Mr Child submits, there is no reference, express or implicit, to those events in any of the pleadings that have been filed in the Employment Relations Authority or this Court including by counsel.

[16] Looking at the timing of these events, Mr Child makes the following points:

- The incident in the cells at the Whakatane police station occurred on 23 October 2006.

- Police commenced criminal and disciplinary investigations on 1 November 2006.

[5] See *Creedy v Commissioner of Police* [2006] ERNZ 517 (EC) at [32]-[39].
[6] [2006] ERNZ 517 (EC) at [32]-[39].

- The four accused police officers were charged in December 2006. A depositions hearing was held in June 2007.

- The criminal trial took place in June 2008.

- The first of Mr Ramkissoon's grievances, the Opotiki grievance, was raised by him on 13 July 2009, that is about 13 months after the last of the "Whakatane four" significant events.

[17] Mr Child is correct that the matters constituting Mr Ramkissoon's Opotiki grievance are confined to those which occurred or came to his notice within the period of 90 days before the grievance was raised, that is on or after 14 April 2009. The defendant accepts that the key decisions relating directly to the Opotiki appointment all occurred after this date so that the grievance is within time. However, counsel submits, events between 23 October 2006 and 14 April 2009 are out of time in the sense that they cannot constitute grounds for a personal grievance unless they first came to Mr Ramkissoon's notice after 14 April 2009. There is no suggestion of that. As the Court of Appeal confirmed in *Waikato District Health Board v Clear*,[7] there can be no personal grievance liability on an employer based on findings about out of time actions or events.

[18] Turning to the defendant's submissions about the extent of relevance of evidence about the "Whakatane four" events, Mr Child reiterates that it is not the Commissioner's case that there can be no reference whatsoever to them in evidence. Rather, the defendant is concerned to exclude any possibility of liability arising out of those events. Accordingly, the defendant says that while he is content for the plaintiff to spend some time in evidence recounting these background events, they should not be allowed to be a significant focus of the case. The defendant says that this proceeding is not an opportunity to traverse in a broad ranging way Mr Ramkissoon's, or others', complaints about events from 23 October 2006.

[19] Nor, the defendant concedes, should the plaintiff be unable to argue a case about the motives of the individuals whose actions were, or related directly to, the

[7] [2010] NZCA 305 at [44]-[51].

within time grievances including the three in time grievances. Put shortly, the defendant accepts that the plaintiff is free to advance arguments that the defendant's decisions and actions about the within-time grievances involved prejudice or ill-will against him deriving from his connection to the "Whakatane four" events.

[20] The defendant, through counsel, suggests a direction that the Court may make to clarify this issue as follows:

> The actions, omissions, or events that are the subject of this proceeding are limited to matters that both:
>
> a) occurred no more than 90 days before the first personal grievance was raised on 13 July 2009; and
>
> b) are, in substances alleged in the letters raising personal grievances on behalf of the plaintiff.
>
> It may be appropriate for the evidence to discuss relevant historical events, for the purpose of providing background context (but not as a basis for making determinations about liability or remedies).
>
> It will be for the Court to control the extent of contextual evidence that is heard, as it considers appropriate and necessary, during the course of the hearing.

[21] Counsel for the plaintiff asserts that he has always maintained that the "Whakatane four" incident was a significant turning point in his career and that it was the start of criticisms of him and allegations against him by senior officers. He goes so far as to say that, at an unspecified time after the trial of the four officers at which he gave evidence, he was told that he might be charged with perjury in respect of the evidence he gave. The plaintiff accepts, however, that he has neither raised a grievance about these matters nor referred to them expressly in those grievances that he did raise. He says, in any event, that evidence that he proposes to call about the "Whakatane four" incident will be in the nature of factual background to his grievances.

[22] Mr Brosnahan, counsel for the plaintiff, submits, without citing authority for his proposition, that the law is clear that where an ongoing course of conduct is alleged leading to an ultimate dismissal/resignation/retirement, evidence of the ongoing course of conduct will be relevant to the Court's decision. Counsel submits there are no reasons to restrict evidence in relation to that ongoing course of conduct

and no reason why the Court should not make findings in respect of it. That is said to be especially so where, as here, an employee alleges that he was dismissed constructively as a result of a lengthy and continuing course of misconduct by the employer.

[23] Counsel points to three cases in which he says such historic events which significantly pre-dated the raising of a constructive dismissal grievance, were nevertheless considered in the eventual determination of it. These are *Commissioner of Police v Hawkins*,[8] *Brickell v Attorney-General*[9] and *Gilbert v Attorney-General*.[10]

[24] The plaintiff has now filed briefs of the evidence he intends to call from those witnesses who have agreed to be briefed and 'will say' statements of those witnesses who have been summonsed and, I assume, have not agreed to be briefed. It is, therefore, possible to ascertain the broad nature and extent of the evidence that the plaintiff proposes to lead about the "Whakatane four" incident and its aftermath.

Decision

[25] In applying s 114, the defendant is correct about the scope and nature of evidence that the plaintiff is entitled to lead at the forthcoming hearing in relation to his unjustified disadvantage grievances. The position may be different, however, in relation to the plaintiff's unjustified constructive dismissal grievance. The s 114 limitation applies to the grievance itself which is an alleged unjustified constructive dismissal. Unlike in the case of the disadvantage grievances, the 90 day limit under s 114 does not constrain the events that may have led relevantly to that resignation which is alleged to have been a constructive dismissal. Although relevance and causation must always be the touchstones, if events pre-dating the 90 days before that grievance was raised may be relevant to, and causative of, the plaintiff's resignation, then such evidence cannot be excluded before or at trial. That is not to say, of course, that the evidence will eventually be persuasive or even significant but, unlike an unjustified disadvantage grievance, there is no statutory exclusion of the statutory constraint issues that the Court may examine.

---

[8] [2009] 3 NZLR 381.
[9] [2000] 2 ERNZ 529.
[10] [2000] 1 ERNZ 332.

[26] There is a second string to the defendant's bow in his attempt to limit the scope of the evidence about the "Whakatane four" events at trial. Relevant events dating back to the "Whakatane four" incident might be admissible in the plaintiff's constructive dismissal grievance because, unlike the disadvantage grievances, they are not time barred from being so. However, the Commissioner's case is that they are not, and have not ever been, included in the plaintiff's "pleadings" in the broader sense of the word. These include his lawyer's letter that raised his grievance, the statement of problem in the Employment Relations Authority, and the statements of claim in this Court.

[27] The constructive dismissal grievance was raised with the defendant by letter of 30 August 2011. This letter was written by the plaintiff's current counsel, Mr Brosnahan. It referred to the earlier grievances, said that Mr Ramkissoon's psychological and mental health had been affected detrimentally by both his treatment relating to the Opotiki appointment and subsequently by alleged "harassment from Inspector Venables at Whakatane". Inspector Sandra Venables was not, however, apparently involved, at least so far as Mr Ramkissoon was concerned, with the "Whakatane four" incident or the subsequent trial. Mr Brosnahan's letter raising the grievance goes on that these actions of the Commissioner through his staff brought about Mr Ramkissoon's constructive dismissal.

[28] The constructive dismissal personal grievance was brought to the Employment Relations Authority by being incorporated into an amended statement of problem of 21 May 2012. After reiterating the Opotiki and rehabilitation management grievances, this amended statement of problem filed by Mr Brosnahan on behalf of the plaintiff alleged that the Commissioner's actions in relation to the rehabilitation management grievance (which contained no reference to the "Whakatane four" events) harmed the plaintiff to the extent that he was required to disengage medically from his employment with effect from 22 August 2011. That is said to have been a constructive dismissal for which he sought a number of compensatory remedies.

[29] The plaintiff's latest statement of claim in this Court (his amended statement of claim dated 25 January 2013) deals with his "constructive dismissal grievance" beginning at para 25. This effectively repeats the pleading in the Authority: neither the grievance nor the reference in it to the particulars of the rehabilitation management grievance refers expressly or implicitly to the "Whakatane four" events. The only real difference between those pleadings is that Mr Ramkissoon now seeks the remedy of reinstatement to the rank of sergeant as well as compensation.

[30] As Mr Child has pointed out, the Court of Appeal[11] has confirmed that in personal grievance cases it is not permissible to impose liability as a result of findings about actions or events that are out of time.

[31] Although on very different facts, the relevant events in *Clear* which indicated a longstanding and deteriorating dysfunctional relationship between the employee and her supervisor and employer bears a relevantly close relationship to this case. Although the judgment of the Court of Appeal records that the employee in *Clear* brought separate personal grievances for unjustified dismissal and unjustified disadvantage, its opening statement on limitations[12] at [31] does not distinguish between those grievances when it records:

> There is no dispute in this case that the limitation cut-off date is 19 September 2002 [90 days before the employee's dismissal although this took effect a month later]. In other words, that the Board cannot be liable for breaches occurring prior to that date.

[32] The employer's complaint on appeal was that the trial court had breached s 114 by taking into account, and finding the employer liable for, events which led to "sustained stress over several years" most of which occurred before the start of the 90 day limitation period.

[33] Dealing with the trial court's recounting of events before the 90 day cut-off date, the Court of Appeal recorded:[13]

> We see no error in the Employment Court's reference, without more, to the ongoing nature of the Board's duty. That is an accurate statement of the

[11] *Waikato District Health Board v Clear*, above n 6.
[12] At [31].
[13] At [42].

> position. So long as the breach is founded on the conditions as they were after 19 September 2002, there is no limitation problem. We consider the key point being made by Judge Shaw [the trial Judge] was that the working conditions were not safe.

[34] Addressing the trial court's comments about the way in which the grievant was treated in relation to a complaint that pre-dated the 90 day limitation, the Court of Appeal noted:[14]

> If the Employment Court was imposing liability on the basis of [the employer's representative's] actions, that would be wrong. But the judgment has to be read in context. When it is, we consider the thrust of the finding is that when the Board came to deal with the one "in-time" complaint, the Board did not deal with it properly because it had not been viewed contextually.

[35] I consider it would be wrong to read the Court of Appeal's remarks on this issue affecting events to be proved in evidence as applying to both the disadvantage and dismissal grievances. That is because the 90 day limitation period under s 114 on a dismissal grievance relates to the alleged wrong, that is the unjustified dismissal or unilateral termination of the employment by the employer. So long as a grievance alleging unjustified dismissal is raised within 90 days of that event occurring or coming to the grievant's notice, whichever is the latter, there is no statutory constraint, especially by any limitation period, on what relevant events may have led to the dismissal. In practice, of course, there are many cases where a dismissal takes place after a very long period of disputation, unsatisfactory relations, and the like which, to the extent that they are relevant, must all be taken into account in determining the question of justification for an actual or constructive dismissal.

[36] The plaintiff's very extensive brief of evidence-in-chief (85 pages including 547 paragraphs) purports to deal with the "Whakatane four" events at considerable length. This starts at para 21 on page 4 and continues to para 56 on page 10 at which point the brief addresses an associated but arguably separate allegation. This is that the plaintiff was, in September 2007, reassigned to take what the plaintiff describes as the most undesirable duties at the Whakatane police station of transporting prisoners which the plaintiff alleges had to be performed unsafely by him because of

[14] At [44].

staff shortages. The proposed narrative about the "Whakatane four" incident recommences at page 13 (para 72) of the brief and continues to page 19 (para 108).

[37] The absence of any reference in the pleadings to the "Whakatane four" incident or its repercussions means that these events can play no more than a background role in the establishment by Mr Ramkissoon of his personal grievances, both the unjustified disadvantage grievances and the unjustified constructive dismissal grievance.

[38] Accordingly, the directions sought by counsel for the defendant, which have been set out at [17] are allowed with some minor amendments as follows:

> The actions, omissions, or events that are the subject of this proceeding are limited, on the unjustified disadvantage grievances, to matters that both:
>
> a) occurred no more than 90 days before each unjustified disadvantage personal grievance was raised with the defendant; and
>
> b) are, in substance, specified in the plaintiff's pleadings.
>
> So far as the acts, omissions, or events the subject of this proceeding affect the plaintiff's unjustified constructive dismissal personal grievance, these must be, in substance those referred to in the plaintiff's amended statement of claim.
>
> It may be appropriate for relevant evidence to be adduced of historical events, for the purpose of providing background context (but not as a basis for making determinations about liability or remedies).
>
> The extent of such contextual evidence will be determined by the Court during the hearing if it is objected to formally by the defendant.

[39] Costs on this interlocutory application and judgment are reserved.

GL Colgan
Chief Judge

Judgment signed at 4.50 pm on Wednesday 7 August 2013