

**IN THE EMPLOYMENT COURT
AUCKLAND AND CHRISTCHURCH REGISTRY**

**[2014] NZEmpC 152
ARC 88/10**

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

BETWEEN STEPHEN DAVIS
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

CRC 31/13

IN THE MATTER OF proceedings removed from Employment
Relations Authority

BETWEEN STEPHEN DAVIS
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

Hearing: 9 June to 13 June 2014 (Heard in Whangarei)
30 June to 3 July 2014 (Heard in Christchurch)
7 and 8 July 2014 (Heard in Christchurch)

Appearances: J Goldstein and L Ryder, counsel for plaintiff
E Child and R Groot, counsel for defendant

Judgment: 19 August 2014

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Both of these sets of proceedings involve applications by Constable Davis for remedies resulting from alleged disadvantage grievances pursuant to the provisions of the Employment Relations Act 2000 (the Act). The grievances, alleged to have

arisen when Mr Davis was employed primarily at Mangonui, in the Northland Region, have been the subject of an investigation by the Employment Relations Authority (the Authority). Mr Davis was not successful in respect of those proceedings. A determination of the Authority was issued on 5 July 2010.¹ Mr Davis subsequently filed a challenge against that determination. His election related to the whole of the determination and he sought a full hearing of the entire matter by way of a hearing de novo.

[2] As a discussion of the factual situation in this matter will show, Mr Davis transferred to Christchurch as a result of the difficulties arising between himself and the defendant in the Northland Region. After he had commenced his employment in Christchurch, further employment relationship problems arose. Mr Davis commenced further proceedings in the Authority claiming alleged disadvantage grievances arising during the period of his employment in Christchurch. In view of the fact that there was already a challenge lodged with the Court in respect of the determination of the Authority, there was a further determination removing the Christchurch proceedings to the Court.²

[3] After the transfer of the Christchurch proceedings there were directions from the Court that both sets of proceedings should be heard together. For the convenience of the parties it was agreed that there be a hearing in Whangarei in respect of the Northland matters and a hearing in Christchurch in respect of the Christchurch matters.

[4] At the end of five days of hearing in the Whangarei Court not all of the evidence had been completed. Those witnesses who were not able to be heard in Whangarei had their evidence heard in Christchurch.

The pleadings

[5] The Whangarei matters are contained in a third amended statement of claim filed with the Court on 1 October 2013. This document was filed by Mr Davis's

¹ *Davis v Commissioner of Police* ERA Auckland, AA 313/10, 5 July 2010.

² *Davis v Commissioner of Police* [2013] NZERA Christchurch 134, 3 July 2013.

counsel. There had been pleadings previously filed by Mr Davis in person, which contained an attack on the integrity of the Authority Member. However, these comments were then overtaken by the document filed on 1 October 2013.

[6] In these final pleadings Mr Davis claims three unjustifiable disadvantages, breaches by the defendant of obligations in employment, breach of the good faith provisions of the Act and breach of the New Zealand Police Code of Conduct (Code of Conduct). The three disadvantage claims relate to Mr Davis's secondment from Mangonui to Kaeo, allegations of being subjected to conduct amounting to bullying, intimidation and harassment by a fellow police officer and failure by the defendant to fully and fairly investigate issues that Mr Davis had raised in relation to the conduct of that officer. So far as the breaches are concerned, Mr Davis alleges the defendant breached his implied obligation of trust and confidence and fair dealing in the way he dealt with Mr Davis's complaints and that he breached his State Sector obligations to be a good employer.

[7] The remedies Mr Davis seeks in respect of these allegations are orders:

- a) that he was unjustifiably disadvantaged;
- b) that he be reinstated to Mangonui or another position by agreement with no disadvantage to conditions and remuneration;
- c) that he be awarded reimbursement of lost remuneration from the date of transfer from the Mangonui station until the date of hearing;
- d) that matters relating to his alleged disadvantages be removed from his personnel file;
- e) that he be awarded compensation pursuant to s 123 of the Act;
- f) that there be no reduction of his remedies due to any contributing behaviour; and

g) for costs and interest and that he be awarded costs in respect of the Authority's investigation meeting. (The defendant agreed not to pursue costs against Mr Davis following the Authority's determination).

[8] The Christchurch matters are contained in a first amended statement of claim filed on 2 October 2013. The filing of this statement of claim followed the removal of the Christchurch proceedings from the Authority to the Court.

[9] In these proceedings Mr Davis claims that he was further unjustifiably disadvantaged by alleged actions against him by the defendant. He again alleges that the defendant breached his express and implied obligations of trust, confidence and fair dealing in the way that he dealt with Mr Davis's complaints. Again there is an allegation that the defendant breached his State Sector obligations to be a good employer and the good faith obligations under the Act. There is a further pleading that the defendant breached the terms of Mr Davis's employment agreement, including the Code of Conduct, in the way that he dealt with Mr Davis's complaints. This pleading is included to found an alternative remedy of damages both pecuniary and non-pecuniary for the defendant's breach of Mr Davis's employment agreement.

[10] In addition to the remedy for damages, Mr Davis seeks orders:

- a) that he was unjustifiably disadvantaged as he has claimed;
- b) that he be awarded reimbursement of lost remuneration from December 2010, when he was transferred to Christchurch until the date of hearing;
- c) that the defendant be ordered to pay him his full salary without deduction as from the date of the hearing and indefinitely for the period while his employment continues;
- d) that he be awarded compensation pursuant to s 123 of the Act;
- e) for costs; and
- f) interest.

Factual summary – Whangarei

[11] Constable Davis came into dispute with his two colleagues in the three-man Mangonui Police Station. The dispute arose over their respective interpretations of the application of and compensation for overtime worked as provided for in the collective agreement. As they were employed in a small rural police station, each of them was placed on a higher salary scale than employees in urban and larger provincial stations. In addition, they received a rural response allowance and a payment in lieu of what was known in the larger stations as TOIL (Time Off In Lieu). It is not necessary to deal with the intricacies of the clause in the collective agreement that caused the dispute, except to say that some time earlier the police officers' union had negotiated overtime provisions in order to improve the lifestyle of police officers in small rural police stations. The dispute arose as to how these provisions were to operate. Mr Davis took an adamant attitude to the matter.

[12] As the difficulties appeared to impact on the operation of the station, a meeting was conducted by the Senior Sergeant responsible for the station and who was situated at Kaitaia. The Senior Sergeant endeavoured to resolve the dispute by mediating between the three officers. As Mr Davis would not resile from the stand he was taking, no agreement could be reached. The Senior Sergeant then set down rules as to how overtime at the station was to be taken and compensated for.

[13] Mr Davis in later actions made it plain that he was not prepared to accept the manner in which the Senior Sergeant chose to resolve the dispute. On two later separate occasions, he referred back to the overtime dispute, when far more serious matters relating to the employment relationship problem at the station were being discussed.

[14] The day following the meeting at which the rules had been established by the Senior Sergeant, Mr Davis sent an email to one of his fellow officers at the Mangonui station accusing him of improper violence, on two separate occasions, to prisoners held in the cells. The officer who received this email was the Senior Constable who was in charge of the station. He reacted negatively to these allegations against him. However, he first quite properly forwarded the email to the

Senior Sergeant in the expectation that the Senior Sergeant would want to inquire into the allegations against him. He also had a meeting with Mr Davis at which he expressed his outrage at what amounted to unfounded allegations against him. Mr Davis had not himself observed the alleged incidents. He reported his understanding of what others had told him and on one occasion what he heard from a distance. He drew unsubstantiated inferences and later stated he believed the allegations to be true as part of a “gut feeling” he had. It would have been clear from the outset that the allegations were unsupported by any or sufficient evidence.

[15] The Senior Constable against whom the allegations were made had indicated to Mr Davis that the allegations were unacceptable and that they were made as a spiteful reaction by Mr Davis at having his assertions as to the interpretation of the overtime provisions in the collective agreement rejected. The Senior Constable also indicated that the allegations affected the previous good relationship between them. Mr Davis, in a hand-written record of the conversation, alleged that the Senior Constable advised him that he had better be careful and that things had changed. He said that he would be watching Mr Davis closely. He told Mr Davis that he had nothing to hide. He said to Mr Davis that he was not to be investigating him and that it was clearly a reaction to the previous day’s meeting. The Senior Constable reacted further by locking his own office at the station and also the drawers in his office. The Senior Constable later acknowledged, following meetings and discussions with his senior officers, that his anger and actions were not appropriate. However, he denied that anything he said or did amounted to a physical threat as Mr Davis later claimed.

[16] Mr Davis denied that his email was a response to any feelings he harboured over the overtime issue. He maintained later that the Senior Constable’s reaction amounted to a threat to him and he then escalated the matter to an allegation that he felt endangered and unsafe while working in the Mangonui Police Station. He did not raise these allegations immediately but he did complain to the Senior Sergeant about the Senior Constable’s actions in excluding his use of the office facilities at the station. The evidence disclosed that in any event the Senior Constable had then adopted the habit of locking his office upon the advice of a supervising officer.

[17] When the Senior Sergeant received a copy of the email containing Mr Davis's allegations, he treated those allegations as serious. In consultation with his supervising Inspector, he commenced an inquiry. He spoke at intervals to both Mr Davis and the Senior Constable. By this time Mr Davis had advised the Senior Sergeant of the Senior Constable's actions in locking cabinets and his office at the Mangonui station. The Senior Sergeant became concerned at the deteriorating relationship between the two. In the course of the investigation, he interviewed a volunteer who had passed on comments to Mr Davis and also the other constable at the station who had witnessed one of the cell incidents. Neither of them backed up Mr Davis's assertions.

[18] Following the discussion with the volunteer and the other constable, the Senior Sergeant had meetings with the Senior Constable and Mr Davis. He was, by this time, more concerned about further deterioration in their relationship. The Senior Sergeant and the Inspector had decided, following further inquiries, that there was simply no evidence to show that the Senior Constable had abused his position in relation to the cell incidents. The inquiry was not to be taken further. Mr Davis was informed of this at a meeting on 3 September 2009. He reacted badly, telling the Senior Sergeant that he was wrong and accusing him and the Inspector of sweeping the matter under the carpet and conducting a cover-up. He indicated that he no longer had confidence in the decision-making ability of the Senior Sergeant or the District Commander or the Area Commander. He made a threat to expose the matter to the media.

[19] Mr Davis then asked the Senior Sergeant to commence a prosecution against the Senior Constable for intimidation or threatening language. This amounted to a change of tack because up until then Mr Davis had been concentrating on the cell allegations. The assertions of intimidation or threatening language were in relation to the comments the Senior Constable had directed in anger towards Mr Davis following receipt of the initial email. When the Senior Sergeant disagreed that there was intimidation or threatening language sufficient to found a prosecution, Mr Davis raised again the dispute over the overtime issues resolved by the Senior Sergeant some time earlier. The Senior Sergeant stated that Mr Davis at this meeting raised

no assertion that he was feeling unsafe or intimidated in his work environment at the Mangonui station.

[20] Following this meeting, and being aware that there was an escalating problem in the deteriorating relationship between Mr Davis and the Senior Constable, the Senior Sergeant asked them to meet to resolve matters. They did meet but apparently this did not go well. On the face of it, from the contemporary correspondence, emails that were passing between the two showed a level of co-operation continuing between the two of them at the day-to-day operational level. However, on the other hand, there was ‘tale-telling’ correspondence going on between each of them individually to the Senior Sergeant with each making allegations and counter-allegations against the other. Mr Davis began preparing documents to initiate a prosecution against the Senior Constable. This included the preparation of a lengthy victim impact statement, Mr Davis being the alleged victim.

[21] Eventually, in this deteriorating atmosphere, the Inspector decided that one of them should be seconded elsewhere to relieve the tension in the Mangonui station. Senior Northern district human resources managers were asked to conduct an investigation. This appears to have resulted not only from Mr Davis’s request for an independent investigation but also from the Inspector’s concern at the worsening relationship at the Mangonui Police Station and recognition of his and the Senior Sergeant’s inability to resolve the dispute.

[22] The Human Resources Managers did conduct investigations. They did not have the capability to inquire into the cell allegations but apparently regarded themselves as reviewing the procedures adopted which were material to the employment related dispute; and endeavouring to use their skills to mediate a resolution. Mr Davis clearly had the expectation that the enquiries they made would go beyond this purpose. However, I cannot see how he could have expected that from these managers.

[23] Further meetings were held. An attempt at mediation was conducted. This again ended badly. The conclusion reached and recommended by the Human Resources Managers was that while there were faults on both sides, Mr Davis should

be moved away from the Mangonui station. The primary reason for this selection was that from an operational perspective the Senior Constable was the officer in charge. He also resided with his family in the station's nearby residence.

[24] Mr Davis was dissatisfied with the outcome of the enquiries or the review by the Human Resources Managers. He raised a personal grievance and then filed an application with the Authority to have his grievances investigated. About this time the Senior Constable lodged an harassment complaint against Mr Davis.

[25] Initially Mr Davis was to go the Kaitaia Police Station, although this did not eventuate. After some initial procrastination and a further mediation, Mr Davis was seconded to the Kaeo Police Station to fill the role of Community Constable. He remained there pending the outcome of the investigation meeting conducted by the Authority. There was continuing contact between Mr Davis and the Senior Constable during this time. This resulted partly from the fact that in accordance with operational rules, the Inspector would not initially allow Mr Davis to use a Police vehicle to travel from his home in Cable Bay to the Kaeo Police Station. He was required to travel to the Mangonui Police Station, pick up the Police vehicle there and deliver it back on his way home. This was clearly unsatisfactory and eventually the Inspector agreed to an exception to the rules being made. This did not alleviate the problem, however, because Mr Davis persisted in going to the Mangonui Police Station to use the offices there. This meant potential contact between the two.

[26] Mr Davis further complained that while he was conducting a defended hearing at the Kaitaia District Court he noticed the Senior Constable sitting in the back of the Court. Mr Davis alleged that the Senior Constable was doing this as part of a concerted harassment action against him. The explanation for the Senior Constable being in the courtroom was that he had a defended hearing which immediately followed that being conducted by Mr Davis. In addition to that he was assisting the Court staff with cell administration as a result of the Court staff being short-handed. Mr Davis's assertions in this respect were without foundation. Nevertheless, in view of these contacts and the complaints which were emanating, it was decided that Mr Davis was to remain away from the Mangonui station.

[27] While all of these developments were occurring and as a result of the serious employment relationship problem now presented, the National Manager of the Professional Standards Division at Police Headquarters in Wellington became involved. A senior Inspector was asked to carry out an employment investigation under specific terms of reference. He was regarded as having some independence, being from headquarters in Wellington, and being involved in professional standards issues. He did not know Mr Davis or the Senior Constable. The terms of reference required him to conduct an employment investigation into the allegations made in Mr Davis's personal grievance and the harassment complaint of the Senior Constable. The investigation was to specifically include Mr Davis's allegations of mishandling of the overtime issue and the behaviour of the Senior Constable towards him.

[28] The specific terms of reference set down in writing were produced during the course of the hearing. Considerable criticism during the course of Mr Davis's evidence was directed at this Inspector's inquiries. However, for Mr Davis to have managed to elevate his complaints to an inquiry at this level demonstrated considerable patience on the part of the defendant. This is particularly so when it was agreed that his dispute over the overtime issue would be included.

[29] The Inspector carried out a very thorough investigation. Mr Davis interpreted the purpose of senior management in the Professional Standards Division appointing someone with independence to mean that this was a completely independent inquiry. That again would be an unrealistic expectation. The Inspector interviewed a number of persons involved and on the periphery of the dispute. He did not interview some of the people requested by Mr Davis but my assessment, like that of the Member of the Authority in his determination, is that the extent of the inquiry which Mr Davis was expecting would have resulted in the receipt of information which was irrelevant to its ultimate purpose.

[30] At the time that the senior Inspector from Wellington was carrying out his investigation, an attempt was made to prepare for the time when Mr Davis's secondment in Kaeo came to an end. It was anticipated that he would return to the Mangonui Station at that time. In order to achieve reconciliation before this

happened, the Human Resources Managers proposed to approach both Mr Davis and the Senior Constable to ascertain whether they would be agreeable to consulting with a registered psychologist. The Senior Constable gave his consent. Mr Davis saw it as an attempt to entrap him. His reasons for this related to a draft letter with a consent form attached. This was prepared so it could be sent to the psychologist in the name of the Inspector who was then Acting District Commander. Mr Davis apparently objected to the fact that the draft letter indicated that the senior Inspector's report (which had not been completed by that stage) would be released to the psychologist. He refused to agree.

[31] In his evidence the Inspector who was then Acting District Commander (the same Inspector who had helped the Senior Sergeant with the original allegations Mr Davis had made), expressed regret that he had not been more involved in this process. He was of the view that the reference to a psychologist had the potential to solve the problems faced in their entirety. His primary reasoning for both constables to see the psychologist was for their own assistance and to help resolve the fundamental breakdown issues that had occurred. He had not seen the proposed consent form before the hearing but had helped draft the proposed letter. Any assistance the psychologist could give was not to be used in any evidential way. Indeed, his view was that it would be kept confidential. He regretted not being aware of the consent form, which he conceded would have given Mr Davis the impression that the psychologist could provide evidence. He conceded also that if he had then intervened and explained his true purpose for the suggestion, the matter might have been resolved.

[32] During the course of the inquiry by the senior Inspector from Wellington, the preliminary steps in Mr Davis's personal grievance before the Authority were taking place. Eventually the investigation meeting itself took place. The Inspector had requested the Authority to adjourn the investigation meeting for a period to enable him to complete his inquiries and produce his report. This was agreed over the objection of Mr Davis. The Inspector participated in both the mediation and the investigation meeting after he had completed his report. My initial reaction to this was that it perhaps might have been an improper interference in the Authority's investigation meeting. However, upon reflection and having re-read the Inspector's

final report and considered the extent to which he investigated all of the issues, there was no reason why he should not be entitled to participate in the mediation and the investigation meeting. With the background that he would have obtained in the matter as a result of his inquiry, he would have been a valuable person to be involved in any attempt to resolve what had become a difficult employment relationship problem for the Commissioner. The fact that the dispute had reached the stage of being referred to the Authority amounted to a very serious escalation of the issues which Mr Davis was raising.

[33] In addition to this, the Inspector was successful in persuading the Senior Constable to suspend his harassment complaint against Mr Davis. This was despite the fact that while no specific harassment complaint had been made by Mr Davis against the Senior Constable, the nature of the allegations being made in the personal grievance in part amounted to that; and of course these were pursued through the investigation meeting by the Authority Member. During the course of the investigation meeting the Authority Member, sensibly in my view, adjourned the proceedings to allow Mr Davis to speak to the Inspector and also to the General Manager for Human Resources who was present. The purpose of this was to ascertain whether, without a final decision being made by the Authority, there could be some resolution of Mr Davis's grievances by considering other options for him away from the Northland region. A discussion did take place along these lines, but did not result in the matter being concluded. Mr Davis adopted the attitude that witnesses had lied during the course of the investigation meeting and misled the Authority. His insistence that the personnel who in his view had behaved dishonestly should be pursued meant the prospect of a final resolution became remote.

[34] The position changed to some extent following the Authority's determination in which Mr Davis was unsuccessful. It became clear that he would have to be moved away from the Northland area. This was not just because of the disputes over the overtime issue and the personality conflict with the Senior Constable, but because by this stage Mr Davis was making serious allegations attacking the integrity of senior police officers in the Northland region. Later he went to the extent of writing to the then Minister of Police, raising very serious allegations of

corrupt Police practices and alleging a widespread conspiracy against him by these officers and personnel. After he had been seconded to the Kaeo station, contemporary documents disclosed that relationship issues were also arising between Mr Davis and the officers stationed at the Kaeo Police Station or supervising it.

[35] The Human Resources Managers, both in the Northland region and at Police Headquarters, had the ability to ascertain the wider picture in respect of all of these events. They made the decision that the way to resolve it was to move Mr Davis to an urban police station. He did not have to accept that of course. However, the General Manager for Human Resources adopted the view that if Mr Davis insisted on going back to his position at the Mangonui Police Station, as he was entitled to do, the inevitable outcome would have been further difficulties arising. In his view this had the potential or even inevitability that Mr Davis would finish up being dismissed for his actions because he would become incompatible with his fellow officers. Mr Davis interpreted this view as an expression to him of an ultimatum of either transferring to an urban station or being dismissed for incompatibility. The evidence, when carefully considered, does not justify the interpretation which Mr Davis took. However, following considerable discussion, and again delays, Mr Davis consented to being transferred to the Christchurch Police Station. Events which occurred there after his transfer gave rise to the grievances which he subsequently raised against senior officers in Christchurch. This resulted in a further employment relationship problem being referred to the Authority and then removed to the Court.

Factual summary – Christchurch

[36] Mr Davis and his family were transferred to Christchurch. He was appointed to the Traffic Alcohol Group (TAG) team. The transfer was to provide a fresh start for Mr Davis following what had transpired in Northland. Christchurch personnel were not to be informed of the prior events; and the grounds for transfer were welfare or personal reasons in accordance with the provisions of the Policing Act 2008.

[37] There were remuneration changes as a result of the move. Mr Davis transferred to the salary band applicable to an urban station. He was placed on the step within that band closest to his previous salary. He was able to retain his rural response allowance for a further period exceeding 12 months. He did not retain his “in lieu of TOIL” allowance, as he became eligible for TOIL in the Christchurch station. He was reimbursed completely for his moving expenses. He was granted a week’s special leave to assist with the move. As a result of an administrative error, he was paid more than his entitlement under these arrangements. The defendant did not seek reimbursement of the overpayment. Earlier the defendant had agreed not to seek any costs from Mr Davis arising from the proceedings in the Authority.

[38] Within a relatively short time of his arrival in Christchurch, Mr Davis’s supervising Sergeant began to notice minor performance issues. They were noted and discussed with him. About eight months after his commencement in Christchurch, while Mr Davis was processing a suspected drink driver on the ‘booze bus’, the suspect wandered off. The suspect had been standing next to Mr Davis while he processed papers in the bus. Another officer had asked the suspect to move off the bus. The suspect took this as an invitation to leave and did so. Mr Davis did nothing at the time, continued his paperwork and then found the suspect had left. He pursued the suspect to his home and completed the process. The suspect was later convicted after a defended hearing and unsuccessful appeal using as grounds the fact that he had been asked to leave the ‘booze bus’. This incident was investigated by the supervising Sergeant of the TAG team and the Senior Sergeant having overall oversight of the team. Following two meetings with Mr Davis, he was issued with a notice to undergo a performance improvement plan (PIP). This was issued because of the continuation of the minor performance issues culminating in the serious incident on the ‘booze bus’. Proper procedures were adopted in issuing the notice. Such a plan is not a disciplinary device. However, failure to improve following implementation of the plan can lead to disciplinary action and accordingly there is some risk of this happening.

[39] Mr Davis refused to sign the PIP and disputed that any aspect of his performance made the plan necessary. Nevertheless, the Senior Sergeant forced him to comply and he undertook the programme necessary to complete the plan. The

Senior Sergeant who issued the PIP notice stated in evidence that Mr Davis's performance improved noticeably following completion of the plan.

[40] Mr Davis appears to have regarded the implementation of the plan as a disciplinary measure. Following the implementation of the plan, Mr Davis began raising with the Senior Sergeant complaints against his supervising Sergeant on the TAG team. The complaints consisted of examples where he alleged the Sergeant gave more favourable treatment to other officers on the TAG team than to him. Mr Davis alleged that the Sergeant effectively discriminated against him by having a pecking order in the team where she played favourites. He alleged that her favourites were treated like "pseudo boyfriends/servants". Many of these allegations were minor. It has been suggested that this was retaliatory action to the issue of the PIP reminiscent of Mr Davis's Mangonui complaint against the Senior Constable there. Mr Davis denies this but such an inference can be drawn.

[41] In addition to his grievances arising out of his transfer to Christchurch and alleged financial disadvantage from doing so, Mr Davis raised the issuing of the PIP and the handling of his complaints against his supervising Sergeant as further grievances.

[42] The most serious allegation against the Sergeant related to her failure to discipline one of her favoured officers on the TAG team for pepper-spraying another officer during horseplay between the two. This was regarded seriously by the Senior Sergeant to whom Mr Davis raised the complaints. Mr Davis did not witness the incident himself and refused to divulge further details to identify the officers involved. When it was raised with the supervising Sergeant she was not even aware it had occurred.

[43] Another complaint against the Sergeant was that she came in late to work on one occasion. Mr Davis alleged that this was because she had a hangover. It transpired that the Sergeant had been taking pre-approved TOIL. The complaint appears to have been made in response to Mr Davis's assertions that the Sergeant inconsistently rebuked him for his own lateness to work.

[44] Mr Davis included in his complaints an allegation that the Sergeant had allowed officers to watch the Rugby World Cup final live on television during their shifts. In fact this was not her decision. Permission to watch the final had been given by the supervising Senior Sergeant.

[45] There were two complaints about the Sergeant allowing officers to finish shifts early but receive payment for the shift to the time it was rostered to end. With one of the complaints, generally very short periods of time were involved. Mr Davis alleged this was acquiescence by the Sergeant in timesheet fraud. The reason given for the allowance in this way was to ensure that officers were back at base in time to complete shifts and unless necessary, not encroach into the nine-hour rest break requirement before the next shift commenced. Any breach of the nine-hour rest break requirement had fiscal consequences. The practice was not confined to the TAG team. The practice had approval from senior managers and officers ranked higher than the Sergeant. There was also some element of give and take in this practice in that the early finishing times would be balanced out by other occasions where unpaid overtime for a short period was worked.

[46] With the other complaint as to early finishing times, Mr Davis raised another incident where officers were allowed to leave early on pay. The period in this case was apparently in excess of an hour before the end of the rostered shift. There were insufficient duties available to the returning officers and they were allowed to leave early but be paid to the end of the shift. The practice was endorsed on the “swings and roundabouts” principle again where officers were sometimes detained beyond rostered duty times or worked during meal or tea breaks.

[47] These incidents would be regarded as the more serious of those raised by Mr Davis against his supervising Sergeant. As can be seen, there was a reasonable explanation or they were not in any event decisions made by the Sergeant. Even so it is hard to ascertain how any of them affected Mr Davis to his disadvantage such that a personal grievance arose. In the case of the “pepper spray” incident he alleged had occurred, he refused to give sufficient information to his Senior Sergeant and the Human Resources Manager for the Canterbury district, who was also assisting in

handling Mr Davis's complaints, to enable them to investigate and take action on that matter.

[48] Included in the plethora of further matters he raised as examples of where the "favourites" were treated differently from him were:

- a) being allowed to eat food at meetings;
- b) having meetings in a room where a television set was on;
- c) making a comment about golf during a meeting;
- d) an officer getting away with not always wearing the required armoured vest;
- e) lateness to meetings;
- f) meal times changing from time to time;
- g) a delay in having an administrative form signed off;
- h) people being asked to make cups of tea for the Sergeant;
- i) the allocation of police cars on a favourable basis; and
- j) socialising together when on trips;

[49] He also complained of other members of the team who were not "favourites" being on the receiving end of the Sergeant's quips, taunts, slights or rebukes.

[50] Mr Davis's complaints against the Sergeant were, apart from one matter, rejected. As Mr Davis had done in Northland, when he was not satisfied with the outcome of the inquiry by the Senior Sergeant and the Canterbury district Human Resources Manager into the Sergeant's alleged behaviour towards him and into the other matters he had raised, he referred them to a more senior officer. The Senior

Sergeant had offered Mr Davis the assistance of a support person should he have needed advice on any future issues. As this would preclude Mr Davis from furthering his then complaints, he declined that offer. He then wrote to the Inspector who was the officer in charge of Canterbury Road Policing. He referred that Inspector to his complaints against the supervising Sergeant and repeated the allegations he had made to the Senior Sergeant and the Canterbury district Human Resources Manager. He used somewhat intemperate language in his letter to the Inspector. When the Inspector declined to intervene, Mr Davis referred the matters to the District Commander. He sent a number of emails to the District Commander. There was an unsuccessful attempt at that point to elicit further information from Mr Davis, particularly relating to the time-off issues. The officers deputised by the District Commander to investigate these issues felt they could take them no further when Mr Davis would not provide further information. Mr Davis then notified his personal grievance. When this was not accepted by the District Commander, Mr Davis filed his Christchurch personal grievance claim with the Authority.

Principles applying

[51] It is important to emphasise that the Court is only required to resolve an employment relationship problem. Mr Davis relies upon s 103(1)(b) of the Act which reads:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment ..., is or are or was ... affected to the employee's disadvantage by some unjustifiable action by the employer; ...

[52] The test for justification is now contained in s 103A(2) which reads:

...

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

....

[53] Section 103A(3) then deals with matters which are included and what the Court must consider in applying the test under subs (2). The discretion, however, is wider than the matters contained in subs (3) because subs (4) gives a further discretion to the Court to consider any other factors it thinks appropriate. It is significant in this case that subs (3), however, refers to “taking action against the employee”.

[54] The issues raised in this case, involving both the Northland and the Christchurch phases of Mr Davis’s employment, span the amendment to s 103A, which came into effect on 1 April 2011. The Court must therefore consider the actions of the employer on the basis of the “would” and “could” tests, depending upon the date when the various complained of actions took place.

[55] Therefore, where actions, were taken specifically against Mr Davis in both Northland and Christchurch, the Court needs to consider whether or not there is substance to his complaints within the confines of the statutory provisions. However, where he has complained about the inadequacy of the employer in investigating the actions of other officers for alleged or perceived misdemeanours not involving him at all, there is some difficulty in reaching a conclusion that in those respects a disadvantage grievance can be sustained. It may well be that if substantiated, the failure to properly investigate might be pursued through other avenues, but it is difficult to see how this Court can deal with it within the context of Mr Davis’s claims.

Conclusions

[56] I observed Mr Davis during the course of his evidence at both hearings. Having read the material provided and considering all of the witness’ evidence, I formed the view that Mr Davis does not take kindly to any criticism of himself. He appears to believe, without any solid foundation, that all those who have been

involved from the employer's side are dishonest and corrupt. In both Northland and Christchurch he has assumed the role of a victim in this wide spread corruption. Trivial incidents have been blown out of proportion and accusations have been made by Mr Davis without any proper basis. When decisions have been made with which he does not agree, he seems to have taken that personally. The inferences taken by more than one witness that his actions were retaliation might have some basis. As the Human Resources Manager for the Canterbury district stated to Mr Davis during one of his interviews, he has adopted an incredibly high standard required of others and not everyone would be able to meet those standards all the time.

[57] What set off this entire sequence of events was Mr Davis's attitude to the provisions of the collective agreement relating to overtime for rural station officers and opposition from his fellow officers and union representative. Mr Davis did pursue this issue in an obsessive and at times inappropriate way. It is not for this Court in these proceedings to provide an answer to the correct interpretation of the clauses. The Act provides a straightforward way for a dispute over the provisions of an employment agreement to be interpreted. Mr Davis could have persuaded his union to seek an interpretation or sought one himself. Instead of that he embarked upon a crusade, obstinately refusing to respect the views of others and adopting a rigid, unwavering stance. When a Senior Sergeant was confronted with the problem and made what appeared to be reasonable attempts to resolve it, (with the agreement of the union representative present), Mr Davis reacted. He then made the unsubstantiated accusations against the Senior Constable at the Mangonui station.

[58] The reaction by the Senior Constable to the unfounded accusations was understandable but not entirely appropriate. The Senior Constable appears to have been spoken to about that and accepted that some blame attached to him. He confirmed that in his evidence. However, once again Mr Davis refused to accept the findings of the Senior Sergeant, the Inspector with overall supervision for the area, human resources managers brought in to assess the situation and finally a senior Inspector from Wellington who carried out a comprehensive review.

[59] When the Senior Sergeant informed Mr Davis that he, in conjunction with the Inspector, had decided there was no basis for the allegations as to the cell incidents,

Mr Davis reacted badly, changing tack and wanting the Senior Constable charged with intimidation or threatening language. This was an entirely inappropriate reaction by Mr Davis who then alleged that he felt threatened and unsafe in his work environment at Mangonui. He over-dramatised that situation. He then made allegations against his senior officers in the Northland region who had tried to handle in a sensitive and appropriate way what had become a serious and unnecessary employment relationship problem. Mr Davis even went so far as later complaining to the Minister of Police alleging a serious conspiracy and cover up by the senior officers. During the course of the hearing in the Whangarei Court, I went through with Mr Davis his then attitude to those with whom he had become involved in the disputes. With one or two exceptions, he accused them of dishonesty, misleading conduct, or corruption. This included a colleague at the Kaeo station and the Senior Sergeant with responsibility for that station.

[60] While it became apparent to his superior officers and the human resources managers that his future employment in Northland was untenable, Mr Davis failed to recognise the damage he had done. By this stage he had taken the very serious step of bringing a personal grievance to the Authority. Even there, following the hearing of that, he indicated his view that witnesses had lied and he wanted something done about that.

[61] The irony is that despite all of this behaviour, the senior officers and human resources managers who were involved regarded Mr Davis as a good police officer when it came to operational matters and performance of his duties. The same comments were made when he went to Christchurch and indulged in similar behaviour there.

[62] Mr Davis's pursuit of the Senior Constable to have him prosecuted for criminal behaviour lacked judgment and proportionality. The decisions in respect of the Senior Constable resulted in no disadvantage to Mr Davis. He alleges he was subjected to threatening, unreasonable, and unfair treatment by the Senior Constable. That was overstatement of the position. It was understandable that the Senior Constable would react as he did. When what he said is analysed in the context of subsequent actions, Mr Davis was not under threat of violence. The Senior Sergeant

was correct to dismiss out of hand the request to prosecute. The Authority's findings on these issues were correct. What the defendant faced when the two officers embarked on reciprocal complaints is how he could resolve the dispute so that both officers could work together. I have already indicated that the steps taken by the defendant showed unusual patience. When Mr Davis escalated his accusations towards the senior officers, it was inevitable that he would have to be placed elsewhere. The move to Kaeo was a reasonable effort to separate the two. Inevitably he would have to move from the region. He could not be forced to do that. He voluntarily chose to do it despite his assertions that he was given the choice of transferring or being dismissed. The assessment by the General Manager for Human Resources, that if he remained in Mangonui he would inevitably face dismissal for incompatibility with his colleagues, was an astute assessment. I believe that when confronted with that reality and having lost in the Authority, Mr Davis saw that was so.

[63] Mr Davis did not suffer any disadvantage as a result of the way the overtime dispute was resolved. The decision imposed by the Senior Sergeant to resolve that was what a fair and reasonable employer would have done in all the circumstances.³ Support for his decision was available. In order to try and dissuade Mr Davis from his rigid stance, it was even suggested that he could speak to the union people who had negotiated the change to the collective agreement in the first place. He declined. Avenues were open to Mr Davis under the Act to have his interpretation tested before the Authority if that is what he wanted.

[64] Similarly Mr Davis was not unjustifiably disadvantaged by the decisions taken in respect of the dispute which then arose with the Senior Constable at the Mangonui station. That dispute was of his own making. He then compounded it by his refusal to accept compromise. But even if there were grounds to discipline the Senior Constable, how the employer carried that out could not effect any disadvantage to Mr Davis. He was not the victim of any of the alleged cell incidents; merely the informant of them.

³ Employment Relations Act 2000 s 103A(2). The test of justification was amended on 1 April 2011 to read "could".

[65] The allegation he had made was so serious that the Senior Constable indicated that he had lost trust in Mr Davis as a colleague. That might have been retrievable if Mr Davis, throughout the process, had been prepared to make concessions as to his own involvement.

[66] Mr Davis was not disadvantaged by the initial move to Kaeo. He might have seen that as unfair. Objectively, however, the only decision which could have been reached, no matter who was at fault, was to move Mr Davis.

[67] In his submissions Mr Goldstein, on behalf of Mr Davis, has referred to the Code of Conduct process to be applied in investigating matters such as this. His emphasis was that the Code was not applied and therefore procured a disadvantage to Mr Davis. However, in making the submission, Mr Goldstein has overlooked that the Code of Conduct disciplinary processes would apply in an investigation into the Senior Constable's conduct to ensure that fair treatment and proper process applied in his interests; not necessarily to Mr Davis who was simply the informant. If there were breaches of the Code in making an adverse finding against the Senior Constable, then that would be something which would be actionable by the Senior Constable and not Mr Davis. The harassment policy which Mr Goldstein also referred to, if it was in existence, was not engaged by Mr Davis in any event. He made no discrete harassment complaint. His complaints against the Senior Constable proceeded gradually through the process where the Police had decided to deal with it as an employment relationship problem and to look for a resolution in the interests of Mr Davis. It is also clear the Senior Constable was spoken to about his behaviour; but how the Police dealt with him is really no business of Mr Davis who has exaggerated the effect on him of alleged deficiency in process. It was open to the defendant employer to decide that no misconduct or serious misconduct had occurred and then to deal with what confronted him as a serious employment relationship problem, in order to endeavour to resolve the differences which had arisen. That is how it proceeded.

[68] There is a conceptual difficulty, therefore, in Mr Davis alleging breach of the Code of Conduct process after the complaint about the Senior Constable's behaviour was lodged. It was up to the employer to decide whether the conduct was

misconduct or serious misconduct before putting the procedure into effect. As it turned out the defendant decided that no misconduct or serious misconduct had occurred and that there was the end of the matter. Any issues relating to the Code of Conduct process were not even engaged. It was that decision which Mr Davis refused to accept.

[69] Similar issues were pleaded and argued in respect of the Christchurch complaints. Again those accusations were not against Mr Davis but other officers. Code of Conduct processes were again not engaged. Even if they were, it is difficult to see how the outcome could have any effect on Mr Davis's employment to his disadvantage.

[70] Mr Davis, as I have indicated, did not raise in the Northland dispute any separate complaint under the provisions of any harassment policy. As Mr Child for the defendant submitted, issues specifically referred to as harassment started to arise following the raising of the personal grievance. Mr Davis had chosen to follow that course. The Senior Constable, of course, had raised a complaint of harassment of his own. That was not to the Authority but to his employer. The employer in this situation was then faced with a dilemma. However, the senior Inspector from Wellington, who had carried out the final investigation, persuaded the Senior Constable to suspend his complaint. Therefore, Mr Davis can have no complaint as to how that was handled.

[71] It is clear that for a time each of them contributed equally to the problem. The Senior Constable was obviously spoken to about his behaviour because he conceded he was in the wrong in overreacting. Nevertheless, in view of the lack of trust which had developed, it is clear the Senior Constable would have had great difficulty in continuing his relationship with Mr Davis if Mr Davis had in fact returned to the Mangonui station.

[72] The move to Christchurch did not disadvantage Mr Davis either. In any event it was a move to which he consented. Quite apart from that, viewed objectively, it was a step which was very much to his advantage, in the

circumstances of his position in Northland. It meant that he avoided what everyone could see as inevitable if he remained in Northland.

[73] Unfortunately the move to Christchurch resulted in similar problems arising. Mr Davis got into personality disputes with his supervising Sergeant. These arose gradually, it seems, and were not revealed by him until later in time. When they were raised, following his being placed on a PIP, for which he blamed the Sergeant, the majority of the allegations were found to be trivial. Mr Davis cannot realistically claim to be disadvantaged by the PIP. The performance issue represented by the suspect leaving the booze bus was a serious issue. Mr Goldstein, in his final submissions, implied that if the officer who asked the suspect to leave was also placed on a PIP, then Mr Davis would not have any reason to complain. However, the problem with that concession is that the inference then arising is that Mr Davis was not complaining about the PIP being issued against him per se but that he had been treated differently from another officer. The PIP was not a disciplinary measure. The documentation clearly states that.

[74] Following the imposition of the PIP, Mr Davis released to the Senior Sergeant supervising his team a litany of primarily trivial accusations and complaints against his immediate supervising Sergeant. Such trivial accusations could never form the basis of a disadvantage grievance as it would mean the merest slight, benign rebuke, or some minor act of preference towards an employee by an employer could result in an application being made by an employee to the Authority. That could not be the purpose of the remedies under the Act. The workplace has to be more robust than that.

[75] The Human Resources Manager for the Canterbury district rejected Mr Davis's assertion that he had been subject to harassment by the Sergeant. There was no basis to initiate an inquiry along those lines. The incident where officers were allowed to watch the final of the Rugby World Cup, which Mr Davis had originally asserted was actioned by the Sergeant, turned out to be a decision by the Senior Sergeant. The Senior Sergeant stated in evidence that in allowing the officers to watch the final he had made sure that there was cover in the event that any emergency arose. It was hard, in any event, to see how this decision would have

been to Mr Davis's detriment. Similarly the issue involving the early finishing of shifts by police officers could not be to Mr Davis's detriment. One of these issues was explained as being necessary to ensure that there was not a breach of the nine-hour break rule following the shifts. There was also the incident where officers were allowed to finish a shift quite early. This was a period of about an hour. Mr Davis and some of the other officers chose not to watch the Rugby World Cup final. They also chose not to accept payment for the time-off periods, choosing instead to record the time as leave. However, even if allowing officers time-off on pay in such circumstances was objectionable to him, it cannot give rise to a disadvantage to Mr Davis.

[76] The other more trivial incidents involve Mr Davis complaining about the Sergeant treating officers differently in the way that she might rebuke them for late arrival at "line up" and the like. He complained about the fact that he was not given use of the more sought-after Police vehicles as a result of the Sergeant's alleged favouritism towards other members of the team over Mr Davis and one or two others. He raised a perceived slight by the Sergeant over his reluctance to enter the Police Station building following the second earthquake in Christchurch. In view of the Sergeant's evidence on this point, which I accept, Mr Davis's assertion is simply not tenable. A long list of many other similarly trivial matters has been raised.

[77] The one allegation the Senior Sergeant did regard as raising serious issues was the assertion that a member of the TAG team had pepper-sprayed another during horseplay. This would have been a serious disciplinary issue but Mr Davis refused to disclose the names of those involved. He had not in fact seen the incident himself, but apparently knew about it from others. Without having more information, the Senior Sergeant and the Canterbury district Human Resources Manager who were inquiring into that matter felt unable to take it further. Mr Davis alleged that he was not prepared to give the names of those involved unless it was under a safe procedural environment for him to do so. When I questioned him further about this matter, he was unable to explain specifically what he meant by it. An inquiry was being conducted by a senior police officer in conjunction with a senior human resources manager who had made it clear that they regarded the incident as serious. I would have thought that in that situation Mr Davis would have revealed more

information to enable further enquiries to be made but he chose not to do so. If it was a complaint against the Sergeant as an example of her overlooking behaviour of her “favourites”, that is not tenable either because the Sergeant was not aware of its occurrence until later.

[78] When receiving this plethora of complaints the Senior Sergeant had initially formed the view that the Sergeant against whom the complaints were made had created and was in charge of a dysfunctional team. He carried out further enquiries and made further observations which soon persuaded him that this was not so. Mr Davis called several witnesses who were members or former members of the TAG team. Some of these witnesses confirmed that the Sergeant against whom Mr Davis complained could sometimes be a difficult supervisor, but each officer still remaining with the Police indicated that they would be prepared to return to work under her supervision.

[79] In the circumstances where Mr Davis would not give sufficient information to enable the officers to investigate the pepper-spraying incident, it is difficult to see how their refusal to investigate the matter further resulted in any disadvantage to Mr Davis. It was, in effect, a similar situation to that which arose in respect of his allegations against the Senior Constable in Mangonui. Once the complaint is made, it is up to the employer to investigate it. Whether or not the person who is the subject of the complaint is disciplined is really of no concern to an informant in Mr Davis’s position. He was not a victim. Any personality conflicts between Mr Davis and his supervising Sergeant in Christchurch were in any event resolved virtually at the time that the Senior Sergeant was carrying out his investigations because the Sergeant was seconded to assist the New Zealand Police abroad at that time. Mr Davis has not worked under her supervision since then.

[80] In summary, Mr Davis’s pursuit of the Sergeant in Christchurch and persistence in seeking to have her reprimanded or disciplined in some way is reminiscent of the pursuit of the Senior Constable in Mangonui. The majority of the complaints were so trivial as to not warrant further investigation. The early time off from shifts and leave to watch the Rugby World Cup final were either not decisions of the Sergeant or were ratified by more senior officers. The one matter which was

accepted by the Sergeant and perhaps had some substance was the complaint Mr Davis made relating to her rebuking him and others in the presence of the whole unit. That was dealt with appropriately by the Senior Sergeant and the Sergeant agreed to amend the way she dealt with such matters in the future.

[81] Mr Davis claims to have suffered substantial financial disadvantage by his transfer to Christchurch. While I do not accept the grievance relating to the transfer, to which Mr Davis consented, for the reasons already stated the financial loss was not, in any event, substantial. His reduction in salary was a small sum annually. It was partly ameliorated by a mistake made by the Police administration after he transferred. Shortly afterwards Mr Davis's salary was increased beyond that received by him in Northland. In his second brief of evidence filed for the Christchurch hearing he indicated that he is not claiming reimbursement of wages in relation to his base salary. His rural response allowance was continued for over a year beyond his transfer. He lost the "in lieu of TOIL" allowance but was eligible for the TOIL allowance once stationed in Christchurch. The overpayment made to him by mistake was not claimed back from him. It is debatable whether he lost any income once transferred. However, if successful in his grievances he claimed substantial reimbursement of the allowances extending into the future of his employment with the defendant.

[82] Mr Goldstein indicated at the conclusion of his final submissions that the claim for damages for breach of contract was very much an alternative cause. For the reasons which I have already set out, I do not accept that there has been any breach of contractual provisions by the defendant such as to justify an award of damages as claimed by Mr Davis. This cause of action was not the subject of much evidence or submission during the course of the hearing. Apart from Mr Davis's assertions to support his claim for compensation under the Act, there is inadequate evidence upon which the Court could make an assessment of damages even if the cause of action was proved. No corroborative evidence of any kind has been led which would closely approximate that required to substantiate damages of this kind.

Disposition

[83] As can be seen from Mr Davis's briefs of evidence and the transcript, many incidents occurring in his employment have been dealt with in intricate detail. I have carefully considered all of the evidence and submissions of counsel. I have read all of the many documents produced as exhibits. While not referring to all of them specifically, I have taken them all into account in reaching my decision in this matter.

[84] For the reasons set out, I do not accept Mr Davis has established the disadvantage grievances that he claims to have suffered. Nor do I accept that he has established any breach of the obligations pleaded. It is clear that when faced with difficult employment relationship problems, largely of Mr Davis's own making, the employer went to considerable lengths to try and resolve the issues and to keep Mr Davis in employment. It is significant that despite all that has happened, Mr Davis has remained a sworn Police Officer in Christchurch.

[85] It may be unfortunate that the Inspector in Northland initially refused to allow Mr Davis to have a Police vehicle to travel from his home to the Kaeo Police Station without having to collect the vehicle from the Mangonui Police Station. The fact that this was perhaps unreasonable soon became apparent and it was rectified. It may also have been unfortunate that Mr Davis was the only one who had a PIP imposed on him as a result of the 'booze bus' incident. That does not mean that the imposition of the PIP was an unreasonable reaction to Mr Davis's own involvement in the quite serious incident which had occurred.

[86] Mr Davis does not agree with the decisions made and actions taken. However, I can find no basis for holding that in any respect those decisions and actions of the defendant through his employees and officers were anything other than what a fair and reasonable employer would or could have done in all the circumstances at the time that they occurred.⁴ Mr Davis's claims are dismissed.

⁴ Applying the tests under s103A of the Act depending upon the date the actions were alleged to have occurred.

Costs

[87] Insofar as costs are concerned, the length of the hearing involved in this matter will mean that substantial costs will have been incurred by the defendant. The costs in respect of the challenge and the proceedings removed into this Court are reserved. I will allow the defendant 21 days to file a memorandum containing his submissions on costs, if sought. Mr Davis will then have a further 21 days to reply by way of memorandum.

M E Perkins
Judge

Judgment signed at 10am on 19 August 2014