IN THE EMPLOYMENT COURT
WELLINGTON

WC 7B/08
WRC 38/05

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	remedies
BETWEEN	ROBERT CRAIG HAWKINS Plaintiff
AND	COMMISSIONER OF POLICE Defendant

Hearing: 28 February 2008
(Heard at Wellington)

Counsel: C P Brosnahan, Counsel for the Plaintiff
Aaron Martin, Counsel for the Defendant

Judgment: 12 August 2008

REMEDIES JUDGMENT OF JUDGE C M SHAW

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[1] This judgment was originally issued on 27 March 2008 following which it was recalled to remedy an error in the calculation of loss of earnings. Alterations made as a result of the recall are footnoted in this amended judgment.

Introduction

[2] Following a hearing limited to liability, the defendant was found to have unjustifiably constructively dismissed Mr Hawkins from his employment at the Taumarunui police station as a police officer holding the rank of sergeant. All

issues relating to remedies including reinstatement had been held over for a hearing pending the outcome of the liability hearing[1].

[3] Mr Hawkins's employment was terminated on 21 June 2001 when his application to disengage was accepted but he only sought reinstatement in 2003 following his discharge under s347 of the Crimes Act 1961 from criminal charges brought against him by the police. His reinstatement is opposed by the defendant.

[4] At the remedies hearing Mr Hawkins gave oral evidence. The defendant produced no evidence other than an affidavit which addressed one relatively minor point in Mr Hawkins's evidence, which had no effect on this judgment.

The issues

[5] Mr Hawkins seeks the following orders:

1. Reinstatement. The issue is whether reinstatement would be practicable particularly in the light of the 7½ years which have elapsed since the termination of his employment.
2. Compensation for his loss of income. The issue is whether this should be assessed on the basis of sergeant or senior sergeant salary and whether alleged delays by Mr Hawkins in prosecuting his grievance should be taken into account.
3. Compensation under s123(1)(c)(i) for hurt and humiliation. The issues are quantum and whether this should be reduced because of contribution.
4. Costs including disbursements.

1. Reinstatement

The law

[6] The Employment Relations Act 2000 confers a wide discretion to provide reinstatement as a remedy. Section 125 recognises that reinstatement of an employee to his or her former position or placement of the employee in a position no less advantageous to the employee is the primary remedy under the Act. Where an

[1] *Hawkins v Commissioner of Police* WC 29/07, 30 November 2007

employee has sought reinstatement and such reinstatement is practicable, there is an expectation that the order should be made.

[7] In *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*[2] the Court of Appeal endorsed the tests for practicability applied by the Employment Court. The essential elements of this test are:

- The onus is on the employer to establish that reinstatement is not practicable.
- Practicability is not the same as possibility. What is possible is not necessarily practicable.
- The interests of the parties and the justice of their cases are to be balanced with a regard not only to the past but more particularly to the future.
- Practicability involves considering whether the employment relationship can be successfully reimposed on the parties.
- The Court takes a broad approach in assessing whether the employment relationship can be renewed and may consider matters which may not have formed reasons for the dismissal but which are nonetheless germane.

[8] Since 2004 the Employment Relations Act 2000 has mandated that parties to employment relationships are to deal with each other in good faith which requires the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative. Although Mr Hawkins's employment ended before 2004, any future employment would be governed by this requirement.

[9] As noted in *South Taranaki Free Kindergarten Association v McLennan*[3] if it is probable that the parties can reasonably resume a relationship which is in accord with the requirements of good faith, then reinstatement should normally be practicable.

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[2] [1994] 2 ERNZ 414
[3] [2006] ERNZ 1019

[10] In this case, because 7½ years have passed, the Crown resists an order for reinstatement partially because of the length of time since the termination. I hold that while this is a relevant consideration it is only relevant to the extent that it impinges on whether or not the reinstatement would be practicable. In *Woud v Department of Corrections*[4] a prison officer was reinstated after 4½ years' absence. Chief Judge Goddard held that changes to workplace practice during the intervening years did not prevent reinstatement but indicated that a considerable amount of retraining would be necessary.

Facts relevant to reinstatement

[11] Mr Hawkins is aged 46. Since at least November 2004 he has been medically cleared to return to work. He produced extracts from newspapers and the police Ten-One magazine to support his contention that a number of police officers have rejoined the police after long absences. The police Ten-One magazine stated that four constables who left the job an average of 16 years ago had rejoined under a pilot programme that allowed them to retrain in their own district. This programme was said to have been successful. He gave evidence that a number of people had joined the police for the first time in their mid-forties and some police officers, who had been out of active service, had resumed duties either by virtue of re-employment, the lifting of suspension, or a Court decision relating to their employment.

[12] The troubles that Mr Hawkins encountered at Taumarunui police station are, in his view, no longer a problem. They had centred around Detective Sergeant Webb and Inspector Allan neither of whom are now associated with that police area. He says he will have no difficulties working with the present area controller or the current officer in charge of the station. He has had positive contact with the area controller recently and has no reason to believe that he would not be able to operate in the Taumarunui police station. He was not challenged on his evidence that there is a vacant sergeant's position at Taumarunui.

[13] Mr Hawkins is adamant that he wishes to return to policing duties at Taumarunui police station because his two sons aged 17 and 14 live in Taumarunui

[4] [2005] ERNZ 314 at 339

and he does not wish to be separated from them. They do not live with him but he has regular contact with them.

[14] It is the defendant's case that it would be impracticable for Mr Hawkins to return to the role of sergeant because of his history. Because the role of sergeant is the first line of supervision and is a key position in terms of expertise and experience within the organisation, there is a need for the Commissioner to ensure that supervisors have demonstrable current experience in order to exercise the judgment necessary to undertake these roles and to ensure the safety of employees and other persons associated with the police. The defendant objects to Mr Hawkins being appointed to a senior operational management role in the police without the opportunity to undertake the background checks and other psychological and fitness tests that recruits would normally be required to take.

[15] Mr Martin submitted that the practicability of Mr Hawkins being reinstated back to Taumarunui would be undermined by his association with and assistance by Mr Harland, a former police officer who has made ongoing complaints about the Taumarunui police. Mr Martin suggested that subordinate staff at the Taumarunui police station would be likely to regard Mr Hawkins as being in Mr Harland's debt to some extent and that this could undermine his authority. If he is to be reinstated, the defendant says this should be to a position in Wanganui where there is a larger body of non-commissioned officers and other managers to provide support to the plaintiff's reintegration back into policing.

[16] In response Mr Hawkins did not accept that this association would be detrimental to his re-employment. He referred to the oath that must be signed by all police officers and the passage of time that had passed which meant that, of the two or three officers at the station who were there when he left, he has had no problems at all with them and in fact is on friendly relations with them.

[17] I find that the defendant has not discharged its onus of proving that it would be impracticable to reinstate Mr Hawkins to his former position of sergeant at the Taumarunui police station even after such a length of time. There was no evidence

of any resistance to working with him at an area or local level or that he would be incapable of performing his former role.

[18] It was accepted by Mr Brosnahan that it would be appropriate for Mr Hawkins to undergo tests or retraining necessary to bring him up to date with police practice and procedures, given the long period of time since he was employed. In addition, in my view, it would not be unreasonable for the Commissioner to place Mr Hawkins in a position no less advantageous to him but at a larger police station other than Taumarunui for a limited period of time for the purposes of retraining before he takes up his position at Taumarunui. It was suggested by Mr Martin that Wanganui would be a suitable venue as it is only 2 hours away from Taumarunui. This suggestion has some merit provided it does not become a permanent placement without Mr Hawkins's agreement but one that transitions to Mr Hawkins's eventual employment at Taumarunui if that is still his wish.

[19] For the purposes of this decision, however, it is enough to note that Mr Hawkins is to be reinstated immediately to his former position or to a role no less advantageous to him. Because questions of retraining and reintegration are intensely practical, these matters of detail should be left to the parties to reach agreement on. If necessary, they may have recourse to mediation to reach agreement on the best method of reinstatement and if that fails they have leave to refer the matter to the Court for a decision on any outstanding disputed matters relating to reinstatement.

2. Loss of income

[20] Counsel dispute the length of time he should be compensated for loss of salary[5]. The Crown maintains that his loss of remuneration should be reimbursed from 21 June 2001 but only to the extent provided for in s128 of the Employment Relations Act 2000, namely either the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration, and the Court should not exercise its discretion under s128(3) to award payments greater than those sums. Mr Hawkins seeks compensation from 21 June 2001 to the date of his reinstatement. Mr Brosnahan submitted there are no compelling reasons why he should be restricted to 3 months' compensation.

[21] In *Telecom New Zealand Ltd v Nutter*[6] the Court of Appeal approved the principle[7] that compensation is entirely discretionary and there is no automatic entitlement to an award reflecting the balance of the expected working career of an employee or any similar approach. Moderation is appropriate in setting awards for a number of reasons including the effects on the employer and community expectations. Awards over 12 months can be made but the principal consideration is the actual loss suffered by the employee. That loss must be properly assessed and must allow for all contingencies which might, but for the unjustified dismissal, have resulted in termination of the employee's employment.

[22] These observations were made in the context of a case in which reinstatement was not in issue. Where an employee is reinstated, the actual loss suffered by the employee can be quantified accurately because, as well as a starting point for economic loss, the date of reinstatement marks its end and the Court does not have to calculate an artificial end point for the payment of economic loss. In these circumstances, the principle of moderation is best met by the application of the principle of mitigation of loss.

[23] The second matter in dispute is the basis upon which any loss of earnings compensation is calculated. Before he faced criminal charges, Mr Hawkins was due for a promotion to a rank of senior sergeant upon completion of outstanding exams. It is his case that, but for the constructive dismissal and the associated criminal charges, he could have sat the exams and would have been promoted to senior sergeant within a matter of months. Mr Brosnahan initially submitted that any calculation of loss of income should recognise the likelihood that Mr Hawkins would have been promoted and would therefore have been receiving a salary of senior sergeant since that time. However, following submissions, he accepted that given the criminal charges laid against Mr Hawkins and, in spite of their outcome, the probability of his becoming senior sergeant soon after was not likely.

[24] I conclude that it is not possible to rationally calculate when, if at all, Mr Hawkins would have reached the rank of senior sergeant therefore the calculation of

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[5] Amended by the recall judgment
[6] [2004] 1 ERNZ 315

his lost income is to be on the basis of what a sergeant would have earned during the relevant time. There is no dispute that this will include what the Commissioner would have contributed to his superannuation fund.

[25] The final item of contention between the parties on the issue of reimbursement is the extent to which Mr Hawkins mitigated his loss in the intervening period since his acquittal.

Facts on loss of income

[26] Mr Hawkins's first employment following the termination of his employment was in his own ground spreading business which he had purchased in early 2002. He lost his truck in an accident and had to purchase a replacement vehicle which cost considerably more than the replacement value of the original vehicle. He sold his ground spreading business at the end of August 2003. Accounts submitted by Mr Hawkins show that this business ran at a loss until its sale. However, the accounts also show that Mr Hawkins, who had a 100 percent shareholding in the business, took drawings from it in the 2003 financial year of $46,968 and in 2004 $65,894. These earnings should be applied in mitigation.

[27] Mr Hawkins then obtained employment as a meter reader receiving a salary of $26,000. During that time, he unsuccessfully applied for several positions including a prison officer's job at Tongariro Prison, a job in retail, and a job with the Ruapehu District Council as a compliance officer. I find he took all reasonable steps to mitigate his loss during that time. He commenced employment at Ravensdown on a salary of $31,000 through to November 2007. At the time of the hearing he was earning $34,000 per annum. These earnings should be applied in mitigation of his claim for remuneration.

Delays

[28] It was submitted for the defendant that Mr Hawkins should not receive compensation for loss of income for the period 21 April 2006 to 20 April 2007 because his delays in progressing discovery resulted in a year's delay in getting his case on for a hearing.

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[7] *Telecom South v Post Office Union* [1992] 1 ERNZ 711

[29] Mr Brosnahan countered that submission by pointing out that the delay was caused by an ongoing dispute between the parties about how and where documents could be inspected. He accepted that, partly because he was overseas, 4 to 5 months of the delay was caused by him.

[30] I find that the delays which did occur are explicable. They were not caused by Mr Hawkins personally and he should not be penalised by reducing what he would otherwise be entitled to receive as lost income.

[31] Counsel advised that they could agree the arithmetic of Mr Hawkins's lost income. This should be calculated on the basis of what he would have received as a sergeant between 21 June 2001[8] and the date of reinstatement less income earned by him during that time.

3. Compensation for hurt and humiliation

[32] Mr Hawkins's evidence about the breakdown in his mental health at the time he made his application to disengage including evidence from his psychologist, Ms Duckworth, is recorded in the substantive judgment[9].

[33] At the hearing on remedies, Mr Hawkins said that at the time he perfed he was on the point of considering suicide. He was fortunate that his friends rallied around him and took steps to protect him as best they could. The whole incident has had a devastating effect upon his life generally and as a police officer, a job that he loved and believed he did well. He said that it was hard to put into words how low and worthless he felt during this period. That evidence was not challenged in cross-examination.

[34] The assessment of compensation for hurt and humiliation is necessarily an inexact science. Section 123 of the Employment Relations Act 2000 confers an unrestricted discretion to award such compensation and the cases reveal a wide range of awards because of necessity they are fact specific. While awards must be in accord with principle, any concept that such awards should fall within a permissible

[8] Amended by the recall judgment
[9] *Hawkins v Commissioner of Police* WC 29/07, 30 November 2007

range such as that stipulated in *NCR (NZ) Corporation Ltd v Blowes*[10] is not in accord with statutory discretion. Principles to be applied include consideration of the injury suffered by the employee and the avoidance of penalising the employer.[11] A comparison with like cases is also of assistance. In the case of constructive

dismissal where the events leading up to the termination of employment are part of the dismissal process, the effects of the employer's treatment on an employee before termination is also relevant.

[35] There are a number of cases where police officers have been awarded compensation for hurt and humiliation after bringing a successful grievance or other employment-related case. Inevitably, the factual situation and personal circumstances which led to those awards vary widely and awards have ranged from between no award for compensation because of contributing conduct[12] to awards of $25,000[13] and $70,000[14]. In *Ryan v Commissioner of Police*[15] a police officer who had pleaded guilty to minor breaches of police regulations was found to have suffered significant stress. He was out of his employment for 15 months. He was subsequently reinstated and awarded $15,000 compensation.

[36] Although *Waugh* was not a case of dismissal, the former Chief Judge described it as a bad case of its kind. It was similar to the present case in that it involved the laying of criminal charges and humiliation was endured for a protracted period of time. Mr Waugh was awarded $50,000.

[37] Also relevant to this survey are two High Court cases in which police officers developed mental stress as a result of their work conditions. In *Brickell v Attorney-General*[16], Mr Brickell was awarded $75,000 for damages for pain, suffering, and loss of amenity having established liability in negligence and a breach of statutory duty under the Health and Safety in Employment Act 1992, with an allowance for contributory negligence. A claim for breach of contract in the High Court led to two

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[10] [2005] ERNZ 932 (CA)
[11] *Waugh v Commissioner of Police* [2004] 1 ERNZ 450
[12] *Riddell v Commissioner of Police* [2003] 2 ERNZ 136
[13] *Cartwright v Commissioner of Police* [2001] ERNZ 255
[14] *Benge v Attorney-General* [2000] 2 ERNZ 234 (HC)
[15] [2005] ERNZ 390

former police officers being awarded $70,000 and $10,000 for stress, mental injuries, and loss of amenity[17]. These awards were made 8 years ago.

[38] In assessing what is appropriate for Mr Hawkins, I take into account Ms Duckworth's evidence that Mr Hawkins was suffering from untenable stress that had built up over a period of about 18 months resulting in both psychological and psychometric disorders. He was diagnosed with an adjustment disorder. The effects of his eventual termination from the police given that psychological state can reasonably be inferred to have been extreme. In addition, I take into account the humiliation of the publicly voiced views of Inspector Allan at the time that Mr Hawkins's situation was being discussed at open meetings at the Taumarunui police station. It was made clear to his colleagues that he had no future in the police and this was also conveyed to Mr Hawkins. As a result, Mr Hawkins became suicidal.

[39] In assessing his hurt and humiliation, I discount the stress that arose from the laying of the criminal charges against him. As Mr Brosnahan pointed out in submissions Mr Hawkins is not critical of the police for commencing the criminal proceedings and there is no suggestion that the police acted improperly in this regard.

[40] I assess Mr Hawkins's level of compensation at $35,000.

Contribution

[41] Mr Martin submitted for the defendant that Mr Hawkins contributed to his personal grievance in two ways. First, if he had disclosed that he was facing criminal charges in his application to disengage, the application may have been refused and he would have remained in his employment. This is a disingenuous argument. The Commissioner, through his senior officers, was fully aware of the criminal charges well before Mr Hawkins's application was made. In any event, Mr Hawkins was influenced in the timing and the way he framed his application by advice given in part by the police welfare officer[18]. I cannot reasonably infer that if Mr Hawkins had revealed the pending criminal charges in his application to

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[16] [2000] 2 ERNZ 529
[17] *Benge v Attorney-General* [2000] 2 ERNZ 234

disengage he would have remained in employment. All the indications were that the police elected to receive and approve his application notwithstanding the criminal charges.

[42] Second, Mr Martin submitted that the criminal charges laid against Mr Hawkins contributed to his disengagement and the personal grievance. The evidence did not support that submission. In the substantive judgment I found[19] that the prospect of the criminal charges being laid would not necessarily have led him to seek to disengage.

[43] I conclude that there were no contributing factors on Mr Hawkins's behalf which should result in the reduction of remedies due to him.

4. Costs

[44] Mr Hawkins has incurred actual legal fees in relation to his personal grievance of $85,000 plus GST. He is seeking 66 percent of that sum. Given the complexity of the case and the length of hearing, that amount is reasonable.

[45] He has also claimed as a disbursement an account rendered to him by Paul Bass, a former colleague of his and now a private investigator. From 2001 Mr Bass undertook inquiry and consultancy work for Mr Hawkins in relation to this case and charged $26,751. Mr Brosnahan accepts 32 hours of Mr Bass's work did not directly relate to the personal grievance and the account should be reduced accordingly. This concession is enough to eliminate concerns expressed by Mr Martin that Mr Bass's alleged costs were not actual costs incurred by the plaintiff or a reasonable disbursement in the proceedings. I note that, although Mr Bass attended Court in October 2007 and gave evidence, he made no charge for that.

Orders

1. Mr Hawkins is to be reinstated immediately to his former position or to a role no less advantageous to him.

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[18] At paras [96] – [97] of the substantive judgment
[19] At para [104]

2. Mr Hawkins is entitled to payment of a sum representing his loss of remuneration from 21 June 2001[20] until his reinstatement. This sum is to be calculated based on the salary a sergeant would have earned during that period. It will take into account the contributions the Commissioner would have made to Mr Hawkins's superannuation scheme and will be reduced by the amount of remuneration received by Mr Hawkins personally as drawings or salary as shown in his accounts for that period.

3. The defendant is to pay Mr Hawkins the sum of $35,000 as compensation under s123(1)(c)(i).

4. The Commissioner is ordered to pay $56,000 plus GST to the plaintiff being 66 percent of the plaintiff's costs and the disbursement of $21,532.50 for Mr Bass's account as it relates to the personal grievance.

5. As the questions of the manner of reinstatement and the arithmetical calculation of his loss of income have been left for the parties to resolve, leave is granted for either party to apply to the Court on 1 month's notice for any orders arising from those matters should that be necessary.

C M SHAW
JUDGE

Judgment signed at 4pm on 12 August 2008

[20] Amended by the recall judgment