

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 29/09  
WRC 26/06**

IN THE MATTER OF proceedings removed from the  
Employment Relations Authority

BETWEEN DEAN SHAUN SMITH  
Plaintiff

AND ATTORNEY-GENERAL FOR AND ON  
BEHALF OF COMMISSIONER OF  
POLICE  
Defendant

Hearing: 5, 6 and 7 August 2009 and 2 September 2009  
(Heard at Wellington)

Appearances: NJ Sainsbury, Counsel for Plaintiff  
Joanna Holden and Antoinette Russell, Counsel for Defendant

Judgment: 24 December 2009

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**JUDGMENT OF CHIEF JUDGE GL COLGAN**

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[1] On 21 June 2004 Constable Dean Smith was discharged from the police (dismissed) following a finding by a Police Tribunal (“the Tribunal”) that he had assaulted unlawfully a prisoner in custody and had failed to furnish to his supervisor a report about his use of force. He says that his dismissal was unjustified and seeks remedies including reinstatement, reimbursement of lost remuneration, compensation, and costs.

[2] Mr Smith’s grounds for saying he was dismissed unjustifiably include comprehensive challenges to the fairness and reasonableness of the Commissioner’s investigation and prosecution of the allegations of misconduct, and to the correctness of the Tribunal’s procedure and conclusions upon which the Commissioner acted in determining to dismiss the plaintiff.

[3] This judgment deals with questions of liability alone. Remedies, if appropriate, will be heard and determined subsequently.

[4] In two respects, the age of this case means that it is to be determined by law that has been superseded. First, because the dismissal took place in mid 2004 before the enactment of s103A of the Employment Relations Act 2000, the test for justification of dismissal is identified by the Court of Appeal in *W & H Newspapers Ltd v Oram*<sup>1</sup>. Second, the process that led to Mr Smith's dismissal was not the more recently adopted mainstream employment law. Rather, it was the former process by which a police officer faced first a Tribunal to determine guilt of regulatory offences followed, if convicted, by a separate decision by the Commissioner as to consequence for employment.

[5] The test of justification for Mr Smith's dismissal in this case must therefore be, to summarise the words of the Court of Appeal in *W & H Newspapers*, whether the decision to dismiss was one which a reasonable and fair employer could have taken in the particular circumstances.

[6] There is a further difference between this and many other cases. A fair inquiry into alleged misconduct in employment is an almost universal requirement and, in many cases, employment agreements spell out the prerequisites for such an inquiry. In the case of police officers, Parliament and the Executive have set at least some of the prerequisites for a fair inquiry in the Police Act 1958 and the Police Regulations 1959. So one element of a fair inquiry into misconduct will be compliance by the Commissioner with those statutory obligations. Conversely, if they are complied with, it will be difficult for a plaintiff such as Mr Smith to argue that the Commissioner's compliance was nevertheless a procedural unfairness. But there will also be considerations that are part of the process that are not spelt out expressly in statute or regulations, the fairness of which in any particular case is nevertheless open to consideration by the Court as part of its assessment of whether there was a fair and reasonable process of inquiry into alleged misconduct by an officer.

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<sup>1</sup> [2000] 2 ERNZ 448.

## **Relevant background facts**

[7] As in many cases, the events leading to the grievance did not occur in isolation. They are to be seen against a background of unrelated but relevant circumstances.

[8] Background tensions that contributed to Mr Smith's unilateral intervention in Constable Ian Campbell's handling of a prisoner, JC<sup>2</sup>, included the following. Constable Campbell was based at the Wainuiomata police station whose officers employed some different tactics and standards when dealing with prisoners. Mr Smith was stationed at Lower Hutt. However, because of the absence of decontamination equipment at the Wainuiomata station, prisoners, such as JC, who had been capsicum sprayed, were brought to the Lower Hutt station from the Wainuiomata area for that purpose. Unlike some other police stations at the time, Lower Hutt's capsicum spray decontamination area consisted only of a water tap, short hose, and a grated floor drain. Although Lower Hutt station practice was for officers to apply water to prisoners' eyes while prisoners remained handcuffed, Constable Campbell both removed JC's handcuffs and permitted him to wash out his own eyes with the hose.

[9] For much of the relevant time that JC was at the Lower Hutt police station he shouted loudly and abusively and attracted the attention of others who were not dealing with him. That did not endear him to staff present and especially Mr Smith.

[10] Also detectable is an underlying issue that might be described as "whose prisoner an arrested person is". Larger stations such as Lower Hutt have a dedicated watch house staff with the intention that these personnel, detached from the circumstances of the offence or arrest, will process prisoners expeditiously. A complication may have arisen in this case because, although decontamination of JC was a first priority, he had still to undergo breath or blood alcohol procedures that were the responsibility of the arresting officer, Constable Campbell. In these

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<sup>2</sup> The name of the prisoner is not to be published or his identity otherwise disclosed pursuant to an order made on 5 August 2009 under clause 12(1) of Schedule 3 to the Employment Relations Act 2000.

circumstances, Constable Campbell had responsibility for JC's decontamination but performed this function in a way that may well have been contrary to Lower Hutt practices and expectations.

[11] There was a further unique and complicating factor affecting JC's presence in the police station. Some weeks earlier he had been involved in a confrontation with Lower Hutt police in which he had punched an officer in the nose. JC may indeed have believed that he inflicted a broken nose and was not ashamed of this or reticent in boasting of it, even in the police station. JC's loud and aggressive behaviour drew his presence to Mr Smith's attention and the latter went to investigate what was happening. Mr Smith took issue with JC's self-decontamination and interceded peremptorily, over-riding the process being supervised by a constable of longer standing, Constable Campbell. Reacting to Mr Smith's high-handed intervention, which included directing JC to relinquish the water hose and kneel down, the prisoner whose vision was still adversely affected by the capsicum spray may have believed erroneously that Mr Smith was the officer on whom he had inflicted a broken nose some weeks previously. JC escalated the already tense situation caused by Mr Smith's intervention, by referring to this event in a provocative way. Those background circumstances may explain, but not excuse, what happened that led to the dismissal.

[12] Mr Smith had been a sworn constable for about 6 years before the events of the early morning of 29 March. He became involved following the arrest and removal to the Lower Hutt police station by Constable Campbell, of JC whose demeanour leading to his arrest had caused the use of capsicum spray to restrain him. Mr Smith was alleged to have used unnecessary force against JC and indeed to have assaulted him without justification in the station's decontamination or eye wash area, in a holding cell, and in the charge room. A number of other police officers were present in each of these locations at the time and closed circuit television video recordings were made of some of these incidents. JC was examined medically by a nurse on duty at the station and although inquiries were made of him there whether he wished to complain formally about his treatment, he declined to do so. On the following day, however, a senior sergeant and another constable visited JC at home and, as a result, JC made a formal complaint of assault against Mr Smith.

[13] Senior Sergeant (now Inspector) Michael Coulter was delegated the task of undertaking a preliminary investigation of this complaint which eventually resulted in the bringing of two formal charges of breach of the Police Regulations 1959 against Mr Smith involving his unlawful assault of JC and his failure to file what is known as a use of force report following the incident. The assault on a prisoner was categorised as disgraceful conduct.

[14] The Commissioner appointed Kristy McDonald QC to be a Tribunal under s12 of the Police Act and a hearing was conducted at which Mr Smith was represented by counsel and participated fully by cross-examining the Commissioner's witnesses, calling his own witnesses, and making submissions. In a reserved decision given in writing, the Tribunal found the charges proved for reasons which it set out in that decision.

[15] Three separate unlawful assaults on JC were alleged. The Tribunal was satisfied to the requisite criminal standard of only one of these which took place in a corridor outside the police station's charge room. It followed from Mr Smith's consistent denial that he had used unwarranted force that he also failed to lodge a report to his supervisor as required when such force was employed. A conviction for this failure to comply with the regulatory requirement to submit such a report was also entered by the Tribunal.

[16] Ms McDonald concluded that the assault on JC by Mr Smith was disgraceful conduct and recommended his discharge. That decision was, however, for the Commissioner independently of the Tribunal, although its findings and recommendations were important features in that separate decision-making process.

[17] The Commissioner, by his delegate, Assistant Commissioner Peter Marshall, then considered the consequences for Mr Smith of the Tribunal's findings. This was a lengthy process in which Mr Smith, through counsel, was given and took the opportunity to make several detailed written submissions to the Commissioner. This process included the seeking by Mr Smith and eventual provision by the Commissioner of some detail of earlier similar cases before the plaintiff was

discharged. Following deliberations, the Commissioner's delegate discharged Mr Smith from the police under s5A of the Police Act.

### **Grounds for challenging dismissal**

[18] These are several each of which will be addressed separately in the balance of this judgment. They may be summarised as follows.

[19] First, Mr Smith alleges that the complaints against him by JC were solicited improperly by other police officers. Next, he contends that Senior Sergeant (now Inspector) Coulter did not undertake a fair and unbiased preliminary inquiry into those complaints. Next, Mr Smith denies having assaulted unlawfully JC in any of the three locations where this was alleged to have taken place in the Lower Hutt police station. Next, Mr Smith contends that the preparations by the Commissioner and his counsel for the prosecutions of him before the Tribunal were unfair. He then says that, as a result of the Tribunal wrongly accepting the evidence of Constable Campbell, the Tribunal reached a flawed decision that he was guilty of disgraceful conduct as a police officer.

[20] Moving, chronologically, to the post-Tribunal phase, Mr Smith alleges that the Commissioner's delegate, Assistant Commissioner Marshall, wrongly and unfairly refused to deal properly, and in accordance with employment law, with submissions made to him by Mr Smith's counsel. These were that the Commissioner was bound to treat Mr Smith consistently with the way in which other police officers in similar circumstances had been dealt with previously. Finally, the plaintiff's case is that the Commissioner's decision to discharge Mr Smith for disgraceful conduct as a police officer was wrong and also causes his dismissal to have been unjustified.

### **The Tribunal's findings**

[21] The Tribunal was unable to conclude whether Mr Smith had assaulted JC in the eye wash area by punching and kicking him as alleged by Constable Campbell and JC. Although there was uncontested evidence of the application of force to JC

by Mr Smith by taking him to the ground and subsequently removing him forcibly to the cell, the Tribunal concluded that this was not such an application of force to the prisoner in custody as would have amounted to disgraceful conduct by Mr Smith which was the nature of the charge against him. So the Commissioner's inquiry did not uphold the first of three assault incidents that supported the charge of disgraceful conduct.

[22] Accounts from witnesses of events in the cell were similarly confused and, in some instances, in stark conflict. There, also, the Tribunal declined to find an assault on a prisoner amounting to disgraceful conduct, proved.

[23] The third assault alleged against Mr Smith was said to have occurred some time later in the prisoner processing part of the station. JC was taken to the excess breath or blood alcohol ("EBA") processing area where he refused to submit to EBA procedures as a result of which he was charged with a relevant offence or offences. He also telephoned a lawyer and in the course of a short conversation complained of having been assaulted. Although it appears that Mr Smith was absent for some of this period, he returned to again confront JC as the latter was preparing to leave the station after his property had been returned to him and paper work, including charges and bail, was being finalised.

[24] Mr Smith was concerned that JC was to be released from police custody after what Mr Smith considered was too short a period in all the circumstances of JC's aggressive and threatening conduct. Mr Smith considered that JC should have been detained at the station for longer, although it was the decision of the arresting officer and the watch house staff that he could be released. It was in these circumstances that the Tribunal found Mr Smith assaulted JC unjustifiably and in circumstances that amounted to disgraceful conduct by a police officer.

### **Review of the Tribunal's decision**

[25] This is the first case in which this Court has examined critically the hearing of a s12 Tribunal and its decision. As already noted, police officers' employment law has changed more recently so that Tribunals no longer consider charges of

misconduct as part of the Commissioner's decision whether an officer should be discharged. When I inquired of counsel whether this might be the only case in which the issue arises in practice, I was informed that there may be others still to be decided under the previous regime as this is. So this is the first, but may not be the last, review of a s12 Tribunal by this Court in a personal grievance case.

[26] For these reasons, and to determine the extent to which this can be done, it is necessary to examine carefully the judgment of the Supreme Court that allowed this to occur. That is *Creedy v Commissioner of Police*<sup>3</sup>. The Supreme Court, in paragraph [18] of the judgment of Wilson J, described the nature of the Tribunal's inquiry as:

*... an administrative inquiry, carried out on behalf of the Commissioner and fairly conducted, into any allegations of misconduct. If the outcome of that inquiry was an adverse finding, a second right became available. This was the right of access to the personal grievance regime and through it, if necessary, to the Labour Court (sic).*

[27] Without disagreeing with the Supreme Court, I would add that the statute gave police officers additional intermediate rights. These were that in the event of an adverse finding by the Tribunal, a police officer was entitled by statute to make submissions to the Commissioner or the Commissioner's delegate whose role it was to determine the employment consequences of the Tribunal's findings. Such rights extended, for example, to a statutory provision allowing an officer to seek a rehearing in an appropriate case. It is clear that these intermediate rights between the Tribunal process and the personal grievance process were both valuable and practical. It is not difficult to imagine, for example, that officers subjected to adverse findings by a Tribunal may nevertheless have been able to persuade the Commissioner or his delegate to a consequential course of action that has not been the subject of challenge by personal grievance, especially if the consequence has fallen short of dismissal.

[28] At paragraph [20] the Supreme Court described the s12 inquiry process as "*administrative procedure, to assist the Commissioner as the employer in terms of s 5(5).*" At paragraph [21] the Supreme Court noted that such an inquiry carried out

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<sup>3</sup> [2008] 1 ERNZ 109.



on behalf of the Commissioner is one “... for which he or she is responsible, and the reasonableness or otherwise of the Commissioner’s belief, in the light of the outcome of the inquiry, can be the subject of a personal grievance.”

[29] At paragraph [22] the Court confirmed that a s12 inquiry:

*... is an aspect, and an important one, of a dismissal. If the conduct of an inquiry could not be challenged by way of a personal grievance, it could not be challenged at all (except, possibly, by judicial review). Parliament is most unlikely to have intended such an outcome.*

[30] The Supreme Court concluded at paragraph [23]:

*... all aspects of the internal police disciplinary procedure, other than where s 87(2)(a) or (b) is engaged, are amenable to a personal grievance. It follows that... the Employment Court would have jurisdiction to review the laying of the charges against the appellant, the conduct of the police in prosecuting those charges, and the Tribunal's conduct and report.*

[31] So this allows a broad examination of the Tribunal process and outcome as an element of determining the fairness and reasonableness of the Commissioner’s determination that Mr Smith was guilty of gross misconduct as a police officer.

### **Implied terms and conditions of employment**

[32] The plaintiff relies upon breaches of contract and asserts that the following are implied terms and conditions of employment of police officers by the Commissioner. These are said to emanate from the statutory requirement under s7 of the Police Act 1958 that the Commissioner must operate a personnel policy complying with the provision of being a good employer as defined in s56 of the State Sector Act 1988. In particular, these are said to require, in respect of the investigation and disposition of disciplinary charges against sworn members of the police, the following obligations on the Commissioner as employer.

[33] The first is said to be the avoidance of bias or apparent bias in disciplinary investigations including by the Commissioner’s delegate in the investigation of a complaint of misconduct against a sworn member. In practice that obligation is said to require the appearance of being impartial and independent of all parties to the complaint and, in addition, the fact of impartiality and independence.

[34] No authority is cited for this proposition and I consider that, as stated, it goes too far. While employment law obliges an employer, including by the employer's delegate, to undertake an open-minded and unbiased consideration of a complaint or complaints of misconduct against an employee, that is not the same as, and does not include, a requirement to be independent of all parties to the complaint. Again, whilst it is preferable that complaints of misconduct are investigated by persons not involved in them, whether as complainant or witness, that is not the same thing as I understand is being advanced by the plaintiff as a requirement of "independence" of all parties to the complaint.

[35] The next manifestation of the good employer obligation is said to be a requirement that prosecutions of police officers before Tribunals must be undertaken "*with proper and fair process*" and, in particular, pursuant to s12 of the Police Act, prosecutions are to be conducted "*dispassionately and with scrupulous fairness*" including a requirement that the prosecutor places all relevant factual material accurately before the Tribunal. Again I consider that these assertions of the state of the law go too far, although there are duties. The Tribunal process under s12 of the Police Act is a formal statutory method of ascertaining the existence of what is known in employment law as serious misconduct by an employee. The person undertaking that role, the Tribunal, is bound to act dispassionately and fairly. While I agree that a fair investigation will generally require the consideration of all relevant material by the decision-maker, I consider it goes too far to impose an absolute obligation on the employer alone to furnish all of this information. The important feature of the duty is that relevant information is identified and considered, irrespective of its source.

[36] The next implied term or condition is said to be that a Tribunal must comply with the requirements of natural justice and reach its decision reasonably on the evidence. I accept that proposition, both as a matter of statutory obligation and also as a manifestation of the contractual duty of fair inquiry into allegations of serious misconduct in employment.

[37] The next implied term or condition of employment affects the role of the Commissioner as employer following a finding of guilt by a Tribunal. The plaintiff

says that the Commissioner, when exercising his powers under s5A of the Police Act, is obliged to take into account all relevant information in determining whether to remove a sworn member of police so as to maintain good order and discipline within the service and to avoid it being brought into disrepute. That is said to extend to not making arbitrary decisions but, rather, making ones that ensure consistency with other cases of a similar nature that have previously been determined by the Commissioner. I agree that employment law requires generally a consistency of sanction for serious misconduct in relevantly similar circumstances although, as the cases show, an employer is not irrevocably committed to identical treatment of employees in similar circumstances. To the extent that broad consistency of treatment is an element of fairness, any departure from that should be explicable reasonably by the employer.

[38] Finally, the plaintiff submits that the Commissioner as employer is obliged to provide to a sworn officer against whom a charge or charges have been proven, with information regarding the disposition of similar cases by the Commissioner under s5A. The plaintiff says this extends to a requirement to provide sufficient details of the circumstances of other cases to enable the member at risk, by himself or through counsel, to make submissions why precedent cases should be followed or distinguished.

[39] Again, I consider that the proposition is too extreme although it is based on some sound elements. A sworn officer at risk of removal under s5A is entitled to seek and be given reasonable information about materially analogous precedent cases, although justification for dismissal will always turn primarily on the merits of each particular case in its circumstances and at its time. I do not think this can be elevated to the status of a term or condition of employment. Rather, in any particular case it will be an element of fairness and reasonableness of the employer's decision-making methodology.

### **The legal tests for dismissal**

[40] In addition to determining whether Mr Smith's dismissal was justified as that concept was defined for all personal grievance cases before the passing into law of

s103A of the Employment Relations Act, there are statutory overlays in the case of police officers. The first are s5(4) and (5) of the Police Act providing:

- (4) *Subject to—*
- (a) *The provisions of this Act, any general instructions issued under section 30 of this Act, and any regulations made under section 64 of this Act; and*
  - (b) *The conditions of employment set out in any agreement under section 67 or section 75 of this Act; and*
  - (c) *The conditions of employment set out in any individual contract of service under this Act,—*
- the Commissioner may at any time remove any member of the Police from that member's employment.*
- (5) *Except as otherwise expressly provided in this Act, the Commissioner shall have all of the rights, duties, and powers of an employer in respect of all members of the Police.*

[41] Inserted as from 1 February 1994 and so applicable to this case, although now repealed, is s5A as follows:

**5A *Members may be removed for incompatible behaviour***

- (1) *The Commissioner may institute the removal of a member of the Police from that member's employment if, following an inquiry under section 12 of this Act into alleged misconduct (in the case of a sworn member of the Police), or following an investigation into alleged serious misconduct (in the case of a non-sworn member of the Police), the Commissioner has reasonable grounds for believing—*
- (a) *That the member has behaved in a manner which is incompatible with the maintenance of good order and discipline within the Police or which tends to bring the Police into disrepute; and*
  - (b) *That the removal of the member is necessary to maintain good order and discipline within the Police or to avoid bringing the Police into disrepute.*
- (2) *Subsection (1) of this section applies to behaviour of any kind including, but not limited to, sexual behaviour of a heterosexual, homosexual, lesbian, or bisexual kind.*

[42] Therefore, it was incumbent on the Commissioner or his delegate to determine, in dealing with Mr Smith, whether he had behaved in a manner which

was incompatible with the maintenance of good order and discipline within the police or which tended to bring the police into disrepute, and that the removal (dismissal) of the member was necessary to maintain good order and discipline within the police or to avoid bringing the police into disrepute.

## **Discussion**

[43] The plaintiff advances five separate grounds of challenge to the justification for Mr Smith's dismissal. Three of these are really without merit. The remaining two grounds raise serious issues for consideration.

[44] The first ground in reliance on which dismissal is said to have been unjustified challenges the manner in which JC's complaint was made and the independence and impartiality of (then) Senior Sergeant Coulter. I am satisfied that there was no improper solicitation of JC's complaint as the plaintiff alleges. Constable Campbell first raised the matter of his disquiet about Mr Smith's conduct with another colleague who, properly, recommended that this be taken up with a non-commissioned officer. In these circumstances, the senior sergeant was bound to investigate the matter. That process included a prompt interview with the alleged victim of the assault. It was sound policing practice and commonsense in the circumstances that then prevailed that the investigating non-commissioned officer took with him to his first meeting with JC a constable whom he believed may have had the trust and confidence of the victim. That approach did not amount to an unreasonable solicitation of a complaint from an otherwise reluctant civilian.

[45] The second and associated element of this complaint about the investigative process addresses Senior Sergeant Coulter's subsequent investigations, reports, and recommendations. Although not in any sense a decision-maker in relation to Mr Smith's discharge, Senior Sergeant Coulter was the non-commissioned officer to whom the original complaints against Mr Smith were brought and who undertook preliminary investigations into them.

[46] I am not satisfied on the evidence heard and seen by me that Senior Sergeant Coulter could be categorised as having been biased against Mr Smith. He was

obliged to take seriously a serious complaint by a police officer against a colleague and to conduct thorough preliminary investigations as he did. Senior Sergeant Coulter's investigations were documented comprehensively and were reviewed by more senior police officers beyond the station and eventually the district in which he worked.

[47] All important decisions about the prosecution of Mr Smith and, subsequently, about the consequences of the Tribunal's findings, were made by independent, detached, and appropriately qualified and experienced persons. Even if, as I find he was not, Senior Sergeant Coulter may have been biased against Mr Smith, the thorough process undertaken following the senior sergeant's preliminary inquiries had checks and balances which would have identified and nullified such biases. Not the least of these would have been the opportunity for Mr Smith to participate in the investigation process as he did with the assistance of counsel. I am satisfied there is nothing in this ground of challenge to the justification of dismissal.

[48] Next, Mr Smith alleges that the prosecution before the Tribunal was conducted unfairly and improperly and, in particular, that the Commissioner called witnesses against Mr Smith selectively. The Tribunal prosecution was both overseen and conducted by Philippa (Kate) Feltham, a lawyer from the Crown Solicitor's office in Wellington who was counsel for the Commissioner. Ms Feltham brought an appropriate professional detachment to the prosecution of Mr Smith. She liaised with his counsel for the hearing in the Tribunal about what witnesses would be called and the content of their evidence. The prosecutor was persuaded to change her intended conduct of the prosecution to call, as one of the Commissioner's witnesses, a person whom she had not originally intended calling and whom Mr Sainsbury wished to cross-examine.

[49] Although there were some witnesses whom the prosecutor elected not to call, Mr Smith and his counsel were aware of their identities and were able to, and indeed did, call those persons as witnesses in the Tribunal.

[50] Although the Tribunal process has many of the hallmarks of a criminal prosecution in a court, as the judgment of the Supreme Court in *Creedy* confirms, it

is, nevertheless, part of a process of investigation of misconduct in employment. The important feature is that the Tribunal heard all relevant witnesses as I am satisfied it did. It is less important as to which party called any particular witness to give evidence. The process was fair in the sense that Mr Smith knew which witnesses were to be called or not and had the opportunity and did call to give evidence those whom the prosecutor had chosen not to call.

[51] Again I conclude that there is nothing in this ground of challenge to the justification of Mr Smith's dismissal.

[52] Next, the plaintiff says that the Commissioner did not take into account all relevant information in deciding, by his delegate, to discharge Mr Smith. Assistant Commissioner Marshall had the Tribunal's written decision and access to the information considered by it. Further, Assistant Commissioner Marshall offered Mr Smith several opportunities over an extended time period to bring to his attention any other matters that might be relevant to the sanctions for disgraceful conduct of which the Tribunal had found Mr Smith guilty. Mr Smith, through counsel, took up those opportunities and provided detailed submissions to the Commissioner's delegate which would have taken into account the decision to discharge the plaintiff.

[53] To the extent that an incorrect sequencing of still photographs from video surveillance cameras was only discovered after Mr Smith's employment was terminated, Assistant Commissioner Marshall cannot be criticised for overlooking what was only later discovered to be erroneous. In any event, I do not consider that the erroneous sequencing of the photographs would have changed Assistant Commissioner Marshall's conclusion to discharge Mr Smith. Even considered in their correct sequence, the still photographs were only one piece in a detailed jigsaw puzzle of evidence pointing to Mr Smith's culpability. Other evidence considered independently would reasonably and fairly have brought the Tribunal, and Assistant Commissioner Marshall subsequently, to the same conclusions about Mr Smith's guilt and the appropriate employment sanction.

[54] I reject this ground of challenge to the justification for Mr Smith's dismissal.

[55] The two remaining grounds which have more merit than the others are as follows. First, the plaintiff says that the Tribunal could not reasonably have concluded that he was guilty of disgraceful conduct on the evidence placed before it. The second remaining ground deals with the Commissioner's refusal to provide Mr Smith with information about similar past cases and especially Assistant Commissioner Marshall's failure or refusal to consider and apply consistent standards of sanction to Mr Smith as had been applied in materially similar cases in the past. These remaining grounds are dealt with next.

### **Decision – Correct findings by the Tribunal?**

[56] The challenge to the Tribunal's decision rests really on the reliability of the evidence given by one witness. As the initial and principal complainant, Constable Campbell was an important witness in the Tribunal. He gave several different accounts of Mr Smith's conduct. He was the principal complainant and witness against the plaintiff during the Commissioner's investigations. Constable Campbell's first recording of his observations of Mr Smith involved writing notes in the back of his notebook in the seclusion of a toilet area in the Lower Hutt police station. The account so recorded closest in time to those events is broadly consistent with Mr Smith's explanation of what occurred.

[57] The next record of Constable Campbell's account took place later the same day when he telephoned a colleague, Constable Rollo, and told the latter what had happened. This account is recorded in a job sheet subsequently prepared by Constable Rollo who also gave evidence before the Tribunal. What Constable Campbell told Constable Rollo adds some further detail to what Constable Campbell wrote in his notebook earlier in the day, but was still largely consistent with Mr Smith's account of events.

[58] The next record of Constable Campbell's account of events was when he made a statement to then Senior Sergeant (now Inspector) Coulter to whom Constable Rollo had referred Constable Campbell. That statement differed remarkably from the accounts Constable Campbell had previously given. However, within a matter of a further couple of days, Constable Campbell made a second



statement to Senior Sergeant Coulter which differed again from the first formal statement that he had made to the senior sergeant.

[59] A further record of Constable Campbell's account of events was prepared in the form of a brief of evidence to be given to the Tribunal. Finally, for the purposes of this case, Constable Campbell gave evidence to the Tribunal led by counsel for the Commissioner, Ms Feltham. This account is likewise recorded, although now in the transcript of the Tribunal.

[60] When those several accounts of events by Constable Campbell are compared, there is a remarkable inconsistency between several of them in quite significant areas. For example, Constable Campbell goes from having made no record of seeing assaults to giving a detailed description of assaults allegedly seen by him to later saying that he did not see assaults by Mr Smith on JC. Before the Tribunal, Constable Campbell was cross-examined effectively by Mr Smith's counsel about these inconsistencies. It is, with respect to the Tribunal, difficult to understand how those indicia of apparent unreliability could not have been the subject of significant analytical comment by the Tribunal in its decision and how it could have concluded, as it did, that Constable Campbell was an entirely credible witness about these events.

[61] I agree with the plaintiff's case that the Tribunal was wrong to have accepted, apparently uncritically, the veracity of Constable Campbell's evidence. The Tribunal was addressed on the inconsistencies in contemporaneous and subsequent records created by him as an experienced police officer who claimed to have observed a very serious assault by another police officer on a prisoner. The inconsistencies between Constable Campbell's various accounts, oral and written including formal statements, evidence on oath, job sheets and notebook entries, were such that, at the very least, the Tribunal ought to have questioned seriously the overall reliability of Constable Campbell's evidence.

[62] But it must be remembered that two of the three alleged assaults by Mr Smith on JC were not found by the Tribunal to have been proven. In that sense, the Tribunal may be seen to have been dissatisfied implicitly with the evidence of

Constable Campbell. In these circumstances Ms Holden conceded that if these unproven allegations had been the only allegations of assault amounting to disgraceful conduct, the Commissioner could not have acted against Mr Smith in an employment setting, or at least certainly could not have dismissed him justifiably.

[63] That leaves the charge room corridor assault. The only witnesses to this event were JC, Constable Campbell and Mr Smith himself. Additionally, there was relevant surveillance camera evidence of events before and after the assault. Further, Mr Smith admitted to at least a technical assault on JC in that area, that was by holding him against the wall by his (Mr Smith's) arm extended horizontally across JC's chest and upper arms, as I understand it effectively pinning him to the wall and preventing the use of his arms. This was at times described as "barrelling" JC up against the wall. By Mr Smith's account, this was a technical assault but of a less serious nature than that which both JC and Constable Campbell alleged in evidence and which formed the basis of the charge before the Tribunal of disgraceful conduct.

[64] The Commissioner's case was that Mr Smith held JC by placing both his (Mr Smith's) hands around JC's neck and either exerting upward pressure or at least inducing, as a natural reaction in JC, his standing on tiptoes. There was no justification for assaulting JC at that time and in the circumstances. He was not a threat to anyone and was about to be released on bail, having been charged and processed. Although it is common ground that there was no observable injury to JC as a result of this event, whether at the time or upon subsequent medical examination a couple of days later, that was not decisive of whether it had taken place as alleged by the Commissioner to the Tribunal.

[65] Relying on a general credibility assessment of Constable Campbell, the Tribunal accepted their account of this event of both JC and Constable Campbell and rejected Mr Smith's. It made this finding to the criminal standard of beyond reasonable doubt. Significantly for the purpose of this decision, however, the Tribunal accepted JC's account independently of Constable Campbell's. As I read the Tribunal's decision, even if Constable Campbell's evidence had been doubted, perhaps even rejected entirely or in its absence, the Tribunal found beyond reasonable doubt that JC was to be believed and Mr Smith was not. So even if, as

the Tribunal failed to do in my assessment, it had questioned seriously Constable Campbell's veracity because of the unreliability of his evidence inherent in his inconsistent accounts, this would not have affected its conclusions about the charge room corridor assault. Independently of Constable Campbell's account, the Tribunal accepted JC's account of these events and rejected Mr Smith's.

[66] Could the Commissioner have concluded reasonably that this single assault, as described by JC and Constable Campbell and accepted by the Tribunal as having occurred in the way so described, was unacceptable and disgraceful conduct on the part of a police officer and incompatible with the maintenance of good order and discipline or which tended to bring the police into disrepute? Indeed, Mr Smith has conceded, responsibly through counsel and in evidence, that if he had assaulted the prisoner in the way alleged in custody, dismissal would have been an inevitable outcome. I agree that such an assault on a prisoner in these circumstances was both unjustifiable and disgraceful conduct by a constable, and met the tests for discharge under s5A.

[67] In these circumstances I am satisfied that a fair and reasonable employer could justifiably have dismissed a constable as the Commissioner dismissed Mr Smith. That ground of challenge to the justification for dismissal does not succeed.

### **Decision - Disparity of treatment**

[68] I turn to the second meritorious ground of challenge to justification for dismissal, disparity of treatment. Despite not having been explored at all in evidence, counsel for both parties invited me to examine the comparator documents provided so that if I find that Assistant Commissioner Marshall was wrong to have had no regard to parity of treatment as compared to other relevant cases, it would be open to me to determine the parity issue independently.

[69] Mr Smith contends that his dismissal was unjustified because the Commissioner did not treat him fairly and consistently with other officers who had misconducted themselves in materially similar ways and refused to undertake the exercise of analysing how relevant earlier cases had been dealt with.

[70] Although cases of disparity of treatment are not common, the judgment for example in *Rapana v Northland Co-operative Dairy Co Ltd*<sup>4</sup> illustrates the operation in practice of the principle and the way in which it must be established in proceedings. At p537 and after having set out previous authority, the Court noted:

*... Where, in the course of an inquiry which may lead to dismissal of an employee (or indeed to other disadvantage in employment) a question of parity of treatment of employees is in issue, the reasonable and fair treatment of the employee may involve consideration by the employer of relevant prior incidents and the consequences of them for other employees. A fair and reasonable employer will treat employees in a fair and reasonable manner. Reasonable consistency is one facet of fairness. To arbitrarily impose consequences for materially similar breaches and/or in respect of employees whose circumstances are materially similar, may not be fair and reasonable treatment. Where, in the [then Employment] Tribunal, an employee bringing a personal grievance raises the issue of disparity of treatment and the Tribunal considers that there is substance to the issue (a prima facie case of disparity), it will be incumbent upon the employer, who or which has the onus of persuading the Tribunal of the justification of the dismissal, to address the parity/disparity issue and to satisfy the Tribunal that its decision to dismiss was, in this regard, fair and reasonable.*

[71] In *NZFP Pulp and Paper Co Ltd v Horn*<sup>5</sup> the Employment Court considered what constituted prima facie disparity as follows at p285:

*What is a prima facie case of disparity? The notion of a prima facie case is well known to the law of evidence. It is most commonly to be found in the criminal law but may not be unknown to employment law. For example, the shifting burden of proof to justify a dismissal in personal grievance cases is sometimes said to require the establishment by the grievant of a prima facie case of unjustified dismissal in which circumstances the onus of establishing justification for the dismissal moves to the respondent employer. The test being an evidential one, it does not matter in my assessment that most examples are to be found in criminal law.*

*Prima facie evidence is that which establishes a prima facie case. This, as the Court of Appeal recently confirmed in the area of disparity of treatment, may or may not conclusively establish a case of unjustified dismissal. A party is said to have a prima facie case when the evidence in his or her favour is sufficiently strong for his or her opponent to be called on to answer it. In the criminal law context, a prima facie case is one supported by evidence capable of establishing it to the satisfaction of a jury in the absence of any evidence from the opposing side.*

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<sup>4</sup> [1998] 2 ERNZ 528.

<sup>5</sup> [1996] 1 ERNZ 278.

[72] Finally, in this regard, the Court's judgment in *Cooke v Tranz Rail Ltd*<sup>6</sup> is apposite. At p621 the Court noted that "... *disparity of treatment is no more than a factor to be put in the balance with other factors when deciding whether a particular employee's dismissal was justifiable.*"

[73] Although not referred to by counsel in submissions to me, the issue of parity of treatment of dismissed police officers has also been examined comprehensively by this Court in a series of interlocutory judgments leading to a substantive judgment in a case known as *NZ Police Assn Inc v Commissioner of Police*<sup>7</sup>.

[74] The leading case in the field is the judgment of the Supreme Court in *Buchanan v Chief Executive of Department of Inland Revenue* [2006] NZSC 37; [2006] ERNZ 512; (2006) 18 PRNZ 79 at paragraph 7. The Supreme Court approved the approach to this question adopted by the Court of Appeal in *Samu v Air NZ Ltd* [1995] 1 ERNZ 636 and, in particular:

*... even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. (p639)*

[75] In *Samu* the Court of Appeal reiterated the test it had set out 10 years earlier in *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd*<sup>8</sup>:

*We accept that if there is a prima facie case of disparity or enough to cause inquiry to be made by the Arbitration Court into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming.*

[76] Following the description of the process for considering parity of treatment in the *Airline Stewards & Hostesses* case, the obligation to establish "a *prima facie* case of disparity or enough to cause inquiry to be made by the ... Court into the issue of disparity ..." lies on the grievant. After a grievant has met that test, the onus of establishing parity as part of the overall justification for dismissal, moves to the employer. In this case, however, Mr Smith has not in evidence established either a

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<sup>6</sup> [1996] 1 ERNZ 610.

<sup>7</sup> [1997] ERNZ 199.

<sup>8</sup> [1985] ACJ 952, 954.

prima facie case of disparity or even a sufficient concern to cause inquiry to be made by the Court into the issue of disparity. All the evidence establishes is that:

- Several different people as the Commissioner's delegates make decisions to dismiss police officers in the circumstances such as Mr Smith's.
- Relevant comparative material was available to the Commissioner's delegate for consideration.
- The Commissioner's delegate was requested expressly to consider questions of parity of treatment when dealing with Mr Smith.
- The Commissioner's delegate refused to provide any such consideration although he had provided limited summary material about similar cases to Mr Smith's counsel.

[77] Even if the evidence establishes disparity, this would not alone have been enough. As the Court of Appeal noted in *Samu* at p639:

*... Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.*

[78] Here, such evidence as I have been asked to review establishes that at the time of Mr Smith's dismissal, at least five Deputy Commissioners or Assistant Commissioners of Police were delegated the task of determining whether sworn police officers should be disengaged under s5A of the Police Act. Assistant Commissioner Marshall confirmed that position in his evidence and indeed it would not be surprising if, at least in the case of more senior officers, the Commissioner himself might not have taken such decisions himself. But in circumstances where five delegates of the chief executive of a large employer undertake the same important task, the principle of broad consistency of treatment is especially important.

[79] The evidence in this case establishes that, at relevant times, other constables had been found to have assaulted prisoners in custody and faced consequences for their continued employment. I do not think it matters significantly whether such findings were in criminal prosecutions in Court, or by s12 Tribunals. Each has required a decision by the Commissioner whether the particular constable should be disengaged or otherwise sanctioned in all the circumstances of the case. Further, and as Assistant Commissioner Marshall said in his evidence, and self-evidently, every case is different from others as are the individual circumstances of the police officers at risk, that can only be, at best, broadly similar.

[80] An employer can be expected to justify apparent inconsistency of treatment where this is an issue in a claim for unjustified dismissal. The cases also show that if a plea for consistency of treatment is raised when an employer is considering the consequences of misconduct, a fair inquiry and decision-making process will also require this to be taken into account by the employer at that stage. As appellate courts have noted, however, there is “*certainly no requirement that an employer is for ever after bound by the mistaken or over generous treatment of a particular employee on a particular occasion*”.<sup>9</sup>

[81] Given the state of the law, Assistant Commissioner Marshall was wrong to have refused to countenance at all the urgings of Mr Smith’s counsel for consistency of outcome. Assistant Commissioner Marshall acknowledged frankly his position taken at the time on this, despite having succeeded in persuading others within the Commissioner’s office that some information about apparently similar cases should be supplied to Mr Smith’s counsel. That was a change from previous policy and was to the Assistant Commissioner’s credit. Assistant Commissioner Marshall was similarly forthright in evidence about his reasons for refusing to consider a consistency of treatment argument. He said that Mr Smith’s case had to be dealt with on its merits alone and there were very strong policy arguments for the uncompromising safety of prisoners in custody that were paramount. In this sense of refusing to look more broadly than the particular circumstances of the Smith case, the defendant acted wrongly. The principles, being consistency of treatment and the

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<sup>9</sup> See *Samu* at p639.

protection of prisoners in custody, are different but not irreconcilable, and are both important. Both can be accommodated in the exercise of the Commissioner's function of determining consequences of misconduct. Under the new employment regime for police officers, these considerations of broad parity of treatment in relevantly similar circumstances, and long established in other employments, will apply to police officers.

[82] But having so concluded, the consequence of this finding is problematic. That is because neither party led evidence of those comparative cases. Although one large volume or bundle of documents contained appropriately anonymised accounts of events and outcomes in what may have been similar cases, no reference to its contents was made in evidence. When I inquired of counsel during final submissions what I should make of this, Mr Sainsbury submitted that its relevance to the case was to establish that such information existed in the Commissioner's records and, by inference, ought to have been available to Assistant Commissioner Marshall had he agreed to have recourse to it.

[83] Such analysis of the comparative material as I have been able to undertake unaided has revealed a range of circumstances and outcomes that included both summary dismissals and lesser sanctions. Other variables in the data have included whether sanctions were imposed following Court convictions or Tribunal findings. It is not surprising, either, that some police officers in similar circumstances in the past, resigned before being dealt with by the Commissioner. No clear, even broad, pattern is discernable simply by reading the anonymised and bare detail of previous cases.

[84] But establishing simply the existence of comparative material that would have been available to the Commissioner and an obligation in law to have regard to it, did not assist me greatly to decide whether disparity of treatment existed in this case.

[85] I have already concluded that Assistant Commissioner Marshall was wrong to have refused to have any regard to any comparative considerations whatsoever and especially after having been asked expressly by Mr Smith to do so and knowing



that documentary material enabling such an exercise to be undergone was held by the police.

[86] Making the best I can of the data left for me to examine, it cannot be said that the Commissioner's treatment of Mr Smith was so disparate when compared to the relevant cases of other constables that his dismissal was thereby unjustified. Appropriate indicia for comparison included cases of assaults by police officers while on duty and, more particularly, assaults by officers on prisoners in custody. The evidence indicates that in most such cases, upon conviction in the District Court or a finding of a charge proved by a Tribunal, officers have either resigned or, in a few cases such as this, have been discharged. The Commissioner regards very seriously, and appropriately so in my view, assaults (being the use of excessive and/or unwarranted force) by officers on prisoners in custody. As I have already noted, Mr Smith's case recognised that by accepting tacitly that the appropriate consequence for doing so would be discharge, that is dismissal. I am not satisfied that Mr Smith was dealt with in a disproportionately harsh manner as compared to others previously. In these circumstances, this ground of challenge to the dismissal must also fail.

### **Summary of judgment**

[87] This is a case that was removed by the Employment Relations Authority for hearing at first instance in the Employment Court. As such, I am very conscious that this is the first but, for many practical purposes, also the final opportunity for Mr Smith to have determined his claim to unjustified dismissal that he has pursued relentlessly for several years. For these reasons, and because this clearly represented the loss to Mr Smith of a career to which he was dedicated, I have considered and weighed all of the substantial quantity of very detailed evidence about the dismissal and the events that led to it. In the end, however, I have concluded that the Commissioner, as a fair and reasonable employer, could justifiably have reached the decisions he did about Mr Smith's culpability and the serious consequences of that. Despite some errors (affecting parity of treatment questions) and serious doubts (about the consistency and therefore the veracity of an important witness for the Commissioner in the Tribunal), I am satisfied that the Commissioner has established

justification for Mr Smith's dismissal. It follows that his claim must be, and is, dismissed.

### **Costs**

[88] These are reserved. The parties should have an opportunity to resolve them directly, taking account of such elements as Mr Smith's capacity to meet an award and the conclusion of error by the Commissioner in what may be an important issue for future disciplinary investigations. If costs cannot be settled, the defendant may apply for an order by memorandum filed and served no later than 1 March 2010, with the plaintiff having the following period of 1 month in which to respond by memorandum.

GL Colgan  
Chief Judge

Judgment signed at 11.30 am on Thursday 24 December 2009