

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 4/07  
WRC 13/06  
WRC 29/06**

IN THE MATTER OF proceedings removed from the  
Employment Relations Authority

AND IN THE MATTER OF an application by the plaintiff to have a  
preliminary issue determined

BETWEEN ANDREW HARLAND  
Plaintiff

AND COMMISSIONER OF POLICE  
Defendant

Hearing: Written submissions received 9 February 2007

Judgment: 16 February 2007

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**JUDGMENT OF JUDGE C M SHAW**

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[1] On behalf of Mr Harland, Mr Brosnahan has applied to have a preliminary question heard before the substantive proceedings on the basis that the preliminary question could be determinative of the entire matter.

[2] The statement of claim asks the Court to make findings that:

1. The Commissioner of Police unjustifiably dismissed him by compulsorily determining his employment under s28C of the Police Act 1958; and
2. That he remains a police officer.

## **The Preliminary Issue**

[3] Broadly put, the preliminary issue which the plaintiff wishes to have heard is the extent to which the certification of the medical experts relied on by the Commissioner complied with s28C and the implication of any default.

[4] The defendant opposes the hearing of this issue before the substantive proceedings.

[5] Section 28C enables the Commissioner to require a member of the police to leave the police if he or she is satisfied that the member is incapable of performing competently the duties of the member's rank. Such a decision has to be supported by certification by two nominated and statutorily approved medical experts.

[6] The first allegation in the statement of claim is that in his case the medical certifications failed to comply with s28C as the psychiatrist and psychologist engaged by the Commissioner were not properly nominated nor approved and therefore the certificates given by those practitioners were not valid.

[7] Next it alleges that, notwithstanding this invalidity, the medical reports were in conflict and should have been reviewed. In addition to this technical argument, the statement of claim alleges that if the plaintiff were in fact unfit then this was due to his working conditions which led to stress and psychological harm. This allegation is supported by a number of detailed particulars relating to the history of his employment from at least 1999 to his disengagement in 2004.

[8] Whether there should be a preliminary hearing depends on a number of matters including whether the question can be determined outside the factual context of the entire case and whether the resolution of the preliminary issue will be determinative of the entire case.

[9] Mr Brosnahan's view is that if the certification of the practitioners was in breach of the statute then the Commissioner's decision cannot stand and Mr Harland has never properly been dismissed.

[10] Mr Gunn submitted by way of memorandum that this preliminary question will not determine the proceedings. He made the point that, regardless of whether Mr Harland is successful on the s28C point and is reinstated, he is likely to pursue his historic allegations concerning his employment as well as his medical condition which is central to the case and that these would necessitate a hearing of essentially the same length and complexity as is currently planned for.

[11] Mr Gunn also argued that the defendant's defence to the technical question will open up the historical allegations because the defendant relies on his medical condition, his behaviour up to and beyond his disengagement, and his views about the police which had been strongly expressed.

## **Conclusion**

[12] On the face of it, while the plaintiff makes the valid point that the s28C technical argument could invalidate the Commissioner's decision to disengage Mr Harland, I am persuaded that the defendant's strong opposition to Mr Harland being re-engaged as a police officer means that a full hearing of the history of employment and medical matters will inevitably have to be held in order to bring full resolution to this employment relationship problem.

[13] Section 28C requires two elements. One is the medical certification, the other is the Commissioner's belief about the ability of a police officer to perform according to his or her rank. The latter issue can only be decided against a factual context. In short, the preliminary question cannot be divorced from wider factual matters which Mr Harland has raised in his statement of claim.

[14] For these reasons, the application to have the matter determined by way of a preliminary question is refused and the timetabling set out in my minute to the parties of 19 December 2006 will now be activated. The parties are also to advise the Registrar by no later than 23 February 2007 of the confirmed availability of their witnesses after 1 August 2007 so that a fixture can be allocated.

[15] The parties are reminded that the first timetabling step is for each of them to file and serve a sworn list of documents by 9 March 2007 with inspection to be completed by 20 April 2007.

**C M Shaw**  
**JUDGE**

Judgment signed at 9.45 on 16 February 2007