

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 23/07
CRC 12/07**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF an application by the defendant to strike
out parts of the plaintiff's statement of
claim

AND IN THE MATTER OF an application by the plaintiff for leave
to extend time to raise personal
grievances

BETWEEN CHRISTINE LORRAINE COY
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

Hearing: 14 November 2007
(Heard at Christchurch)

Appearances: J S Fairclough, Counsel for Plaintiff
Aaron Martin and Lisa Fong, Counsel for Defendant

Judgment: 19 November 2007

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The Commissioner of Police (as Christine Coy's former employer) wants to have a number of the plaintiff's claims and other detail struck out of her statement of claim alleging personal grievances (unjustified disadvantage in, and unjustified dismissal from, employment). The Commissioner's grounds for doing so include that Ms Coy failed to raise some of these grievances with the Commissioner within 90 days of their occurrence or her awareness of their occurrence as is required by s114 of the Employment Relations Act 2000. In other respects, the Commissioner

says that the case that Ms Coy proposes to bring, as foreshadowed by her statement of claim, will include a number of irrelevant and otherwise inadmissible allegations which, if they are not now excluded, will lengthen unduly and improperly the trial of her case.

[2] Only 2 days before the hearing of the Commissioner's application to strike out parts of the claim, Ms Coy herself applied for leave to extend the statutory 90-day period for the raising of her grievance or grievances to the extent that the Court might conclude that these or some of them were out of time. Ms Coy relied on two affidavits (hers and her husband's) to both oppose the Commissioner's application to strike out parts of her claim and also in support of this application to extend the time for raising grievances. Mr Fairclough made submissions in support of the plaintiff's application for leave under s114 and at the conclusion of these I dismissed this application without needing to hear fully from the defendant in opposition to it. This judgment will contain my reasons for refusing that application.

[3] Nothing contained in this judgment determines the merits of Ms Coy's claims of maltreatment by her employer's representatives. Rather, this judgment determines the scope of the claims that the law allows.

[4] The nature of Ms Coy's claim can be summarised as follows. Between 1993 and 2003 the plaintiff alleges that, in a number of respects, she was treated unjustifiably and to her disadvantage in her employment as a constable. The statement of claim alleges the submission of a personal grievance by the plaintiff on 4 December 2002 (orally) that was said to have been confirmed in writing on 22 December 2002 and reinforced with further detail in writing on 20 March 2003. Ms Coy asserts that she submitted a further and separate personal grievance on 8 May 2003 before she disengaged from the police and submitted a further personal grievance (unjustified constructive dismissal) on 11 November 2003.

[5] Some events that occurred as long ago as 1994 that are referred to in both the plaintiff's correspondence raising personal grievances and in her statement of claim cannot constitute disadvantages in employment that, if unjustified, will provide the plaintiff with justiciable personal grievances. But, as the defendant acknowledges,

the plaintiff has some personal grievance complaints that are not barred by the 90-day rule in s114. These include the plaintiff's claim that she was constructively dismissed unjustifiably which claim relies on the accumulation over time of her treatment by supervisors.

[6] There being no objection to the maintenance of that cause of action, some events going back even to 1994 may be relevant to the establishment of a case of constructive dismissal as so defined: *Jeffries v Adis International Ltd* AC 69/06, 7 December 2006. So while the plaintiff is not entitled to rely upon events that occurred prior to 90 days before she raised the relevant personal grievances as independent disadvantage grievances, neither should she be prevented from adducing any evidence at all about these events to support her justiciable grievances. Such evidence of events at that time will have to be relevant to the grievances that remain alive.

Nature of unjustified constructive dismissal personal grievance

[7] Mr Martin for the Commissioner sought to require the plaintiff to be limited in the evidence that she will be entitled to adduce leading to her dismissal grievance by reference to the nature of that claim. As Mr Martin pointed out, the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 set out three categories or classes of constructive dismissal in employment. That the categories may not necessarily be closed is not for decision in this case, at this stage at least.

[8] The first recognised category of constructive dismissal case is where an employer gives an employee an option of resigning or being dismissed. The second category is said to be where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign. The third category consists of cases where a breach of duty by the employer leads an employee to resign.

[9] It is possible to discern from the current operative statement of claim and from other material placed before the Court in connection with these applications,

that the plaintiff's case of unjustified constructive dismissal may fall into any or all of these categories. For example, the plaintiff relies upon a passage in a letter sent to her when she was on sick leave on 5 September 2003 by an HR manager advising her:

It is not an option for us to continue paying you whilst you are on 'stress' leave awaiting a Court date in the Employment Court (sic) to have your grievance heard. In the event that you are not going to be well enough to return to work for an extended period then the Commissioner will have no alternative but to consider whether you must be retired from service.

[10] Ms Coy categorises what she contends was her long-term mistreatment by her supervising sergeant and exacerbated by other supervisory officers, as being a course of conduct with the deliberate and dominant purpose of coercing her to resign. She contends that breaches of common law and statutory employment obligations such as to provide a safe workplace and environment, amounted to a breach of duties by the Commissioner leading to her resignation.

[11] In respect of the second and third category conduct outlined above, the relevant history of the plaintiff's employment will be significant in establishing or disproving the existence of a constructive dismissal and the justification or absence of justification for it.

What grievances are justiciable?

[12] When did the 90 days under s114 for the raising of personal grievances begin to run? This is covered by s114(2) that provides that a grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This test has been the subject of definition in case law. Ironically, perhaps, one of the most recent cases to confirm when a grievance has been raised is another police case, *Creedy v Commissioner of Police* [2006] 1 ERNZ 517. This issue is not one affected by subsequent appeals in that case.

[13] In *Creedy* at paragraph [35], the Court confirmed previous interpretations to the effect that a grievance is raised with an employer as soon as the employee has

made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This means that the grievance should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not the raising of a grievance, for an employee to advise an employer that the employee considers that he or she has a personal grievance or even simply by specifying the statutory type of personal grievance. For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. That is not to say that a grievance may not be raised orally or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates. The requirement is certainly not for the sort of detail that may subsequently be required when lodging a statement of problem in the Employment Relations Authority.

[14] In this case that test was certainly met by the 14-page letter written by the plaintiff to the Commissioner on 20 March 2003. Equally certain is the failure to meet the test in Ms Coy's oral advice to Inspector DH Gaskin on 3 or 4 December 2002 that: *"I can tell you now I am going ahead with a Personal Grievance because I think I have been personally treated very badly."* Ms Coy did not contend that this oral advice raised her grievance. The more difficult question is whether an intermediate written communication from Ms Coy to Inspector Gaskin dated 22 December 2002 constituted the raising of a personal grievance. This letter was materially as follows:

As per our conversation of the 4th of December 2002, I wish to formally advise you that I intend to proceed with personal grievance against the department.

My personal grievance will be based on:

- *Harassment*
- *Denial of Procedural fairness*
- *Intimidation*
- *Victimisation*
- *Professional Mismanagement*

My submission is currently being prepared and I anticipate it will be forwarded to you some time in the New Year, after Association input and other professional advice has been obtained.

[15] Although by a narrow margin, I conclude that Ms Coy's letter to Inspector Gaskin of 22 December 2002 meets the tests for raising a grievance under s114(2) in the sense that it made known to the Commissioner's representative that the plaintiff alleged a personal grievance that she wanted the employer to address. Read in conjunction with the advice that the defendant concedes Ms Coy gave to Inspector Gaskin on 3 or 4 December 2002 about her intended personal grievance, the letter to the Commissioner of 22 December 2002 meets the test in s114(2) for the raising of a personal grievance. It follows that the plaintiff is entitled to raise as grievances only events that had occurred in the previous 90 days, that is on or after 23 September 2002.

Consent by waiver?

[16] Mr Fairclough submitted that the defendant had consented by waiver to Ms Coy raising her out of time grievances and should therefore not be permitted to now have them struck out. I find against that argument for the following reasons.

[17] The Commissioner's first response to Ms Coy's personal grievances was a letter to her from Inspector Gary Lennan, Canterbury Human Resources Manager, dated 1 April 2003. This responded to Ms Coy's memorandum of 20 March to Inspector Gaskin. This letter stated that the Commissioner had no record of formal notification of a personal grievance of 10 December 2002 although acknowledged receipt of Ms Coy's memorandum of 22 December 2002 "*advising of your intention to pursue a personal grievance.*" Inspector Lennan confirmed that the Commissioner had, on 1 April 2003, received Ms Coy's notification of personal grievance and advised her that "*A formal response in relation to your grievance will be forwarded once the allegations made have been researched and considered.*"

[18] The next communication to Ms Coy about her personal grievance was Inspector Lennan's letter of 17 April 2003. This advised that although police took seriously the matters raised by the plaintiff on 20 March 2003, allegations against the plaintiff's supervising sergeant of disadvantage over the period from 1993 to late 2002 "*fall well outside the 90-day time period stipulated in s.114 for raising a*

personal grievance.” The letter reiterated that “*the complaints raised appear largely to be outside the 90-day time frame*”.

[19] Ms Coy was then still a serving officer. Inspector Lennan’s letter of 17 April confirmed that the Canterbury District Commander was concerned about the allegations the plaintiff had made and wished to address where she was to work until these matters were resolved. Inspector Lennan’s letter also reminded Ms Coy of the support available through nominated police welfare officers.

[20] Allegations made by Ms Coy included of recent maltreatment and, as Mr Martin submitted, the Commissioner, having been notified of these issues, was obliged to deal with the plaintiff’s prospective welfare as a serving police officer. That did not amount to consent to the raising of grievances that were otherwise statute barred. In this regard the case is distinguishable from such others as *Jacobsen Creative Surfaces Ltd v Findlater* [1994] 1 ERNZ 35 and *Phillips v Net Tel Communications* [2002] 2 ERNZ 340.

The plaintiff’s time extension application

[21] These are my reasons for refusing Ms Coy’s application to extend the time for raising grievances not raised before 22 December 2002. Section 114(4) provides that, in this case, the Court may grant leave to raise such grievances if it is both satisfied that the delay in doing so was occasioned by exceptional circumstances and that it is just to do so. Exceptional circumstances may include those set out in s115 but are not limited to those statutory examples.

[22] Mr Fairclough relied on the following grounds to satisfy the statutory tests. Counsel submitted that, as evidenced by her letter of 20 March 2003, Ms Coy had had concerns about her treatment in employment over many years. These concerns included not only specific instances of alleged maltreatment but also failures such as to provide adequate training for and support to her. Counsel submitted that each of these incidents did not, on its own, cause her to raise a grievance, but “*two issues in October and November 2002 caused her concern and [brought] into focus her past concerns which perhaps to that point [had] not been elevated to the level of a*

personal grievance but in combination [brought] her to the point where she realise[d] she [had] a grievance not only for the recent occurrences but for what [had] occurred in the past.”

[23] Ms Coy has not sought to establish any of the specific s115 exceptional circumstances. I do not find the other relevant events to which she has deposed and that occurred before mid September 2002 amount to exceptional circumstances in employment. Indeed, Ms Coy’s own affidavit sworn on 12 November 2007 and filed in support of her application for leave does not address any pre-September 2002 circumstances that might be relevant to her reasons for not raising a personal grievance within time. Nor does the affidavit evidence of the plaintiff’s husband, John Langbehn, also filed in support of this application for leave, advance these matters materially. Mr Langbehn’s involvement in these matters appears to have begun after the events of October and November 2002 which, as I have found, are able to be the subject of an unjustified disadvantage personal grievance.

Summary of judgment

[24] Events that occurred after 23 September 2002 coming within the complaints referred to in the plaintiff’s letter to Inspector Gaskin dated 22 December 2002, may be the subject of a personal grievance or personal grievances brought by Ms Coy. So too may be the events that were referred to in the plaintiff’s memorandum dated 8 May 2003 that occurred within the 90 days preceding that date. Likewise, Ms Coy is entitled to bring as an unjustified constructive dismissal grievance claim, the complaints she raised with the Commissioner by letter dated 11 November 2003 and incorporating reference to her disengagement application made on or about 26 September 2003.

[25] Although not themselves constituting remediable personal grievances, historical events that are relevant to the establishment of Ms Coy’s justiciable personal grievances may be the subject of evidence to be adduced at trial.

[26] Although I decline to strike out causes of action or potential evidence, the plaintiff must nevertheless re-plead her claims within the parameters outlined above.

[27] Ms Coy's application for leave to raise personal grievances out of time under s114(3) is refused.

Further amended statement of claim

[28] The plaintiff's current pleading does not conform to the requirements in the Employment Court Regulations 2000. Each of the separate grievances that have been found to have now been raised in accordance with s114 should be pleaded as separate causes of action. Evidence of relevant background events should not be pleaded but, rather, their nature summarised as allegations. The remedies sought for each of the grievances should be specified in accordance with the regulations. Re-pleading in this way will both confine appropriately the breadth of the events about which the plaintiff may adduce evidence and will enable the Commissioner to focus in his statement of defence upon those allegations.

Case progression

[29] By agreement, the plaintiff now has 14 days within which to file and serve a further amended statement of claim addressing the consequences of this judgment. The defendant may then have 14 days within which to file and serve a statement of defence to that further amended statement of claim. Counsel agree that although document discovery has not yet been undertaken and will depend upon the scope of the claim, no particular delays are anticipated. That will have to be attended to under the process embodied in the Employment Court Regulations 2000.

[30] The Registrar should arrange a further telephone conference call with counsel shortly before 20 December 2007 so that further directions can be given to progress this and the associated Ramsay case to a fixture in 2008.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Monday 19 November 2007