IN THE COURT OF APPEAL OF NEW ZEALAND

CA234/06
[2007] NZCA 311

BETWEEN	COMMISSIONER OF POLICE Appellant
AND	MARK RAYMOND CREEDY Respondent

Hearing: 13 June 2007

Court: William Young P, Hammond and O'Regan JJ

Counsel: C C Inglis and C M Curran-Tietjens for Appellant
J A Hope for Respondent

Judgment: 24 July 2007 at 3 pm

JUDGMENT OF THE COURT

A Leave to appeal is granted on the question, "Was the Chief Judge's conclusion as to 'exceptional circumstances' wrong in law?"

B The appeal is allowed on that question in relation to the unjustifiable dismissal claim (but not the unjustifiable action claim) with the result that the personal grievance claim by Mr Creedy, based on the contention that he was unjustifiably dismissed, is out of time.

C Mr Creedy is to pay costs of $6,000 and usual disbursements.

REASONS OF THE COURT

(Given by William Young P)

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Introduction

[1] A tribunal established by the Commissioner of Police under s 12 of the Police Act 1958 found the respondent, Mr Mark Creedy, guilty of a number of misconduct charges. Assistant Commissioner Long (acting as the delegate of the Commissioner) was to decide what sanction should be imposed but, before that decision was made, Mr Creedy sought and was permitted to disengage under the Police Early Retirement Fund scheme. His disengagement became effective in December 2001. In January 2003 he commenced personal grievance proceedings in the Employment Relations Authority. He claimed that the police actions associated with the instigation of the disciplinary proceedings amounted to unjustifiable action (under s 103(1)(b) of the Employment Relations Act 2000). He also claimed that he had been constructively dismissed and that this dismissal was unjustifiable. The focus of this latter claim is on the conduct of the inquiry by the tribunal (including the conclusions reached), the way the police prosecuted the disciplinary charges and the response of Assistant Commissioner Long to the tribunal's report.

[2] The Employment Relations Authority held that both claims were out of time. So the proceedings commenced by Mr Creedy were dismissed. Mr Creedy, however, successfully challenged this decision in the Employment Court, with Chief Judge Colgan holding that there were exceptional circumstances in relation to both claims which warranted a grant of leave to bring the personal grievance proceedings and that leave should be granted.

[3] The Commissioner accepts the decision of the Chief Judge on the unjustifiable action claim but challenges his conclusions in relation to the unjustifiable dismissal claim. The Commissioner's argument raises two questions:

(a) Was the Chief Judge's conclusion as to 'exceptional circumstances' wrong in law?

(b) Was the Chief Judge wrong to conclude that the proceedings of the Police tribunal were part of the Commissioner's employment inquiry so that the actions of the tribunal are subject to review as part of the hearing of the respondent's personal grievance?

[4] On 26 September 2006 this Court granted leave to appeal on the second question, reserving for the substantive hearing whether to grant leave on the other question (*Commissioner of Police v Creedy* CA121/06 26 September 2006).

[5] We will address the case by reference to the questions we have identified. But, before we do so, it is necessary to say a little more about the factual background and to provide an overview of Mr Creedy's complaints.

Factual background

[6] Mr Creedy joined the police in 1989. By 2000 he had achieved the rank of Sergeant. In September 2000 complaints were made against him by other police officers and he was stood down from duty on 22 September 2000. Disciplinary charges were laid against him in December 2000. Dame Augusta Wallace, a retired

District Court Judge, was appointed under s 12 of the Police Act to hear the disciplinary charges. In this judgment we refer to her as "the tribunal".

[7] Throughout the process Mr Creedy was represented by Mr Paul Barrowclough. Mr Barrowclough had served with Mr Creedy in the Police but was, by 2000, practising as a barrister. When he was first consulted by Mr Creedy, Mr Barrowclough was living in Australia. He returned to New Zealand to take the case. At the time, Mr Creedy was his only client and during the proceedings he flatted with Mr Creedy.

[8] On 4 April 2001 Mr Barrowclough wrote to Superintendent Cox, Mr Creedy's District Commander, in these terms:

> As the disciplinary process for sworn members of police is essentially an employer's process (albeit having its genesis in statute), by this letter Sergeant Creedy serves notice that he commences a personal grievance with you pursuant to section 103 of the Employment Relations Act 2000.
>
> It is claimed that one or more of Sergeant Creedy's conditions of employment is or are affected to his disadvantage by the unjustified way in which you, as his employer have applied the disciplinary process to him.
>
> Pending the final determination of the disciplinary proceedings, Sergeant Creedy reserves his rights to pursue this personal grievance in due course.
>
> For the purposes of the Employment Relations Act 2000, time to initiate this personal grievance action, which this letter of notification serves to do, commences from 20th February 2001, this being the final date bulk disclosure of the police disciplinary files was served on Sergeant Creedy through me.

[9] Superintendent Cox sought further particulars of the alleged unjustifiable actions relied on by Sergeant Creedy, but Mr Barrowclough took the view that he had provided sufficient information to raise a grievance, advised Mr Creedy accordingly, and, presumably with Mr Creedy's consent, did not provide the further particulars requested. On the findings of fact made by the Chief Judge:

(a) Mr Barrowclough told Mr Creedy that the letter he had sent protected Mr Creedy's position for the future.

(b) What Mr Barrowclough meant by this was that Mr Creedy could later pursue a personal grievance associated with the unjustifiable actions referred to in the letter (ie those which occurred prior to 21 February 2001 associated with the application of the disciplinary process to Mr Creedy).

(c) Mr Creedy took from what he was told that, if he was later dismissed as a result of the disciplinary process, his right to bring a personal grievance based on unjustifiable dismissal was protected by the 4 April letter.

[10] The substantive hearing of the charges against Mr Creedy commenced on 14 May 2001 and extended over many days. Eventually, in a report dated 29 August 2001, the tribunal found most of the charges proved. Under the statutory scheme (which we will discuss shortly) the sanction to be imposed was to be determined by the Commissioner of Police (or in this case, Assistant Commissioner Long who was acting under delegated authority). Assistant Commissioner Long commenced the associated processes but these were rendered redundant when Mr Creedy applied for a discharge under the Police Early Retirement Fund scheme. As far as we can see, Assistant Commissioner Long's reliance on the report went no further than his calling for submissions on the report from Mr Creedy.

Overview of Mr Creedy's complaints

[11] The charges against Mr Creedy primarily related to the way in which he interacted with sworn and unsworn police staff. They involved allegations of sexually direct comments and questions often, but not always, directed to female officers, coarse language, often associated with the use of the word "fuck"; over-familiar physical contact or positioning, intimidatory language and conduct and inappropriate use of pepper spray. Two rather different charges associated with the misuse of a pistol were dismissed and we need say no more about them. There was also a charge which was held to have been proved relating to some comparatively minor (and inconsequential) contact between Mr Creedy and two police officers

which was in breach of the instructions given to Mr Creedy when he was stood down in September 2000.

[12] Mr Creedy's complaints about what happened fall under four general heads:

(a) The investigation and the decision to charge. Complaints under this head are covered (at least generally) by the 4 April 2001 letter. Mr Creedy's position is that the allegations against him really came down to questions of performance and did not warrant the sort of investigation which followed and the instigation of disciplinary proceedings. As well, he complains about the soliciting of complaints and the way in which the investigation proceeded. The Commissioner now accepts that Mr Creedy is entitled to have his personal grievance associated with these complaints investigated.

(b) Complaints about the way in which the tribunal conducted the inquiry and the conclusions she reached. These include challenges based on new evidence but are otherwise of the kind usually seen in judicial review proceedings, bias (actual or apparent), unfairness of process and irrationality of conclusions. The Commissioner's position is that Mr Creedy's personal grievance in relation to these complaints is out of time and, in any event, the conduct of the inquiry by the tribunal is not susceptible to review in personal grievance proceedings.

(c) Complaints about the way in which the police prosecuted the case before the tribunal. The Commissioner's position is that Mr Creedy's personal grievance in relation to these complaints is out of time but, in the course of argument, Ms Inglis accepted that, were it not for the time bar, the conduct of the prosecutor in these proceedings could be challenged in personal grievance proceedings.

(d) Police actions after the tribunal's report was received. The Commissioner's position is that Mr Creedy's personal grievance in relation to these complaints is out of time but, in the course of

argument, Ms Inglis accepted that, were it not for the time bar, such police actions could be challenged in personal grievance proceedings. She made the point that Assistant Commissioner Long never got around to acting on the report (other than soliciting submissions as to what he should do) before Mr Creedy sought disengagement.

Was the Chief Judge's conclusion as to 'exceptional circumstances' wrong in law?

Background

[13] Section 114 of the Employment Relations Act 2000 provides:

> **114 Raising personal grievance**
>
> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
>
> (2) For the purposes of subsection (1), 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.
>
> (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
>
> (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
>
> > (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
> >
> > (b) considers it just to do so.
>
> …

> (6) No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[14] It is also necessary to refer to s 115 which provides:

> **115 Further provision regarding exceptional circumstances under section 114**
>
> For the purposes of section 114(4)(a), exceptional circumstances include—
>
> (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
>
> (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
>
> (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
>
> (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[15] Two distinct timing issues arose:

(a) As to the unjustifiable actions grievance (see [12](a) above). Mr Barrowclough's letter of 4 April 2001 purported to raise a grievance in relation to this head of the claim but did not give adequate particulars. In the Employment Court, the Chief Judge concluded that the notice was inadequate but that the case was within s 115(b) and he gave Mr Creedy leave to pursue his personal grievance in relation to it. The Commissioner does not challenge this aspect of the judgment.

(b) As to the unjustifiable dismissal grievance which was not raised until January 2003, the Chief Judge's conclusion that there were exceptional circumstances in relation to this claim is challenged by the Commissioner.

Wilkins & Field Ltd v Fortune

[16] In *Wilkins & Field Ltd v Fortune* [1998] 2 ERNZ 70 (CA) this Court was required to address s 33(4) of the Employment Contracts Act 1991 which was in these terms:

> (4) Where, on an application under subsection (3) of this section, the Tribunal, after giving the employee's employer an opportunity to be heard,—
>
> > (a) Is satisfied the delay in submitting the personal grievance was occasioned by exceptional circumstances; and
> >
> > (b) Considers it just to do so,—
>
> the Tribunal may grant leave accordingly, subject to such conditions (if any) as it thinks fit."

[17] The Court addressed this test in this way (at 76–77):

> **The "exceptional circumstances" test**
>
> The present appeal … is confined by s 135 to questions of law. The submission for the appellant is directed to the requirement of exceptional circumstances occasioning delay and to the finding that the delay by Mr Fortune in submitting his personal grievance was occasioned by circumstances identified by the Tribunal and seemingly by the Employment Court as exceptional. …
>
> A potential claimant has 90 days in which to submit a personal grievance. That period allows substantial time for assessing the position, for reflection, for taking and considering advice, for deciding whether to raise a personal grievance and, if that course is followed, for submitting it to the employer. Where the personal grievance is that the employee was unjustifiably dismissed the starting point is clear and the employee is expected to plan the time so as to meet the 90-day limit. In the context of s 33(4) "exceptional" is a limiting adjective. *Exceptional circumstances are circumstances which are unusual, outside the common run, perhaps something more than special and less than extraordinary*. In the specific circumstances of a particular case an unexpected delay or difficulty or other factor affecting the ability of an employee to respond and submit the personal grievance within 90 days might constitute exceptional circumstances. …
>
> An inquiry under s 33(4) calls for an explanation for the failure to submit the personal grievance within the 90 days and the identification of particular circumstances which fairly satisfy the twofold test, namely that they constitute exceptional circumstances and that they occasioned the delay in submitting the personal grievance within time.

> **Application of s 33(4) by the Employment Court**
>
> Without addressing the specific criteria the Chief Judge obviously considered that there was a reasonable explanation for the delay and identified two broad factors which it is reasonable to assume he considered constituted exceptional circumstances causative of the delay. The first was that the employee (and the employee's advocate) believed, although wrongly, that the complaint of a personal grievance was made in time. The second was that the employer did not warn the employee or the advocate that the advice given was insufficient to amount to the submission of a personal grievance, or did not alert the employee to the problem, or did not respond at all before the time expired. In our view neither factor could constitute an exceptional circumstance occasioning delay within the meaning of s 33. *It is not exceptional for a party in litigation or prospective litigation to believe mistakenly that he or she need take no further step at that time.* And knowledge of a complaint which might or might not give rise to a personal grievance claim is not an exceptional circumstance. In that regard, too, the employer responds to an actual personal grievance and in a case such as the present is not obliged to consider the employee's grievance unless and until the Tribunal grants the employee leave to submit the personal grievance (cl 3(2) of the First Schedule).
>
> (Emphasis added)

Employment Court decision

[18] The key reasons for the Chief Judge's conclusion that there were exceptional circumstances in relation to the unjustifiable dismissal claim appear in a number of passages of his judgment.

[19] The first relevant passage is as follows:

> [47] What are "exceptional" circumstances? They are less than "extraordinary" circumstances but are clearly more than the circumstances in most cases. Section 114(4) addresses cases that are the exception rather than the rule. More than this, however, I consider it to be wrong in principle and unhelpful to attempt to impose even broad general rules that take no account of the infinitely variable individual circumstances of any particular case. So, for example, I consider it wrong to say that ignorance of s114 is per se not an exceptional circumstance.
>
> [48] Although I consider the foregoing very general description of "exceptional" circumstances given by the Court of Appeal in the *Wilkins* case is still applicable, it is clear that other aspects of its findings were intended by Parliament in enacting the Employment Relations Act 2000 to not apply to the current regime. For example, at p77 of the reported judgment the Court of Appeal stated, in relation to the Employment Court's two identified grounds for finding exceptional circumstances:

> The first was that the employee (and the employee's advocate) believed, although wrongly, that the complaint of a personal grievance was made in time. ... In our view neither factor could constitute an exceptional circumstance occasioning delay within the meaning of s 33. It is not exceptional for a party in litigation or prospective litigation to believe mistakenly that he or she need take no further step at that time. And knowledge of a complaint which might or might not give rise to a personal grievance claim is not an exceptional circumstance.
>
> [49] The new s115(b) was enacted to address and negate that conclusion. It follows that these aspects of the judgment of the Court of Appeal in *Wilkins* do not now represent the law as Parliament has intended it.
>
> (Footnote omitted)

[20] Having dismissed a number of the contentions advanced on behalf of Mr Creedy, the Chief Judge went on:

> [58] Despite the foregoing, I have concluded that the circumstances in which no personal grievances alleging unjustified disadvantage and constructive dismissal were raised within the period of 90 days after Mr Creedy claims he was disadvantaged and ceased to be a constable respectively, were exceptional for the following reasons.

[21] After dealing with the unjustifiable action claim, the Chief Judge then addressed the unjustifiable dismissal claim:

> [60] … As I have already found, Mr Creedy believed that his barrister had raised a personal grievance with his employer in early April 2001. So too did the barrister, although I have already concluded that was an erroneous belief. I am satisfied that Mr Creedy honestly believed that having done so, he thought it was unnecessary to raise any further personal grievance (including one relating to a possible dismissal) within the 90 day period of which he was aware, in the event that the Commissioner's investigations of, and prosecutions against, him brought about his dismissal.
>
> [61] Mr Creedy was very dependent upon his barrister. Mr Barrowclough returned to New Zealand from Australia at Mr Creedy's specific request and, initially at least, solely to act for him in the matter of the misconduct inquiry undertaken by the Commissioner. Mr Barrowclough then had no existing legal practice in New Zealand. Mr Creedy met Mr Barrowclough at the airport and provided living accommodation for his barrister at his home. At first, Mr Barrowclough worked solely on Mr Creedy's case and had no other clients. Although the professional relationship between the two was that of a barrister and fee-paying client, it was an exceptionally close and, from Mr Creedy's point of view, dependent relationship. At issue was the continuation of Mr Creedy's occupation as a police officer. The plaintiff had had no other occupation to speak of and was committed to the role in which he had advanced by promotion and in respect of which he had received consistently meritorious assessments. Mr Creedy wanted desperately to

> continue to be a police officer. He put his faith in that pursuit in his barrister's hands.
>
> [62] Mr Barrowclough believed he had done enough for Mr Creedy in respect of allegations of unjustified disadvantage in employment for the notice given to the police on 4 April to protect Mr Creedy's entitlements to pursue that grievance in future. What is significant now, however, is that Mr Creedy and Mr Barrowclough talked past each other. Mr Creedy asked his lawyer if his position was protected for the future, meaning (to Mr Creedy) whether he could challenge his dismissal if that resulted from the then disciplinary inquiry. Mr Barrowclough replied in the affirmative, meaning (to Mr Barrowclough, however) that in future Mr Creedy could use the letter of 4 April to establish the raising of the grievance relating to events that had occurred before 21 February 2001 in pursuit of that grievance. What each of Mr Creedy and Mr Barrowclough said and intended, was misinterpreted by the other. It is regrettable that these vital advices were not recorded in writing by the barrister, but they were not and this too may have contributed to the misunderstandings.
>
> …
>
> [64] Acting in reliance upon what he understood Mr Barrowclough had told him, Mr Creedy at all relevant times assumed that he did not need to raise a further grievance and had the statutory period of three years from 4 April 2001 within which to bring personal grievance proceedings against the Commissioner in the Employment Relations Authority. That conclusion establishes the necessary causative link between the exceptional circumstance and the failure to raise the grievance within the 90-day period.
>
> [65] I conclude these were exceptional circumstances, both during and following an employment relationship. They led to the grievances not being raised until the first statement of problem was filed in the Authority in January 2003 within three years of the grievances having occurred. These findings meet the first limb of the statutory test under s 114(4)(a).

Evaluation

[22] The question for the Chief Judge was one of evaluation and thus not readily susceptible to review on an appeal which is confined to points of law. Indeed, Mr Hope made much of the argument that the Commissioner’s challenge to this part of the judgment involved dressing up what was really a question of fact as one of law. That was a powerful contention, but it is also right to recognise that some legal analysis is required when the exceptional circumstances test is invoked and the application of the test must be in accordance with the general scheme and purpose of the Act. Further, consistency of approach is as important in this area of the law as it is in others.

[23] On the Chief Judge's findings, the reason why Mr Creedy did not raise a grievance in a timely way in relation to his dismissal was because he understood that he did not need to do so. On the face of it, that reason is fairly and squarely within the ratio decidendi of *Wilkins & Field* (see the second of the two passages which we have italicised). So unless *Wilkins & Field* can be distinguished or has been overtaken by new legislative scheme under the Employment Relations Act 2000, the Chief Judge should not have concluded that the circumstances relied on by Mr Creedy were exceptional.

[24] We are of the view that *Wilkins & Field* is not distinguishable.

[25] The point which this Court made in *Wilkins & Field* is that the test requires more than just a meritorious reason for not having raised the grievance in a timely way. The exceptional quality of the relevant circumstances must be in respects which are relevant to the evaluative exercise in issue. In the present case, the particular circumstances identified by the Chief Judge (primarily associated with the unusual and close professional relationship with Mr Barrowclough) no doubt were exceptional (as it is unusual for counsel to have only one client and to reside with that client). But the peculiarity of those circumstances was only relevant to the degree of reliance which Mr Creedy may have placed on Mr Barrowclough. Since clients normally rely on their legal advisers, the "exceptionality" of the legal and personal relationship between Messrs Creedy and Barrowclough is not material to the s 114(4) exercise.

[26] With respect to the Chief Judge who obviously thought otherwise, we are likewise of the view that the *Wilkins & Field* test has not been overtaken by a new legislative scheme under the Employment Relations Act 2000. It is true that s 115 of the Employment Relations Act 2000 did not have a counterpart in the Employment Contracts Act. Obviously if a case is within s 115, the *Wilkins & Field* test does not have to be independently satisfied. But outside the situations provided for by s 114, there is no reason to suppose that the phrase "exceptional circumstances" has a meaning which differs from its meaning under the 1991 Act as determined in *Wilkins & Field*. We note that the Chief Judge has previously expressed very much the same view in *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 at [22]:

> I consider Parliament did not intend to alter, by relaxing, the tests for extending the limitation period when it enacted ss 114 and 115 in 2000. Had it so intended, it is logical that it would have changed what is now s 114 but it did not do so. Instead, it sought to exemplify, but not limit, situations that would amount to exceptional circumstances, the first of two tests applicable under s 114(4).

[27] In those circumstances, we grant leave to appeal and allow the appeal. This has the practical consequence that the complaints made by Mr Creedy which are referred to in [12](b), (c) and (d) above are out of time and will not be able to be pursued. It is nonetheless appropriate to address the second question as it was the primary focus of the argument before us.

Was the Chief Judge wrong to conclude that the proceedings of the tribunal were part of the Commissioner's employment inquiry so that the actions of the tribunal are subject to review as part of the hearing of the respondent's personal grievance?

The statutory provisions relevant to police disciplinary processes

[28] Section 5 of the Police Act 1958 provides:

> **5 Members of the Police**
>
> …
>
> (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.
>
> …
>
> (7) Without limiting subsection (4) of this section, where the Commissioner is satisfied that any sworn member of the Police is guilty of any misconduct or neglect of duty, the Commissioner may impose all or any of the following penalties:
>
> (a) Reduction to any rank, whether commissioned or otherwise:
>
> (b) Reduction in seniority by any specified number of years:
>
> (c) Reduction in pay for any specified period:
>
> (d) A fine not exceeding $500.

(8) Where subsection (7) of this section applies, the Commissioner may order the payment by the member concerned of such sum as the Commissioner thinks just and reasonable towards the costs of any inquiry into that member's misconduct or neglect of duty.]

[29] Section 5A(1) provides:

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.

…

[30] Section 12 provides:

12 Inquiry into misconduct

(1) Where any misconduct or neglect of duty is alleged against any sworn member of the Police, the Commissioner may appoint one or more persons to inquire into the alleged misconduct or neglect of duty and to report to the Commissioner on that matter.

(2) Where such an allegation is made against any sworn member of the Police, the Commissioner may suspend the member from duty under section 32 of this Act, but shall not take any other action against that member in respect of a matter being investigated under this section until the Commissioner has considered the report to be provided under this section.

(3) The person or persons holding the inquiry shall—

(a) Take all reasonable steps to ensure that the member against whom the allegation is made is given notice of the reasons for the inquiry; and

(b) Give the member or his or her counsel or agent a reasonable opportunity to make submissions and be heard in respect of the allegation.

(4) The person or persons holding the inquiry shall follow the procedure prescribed in regulations made under section 64 of this

> Act, but may receive any relevant information whether or not the same information would be admissible in a Court of law.

> (5) For the purposes of this section the person or persons holding any such inquiry shall have the same powers and authority to summon witnesses and receive evidence as are conferred upon Commissions of Inquiry by the Commissions of Inquiry Act 1908, and the provisions of that Act, except sections 11 and 12 (which relate to costs), shall apply accordingly.
>
> …
>
> (7) So long as any person engaged in any inquiry under this section acts bona fide in the discharge of that person's duties, no action shall lie against that person for anything that he or she may report or say in the course of the inquiry.
>
> (8) Every witness attending and giving evidence and every counsel or agent appearing at any inquiry under this section shall have the same privileges and immunities as witnesses and counsel in Courts of law.
>
> …

[31] The Police Regulations 1992 make extensive provision as to disciplinary offences which amount to misconduct or neglect of duty and for the procedure to be followed at a s 12 inquiry. That procedure is broadly similar to that adopted in the District Court for the summary trial of criminal offences. At the conclusion of the process, the tribunal reports its findings to the Commissioner and it may make a recommendation as to penalty. The decision as to penalty is for the Commissioner. Regulation 27 provides:

> The Commissioner may, in his or her discretion, grant a rehearing of any charge if application for a rehearing is made within 7 days after the member is notified that the charge has been proved.

[32] It is common ground that the Commissioner may only dismiss a sworn member of the police if the s 12 process has been complied with, see *Commissioner of Police v Moore* [2002] 2 NZLR 83 (CA).

The employment responsibilities and liabilities of the Commissioner

[33] As noted, the Commissioner is treated as the employer of police officers (see s 5(5) of the Police Act). The Commissioner is obliged to operate a personnel policy that complies with the principle of being a good employer by following (subject to

the Act) as closely as possible the provisions of s 56 (fair and proper treatment) and s 58 (equal opportunities) of the State Sector Act 1988. As well, s 87(1) of the Police Act provides that Part 9 of the Employment Relations Act 2000 applies to personal grievances by sworn members of the police.

[34] The key provisions of Part 9 of the Employment Relations Act are s 103(1)(a) and (b) which relevantly provide:

> **103 Personal grievance**
>
> (1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim—
>
> (a) that the employee has been unjustifiably dismissed; or
>
> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; …

Overview of the problem

[35] An unjustifiable action claim under s 103(1)(b) must focus on the actions of the employer. On this basis, the actions of a tribunal appointed under s 12 of the Police Act plainly would not found a claim for unjustifiable action unless the tribunal's actions can be attributed to the Commissioner. Section 103(1)(a) is focused on the dismissal (which is necessarily an act of the employer). Where constructive dismissal is alleged, the actions which are said to constitute the constructive dismissal must necessarily be those of the employer. An employee who resigns as a result of actions taken by a third party cannot claim to have been constructively dismissed by the employer. Therefore, if the actions of the tribunal, including the process adopted and the conclusions reached, cannot be attributed to the Commissioner, criticisms of those actions cannot be deployed by Mr Creedy in support of his claim that he was constructively and unjustifiably dismissed by the Commissioner.

[36] It follows that it would not be open to the Employment Relations Authority to review the actions of the tribunal as part of the personal grievance proceedings unless the actions of the tribunal can be attributed to the Commissioner.

The judgment of the Employment Court

[37] The Chief Judge identified the relevant issue in this way:

> **Challenge to conduct of tribunal?**
>
> [69] As one of his grounds that it would not be just to grant Mr Creedy leave, the Commissioner says that the plaintiff will not be entitled in law to examine or challenge the processes of the tribunal because it was an independent statutory body and did not act as the employer in respect of Mr Creedy's conduct in employment. Such an attack is intended by Mr Creedy to be a part of his grievance, but not the whole complaint of absence of justification for constructive dismissal.
>
> [70] More particularly, Ms Inglis for the Commissioner submitted that it is not open to a constable or former constable in the plaintiff's circumstances to challenge by personal grievance the justification for a number of important steps that led to dismissal (including constructive dismissal). Counsel submitted that questions such as the propriety of the conduct of the s12 inquiry undertaken by Dame Augusta as a tribunal, the Commissioner's prosecution of his case before the tribunal, and the propriety of the tribunal's recommendation for dismissal, were all the acts of, or necessarily connected with, an independent statutory process that are beyond attack in personal grievance proceedings.
>
> [71] I do not accept that submission for the following reasons.
>
> [72] First, Mr Creedy's challenge to the propriety of Dame Augusta's conduct of the s12 inquiry is only one element of the plaintiff's assertion that he was both disadvantaged in employment unjustifiably and constructively dismissed unjustifiably. It is, nevertheless, necessary to examine these challenges to the tribunal because they are made and raise serious issues. Questions of justification for dismissal (including constructive dismissal if this is established) and for disadvantage in employment cannot exclude significant elements of the process that led to these outcomes.
>
> [73] The nature and scope of the acts and omissions that Mr Creedy seeks to impugn are ascertainable from what I understand to be the latest pleading, his first amended statement of problem dated 18 February 2004. This is a lengthy document but the following allegations can be distilled from it. I separate them into three broad categories. The first consists of acts or omissions alleged against the Commissioner (in practice by his senior managerial staff) before the commencement of the s12 inquiry but not including what was done or not done by Dame Augusta as a tribunal. The second category of acts or omissions are those alleged against Dame Augusta in undertaking her function as the tribunal. The third category

> consists of allegations against the Commissioner after Dame Augusta's inquiry.

[38] The Chief Judge later observed:

> [111] … [T]he inquirer (the tribunal) is the appointee of the Commissioner as employer and may be any person or persons without restriction as to qualification, experience etc. The task of the tribunal it to inquire into the allegations of misconduct in employment and to report on these to the Commissioner for his subsequent sanction. … . [A] s12 Police Act inquiry is established for employment purposes and is an integral and necessary part of a process that may result in dismissal or other sanction in employment.
>
> [112] In this sense, therefore, a s12 inquirer/tribunal is the agent or the delegate of the Commissioner in his employment role. This is illustrated, for example, by the provision in reg 27 of the Police Regulations 1992 that it is for the Commissioner (and not for the tribunal) to consider any application for rehearing [and determine sanctions].

[39] That the inquiry could be challenged in judicial review was, in the view of the Chief Judge, not a controlling consideration. Judicial review would be a challenge to process only whereas a personal grievance examines process and substance: at [114]. He also noted that the sanctions and procedures adopted under the Police Act were seen as largely comparable to those found in regular employment relationships: cf *Petersen v Board of Trustees of Buller High School* [2002] 1 ERNZ 139 (EC).

Evaluation

[40] As already noted, the key issue is whether the actions of the tribunal can be attributed to the Commissioner. This is essentially consistent with the approach taken by the Chief Judge and, as is apparent, he concluded that such attribution was appropriate on the basis that the tribunal process was part and parcel of the Commissioner's processes with the result that the tribunal was "the agent or the delegate of the Commissioner in his employment role". We will shortly address the validity of that conclusion directly. But before we do so, we will look at the situation rather more broadly.

[41] It is true that a s 12 inquiry under the Police Act serves a purpose which is functionally similar to an inquiry which an employer might privately commission and which would be open to review in a later personal grievance claim: cf *Petersen*. But the critical feature of the present case is that the inquiry by the tribunal was a statutory process and subject to the supervisory jurisdiction of the High Court. So it is far from clear that the *Petersen* situation is truly analogous.

[42] Leaving aside the Commissioner's limited power to grant a rehearing, the Commissioner must treat a tribunal's findings as valid unless and until they are set aside in the High Court. It is very difficult to see how reliance by the Commissioner on the validity of a tribunal report (and the report must be so regarded unless and until it is set aside) could be held to be unjustifiable.

[43] Against that background, the approach taken by the Chief Judge seems to involve a practical derogation from *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) (and in particular the rule that a decision is valid until set aside) and the general principle of administrative law that judicial review of administrative decisions is available only in the High Court. There are some exceptions to this latter principle in relation to the statutory jurisdiction of the Employment Court under s 96 of the Employment Relations Act, but it is clear that this statutory jurisdiction does not authorise the Employment Court (and still less the Employment Relations Authority) to review the decision of a tribunal exercising jurisdiction under s 12 of the Police Act, see *Smith v The Attorney-General* [2005] ERNZ 699 (EC).

[44] Mr Hope argued that Mr Creedy was not so much seeking a review of the processes and decision of the tribunal in the administrative law/judicial review sense but was rather simply relying on what happened in relation to the tribunal as a subset of the reasons why he maintained that his dismissal was unjustifiable. This is true, but given that the complaints against the tribunal are largely cast in the sort of terms that would not be out of place in a statement of claim in review proceedings (actual or apparent bias, procedural unfairness and irrationality), the point is perhaps a little semantic. Further, it is quite clear that Mr Creedy is not just seeking to challenge the actions of the Commissioner associated with the report but rather wishes to rely

directly on alleged errors or unfairness on the part of the tribunal even in the absence of any adopting action on the part of the Commissioner. He would have to go that far because, as will be recalled, the post-report phase of the disciplinary process was aborted when Mr Creedy resorted to the Police Early Retirement Fund scheme. Assistant Commissioner Long did not act on the report (other than in seeking submissions from Mr Creedy as to what he should do).

[45] As well, the implications of the Chief Judge's approach are distinctly awkward. The proceedings of a tribunal conducting a s 12 inquiry are subject to review by the High Court. If Mr Creedy is right, the processes of such a tribunal are susceptible first to argument before the tribunal, then before the High Court on review (and possibly this Court and the Supreme Court should there be appeals) and then in a technically different (but substantially similar way) before the Employment Relations Authority and Employment Court (and then perhaps again to this Court and the Supreme Court). As well, there is at least some scope for a re-run of the factual arguments determined by the tribunal under s 12 in front of the Employment Relations Authority and, on a *de novo* basis, the Employment Court.

[46] That is not to say that there is not some practical awkwardness on the Commissioner's argument. As noted, Ms Inglis accepted that the conduct of the Commissioner (including that of the prosecutor) referable to the proceedings of a s 12 tribunal could be scrutinised in a personal grievance claim. She also accepted (although we are not entirely sure that she was right to do so) that the appropriateness of a Commissioner's decision to act on the basis of the report of a s 12 tribunal could also be addressed. In this way, even on the Commissioner's argument, there is at least some scope for what looks a little like an indirect challenge to the processes of a s 12 tribunal. As well, what happened before the tribunal and the implications of its report will necessarily form part of the factual background which will have to be addressed on the hearing of a personal grievance.

[47] We also accept that appointments made under s 12 are on an ad hoc basis and that there is no legislative underpinning for the usual practice of appointing retired judges or senior lawyers. So those appointed under s 12 do not have a tenured

position and this might be thought to detract from their independence of the Commissioner.

[48] With those general considerations in mind, we come directly to the question whether the actions of the tribunal can be attributed to the Commissioner.

[49] We consider that the answer to this question is tolerably clear:

(a) In the performance of his or her duties, a person conducting a s 12 inquiry does not act on the direction of the Commissioner. Rather, the expectation is that a s 12 inquiry will be conducted in like manner to the summary trial of a criminal offence. The Commissioner is bound by the decision of s 12 inquiry if the result is an acquittal. The idea underpinning the s 12 process is that the decision-maker must be someone other than the Commissioner. Since the powers which Dame Augusta exercised were not those of the Commissioner, she cannot have been acting as his agent or delegate, at least as those terms are used by lawyers.

(b) We accept that when the Chief Judge held that Dame Augusta was the agent or delegate of the Commissioner he was probably not using the words in their ordinary legal sense but rather may have been simply putting in different words his conclusion that the Commissioner had to take responsibility for the conduct of s 12 inquiry. The point we are making is not a criticism of the language used by the Chief Judge but rather that resort to ideas of delegation and agency do not support the conclusion that the actions of the tribunal can be attributed to the Commissioner.

(c) Mr Creedy claims that he had been constructively and unjustifiably dismissed. He could be expected to list the actions of the Commissioner which, on his case, amounted to constructive and unjustifiable dismissal. The actions of third parties might be thought not to belong in such a list. If we are right in concluding that the

tribunal was not exercising the powers of the Commissioner and was not his agent or delegate, it follows that it was a third party for these purposes unless there was another basis for attributing its actions to the Commissioner.

(d) The only other basis on which the tribunal's actions might be attributed to the Commissioner is if this is provided for in the Police Act or the Employment Relations Act. There is no explicit provision in either Act to that effect. Nor do we regard such attribution as implicit in the legislation. Indeed, we think it almost inconceivable that the legislature could have intended that the actions of a tribunal appointed under s 12 could have been subject to the level of review which would result from the approach taken by the Chief Judge.

[50] For those reasons, we are of the view that the Chief Judge was wrong to conclude that the actions of the tribunal could be attributed to the Commissioner and thus wrong to conclude that they were open to review in personal grievance proceedings.

Result

[51] Leave to appeal is granted on the question, "Was the Chief Judge's conclusion as to 'exceptional circumstances' wrong in law?".

[52] The appeal is allowed on that question in relation to the unjustifiable dismissal claim (but not the unjustifiable action claim) with the result that the personal grievance claim by Mr Creedy, based on the contention that he was unjustifiably dismissed, is out of time.

[53] Mr Creedy is to pay costs of $6,000 and usual disbursements.

Solicitors:
Crown Law Office, Wellington, for Appellant
Till Henderson, Hamilton, for Respondent