IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2007
[2008] NZSC 31

	BETWEEN	MARK RAYMOND CREEDY Appellant
	AND	COMMISSIONER OF POLICE Respondent

Hearing: 10 March 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: J A Hope, S A McKenna and M O Hope for Appellant
D B Collins QC Solicitor-General, C Inglis and C Curran-Tietjens for Respondent

Judgment: 23 April 2008

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Wilson J)

Introduction

[1] This appeal raises the question of whether aspects of Police disciplinary procedures are amenable to a personal grievance under the Employment Relations Act 2000 and, if so, whether the appellant's grievance can be brought out of time.

[2] The appellant, Mr Creedy, was formerly a Police Officer. He seeks to bring a personal grievance against the respondent, the Commissioner of Police, alleging that he was constructively and unjustifiably dismissed. In order to do so, Mr Creedy must establish first that there is jurisdiction for him to invoke the grievance procedure in the Employment Relations Act 2000 and secondly that he should be permitted to do so out of time. These issues are reflected in the grounds on which Mr Creedy was granted leave by this Court to appeal, namely:

> A. Was the Court of Appeal wrong to conclude that delay by the appellant in raising the personal grievance concerning his unjustifiable dismissal was not due to "exceptional circumstances" under s 114 of the Employment Relations Act 2000?
>
> B. Did the Employment Court have jurisdiction to review:
>
> (i) the laying of charges of misconduct against the appellant and police conduct in prosecuting those charges before the Tribunal; and
>
> (ii) the Tribunal's own conduct of the proceeding and report to the Commissioner?

[3] Mr Creedy also alleges that he was subjected to disadvantage in his employment, but no issue arises in this Court over that claim.

Background

[4] In December 2000, the appellant was charged with 39 disciplinary offences. In January 2001, he was suspended from duty. Mr Creedy instructed a former Police colleague, Mr Barrowclough, to act as his counsel. Mr Barrowclough devoted much of his time to the defence of Mr Creedy, and was living at his home.

[5] On 4 April 2001, Mr Barrowclough wrote to the Police to notify them of a personal grievance over an employment "disadvantage" to the appellant through the application of the Police disciplinary process. No details were provided. The Police replied the following day seeking further details, pointing out that time was of the essence and that as the events allegedly giving rise to a personal grievance were already known there was no justification for not giving details of the alleged grievance. Mr Creedy claimed that Mr Barrowclough assured him the 4 April letter

was sufficient to protect his right to bring a personal grievance based on his dismissal if that were the outcome of the disciplinary process. Mr Barrowclough denied giving any such assurance.

[6] An inquiry into the charges against the appellant was conducted under s 12 of the Police Act 1958 by a person acting as the Police Disciplinary Tribunal. In a decision issued on 29 August 2001, the Tribunal found 31 of the 39 charges to be proved. On 14 September 2001, the Tribunal recommended to the Commissioner that Mr Creedy be dismissed. On 18 September 2001, the Commissioner gave the appellant 14 days in which to make submissions on that recommendation. After consulting Mr Towner, a well-known employment lawyer whom he had previously consulted in July 2001, the appellant on 17 October 2001 applied to the Commissioner to disengage from the Police on psychological grounds, under the Police Early Retirement Fund (PERF) Scheme. On 13 December 2001, that application was granted. Mr Creedy received a PERF payment of $190,000.

[7] On 23 January 2003, more than a year after he left the employment of the Police, the appellant alleged to them for the first time that he had been constructively dismissed. He did so by filing a "Statement of Problem" in the Employment Relations Authority, the first step in the personal grievance procedure. Because of the delay, Mr Creedy required leave to pursue his grievance out of time. Before the Authority, the Commissioner successfully opposed his application for leave. The appellant then went to the Employment Court. The Chief Judge of that Court held that, because Mr Creedy and Mr Barrowclough had "talked past" each other, the "exceptional circumstances" required to extend time were established and, furthermore, that the actions of the Tribunal were subject to review as part of the personal grievance. On appeal by the Commissioner to the Court of Appeal, that Court differed from the Employment Court on both the timing and jurisdiction questions.

[8] In *Wilkins & Field Ltd v Fortune* [1998] 2 ERNZ 70 (CA), decided under the provisions of the Employment Contracts Act 1991, the Court of Appeal had held that the mistaken belief of an employee that a legal adviser had notified a personal grievance within the 90 day time limit could not constitute the "exceptional

circumstances" required before time could be extended. In the present litigation, the Chief Judge in the Court below took the view that subsequent changes introduced by the Employment Relations Act had overtaken that decision.[1] The Court of Appeal thought that they had not.[2]

[9] Mr Creedy sought leave to appeal to this Court on both aspects of the case. Leave was given in the terms recorded at para [2] above.

Jurisdiction

[10] Because jurisdiction must be established before any question of compliance with the time limit will arise, we address this issue first.

[11] For the appellant, Mr Hope submitted that the s 12 inquiry was conducted administratively and was the responsibility of the Commissioner. All aspects of the inquiry could therefore be the subject of a personal grievance, and were amenable to an appeal to the Employment Court. In reply, the Solicitor-General submitted that the inquiry was quasi-judicial in nature and that the Commissioner was not responsible for its conduct. A personal grievance can only be brought against an employer, and the Tribunal was not the employer of the appellant. The laying of the charges, the conduct of the Police in presenting them, and the conduct of the Tribunal in investigating them, were therefore not amenable to review under the provisions of the Employment Relations Act.

[12] The question of which of these approaches is correct in law can readily be answered by examining the relevant statutory provisions and their history.

[13] Prior to amendments made in 1989, the Police Act 1958:

- established, in s 33, a regime for inquiries into allegations of misconduct or neglect of duty against all officers below the rank of Chief Superintendent (with the form of the inquiry varying according to the rank of the officer who

---

1 [2006] 1 ERNZ 517.
2 (2007) 8 NZELC 98,926.

was the subject of the allegations). The persons(s) inquiring would report to the Commissioner on whether the charges had been proved and, if they had, the Commissioner then determined the penalty to be imposed;

- conferred on all Police Officers (other than cadets or recruits) a right of appeal under s 34 to an Appeal Board, established by s 46 and chaired by a District Court Judge, against the result of any inquiry or any penalty imposed.

Police Officers therefore had the dual protection that any allegations against them were required to be established by an inquiry and the findings (if challenged) confirmed on appeal by the Appeal Board.

[14] The State Services Restructuring Bill 1989 proposed extensive changes to employment arrangements in the State sector. The legislation appeared to have two broad objectives, first to place all employees of the State on the same basis as far as practicable and secondly to align that basis as closely as possible with employment arrangements in the private sector. After the Second Reading, the Bill was split into a number of different Bills, including one which was subsequently enacted as the Police Amendment Act 1989.

[15] That Act:

- repealed ss 33, 34 and 46;

- introduced a new s 5 into the principal Act, including (in subs (5)) a provision that the Commissioner, except as was otherwise expressly provided, should have "all of the rights, duties, and powers of an employer in respect of all members of the Police".

- replaced s 33 with a new s 12 which, as subsequently amended in some minor and immaterial respects, reads in part:

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.

…

(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;

- introduced into the principal Act a new s 87, in the following terms:

87 Personal grievances

(1) Part 9 of the Employment Relations Act 2000 applies in relation to personal grievances by sworn members of the Police.

(2) For the purposes of Part 9 of the Employment Relations Act 2000 (as applied by subsection (1)), an action by the Commissioner (other than the imposition of a penalty under this Act) is not unjustifiable if —

(a) the Commissioner's principal reason for taking the action is to ensure that an operational requirement is met; and

(b) any failure to perform the requirement would be likely to result in a breach of the oath of office prescribed by section 37;

- added a Fifth Schedule, in materially the same terms as the Seventh Schedule to the Labour Relations Act 1987, setting out the procedure for resolution of

personal grievances by a grievance committee, with a right of appeal to the Labour Court. (The Labour Relations Act was subsequently replaced by the Employment Contracts Act 1991 and then the Employment Relations Act 2000. Under the 1991 Act, the Labour Court became the Employment Court).

[16] Looking at these provisions as a whole, the inference is inescapable that Police Officers facing allegations of misconduct were intended to have the protection of, first, a s 12 inquiry and, secondly, resort to the personal grievance procedure.[3] More particularly, there is no basis for discerning in the words of the legislation that the protection previously afforded by the right of appeal to the Appeal Board was being removed without being replaced by access, if necessary, to the Labour Court. Police Officers potentially facing dismissal or other very serious consequences were not to be bound by the findings of an inquiry, possibly conducted by other officers, with no right to appeal against those findings.

[17] There was nothing in the Explanatory Note to the State Services Restructuring Bill, or in the speech of the Minister responsible when introducing it, to suggest that the legislation was intended to deprive Police Officers of any right of appeal. To the contrary, such indications as are available suggest that the right of appeal was to continue, albeit in a different form. The Explanatory Note stated that the clause which became s 12 replaced s 33 (which provided for inquiries), without any suggestion that it also removed the existing right of appeal. The Minister of State Services made the following comments on the introduction of the Bill:[4]

> The amendments made by the Bill to the Police Act 1958 are extensive and significant. They are designed to amalgamate the sworn police and civilian staff into a single unified police service outside the Public Service, and to apply the personnel and industrial relations arrangements of the State Sector Act wherever practical to the police. Under the Bill the Police Department will be removed from the Public Service and its civilian employees will become non-sworn members of the police service. The Commissioner of Police will be established on a similar footing to that of chief executives elsewhere in the State sector, with all of the usual rights, duties, and powers of an employer in relation to members of the police service.

---

[3] This point does not appear to have been raised in the Court of Appeal, and understandably was therefore not considered by that Court.

[4] Hon Stan Rodger MP (21 September 1989) 501 NZPD 12828.

> The personnel provisions of the State Sector Act and the personal grievance provisions of the Labour Relations Act will apply both to non-sworn, and, to the extent practicable, to sworn police …

These references reinforce the conclusion that, far from intending to deprive Police Officers of any right of appeal, the purpose of the legislation was that, in future, an appeal would be to the Labour Court as part of the personal grievance procedure.

[18] Subject only to the qualifications introduced by paras (a) and (b) of s 87(2), which recognise the special nature of Police work, these legislative changes gave members of the Police the same or equivalent rights as other public sector employees and private sector employees. The first of those rights was to 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.

[19] In 1992, Police Regulations[5] were made pursuant to s 64 of the Police Act. They replaced the 1959 Regulations,[6] which were in materially the same form. Under the heading "Procedure at inquiry", the 1992 Regulations referred to the persons conducting the inquiry as "the Tribunal" and included provisions that:

> **20 Procedure where charge not admitted**
>
> (1) Where the member does not admit the charge, the Tribunal shall first hear the prosecutor and such evidence as the prosecutor may adduce, and shall then hear the member charged and such evidence as he or she may adduce. It shall then hear any evidence that the prosecutor may adduce in rebuttal.
>
> (2) The parties may examine, cross-examine, and re-examine witnesses.
>
> (3) The evidence shall be recorded.
>
> …

---

5 SR 1992/14.
6 SR 1959/9.

> **24 Procedure of District Court to be followed**
>
> Subject to these regulations, the procedure at the hearing shall conform as far as practicable with any necessary modifications to that followed in District Courts in their summary criminal jurisdiction and, in particular, the provisions of section 43 of the Summary Proceedings Act 1957 (relating to amendments) shall apply.

The Regulations as a whole, and regs 20 and 24 in particular, suggest that the s 12 inquiry to be conducted by "the Tribunal" is quasi-judicial in nature.

[20] Keeping in mind that many s 12 inquiries will not result in any employment issues — because the allegations are not established or the officer charged accepts the outcome — it is understandable and desirable that the Regulations should impose procedural safeguards. However, that fact does not change the nature of the s 12 inquiry. It remains an administrative procedure, to assist the Commissioner as the employer in terms of s 5(5).[7]

[21] In 1994 s 5A was introduced into the Police Act by the Human Rights Act 1993. The section reads:

> 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.

---

[7] See para [15] above.

Section 5A does not change the legislative scheme introduced by the 1989 amendments. The s 12 inquiry continues to be an inquiry carried out on behalf of the Commissioner, 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.

[22] Section 113 of the Employment Relations Act prohibits an employee who has been dismissed from challenging "that dismissal or any aspect of it, for any reason", otherwise than by a personal grievance. In the case of a Police Officer, the s 12 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.

[23] We conclude therefore that 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, if the appellant's personal grievance was brought within time, 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.

Time

[24] Section 114 of the Employment Relations Act reads as follows, in material part:

> **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.
>
> …

(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.

…

(5) 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.

[25] Section 114(4), which is in materially the same form as the relevant provision was when *Wilkins & Field* was decided, plainly prescribes two conditions for the grant of leave, both of which must be satisfied. First, the delay must have been occasioned by "exceptional circumstances". Secondly, the justice of the case must require an extension of time.

[26] Section 115, which was enacted following *Wilkins & Field,* provides specific examples of "exceptional circumstances". It reads in part:

For the purposes of section 114(4)(a), exceptional circumstances include —

…

(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

…

This wording confirms that the circumstances specified in the section are not an exhaustive exposition of what may constitute "exceptional circumstances" for the purposes of s 114. It also makes clear that para (b) will apply only where the

employee has made reasonable arrangements to have the grievance raised and the agent has unreasonably failed to ensure that it was.

[27] For the appellant, Mr Hope seemed to accept that s 115(b) did not apply on the present facts but submitted that the circumstances were exceptional because of the unusually close relationship between Mr Creedy and Mr Barrowclough and the misunderstanding which had occurred between them. In reply, the Solicitor-General submitted that s 115(b) was of no assistance, because neither limb of that paragraph was satisfied on the facts.

[28] Although, as we have already noted,[8] the contents of s 115 are clearly not intended to be a comprehensive schedule of what will constitute "exceptional circumstances", they assist in determining when such circumstances exist and when they do not. More particularly, Parliament has specified in s 115(b) that reliance on an agent will result in "exceptional circumstances" if the requirements of that paragraph are met. It would tend to negate the purpose of that paragraph if other situations where an employee had mistakenly relied on an agent to ensure that a grievance was notified in time were readily treated as establishing "exceptional circumstances".

[29] Mr Creedy had an agent, Mr Barrowclough. Section 115(b) is therefore relevant. On any view of the present facts, they do not come within either limb of that paragraph. Mr Creedy did not make any arrangements with Mr Barrowclough to raise a grievance on his behalf grounded on his departure from the Police, and Mr Barrowclough cannot therefore be said to have failed unreasonably to ensure that it was. There is no evidence that Mr Creedy ever told Mr Barrowclough that he wanted to challenge his departure, or even that Mr Barrowclough was still acting for him 90 days after it. Nor can the unusually close relationship between Mr Creedy and Mr Barrowclough be said to be material. Most clients rely on their legal advisers to protect their interests, even if they are one of many clients. There is therefore no basis in law on which the time for bringing the appellant's grievance can be extended.

---

[8] At para [26] above.

[30] In their judgments, both the Courts below discussed the interpretation of the phrase "exceptional circumstances", and we heard extensive argument on this point. Where none of the s 115 categories applies, either directly or by parity of reasoning, this question remains of practical significance.

[31] In *Wilkins & Field*, the Court of Appeal treated "exceptional circumstances" as those which are "unusual, outside the common run, perhaps something more than special and less than extraordinary".[9] This formulation appears to combine two different meanings, the first that of being unusual (the "exception to the rule") and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.

[32] First, it accords with ordinary English usage. As Lord Bingham of Cornhill said in *R v Kelly* [1999] 2 All ER 13 (CA), when construing a reference to "exceptional circumstances":[10]

> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.

Secondly, it will be easier to apply. The very language of *Wilkins & Field* implies both uncertainty ("perhaps") and lack of precision ("something more than special and less than extraordinary"). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance[11] reinforces this point.

[33] Having said that, we also emphasise that Parliament has imposed a 90 day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established

---

9 At p 76.
10 At p 20.
11 Discussed at para [22] above.

and, in addition, the overall justice of the case (which includes taking account of the position of an employer facing a late claim) so requires.

Result

[34] The requirements of s 114 are not satisfied. The appellant is therefore time-barred from bringing a personal grievance against the respondent alleging that he was constructively and unjustifiably dismissed.

[35] Because the appellant succeeded on one part of this appeal and the respondent on the other, we make no order as to costs.

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