IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 194
WRC 26/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	COMMISSIONER OF POLICE Plaintiff
AND	DEREK HEWSON COFFEY Defendant

Hearing:	5 - 6 July 2014 (heard at Wellington)
Appearances:	P Churchman QC, counsel for the plaintiff G O'Sullivan, counsel for the defendant
Judgment:	22 October 2014

JUDGMENT OF JUDGE A D FORD

Introduction

[1] In February 2013, Mr Coffey's employment as Business Services Manager for the Tasman Police District in Nelson was terminated on the grounds of redundancy. He brought proceedings in the Employment Relations Authority (the Authority) claiming, inter alia, that his employment had been unjustifiably terminated because of an invalid redundancy. He was completely successful. In a determination dated 25 November 2013, the Authority upheld his claim concluding that while the restructuring was genuine, it was "not carried out properly in regard to Mr Coffey".[1] The Authority ordered reinstatement, lost wages, and $15,000 compensation for humiliation, loss of dignity and injury to feelings.[2]

[1] *Coffey v Commissioner of Police* [2013] NZERA Wellington 152 at [41] [Authority determination].
[2] At [45].

[2] In this proceeding, the plaintiff does not take issue with any of those findings but it has challenged by way of a non de novo challenge a related finding made by the Authority that under the terms of his employment agreement, Mr Coffey was unable to be made redundant without his consent.

Background

[3] Mr Coffey commenced employment with the plaintiff, the Commissioner of Police (the plaintiff or the police) in January 1990. He was appointed as a non-sworn member of the police under s 5 of the Police Act 1958.

[4] In July 1999, Mr Coffey took up the position of Business Services Manager at Nelson. He was employed under an individual employment contract dated 11 October 1999 (the 1999 agreement) which was effective from 19 July 1999. Mr Coffey described his Nelson position as a "Band One middle management position equivalent to the rank of Inspector for Constabulary positions." It was common ground that Mr Coffey's employment was terminated on Friday, 1 February 2013 as a result of a restructure.

[5] Mr Coffey's Nelson appointment followed on from an earlier police restructuring and his personal involvement in an employment dispute in which he had sought a compliance order from this Court requiring, as he put it in his evidence, "the Commissioner of Police to comply with the terms and conditions of my employment contract and its specific conditions relating to restructuring".

[6] That case came before then Chief Judge Goddard in early 1999, *Coffey v Commissioner of Police*.[3] At that stage, Mr Coffey was based at central district headquarters located in Palmerston North in the capacity of District Finance Manager. The 1999 Court judgment records that prior to the amalgamation into one of the Palmerston North and Wanganui Districts, Mr Coffey had been the District Executive Officer at Palmerston North with responsibilities for both finance and human resources.[4] The outcome of the 1999 proceedings was that, after making a

[3] *Coffey v Commissioner of Police* [1999] 1 ERNZ 414 (EmpC).
[4] At 419.

number of preliminary findings, the Court adjourned the case for further consideration.[5]

[7] The present proceedings relate to Mr Coffey's position following a restructuring exercise undertaken as part of a Finance Group review called "Policing Excellence". Although there are no longer any live issues relating to the restructure itself, the issue that remains to be resolved is whether the Authority was correct in concluding that under the terms of his employment agreement, Mr Coffey is unable to be made redundant without his consent.

The 1999 agreement

[8] Mr Coffey's 1999 agreement contained provisions confirming that it constituted the entire agreement between the parties and that no modification or variation of its terms would be effective unless made in writing and duly signed by both parties. It also confirmed that Mr Coffey was bound by any policies or directions "from time to time promulgated by the Commissioner".

[9] An unusual feature of police individual employment contracts or agreements was that from time to time the employee would be offered variations so as to incorporate relevant changes that had been made to corresponding police collective employment contracts or agreements. These variations would be notified by letter and if they were acceptable, the employee was required to sign an "Acknowledgement and Acceptance" box and return the letter.

[10] The background to this practice was explained in the 1999 case referred to in [6] above. The Court noted that while there were other service organisations, the vast majority of members of the police were employed under a collective contract in which the New Zealand Police Association had been the bargaining agent for members of the police. The Court also noted that the collective employment contract was used as the basis for the police standard form individual employment contracts.[6] The individual contracts, in other words, were modelled on the equivalent provisions in the collective employment contract although they were not always identical.

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[5] At 447.
[6] At 414.

[11] The evidence before me established that that same practise continues. A witness for the plaintiff told the Court that these days there are approximately 13,000 employees in the police but only 790 are employed under individual employment agreements.

Restructuring

[12] Pursuant to the practice referred to in [9] above, cl 10 of Mr Coffey's 1999 agreement contained a specific provision relating to restructuring and redundancy which made reference to options available under a collective contract. Clause 10 stated:

> **10 TERMINATION OF CONTRACT IN THE EVENT OF RESTRUCTURING**
>
> In the event of the position ceasing to exist during the term of this contract through restructuring, the Appointee will have available to negotiate with the Commissioner the relevant options applying in the Police Non-Sworn Collective Employment Contract at the time the contract was agreed.

[13] There was no dispute that the relevant collective employment contract at the time of Mr Coffey's 1999 agreement was the Non-Sworn Members of Police Collective Employment Contract 1998 – 2000 made between the Commissioner of Police, the New Zealand Police Association and the New Zealand Public Service Association (the 1998 – 2000 CEC).

[14] The relevant provisions relating to restructuring and redundancy situations were set out in the restructuring and surplus staff provisions contained in Section 7 of the 1998 – 2000 CEC. Clause 7.9.6 in Section 7 of the 1998 – 2000 CEC provided:

> **7.9.6 Severance**
>
> Following agreement that the option of severance is to be made available (as per 7.7-7.8) and where it is mutually agreed on the individual ceasing service, payment will be made in accordance with 1 (a) and (b) or 2 (a) and (b) below.

[15] The Authority concluded that the restructuring and surplus staff provisions in Section 7 of the 1998 – 2000 CEC had been imported into the terms of Mr Coffey's

1999 agreement and that Mr Coffey's agreement was required before he could be made redundant.[7] Although one of the plaintiff's principal witnesses, Mr Peter Harvey, appeared to express some disquiet in his evidence about that proposition, there was no challenge to that particular finding.

[16] What the plaintiff does contend, however, is that in March 2009, Mr Coffey agreed to a new individual employment agreement (the revised 2009 IEA) and the relevant provisions in that agreement relating to restructuring and redundancy (cls 11.2 and 11.3) incorporated the provisions of a new collective agreement made under the Employment Relations Act 2000 (the 2008 – 2009 CEA). The relevant clauses in the revised 2009 IEA provide:

> **11.2 Other Employees (formally non-sworn)**
>
> In the event of a "non-sworn" employee's position ceasing to exist through review or restructuring, the provisions of Section 7 Review and Restructuring Provisions of the Non Sworn Employees of Police Collective Employment Agreement will apply.
>
> **11.3 Restructuring Agreement**
>
> The parties agree to review the restructuring agreement and provisions, and for any agreed outcome to be incorporated into the respective collective agreements by way of the variation provisions of the agreements.

[17] The plaintiff's case is that the reference to "Section 7" of the collective agreement in cl 11.2 of the revised 2009 IEA was a reference to Section 7 of the 2008 – 2009 CEA. Relevantly, cl 7.11 in Section 7 of the 2008 – 2009 CEA provided, inter alia:

> **7.11 Severance**
>
> a) Where an individual has been advised that they are surplus and they elect to take severance, and a termination date has been mutually agreed on the individuals ceasing service, payment will be made in accordance with 7.12 below.

[18] It is an important part of the plaintiff's case that the 2008 – 2009 CEA applied and that under cl 7.11 and the other provisions in Section 7, Mr Coffey did not have to agree before he could be made redundant as the result of a restructuring.

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[7] Authority determination, above n 1, at [25].

[19] For his part, Mr Coffey contends that at no stage did he ever agree to any variation of his 1999 agreement whereby the restructuring and redundancy provisions in the 2008 – 2009 CEA would apply to his situation. Mr Coffey's understanding at all material times was that cl 10 of his 1999 agreement continued to refer to the restructuring and redundancy provisions in Section 7 of the 1998 – 2000 CEC. Mr Coffey also maintained that, in any event, nothing turned on the finding as to which collective applied because the provisions in both the 1998 – 2000 CEC and the 2008 – 2009 CEA required his approval before his employment could be terminated on the grounds of redundancy.

Variation letters

[20] In [9] above I refer to the defendant's practice of incorporating relevant provisions from collective agreements into individual employment agreements by way of variations. The variations that were issued from time to time would be incorporated into the individual employment agreements by way of correspondence. A letter produced in evidence, dated 11 June 2007, which was written to Mr Coffey illustrates the practice that was followed. As the letter was a forerunner of a more significant letter in the present case and as the Court has been invited to draw certain conclusions based on differences in the wording of the two letters, I set out the terms of both letters in full:

> 11 June 2007
>
> DEREK COFFEY DCB003
> Tasman District
>
> Dear Derek
>
> **2006 INDIVIDUAL EMPLOYMENT AGREEMENT:**
> **OFFER OF VARIATION;**
> **SWORN AND NON-SWORN**
>
> According to our records you are a member in Band One or Band Two who is not a member of the service organisations (NZ Police Association, Police Manager's Guild or the NZ PSA (Public Service Association)) and you are therefore not covered by the Band One and Band Two Collective Employment Agreement which has recently been settled. (If you are interested, information about the collective wage round settlement is available on the Corporate Intranet under > *Services* > *HR* > *Employment Agreements).*

NZ Police is now offering a variation to sworn and non-sworn members in Band One and Two who are on individual employment agreements. The offer of variation is detailed in the attached "Terms of Variation" document. A key aspect of this variation is a wage adjustment as per schedule two effective from 1 December 2006 and further wage adjustments in December 2007 and July 2008.

If you wish to accept this offer we require you to sign the "Acknowledgement and Acceptance" box at the end of this letter. We have provided you with two copies of this letter in addition to the "Terms of Variation" so you can return a copy of your acceptance to Employment Relations, PNHQ for processing and retain a copy for your own records. If accepted by you, the attached "Terms of Variation" will vary the relevant sections of your current individual employment agreement. Your current individual employment agreement will be re-issued in due course, incorporating the terms of this variation and making other amendments in line with legislative requirements.

If you choose not to accept the attached "Terms of Variation", your individual employment agreement will remain unchanged and there will be no adjustment to your remuneration nor will any of the other terms and conditions detailed in the attached "Terms of Variation" apply to you.

You may elect to join the Sworn or Non-sworn Collective Agreement at any time. Only members of the NZ Police Association, Police Manager's Guild or the NZ PSA (Public Service Association) are covered by the Band One and Band Two Collective Employment Agreement. Should you wish to discuss membership with these unions you should contact your local HR Manager / Officer for details on how to contact the local union representative. If you do join a union and become covered by the Collective Employment Agreement, an individual employment agreement will no longer apply to you.

You are entitled to seek independent advice on this offer and are encouraged to do so. If you have any queries about this offer please contact your local HR Manager in the first instance.

If you decide to accept this offer, please sign the "Acknowledgement and Acceptance" box below and return the signed letter to your local HR manager.

Yours sincerely

Charlie Busby
HR Manager Employment Relations
Police National Headquarters

2006 INDIVIDUAL EMPLOYMENT AGREEMENT:
OFFER OF VARIATION;
SWORN AND NON-SWORN

ACKNOWLEDGEMENT AND ACCEPTANCE

I have read the "Terms of variation" attached to this letter and **agree** to the variation to my individual employment agreement.

By accepting this offer my remuneration will be adjusted and those terms and conditions detailed in the attached "Terms of Variation" that I am eligible for will apply to me.

I have been advised of my entitlement to seek independent advice on this offer.

signed: (Duly signed by Mr Coffey)

name (print):

designation (post title)

QID: DCB003 Date: 28/6/07

[21] The "Terms of Variation" attachment referred to in the third paragraph of the above letter was not included in the documentation produced in the agreed bundle but in evidence Mr Coffey explained that since 1999 certain variations to his individual employment conditions had been agreed upon and in each case he signified his agreement to such variations not only by signing and returning the letter itself but also by signing and returning to the HR section the actual "Terms of Variation" document. There was no evidence to the contrary. Nor was there any evidence that Mr Coffey was ever reissued with an individual employment agreement incorporating the terms of the 2007 variation as had been predicated in the final sentence of the third paragraph of the letter of 11 June 2007.

[22] The other letter, which is crucial to the plaintiff's case, follows the same general format as that set out in [20] above but there were some differences and they were highlighted in argument before me. The letter is dated 27 March 2009 and is again addressed to Mr Coffey at the Tasman District. It reads:

Dear Derek

2008 INDIVIDUAL EMPLOYMENT AGREEMENT:
OFFER OF VARIATION

According to our records you are a member in Band One or Band Two who is not a member of the service organisations (NZ Police Association, Police Manager's Guild or the NZ Public Service Association) and you are therefore not covered by the Bands One and Two Collective Employment Agreement which has recently been settled.

NZ Police is now offering a variation to sworn and non-sworn members in Bands One and Two who are on individual employment agreements (IEAs). The revised IEA is attached. However, the key changes in this offer are:

- an offer of 4% increase to remuneration bands effected from 1 December 2008.
- sick leave entitlement changed to 10 days per annum in each of the first two years of employment, with 15 days per annum after two years
- long service leave provisions amended, replacing the previous long service and retiring leave provisions

If you wish to accept this offer we require you to sign the "Acknowledgement and Acceptance" box at the end of this letter. We have provided you with two copies of this letter in addition to the IEA so you can return a copy of your acceptance to Employment Relations, PNHQ for processing and retain a copy for your own records.

If you choose <u>not</u> to accept this offer, your current individual employment agreement will remain unchanged and there will be no adjustment to your remuneration nor will any of the other terms and conditions detailed in the attached "Terms of Variation" apply to you.

You may elect to join the Collective Employment Agreement at any time. Only members of the NZ Police Association, Police Manager's Guild or the NZ PSA (Public Service Association) are covered by the Bands One and Two Collective Employment Agreement. Should you wish to discuss membership with either of these unions you should contact your local HR Manager/Officer 10,000 on how to contact the local union representative. If you do join a union and become covered by the Collective Employment Agreement, an individual employment agreement will no longer apply to you.

You are entitled to seek independent advice on this offer and are encouraged to do so. If you have any queries about this offer please contact your local HR Manager in the first instance.

If you decide to accept this offer, please sign the "Acknowledgement and Acceptance" box below and return the signed letter to your local HR Manager.

Yours sincerely

Charlie Busby
National Manager: Employment Relations
Police National Headquarters

[23] The box at the end of the letter stated:

2008 INDIVIDUAL EMPLOYMENT AGREEMENT:
OFFER OF VARIATION;

ACKNOWLEDGEMENT AND ACCEPTANCE

I have read the offer and **agree** to the individual employment agreement.

By accepting this offer my remuneration will be adjusted and those terms and conditions detailed in the IEA that I am eligible for, will apply to me.

I have been advised of my entitlement to seek independent advice on this offer.

signed: (Duly signed by Mr Coffey)

name Derek Coffey

designation Business Services Manager

QID: DCB003 Date: 31/3/09

[24] The fourth paragraph of the letter refers to an attached "Terms of Variation" but there appears to have been no such attachment. Certainly none was produced. The only attachment to the letter as produced is a half page "Remuneration Schedule" setting out proposed remuneration adjustments to Mr Coffey's salary. Mr Coffey accepted, however, that he did receive with the letter a copy of the revised 1999 IEA referred to in the second paragraph but he did not sign that document. He said that he did not see it as a new individual employment agreement but as "a template of variations" to his existing 1999 agreement.

The Authority's findings

[25] In essence, the Authority determined that Mr Coffey continued to be employed under his 1999 agreement, subject to those variations that had been agreed to through correspondence, and that his position in the event of restructuring continued to be governed by the provisions of Section 7 of the 1998 – 2000 CEC. As the Authority summed it up:

> [37] Mr Coffey was covered by the terms of an individual employment agreement. The 1998 – 2000 terms were imported because there was no variation revoking that arrangement notwithstanding what happened with subsequent collective employment agreements. The 1998 – 2000 terms were personal to Mr Coffey. The Commissioner was required to get mutual agreement on the option of termination for the reason of severance. That never happened.

[26] The reasons why the Authority reached the conclusion that the restructuring and severance provisions in the 2008 – 2009 CEA did not apply to Mr Coffey's situation were set out in para [25] of its determination. In summary and relevantly, the Authority appeared to base its conclusion on the following findings:

(i) There was no express revocation of the 1998 – 2000 CEC and so the restructuring and redundancy provisions contained in that document continued to apply to Mr Coffey;

(ii) Mr Coffey never signed the terms of the 2008 – 2009 CEA and, hence, the collective agreement that applied to him continued to be the 1998 – 2000 CEC because, in terms of cl 10 of his 1999 agreement (see [12] above) it was the collective contract "at the time the contract was agreed";

(iii) Although the letter of 27 March 2009 gave Mr Coffey the opportunity of electing to join a union, he did not do so which indicated his intention to protect the terms of the 1998 – 2000 CEC which applied at the time has contract was agreed;

(iv) There was no date attached to the collective and Mr Coffey said that he never saw it. (This is presumably a reference to the fact that the collective referred to in cl 11.2 of the 2009 revised IEA (see [16] above) was to Section 7 of an undated collective). In other words, there was no specific reference to the 2008 – 2009 CEA and Mr Coffey could therefore have presumably assumed that the reference to "Section 7" was a reference to Section 7 of the 1998 – 2000 CEC.

(v) The "key changes" listed in para 2 of the "Offer of Variation" letter of 27 March 2009 (see [22] above) did not identify any change to the position regarding termination in the event of a restructure;

(vi) The police initially accepted that the terms of the 1998 – 2000 CEC applied but changed their mind as the matter progressed before the Authority.

[27] There were two matters arising out of the Authority's determination which counsel for both parties drew to the Court's attention. They appear to be oversights and nothing hinges on them but as this is a non de novo challenge, it is appropriate to have them clarified. First, the Authority referred in para [6(ii)] of its determination to the "1999 – 2000 collective employment agreement" and in para [24] to the "1999 – 2000 CEC". Counsel submitted, and the Court agrees, that the references should have been to the 2008 – 2009 CEA. Secondly, the Authority made a reference in para [33] to Mr Coffey's "former superior in charge". Counsel submitted, and again the Court agrees, that the reference should have been to his "former second in charge".

Submissions

[28] Counsel for the plaintiff, Mr Churchman QC, submitted in relation to the point raised by the Authority about the absence of any express revocation provision in the variation ([26(i)] above), that it was not the plaintiff's practice to expressly revoke previous agreements. He also stated that collective agreements "can live on as the basis for individual terms of employment but only until a new collective is executed".

[29] Mr Churchman submitted that the wording of the "variation document" (the letter of 27 March 2009 ([22] above)) set out clearly that if the offer contained therein was not accepted then the terms and conditions of Mr Coffey's employment would remain unchanged but if the offer was accepted then the new individual employment agreement would apply. Mr Churchman contended that it was not necessary for the letter to state that the revised 2009 IEA specifically revoked

Mr Coffey's prior employment agreement because that was the effect of the fourth paragraph of the letter and the wording in the acknowledgement and acceptance box at the end of the letter.

[30] In relation to the Authority's findings that there was no date attached to the collective agreement ([26(iv)] above), Mr Churchman stressed that cl 11.2 of the revised 2009 IEA referred not to a collective employment "contract" but to a collective employment "agreement". The implication was that this change of terminology should have alerted Mr Coffey to the fact that what was being referred to was not his "historical contract signed prior to the enactment of the Employment Relations Act 2000".

[31] As to the point made by the Authority that Mr Coffey had not seen the 2008 – 2009 CEA, Mr Churchman stressed that the collective was available on the police intranet and Mr Coffey, who had claimed significant HR experience, would have known where to find it.

[32] In response to the Authority's reliance on the fact that the changes to the restructuring provisions had not been listed in the "key changes" set out in the letter of 27 March 2009 ([22] above), Mr Churchman submitted that unlike the other letters of variation Mr Coffey had signed over the years, the variation contained in the March 2009 letter was different in that "it contained a new IEA (and corresponding CEA) to replace any previous agreement". Counsel also stressed that Mr Coffey was responsible for reading and clarifying any matters in the variation letter and accompanying revised 1999 IEA, and the variation letter encouraged him to seek independent advice on the offer.

[33] Mr Churchman noted that the wording in the acknowledgement box of other letters of variation referred only to an offer of a variation to "my individual employment agreement" unlike the March 2009 letter of variation which, counsel submitted, replaced the agreement entirely.

[34] The position regarding the observation made by the Authority that the plaintiff's case had changed ([26(vi)] above) was the subject of conflicting evidence

and submissions. The Authority noted that initially the Police accepted that the restructuring provisions in the 1998 – 2000 CEC applied to Mr Coffey but they changed their mind as the matter progressed.[8]

[35] The background to this particular finding appears to relate to statements made in an exchange of correspondence between counsel for the respective parties in early 2013. In a letter to Mr Churchman dated 22 February 2013, Mr O'Sullivan requested a copy of the revised 2009 IEA and the 2008 – 2009 CEA. In his letter in response dated 26 February 2013, Mr Churchman accepted that Mr Coffey was employed under the 1999 agreement which incorporated the restructuring provisions in the 1998 – 2000 CEC but, significantly, he denied that Mr Coffey's employment conditions had been varied in 2008 or that the "current CEA" (which could only be a reference to the 2008 – 2009 CEA had any application to Mr Coffey.

[36] The statements made in Mr Churchman's letter of 26 February 2013 are, of course, the direct antithesis of the contentions made subsequently by the plaintiff in both the Authority and in this Court. There was an explanation for the inconsistency that was put forward in evidence by one of the witnesses for the plaintiff but I did not find it particularly convincing.

[37] In dealing with this particular aspect of the case in his submissions in response, Mr O'Sullivan stated:

> 11. Evidence was given regarding the individual employment agreement template which seems to have been sent out with the 2008 individual employment agreement offer of variation. That document is dated 27 March 2009. The template employment agreement is not signed, does not have Mr Coffey's name on it, and purports to be in effect from 1 December 2008 to 30 November 2009. If this document was to make changes to Mr Coffey's employment arrangement, especially severance, then it would have had the effect of backdating Mr Coffey's severance arrangement by over three and a half months. It is submitted that could never have been the intention. The simple fact is that Police did not consider this provision altered Mr Coffey's individual employment agreement to the extent the 2008 – 2009 provisions applied rather than the 1998 – 2000 provisions. In fact following Mr Coffey's dismissal, Police wrote through their counsel

[8] At [25(vii)].

> "*The 1998 – 2000 Collective Employment Contract was the document in force at the time Mr Coffey signed his employment agreement on 11 October 1999. …"*
>
> The letter makes it clear that on 26 February 2013 Police were not arguing the 2008 -- 2009 Collective had any application to Mr Coffey. It is difficult to see how this position could change simply because four weeks before the hearing in the Authority Mr Coffey found the template and forwarded it to Police as part of the disclosure process.

[38] Mr O'Sullivan stressed in his submissions that Mr Coffey had not signed any variation importing the severance terms of any collective other than the 1998 – 2000 CEC and that the revised 2009 IEA that had been sent to Mr Coffey remained unsigned and it did not even have Mr Coffey's name on it. Mr O'Sullivan also referred to the letter of 22 March 2009 containing the offer of variation ([22] above) and highlighted the fact that the "key changes" to Mr Coffey's employment agreement listed in that letter did not make reference to any variation of his restructuring and severance conditions.

[39] Mr O'Sullivan made reference to s 70 of the Policing Act 2008 which provides, inter alia:

> The Commissioner may at any time, subject to this Act and the conditions of employment set out in any applicable employment agreement,
>
> (a) suspend any Police employee from that employee's employment, with or without pay;
>
> (b) remove any Police employee from that employee's employment.

[40] Mr O'Sullivan stressed that before Mr Coffey's employment could be terminated, the Commissioner was required under s 70 to not only ensure that any termination was in accordance with that Act but also in accordance with the conditions of employment set out in his employment agreement.

Discussion

[41] In his closing submissions, Mr Churchman summarised the plaintiff's position on the principal issue before the Court in these terms:

> 39. NZ Police's position on the issues before the Court are that:

(a) The defendant's applicable terms and conditions are the 2008 – 2009 IEA and CEA …

[42] The difficulty with that submission is that it is inconsistent with the pleadings. The relevant provision in para 10 of the plaintiff's statement of claim states:

10. The relief sought by the plaintiff are findings by this Court that:

10.1 the defendant's terms and conditions of employment are as set out in his individual employment agreement dated 11 October 1999 as modified by the subsequent written variations …

[43] Parties are bound by their pleadings and I proceed, therefore, on the basis that the plaintiff accepts the Authority's findings that Mr Coffey's applicable terms and conditions of employment are those set out in his 1999 agreement modified by subsequent written variations. The principal issue before the Court, therefore, is whether the agreed variations to Mr Coffey's 1999 agreement include the restructuring and severance provisions contained in the 2008 – 2009 CEA.

[44] The law relating to variations of employment agreements is relatively straightforward. The learned authors of *Employment Law in New Zealand* state:[9]

> It is fundamental that a variation to an employment agreement, as with any contract, requires the genuine consent of the parties, whether that variation takes the form of alteration to an existing term or condition or the imposition of a new term.
>
> …
>
> There will often be a dispute between the parties as to whether a contract variation has occurred, as opposed, for instance, to really sedation or recession. In this context, the parties' intentions, the width of the changes and the nature of those changes will all be relevant considerations.

[45] In the recent case of *Teat v Willcocks* the Court of Appeal, in considering whether a contract had been varied, said:[10]

> Although the position is not yet settled, we consider that consideration in the form of the benefit "in practice" is sufficient to support a binding variation. Further, we are attracted to the alternative view expressed by this Court in

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[9] Gordon Anderson with John Hughes *Employment Law in New Zealand* (LexisNexis, Wellington 2014) at [7.7].

[10] *Teat v Willcocks* [2013] NZCA 162, [2014] 3 NZLR 129 at [54].

> *Antons Trawling Co Ltd v Smith* that no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure. This seems to us to reflect the reality of what happened in the present case – a variation was proposed and willingly accepted, and the parties proceeded on that basis. In the context of an existing agreement supported by consideration, that seems to us to be sufficient to constitute a binding variation.

[46] In addition to the legal principles referred to above there is the overriding statutory requirement in s 4 of the Employment Relations Act 2000 for parties to an employment relationship to deal with each other in good faith. That requirement is specifically reinforced by the "Code of good faith for employment relationships in relation to provision of services by Police" which was inserted as Sch 1C to the Employment Relations Act 2000 by virtue of s 122 of the Policing Act 2008.

[47] The good faith requirement applies with all its connotations to an employer seeking to make a variation to an employee's individual employment agreement.[11] An employer cannot impose a variation unilaterally. A variation sought by an employer requires the genuine consent of the employee. It is axiomatic, however, that an employee cannot agree to a variation to an employment agreement unless he or she has full knowledge of what the variation is all about and is given proper opportunity of obtaining independent advice on the matter.

[48] The most striking feature about the contents of the letter dated 27 March 2009 (see [22] above) which offered Mr Coffey a variation to his 1999 agreement was that in the second paragraph it referred to an attachment, namely the revised 2009 IEA, and then it went on to set out in the letter the "key changes" in the offer of variation. But nothing is said in those key changes about any proposed changes to the restructuring and severance provisions in the 1998 – 2000 CEC which applied to Mr Coffey.

[49] Mr Harvey, who retired from the police in October 2013 after an impressive career in industrial relations, responsibly accepted in cross-examination that the proposed changes to Mr Coffey's restructuring and severance employment conditions "ideally" should have been included in the key changes set out in the letter of 27 March 2009. With respect, that is probably an understatement.

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[11] Employment Relations Act 2000, s 4(4)(ba).

[50] The author of the letter in question, Mr Charlie Busby, did not give evidence before me but when he took it upon himself to list in the letter the "key changes" in the proposed variations to Mr Coffey's 1999 agreement, he assumed the employer's obligation to act in good faith. However, by listing only the advantageous changes from the employee's perspective and failing to include any reference to the significant disadvantageous change to the employee's position upon restructuring, Mr Busby materially and significantly misrepresented the position.

[51] Mr Churchman submitted, quite correctly, that Mr Coffey was experienced in HR matters and Mr Busby's letter encouraged him to obtain independent advice on the offer. Mr Churchman also submitted that it was open to Mr Coffey to peruse the 2008 – 2009 CEA on the intranet to find out for himself what it said.

[52] These submissions, however, overlook the important point that there was nothing contained in the letter of 27 March 2009 which would have given Mr Coffey any cause to incur the expense of consulting a solicitor about what was proposed or, for that matter, given him reason to check out on the intranet the terms of the collective agreement which, of course, he was not a party to. Moreover, there was no specific reference made in the letter of 27 March 2009 to the 2008 – 2009 CEA and there was no suggestion made that Mr Coffey should inspect the document. The position in this regard can be compared with Mr Busby's letter of 11 June 2007 ([20] above) which pointed out in the first paragraph that information about the collective wage round was available on the intranet.

[53] Mr Churchman submitted that cl 11.2 of the revised 2009 IEA referred to Section 7 of the Non-Sworn Members of Police Employees' Collective Employment Agreement and he stressed that Mr Coffey should have understood from the use of the word "Agreement" that the collective being referred to was not the earlier collective contract. I do not accept, however, that in itself the use of the word "Agreement" should have caused Mr Coffey to make additional inquiries about what was being proposed. The earlier letter of 11 June 2007 had also referred to a collective agreement.

[54] Furthermore, there was no date given for the collective agreement referred to in cl 11.2 of the revised 2009 IEA and the reference to "Section 7" in that document could just as easily have been a reference to Section 7 of the 1998 – 2000 CEC, which was the corresponding section in that earlier collective dealing with restructuring. In any event, the overriding consideration in my view is that nothing whatsoever was said in the key changes listed in the letter of 27 March 2009 to alert Mr Coffey to the fact that a variation was being proposed to the restructuring provisions of his 1999 agreement.

Conclusions

[55] I have considered the evidence and all of Mr Churchman's submissions carefully but I have not been persuaded that the Authority was wrong in concluding as it did that there never had been any agreed variation to the original restructuring and severance provisions incorporated into Mr Coffey's 1999 agreement. For these reasons, the plaintiff's non de novo challenge is dismissed.

[56] The defendant is entitled to costs. If this issue cannot be agreed upon between the parties then Mr O'Sullivan is to file submissions within 21 days of the date of this judgment and Mr Churchman will have a further 21 days from receipt of Mr O'Sullivan's submissions in which to file submissions in response.

A D Ford
Judge

Judgment signed at 2.15 pm on 22 October 2014