

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA116/2021
[2022] NZCA 342**

BETWEEN **COMMISSIONER OF POLICE**
 Appellant

AND **NEW ZEALAND POLICE ASSOCIATION**
 INCORPORATED
 Respondent

Hearing: 5 July 2022

Court: French, Clifford and Dobson JJ

Counsel: P J Radich QC, H P Kynaston and L E S G Roberston for
 Appellant
 S L Hornsby-Geluk and B J Locke for Respondent

Judgment: 28 July 2022 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed. The question of law submitted for determination by this Court, namely:

Are generic rotational positions, whether agreed between Police and employees or otherwise, and whether through an expression of interest process or otherwise, able to be established only in accordance with s 65(1)(d)(v) or can they be established under s 18 of the Policing Act 2008?

Is answered as follows:

Section 65 of the Policing Act 2008 is not a provision that is contrary to the powers of the Commissioner of Police as an employer, as provided for in s 18(4) of that Act.

B We make no award of costs.

REASONS OF THE COURT

(Given by Dobson J)

[1] The appellant (the Commissioner) and the respondent (the Association) have had a relatively long-standing dispute over the scope of the Commissioner's obligation as employer, to pay employees reimbursement for motor vehicle expenses incurred when travel for work purposes involves greater travel costs for employees than when they are commuting from their homes to their initial place of work (MVR).

[2] After a ruling from the Employment Relations Authority on disputes raised between the parties on this issue¹ the Commissioner commenced a challenge in the Employment Court on a number of issues of interpretation that had arisen in the course of the dispute. In February 2021 the Employment Court issued a reserved decision ruling on the questions posed for it, essentially in favour of the Association.²

[3] This Court is precluded from hearing appeals from the Employment Court on questions of law concerning the construction of individual or collective employment agreements, all other questions of law requiring leave.³ Although the Employment Court judgment focussed primarily on the scope of the Commissioner's obligations to pay MVR pursuant to the relevant provision in the collective employment agreement, the reasoning in the judgment included a finding on the scope of the power of the Commissioner as employer to employ personnel on terms stipulating that there would be generic rotation of their positions with work of a variety of types likely to be undertaken at a number of locations. As we explain below, the judgment interpreted provisions in the Policing Act 2008 (PA) as limiting the circumstances in which the Commissioner could contract with employees to rotate their duties in this way.

¹ *New Zealand Police Association Inc v Commissioner of New Zealand Police* [2019] NZERA 505.

² *Commissioner of Police v New Zealand Police Assoc Inc* [2021] NZEmpC 8, [2021] ERNZ 21 [Employment Court judgment].

³ Employment Relations Act 2000, s 214(1).

[4] The Commissioner sought leave to appeal on a question of law raised by the Employment Court's interpretation of the relevant provisions in the PA. The Commissioner sought to argue that s 18, a more general provision in the PA addressing the Commissioner's powers as an employer, overrode the specific exception in s 65 from usual public sector employment processes that provide for rotation of existing employees.

[5] Over the Association's opposition this Court granted leave to appeal on a question of law on interpretation of the PA posed in the following terms:⁴

Are generic rotational positions, whether agreed between Police and employees or otherwise, and whether through an expression of interest process or otherwise, able to be established only in accordance with s 65(1)(d)(v) or can they be established under s 18 of the Policing Act 2008?

Context in which the question of interpretation arises

[6] For many years the terms of collective agreements for Police employees have included a provision for the Commissioner to reimburse them for MVR. The circumstances generating employees' claims for MVR included those in which employees were re-located to a different station than the one at which they worked.

[7] In the earlier years in which the MVR applied, relocations of Police employees that were likely to trigger claims for such reimbursement were substantially conducted pursuant to the Commissioner's power to do so under s 65 of the PA. That section provides:

- 65 Power to temporarily assign, second, and locate employees and other persons within Police**
- (1) The Commissioner may, subject to any applicable employment agreement, but without complying with sections 59(1) and 60(1)—
- (a) assign a Police employee to a temporary position in the Police:
 - (b) assign a person to a position in the Police:
 - (c) second a Police employee to a position with another employer:

⁴ *Commissioner of Police v New Zealand Police Association Inc* [2021] NZCA 299 [Leave judgment].

- (d) relocate a Police employee—
 - (i) on the graduation of that person from initial recruit training; or
 - (ii) within the district in which the employee is stationed, and at the employee's existing level of position, to meet Police requirements, after considering the employee's circumstances and the merit of all employees who have indicated an interest in the position; or
 - (iii) on the return of that person to duty from an overseas assignment, leave without pay, parental leave, or other special leave; or
 - (iv) to fill a vacancy in a temporary international assignment, after considering all employees who have indicated an interest in the position; or
 - (v) in order to rotate an employee within the district in which he or she is stationed; or
 - (vi) for substantial welfare or personal reasons:
 - (e) locate a person who is rejoining the Police as an employee.
- (2) Subsection (3) applies if—
- (a) the Commissioner assigns a person to a temporary position under subsection (1)(a) or assigns a person to a position under subsection (1)(b) without complying with sections 59(1) and 60(1); and
 - (b) the person has occupied that position or been on that secondment for a period of at least 14 months.
- (3) The position occupied, or the secondment, must be considered to have been vacated by that person and, subject to any applicable employment agreement, any further assignment to or secondment of that position must be dealt with in compliance with sections 59(1) and 60(1).

[8] Utilising the procedure under s 65 frees the Commissioner from the obligation to comply with ss 59 and 60 of the PA. Those sections provide:

59 Appointments on merit

- (1) In making an appointment under section 18, the Commissioner must give preference to the person who is best suited to the position.
- (2) This section is subject to sections 64 and 65.

60 **Obligation to notify vacancies**

- (1) If the Commissioner intends to fill a position that is vacant or is to become vacant in the Police, the Commissioner must, wherever practicable, notify the vacancy or prospective vacancy in a manner sufficient to enable suitably qualified people to apply for the position.
- (2) This section is subject to sections 64 and 65.

[9] Since at least September 2014 the Association has expressed concern to the Commissioner about a change to the practice of rotating employees. This arose because appointments were being made for “generic rotational positions” on terms where the employee may not have an initial place of work stipulated in her or his conditions of engagement so that on a rotation or relocation to a different location, the employee would arguably not qualify for MVR. The Commissioner claims to have the power to employ on these terms in reliance on s 18 which provides:

18 **Commissioner may appoint Police employees**

- (1) The Commissioner may from time to time appoint the people that the Commissioner thinks necessary for the efficient exercise and performance of the powers, functions, and duties of the Police.
- (2) The power conferred by subsection (1) includes power to appoint people on an acting, temporary, or casual basis or for any period that the Commissioner and the employee agree.
- (3) The Commissioner may assign to a Police employee any level of position that the Commissioner considers appropriate.
- (4) Unless expressly provided to the contrary in this Act, the Commissioner has all of the rights, duties, and powers of an employer in respect of Police employees.

[10] The Commissioner’s power to employ personnel on such generic rotational terms became relevant to the Employment Relations Authority determination at the outset of the present proceedings, and then the appeal to the Employment Court, resulting in the judgment giving rise to the question of law to be considered in this appeal.

[11] The issue between the parties is now much broader than whether the Commissioner is liable to pay MVR to employees whose work is relocated from the police station or other facility at which they commenced work. Widespread adoption of generic rotational terms instead of appointing employees to a specific station has

real significance for the employment conditions of the employees and affects the relative scope of the Commissioner's powers as employer. Not the least of these is the prospect of the Commissioner being able to avoid compliance with the obligations in ss 59 and 60 of the PA.

[12] The full import of the transformation in the issue between the parties seems not to have been addressed when leave was sought to argue a question of law in this Court. Indeed the implications of the extent to which the issue raised by the question of law had evolved was not squarely addressed in the written submissions of the parties on the appeal.

The Employment Court judgment

[13] It was argued for the Commissioner in the Employment Court that s 18(4) empowered the Commissioner to negotiate the employment of personnel on any terms that he or she proposed, provided that those terms were agreed to by the personnel being employed, and that the Commissioner's conduct complied with his or her obligations as an employer under Part 4 of the PA.

[14] After reviewing some of the provisions in Part 4 of the PA and considering the terms of s 65 in detail, the Judge held that s 65 constituted one of the provisions referred to in s 18(4) so that the powers of an employer that the Commissioner would otherwise have are constrained by the terms of s 65 when dealing with employees on matters coming within s 65. The Judge recorded his finding as follows:⁵

[98] The power of appointment or engagement of employees is spelt out in considerable detail in the various provisions I have reviewed. Parliament has defined the power of appointment with some specificity. I find s 65 is an example of a provision which falls within the proviso contained in s 18(4). It cannot be construed as allowing the Commissioner to engage employees in some other manner, as he or she might think fit. I do not agree that s 18(4) allows for "generic" rotational positions.

[15] The consequence of interpreting the statutory provisions in that way was that the Employment Court ruled that any rotation of employees had to comply with the limits in s 65(1)(d)(v).⁶ The judgment went on to provide interpretation of provisions

⁵ Employment Court judgment, above n 2.

⁶ At [99].

in the collective employment agreement that have no bearing on the question of law before this Court.

Submissions on appeal

[16] Mr Radich QC submitted for the Commissioner that the Employment Court had wrongly interpreted ss 18 and 65 of the PA by treating s 65 as an “expressly provided” constraint on the scope of the Commissioner’s power as an employer in s 18(4). Rather, on the Commissioner’s approach s 65 was a limited exception to the obligations that otherwise apply under ss 59 and 60 to require appointments to be made on merit and, wherever practicable, for vacancies to be notified sufficiently for suitably qualified people to apply for the position. As such, s 65 was not a constraint on the Commissioner’s powers as an employer, but rather an exception to the obligations imposed under ss 59 and 60.

[17] For the Association, on the narrow question of the meaning of the words used in s 18(4) and in s 65, Mx Hornsby-Geluk accepted that s 65 did not constitute one of the express provisions to the contrary of the power vested in the Commissioner by s 18(4). Rather, s 65 defined an exception to the general obligations imposed on the Commissioner under ss 59 and 60. It accordingly had the effect of freeing the Commissioner from the usual obligations to make appointments on merit and to notify vacancies, but only in the limited circumstances that were provided for moving existing employees about within the Police as stipulated in s 65.

[18] However, effectively submitting that the Employment Court was right for the wrong reasons, Mx Hornsby-Geluk maintained a submission that s 65 still operated as a constraint on the terms upon which the Commissioner could employ personnel.

[19] It was submitted for the Association that all appointments by the Commissioner had to be to a “position” so that a generic rotational position would be unlawful. Sections 59, 60 and 61 all contemplate employment necessarily being for a position.

[20] Further s 65 of the Employment Relations Act 2000 requires every individual employment agreement to include details such as a description of the work to be performed by the employee and an indication of where work is to be performed.

Arguably the obligations applying under that section of the Employment Relations Act, and the nature of the employment relationship contemplated under the PA required the Commissioner to provide more specific details on the engagement of any employee than would be reflected in any employment to a generic rotational position.

[21] It was evident during argument that the competing positions raised issues beyond the question of law for determination on the present appeal. After the limited scope of the question of law raised on the appeal had been canvassed with counsel for both parties, Mx Hornsby-Geluk applied for the appeal to be dismissed on the ground that the question depended upon an illegitimate proposition in that it presumed the legitimacy of the concept of appointing employees to generic rotational positions when that concept is not adequately defined, and the Association challenges the lawfulness of the Commissioner being entitled to employ staff on such terms in any circumstances.

[22] As answers to questions posed by us of Mr Radich had demonstrated, there is no evidence of identifiable parameters on the level of generality of the terms of generic rotational positions. It was submitted for the Association that it was misconceived to pursue a determination on the question because of that inadequacy, and the appeal ought to be dismissed allowing the parties to recast the terms of the issue between them, ideally on an agreed set of test cases.

Analysis

[23] In this Court's decision granting leave the concept of generic rotational positions was defined as follows:⁷

... where Police employees are appointed to positions on the basis that they will move through different portfolios, work groups and potentially places of work on an ongoing basis.

[24] An affidavit of Mr Gregory Fleming, an industrial advocate with the Association, opposing the grant of leave, focussed primarily on the terms of the collective agreement and the Association's concern that the Commissioner was

⁷ Leave judgment, above n 4, at [6].

breaching those terms in relation to the MVR.⁸ His reference to the appointment of employees into “generic positions” did not suggest a dispute with the scope of generic positions that might be proposed by the Commissioner.

[25] We do not accept Mx Hornsby-Geluk’s submission that a lack of adequate definition of what comprises generic rotational positions, or a challenge to whether employment on any such terms is within the lawful powers of the Commissioner should justify a refusal to answer the relatively narrow issue of statutory interpretation that is raised by the question of law on which leave was granted.

[26] As is conceded for the Association, on the terms of ss 18 and 65 of the PA, the latter does not constitute an express provision applying to constrain the rights of the Commissioner as an employer that are provided for in s 18(4) of the Act.

[27] Instead, s 65 operates as an exception to the obligations otherwise imposed on the Commissioner under ss 59 and 60. The result is that the Commissioner is free of those obligations where temporarily assigning, seconding or relocating employees under s 65. The consequence is that whatever other constraints might apply to the otherwise general terms of the Commissioner’s power provided in s 18(4) of the PA, the provisions of s 65 are not one of them.

[28] It follows that to whatever extent, if any, it is otherwise lawful for the Commissioner to employ staff by appointing them to generic rotational positions, the Commissioner’s powers to do so under s 18(4) are not subject to a requirement to comply with s 65 of the PA.

[29] We do not express any view on the submission for the Association that the existence of the procedure provided for in s 65 should in any event be treated as a constraint on the Commissioner’s powers generally to employ staff on whatever terms might be agreed. Those submissions extend to arguments that such terms cannot be invoked as a general practice because that would subvert the statutory purpose of the obligations in ss 59 and 60 and possibly arguments that aggregating such sweeping powers of redeployment to the Commissioner could in circumstances become

⁸ Affidavit of Gregory John Fleming, sworn 24 March 2021.

inconsistent with the Commissioner's statutory obligations of good faith and to be a good employer.⁹ We note that the obligations in ss 59 and 60 have wider application generally in state sector employment.

[30] As counsel were inclined to agree by the end of the hearing, these significant issues need to be addressed squarely and are not ones that can be treated as coming within the question of law as posed. Given the extent to which the issue of law has moved the dispute on, we make no order that the matter be remitted to the Employment Court.

[31] For the avoidance of doubt we answer the question in the terms we do without expressing any view as to whether employment to generic rotational positions, whatever scope is attributed to that expression, is lawful for the Commissioner.

Result

[32] We answer the approved question of law, as set out above at [5], as follows:

Section 65 of the Policing Act 2008 is not a provision that is contrary to the powers of the Commissioner of Police as an employer, as provided for in s 18(4) of that Act.

In doing so, we allow the appeal.

Costs

[33] The Commissioner sought costs in the event that the question of law was answered in his favour. The Association submitted that costs ought to lie where they fall and that, if the Association's position was not upheld, it ought not to be liable for costs given the misconceived terms on which the question of law had now been argued.

[34] As the arguments played out, the appeal was appropriately seen as a test case. It appears not to have resolved a significant issue that is likely to require resolution in another forum. We did not see the form in which the Commissioner pursued a question of law as disentitling him to costs. However, nor do we consider the Association ought

⁹ See Policing Act 2008, s 58; Public Service Act 2020, ss 73 and 74 and Employment Relations Act 2000, s 4.

to bear liability for costs in what is appropriately seen as a form of test case.
Accordingly we make no order as to costs.

Solicitors:

Buddle Findlay, Wellington for Appellant

Dundas Street Employment Lawyers, Wellington for Respondent