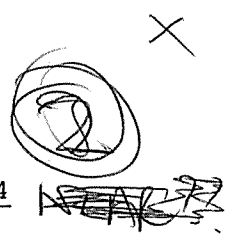


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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.130/84

No Special
Consideration

548

IN THE MATTER of Part I of the Judicature
Amendment Act 1972

AND

IN THE MATTER of an application for review

BETWEEN DAVID WILLIAM TYERS of
Taumarunui, Police Constable
Applicant

AND KEN THOMPSON of Wellington,
Commissioner of Police
First Respondent

AND MALCOLM THOMAS CHURCHES
of Wellington, Deputy
Commissioner of Police
Second Respondent

AND THE ATTORNEY GENERAL (sued
in respect of the
New Zealand Police)
Third Respondent

Hearing 23 May 1984
Counsel J Milne for Applicant
C J Thompson and P J Mears for Respondents
Judgment 24 May 1984

(ORAL) JUDGMENT OF DAVISON C.J.

As this is a case which involves substantial issues of fact, I decided that having had the opportunity to review the evidence last night, it is appropriate that I should give my judgment on the matter immediately.

Since May 1979 Constable Tyers (whom I will refer to as "the applicant") has been stationed at Taumarunui. On 16 April 1984 at the direction of Deputy Commissioner Churches, he was ordered to transfer from Taumarunui to the Auckland District.

The implementation of that transfer was delayed because of representations made on his behalf by the New Zealand Police Association Incorporated (which I shall refer to as "the Association"). But by 10 May 1984 when it became apparent that the direction to transfer would stand, the applicant filed in the High Court an application under the Judicature Amendment Act 1972 for a review of the decision of the Deputy Commissioner.

An application was then made for an interim order that the decision of the Deputy Commissioner ordering the transfer be not implemented until the further order of the Court and such an order was made on 14 May 1984.

THE APPLICATION

The grounds upon which the applicant seeks a review of the decision of the Deputy Commissioner are:

- (a) The Deputy Commissioner exercised the power of transfer under Regulation 32 of the Police Regulations 1959 invalidly for the reason that such power was used as, or substantially as, or in lieu of, disciplinary measures against him and was therefore exercised:
 - (i) for an improper or irrelevant purpose and/or
 - (ii) in such manner as to nullify the disciplinary provisions in the Police Act 1958 and the Police Regulations 1959, thereby defeating statutory rights and remedies and abrogating procedural safeguards.
- (b) The Deputy Commissioner also exercised his power of transfer under Regulation 32 unfairly and therefore invalidly in that it failed to give the applicant any opportunity to answer such allegations as were made against him in a memorandum dated 28 December 1983 from the District Commander at Wanganui to the national headquarters of the New Zealand Police.

- (c) The Deputy Commissioner also exercised his power of transfer under Regulation 32 upon certain mistakes of fact, which are set out in paragraph 7 of the amended statement of claim.

THE FACTUAL BACKGROUND

The Taumarunui Police Station is a small station manned by three non-commissioned officers and eight constables. The non-commissioned officers consist of a Senior Sergeant, a Sergeant, and a Detective Sergeant.

During recent years there have been various problems at the Taumarunui Police Station and at the end of April 1983 the former officer-in-charge there having been transferred, Senior Sergeant Brand was transferred to Taumarunui to take charge of that station. That transfer followed some fairly serious internal staff problems which had been investigated by two senior police officers late in 1982 and it was as a result of their investigations that the previous officer-in-charge was transferred and Senior Sergeant Brand placed in charge at Taumarunui. The police authorities at the time considered that it was necessary to have a firm and able officer to take charge of that station.

The problems of the past which had resulted in the change of command at Taumarunui station, however, did not fade away. On 6 December 1983 Senior Sergeant Brand felt constrained to write to his superiors at Wanganui a report involving a minor incident concerning the alleged shooting of ducks, but which matter had brought the applicant into sharp conflict with Senior Sergeant Brand over the nature of the charges, if any, which should be laid against the alleged offender. The outcome was a meeting at which Senior Sergeant Brand, the Sergeant, the Detective Sergeant and the applicant were all present when the incident was discussed. But, arising out of those discussions, the applicant made it quite plain to Senior Sergeant Brand that he did not trust him.

Those matters were reported to the District Office by Senior Sergeant Brand but, having considered that report, Superintendent Dean, the District Commander, decided to take no further action in the matter at that stage. That, however, was not to be the end of the matter. Copies of Senior Sergeant Brand's report were sent to the applicant, the Sergeant, and the Detective Sergeant. The applicant took exception to the report and requested a personal interview with Superintendent Dean. That took place on 20 December 1983 and, during the course of the interview, the applicant made it quite plain that he disagreed with the report. He acknowledged that he had told Senior Sergeant Brand that he did not trust him and the Superintendent informed the applicant that that was a very serious allegation and that he expected the applicant to back that allegation up with matters of fact.

The applicant then submitted to the Superintendent a report which had apparently been prepared a little earlier and which was dated 19 December. That report made allegations that Senior Sergeant Brand had assaulted a member of the public. The applicant told the Superintendent that he believed he knew of other unprofessional matters involving Senior Sergeant Brand but it would sound like pin-pricking to detail them and he declined to do so.

At the close of the interview the Superintendent asked the applicant if there were any other matters he wanted to make the Superintendent aware of. The applicant handed the Superintendent another report, also dated 19 December 1983, alleging that the Detective Sergeant had assaulted a member of the public. The Superintendent was already aware of the incident involving Senior Sergeant Brand which had occurred on 19 November 1983 as the Senior Sergeant had already discussed the matter with him, but the Superintendent was not aware of the incident involving the Detective Sergeant which had occurred on 30 July 1983.

The Superintendent filed a long report with the Commissioner of Police about his interview and inquiries.

That report was dated 28 December 1983 and was some five pages in length. It was a comprehensive report. He summed up the situation as he then saw it in these words:

" As the situation now stands, we have a very capable Senior Sergeant virtually obliged to keep looking over his shoulder to ensure he is not being stabbed in the back by one of his own staff. The Senior Sergeant has commented to me that on the completion of each duty period, he finds himself considering what particular happening occurred that day which Constable Tyers could document against him - a rather untenable situation whichever way you look at it. "

He went on to say:

" As already touched upon, the insidious activity outlined above is precisely the same as confronted Senior Sergeant Davey over a year ago. "

He further said:

" The position thus arises as to what is to be done in this case. Quite obviously some action will have to be taken to rectify a deep-seated problem which will not be removed by counselling or other conciliatory action. The obvious solution is, of course, that Constable Tyers must be removed from Taumarunui, but in saying this I seek your indulgence as to how this might be achieved.

In the first instance, Constable Tyers has not erred to the extent where he would be liable for disciplinary action. Secondly, it is my considered view that there is no basis whatsoever for Constable Tyers to allege that Senior Sergeant Brand is not carrying out his duties in a fit and proper manner. ...

Although Senior Sergeant Brand is quite satisfied to remain at Taumarunui for a reasonable period, this satisfactory state of affairs will not continue unless something is done to remove the troublesome influence mentioned. "

After some discussion with Deputy Commissioner Churches in February 1984, Superintendent Dean carried out further inquiries into the applicant's allegations of assault on the members of the public.

Following those inquiries, he reported back to the Deputy Commissioner on 16 February and in that report he said:

" Nothing is disclosed within this recent documentation that I did not already know. The matters highlighted by Constable Tyers are in reality non-events and in the ordinary course of work would have passed by with little comment one way or the other.

What is to be emphasised here is that neither of the two incidents mentioned were carried out within the view of Constable Tyers. He only heard about them in discussion following each event. For a man of his experience, I can only endorse how dangerous it is for a member to depend on hearsay evidence given in a relaxed informal setting, to base his allegations against senior officers. The member in my view has displayed a rather malicious vindictive attitude, which from any way you look at it, lacks balance.

Without further dilating of the situation which I feel has been amply aired, it would appear that Constable Tyers has possibly contravened Regulation 41(5) of the Police Regulations 1959, in that he has proffered complaints against Senior Sergeant Brand and Detective Sergeant Bell, which cannot be substantiated. The manner in which this was done indicates to me not only that the allegations were groundless, but that they were submitted for vindictive reasons and certainly not for the good of the service. "

The Deputy Commissioner considered the report and he also made his other further inquiries and as a result he sat down and prepared what he called a "file note" on the problem. That file note is dated 22 February 1984. In it he dealt with the problem under various heads. The first head was "Current Position" and he said:

- " It is said in the file that Constable Tyers should transfer for the following reasons:
- (1) There is no confidence in Constable Tyers at Taumarunui.
 - (2) Tyers says he does not trust the Senior Sergeant.

- (3) This mutual distrust can be "a festering sore" and should be removed.
- (4) In the opinion of the District Commander the allegations against Senior Sergeant Brand and Detective Sergeant Bell cannot be substantiated. He says the manner in which this was done indicates not only that the allegations were groundless but they were submitted for vindictive reasons and certainly not for the good of the service. "

The Deputy Commissioner then detailed the reasons against a transfer of Constable Tyers as follows:

- (1) He has not applied for a transfer.
- (2) Never advised that his actions are detrimental to staff relations.
- (3) Transfer punitive and contrary to natural justice.
- (4) Social and financial hardship.
- (5) Has never been charged with any criminal offence or any breach of the Police Regulations or General Instructions.
- (6) Feels that the transfer is being made because two NCOs were reported for criminal assault. "

The Deputy Commissioner then considered the situation and he said:

- (1) Senior Sergeant Brand and Detective Sergeant Bell on one side obviously dislike, mistrust and are wary of Constable Tyers' actions.
- (2) Sergeant Cosford is apparently friendly with Tyers and appears to be wavering between the two sides.
- (3) There is no information on the file on any likely effect that the current situation has on other constables.
- (4) Constable Tyers is rated well 'valuable, conscientious and able policeman'.
- (5) Tyers is said to be 'strong willed and a self contained person'.
- (6) We are faced with a somewhat intolerable and apparently irreconcilable situation.

- (7) Regardless of the motives of either party we have a situation which if allowed to continue must:
 - (a) Affect policing in the area.
 - (b) Make it difficult for all staff to work efficiently.
 - (c) Difficult for the Senior Sergeant to exercise proper control over the staff.
 - (d) Affect police/public relations in the area.
- (8) On the information available there must be a serious question as to whether Constable Tyers has the personality and is suited to a small station such as Taumarunui.
- (9) If the situation is allowed to continue then it is likely that more serious problems will arise in the future, meantime making it extremely difficult for all the staff at this station to work efficiently and effectively.
- (10) It is my conclusion that Constable Tyers should transfer from Taumarunui. "

He went on to record:

" I considered allowing Constable Tyers to remain 'under warning' at Taumarunui for a trial period but I am convinced that bad relationships are so entrenched that such a trial would be futile. "

The Deputy Commissioner then sent to the Superintendent a memorandum setting out his conclusions on the matter and directing that the applicant be transferred from Taumarunui forthwith. That memorandum was undated and I refer to just four passages from it. The memorandum said:

" It is clear that you understandably no longer have confidence in Constable Tyers, and he has made it quite clear that he has no confidence in his supervisors within this station. Such mutual distrust and the consequent disharmony in a small station like Taumarunui cannot be tolerated, in the interests of both the Police and the local community. This is particularly significant in view of the previous problems relating to morale and discipline at Taumarunui.

Constable Tyers has been invited to give reasons why he should not be transferred out of Taumarunui. He indicates that he has no desire to shift, and that his domestic and social life would suffer and he would suffer financially. He states that he considers a transfer to be punitive in nature, and against natural justice.

I wish to make it quite clear to Constable Tyers that the necessity for his transfer is not to be regarded as a punishment.

However, he must realise that his conduct towards the Officer in Charge of Taumarunui in particular has created a situation where his position is untenable. The Constable's allegations made against the Senior Sergeant and Detective Sergeant at Taumarunui are not only groundless, but appear to have been made for vindictive reasons, and certainly not for the good of the service.

Constable Tyers' transfer from Taumarunui is to be effected forthwith. He is to read this memorandum and state his preference for transfer to either Wellington or Auckland. Should he wish to apply for a transfer to another area, consideration will be given to his suitability for other positions. "

The applicant was given a copy of that report. He made representations through the Association but to no effect and on 16 April 1984 he was served with formal notice of his transfer.

DECISION

I deal in turn with each of the three causes of action which have been pleaded on the applicant's behalf.

(1) Alleged disciplinary nature of the transfer

The power to transfer a police officer is given to the Commissioner by Regulation 32 of the Police Regulations 1959 which provides:

32(1) " A member may, at any time, be ordered by the Commissioner to perform duty in any part of New Zealand, or to go beyond New Zealand for Police purposes. "

That power of transfer is available for administrative purposes and, as one would expect, it is necessary for the efficient operation of the police force. The power to transfer, however, is not available for use as a punishment for any officer who may be considered to have committed any offences warranting punishment. If there is any question of disciplinary offences having been committed by an officer, and it is intended to use those disciplinary offences as the basis for punishment, then the appropriate procedural steps must be taken in accordance with the provisions of the Act and Regulations. Those provisions are to be found first in the Police Regulations, Regs 46, 49 and 50, and in s 33 of the Police Act 1958.

Having decided to take disciplinary action against an officer and he having pleaded guilty or been found guilty, the punishments which may be imposed are those set out in s 33(3) (b) of the Police Act which involve dismissal from the force, reduction in seniority, reduction in pay, or a fine not exceeding \$175, but there is no provision for an order for transfer by way of disciplinary punishment. So it is a wrong use of the powers of transfer if it is in fact used by way of punishment for disciplinary purposes. I refer to Kelly v Walton (High Court, Wellington, A.101/83, 1 May 1984).

The principal issue in this case is - what was the motive or purpose for which the applicant was ordered to be transferred from Taumarunui to Auckland? Was it to discipline or punish him as he says because he acted in the way he did towards Senior Sergeant Brand and Detective Sergeant Bell, or was it for the efficient administration and efficiency of the force at Taumarunui?

This is not a case where on the facts there is only one reason for transfer such as in McConnell v Urquhart

[1968] NZLR 417, or Kelly v Walton (ante). It is said on behalf of the applicant that the reason for transfer was disciplinary. It is said on behalf of the Police Commissioner that the transfer was administrative. That being the case, where there are two possible factors which may have influenced the decision to transfer, then the test which the Court will apply is whether or not disciplinary purposes were a substantial motive for transfer in the sense that if the disciplinary purposes did not exist the transfer was unlikely to have been made. I refer to Bullen and Reid v State Services Commission (High Court, Wellington, A.40/84, 18 April 1984); and also the decision of the High Court of Australia in Thompson v Randwick Corporation (1950) 81 CLR 87, 106; and to Wade, Administrative Law p 390.

On behalf of the applicant it was said that there were one or more offences of a disciplinary nature with which the applicant might have been charged under the Police Regulations and he says he should have been charged so as to give him an opportunity of answering those charges and, if possible, of clearing himself in relation to the matters involved. That is correct if the Police authorities had intended to deal with him in a disciplinary way. But it is open to a Police Commissioner, even though there might be ground for laying charges, to decide that the case does not warrant such charges being laid. The Commissioner has a discretion in the matter. I refer to R v Metropolitan Police Commissioner ex parte Blackburn [1968] 1 All ER 763, 769; and also to Kelly v Walton (ante).

The police authorities clearly decided not to lay charges. That is apparent from a reference to the various documents in the case. In the District Commander's report to the Deputy Commissioner of 28 December 1983 the Superintendent said:

" Constable Tyers has not erred to the extent where he would be liable for disciplinary action. "

In the Superintendent's further report to the Deputy Commissioner of 16 February he alludes to the

possibility of the applicant having contravened R 41(5) of the Police Regulations but he takes the matter there no further.

Deputy Commissioner Churches in his memorandum to the Superintendent of 3 May 1984 says:

" The only resolution available is to transfer the Constable from Taumarunui. The question of fault in this matter is not resolvable. "

And then the Deputy Commissioner in his affidavit filed in these proceedings has said, and I have no reason to disbelieve him:

" I believed that it was completely inappropriate to charge the Constable because I was concerned with the total situation at the Station. My responsibility and object was to solve the disharmony. Had the disciplinary aspect received greater consideration then it would have been mentioned in my file note. "

It is clear that whatever possible charge or charges may have been laid against the applicant, the Police authorities decided not to charge him. The mere non-laying of charges does not establish that a transfer was not for disciplinary purposes if a substantial purpose or motive for the transfer (in the sense that it would not otherwise have been made if that purpose had not existed) was to discipline the officer. It is necessary to look behind the stated actions and to look at the realities of the situation as they existed.

The tests to be applied have been set out previously in Kelly v Walton and Bullen and Reid v State Services Commission and what I have had to do, and what I have considered overnight, is to look at the totality of the evidence, weigh it up, and decide what was the substantial purpose for the transfer. I have come to the conclusion that the solution to this matter lies in a consideration of the file note of the Deputy Commissioner Churches. He was the

officer who had the decision whether to transfer the applicant or not, and I am satisfied that that file note compiled at an early stage in these proceedings in February exposes his whole thinking on the matter and the thought processes which led him to the conclusion that he reached that it was necessary that the applicant be transferred for the efficiency of the Force.

I read out substantial passages from that file note earlier because I think it is important that those passages be available so that the reasoning behind the transfer be understood, and I merely reiterate at this stage three of the points made by the Deputy Commissioner:

- "(1) We are faced with a somewhat intolerable and apparently irreconcilable situation.
- (2) On the information available there must be a serious question as to whether Constable Tyers has the personality and is suited to a small station such as Taumarunui.
- (3) If the situation is allowed to continue then it is likely that more serious problems will arise in the future, meantime making it extremely difficult for all the staff at this station to work efficiently and effectively. "

The Deputy Commissioner's follow-up memorandum undated to Superintendent Dean merely elaborated upon some of the matters in the file note, and the passages I have previously read from that memorandum are apposite when considering the purpose for which the Deputy Commissioner ordered the transfer. That memorandum made it clear that it was a matter of confidence and mutual trust affecting morale and discipline; that Constable Tyers was not being transferred by way of a punishment; and that the relationship between the applicant and Senior Sergeant Brand was not for the good of the service.

The onus is upon the applicant to prove that the transfer was made for other than proper administrative purposes. In my view, he has failed to prove that it was so made. I find that not only has he failed to prove that

but I find affirmatively that the transfer was made by the Deputy Commissioner for good and sufficient administrative reasons for the operating efficiency of the Taumarunui station.

(2) The right to a hearing

It was alleged that before a transfer could be made under Regulation 32, the applicant was entitled to a hearing in relation to the matters set out in the memorandum of 28 December 1983 from Superintendent Dean to Police Headquarters. Mr Milne, counsel for the applicant, accepted at the hearing, however, that there was no right for the applicant to be heard before such a transfer was made, so that matter does not become an issue. But, in any event, if it were necessary for me to do so I would find on the facts that the applicant was given a sufficient and adequate opportunity, both orally and in writing, to answer to matters which could be alleged against him.

(3) Mistake of fact

This was based upon the principles set out in the case of Daganayasi v Minister of Immigration [1980] 2 NZLR 130, and it was alleged that the Deputy Commissioner in reaching his decision was acting under a mistake of fact which was central to the issue before him and which invalidated his decision.

I have considered the allegations of fact allegedly to have been mistaken by the Deputy Commissioner and I am satisfied that he has not so misdirected himself as to the facts as to in any way invalidate his decision. He well knew in substance the various allegations pro and con in this matter. If he was slightly in error in referring to one of the alleged assaults on a member of the public by giving the wrong name of a member of the public, that matter is in my view insignificant. It was not wrong for him at least to appreciate that there had been trouble at this station before Senior Sergeant Brand was placed in charge

even though it is alleged there may have been something said as to the previous dealing with the trouble being the end of the matter. There is further reference to the Deputy Commissioner having accepted certain matters as false where it would have been more appropriate to have referred to them as not substantiated.

None of those matters, however, go to the root of the Deputy Commissioner's decision. What concerned the Police Deputy Commissioner was not so much whether the applicant was right or wrong about the allegations that he had made or that ^{they} were made against his fellow officers but his attitude to authority in a disciplined force and his apparent inability to work with and trust his superior officers.

I am quite satisfied that there is no mistake which was made by the Deputy Commissioner which can have the effect of invalidating his decision.

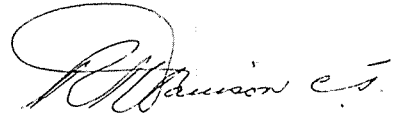
Mr Milne on behalf of the applicant advanced all possible arguments. However, the fact is that the facts do not support the applicant's allegations that he was transferred for disciplinary purposes. The applicant's work as a police constable is not in issue here. It is accepted that there is nothing wrong with his general performance. It was simply his inability to work in harmony with the other officers at Taumarunui which was the root cause of his transfer, a transfer which the Deputy Commissioner considered necessary for the sake of harmony and the more efficient working of the force.

The result is that I have found that there are no grounds for this Court exercising its discretion to review the decision of the Deputy Commissioner transferring Constable Tyers from Taumarunui and the application must be dismissed.

If there is any question of costs the parties may raise the matter by memorandum.

In relation to the order which I made yesterday directing that the names of the non-commissioned officers,

Senior Sergeant Brand and Detective Sergeant Bell be not published, I think it is impossible to divorce reference to their names from the decision while still making it a meaningful decision, but I do indicate that nothing has been disclosed in these proceedings which should be held to reflect in any way upon the character or ability of either of those two officers.



Solicitors for the applicant

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Solicitors for the respondents

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