IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-2611

IN THE MATTER OF	of an application for judicial review pursuant to the Judicature Amendment Act 1972
BETWEEN	KEITH DEREK PARSONS, ERLE BUSBY, JOHN EDMUND MILLS AND BRUCE GORDON LAING Plaintiffs
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 12 March 2009

Appearances: S Hughes QC and E M Gooch for the plaintiffs
R B Chan and L M Fong for the defendant

Judgment: 22 May 2009

JUDGMENT OF CLIFFORD J

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Introduction

[1] The plaintiffs are Police Officers, stationed variously at Whakatane and Edgecumbe. As such, they are employed by the Commissioner for Police ("the Commissioner").

[2] Following an incident in the Whakatane Police Station involving a Mr Rawiri Falwasser, who had been arrested on suspicion of car conversion, the plaintiffs were variously charged with assaulting Mr Falwasser with weapons. The weapons in question were oleoresin capsicum, or pepper spray, and Police batons.

[3] The matter proceeded to trial in the Tauranga District Court on 9 June 2008 and on 25 June 2008 the jury returned not guilty verdicts as regards all charges faced by the plaintiffs.

[4] The decision has now been made to proceed with disciplinary charges against the plaintiffs arising out of the same incident, and the Commissioner has appointed a Tribunal, in terms of s 12 of the Police Act 1958 (as then in force) to investigate the charges and to report to the Commissioner.

[5] The plaintiffs say that, in the circumstances of their acquittal on the criminal charges, the disciplinary charges constitute an abuse of process and a breach of their legitimate expectations. They therefore seek orders that would prevent the Commissioner from taking any further steps to discipline in relation to the matters in respect of which they have been acquitted in the District Court.

[6] Affidavit evidence on this application was given for the plaintiffs by the Chief Executive Officer of the New Zealand Police Association, Mr Christopher Pentecost. For the defendant, Superintendent Gary Smith (the District Commander for the Bay of Plenty District) and Superintendent Jonathan Moss (the Manager of the Professional Standards team at Police National Headquarters; Acting Manager before December 2007) provided affidavits.

[7] During the course of hearing the plaintiffs' application, there appeared to be something of a difference of view between the plaintiffs and the defendant as to certain aspects of the evidence presented at the plaintiffs' criminal trial in the District Court. As that evidence was a matter of record, and as counsel for the defendant acknowledged not having read all of that record, I asked counsel for the plaintiffs and for the defendant to confer after the hearing, and to provide me with a joint memorandum which would either resolve that matter or indicate if there were material differences of view.

[8] I subsequently received separate memoranda from the plaintiffs and the defendant. At the request of the defendant, Ms Hughes, for the plaintiffs, appended to her memorandum various exhibits that had not previously been placed before me. For the defendant, Ms Chan explained her approach to reading the record, and amplified submissions she had made at the hearing as to the way in which the evidence at the District Court trial was characterised in the plaintiffs' submissions.

[9] Put very simply, Ms Hughes characterised the evidence that the Police propose to place before the Tribunal as being "more of the same", referring to evidence provided in the District Court by Police witnesses. Ms Chan submitted that there will be a narrower range of evidence covered before the Tribunal than in the District Court, and moreover that further expert evidence on appropriate standards of Police conduct will be introduced. As relevant, I will comment on those submissions in the course of this judgment.

Background

[10] My understanding of the factual background to this matter, as reflected throughout this judgment, is based on the pleadings and other material filed in this proceeding. At certain points, therefore, my narrative in this section of my judgment reflects the different interpretations placed by the plaintiffs and the defendant on the proper understanding of the facts that lay behind the charges the plaintiffs faced in the District Court, and the disciplinary proceedings they are now challenging. I do not consider that, in these judicial review proceedings, it is my task to separately review the factual record and endeavour to resolve those differences. I therefore

have not done so. Rather, in my judgment, these proceedings call for me to consider the essentially legal arguments made by the plaintiffs, based on the relationship between the elements of the criminal charges they faced, the defences they relied on, and the disciplinary proceedings that they are now challenging.

[11] On 23 October 2006 Mr Falwasser was arrested on suspicion of car conversion and transported to the Whakatane Police station ("the station") by the plaintiff Mr Laing (a Senior Constable). The plaintiff Mr Parsons (a Sergeant) was the sectional supervisor and the senior Officer responsible for the cell area at the station that afternoon. The plaintiffs allege that Mr Falwasser declined to be searched, fingerprinted or processed. He was placed in what has been described as either an observation or holding cell.

[12] As there were concerns about Mr Falwasser's mental state, he was assessed by the Duly Authorised Officer, a mental health professional. The Officer deemed that he was not suffering any mental illness. In addition, Mr Falwasser's brother, Mr Tawera Falwasser, was contacted and attended at the station. There is a dispute as to whether this occurred before or after the events the subject of the criminal and disciplinary charges.

[13] The plaintiff Mr Laing attempted to continue to process Mr Falwasser. It seems that Mr Falwasser was of the belief that his rights had been infringed and so resisted Police requests for fingerprints and photographs, and refused to sign documents. The defendant's position is that Mr Falwasser's conduct is properly described as passive resistance only.

[14] Mr Laing and Mr Parsons determined to move Mr Falwasser from the observation holding cell to a different cell. Mr Falwasser declined to leave the cell and Mr Parsons drew his pepper spray and deployed it. The plaintiffs say that Mr Falwasser had moved towards Mr Parsons. The defendant says that Mr Falwasser did not pose any reasonable threat to the safety of Police staff and had offered no violence to warrant the use of the pepper spray.

[15] The plaintiffs say that Mr Falwasser then became aggressive and that the plaintiff Mr Busby saw this on closed circuit television. Mr Busby (a Sergeant) was the supervisor of the Whakatane "Law Enforcement Team". Mr Busby entered the cell area with his baton drawn and he and Mr Parsons engaged Mr Falwasser with their ASP batons. As a result, Mr Falwasser received a deep cut to the head and strikes to his arms.

[16] Mr Parsons again struck Mr Falwasser on the lower arm with his ASP baton through the open door after Mr Falwasser had retreated into the cell.

[17] The plaintiffs say that the situation was discussed with another Officer and a plan was formulated in which a group of Officers would enter the cell, use their riot shields to force Mr Falwasser against the wall and then handcuff him. They say that Mr Falwasser reacted aggressively when they tried to execute the plan and the plan was abandoned. The defendant says that Mr Parsons and another Officer lined up in front of the door with their shields and that the plaintiff Mills (who was working as a "general duties" Constable) used his pepper spray to spray Mr Falwasser in the face at close range. Mr Falwasser reacted violently to this, punching and striking at the riot shields. The defendant says that the level of spray in the area was such that the Police staff left the area, leaving Mr Falwasser locked in his cell in an extremely upset state.

[18] The plaintiffs say that a further plan was formulated whereby efforts were made to spray Mr Falwasser in the face so as to achieve compliance. Mr Laing and Mr Mills say they administered sprays of pepper spray for this purpose. Mr Falwasser remained locked in his cell at this time. The defendant says that Mr Laing and Mr Mills sprayed pepper spray into the cell through the top vent and bottom opening of the cell and that when Mr Falwasser attempted to cover the hole at the bottom of the cell to prevent further spraying, Mr Busby used a PR24 baton to strike at the hole from the outside, hitting Mr Falwasser's foot.

[19] The defendant says that Mr Mills then retrieved a box containing 72 canisters of pepper spray, the majority of which had been partially used. He says that Mr Mills donned a mask and gloves and then continued to spray Mr Falwasser through

the vents in the cell. He says that Mr Falwasser again tried to use his foot to block the spray and that Mr Busby again entered the area with his PR24 baton and struck a number of blows to Mr Falwasser's foot through the lower opening. The defendant says that Mr Falwasser then tried to block the lower opening using his shirt, which was drenched in blood and pepper spray, and that the shirt was removed from the opening by a constable.

[20] The defendant says that Mr Falwasser then attempted to use his jacket to stop the spray coming through the top vent, and used a separate piece of clothing to cover his face. Again the clothing was removed from the vent. Mr Mills continued to deploy the spray, and he was joined in doing so by Mr Laing. The defendant says that Mr Mills taunted Mr Falwasser while deploying the spray.

[21] Those events were captured on closed circuit television.

[22] The defendant says further that Mr Mills did not submit a report in relation to use of the pepper spray. Such a report is required under the Police General Instruction A277. There is no challenge to the disciplinary charge based on that matter.

[23] It is said that, as a consequence of those events, Mr Falwasser received a 5cm laceration on the top of his head, which required stitches, extensive bruising to his left shoulder, forearm and hand, a 6.5cm laceration to his left hand and bruised knees and bruising to his feet. The defendant says that Mr Falwasser continued to have headaches and spells of dizziness for several weeks after the incident and has been diagnosed as having post-traumatic stress disorder as a result.

[24] The actions of the plaintiffs were the subject of a complaint to the Police by Mr Falwasser's father – orally on 23 October 2006 and in written form on 27 October. The Police (Sergeant Jenkins) reviewed the closed circuit television footage and referred the matter to the then Police Complaints Authority (now the Independent Police Conduct Authority). Both the Authority and the Police proceeded to investigate the complaint.

[25] Superintendent Gary Smith, the District Commander, served the plaintiffs with stand down notices on 31 October 2006, after receiving the complaint and reviewing the video footage. In a notice dated 8 November 2006, the plaintiffs were advised that they were to be subject to criminal and disciplinary investigations.

[26] On 20 December 2006, the plaintiffs were arrested and charged under s 202C of the Crimes Act 1961. The decision to lay criminal charges was made by Superintendent Smith, after consultation and a review of the case by the Crown Solicitor at Rotorua. The criminal charges faced by the plaintiffs were as follows:

a) Mr Laing:

- Assault with a weapon (oleoresin capsicum spray) – relating to the events at [20] above.

b) Mr Parsons:

- Assault with a weapon (oleoresin capsicum spray) – relating to the events at [14] above.
- Assault with a weapon (ASP baton) x 2 – relating to the events at [15] and [16] above.

c) Mr Busby:

- Assault with a weapon (ASP baton) x 3 – relating to the events at [15] above.
- Assault with a weapon (PR24 baton) – relating to the events at [19] above.

d) Mr Mills:

- Assault with a weapon (oleoresin capsicum spray) – relating to the events at [18] above.

[27] The plaintiffs were suspended from duty on 16 February 2007 (and currently remain suspended on full pay).

[28] On 29 May 2007 notices of intention to lay internal disciplinary charges were served on each of the plaintiffs. Superintendent Smith made the decision to lay these charges on the basis of his view that "the plaintiffs' conduct fell well below the standard expected of our members". He made the decision in consultation with an Inspector Scott Fraser and the Professional Standards team at Police National Headquarters, as required by General Instructions IA122(1)(d) and (2)(a).

[29] On or about 29 September 2007, the plaintiffs were served with disciplinary charges under regs 9(5), 9(30) and 9(41) of the Police Regulations 1992:

> **9 Disciplinary offences by sworn members of Police**
>
> The following shall be offences of misconduct or neglect of duty on the part of any sworn member for the purposes of the Act:
>
> …
>
> (5) Treating any person or prisoner cruelly, harshly, or with unnecessary force or violence:
>
> …
>
> (30) Wilfully or negligently omitting to make an entry in any official book, document, record, or information recorded or stored by means of any tape recorder, computer, or other device as to any matter which ought to be entered:
>
> …
>
> (41) Wilfully violating any provision of these regulations, or of general instructions, or of any general order issued by the Commissioner, the member's Region Commander, the member's District Commander, or the Commandant of the Royal New Zealand Police College:
>
> …

[30] The reg 9(41) charge was based on an alleged violation of General Instruction A270, which states as relevant:

> 1. Police members may only use [oleoresin capsicum] spray to:
>
> - defend themselves or others if they fear physical injury to themselves or others, and they cannot reasonably protect themselves, or others less forcefully, or
>
> …
>
> - resolve an incident where a person is acting in a manner likely to seriously injure themselves and the incident cannot reasonably be resolved less forcefully. …
>
> 2. [Oleoresin capsicum] Spray must not be used against people offering passive resistance. …

3. [Oleoresin capsicum] Spray is to be used in accordance with the approved training given.

[31] The charges laid were as follows:

a) Mr Laing:

- Using unnecessary force (oleoresin capsicum spray) – relating to the events at [20] above (reg 9(5)).
- Wilfully violating the provisions of General Instruction A270(2), that pepper spray must not be used against persons offering passive resistance – relating to the events at [20] above (reg 9(41)).

b) Mr Parsons:

- Using unnecessary force (oleoresin capsicum spray) – relating to the events at [14] above (reg 9(5)).
- Wilfully violating the provisions of General Instruction A270(2), that pepper spray must not be used against persons offering passive resistance – relating to the events at [14] above (reg 9(41)).
- Using unnecessary force (ASP baton) – relating to the events at [15] and [16] above (reg 9(5)).

c) Mr Busby:

- Using unnecessary force (ASP baton) – relating to the events at [15] above (reg 9(5)).
- Using unnecessary force (PR24 baton) – relating to the events at [19] above (reg 9(5)).

d) Mr Mills:

- Using unnecessary force (oleoresin capsicum spray) – relating to the events at [18] above (reg 9(5)).

- Wilfully violating the provisions of General Instruction A270(2), that pepper spray must not be used against persons offering passive resistance – relating to the events at [18] above (reg 9(41)).
- Wilfully violating the provisions of General Instruction A277, that members of the Police who use pepper spray against another person are required to submit a report (reg 9(30)).

[32] The plaintiffs entered not guilty pleas to the disciplinary charges in October 2007. On 9 October and 16 November 2007, counsel for Mr Mills and Mr Parsons respectively requested that the disciplinary charges not proceed until the criminal charges were disposed of. On 16 November 2007 the plaintiffs were advised that the disciplinary charges would be held in abeyance pending the outcome of the criminal proceedings. This was expressly stated to be pursuant to the leading Employment Court cases regarding prejudice to fair trial rights: *Russell v Wanganui City College* [1998] 3 ERNZ 1076 and *Sotheran v Ansett New Zealand Ltd* [1999] 1 ERNZ 548.

[33] As stated, the plaintiffs were acquitted on the criminal charges on 25 June 2008. The plaintiffs did not deny the assaults occurred but maintained that they were justified in defence of themselves, in defence of others and in acting in execution of their duty.

[34] On 2 July 2008 Inspector Fraser sent a letter to each of the plaintiffs notifying them of their right to elect to be dealt with under the new Police Code of Conduct (introduced on 1 February 2008). The letter required the plaintiffs to advise of their election by 11 July, at which point appropriate disciplinary procedures would be initiated.

[35] On 11 July 2008, counsel for the plaintiffs replied stating that the plaintiffs did not elect to be dealt with under the Code of Conduct. Counsel further stated that given the acquittal on the criminal charges and the similar process in the Tribunal to that in the District Court, it was assumed that the Tribunal charges would be withdrawn.

[36] Superintendent Smith, in consultation with the Professional Standards team at Police National Headquarters, resolved to proceed with the disciplinary charges. As to this decision, he states:

> I saw no reason to withdraw the disciplinary charges against the plaintiffs. While the plaintiffs had been acquitted of the criminal charges nothing came out of the criminal process that altered my view that the disciplinary charges should proceed to a Tribunal hearing.
>
> I remained of the view that the charges should be pursued because of the seriousness of the plaintiffs' conduct evidenced by the information available and the major departure from normal practice evidenced by that material. The focus of the District Court hearing was whether criminality had been established, whereas the focus of the disciplinary charges was on whether the plaintiff's [sic] conduct was consistent with the required standard.

[37] On 22 July 2008 the Acting Assistant Commissioner appointed the disciplinary Tribunal, pursuant to s 12 of the Police Act 1958, to conduct an inquiry into the disciplinary charges. Ms Kristy McDonald QC was appointed to act as the Tribunal and the plaintiffs were notified of this appointment.

[38] On 23 July 2008 the Police advised counsel for the plaintiffs that the charges would not be withdrawn and that a Tribunal had been appointed.

[39] The Tribunal hearing was to proceed on 17 November 2008, and then on 19 January 2009, but has been adjourned pending the outcome of this proceeding.

The disciplinary process

[40] It is useful to set out the process by which disciplinary charges against Police Officers are dealt with. As relevant to the present case, this is pursuant to the Police Act 1958 ("the Act"), the Police Regulations 1992 ("the Regulations") and Part IV of the General Instructions (Internal Affairs: Complaints, Discipline and Procedure) issued under s 30 of the Act. Although this legislative regime has since been repealed, it continues to apply in relation to incidents that occurred while the Act was in force (unless an Officer elects differently): s 103 of the Policing Act 2008 and reg 7 of the Police Amendment Regulations 2007. I note also that the complaint and disciplinary process is also subject to the oversight of the Independent Police Conduct Authority under the Independent Police Conduct Authority Act 1988

(originally the Police Complaints Authority under the Police Complaints Authority Act 1988).

[41] Where a Police Officer is suspected of having committed a criminal offence or is suspected of misconduct or neglect of duty, or if such a complaint as to a Police Officer's conduct is upheld, this is to be reported to the District Commander, who is to cause an investigation to be carried out: IA121 of the General Instructions. The completed investigation is then submitted to the District Commander with proposals as to the most appropriate action to be taken, including criminal charges, disciplinary charges, reprimands, an adverse report or counselling: IA122. Paragraph (d) of IA122 states:

> Criminal proceedings are not a bar to disciplinary proceedings against a staff member. However, where disciplinary proceedings are contemplated in addition to criminal proceedings the O/C Internal Affairs must be consulted.

[42] A decision is then made by the District Commander or Region Commander as to whether to bring disciplinary and/or criminal charges against the Police Officer. The Region Commander or District Commander may consult the O/C Internal Affairs as part of this decision-making process (IA127(3)) and, as stated, must do so if both criminal and disciplinary proceedings are contemplated.

[43] If disciplinary charges are to be brought, and unless the Police Officer pleads guilty, the Commissioner is to appoint a Tribunal in accordance with s 12 of the Act and the Region Commander or District Commander shall arrange the date, time, and place of hearing: reg 16 and IA127(9).

[44] A disciplinary hearing is undertaken for the purpose of determining what conduct has in fact occurred (unless admitted per reg 7H), its seriousness, and the circumstances in which it occurred, and to report on these findings to the Commissioner: s 12; reg 7G(1) of the Police Regulations. The Commissioner is not entitled to take any action against the Police Officer, except to suspend him or her, until the Commissioner has received the report from the Tribunal.

[45] The Tribunal is required to follow the procedure prescribed in the Regulations and may receive any relevant information whether or not it would be

admissible in a Court of law: s 12(4). It has the same power and authority to summon witnesses and receive evidence as is conferred upon Commissions of Inquiry by the Commissions of Inquiry Act 1908: s 12(5). Unless the charge is admitted, the Tribunal is required to hear the parties and such evidence as they may adduce and the parties may examine, cross-examine and re-examine witnesses: reg 20. Subject to the Regulations, the procedure at the hearing shall conform as far as practicable and with any necessary modifications to that followed in District Courts in their summary criminal jurisdiction: reg 24 and IA 127(9).

[46] At the end of the hearing, the Tribunal reports its findings to the Commissioner, along with any submissions as to penalty from the prosecutor and Police Officer under reg 21, and any comment on penalty or the submissions that the Tribunal itself might make: reg 26(2) and IA127(9). The Commissioner then considers whether to accept the Tribunal's findings: IA127(9)(f). If the Commissioner is satisfied that misconduct occurred, the Commissioner may institute the removal of the Police Officer from his or her employment, may impose on the Police Officer any or all of the penalties stated in s 5(7) or may decide that no penalty should be imposed on the Police Officer, and that instead the misconduct should be dealt with under the policies put in place for the purposes of reg 7B (for unsatisfactory performance): reg 7M. The penalties in s 5(7) are reduction to any rank, reduction in seniority by any specified number of years, reduction in pay for any specified period and/or a fine not exceeding $500.

[47] Regulation 7M is subject to s 5(4), which states that the power to remove is subject to the provisions of the Act, the General Instructions, the Regulations and the Police Officer's conditions of employment. Section 5A(1) provides that the Commissioner may institute the removal of a Police Officer if, following an inquiry under s 12, the Commissioner has reasonable grounds for believing that the Police Officer 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 that the removal of the Officer is necessary to maintain good order and discipline within the Police or to avoid bringing the Police into disrepute. Thus, as stated in *Commissioner of Police v Moore* [2002] 2 NZLR 83 (CA) the statutory power to remove a Police Officer from his or her employment cannot "lawfully be

exercised without there first being an inquiry under s 12 of the Act and the Commissioner having reasonable grounds for belief in terms of s 5A(1)(a) and (b)". The function of s 5A is therefore to delineate the circumstances in which the s 5(4) power to remove may be exercised.

[48] The Police Officer is entitled to make submissions to the Commissioner under reg 7O (see also IA128(2)). The Commissioner is also required to take into account all submissions made under the Regulations as well as the employment history of the Police Officer concerned, and must determine outcomes that are reasonable in all the circumstances: reg 7N.

[49] There is provision for reconsideration of removal by the Commissioner under reg 7P. Appeals may be brought via the procedures provided in the Employment Relations Act 2000: see *Creedy v Commissioner of Police* [2008] 3 NZLR 7 (SC) and s 87 of the Act.

The application for review

[50] The plaintiffs seek judicial review of the decision to proceed with the disciplinary charges on the following grounds:

a) Abuse of process – the Commissioner failed to act with due process because (i) he directed the Tribunal to be formed to hear the disciplinary charges after the plaintiffs were acquitted on the charges before the Courts and (ii) the charges before the Tribunal are identical in content to those for which the plaintiffs have been acquitted.

b) Breach of legitimate expectation – the plaintiffs had a legitimate expectation that they would not be subject to a hearing by a Tribunal if acquitted by the Courts, they were acquitted, and the Commissioner breached their legitimate expectation by deciding to appoint a Tribunal.

[51] The defendant sought to persuade the Court that the decision to appoint a Tribunal is procedural only and that therefore the application for judicial review is premature. He also referred to the appeal rights under the Employment Relations Act 2000 and the general approach of the Court to require that appeal rights be exhausted before review is sought.

[52] I am not so persuaded. In this I refer to the recent decision of the Supreme Court in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1, in which the Court did intervene in materially similar circumstances. Moreover, I am of the view that, if an abuse of process is established here, the abuse consists of, and would be complete in, the plaintiffs being required to relitigate the matter the Tribunal has been constituted to consider. Such an abuse is therefore not something remediable at the substantive proceedings before the Tribunal. The decision to appoint the Tribunal is therefore not a "preliminary decision" only, without effect on the plaintiffs' rights or interests, which should not properly be the subject of judicial review.

Abuse of process

[53] The leading case, on which the plaintiffs principally rely, is *Z v Dental Complaints Assessment Committee*. The disciplinary body sought to prosecute Z for the same conduct for which Z had been unsuccessfully prosecuted in the criminal Courts. Defining abuse of process in this context, McGrath J, giving the judgment for the majority (Blanchard, Tipping and McGrath JJ), commented at [119] and [120]:

> [119] An allegation of abuse of process in the public law context is in essence a complaint that discretionary power has been exercised in a way which falls outside the scope of the authority conferred by Parliament, or for a purpose for which the power was not conferred.
>
> [120] The submission for the appellant is that it was an abuse of process for the respondent to include, in the subject of its report and the disciplinary inquiry, acts of alleged misconduct which directly correspond with those for which the appellant was tried. [Counsel for Z] argued that this amounts to a collateral attack on the verdicts of not guilty in the District Court, which Parliament cannot have intended to authorise, and which falls outside its purpose.

[54] The Supreme Court held that whether further proceedings constituted an abuse of process required a broad merits-based judgment, in context, as to whether, in all the circumstances – including the public and private interests and all the facts of the case – a party was misusing or abusing the process of the Court (at [2], [63] and [127], adopting the statement of Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31).

[55] McGrath J commented generally on abuse of process in this context from para [126], and the following points can be noted:

- "There is no rule of law that prevents inquiry into some of the essential facts in issue in a criminal trial where they are relevant to an accusation of a different character. Where an element of a criminal charge was not necessarily resolved in the criminal process, and could found a finding of unprofessional conduct, it is not in principle an abuse of process for a later disciplinary inquiry to examine that element." ([126])

- The function of the criminal justice system is to determine whether the defendant has committed a crime and to impose punishment. The purpose of disciplinary proceedings is materially different: to determine whether a practitioner has met appropriate standards of conduct and to ensure that these standards are met in the future. Therefore, "the disciplinary process may cover much wider ground than that litigated at the criminal trial". Also of relevance is the "inquisitorial nature of the inquiry, coupled with the Tribunal's own power to summon witnesses and generally to admit evidence which is not admissible in criminal proceedings", as well as the expertise of the Tribunal members in the occupational field concerned. Moreover, there is a different standard of proof. "The combined effect of all these factors makes it likely that in many cases different evidence will come before the Tribunal, which is addressed to wider aspects of a practitioner's conduct than the strict regime of a criminal trial would allow." ([127] to [130])

- These considerations "signal the importance of the public interest served by the disciplinary process and the difference in nature of that process from criminal justice" and "tell strongly against the proposition that the initiation of disciplinary proceedings, for the intended statutory purpose, is an abuse of process even if they include the same allegations as those in earlier criminal proceedings which resulted in an acquittal". ([132])

- "Nevertheless, there will be some situations in which it would be an abuse of a Complaints Assessment Committee's discretionary power to refer allegations of aberrant conduct by a practitioner to the Tribunal because the scope of a disciplinary inquiry would simply replicate the exercise that a criminal court has undertaken, where that process has resulted in an acquittal. Bodies such as the respondent must be careful not to permit their processes to be used simply as a reserve means of punishing conduct of a criminal nature after criminal proceedings have been unsuccessful." ([133])

[56] On the facts of that case, Z had been acquitted on criminal charges of indecently assaulting three complainants (two of whom had been given sedatives at a higher dosage than recommended). The three complainants then complained to the Dental Council that Z had been guilty of professional misconduct on the basis of the same allegations of indecent assault. The disciplinary charges were laid under s 54(1)(b) and (c) of the Dental Act 1988, which covers "any act or omission in the course of or associated with the practice of dentistry that was or could have been detrimental to the welfare of any patient or other person" or professional misconduct. The particulars concerned the administering of the sedative at twice the recommended maximum dose (complainants 2 and 3 only) as well as particulars relating directly to the alleged indecent assaults (in that the (excessive) dosage exposed the complainant to "the risk of undesirable side-effects or consequences", including the indecencies). Z challenged the particulars relating to the indecencies.

[57] The Supreme Court held (Anderson J dissenting) that the particulars relating to the indecencies were identical to the criminal charge on which Z had been acquitted. The first complaint was found to be no wider than the criminal allegations

decided in Z's favour (not including an allegation of excessive sedation) and to have insufficient evidentiary relevance to the other alleged events to justify its inclusion in the inquiry. It therefore amounted to an abuse of process and the references in the charge particulars to the events relating to the first complainant were to be deleted. However, the Court found (Elias CJ dissenting) that it was not an abuse to pursue concerns over Z's allegedly excessive sedative dosing, the scope of that inquiry being wider than that of the criminal proceeding, even though it would traverse some of the same ground. Moreover it considered that it was open for the disciplinary tribunal to have reference to the indecencies alleged in the second and third complaints in relation to these charges, in that it would be artificial to exclude consideration of these allegations which went to possible motives and whether the allegedly excessive dosage was deliberate or negligent.

[58] The Court noted, in this context, that acquittal of the whole offence is not acquittal of every part of the offence. On this the majority cited (at [125]) the following statement of Gresson P in *In re A Medical Practitioner* [1959] NZLR 784 (CA) at 801:

> The general verdict of not guilty decides nothing more than that there was a failure upon the part of the prosecution to establish all the necessary ingredients. It negatives every offence of which the accused could properly be found guilty on that particular indictment . In *R v Salvi* (1857) 10 Cox CC 481n, Sir Frederick Pollock CJ said: 'Acquittal of the whole offence is not acquittal of every part of it; it is only an acquittal of the whole' (ibid, 483n)."

[59] The plaintiffs, relying on *Z v Dental Complaints Assessment Committee,* say that the disciplinary charges pursuant to reg 9(5) and (41) will entail an inquiry into all of the essential facts in issue at the criminal trial as relevant to an accusation of an identical character, that the disciplinary proceedings are of the same nature such that to permit them to continue would offend the integrity of the criminal process or the Courts' sense of justice or propriety. This is, therefore, a situation amounting to abuse as referred to in [133] of *Z v Dental Complaints Committee* because the scope of the disciplinary inquiry "would simply replicate the exercise that [the] criminal Court has undertaken, where that process has resulted in an acquittal".

[60] The plaintiffs do not say that the charge against Mr Mill under reg 9(30) amounts to an abuse of process.

[61] In light of the legal principles stated in *Z v Dental Complaints Assessment Committee*, it is appropriate to consider the question of whether the pursuance of the disciplinary charges here is an abuse of process in terms of a comparison between the substance and purposes of the two sets of charges, and between the procedure of the criminal and disciplinary processes (including the standard of proof).

Substance and purpose of the charges

[62] In the criminal proceedings, the plaintiffs were charged with assault with a weapon under s 202C of the Crimes Act. Relevant defences to this offence include those in ss 39 and 48 of the Crimes Act:

> **39 Force used in executing process or in arrest**
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> Where any person is justified, or protected from criminal responsibility, in executing or assisting to execute any sentence, warrant, or process, or in making or assisting to make any arrest, that justification or protection shall extend and apply to the use by him of such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, warrant, or process can be executed or the arrest made by reasonable means in a less violent manner …
>
> **48 Self-defence and defence of another**
>
> Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[63] Section 62 of the Crimes Act states that persons authorised by law to use force will nevertheless be criminally responsible for any excess of such force.

[64] The disciplinary charges under reg 9(5) charge that the plaintiffs used "unnecessary force".

[65] The plaintiffs say that the disciplinary charges are identical to the criminal charges – that both comprise a use of force against Mr Falwasser and no legal excuse or justification for the use of that force.

[66] The plaintiffs further say they intend that their defences to the disciplinary charges will be identical to those used in the District Court – namely defence of themselves, defence of others and acting in execution of their duty. They say that, unlike in *Z v Dental Complaints Assessment Committee*, there is no collateral issue remaining to be considered.

[67] As the plaintiffs were acquitted by jury the basis of their acquittal is not clear. Given the two defences relied on, it may have been that the jury found that the force used by the Officers was necessary to overcome force used by Mr Falwasser in resisting the Officers in the execution of their duty. Alternatively, it may be that the jury found that, in the circumstances as the plaintiffs each reasonably believed them to be, the force used was reasonable.

[68] The former would appear to be materially identical in substance to what would amount to a defence to the disciplinary charges, except insofar as there may be a higher standard in terms of what constitutes necessary force under reg 9(5). That is, in employment terms, except to the extent that the Commissioner is entitled to hold Police Officers to a higher standard of behaviour, involving a lesser use of force, than may be allowed by a jury under the s 39 defence.

[69] If, however, the jury acquitted on the basis of self-defence, it would appear at least possible that the subjective-objective nature of the criminal defence (in s 48 of the Crimes Act) is materially distinct from the nature of the inquiry under the Regulations. There were no submissions on this issue from the defendant. It seems to me, however, that the test in General Instruction A270 (see [30] above) as to when Police Officers may use oleoresin capsicum spray in their defence or defence of others could well – on this basis – be materially different.

[70] In either case, the general question seems to be whether a particular use of force may be found by a jury to be necessary or reasonable under the criminal law but be considered unnecessary under the Regulations. That is, the question for me is the Commissioner may set standards of conduct for Police Officers that require more – or a higher standard of conduct – than simple compliance with the criminal law.

Whether the Commissioner can establish that, as a matter of fact, he has done this is, in my judgment, a matter for the Tribunal.

[71] The defendant submits that the Commissioner is entitled to set such higher standards around the use of force by his employees and that he is entitled to inquire, through a Tribunal, into what the appropriate execution of duty required in the particular circumstances, having regard to the standards, training and experience of the Officers involved. He says the focus is on employees using appropriate methods of policing.

[72] Section 5(5) of the Act provides that the Commissioner has "all of the rights, duties, and powers of an employer in respect of all members of the Police". In *Creedy v Commissioner of Police* the Supreme Court noted (in relation to an issue as to whether the internal police disciplinary procedure is amenable to a personal grievance) that a s 12 inquiry is conducted on behalf of the Commissioner in his or her role as the employer of Police:

> [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 were made pursuant to s 64 of the Police Act. … 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). (footnotes excluded; my emphasis)

[73] As stated by Superintendent Smith in his affidavit in these proceedings:

> The laying of criminal charges and disciplinary charges are separate processes. The criminal charges were laid against the plaintiffs by Police

> pursuant to its role as a law enforcement agency. The laying of the disciplinary charges against them was carried out by Police as the plaintiffs' employer.

[74] Some support for a higher standard for Police Officers in terms of the use of force can be found in an article by L Wansborough titled "Less than legal force? An examination of the legal control of the Police use of force in New Zealand" (2008 *Auckland University Law Review* 14, 176). The author states at 199 that the General Instructions:

> play a crucial role in informing police about the rules relating to the use of force and the use of particular weapons when exercising force. Further, while these rules must be informed by and limited by the legal requirements of police use of force, they can also be more restrictive than the legal test, prohibiting behaviour that may not necessarily be illegal, but that is nevertheless inappropriate.

[75] In para IA126 of the General Instructions (in relation to the availability of diversion) the following statement is made as to the Commissioner's right as employer to set high standards to protect the Police organisation:

> The Commissioner, as an employer, has the right to set such standards for his employees as are necessary to protect the integrity of the organisation he or she heads. The integrity of the New Zealand Police entitles the Commissioner to <u>expect higher standards of personal conduct of police staff</u> than would be the case in other occupations. (my emphasis)

[76] There is evidence that the disciplinary charges have a different purpose to the criminal charges such that meeting that purpose might require a different and/or higher standard of conduct than is required under the criminal law.

[77] Superintendent Smith states that the primary focus of the Tribunal inquiry is to ascertain whether the plaintiffs have failed to meet the appropriate standards of conduct in their duty as sworn members of the Police. The charges do not allege breaches of the criminal law and do not replicate the wording of the criminal charges. He states that the Tribunal is instead "required to determine whether the disciplinary charges are proved in light of the conduct expected of Police employees, having regard to Police training, the tactical options available to the plaintiffs and the requirements of the relevant General Instructions".

[78] Superintendent Smith notes that a number of General Instructions deal with the manner in which persons in custody ought to be dealt with. It is his view that a number of aspects of the plaintiffs' conduct fell well short of the expected standards. He says:

> The handling of persons in custody is one of the high risk tasks that Police are required to carry out. It is important that where there is evidence that the appropriate standards have not been met, that the Commissioner is able to pursue the process under the Police Act, regulations and General Instructions, to [sic] that he is able to make an appropriate decision as to an employment outcome.

[79] Similarly, Superintendent Jonathon Moss, stated in his affidavit that:

> Employees of Police are given training and very clear instruction in the requirements of General Instructions issued under the Police Act 1958 including on the use of force and deployment of firearms and other weapons. The General Instructions exist because of the special operating environment in which employees of Police are employed, which on occasion requires the use of force. Employees are also given training on how to deal with a variety of different scenarios including situations similar to the kind that arose involving Mr Falwasser on 23 October 2006.
>
> …
>
> In Mr Falwasser's case, the incident occurred in a structured environment in which there was opportunity to exercise control, planning and leadership. The question for the Tribunal in relation to the charge of unnecessary force is whether, in light of the employees' training, the tactical options available to the plaintiffs and the requirements of the relevant General Instructions, the force used by them was necessary.
>
> In relation to the wilful violation of A270, the question is whether the plaintiffs' use of the [oleoresin capsicum] spray breached the relevant General Instruction. In relation to the wilful violation of A277, the question is whether the requirements for an [oleoresin capsicum] spray report were complied with.

[80] He says that the disciplinary "charge encapsulates the issue that Police as an employer has with the individual's actions as an employee of Police" and that:

> The purpose of pursuing disciplinary charges is completely different to the purpose of criminal charges. A disciplinary investigation is an employment investigation into the behaviour of staff in the workplace or related to the workplace, with a view to regulating and maintaining the professional standards of the Police.
>
> …
>
> The focus of the disciplinary charges brought against the plaintiffs is their conduct in the workplace. That is, scrutiny of the plaintiffs' management of Mr Falwasser who was in their lawful custody and whether their actions

> were in accordance with the training and instruction provided to all officers. The focus is not on whether they have committed a crime.

[81] That the purpose of disciplinary proceedings is primarily to protect and enforce the standards of professional conduct in the public interest (as opposed to punishment) is recognised in *New South Wales Bar Association v Evatt* (1968) 117 CLR 177, 183 (HCA), *In Re a Medical Practitioner* at 800, *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720 at 724–725, *Professional Conduct Committee v Martin* HC WN CIV-2006- 485-1416 27 February 2007 at [23] and [24] and Forbes *Justice in Tribunals* (2ed 2006) at para 12.72.

[82] In the Police context, General Instruction IA128(2)(c)(i) provides that, when considering whether a Police Officer ought to be dismissed, the Commissioner is to consider whether the offending was sufficiently serious to justify this and:

> In considering this issue the Commissioner shall take into account the potential risk to the Police credibility, integrity and reputation that would arise if such offending was not met with dismissal. The Commissioner shall also take into account the right of the Commissioner, as chief executive of the New Zealand Police, to set standards for the organisation and for staff, and to take decisive action when breaches of those standards threaten the credibility, integrity and reputation of the Police. (my emphasis)

[83] General Instruction IA101 states:

> 1 The most critical asset of the New Zealand Police is its reputation and it is the duty of every member of Police to promote it and defend it.
>
> 2 We promote and defend our reputation by setting high professional standards for ourselves and demonstrating to the public, through our willingness to be held accountable for breaches of those standards, that we deserve their trust and confidence.
>
> 3 It is our reputation that encourages, for example, witnesses to come forwards, jurors to believe prosecution witnesses, and communities to support our search and rescue operations. Our effectiveness as a policing service is only as strong as our public support.
>
> 4 Therefore the purpose of an internal investigation is to reach a reliable position of knowledge from which informed decisions can be made in respect of complaints against Police or alleged disciplinary offences by Police members. …

[84] On the basis of these considerations I am satisfied that the disciplinary process here has a distinct purpose to that of the criminal process – namely, to

uphold specific standards of conduct required of Police Officers under the terms of their employment, and, importantly, to promote and protect the credibility, integrity and reputation of the Police. The guiding purpose of disciplinary proceedings – by which decisions as to whether an Officer has complied with the standards required of Police Officers will be informed – is to regulate and maintain the professional standards and reputation of the Police. I am of the view that, to achieve this purpose, the Commissioner might properly hold Police Officers to a higher and different standard than is required under the criminal law – in other words, that what amounts to reasonable force under the Regulations and General Instructions may be informed by the different purpose of those Regulations and General Instructions.

[85] These considerations indicate, in my judgment, that it would not amount to an abuse of process for the Commissioner to pursue the disciplinary charges against the plaintiffs – i.e. that it is not a simple replication of the exercise that the criminal Court has already undertaken, but is an inquiry into whether the plaintiffs have met the arguably different or higher standard required of them by the Regulations and General Instructions, to uphold and promote the reputation and integrity of the Police.

Scope and process of inquiry

[86] Further considerations noted in *Z v Dental Complaints Assessment Committee* in determining whether the laying of disciplinary charges after being acquitted of criminal charges amounts to an abuse of process are if the tribunal inquiry is inquisitorial in nature, if the tribunal has power to summon witnesses itself and generally admit evidence not admissible in criminal proceedings, and whether there is a different standard of proof. This is because these factors make it likely that different evidence will come before the tribunal – that it will look at wider aspects of the practitioner's conduct.

[87] Under the Regulations, the Tribunal hearing is to be conducted in accordance with the criminal procedure in the District Court "as far as practicable and with any necessary modifications". However, like a commission of inquiry, the Tribunal can request information and ask questions, and the Tribunal can hear evidence that

would not be admissible in a Court. Superintendent Moss's evidence was that, although the Tribunal hearing is an adversarial hearing, the Tribunal is known to exercise its powers under the Commissions of Inquiry Act to request information and ask questions.

[88] In *Z v Dental Complaints Assessment Committee*, the majority (and Anderson J) held that the appropriate standard of proof in professional disciplinary proceedings is the civil standard of proof of the balance of probabilities (i.e. not whether the charges are established beyond reasonable doubt). The standard is to be "flexibly applied" – which does not mean that the degree of probability required changes, but that as a matter of fact a tribunal will require stronger evidence of more serious allegations before the matter will be proved to its reasonable satisfaction (compare Elias CJ at [4] and [49]-[55] who supported the imposition of the criminal standard of proof in such situations). As to this McGrath J noted at [107]:

> … the true reason for the flexible application of the civil standard is concerned more with judicial policy as to what the ends of justice require outside of the criminal justice system. In the present context this reflects the different impact on the individual of the consequences of adverse findings in an occupational disciplinary process, compared with those of a conviction for a criminal offence. The latter, of course, may include loss of liberty. As well, it reflects the different nature of the societal interests served by the two processes. Moreover, the principle requiring more cogent evidence generally in serious civil cases is sound and well established in New Zealand. (footnotes excluded)

[89] Superintendent Moss acknowledges that, where an Officer faces more serious charges, the civil standard of proof that the Tribunal has applied has generally been higher.

[90] In addition, Superintendent Smith asserts that the scope of the intended inquiry at the Tribunal will cover wider ground than that of the criminal proceedings. As to the evidence that is likely to be adduced, Superintendent Moss states:

> The evidence Police adduce before the Tribunal depends on the kind of behaviour at issue and the nature of the disciplinary charges laid. For a charge of unnecessary force, Police will generally adduce evidence of the standards of behaviour expected of its employees. Whether force was necessary in the circumstances is illustrated by the relevant General Instructions, Police training and tactical options, among other evidence. In the present case Police will adduce evidence relating to the training provided

and the standards of conduct expected of the plaintiffs relevant to their rank and responsibilities in such a situation.

[91] The evidence in the criminal proceedings included:

a) Oral evidence from all scene witnesses, all other Police Officers present, two other persons present in the cells, attending doctors and the Duly Authorised Officer.

b) Oral evidence from Mr Falwasser and his brother and father (and possibly his mother).

c) The closed circuit television footage of the events.

d) Written statements for each of the plaintiffs (none of whom were cross-examined).

e) Expert evidence as to Police policies and procedures and options available to Police Officers was given by a retired Senior Sergeant John Moran. Mr Moran gave evidence, amongst others things, of the importance of considering other options if the use of oleoresin capsicum spray does not work, the meaning of co-operative behaviour and active and passive resistance, and his view that Mr Falwasser's behaviour was passive (based only on the video footage).

A volume of documents including: Staff Safety Tactical Training – Manual Defensive Tactics – OC Spray; Staff Safety Tactical Training – Manual Defensive Tactics – Expandable Baton; General Instructions relating to baton use and training; Tactical Options Framework; Manual of Best Practice – including relevant portions of Crimes Act and Police Act as to when force might be used; and all General Instructions said to be relevant to the inquiry.

[92] The plaintiffs allege that Mr Moran's evidence, in particular, is the same evidence which will be adduced before the Tribunal. For example, the plaintiffs refer to Mr Moran's evidence in relation to:

a) General Instruction A270, as to the use of oleoresin capsicum spray and the risk factors that Police Officers must be aware of when using it, and the message in the Manual that its use is just one option available to Police Officers;

b) General Instruction A261, and that striking someone with an expandable baton is the use of force that is more than trifling or moderate force; and

c) the guidance given by the Tactical Options Framework as to the best option to respond to particular behaviours.

[93] The defendant accepts that the majority of the evidence called in the District Court can be characterised as set out above, but states that he intends to call far fewer witnesses before the Tribunal and that he intends to call two new expert witnesses: Inspector Peter Gibson (Officer in charge of the Northern Service Training Centre and who has been a qualified oleoresin capsicum spray and PR24 baton instructor) and Mr Mark Wickens (Manager: Physical Training and Defensive Tactics at the Royal New Zealand Police College in Porirua). He says that their evidence will not be the same as Mr Moran's and will be called expressly for the purpose of the witnesses providing their expert opinion on whether they consider the force used by each plaintiff was, from a Police perspective, necessary in the circumstances (which evidence was not adduced in the District Court, as it went to a jury question).

[94] The defendant says Mr Moran was called primarily to explain the tactical options framework (a diagram) and how it is implemented practically, and the theory behind the use of force. In the District Court Mr Moran was not asked to comment on the conduct of the plaintiffs (and in fact had not read the file) – although he responded to questions from counsel for the plaintiffs putting their theory of the case to him. The defendant says that the commentary to be provided by these new witnesses illustrates the higher standard expected of Police Officers, and is relevant to whether they have complied with their personal obligations as Police Officers to obey and be guided by the General Instructions.

[95] The defendant says that the Tribunal will consider the seniority and rank of the Police Officers, their experience, the circumstances known to each, the alternative options and the level of risk posed by the use of these options in assessing whether the use of pepper spray was appropriate and therefore necessary.

[96] In my view, it does therefore seem likely that there will be some differences in the scope of the evidence produced before the Tribunal such that it is not a repetition of the inquiry before the District Court. Moreover, the Tribunal has powers under the Commissions of Inquiry Act to itself request information and ask questions and there is a different standard of proof. These factors support the view that the bringing of the disciplinary charges does not amount to a mere replication of the criminal proceedings such that it is an abuse of process.

Need for greater circumspection

[97] The plaintiffs raised a further matter which, they submitted, had bearing on whether the continuation of the disciplinary charges would give rise to an abuse of process. They submitted that, unlike in the context of disciplinary charges brought by a professional body, which may result in a striking off but with an opportunity to return to the fold, the issue here is the plaintiffs' employment status. Thus the plaintiffs:

> do not have a qualification to carry forward and cannot ultimately apply for reinstatement. The worst consequence for a Tribunal is to recommend dismissal. Furthermore, the employer in this instance is in the position of being employer, investigator and prosecutor. There is with respect all the more reason to be circumspect regarding the holding of Tribunals in circumstances such as these.

[98] In my view, and as illustrated by the summary of the disciplinary process above, there are multiple protections built into the process such that it is not a situation where one person or body has complete control. Thus, for example, the Tribunal (an independent barrister here) exercises a quasi judicial function and must report to the Commissioner before any serious sanction may be considered by the Commissioner. Furthermore, there is an appeal process and the disciplinary process is subject to independent civilian oversight by the Independent Police Complaints

Authority. There is, therefore, considerable "circumspection" built into the disciplinary process.

[99] Nor am I of the view that the consequences of disciplinary charges are materially more severe in this context than in the context of a professional body, so as to alter the proper approach to whether there is an abuse of process.

Legitimate expectation

[100] As stated, the plaintiffs also claim that they had a legitimate expectation that the disciplinary charges would not proceed if they were acquitted of the criminal charges.

[101] For a legitimate expectation, that a decision will not be made contrary to the interests of a person to arise, that decision must affect that person by depriving them of some benefit or advantage which:

a) they have been permitted by the decision-maker in the past to enjoy (or were promised) and which they can legitimately expect to be permitted to continue to enjoy (until rational grounds for withdrawing it have been communicated to them and they have been given opportunity to comment); or

b) they have received assurance will not be withdrawn until they are given opportunity to comment. (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408-9; *De Smith's Judicial Review* (6ed 2007) at para 12-006).

[102] Such a legitimate expectation may be created by the giving of assurances or the existence of a regular practice: Taylor *Judicial Review* (1991) at para 13.06.

[103] In this proceeding the defendant categorised the alleged legitimate expectation as one of substantive outcome. In my view, it is more aptly described as a legitimate expectation of procedure. On my findings that follow, however, nothing turns on this point.

[104] It is acknowledged by all parties that it is well known that Police Officers have faced disciplinary charges after a discharge without conviction. I am of the view, however, that that is a quite different situation from where an Officer has been acquitted and does not help on the point at issue here.

[105] The Chief Executive Officer of the New Zealand Police Association, Mr Christopher Pentecost, deposed that he could find no instance where a member of the Association – approximately 98 percent of Police Officers in New Zealand – has faced "identical" disciplinary charges after an acquittal. He states that the usual process is that a set of internal charges is laid (so as to come within the time limit for the laying of charges in reg 13) and held in abeyance until the criminal proceedings are dealt with and, if the Officer is acquitted, the internal charges are withdrawn. He states:

> It is my expectation, and the expectation of the membership of the Association, that an acquittal would inevitably result in a discontinuance of the internal charges.

[106] Conversely, Superintendent Smith stated that there is nothing he is aware of requiring the withdrawal of disciplinary charges upon an acquittal, and no general principle of practice that this will inevitably be done. He said that each case is judged on its merits for the appropriate form of disciplinary action, and the approach taken will depend on the seriousness of the incident involved.

[107] Superintendent Moss gave evidence that:

> Where an employee is charged with criminal offending, there will always be an employment investigation. … Each case is treated individually.

[108] He stated that, while disciplinary charges are usually held in abeyance until any criminal proceedings are dealt with, this is to avoid prejudice to the Officer in his or her defence of the criminal proceedings, and not because the verdict in the criminal case will determine the outcome of the disciplinary proceedings.

[109] He stated that he was "not aware of any communication with the plaintiffs which would lead them to reasonably believe that if they were acquitted of the criminal charges the Tribunal would not proceed and they would not face any other

form of discipline", nor of "a more general expectation amongst Police Officers who receive an acquittal in the criminal context, that they will have any disciplinary charges brought against them withdrawn". He said that that would depend on the particular circumstances of each case.

[110] Police Officers are required under s 30 of the Act to obey and be guided by the General Instructions (which are published in the Police Magazine "Ten-One" and are available on the Police intranet). General Instruction IA122 contains a clear statement that criminal proceedings are not a bar to disciplinary proceedings. There is no specific mention of the situation where the criminal proceedings result in an acquittal.

[111] Superintendents Smith and Moss asserted that Police *have* faced disciplinary charges after acquittal. According to them, Professional Standards National Headquarters ("Professional Standards") files since 1998 disclose that 17 sworn employees have been acquitted of criminal charges for conduct in the course of duty (excluding the plaintiffs). Of these:

a) Thirteen returned to duty without further disciplinary charges, for different reasons. Superintendent Moss stated that in some cases proper processes were not followed and disciplinary charges could not be pursued. In other cases the charges did replicate the criminal charges – eg. "Did Constable X assault Y on Z date and is he thereby guilty of disgraceful conduct?" – and were withdrawn.

b) Two, who were both acquitted on one offence and convicted of another, resigned. One resigned before disciplinary charges were considered. The second resigned at a time when a Tribunal inquiry into the incident leading to the acquittal and conviction was underway, after the Officer and the Police negotiated his exit.

c) In one case employment outcomes were agreed between the Commissioner and the Officer and formal disciplinary steps were not pursued.

d) In one case, *New Zealand Police v J* Disciplinary Tribunal [no file number] 25 March 2007, K P McDonald QC, a Tribunal was convened and found against J on three charges.

[112] In the latter case, J, a sworn member of the Police, was convicted of assault under s 9 of the Summary Offences Act 1981 but acquitted on appeal to the High Court. He was subsequently found guilty on three disciplinary charges.

[113] The basic facts of that case were that the Police were called to an address following an incident at a party in Masterton. From that address a Constable radioed J asking him to look out for a Polynesian or Māori man without a shirt, who was said to have strangled a woman. J saw a shirtless man walking along the street. He called out but the man continued into his house. J and two Constables followed him onto the property, J went to the front door and the man came out and walked towards him. The man was arrested and J subsequently sprayed him with pepper spray. On appeal against his criminal conviction, the High Court found that the Police had failed in the summary hearing to exclude the defences available to J under s 40 of the Crimes Act 1961 (use of such force as may be necessary to prevent escape after arrest).

[114] J nevertheless faced disciplinary charges under regs 9(5), 9(41) and 9(42) (the latter comprising negligence in the discharge of his duty in failing to discharge his duties under General Instructions in relation to the use of pepper spray and in particular the provision of after-care). All three charges related to the use of the pepper spray, which had formed the basis of the criminal charges.

[115] In neither hearing did J allege that he had not deployed the pepper spray. The issue in the criminal hearing was whether there was any reasonable doubt as to J having a defence under ss 39 or 40 of the Crimes Act. The issue in the disciplinary hearing (on the first charge, under reg 9(5)) was whether J believed on reasonable grounds that he was justified in using reasonable force. (I note, too, that the Tribunal rejected an argument that she should not hear the first charge because the matter had already been the subject of factual findings in the High Court.)

[116] Superintendent Moss also referred to three cases (by way of example) involving conduct of a Police Officer *outside* the course of his or her duty:

a) A currently ongoing case in which W was acquitted of sexual offending and has been charged with disgraceful conduct for inappropriate relations through telephone calls and text messages under reg 9(12). A Tribunal has been convened and is proceeding in this matter. It appears, however, that the charges on which he was acquitted are quite different to those which he faces in the disciplinary proceeding (being in respect of the communication as opposed to any alleged physical contact).

b) A case involving B who was acquitted on a criminal assault charge against his wife. Professional Standards advised the District Commander to proceed with disciplinary charges (which were held in abeyance pending the criminal resolution). However, following mediation, B resigned and so a Tribunal inquiry was not required. Mr Pentecost stated that the disciplinary charges related to completely different matters, namely the pursuit of secondary employment without permission while suspended.

c) W was acquitted of assault in the District Court and the Police proceeded with a reprimand.

[117] On the evidence before me, I am not satisfied that there is (or was at the relevant time) a general principle or practice whereby an acquittal of criminal charges would necessarily result in internal disciplinary charges relating to the same incident being withdrawn. Moreover, I am of the view that the Commissioner's conduct since the complaint was such as to dispel any such expectation.

[118] I am also persuaded that an implied representation or practice as contended by the plaintiffs would conflict with the principles of Police accountability inherent in the General Instructions and legislative regime and that it would be an undue fetter on the Commissioner's statutory duties in terms of the disciplinary process.

[119] For these reasons I find that the decision to pursue the disciplinary charges, notwithstanding the plaintiffs' acquittal on the criminal charges, is not in breach of a legitimate expectation of the plaintiffs such that I should interfere with that decision on judicial review.

Result

[120] The plaintiffs are unsuccessful on each of their grounds of review.

[121] The question of costs was not addressed before me. I see no reason, however, why costs should not follow the event in favour of the defendant on a 2B basis. If the parties are unable to agree on the question of costs, they may file submissions.

"Clifford J"

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