

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 52
5318254**

BETWEEN PAUL LAMB
 Applicant

AND THE COMMISSIONER OF
 THE POLICE
 Respondent

Member of Authority: Eleanor Robinson

Representatives: David Grindle, Counsel for Applicant
 Sally McKechnie, Counsel for Respondent

Investigation Meeting: 7 & 8 December 2010 at Whangarei

Submissions received: 23 December 2010 from Applicant
 21 December 2010 from Respondent

Determination: 10 February 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Paul Lamb, claims that he has a personal grievance under s103(1)(a) of the Employment Relations Act (“the Act”) in that he was unjustifiably dismissed by the Respondent, The Commissioner of New Zealand Police (“the Police”), on 27 July 2010.

[2] The Police deny that Mr Lamb was unjustifiably dismissed and claim the dismissal of Mr Lamb was substantively and procedurally justifiable, and that the dismissal decision was a decision which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

Issues

[3] The issues for determination are:

- Did the Police carry out a fair and reasonable investigation?
- On the basis of the investigation undertaken, was the decision that the actions of Mr Lamb constituted serious misconduct a decision which a fair and reasonable employer would have reached?
- If there was serious misconduct, would a fair and reasonable employer have considered dismissal to have been within the range of reasonable penalties available?

Background Facts

[4] Mr Lamb joined the Police as a recruit on 18 October 1993. During his employment with the Police Mr Lamb had served principally as a frontline uniformed officer in the Whangarei area, in which capacity he had regular contact with members of the public.

[5] Prior to February 2009, Mr Lamb had been subject to a period of rehabilitation and reintegration. The rehabilitation process had originally come into place as part of a mediated settlement agreement following disciplinary processes in June 2007. During the rehabilitation process Mr Lamb was subject to close supervision, support and monitoring. It was agreed as part of the mediated settlement agreement that Mr Lamb would work in non-frontline duties for a period of 12 months, to be reviewed after 6 months, with a process being agreed for Mr Lamb's return to frontline duties thereafter. As a result of various events, the rehabilitation period had been extended.

[6] On 26 January 2009 Mr Lamb had just returned to frontline duties, being posted to the Strategic Traffic Unit ("STU") in Whangarei and subject to the supervision of Sergeant Graham Pugh, the sergeant in charge of STU. Apart from Sergeant Pugh, Mr Lamb was also supervised by Inspector Dimery as part of the rehabilitation process.

[7] On 17 February 2009 Mr Lamb was working as part of STU when he responded to a call from a police officer, Constable Furze. Constable Furze was requesting assistance in controlling a suspect, Mr Hirini Tamihana, who was involved in an alleged bag snatching incident.

[8] Mr Lamb assisted in getting Mr Tamihana into the rear of a police car and joined him in the back seat, where he (Mr Lamb) remained for the journey in the vehicle to Whangarei police station.

[9] During that journey, it is accepted that Mr Tamihana was intoxicated and difficult to control, and that Mr Lamb had punched and choked him in an effort to control him during the journey.

[10] On arrival at the Whangarei police station, Mr Tamihana had been uncooperative and was bleeding from his nose. Mr Tamihana had spat blood and mucus on the walls and a glass screen. Mr Lamb told Mr Tamihana to wipe up the blood and mucus and when he refused to do so, Mr Lamb used Mr Tamihana's jersey to do so.

[11] Following this incident and at the conclusion of his shift, Mr Lamb completed a Job Sheet outlining his involvement with Mr Tamihana. A Job Sheet is a chronological record of events detailing an officer's involvement in a particular incident. Mr Lamb did not refer to the use of any force on Mr Tamihana on the Job Sheet.

[12] Mr Lamb was next at work on 19 February 2009, when he completed and submitted a Tactical Options Report ("TOR"). A TOR is a record of events leading up to, and including, an incident where a tactical option, that is force, has been considered or used on a suspect. On the TOR Mr Lamb reported that he had punched Mr Tamihana once and had forcibly restrained him during the journey in the vehicle to Whangarei police station.

[13] On 23 February 2009, Mr Lamb was notified in writing that a criminal and an employment investigation following the incident with Mr Tamihana on 17 February

2009 was in process. Under the Police Code of Conduct (“the Code”) Mr Lamb was able to elect whether the two investigations should proceed concurrently or consecutively, and was advised of his right to seek legal advice prior to making this decision. Mr Lamb elected to have the criminal process proceed first.

[14] On 23 February 2009 Mr Lamb was stood down from duty and on 14 April 2009, he was suspended from duty.

[15] The criminal investigation process proceeded and resulted in the matter being heard in the District Court. On 18 November 2009, Mr Lamb was acquitted by the District Court of any criminal charges in the incident involving Mr Tamihana.

[16] Following the District Court verdict, Mr Lamb was advised by a letter dated 22 December 2009 from Ms Korina Pascoe, Employee Practices Manager, that the employment investigation would be proceeding. Under the Code the following steps are to be followed:

- An investigation to involve seeking an explanation from the complainant, examining witnesses and the person who was the subject of the complaint.
- Once the initial investigation step is complete, a report is to be compiled and forwarded to the decision maker (usually a District Commander or National Manager) who is to make a recommendation as to whether the matter is:
 - Misconduct;
 - Serious misconduct,
 - Merely performance related;
 - Needs no further action
- Matters which are considered to be misconduct can be resolved by the means of Progressive Disciplinary process (being a series of staged warnings).

- Matters which are considered to be serious misconduct, are referred to the National Disciplinary Committee (‘NDC’), which is made up of:
 - Assistant Commissioner: Crime and Operations, or in their absence Assistant Commissioner: Strategy, Policy and Performance;
 - General Manager: Human Resources;
 - General Manager: Public Affairs;
 - National Manager: Professional Standards; and
 - Employee Relations Manager.

- The NDC is to assess the information from the investigation and make a recommendation.

- In the event that the NDC recommend that the matter is potential serious misconduct, it is to be set down for a Disciplinary Hearing.

- A Disciplinary Hearing is to be run by one of a panel of experienced external employment practitioners, and is to involve the hearing of evidence from the police officer who is the subject of the complaint, his or her representative(s) and witnesses.

- In reaching a decision, the Disciplinary Hearing panel member has a range of options. In the event that the matter is considered to be misconduct, the matter enters the Progressive Disciplinary process. A finding of serious misconduct generally results in a preliminary decision to dismiss, after which the employee has 7 days in which to make a submission as to the proposed outcome.

- Any submissions are considered before a final decision is made.

[17] The steps as set out in the Code were followed in the employment investigation.

[18] Mr Wayne Annan, General Manager, Human Resources, undertook the investigation. Mr Annan submitted his report, dated 22 February 2010, to

Superintendent Rusbatch, the Northland District Commander, who reviewed the report. Superintendent Rusbatch then forwarded the report to the National Disciplinary Committee (“NDC”) with his recommendation that the matters which were the subject of the report be viewed as potentially serious misconduct.

[19] On 24 February 2010 the NDC, having considered the report, determined that the matters be treated as potential serious misconduct and that the issue should proceed to a Disciplinary Hearing.

[20] On 9 April, a Disciplinary Hearing was held before Mr David Robb, a Disciplinary Hearing Panel Member. Mr Robb issued his report on 1 June 2010. This report was sent to Assistant Commissioner Nicholls who had been appointed as the final decision maker in the process.

[21] Assistant Commissioner Nicholls considered the Disciplinary Hearing report from Mr Robb, together with the investigation report from Mr Annan, and a report from the Northland District which set out Mr Lamb’s employment history with the Police.

[22] Assistant Commissioner Nicholls, by letter dated 2 June 2010, conveyed his preliminary decision of dismissal to Mr Lamb.

[23] On 8 June 2010 a submissions hearing was held in Whangarei between Assistant Commissioner Nicholls, Mr Lamb and his representative, Mr Harley Dwyer of the Police Association. On 16 July 2010, Assistant Commissioner Nicholls advised Mr Lamb of his decision to dismiss Mr Lamb for serious misconduct.

[24] On 21 July Mr Lamb emailed the Police indicating that he would not resign and that he did not accept the dismissal notice. Mr Lamb reiterated in this email the alternatives to dismissal that he had put forward at the submissions hearing on 8 June 2010.

[25] On 27 June 2010, Mr Lamb was dismissed from the Police.

Determination

[26] There are several sources from which the structure of the Police employment and discipline procedures are derived. These include the Policing Act 2008, the Code, the Employees Guide to the Code and the relevant collective agreement.

Code of Conduct

[27] The Code was introduced to the Police on 1 February 2008. The purpose of the Code was to establish standards of behaviour expected of all Police employees, and has five core principles:

- (i) Honesty and Integrity;
- (ii) Loyalty, Good Faith and Professionalism;
- (iii) Fairness and Impartiality;
- (iv) Respect for People and Property; and
- (v) Confidentiality

[28] As part of the Code's introduction to the Police, Mr Annan said there was extensive training provided and Assistant Commissioner Nicholls explained at the Authority Investigation Meeting that the Code was a "*milestone in the history of the New Zealand Police*". As such, he said it was easily accessible in every police station and further he stated that it was displayed on police station walls.

[29] Mr Lamb said that he had not been at work when the Code was introduced and he had received no training on it, but agreed that he was aware of it, had read it, and stated that it had confirmed what he had learnt and understood of the Police procedure to that date.

[30] Section 20 (2) of the Policing Act 2008 states that "*It is the duty of every police employee to conduct himself or herself in accordance with the code of conduct.*" Mr Lamb was also bound by the Code through the provisions of the collective agreement which covered his employment and which states: "*The Code of Conduct places obligations and rights on the employee and employer that shall be observed at all times*".

[31] I find that Mr Lamb was aware of the dictates of the Code and bound to act in accordance with the principles contained within it.

Elements of a Justifiable Dismissal

[32] The Policing Act 2008 states at s 56: “*Except as expressly provided in this Act, the Employment Relations Act 2000 applies in relation to the Police.*”

[33] The decision to dismiss Mr Lamb on the basis of serious misconduct must be a justifiable decision in accordance with the test as set out in s 103A of the Act which states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred”

[34] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adhere to the principles of natural justice. The then Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*¹ stated:

“That is not to say that the employer’s conduct of the disciplinary action is to be put under a microscope and subjected to pedantic scrutiny...”

However a process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable

[35] There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

¹ [1990] 1 NZILR 35

Did the Police carry out a fair and reasonable investigation?

[36] Following Mr Lamb's acquittal on the criminal charge associated with the incident involving Mr Tamihana, the disciplinary process commenced as had been advised to Mr Lamb in February 2009.

[37] The Code sets out the steps which are to be followed in the Code Disciplinary Process, the first step being the investigation.

Investigation Stage

[38] Mr Wayne explained that in his capacity as General Manager, Human Resources, he would normally be the ultimate decision-maker. However as he was familiar with Mr Lamb, having had involvement in the mediated settlement process in June 2007, he undertook the investigation process only.

[39] Mr Lamb was invited to attend the investigation meeting by letter dated 9 January 2010 and advised in that letter of the nature of the allegations, his right to have representation, and the possible outcome, this being dismissal.

[40] Mr Annan said that in carrying out the investigation process, he reviewed the relevant documents, visited Whangarei police station where the incident had taken place, and interviewed a number of the police officers. The meeting with Mr Lamb took place in late January 2010 and Mr Lamb was represented at that meeting by a member of the Police Association.

[41] At the conclusion of his investigation, Mr Annan completed a detailed report dated 22 February 2010, and sent this to the District Commander of Northland, Superintendent Rusbatch. A copy of this report was also provided to Mr Lamb.

[42] Mr Annan's opinion was that, after completing his investigation and upon reviewing the evidence available, Mr Lamb had breached the Code and that this constituted serious misconduct for three reasons, these being:

- *A failure to behave in a manner consistent with both the values of the Police and the Code of Conduct.*
- *A failure to follow the basic requirements and use good judgment.*
- *A breakdown in the employment relationship and use good judgment.*

In reaching his opinion, Mr Annan stated in the report that he had focussed specifically on (i) Mr Lamb's failure to raise the use of force on Mr Tamihana in the incident on 17 February 2009 with his or any Supervisor prior to submitting a TOR; (ii) the fact that the TOR was inconsistent with the Job Sheet, and in his view had only been submitted: "... *after it was apparent an investigation was underway*"; and (iii) on Mr Lamb having used Mr Tamihana's jersey to wipe up the blood and mucus.

[43] Superintendent Rusbatch reviewed Mr Annan's report and then forwarded the report to the NDC, together with his recommendation that the matters referred to in the report constituted potentially serious misconduct.

Disciplinary Hearing

[44] On 24 February 2010 the NDC convened and considered the report. The Committee's view was that the matter should be treated as potential serious misconduct and referred to a Disciplinary Hearing.

[45] Mr Annan explained that the Disciplinary Hearing process can be aligned to that followed by the Employment Relations Authority. In this instance Mr David Robb was the Disciplinary Hearing panel member appointed by Assistant Commissioner Nicholls acting on the advice of his staff, to lead the Disciplinary Hearing in respect of Mr Lamb.

[46] Mr Lamb was advised by letter dated 26 February 2010 that there would be a Disciplinary Hearing in connection with the Mr Tamihana incident. Mr Lamb was advised that the matter could amount to serious misconduct, provided with information as to the nature of the hearing, a copy of all the information that would be provided to Mr Robb, and was advised of his right to have representation at the Disciplinary Hearing.

[47] The Disciplinary Hearing took place on 9 April 2010. Mr Lamb was represented by Mr Harley Dwyer of the Police Association. Prior to the Disciplinary Hearing, there had been correspondence and discussion between Mr Harley, Police employees and Mr Robb about the scope of the inquiry.

[48] At the Disciplinary Hearing witnesses were called and submissions were made on behalf of Mr Lamb. Mr Lamb was also given the opportunity to discuss any further matters. Following the Disciplinary Hearing, there were discussions between Mr Dwyer, the Police and Mr Robb to clarify details.

[49] On 1 June 2010 Mr Robb issued his Disciplinary Hearing report to Assistant Commissioner Nicholls. Mr Robb explained in his report that he had examined and considered the three matters raised by the Police against Paul Lamb. These issues were:

- a. *Whether Senior Constable LAMB's failure to raise the use of force with his supervisor prior to lodging a Tactical Options Report ("TOR") constitutes any misconduct*
- b. *Whether the inconsistency between Senior Constable LAMB's job sheet and TOR constitutes any misconduct.*
- c. *Whether Senior Constable LAMB's treatment of an offender and LAMB's actions in wiping the offender's blood and mucus with his jumper constitutes any misconduct.*

[50] Mr Robb's conclusion as outlined in his Disciplinary Hearing report was that upon considering these three matters, he believed they constituted serious misconduct.

The Commissioner

[51] Assistant Commissioner Nicholls acting as the Commissioner's delegate in the process, considered Mr Annan's investigation report and Mr Robb's Disciplinary Hearing report. Assistant Commissioner Nicholls was also provided with a report from the Northland District, dated 2 June 2010, and which set out Mr Lamb's

employment history. Based on these reports, Assistant Commissioner Nicholls made a preliminary decision to dismiss Mr Lamb from the Police.

[52] Mr Lamb was advised of this decision by letter dated 2 June 2010 and invited to make submissions in respect of this decision, either in writing or in person. Mr Lamb appeared in person at a submissions hearing held on 8 July 2010, and presented oral submissions. Mr Lamb's representative Mr Dwyer gave written submissions to which he spoke.

[53] Assistant Commissioner Nicholls invited Mr Lamb to address any other matters he wished to be considered by him, and Mr Lamb availed himself of this opportunity.

[54] On 16 July 2010 Assistant Commissioner Nicholls wrote to Mr Lamb advising him of his decision to dismiss him. The letter detailed the reasons for this decision and informed Mr Lamb of his right in accordance with the Code Disciplinary Process to seek alternative outcomes to dismissal.

[55] Mr Lamb chose not to make further submissions but on 21 July 2010 he emailed the Police indicating that he would not be resigning, that he did not accept the dismissal decision, and that he adhered to the alternative outcome of working in a non-frontline position which he had suggested in his submissions presented by Mr Dwyer and dated 8 July 2010.

[56] By letter dated 27 July 2010 Mr Lamb was informed by Assistant Commissioner Nicholls that careful and full consideration had been given to his suggested alternatives to dismissal but that his (Assistant Commissioner Nicholls) decision was dismissal Mr Lamb. Reasons were provided in this letter for the decision.

[57] I find that at all stages of the disciplinary process the Police fulfilled their duty to inform Mr Lamb of the allegations against him, and to provide him, and his representatives, with full copies of all documents and an informed opportunity to respond.

Pre-determination

[58] A disciplinary process should also be free from pre-determination and the outcome decision should be free from bias and pre-determination.

[59] At the Authority Investigation Meeting, Mr Lamb said that he had been informed that the *Northern Advocate* newspaper had a tape of Superintendent Rusbatch saying that Mr Lamb was a “*bad apple*” and that he was determined to “*get rid of*” Mr Lamb.

[60] It has been established subsequent to the Authority Investigation Meeting that Mr Lamb had sent an email to the *Northern Advocate* newspaper on 23 November 2009 requesting copies of all information they held, including tape recordings of interviews, in relation to the reporting of the criminal investigation. However the *Northern Advocate* response was to the effect that no information of the nature requested by Mr Lamb would be supplied and consequently no tape was provided to Mr Lamb or submitted in evidence.

[61] Mr Lamb refused to tell the Authority the source of the information about the existence of the tape, but did state that he had told Mr Dwyer of the existence of the tape. Following a telephone conference call during the Authority Investigation Meeting in which Mr Dwyer denied knowledge of the existence of such a tape, Mr Lamb said that he was certain that he had told one of his representatives about the tape but was unable to recall exactly whom. Superintendent Rusbatch forcibly denied having made such a comment.

[62] I find no verification of the existence of such a tape or of Superintendent Rusbatch having made the alleged recorded remarks, and consequently I find no evidence of pre-determination on this basis.

[63] As regards bias and pre-determination, Mr Grindle questioned Mr Annan’s independence. Mr Annan had been previously involved with Mr Lamb and had been involved in the mediated settlement agreement.

[64] In any organisation, members of the Human Resources department may have repeated involvement in disciplinary matters with employees, but there is an

expectation that the disciplinary matters will be addressed professionally and without being unduly influenced by bias or a lack of independence.

[65] Mr Annan was the General Manager of Human Relations, and I do not find that the fact that he had been previously involved with Mr Lamb in a disciplinary context evidence of his having been biased or of having pre-determined the outcome of the matters related to the Mr Tamihana incident.

[66] As Judge Travis observed in *New Zealand Tramways Etc IUOW v Auckland Regional Council*²:

The mere fact that the person making the decision is an officer of the employer empowered to deal with the issue does not of itself make the decision biased and thereby deny the employee of the opportunity of a fair hearing.

[67] I further find that although Mr Annan would normally have been the outcome decision maker in the disciplinary process, in this case Mr Annan, after having undertaken the investigation, was not involved in the later stages of the process. Subsequent decisions were made by Superintendent Rusbatch, the NDC, Mr Robb, who was independent of the Police, and finally by Assistant Commissioner Nicholls. I find no evidence of bias and pre-determination in the processes followed.

[68] I determine that the Police carried out a fair and reasonable investigation and followed a robust process.

Was the decision that the actions of Mr Lamb constituted serious misconduct a decision which a fair and reasonable employer would have reached following the investigation?

[69] In determining the findings of Mr Robb and the Police with regard to serious misconduct I have to consider s103A of the Act and whether the findings are those which the fair and reasonable employer would have made. In *Fuiava v Air New Zealand Limited*³ Judge Travis stated:⁴

² [1992] 2 ERNZ 883

³ [2006] ERNZ 806; (2006) 4 NZELR 103 (EMC)

⁴ At para [50]

The Court in Hudson found that the new s103A did not give the Employment Institutions the unbridled licence to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively.

1. The Investigation Process

[70] Mr Annan's role was to carry out a thorough investigation of the allegations against Mr Lamb and to forward a report with his view of the matter to the decision maker, who was to make a recommendation to the NDC, who in turn would decide if the matter needed to be progressed to a Disciplinary Hearing.

[71] Mr Annan's investigation meeting preceded the Disciplinary Hearing at which Mr Robb presided and at which the conclusion of serious misconduct by Mr Lamb was made and submitted to Assistant Commissioner Nicholls. In reliance on Mr Annan's report, Superintendent Rusbach and subsequently the NDC reached the view that there was 'potentially serious misconduct'. It was therefore the first step of the process only and it will be Mr Robb's conclusions on which I shall concentrate.

[72] After investigating all the issues fully, Mr Annan recommended that Mr Lamb's actions be dealt with by way of serious misconduct for three reasons:

- *A failure to behave in a manner consistent with both the values of Police and the Code of Conduct".*
- *A failure to follow basic requirements and use good judgement.*
- *A breakdown in the employment relationship such that it strikes at the heart of the employment relationship.*

Mr Annan believed that these reasons resulted in a real risk that Mr Lamb would repeat behaviour that would lead to further investigations.

[73] These conclusions formed the platform from which the subsequent steps were taken resulting in the Disciplinary Hearing.

2. The Disciplinary Hearing

[74] Mr Robb's role as the panel member assigned to the Disciplinary Hearing in respect of Mr Lamb had been to decide if Mr Lamb's actions on 17 February constituted serious misconduct. Following the Disciplinary Hearing Mr Robb had concluded that there were three areas in which Mr Lamb's actions constituted serious misconduct, a conclusion which formed the basis for the decision to dismiss Mr Lamb.

[75] I note that although Mr Robb was not present at the Authority Investigation Meeting, there are no challenges to the veracity of the details of the Disciplinary Hearing as contained in his report and consequently I accept them as a true record.

[76] Mr Robb in the Disciplinary Hearing was focusing on the same three issues as Mr Annan had done in his investigation meeting, these being: (i) Mr Lamb's failure to follow internal reporting procedures and completion of TOR reports; (ii) inconsistencies in Mr Lamb's reporting of the events involving Mr Tamihana, and (iii) the treatment of Mr Tamihana during his processing at the Whangarei police station. Mr Robb's reasoning and conclusions were set out in the Disciplinary Hearing report completed following the Disciplinary Hearing and which was sent to Assistant Commissioner Nicholls. In the Disciplinary Hearing report, Mr Robb stated that he had made reference to the Code, specifically to the following sections which state:

Honesty and Integrity [P.3]

- *Employees avoid any activities, either work-related or non-work-related, that may in any way bring the New Zealand Police into disrepute and/or damage the relationship of trust and confidence between Police and Government, other agencies or the Community.*
- *All employment related communications are conducted in good faith, in an open and truthful manner.*
- *Employees take responsibility for their own actions and decisions, and challenge unethical or unprofessional behaviour.*

Loyalty, Good Faith and Professionalism [P.4]

- *Employees obey all lawful and reasonable instructions unless there is good and sufficient cause to do otherwise.*
- *Employees abide by the provisions in all New Zealand legislation, together with instructions, standards, policies and procedures set by Police.*
- *Employees act professionally at all times and are aware of the impact of their behaviour and decisions.*
- *Employees exercise sound discretion and judgement at all times.*

Respect for People and Property [P.6]

- *Employees are fair and just in carrying out their duties, irrespective of their personal beliefs, values and philosophies.*
- *Employees respect the rights of all persons and treat members of the public and other employees with courtesy and respect.*

[77] Mr Robb in the report addressed each of the three issues and then presented his conclusion.

Issue 1: The failure by Mr Lamb to raise the use of force with his supervisor prior to lodging a Tactical Options Report (“TOR”)

[78] The completion of a TOR is addressed by Police General Instructions – Use of Tactical Options A261 (“A261”). A261 states:

1. Where in the execution of a duty a member uses force on any person, regardless of whether or not that person has been arrested, the member shall at the first opportunity submit a Tactical options Report to his or her supervisor

And

9. Where it is likely an incident will result in a complaint or other enquiry, regardless of the extent of force used, a member shall report the matter to his or her supervisor who shall direct whether or not paragraph one of this General Instruction is to apply.

[79] The incident involving Mr Tamihana occurred on 17 February 2009 and Mr Lamb had completed the TOR on 19 February 2009. Mr Lamb did not raise the use of force with his supervisor prior to completion and lodgement of the TOR.

[80] Mr Lamb explained to Mr Robb, and subsequently to the Authority, that he understood that any use of force mandated the completion of a TOR, such that he needed to comply with paragraph 1 of A261, and that consequently there was no necessity for him to contact a supervisor. Mr Lamb said that it was his belief that ‘at the first opportunity’ meant ‘within three days’ and he had completed a TOR within three days. On that basis Mr Lamb believed that he had complied with the requirements of paragraph 1 of A261.

[81] Mr Robb as part of his process had interviewed Sergeant Pugh and questioned him as to his (Sergeant Pugh) expectations concerning the completion of a TOR. Mr Robb stated that Sergeant Pugh told him that his expectation was that a TOR would be completed prior to the “*completion of duty*” although Sergeant Pugh had acknowledged that occasionally people forgot to do so. However Sergeant Pugh had added that the TOR was a: “*kind of a backstop if you use force and you know it’s potentially going to be contentious*”.

[82] Sergeant Pugh had also informed Mr Robb, as indeed he informed the Authority at the Authority Investigation Meeting, that he had told Mr Lamb, in light of what Sergeant Pugh knew of Mr Lamb’s reputation, of his expectations of Mr Lamb whilst he was working in the STU.

[83] As regards not reporting the incident to a supervisor, Mr Robb had queried Mr Lamb not reporting the issue to a superior and stated that he found Mr Lamb’s response that: “*...it was one punch , you know, and in the big picture it wasn’t that serious to hunt someone down to discuss it*”, concerning in the circumstances.

[84] The circumstances Mr Robb believed to be relevant included the fact that that Mr Lamb was “*very aware*” that there could be ramifications to the incident with Mr Tamihana. Mr Robb wrote that:

It was a serious situation and Paul LAMB recognised that in the meeting. Put simply, before he finished duty that day of 17 February he knew that there were ‘closed door’ discussions occurring between Pugh and Furze. Even more relevant is that he also knew that there had been some sort of inquiry at the front counter by an associate of Tamihana. Paul LAMB told me that he had been told that a family member was at the counter making a PCA complaint.

[85] Mr Robb further considered relevant the fact that Mr Lamb was an experienced employee who had just returned to active duty and who was still under supervision at that time, consequently Mr Robb believed there was an onus on him to use sound judgement to protect his reputation.

[86] Mr Robb did not believe that Mr Lamb had complied with the requirements of A261 and that failing to take a greater degree of responsibility by reporting the matter to a supervisor immediately was a serious breach of the Code. Mr Robb considered Mr Lamb had seriously breached the Code in failing to show sound discretion and judgement, which had the potential to bring the Police into disrepute. This had contributed to Mr Robb’s finding of serious misconduct.

[87] It was established at the Authority Investigation Meeting that different time frames might apply to different areas of Police operations, the evidence of Sergeant Pugh established that some police officers might forget to complete a TOR at the end of their shift, and I accept that there is ambiguity over the precise interpretation of “*at the first opportunity*”. I further accept Mr Lamb’s explanation that he believed that since he knew he had to complete a TOR as he had used force, there was no purpose to be served in his seeking guidance as to whether or not a TOR needed to be completed.

[88] However Mr Lamb did not offer a credible explanation as to why he had not completed the TOR at the end of his shift, and I consider that to have both done so, and reported his use of force in the incident with Mr Tamihana to a supervisor at the end of his shift, would have been an exercise of good judgement in all the

circumstances at the relevant time; these being the fact that Mr Lamb had just returned to frontline duties, was still under supervision, and had been spoken to by Sergeant Pugh in regards to his (Mr Lamb's) reputation and Sergeant Pugh's expectation of how Mr Lamb would conduct himself whilst working with the STU.

[89] I find that a fair and reasonable employer would conclude, as did Mr Robb, that in the relevant circumstances at the time, Mr Lamb had failed to exercise "*sound discretion and judgement*" and that this had the potential to bring the Police into disrepute, such that it contributed to a finding of serious misconduct.

Issue 2: The inconsistency between Mr Lamb's Job Sheet and the TOR

[90] The Job Sheet completed by Mr Lamb on 17 February 2009 following the incident with Mr Tamihana contained no mention of a punch. The TOR completed on 19 February 2009 referred to one punch.

[91] Mr Robb stated that although he had found it difficult to appreciate the inconsistencies between the two documents, Mr Dwyer had explained on behalf of Mr Lamb that as the Job Sheet was often relied upon by the Police to progress a prosecution, it would "*rarely contain all the information in relation to an incident*", which Mr Robb understood to mean that the police officers would ensure the Job Sheet was brief, and which explanation Mr Robb accepted might account for inconsistencies between the documents "*given the differing reasons and circumstances in which either document might be relied upon*".

[92] Mr Robb came to the view that Mr Lamb had, for various reasons including the fact that he was still under supervision and had been clearly advised of Sergeant Pugh's expectations, completed two reports which were deliberately inconsistent "*in the hope that his punching Tamihana might escape Police attention or further action.*"; that in fact Mr Lamb had deliberately attempted to mislead the Police in relation to the events with Mr Tamihana in the police car on 17 February 2009.

[93] Mr Robb considered that had Mr Lamb spoken to a supervisor on 17 February and been advised not to include mention of the punch on the Job Sheet, the issue of inconsistency with the TOR might not have arisen, but that Mr Lamb's decision not to

have done so in the circumstances constituted extremely poor judgment on Mr Lamb's part which tainted both motivation and outcome. Further that this undermined the requirements in the Code that:

- *All employment related communications are conducted in good faith, in an open and truthful manner' ; and*
- *Employees are to take responsibility for their own actions and decisions, and challenge unethical or unprofessional behaviour.*

[94] Mr Robb concluded that Mr Lamb's approach to the matter had lead him (Mr Robb) to find Mr Lamb's ability to conduct himself ethically or professionally in doubt, leading him to a finding of serious misconduct. Mr Robb concluded:

My determination is that the matter of inconsistency alone may have resulted in a finding of misconduct. However Paul LAMB's approach to the different and inconsistent information provided in the job sheet and the delay in completing the TOR lead me to the overall finding of serious misconduct given the circumstances and motivations I identify above.

[95] At the Authority Investigation Meeting, Mr Lamb explained that he understood that no information adverse to the Police position should be included on a Job Sheet, this was used by the Prosecution counsel in the court and the information contained thereon would be revealed to Defence counsel in the case. I preferred the explanation provided by Assistant Commissioner Nicholls that all available information should be included on a Job Sheet as this information provided a basis for relevant charges. In the case of Mr Tamihana, who appeared in court the following day, if the information as to the punch had been included on the Job Sheet this might have enabled the inclusion of such potential charges as that relating to assault on a police officer in the execution of his duty.

[96] I do not accept that Mr Lamb provided a credible explanation as to why he had not included that details of the punch on the Job Sheet, and again I consider that to have both done so, and reported his use of force in the incident with Mr Tamihana to a

supervisor at the end of his shift, would have been an exercise of good judgement in the circumstances at the relevant time

[97] I find that a fair and reasonable employer would conclude, as did Mr Robb, that in the relevant circumstances at the time, Mr Lamb had failed to exercise good judgement in the manner of completing the Job Sheet, resulting in inconsistencies between the Job Sheet and the TOR and leading to a conclusion that Mr Lamb had failed to conduct himself ethically and professionally in breach of the Code, such that it resulted in a finding of serious misconduct.

Issue 3: The actions of Mr Lamb in using Mr Tamihana's jumper to wipe up the blood and mucus

[98] Mr Robb, whilst of the initial opinion that Mr Lamb's actions in using Mr Tamihana's jumper for cleaning the blood and mucus was at variance with the Code focus of ensuring professional behaviours and actions by the Police, stated that as part of the Disciplinary Hearing process he had visited two other police stations and interviewed other officers to ascertain prevalent views on the matter.

[99] Mr Robb noted that using an offender's clothing to wipe their own mess had been a practice previously but that the officers interviewed had designated this as '*the old way*' and that usual prevailing practice was to use appropriate cleaning materials or to call in a cleaner.

[100] Mr Robb stated that Mr Lamb, who admitted that he had used Mr Tamihana's jumper as a cleaning material, offered in explanation the fact that another police officer had suggested the action. However Mr Robb noted that this police officer had less than one year's service and was therefore considerably less experienced than Mr Lamb.

[101] Mr Robb stated his view that Mr Lamb had considered his actions appropriate and had exhibited no appreciation of the potential harm such an action might do to the Police. Mr Robb concluded that while this action on its own would justify a finding of misconduct, taken in the "*matrix of all the events of the 17 February including the*

other two allegations above, I believe that a reasonable employer would determine that the threshold to determine serious misconduct by Paul LAMB has occurred.”

[102] I find that the use of Mr Tamihana’s jersey was inappropriate behaviour from a senior police officer, but not of itself sufficient to justify a finding of serious misconduct. However I find that it was open to Mr Robb, acting fairly and reasonably, to conclude that this incident formed part of a pattern of behaviour arising from the same incident, and for him to treat this matter as an integral part of the matrix of events, which resulted in his concluding serious misconduct had occurred.

Mr Robb’s finding of serious misconduct

[103] Mr Robb summarised his conclusions and set them within the context of the Code by which Mr Lamb was bound, the cornerstone principle of which was that Police employees work to the “*highest ethical standards*’. Mr Robb viewed the three incidents as demonstrating a very low ethical standard and unprofessional conduct, and based the finding of serious misconduct in serious errors of judgement by Mr Lamb at the relevant time.

[104] I find Mr Robb’s conclusion that this matter constituted serious misconduct a finding that a fair and reasonable employer would have reached given all the circumstances at the relevant time.

3. The Submissions Hearing

[105] Assistant Commissioner Nicholls read Mr Robb’s report carefully and concluded that Mr Robb’s findings and conclusions were sound. At the submissions hearing with Mr Lamb, Assistant Commissioner Nicholls questioned Mr Lamb as to his training as he was concerned that in light of his long period of suspension, Mr Lamb might be unaware of the need to submit a TOR. However Mr Lamb had assured Assistant Commissioner Nicholls that he was well trained and knew the report was mandatory.

[106] Assistant Commissioner Nicholls questioned Mr Lamb at some length and stated that he found some of Mr Lamb’s conclusions ‘*concerning*’. Assistant Commissioner Nicholls had been particularly concerned that Mr Lamb, in answering

his questions, did not appear to understand the significance of his use of force and of his having omitted mention of it on the Job Sheet, although Mr Lamb had agreed that any issue of importance should be a consistent thread through all documentation. Assistant Commissioner Nicholls considered that a punch to a prisoner was of sufficient importance that it should have been noted in all the documentation.

[107] In respect of the matter of reporting the use of force to a supervisor, Assistant Commissioner Nicholls stated that Mr Lamb had informed him that “he didn’t need to discuss all issues with his supervisor and that *“it was only one punch”*.” Assistant Commissioner Nicholls stated that all Police officers will, at some stage in their careers, be required to use force and that it is important that in such a situation, all the circumstances are correctly and accurately reported. Assistant Commissioner Nicholls considered that Mr Lamb appeared to be trying to minimise the significance of his use of force, which he found disturbing.

[108] Assistant Commissioner Nicholls had also been concerned that Mr Lamb in relation to the cleaning up of Mr Tamihana’s blood and mucus with Mr Tamihana’s jumper appeared to be attributing the blame to a junior officer who, with less than one year’s service, was still on probation. In contrast, Assistant Commissioner Nicholls held the view that as a Senior Constable, Mr Lamb should have been providing advice, guidance and leadership to junior officers and concluded that Mr Lamb did not have the judgement to be able to do so.

[109] Having listened to and taken account of the submissions of Mr Lamb and his representative on the matter, Assistant Commissioner Nicholls did not alter his view of Mr Robb’s conclusion that Mr Lamb had made serious errors of judgement or that these resulted in a finding of serious misconduct. Assistant Commissioner Nicholls stated that he had reached the conclusion that he *‘could have no confidence in Mr Lamb if he remained a police officer and could not trust that he would act in the way expected of him’*.

[110] Assistant Commissioner Nicholls held that the timing of the events on 17 February 2009 was a significant factor, because they occurred within weeks of Mr Lamb’s return to frontline duties

[111] I determine that the decision of the Police in finding that the actions of Mr Lamb constituted serious misconduct was a decision which a fair and reasonable employer would have reached in all the circumstances at the time.

If there was serious misconduct, would the fair and reasonable employer have considered dismissal to have been within the range of reasonable penalties available?

[112] Assistant Commissioner Nicholls said that Mr Lamb had raised with him at the submissions hearing the fact that he (Mr Lamb) had been the subject of 15 complaints in 16 years with the Police. Mr Lamb told Assistant Commissioner Nicholls that the theme of the complaints was foul language and the use of force. However 8 of the complaints were not upheld, and 4 were upheld, these latter forming part of the mediated settlement, of which the rehabilitation programme also formed part. Assistant Commissioner Nicholls considered that these complaints were indicative that Mr Lamb had '*a significant history of bad judgement*'.

[113] In *Harry Butcher v OCS Ltd*⁵, the reliance by an employer on expired warning to dismiss an employee was examined. Judge Travis stated:⁶

The recent decision of the English Court of Appeal in Airbus UK Ltd v Webb [2008] EWCA Civ 49 clarifies the position that if, but for the previous warning, the employer would not have had a reason for dismissing the employee, the expired warning cannot be relied on. An expired warning can be taken into account by an employer when deciding to dismiss an employee, and by a Tribunal in deciding whether the employer has acted reasonably or unreasonably. Previous misconduct referred to in the expired warning may be relevant in determining the reasonableness of the employer's response to the new misconduct. I therefore accept Mr McBride's submission that a recently expired warning for the same conduct cannot be completely disregarded as it is part of all the circumstances which have to be considered under s103A.

[114] Assistant Commissioner Nicholls held that these later three issues, deemed to be serious misconduct in themselves, were not isolated incidents. Rather they were related to previous misconduct arising from incidents which constituted serious

⁵ [2008] ERNZ 367

⁶ At para [55]

misconduct and were attributable to poor judgement, of which there was a previous pattern of behaviour.

[115] I find that the previous complaints could be taken into consideration by Assistant Commissioner Nicholls in arriving at the decision that dismissal was the appropriate outcome as they formed part of all the circumstances at the relevant time.

[116] I note that Assistant Commissioner Nicholls was also aware at the time of the submissions hearing of commendations Mr Lamb had received in his career. The Employment Court in *Air New Zealand v Hudson*⁷ commented that a fair and reasonable employer in making an evaluation about whether to dismiss or not would:⁸ “*In doing this, ... would have been entitled to rely on matters other than the misconduct in question.*” These matters were described as including “*commendations and other positive matters raised by clients and colleagues*”.

[117] Assistant Commissioner Nicholls stated while he had considered all these matters, the upheld complaints and commendations, he had not delved into the details of each and they were not determinative of his decision that dismissal was the appropriate outcome. Nor had he taken into undue consideration a previous history of medical concerns.

[118] What had been of importance to Assistant Commissioner Nicholls in reaching the decision to dismiss was that taking the totality of the three issues arising out of the Mr Tamihana incident and the historic matters, he felt that, despite Mr Dwyer’s representations to the contrary, that Mr Lamb had not demonstrated a change in behaviour, but had exercised poor judgement in the Mr Tamihana incident. The result of this was that Assistant Commissioner Nicholls felt he could have no confidence that there would be no recurrence of such an incident.

[119] At the submissions hearing Mr Lamb and Mr Dwyer had suggested that Mr Lamb be allowed to work in a non-frontline position as an alternative to dismissal, Mr Lamb reiterated this request in his email of 21 July 2010. Assistant Commissioner Nicholls did not consider this alternative to be a viable one on the basis that :

⁷ [2006] ERNZ 415

⁸ At para [182]

. Broadly summarised, I was concerned that Mr Lamb has a history of exercising poor judgment. The ability to exercise judgment is key in policing. I did not consider that there was an alternative role, out of frontline or out of Northland District within Police, which does not require an officer to reliably exercise sound judgment. I did not have confidence that Mr Lamb would act in a manner that would not adversely impact on others.

[120] In sum, the Police as represented by Assistant Commissioner Nicholls, reached the view that they could have no trust and confidence in Mr Lamb to behave appropriately and professionally either in a frontline or a non-frontline position, and that this loss of trust and confidence was irreparable. In these circumstances, dismissal was the appropriate outcome.

[121] I find that the decision taken by the Police to dismiss Mr Lamb was one which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

[122] For the above reasons I find that Mr Lamb was not unjustifiably dismissed from his employment with the Police.

[123] **Costs**

[124] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

