

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 34
5530640

BETWEEN STEPHEN DAVIS
 Applicant

A N D COMMISSIONER OF POLICE
 Respondent

Member of Authority: Helen Doyle

Representatives: David Beck and Danielle Mills-Godinet, Counsel for
 Applicant
 Hamish Kynaston and Nicola Ridder, Counsel for
 Respondent

Investigation Meeting: 9, 10, 11 and 12 February 2016 at Christchurch

Submissions Received: 12 February 2016

Date of Determination: 29 March 2016

DETERMINATION OF THE AUTHORITY

- A Stephen Davis was unjustifiably dismissed from his employment with the Commissioner of Police.**
- B The Commissioner of Police is ordered to pay to Stephen Davis:**
- i. Three months lost wages from the date of dismissal under s 123 (1)(b) of the Act less two weeks' notice paid and earnings received in the sum of \$13,418.94 (gross)**
 - ii. Payment of the lost benefit of the superannuation contribution on that sum under s 123 (1)(c)(ii) in the sum of \$1,633.52 net. Mr Beck has seven days from the date of this**

determination to return to the Authority if there are any issues about the lost benefit calculation provided by Ms Ridder.

iii. Compensation in the sum of \$10,000 without deduction under s 123 (1)(c)(i) of the Act.

iv. No order is made for reinstatement.

C Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.

Employment relationship problem

[1] Stephen Davis was employed by the Commissioner of Police (Police) from 18 February 2002 until he was dismissed on 7 April 2015 for reason of incompatibility with his colleagues and with Police as an organisation and because he had no trust and confidence in Police. He served in a variety of frontline roles in various Police Districts.

[2] Mr Davis worked as a Constable in the Northland District. In early 2010 Mr Davis lodged a statement of problem with the Employment Relations Authority alleging unjustified disadvantage grievances. These proceeding were investigated and determined by the Authority in July 2010. Mr Davis's grievances were not upheld by the Authority and he filed a de novo challenge to the determination with the Employment Court.

[3] In December 2010 Mr Davis transferred to the Canterbury District. On 30 April 2012 unjustified disadvantage grievances were raised by Mr Davis about his transfer to Christchurch, a performance improvement plan (PIP) and the handling by Police of complaints that he had made against his Christchurch Supervising Sergeant.

[4] In or about early 2012 there was a restructuring of some of the units in the Road Policing Group and Mr Davis was assigned to a Strategic Traffic Unit (STU).

[5] In or about June 2013 Mr Davis lodged a statement of problem with the Authority in Christchurch about the Christchurch grievances and these were removed

to the Employment Court by the Authority. It was decided by the Employment Court these grievances would be heard together with the challenge to the Authority determination about Mr Davis's Northland grievances.

[6] In June and July 2014 the Employment Court, over a period of 11 days, conducted a hearing into the challenge and the Christchurch grievances in Whangarei and Christchurch.

[7] On 19 August 2014 the Employment Court issued its judgment with respect to the challenge to the Authority determination about the Northland grievances and the removed Christchurch grievances from the Authority.¹ The challenge was not successful and the Employment Court found that Mr Davis had not established his alleged grievances or breaches arising from his Christchurch employment. Judge Perkins observed in his judgment that *Mr Davis does not agree with the decisions made and actions taken* [by Police]. Judge Perkins stated that he could find no basis for holding in any respect those decisions and actions of the Police were anything other than what a fair and reasonable employer would or could have done in all the circumstances at the time they occurred.²

[8] Between 19 August and 23 October 2014 Mr Davis took 3 days sick leave and 11 other days off comprising shift workers leave, long service leave or annual holiday leave but was otherwise at work and on 16 September 2014 Mr Davis applied to the Employment Court for a rehearing.

[9] On 23 October 2014 after a cost judgment which awarded significant costs against him, Mr Davis commenced a period of sick leave and advised his Senior Sergeant of the nature of his medical condition which by agreement I prohibit from publication.

[10] In early December 2014 Mr Davis advised Police that he was likely to be ready to return to work. Ms Ridder advised in an email dated 12 December 2014 to Mr Beck that Police was working on a return to work plan and once more information was to hand about Mr Davis's likely return date she would be in touch to progress that. On 16 December 2014 Ms Ridder advised Mr Beck that Mr Davis, who was running out of sick leave, would be placed on special leave from 19 December until

¹ [2014] NZEmpC 152

² Ibid [86]

19 January 2015 and set out why Police needed assurance that Mr Davis was well enough to return to front line policing and asked that he see a police psychologist. During this period Mr Davis provided clearance from his doctor and a counsellor.

[11] Police organised an appointment with clinical psychologist Dr Dorahy on 12 January 2015. Mr Davis would not submit to an assessment by Dr Dorahy for various reasons and proposed in an email dated 20 January 2015 that he see a psychiatrist recommended by his doctor and counsellor because of Police's requirements. Police still required an assessment by a clinical psychologist familiar with Police frontline requirements and on 2 February 2015 following receipt of a letter dated 2 February 2015 from Superintendent Gary Knowles Mr Davis agreed to see a different clinical psychologist.

[12] The return to work proposal and the assessment by a clinical psychologist was put on hold by Police at this point until the process that started with Superintendent Knowles was completed.

[13] Superintendent Knowles was District Commander of the Canterbury District between February 2012 and August 2015.³ In that role as District Commander he led about 1000 staff. Superintendent Knowles has been with Police for 38 years with approximately 29 years spent in leadership roles. His letter of 2 February 2015 to Mr Davis expressed doubt about whether the employment relationship between Mr Davis and Police could sensibly continue and he sought Mr Davis's comment on his proposal to recommend termination of Mr Davis's employment to an Assistant Commissioner with delegated authority to dismiss.

[14] By letter dated 8 February 2015 Mr Davis responded to the proposal addressing several issues.

[15] On 10 February 2015 Superintendent Knowles as a result of Mr Davis's response interviewed five officers and on 24 February 2015 responded to Mr Davis's letter. He advised that he had decided to recommend termination of Mr Davis's employment to the Acting Assistant Commissioner William (Bill) Searle who holds the rank of Superintendent. He advised Mr Davis in his letter of the names of the five individuals he had spoken personally to but advised that he had decided not to

³ Superintendent Knowles has since August 2015 held the role of New Zealand Police Liaison Officer in Bangkok.

disclose the notes from the meetings as he knew it would make those he spoke to uncomfortable. He included a summary of what was said with his letter without attributing the comments to a particular individual and attached a copy of his memorandum for recommendation advising that Acting Assistant Commissioner Searle would be in touch about his decision making process.

[16] Superintendent Searle was in 2008 appointed as the District Commander of Waitemata District in which role he leads approximately 900 staff. He has been with the Police for over 33 years and has worked in various operational and supervisory roles. Superintendent Searle acts in the role of Assistant Commissioner, Districts as required and it was in this capacity of Acting Assistant Commissioner that he was the delegated decision maker in relation to the termination of Mr Davis's employment.

[17] Superintendent Searle communicated with Mr Davis after he received the memorandum from Superintendent Knowles. He had no personal knowledge of Mr Davis although both he and Mr Davis thought they recognised each other when they first met on 13 March 2015.

[18] On 10 March 2015, in response to a request from Mr Davis, Superintendent Searle provided Mr Davis with redacted copies of the interviews with five of Mr Davis's colleagues. Before doing so Superintendent Searle spoke to Superintendent Knowles about the notes and his reluctance that they be released. Superintendent Searle considered that the concerns Superintendent Knowles had could be managed by redacting the part of the notes that would identify the individual who made the comment. That was the only communication that Superintendent Searle had in relation to his decision to terminate Mr Davis's employment with Superintendent Knowles because he wanted to keep his decision making as independent as possible.

[19] On 13 March 2015 Superintendent Searle met with Mr Davis in Christchurch. Mr Davis was represented by a barrister, David Goldwater at the meeting and Superintendent Searle attended with Ms Ridder. The meeting was about four hours in duration and was recorded. A transcript was provided as part of the bundle of documents in this matter.

[20] After the meeting Superintendent Searle undertook some further investigation and gave thought to his decision. He advised Mr Davis of his decision by letter dated

24 March 2015 which was to terminate Mr Davis's employment. Mr Davis was given the termination period of two weeks in the collective employment agreement which covered his work and an additional two weeks.

[21] On 7 April 2015, Mr Davis's employment with Police ended.

[22] Mr Davis says that he was unjustifiably dismissed both procedurally and substantively from his employment on 7 April 2015. Mr Davis claims as an alternative cause of action that he was unjustifiably disadvantaged by the process adopted by Police and that there was a breach of good faith obligations by Police.

[23] Mr Davis seeks reinstatement to a position with the Police, compensation for lost income and compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000 (the Act). He seeks a penalty under s 4A of the Act for breaches of good faith.

[24] Police accept Mr Davis was dismissed but say that he was justifiably dismissed for incompatibility with colleagues and with Police as an organisation. Further it was concluded that Mr Davis had no trust and confidence in Police. Police say that the disadvantage claim is effectively subsumed and part of the unjustified dismissal claim but deny any of its actions were unjustified. Police deny that it breached its duties of good faith or, in the alternative, that such breach did not meet the high threshold necessary under s4A of the Act for an imposition of a penalty.

The issues

[25] The Authority is required to consider the following issues in this case:

- a. Was Mr Davis's dismissal for incompatibility justified?
- b. In the alternative were there actions of Police that were unjustified and caused Mr Davis disadvantage?
- c. If Mr Davis's dismissal was unjustified, then what remedies should be awarded, is reinstatement practicable and reasonable and are there issues of contribution and mitigation?
- d. Was there a breach of good faith by Police? If there is a breach of good faith should a penalty be awarded?

Incompatibility

[26] Termination of employment on the ground of incompatibility and irreconcilable break down in trust and confidence will arise only in an unusual and rare case. The facts need to be entirely convincing.⁴

[27] Judge Travis in *Mabry v West Auckland Living Skills Homes Trust Board (Inc)*⁵ set out the essential issues to be considered in determining whether dismissal for incompatibility is justified:

- a. whether the employer was entitled to come to the conclusion that the employment relationship was irreparable; and
- b. if so, whether the irreconcilable breakdown was attributable wholly or substantially to the employee; and
- c. whether the manner in which the employer carried out the dismissal was procedurally fair.

[28] I accept Mr Kyneston's submission that incompatibility should not be narrowly assessed and that a broader view of the employment relationship should be taken.⁶

[29] It is accepted that Mr Davis has a right as an employee to bring personal grievance claims if he considers he has employment relationship problems that he remains in disagreement with Police about. The proceedings are a factor in this case. Mr Beck submits the proceedings were the reason for dismissal. Mr Kyneston submits that they are a factor not because Mr Davis exercised his legal rights but because of his state of mind, his unwavering pursuit of his complaints and claims and that he cannot see he has any responsibility to repair relationships or that he must compromise.

[30] Ultimately the justification test in s 103A of the Employment Relations Act 2000 (the Act) is to be applied by the Authority in determining justification of the dismissal or an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under s 103A of the Act to

⁴ *New Zealand Fire Service Commission v Reid* [1998] 2 ERNZ 250 confirmed in the Court of Appeal in *Reid v New Zealand Fire Service Commission* [1999] 1 ERNZ 104 (CA) at 107

⁵ (2002) 6 NZELC 96,573

⁶ *Reid v New Zealand Fire Service Commission* [1999] 1 ERNZ 104 (CA) at 107

consider on an objective basis whether Police's actions and how Police acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[31] The Authority must consider the four procedural fairness factors set out in s 103A (3) of the Act. These are whether the allegations against Mr Davis were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to the concerns and whether such explanation was considered genuinely by Police before dismissal. The Authority may take into account other factors as it thinks appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[32] A fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act.

Was Mr Davis's dismissal for incompatibility justified?

Reason for the decision to terminate Mr Davis's employment

[33] Superintendent Searle summarised the reasons for the dismissal in his letter of 24 March 2015 which provided the final decision on termination of employment.

[34] He wrote in his letter that Mr Davis's employment was not being terminated for misconduct or in response to litigation he had been involved in against the Police. He wrote on page 4 of his letter that in standing back and considering [the meeting held on 13 March 2015 and his findings from that meeting]

...it is your inability and unwillingness to resolve issues with your colleagues, or that you raise with Police as an organisation, that strikes me. Despite Police's best efforts you have showed distrust of Police processes and unwillingness to resolve things in good faith. You have such distrust you have covertly recorded senior managers. When issues you had raised in Christchurch were escalated to Superintendent Knowles and he put in place processes to resolve them, you refused to cooperate. You refused to cooperate with Police's (quite reasonable in my view and standard) request for you to be assessed by a clinical psychologist.

I believe that you are not only incompatible with your colleagues, but also with Police as an organisation. In my view you have no trust and confidence in Police and I do not believe our employment relationship can continue.

Despite my direct questions on the point, you were unable to provide me with any assurances that what has happened in the past won't happen again. Other than acknowledging there may have been a different perspective, you have not shown any awareness of the part you have played or accepted any responsibility for what has happened. You couldn't give me any assurance that, when the Employment Court process is at an end, the matters will be from your perspective too. In fact, your response that you will follow "due process" indicated to me that unless the decision goes in your favour, the matter will never be at an end from your perspective. I do not believe you accept that Police can have a different view to you.

[35] Superintendent Searle concluded in his letter that it was for those reasons, incompatibility with colleagues and Police as an organisation and there being no trust and confidence in Police, that he had decided to terminate Mr Davis's employment. In his evidence Superintendent Searle said that the latter reason that Mr Davis had no trust and confidence in Police overlapped to a degree with the former reason. I agree.

Difficult issues facing the decision maker

[36] This was not a straightforward matter and there was not a lot of guidance for Superintendent Searle about similar issues in Police. He had been advised by Ms Ridder before his meeting with Mr Davis that as far as Employment Relations were aware there are no similar cases within Police.

[37] Some cases where incompatibility has been considered involve conflict between individuals in a workplace where it would be difficult if not impossible for them to be separated. That is not the situation with Police. Police has a large number of employees, about 12,000 and there are 12 policing districts within New Zealand with many Police stations. Mr Davis had of course transferred from Northland when there were concerns about incompatibility and the real possibility of that leading to dismissal.

[38] There was some consideration by Police in or about December 2014 that Mr Davis be transferred out of Road Policing Unit in the Central Station to another station within the Canterbury District. It seems that the concern with that station was that a Constable involved in an incident reported by Mr Davis to the Inspector, which I will refer more to later, the pepper spraying incident, worked there. The return to work plan was then put on hold for the psychological assessment and the psychological assessment was in turn put on hold for the process commenced by Superintendent Knowles to be completed.

[39] Legal proceedings and/or serious allegations by an employee against an employer in the workplace have been a factor in some incompatibility cases in the employment area. Litigation depending on its nature can impact on ongoing communication, relationships and trust in the workplace. Over time, if trust is not rebuilt, the conflict generated in the relationship can reach the point where continued employment becomes untenable. The expectation would be the normal ups and downs of employment relationships, which the Judge considered the majority of Christchurch grievances pursued by Mr Davis concerned, are resolved close to when they arise rather than being the subject of grievance and litigation.

[40] Legal proceedings were considered a relevant feature of the conflict and therefore the fairness and reasonableness of the employer's decision to dismiss in *NZ Fire Service Commission v Reid*.⁷ Many of Mr Reid's legal proceedings were described by Judge Colgan, as the Chief Judge was at that time, as without merit because they were dismissed as misconceived rather than on their merits. Mr Davis was unsuccessful in his challenge to the 2010 Authority determination and his Christchurch claims were not upheld but it could not be said that the challenge or the Christchurch proceedings were dismissed other than on their merits. There was a significant consequence to Mr Davis when he was unsuccessful because a total award of costs was made against him including disbursements in the sum of \$133,742.93.

[41] The Employment Court in *Snowdon v Radio New Zealand Limited*⁸ found the decision taken to dismiss Ms Snowdon on the grounds of an irreconcilable breakdown in trust and confidence was justified against a background which included proceedings and allegations of serious criminal wrongdoing on the part of her employer, allegations of financial mismanagement and a depreciation scam, an allegation of malicious defamation and a refusal to meet with the new Chief Executive Officer as invited.

Issues coming to the notice of Police

[42] I accept as likely the oral evidence of the Inspector that it was not until the Employment Court judgment was released and Mr Davis was away from the workplace on sick leave from October 2014 that officers felt they could talk about their concerns. There was also publicity arising from the judgment. In Christchurch

⁷ Above n 4 at pg 255

⁸ [2014] NZEmpC 45

that would have given rise to the knowledge of Mr Davis's issues in Northland and his allegations of corruption in that District.

[43] There was no dispute that Mr Davis was a good performer in his role as a Constable. He had been relieving as a Sergeant from time to time from about 2012. I was provided as part of the documentation with his performance appraisal forms which I have considered along with the other documentation.

Could Superintendent Searle have fairly and reasonably reached the conclusion there was irreconcilable incompatibility with colleagues and Police as an organisation and that Mr Davis had no trust and confidence in Police?

[44] One of the main issues for the Authority is whether incompatibility concerns about Mr Davis relate essentially to the period 2009–2012, and the subsequent Court case about those events. There was clearly conflict between the parties during that period the history of which I shall set out as briefly as I can before turning to whether there were more recent matters of concern.

What happened up to mid-2012

[45] The situation in Northland in 2009 impacted on the relationship between Mr Davis and the Senior Constable at the Mangonui station to the extent that it was concluded after attempts to resolve the issues, including intervention by human resource managers and mediation, they could no longer work together. It was recommended that whilst there was fault on both sides Mr Davis should be moved away because the colleague was the officer in charge and resided with his family in the station's residence.

[46] Mr Davis was seconded to another station in Northland but remained dissatisfied with the situation at Mangonui, the inquiries into it and his secondment. He raised a personal grievance and lodged an application with the Employment Relations Authority.

[47] The National Manager of Professional Standards Division (Professional Standards) at Police Headquarters became involved and a Senior Inspector from Wellington was asked to carry out an employment investigation with the terms of reference the allegations made by Mr Davis in his personal grievance. The Inspector did not uphold the complaint of Mr Davis. Judge Perkins described the investigation

as *very thorough* but the judgment reflects that Mr Davis was critical of the Inspector's inquires in his evidence.

[48] It was anticipated that Mr Davis would, after a period of secondment, return to the Mangonui station and the Human Resource Manager proposed to Mr Davis and his colleague with whom he had the relationship difficulties at Mangonui whether they would be agreeable to consulting with a psychologist. The Senior Constable agreed but Mr Davis had concerns it appears about what was to be released to the psychologist and the proposed consent form. No consultation with a psychologist took place.

[49] The grievances were the subject of an Authority investigation meeting in 2010. By the time the determination was issued in July 2010 Mr Davis had made some serious allegations about senior police offices in the Northland region and had written to the Minister of Police about allegations and alleged corruption.

[50] Human resources discussed with Mr Davis moving him to an urban police station. Mr Davis covertly recorded conversations on 16 July 2010 with the National Human Resource Manager. The transcript of the recording reflects a straightforward and robust discussion. The issue of incompatibility was raised with Mr Davis as was a possibility that if he was put back into the station it could end in his dismissal. There was exploration of other options with Mr Davis and ultimately a decision was made to transfer Mr Davis to Christchurch. Mr Davis agreed with that decision although in his evidence said that he felt it was made under duress. Christchurch was to be a fresh start for Mr Davis.

[51] Mr Davis transferred to Christchurch in late 2010 and started working in the Traffic Alcohol Group (TAG) on 15 December 2010. It was known that Mr Davis was transferring to Christchurch for welfare issues and there was nothing to support that his colleagues in Christchurch were aware of the Northland issues.

[52] The evidence supported that there weren't any employment issues for Mr Davis until April 2011 when he said that issues arose for him with his Sergeant. Whilst some minor performance issues were raised with Mr Davis by his Sergeant in informal discussions there was a more serious issue in August 2011 that the Sergeant

spoke about with her Senior Sergeant⁹ and it was decided to put Mr Davis on a narrowly focussed PIP from 23 October 2011.

[53] On 30 October 2011 complaints were raised by Mr Davis about the Sergeant to the Senior Sergeant. There was an informal meeting between the Senior Sergeant and Mr Davis on 1 November 2011 to discuss the issues and Mr Davis sent further emails with some more complaints.

[54] There was a meeting on 9 February 2012 with the Senior Sergeant and the Canterbury District Human Resources Manager about the issues. Mr Davis covertly recorded that meeting. One of the complaints that the Sergeant had rebuked Mr Davis on one occasion in front of colleagues was found to have some foundation but the majority Mr Davis was advised were able to be simply answered. One of the more serious complaints was about use of pepper spray or being chased with pepper spray. I understand this complaint concerned behaviour in the nature of horseplay by officers, albeit it with potential health and safety concerns, on two separate occasions in 2011. Mr Davis would not advise the names of those involved at the time and the Senior Sergeant concluded that complaint could not be investigated further. At a later date at or about the time of the Employment Court hearing in 2014 Mr Davis made a protected disclosure of the names of the officers involved.

[55] Mr Davis was not satisfied with the outcome from the 9 February 2012 meeting that his complaints were without substance and he referred the complaints to the Inspector who did not feel he could intervene. I understand this was because he told Mr Davis he was effectively at the same rank as the Human Resource Manager.

[56] The matter was then escalated to Superintendent Knowles at a point between February and April 2012. Superintendent Knowles initiated an investigation into one of the allegations, that of timesheet fraud, and asked that Professional Standards support it. The transcript from the recording of the meeting of 13 March 2015 provides some clarity about what happened then when Superintendent Searle questioned Mr Davis that he would not co-operate with the investigation initiated by Superintendent Knowles. I will not set all the discussion out but the main point is that Mr Davis said that he met with the Highways Sergeant who was to carry out the investigation and started to provide him with information but the second time he

⁹ Currently holding the rank of Inspector

became concerned that Superintendent Knowles had involved Police National Headquarters and in particular the person who was dealing with the Northland matters, the subject of the de novo challenge. His explanation has to be considered in light of the letter from Superintendent Knowles dated 26 June 2012 where it seems that at least as of June 2012 the grievances Mr Davis had raised were to be consolidated with Northland matters and managed by Crown Law.¹⁰

[57] From about late February 2012 the Sergeant was preparing for a deployment to Afghanistan and Mr Davis did not work under the Sergeant's supervision after that time.

Did issues of concern continue?

[58] The issue for the Authority is whether there was anything in the behaviour or actions of Mr Davis after 2012 that could inform any relationship going forward and confirm or ease any concerns about what could happen in the future. The situation in *Reid*¹¹ involved ongoing elements of conflict identified formally prior to dismissal and still continuing to the date of dismissal.

[59] Superintendent Searle said in his evidence that he wanted Mr Davis to accept that he had an impact on relationship breakdowns, that he was prepared to put issues in the past and prepared to work to resolve issues with Police if they arose in the future and that he had trust and confidence in the organisation. He was not satisfied of those matters after the meeting on 13 March 2015.

[60] Mr Davis responded to concerns at the meeting on 13 March 2015 to Superintendent Searle by referring to the time since 2012. He spoke of his three very good performance appraisals over this time and his relationships with three supervisors and colleagues supporting he was able to move forward and that is what he had done for the last three years *since everything happened*. Emphasis was placed by him on there being nothing outside the time frame from 2009–2012 except the issue about the copies of the Authority determination from 2010 being left out in the work area shortly before the Employment Court case in 2014.¹² I'll set out what was relied on by Superintendent Searle after 2012.

¹⁰ Page 617 of the bundle

¹¹ Above n 4.

¹² Pages 146,147, 148, 162 and 163 of the transcript from the 13 March 2015 meeting

After 2012

[61] In 2013 proceedings were lodged with the Employment Relations Authority about the Christchurch matters.

[62] In 2014 Mr Davis raised a complaint close to the Employment Court hearing that seven copies of his 2010 Authority determination had been left about the Christchurch office and Police accepted the validity of that concern. He also raised a personal grievance but when asked did not advise Police why he considered he had a grievance. Police do not accept that there was a grievance. No proceedings have been lodged in respect of that grievance. The matter was investigated but Mr Davis was unhappy with the process because he thought he should have been spoken to initially by the investigator. He told Superintendent Searle that the investigator who was from Human Resources worked with another Human Resources person who could have been involved in the situation. He did not engage with the process further.

[63] Superintendent Searle did place some reliance on this issue and I accept a fair and reasonable employer could see it as indicating some continuing lack of trust in Police processes and the resorting to the raising of a grievance without, when asked by Police to do so, advising the details of the grievance so that it could be resolved. It was not though significantly separate, and indeed could have been said to be linked, to the upcoming Court process.

[64] In December 2014 and January 2015 Police asked Mr Davis to attend a psychologist to establish his fitness to return to work. Superintendent Searle questioned Mr Davis about this at the meeting on 13 March 2015. He concluded in the letter of termination dated 24 March 2015 that Mr Davis's resistance to being assessed by a clinical psychologist *is an example of your being unable to accept Police processes and procedures (or to take a conciliatory approach to resolving difficulties as they arise)*.

[65] I accept that a fair and reasonable employer could see the responses to the request to see a psychologist as an example that Mr Davis did not have trust to simply agree to what was, objectively assessed, not an unusual request or be more conciliatory in his responses. Mr Davis referred in one email dated 27 January 2015 to a third party sharing his concerns about how Police have gone about their process

which supports some trust issues. Ms Ridder patiently set out the reasons for the request on several occasions to Mr Davis.

[66] In an email dated 12 January 2015 to Ms Ridder Mr Davis stated he was concerned about the background management had provided the psychologist for him to complete his assessment. He stated that proposing such an assessment without adequate consultation/information should have been recognised as problematic given earlier 2010 matters that he referred to as *part of matters before the Court*. Objectively assessed when I read the emails that Mr Davis sent, even if he could justify in some way the content of his emails over this period, they support he had lost some sight of the bigger picture including returning to work safely, maintaining a constructive relationship with Police and taking a conciliatory approach.

[67] Mr Davis did ultimately however agree to attend a psychologist. His initial resistance and the reasons he resisted is a factor that a fair and reasonable employer could take into account looking forward.

Interviews with officers

[68] Superintendent Searle said in his evidence that the interviews with the five officers confirmed the issues were current. I will summarise the concerns recorded.

[69] Four of the individuals who were interviewed by Superintendent Knowles in February 2015 had been involved in the Employment Court case; the Sergeant who had supervised Mr Davis in 2011/2012 in TAG, the Inspector who had provided concerns by email, a Senior Constable and a Constable who gave evidence to the Employment Court. The fifth person interviewed was the Senior Sergeant who was Officer in Charge of Operations of Road Policing between January 2013 and January 2015. The evidence supported that the notes provided are not verbatim. There is an issue as to whether the redacted provision of the notes to Mr Davis was in accordance with good faith obligations. I shall come to that.

[70] I'll start with the notes of the interview with the Sergeant who was involved in giving evidence to the Employment Court. At the Authority investigation meeting the Sergeant said in evidence that there were least 34 complaints at the Employment Court she was required to answer and only one that was found to perhaps have some substance. The Judge describes in his judgment that many of the complaints about the

Sergeant were trivial accusations and complaints that could never have formed the basis of a disadvantage grievance.¹³

[71] The notes from the interview with the Sergeant provide she was concerned about not being able to relax if Mr Davis came back into the work environment and that he would carry on making the complaints. It is recorded that the Sergeant could never be in the same work group as Mr Davis and would just leave because she couldn't keep looking over her shoulder. The Sergeant has approximately 25 years' experience in Police.

[72] The notes from the interview with the Inspector who was at the material time in 2011/2012 the Senior Sergeant to whom Mr Davis had made the complaints about the Sergeant referred to safety and trust issues if Mr Davis returned to work. In relation to trust issues the Inspector referred to staff concerns that Mr Davis records conversations and takes them out of context to suit his agenda and that would impact on staff being able to talk freely. The notes reflect about any impact if Mr Davis moved to another work group or District that Mr Davis had *moved to Northland and issues happened, he came to Christchurch for a fresh start and issues happened.... He would continue to litigate and further issues would arise.* The Inspector referred to the *Police way and Steve's way - A lot of the time they line up but when they don't, in Steve's mind Steve's way prevails.*

[73] The Senior Constable referred to concerns about being hounded by Mr Davis about giving evidence against the Sergeant and that *he had been taking notes of every conversation that we had.* He also stated *He wanted me to go and crucify [Sergeant]. If he came back I would refuse to work with him... I don't need to have a conversation and then find out it is going to be used against me.*

[74] The Constable said he had had got along with Mr Davis and said they were good colleagues. He said that *Mr Davis misinterpreted things and took the Constable to Court thinking it would be beneficial but it was not.* The notes also contain the statement *does not take advice and puts people in unsafe situation which is not good.*

[75] The Senior Sergeant, the notes reflect, stated that Mr Davis is a nice guy but *fixated with his issues from years gone by and a good few of the traffic cops here who distrust him and don't want to say more to him than they have to.* On the other hand

¹³ [2014] NZEmpC 152 at [74]

there are a few guys loyal to him especially his own team and he does a good traffic cop job. The note stated the common concern is he won't let it go. He's had his issues, lost the case and now lost the plot and won't release it. Unstable.

[76] Mr Davis said at the meeting on 13 March that of the individuals interviewed four were involved in the Court hearing and he had not worked with them since 2012.

[77] Superintendent Searle appropriately undertook some enquires after the 13 March 2015 meeting about that second important matter. He accepted that Mr Davis had not reported to the Sergeant since 2012 but that they remained part of the same workgroup and therefore shared the same physical space and resources and would have to work operationally together. The Senior Sergeant he concluded was a supervisor in Mr Davis's work group and in contact as group supervisor with Mr Davis. The Senior Sergeant was the only one interviewed who was not involved in the Court hearing. The Inspector had relieved for three months in 2014 as Road Policing Manager and whilst he did not work with Mr Davis on a daily basis was the senior manager responsible for the workgroup. The two Constable's had not worked on the same section as Mr Davis since 2012 but as members of STU often worked together or at the same time in the same place doing the same duties.

[78] Mr Davis said at his meeting with Superintendent Searle on 13 March that the actual Road Policing Manager, not the Inspector who was the Acting Road Policing Manager, had told him that no person had come to him with a concern about Mr Davis returning to work. Superintendent Searle confirmed in his letter of dismissal that he did not talk to that Inspector. He wrote in the letter of termination that *Police is a command and control environment*. He accepted that it would be possible for Mr Davis to return to work but that does not mean that Police consider it appropriate to order people to work with him when he is incompatible with them and unable to adopt a conciliatory approach to difficulties when they arise.

[79] Objectively assessed there remained a question about what was happening with relationships between about mid-2012 and the Employment Court hearing in June/July 2014. Mr Davis had three supervisors over that period in Christchurch.

[80] I note Superintendent Knowles said in his letter dated 24 February 2015 to Mr Davis that *I believe the pattern of relationship breakdowns with your colleagues and supervisors is most unusual. In my experience as a senior Police manager, I have*

never seen relationships with superior officers, supervisors and colleagues destroyed almost across the board, as has happened with you. He said though in answer to a question from me that he did not, between 2012 and 2014, recall hearing anything about Mr Davis. He was not briefed about the Court case. I accept he was involved in the issue about the determinations in 2014 shortly before the Court case.

[81] It was unclear whether from 2012 Mr Davis had adopted a conciliatory approach to difficulties when or if they arose and were brought to his attention by a supervisor or whether it was the situation that supervisors/colleagues were anxious or reluctant to raise issues with Mr Davis and colleagues were walking on *egg shells* until the Court case. The Senior Sergeant in his evidence both written and oral indicated that no issues about Mr Davis were raised to him by his Sergeants (Mr Davis's supervisors) and they trusted him to act up as acting sergeant and to lead mini traffic operations. Mr Davis also received several letters of praise.

[82] The Senior Sergeant's evidence was that there was still a general feeling of mistrust amongst the officers about Mr Davis's obsessive and continued accusations of colleagues and his involvement of them in continued litigation which of course was the concern of the Constables and Sergeant who were interviewed. There was no information before Superintendent Searle of new accusations by Mr Davis aside from the grievance issue in 2014 since mid-2012.

[83] I find that a fair and reasonable employer could have been expected to carry out some investigation with Mr Davis's supervisors about the period from 2012 and what was happening during that time in light of the explanation. I accept Superintendent Searle's evidence about the command and control environment but such an inquiry would not simply be about it being possible for Mr Davis to return to work. It would have informed the decision making about whether it would have been workable for Mr Davis to return to Police by speaking to those who worked more closely day to day with Mr Davis from mid-2012.

Psychological assessment

[84] Another issue for the Authority, which is aligned somewhat with the earlier issue, is whether the proposed assessment by the psychologist which was agreed to could and should have continued. Mr Kyneston submits that it was reasonable for that

process to be put on hold because it would not have been necessary in the event Mr Davis was dismissed.

[85] The decision to put the psychological assessment on hold until the 13 March 2015 meeting was not unreasonable of itself because the nature of the assessment required could have changed after that meeting. There was a period of time from mid-2012 without continued accusations, save as to the determination issue, but Superintendent Searle remained concerned about Mr Davis's mind-set and what he concluded was an inability to move on from earlier issues. I am of the view that this is a case where a psychological assessment could have assisted the decision making process about whether Mr Davis had insight into the impact of his behaviour, whether he could move on from his earlier issues and whether he could adopt a conciliatory attitude to relationships in the future.

[86] Superintendent Searle has considerable experience in Police but it was a difficult and novel situation and a psychological assessment could have informed his decision making process and the difficult conclusions about what could happen in the future and whether it could be managed or whether the relationship was irreparable. A fair and reasonable employer could have been expected to proceed with the proposed psychological assessment with a broader instruction as required to the psychologist to inform and assist the decision making process.

Conciliation with colleagues and redaction of the interview notes

[87] Mr Davis and Mr Goldwater stated on 13 March 2015 that there should be an attempt at conciliation with colleagues and suggested an occupational psychologist. Superintendent Searle concluded that there was no willingness to adopt a conciliatory attitude going forward and that Mr Davis appeared to have no insight into the impact of his behaviour on others or willingness to accept that he may be responsible for the breakdown in the relationships. Mr Davis did seem though to accept that the way he has behaved impacted on people when asked by Superintendent Searle at the meeting.¹⁴

[88] The redaction of the interview notes provided to Mr Davis before the meeting on 13 March 2015 did in all likelihood have some impact on what Mr Davis felt he

¹⁴ Transcript of the meeting on 13 March 2015 at pg166

could say about repairing relationships. I do record that Superintendent Searle and Superintendent Knowles were not involved in the redaction of the interview notes.

[89] An example of the redaction impacting on findings was the Sergeant's interview notes which were particularly heavily redacted. In his letter confirming the termination from Superintendent Searle dated 24 March 2015 he refers to Mr Davis, when asked whether the relationships might be repaired, saying it was *difficult to comment*. My reading of the transcript was that the difficulty Mr Davis expressed was related to the redaction. He then explained that it is more complicated than a yes and no answer because it doesn't just involve him. The redacted statement from the Sergeant showed she would leave if she was in the same work group as Mr Davis. Mr Davis's answer has to be seen in that light and he mentioned the redaction again before it seems he was cut off by Mr Goldwater who asked if he would attempt to do it in good faith which he said he would.¹⁵

[90] The redactions were to remove names and other identifying features but on closer analysis, once the unredacted versions were provided as part of the bundle of documents it is clear that some other matters were redacted. This included an opening statement by Superintendent Knowles toward the start of four of the interviews which with some slight variation was along the lines as set out below:

I have written to Constable Davis telling him it is my intention to terminate his employment. He has written back to me and I have spoken to Nicola Ridder of Employee Relations who said I need to satisfy myself that this is the right decision and hence I am speaking to yourself and a couple of your colleagues.

[91] Superintendent Knowles asked some closed questions particularly of the Senior Constable and Constable. He could see nothing wrong with stating the reason for the interview and the nature of his questioning.

[92] Considering the issue objectively it could potentially have been prejudicial to disclose an intention to dismiss Constable Davis before questioning. Having done so then asking closed questions could suggest what the right answer would be. As a matter of common sense however I accept that four of the individuals interviewed had their relationship with Constable Davis tested and to varying degrees damaged because of earlier events and involvement in the Court case. The Sergeant I find was particularly affected by the allegations Mr Davis made in 2011 and his pursuit of them

¹⁵ Page 160 and 161 of the transcript of the meeting on 13 March 2015

all the way to an Employment Court hearing. The Constables had concerns about trust in the future as Mr Davis had taken notes of conversation they had with him in 2011/2012 and used those without their permission in his Court case and that Mr Davis had taken things literally when they were not meant to be so taken. It was important for Police to hear the officers concerns so they could be dealt with and those individuals could be appropriately supported. I could not, and do not, conclude that what they told Superintendent Knowles was influenced by his questioning rather than their genuine account of what they thought would be difficulties for them if Mr Davis returned to the workplace.

[93] The duty of good faith in s 4 (1A)(c) of the Act requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to provide access to information relevant to the continuation of employment and an opportunity to comment on it. I am of the view that the statements should have been provided without redaction in the circumstances of this case so that Mr Davis could see fully the impact his actions had on others and answer the concerns. Even if it could be said the redaction of names or matters that could identify the person interviewed was appropriate the redactions went beyond on occasion what was stated to be its purpose and was unfair and not in accordance with good faith. It impacted on the ability of Mr Davis to properly answer the concerns including from one of those interviewed that they may continue to be targeted even if working away from Mr Davis.

Trust in Police and Police processes?

[94] Superintendent Searle concluded that Mr Davis's issues with Police were inexplicably escalated and indicated that Mr Davis did not have trust in Police processes. Superintendent Searle wanted to maintain an open mind and did not read the judgment or determination. A fair and reasonable employer could certainly conclude there were trust issues. I accept Mr Beck's submission that there was a level of complexity about those previous events and why matters had escalated and why Mr Davis had disengaged from processes that needed careful assessment and consideration. At times there could have been a level of misunderstanding on Mr Davis's part about what was happening.

[95] There were some issues as to whether Mr Davis trusted the District Commander or his office. Mr Davis had not met Superintendent Knowles but having

revisited the transcript I could not be satisfied that Mr Davis's answers about that matter could fairly and reasonably led to a conclusion that he did not.

[96] In respect of the covert telephone calls Police must have known about those earlier than 13 March and had not raised those issues with Mr Davis. Mr Davis did say at the meeting that he had learned how to approach recording meetings openly since that time.

[97] I am not satisfied that a fair and reasonable employer could, without further investigation and a psychological assessment, conclude from the meeting on 13 March 2015 that Mr Davis had no trust and confidence in the Police or Police processes if a future issue arose.

Conclusions on irreconcilable incompatibility

[98] I accept that incompatibility concerns with colleagues and with Police as an organisation needed to be raised with Mr Davis before a decision was made about his returning to work. This was properly done by Superintendent Searle holding a meeting with Mr Davis. I am not satisfied there was an ulterior motive to undertake the meeting because Mr Davis took proceedings against Police. The concerns and issues were I accept more significant than simply the proceedings.

[99] Aside from the procedural issues already referred to the meeting was otherwise procedurally fair. Mr Davis had an opportunity to respond to the concerns which were clearly put by Superintendent Searle who came to the meeting with an open mind.

[100] Once further investigation had been undertaken and an appropriate psychological assessment had been obtained a fair and reasonable employer could have been expected to have considered whether there were alternatives to dismissal. Alternatives were considered by Superintendent Knowles and Superintendent Searle but rejected by the former on the basis that Mr Davis working in a small station with tight teams would not work given what had happened in Northland and transferring out of the District had happened before without success. Superintendent Searle concluded that it was not possible for Mr Davis to return to work in the same role and it would not have been workable for him to work elsewhere in Police.

[101] In the absence of such further investigation and psychological assessment I do not find that a fair and reasonable employer could conclude in all the circumstances that there was irreconcilable incompatibility between Mr Davis and his colleagues and between Mr Davis and Police so as to justify dismissal. A fair and reasonable employer could not conclude Mr Davis had no trust and confidence in Police. The finding that there was irreconcilable incompatibility in the absence of further investigation about relationships since 2012 and a psychological assessment in this difficult and novel situation was premature. I find that Mr Davis was unjustifiably dismissed from his employment with Police.

[102] Mr Davis has a personal grievance that he was unjustifiably dismissed within which the unjustified action grievance is subsumed. Mr Davis is entitled to consideration of remedies.

Remedies

Reinstatement

[103] The main remedy Mr Davis seeks is reinstatement. Reinstatement is available as a remedy under s 123 (1)(a) of the Act. Section 125 (2) of the Act provides that the Authority can order reinstatement if it is practicable and reasonable.

[104] Reinstatement is no longer the primary remedy for a personal grievance but as Mr Beck submits it is the remedy that is of most importance to Mr Davis. Police oppose reinstatement.

[105] Mr Beck and Mr Kyneston refer in relation to the consideration of practicability to the Labour Court judgment in *Northern Hotel IUOW v Rotorua RSA Inc*¹⁶ and whether Mr Davis would be a harmonious and effective member of Police's workforce if he was reinstated. Mr Kyneston observes that practicability is not the same as possibility and that what is possible is not necessary practicable.¹⁷

[106] The Employment Court in *Angus v Ports of Auckland Limited (No 2)* stated about reasonableness¹⁸:

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament had

¹⁶ (1989) ERNZ Sel Cas 535 (LC) at 540.

¹⁷ *South Taranaki Free Kindergarten Association v McLennan* [2006] 1 ERNZ 1019 at 7

¹⁸ [2011] NZEmpC 160, [2011] ERNZ 466.

now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[68] ... The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[107] Mr Beck appropriately acknowledges in his submission that reinstatement would require *quite a lot of groundwork* but that the Police have not genuinely considered Mr Davis returning to work other than within Road Policing at the Central Station. He refers to Mr Davis's excellent work record and the absence of issues raised in STU. He submits that Mr Davis is passionate about his role and the evidence confirms that he was a competent officer.

[108] Police is a large organisation and there could be other places to place Mr Davis aside from Road Policing. The Sergeant is no longer in Christchurch although hopes to return one day. I accept that it would be possible for Mr Davis to return to Police but whether it would be practicable and reasonable is another matter. Mr Davis was clearly competent at his role and a good performer. He was regarded well by some in Police but the evidence supported a level of distrust existed.

[109] I agree with Mr Davis's evidence that a current employee can bring matters of concern with their employer before the Authority or Court. There has to be some awareness though of the damage that may be caused to relationships as a result. Mr Davis would have seen the effect the allegations had on his Sergeant when she gave her evidence to the Authority. It was wide reaching. The evidence was that someone else in Police did not want a promotion because they did not want to go through what the Sergeant did when Mr Davis pursued his allegations. One of the Constables interviewed by Superintendent Knowles said he had issues with the

Sergeant at that time, as employees do from time to time with their supervisors but he had dealt with them and well and truly moved on by 2014. That Constable was also concerned that his personal conversations were recorded and used by Mr Davis in the proceedings without his permission.

[110] Mr Davis in his written evidence provided details of other conversations he had had with the Constables interviewed by Superintendent Knowles. These had not been raised previously in the Court proceedings and were new matters. Mr Davis had taken a note of the conversations in or about 2011/2012 and still had that information to retrieve and include in his statement of evidence. I agree with Mr Kyneston that Mr Davis had a lack of insight about how those two individuals may feel about that use of information from conversations. Mr Davis had clearly read the notes of their interviews and notes of other interviews. They show a significant concern of officers was that Mr Davis would record conversations and use them at a later time for his own purposes. If Mr Davis does not have insight into concerns about his behaviour then that is of concern in considering whether the employment relationship could be successful into the future if Mr Davis was reinstated

[111] Mr Davis also continues in his written statement of evidence to hold firm views about Northland that he had been unfairly judged and issues particularly about the Sergeant but also about the Inspector in Christchurch. That has to be weighed with a submission about his willingness to move forward in a positive way and participate in conciliation meetings.

[112] Mr Beck refers me in his submission to *De Bruin v Canterbury District Health Board*¹⁹ where Mr De Bruin was reinstated after slapping a patient. Judge Couch was though satisfied in that case that what occurred was a truly extraordinary one off event which was extremely unlikely to occur again and that therefore reinstatement would be reasonable as well as practicable. I am not so satisfied in this case.

[113] None of the Police witnesses supported Mr Davis's reinstatement. The evidence of the Senior Sergeant was particularly compelling because he was clearly fond of Mr Davis and had held him in some regard. He reluctantly said when I asked him about reinstatement that reinstatement was not something he supported. The Inspector referred to the work of a front line constable being at times dangerous. Staff

¹⁹ [2012] NZEmpC 110 at [77]

need to work closely together to mitigate risk and resolve incidents. They need to have trust in each other and be able to talk freely about matters. The Inspector said that he knows of many of Mr Davis's colleagues that have strong views about Mr Davis and they work in and around Christchurch. The Senior Sergeant believes that Mr Davis has *burnt his bridges* with his colleagues and Police. The Sergeant viewed Mr Davis's accusations as retaliatory in nature for the PIP and said given Mr Davis's previous behaviour and the need for trust in a team Mr Davis would place other staff members at risk.

[114] The evidence reflected that there was a level of distrust of Mr Davis and some officers were careful about what they said to him before the release of the Employment Court judgment. Knowledge following the judgment by those in Police is now more wide spread. A situation where officers in a team had to watch what they said to each other would be, I find, quite untenable and potentially dangerous.

[115] I am not satisfied that reinstatement is practicable and reasonable and I decline to make an order.

Lost Wages

[116] Mr Davis seeks lost wages from the date of dismissal until the date of the investigation meeting. Under s 128 of the Act where the Authority determines that the employee has a personal grievance it must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months ordinary time remuneration.

[117] I am not minded in this case to exercise my discretion and order Police to pay more than three months lost wages but I do not as Mr Kyneston submits limit such recovery to six weeks. I am satisfied that Mr Davis attempted to mitigate his loss. He was successful in obtaining another position from 1 June 2015 in a different area of work.

[118] During the investigation meeting Mr Davis provided his calculation of lost income. Ms Ridder following the investigation meeting provided a memorandum of counsel estimating three months lost wages to be the sum of \$13,418.94 taking into account the two weeks discretionary notice paid and the amount Mr Davis has received for the period from 1 June 2015. Ms Ridder has also calculated Police's net contribution to Mr Davis's superannuation scheme for that period as \$1,633.52.

[119] Subject to issues of contribution Mr Davis is entitled to be reimbursed under s 123 (1)(c)(i) for three months lost wages from 7 April 2015 and the lost benefit of Police superannuation contributions on that sum. I accept Ms Ridder's workings for the lost wages as appropriate based on Mr Davis's information including that from Inland Revenue in the sum of \$13,418.94 (gross). Her assessment of lost wages for the first week in July was appropriate. I accept that Ms Ridder would also have the information necessary to calculate the net contribution to Mr Davis's superannuation scheme in the sum of \$1,633.52 (net). As I have not had a response from Mr Beck about that issue I will give him seven days from the date of this determination to raise any issue with the Authority about the superannuation scheme calculation.

Compensation

[120] Mr Kyneston submits that there was no significant evidence about the effect of the dismissal. I accept however that there was a level of distress for Mr Davis. Mr Davis was of the view that he should not have been dismissed because he simply took matters through due process and that his behaviour and actions had changed since 2012. Mr Davis suffered financially from being dismissed. He is living with his parents. Mr Davis wanted a career in Police and there was a degree of bewilderment on his part about how matters got to the point of dismissal. He said in his evidence that he thought his job was continuing when he went on sick leave.

[121] Subject to issues of contribution Police are to pay to Mr Davis the sum of \$10,000 without deduction being compensation under s 123 (1)(c)(i) of the Act.

Contribution

[122] The Authority must under s 124 of the Act, where it determines that an employee has a personal grievance, in deciding the nature and the extent of the remedies consider the extent to which the actions of Mr Davis contributed towards the situation that gave rise to the personal grievance and if required reduce the remedies that would otherwise have been awarded.

[123] Mr Kyneston submits that Mr Davis contributed so significantly toward the situation that gave rise to the grievance that there should be 100% reduction of remedies.

[124] It wasn't a blameworthy action on the part of Mr Davis to take proceedings against Police or to pursue a challenge to an Authority determination. It was not until Mr Davis went on sick leave in October 2014 that issues of incompatibility and trust and confidence were disclosed including the issue about recording conversations. Mr Davis had not been warned earlier about these matters. He had not been told before he went on sick leave that colleagues were cautious about what they said to him and that there was a level of distrust about him in Road Policing.

[125] I do not find that he had any real insight into these being matters that he should have considered and take into account in pursuance of his litigation and how he pursued such litigation. The situation that gave rise to the grievance or the causal link was after the Court hearing when issues that Mr Davis was incompatible with his colleagues and with Police as an organisation came to the attention of Human Resources. I have found some further steps and investigation should have been undertaken before conclusions about irreconcilable incompatibility were reached.

[126] The nature and extent of the remedies ordered already reflects the impact of a lack of insight on the part of Mr Davis into his actions and an inability to move beyond the matters that gave rise to litigation. Reinstatement was not ordered and lost wages limited to three months. I am not satisfied the nature and extent of other remedies in all the circumstances should be reduced further for reasons of contribution.

Orders Made

[127] I order that Commissioner of Police pay to Stephen Davis:

- a. A sum equal to three months ordinary time remuneration from 7 April 2015 under s 123(1)(b) of the Act less two weeks notice paid and earnings received in the sum of \$13,418.94 (gross)
- b. Payment of the lost benefit of the superannuation contribution on that sum under s 123 (1)(c)(ii) in the sum of \$1,633.52 net. Mr Beck has seven days from the date of this determination to return to the Authority if there are any issues about that lost benefit calculation.
- c. Compensation without deduction in the sum of \$10,000 under s 123 (1)(c)(i) of the Act.

Penalties for breach of good faith

[128] Mr Beck lodged an amended statement of problem after being directed to by the Authority at the request of Police to provide further particulars about the allegations of breach of good faith. The particularised allegation of breach of good faith was the failure to be active and constructive in establishing and maintaining a productive employment relationship under s 4 (1A)(1)(b) of the Act by *initially indicating to the applicant, after a period of sick leave (starting 24 October 2014), that they required a medical clearance for his return to work and that at the time (12 December 2014):* In anticipation of Steve being cleared to return, Police is working on a return to work plan. Once we have more information about Steve's likely return date, we will be in touch to progress that.

[129] During submissions Mr Beck sought a penalty for breaches of good faith for the redactions of the interview notes. I have found a breach of good faith about that matter however it was not pleaded and Mr Kyneston submitted that he would have wanted to call evidence about this matter. The Authority is not bound by technicalities but there was no penalty sought in amended pleadings specifically to further particularise the allegations for a breach of good faith about the redacted interview notes. I do not find it appropriate to consider whether or not a penalty should be awarded in those circumstances.

[130] It was not a breach of good faith to put the return to work plan on hold given the serious concerns about incompatibility and the proposed meeting on 13 March 2015. I have not found it was inappropriate to put the psychologist's assessment on hold until that meeting because the scope of such assessment could have changed.

[131] I do not make an award of a penalty in the circumstances.

Costs

[132] I reserve the issue of costs. The parties should try to reach agreement failing which Mr Beck has until 19 April 2016 to lodge and serve submissions as to costs and Mr Kyneston has until 3 May 2016 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority