

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 379
3005373

BETWEEN MELISSA OPAI
Applicant

A N D COMMISSIONER OF POLICE
Respondent

Member of Authority: Rachel Larmer

Representatives: Rani Amaranathan, Counsel for Applicant
Nicola Ridder and Hamish Kynaston , Counsel for
Respondent

Investigation Meeting: 07 and 08 August 2018 at Auckland

Submissions Received: 13 August 2018 from Applicant
17 August 2018 from Respondent
22 August 2018 from Applicant
23 August 2018 from Respondent
24 August 2018 from Applicant
11 September 2018 from Respondent

Date of Determination: 29 November 2018

DETERMINATION OF THE AUTHORITY (NO. 2)

Employment relationship problem

[1] Since 2005 the New Zealand Police has employed Ms Opai in various civilian roles. Ms Opai was covered by the New Zealand Police Collective Agreement dated 01 July 2012 to 30 June 2015.

[2] At the time the events that are the subject of this determination occurred (2013/2014), Ms Opai was a Watchhouse Officer (Supervisor) based at Counties Manukau District Headquarters in Manukau.¹ Ms Opai and two staff she supervised worked in the Public Counter workgroup.

¹ When that position was disestablished Ms Opai was redeployed to another civilian position within the Police.

Internal Police Notification of Employment Relationship Problem

[3] Ms Opai has submitted a number of internal Notification of Employment Relationship Problems (ERPs) with the Police. The material ones, for the purposes of this determination were:

- (a) First ERP dated 23 October 2013 regarding her 2012/2013 performance appraisal. This was out of time;
- (b) Second ERP dated 04 December 2013 regarding her views that the 258 Report was an attempt to diminish the effect of her first ERP. This was out of time.
- (c) Third ERP dated 16 March 2014 repeated the second ERP and added new concerns. The repetition of the second ERP issue was out of time. This determination addressed the new concerns, discussed later, which were raised within time in this third ERP.

Laurie Culpan's title

[4] The Authority referred to Laurie Culpan as "*Senior Sergeant Culpan*" in this determination because that was his title and rank at the material time, in terms of the matters determined in this particular investigation. The documentation reviewed by the Authority during the investigation meeting also reflected that rank.

[5] However the Authority notes that he now holds the rank of "*Acting Inspector*". The Acting Inspector title/rank was not used in this determination, because that did not align with the documentation or with how all of the other witnesses in this matter referred to him in their witness statements and during their oral evidence to the Authority.

The Officer in Charge of Counties Manukau Public Counter position

[6] Senior Sergeant Culpan worked in the Counties Manukau Police District during his career with the Police. He has held a variety of frontline, supervisory, management, prosecutorial and investigative roles since he joined the Police in 1998.

[7] At the material time, in terms of this determination, Senior Sergeant Culpan was the Officer in Charge of the Counties Manukau Public Counter. This was a supervisory/management position, that Senior Sergeant Culpan took over from (then) Senior Sergeant Traill, who was previously Ms Opai's manager. By the time of the

Authority's investigation meeting Senior Sergeant Traill had been elevated to the rank of Inspector.

[8] Senior Sergeant Culpan took over the Officer in Charge position in February 2013 and held it for one year, until (then) Senior Sergeant Traill returned to the Officer in Charge position in February 2014. At that point, (then) Senior Sergeant Traill became Ms Opai's manager again.

The handover of the Officer in Charge position

[9] The Authority has explained the handover that took place when Senior Sergeant Culpan transferred out of the Officer in Charge role and (then) Senior Sergeant Traill transferred back into it because Ms Opai raised concerns about the documentation Senior Sergeant Culpan transferred to (then) Senior Sergeant Traill.

[10] Senior Sergeant Culpan handed over the Officer in Charge of Counties Manukau Public Counter position to (then) Senior Sergeant Traill during February and March 2014. The handover involved:

- (a) several face to face meetings between the two (then) Senior Sergeants;
- (b) the transfer of electronic documents from Senior Sergeant Culpan's secure file on the Police's system to Senior Sergeant Traill's, so he could access these documents himself;
- (c) the transfer of a lever arch folder of documents Senior Sergeant Culpan had compiled during his management of the Public Counter section so (then) Senior Sergeant Traill could be informed about what had occurred in his absence;
- (d) Senior Sergeant Culpan emailed to (then) Senior Sergeant Traill draft performance appraisals for the 2013/2014 performance year for all staff in the Public Counter section, except Ms Opai;
- (e) a hard copy of Ms Opai's draft 'year to date' performance appraisal, diary notes for the 2013/2014 appraisal year and supporting documentation being put into a sealed brown envelope marked "*Staff in Confidence*" and placed by Senior Sergeant Culpan on (then) Senior Sergeant Traill's chair.

[11] The last item (the brown envelope containing Ms Opai's information) was discovered on 11 May 2018 in the drawer of a desk (then) Senior Sergeant Traill had been using until his transfer from Counties Manukau to Tasman District. It contained the documents, that had been placed into the "*Staff in Confidence*" brown envelope described above, from the March 2014 handover.

[12] The material about Ms Opai had been handed over in that way (sealed brown envelope, marked in confidence) because Police had told Senior Sergeant Culpan he was not to discuss any performance issues with Ms Opai until her first ERP arising from his 2012/2013 performance appraisal of her had been resolved. That had not occurred by the time he left his management role regarding the Public Counter section.

[13] Ms Opai believed that the content of the information that was handed over, and the manner in which that had occurred had unjustifiably disadvantaged her. The Authority did not agree.

The 258 Report

[14] Throughout this determination there is reference to a "*258 Report*". The 258 Report was a memorandum dated 05 November 2013 that Senior Sergeant Culpan sent to Inspector Brady, who at that time was the Professional Conduct Manager of the Counties Manukau District, about a complaint one of Ms Opai's colleagues "*J*" had made. *J*'s complaint was dated 10 October 2013.

[15] The term "*258 Report*" has no special significance. It has simply been used as a descriptive term, because the Police internal template document that Senior Sergeant Culpan wrote his memorandum to Inspector Brady on was called a "*258*" template.

[16] *J*'s emailed complaint to Senior Sergeant Culpan was attached to his 258 Report, so the purpose of the 258 Report was to record Senior Sergeant Culpan's initial assessment of *J*'s complaint, in accordance with the Police's usual complaint process.

[17] Counties Manukau Police District practised a reporting regime for all complaints and internally reported matters that required all such matters to be reported to Inspector Brady in his role as the Professional Conduct Manager, so that Inspector Brady acted as a central collection point for such material.

[18] Although Ms Opai believed that the 258 Report was improper retribution for her first ERP, which named (among others) Senior Sergeant Culpan, regarding her 2011/2013 performance appraisal, the Authority did not agree.

[19] The Authority was satisfied that the preparation of the 258 Report had nothing to do with the previous ERP. The 258 Report was prepared on the advice of senior management (Inspector Wilkie and Inspector Brady) so that J's complaints could be categorised by Police in the normal way. Accordingly, the 258 Report was not improper.

[20] That approach adopted to J's complaint was consistent with how such matters were to be dealt with by Police at that time. It also ensured accurate statistical information would be kept regarding internal complaints. The Authority concluded that Senior Sergeant Culpan's 258 Report was therefore necessary, reasonable and appropriate.

[21] Even if the 258 Report had disadvantaged Ms Opai (and that was not provided) then any disadvantage would have been justified in all the circumstances. The Authority was satisfied that the way in which the Police dealt with J's complaint was what a fair and reasonable employer could have done in all the circumstances.

Inspector Brady

[22] Inspector Brady's job title changed from Professional Conduct Manager to "*Police Professional Conduct*" (PPC) while he was in that role so his position, for the purposes of this determination, has been referred to as "*PPC*". Inspector Brady held his PPC role for 12 years. Inspector Brady retired in July 2015 after a 38 year long career in the Police.

[23] Prior to his PPC role, Inspector Brady held a number of frontline and supervisory roles in the Police's Criminal Investigation Bureau Branch (the CIB), so he had a good understanding of how things in the Police worked and the normal processes that applied to complaints and investigations.

Police Professional Conduct (PPC)

[24] The role of PPC in the Police is to ensure the actions, conduct and procedures of Police employees are appropriate to ensure public confidence is maintained. PPC's focus is on preventing instances of inappropriate conduct, and ensuring employees

have the support they need to appropriately discharge their professional responsibilities.

[25] When issues do arise, PPC focused on ensuring any issues were appropriately addressed and employees were supported in understanding conduct expectations of Police going forward.

[26] At the material time, PPC had a practice of categorising all issues. The union had previously raised concerns about inconsistencies in how issues were addressed, so the Police were very focused on ensuring a fair and transparent process was applied to any issues that had been raised, hence the decision to categorise everything.

Categorisation Panel

[27] Categorising a complaint meant convening a “*Categorisation Panel*” that consisted of Inspector Brady as the PPC Manager, two Senior Human Resources personnel, and a representative of the District Commander.

[28] The Categorisation Panel would sit together each week (or as required) to discuss issues that had arisen and to jointly decide how such matters should be addressed. That process meant decision making did not sit with just one person.

[29] The idea behind using the Categorisation Panel to assess complaints and possible conduct issues was to ensure the Counties Manukau District addressed potential conduct or other issues in a way that ensured everyone was treated fairly and consistently, by adopting a transparent process.

Possible Categorisation Panel outcomes

[30] There were five potential outcomes available to the Categorisation Panel;

- (a) No further action;
- (b) Potential performance;
- (c) Potential Fast Track for potential misconduct;
- (d) Potential misconduct;
- (e) Potential criminal.

[31] The outcome of “*No further action*” would not have been an appropriate outcome for the 258 Report because of the number of work ethic type issues J had raised in her complaint, in addition to the timekeeping issues about Ms Opai and the

two staff she (Ms Opai) supervised, which clearly needed to be addressed by Police in some way.

[32] A “*No further action*” outcome would have been inappropriate, because those other (non-timekeeping) issues would have not been allocated to an officer to resolve.

[33] The Authority was satisfied that the “*Potential performance*” outcome given by the Categorisation Panel was justified in all the circumstances. This was fair and reasonable decision because it was the lowest possible alternative categorisation available that enabled all of the issues in J’s complaint (not just the timekeeping allegations) to be allocated to a manger to resolve.

Categorisation process and documentation

[34] Categorisation basically involved a preliminary assessment based on the available information only. It does not involve independent investigation by the Categroisation Panel. In this case teher was sufficient information provided in the 258 Report to enable J’s complaint to be categorised.

[35] In terms of documentation generated, the categorisation process resulted in a “*Categorisation Record Sheet*” which noted a categorisation for J’s complaint of “*Potential performance*”.

[36] Inspector Brady then prepared a memorandum dated 11 November 2013 to Inspector Shearer, the Operations Group Manager for Counties Manukau District, who had overall management oversight of the Public Counter workgroup, in which J and Ms Opai both worked as supervisors.

[37] Inspector Brady’s memorandum stated that:

- (a) a categorisation process had occurred of an internal complaint regarding timekeeping by Ms Opai and the two staff she supervised;
- (b) the reported behaviour had been categorised as “*potential performance*”;
- (c) “*a breakdown in the workgroup relationships*” was noted;
- (d) Inspector Shearer was asked to manage the issue via the Blueteam database.

Blueteam database

[38] Human Resources staff, managers and supervisors had access to an IAPro subsystem called “*Blueteam*”. This was an online access portal that allowed PPC to assign responsibility for a matter in Blueteam to an employee’s manager or supervisor, if that person was required to take some action on the PPC file.

[39] The allocated officer could access relevant documents provided by PPC via the Blueteam portal. Managers/supervisors only had access to Blueteam files that had been specifically assigned to them by PPC. No-one apart from the allocated manager/supervisor who was involved in undertaking action on the matter could access the Blueteam information.

[40] Once action had been taken by the assigned manager/supervisor they could upload relevant documents about their actions via the Blueteam subsystem, to be saved by PPC against the IAPro file number.

[41] If a formal employment process was required after the categorisation process had been conducted, and appropriate action had been taken by a manager/supervisor, then PPC would work closely with the Police’s Human Resources team.

[42] In this case, J’s complaint was dealt with informally. It was not investigated and no employment process was conducted. Human Resources was therefore not involved. This is discussed in more detail later in this determination.

[43] The Authority was satisfied that the allocation of the 258 Report via Blueteam occurred in accordance with Police normal practice and was therefore justified.

Internal Affairs Professional (IAPro)

[44] IAPro is the PPC database used to record and manage issues that had been raised and investigations that were underway. Relevant documents are uploaded to IAPro by PPC against an IAPro case number.

[45] The IAPro case number is generated by the National Intelligence Application (NIA) to give PPC a trackable file number. For internal matters such as J’s complaint, rather than recording the matter against J’s name or the name of the employee(s) complained about, PPC recorded information against the Police District, to protect the confidentiality of the employees involved in the matter.

[46] Access to IAPro is closely restricted with the Police. Only Professional Conduct Managers (such as Inspector Brady) and some Senior Human Resources

employees had access at District level. At Police National Headquarters (PNHQ) level only PPC and Employee Relations staff could access it. Any access that occurred had to be for legitimate work related reasons.

[47] The Authority was satisfied that the entry of the 258 Report into IAPro occurred in accordance with Police's usual practice. To close out the PPC's involvement in this matter, Inspector Brady generated an "*Incident Summary*" report in IAPro about J's complaint.

[48] The IAPro record keeping did not disadvantage Ms Opai. Even if it had, any disadvantage would have been justified in all the circumstances. Police had to keep accurate and appropriate records of all complaints for internal consistency, accuracy and statistical reasons.

IAPro Reports

[49] IAPro is used to generate a number of generic reports that provide statistical information.

[50] Generating an "*Employment Investigation Report*" in IAPro about an incident will provide a summary of the information that had been entered into IAPro about the matter. Despite the name of the report, it was a simple administrative summary document. It did not mean that an "*investigation*" or "*employment process*" was underway or had been undertaken.

[51] If (theoretically because there was no evidence it had actually occurred) an appointment panel that had wanted to do a 'conduct check' on Ms Opai prior to appointing her to a different internal Police position, then the chair of the appointment panel would ask PPC to search IAPro against Ms Opai's name.

[52] PPC would conduct the search of IAPro and would review any relevant information. If information that adversely impacted on Ms Opai's appointability was discovered, then PPC would summarise the relevant information to the chair of the appointment panel. PPC did not just hand over IAPro records.

[53] The IA Pro Reports contained accurate information which did not objectively disadvantage Ms Opai.

National Intelligence Application (NIA)

[54] NIA used specified codes that were preloaded into the system and therefore had to be selected when data was inputted. As already stated, information in NIA was recorded against the Police District, so employees names were not used in NIA.

[55] In terms of J's complaint, NIA recorded an internal complaint had been received in the Counties Manukau District. The file was not linked to Ms Opai so, contrary to her belief, searches against her name in NIA would not result in any information about her being found regarding this matter.

[56] The NIA entry therefore did not disadvantage Ms Opai.

Police National Headquarters (PNHQ)

[57] Inspector Brady referred the closed PPC file to PNHQ after J's complaint had been actioned and the matter concluded. The outcome (conclusion) was an informal resolution of the issues, which had involved Inspector Wilkie holding expectation setting meetings with the entire Public Counter workgroup.

[58] PNHQ simply received PPC information, which included Inspector Brady's memorandum dated 12 February 2014, summarising the steps the Police had taken in response to J's complaint. Inspector Brady's memo made it clear J's complaint had not been investigated.

[59] Ms Opai's concerns about PNHQ's involvement with the 258 report were not objectively supported by evidence, so did not establish disadvantage.

Independent Police Conduct Authority (IPCA)

[60] There are protocols around what issues had to be referred by PPC to the Independent Police Conduct Authority (IPCA). J's complaint and the 258 Report did not fall within the parameters of the types of issues that were to be referred to the IPCA.

[61] Accordingly, there was no need for IPCA to be involved at all. Even if PPC had attempted to involve IPCA in this matter, IPCA would most likely have sent the matter back to PPC to deal with on the basis it did not fall within the protocols defining IPCA's jurisdiction.

Diary notes

[62] Police have an internal focus on accurate and appropriate record keeping. This is often done via “*diary notes*”. Diary notes are simply a way of recording information that occurs or arises throughout the performance year. Diary notes can cover any information such as internal and external feedback about an employee, positive and/or negative performance issues, expectations that have been set etc. Diary notes may be discussed during, and/or attached to, an employee’s performance appraisal.

[63] A diary note was viewed by the Authority as a neutral action, because a diary note was not inherently positive or negative. Any negative or potentially negative information a diary note contained would be discussed with the employee, if it was going to affect their performance appraisal.

[64] Ms Opai’s claims that the proposed, or actual, diary notes taken in this case unjustifiably disadvantaged her did not succeed.

[65] The diary notes that were taken were fair, reasonable and appropriate so even if they had disadvantaged Ms OPai (and that was not proved) then they would have been justified.

[66] Inspector Wilkie's diary notes about the expectation setting meetings that were stated as being appended to Ms Opai’s performance appraisal were not in fact appended, so Ms Opai could not have been disadvantaged by diary notes that did not exist.

Ms Opai’s multiple unjustified disadvantage grievances topics

[67] Ms Opai claimed the Police unjustifiably disadvantaged her in her employment regarding:

- (a) The 258 Report dated 05 November 2013 written by Senior Sergeant Culpan, regarding a complaint J made on 10 October 2013 about (among other things) Ms Opai’s (and others) time keeping and time recording;²
- (b) The December 2014 restructuring of the Watchhouse Officer roles;
- (c) A 03 March 2015 meeting where Ms Opai said was told she would be performance managed if her performance did not improve;

² “258 Report” is simply the name of an internal Police template document, it has no significance itself.

- (d) Her 2015 performance appraisal;
- (e) An alleged course of conduct by Police in breach of its duty to Ms Opai and/or that attempted to constructively dismiss her.³

[68] This investigation and determination related solely to the topic recorded in item (a) – namely, the 258 Report.

[69] By agreement, the other disadvantage grievances and breach of good faith claims (items (b)-(e) above) are to be separately investigated and determined at future investigation meetings. They therefore do not form part of this determination.

Evidential burden of proof

[70] Ms Opai had the onus of proving on the balance of probabilities that one or more of the conditions of her employment had been affected to her disadvantage by the Police.

[71] Disadvantage is a wide concept, not limited to just financial loss. It can relate to an express or implied term and condition of employment. Disadvantage is an unfavourable situation or circumstance that put the employee in a less favourable position than the employee was previously in.

[72] If disadvantage was proven then the onus passed to the Police to prove on the balance of probabilities that its actions and how it acted were justified.

Justification test

[73] The Authority was required to objectively assess justification in light of the justification test in s.103A of the Employment Relations Act 2000 (the Act).

[74] This required the Authority to determine whether the Police's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.⁴

[75] The term "*unjustified*" has its ordinary meaning, so an action was unjustified if it was unjust or unfair.⁵

³ Ms Opai is still employed by the Police.

⁴ Section 103A(2) of the Act.

⁵ *Auckland City Council v Hennessey* (1982) Sel Cas 4 (CA).

Jurisdiction determination

[76] The Authority issued a previous determination in *Opai v The Commissioner of Police*⁶ which dealt with jurisdiction issues.

[77] The jurisdiction determination identified specific alleged unjustified disadvantage grievances that the Authority held had been raised within the 90 day deadline in s114(1) of the Employment Relationship Act (the Act).

[78] The jurisdiction determination held that:

- (a) The disadvantage grievances that were raised in Ms Opai's 16 March 2014 ERP, in so far as they related to Police actions/inactions over the period 05 December 2013 to 11 March 2014 were within time and would be investigated by the Authority;
- (b) The disadvantage grievances at paragraph 32 of Ms Amaranathan's letter dated 29 May 2017 to the Authority, in so far as they had not already been covered by the 14 March 2014 ERP, were within time and would be investigated by the Authority.⁷

The 16 March 2014 ERP

[79] The within time claims in Ms Opai's 16 March 2014 ERP included that:

- (a) she didn't receive a 'Notice of Allegation' regarding J's complaint about her which had resulted in the 258 Report;
- (b) she was never the subject of an investigation meeting regarding J's complaint;
- (c) she never received 'Investigation Findings' regarding J's complaint;
- (d) J's allegations were investigated without notice to Ms Opai and were considered "*Not Upheld*," but Ms Opai was not advised that a breach of the Code of Conduct was not established, or of the outcome of the investigation;
- (e) she asked for "*full disclosure of the investigation [re J's complaint] including [...] the report submitted by Senior Sergeant Cuplan (and the*

⁶ [2017] NZERA Auckland 357.

⁷ Supra at paragraphs [48], [49], [53],[65]-[71] and 75]-[78].

staff member associated to the allegation) [...]” but did not get it until 28 February 2017.

Authority’s findings on the 16 March 2014 ERP

[80] In terms of the specific claims made by Ms Opai in her 16 March 2014 ERP, the Authority’s findings are:

- (a) A ‘*Notice of Allegation*’ was not required or necessary because there was no investigation of J’s complaint or the 258 Report, no formal process was undertaken, no disciplinary allegations were put to Ms Opai;
- (b) Ms Opai was never the subject of an investigation meeting regarding J’s complaint because there was no investigation, because the matter was dealt with informally;
- (c) Ms Opai never received ‘*Investigation Findings*’ regarding J’s complaint because it never got to that point;
- (d) J’s allegations were not “*investigated without notice*” to Ms Opai, because they were not in fact investigated;
- (e) Ms Opai was “*not advised of a breach of the Code of Conduct*” because J’s complaint was not dealt with as a breach of the Code of Conduct and no disciplinary or poor performance allegations were ever put to Ms Opai, so there was nothing for her to have responded to;
- (f) Ms Opai was “*not advised of the outcome of the investigation*” because there was no investigation or outcome for Police to have advised her about;
- (g) The Police were not required to disclose J’s complaint file to Ms Opai because it decided to address the issues informally.

Issues arising from Ms Opai’s submissions regarding her 16 March 2014 ERP

[81] In paragraph 2.1 of her submissions Ms Opai identified the following four issues in relation to the 16 March 2014 ERP disadvantage grievance:

- (a) Did Police breach its own policies, procedures and its Code of Conduct?
- (b) Did Police investigate the 258 Report?

- (c) Was Ms Opai denied the opportunity to be involved?
- (d) Did Police accurately inform Ms Opai of the outcome of the 258 Report?

Authority's findings on issues arising from Ms Opai's submissions regarding her 16 March 2014 ERP

[82] In terms of the Authority's findings regarding the 16 March 2017 ERP, in short:

- (a) The Police complied with its policies and procedures regarding the initial assessment and categorisation of J's complaint/258 report and by allocating the matter to Inspector Wilkie to resolve;
- (b) Police did not investigate the issues identified in the 258 Report.
- (c) Ms Opai was accurately informed of the outcome of the complaint, namely it was not going to be investigated and would instead be addressed by way of expectation setting meetings with the workgroup.

Ms Opai's claim that she was told PNHQ had "*investigated*" the 258 Report and concluded it was "*Not Upheld*"

[83] Ms Opai claimed that Inspector Brady told her on 11 March 2014 that the 258 Report had been considered (meaning investigated) by PNHQ and found to be "*Not Upheld*."

[84] Ms Opai said that information from Inspector Brady unjustifiably disadvantaged her because she discovered in February 2017 that PNHQ had not investigated and had not concluded that J's complaint was "*Not Upheld*".

[85] Inspector Brady denied that he told Ms Opai that PNHQ had investigated the 258 Report or that PNHQ had concluded that the complaint was "*Not Upheld*".

[86] Inspector Brady said he always knew that:

- (a) PNHQ had never investigated the 258 Report;
- (b) PNHQ could not have concluded the complaint was "*Not Upheld*" without it having been investigated;

- (c) A clearance code of “*Not Upheld*” could only be used for a complaint that had been formally investigated where the allegations were found, after the formal investigation had been conducted, to not be substantiated.
- (d) The 258 Report was never formally investigated by Police, who instead dealt with it informally.

[87] Ms Opai’s claim that Inspector Brady told her that PNHQ had investigated and concluded a “*Not Upheld*” outcome did not succeed.

[88] The Authority preferred Inspector Brady’s evidence that he would not have said to Ms Opai what she alleged he told her, because it was not true, and he knew it was not true when he spoke to Ms Opai in March 2014. There was never any ambiguity about that. The 258 Report was not investigated and PNHQ had not been involved in an investigation.

[89] Inspector Brady was very experienced, senior Police officer who had 38 years of service. The Authority found Inspector Brady to be an impressive, impartial and truthful witness. He was careful and precise and obviously wanted to be fair and even handed. Ms Opai acknowledged he was an honest witness.

[90] Inspector Brady was clearly very familiar with the various terms used by Police. Ms Opai was not. The term “*Not Upheld*” has a very particular meaning.

[91] The Police, and in particular Inspector Brady in his PPC role, were careful about how and when the term “*Not Upheld*” was used. It would only be used in a situation if a complaint had been formally investigated, if the allegations were found to have not been substantiated.

[92] The Authority considered it was very unlikely Inspector Brady would have made the comments Ms Opai attributed to him regarding the 258 Report, when he knew they were untrue.

[93] It was therefore more likely than not that Ms Opai had either misunderstood what had been said on 11 March 2014 or alternatively was confused about when the comments she attributed to Inspector Brady were made, and what they meant, if they were said at all.

[94] Inspector Brady's 11 March 2014 meeting was to try to conclude Ms Opai's first two ERPs, both of which were out of time in terms of these Authority proceedings.

[95] Inspector Brady thought that Ms Opai could have been confused with a meeting he held with her on 22 November 2013 in which he had discussed the previous 'integrity reporting' complaints she had made about two colleagues in her workgroup.

[96] Ms Opai's previous 'integrity reporting' had involved PNHQ. In those two cases PNHQ had reviewed the complaints made by Ms Opai and concluded that one of the complaints Ms Opai made had been "*Not Upheld*".

[97] Inspector Brady gave Ms Opai that information during their November 2013 meeting, which aligned with what Ms Opai believed she had been told by Inspector Brady on 11 March 2014.

[98] The Authority therefore considered that, if comments had been made by Inspector Brady about PNHQ making a "*Not Upheld*" finding, then it was more likely than not that occurred in connection with a discussion in November 2013 about the outcome of the two 'integrity reporting' complaints Ms Opai had made, and not during the March 2014 discussion regarding the 258 Report.

[99] Inspector Brady's notes of the 11 March 2014 meeting and job sheet recorded what was discussed. They did not record the "*Not Upheld*" comment Ms Opai attributed to him. The Authority accepted Inspector Brady's evidence that had he made such a comment it would likely have been recorded.

[100] All of the documentation Inspector Brady sent to PNHQ when he closed the 258 Report complaint file made it clear the matter had not been investigated. It was clear that PNHQ could not have concluded the 258 Report had been "*Not Upheld*" because PNHQ did not investigate the matter.

[101] The matter was only referred to PNHQ after it had been closed by Inspector Brady, as part of the normal internal Police record keeping for complaints, so there was nothing for PNHQ to have investigated. Inspector Brady's closure memo to PNHQ stated "*there is no need for an employment inquiry into systematic time theft because there is no evidence to suggest that.*"

[102] Inspector Wilkie also confirmed that PNHQ did not become involved with the 258 Report issues because she had decided, with agreement from Inspector Brady, to address the issues informally at District level.

[103] The Authority finds as a matter of fact that Inspector Brady did not tell Ms Opai on 11 March that PNHQ had investigated the 258 Report and/or that it had found the complaints in the 258 Report to be “*Not Upheld*”.

[104] Accordingly, Ms Opai’s claim that Inspector Brady’s comments on 11 March 2014 about the 258 Report unjustifiably disadvantaged her did not succeed.

Ms Opai’s belief that the Police had made dishonesty allegations against her

[105] Ms Opai believed that the Police had made “*allegations of time theft*” against her and that she had been labelled “*a dishonest thief*” Ms Opai’s subjective view about that was not objectively supported by the evidence. In particular:

- (a) The Police never alleged she had engaged in time theft;
- (b) The Police never called Ms Opai a “*dishonest thief*” and never said or did anything to reasonably lead her to form that view;
- (c) Inspector Brady specifically told Ms Opai there was no question mark or suspicion hanging over her, in response to Ms Opai’s concerns that was the case;
- (d) No “*allegations of time theft*” were ever put to Ms Opai, as she claimed;
- (e) No misconduct or serious misconduct or other disciplinary concerns were ever raised with Ms Opai;
- (f) No formal process was started or undertaken regarding the 258 Report;
- (g) No investigation of J’s timekeeping allegations occurred, because Police believed that was not necessary;
- (h) Ms Opai’s employment was never in jeopardy;
- (i) Ms Opai never faced the possibility of any sort of disciplinary sanction being imposed on her;

- (j) No performance concerns were ever raised with Ms Opai regarding timekeeping or time recording.

Issues arising from letter dated 29 May 2017 from Ms Armaranathan to the Authority

[106] Paragraph 32 of Ms Armaranathan's letter dated 29 May 2017 to the Authority, claimed that;

- (i) Although Police told Ms Opai in March 2014 that the 258 Report had been investigated and "*Not Upheld*," she found out on or after 28 February 2017 that was not the case. The Authority preferred Inspector Brady's evidence about this;
- (ii) In future job interviews for Police positions Ms Opai would not be able to honestly answer that concerns about her had been raised but had been "*Not Upheld*". The Authority concluded that the evidence contradicted that claim;
- (iii) Inspector Brand knew the outcome of the 258 Report and it affected her treatment of Ms Opai.⁸ This claim will be dealt with in a future investigation meeting.

[107] Ms Armaranathan's letter to the Authority stated that Ms Opai was not pursuing disadvantage claims regarding:

- (a) the producing of the 258 Report; or
- (b) the advice Police gave to Ms Opai in December 2013 that the complaints about her in the 258 Report would not be investigated.

[108] The Authority considered that Ms Opai subsequently took a different position on that in her submissions, attempting to pursue these 'out of time' issues as separate disadvantage grievances.

[109] The Authority has already held that the:

- (a) production of the 258 Report did not disadvantage Ms Opai, and even if it had done so, any disadvantage would have been justified in all the circumstances; and

⁸ This disadvantage claim does not form part of this investigation as it will be investigated as part of the Authority's investigation into Ms Opai's remaining claims.

- (b) Police's informal response to J's complaint did not disadvantage Ms Opai, and even if it had, any disadvantage would have been justified in all of the circumstances.

Issues arising from Ms Opai's submissions regarding the 29 May 2017 letter

[110] In paragraph 2.2 of her submissions Ms Opai identified the following four issues in relation to the 29 May 2017 disadvantage grievance:

- (a) Did Police unjustifiably fail to provide the incident file until 2017? The Authority held the Police did not have to disclose it, and even if it did, not disclosing it was justified in all the circumstances.
- (b) Did Police predetermine that there were timekeeping discrepancies in the Public Counter workgroup without ever properly investigating the underlying allegations? The Authority held that there was no outcome reached, so there could not have been predetermination of the timekeeping allegations, which were addressed informally;
- (c) Was the recorded outcome contrary to what Ms Opai was told on 11 March 2014? No, the Authority has determined this point already;
- (d) Did Police fail to make a genuine or impartial inquiry into the allegations? No, the Authority has determined this point already;

Issues arising from Ms Opai's affidavit dated 15 August 2017

[111] Ms Opai filed an affidavit dated 15 August 2017 to assist the Authority to determine the preliminary jurisdiction issues.

[112] Ms Opai's affidavit set out the Police actions that occurred, or came to her attention, over the period 05 December 2013 to 16 March 2014, that she claimed unjustifiably disadvantaged her:⁹

- (a) On 07 January 2014 Ms Opai found out that Senior Sergeant Culpan had met with her section on 18 December 2013, as part of Inspector Wilkie's 'expectation setting meeting.' The expectation setting meetings with staff are discussed in more detail later in this determination;

⁹ The out of time actions prior to 05 December 2013 are not included in this list.

- (b) During the 18 December 2013 expectation setting meeting Ms Opai's section was told about J's timekeeping complaint and/or the 258 Report about it;
- (c) On 06 March 2014 Ms Opai (and others) found out Senior Sergeant Culpan had written a briefing paper which stated (among possible outcomes) that two unnamed Watchhouse Officers (meaning Ms Opai and J) could "*be more easily performance managed or exited*" from the Police;
- (d) On 11 March 2014 Ms Opai met with Inspector Brady who she claimed told her the 258 Report "*was investigated by PNHQ (Police National Headquarters) in November and the findings were 'Not upheld'.*"

[113] On or after 28 February 2017 Ms Opai received the third tranche of discovery in her High Court defamation proceedings against the Police and others. This included, among other things, the 258 Report "*incident file*".

[114] Ms Opai said that she had asked for that information in 2014 but the first time she saw those documents was on or after 28 February 2017. That discovery resulted in Ms Opai filing her Authority proceedings.

Authority's findings on issues arising from Ms Opai's affidavit dated 15 August 2017

Senior Sergeant Culpan's attendance at the 18 December 2017 expectation setting meeting with Ms Opai's section

[115] There was no evidence that Ms Opai was disadvantaged by Senior Sergeant Culpan's attendance at the expectation setting meetings Inspector Wilkie had with each of the sections in the Public Counter workgroup, or by his attendance at the 18 December meeting with Ms Opai's section.

[116] Ms Opai was on leave when the expectation setting meeting with her section was held, so she was not present when Inspector Wilkie and Senior Sergeant Culpan met with the staff she (Ms Opai) supervised.

[117] The Police had good reason for proceeding with the expectation meeting with the two staff Ms Opai supervised in her absence. The expectation meetings had already occurred with the other sections, Police wanted them completed before the end of the year, and it was unknown when Ms Opai would be returning from an unspecified period of personal leave. As it turned out, Ms Opai was away from work until 07 January 2014.

[118] Senior Sergeant Culpan's attendance at the workgroup expectation meetings was reasonable, necessary and appropriate. It did not disadvantage Ms Opai and even if it had (which was not proved) it would have been justified.

[119] Senior Sergeant Culpan had responsibility for supervising and managing the Counties Manukau Public Counter and he reported to Inspector Wilkie. Senior Sergeant Culpan therefore needed to know what expectations had been set with the workgroup by Inspector Wilkie and what other concerns (if any) Public Counter staff had raised with Inspector Wilkie when she met with them. The best way for that to occur was for him to be present at each section meeting.

[120] The fact Ms Opai had previously raised an ERP regarding her 2012/2013 performance appraisal did not create an actual conflict of interest in terms of Senior Sergeant Culpan attending the expectation meetings with the Public Counter sections, particularly when he did not attend the one on one meeting Inspector Wilkie held with Ms Opai.

[121] Senior Sergeant Culpan had responsibility for monitoring and enforcing the expectations Inspector Wilkie had set with the workgroup so he needed to be at the meetings.

Information given to Ms Opai's section staff on 18 December 2013

[122] Ms Opai claimed she was disadvantaged because during the 18 December 2013 expectation setting meeting with her section because the two staff she supervised were told about J's timekeeping complaints and/or the 258 Report.

[123] The 258 Report referred to Ms Opai's section staff and J's complaint identified them by name alongside allegations about their allegedly inaccurate timekeeping. Ms

Opai was not disadvantaged, because the staff who J had complained about had as much right as she did to know that a complaint had been made about them.

[124] Even if there had been some disadvantage (which was not proved) the Authority would have found it was justified in all the circumstances.

Senior Sergeant's briefing paper

[125] On 06 March 2014 Ms Opai (and others) found out Senior Sergeant Culpan had written a briefing paper dated 01 November 2013 which included as a possible option that two Watchhouse Officers could "*be more easily performance managed or exited*" from the Police.

[126] During 2013 Senior Sergeant Cuplan was part of a Review Team, along with Inspector Wilkie and a Human Resources Advisor, tasked with reviewing how the Public Counter could best ensure service delivery needs and 'Service Excellence' expectations were met.

[127] Part of that review involved addressing on-going issues with the Public Counter regarding its negative culture of staff complaining about each other and making allegations and counter allegations about work ethics, timekeeping, bullying and involving the use of long term relievers acting in supervisor roles within the workgroup.

[128] The Public Counter was staffed with five sections comprising one supervisor and two staff. Each section (meaning a supervisor and their two staff) worked early, late and night shifts on a roster pattern. Two of the five supervisor roles were vacant in 2013.

[129] Senior Sergeant Cuplan recommended that the Public Counter could run more effectively if the five sections worked under three supervisors, who would work early and late shifts only. That could be achieved by changing the (then) Public Counter supervisors' rosters, meaning the two (then) supervisor vacancies would not need to be advertised or filled.

[130] Inspector Wilkie spoke to Ms Opai about changing her roster which she agreed, because that change better suited Ms Opai's personal circumstances at that time.

[131] By the time Senior Sergeant Culpan wrote the November briefing paper which contained three options, one of the proposed options was already underway, by agreement of those involved.

[132] The briefing paper was left by Senior Sergeant Culpan for Inspector Traill as part of the handover documentation so that he was informed about the discussions the Review Team had had in his absence from the Public Counter workgroup, which he (Inspector Traill) had managed before Senior Sergeant Culpan had transferred into the position. It was not intended to be actioned.

[133] The briefing paper informed Inspector Traill about the background to the changes that had been made, by agreement, with the Public Counter supervisors, given he was responsible for implementing and managing these rosters.

[134] Although it was odd that Inspector Traill showed staff this briefing document, when there was no need for that to have occurred, the Authority was not satisfied that the evidence established Ms Opai had actually been disadvantaged by the briefing paper.

[135] More than five years after the comment in the briefing paper about performance managing or exiting two Watchhouse Officers, Ms Opai had not been performance managed or exited from her employment by the Police.

Information communicated to Ms Opai by Inspector Brady

[136] The Authority has already determined this conflict in the evidence in favour of Inspector Brady's version of events.

Non disclosure of 258 Report incident file until 28 February 2017

[137] On or after 28 February 2017 Ms Opai received the third tranche of discovery in her High Court defamation proceedings that included the 258 Report "*incident file*".

[138] Ms Opai's claim that by failing to disclose the incident file Police breached the Privacy Act 1993 was outside the Authority's jurisdiction, as Privacy Act claims are to be raised with the Privacy Commissioner.

Claims arising from Ms Opai's Third Amended Statement of Problem

[139] Ms Opai's Third Amended Statement of Problem lodged with the Authority on 24 August 2017 claimed she had been unjustifiably disadvantaged by the following actions;

- (a) The 258 Report complaint had not been recorded as "*Not Upheld*", contrary to what she said she had been told on 11 March 2014. This claim did not succeed, because she was not told that;
- (b) A finding had been made that Ms Opai's workgroup was "*clearly dysfunctional*" without that finding having first been put to her to respond to. This claim did not succeed. The workgroup was clearly dysfunctional. Police did not need to put that view to Ms Opai before forming it because no formal action was taken against her about that;
- (c) The recorded outcome implied wrongdoing by Ms Opai. This claim did not succeed, because it did not;
- (d) The recorded outcome was unjustified and not one a fair and reasonable employer could have made in all the circumstances. This claim did not succeed, the 'outcome' was informal resolution of the complaint;
- (e) Police recorded the 258 Report complaint and its outcome in its databases but Ms Opai was not advised of that. The Authority held Police did not have to advise Ms Opai of how it had internally recorded J's complaint. The information entered into Police databases was necessary and appropriate and did not disadvantage Ms Opai;
- (f) The incident file did not record a "*Not Upheld*" outcome. This claim did not succeed, because that was not an available outcome;
- (g) The incident file used a clearance code of "*Other*", which she believed left a question mark over her integrity. The Authority accepted Inspector Brady's evidence that this was the only applicable code that could have been used. The "*Other*" code was neutral so did not disadvantage Ms Opai;
- (h) The incident file and/or its contents are available to and/or known to others within the Police. The Authority held that only those who

needed to know about the matter due to their professional responsibilities had access to this information, and that did not disadvantage Ms Opai;

- (i) She cannot truthfully answer questions, whether in a job interview or otherwise, that any complaints about her conduct had been “*Not Upheld*”. This claim did not succeed, Ms Opai had not disclosed that in a subsequent internal job application;
- (j) Anyone who carried out a police vet on her would have the NIA database entry about her reported to them. This claim did not succeed, she was not named in NIA;
- (k) She had not been appointed to any positions she had applied for after the 258 Report and now felt unable to apply for any jobs, in or outside the Police that would require police vetting and/or involved questions about any integrity reporting about her. The Authority held that nothing in the incident file or on the Police databases would have adversely affected Ms Opai’s employment prospects. No wrongdoing was established and none of the recorded information would have made Ms Opai unappointable for integrity reasons.

[140] The Authority further noted that:

- (a) There was no evidence an appointment panel had ever asked PPC to do a ‘police vet’ or ‘conduct check’ on Ms Opai;
- (b) Even if such a check had been requested, (and there was no evidence of that), PPC would have seen that although a complaint had been made about (among a range of other issues) Ms Opai, it had resulted in no investigation or action against her. That information could not have objectively disadvantaged Ms Opai or rendered her unsuitable for appointment;
- (c) Ms Opai had been told from the outset by Inspector Wilkie and Senior Sergeant Culpan that Police did not consider investigation of J’s complaint was necessary because it involved poor workgroup practices. Inspector Brady specifically told Ms Opai in March 2014 that there were no lingering suspicions or question marks hanging over her from

the Police's point of view, after she had expressed concern about that to him.

Issues arising from the 258 Report incident file that Ms Opai claimed unjustifiably disadvantaged her

[141] Ms Opai said that after reviewing the 258 Report incident file on or after 28 February 2017 she identified that the following actions had unjustifiably disadvantaged her:

- (a) There were no diary notes to support J's complaint about Ms Opai's timekeeping and no-one had ever asked for them. The Authority held this was not necessary because the complaint was dealt with informally, so investigation of J's diary notes was not required;
- (b) The people who received the 258 Report predetermined that there were timekeeping discrepancies in Ms Opai's workgroup, even though they had failed to investigate J's timekeeping allegations about Ms Opai and the two staff she supervised.¹⁰ The Authority held there was no predetermined outcome;
- (c) Although Inspector Brady had told Ms Opai on 11 March 2014 that the 258 Report had been "*Not Upheld*" that was not what had been recorded on the NIA, IAPro, Blueteam and the PNHQ Employee Relations Police national databases. This claim did not succeed, accurate information had been recored in Police databases;
- (d) Although Inspector Shearer had been told to address, among other things, whether the subject employees routinely finished work early and failed to record that on their timesheet, no investigation occurred and formal findings about that were not made.¹¹ The Authority held this investigation was not required because the issues were instead dealt with informally;
- (e) There was no genuine and impartial inquiry into the 258 Report, because J's allegations about Ms Opai's timekeeping had been

¹⁰ The "*people*" refers to Inspector Brady who categorised the 258 Report and Inspector Wilkie who was assigned the 258 Report complaint to resolve.

¹¹ The "subject employees" were Ms Opai and the staff who reported to her.

predetermined by the Police as being true. This claim did not succeed, there was no predetermined outcome;

- (f) Although Ms Opai had been told by Inspector Wilkie on 03 December 2013 that the 258 Report was not going to be investigated, she subsequently found out it had been investigated. This claim did not succeed, there was no investigation;
- (g) The 258 Report investigation that occurred was unfair and inadequate, and it had also occurred without Ms Opai's knowledge or involvement. This did not succeed, there was no investigation for her to have been involved with;
- (h) Although the 258 Report was not properly investigated the Police concluded that;
 - (i) Diary notes should be attached to the performance appraisals of the people, including Ms Opai, named in J's complaint. The Authority held this did not disadvantage Ms Opai as it never occurred;
 - (ii) The workgroup J and Ms Opai were part of was "*clearly dysfunctional*," without first putting that allegation to Ms Opai to respond to. This claim did not succeed, Police were justified in forming that view;
 - (iii) The outcome of the 258 Report was recorded as "*Other*," which Ms Opai claimed that left a question mark over her integrity, instead of "*Not Upheld*". This claim did not succeed, no wrongdoing was implied by the use of the code "*Other*";
- (i) The 258 Report resulted in an incident file being lodged in the Police databases that was adverse to Ms Opai because it:
 - (i) Did not give Ms Opai a formal opportunity to respond to it. This claim did not succeed. The incident report was not adverse and Inspector Wilkie's notes recorded that Ms Opai had denied any wrongdoing;
 - (ii) Did not clear Ms Opai of wrongdoing. This claim did not succeed, there was no finding of wrongdoing;

- (iii) Published the “*Other*” status to anyone who did a police vet/conduct check on Ms Opai. This claim did not succeed. The “*Other*” status was the applicable and correct code. Its use did not imply wrongdoing;
 - (iv) Anyone interviewing Ms Opai for an internal position could obtain it. This claim did not succeed. The incident report was closely held with the Police and was only accessed for legitimate professional reasons;
 - (v) Likely adversely affected all of the positions Ms Opai subsequently applied for. This claim did not succeed, no evidence supported it;
 - (vi) Meant Ms Opai had “*no chance with any jobs [she] applied for since that time, or any jobs [she] will apply for in future.*” This claim did not succeed, it was Ms Opai’s subjective perspective which was objectively unsupported by evidence.
- (j) The 258 Report was intended to impact on Ms Opai’s next performance appraisal because;
- (i) diary notes were to be attached to her workgroup’s performance appraisals. The Authority held that although dairy notes were reasonable and appropriate, that did not actually occur;
 - (ii) issues between the supervisors that impacted on all staff, would be “*closely monitored*” by Senior Sergeant Culpan. That did not disadvantage Ms Opai. Even if it had, he was the workgroup manager so it would have been reasonable and appropriate, so therefore justified, for him to monitor workgroup issues.

Further jurisdiction issues raised by Ms Opai

[142] Ms Opai claimed in her submissions that the initial assessment by Police of J’s complaint, and the categorisation of the 258 Report, were now ‘within time’ disadvantage grievances because she did not know that the Police had not checked J’s

diary notes or Ms Opai's timesheets until the Police gave evidence about that during the High Court proceedings.¹²

[143] These new claims did not succeed.

[144] There was no need for Police to have checked J's diary notes or Ms Opai's timesheets because an informal response occurred, so that information in itself could not make 'out of time claims' into 'within time' claims.

[145] In any event, the Authority finds that it was not necessary for Senior Sergeant Cuplan to have done more than he actually did in terms of conducting an initial assessment of J's complaint before he wrote the 258 Report. Nor did the Police have to do more than had actually occurred regarding its categorisation of the 258 Report.

[146] Accordingly, Police actions in this regard did not disadvantage Ms Opai.

[147] The Authority was satisfied that the actions taken by Police regarding J's complaint were consistent with the police's statutory and contractual obligations. Ms Opai was not subject to disciplinary and/or performance management processes so an informal response to the complaint was justified.

[148] The issues in the 258 Report were not viewed as personalised wrongdoing by Ms Opai but were instead viewed by the Police as overall workgroup issues, that needed to be informally addressed, in the first instance, consistent with the overall Police policy of intervening in employment issues at the lowest level possible.

[149] The Authority recognised that Ms Opai felt, and very strongly believed, the Police response to the 258 Report issues disadvantaged her, but that was not objectively the case. Ms Opai's strong and genuine subjective views about being disadvantaged did not make her own perceptions about that objectively factually correct.

[150] Ms Opai's strong adverse emotional response to the 258 Report caused her to view everything that has happened since then through the lens of Police wrongdoing that was personally targeted at her. From an objective perspective, that was not in fact the case.

¹² This was held from 2-6 July 2018.

[151] It was clear that Ms Opai believed her view of, and perspective on events, was accurate and that her evidence was truthful. She has clearly devoted considerable time and resources to proving herself correct.

[152] However an honest witness can also be a mistaken witness. The Authority's role is to objectively assess the evidence from a position of not being personally involved in, or affected by the events, in the way parties are.

[153] After thoroughly reviewing and testing the evidence over a two day investigation meeting, the Authority concluded that it did not share Ms Opai's perspective on the events in issue.

Authority satisfied that the Police's response to J's complaint was justified

[154] The Police adopted a depersonalised approach to the 258 Report because it was seen as a reflection of poor workgroup practices that had crept in over time, rather than as wrongdoing by, or performance problems with, Ms Opai.

[155] Ms Opai's unhappiness and dispute regarding the 258 Report issues was coloured by her upset regarding, and focus on, the timekeeping allegations about her and the two staff she supervised. However that was only one part of J's complaint.

[156] The Police looked at the entirety of J's complaint, not just the allegations about Ms Opai and the two staff she supervised. Police rightly identified that J's complaint had arisen due to simmering issues between the different workgroup sections regarding the cross over and allocation of work and treatment of staff within, and between, different sections in the same workgroup.

[157] Police were unconcerned about the timekeeping allegations that Ms Opai was fixated on, viewing it as 'tit for tat,' meaning it was reflective of the culture that had developed within that workgroup of lodging complaints and counter complaints about each other.

[158] Instead Police focused on addressing the underlying simmering issues within the overall workgroup that had caused numerous issues, complaints, ill feeling and formal investigations to have arisen. The intention was to nip that behaviour in the bud going forward, by taking informal action in the first instance.

[159] Police decided to address these underlying issues informally by way of 'expectation setting meetings' with all staff in the workgroup. In addition to setting expectations, these meetings provided staff with an opportunity to raise their specific concerns with management in an informal way.

[160] The aim was to clear the air, set boundaries around appropriate behaviour, and set clear expectations regarding work ethic, performance, absences, handovers, workflow and timekeeping that would be enforced going forward. If that did not resolve the issues, then formal action would have been taken in future. That approach was fair, reasonable and justified in all the circumstances.

[161] It did not disadvantage Ms Opai.

Did the Police unjustifiably disadvantage Ms Opai by failing to properly inform her about J's complaint?

What was Ms Opai told?

[162] Inspector Wilkie met with Ms Opai on 03 December 2013 and told her that a complaint had been made about her (Ms Opai) and the two staff she supervised involving their work ethic and time recording. Although Inspector Wilkie did not tell Ms Opai that J had made the complaint, Inspector Wilkie recalled that Ms Opai knew, or had concluded, that it was J.

[163] Inspector Wilkie said she told Ms Opai that complaints within the workgroup about each other's work ethic was an on-going issue that she (Inspector Wilkie) wanted to deal with informally. Rather than undertake a formal investigation into J's complaint Inspector Wilkie told Ms Opai that the Police intended to draw a line in the sand by setting expectations with the entire workgroup.

[164] Ms Opai used this discussion to also complain to Inspector Wilkie that J had been rude to her (Ms Opai) and had a go at her. Inspector Wilkie reiterated her belief to Ms Opai that poor workplace practices had crept in and that she expected everyone to treat each other professionally.

[165] Ms Opai told Inspector Wilkie that the allegations were baseless and that she was confident she (Ms Opai) and her staff submitted accurate timesheets. In response,

Inspector Wilkie told Ms Opai that the Police could investigate J's allegations if Ms Opai felt strongly about it.

[166] Ms Opai told Inspector Wilkie that she (Ms Opai) was not encouraging the investigation but was not afraid of the outcome of a formal investigation, if one was conducted.

[167] Inspector Willkie's view was that Ms Opai did not say or do anything that indicated she was not satisfied with the Police's proposed informal response to J's complaint. Ms Opai had denied any wrongdoing to Inspector Wilkie, who had recorded that denial in her notes.

What did Ms Opai know by 03 December 2013?

[168] To summarise, as at 03 December 2013 Ms Opai knew:

- (a) A colleague had complained that Ms Opai's timekeeping and time recording was inaccurate;
- (b) Police considered J's complaint was a reflection of on-going workgroup tensions;
- (c) Police did not intend to investigate the complaint;
- (d) Police had offered to formally investigate the complaint if Ms Opai wanted that to occur, but she (Ms Opai) had not asked for that to be done;
- (e) Instead of investigating the complaint Police had proposed holding expectation setting meetings with the Public Counter workgroup;
- (f) The expectation setting meetings were intended to address what Police considered were poor work practices that had crept into the entire workgroup over time.

[169] The communication of this information to Ms Opai properly informed her of the 258 Report issues, and did not disadvantage her.

What was Ms Opai not told?

[170] Ms Opai said she was not told:

- (a) J had made the complaint;

- (b) Senior Sergeant Culpan had prepared a 258 Report;
- (c) The complaint had been categorised as “*Potential performance*” by Professional Standards, before being referred to Inspector Wilkie to resolve;
- (d) The matter had been entered into IAPro;
- (e) There was an incident file that would be identified in future conduct checks;
- (f) A formal outcome had been recorded.

[171] There was no need for the Police to have given Ms Opai the above information. Ms Opai also failed to prove that she was disadvantaged by not receiving the above information. Even if she had been disadvantaged, that would have been justified.

[172] Ms Opai has overlooked the fact that the 258 Report of J’s complaint covered a range of work related issues, not just the timekeeping allegations that Ms Opai has focused on.

[173] Inspector Wilkie explained that the workgroup had recently been through two formal disciplinary investigations that had been lengthy, disruptive and stressful for those involved.

[174] Inspector Wilkie was concerned that conducting another formal investigation that involved three more staff from the same workgroup, for the same or similar allegations, would add to the bad feeling and dysfunction already evident, but would not achieve anything useful.

[175] Disclosing specific information about J’s complaint and the 258 Report would likely have increased disharmony in an already dysfunctional workgroup. There was objectively no good reason for that to have occurred.

[176] Addressing the underlying workgroup issues, that had been bubbling away for a long time, was pragmatic. That was a reasonable and appropriate conclusion that was open to a fair and reasonable employer in all the circumstances.

[177] The categorisation of the 258 Report as “*potential performance*” did not disadvantage Ms Opai because Inspector Wilkie, who was responsible for resolving the complaint, decided it was not a performance matter for Ms Opai but was a widespread workgroup practice issue. Inspector Brady had agreed with that approach.

[178] The categorisation report specifically identified inter-section relationships on the public counter had been breaking down and on-going management would be required to repair the workgroup relationships. Inspector Wilkie’s approach addressed that.

[179] There was no disadvantage to Ms Opai regarding IAPro.

[180] The PPC database called IAPro appropriately recorded and managed J’s complaint in the usual way. The use of IAPro did not disadvantage Ms Opai.

[181] Ms Opai’s concerns about people accessing the IAPro database was not objectively supported by the evidence produced to the Authority. Entry of this matter into IAPro did not imply wrongdoing, contrary to what Ms Opai believed.

[182] The IAPro production of a generic template report called “*Employment Investigation Report*” was just the name given to a simple administrative summary document in IAPro. It did not mean, as Ms Opai believed, that an employment investigation had been undertaken. IAPro documentation made it clear there was no investigation.

[183] The Authority concluded that Ms Opai was unable to prove that she had been disadvantaged by the 258 Report incident file.

[184] Police are expected to keep internal records of issues/complaints made and how these had been addressed. Inspector Brady’s Summary Form closing the matter, as submitted to PNHQ, was for internal reporting purposes only to enable information to be collected for reference and statistical analysis. It did not conclude, imply or record any wrongdoing by Ms Opai.

[185] Ms Opai’s concern about the use of the clearance code “*Other*” in the PNHQ Summary Form was without merit. Inspector Brady explained it was the only relevant code that could have been used because the Police did not consider the allegations should be investigated.

[186] The use of the “*Other*” code was therefore reasonable and appropriate and did not call Ms Opai’s integrity into question, as she claimed. It made no judgment about her conduct or about the other employees complained about or about the merits of J’s complaint.

[187] The “*Incident File Cover Sheet*” showed the complaint file was filed by Records Management at PNHQ on 13 February 2014 and the electronic file was stored in the IAPro database. The information was therefore not readily accessible, as Ms Opai incorrectly believed.

[188] Contrary to Ms Opai’s assertion, Police did not need to explain to Ms Opai the details of how its internal complaints were stored. It would be unwieldy and unrealistic to impose a legal obligation on Police to explain to anyone and everyone named in a Police document how, where, when, by whom and why a Police record was intended to be stored.

[189] Ms Opai was not disadvantaged by not being told the “*formal outcome*” of the 258 Report because there was no “*formal outcome*” to tell her about.

[190] The informal outcome of the 258 Report was clearly communicated to Ms Opai and she had an opportunity to provide her views on the proposed informal response before it was implemented.

Were any statutory and/or contractual obligations to Ms Opai breached regarding what she was/was not told about the 258 Report?

[191] The Authority concluded that Ms Opai had not proved to the required standard of proof that the Police’s actions in this matter breached:

- (a) Section 4 good faith obligations under the Act;
- (b) Section 58 of the Policing Act 2008;
- (c) Section 56 of the State Sector Act 1988;
- (d) The applicable Collective Agreement;
- (e) The contractual Code of Conduct, because the Police decided to informally address the issues J had raised with the entire workgroup, outside a formal Code of Conduct process. Meaning there was no Code of Conduct investigation required or undertaken;

- (f) The Supervisors Guide to the Code of Conduct, because Senior Sergeant Culpan conducted a reasonable and appropriate ‘initial assessment and categorisation’ of J’s complaint before referring it to the Categorisation Panel to categorise. This action was in line with normal and expected Police procedures. It was also done in response to advice given by Inspector Wilkie and Inspector Brady to do so. There was no “*investigation*” for Ms Opai to be involved in;
- (g) The Employee Guide to the Code of Conduct, which did not apply because the Police decided no action, whether disciplinary or potential performance related, should be taken against Ms Opai regarding the 258 Report, so no “*investigation*” of the 258 Report was required;
- (h) The Disciplinary Process Policy, which did not apply;
 - (i) J’s complaint never became a disciplinary issue, so no disciplinary action was taken;
 - (ii) There was no “*investigation*” for Ms Opai to be involved in;
 - (iii) Because there was no disciplinary action, no disciplinary investigation meeting was required, so Ms Opai did not have to be given a “*Notice of Allegation*”;
 - (iv) The expectation setting meetings held with the entire workgroup were not a “*disciplinary sanction*” imposed on Ms Opai as the result of a disciplinary process against her, because there was no disciplinary allegations or process.
- (i) Performance Management Policy, which did not apply because the Police decided not to address the matter with Ms Opai as potential performance issues, so no performance management process was commenced. Therefore the “*Managing Poor Performance*’ provisions did not apply. There was no “*investigation*” for Ms Opai to be involved in;
- (j) Investigations of Complaints and Notifiable Incidents Policy, which did not apply.

Did the decision not to investigate J's complaint unjustifiably disadvantage Ms Opai?

[192] It was not unfavourable to Ms Opai for the Police to decide they would not investigate the 258 Report but would instead address the issues informally by setting expectations with the workgroup.

[193] Ms Opai was not disadvantaged because she was not subjected to a formal employment investigation or to disciplinary action or disciplinary sanctions or to performance management or other adverse outcomes. Her position was not affected to her detriment.

[194] The Police's decision not to investigate the 258 Report was not unfavourable to Ms Opai and did not result in her being treated less favourably than prior to the 258 Report being made.

[195] The uncertainty, time, stress and resources associated with a formal investigation could reasonably be viewed as being more unfavourable to Ms Opai than the decision the Police actually made.

[196] There was no legal obligation on the Police to have to conduct a formal investigation into J's complaint in circumstances where it had fairly and reasonably concluded that the issues raised in the complaint were not personal to Ms Opai but were a symptom of poor work practices that had developed across the whole workgroup.

Did the creation of an incident file for the 258 Report unjustifiably disadvantage Ms Opai?

[197] The creation of an incident file did not disadvantage Ms Opai because it involved neutral internal record keeping only. It did not imply or conclude any wrongdoing by her.

[198] Even if Ms Opai had been disadvantaged by the creation of an incident file about J's complaint (which was not proven) it would nevertheless still have been reasonable, necessary and appropriate for the Police to keep an internal record of J's complaint.

[199] Prior to the introduction of IAPro the Police experienced difficulties in tracking and monitoring complaints, conduct issues and other employment issues.

Practices were also inconsistent nationally. IAPro record keeping was necessary and appropriate to address those concerns, so it would have been justified, even if Ms Opai had been disadvantaged.

Was Ms Opai unjustifiably disadvantaged because she was denied the opportunity to clear her name?

[200] Ms Opai did not need to clear her name because the Police had not made any adverse conclusions about her or her conduct. Inspector Wilkie gave Ms Opai an opportunity on 03 December 2013 to ask for a formal investigation but she elected not to do so.

[201] Police never alleged that Ms Opai had engaged in misconduct or serious misconduct. Ms Opai had denied any wrongdoing. The informal approach taken indicated that the Police must have accepted that response.

Did the record of the incident file unjustifiably disadvantage Ms Opai by adversely affecting her internal appointment opportunities?

[202] The incident file records did not disadvantage Ms Opai and they did not adversely affect her internal appointment opportunities.

[203] No information about J's complaint would be published to anyone obtaining information about Ms Opai in NIA because the NIA entry was not linked to her name. None of the information on the PNHQ Summary Form was recorded in NIA.

[204] The Police's Appointments Guidelines did not require Ms Opai to disclose J's complaint because it was not a "*current complaint and/or disciplinary action and/or disciplinary review.*" Ms Opai was never subject to an employment investigation or disciplinary sanction.

[205] Ms Opai has never been required by Police to notify an appointment panel considering her application for an internal position of the matter. Ms Opai also did not in fact disclose J's complaint for an internal position she had applied for.

[206] Ms Opai's claim that "*anyone interviewing me for an internal position can obtain this information*" was not correct.

[207] The Authority accepted Inspector Brady's evidence that this did not disadvantage Ms Opai:

- (a) The conduct check had to be requested by the chair of an appointment panel in respect of the preferred candidate for an internal role.
- (b) The request had to be made to PPC, who had responsibility for searching IAPro against the preferred candidate's name to see if there was a disciplinary sanction or investigation for conduct that would adversely impact on the candidate's suitability for the role;
- (c) If that had occurred, then the PPC Officer who searched IAPro would have seen that:
 - (i) a complaint had been received;
 - (ii) the complaint did not fall within any of the specified categories of conduct, so it had been coded "*Other*";
 - (iii) the complaint had not been investigated;
 - (iv) the complaint had been resolved informally; and
 - (v) the complaint had not resulted in any criminal charge, adverse report, reprimand, performance management process, or disciplinary outcome against Ms Opai.
- (d) This limited information was not adverse to Ms Opai so would not have disadvantaged her.

Did the "*circulation*" of the 258 Report unjustifiably disadvantage Ms Opai?

[208] Ms Opai claimed that there was improper "*circulation*" of the 258 Report within Police and to "*others*" that unjustifiably disadvantaged her.

[209] The Authority was not satisfied that the 258 Report was widely circulated or circulated in an inappropriate manner that disadvantaged Ms Opai:

- (a) Senior Sergeant Culpan sent the 258 Report to Human Resources for advice before he finalised it. That did not disadvantage Ms Opai. Even if it had, any disadvantaged would have been justified because it was reasonable and appropriate for a manager to seek advice from Human Resources in this way;

- (b) Senior Sergeant Culpan emailed the draft 258 Report to his personal and private email address, so he could continue working on it from home outside of usual business hours. No-one else had access to his personal email account. That did not disadvantage Ms Opai. Even if it had, it would have been justified because it was reasonable and appropriate for a manager to manage his workload in this way so he could continue to do work outside of normal work hours;
- (c) The 258 Report was sent to Inspector Brady for categorisation. That did not disadvantage Ms Opai. Even if it had, it was reasonable and appropriate for the 258 Report to be categorised so any disadvantage that had occurred would therefore have been justified;
- (d) The 258 Report was allocated to Inspector Shearer via the online secure Blueteam case management system. He passed the matter on to Inspector Wilkie to resolve, because she was the Case Management Inspector at the Counties Manukau Hub with responsibility for the Public Counter. This did not disadvantage Ms Opai. Even if it had (which was not proved) any disadvantage that may have occurred would have been justified.
- (e) Senior Sergeant Cuplan included information about the matter to (then) Senior Sergeant Traill as part of a normal handover process. Senior Sergeant Culpan noted that the issues had been resolved so did not need raising with Ms Opai. This did not disadvantage Ms Opai. Even if it had, then it would have been justified because the information was provided so that (then) Senior Sergeant Traill understood the background to the issues he had taken over responsibility for managing going forward. It was necessary and appropriate as part of an efficient and orderly handover between the Public Counter managers.

[210] The Authority has concluded that the manner in which the 258 Report was dealt with and/or circulated internally by the Police did not disadvantage Ms Opai. Even if the Authority was wrong about that and there was some disadvantage (which was not proved) any disadvantage Ms Opai may have suffered was justified in all of the circumstances.

[211] The handling of J's complaint was conducted in accordance with the Police's usual processes and involved an appropriate exercise of Police discretionary decision making. It was therefore justified.

Did Police's failure to respond to Ms Opai's March 2014 request for full disclosure of J's complaint result in her being unjustifiably disadvantaged?

[212] Ms Opai said she was unjustifiably disadvantaged because she had requested full disclosure of J's complaint and the 258 Report in her 16 March 2014 ERP but that she did not get that until the third tranche of the High Court discovery was received by her solicitors on or after 28 February 2017.

[213] The Authority finds that the Police were not required to provide Ms Opai with a copy of J's complaint and/or the 258 Report in March 2014 because it had decided not to formally investigate.

[214] Even if the Authority was wrong about that, it accepted Inspector Wilkie's evidence that there was good reason for not providing that information to Ms Opai at that time.

[215] There had been a history of the Public Counter supervisors complaining about the timekeeping, work practices and work ethics of the other supervisors and sections. The Police had also just finished a lengthy and disruptive investigation into two staff for similar issues.

[216] Inspector Wilkie was aware the section was already dysfunctional so she did not see any benefit in disclosing information that could have caused further bad feeling and ill will within the workgroup, when the Police had decided that formal action over the 258 Report was not necessary, appropriate or required.

[217] That decision was reasonable and appropriate in the wider overall interest of maintaining workplace relations. It would therefore have been justified if any disadvantaged had been proved by Ms Opai.

The Authority's finding on other concerns identified by Ms Opai, that have not already been addressed in this determination

[218] *No review of PeopleSoft* – PeopleSoft was the time recording software which Ms Opai said should have been, but was not checked, before the 258 Report was

prepared. Ms Opai believed that would have cleared her of wrongdoing but it would not have because on the face of it, the PeopleSoft identified discrepancies that would have required additional investigation.

[219] *Inadequate investigation prior to 258 Report being prepared* – The Authority did not accept Ms Opai’s view that Senior Sergeant Culpan was obliged to do more actual investigation than he did before he wrote the 258 Report. Senior Sergeant Culpan received the complaint from J, he viewed J’s notes, he took advice from two superiors and in accordance with that advice he prepared a 258 Report that contained the necessary information. He therefore handled J’s complaint appropriately.

[220] *Ms Opai believed her employment was in jeopardy* – Ms Opai’s employment was never in jeopardy. Nothing the Police said or did could have reasonably or objectively have lead Ms Opai to have formed that conclusion.

[221] *Escalation of J’s complaint* – Ms Opai said the 258 Report was an unnecessary and inappropriate escalation of J’s complaint. The Authority considered that Senior Sergeant Culpan’s sending of the 258 Report to Inspector Brady was not an “*escalation*”. It was a normal and appropriate action that enabled someone other than Senior Sergeant Culpan to address the issues J had identified. It was a neutral action that, contrary to her views, was not adverse to Ms Opai.

[222] *Ms Opai believed she was at risk of disciplinary action* – Ms Opai was never at risk of disciplinary action. The Police did not say or do anything that would reasonably or objectively have given Ms Opai that impression.

[223] *Inspector Wilkie’s negative view of the workgroup took precedence over “the process required to protect Ms Opai’s rights”* – Ms Opai’s rights were not adversely affected. The Police intervened at the lowest possible level, in accordance with its normal approach to resolving workplace issues. The situation was another example of the problems Inspector Wilkie already knew about in the workplace, where staff were continually complaining about and blaming each other for poor work practices.

[224] *The complaint pertained only to Ms Opai so her rights were disregarded* – That is not right. J’s complaint raised a raft of workplace and work ethic issues, not just timekeeping, and it also named the two staff Ms Opai supervised. Ms Opai’s

individual rights were not disregarded by the Police setting expectations with entire workgroup.

[225] *Ms Opai's absence when the section meetings were held made it clear to staff the allegations were about her* - the Authority does not agree with Ms Opai's view about that. She was not named in any of the section meetings. The details of the 258 Report and J's complaint were not disclosed to others who were not also named in the complaint. No-one including Ms Opai was accused of wrongdoing during the section meetings, as the focus was on setting expectations going forward, not blaming or shaming individuals or particular sections.

[226] *Inspector Brady's conflict of interest* – The Authority does not agree with Ms Opai that Inspector Brady had an actual conflict of interest that prevented him from categorising the 258 Report just because Ms Opai's first two ERPs had been referred to Inspector Brady to resolve.

[227] *Persistent attempts to raise Ms Opai's timekeeping issues with others* - The Authority does not agree that there were persistent attempts to raise the timekeeping issues with others. The bundle of documents Senior Sergeant Culpan left for Inspector Traill was a neutral handover of information between managers to ensure a smooth changeover, and to ensure the incoming manager was properly informed about previous workgroup matters he was going to have responsibility for going forward. Others received the 258 Report for legitimate work related reasons.

Summary of Authority findings on Ms Opai's unjustified disadvantage grievance claims

[228] The Authority concluded that Ms Opai's unjustified disadvantage grievances, relating to issues associated with or involving the 258 Report, did not succeed.

[229] Ms Opai failed to discharge the onus of establishing on the balance of probabilities that any of the Police's actions or acts had disadvantaged her in her employment.

[230] The Authority was satisfied that even if any disadvantage had occurred (which was not proved) then Police would have discharged its burden of establishing on the balance of probabilities that it had meet the statutory justification test in s.103A(2) of the Act.

[231] The Authority's view was that how the Police acted, and the Police's actions were what a fair and reasonable employer could have done in all the circumstances at the time the actions Ms Opai complained about occurred.¹³ Accordingly, any disadvantage that could potentially have occurred, was nevertheless justified.

Costs

[232] The Police as the successful party is entitled to a contribution towards its actual legal costs. Proof of actual costs incurred will be required in support of any application for costs.

[233] The parties are encouraged to resolve costs by agreement.

[234] However, if that does not occur, then the Police have 14 days within which to file a costs application. Ms Opai has 14 days within which to respond. The Police have a further 7 days to file any reply cost submissions.

[235] The Authority is likely to adopt its usual notional daily tariff based approach to assessing costs, so the parties are invited to identify any factors they say should result in the notional daily tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority

¹³ Section 103A(2) of the Act.