

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 618
3005373

BETWEEN

MELISSA JEAN OPAI
Applicant

AND

COMMISSIONER OF POLICE
Respondent

Member of Authority: Rachel Larmer

Representatives: Rani Amaranathan, counsel for the Applicant
Nicola Cuervo and Louise Robertson, counsel for the
Respondent

Investigation Meeting: 10, 11 and 12 May 2022 at Auckland

Submissions and other information received: 7 July, 17 August, 28 October, 28 November 2022 and
11 October 2023 from the Applicant
21 July and 12 December 2022 from the Respondent

Date of Determination: 20 October 2023

DETERMINATION OF THE AUTHORITY

Non-publication order rescinded

[1] On 11 October 2019 the Authority issued a non-publication order prohibiting publication of Ms Opai's evidence about her medical issues.¹

[2] During the course of this investigation meeting Ms Opai confirmed to the Authority that she was comfortable with her medical evidence being published, on the basis that it formed a fundamental part of her claims. On 11 October 2023 Ms Opai confirmed in writing that the non-publication order could be vacated.

¹ *Opai v Commissioner of Police* [2019] NZERA 580.

[3] Accordingly, the Authority's non-publication order dated 11 October 2019 is now rescinded.

Naming of Police witnesses

[4] In most cases Police witnesses have been referred to using the title they held at the time of the events described in this determination, for ease of reference.

Employment Relationship Problem

Ms Opai's role

[5] Ms Opai worked for Police from 2005 to 3 November 2018. At the time of her dismissal she was employed in the Disclosure Group - File Management Support Officer ("FMSO") shift role. This was a permanent full time shift work position, which involved an early and late shift pattern.

Ms Opai's dismissal

[6] Police dismissed Ms Opai on 3 November 2018, because she could or would not work the shifts her role required, and because the employment relationship had irretrievably broken down.

Ms Opai's claims

[7] Ms Opai claimed Police:

- (a) Unjustifiably disadvantaged her in multiple ways;
- (b) Breached its good faith obligations to her;
- (c) Should have a penalty imposed on it for its breaches of good faith;
- (d) Discriminated against her because of her disability; and
- (e) Unjustifiably dismissed her.

[8] The large number of claims, and the extensive amount of evidence they required, resulted in three separate investigation meetings which have been referred to as "IM1", "IM2" and "IM3". This determination deals with the third and final investigation meeting into Ms Opai's claims ("IM3").

Previous determinations

[9] This is the sixth determination the Authority has issued in this matter.

First determination

[10] The first determination issued on 15 November 2017 dealt with the Police claim that the Authority did not have jurisdiction to investigate some of the claims that were made by Ms Opai in her Third Amended Statement of Problem.²

[11] The Authority held that disadvantage grievances raised by Ms Opai on 4 December 2013 could not be investigated by the Authority as discrete unjustified disadvantage claims, but they would be considered as relevant background to other unjustified disadvantage grievances which were within time.

Second determination

[12] The second determination was issued on 29 November 2018.³ This was a substantive determination into the various unjustified disadvantage grievances that Ms Opai had raised regarding what was described as “*the 258 Report*”. The investigation of those issues was called “*IM1*”. None of Ms Opai’s unjustified disadvantage grievances related to issues associated with or involving the 258 Report succeeded.⁴

Third determination

[13] The third determination was issued on 3 May 2019.⁵ This was a costs determination which dealt with costs on the preliminary jurisdiction matter (on which Ms Opai succeeded) and on the substantive claims in IM1, regarding the 258 Report issues (on which Police had succeeded). Ms Opai was ordered to pay Police \$6,000 towards its legal costs.

Fourth determination

[14] The fourth determination was issued on 11 October 2019.⁶ This was a non-publication order that prohibited publication of the medical evidence Ms Opai had provided to the Authority in support of her claims.

² [2017] NZERA 357.

³ [2018] NZERA 379.

⁴ This determination has been challenged, see EmpC 437/2018.

⁵ *Opai v Commissioner of Police* [2019] NZERA 264.

⁶ *Opai v Commissioner of Police* [2019] NZERA 580.

Fifth determination

[15] The fifth determination was issued on 9 April 2020.⁷ This was a substantive decision for the second investigation meeting, which is referred to as “IM2”. This investigated a number of unjustified disadvantage grievances that arose in 2014 and 2015. These were categorised into three main types of grievance (each of which involved multiple separate grievance claims within those three main categories).

[16] They included disadvantage grievances arising from the disestablishment of Ms Opai’s Watchhouse Officer role in December 2014, disadvantage grievances that arose from performance feedback her then supervisor had raised with Ms Opai during a meeting on 3 March 2015, and a range of disadvantage grievances that arose from Ms Opai’s claims that Police had mishandled her 2014/2015 performance appraisal.

[17] The Authority determined the Police restructuring of the Public Counter Workgroup that occurred in 2014/2015, that resulted in the disestablishment of Ms Opai’s then position, was substantively justified and had been conducted in a procedurally fair manner. Accordingly, Ms Opai’s various disadvantage grievances associated with that claim did not succeed.

[18] However, Ms Opai’s unjustified disadvantage grievances relating to the 3 March 2015 meeting she had with her then supervisor and her claims about the way Police had dealt with her 2014/2015 performance appraisal succeeded. Ms Opai was awarded \$20,000 distress compensation as a result of those unjustified disadvantages.

Unjustified disadvantage grievances in IM3

[19] Ms Opai made multiple unjustified disadvantage grievance claims that are the subject of this substantive determination for IM3. These related to her claim that from 2015 onwards (excluding the performance appraisal issues that were dealt with by the Authority during IM2), Police unjustifiably disadvantaged her in her employment under the following three broad headings, each of which consisted of multiple separate alleged unjustified disadvantage grievances:

- (a) By failing to provide her with a safe workplace;
- (b) By changing the Disclosure Group roster in June 2017; and
- (c) By concluding her temporary role in the Disclosure Unit in September 2017.

⁷ *Opai v Commissioner of Police* [2020] NZERA 147.

Breach of good faith and penalty claims

[20] Ms Opai also claimed that Police were not responsive and constructive in raising relationship concerns with her or in the way it dealt with her health issues, which she claimed breached its good faith obligations under s 4(1) of the Employment Relations Act 2000 (the Act).

[21] Ms Opai sought a penalty be imposed on the Police for any breaches of good faith that occurred. Police maintained it had met its good faith obligations to Ms Opai, but said that even if there had been breaches of good faith they would not have met the threshold for the imposition of a penalty.

Disability discrimination claim

[22] Ms Opai's disability discrimination grievance related to her claim that Police breached its duty to accommodate her health condition, which arose from her bladder failure and loss of vision in one eye.

[23] Ms Opai claimed that the Police failure to agree that she could work the shift pattern she had identified as suitable, which she said had been recommended by her GP, discriminated against her on the grounds of disability.

[24] Police denied it had discriminated against Ms Opai. It had offered her a Flexible Employment Opportunity ("*FEO*") position that only required her to work the hours and days she said she had been medically cleared work, but she did not accept that offer. Other options that would have accommodated her disability were also either declined by Ms Opai, or not responded to.

Unjustified dismissal grievance

[25] On 3 October 2018 the Police dismissed Ms Opai on one month's notice because:

- (a) It could not continue to accommodate her working on a non-shift basis on an ongoing basis, and she did not agree to do the shift pattern her role required; and
- (b) It believed there had been an irretrievable breakdown in the relationships she had with her supervisors and managers, and with the Police overall, to the extent the necessary trust and confidence had been so fundamentally undermined that her employment could not continue.

[26] Ms Opai was not required to work out her notice period, but instead remained on the paid special leave she had been on since 30 August 2018. Her employment ended on 3 November 2018.

[27] By the time Ms Opai was dismissed, she had been temporarily working a day shift only for more than three years. Despite not doing the shift work her role required, Police had continued to pay her the shift loading, as if she had been doing shift work.

[28] Police believed it could accommodate Ms Opai's health condition, in accordance with the medical information her Urology Specialist had provided in a report to her General Practitioner ("GP") dated 15 November 2017. However, Ms Opai disagreed with the Police view about that, so she declined on health grounds to work the shift pattern her role required.

[29] Ms Opai told Police on 14 March 2018 that she would not be able to do shift work for at least another year, at which time her GP intended to review her situation. She gave Police a letter from her GP dated 12 March 2018 that said "*she should stay on 8 hour shifts 5 days per 7 day calendar week.*" That was the last updated medical report she gave Police before she was dismissed.

[30] However, Ms Opai also told Superintendent Rogers on 21 March 2018 that she had never asked her medical practitioners what shifts she could work, although she had told Police in October 2017 that she would do that. Police were concerned that Ms Opai had only sought medical advice on the shifts she wanted to work, but not on her ability to do the shifts the FMSO roles required.

[31] Ms Opai was not interested in being deployed into an alternative role. She only wanted to be allowed to continue doing her permanent FMSO (shift) role, but on an ongoing non-shift basis while continuing to be paid the shift allowance that went with her permanent FMSO shift role. Police declined Ms Opai's requests to do so on the grounds it was not workable for operational, financial and workflow reasons.

[32] Ms Opai had made a number of serious, highly personal and targeted complaints about Police employees. These often contained very serious allegations that were supported by limited or no evidence. She appeared to have little or no insight into the adverse impact her actions had on those involved, instead believing that she was simply highlighting wrongdoing by others.

[33] Police said the significant number and nature of Ms Opai's concerns, complaints and personal grievances caused a relationship breakdown, as her actions had reached the level where they fundamentally undermined the trust and confidence in the employment relationship.

[34] Ms Opai unsuccessfully pursued defamation proceedings personally against a Senior Sergeant, who had been her manager, and the Police in the High Court.⁸ Ms Opai had declined to withdraw the claim she had made against her manager personally, despite Police as her employer having committed to accept full liability for any findings that could be made against him.⁹

[35] Ms Opai's unsuccessful defamation proceeding arose from legitimate constructive feedback the Senior Sergeant managing her had recorded in a draft performance appraisal document he was discussing with her, as part of the annual performance review process. Ms Opai's managers' and supervisors' fears about addressing legitimate work related issues with her had to be seen within that context.

[36] Police were concerned that there was an atmosphere of distrust and unease while Ms Opai was at work because of the approach she adopted to employment issues. Ms Opai's supervisors felt unable to constructively engage with her or give her feedback and three of them had left their roles, at least in part due to difficulties they were experiencing in managing her. Ms Opai's colleagues were fearful about Ms Opai misinterpreting something they had said or done.

[37] Police said that an experienced Human Resources Advisor, an Inspector and other Police leaders in the District reported feeling "*significantly impacted*" by their dealings with Ms Opai and had asked to move away from their chain of command, so they did not have to continue dealing with her.

[38] Another Senior Sergeant had been removed away from Ms Opai's chain of command by management for his own wellbeing. The Police District Welfare Officer had also reported she was concerned about the extent of the adverse impact Ms Opai was having on her supervisors.

⁸ *Opai v Attorney-General* [2018] NZHC 2267.

⁹ These proceedings related to legitimate comments her manager had recorded and discussed with her in her 2014/2015 performance appraisal.

[39] Ms Opai said Police had not raised the relationship concerns with her, prior to proposing it as grounds for an incompatibility dismissal, so it should not be able to use it as a ground for her dismissal. She pointed out that Police had failed to conduct performance appraisals with her, which she said had contributed to the relationship issues, because incompatibility concerns could and should have been raised during the annual performance appraisal process.

The Authority's investigation

Timing of determination

[40] The Chief of the Authority granted an extension to the statutory timeframe, in recognition that the issuing of this determination has not occurred within the three months' statutory timeframe specified by s 173C(3)(b) the Act. The extension recognised that the delay was occasioned by exceptional circumstances, in accordance with s 174C(4) of the Act.

Nature of the investigation conducted by the Authority

[41] Because of the voluminous and detailed nature of Ms Opai's various issues it was agreed from the outset that the investigation of her substantive claims would be conducted over the course of three different investigation meetings.

[42] IM1 involved a two-day investigation meeting in August 2018, IM2 involved a four-day investigation meeting in October 2019, and IM3 a three-day investigation meeting in May 2022. In total the Authority spent nine days of investigation meeting time hearing evidence about Ms Opai's claims.

[43] The Authority reviewed more than 4,267 pages of documents. However, that number excluded documents that were attached to witness statements, handed up during or after the three investigation meetings or which were attached to the parties' submissions. It also excluded the multiple memorandums that have been filed and extracts that were provided from the transcript of the High Court defamation proceedings.¹⁰

[44] There has been an extensive investigation into Ms Opai's many grievances and complaints. IM1 involved in excess of 1,194 pages of documents. IM2 involved in excess of 1,175 pages of documents. IM3 involved nine witnesses and in excess of 1,898 pages of documents.

¹⁰ Above n8.

[45] During the course of its investigation the Authority received evidence from 19 witnesses, some of whom gave evidence at more than one of the investigation meetings. Ms Opai has herself lodged 11 witness statements and two affidavits. Some of her witness statements have been very long and detailed.

[46] More than 212 pages of witness statements/affidavit evidence was lodged for IM3 alone. The parties also provided a 17 page Table of Issues for IM3, which gives some idea of the scope of the investigation that occurred. After IM3 Ms Opai filed 67 pages of written submissions and Police filed 110 pages of submissions.

[47] While the discrete claims that have been considered in each of the Authority's investigation meetings resulted in standalone determinations, all of the evidence provided for all three investigation meetings has been considered when determining the claims in IM3.

Chronology and timelines

[48] The Authority prepared its own 52 page chronology which ran from July 2014 until October 2021, to ensure that it was able to put all of the key events and communications within a chronological context. That was considered important to ensure that issues that developed throughout the course of the employment relationship were not just viewed in isolation but were seen within the wider overall context.

[49] The parties lodged a six page timeline of the medical information that had been provided by Ms Opai to ensure that the various medical issues could be properly assessed within a chronological context during IM3.

[50] In addition, the parties filed a four page report on the dates and nature of the various complaints, 'integrity reports', personal grievances, and employment relationship problems she had raised from 2012 until 2018. Some of this pre-dated the claims that the Authority was investigating, but it was important context to ensure that the full history of the matters that ultimately resulted in Ms Opai's dismissal could be appropriately assessed.

Content of this determination

[51] As permitted by s 174E of the Act, this determination has stated findings of fact and expressed conclusions on issues necessary to dispose of the matter in as efficient manner as possible.

[52] The Authority acknowledges Ms Opai presented extremely detailed evidence of multiple specific instances and examples she said supported each of her many sub-issues. All of that has been carefully considered. However, the length of this determination meant that every concern Ms Opai raised with the Authority could not be recorded, so this determination has focused on the legal issues that required determination.

[53] However, the voluminous amount of evidence that has been heard during the course of the Authority's investigations into all of Ms Opai's claims has also meant that it was not practicable to summarise all of the evidence or submissions that have been received. A massive amount of detail has therefore not made it into this determination.

Issues to be determined

Overview of the issues

[54] Ms Opai's claims in IM3 included:

- (a) Police followed a course of conduct from 2015 onwards which unjustifiably disadvantaged her in her employment.¹¹ In particular, Ms Opai claimed that:
 - (i) Police failed to provide her with a safe workplace;
 - (ii) The changes Police made to the Disclosure Group roster pattern in June 2017 unjustifiably disadvantaged her; and
 - (iii) The proposal and decision to end her temporary role in the Disclosure Group in October 2017 unjustifiably disadvantaged her;
- (b) Police breached its good faith obligations to her, so should have a penalty imposed on it;
- (c) Her dismissal was unjustified; and
- (d) Police discriminated against her because of her disability.

Specific issues to be determined

[55] The parties agreed that IM3 required the following specific issues to be determined, which the Authority has summarised/paraphrased for ease of reference:

¹¹ This excluded the performance appraisal issues that were determined by the Authority during IM2, above n 7.

1. Did Police follow a course of conduct from 2015 onwards which unjustifiably disadvantaged Ms Opai in her employment? In particular:
 - (a) Did Police fail to provide a safe workplace for Ms Opai, as a result of any or all of the allegations she made about:
 - (i) The File Management Centre Supervisor appointments to the Acting and Permanent roles;
 - (ii) The manner in which her welfare transfer application in October 2016 was dealt with;
 - (iii) The way Inspector Tracy Phillips dealt with Ms Opai's performance appraisal;
 - (iv) The secondment of Inspector Brand and Senior Sergeant Culpan into her workgroup;
 - (v) Others being encouraged and/or instructed not to speak to and/or support her;
 - (vi) The decision to decline her special leave application dated 29 August 2017;
 - (vii) The proposal to end her temporary role in the Disclosure Group on 13 October 2017;
 - (viii) The declining on 26 February 2018 of her application for a FEO;
 - (ix) The cancellation on 5 March 2018 of an advertised role after she had applied for it on 15 February 2018 on a FEO and/or Welfare Transfer basis;
 - (x) Failure by Police to properly investigate her complaints about Inspector Brand dated 7 April 2017, 31 October 2017 and 30 July 2018;
 - (xi) Failure by Police to provide her with appropriate support after she made complaints;
 - (xii) Failure by Police to prevent retaliatory conduct against her for making complaints;

- (xiii) Police disclosure of her complaint to the Police Commissioner dated 30 July 2018 to Inspector Brand and Superintendent Rogers;
 - (xiv) The proposal to terminate her employment being made on the same day the High Court released its judgment in her unsuccessful defamation proceedings against Police; and
 - (xv) Police having predetermined her dismissal, if she could not work a shift roster pattern;
- (b) By changing the roster pattern in the Disclosure Group in June 2017. In particular, Ms Opai alleged that Police failed to:
- (i) Consult her about the roster changes; and
 - (ii) Consider or accommodate the impact of the roster changes would have on her ability to manage her disability;
- (c) By proposing to conclude her temporary role in the Disclosure Group in October 2017. In particular Ms Opai claimed:
- (i) The process Police followed was unfair;
 - (ii) The decision was unjustified; and
 - (iii) The ending of her temporary role on 13 October 2017 unjustifiably disadvantaged her;
2. Was Ms Opai's dismissal unjustified? In particular, Ms Opai alleged that:
- (a) It was procedurally unfair because Police:
 - (i) Failed to sufficiently investigate the concerns it had;
 - (ii) Failed to provide her with all relevant information;
 - (iii) Did not have an open mind;
 - (iv) Failed to take all relevant matters into account before dismissing her;
 - (b) It was substantively unjustified because:
 - (i) Police did not consider another way of accommodating her disability, either within her existing role, or elsewhere within a reasonable distance of her home;

- (ii) A fair and reasonable employer could not have dismissed her in all the circumstances for refusing to work an alternating early/late shift roster;
 - (iii) A fair and reasonable employer would not have dismissed her for an irretrievable relationship breakdown. In particular, Ms Opai claimed:
 - A. Police were improperly motivated by her previous complaints;
 - B. There was insufficient evidence to support the Police conclusion that there had been an irretrievable breakdown in the parties' relationship;
 - C. Police caused or contributed to any irretrievable breakdown in the relationship, by failing to properly address Ms Opai's complaints and concerns;
 - D. Police had not taken reasonable steps to repair the employment relationship, before concluding it had irretrievably broken down;
3. Did Police discriminate against Ms Opai because of her disability? In particular, Ms Opai alleged the following were instances of discrimination:
- (a) The changes made to Disclosure Group's roster pattern in June 2017;
 - (b) The ending of her temporary role on 13 October 2017;
 - (c) Permanently appointing her to the Disclosure Group - FMSO shift role;
 - (d) Failing to accommodate:
 - (i) Medical advice she had provided; or
 - (ii) Her view that she should be:
 - A. Permitted to work the same shifts all the time, rather than alternating shifts; or
 - B. Transferred into another non-shift role within reasonable distance of her home;

- (iii) Flexible work opportunities for her, when she said Police had offered flexible working opportunities to other employees;
 - (iv) Her disability, because she had been dismissed for refusing to work an alternating early/late shift roster on health grounds;
4. If any of Ms Opai's personal grievance claims succeed, what remedies should she be awarded?
 5. Should any remedies Ms Opai may be awarded be reduced under s 124 of the Act, on the grounds of contribution?
 6. Did Police breach its good faith obligations to Ms Opai?
 7. If so, should a penalty be imposed on Police for any breaches of good faith that occurred?
 8. What if any costs and disbursements should the successful party be awarded?

Material facts and factual findings

Collective Agreements

[56] Ms Opai commenced employment with the Police in August 2005. In terms of the claims in IM3, Ms Opai was covered by the Police Employee Collective Employment Agreements dated 1 July 2015 to 30 June 2018 and 1 July 2018 to 30 June 2021, which have been referred to in this determination as "*the CEAs*".

Restructure of the Public Counter section

[57] Ms Opai worked initially as a Watchhouse Assistant and then as a Watchhouse Officer (Supervisor) based at Counties Manukau District Headquarters in Manukau ("*CMDHQ*"). The Watchhouse staff managed the Public Counter at CMDHQ.

[58] The Police restructured its Front Counter Operations in late 2014, which merged the Public Counter and the File Management Centre ("*the FMC*") into one workgroup. That resulted in Ms Opai's Watchhouse Officer role being disestablished. This restructure was the subject of IM2.¹²

¹² Above n7.

Ms Opai's permanent FMSO shift role

[59] As a result of the restructure, Ms Opai was re-assigned to a File Management Support Officer (“FMSO”) shift role, with effect from 5 March 2015. It is this new FMSO shift role that was Ms Opai’s permanent role, and it included a shift loading to recognise the role required shift work.

[60] The new FMSO shift role involved night shifts, as opposed to just ‘earlies’ and ‘lates’ (which were both daytime shifts), which was the roster pattern Ms Opai had worked in her Watchhouse Officer role.

Ms Opai's temporary Disclosure Group - FMSO (non-shift) role

[61] In June 2015, following Ms Opai’s return to work after a significant period of leave, Police created a temporary FMSO non-shift role for her in the Disclosure Group to support her recovery from health issues she was experiencing. The Disclosure Group - FMSO non-shift role remained Ms Opai’s temporary role until it was ended on 13 October 2017.

Changes made in June 2017 to the Disclosure Group's roster pattern

[62] In June 2017, after a consultation process, Police changed the Disclosure Group’s roster pattern from day shifts (6.00 am-8.00 am start and 2.05-4.05 pm finish, depending on personal preferences) to rotating early shifts (6.00 am until 3.00 pm), mid-shifts (11.00 am until 7.00 pm) and late shifts (11.00 am until 9.00 pm). These shift patterns were to be worked on a ‘six days on, four days off’ cycle.

[63] Ms Opai’s claim that the roster change was initiated by Inspector Brand to deprive her of a non-shift role was unsupported by evidence, and therefore without merit. There were good reasons for the roster change and it occurred after a fair and proper consultation process. The roster change aligned the Disclosure Group’s hours and days of work with organisational needs, given the increased volumes of work and a backlog created by a significant amount of work arriving outside of the normal dayshift hours.

Proposal to end Ms Opai's temporary role in August 2017

[64] In August 2017 Superintendent Rogers instructed Inspector Brand to write to Ms Opai proposing to draw her temporary non-shift role to a conclusion. The proposal to end the temporary role was therefore not Inspector Brand’s decision, as she was simply the administrative conduit for the proposal.

[65] As the District's Operations and Support Manager, Inspector Brand had overall responsibility for staffing in the Operations and Support workgroup, which included the Disclosure Group. It was therefore appropriate for her to send the letter. Inspector Brand wrote to Ms Opai on 2 August 2017 explaining the reason for the proposal and invited Ms Opai to a meeting to discuss the matter.

[66] Ms Opai responded by claiming that Inspector Brand was conflicted due to previous complaints she had made. Although Inspector Brand was not conflicted, Superintendent Rogers agreed to personally take over as the decision maker, in order to allay Ms Opai's concerns, even though it would normally be Inspector Brand's responsibility.

Conclusion of Ms Opai's temporary Disclosure Group role in 2017

[67] Following consultation, Police wrote to Ms Opai on 13 September 2017 advising that it had concluded her temporary non-shift role in the Disclosure Group, as it was not financially sustainable to continue with it. She was told her temporary role would end on 13 October 2017.

October 2017 events

(i) 10 October 2017 proposal letter of new role for Ms Opai

[68] On 10 October 2017 Superintendent Rogers wrote to Ms Opai confirming that "*I am mindful that any role Police deploys you into needs to accommodate your health condition.*" She noted that Police would need to receive updated medical information from Ms Opai's specialist before she started working shifts.

[69] Superintendent Rogers therefore proposed to deploy Ms Opai into the FMSO vacancy in the Disclosure Group that Police had been holding open for her. This was a permanent shift role, but it only had two shifts, unlike Ms Opai's permanent FMSO (shift) role which had a three shift roster pattern.

[70] To accommodate Ms Opai's health condition the role would be made into a non-shift role on a short term basis, to give the parties time to arrange medical clearance for Ms Opai to work the early/late shifts the role required. It was proposed that Ms Opai would move into the new role on 16 October 2017, at which point her salary would decrease from Scale B to Scale A from that date, but would move back to Scale B once she had been cleared to start working early/late shifts.

[71] Superintendent Rogers asked Ms Opai to come to their meeting the next day prepared to address this offer, or any alternative proposals she had.

(ii) 11 October 2017 meeting

[72] Superintendent Rogers and Ms Opai met on 11 October 2017. Ms Opai agreed to be deployed back into her permanent FMSO shift role. However, she would continue to be based in the Disclosure Group, working day shifts only while still being paid a salary with a shift loading, pending medical clearance that she was able to resume undertaking the shifts required by her permanent FMSO role.

(iii) 12 October 2017 letter recording the parties' agreement

[73] Superintendent Rogers asked Inspector Brand to write to Ms Opai recording the agreed arrangements. This was to record that Ms Opai had agreed to Police making arrangements for her to undergo a medical assessment (with a focus on her ability to work shifts) and that Police had agreed her remuneration would remain unchanged while that was occurring.

[74] On 12 October 2017 Inspector Brand signed and sent the letter Superintendent Rogers had instructed was to be sent to Ms Opai confirming what had been agreed. Ms Opai strongly objected to that, claiming Inspector Brand had a conflict of interest and had breached her privacy. The Police considered that these complaints were without merit, and that Ms Opai overreacted to what was a simple administrative matter. The Authority agreed with that finding.

(iv) Inspector Brand's interaction with Ms Opai on 31 October 2017

[75] Ms Opai was required to sign the acknowledgment in the 12 October 2017 letter and return it, but had not done so. Human Resources (“HR”) asked Inspector Brand (as the workgroup manager) to follow up with Ms Opai to get that done. Inspector Brand therefore visited Ms Opai in person at her desk on 31 October 2017, to ask her to sign and return the acknowledgement in the 12 October letter.

[76] Ms Opai strongly resisted Inspector Brand's attempt to speak with her about the 12 October 2017 letter, so Inspector Brand immediately retreated. Although this brief work related interaction lasted only a few seconds, it caused Ms Opai to file another formal complaint about Inspector Brand. She claimed this behaviour did not make her feel safe in the workplace. Ms Opai also described this very brief interaction with Inspector Brand as “*feeling like psychological abuse*”.

[77] Superintendent Rogers told Ms Opai that Inspector Brand's conduct was entirely appropriate, and in line with her expectations. The Authority was also satisfied that Inspector Brand's conduct was reasonable, professional and appropriate. Ms Opai's complaints about it were therefore not accepted.

(v) Complaint about Inspector Brand speaking to staff near Ms Opai's desk

[78] On 27 October 2017 Ms Opai complained about Inspector Brand speaking near Ms Opai's desk to others in the workgroup. That complaint was without merit. It was unrealistic for Ms Opai to demand that Inspector Brand had no communications in the workplace with the workgroup she was responsible for.

[79] It was part of Inspector Brand's responsibility as the Head of the workgroup to engage with the team and at times that needed to occur close to where Ms Opai sat, which was directly in front of the Disclosure Group's FMC Coordinator's desk. It was unreasonable for Ms Opai to expect otherwise.

(vi) Ms Opai's 31 October 2017 complaint about Inspector Brand

[80] On 31 October 2017, Ms Opai raised a complaint with her supervisors, which she copied to Superintendent Rogers, which stated that Inspector Brand's "*behaviour did not make me feel safe*" and she demanded that Inspector Brand did not have any direct contact with her in future.

[81] Superintendent Rogers advised Ms Opai by email on 3 November 2017 that she was expected to be able to interact with Inspector Brand about operational matters. Likewise, Ms Opai was expected to interact with all of her colleagues and superiors, including Inspector Brand, in a professional manner in the workplace. That was an appropriate response by Police to Ms Opai's complaint.

[82] Ms Opai's complaint was without merit. Inspector Brand's interactions with Ms Opai were minimal, occurred at the direction of others (either Superintendent Rogers or Human Resources), were brief, professional and appropriate in the circumstances.

Ms Opai's complaint to the State Services Commissioner

[83] In mid-December 2017 Ms Opai complained to the State Services Commissioner. Superintendent Rogers said she understood that complaint specifically referred to Inspector

Brand and to Ms Opai's unsuccessful application for review of Inspector Brand's appointment to the District Operations and Support Manager role.

Ms Opai's complaint to the Commissioner of Police

[84] On 30 July 2018 Ms Opai made a complaint about Inspector Brand to the Commissioner of Police. She reiterated her concern about Inspector Brand's original appointment and about the review process that the Police had followed as a result of Ms Opai's unsuccessful challenge to that appointment.

[85] Ms Opai disputed the outcome of the review and said she would be seeking a review of the Review of Appointments Process "*by way of Ministerial*". This related to the formal review Ms Opai had sought on 14 December 2017 of the appointment of Inspector Brand to the District Operations Support Manager – CMDHQ.

[86] Ms Opai's 30 July 2018 complaint was a very serious personal attack on Inspector Brand's reputation and integrity, that included second hand hearsay information. The Police response to Ms Opai dated 24 August 2018 pointed out that the allegations she had made were serious but unsupported by evidence.

[87] Police noted Ms Opai had previously complained about Inspector Brand through many different means (complaints, raising Employment Relationship Problems ("*ERPs*"), review processes, personal grievances, Authority proceedings and the defamation proceedings she pursued in the High Court). Police said it had investigated, considered and addressed the issues Ms Opai had raised and did not share her view and perspectives about Inspector Brand.

[88] The Authority was satisfied Police had treated Ms Opai's complaints about Inspector Brand seriously and had responded to all of them. It was fairly and reasonably open to Police in the circumstances to reach a different conclusion than Ms Opai had wanted.

Medical information

[89] On 11 October 2017, Ms Opai informed Police that there was no longer any restrictions on her ability to drive at night. On 15 November 2017 Ms Opai's Urology Specialist provided a report to her GP that recommended she continue to work day shifts only, to assist her with getting into and maintaining a rhythm of self-catheterisation every four hours, or more frequently if needed.

[90] Prior to receipt on 22 November 2017 of Dr Lawrence's report dated 15 November 2017 (that had been sent to the GP), Police had asked Ms Opai to undergo a medical assessment to address specific questions it had about her health needs, and in particular regarding the hours and shifts that she was medically cleared to work.

[91] Although Ms Opai had specifically agreed to these questions being answered, that did not happen. Notwithstanding Police considered that the medical information from Dr Lawrence had not adequately responded to its questions, it was satisfied that Dr Lawrence had given valuable advice about how Ms Opai's health condition could be appropriately managed in the workplace.

[92] Police said it could readily accommodate Ms Opai in maintaining a regular rhythm for catheterisation in the workplace. It identified how it intended to do that in a letter to Ms Opai dated 7 December 2017. Ms Opai was therefore on notice that Police believed it could appropriately support her to manage her bladder issue in the workplace, in a way that was consistent with what her Specialist's advice had recommended.

[93] Police therefore believed Ms Opai's needs, as described in the 15 November 2017 report by her Urology Specialist, could be accommodated if she returned to shift work in accordance with the normal Disclosure Group - FMSO shift roster. Ms Opai disagreed, because she believed she needed to continue working day shifts only.

[94] In February 2018 Ms Opai said she had sought further medical advice from her GP (because her Urologist had gone on parental leave) to clarify whether or not she had been medically cleared to work the shifts required by her permanent Disclosure Group FMSO (shift) role.

[95] Ms Opai said her GP recommended that she should continue to work day shifts only, on her current hours of work, for the next 12 months. However, Ms Opai later told Superintendent Rogers when they met on 21 February 2018 that she had not asked her GP or Urologist to address whether she could be medically cleared to work any of the FMSO shift patterns. No reason was given for Ms Opai's failure to do what she had agreed to do.

Proposal that Ms Opai leave Police on health grounds

[96] On 13 February 2018 Police asked to meet Ms Opai to discuss the possibility of her leaving her employment on health grounds. She was given a copy of the "*Leaving Police on Health Grounds Policy*" and Police said wanted to discuss both a compulsory and voluntary

cessation of employment. Ms Opai told Police she was not interested in leaving or in a medical retirement, so that was not taken further.

21 February 2018 meeting

[97] The Police Association was representing Ms Opai regarding the proposed ending of her employment. Superintendent Rogers, Ms Opai and her representatives Mr Stewart Mills and Constable Martin Carroll met on 21 February 2018.

[98] Ms Opai confirmed during the 21 February 2018 meeting that she would seek medical clearance to work an 'earlies and lates' shift pattern. However, she did not appear to have done so, because the specific shift work questions Police had identified it needed answers to, which were set out in the referral letter dated 13 September 2017 and in the referral letter dated 25 October 2017 to Dr Lawrence, were not responded to.

28 February 2018 letter

[99] On 28 February 2018 Superintendent Rogers wrote to Ms Opai following their meeting. She was asked to provide further information about her eye issue, because what she said during the 21 February 2018 appeared to contradict the information she had given Police in October 2017.

[100] Police responded to Ms Opai's concerns that it had breached her privacy regarding her medical condition by assuring her that there had been disclosure to the very least extent necessary that enabled Police to make decisions about how to safely manage her condition in the workplace.

[101] Police also recorded surprise that Ms Opai said she had not discussed the maximum number of hours or the timing of her hours of work she was medically cleared to do with her medical practitioners, as she had said back in October 2017 that she would do so. Despite Ms Opai having previously given her express permission for those questions to be asked and answered, that had not occurred.

14 March 2018 meeting

[102] Superintendent Rogers, Ms Opai and her representatives Mr Mills and Constable Carroll met on 14 March 2018. Ms Opai provided a copy of her GP's letter dated 12 March 2018 which set out what days and hours she had been medically cleared to work. However, it

again did not address the specific shift work questions Police had raised. Ms Opai did not update that medical report before she was given notice of dismissal on 3 October 2018.

22 March 2018 letter

[103] Following the 14 March 2018 meeting, Police wrote to Ms Opai by letter dated 22 March 2018. Among other things it responded to the proposal Ms Opai had made on 14 March 2018, to work a ‘five days on five days off’ roster, with shifts that fell between the hours of 7am and 6pm. Police explained why it did not consider that providing Ms Opai with her own roster pattern was workable.

[104] Superintendent Rogers identified that, despite the specific requests Police had made for medical information about whether or not Ms Opai could work the early/late shift roster her FMSO shift role required, that was not addressed in her GP letter dated 12 March 2018, or in the information she had conveyed during their 14 March 2018 meeting.

[105] Police expressed concern that instead of seeking medical advice on whether she could work the roster pattern that the FMSO roles required, Ms Opai appeared to have sought medical advice about whether she could work a pattern of hours that she thought would suit her. However, no further medical information was provided by Ms Opai.

[106] Police also proposed a FEO arrangement, under which she would work the same roster pattern as the others in her section, but with reduced hours. If accepted, Police said it would reorganise Ms Opai’s work to manage the FEO arrangement, which could be reviewed on a regular basis to make sure it was workable and sustainable. Ms Opai did not respond to this offer.

Proposal to end the employment relationship

(i) 30 August 2018 letter

[107] Police wrote to Ms Opai on 30 August 2018 proposing to end the employment relationship. Superintendent Rogers set out her view that the present situation was unsustainable, firstly due to unresolved issues regarding her hours of work and secondly due to her lack of trust in supervisors and managers, and her intensely negative and fixed views she had expressed about them.

[108] Police recorded that Ms Opai’s “*numerous and ongoing accusations have been very damaging to your relationships, with your colleagues, supervisors, and managers and to Police*

as your employer.” That was an accurate and justified observation, validated by the evidence the Authority heard.

(ii) Shift work issues

[109] Police had first proposed on 11 January 2018 to end Ms Opai’s employment on 2 March 2018, because she had declined to work the early/late shift roster her role required, and Police could not identify an alternative way to resolve the situation. Police said it could not continue to accommodate Ms Opai working on a non-shift basis indefinitely, for the reasons it had set out in previous communications.

[110] On 22 March 2018 Police had offered Ms Opai a FEO option that aligned her shift pattern with the days and hours she believed she could work. However, Ms Opai never responded to that offer. Ms Opai told Police she only wanted to work in a non-shift role in the Disclosure Group and was not interested in exploring non-shift options elsewhere. Nor had she asked Police to consider her working a FEO shift pattern aligned to her section.

(iii) Relationship issues (incompatibility)

[111] Superintendent Rogers recorded her observations about how Ms Opai’s colleagues, supervisors, and managers were constrained in how they went about their day to day roles, out of fear she would construe something innocent, or even unrelated to her, as a slight against her and complain about them or their conduct.

[112] Superintendent Rogers observed that when Police responded to Ms Opai’s complaints about her supervisors, managers or HR, she remained very fixed in her views – even when clear evidence to the contrary was presented to her. She recorded that Ms Opai’s behaviour was repeated in such a sustained way that it had given rise to a situation where her supervisors and colleagues were reluctant to cross her path in case she misinterpreted something they said or did, and complained about them.

[113] Police reported an atmosphere of distrust and unease in the FMC when Ms Opai was at work. Ms Opai’s immediate supervisors did not feel able to provide her with honest and fair feedback, or sometimes even have conversations in the workplace that did not relate to her, in case she complained about them. They were also afraid to have conversations Ms Opai may overhear, because they did not trust that she would not misinterpret, manipulate, and use what they said against them.

[114] Staff had left the workgroup because of Ms Opai and others who had been approached to work in it had declined to do so, on the basis they did not want to have to supervise Ms Opai. Superintendent Rogers said she had witnessed the adverse impact Ms Opai had on others in the workgroup.

[115] Superintendent Rogers said she had considered what could be done to address that, but believed that because Ms Opai had such a fixed view of things, she did not think there was anything that could be done to change that situation. As long as Ms Opai was employed by Police she would likely continue to complain about her colleagues, supervisors, manager and HR. Police said:

Your colleagues, supervisors, and managers worry about who or what you will complain about next, and go out of their way to avoid you. This constraints and affects their ability to do their jobs effectively. It creates a negative atmosphere in the workplace. It has got to the point where it seems to me that the solution is to remove you from the workplace and end your employment with Police.

[...]

You have made no secret of your complaints and the nature of your litigation against the Police, and people are worried about becoming a future target.

[...]

Despite the considerable time and goodwill Police have invested, you do not seem willing or able to accept there may be a different perspective, or to otherwise find a way to resolve your concerns and move on. If you continue to maintain (as you do, that your supervisors and managers are (among other things) dishonest and deliberately targeting you, I do not see what else we can do.

[116] Ms Opai was given paid special leave until 5 September 2018, while the parties worked through the issues raised in the letter dated 30 August 2018.

[117] Police considered that Ms Opai's response to its proposed dismissal did not focus on the substance of its proposal or take up the invitation to explore how these concerns could be resolved, short of her dismissal. Police suggested meeting to discuss the matter further, but Ms Opai did not wish to meet.

[118] Instead she provided a written response, which the Police understandably considered did not focus on the substance of its concerns. Ms Opai alleged that the dismissal proposal was retaliation against her for the complaints, grievances and the proceedings she had taken against Police and its employees.

[119] The Authority did not accept that it was retaliation, rather it was a response to the manner in which Ms Opai pursued her concerns and her inability to accept facts or viewpoints

she disagreed with. Superintendent Rogers' concerns were fair, reasonable and accurate. There was also ample evidence supporting her astute observations.

Ms Opai's dismissal on 3 November 2018

[120] Police concluded that Ms Opai held very rigid and fixed views about the issues between the parties, and that she was not prepared to reflect on, or engage meaningfully about, finding a way forward. It concluded that the trust and confidence inherent in the employment relationship had been so fundamentally undermined that there needed to be a parting of ways.

[121] Police wrote to Ms Opai on 3 October 2018 confirming its decision to end her employment on notice, and inviting her to continue on paid special leave during her notice period. Police enclosed two additional documents which Ms Opai had not previously been provided with, and advised that it would keep its decision under review during her notice period, in case she wished to provide further feedback or information for Police to consider.

[122] No further feedback was provided, so Ms Opai's employment with Police ended on 3 November 2018.

Relevant law

Justification test

[123] The Authority is required to assess justification regarding Ms Opai's disadvantage and dismissal personal grievance claims in accordance with the statutory justification test set out in s 103A(2) of the Act. This requires the Authority to objectively assess:¹³

Whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[124] Justification must therefore be assessed at the time the dismissal or disadvantage action occurred. Section 103A(3) of the Act sets out four procedural fairness tests the Authority must consider when assessing justification. Section 103A(4) of the Act provides that the Authority may also consider other appropriate factors.

¹³ Section 103A(1) of the Act.

[125] Section 103A(5) of the Act precludes the Authority from finding that a dismissal or action was unjustified solely because of minor process defects that did not result in unfairness to the employee.

[126] The Authority may not step into the employer's shoes and decide what it would have done had it been making the decision at the relevant time. The employer's actions are to be objectively assessed at the time the dismissal or each alleged unjustified disadvantage action occurred, to determine whether they were within the range of responses that were open to a fair and reasonable employer, in all the circumstances.

[127] A fair and reasonable employer is expected to comply with its statutory obligations, such as the good faith obligations in s 4 of the Act, and each of the procedural fairness tests in s 103A(3) of the Act. A fair and reasonable employer would also comply with its contractual obligations, so failure to do so could undermine the ability to establish justification.

Good faith obligations

[128] Section 4 of the Act imposes mutual good faith obligations on parties in an employment relationship. This requires parties to “*be active and constructive*” and “*responsive and communicative*” in maintaining a productive employment relationship.¹⁴

[129] Section 4(1A)(c) of the Act imposes obligations on an employer that is proposing to make a decision that may adversely affect the employee's ongoing employment to provide the employee with access to relevant information, and an opportunity to comment on it, before a final decision is made.

[130] Section 4A of the Act provides that a penalty may be imposed for certain breaches of good faith.

Unjustified disadvantage claims

[131] An unjustified disadvantage is something that is done by an employer that affects the employee's employment or conditions of work in a way that disadvantages them. Once the employee establishes that they have been disadvantaged, then the employer must satisfy the Authority that the action that disadvantaged the employee was justified.

¹⁴ Section 4(1A)(b) of the Act.

[132] The fact that an employee is unhappy, or disagrees with the employer's decision, does not necessarily mean that an action that disadvantaged them was not justified. Whether or not it will be justified will depend on all the circumstances, including whether the employer had a good reason for the decision and whether it was carried out in a way that complied with the employer's good faith and procedural fairness obligations.

Obligation to provide a safe workplace

[133] Employers are required under the Health and Safety at Work Act 2015 (*"the HSWA"*) to protect employees, and others, from harm in the workplace by identifying, eliminating or minimising potential health and safety risks.

[134] Employers must ensure, as far as reasonably practicable, that the health and safety of employees and others was not put at risk from work that those individuals were carrying out either in the workplace or in connection with the conducting of the employer's business.

[135] Section 45 of the HSWA also puts a duty on workers to take reasonable care of their own health and not to engage in acts or omissions that adversely affect their own health and safety or that of other persons.

[136] Breaches of the HSWA are investigated and prosecuted by WorkSafe New Zealand. However, the failure by an employer to provide an employee with a safe workplace may also amount to an unjustified disadvantage, which is what Ms Opai has claimed.

Discrimination

[137] Section 103(1)(c) of the Act provides that an employee may bring a personal grievance claim against their employer if they have been discriminated against in their employment. In this case, Ms Opai claimed she was discriminated against because of her disability.

[138] Section 105 (1) of the Act identifies the prohibited grounds of discrimination, as set out in s 21(1) of the Human Rights Act 1993 (*"the HRA"*). Section 105(2) of the Act gives the prohibited grounds of discrimination listed in s 105(1) of the Act the meanings they have in s 21(1) of the HRA.

[139] Section 104(1)(b) of the Act provides that an employee has been discriminated against if the employer, directly or indirectly, dismisses or subjects the employee to any detriment, in circumstances in which other employees doing the same would not be dismissed.

[140] Section 21(1)(h)(i) of the HRA defines disability as including “*physical disability or impairment*” and s 21(1)(h)(v) of the HRA provides that disability includes “*any other loss of abnormality of psychological, physiological, or anatomical structure or function*”.

[141] Section 22 of the HRA addresses discrimination in employment matters. Section 22(1)(b) provides that it is unlawful for an employer to provide the employee with less favourable terms of employment than are made available to other “*employees of the same or substantially similar capabilities who are employed in the same or substantially similar circumstances on work of that description*”.

[142] Section 22(1)(c) of the HRA provides that it is unlawful for an employer to dismiss an employee or subject them to detriment if other employees doing that work would not be dismissed or subjected to such detriment.

[143] Section 29 of the HRA sets out exceptions to different treatment based on disability. Section 35 of the HRA qualifies the permitted exceptions. An employer cannot rely on an exception in the HRA if another worker could do the duties the disabled employee cannot do, without a great deal of cost or disruption to the business.

[144] The Employment Court in *Idea Services Ltd v Crozier* set out the legal principles that apply to consideration of a discrimination grievance.¹⁵ The burden of proving all elements of a discrimination claim lies with the employee.¹⁶ There must be a causal link between the prohibited ground of discrimination and the treatment complained of. The choice of a comparator must be made with the underlying purpose of the anti-discrimination laws in mind.¹⁷

[145] The Court of Appeal in *Smith v Air New Zealand Limited* considered discrimination provisions required an evaluative analysis of the proportionality or reasonableness of the employer’s response to the needs of the person who had the disability.¹⁸

Assessment of credibility

[146] The Authority found the Police witnesses (Senior Sergeant Tierney, Ms Lowe, Inspector Brand and Superintendent Rogers) credible. Despite many of the events occurring up

¹⁵ [2017] NZEmpC 77 at [225].

¹⁶ *Post Office Union (Inc) v Telecom (Wellington) Ltd* [1989] 3 NZILR 527 (LC).

¹⁷ *Air New Zealand Ltd v McAlister* [2010] NZLR 153 at [49].

¹⁸ [2011] NZCA 20 at [60] and [61].

to seven years ago, these witnesses gave clear and consistent evidence. What they said made logical sense.

[147] Because Ms Opai has engaged in such a serious and sustained personal attack on Inspector Brand's reputation and integrity, the Authority has recorded its view that it found Inspector Brand to be a truthful and credible witness.

[148] Some of the evidence from some of Ms Opai's witnesses suggested they could have had an 'axe to grind' regarding their own issues with Police. To the extent those witnesses relied on broad opinions, emotive language, hearsay and irrelevant narratives about their own experiences as Police employees, that approach tended to undermine the weight the Authority gave to their evidence.

[149] Ms Opai's evidence throughout the course of the Authority's entire investigation (meaning IM1, IM2 as well as this IM3) has in many respects been demonstratively wrong. Examples of that are recorded in the Authority's substantive determinations. In many instances that was not because of finely balanced or nuanced differences in the evidence, but because Ms Opai's perception or understanding of a situation was fundamentally wrong.

[150] Ms Opai has repeatedly misinterpreted, recharacterized or misstated facts. She has made assumptions and jumped to conclusions that contradict the available evidence. Ms Opai has put the worst possible interpretation on events and interactions, and appeared unable to budge from her views, regardless of evidence to the contrary. She appeared to have been unduly influenced by unfounded gossip, rumours and speculation.

[151] Accordingly, the Authority did not find Ms Opai to be a reliable witness. She viewed events through a lens of Police persecution against her, which substantially undermined her ability to see things clearly or account events accurately. Although Ms Opai was proven wrong by incontrovertible evidence about many matters, she could not acknowledge her perception of events could be wrong.

[152] Ms Opai honestly believed she was giving truthful evidence about what she strongly, but subjectively, believed was true. However, the problem was that her genuine beliefs were in many respects wrong and she could not see or accept that. Ms Opai's submissions also contained a significant amount of speculation, conjecture and supposition as well as hearsay evidence.

Issue 1 - Did Police follow a course of conduct from 2015 onwards that unjustifiably disadvantaged Ms Opai in her employment?

Structure of the Authority's findings on each alleged disadvantage grievance

[153] The period during which Ms Opai claimed Police followed a course of conduct that unjustifiably disadvantaged her in her employment excluded the performance appraisal issues that were dealt with in IM2, which were the subject of the Authority's determination dated 9 April 2020.¹⁹

[154] Ms Opai claimed that numerous actions taken by Police unjustifiably disadvantaged her in her employment. She identified the following three broad issues to support her 'course of conduct' unjustified disadvantage grievance claim ("*the three broad issues*"), namely:

- (a) Failure to provide her with a safe workplace;²⁰
- (b) Restructure of the roster pattern in the Disclosure Group in June 2017;²¹ and
- (c) Proposal to conclude her temporary role in the Disclosure Group in August 2017 and the ending of it on 3 October 2017.²²

[155] Ms Opai also made a number of other separate unjustified disadvantage grievance claims under each of those three broad issues. The Authority has had to determine each of the separate grievance claims she made under each of the three broad issues, before determining whether Police had engaged in as 'course of conduct' since 2015 that had unjustifiably disadvantaged her.

[156] The 'course of conduct' disadvantage grievance claim is therefore determined in paragraphs [274] to [277] of this determination, after all of Ms Opai's claims under each of the three broad issues had been determined.

Determination of sub-issues under failure to provide safe workplace grievance claim

(i) Allegations about the File Management Centre Supervisor appointments

[157] Ms Opai claimed the way Police dealt with the Acting and Permanent appointments to the File Management Centre Supervisor ("*the FMCS*") role unjustifiably disadvantaged her.

¹⁹ Above n7.

²⁰ See paragraphs [157] – [250].

²¹ See paragraphs [251] – [256].

²² See paragraphs [257] – [273].

(i) Acting FMCS role

[158] The Acting FMCS role became available in November 2014 when the employee (“RA”) who held the permanent position temporarily moved into another workgroup. Ms Opai’s belief that the person who was appointed to the Acting role was ‘shoulder tapped’ was incorrect. The Acting role was advertised within Counties Manukau District (“CMD”), but Ms Opai did not apply for it.

[159] Ms Opai’s claim that the EOI for the Acting role was advertised four days before the 2014 restructure of the workgroup she was in was announced was incorrect. It was advertised after the restructure of Ms Opai’s workgroup was announced, so she could have applied for it, had she wished to do so.

[160] Ms Opai’s complaint about the EOI process for the Acting role was not upheld. A senior Police HR Manager reviewed the EOI that had resulted in the Acting FMCS appointment, and confirmed it had been managed appropriately. The appointment to the Acting role was considered by the Development Board (a panel of senior leaders with the district) which confirmed the successful candidate’s appointment.

[161] Ms Opai claimed the Acting appointment disadvantaged her because eight days later she found out she was Affected By Redundancy (“ABR”), which gives an employee certain rights under the CEA. Ms Opai’s claim about that was not correct. The Acting FMCS role was not a suitable redeployment opportunity for her because it was a higher salary band.

[162] The recruitment of, and appointment to, the Acting FMCS role did not disadvantage Ms Opai.

(ii) Recruitment to the permanent FMCS role

[163] RA did not return to her FMCS role, as she was appointed to a permanent role elsewhere. Police advertised RA’s FMCS role as a permanent vacancy on 22 May 2015. It was re-advertised on 8 June 2015, because it was initially advertised for only one week, when it should have been advertised for two weeks.

[164] Police then discovered that the FMCS role had only been advertised locally, when it should have been advertised nationally, so it re-ran the appointment process to address that error. The role was re-advertised nationally on 31 July 2015. Two candidates (Ms Opai and the Acting FMCS) were shortlisted, with interviews due to be held on 18 July 2015.

[165] Ms Opai informed Police the day before the interview that she no longer wished to attend the interview and she declined to reschedule it. The one remaining candidate was appointed to the permanent FMCS role.

[166] Even though she had declined to complete the interview process, Ms Opai nevertheless applied for a formal review of the successful candidate's appointment. An Independent Review Committee concluded that the appointment process had been correctly applied, so the successful candidate's appointment was confirmed. However, Ms Opai did not accept that.

[167] The Authority investigated a myriad of complaints Ms Opai made about the FMCS appointment processes. However, after reviewing extensive evidence about Ms Opai's multiple concerns, the Authority was satisfied the FMCS appointment and review processes for both the Acting and Permanent roles did not unjustifiably disadvantage Ms Opai.

(ii) Allegation about Ms Opai's welfare transfer application in October 2016

[168] In September 2016 a vacancy for a FMSO (non-shift) role became available. On 11 October 2016 Ms Opai applied for a welfare transfer to a permanent day shift role within the Disclosure/Records workgroup. This had been proposed by Police as a solution to what was at that time considered to be her temporary health issues.

[169] The proposed welfare transfer would have required Ms Opai to vacate her permanent, FMSO shift role, and move into a permanent FMSO non-shift role. The same day she made the application, Ms Opai was informed that if successful she would move from Band C (Shift) Step 16 to Band C Step 16.

[170] The proposed welfare transfer stalled and ultimately did not take place, as the parties were unable to agree about how the movement between roles would affect Ms Opai's pay. She wanted to preserve her remuneration, so asked to be transferred across to the non-shift Band Step 19, as that was as close as possible to her current pay.

[171] Police declined her request on the basis it had an obligation to comply with the relevant provision in clause 5.6 of the CEA which dealt with movement between shift worker bands. This required the move to be to the equivalent or interim step in the pay scale.

[172] According to Total Remuneration pay scales dated 1 July 2016 schedule the salary difference would have been \$2,333 per year.²³ Ms Opai confirmed on 16 November 2016 that

²³ Schedule C of the CEA.

she was not going to accept the welfare transfer because of the pay differential, and she claimed she had been treated differently than others. However, the evidence did not support her claim of differential treatment.

(i) January 2017 offer of FMSO non-shift role

[173] Police wrote to Ms Opai on 19 January 2017 offering her an opportunity to apply for a vacant FMSO non-shift role. The pay difference would have been \$2,363 less than she received in her shift role, reflecting the standard hours she would work. Ms Opai did not take up that offer.

(ii) April 2017 offer of a FMSO non-shift role

[174] Police wrote to Ms Opai on 21 April 2017 to advise that the offer of a welfare transfer to the vacant FMSO non-shift role remained open to her, but that she would not be paid according to the shift pay scale when she would not be doing shift work. Ms Opai did not respond to that offer.

(iii) Justification of salary decision

[175] The Police decision not to move Ms Opai to a higher pay band following the proposed welfare transfers was justified. The two comparators Ms Opai referred to during the Authority's investigation were not in comparable situations to her.

[176] Police engaged at length with Ms Opai over the salary band issue. To the extent that there was a discretion available to Police to increase Ms Opai's pay scale, the decision not to do so was within the range of reasonable responses available to a fair and reasonable employer in all the circumstances to avoid disparity with her colleagues.

[177] Ms Opai was not subjected to harm or unjustifiably disadvantaged regarding the welfare transfer roles she was offered, or by the decision not to pay her the equivalent salary she received for doing shift work for a non-shift role. Police were justified in not wanting to pay Ms Opai, who would not be doing any shift work, on a higher pay scale band and step than her colleagues who were required to do shift work in the same FMSO role.

(iii) Allegation about how Inspector Phillips dealt with performance appraisal issues

[178] On 21 and 23 November 2016, Inspector Tracey Phillips instructed Ms Opai's supervisor to document the ongoing discussions they had been having with Ms Opai about her health issues in her Performance Development Plan. The supervisor did not follow that

instruction, because under the Police Rehabilitation Policy employees' medical information was to be kept separate from other personnel files.

[179] Ms Opai was therefore unable to establish she had suffered any harm or disadvantage regarding Inspector Phillips' instruction, because her supervisor had identified the error and corrected it, without any adverse action being taken against Ms Opai. Accordingly Ms Opai's unjustified disadvantage grievance claim about that did not succeed.

(iv) Allegations about the secondment of Inspector Brand and Senior Sergeant Culpan into the FMC workgroup

[180] In April 2017 Inspector Brand was seconded to the District Operations and Support Manager role. Around the same time Senior Sergeant Culpan was also seconded into the workgroup. He did not need to have direct contact with Ms Opai, because there were three people between them in the chain of command. Likewise, contact between Ms Opai and Inspector Brand would also be minimal, as there were four people between them in the chain of command.

[181] Inspector Brand was seconded back into the FMC workgroup because she had previous experience in it, as had Senior Sergeant Culpan. These secondments were for genuine and legitimate operational reasons, that were unrelated to Ms Opai or the Disclosure Group review that she had raised personal grievances about.

[182] Their secondments were appropriate as Police were entitled to make normal and genuine operational decisions that involved the District Ms Opai worked in. Contrary to Ms Opai's repeated claims, Inspector Brand did not have a conflict of interest.

[183] Ms Opai's complaints about Senior Sergeant Culpan and Inspector Brand returning to her workgroup were without merit. Police responded appropriately to Ms Opai's concerns by reassuring her that the secondments had nothing to do with her. Ms Opai did not accept that. She incorrectly believed that the purpose of Inspector Brand's secondment was to lead an upcoming review of her workgroup. However, Inspector Brand had very little involvement in that review.

[184] Inspector Brand applied for the District Operations and Support Manager role when it became vacant, and she was recommended for appointment to the role in November 2017. Ms Opai then took the "*extremely unusual*" step of applying as a non-applicant for a formal review of Inspector Brand's appointment. The review panel confirmed Inspector Brand's

appointment in January 2018. Ms Opai did not accept that decision, so kept on escalating her complaints about it.

[185] Police investigated Ms Opai's complaints about Inspector Brand and found them to be without merit. That decision was open to a fair and reasonable employer in all the circumstances.

[186] Ms Opai was not disadvantaged by Senior Sergeant Culpan's and Inspector Brand's secondment into her workgroup. Police addressed Ms Opai's concerns about Senior Sergeant Culpan and Inspector Brand by noting that she should continue to deal with her supervisor, and escalate issues to several other higher managers if required. That was appropriate in the circumstances.

[187] Ms Opai's claims that these secondments were unsafe and/or caused her psychological harm were not established on the evidence, so were not accepted by the Authority.

(v) Allegations that Police had encouraged/instructed others not to speak to or support Ms Opai

[188] Ms Opai claimed Police encouraged or instructed others not to speak to, or support, her, and put forward a range of complaints and concerns to support this allegation. The Authority accepted the Police evidence that it did not encourage or instruct employees not to speak or support Ms Opai in the way that had been alleged. There was a legitimate and satisfactory explanation for what had occurred, which did not unjustifiably disadvantage Ms Opai.

[189] Ms Opai's claim that Police created or contributed to a fear of Ms Opai by others was not supported by the evidence, so was not accepted by the Authority. The Authority was satisfied the instructions Police gave to others were justified in all the circumstances, so this disadvantage grievance claim did not succeed.

(vi) Allegations regarding Ms Opai's 29 August 2017 special leave application

[190] Ms Opai incorrectly claimed that Inspector Brand declined her application on 29 August 2017 for special leave to cover time she was away from work during August, caring for her terminally ill mother. However, Inspector Brand did not make that decision, Superintendent Rogers did. The decision made was also actually favourable to Ms Opai, even though she did not get the full period of special leave that she had sought.

[191] The granting of paid special leave is discretionary. Police exercised its discretion in Ms Opai's favour, so the failure to give her all of the time she had off work in August as paid special leave was not unjustified. The decision by Police to grant to Ms Opai half the amount of discretionary paid time off was one that was open to a fair and reasonable employer to have made in the circumstances. The decision was not conduct that caused Ms Opai harm, was unsafe or disadvantaged her.

(vii) Allegations regarding the proposal to end Ms Opai's temporary role in the Disclosure Group by 13 October 2017

[192] In July 2017 Superintendent Rogers conducted a review of all staff on light or restricted duties. That identified Ms Opai had (at that time) been working in a temporary non-shift role for more than two years. The temporary role had been created in June 2015 as a short term solution to her inability to perform shift work, while she recovered from health issues.

[193] Ms Opai's permanent FMSO shift role was being covered by a fixed term contractor, because it was being held open for her to return to. The fixed term contractor's costs were coming from the District's budget for temporary and casual staff, which was being exceeded. Ms Opai's temporary role was also surplus to the number of roles that the Disclosure Group had been funded for.

[194] Superintendent Rogers' proposal to end Ms Opai's temporary role in the Disclosure Group meant that she could either return to her permanent FMSO shift role in the FMC (doing the three shift roster pattern) or be deployed to a vacant FMSO shift role in the Disclosure Group (doing the two shift pattern). There were no vacant FMSO non-shift roles available in the workgroup at that time.

[195] Police accepted Ms Opai would need to obtain medical clearance before she could return to her permanent FMSO shift role, because it was not clear if she was able to perform all of the shift work that was required in that role. She was therefore asked to provide Police with medical information about her ability to do the FMSO shifts.

[196] Ms Opai was consulted about the proposal to conclude her temporary role, before a final decision was made to end it. Police did not share Ms Opai's views, which was a position that was open to them to adopt in all the circumstances.

[197] The Authority accepted the Police evidence that the proposal was financially motivated and unrelated to Ms Opai's Authority proceedings or the Disclosure Group roster change. Continuing the temporary role was not the only way to accommodate Ms Opai's health issues.

[198] Ms Opai was invited to engage with Police about other suitable options, or vacancies she was interested in. She was also told there was a non-shift role in District Licensing Police could discuss with her, but she did not express any interest in that role or any other vacancies.

[199] When Ms Opai returned to work on 9 October 2017, Superintendent Rogers wrote to her proposing to deploy her into the vacant FMSO shift role in the Disclosure Group that was being held open for her, because that would involve the least amount of change to her day to day work from what she had already been doing in her temporary role.

[200] Ms Opai would continue to do the same work on a non-shift basis for a short term, until she got medical clearance to work the 'earlies' and 'lates' shifts that role required. Police proposed to meet with Ms Opai to discuss a suitable alternative role, medical clearance and a referral to a specialist for updated medical advice about her ability to work shifts.

[201] Ms Opai met with Superintendent Rogers on 11 October 2017 and agreed with Police's proposal to deploy her into a vacant FMSO role in the Disclosure Group, but on a non-shift basis, pending medical clearance. Ms Opai asked to retain her shift loading, and Superintendent Roger agreed to continue paying it, until medical advice about her ability to undertake shift work could be obtained.

[202] Inspector Brand was asked to write to Ms Opai to confirm these arrangements, and she did so by letter dated 12 October 2017. The Authority did not accept that Ms Opai's complaints about Inspector Brand writing this letter were valid, or that her involvement had disadvantaged Ms Opai.

[203] Ms Opai also complained about the timing of the proposal, but that, did not in itself make the proposal to end her temporary role unjustified. Police had good reasons for proposing to end Ms Opai's temporary role, and it engaged with her about that in good faith and in compliance with procedural fairness requirements.

[204] Ms Opai's unjustified disadvantage grievance claim about this issue did not succeed.

(viii) Allegations about the declining of Ms Opai's FEO application on 26 February 2018

[205] When Ms Opai met with Superintendent Rogers on 15 December 2017 she said she did not agree to start working on the early/late shift roster, because her specialist's report meant she could not do so. Ms Opai said she was not interested in any other positions and asked to continue working in her FMSO shift role in the Disclosure Group but on a non-shift basis, under a FEO arrangement.

[206] Superintendent Rogers considered the request in accordance with the FEO Policy, but declined it. That arrangement would not have enabled minimum staffing levels to be maintained day to day and there would not be adequate cover available for absences and leave if Ms Opai was working a different roster pattern than the rest of her section. It would have adversely impacted on service delivery and have been costly backfilling Ms Opai's role to cover the shifts she would not be working.

[207] On 15 February 2018, Ms Opai submitted an EOI to be appointed into a vacant FMSO role in the Investigation Support Unit ("ISU") by way of a FEO/Welfare Transfer. That was unsuccessful as the ISU role had the same shift pattern as her FMSO shift role in the Disclosure Group, so her request was declined for the same reasons.

[208] These decisions did not make the workplace unsafe, create a health and safety risk or which would cause harm to Ms Opai. Nor was she unjustifiably disadvantaged by them. These were legitimate operational decisions that were within Superintendent Roger's discretion, which she exercised in consultation with Ms Opai and in accordance with the FEO policy.

[209] These decisions were therefore within the range of responses available to a fair and reasonable employer in all the circumstances. Accordingly, this unjustified disadvantage grievance did not succeed.

(ix) Allegations about the cancellation on 5 March 2018 of an advertised role after Ms Opai had applied for it

[210] On 31 January 2018 FMC staff were advised that there was a 12 month temporary FMSO non-shift role in the ISU which would be filled by way of an EOI process. Ms Opai submitted an EOI for the FMSO non-shift role in the ISU on 15 February 2008, but she did not formally request a welfare transfer or an FEO.

[211] On 5 March 2018 the ISU Manager emailed FMC staff to advise that the EOI had been cancelled, and would be readvertised in a few months' time, because it had been temporarily filled by an employee who was working reduced hours as part of a rehabilitation plan.

[212] Ms Opai said that decision unjustifiably disadvantaged her. The Authority did not agree. Police had a legitimate reason for cancelling the EOI process, as the role was needed as part of a rehabilitation plan for another employee. Ms Opai already had a temporary role as well as a permanent role, so the decision to provide another employee with a rehabilitation opportunity was not unjustified.

(x) Allegations that Police failed to properly investigate Ms Opai's complaints about Inspector Brand

[213] Ms Opai claimed the Police failed to properly investigate her complaints about Inspector Brand dated 7 April 2017, 31 October 2017 and 30 July 2018.

[214] Police responded to Ms Opai's 7 April 2017 complaint on 8 May, 2 June and 7 July 2017. Police responded to Ms Opai's 31 October 2017 complaint on 3 November 2017. Police responded to Ms Opai's 30 July 2018 complaint on 24 August 2018.

[215] Police took all of Ms Opai's many complaints, concerns and issues seriously. After investigating, Police concluded that Inspector Brand had not engaged in any wrongdoing. Based on evidence Ms Opai produced to the Authority, the Police view about that was justified. Ms Opai's disagreement with that finding did not mean Police had not investigated or considered her concerns.

[216] It was clear that Police had devoted extensive time and resources to addressing a very wide range of detailed concerns, complaints and issues Ms Opai had raised, including those about Inspector Brand.

[217] Ms Opai incorrectly believed that because she had raised a personal grievance, which Police investigated but did not uphold, about Inspector Brand on 29 October 2014 then she was forever conflicted out of having any involvement in anything that was even remotely related Ms Opai.

[218] Although, Police advised Ms Opai that Inspector Brand did not have a conflict of interest, she would not accept that. Ms Opai's position about what constituted a 'conflict of

interest' was unreasonable, unrealistic and the foundation of many of the problems that occurred.

[219] Ms Opai's claim that Inspector Brand's secondment to her workgroup was unsafe, and had therefore created foreseeable psychological harm to her, was not accepted by the Authority. None of the matters Ms Opai relied on as examples of unjustified disadvantages, bullying or conduct that had allegedly created an unsafe workplace for her were accepted by the Authority as having merit.

[220] The Authority was satisfied, after an exhaustive investigation into every issue Ms Opai had with Inspector Brand, that the evidence did not support objectively Ms Opai's view that Inspector Brand had bullied her, improperly targeted her and/or otherwise acted inappropriately towards her. While Ms Opai genuinely perceived that was the case, her subjective view about that was not accepted by the Authority.

[221] Inspector Brand estimated while she was in the role of Case Management Inspector from mid-2014 to early 2015, she had no more than five face to face conversations with Ms Opai. From April 2017 until Ms Opai's employment ended on 3 November 2018, Inspector Brand in her role of District Operations and Support Manager had barely any contact with Ms Opai.

[222] Other than a very brief interaction with her about the conclusion of her temporary role in the Disclosure Group, and the 31 October 2017 inquiry asking her if she would sign the 12 October 2017 letter they did not have any direct contact.

[223] Ms Opai blamed Inspector brand for decisions she did not make, or matters she had little or no involvement in. Ms Opai also viewed normal appropriate administrative actions or operational decisions by Inspector Brand as a personal threat to her (Ms Opai's) health and safety. There were so many examples it was beyond the scope of this determination to list them all.

[224] The Authority noted the High Court observed in its August 2018 judgment that:²⁴

I fear Ms Opai is now obsessed with the way she perceives she was treated as an employee. This case is in point. There is no basis for a defamation case given the employment context, the nature of the statements complained about and the processes being followed when they were made.

[225] A similar observation could be made about Ms Opai's views about Inspector Brand. The Authority fears that Ms Opai has become obsessed with proving wrongdoing by Inspector Brand, which has coloured her adverse perception about her employment with Police.

[226] Ms Opai's unjustified disadvantage grievance alleging Police had failed to properly investigate her complaints about Inspector Brand did not succeed.

(xi) Allegation that Police failed to provide Ms Opai with appropriate support after her complaints

[227] Ms Opai's claim that Police failed to appropriately support her after her complaints about Inspector Brand did not succeed. Police offered in its response to Ms Opai's 7 and 31 October 2017 complaints to meet with her to discuss her concerns further. Ms Opai was also offered EAP and welfare support.

[228] By the time of Ms Opai's 30 July 2018 complaint, Superintendent Rogers had made it clear she was happy to discuss any concerns Ms Opai had about Inspector Brand and that her preference was to deal with matters that arose at an early stage and in a low-key way.

(xii) Allegation that Police failed to prevent retaliatory conduct against Ms Opai for making her complaints

[229] Ms Opai gave the following examples of what she claimed was retaliatory conduct against her for making complaints:

- (a) The 2017 restructure of the Disclosure Group roster;²⁵
- (b) Proposal to end her temporary role;²⁶
- (c) Inspector Brand speaking to staff near Ms Opai's desk;²⁷
- (d) Inspector Brand asking her on 31 October 2017 to sign and return the 12 October 2017 letter.²⁸

[230] None of these were examples of retaliation against Ms Opai for having made complaints. These were objectively justified decisions or legitimate work related interactions.

²⁵ See paragraphs [251]-[256].

²⁶ See paragraphs [257]-[273].

²⁷ See paragraphs [78] and [79].

²⁸ See paragraphs [75]-[77] and [80]-[82].

None of these examples created an unsafe workplace for Ms Opai or unjustifiably disadvantaged her.

[231] The evidence did not support Ms Opai's claim Inspector Brand had retaliated against her for complaints she had made. Nor was there any credible evidence of retaliation against Ms Opai by Police or its employees.

(xiii) Allegation Police should not have disclosed her 30 July 2018 complaint to the Police Commissioner to Inspector Brand and Superintendent Rogers

[232] Ms Opai claimed that she was unjustifiably disadvantaged when one of the Police in-house employment lawyers provided Superintendent Rogers with a copy of Ms Opai's 30 July 2018 complaint to the Police Commissioner about Inspector Brand, along with a copy of the Police response to Ms Opai.

[233] Superintendent Rogers was unaware of the complaint until then. Police did not agree with Ms Opai that this had breached her privacy. Police had an obligation to be upfront with its employees who it received complaints about and to let them know whether a complaint had been upheld or not.

[234] The Authority shared Superintendent Rogers' view that it would be unfair to Inspector Brand if Police had not let her know that Ms Opai had made a complaint to the Police Commissioner about her. This disadvantage grievance claim did not succeed, because disclosure of the complaint was not unjustified in the circumstances.

(xiv) Allegation about the timing of the Police proposal to terminate Ms Opai's employment on day of the High Court decision

[235] The High Court's judgment on the defamation proceedings was released on 30 August 2018, which was the same day Police sent correspondence to Ms Opai's representatives advising that decisions about her ongoing employment could not be delayed any longer.

[236] Superintendent Rogers said that she had expected the decisions of the High Court and Authority to be months away when she had prepared the letter to Ms Opai. She considered holding the letter back (that had been finalised the previous day, 29 August) but decided not to because it had been "*weeks in the making*" and there would never be a "*right time*" to deliver this unfavourable news to Ms Opai, which would not be well received regardless of when it was sent.

[237] Superintendent Rogers decided it was better to get it over with rather than dragging the matter out further, given there had already been extensive delay and the process had become protracted. That was a decision that was open to a fair and reasonable employer in all the circumstances.

[238] The Authority did not agree that the timing of the 30 August 2018 proposal to dismiss Ms Opai unjustifiably disadvantaged her or amounted to a breach of duty.

(xvi) Allegation that Police had predetermined Ms Opai's dismissal if she could not do shift work

[239] This claim was contrary to the available evidence, so did not succeed. Police took many steps to keep Ms Opai employed. Ms Opai accepted during the investigation meeting that Police had offered her a role that met her medical requirements, so would have enabled her to have remained employed, but that she had not accepted that offer.

Broad issue (a) - Did Police fail to provide Ms Opai with a safe workplace?

[240] The specific matters Ms Opai identified as having created an unsafe workplace for her, because she said they had caused her foreseeable harm, were not accepted by the Authority as having involved any breaches of duty by Police.

[241] After carefully reviewing all of the evidence the Authority was satisfied that the actions Police took regarding issues Ms Opai raised were not unfair, unreasonable or unjustified in all of the circumstances. None of the matters she relied on had objectively created a health or safety risk to her or made her workplace or normal duties unsafe.

[242] Ms Opai also failed to establish a causal link between her health issues and any breach of duty by the Police. While she attributed her health conditions to Police, the medical evidence did not do so. There were many reasons, excluding a breach of duty or wrongdoing by Police, as to why she could have been stressed or unwell.

[243] Based on the evidence the Authority heard, it was not reasonably foreseeable that the way in which Police engaged with Ms Opai would have caused her mental or physical harm. Police attempted to resolve her complaints at a local level, and when that was unsuccessful her issues were escalated through the appropriate channels. The parties have participated in four mediations. Police have expended extensive, and some may say excessive, time and resources over many years addressing Ms Opai's concerns.

[244] Where Ms Opai's concerns were established by Police as valid, then action was taken. Examples of that included the workplace expectation setting that occurred in 2014 (see IM1), the removal of the disputed comments from her performance appraisals, action taken regarding Inspector Phillips' interaction with Ms Opai on or around 6 January 2017, and the decision Ms Opai did not have to keep providing medical certificates until she had surgery made in response to her complaint that requests for information about her health were causing her stress.

[245] Concerns Ms Opai had about the appointments of Inspector Brand and of the successful candidate to the FMC Supervisor roles were subject to formal Review Panel inquiries. To address Ms Opai's objection about Inspector Brand being involved in her employment issues, Superintendent Rogers also took on responsibility for that.

[246] The Authority was satisfied that Police acted in accordance with its contractual, good faith and procedural fairness obligations regarding decisions it made that affected Ms Opai or in terms of responding to concerns, complaints or issues she had raised, whether about herself or others. None of the decisions Police made created an unsafe workplace or breached its HSWA obligations to Ms Opai.

[247] Ms Opai was given unpaid time off work, extended bereavement leave and paid special leave to deal with health and personal issues. Police had also engaged with Ms Opai by way of meetings, written communications and formal responses to her ERPs and personal grievance claims. She had access to EAP support.

[248] Police appropriately engaged with Ms Opai regarding her eye issue and bladder issues and adjustments were made to accommodate her health issues. Temporary non-shift roles were created for her. Opportunities to apply for permanent non-shift roles were raised with her, but she did not pursue them.

[249] Police's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time each action Ms Opai has complained about occurred. Accordingly, Police have justified, in accordance with the justification test in s 103A(2) of the Act, all of the examples Ms Opai identified as alleged failures by Police to provide her with a safe workplace.

[250] Accordingly, Ms Opai's unjustified disadvantage grievance claim that the Police failed to provide her with a safe workplace did not succeed.

Broad issue (b) - Did the 2017 roster change in the Disclosure Group unjustifiably disadvantage Ms Opai?

[251] The Disclosure Group team worked day shifts, which started between 6.00-8.00 am and finished between 2.05-4.05 pm, depending on personal preference. At the time the roster change was made there was a backlog of work requiring regular overtime support, and Police considered that the existing roster no longer suited the organisation's needs.

[252] Ms Opai's belief that the changes to the Disclosure Group roster was an example of Inspector Brand "gunning" for her was not accepted. The roster change process was led to Inspector Shearer and Ms Lowe. Contrary to Ms Opai's view, the roster change was not about addressing poor performance. There were clearly legitimate operational reasons for the roster changes, which was broadly agreed with by the Disclosure Group team members.

[253] Police changed the Disclosure Group's roster pattern in June 2017 following consultation with those affected. Although Ms Opai's permanent FMSO shift role was not in the Disclosure Group, Police still involved her in the roster review consultation process.

[254] Ms Opai attended an individual meeting with Inspector Shearer and Ms Lowe, and was invited to the team meeting on 2 May 2017. Ms Opai was provided with a copy of the consultation document, she submitted written feedback on the proposal and she was provided with a copy of the decision document.

[255] Ms Opai's complaint that it was unfair that she had received the outcome document one hour later than those who were directly affected by the change was not accepted by the Authority. The Police decision to communicate the outcome to the affected staff before communicating the outcome more widely was justified.

Findings on Ms Opai's specific claims

[256] The roster change was substantively justified and was carried out in a procedurally fair manner.²⁹ Neither Ms Opai's temporary FMSO (non-shift) role in the Disclosure Group or her permanent FMSO (shift) role were affected by the proposed roster changes, so it did not adversely affect her ability to manage her health because Ms Opai's work hours remained unchanged.³⁰

²⁹ Issue 1(b)(i).

³⁰ Issue 1(b)(ii).

Broad issue (c) - Did the proposal in 2017 to conclude Ms Opai's temporary role in the Disclosure Group unjustifiably disadvantage her?

Background

[257] In June 2015 Police had created a temporary role in the Disclosure Group for Ms Opai to support her recovery from health issues she was experiencing. The temporary role was intended to be a short term solution to Ms Opai being unable to perform the shift work her FMSO (shift) role required.

[258] Police asked Ms Opai in April 2017 when she would be able to return to shift work. If that was uncertain, then Police said it would likely propose to transfer her to a non-shift role. Matters did not progress while the parties participated in the High Court defamation proceedings and the IM1 in the Authority.

[259] Superintendent Rogers took advice from the Workforce Management (“WFM”) Human Resources, the District Welfare Officer, District Physical Education Officer (“*the PEO*”) and the District Health and Safety representative. She then instructed Inspector Brand to write to Ms Opai proposing to end her temporary role.

Did Police follow a fair process regarding its proposal to conclude the temporary role?

[260] Ms Opai was consulted about the proposal to end her temporary role. On 2 August 2017 Inspector Brand wrote to Ms Opai proposing to conclude her temporary role in the Disclosure/Records workgroup by 31 August 2017.

[261] Inspector Brand asked to meet with Ms Opai to discuss whether she could work early/late shift roster and informed her that there were no day shift roles available in CMDHQ. Ms Opai was told that further information about her ability to undertake her permanent FMSO (shift) role was required, so decisions could be made about her temporary role. Ms Opai was put on notice of the options that Police could pursue under various different scenarios.

[262] Ms Opai's belief that Police had advertised for five FMSO non-shift roles on 3 August 2017 was incorrect. It had advertised five FMSO (shift) roles in the FMC, which were the same as Ms Opai's permanent role. These advertisements therefore did not make the proposal to end Ms Opai's temporary role unjustified.

[263] Ms Opai also incorrectly interpreted the 2 August 2017 proposal to conclude her temporary role as advice that there was no job for her if she could not work the new roster.

Police had put forward two options for Ms Opai to consider that involved her retaining her shift pay, which was important to her.

[264] Ms Opai met with Superintendent Rogers on 21 August 2017 to give feedback on the proposal to conclude her temporary role. Ms Opai's counsel also attended that meeting and made submissions on Ms Opai's behalf. She also provided written feedback on 23 August 2017, that said the proposal was a sham, reprisal against her and should cease. Ms Opai also said she wanted to continue in her temporary role until she had surgery for her bladder issues, which at that time had not been scheduled to occur.

Did Police have a good reason for proposing to end Ms Opai's temporary role?

[265] The proposal to conclude the temporary role occurred because Police was in the process of confirming appointments to other FMSO roles in the District and bedding down the new structure in the Disclosure Group. Superintendent Rogers considered it appropriate to review Ms Opai's permanent and temporary roles at the same time.

[266] By July 2017, Police had maintained Ms Opai's temporary role for over two years. There were financial costs to doing that. Police were paying a fixed term contractor to cover Ms Opai's permanent role and it was also continuing to pay Ms Opai a shift allowance, even though she was not doing shift work. Her temporary role was also over and above the total number of funded roles in the Disclosure Group, so was not funded by the District.

[267] Police were substantively justified in reviewing Ms Opai's temporary role after two years, as it was only ever intended to be a short term solution to her health issues.

Was the decision to end Ms Opai's temporary role on 13 October 2017 justified?

[268] Superintendent Rogers wrote to Ms Opai on 13 September 2017 with her decision to conclude Ms Opai's temporary role from 13 October 2017 and explained why the decision had been made. This timeframe would give the parties time to identify a suitable alternative role for Ms Opai and then to transition her into it.

[269] Ms Opai was also informed that a non-shift FMSO role in the District Licensing Group had become available since Police wrote to her on 2 August 2017. She was invited to let Superintendent Rogers know if she was interested in that role. However, Ms Opai did not express any interest in that non-shift role.

[270] Ms Opai's claim that the proposal to conclude her temporary role was a sham and was retaliation for her Authority proceedings was not accepted. The Police decision that Ms Opai's temporary role was not the only way to manage her health condition was within the range of reasonable responses available to a fair and reasonable employer in all the circumstances.

Findings on Ms Opai's specific claims about the ending of her temporary role in October 2017

[271] The Police proposal on 2 August 2017 to conclude Ms Opai's temporary Disclosure Group FMSO (non-shift) role and the conclusion of it on 13 October 2017 were procedurally and substantively justified.

[272] Ms Opai and Superintendent Rogers met on 11 October 2017. Ms Opai accepted the Police offer for her to stay in the Disclosure Group team while the parties worked through the medical clearance issues. Police allowed Ms Opai to remain on her same shift salary until the parties had received the medical report she had agreed to provide regarding her ability to work shift work.

[273] Police followed a fair process by consulting with Ms Opai about the proposal to end her temporary role, and by considering the feedback she provided before it made a decision to end it.³¹ The decision was substantively justified, because Police had good reasons based on reasonable grounds for that decision.³² Ms Opai's unjustified disadvantage claim regarding the ending of her temporary role did not succeed.³³

Outcome of issue 1 – did Police follow a course of conduct from 2015 onwards that unjustifiably disadvantaged Ms Opai in her employment?

[274] The Authority was not satisfied that any of the three broad issues Ms Opai relied on evidenced a course of conduct by Police from 2015 onwards that had unjustifiably disadvantaged Ms Opai in her employment. Nor was the Authority satisfied that any of the other the unjustified disadvantage allegations, under each of those three broad issues, either individually or taken together evidenced such a course of conduct.

[275] Police did not fail to provide Ms Opai with a safe workplace. The change that occurred to the Disclosure Group rosters in 2017 was justified, as was the proposal and decision to end Ms Opai's temporary role in the Disclosure Group in October 2017.

³¹ Issue 1(c)(i).

³² Issue 1(c)(ii).

³³ Issue 1(c)(iii).

[276] Although Ms Opai strongly disagreed with decisions Police made and actions it took, the Authority was satisfied that all of these fell within the range of responses that were available to a fair and reasonable employer in all the circumstances. To the extent Police actions disadvantaged Ms Opai, then any disadvantage she may have suffered was justified.

[277] Accordingly, Ms Opai's 'course of conduct' disadvantage grievance claim did not succeed.

Issue 2 - Did Police breach its good faith obligations to Ms Opai and if so should a penalty be imposed on it?

[278] Police consulted Ms Opai about proposed changes that would potentially affect her. She was given access to relevant information and an opportunity to comment on it before a final decision was made.

[279] Police were responsive in terms of supporting Ms Opai with her medical issues. It gave her more than a year to provide the required medical information. It gave her an opportunity to present further information during her notice period. Police gave her leave without pay and paid special leave. She was also offered EAP and Police welfare support.

[280] Police created two temporary FMSO non-shift roles for Ms Opai. For more than three years Police paid her a shift based salary, despite her not doing any shift work over that period. Police offered to explore medical retirement with Ms Opai, which she refused to do. Police invited her to apply for non-shift roles, which she did not do. She was also offered other FEO opportunities that accommodated her health issues, which she did not accept.

[281] Police offered Ms Opai a FEO based on her shift role, which only required her to work the restricted hours and days she said she could work due to her health condition. She never responded to that offer. Police asked Ms Opai if she wanted to transfer to another district, but she said she was not interested in that. Police invited Ms Opai to identify any other options she was interested in exploring, but she did not do so.

[282] The Authority was satisfied that Police met its good faith requirements to Ms Opai. It was active and constructive in terms of engaging with her regarding her various concerns. It has devoted extensive time and resources to investigating and responding to the issues Ms Opai has raised.

[283] Accordingly, Ms Opai's breach of good faith and associated penalty claims did not succeed.

Issue 3 - Was Ms Opai's dismissal unjustified?

Reasons for dismissal

[284] Police dismissed Ms Opai on two grounds:

- (a) It could not continue to accommodate her working in her role on a non-shift basis; and
- (b) It believed there had been an irretrievable breakdown in the relationships she had with her supervisors and managers, and with Police overall, such that her employment could not continue.

Good faith requirements

[285] Police met its good faith obligations in s 4(1A)(c)(i) of the Act to Ms Opai, by providing her with access to relevant information and an opportunity to comment on it before it made a decision to dismiss her.

[286] Ms Opai's complaints about the inadequacy of the information she was given regarding the incompatibility or relationship problems was not accepted. Superintendent Rogers set out in very clear and insightful terms exactly what Police were concerned about and why. Ms Opai therefore had sufficient information to be able to understand and respond to the concerns that had been raised with her.

Requests for medical information

[287] Superintendent Rogers in a letter dated 13 September 2017 to Ms Opai asked her to provide updated medical information about her ability to do shift work. Ms Opai was given a draft referral letter that set out what specific information Police wanted to know and was asked to obtain a response from her Urologist. Alternatively, Police offered to refer her to an independent specialist. Ms Opai did not provide the requested information.

[288] Police repeated this request (via counsel) on 3 October 2017. Superintendent Rogers in a letter to Ms Opai dated 10 October 2017 said Police wanted to make arrangements for her to be assessed by a specialist, so it could receive updated advice about her health condition and ability to work shifts.

[289] In a meeting with Superintendent Rogers on 11 October 2017 Ms Opai agreed to Police making arrangements for a medical assessment, to obtain medical clearance for the Disclosure Group - FMSO (shift) role which involved an early/late shift pattern. On 17 October 2017 Ms Opai withdrew her consent to see a medical practitioner organised by Police, and instead said she would obtain an updated report from her own Urologist, Dr Lawrence. Police agreed to that.

[290] Police sent Ms Opai a letter dated 24 October 2017 addressed to Dr Lawrence that described the roster pattern for the FMSO (shift) role and set out the times of the shifts and the number of days to be worked. Dr Lawrence was asked to respond to a number of specific questions about Ms Opai's ability to work shifts. Ms Opai consented to Dr Lawrence providing Police with a response to its specific questions, which had been agreed with her.

Dr Lawrence's report

[291] Ms Opai saw Dr Lawrence on 6 November 2017. On 15 November 2017 Dr Lawrence's office advised Police that it could not disclose any details about Ms Opai's appointment, because it did not have her consent to do so. Ms Opai never explained why she had withdrawn her consent for Dr Lawrence to answer the specific shift work related questions Police had posed.

[292] The report Dr Lawrence sent to Ms Opai's GP dated 15 November 2017 (provided to Police on 22 November 2017) did not answer any of the specific questions Police had asked. Ms Opai has never explained that omission.

[293] Superintendent Rogers said that after reading Dr Lawrence's report to the GP dated 15 November 2017 she was confident Police "*would easily be able to manage Melissa's condition in the workplace and that we had suitable facilities available to do so*". However, Ms Opai disagreed with that.

[294] Police concluded, based on the available medical information, that Ms Opai was medically able to do the early/late shift pattern her Disclosure Group FMSO (shift) role required. Police agreed it would not be possible for Ms Opai to work night shifts, but it was not asking her to do that. Based on the available information, these conclusions were open to a fair and reasonable employer in all the circumstances.

[295] Police informed Ms Opai in a letter dated 7 December 2017 that it was:

readily able to accommodate you maintaining a regular rhythm for catheterisation in the workplace. Given you need to catheterise regularly and have been working eight-hour hours shifts, I expect you will have been catheterising at work for some time now. Whether you are working earlies(0600 – 1500 or 1530 hrs) or ‘lates’ (1100-2100 hrs) you will be able to catheterise at the same time every day, and as required.

[296] Police then set out in detail what facilities were available for Ms Opai to use and asked her if there was anything else that would support her to manage her condition in the workplace.

Consultation with Ms Opai about her options

[297] Police in its letter dated 7 December 2017 (which was sent on 8 December) to Ms Opai set out two options. She could start working the early/late shift roster from 8 January 2018 in her Disclosure Group FMSO (shift) role, or she could decline to do so.

[298] Because there were no non-shift FMSO roles in the District, if Ms Opai only wanted to work on a non-shift role basis, unless a suitable redeployment option could be agreed, Police would need to consult her about ending the employment relationship.

15 December 2017 meeting

[299] When the parties met on 15 December 2017, Ms Opai told Superintendent Rogers that she did not agree to work the Disclosure Group FMSO early/late shift roster, because she believed her specialist report meant she could not do so.

[300] Ms Opai also said she was not interested in any other role within Police, within or outside of the Counties Manukau District. She also asked Superintendent Rogers to agree to her working in her current role on a FEO non-shift basis.

[301] Police did investigate turning Ms Opai’s current temporary role into a permanent non-shift role, but concluded it could not accommodate that as a permanent arrangement as it was not workable for operational reasons. That was a decision that was open to a fair and reasonable employer in all the circumstances.

Police consideration of FEO request

[302] Superintendent Rogers declined Ms Opai’s FEO request, on the basis Police could not maintain minimum staffing levels day to day and cover absences and leave, if Ms Opai worked a different roster pattern than the rest of her section.

[303] Ms Opai was advised that the FEO request had been declined, because Police could not reorganise work among existing staff to accommodate it and because allowing it would have had a detrimental impact on the performance of the Disclosure Group, the quality of the work it did, and its ability to meet the demand of its customers. The additional cost of having to backfill Ms Opai's role was also a factor in the decision to decline the FEO request.

[304] That was a decision that was open to a fair and reasonable employer to have made in all the circumstances, so it was not unjustified.

Further consultation with Ms Opai

[305] On 11 January 2018 Superintendent Rogers wrote to Ms Opai advising her that:

- (a) Her FEO application to change her current shift role into a non-shift role had been declined;
- (b) Police disagreed with Ms Opai's interpretation of Dr Lawrence's report about her ability to work the shifts her role required;
- (c) Police could accommodate Ms Opai to manage her health condition while at work and that there were suitable facilities to enable her to do so; and
- (d) Police proposed ending Ms Opai's employment on 2 March 2018 if a suitable role could not be agreed.

[306] Ms Opai was asked to meet with Superintendent Rogers to discuss these issues further.

Request for further medical information

[307] Ms Opai replied on 16 January 2018, asking for clarification from Dr Lawrence about whether she could work an early/late shift roster, because of the parties' differing interpretation of the specialist advice. Police agreed Ms Opai could obtain that further information, but asked her to ensure that Dr Lawrence specifically answered the questions in the 25 October 2017 referral letter which had not been responded to.

[308] Ms Opai declined to meet with Superintendent Rogers on 18 January 2018, and instead said she would seek further information from her specialist about whether it was appropriate for her to work shifts.

[309] Police responded immediately saying it welcomed further information, but wanted to make a decision by 31 January 2018, expressing concern about how protracted the matter had

become. Ms Opai was invited to meet again before then, or if she preferred to provide written submissions and any further medical information by that date.

Welfare transfer and FEO in the ISU

[310] Ms Opai emailed Superintendent Rogers on 1 February 2018 asking her to consider a welfare transfer and FEO into a role in the ISU. However, the ISU role had the same roster pattern as Ms Opai's Disclosure Group role.

[311] Police therefore considered it would be difficult to manage for the same reasons that the FEO for Ms Opai's Disclosure Group FMSO shift role had already been declined. That decision was open to fair and reasonable employer to make in all the circumstances.

GP report dated 1 February 2018

[312] On 2 February 2018 Ms Opai provided Police with a medical report dated 1 February 2018 from her GP, as her Urologist was on parental leave. However, it did not respond to the questions Police had asked in its referral letter dated 13 September 2017 or in the referral letter it had sent to Dr Lawrence on 25 October 2017. The GP's report stated that:

It is my opinion that Melissa Opai on medical grounds needs the following workplace circumstances to be maintained in order to maintain her physiological health.

I recommend the following:

1. Melissa needs to stay on daytime shifts for at least the next 12 months with a view to medical review.
2. Melissa needs to stay on the same hours she is working at present in the interim.

Response to Ms Opai's request for a FEO in the ISU

[313] Superintendent Rogers wrote to Ms Opai on 13 February 2018 (responding to her informal query about a FEO ISU role), explaining why the Police did not consider it suitable. Ms Opai was advised that she was welcome to submit an EOI in a formal FEO request had she wanted to. She did so, and it was declined on 26 February 2018.

[314] Police raised the idea in its letter of 13 February 2018 of an exit on health grounds, based on Ms Opai's GPs advice that she would be unable to meet the shift requirements of her role for the next 12 months. Ms Opai was not interested in exploring that option.

21 February 2018 meeting

[315] Superintendent Rogers described the 21 February 2018 meeting as difficult, with Ms Opai being reluctant to discuss her role and what to do given she believed she was unable to perform shift work. Ms Opai also informed Superintendent Rogers that she had never discussed with her medical practitioners which shift patterns she could work and also confirmed that she wanted to remain employed by Police, so was not interested in exploring medical retirement at all.

[316] Ms Opai also asked Police to defer any decisions about her employment for 12 months. The meeting concluded with Ms Opai agreeing to visit her doctor for more information about the hours (shifts) she could work, although why that had not been addressed previously remained unexplained.

26 February 2018 letter

[317] Police informed Ms Opai in a letter dated 26 February 2018 that it was not willing to defer making a decision for another 12 months. The letter also set out Police expectations in terms of the additional medical information it sought. Ms Opai was invited to identify any additional support she required while the parties progressed through the process.

Should the decision have been deferred?

[318] On 1 March 2018 Ms Opai's counsel asked Police to put its process on hold pending determination of her employment claims by the Authority. That request was declined. Police wanted to be able to bed down the new structure in the Disclosure Group and given Ms Opai held one of those roles, Police did not want to delay that process indefinitely. The matter had also already become unduly protracted, so further delay was considered undesirable.

[319] Ms Opai's temporary Disclosure Group FMSO (shift) role ended on 13 October 2017. Police had been attempting to obtain medical clearance for her to work shifts since 13 September 2017. Ms Opai had been on notice since 8 December 2017 that if she was not cleared to do the shift work her FMSO role required, and an alternative role could not be agreed, then her ongoing employment could be in jeopardy.

[320] By the time Police declined Ms Opai's suggestion that a decision about the ending of her employment be put off for a further 12 months, she had been working day shifts only for almost three years. There was no indication anything would have changed over the next 12

months. It was fair and reasonable for Police to conclude that both parties needed a degree of certainty regarding the employment process, which had been ongoing for some time.

[321] It was also within the range of reasonable responses available to a fair and reasonable employer for Police to decline Ms Opai's request to defer a decision until after the Authority proceedings had been completed. Although IM1 had been heard in August 2018 the Authority's determination was not released until after Ms Opai's employment had ended. IM2 and IM3 had not been set down at that point, so there was no reliable indication of when those matters would be completed.

[322] It was therefore not unjustified for Police to consider that it was not appropriate for it to wait until the outcome of Ms Opai's Authority proceedings had concluded, given the number and scope of personal grievances for determination and the challenge rights associated with Authority determinations.

12 March 2018 GP report

[323] Ms Opai visited her GP again on 12 March 2018 and provided a "to whom it may concern" letter from the GP that said:

In my opinion she should stay on 8 hour shifts 5 days per 7 day calendar week.

Melissa feels she can be more flexible with her shifts and if necessary start and finish later each day ie 1000hr to 1800hr or the five days a week involving weekend days.

I think on medical grounds she should be fit to manage altered shift time as outlined above.

In my opinion the latest she finish (sic) each day should be 1800 hr.

14 March 2018 meeting

[324] During her 14 March 2018 meeting with Superintendent Rogers, Ms Opai said she could medically work a shift pattern involving five days on, two days off, with her working hours to occur between 7.00 am and 6.00 pm.

[325] Police decided it could not accommodate the hours or shift pattern that Ms Opai had proposed for the reasons already communicated to her. However, Superintendent Rogers considered an alternative arrangement, whereby Ms Opai would work within the hours her GP had confirmed were suitable for her to work, but on a roster pattern that aligned with her section, namely a 'six days on four days off' roster.

22 March 2018 alternative FEO proposal by Police

[326] Superintendent Rogers wrote to Ms Opai on 22 March 2018 explaining that Police could not agree to the FEO proposal she had put forward on 14 March 2018, but had instead identified a workable alternative that was consistent with her GP's advice.

[327] Police proposed a FEO whereby Ms Opai would work the same roster pattern as others in her section, but would work only five of the six days on, start her early shifts one hour later at 7.00 am and finish her late shifts three hours earlier at 6.00 pm. However, where employees work reduced hours on an FEO, there is a corresponding drop in pay, so Ms Opai's pay would reflect her reduced hours and days of work.

[328] Police offered Ms Opai a formal FEO arrangement or the option to try the FEO on a short term trial basis. Although there would be a corresponding drop in pay, Police said it could review the arrangement regularly and Ms Opai could increase her hours of work as and when she was able to, based on her medical advice.

[329] Ms Opai was invited to provide feedback on that proposal, and told that if she did not respond by 28 March 2018, then Police would write to her about the next steps. Ms Opai did not respond to Superintendent Rogers' letter or the FEO proposal.

[330] The process stalled for another few months. Ms Opai's defamation proceedings were heard in the High Court in July 2018 and the first of the Authority's investigation meetings to address some of Ms Opai's personal grievances took place in early August 2018.³⁴

*30 August 2018 letter proposing dismissal**(i) Shift work issues*

[331] Police wrote to Ms Opai on 30 August 2018 proposing to end her employment for two reasons. First, she had not expressed any interest in the FEO arrangement Police had proposed that aligned with the medical information she had provided.

[332] Ms Opai had also been clear throughout that she did not want to work in a different role on a non-shift basis, so the only other option was to bring the employment relationship to an end. However, Police said it remained open to exploring other options, if Ms Opai was interested in doing so.

³⁴ This was IM1.

[333] Police proposed that Ms Opai's employment would come to an end on 5 October 2018. She was invited to meet with Superintendent Rogers on 5 September 2018, and she was asked to come to that meeting prepared to discuss the proposal to end her employment, along with any other views she had on timeframes, notice and transitional arrangements.³⁵ Police advised that in the interim it would be better for Ms Opai to remain out of the workforce and that she was offered paid special leave to facilitate that.

(ii) Relationship issues

[334] The proposed termination letter also referred to the fact that Superintendent Rogers was concerned about what she had heard and observed about the state of Ms Opai's workplace relationships with colleagues, supervisors and managers and the implications that had for her employment relationship with Police. See paragraphs [111] to [119] of this determination.

[335] Police had taken steps to look into and address Ms Opai's multiple complaints involving many people, finding there to be little or no substance to most of the allegations she had made. Although Police had responded to Ms Opai's complaints, she did not accept the validity of those responses.

[336] Instead Ms Opai maintained her very fixed views about what had happened and refused to see any other perspective. She had made it plain she felt persecuted, because she believed that there was a campaign against her within Police, and that she did not trust the organisation. She said in one of her witness statements "*I truly felt hated*". The evidence the Authority heard did not establish there was a campaign by Police against Ms Opai, or that she had been persecuted by Police.

[337] Superintendent Rogers said she was keen to understand Ms Opai's view of the issues Police had identified and about how the parties could go about addressing them.

14 September 2018 response from Ms Opai

[338] Ms Opai declined to meet with Superintendent Rogers and instead responded in writing on 14 September 2018. However, Police were concerned that Ms Opai did not focus on the substance of what was being proposed, and had not taken up the invitation to explore how the issues Superintendent Rogers had raised could be resolved. Those concerns were valid.

³⁵ Ms Opai asked to extend this by two weeks, and Police agreed to that request.

[339] Police responded to the issues Ms Opai had raised. It declined her request to delay making a decision until after the Authority proceedings were at an end. The process had taken considerable time and Police did not feel it could continue delaying its decision any longer, particularly when it did not believe that the Authority's determination of Ms Opai's grievances would assist with resolving issues that had been raised with Ms Opai. That was a legitimate view for Police to have.

21 September 2018 letter

[340] Police wrote to Ms Opai on 21 September 2018 asking her to engage with the substance of the information that had been put to her in the 30 August 2018 letter, and provide a response to that. Superintendent Rogers stated:

In particular, I would like to know what you think about the views expressed, whether you think it is sustainable for you to continue your employment with Police in light of those, and what, if anything you think might be done practically to address them.

In the absence of a meaningful response to these questions, I am left with the view that there has been an irretrievable breakdown in the relationships you have with your supervisors and managers (and Police overall), due to the lack of trust you have in them, and the intensely negative and fixed views you have expressed about them. In this event, it is probably not sustainable for Police to continue your employment.

[341] Superintendent Rogers' letter to Ms Opai expressed a firm preference to meet, and she suggested two dates (26 or 27 September) because she wanted to have a dialogue with Ms Opai about the situation and if, or how, it could be fixed. Ms Opai did not accept the invitation to meet and provided a written response on 28 September 2018.

28 September 2018 response from Ms Opai

[342] Ms Opai did not believe her dismissal was justified, or that the relationship problems were valid. She challenged the information (or lack of it) to support the concerns that had been raised.

[343] Ms Opai said that Police were proposing to terminate her employment "*for having the courage to Speak Up about the misconduct of others.*" She believed she was going to be dismissed because she had exercised her rights to utilise Police internal integrity reporting processes, and that was being used against her by the Police claim that doing so had damaged her working relationship.

[344] Ms Opai said she had a disability that meant she could not work shifts and that the shift pattern Police proposed was not effective anyway. She also said she had developed very good working relationships with other staff at CMDHQ.

[345] Ms Opai did not accept that her integrity reports, ERPs, complaints and personal grievances had damaged the relationships of those she had reported and instead considered that it was the Police's failure or refusal to address her complaints when they were raised that had damaged the relationship.

[346] Ms Opai further said that if her conduct had caused the relationships to break down then she should have been given a warning before being dismissed. She also pointed that the rehabilitation policy required "*all matters relating to disciplinary action must be dealt with outside the rehabilitation process*".

Medical disengagement process

[347] Police considered whether a medical disengagement process for incapacity under s 74 of the Policing Act 2008 would be appropriate, but concluded that was only available if Ms Opai was "*incapable of performing competently*" her duties.

[348] Although Ms Opai's personal view was that she was not capable of working the early/late shift roster, Police did not consider that was supported by the medical information she had provided. Police had also proposed a suitable FEO role that had met Ms Opai's medical requirements, Ms Opai had not been interested in exploring this option.

Notice of termination of employment

[349] Police communicated its decision to terminate Ms Opai's employment in a letter to her dated 3 October 2018. She was advised her employment would end on 3 November 2018 and that she was not required to work out her notice period. Her paid special leave was extended for the duration of her notice period.

[350] Ms Opai was informed that the decision would be kept under review until 12 October 2018, in case there was any additional information she wanted considered. She was invited to send that to Superintendent Rogers before midday on 11 October 2018.

[351] On 10 October 2018, Ms Opai emailed Superintendent Rogers to enquire about any non-shift vacancies that had become available within the Counties Manukau District since 30 August 2018.

[352] Police identified one non-shift role that had been advertised in Exhibits, but that was unsuitable for Ms Opai due to the lifting requirements of the role. Apart from that, Superintendent Rogers remained of the view that the irretrievable breakdown in Ms Opai's relationships and her apparent lack of insight into the part she had played in that meant that moving her to another role would not be feasible.

Procedural fairness requirements

[353] Police met each of the minimum procedural fairness tests set out in s 103A(3) of the Act because:

- (a) It sufficiently investigated its concerns, as per s 103A(3)(a) of the Act;
- (b) It raised its concerns with Ms Opai before it made a decision to dismiss her, as per s 103A(b) of the Act;
- (c) It gave Ms Opai a reasonable opportunity to respond to the matters of concern, as per s 103A(3)(c) of the Act and
- (d) It also genuinely considered her explanations, before deciding to dismiss her, as required by s 103A(3)(d) of the Act.

[354] Police appropriately investigated its concerns about whether or not Ms Opai could undertake the full shift work part of her role, and about the relationship issues it had identified. Police raised its concerns with Ms Opai and she was given a reasonable opportunity to respond before she was dismissed. The medical and other information she provided was carefully considered, and adjustments to her role were made to accommodate that advice.

Disparity of treatment

[355] Although Ms Opai claimed she had been treated less favourably than others in similar or identical circumstances, the evidence did not establish that the people she had identified as comparators were in a comparable situation to her. Her disparity of treatment argument therefore did not succeed.

Were redeployment options considered?

[356] Police was willing to consider redeploying Ms Opai into an alternative role, but it could not do so because she said she was not interested in exploring that option. Police could not force Ms Opai into a new role that she did not consent moving into.

[357] Superintendent Rogers had offered to explore with Ms Opai the possibility of a move to a different district, or to a different workplace within Counties Manukau district, but Ms Opai had declined that and said she did not want to leave district headquarters.

[358] Ms Opai elected not to proceed with a welfare transfer to a non-shift role in the Disclosure Group that she had been invited to consider in October 2016, due to the fact that she would no longer have received a salary with a shift loading.

[359] When Police drew Ms Opai's temporary role to a conclusion, she was advised that there was a vacant non-shift role in the District Licensing Group that Police would be happy to discuss with her. However, Ms Opai did not express any interest in that option.

[360] There were non-shift FMSO vacancies advertised in Pukekohe and Ormiston prior to the Police proposal dated 30 August 2018 to dismiss Ms Opai. However, she did not apply for those vacancies. Ms Opai's complaint that these were never put forward as an option was not accepted, because Police had invited her on a number of occasions to advise if there were any alternative roles she was interested in, and she had not done so.

[361] Nor had Ms Opai expressed any interest in, or asked for information about, the non-shift FMSO vacancies following receipt of 30 August 2018 letter which proposed terminating her employment.

[362] The Police decisions not to accommodate Ms Opai's other requests (FEO and otherwise) to undertake her permanent role on a non-shift basis were not unjustified in the circumstances. Although it could theoretically have been accommodated, it was not in practice workable for operational, financial and workflow reasons. These were therefore decisions that were open to a fair and reasonable employer in all the circumstances.

Medical incapacity termination

[363] Ms Opai's submissions that the Police should have dismissed her for medical incapacity were not accepted, because Police had proposed that option and Ms Opai had firmly rejected it.

[364] It was reasonable for Police to change course after Ms Opai advised it that she did not want to engage about a potential medical disengagement. While it was open to Ms Opai to raise concerns with Police about this while employed, or to ask Police to take a different approach, she did not do so prior to the ending of her employment.

[365] Superintendent Rogers referred in the correspondence to Ms Opai about her being either “*unwilling or unable*” to undertake shift work. That was because Police did not consider it had sufficient medical information to say definitively one way or the other whether Ms Opai could undertake shift work.

[366] Police had therefore suggested therefore an alternative way of accommodating Ms Opai’s health needs in a way that aligned with her belief about, and interpretation of, the medical information she had provided.

[367] Although Police had repeatedly asked for a clear answer to her medical capacity to work the FMSO shifts, that had not been provided. Given Ms Opai had declined to agree to a medical assessment by a specialist appointed by Police, and she had withdrawn her prior consent for Dr Lawrence to answer Police’s queries, there was not much further the Police could take that issue.

Incompatibility allegations

[368] The leading case for an incompatibility dismissal is the Court of Appeal decision in *Reid v New Zealand Fire Service Commission*.³⁶ This recognised that dismissal for an irreconcilable breakdown of an employment relationship will be “*unusual and rare.*” The bar to justifying an incompatibility dismissal is a high one. However, this instance is one of those rare cases in which that high bar had been met.

[369] The evidence supporting the Police view that there had been an irreconcilable breakdown in the relationship was entirely convincing. Ms Opai was substantially responsible for the irreconcilable breakdown, because of the approach she took to her multiple concerns.

[370] Police did take her concerns seriously and investigated and responded to them. The problems arose because Ms Opai was not prepared to accept that, so she considered outcomes that did not uphold her views as continued persecution of her. It was her uncompromising and largely irrational subjective perceptions that wholly or substantially caused the relationship breakdown.

[371] The Authority investigated each and every concern Ms Opai had, but was not satisfied Police had engaged in the wrongdoing towards her that she alleged had occurred. The Authority was also mindful to stand back and take a broad view of the entire relationship, instead of just

³⁶

[1999] 1 ERNZ 104.

focusing on the specific claims Ms Opai had made, in order to determine whether it was open to a fair and reasonable employer in all the circumstances to have concluded that the relationship had irretrievably broken down.

[372] The Authority was satisfied that there was compelling evidence to support the Police conclusion that there was a relationship incompatibility between the parties that was so serious it fundamentally undermined the trust and confidence inherent in the employment relationship.

[373] Police were therefore substantively justified in fairly and reasonably concluding that the employment relationship had irretrievably broken down, in light of the fact that it had bent over backwards to address her concerns over a very long period of time.

[374] Ms Opai had little or no insight into the impact of her actions on those involved and did not express any concern, reflection or desire to improve her relationships with the others in any of her communications with Police before her employment ended.

[375] The parties had attended four mediations that did not resolve Ms Opai's concerns. Inspector Brady and Superintendent Rogers had also both (separately) worked hard to understand and address Ms Opai's various concerns. Although they both got close to reaching resolution of at least some of her concerns, each time that fell apart at the last minute due to Ms Opai's unreasonable stance.

[376] Ms Opai was represented by the Police Association and experienced counsel in her dealings with the Police. She was also someone who very strongly argued her own position and who would not let go of her strongly held perceptions that there had been repeated and ongoing wrongdoing by others, that she believed Police had failed to address.

[377] Ms Opai therefore genuinely believed she was acting appropriately in rigorously holding managers, supervisors and HR advisors to account for conduct that in her view breached Police policies or procedures.

[378] Police did fully and fairly put its concerns to Ms Opai and attempted to engage her to suggest ways the parties could address the relationship issues. The process Police followed before concluding there was an irreconcilable breakdown in the relationship was therefore procedurally fair to her.

Findings on the specific claims Ms Opai made about her dismissal

[379] The Authority made the following findings on the specific issues Ms Opai said made her dismissal unjustified:

- (a) The dismissal was not procedurally unjustified. Police did sufficiently investigate its concerns.³⁷ It provided her with relevant information and kept an open mind about the outcome during the process.³⁸ Police did appropriately consider all relevant factors and did not take irrelevant factors into account before it made the decision to dismiss her.³⁹
- (b) The dismissal was substantively justified. Police accommodated her disability in a number of ways.⁴⁰ It offer her a FEO role that met her medical requirements regarding shift work.⁴¹ Police were not improperly motivated by her complaints and did not cause or contribute towards the irretrievable breakdown in the parties relationship.⁴² The relationship was beyond repair, so Police had got to the stage where it could fairly and reasonably cry halt. Ms Opai did not identify any steps Police could have taken to improve or repair the relationship.⁴³

Was Ms Opai's dismissal justified?

[380] It is clear that the way that Ms Opai engages with others can be extremely challenging for those that have the responsibility of managing her or investigating the issues that she has raised.

[381] Police established it had taken all relevant factors into account when making the decision to dismiss Ms Opai and that irrelevant factors were not taken into account. There was no evidence of pre-determination or bias. Nor were there any improper motives. The decision to dismiss Ms Opai was not retaliation against her for having raised complaints or pursued proceedings against the Police.

³⁷ Issue 2(a)(i).

³⁸ Issues 2((a)(ii) and (iii).

³⁹ Issue 2(a)(iv).

⁴⁰ Issue 2(b)(i).

⁴¹ Issue 2(b)(ii).

⁴² Issue 2(b)(ii).

⁴³ Issues 2(b)(iii)(A)-(D).

[382] The Authority was satisfied that Police had good reasons, based on reasonable grounds, for ending the employment relationship. It followed a fair and proper process before reaching that conclusion.

[383] Accordingly, the decision by Police to dismiss Ms Opai was procedurally substantively justified in all of the circumstances.

Issue 4 - Did Police discriminate against Ms Opai because of her disability?

[384] Ms Opai had a disability in terms of the definition of disability in s 21(1)(h) of the HRA.

[385] The Supreme Court in *McAlister v Air New Zealand Limited* determined there must be a causative link between the prohibitive ground of discrimination and the treatment complained of, such that the prohibited ground was a material ingredient in the making of the decision to treat the employee in the way in which they were treated.⁴⁴ That evidential link is missing in this case.

Standard of assessment

[386] Ms Opai's discrimination claims are to be assessed on the standard of reasonableness and reasonable expectation, set out in the exceptions allowed under s 29 and 35 of the HRA. For practical purposes the standard of reasonableness to be applied to the assessment of the discrimination claims appears to be no different than the standard to be applied to the unjustified disadvantage grievances and to Ms Opai's dismissal.

[387] The accommodations Police offered Ms Opai, and its assessment of the medical information she provided, had to be within the range of what a fair and reasonable employer could have done in all the circumstances at the material time. What is reasonable is a question of fact that must take the particular circumstances of both parties into account.

[388] That required an assessment of what was practicable, fair and proportionate in all the circumstances in light of the information that was available at the time each allegedly discriminatory action occurred. This approach necessarily involved a balancing of the interests, rights and needs of the parties, because a fair and reasonable employer could not have acted without making such a balanced assessment.

⁴⁴ [2010] 1 NZLR 153 at [40] and [49].

Comparator

[389] The parties did not identify a comparator. The Authority considers an appropriate comparator was other employees with FMSO (shift) roles who were not available to undertake the shift work the FMSO shift position required. The question for the Authority to assess was therefore whether or not an employee in that situation would have been treated the same or more favourably than Ms Opai was.

[390] The Authority concluded that other employees who had been unavailable or unable to work the shift work roster pattern their permanent FMSO shift role required for more than three years, while still being paid the shift allowance for that period to time, would also have had their ongoing employment in the permanent FMSO shift role reviewed.

Authority's findings on each disability discrimination allegation

[391] The Authority made the following findings regarding each alleged incident of disability discrimination.

(i) The roster change in June 2017

[392] This was not an instance of disability discrimination. Police were entitled to implement a roster that better met the needs of the work group. Ms Opai was not affected by the roster change at the time it occurred.⁴⁵

(ii) The ending of Ms Opai's temporary role on 13 October 2017

[393] This decision was not an instance of disability discrimination. This decision was justified in all the circumstances.⁴⁶

[394] Ms Opai was not treated less favourably than others, who were doing the same or similar work as her. Suitable alternative arrangements were made to accommodate Ms Opai's disability, so the ending of her temporary role did not result in her being subjected to any detriment.

(iii) The permanent appointment to the Disclosure Group FMSO (shift) role

[395] This was not an instance of disability discrimination. Ms Opai's disability was accommodated, so she was not subjected to any detriment. She was not treated less favourably than others without a disability would have been. There was no evidence that this change had

⁴⁵ Paragraphs [63] and [251]-[256].

⁴⁶ Paragraphs [192]-[204] and [257]-[273].

any effect on Ms Opai's ability to manage her disability, because suitable arrangements had been put in place to accommodate her health condition.⁴⁷

(iv) Alleged failure by Police to accommodate her medical advice

[396] The evidence did not establish that Police had failed to accommodate Ms Opai's medical advice.⁴⁸ Police had created two temporary roles for Ms Opai that accommodated her medical issues. It continued to pay her the shift rate for three years, although she did not do any shift work over that period.

[397] Police made reasonable adjustments to Ms Opai's permanent FMSO (shift) role to accommodate her disability. Police offered Ms Opai non-shift roles that accommodated her disability, which she did not accept. She was also told about a number of non-shift roles that were available, but again did not follow that up.

[398] Police offered Ms Opai multiple FEO opportunities that accommodated her disability, which she did not accept. Police invited Ms Opai to identify alternative roles she thought better accommodated her disability, but she did not do so.

[399] Police repeatedly asked Ms Opai to provide medical information that addressed the specific questions it had about her ability to work the early and late shift pattern her role required, but despite being given more than 12 months to do so, that did not occur. Police then tailored an FEO role to the hours Ms Opai had said she could work. Police had also offered to explore medical retirement, if she was medically incapable of doing her role, but she rejected that.

[400] It was not disability discrimination for Police to reach the conclusion on 3 October 2018 (the date notice was given) that it could not deliver its services effectively if Ms Opai's preferred roster pattern was accommodated. That decision was justified on the available evidence.

(v) Offering flexible working opportunities to other employees, but not to her

[401] Police did not offer FEOs to other employees but not to Ms Opai. She was wrong about that. Ms Opai was offered suitable FEOs in October 2016, January 2017, April 2017 and March

⁴⁷ Paragraphs [199]-[201].

⁴⁸ Paragraphs [287]-[298], [305]-[309], [326]-[329] and [356]-[362].

2018, none of which she accepted. These FEO roles accommodated her disability. This was not an example of disability discrimination.⁴⁹

(vi) Dismissing her after she refused to work an alternating early/late shift roster due to her disability

[402] The evidence established that Police had offered Ms Opai roles that accommodated her disability, but she had not accepted them. The medical evidence did not establish that the FEO role she was offered on 22 March 2018 was unsuitable.

[403] Ms Opai accepted when giving evidence during IM3 that the FEO offer she was made on 22 March 2018 had accommodated her disability, as it was aligned with the days and hours she believed her GP had cleared her to work. Her disability was therefore appropriately accommodated, in line with what Ms Opai believed she could do.⁵⁰

Outcome

[404] The Authority did not agree with Ms Opai that the actions and decisions by Police she had identified were discriminatory. Police made legitimate operational decisions that were open to it to make as a fair and reasonable employer in all the circumstances.

[405] Police worked hard, and spent a lot of time and effort accommodating Ms Opai's health issues and disability. Police did not treat Ms Opai differently than how it would have treated other employees in the same role who did not suffer from a disability, but who had declined to undertake the shift work their role required.

[406] Ms Opai was not subjected to detriment, or treated less favourably, because of her disability. Rather she could be said to have been treated more favourably than other FMSOs in shift roles, because her colleagues had to actually do the shift work to be paid the shift loading, while Ms Opai did not.

[407] The Disclosure Group roster change and the conclusion of Ms Opai's temporary role did not have any effect on her ability to manage her health issues, because following both events she continued working day shifts only.

⁴⁹ Paragraphs [106] and [326]-[329].

⁵⁰ Paragraphs [356]-[367].

What if any costs should be awarded?

[408] The Police as the successful party would normally be entitled to a contribution towards their actual costs. However, Ms Opai is legally aided.

[409] The parties agreed there was no reason to depart from s 45(2) of the Legal Services Act 2011. Accordingly, it is not appropriate to award costs in these circumstances, so costs lie where they fall.

Summary of outcome

[410] The Authority made the following findings:

- (a) Ms Opai was not unjustifiably disadvantaged in her employment. To the extent that she suffered any disadvantage, that was justified in all the circumstances;
- (b) Police did not fail to provide Ms Opai with a safe workplace;
- (c) Ms Opai did not establish that Police were responsible for her health problems. The evidence did not support Ms Opai's view that she had been bullied by Police;
- (d) Police did not breach its good faith obligations to Ms Opai;
- (e) Ms Opai's dismissal was procedurally and substantively justified;
- (f) Police did not subject Ms Opai to disability discrimination, because it appropriately accommodated her disabilities and did not subject her to detriment; and
- (g) Because Ms Opai is legally aided, no costs award has been made.

