



# New Zealand Employment Relations Authority Decisions

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## Opai v The Commissioner of Police (Auckland) [2017] NZERA 357; [2017] NZERA Auckland 357 (15 November 2017)

Last Updated: 1 December 2017

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 357  
3005373

BETWEEN MELISSA JEAN OPAI Applicant

A N D THE COMMISSIONER OF POLICE

Respondent

Member of Authority: Rachel Larmer

Representatives: Rani Amaranathan, Counsel for Applicant

Nicola Ridder and Hamish Kynaston, Counsel for

Respondent

Investigation Meeting: On the papers

Submissions Received: 16 August 2017 from Applicant

25 August 2017 submissions from Respondent

Date of Determination: 15 November 2017

### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

#### Employment relationship problem

[1] Ms Melissa Opai is employed by the New Zealand Police. At the material time, in 2013, she was employed as a Watch House Officer based at Counties Manukau District Headquarters, in Manukau. Ms Opai is currently working for the Police as a File Management Support Officer in Papakura.

[2] Ms Opai has filed three Statements of Problem (SoPs) with the Authority which cover a number of different claims. The parties are also currently engaged in High Court litigation involving defamation proceedings brought by Ms Opai.

[3] Ms Opai has raised a number of personal grievance claims against the Police, only some of which are set out in her various SoPs. Ms Opai acknowledges that some

of the grievance claims she raised with the Police were not commenced with the Authority within three years of her raising them, as required by [s.114\(6\)](#) of the [Employment Relations Act 2000](#) (the Act).

[4] Ms Opai accepts the Authority doesn't have jurisdiction to investigate grievances that she either failed to raise with the Police within 90 days (as required by [s.114\(1\)](#) of the Act) or which (if she raised within time) she failed to commence with the Authority within three years of having raised the grievances (as required by [s.114\(6\)](#) of the Act).

[5] This determination addresses whether or not the Authority has jurisdiction to investigate Ms Opai's 258 Report

disadvantage grievance. The Police claim that Ms Opai did not raise her grievance within 90 days of it arising or coming to her attention, as required by [s114\(1\)](#) of the Act.

[6] Alternatively the Police say that if the 258 Report disadvantage grievance was raised within 90 days then Ms Opai is still time barred in accordance with [s.114\(6\)](#) of the Act from pursuing it because she did not commence her grievance in the Authority within three years of raising it with the Police.

[7] Ms Opai says she raised a new disadvantage grievance about the 258 Report on 16 March 2014 (as well as repeating her 04 December 2013 grievance claim, which she accepted are out of time).

[8] Ms Opai says her 16 March 2014 disadvantage grievance in so far as it related to claims that Inspector Baker (who has since left the Police) told her (Ms Opai) in early 2014 that the 258 Report had been investigated and was “*not upheld*”, when that was not in fact the case, together with her claim that Police had not followed its own procedures or Code of Conduct regarding the investigation of the 258 Report related to Police actions/inaction that occurred after 04 December 2013.

[9] Ms Opai therefore says her 16 March 2014 disadvantage grievance was raised within 90 days of it arising as it related to the period from 05 December 2013 to 16 March 2014.

[10] Ms Opai further says that she raised a new disadvantage grievance relating to the 258 Report by letter dated 29 May 2017. Ms Opai says this 29 May 2017

grievance was raised as a result of information that came to her attention after 28 February 2017, so she says it was raised within time.

### **Relevance of the 258 Report**

[11] The 258 Report Form dated 05 November 2013 related to alleged time sheet discrepancies by Ms Opai and two Watch House Assistants she managed.

[12] Ms Opai found out about the timesheets complaint on 03 December 2013 at a meeting with Inspector Wilkie, who was at that time in charge of the Operations Unit.

[13] Ms Opai says Inspector Wilkie did not specifically advise her (Ms Opai) of the existence of the 258 Report but did inform Ms Opai a complaint had been made about her and her staff regarding their timekeeping and alleged failures to accurately record their work hours.

[14] Inspector Wilkie advised Ms Opai on 03 December 2013 that the Police were not going to investigate the allegations in the 258 Report, but instead believed it was appropriate to reiterate acceptable standards of behaviour to all staff in terms of timekeeping and other general housekeeping matters.

[15] Inspector Wilkie advised Ms Opai that all five sections of the relevant workgroup would be reminded of the same information by way of sectional meetings.

[16] Ms Opai informed Inspector Wilkie that she considered the allegations were completely baseless and that she was confident that her timesheets and the timesheets of her staff accurately recorded the actual hours they had worked.

[17] Ms Opai says that she believed that the underlying complaint made on

10 October 2013 which had resulted in the 258 Report issued by Senior Sergeant Culpan was done as payback or retribution because Ms Opai had previously raised a complaint regarding the unethical behaviour of a Police colleague.

[18] Ms Opai also believed that Senior Sergeant Culpan had unfairly criticised her in her performance review for reporting this unethical behaviour, so on 23 October

2013 Ms Opai had raised an Employment Relationship Problem (ERP) against Senior Sergeant Culpan for that.

[19] Ms Opai expressed her dissatisfaction to Inspector Wilkie about the proposed informal approach to the 258 Report by the police. That resulted in Inspector Wilkie asking Ms Opai directly whether she wanted the 258 Report investigated or not.

[20] Ms Opai's response to Inspector Wilkie was that she was not encouraging an investigation but that she was not afraid of an investigation because she (Ms Opai) believed that she and her staff would be cleared should an investigation be conducted.

[21] Ms Opai raised an ERP on 04 December 2013 recording her view that the 258

Report and underlying complaint was a “*blatant attempt to discredit [her] to diminish the effect of [her] October 2013 ERP*”.

[22] Ms Opai states in her affidavit to the Authority dated 15 August 2017 that when she raised her 04 December 2013 ERP, she was concerned because she believed the complaint was untruthful and improperly motivated. Ms Opai also viewed the 258

Report as defamatory of her character.

[23] Ms Opai’s 04 December 2013 ERP also set out her view that the Police had failed to deal with her in good faith, had not followed its own procedures or Code of Conduct by not investigating the complaint which had given rise to the 258 Report, and by not formally advising her of the allegations that had been made against her or that no further action would be taken.

[24] Ms Opai acknowledges that the disadvantage grievance she raised on

04 December 2013 is on the face of time barred. However she says that new grievances she raised on 16 March 2014 are not out of time because they involved Police actions subsequent to the 04 December ERP.

[25] Ms Opai further says that issues raised in her Statement of Problem which was lodged with the Authority on 16 March 2017 (and processed by the Authority Support Staff the next day) are not out of time because they involve issues that only came to her attention after 28 February 2017.

### Issues

[26] At issue in this determination is whether or not the Authority has jurisdiction to investigate Ms Opai’s unjustified disadvantage grievance involving “*the 258*

*Report*”. The first Statement of Problem filed on 16 March 2017 sets out this

258 Report disadvantage grievance as:

The applicant says the respondent affected her employment to her disadvantage by its unjustified actions pursuant to [s.103\(1\)\(b\)](#) of the [Employment Relations Act 2000](#) by a 258 report it promulgated against her.

[27] This claim is amended in Ms Opai’s Second Amended Statement of Problem

(2ASoP) filed on 12 June 2017. The 2ASoP states:

The applicant says the respondent affected her employment to her disadvantage by its unjustified actions pursuant to [s.103\(1\)\(b\)](#) of the [Employment Relations Act 2000](#) by the actions it took and/or failed to take in response to a 258 report promulgated against her.

[28] Ms Opai’s Third Amended Statement of Problem (3ASoP) filed on 24 August

2013 recorded the disadvantage claim in exactly the same way that it appears in the 2ASoP.

[29] The Police say that the Authority does not have jurisdiction to investigate the

258 Report disadvantage grievance because:

a. It was not raised within 90 days;

b. Even if it was raised within time, the claim was not commenced within three years of it being raised; and

c. It does not consent to this claim being raised or commenced out of time.

[30] The following issues are to be determined:

a. What does the 16 March 2014 disadvantage grievance relate to?

b. When did the 16 March 2014 disadvantage grievances arise or come to Ms Opai’s attention?

- c. Did Ms Opai raise the 16 March 2014 disadvantage grievances within the 90 day time limit?
- d. If so, did Ms Opai commence her 16 March 2014 disadvantage grievance within three years of raising it?
- e. If not, should leave be granted under [s.219](#) of the Act to extend the three year time limit?
- f. What does the 29 May 2017 disadvantage grievance relate to?
- g. Was the 29 May 2017 disadvantage raised within 90 days?
- h. What if any costs should be awarded?

[31] Ms Opai's alleged disadvantage grievance raised on 04 December 2013 involved the filing of the 258 Report and the Police advice to Ms Opai that the timekeeping complaint about her and her subordinates was not going to be investigated.

[32] The Authority does not have jurisdiction to investigate the 04 December 2013 alleged disadvantage grievances, but they can be considered as relevant background.

#### **What does the 16 March 2014 disadvantage grievance relate to?**

[33] Ms Opai says that the 16 March 2014 ERP raised new matters that she had not already raised in the 3 December 2013 ERP.

[34] The 16 March 2014 ERP filed by Ms Opai raises a number of issues. It revisits her 03 December 2013 meeting with Inspector Wilkie and the

04 December 2013 ERP. Those matters are out of time.

[35] The 16 March 2014 ERP records Ms Opai's belief that she had been defamed by the 258 report in an attempt to discredit her character, work ethic, reputation and integrity. Ms Opai further records that in December 2013 Inspector Wilkie and Senior Sergeant Culpan had a meeting with Ms Opai's staff (in Ms Opai's absence) during which staff were told that the 258 Report allegation was not going to be investigated.

[36] Ms Opai then refers to an 08 January 2014 informal meeting which was an attempt to resolve issues she had filed in another (out of time) ERP she filed on

23 October 2013. This is the ERP she had raised that Ms Opai claimed the 258 Report was pay back for.

[37] Ms Opai claims that on 08 January 2014 Inspector Brady advised her that he was still to categorise the 04 December 2013 ERP or "*would advise otherwise*".

[38] Ms Opai in the 16 March 2014 ERP says:

I was surprised at this considering Inspector Wilkie and Senior Sergeant Culpan both advised on 3.12.13 that the matter was not going to be investigated and I advised Inspector Brady of this. However, I felt that I would let matters run their course.

[39] Ms Opai claims that at a meeting she had with Inspector Brady on 11 March

2014 the 258 Report was discussed. Inspector Brady is no longer with the Police so his views on this meeting have not yet been put before the Authority.

[40] Ms Opai claims that Inspector Brady told her that:

PNHQ had determined the allocation of "*keeping an inaccurate record of attendance*" against [her] was "*not upheld*".

[41] Ms Opai then said she:

[...] inquired as to what that meant. Inspector Brady explained that there was no evidence to support the allegations. I further inquired "*so there were no discrepancies found in my timesheets?*", Inspector Brady replied, "*no*".

[42] Ms Opai then sets out her specific concerns which were recorded in five bullet points. The first bullet point relates to the way in which the 3.12.13 advice regarding the 258 Report was put to her, and in particular the communication that the timekeeping allegation against her was not going to be investigated.

[43] I find that this relates to the 04 December 2013 ERP, so is out of time and therefore will not be a matter investigated as a discreet disadvantage grievance claim by the Authority.

[44] The second to fifth bullet points identify Ms Opai's concerns that the Police had failed to follow their own internal policies and Code of Conduct regarding the

258 Report.

[45] In particular Ms Opai claimed that she was never the subject of an investigation meeting, was not in receipt of investigation findings and that she had not been formally advised that a breach of the Code of Conduct had not been established or that no further action would be taken.

[46] Ms Opai further stated that she believed that the way in which the 258 Report investigation had been conducted was procedurally unfair and breached good faith and natural justice principles, that she was not provided with all the relevant information or an opportunity to be represented or heard regarding the allegations that were under consideration, which meant that any explanation she wished to put forward was not considered. Lastly Ms Opai claimed she had not been formally notified that she was no longer under investigation as a result of the 258 Report.

[47] In her 16 March 2016 ERA Ms Opai requested “*full disclosure of the investigation pertaining to the [258 Report] allegation made me*”. Ms Opai claims that did not occur until 28 February 2017, which I discuss in more detail later.

[48] Putting to one side the concerns Ms Opai had as specified in her

04 December 2013 ERP, I find that the 16 March 2014 ERP involved a disadvantage grievance claim that:

- a. The Police had investigated the 258 Report;
- b. The Police investigation into the 258 Report breached its own policies and procedures and the provisions of its Code of Conduct;
- c. Ms Opai had no opportunity to be involved in that investigation; and
- d. Ms Opai was not informed of the outcome of the 258 Report investigation (other than the alleged verbal response that Inspector Brady gave her during the meeting on 11 March 2014 during which he allegedly said that the 258 Report complaint was “*not upheld*” which Ms Opai says she subsequently discovered was incorrect.

[49] Ms Opai set out those alleged unjustified actions in paragraphs 26 to 29 of her

15 August 2017 affidavit. These occurred over the period 05 December 2013 to

11 March 2014.

[50] The 16 March 2014 ERP therefore related to actions taken or which had become known to Ms Opai after her 04 December 2013 ERP had been filed.

**Did Ms Opai raise her 16 March 2014 ERP within 90 days of the alleged disadvantage arising or coming to her attention?**

[51] I am satisfied that Ms Opai raised her disadvantage grievance regarding actions that the Police had taken over the period 05 December 2013 to 11 March 2014 in her 16 March 2014 ERP.

[52] I therefore find that the alleged disadvantage grievances which occurred over that specified period were raised within 90 days of them arising or coming to Ms Opai’s attention, so [s.114\(1\)](#) of the Act has been complied with.

[53] Accordingly the Authority has jurisdiction to investigate the 258 Report disadvantage grievance insofar as it relates to the Police’s actions from 05 December

2013 to 11 March 2014.

**Did Ms Opai commence her 16 March 2014 unjustified disadvantage grievance action within three years of raising it?**

[54] [Section 114\(6\)](#) of the Act states “*no action may be commenced in the Authority [...] in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with this section*”.

[55] The Police claim that even if Ms Opai’s [s 16](#) March 2014 disadvantage grievance was raised within time, the Authority still does not have jurisdiction to investigate it because Ms Opai failed to commence her 258 Report disadvantage grievance within three years of the date on which she raised it with Police.

[56] The Authority records show that Ms Opai lodged her first Statement of Problem on 16 March 2017. Her Statement of Problem was then processed by the Authority Support Officer on 17 March 2017.

[57] When serving the Statement of Problem on the Police the Authority advised the Police in writing of the dates on which the Statement of Problem was lodged and then processed by Authority Support Staff.

[58] The 258 Report disadvantage grievance was raised on 16 March 2014 and the claim was lodged with the Authority on 16

March 2017.

[59] I am therefore satisfied that Ms Opai has met the requirements of [s.114\(6\)](#) of the Act by commencing her 258 Report disadvantage grievance on 16 March 2017 which was exactly three years after she had raised it with Police.

**What does the 29 May 2017 disadvantage grievance relate to?**

[60] Ms Opai says that as a result of the discovery process in the High Court relating to her defamation proceedings against the Police she was provided with documentation which included the “*incident file*” relating to the material 258 Report.

[61] This incident file included documentation that Ms Opai had requested in her

16 March 2014 ERP which related to the Police’s investigation of the 258 Report.

[62] Ms Opai said that the Police have provided her with three tranches of discovery regarding the defamation proceedings. The first occurred on 19 April 2016 which omitted the incident file relating to the 258 Report. The second tranche was on

06 October 2016 but again did not include the incident file relating to the 258 Report.

[63] Ms Opai says it wasn’t until late in the afternoon on 28 February 2017 that the Police disclosed to her counsel in the defamation proceedings a third tranche of discovery consisting of 82 documents which Ms Opai says should have been included in the first tranche of High Court discovery documentation.

[64] Ms Opai says it is not until after the third tranche of discovery disclosed on the evening of 28 February 2017 that she saw for the first time the 258 Report incident file and the associated documents in it.

[65] Ms Opai says it was not until then that she discovered there was an “*investigation report*”, that Senior Sergeant Culpan was found to have had a conflict of interest regarding the matter, and that Senior Sergeant Culpan had attended all staff meetings discussing timekeeping and timesheets issues except the ones that Ms Opai had been present at.

[66] Ms Opai says that she also discovered that Senior Sergeant Culpan had sent Ms Watson in Human Resources a copy of his proposed 258 Report before he published it to others and that Ms Watson had filled in some blanks on the 258 Report Form and sent it back to Senior Sergeant Culpan who then finalised it.

[67] Ms Opai further says that she only found out from an affidavit from the Police in relation the third discovery tranche that searches had been undertaken regarding the named individual (who was a Police employee) who had made the originating complaint which had given rise to Senior Sergeant Culpan’s 258 Report.

[68] Ms Opai says that as a result of the High Court discovery process, which included disclosure of the 258 Report incident file, it appears that there are no documents supporting the originating complaint which has given rise to the 258

Report against Ms Opai. Ms Opai says she did not find this out until after she had read through the full third discovery tranche subsequent to 28 February 2017.

[69] Ms Opai claims that as a result of reviewing this third tranche of discovery information she has formed the view that the Police had predetermined that there were

timekeeping discrepancies in Ms Opai’s workgroup without ever having properly investigated the underlying allegations.

[70] Ms Opai further claims that although on 13 March 2014 Inspector Brady allegedly told her that the allegations had been investigated by PNHQ and were “*not upheld*”, that is not what is in fact what is recorded on the Police’s national database.

[71] Ms Opai says that she believes from reviewing the relevant documentation that no investigation or formal finding ever appears to have been made regarding the 258

Report. Ms Opai therefore believes that there was no genuine or impartial inquiry undertaken by the Police into the allegations against her which were set out in the 258

Report but instead the Police had predetermined the truth of them.

**Was the 29 May 2017 disadvantage grievance raised within 90 days?**

[72] Ms Opai says that she raised a personal grievance claim in her Statement of Problem which was filed with the Authority on 16 March 2017 which arose from new facts which had come to her attention as a result of the third discovery tranche from the High Court Defamation proceedings.

[73] Ms Opai says that her counsel raised a personal grievance for unjustified disadvantage regarding the actions and inactions taken in respect of the 258 Report in relation to that new information (in case it was required) in a letter to the Authority, copied to Buddle Findlay dated 29 May 2017.

[74] Paragraph 32 of that letter sets out her view on the alleged disadvantage grievances she claimed had arisen out of her review of the third tranche of High Court discovery in the defamation proceedings.

[75] I therefore find that the matters identified in paragraph 32 of Ms Opai's counsel's letter of 29 May 2017, to the extent they had not already been covered by the 16 March 2014 ERP, are disadvantage grievance claims that were raised within 90 days of them arising or coming to Ms Opai's attention.

[76] The Authority therefore has jurisdiction to investigate the disadvantage grievance in paragraph 32 of Ms Opai's letter dated 29 May 2017.

### **Outcome**

[77] The disadvantage grievances raised in Ms Opai's 04 December 2013 ERP may not be investigated by the Authority as discreet unjustified disadvantage grievance claims. However they may be considered as relevant background to the other within time disadvantage grievances the Authority is investigating.

[78] The Authority has jurisdiction to investigate the unjustified disadvantage claims relating to the 258 Report raised in Ms Opai's [16](#) March 2014 ERP and in her counsel's letter dated 29 May 2017 to the Authority and Police's counsel.

### **What if any costs should be awarded?**

[79] Ms Opai as the successful party is entitled to a contribution towards her actual costs. However costs are reserved pending the resolution of the substantive proceedings.

**Rachel Larmer**

**Member of the Employment Relations Authority**

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