NOTE: an order prohibiting the publication of certain information appears on p 4 of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 12
5329610

	BETWEEN	Q Applicant
	AND	THE COMMISSIONER OF POLICE Respondent

Member of Authority:	R A Monaghan
Representatives:	J Goldstein, counsel for applicant R Gold and R de Groot, counsel for respondent
Investigation meeting:	25, 26, 27, 28, and 29 June 2012
Additional information provided:	10 July 2012
Submissions received:	13 July and 8 August 2012 from the applicant 1 August 2012 from the respondent
Determination:	23 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Q was a sworn police officer with long service, and from the late 1990s was employed as a Senior Constable in a specialist unit of the New Zealand Police. This employment relationship problem comprises three personal grievances of his, and concerns events in 2010.

[2] The first grievance occurred against a background of dissatisfaction with the management of the unit. In 2008 three other officers had raised their own personal grievances because of that dissatisfaction. Although the grievances were settled at the

time, and a procedure to review the operation of the unit was agreed, some dissatisfaction continued.

[3] Q was one of those who continued to feel dissatisfied. He distrusted his superior officers as a group ('the management'). He had relatively little contact with T, an acting senior sergeant who had transferred into the unit on a temporary basis, but became very critical of him and said other members of the unit were also concerned. Q raised the concerns during a meeting on 28 April 2010 attended by himself, his colleagues, and several senior officers including T.

[4] A draft policy, which was to apply in the premises where the unit was based, was to be discussed at the meeting. Q believed there were deficiencies in the draft, and attributed these to T. He also believed that T had acted in a way that did not accord with important principles reflected in the policy. He had with him at the meeting items which he had removed from T's office the day before, and which he viewed as evidence of the breach of those principles. The items were in a bag. Q sought to hand the bag to D, a senior sergeant who was presenting the contents of the policy to the meeting.

[5] Most of the remaining concerns were raised during a later part of the meeting, intended to be a catch-up for Q and his immediate colleagues. Q enquired whether a mechanism under which officers could rate their supervisors could be considered, and when asked what he was getting at he said T was making too many fundamental errors. He also asked whether a permanent appointment to T's position could be expedited or alternatively that T be required to limit himself to administrative duties.

[6] T felt he was targeted. He believed Q planned to 'have a go' at him, and had removed the items from T's office in order to use them to humiliate him during the meeting. T found the way in which Q raised his concerns to be unduly critical of him and in some respects based on wrong information. He was offended and distressed at the behaviour, and complained formally about it.

[7] T's complaint led to Q's receipt of the formal written warning, dated 6 December 2010, which is the basis of the first personal grievance. The warning

was a first warning under the disciplinary procedure and concerned Q's behaviour at the meeting in:

- Presenting property removed from T's office without permission or reasonable excuse;
- Behaving in a manner that caused T distress by his conduct and language; and
- Acting in an insubordinate manner towards T.

[8] The second grievance arose out of the attempted placement of Q on duties other than his usual duties, and outside the unit. In June 2010, after the investigation into matters raised by T's complaint began, Q was served with a notice of restricted duties. A variation of that notice was served in September 2010. Q found unsatisfactory the duties he was being required to undertake, and believed in any event that he should be permitted to return to his usual full duties in the unit. In particular he says he should have been permitted to return to those duties after the warning had been issued.

[9] The refusal or failure to allow Q to return to his usual full duties after the warning had been issued in December 2010 is the subject of the second personal grievance.

[10] By September 2010 an investigation had begun into a complaint against Q in respect of an unrelated incident in the early hours of 9 May 2010. The incident occurred in a central city nightclub. Q was carrying out ordinary police duties, accompanied by another police officer and two military officers. An intoxicated young woman, V, removed Q's police hat from his head. Q's reaction as V saw it caused V to complain to the Independent Police Conduct Authority (IPCA). She alleged that Q placed her in a 'headlock/choker' hold, dragged her into the nightclub's hallway and yelled at her, then dragged her outside. Q denied that he placed V in a headlock or choker hold, and that he dragged her as she described. He said her behaviour was unruly and that he used an approved technique to restrain her and eject her from the nightclub.

[11] V's complaint was referred for an employment investigation. Because Q's alleged conduct towards V was possible serious misconduct and dismissal could result, the matter was further referred to a disciplinary hearing conducted by a person appointed from outside the Police.

[12] The resulting report concluded that Q used excessive force in his treatment of V. His conduct amounted to serious misconduct although at the lower end of the scale. After considering that conclusion, and other material including Q's submissions, the Commissioner's delegate dismissed Q for serious misconduct.

[13] Q's third personal grievance is that the dismissal was unjustified.

Orders prohibiting publication

[14] I confirm orders made under schedule 2 clause 10 of the Employment Relations Act 2000 prohibiting the publication of the name of the applicant and his wife, witnesses who appeared under summons, witnesses identified in this determination by a letter of the alphabet, and of the evidence and the pleadings except where that information is set out expressly in this determination.

The employer's disciplinary policy

[15] The applicable policy is detailed, and is set out in the Code of Conduct, Supervisor's Guide. It incorporates investigation and disciplinary phases, the application of which underpins the discussion in this determination. My summary of the associated procedures is appended to the determination.

A. The Warning

The applicable test of justification

[16] The test of the justification for the warning is contained in s 103A of the Employment Relations Act 2000 as it read before 1 April 2011. The test required that justification be determined on an objective basis by considering whether the

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

[17] The justification for the warning can therefore be approached by considering: how the decision was made, namely whether a fair and reasonable procedure was followed in making it; whether substantive findings about the conduct in question were reasonably available to the employer; and whether the disciplinary sanction imposed as a result was the action a fair and reasonable employer would have taken.

Was a fair and reasonable procedure followed

[18] Many of the criticisms of the employer's investigation were based on alleged breaches of the code of conduct procedures. I do not refer to some of them either because I do not accept on the facts that there was a breach; because the breach in question was minor; or because such breaches do not affect the outcome either individually or cumulatively.

1. Was the investigation phase fair and reasonable

[19] I turn first to the investigation phase in the code of conduct procedures. The professional practices manager, Brent Mikaera, conducted the investigation.

[20] Mr Mikaera's investigation began when he received a copy of T's complaint dated 3 May 2010 as well as fuller accounts of events in statements from the person who had chaired the meeting, then-Acting Detective Inspector David Long, and T.

[21] T complained of Q's plan to 'have a go' at him at the 28 April meeting, the removal of items from his office, and Q's behaviour during the meeting which he said had caused him distress. He said of that behaviour that: the items removed from his office had been removed with the intention of humiliating him; Q had openly doubted his word when he responded to a query; Q had said there were too many errors in T's performance, and a particular incident Q had described in support was wrong in fact; T was offended at Q's actions and concerned about Q's mental health; and the relationship between himself and Q had broken down irreparably.

[22] By letter dated 25 May 2010 Mr Mikaera invited Q to an investigation meeting, and provided him with related documentary information. The letter identified the allegations to be investigated as:

- Presenting at the 28 April meeting a bag containing T's property, being property removed from T's office without permission or reasonable excuse;
- Behaving in a manner that caused T unreasonable distress by that action, and by his conduct and language at the meeting; and
- Acting in an insubordinate manner towards T.

[23] Following exchanges with Q's then-solicitors there was no meeting. Instead Q provided his detailed written account of events, followed by submissions. DI Long provided a written response to Q's submissions.

[24] Mr Mikaera's report was dated 26 July 2010. Regarding the allegation in respect of T's property, the report noted Q's admission that he did not have permission to take the property and his explanation that the draft policy meant Q had an obligation to remove the items. Mr Mikaera believed alternative, and less public, approaches to addressing that concern were possible, and found that Q's actions were not reasonable or appropriate in the circumstances.

[25] According to the report overall, Q's conduct amounted to a breach of obligations in the code of conduct to: treat all people with dignity and respect and avoid behaviour that may cause unreasonable distress; and to act in a manner that is efficient, competent and loyal. Mr Mikaera's opinion was that:

> *[Q] has presented the items at the meeting in the manner he has so as to cause the most embarrassment for [T] and has not acted with the best interests of [the unit], [T], or Police. From this view point the allegations as stipulated are substantiated.*

[26] Mr Mikaera commented in a section headed 'investigatory findings' that insubordination was listed in the code of conduct as an example of behaviour that could amount to serious misconduct. He recommended that a finding of possible misconduct be made, and that the matter be referred to the disciplinary phase.

[27] The more substantial of the submissions concerning the investigation phase concerned whether:

- Mr Mikaera was suitably independent;
- The allegation of insubordination should have been included; and
- Attendees at the 28 April meeting should have been interviewed.

(a) Was Mr Mikaera suitably independent

[28] Mr Mikaera is not a sworn police officer and was not employed in or associated with the unit, rather he conducted the investigation as part of the general duties he was employed to perform. He had the necessary independence for such an investigation, and I reject the submission that he was not an independent investigator. He was a suitable person to conduct the investigation.

(b) Should the allegation of insubordination have been included

[29] The inclusion in the investigation of the allegation of insubordination was challenged in the Authority on the ground that T had not complained of insubordination.

[30] To the extent that the allegation was an attempted characterisation of the conduct T had complained of, in principle it was open to the employer to include it in the allegations to be investigated. However the scope of the allegation was not clear and I discuss that matter later in this determination.

(c) Should attendees at the 28 April meeting have been interviewed

[31] Mr Mikaera relied on the statements from Q, T and DI Long and did not interview other attendees at the 28 April meeting. He did so because: he considered any disciplinary outcome was likely to be at a low level, he was reluctant to cause further turmoil in the unit, and the allegation centred on the impact on T and the appropriateness of Q's conduct.

[32] There was no material disagreement of fact about Q's removal of the items from T's office and that the bag containing them was referred to at the meeting, that Q was planning to raise concerns about T at the meeting, and that Q had raised the concerns about T which T said he did. In that regard there was no need to conduct further interviews.

[33] Differing views were expressed about whether Q acted in an agitated or aggressive manner, or whether he was calm and courteous. Having observed the witnesses and read the material I regard this as a matter of impression. Any impression of Q's 'aggression' reflected his intense focus and tendency to be persistent and critical, rather than physical aggression or the use of threats or foul language.

[34] Several of the attendees were summoned to attend the Authority's investigation meeting. Overall that evidence provided further detail of, but otherwise added little to, the material in the statements already available to Mr Mikaera. Broadly speaking it was common ground that there were concerns about T in the unit, but differing opinions of how the concerns should have been raised as well as of the conduct of the meeting. All were aware that Q would raise the concerns at the meeting, but most were unwilling to say Q was speaking for them or denied that he was their spokesman. Most were aware in general terms that an invitation to speak freely was made at the meeting, but several understood the invitation concerned the draft policy. Several expressed discomfort at the turn the meeting took after the discussion on the draft policy, when Q turned to focus on the concerns about T and T became agitated.

[35] A fuller investigation, including interviews of other members of the unit, could have lent support to various matters already referred to by each of Q, T and DI Long. However I do not believe that any fuller investigation would have yielded additional information that was reasonably likely to affect the outcome.

[36] I do not find the failure to interview the attendees to be a significant flaw in the context of the process adopted. I reach this conclusion because of: the low level of seriousness with which the matter was being viewed in the context of a possible

disciplinary sanction; this was an investigatory and not a disciplinary phase; and the absence of a material dispute about what occurred at the 28 April meeting, as distinct from the subjective interpretation of those events.

2. Was the disciplinary phase fair and reasonable

[37] The District Commander at the time, Superintendent (at the time) David Cliff, accepted Mr Mikaera's recommendation regarding a finding of possible misconduct. He said in evidence that he did not consider the allegations to be so serious dismissal was a possibility, but considered they were too serious to be regarded as a possible performance matter.

[38] The matter progressed to the disciplinary phase on that basis.

[39] By letter dated 23 September 2010 Mr Mikaera asked Q's solicitors whether Q wished to attend a disciplinary meeting. Q's solicitors responded by letter dated 22 October 2010, advising of the view that a disciplinary meeting would have little or no effect on the outcome. For that reason no meeting was sought and '*the documents already filed addressing the issues arising from this investigation'* were relied on.

[40] By letter dated 26 October 2010 Superintendent Cliff advised his preliminary decision on the matter. According to the letter Superintendent Cliff found Q's responses indicated he did not accept the gravity of his conduct and the impact on his role as a member of the Police. The preliminary decision was that a first written warning would be issued. Q was invited to make submissions within 7 working days.

[41] Submissions were provided by letters dated 3 and 5 November 2010. They: repeated the explanation that the terms of the draft policy meant Q had reasonable excuse for removing T's items from the office; expressed concern about the failure to interview other attendees at the meeting, with particular reference to Q's demeanour in raising the issues as well as what actions caused distress to T; and expressed concern about the lack of particulars of the allegation of insubordination as well as repeating the explanation that 'no rank' would apply to the discussion at the meeting.

[42] Superintendent Cliff considered it unacceptable for a constable to take items from a supervisor's office without permission. Any concern about the presence of the

items could have been raised with DI Long or the person conducting the review of the unit. Superintendent Cliff also found unacceptable the way Q had raised his issues with T during the meeting. Rather than raising the issues in confidence, Q had made a derogatory and public attack on a supervisor. The explanation that the meeting was to be conducted on a 'no rank' basis was not accepted as the Police is an essentially rank-based organisation. Q's actions as they had been reported were insubordinate.

[43] For these reasons the warning was issued in the letter dated 6 December 2010.

[44] The more substantial of the submissions to the Authority concerning the disciplinary phase concerned whether:

- Flaws in the investigation phase made the decision to issue a warning unsafe; and
- The allegation of insubordination should have been included.

(a) Did flaws in the investigation make the decision to warn unsafe

[45] I have not accepted there was a failure to interview other attendees which amounted to unfairness to Q.

[46] Further to that, submissions made during the employer's investigation indicated Q was concerned that the statements of T and DI Long were tainted in that they represented the employer viewpoint. Q believed a fuller investigation would validate and vindicate the issues he had raised and the way he raised them.

[47] I accept there was an issue in the unit about how best to raise members' concerns about T, and this was relevant to the quality of Q's judgment in conducting himself as he did. The matter was not simply one of bad behaviour at a meeting, and for no reason. Mr Mikaera did not discuss that in the 'analysis' section of his report, but the supporting material was available and Superintendent Cliff was aware of the wider issues. As he said, he was concerned with the way in which Q had raised the issues on 28 April. For the reasons I have set out, he decided the explanation was unacceptable.

[48] Regarding the 'no rank' explanation, in his report Mr Mikaera did not discuss or make findings on whether and in what context a statement of that kind was made. Again, Superintendent Cliff was aware of the explanation and addressed it.

[49] I do not consider that the flaws in the investigation rendered the decision to issue a warning unsafe. Superintendent Cliff had reasonable grounds for forming the conclusions he did about Q's conduct.

(b) Should the allegation of insubordination have been included

[50] "Insubordinate' means 'disobedient or rebellious'.[1] In an employment context the notion of insubordinate conduct extends to an employee's use of hostile or abusive language towards a superior, or criticism of the employer.[2]

[51] To address an allegation such as insubordination, which incorporates an element of judgment about the quality of particular behaviour, it is necessary first to identify the behaviour allegedly amounting to insubordination and determine whether it occurred.

[52] Here there was enough in T's complaint and the additional statement he supplied to Mr Mikaera, not to mention in Q's own account, to characterise the alleged conduct as insubordination if it occurred. However there was a lack of clarity over precisely what behaviour was considered, or being investigated as, insubordinate. For example the allegation of insubordination as it appeared in the 25 May letter seemed to be an attempt to characterise the overall quality of Q's behaviour towards T during the meeting, except that, in his report, Mr Mikaera seemed to have linked the allegation only with the allegation regarding T's property.

[53] Q's solicitors sought clarification of what was meant by the allegation. Clarification should have been provided. Without such clarification Q was not able to address the allegation directly. Thus, while it was open to the employer to include the allegation of insubordination in the allegations to be addressed, the employer did not go on to address the matter with Q as it should have.

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[1] *The New Zealand Oxford Dictionary* Oxford University Press, 2005.
[2] Examples include: *Coffey v The Christchurch Press, a division of Fairfax New Zealand Limited* [2008] ERNZ 385 (dismissal justified); *Allen v C3 Limited* [2012] NZEmpC 124 (dismissal unjustified)

[54] Even so, the statement and submissions Q provided contained acknowledgements of the conduct in question and explanations of it. Although he was not in a position to go on to say why those matters did not amount to insubordination, the evidence suggests the explanation would have been the same. That is, the conduct was not insubordinate because its purpose was to raise genuinely-held concerns about T in the way Q considered was the most appropriate, and because discussion on a 'no rank' basis had been invited.

3. Was the outcome reached with an open mind

[55] Q argued that the code of conduct procedures were embarked on in order to ensure his removal from the unit in response to T's hurt feelings, and that the warning was issued because T had said he did not wish to work with Q.

[56] Some of the submissions which I have not detailed concerned how and why the procedures were invoked at all. I did not detail them because they involved minute scrutiny of the code of conduct procedures, and I consider it plain that the allegations amounted to conduct that was capable of being considered and investigated as possible misconduct.

[57] Beyond that, direct evidence in support of any plan to remove Q from the unit was said to take the form of a letter dated 16 September 2010. In the letter, the inspector of professional standards referred to an offer that: "*following mediation if [Q] did agree to transfer from [the unit] then the misconduct investigation would not proceed*." However that letter was a reply to a letter of 27 August 2010 from Q's then-solicitors. It was part of a wider discussion about the prospect of mediation, whether the matter should be treated as one of performance management or misconduct, and how Q could achieve a successful return to work.

[58] The solicitors had expressed in the letter their view of the flaws in the investigation process, and said even that embarking on a performance management process would be a waste of time. They said they had been over 'these issues' with Q and recommended mediation "*subject only to [the employer] confirming that performance and misconduct debate first be dropped."* The 16 September letter

responded to that sentence. The solicitors had gone on to suggest that the employer would be unlikely to be successful if the matter ever came before the Authority, and that Q's return to work could remain an issue regardless. They said *"its our recommendation that [the employer] waive any formal disciplinary processes and agrees to now focus on the reintegration pathway."*

[59] I do not accept an exchange of this kind amounts to evidence that the process was intended to ensure Q's removal from the unit, or for that matter that the alleged attempt to bargain about the misconduct investigation meant there was no real concern that Q had committed an act of misconduct. In its proper context the exchange was part of a legitimate attempt to resolve a genuine problem.

[60] I digress to say that this evidence means I do not accept a submission suggesting unfairness to Q because of an alleged failure to engage in a dispute resolution process.

[61] Returning to whether there was evidence of a plan to remove Q from the unit, Q's view appeared to be connected with the notices of restricted duties which had been served on him. Both notices contained prohibitions on entering the unit's premises. I do not accept that the notices had any purpose other than to remove Q from the work of the unit while the allegations about his conduct were being addressed. When issues of the kind raised by T's complaint occur the separation of the parties, and the provision to one of them of alternative duties elsewhere pending a resolution of the matter, is an acceptable practice.

[62] Overall I do not accept Q's submissions about the real purpose of embarking on the code of conduct procedure, or issuing the warning. The warning was concerned with, and addressed, Q's conduct at the 28 April meeting.

[63] The alleged flaws in the disciplinary and investigative process were relied on as evidence of a closed mind on the part of the individuals concerned. However I find that any flaws were nothing other than flaws, and there was no evidence, direct or indirect, of a closed mind on the part of Mr Mikaera or Superintendent Cliff.

[64] Similarly Q considered his conduct to be acceptable and justified. Any opinion to the contrary was, to him, indicative of a closed mind, a closing of ranks on the part of senior officers, and predetermination of the outcome. In those respects, unfortunately, Q's was the closed mind.

[65] I do not accept the employer had a closed mind or was pre-disposed to find against Q.

4. Was similar behaviour by others taken into account

[66] The code of conduct required the decision-maker, Superintendent Cliff, to consult at a national level on whether a matter would be referred for performance management, to the progressive disciplinary process, or to a disciplinary hearing. The requirement is intended to ensure consistency in the treatment of similar conduct.

[67] There is no written record of whether that was done. Although the obligation was the decision-maker's Mr Mikaera said in evidence that, as with all reports, his report was forwarded to the national employment relations team for audit and that the version sent to Q was the final version.

[68] It is at least clear that no similar behaviour was identified or discussed. In the circumstances, and with particular reference both to the low level nature of the concerns and the expected low level of any disciplinary sanction, I do not consider any unfairness to Q resulted.

5. Was there an unfair delay

[69] The timeframe was:

- 3 May - complaint received,
- 7 May - matter categorised as disciplinary,
- 25 May - Q invited to investigatory meeting on 2 June,
- June - meeting dates discussed in exchanges with Q's then-solicitors, with agreed date of 25 June later deferred at their request,

- 6 July - Q's solicitors provide submissions and advise no meeting is sought,
- 26 July - investigator's report completed,
- 6 August - Superintendent Cliff confirms behaviour as misconduct,
- 23 September - Q invited to attend a disciplinary meeting,
- 15 October – invitation to attend disciplinary meeting extended again, but declined,
- 26 October - letter advising of preliminary determination on sanction,
- 3 and 5 November - Q's solicitors provide submissions,
- 6 December - warning issued.

[70] There were particular reasons for the delays at various points. The first notable delay occurred in June and July, when Q was ill and the matter was conducted through exchanges of correspondence between Q's solicitors and the employer. The second notable delay occurred in August, September, and early October. By then the parties had attempted unsuccessfully to agree on mediation for the present problem and several other matters were currently under discussion between them. The third notable delay occurred between the provision in November of submissions on the outcome, and the issue of the warning in December. Superintendent Cliff explained this by saying other calls on his time included his involvement in the aftermath of the September earthquake in Christchurch, and his involvement in the aftermath of the Pike River disaster in November.

[71] The time taken to complete the procedure was not desirable, and was upsetting for Q. It is also unfortunate that differing factors at differing points combined to make the delay even longer than it might otherwise have been. However both parties had responsibility for parts of the delay, and overall the delay was adequately explained.

[72] Mr Goldstein submitted that the delay prejudiced Q. Unless that was a reference to Q's being obliged to use various forms of paid leave during that period, there was no evidence of prejudice. Moreover, Q was ill during some of that time in any event. If he had been medically fit to work, and willing to accept the restricted

duties of which he was notified, he would not have been obliged to use other paid leave entitlements.

[73] Mr Goldstein also submitted that the intention from the outset was to delay a resolution in order to ensure Q did not return to the unit. There was no evidence of that. I do not accept the delay was deliberate, and do not accept it was intended to effect Q's permanent departure from the unit.

6. Conclusion

[74] At the heart of this matter are simple questions of whether Q should have chosen the 28 April meeting as a forum for raising concerns about T, and of whether the way he raised the concerns was appropriate.

[75] Q has made an extensive and detailed challenge to the procedure the employer used in addressing those questions, and to the employer's motives in taking the approach it did. I accept that there were flaws in the procedure, but not that the employer had improper motives in embarking on it. The key elements of a fair procedure are that the allegations against an employee be put to the employee, that the employee be given an opportunity to answer them, and that the response be considered with an open mind. I find overall that this occurred.

Were the findings of fact fair and reasonable

1. Presentation of property at the meeting

[76] This allegation has three limbs:

- Was T's property removed from his office without permission;
- Did Q have reasonable cause to remove the property;
- Did Q 'present' the property at the meeting.

[77] Q accepted that he removed property of T's from an area in the unit's premises which T used as an office. He was on the premises, and was the last to leave, on 27 April. While checking the premises before leaving he noticed in T's office a sports

trophy which was not identified as a police trophy, but was engraved with the names of people known to be police officers. The names covered the period 1987 – 1994, and 2009. Q believed the trophy amounted to 'personal paraphernalia', the presence of which was prohibited under the draft policy. He decided to check the drawers in a desk T used, and found a phone list and a piece of paper with the Police letterhead.

[78] Regarding the second limb, Q relied on the draft policy to say he had a reasonable excuse for removing the items. He believed the papers he found, together with the trophy, breached the prohibition in the draft policy on leaving items which, if located, could compromise the unit's base or the identity of people using the base. In addition a further provision in the draft policy emphasised the importance of security and secrecy at the base. Any breach of policy in that respect, resulting from the action or inaction of an officer, would be dealt with as a performance management issue. The same would apply to a failure to report a breach. Accordingly Q believed a failure to remove the items would place him in breach of the policy himself.

[79] Q also relied on statements on the ability to speak freely which D was said to have made when discussing the policy on 28 April. In particular D said: *'there is no rank in this arena',* and emphasised that if a mistake had been made on a matter of security it was necessary to raise and address it promptly. Q believed that invited or authorised his conduct. In evidence in the Authority D agreed he made that comment, but said it concerned discussion about the draft policy. He also made the point that there was a 'line in the sand' to be drawn in respect of the extent of the freedom to speak, that a respectful approach was still required. In a hierarchy there were more appropriate ways of challenging decisions of senior officers.

[80] Q also noted that he had spoken to DI Long before the meeting, seeking an opportunity to use the time to have a 'catch-up' on issues affecting the unit. I do not accept any suggestion that this discussion authorised the approach Q took during that part of the meeting.

[81] Regarding the third limb, Q did not accept that he had 'presented' the property at the 28 April meeting. It was common ground that the property was brought to the meeting in a shopping bag, that the property was understood to be T's, and that Q drew attention to the fact that there were items in the bag which he considered

breached the draft policy. Q said he did no more than that while T and DI Long said at the time that the contents of the bag were discussed. I consider that key elements of the allegation were not disputed and that at most that a better word than 'presented' could have been chosen when formulating the allegation.

[82] Other alternatives to removing the items and raising the matter in the meeting as he did were put to Q in evidence, but he was reluctant to acknowledge these were preferable and expressed the view that nothing would be done about the matter if he took any of these alternatives. He had himself listed alternatives in his statement at the time. Accordingly there was no question of uncertainty about where and how to raise the concerns, rather a deliberate assessment of the options and a decision to take one of them.

[83] Superintendent Cliff was entitled to consider Q's explanation unacceptable.

[84] In addition, Superintendent Cliff did not accept that the 'no-rank' comment made a difference to the quality of Q's conduct. That conclusion was reasonably open to him.

[85] Overall the employer's conclusion in respect of this allegation was reasonably available to it.

2. Causing T distress by conduct and language

[86] T asserted in his 3 May statement that Q's actions in respect of the property taken from his office humiliated him. His information that Q had planned to 'have a go' at him was proved correct during the meeting, and T became increasingly upset as Q continued to raise the criticisms he did.

[87] The evidence in the Authority was to similar effect and I accept it. The employer's conclusion in respect of this allegation was reasonably available to it.

3. Insubordination towards T

[88] Mr Goldstein submitted that there was no evidence of insubordination on Q's part.

[89] I have accepted that the allegation was not framed with sufficient particularity during the investigation and disciplinary process, making it difficult for Q to respond directly to it.

[90] However I have also found that Q's attention was drawn to specific allegations, particularly his actions in respect of the property he removed. He explained them and the explanation was not accepted. The actions demonstrated significant disrespect for a superior officer and went beyond any acceptable method of raising concerns. The employer was entitled to consider the conduct insubordinate.

Was a warning a fair and reasonable outcome

[91] I conclude that, although there were flaws in the investigation, Q's conduct as advised to the investigator and decision-maker occurred, was not adequately explained, and was so clearly unacceptable that a fair and reasonable employer would have issued a warning in respect of it.

[92] For these reasons I find the warning was justified.

B. The refusal to return Q to his normal duties

The applicable test of justification

[93] The test of the justification for the refusal to return Q to his normal duties is contained in s 103A of the Act as it read before 1 April 2011.

The grievance

[94] This grievance concerned an alleged refusal to return Q to his normal duties after he had received the warning.

[95] The Authority has not been asked to address the justification for an original decision to stand him down, or for either of the two subsequent notices of restricted

duties as at the time they were served. It has been asked to address whether the employer was justified in continuing the restriction on carrying out normal duties from December 2010 and pending the completion of the investigation into Q's conduct at the nightclub.

[96] No issue has been taken under s 114 of the Act regarding the raising of this grievance.

Was the refusal to return Q to normal duties justified

1. The facts

[97] On 14 June 2010 Q was advised that, pending a resolution of the matters involving T, he was not to return to his duties at the unit. He was further advised that meaningful work was available at another Police Station.

[98] On 16 September 2010 Q was advised that an investigation into the incident on 9 May had commenced, and that it was not appropriate that he continue to perform current Police duties pending a resolution of the matter. He was further advised that meaningful work may be available at the Information Reporting Centre (IRC) at the Central Police Station. The work was chosen because it did not involve contact with members of the public. This was considered necessary given the nature of V's allegations.

[99] Q was given an opportunity to make submissions, but none were received. A notice of restricted duties dated 12 October 2010 was served on his solicitors on 15 October 2010. Further submissions were invited within 5 days of service, but otherwise the duties were to commence on 18 October 2010.

2. Conclusion

[100] Q says he was issued with the notices of restricted duties because of the matters involving T, and that once the warning had been issued the matter was resolved. He should then have been permitted to return to his normal duties in the unit.

[101] This view appears to be based on a reading of the 12 October notice in isolation, and in particular generalised references to the 'disciplinary process' not yet being concluded. The variation in October 2010 concerned the 9 May incident, not the matters involving T, and the references to the disciplinary process concerned the 9 May incident. There was no reason to withdraw the October notice on the issue of the warning in respect of the conduct towards T.

[102] As the investigation into the 9 May incident was ongoing, there was no unfairness in the decision to continue the restriction on carrying out normal duties in the unit.

C. The Dismissal

The applicable test of justification

[103] The test of the justification for the dismissal is contained in an amendment to s 103A of the Act which came into force on 1 April 2011. The test is 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 occurred. It requires a consideration of whether the employer:

(i) having regard to the resources available to it, sufficiently investigated the allegations against Q before dismissing him,
(ii) raised its concerns with Q before dismissing him,
(iii) gave Q a reasonable opportunity to respond to the concerns before dismissing him,
(iv) genuinely considered any explanation of Q's before dismissing him, and
(v) considered other relevant factors.

[104] In general justification can be approached by considering: how the decision was made, namely whether a fair and reasonable procedure was followed in making it; whether substantive findings about the conduct in question were reasonably

available to the employer; and whether the dismissal imposed as a result was the action a fair and reasonable employer could have taken.

Was a fair and reasonable procedure followed

[105] Again many of the criticisms of the employer's investigation were based on alleged breaches of the procedures in the code of conduct. Again I do not refer to some of them either because I do not accept on the facts that they occurred, because they were minor, or because they do not affect the outcome either individually or cumulatively.

1. Did the employer sufficiently investigate the allegations

[106] Mr Mikaera, again, was the investigator during the investigation phase of the code of conduct procedure.

[107] He advised Q by letter dated 1 October 2010 that an investigation meeting would be conducted, and sought Q's attendance at a meeting on 11 October. Q was given the details of V's complaint, and witness statements. He was advised that the allegations of misconduct concerned the use of excessive force on V as well as the failure to submit a Tactical Options Report (TOR) in respect of the incident. The latter allegation was made because Police policy required such a report except where the use of force was trifling, or was moderate and specified circumstances applied.

[108] Q declined to attend the meeting but provided a written statement, and made submissions on the outcome.

[109] In a report dated 3 February 2011 Mr Mikaera found the matter was potentially one of serious misconduct and referred it for a determination of whether a disciplinary hearing should proceed.

[110] A decision was made to proceed. By letter dated 17 February 2011 a senior Wellington-based employment law practitioner (the panel member) was appointed to conduct the hearing. He was to address allegations that Q had breached the Code of Conduct by using excessive force against V on 9 May 2010, and had breached policy by failing to submit a TOR on the force used.

[111] I do not refer to the latter allegation again because the panel member did not uphold it and it was not a ground of dismissal. In taking this approach I have not overlooked Q's challenge to the panel member's logic in finding the policy was not breached while finding at the same time that serious misconduct occurred. The question in the serious misconduct context was whether in the circumstances the force used was excessive, and did not depend on whether the force itself was moderate for the purposes of a TOR.

[112] The panel member was also to prepare and furnish a report making findings of fact in relation to: what conduct occurred; the seriousness of the conduct; and the circumstances in which it occurred. He reported in a document dated 16 August 2011.

[113] The report broke the use of force against V down into three stages:

- The initial restraint of V and the moving of her to a point near the corridor (which her complaint described as being placed in a headlock or choker hold and being dragged);
- Q's holding her at that point (which her complaint described as being slammed against a wall with pressure being placed on her upper chest); and
- The moving of V along the corridor and outside (which her complaint described as being dragged outside).

[114] Regarding the first stage, the panel member did not accept Q's explanation that V was attempting to escape from him and he acted as he did to prevent her from doing so. The panel member found that, when V took his hat, Q moved almost immediately to prevent her from moving away, retrieve his hat, and restrain her.

[115] As Q demonstrated the hold in the Authority and described in a statement to the panel member, he placed his right arm across the front of V's chest and neck area to her left shoulder. He held her right elbow with his left hand. He said he chose to hold V in that way so he could move her without risking her safety, while at the same

time retaining control of her. He also said he sought to remove her swiftly, in order to prevent further disruption.

[116] The panel member's report said Q held V's left elbow with his left hand. Q described the difference as evidence of lack of attention and predetermination on the part of the panel member, but I do not accept the difference should be viewed in that way. Otherwise no reason was given to indicate the difference was material.

[117] The panel member accepted that Q did not engage V's neck at the time, so there was no headlock or choker hold as alleged in the complaint. I consider it likely, however, that the difference in height between Q and V meant that as they moved through the nightclub premises Q's arm moved periodically and at times put pressure on V's neck – giving the appearance of what was loosely described as a headlock or choker hold. After considering the hold as he found it to be, and the context in which the hold was applied, the panel member considered there was no need to apply such a hold and that it was excessive.

[118] The panel member was unable to form a conclusion about whether V was dragged, or steered forwards as Q described. He gave Q the benefit of the doubt.

[119] Regarding the second stage, Q explained that, as V realised she was being escorted outside, she began to resist by slowing her pace. He said she became hysterical and irrational, apologising and protesting at being ejected from the club. He held her against the wall so he could adjust his grip. He did so by placing the heel or side of his hand against her neckline, with his forearm elevated. She attempted twice to move back into the night club, and was held back against the wall. The panel member accepted V was not slammed against the wall, but he did not accept it was necessary to hold her against the wall.

[120] The panel member made additional findings that, while Q was motivated to control V and eject her from the nightclub, he was influenced by frustration and anger. He sought to humiliate and intimidate V and teach her a lesson. These findings amounted to the panel member's view of a number of disparaging comments Q had made of V, as well as of pointed comments he had made about the appropriateness of his actions in response.

[121] Regarding the third stage, the panel member found the same hold as that applied at the first stage was applied again. Again he found that V had not resisted, and it was not necessary or reasonable to march her outside in that way. Q had argued that V continued to exhibit resistance by her slowing down, and that her hysterical behaviour and the risk posed by the reactions of her friends and other night clubbers meant the continued restraint was necessary.

[122] The report concluded that the treatment of V was harsh and unjustified and amounted to misconduct.

[123] In finding the misconduct to be serious misconduct, albeit at the lower end of the scale, the panel member took into account that Q reacted angrily and aggressively and found he used excessive force by restraining and removing V. Q did not consider less invasive forms of restraint. Even if some restraint was called for at the first stage, by the time Q reached the second stage he knew V did not present any risk. He had little regard for the impact on her of his treatment. The panel member also found there were no deficiencies in police training that might have contributed to the situation. Lastly, he found that Q's conduct breached certain obligations in the code of conduct regarding appropriate ways of behaving and of treating people, and the use of 'excessive force' is listed in the code of conduct as an example of serious misconduct.

[124] The more substantial of the submissions concerning the sufficiency of the employer's investigation concerned whether:

- Mr Mikaera's conduct of the investigation phase was fair and reasonable;
- The panel member was independent;
- The panel member should have interviewed witnesses in person instead of by telephone;
- The panel member should have taken into account the evidence of a police officer and one of two military police officers who were present;
- There was a breach of good faith in that redacted material was provided to the panel member;

- The panel member made findings that were outside the terms of reference; and
- The panel member should have taken into account that V had been arrested.

(a) Was Mr Mikaera's conduct of the investigation phase fair and reasonable

[125] Again I do not accept the submissions regarding Mr Mikaera's independence, and do not accept that his role in addressing T's complaint meant he should have disqualified himself from investigating V's complaint.

[126] Mr Goldstein also challenged Mr Mikaera's reliance on the written statements of witnesses instead of conducting interviews in person. Because this phase of the process was investigatory and not disciplinary, and the code of conduct refers to interviewing 'depending on the circumstances' and 'if appropriate', I do not accept Mr Mikaera was obliged to interview witnesses in person. I do not accept there was any unfairness in his proceeding on the basis of the written material.

[127] Mr Goldstein submitted further that Mr Mikaera really only determined whether there was a prima facie case for a claim of serious misconduct. I accept that Mr Mikaera's analysis amounted to little more than that, but his role was primarily that of fact finder. Mr Mikaera did at least gather information as the procedure required, note there was common ground over some of the broader aspects of the incident, and identify that on the information available there were conflicts in the evidence about the hold Q had used.

[128] Despite the limited supporting analysis, Mr Mikaera gathered enough material to make it reasonable to conclude there was a possibility of serious misconduct and to refer the matter for a consideration of whether to commence a disciplinary phase.

(b) Was the panel member independent

[129] I do not accept submissions that the panel member was an agent of the Commissioner (in any unfair sense), was not independent, and that his report was merely an extension of the employer's predetermined view.

[130] Police disciplinary procedures no longer include a full adversarial hearing before a retired district court judge.[3] Without that someone has to carry out the investigatory role, and if the person who carries out the role becomes the employer's agent solely by virtue of doing so that is unavoidable. Otherwise I find it inarguable that the panel member was independent. Thirdly, the submission that the report was merely an extension of the employer's predetermined view was based on Q's disagreement with the panel member's procedure and findings and I do not accept it.

(c) Should the panel member have interviewed witnesses in person

[131] Mr Goldstein submitted that the panel member should have interviewed witnesses in person, rather than by telephone. Several witnesses present at the time, as well as V herself, were interviewed by telephone, while Q and Mr Mikaera attended a meeting with the panel member. V could not be interviewed in person as she was residing in the USA.

[132] The failure to interview the witnesses in person was of particular concern to Q because findings about credibility were made.

[133] The most relevant of these findings concerned whether Q had followed V further into the night club before attempting to restrain her, or whether he had moved immediately to restrain her, and whether or how V demonstrated resistance. The panel member gave detailed consideration to the point, and to associated questions of credibility. That approach - together with the fact that extensive written material was available, including detailed information from Q - means I consider it unlikely that interviewing witnesses in person would have made a difference. I do not accept the failure to do so caused unfairness to Q.

(d) Should the panel member have taken into account the evidence of the police officer and the military police officer

[3] That is, the Police Disciplinary Tribunal established under s 12 of the Police Act 1958 no longer exists

[134] In a submission also made in the context of credibility, the panel member's findings were said to be flawed because they did not take into account statements of two other witnesses.

[135] One of the witnesses was the second police officer present. The panel member expressed reservations about that officer's account and did not give it weight. The officer gave evidence in the Authority, and I was concerned to see a police officer giving such unreliable evidence. I, too, give it no weight.

[136] The other witness with whom the submission is concerned was one of two military police officers present. Neither of the military police officers gave evidence in the Authority.

[137] On the information he provided to the panel member, the military police officer in question did not see the incident in its entirety. He was walking along the corridor on his way out the door when he looked back and saw V being held in a 'headlock'. He said V was struggling and hysterical and: '*was trying to get [Q] off her, as someone usually would when in that position. [The military police officer] also said she was yelling out although he did not hear what she was saying.'* He said that in a similar situation he would probably have used the same level of force, although going on to push V against the wall and put her in a second 'headlock' would have been excessive.

[138] The account was not mentioned in the panel member's report. Mr Goldstein submitted that the account made it clear V was resisting and trying to get away, and that the force Q used was appropriate.

[139] I do not agree the account was as clear that. The statement itself did not go that far. Moreover the second military police officer told the panel member that he saw the force as excessive because his training suggested that in the circumstances Q was facing, V should have been moved out by her arm. That information was consistent with the information available to the panel member about the content of Police training. The second military police officer heard V apologising and said she was crying, which was also consistent with other statements and which the officer in question had not heard. Finally, he did not believe V was trying to get away, and

acknowledged she may have struggled to a degree but stopped when she realised the extent of the restraint on her. His comments on the use of force differed from those of the officer in question, but neither was determinative as the conclusion on the matter was for the panel member.

[140] I do not accept that the panel member's failure to refer in the report to the account of the military police officer in question means he did not consider it, or that the failure calls into question his findings.

(e) Was there a breach of good faith in that redacted material was provided

[141] The material provided to the panel member, and initially to Q, included two documents containing redactions. It was submitted that this was a breach of the obligation under s 4 of the Act to make relevant information available, and that findings of credibility may have been affected.

[142] The first document was a letter to Mr Mikaera dated 24 August 2010, summarising V's complaint and making an initial assessment of whether the behaviour complained of raised performance, misconduct or criminal issues. The full version was not made available until the Authority's investigation meeting. The redacted parts included: V's name; the names of and references to the military officers present at the time; V's wish to have the matter brought to police attention but not that Q lose his job; and a passage which read:

> *3.8 Given that the complainant does not wish this matter to be considered criminal, and that no injuries were sustained, and that the complainant admits that she was intoxicated and acting in a disorderly manner, I believe the conduct falls below a criminal offence.'*

[143] The second document was a letter to Superintendent Cliff dated 21 September 2010, and contained a recommendation that a criminal prosecution of V was not appropriate. Q provided an unredacted copy to the panel member, but only the redacted version was available initially to the Authority although that was later corrected. The redacted parts again included: V's name; and the names of and references to the military officers. They also included a passage which read:

> *[V] stated that the action of taking the hat off the officer's head was one she regrets and certainly not one she would have chosen to do had she not been influenced by alcohol.*

[144] These passages are relevant because they include part of V's account of the incident, and were more proximate in time.

[145] I infer from material provided to the Authority that the documents were redacted originally in response to a request under the Official Information Act 1982, or in any event that they were redacted for privacy reasons. Redacted versions were provided to the panel member and the Authority. That was inappropriate. Either no consideration, or wrong consideration, was given to the purpose of the documents in the context of the roles of the panel member and the Authority. Unredacted documents should have been provided to the panel member - not to mention the Authority - and there were no reasonable grounds for providing either with documents redacted as these were.

[146] Mr Goldstein submitted that, if the panel member had been aware of V's comments in their entirety, it was likely he would have found Q had used moderate force to deal with V and would not have found against Q on the matter of credibility.

[147] It is going too far to say the panel member would have been likely to make such findings. The panel member knew V admitted to taking Q's hat, to being under the influence of alcohol, and that she had expressed contrition. Several descriptions of Q's and V's conduct were available to him - including Q's and V's own accounts - and he made such findings as he considered appropriate in respect of them.

(f) Did the panel member make findings which were outside his terms of reference

[148] Mr Goldstein submitted that findings to the effect that Q was angry and humiliated V were outside the terms of reference. Those findings were made on the basis of Q's own account, and there was a reasonable foundation for them. In turn Q's attitude or frame of mind was relevant to his decisions about the force to be used.

[149] I do not accept this matter was outside the terms of reference.

(g) Should the panel member have taken into account that V had been arrested

[150] Another aspect of the submissions concerned whether V had been arrested in the nightclub. It was said that, in the circumstances of an arrest, the force used would have been acceptable.

[151] Q gave an undated statement in which he said:

> *4. … I spun around to discover that a young girl was darting away with my hat into the crowded nightclub. I chased her about ten metres through the crowd and grabbed her shoulder to stop her and then I snatched my hat back from her right hand. When she realised that it was me who had stopped her, she tried to move off so I immediately restrained her. I did this by … [describes hold used] This is a technique I use for small drunk people so I can readily 'steer' them.*
>
> *5. It was imperative that I spoke to the offender outside, firstly because of the noise and secondly because of the crowd. I swiftly marched her towards the street, …*

[152] It seems to me there are difficulties for Q if that is his account of the arrest, and his oral evidence was no more specific on the point. However even if there was an arrest, and it was lawful, the question of whether the force used was excessive remains relevant. I do not accept the mere fact of an arrest would justify the level of force used.

2. Were concerns put to Q before action to dismiss was taken

[153] The panel member's report was provided to Superintendent Cliff for a recommendation as to sanction.

[154] Superintendent Cliff said in evidence he did not take into account the warning as he knew there was a dispute about it, and he noted positive comments about Q in a recent performance appraisal. In respect of Q's conduct towards V he was concerned that: the way in which Q had dealt with V was inappropriate and appeared to have been designed to humiliate her; excessive force had been used when V had not been resisting; Q had no regard for the impact of his actions on V; Q did not acknowledge he had done anything wrong; and Q was dismissive of training in defensive tactics which he had received. The last of these was a reference to material about then-current police training which the panel member had considered and discussed with Q, and of which Q had been critical.

[155] Superintendent Cliff concluded he could no longer have trust and confidence in Q. Q's behaviour was unprofessional and showed a lack of judgment, and Superintendent Cliff was worried by the lack of awareness of the impact of the behaviour. In referring to the period during which T's complaint was being addressed, he said Q had showed a consistent pattern of non-engagement and a lack of confidence in his employer. He commented that it had come to his attention that Q had covertly recorded certain conversations, and believed that action indicated a lack of trust and confidence in his employer. He recommended dismissal in a letter dated 18 August 2011.

[156] A letter dated 19 August 2011 referred the matter to the decision maker, Charles Busby, National Manager Employment Relations. Mr Busby was asked to take into account the panel member's report; Superintendent Cliff's recommendation; the remainder of the contents of the 19 August letter, which included a recent performance appraisal of Q's and a list of potentially similar cases; and a copy of Q's disciplinary history.

[157] On the basis of this material, which was also provided to Q, by letter dated 22 August 2011 Mr Busby advised of his preliminary decision that Q be dismissed. He invited submissions on the preliminary decision by 29 August 2011.

[158] Q had been ill. By agreement, he was to provide his submissions in writing by 30 September 2011. He did so in a document headed 'commentary', which contained 18 pages of detailed challenges to the panel member's procedure and findings. In a second document headed 'commentary penalty' he challenged the preliminary decision to dismiss and matters raised in the letters of 18 and 19 August, but it is not clear whether Mr Busby received this. The Police Association, as Q's representative at the time, also provided submissions dated 19 September 2011. These were less detailed, but also challenged the panel member's procedure and conclusions.

[159] Mr Busby considered this material. By further letter dated 5 October 2011 he advised of his decision that the dismissal should proceed. He then offered an opportunity to request an alternative outcome to dismissal. No further approach was made, so in a letter dated 14 October 2011 Mr Busby advised that Q was dismissed with immediate effect.

[160] There was no suggestion of failure to put to Q details of concerns about what happened on 9 May 2010. Submissions focussed instead on aspects of the matters set out in the letters of 18 and 19 August. Mr Goldstein submitted that these should have been put to Q during his employment if they were concerns, and Q should have been given an opportunity to respond.

[161] The matters were not considered disciplinary matters at the time and there was no obligation to raise them when they occurred. They were raised in the present investigation as part of the employer's obligation to take into account the employee's work history when making a decision. Q had an opportunity to respond to them in that context.

3. Did the employer give Q a reasonable opportunity to respond to its concerns

[162] Q had a reasonable opportunity to respond to the employer's concerns.

4. Did the employer genuinely consider Q's explanation

[163] The most significant submission under this heading concerned the extent to which Mr Busby made his decision based on the panel member's report. Q says Mr Busby made up his mind to dismiss based only on the panel member's report, and all Mr Busby required of Q was to show why he should not be dismissed. Mr Busby did not give any consideration to Q's explanation.

[164] The Employment Court has said of the approach to the broader question raised by this submission:

> *… to be justifiable procedurally, or for that matter substantively, the fair inquiry that must precede every dismissal for cause must be carried out by the decision-maker. Preliminary portions of that investigation can, and in many cases must, be delegated to others. But in the end the decision-maker must turn his mind not only to what those under him report and recommend, but also to what the employee has to say in reply.*[4]

[165] In that case the employer had relied on documentary material and had not spoken to the employee directly. The court found it was wrong of the employer to

[4] *Ioane v Waitakere City Council* [2003] 1 ERNZ 104, 112 at [25]

deprive the employee of his employment, sight unseen and without a glance at his personnel file.[5] In *Timu v Waitemata District Health Board* [6] the employee had met directly with the decision-maker. The employee had drawn attention to conflicts in statements about critical events which were provided during an investigation process. The court found the decision-maker gave the impression that he was interested only in hearing from the employee about penalty, and did not even have the employee's own first hand account of the events in question. Moreover, even an investigator who provided a report to the decision-maker had not spoken to some witnesses directly. This was not fair.

[166] Here, Q chose to present his position to Mr Busby in writing.

[167] Q's position on the events in question was primarily that he had used a moderate degree of force, and that the force used was both reasonable and necessary.

[168] Regarding the findings of fact, he identified the conflict about whether V sought to move off into the nightclub with his hat, and challenged the panel member's method of addressing the matter and his finding on the point. As for whether V was 'resisting arrest', as by then Q put it, Q again challenged the panel member's finding on the point. Regarding stages two and three of the incident, Q argued that other witnesses had not seen what happened, and that the panel member failed to give due consideration to Q's experience in dealing with such incidents. Overall he focussed in considerable detail on why he disagreed with the panel member's findings of credibility, and challenged the panel member's procedure.

[169] Regarding the reasonableness of the force used, Q said the panel member had failed to take sufficient account of: the emotional state of V, to whom he referred as 'the prisoner'; the volatility of the crowd; the need for swift removal before matters escalated; the inherent risk of anti-police sentiment; and the potential for disorder to be sparked quickly. He said he used the least amount of force for maximum benefit, and challenged the panel member's conclusion on the point.

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[5] At [27]
[6] [2007] ERNZ 419

[170] Q also challenged the findings about his frame of mind. He accepted that he was angry when the hat was taken, but not that he acted as he did because his anger got the better of him. He agreed that he had little or no regard for V's distress and embarrassment, and did not believe such regard was required.

[171] Mr Busby turned his mind to all of this, making notes on his copy of Q's commentary and preparing a 'mind-mapping' chart to assist in analysing the response. He was not persuaded that the panel member's investigation was flawed, and concluded that the panel member reached a conclusion that was open to him.

[172] Q's position on penalty was that the preliminary decision to dismiss was wrong, and even if the panel member's findings were correct the penalty of dismissal was not legitimate. His commentary provided a detailed challenge to the contents of the letters of 18 and 19 August. As for assurances made on his behalf that he would not act in such a way again, he expressed his view of the incident in a tone that illustrated the extent to which he had failed to appreciate that the quality of his judgment was in question.

[173] The extent of Mr Busby's notes in respect of the 18-page document, coupled with the absence of any mention of the document regarding penalties, suggests Mr Busby did not receive that document. Although not determinative I observe further that the document was not in the bundle provided to the Authority by the employer, although it was in the bundle provided by Q. However Mr Busby was at least aware of assurances that Q would not act as he had again, but was unable to reconcile these with Q's adamant view that he had done nothing wrong.

[174] Overall I am satisfied that, as decision-maker, Mr Busby addressed the matters he was obliged to address.

5. Other factors

(a) Were the delays unfair

[175] The timeframe was:

- 11 May 2010 – V's complaint received,
- 23 August 2010 – Mr Mikaera interviewed V,
- 1 October 2010 – Q advised of the complaint,
- 17 February 2011 – panel member appointed,
- 14 June 2011 – disciplinary hearing conducted,
- 16 August 2011 – panel member's report available,
- 19 and 30 September 2011 – Q's submissions provided,
- 14 October 2011 – decision to dismiss made.

[176] The delay between the receipt of the complaint, and the advice to Q of the complaint, was undesirable. Mr Mikaera explained it by saying: he sought to speak to V first, but he was unable to make contact with her and did not speak to her until 23 August 2010; and although he was then in a position to advise Q of the complaint, the earthquake of 4 September 2010 meant he was required to attend to other duties.

[177] I observe, without intending criticism of either party, that during this period the parties were engaging in numerous and lengthy exchanges concerning T's complaint, Q's state of health and Q's wish to return to full duties. As for V's complaint, other preliminary activities were being undertaken, and the matter was being considered by the IPCA. In other words, the delay does not mean the matter was being ignored.

[178] Aside from its length, the particular significance of the delay lies in Q's submission that he was prejudiced as he was unable to obtain any CCTV footage of the incident. He believed he might have been able to obtain such footage had he been made aware of the complaint earlier. He believed it would show that V had attempted to evade him by moving away into the nightclub, the nature of the hold he imposed, and the nature of her resistance. He said he had enquired about where the cameras were positioned, and as a result was confident the incident would have been recorded. However, despite his assertions, he cannot possibly know that would be the case or what the recording (as a recording) would show.

[179] A prompt attempt to secure relevant footage was desirable. The information available to me suggests that: V said in a statement that she sought to obtain it herself when she made her complaint, but was told it was unavailable; and when it was

sought well over a month later for the purposes of the IPCA investigation, the Police were told the footage was kept only for three weeks. I accept that, if Q had been advised promptly of the complaint, he would have taken steps to obtain the footage himself.

[180] There is a limited window of opportunity during which CCTV footage can be obtained. Once that window has closed any further delay in a matter becomes irrelevant as far as the footage is concerned. There was no explanation for the early period of delay here and I accept in principle Q was prejudiced in that he was deprived of an opportunity to obtain and rely on the footage.

[181] Beyond that I cannot say precisely when the footage became unavailable and what, if anything, the footage would have showed. I cannot determine whether there was any prejudice to Q beyond the loss of opportunity to obtain the footage. If I give him the benefit of the doubt then the principal conflict of fact - as opposed to differences of opinion and impression - concerned V's actions when she first took the hat. Q says she moved 10 meters away from him, into the club, and carrying the hat. The footage might have shown that.

[182] I also accept the delay in the conduct of the matter before the panel member was undesirable. The panel member recorded in correspondence that he accepted responsibility for some of the delay in convening the disciplinary hearing, and otherwise the delays were explained by a combination of difficulties in arranging to speak to witnesses and pressures of other work.

[183] I accept that to a person in Q's position such explanations are weak. However, and again without intending any criticism, addressing a matter containing the amount of detail and number of issues raised here is time-consuming. Unfortunately delays occur when other matters deserving of priority must also be attended to.

[184] More importantly as far as the subsequent period of delay is concerned, I do not accept that Q was prejudiced. I recognise that in his report the panel member, for example, commented on the effect of the passage of time on witnesses' memories, but some relatively contemporaneous written accounts were available and Q's own

memory does not appear to have suffered. Further, the panel member gave Q the benefit of the doubt as a result.

(b) Was there disparity of treatment

[185] The applicable legal test is set out in *Chief Executive Officer Department of Inland Revenue v Buchanan (No 2)*[7]. It poses three questions, namely,

- Is there disparity of treatment?
- If so, is there an adequate explanation?
- If not, is the dismissal justified notwithstanding the disparity?

[186] Further to the third question, even without an explanation the mere existence of disparity does not necessarily render a dismissal unjustified. All of the circumstances must be taken into account.[8]

[187] The employer turned its mind to the need for consistency in that the material considered when the decision was made included a list of officers accused of using excessive force or force, together with the outcomes. None of the officers was dismissed, but two accused of using excessive force had resigned, and one accused of assault was warned and demoted. Procedures in the other two allegations of use of excessive force had not been completed.

[188] In the Authority the allegation of disparity of treatment centred on events involving one officer accused of using excessive force, W. The matter was dealt with under earlier legislation applying to police disciplinary matters, and may not have been included in the list. While off duty W had observed a boy engaging in activities W suspected amounted to a criminal offence. W interrupted the activities and used his knee to hold the boy face down on the ground, with his arm across his back, intending to restrain him until a Police vehicle arrived. The boy's mother complained.

[189] An investigator found: W had reasonable grounds for believing the boy was committing a criminal offence; the boy's actions indicated he would not stay where he

[7] [2005] ERNZ 767 (CA)
[8] *Samu v Air New Zealand Limited* [1995] ERNZ 636

was without the use of force; and the force used was in line with Staff Safety Tactical Training and was not excessive. Disciplinary action short of dismissal was taken against W, but on another ground not applicable in Q's circumstances.

[190] Since there was a finding of no excessive force, and it is not for the Authority to make any finding of its own on the force used in that incident, I do not consider the circumstances comparable.

[191] Accordingly I find there was no disparity of treatment.

Was the finding that misconduct occurred fair and reasonable

[192] Since the panel member accepted Q's description of the force he had used on V, the central question was whether the force was excessive.

[193] V was a small young woman who had become intoxicated while out nightclubbing with her friends. She was not otherwise making trouble, but as a prank she removed Q's police hat from his head. The Authority was told such pranks are not uncommon, and that tolerance is the best approach. However Q took the matter seriously, and sought to speak to V about it outside the club.

[194] There was a conflict in the evidence about whether V attempted to run away from Q after she had taken his hat, requiring him to go after her to restrain her, or whether she took no more than a step or two before she was stopped. Q alleged the former, in support of his view of the need for restraint. The panel member found the latter more likely, and he was entitled to make that finding. For my part I have given Q the benefit of the doubt, but cannot substitute my findings for those of the panel member if he had reasonable grounds on which to base his. In any event the overall nature of Q's conduct towards V means I do not believe the difference is significant.

[195] While Mr Busby was obliged to take into account that Q disputed the finding, nothing in the statements suggested he should re-hear the conflicting evidence and make his own decision on credibility.

[196] The rest of the evidence about V's attempt to resist concerned her increasing state of upset as she was being led outside. Q relied on her slowing her pace and 'hysterical' behaviour. Her 'hysterical' behaviour concerned her obvious and increasing distress, her attempt to apologise and attempts to shake off Q's hold on her. Much of the evidence of that was contained in Q's own accounts and there was no need for Mr Busby to look further into the panel member's findings on the point.

[197] The finding that the force was excessive was one a fair and reasonable employer could reach.

Could a fair and reasonable employer decide to dismiss summarily

[198] There were flaws in the procedure used in making the decision, but I do not believe they caused unfairness to Q such that the justification for the dismissal is vitiated.

[199] On the evidence available to the employer, even if at the time of the incident V was an intoxicated young woman, Q's attitude to her was disparaging and belittling. She and her friends were not causing trouble, beyond embarking on their prank. There was no evidence that Q spoke to her when he first stopped her in the nightclub, and he should have acknowledged in a more neutral way than he did that his stopping her and placing her in a hold as he did was a shock to her. He considered the hold he used to be necessary and appropriate, when it is at best doubtful that the hold he used was the minimum restraint necessary in the circumstances. He believed it was necessary to show anger in order to control V, but that was a poor exercise of judgment. He regarded V's reaction to being put in a hold and walked outside as resistance to be countered, but again that was a poor exercise of judgment. He did not acknowledge that she was apologising. He was unable to see that his actions appeared heavy handed and was unnecessarily determined to view V as someone who would seek to flee if he applied a lesser restraint. He was also unable to see that the greatest risk of further disruption as a result of the incident lay in the perception of his heavy handed treatment of V, rather than mere anti-Police sentiment.

[200] Although put in a different way the employer's findings about Q's conduct were to similar effect, and I have found the conclusion that the force was excessive was one a fair and reasonable employer could reach.

[201] For these reasons I conclude that a fair and reasonable employer could decide to dismiss summarily. The dismissal was justified.

D. Costs

[202] Costs are reserved.

[203] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority

APPENDIX

The Police Disciplinary Code of Conduct

In summary, steps in the procedure as it relates to Q's circumstances are:

- When a matter arises and the officer's supervisor finds it to be more than minor, the supervisor makes an initial assessment of whether it is a performance matter, whether it concerns misconduct or serious misconduct, and whether there is a possible criminal element;
- The matter is referred to the employee performance manager for categorisation either as a matter requiring possible criminal proceedings or an employment investigation, then reported to the District Commander who makes a decision on the categorisation;
- If a misconduct issue requiring an employment investigation is identified, the officer is notified;
- Suspension may be appropriate during the investigation process, subject to other terms of employment;
- The investigation process includes,
    - providing the officer with a letter requesting attendance at an investigation meeting, informing the officer of the allegations against the officer, including all known details of the allegations, providing details of the process to be followed, and describing the potential impact on the officer's employment,
    - conducting an investigation meeting, during which the employee is given an opportunity to comment on the allegations and provide further information including the names of others who should be interviewed,
    - if appropriate interviewing other people who may have relevant information, and providing the officer with any information obtained as well as an opportunity to comment on it,
    - preparing an investigator's report, which,
      . contains an analysis of the findings and a recommendation,
      . is copied to the officer, the national employment relations team and the decision-maker,
      . is the subject of consultation between the decision-maker and the

national employment relations team in order to ensure national consistency in approach, before the decision-maker decides whether to refer the matter to the progressive disciplinary process,

- advising the officer in writing of the outcome;

- The progressive disciplinary process includes,
  - providing the officer with a letter requesting attendance at a disciplinary meeting, and containing information of the kind also required in the investigation process,
  - conducting a disciplinary meeting in a similar manner to that required in the investigation process,
  - the decision-maker making a preliminary decision, advising the officer of the preliminary decision, and giving the employee the opportunity to make submissions in person or in writing in relation to the decision and the appropriateness of any sanctions;
- When a finding of misconduct is made, a first, second or final warning may be imposed;
- If the possibility of serious misconduct arises, or dismissal is otherwise considered a possibility, the matter is referred to an Assistant Commissioner or Deputy Commissioner to determine whether a disciplinary hearing is to proceed;
- Before that determination is made the matter is referred to the national employment relations team in order to ensure national consistency in approach;
- A disciplinary hearing is conducted,
  - by a person appointed to conduct the hearing, to report any findings to the Commissioner, and to make a recommendation as to the level of misconduct,
  - according to an inquiry procedure determined by the appointed person,
  - taking account of the policy contained in the cea.
- On receipt of the report, the Commissioner or a delegate makes a preliminary determination of the penalty to be imposed, notifies the officer of the preliminary determination and offers an opportunity to comment;
- If the determination is that the officer be dismissed, the officer is invited to suggest alternatives to dismissal; and
- A final decision is made.