

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 147
3005373

BETWEEN

MELISSA JEAN OPAI
Applicant

AND

THE COMMISSIONER OF
POLICE
Respondent

Member of Authority: Rachel Larmer

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

Investigation Meeting: 14-17 October 2019 at Auckland

Submissions and Further Information Received: 23 October 2019 from the Applicant
7 November 2019 from Respondent
13 November 2019 from the Respondent
26 November 2019 from the Applicant
29 November 2019 from the Respondent
12 December 2019 from the Applicant

Date of Determination: 9 April 2020

DETERMINATION OF THE AUTHORITY

Police ranks and titles used

[1] The disadvantage grievances in issue in this matter occurred in 2014 and 2015. Since then many of the Police witnesses have either retired, resigned or have been promoted. That is reflected by the Authority's use of different titles in this determination for some of the Police witnesses who have been named.

Employment Relationship Problem

[2] Ms Opai started work with the Police in August 2005. She has claimed the Police unjustifiably disadvantaged her in her employment as a result of:

- (a) The disestablishment of her Watchhouse Officer (WO) role in December 2014;
- (b) Her supervisor raising poor performance concerns with her during a 3 March 2015 meeting;
- (c) The way her 2014/2015 performance appraisal was (mis)handled by Police.

[3] Alternatively, Ms Opai claimed that even if some or all of these three unjustified disadvantage grievances did not in themselves succeed they nevertheless, on a cumulative basis, together had unjustifiably disadvantaged her in her employment.

[4] Police denied any disadvantage occurred. Alternatively, Police said that even if Ms Opai had been disadvantaged, then that was justified in all the circumstances. In particular, Police said that:

- (a) The 2014/2015 restructure of the Public Counter that resulted in the disestablishment of Ms Opai's position was substantively justified and conducted in a procedurally fair manner;
- (b) Ms Opai's supervisor was justified in discussing performance concerns with Ms Opai on 3 March 2015 in an informal manner, and she was not disadvantaged because no formal performance improvement process was ever started;
- (c) Ms Opai's 2014/2015 performance appraisal did not disadvantage her and Police's actions regarding it were justified.

Relevant law

Disadvantage grievances

[5] Ms Opai's claims are brought under s 103(1)(b) of the Employment Relations Act 2000 (the Act). That section allows an employee to pursue a personal grievance claim against their employer if the employee's employment, or one or more of their conditions of employment, are affected to their disadvantage by unjustifiable action by the employer.

Employment Court cases

[6] The Employment Court decision in *Johnson v Chief of the New Zealand Defence Force* helpfully summarised the legal framework that applied to unjustified disadvantage grievances.¹ There is no need for the disadvantage to have caused financial or material loss.²

[7] A “*condition*” of employment was not limited to a contractual term but included the total environment of the job and how the employment operated in practice.³ A disadvantage grievance is a wider notion than merely a breach of contract.⁴

Onus of proof

[8] Ms Opai bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. That onus then shifts to Police to justify its actions, and how it acted, regarding each of Ms Opai’s alleged disadvantage grievances individually but also regarding the cumulative effect of each of the three concerns she has identified.

Justification test

[9] Justification is to be objectively assessed in accordance with the justification test in s 103A(2) of the Employment Relations Act (the Act).

[10] This requires the Authority to determine whether Police’s actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time each alleged unjustified disadvantage action occurred.⁵

[11] The justification test is an objective test, so the Authority is not permitted to substitute its own decision making for that of the employer’s. The focus must remain on what the Police did and/or did not and their reasons for that.

Collective agreement

¹ [2019] NZEmpC 192

² *Alliance Freezing Company (Southland) v New Zealand Engineering Workers etc Union (CA)* [1990] 1 NZLR 533

³ *NZ Store Workers etc IUOW v South Pacific Tyres (NZ) Limited* [1990] 3 NZLR 452 (LC)

⁴ *ANZ National Bank Limited v Doidge* [2005] ERNZ 518

⁵ Section 103A(2) of the Act.

[12] Ms Opai was a member of the New Zealand Police Association union, so she was covered by the New Zealand Police Collective Agreement dated 1 July 2012 to 30 June 2015 (the CA).

Counties Manukau Public Counter

[13] Ms Opai commenced employment with the Police in August 2005, initially working as a Watchhouse Assistant (WA) and then from 2009 as a Watchhouse Officer (WO). The WO position was a supervisory role over the WAs who worked on the Public Counter.

[14] WAs worked a 24/7 roster comprising of early, late and night shifts. Up until February 2014 WAs were allocated to a particular section within the Public Counter. Each Public Counter section was headed by one of five WOs (Ms Opai was one), who then had responsibility for supervising the WAs who were assigned to work in the particular 'section' each WO headed.

[15] Although there were five WO roles, in practice up to three of the WO positions were vacant at a time. Staff absences together with a high volume of workflow put pressure on Public Counter service delivery.

[16] Up until February 2014 Ms Opai worked a 24/7 roster and was responsible for supervising individual WAs who had been assigned to her 'section' of the Public Counter.

[17] From February 2014 WOs (including Ms Opai) and Police agreed that WOs would no longer work night shifts and instead of supervising the individual WAs who worked in each WOs' 'section', the WOs would supervise any of the WAs who were working on the same shift that the WO was working.

[18] This agreed variation to the WO role was initiated by Ms Opai's then supervisor, Senior Sergeant Culpan, as part of a review he had conducted in 2013. This change suited Ms Opai's personal circumstances at that time, so she was happy not to be required to work night shifts.

Public Counter

[19] The term “*Watchhouse*” is outdated. Police moved away from using that term by replacing it with “*Public Counter*”.

[20] The WO position description - shift Band D, and the WA Supervisor non-shift work Band C, position descriptions both became obsolete in November 2012. These WO and WA position descriptions have therefore been marked in the system as “*not to be used*” since 19 November 2012.

[21] The ‘Watchhouse’ staff managed the Public Counter, which was open 24/7. The WO and WA roles required face-to-face interactions with the public, in addition to a range of administrative functions.

[22] At all material times Ms Opai was based at the Counties Manukau District Headquarters in Manukau (CMDHQ).

File Management Centre

[23] In 2009 the File Management Centre (FMC) was created as a separate work group, that worked in close proximity (within 25 metres) with the staff assigned to work on the Public Counter.

[24] The FMC managed telephone and email interactions with the public, as well as a range of administrative functions.

Similarities between Public Counter and FMC duties

[25] While the Public Counter and FMC workgroups were separate, their functions were similar, the key difference being that the Public Counter staff dealt with the public face-to-face, whereas the FMC staff did so by telephone and email.

[26] The Public Counter and FMC both dealt with victims of crime, members of the public (who could be angry and upset at times), and offenders. They also both had data entry and file management responsibilities (entering information into the Police database known as the NIA), and both workgroups were required to manage the expectations of the groups they were responsible for dealing with.

[27] In 2010 FMC and Public Counter staff began to provide cross-cover to manage work flow demands in those sections. In 2011 they began to ‘role swap’ for career development. The

FMC staff were also expected to help out at the Public Counter on early and late shifts and the Public Counter staff on night shifts were expected to help the FMC staff with data entry.

[28] From February 2014 the FMC supervised the WAs who worked the night shift on the Public Counter.

[29] In practice, the FMC was overloaded with work and the Public Counter staff were often underutilised. Staff absences among those working on the Public Counter also caused considerable pressure for the Public Counter staff who were working, meaning FMC staff were required to help out at the Public Counter from time to time in addition to doing their own workload.

File Management Support Officer (FMSO) role

[30] A File Management Support Officer (FMSO) position description was created in April 2012 and graded Band C. This was updated in October 2014 to include providing cover on the Public Counter.

[31] FMSOs were (and continue to be) managed by FMC Coordinators (FMCCs), and they both work a 24/7 roster.

FMC reporting lines and personnel

[32] FMSOs reported to FMC Coordinators, who reported to the FMC Supervisor (a Sergeant-level position), who reported to the FMC Manager (a Senior Sergeant-level position), who reported to the Case Management Inspector.

[33] Senior Sergeant Phillips held the FMC Manager role up to December 2014. Senior Sergeant Tierney held the FMC Manager role after December 2014.

[34] Senior Sergeant (now Inspector) Brand was a FMC Manager from August 2008 to February 2013. She then became the Case Management Inspector from June 2014 to February 2015. From June 2014 until December 2014 she was an Acting Inspector, then she became an Inspector in 2015.

[35] Inspector Brand's previous roles are referred to in order to show that she had a very good understanding of how the Public Counter and FMC operated in practice.

Customer Services Manager (CSM) role

[36] In early 2014 the Counties Manukau District Leadership Team discussed the possibility of creating a Customer Services Manager (CSM) position, that type of role had proven to have worked well in the Auckland District.

[37] In August 2014 Superintendent Tims asked Acting Inspector Brand to develop a CSM role in Counties Manukau District, with the aim of ensuring that case management services were supporting frontline Police as effectively and efficiently as possible.

[38] A new CMS role - Band I - was created as part of the new FMC structure after the December 2014 restructuring proposal was implemented by Police.

Officer in Charge of Station role (O/C Station)

[39] The WO roles were supervised by the Officer in Charge of the Station (O/C Station), which was a uniformed Senior Sergeant role.

[40] Ms Opai was supervised by a number of different Senior Sergeants, as they were seconded in and out of the O/C Station role on a regular basis.

[41] Senior Sergeant Traill as the O/C Station supervised WOs until he was replaced by Senior Sergeant Culpan. Senior Sergeant Traill returned to the O/C Station role in February 2014 and was then later replaced by Senior Sergeant Mullins, who was seconded into the O/C Station role from August 2014 to February 2015.

[42] Senior Sergeant Mullin is no longer employed by Police, and it was evident that he had some acrimony towards the Police, particularly towards Inspector Brand. He was summonsed to appear at the investigation meeting and attended reluctantly.

[43] Senior Sergeant Mullin was central to Ms Opai's claims. He was Ms Opai's supervisor from August 2014 to February 2015. He was also on the management leadership team that was involved in the 2014 restructuring proposal. He was the supervisor who met with Ms Opai on 3 March 2015, and he drafted the disputed 2014/2015 performance appraisal.

[44] Senior Sergeant Mullin considered that he had always acted appropriately regarding his various actions that had resulted in Ms Opai's disadvantage grievances.

[45] The O/C Station supervisory role was disestablished, along with the WO and WA roles, when the Public Counter and FMC workgroups were merged as a result of the December 2014 restructure.

[46] The December 2014 restructure resulted in WAs and WOs being reassigned into File Management Support Officer (FMSO) roles. The FMSO roles were the same positions that had already existed in FMC workgroup prior to the 2014 restructure.

Other Police management positions in 2014

[47] At the time of the restructuring proposal, Assistant Commissioner Boreham was in charge of the Upper North Island. Superintendent Tims was the District Commander of Counties Manukau Policing District. Inspector Brand was the Acting Case Management Inspector from June 2014 to February 2015.

History of issues Ms Opai had raised with the Police

[48] During 2012 and 2013 Ms Opai raised a number of different concerns and formal complaints with Police involving five of her Public Counter colleagues.

[49] On 5 November 2013 Ms Opai was the subject of a complaint by one of her colleagues. This complaint has been referred to by the parties as “*the 258 report*”. Police decided to address the 258 report informally by setting expectations for the entire Public Counter workgroup.

[50] Ms Opai did not accept that informal outcome so she raised unsuccessful disadvantage grievances relating to the 258 report. These 258 report related issues were investigated by the Authority in 2018 and Ms Opai’s claims against Police did not succeed.⁶

[51] Senior Sergeant Culpan had made comments in Ms Opai’s 2012/2013 performance appraisal that she interpreted as unfair criticisms of her, that she believed were made because she had made formal complaints about some of her work colleagues. Ms Opai objected to these comments and although one part of the initial comment (part of her overall complaint) was amended to remove words she had objected to, the theme of the comment remained in the appraisal.

⁶ *Opai v Commissioner of Police* [2018] NZERA 379.

[52] However, Ms Opai still strongly disagreed with Senior Sergeant Culpan's revised (amended) comment, so she advised Police she would not be signing the appraisal because she disagreed with it.

[53] On 23 October 2013 Ms Opai raised an 'Employment Relationship Problem' (an ERP) with Police regarding her 2012/2013 performance appraisal.

[54] On 29 October 2014 Ms Opai raised a personal grievance alleging misconduct by Inspector Brand (the Brand grievance).⁷ Ms Opai claimed that created a conflict of interest in terms of Inspector Brand's involvement in the 2014 restructuring.

[55] Ms Opai's various ERPs and personal grievances were unresolved when her WO position was disestablished in December 2014.

[56] Ms Opai also filed a defamation claim in the District Court in April 2014. The defamation action against Senior Sergeant Culpan and Police was transferred to the High Court on 30 March 2015. Ms Opai's defamation claim did not succeed.⁸

[57] These matters are set out to demonstrate there had been a lengthy history of issues involving these parties before the current disadvantage grievances arose.

2013 changes to WO position

[58] In 2013 the Public Counter and FMC were restructured by agreement. WOs confirmed their agreement with the proposed changes in a 22 October 2013 meeting and the changes took effect in February 2014.

[59] When the 2013 changes were agreed to, the Public Counter had two vacant WO roles and one WO was working elsewhere, leaving only two out of the five WOs (one of which was Ms Opai) available to work the 24/7 Public Counter shifts.

[60] The 2013 changes, implemented in February 2014, resulted in:

- (a) The WOs ceasing to work night shifts, and

⁷ The Brand grievance is, by agreement, outside the scope of this current Authority investigation.

⁸ *Opai v Culpan and the Attorney-General of New Zealand* [2017] NZHC 1036.

- (b) The FMC Coordinators becoming responsible for supervising the Public Counter and WAs' night shifts, that ran from 22:00 to 07:00 hours on week days, and from 19:00 to 09:00 hours on weekends.

[61] This agreed change meant that the two remaining WOs (one of whom was Ms Opai) stopped working a 24/7 roster and instead worked alternating rostered early and late shifts.

[62] As a result of the 2013 changes, the WOs' and the WAs' shifts no longer aligned, meaning WOs no longer had a consistent 'section' of particular individual WAs working with them. WOs therefore then supervised any of the WAs who were working the same shift as the WOs.

[63] That change resulted in the two remaining WOs having the number of WAs they supervised increase from 2 to 3.3.

Senior Sergeant Culpan's briefing paper

[64] Senior Sergeant Culpan drafted a briefing paper dated 1 November 2013 that identified friction and dysfunction between the different WOs' sections in the Public Counter workgroup (the briefing paper). He set out three options to 'free up' two supervisor positions to use elsewhere, and to positively manage the culture by making changes to how the Public Counter operated. He also recorded in the briefing paper that "*the two remaining officers can be performance managed or exited.*"

[65] When Senior Sergeant Culpan left the O/C Station role, as part of the handover process, he left a copy of his briefing paper for Senior Sergeant Traill who had returned to the role.

[66] During a staff training day held in March 2014 Senior Sergeant Traill handed out a copy of the briefing paper to staff (including Ms Opai). This was a shock to those who saw it because none of them had been aware of the briefing paper until Senior Sergeant Traill handed it out, apparently without first reading it himself.

[67] Ms Opai was very upset about the briefing paper. She believed that Senior Sergeant Culpan's adverse comment about the "*remaining officers*" related to her and the one other remaining WO.

[68] That belief hardened Ms Opai's pre-existing view that she was being treated unfairly by Police. It became a lens through which Ms Opai has viewed all subsequent Police actions

and interactions. This in turn has had a toxic effect on the parties' relationship, as reflected by the extensive considerable time and resources the parties have expended on a variety of employment relationship problems.

[69] An example of how Senior Sergeant Culpan's comment about the "*remaining officers*" has fundamentally coloured Ms Opai's view of Police, is that she viewed the 2014 restructure was a sham, created by Police solely to personally target and exit her from her employment. Ms Opai has held tightly to that view, despite all of the compelling evidence that has been produced to the contrary.

[70] The Police did not intend for anyone to leave their employment as a result of the restructure, because there were positions in the new structure for everyone who wanted one. The restructuring proposal was approved by the Assistant Commissioner specifically on the basis that it did not involve reducing headcount but instead proposed deploying personnel in a more efficient and effective manner.

What part did the Culpan briefing paper play in the 2014 restructure?

[71] Police said it did not rely on Senior Sergeant Culpan's briefing paper. Deputy Commissioner Tims (the decision maker) and Inspector Brand (who led the management restructuring team) both told the Authority that they had not seen the briefing paper and that it played no part in the 2014 restructuring process.

[72] The Authority accepted their evidence about that.

Management comment that Public Counter workgroup was "dysfunctional"

[73] Ms Opai has been particularly upset by a comment she discovered had been made by Inspector Brady (who had attempted to resolve some of Ms Opai's complaints about other staff) in a memorandum he had sent Professional Standards office on 12 February 2014. The comment he made was that "*it is clear this [meaning the Public Counter] is a dysfunctional workgroup.*"

[74] Ms Opai disputed the accuracy of that comment. She also believed that Police were not permitted to make such a comment without first putting it to her to respond to, in her capacity as one of the two WOs who supervised the WAs in that workgroup.

[75] The Authority has seen and heard more than enough evidence that objectively established that the Public Counter could fairly and reasonably be described as dysfunctional.

[76] Police management were not required to put its view that the Public Counter workgroup was dysfunctional to Ms Opai to respond to, before that was recorded in an internal management memorandum. It was a management document only and not a disciplinary finding. There was no legal obligation to consult her about this fair and reasonable assessment of the entire workgroup.

Leadership team involved in the restructuring

[77] In September 2014 Superintendent Tims asked the Case Management and Operations Group leadership team (the leadership team) to review the Public Counter and FMC. The leadership team consisted of:

- (a) Inspector Allan Shearer who was leading the group;
- (b) Inspector Brand who was the Case Management Inspector;
- (c) Senior Sergeant Mullins who was the O/C Station (ie the Public Counter supervisor);
- (d) Senior Sergeant Phillips who was the FMC Manager CMDHQ (he moved to a new role in December 2014);
- (e) Senior Sergeant Tierney who took over the FMC Manager role around 8 December 2014 after Senior Sergeant Phillips left.

[78] Christine Bryan-Wells (Senior Human Resources Advisor) advised the leadership team on the restructuring process and she also liaised with the Police Association, but she was not involved in formulating the 2014 restructuring proposal. There was no conflict of interest in her being involved in the restructure in that way.

[79] Although Inspector Brand fronted the restructuring to staff, Superintendent Tims, the District Commander, was the decision maker. It was Superintendent Tims who sought and obtained approval from Assistant Commissioner Boreham. Superintendent Tims considered the feedback on the proposal and he was the decision maker who decided to implement the proposal.

Reasons for the restructuring proposal

[80] On 11 November 2014 Inspector Brand drafted an updated “*Proposed Organisational Design for Public Counter Services Counties Manukau Consultation Document*” (the Proposal document). Inspector Brand’s evidence was that the restructuring proposal was not about managing poor performance, but was about how the workgroup structure could best support delivery of the Police’s “*Prevention First*” operating model.

[81] That evidence was supported by the other leadership team witnesses and was accepted by the Authority.

[82] The Police Association’s witness also told the Authority that the union did not believe that the restructure was a sham or that it had been done to personally target Ms Opai.

[83] Police management had seen that there were issues with the existing structure that included four different position descriptions for the Public Counter, different operating practices, the overuse of temps and casuals, uneven workflows, and the need for FMC to backfill the Public Counter at short notice. A restructure would also provide opportunities to improve training and management within the workgroup.

[84] The proposal came out of a ‘SWOT analysis’ exercise that was focused on what structure would best support the strategic direction of the District and ensure that Case Management workgroup’s resources were focused in line with the Police service delivery priorities.

[85] On 17 November 2014 the Proposal document was sent out to supervisors for dissemination to affected staff. Inspector Brand held a meeting with affected staff that same day to discuss the proposal and to invite them to send her any questions or submissions they had. Staff were told they could seek more information from the Police Association and additional support from EAP and Police Welfare.

Did Inspector Brand have a conflict of interest?

[86] Ms Opai’s claim that Inspector Brand had a conflict of interest regarding the restructure does not succeed. Inspector Brand was informed on 12 November 2014 by Police in house

lawyers that Ms Opai had complained about her. Inspector Brand answered some of their questions and provided some additional information by email.

[87] The Authority has accepted Inspector Brand's evidence that:

- (a) She did not recall seeing Ms Opai's ERP until she did so in the context of the High Court defamation trial; and
- (b) The ERP did not influence her or Police in any way.

[88] Police were well underway with the research and analysis phase that led to the restructuring proposal prior to Ms Opai raising her ERP about Inspector Brand. Research had been done in September and the Police Association were notified on 22 October 2014 of the proposed restructure.

[89] An entire leadership team was involved in formulating the restructuring proposal. It was signed off by Superintendent Tims on 12 November (the same day Inspector Brand first became aware of Ms Opai's complaint about her).

[90] The raising of an ERP by Ms Opai in October 2014 against Inspector Brand did not create an actual conflict of interest in the particular circumstances regarding the 2014 restructure.

What did the 2014 restructuring proposal involve?

[91] The restructuring proposal was District wide. It involved FMC, Public Counter and Operation Support, and it affected District Headquarters and the Police Areas in the District.

[92] It proposed to:

- (a) Merge the Public Counter and FMC workgroups, meaning there would be 42 staff able to cover the Public Counter instead of the 13 in the existing structure;
- (b) Disestablish 5 WO roles from the Public Counter;
- (c) Disestablish 3 WO roles from CMDHQ (one of these was Ms Opai's role);
- (d) Disestablish 2 WOs based elsewhere in the District;
- (e) Redeploy the WAs to Band C - FMSO roles in the FMC;
- (f) Reassign WOs to Band C - FMSO roles in FMC;

- (g) Increase the FMC Co-ordinator's direct reports from 3 to 6, and give them responsibility for supervising the public counter during early and late shifts, instead of just the night shift, as they had been doing since February 2014;
- (h) Disestablish one Inspector role;
- (i) Disestablish one Senior Sergeant role;
- (j) Deploy the Inspector and Senior Sergeant, whose positions had been disestablished, away from the Operations workgroup to elsewhere in the District (thus freeing up scarce and valuable 'uniformed' resource);
- (k) Reconfirm FMC Coordinators into their roles, meaning no selection criteria was needed because they were "*minimally affected*" (their direct reports increased from 3 to 6 but no other changes);
- (l) Create a new CSM role;
- (m) Add more FMSO roles to the structure, an increase from 15 FMSOs to 30;
- (n) Staff who were not "*reconfirmed*" under the terms of the CA would be considered for "*reassignment*".

What impact would the proposal have had on staff if it was adopted?

[93] Police did not anticipate anyone would lose employment if the proposal was adopted. FMC staff would all be reconfirmed and the employees in the WOs, WAs, Inspector, and Senior Sergeant positions would all be reassigned.

[94] The WOs were the among the most "*significantly affected*" roles, so they would be offered reassignment into FMSO roles. FMC Coordinators would have more FMSOs reporting to them as they would take over responsibility for supervising the Public Counter workflow.

[95] The Band C WAs had minimal change as they would be reassigned as Band C - File Management Support Officers (FMSOs).

[96] The two WOs faced substantive change because their positions would be disestablished, so they were also identified for reassignment into Band C - FMSO roles.

[97] The five 'F Band' - FMCCs would be "*reconfirmed*" in their positions in accordance with the requirements of the CA, because their new roles were the same or very nearly the same as their existing roles.

Outcome of the proposed restructure

[98] Inspector Brand sent affected employees a group email on 15 December 2014 that attached the "*Decisions Document*" that advised (among other things) that the proposal was being adopted. Ms Opai was not the only employee who was affected by that decision.

[99] The adoption of the restructuring proposal:

- (a) Created a new CSM role;
- (b) Created 15 additional FMSO roles ;
- (c) Disestablished the Public Counter WO positions;
- (d) Disestablished the O/C Station position;
- (e) Disestablished the Operations Inspector role;
- (f) Reconfirmed the WAs into FMSO roles;
- (g) Offered the WOs reassignment into FMSO roles;
- (h) Increased the File Management Centre Supervisor's direct reports by adding a telephonist as an additional direct report;
- (i) Significantly increased cover for the Public Counter because 42 staff, instead of the previous 12 staff, became available to cover the Public Counter duties.

[100] Superintendent Tims sent a letter dated 16 December 2014 to Ms Opai confirming that her WO role had been disestablished and explaining her options to her. She was advised she was "*Affected By Redundancy*" (ABR) as a result of the disestablishment of her WO position.

[101] Under the CA staff who were not "*reconfirmed*" in the same/similar position became ABR and were entitled to seek reassignment to "*suitable positions*". If not placed by reassignment the WOs would become "*surplus to requirements*". However Ms Opai was not at risk of being surplus to requirements because there was a FMSO role available for her to be reassigned into.

[102] Staff who were ABR under the CA are given priority consideration for other vacant positions within Police at the same or lower salary bands for a specified time. Ms Opai was invited to apply for other roles within Police.

[103] Ms Opai's offer of reassignment into a FMSO role was made on the basis her existing salary would be protected. Ms Opai was given until 13 February 2014 to accept that offer. That was extended at her request to 5 March 2014 because she had pre-booked leave from 31 January to 2 March 2014.

[104] Ms Opai accepted reassignment to a FMSO role on 2 March 2015.

Did the restructure disadvantage Ms Opai?

[105] The restructure disadvantaged Ms Opai because her position was disestablished. Although she was reassigned to a FMSO position she lost the supervisory responsibilities she had in her WO role and moved from Band D to Band C, with a resultant drop in salary increases, related to progression through Band C instead of D, of approximately \$200 per year over a 5 year period.

Was the disestablishment of Ms Opai's WO position substantively justified?

Was it reprisal conduct that targeted Ms Opai personally?

[106] Ms Opai claimed the restructuring was a sham and/or reprisal conduct against her as a result of the unresolved ERPs and personal grievances she had raised with Police over the 2012-2014 period.

[107] The mere fact that Ms Opai had unresolved ERPs and/or personal grievances did not prevent Police from reviewing its Public Counter and FMC structures, because it had genuine service delivery and resource related reasons for doing so.

[108] While changes to the Public Counter were happening around Ms Opai, these changes were not targeted personally at her. The restructuring proposal was about implementing the right structure in the FMC and Public Counter in order to deliver best policing services.

[109] The restructure was not driven by individual staff or by what individuals (such as Ms Opai) may have wanted, but by what Police leadership considered would enable Counties Manukau District to address the huge volume of work coming through the FMC and Public

Counter. That was reflected in the increase from 12 to 42 staff who could work on the Public Counter after the restructure.

Was it an attempt to exit Ms Opai from her employment with Police?

[110] The restructuring was not an attempt to exit Ms Opai from the Police. Her ongoing employment was never in question, because from the outset she was offered reassignment into a FMSO role. The difference in the effect of her future pay progressions between Ms Opai's WO role and her FMSO role was not significant, being approximately \$200 difference per year. That minor difference was unlikely to have caused her to have left her employment with Police.

Was the restructure improperly motivated?

[111] The restructure was not improperly motivated. Police had genuine reasons based on reasonable grounds for proposing and making the changes that resulted in the disestablishment of Ms Opai's WO position. Senior Sergeant Culpan's comments in the briefing paper were irrelevant to the restructure, as they were not seen by those leading the restructuring leadership team.

Rationale for the restructuring

[112] Police wanted to improve efficiency across Public Counters and the FMC. Superintendent Tims wanted to ensure that Police was using its employees in a way that enabled the best possible service to be provided to the public. That was why he asked the leadership team to develop a proposal to merge the Counties Manukau Public Counter and the FCM.

[113] The rationale for the review of the Public Counter was captured in the consultation proposal document. The reasons for implementing the proposal were also set out in the Police "*Decisions Document*" that was sent to staff on 15 December 2014.

Genuine reasons for restructuring were based on reasonable grounds

[114] The restructure involved a careful review of available resources, workflows and District service priorities. It involved many people and positions, not just Ms Opai.

[115] The changes adopted had clearly identifiable benefits, so Police had objectively good reasons for making the changes that occurred. FMC had a huge workload to deal with and the restructuring addressed that.

[116] The new CSM role freed up Senior Sergeant and Inspector roles for deployment elsewhere in the District. This was particularly important as ‘uniformed’ resource was scarce and under constant scrutiny to ensure it was being deployed in the most effective way possible.

[117] Considerable efficiencies and greater flexibility to cover the Public Counter resulted from the WO and WA roles being combined into FMSO roles in FMC, reporting to FMC Co-ordinators, instead of the O/C Station.

Finding on substantive justification

[118] The disestablishment of Ms Opai’s WO position was substantively justified.

Did Police comply with its good faith obligations?

[119] Section 4(1A)(c)(i) of the Act required Police to give employees affected by the proposed restructure access to relevant information and an opportunity to comment on it, before Police made a final decision that could have affected the employees’ ongoing employment.

Restructuring proposal documentation

[120] Staff were provided with a copy of the comprehensive restructuring proposal and were also verbally informed about the proposed restructure on 17 November 2014. The consultation document included charts of the Proposed New Structure, Current Roles and Impact, and Impact of Changes on Positions.

[121] The reconfirmation and reassignment processes were explained and (in terms of Ms Opai’s WO role) Police proposed to reassign WOs to FMSO roles. The consultation document also explained that the proposed change to FMC Co-ordinator roles was to increase its numbers of direct reports (from 3 to 6) and that they would take over responsibility from the WO roles for the public counter. Staff were therefore fairly informed about the proposed changes.

[122] Feedback was sought by 28 November 2014, although that was later changed to 5 December 2014. Ms Opai gave the Police Association written feedback dated 4 December.

That was received by the Police Association on 5 December and forwarded to Police on 9 December 2014. Police agreed to this extension of time for Ms Opai's feedback on its proposal.

Police FAQs documents

[123] Police made two "*Frequently Asked Questions*" documents available to staff on 19 November 2014. These summarised the questions that had been raised by staff into four "*Key Themes*" and 33 individual points in response to submissions received.

[124] Although Ms Opai criticised the FAQ as "*inadequate*" the Police Association did not pursue that as a concern at the time. The Authority considered that the main points Ms Opai had raised were addressed. Her feedback was long and much of it was unrelated to the substance of the proposal.

[125] The parts of the FAQ that addressed Ms Opai's questions included responding to:

- (a) Who had authorised the proposal;
- (b) Why position descriptions needed to change;
- (c) Why the FMSO position description was the one Police proposed to move to;
- (d) The reasons for the proposal for all Public Counter staff to come under the FMCCs;
- (e) Concern about ongoing employment by explaining that no-one would lose their job because there were enough roles for everyone in the proposed new structure;
- (f) What training would be available;
- (g) Questions about the CMS role, by providing information about that;
- (h) What other Police Districts had moved to the proposed type of model;
- (i) The Police Association's involvement;
- (j) How staff could find out about the proposed changes in pay banding;
- (k) How to make submissions; and
- (l) What to expect in terms of next steps.

Did Police provide misleading information?

[126] Ms Opai was not misled or misinformed about the disestablishment of the WO role or about the FMC Co-ordinators being reconfirmed in their roles. She knew that she would have a FMSO role in the new structure, if she wanted it, so she knew her ongoing employment was not in jeopardy.

[127] Although Ms Opai claimed the information in the consultation documentation was ambiguous regarding the likely impact on FMCCs, staff were told at the 17 November 2014 meeting that FMCCs would be “*reconfirmed*” in their roles. Ms Opai’s feedback shows she knew that.

Information not provided during consultation

[128] Ms Opai identified information that Police did not give her during the consultation process, which she claimed made the disestablishment of her WO role unjustified.

[129] This consisted of the information Ms Opai received from Police on 1 April 2015, in response to her 5 March 2015 request for all research and analysis documents for the restructure. Information that Police gave her in response to this request, that had not been provided to her during consultation, included:

- (a) The July 2014 District Development Plan;
- (b) The Watchhouse Officer job description;
- (c) The 2013 Public Counter survey;
- (d) The Terms of Reference (ToR) for creation of the Customer Services Manager (CMS) role;
- (e) The paper dated 12 November 2014 presented by the leadership team to Assistant Commissioner Boreham.

[130] On 12 June 2018 the Police disclosed the SWOT analysis the leadership team had created in October 2014 when considering what, if any changes, should occur to the FCM and Public Counter services.

[131] All of this was additional background information that predated the restructuring proposal being put out to consultation. The Police did not need to provide this material as part of a fair and meaningful consultation process. Nor was this information requested by the Police Association, at the time, as being necessary to facilitate consultation with staff.

[132] The Police Association was provided with all of the position descriptions (WA, WO, and FMSO) but not the FMCC position description. The absence of the FMCC position description was not relevant to Ms Opai because that role was not available to her, as there were no vacancies and the CA required the existing FMCCs to be reconfirmed into the same roles in the new structure.

[133] Ms Opai would have had a copy of her own WO job description and she could also have readily accessed a copy of it online. Likewise the District Plan and Public Counter survey. The ToR for the CMS role and the 12 November 2014 paper predated the restructuring proposal and did not have to be provided to her.

Did the Police consider Ms Opai's view that the WO and FMCC roles should have been resized/regraded?

[134] Ms Opai in her feedback said the WO role should be rebanded to Band F, while the FMCC role should be reduced from Band F to Band C. Superintendent Tims was aware of the feedback.

[135] Job resizing and rebanding of positions was outside the scope of the proposal. That had already been done by the specialist PNHQ team, that were responsible for this in order to ensure consistency.

[136] Also the WO position description had been obsolete for many years (it had been marked as “*not to be used*” since November 2012) and the proposal was that the WO role should be disestablished. It therefore did not make sense to stop the restructuring process to enable a PNHQ to undertake a rebanding exercise of the WO and/or FMCC positions in the circumstances. The FMCC position had already been job sized.

[137] The WO and FMCC roles were different. These roles had been through the specialist PNHQ job assessment process, which had set the salary bands for them. That banding exercise was completed separately from this restructuring process.

[138] The WO and FMCC roles were not similar or substantially similar. They were quite different. That is evident from the fact that moving from a WO role to the FMCC role would have required a promotion equivalent to two salary bands (from Band D for WO to Band F for FMCC).

[139] The differences in the roles mean that Police were not required under the CA to consider Ms Opai for a FMCC role. Police Association did not take an issue with that at the time or at the Authority's investigation meeting.

[140] Police were however required under the CA to reconfirm FMCCs (who were Band F) into the FMCC roles (also Band F), so they cannot be criticised for doing that. Again, the Police Association did not dispute that was the correct approach. There were no vacant FMCC roles in the new structure available for Ms Opai to have been promoted into, so that was not a viable option for her.

[141] Police did consider Ms Opai's feedback. However it was open to Police to disagree with Ms Opai's feedback relating to these roles because that was her subjective view, which the decision maker (Superintendent Tims) did not share. The Police Association also did not appear to have shared Ms Opai's views about these two roles (WO and FMCC).

[142] Police were fairly and reasonably entitled to have formed a different conclusion than Ms Opai regarding the subjective concerns she had raised about the WO and FMCC roles. That difference in opinion was not a breach of good faith and it did not make the restructuring process unjustified.

Did Police consider the feedback it received on the proposal before it made a final decision?

[143] The Appendix 2 of Ms Opai's submissions set out the feedback on the proposed restructure that she had given Police together with the Police Association's written feedback dated 6 December 2014.

[144] The Authority was satisfied that Police considered this feedback and had good reasons for not adopting the suggestions she had put forward.

[145] In terms of the questions posed in the feedback that Ms Opai considered had not been adequately responded to, the Authority finds that these were not material. So, having now explored in great detail all of that information during the Authority's investigation process, the Authority was satisfied that even if answers/further information had been given to Ms Opai, the outcome of the proposal would more likely than not have been the same.

Finding on compliance with good faith obligations

[146] Police communicated the proposed changes to potentially affected employees, explained the rationale for the proposal, provided relevant information, gave employees an opportunity to provide feedback on the proposal, and considered their feedback before a final decision was made to implement it.

[147] The Police provided sufficient information to enable affected employees to understand what was proposed, allowed an adequate period for consultation and were appropriately responsive to feedback received from staff and the Police Association.

[148] Police met their good faith obligations under s 4(1A)(c)(i) of the Act.

Was the disestablishment of the WO positions implemented in a procedurally fair manner?

Did Police comply with the four s 103A(3) procedural fairness tests?

[149] Section 103A(3) of the Act sets out four procedural fairness tests that an employer is expected to comply with. Although these test do not align comfortably with a restructuring process, the Employment Court has held they must be read in a way that applies to restructuring situations.

[150] The Authority was satisfied that Police met the minimum procedural fairness obligations set out in s 103A(3) of the Act, namely:

- (a) Police set up a management team to investigate whether the existing structure aligned with policing service delivery expectations/requirements, and if not to formulate options as to how service delivery could be improved in line with the District's strategic objectives (s 103A(3)(a));
- (b) Police formulated a restructuring proposal that it put to the Police Association and affected employees (s 103A(3)(b));
- (c) Police gave employees, including Ms Opai, and their union (the Police Association), a reasonable opportunity to provide feedback on the proposed restructure before it was adopted (s 103A(3)(c));
- (d) Police considered and responded to the feedback received from affected employees by way of a Frequently Asked Questions document (s 103A(3)(d)).

[151] Police discharged the onus of establishing that each of the four minimum procedural fairness tests in s 103A(3) of the Act had been met.

Other appropriate factors – s 103A(4) of the Act

[152] Under s 103A(4) of the Act the Authority may consider other appropriate factors. The Authority therefore now addresses other factors that Ms Opai claimed made the disestablishment of her position unjustified.

(i) 4 December 2014 meeting

[153] Ms Opai and her Police Association representative met with a Human Resources Advisor and Senior Sergeant Mullins on 4 December 2014 to discuss how the proposal would personally impact her if it was adopted.

[154] Ms Opai acknowledged that she gave some feedback on the proposal at this meeting. However she also said that she considered Senior Sergeant Mullin showed a lack of genuine interest in what she was saying, so she refrained from going into further details. However her perception about that did not make the restructuring unfair, unreasonable or unjustified.

[155] Ms Opai did not raise that concern with Police Association or during her individual meeting with Human Resources. The HR Advisor encouraged Ms Opai to submit written feedback regarding the points she had made during the meeting. The Police Association did not raise any concerns about the way in which the 4 December meeting with Ms Opai was conducted.

(ii) Obsolete WO position description

[156] Ms Opai said the proposal should have set out that the WO Band D position description was obsolete. She also claimed that Police should have informed her that there would not be an opportunity to apply for WO positions in other Districts because the position description could no longer be used.

[157] The obsolete position description did not disadvantage Ms Opai. The proposal made it clear that the WO Band D position would not be going forward into the new structure. FMCCs would hold the supervising roles going forward, not WOs.

[158] There was no legal requirement on Police to record in the proposal document that the WO position description had been obsolete since November 2012. It was also irrelevant because even if it had not been obsolete, Police had still identified it did not intend to continue with WO positions.

(iii) Reconfirmation of FMCCs

[159] Ms Opai's claim that FMCCs should not have been reconfirmed because their position was not the same does not succeed.

[160] Reconfirmation was required under the CA because the FMCCs' positions were the same or very nearly the same as their existing positions. The FMCC's assumed responsibility for supervising three more staff and they took on supervision of the public counter during early and late shifts.

[161] That was evident from the diagram in the Proposal that identified that the key impact on FMCC was "*minimal change, change in reporting etc*". Even if reconfirmation was not available, the FMCC's still would have been eligible for reassignment under the CA. Ms Opai was not eligible for reassignment into a FMCC role.

(iv) Police Restructuring Policy

[162] Ms Opai's claim that the Police failed to carry out job evaluation and job comparisons as required by the Restructuring Policy does not succeed. The Police's "*approved job evaluation system*" had already graded all of the positions involved in the restructure before the proposal had been put out for consultation.

[163] There was no need to redo the previous job evaluation. Ms Opai's belief that the FMCC position should have been given a lower grade was subjective and speculative because it was contrary to the evaluation that had already been done.

(v) Did Police implement a different structure than it had proposed?

[164] Police did not implement a different structure than what it had consulted with staff about.

[165] Subsequent to the implementation of the restructure, and at the Police Association's request, Police accommodated one WO by excusing them from working in the FMC and one

FMSO from working on the Public Counter. These two individual concessions occurred over a month after the proposal had been implemented, in response to concerns expressed by those two individuals about undertaking duties they had historically not done.

[166] The accommodation agreed to was subject to service requirements still being met. If necessary these two staff members would still be required to work the duties they had not previously done, despite their reluctance to do so. The accommodations that were reached for these two individuals did not make the restructure unjustified.

(vi) Failure to offer individual meeting with the decision maker, Superintendent Tims

[167] Superintendent Tims did not meet any of the affected staff individually. That included Ms Opai.

[168] Ms Opai believed she could have persuaded Superintendent Tims that her views about the proposed restructure should have been preferred over those of the leadership team, if she had been given an opportunity to explain her position to him in person. Ms Opai therefore claimed that his failure to meet with her personally made the disestablishment of her WO position unjustified. The Authority did not share that view.

[169] In this particular case, the failure of the decision maker Superintendent Tims to have a one on one meeting with Ms Opai did not make the disestablishment of her WO position unjustified. That omission is the type of process error that would in this particular case be captured by s 103A(5) of the Act, given the way Police hierarchy operates in practice.

[170] Superintendent Tim's did not just rubber stamp the proposal. He was well aware of the details of it, the key feedback themes as well as specific points of feedback raised by individuals and the Police Association. He had also seen the responses Police had given staff to their feedback.

[171] While it would have been prudent for Police to have offered Ms Opai the option of a personal meeting with Superintendent Tims had she wanted to do so, the Police Association who were representing her at the time did not suggest that was something that she wanted or needed. Nor did Ms Opai ask for a personal meeting.

[172] It is also significant that Police did not anticipate that anyone's ongoing employment was in jeopardy, because there were sufficient roles available for everyone who wanted to remain employed.

[173] After hearing from Superintendent Tims, the Authority was satisfied that he appropriately turned his mind to a summary of the general themes of Ms Opai's feedback. These concerns were recorded in his supplementary statement dated 14 October 2019.

[174] In the end there was a difference of opinion between Ms Opai and Police. Superintendent Tims concluded that the benefits of implementing the proposal in terms of enhanced customer service outweighed the disadvantages that some staff (such as Ms Opai) had identified in their feedback.

[175] The Authority was satisfied that the decision was one that a fair and reasonable employer could have made in all the circumstances, at the time it was made. A personal meeting with Ms Opai would not have changed that.

(vii) Timing of the restructure

[176] While the timing of the restructure was unfortunately close to Christmas and conducted over such a short period of time, this timing in itself did not make the process unjustified.

[177] Ms Opai was given additional time to consider her options and to provide feedback so the Authority was not satisfied that she was actually disadvantaged or that even if she had been disadvantaged that it was unjustified.

Does s 103A(5) of the Act apply to any process errors that may have occurred?

[178] Section 103A(5) of the Act prevents the Authority from finding actions by the Police were unjustifiable solely because of minor process defects that did not result in Ms Opai being treated unfairly.

[179] The Authority is concerned that Ms Opai has subjected the restructuring process to pedantic scrutiny and has adopted the position that she was entitled to more advance input into formulation of the proposal and information than the law required.

[180] The spirit and intent of the consultation obligations required under the Act, the CA and by case law were adequately met. A senior Police Association representative, Stewart Mills, told the Authority that he did not think that the Police had run an unfair process. While that is obviously not decisive, it was consistent with the approach the Police Association adopted during consultation.

[181] Accordingly, any process defects that may have occurred regarding provision of information Ms Opai now says she wanted, and more detailed and specific responses to feedback she had given were in the Authority's view minor, and did not result in Ms Opai being treated unfairly, because it would not have changed the outcome of the restructure.

[182] Section 103A(5) of the Act would therefore have applied to any such process defects, thereby precluding a finding by the Authority that Ms Opai had been unjustified disadvantaged.

Finding on disadvantage grievance related to the disestablishment of Ms Opai's WO position.

[183] Police have discharged its onus of establishing on the balance of probabilities that the disestablishment of Ms Opai's WO position was substantively and procedurally justified.

Did the 3 March 2015 meeting Senior Sergeant Mullin had with Ms Opai unjustifiably disadvantage her?

[184] Ms Opai says that the day after starting her the new Band C - FMSO position (under protest and duress) Senior Sergeant Mullin unjustifiably raised performance concerns with her and "*threatened*" to put her on a formal performance management plan.

[185] Ms Opai said this was a further example of the Police adopting Senior Sergeant Culpan's briefing paper to performance manage her out of the her employment. Police refuted that allegation.

[186] Senior Sergeant Mullin said that when he had returned from leave in January 2015 he found that Ms Opai had not progressed the portfolio of work (updating the Operations Manual referred to as the 'desk file' and managing the volunteers) that he had asked her to take

ownership of in December 2014. He therefore met with Ms Opai on 30 January 2015 to discuss his concerns.

Was there a meeting on 30 January 2015?

[187] Senior Sergeant Mullin said the 3 March meeting was an agreed follow up to the meeting he had already had with Ms Opai on 30 January 2015 Ms Opai said she did not meet with Senior Sergeant Mullin before their meeting on 3 March 2015.

[188] The Authority has resolved this conflict in evidence in Senior Sergeant Mullin's favour. On 4 March 2015 Senior Sergeant Mullin emailed Human Resources notes he had made about Ms Opai while he was her supervisor. This included a diary entry for their meetings on 30 January and 3 March 2015.

[189] It is highly unlikely that back in 2015 Senior Sergeant Mullin created an entirely fictional record of a meeting he said he had with Ms Opai. His notes of their meeting on 30 January were detailed. It recorded three bullet points he had discussed with Ms Opai and what her responses had been.

[190] The 30 January meeting occurred at a stressful time for Ms Opai, so it is more likely than not that she forgot about it. It is however a good example of how an honest witness can nevertheless also be a mistaken witness.

Circumstances leading up to 3 March meeting

[191] In assessing whether or not the 3 March 2015 meeting was justified, the circumstances leading up to it must be considered. The Authority therefore noted that:

- (a) In 2012 Ms Opai had raised an employment relationship problem (ERP) with the Police regarding comments that Senior Sergeant Culpan had included in her 2012/2013 performance appraisal;
- (b) Ms Opai had raised an ERP regarding comments that Senior Sergeant Culpan had included in her 2013/2014 performance appraisal;
- (c) In April 2014 Ms Opai filed defamation proceedings against Senior Sergeant Culpan and the Police in the District Court, which were then transferred to the High Court on 30 March 2015;

- (d) Ms Opai had raised other ERPs with the Police about other matters that had still not been resolved as at 3 March 2015;
- (e) Senior Sergeant Mullin had told Ms Opai, more than once, that she should never have been assessed by previous supervisors as being a “*role model*.” His explanation to the Authority for doing so was not credible. These comments were unnecessary and were undermining of Ms Opai;
- (f) On 15 December 2014 Ms Opai had been advised that her WO position had been disestablished, in circumstances she had objected to;
- (g) On 19 December 2014 Ms Opai had been advised that she was ABR and could either accept severance, a position at Band C which had no supervisory responsibilities, or apply for another position within Police at the same or lower band. She was given until 5 March 2015 to make that election;
- (h) On 5 January 2015 Ms Opai’s WA direct reports had become FMSOs. That change caused the WAs’ (now FMSOs’) reporting line to change, meaning that it was FMC and not WOs (Ms Opai) who had supervisory responsibility from that date onwards;
- (i) Ms Opai had been experiencing health problems during 2014 and January 2015 and had been using other leave (annual leave and statutory holiday leave) to cover her absences;
- (j) On 7 January 2015 the FMC Supervisor, Ashleigh Lowe, had discussed Ms Opai’s sick leave rate and absences with her;
- (k) Senior Sergeant Mullin’s secondment as O/C Station ended in February 2015 so he had returned to his previous role in the Professional Standards so was therefore no longer supervising Ms Opai;
- (l) Ms Opai was on pre-booked annual leave during February 2015;
- (m) Ms Opai advised Police on 2 March 2015 that she accepted the FMSO role under protest.

No support person

[192] Ms Opai was not invited to bring a support person to the 3 March meeting. While there was no legal requirement on Police to have made that offer, because the meeting was not

disciplinary, the history of unresolved and escalating issues involving Ms Opai and her ongoing health problems meant that in these particular circumstances (from a welfare point of view) consideration should have been given to offering Ms Opai an opportunity to be supported at the meeting, possibly by her union representative.

March memorandum

[193] Senior Sergeant Mullin said that, as agreed at the 30 January meeting, he recorded his concerns and expectations in writing in his “*March memorandum*” and handed that to Ms Opai on 3 March. As far as he was concerned the March memorandum simply involved him recording their previous discussion.

[194] However, from Ms Opai’s perspective it came as a shock because she had forgotten about the 3 January meeting. She felt like she had been presented with a memorandum out of the blue alleging poor performance and advising that the next step would be a formal performance improvement plan.

Had performance concerns previously been raised with Ms Opai?

[195] Ms Opai disputed that the issues recorded in the March memorandum as having been “*discussed with her in the past*” had in fact ever been raised with her.

[196] The following issues were identified by Senior Sergeant Mullin in his March memorandum as having been “*discussed in the past*” with Ms Opai:

- (a) Time spent away from core duties;
- (b) Duties not completed, including updating the desk file (Operations manual), ownership of volunteers and completing performance appraisals. He directed her to ‘satisfactorily complete’ the volunteer portfolio ready for the new CSM to commence their duties and complete all performance appraisals that “*are required to be completed*”;
- (c) Not providing a medical certificate after being directed to provide one for any continuing sick leave as a result of her high rate of sickness absence;
- (d) High rate of leave. Since 1 August 2014 she had worked a total of 64 days with 56 days leave. The expectation was “*be cognisant of your leave and consider to allow time for you to establish and develop a sound work ethic ...*”.

[197] The memorandum ended by stating that if there was no improvement in her performance “*in the matters discussed above from now on*”, a performance improvement plan would be implemented.

[198] Police said that it was not until this current Authority investigation meeting that Ms Opai said for the first time that she had not previously had performance concerns raised with her.

[199] It was not referred to in her personal grievance about (among other things) the 3 March meeting that she had raised with Police on 5 March, or in the further details of her grievance that she gave Police on 22 April 2015. Nor was it raised as a concern in her Statement of Problem or in the four witness statements that she filed in advance of this investigation meeting (two of which had responded to Senior Sergeant Mullin’s statements).

[200] These omissions, coupled with the evidence that Ms Opai’s memory and recall of events was demonstratively unreliable around this period (see 30 January meeting she had forgotten about), and the fact that she was suffering from stress and ill health (that was obviously adversely impacting her), it is more likely than not that some performance concerns were previously raised with Ms Opai, but she did not have a clear recollection of them.

[201] It was unlikely that Senior Sergeant Mullin made up diary notes from back in 2014 and 2015 regarding performance concerns he had discussed with Ms Opai, especially when the notes he made could be described as minimal at best and were not particularly helpful to his claim that performance concerns had been raised with her previously.

[202] It was also unlikely that Senior Sergeant Mullins would have dishonestly referenced these previous performance discussions in the March memorandum, or in the diary notes he gave Human Resources in March 2015, or that he would have perjured himself about that when giving evidence to the Authority.

[203] The available records tend to suggest that performance concerns were discussed with Ms Opai. For example the 30 January 2015 diary note recorded that Ms Opai wanted to know the time and date when she was supposed to have spent too much time with the typists preventing them from working.

[204] That response was consistent with Ms Opai's detail orientated approach to employment issues. The notes also refer to performance appraisals, volunteers, and the desk file (Operations manual) which were all tasks that had given rise to performance concerns and which the Authority considers were likely discussed with her.

[205] For these reasons, the conflict in the evidence about whether or not performance concerns were previously discussed with Ms Opai was resolved in favour of Police.

Was Ms Opai given an opportunity to respond to the performance concerns?

[206] Ms Opai said that during the 3 March meeting Senior Sergeant Mullins made general allegations that her performance was not at the required standard, but that when she asked for specific examples he told her they were not important.

[207] This account aligns with the notes that Senior Sergeant Mullin emailed Human Resources on 4 March. He considered the meeting was to set his expectations going forward not to discuss performance concerns because, from his perspective, that had already occurred on 30 January 2015.

[208] However that approach was unfair to Ms Opai and therefore disadvantaged her. She was entitled to a substantive response during the 3 March meeting to her requests for specific details of the performance concerns and to disclosure of the information Senior Sergeant Mullin had relied on in reaching the conclusion that her performance was below the required standard.

[209] That was even more important in circumstances where Ms Opai disputed the poor performance allegations, she believed that she was being improperly targeted because of previous complaints she had made to and about Police, and when the next step was going to be a formal performance improvement plan.

Was the advice about a formal performance improvement plan being the next step justified?

[210] Senior Sergeant Mullin told the Authority that it had become increasingly apparent to him that Ms Opai's morale and motivation was extremely low. He knew she was experiencing

health issues, some of which were stress related. She had also been through a restructure that had caused her considerable concern and anxiety.

[211] Senior Sergeant Mullin's view was that Ms Opai was a capable manager but she was "*extremely disengaged*" and her performance was suffering. He said he intended to get Ms Opai engaged, so wanted to rekindle in her a sense of ownership of her role. He gave an example of allocating her 'ownership' of the volunteers used to triage members of the public who presented to the public counter.

[212] This was not a situation in which a fair and reasonable employer could have viewed the "*next step*" as being a formal performance improvement process. That approach unduly put Ms Opai under increased pressure at a time when she was already suffering considerable stress, and made her fearful of her job security.

[213] The reference to the next step being a formal performance improvement process, without Police first sharing the specific evidence/information that had resulted in that view, and without having given her a reasonable opportunity to respond that evidence/information was unfair and unjustified.

[214] The advice that the next step would be a formal performance process was premature, and an obvious overreach by the Police in all of the circumstances.

[215] A fair and reasonable employer would have properly explored the various factors that were likely to have been adversely affecting Ms Opai's performance. These included but were not limited to:

- (a) That prior to the Senior Sergeant Cuplan ERPs raised by Ms Opai in late 2012, she had received positive performance appraisals and had been commended on initiatives she had implemented (such as the desk book). This positive history showed that she was capable of performing at the required standard (as she had done so for many years), suggesting that something must have gone wrong since then;
- (b) Her unresolved employment relationship problems and personal grievances;
- (c) Her genuine ill health;
- (d) Personal issues that were causing her stress;

- (e) Her lack of paid sick leave, that meant she was exhausting her other leave when genuinely sick;
- (f) Her unhappiness about the restructure;
- (g) The lack of clarity of changes to her supervisory duties post the changes that had been implemented by agreement in February 2014, such as which of the WAs she had to complete performance appraisals for and by when that had to occur;
- (h) Her belief, based on Senior Sergeant Culpan's comments in the 2013 briefing paper, that Police were attempting to exit her from her employment;
- (i) Her belief that Police had subjected her to retaliation for making formal complaints about other employees;
- (j) Lack of clarity over the details of the performance concerns. For example exactly what updates Police claimed should have been made to the desk file (Operations manual) but had not been made by her; what she was required to do with the volunteers and how and when it had to be done by; how many occasions and for what duration she had been observed as being away from the public counter; and what interaction she had with the typists that was of concern;
- (k) Senior Sergeant Mullin's repeated comments to her that she should not have been assessed by previous supervisors as being a role model, that she had understandably found demoralising;
- (l) The historical, and therefore 'stale' nature of the complaints that she had been away from the public counter and/or had been distracting the typists from doing their work.
- (m) Other welfare related issues.

[216] On top of these factors from 2 March 2015 Ms Opai's role and therefore duties had changed. Since 5 January 2015 Ms Opai no longer had supervisory responsibilities, so her alleged failure to complete performance appraisals for the WAs she had supervised could not have been a legitimate concern going forward. Likewise, responsibility for volunteers was not part of her FMSO duties, so that also could not have been a legitimate concern going forward.

[217] While Ms Opai's absences from work should have been of concern to Police, at least from a welfare point of view, she had already been spoken to about that on 7 January 2015 by FMC Supervisor Ashleigh Lowe. The situation had not deteriorated since then to the extent that performance management was reasonably or appropriately the "*next step*."

[218] Furthermore Senior Sergeant Mullin was not the appropriate person to be having these performance related discussions with Ms Opai. He was not her supervisor. He was no longer in Ms Opai's workgroup. He was therefore unable to manage her performance going forward.

[219] Ms Opai was told to improve her performance in a role she no longer held, due to alleged concerns that had arisen over the period 1 August 2014 to 30 January 2015. However she had only worked 64 days over that period, half of that time had involved a restructuring and she had started a new FMSO role on 2 March 2015.

[220] It was premature in these circumstances for Ms Opai to be advised that the "next step" would be a formal performance improvement process, when there was so much complexity underlying the alleged lack of engagement that Senior Sergeant Mullins had reported observing.

[221] The issues that had caused Ms Opai to be disengaged needed exploring and if possible resolution. A fair and reasonable employer could not have advised her that the next step would be a formal performance improvement process without first investigating and attempting to resolve the complexity of underlying issues that were likely affecting her performance.

Was Ms Opai directed by Senior Sergeant Mullins not to take anymore sick leave?

[222] Ms Opai claimed that Senior Sergeant Mullin had directed her not to take any more sick leave. Police disputed that.

[223] The March memorandum said "*be cognisant of your leave and consider to allow time for you to establish and develop a sound work ethic ...*". Ms Opai misinterpreted that as a "*direction*" not to take sick leave. It was not.

[224] It was more likely than not that Senior Sergeant Mullin told Ms Opai that he was concerned that her ongoing absences from work, some of which related to annual leave, were adversely impacting on her ability to do the tasks he had asked her to do so, she should be mindful of her attendance.

[225] However the Authority considered Senior Sergeant Mullin's comment about that was unjustified. Ms Opai was not required to attend work when she was sick. She was also entitled to use her annual leave at her own convenience.

[226] Senior Sergeant Mullin's comments that her absences from work were adversely impacting on her performance (which his diary note recorded Ms Opai had disagreed with) was unhelpful and put her under unnecessary and inappropriate pressure to be at work, due to the advice given to her that the "*next step*" would be formal performance management.

[227] A fair and reasonable employer could not have pressured Ms Opai in this way. That comment made her fear for her ongoing employment, which added to her stress, anxiety and sense of grievance towards the Police.

[228] A fair and reasonable employer would be expected to have fairly assessed Ms Opai's workload and personal circumstances to determine whether it needed to adjust its expectations in line with the amount of time she was at work. There was no evidence that Police did that with Ms Opai, thereby disadvantaging her.

Did Police improperly require Ms Opai to provide a medical certificate for all sick leave from 3 March onwards?

[229] Ms Opai claimed that Senior Sergeant Mullins told her on 3 March that she was required to provide a medical certificate for all future sickness absences. That was not recorded in the March memorandum or in his notes of the 30 January or 3 March 2015 meetings.

[230] Ms Opai was covered by the Police Sick Leave Notification and Management Policy at the material time. That policy set out when a medical certificate could be required.

[231] Senior Sergeant Mullin agreed that some time before the meeting on 3 March 2015 he had required Ms Opai to provide a medical certificate for her sickness absences. However unclear why or exactly when he had done so.

[232] Police did not have any medical certificates from Ms Opai for the period 30 July 2014 to 3 March 2015, although she had significant time away from work due to illness over that period.

[233] Police records show that Ms Opai did not take any unpaid sick leave over the period 1 January 2014 to 31 December 2015. The detailed record of Ms Opai's attendance at work is set out in Police' submissions dated 7 November 2019. She received her new annual sick leave entitlement in November of each year.

[234] As at 28 January 2015 Ms Opai had insufficient paid sick leave left to cover one half day of sickness absence. That was likely to be why Senior Sergeant Mullin had asked for medical certificates to ensure Ms Opai could take unpaid sick leave if required, because that was what the applicable policy required. That did not disadvantage Ms Opai.

Did Police breach its policies and procedures?

[235] Ms Opai relied on the Code of Conduct – Supervisors' Guide that was in place and the Performance Management Policy as the relevant documents that set out how Police were to deal with performance management.

[236] She said that Police breached these policies because there was no informal performance discussion with her before the 3 March 2015 meeting. That is not correct – the 30 January 2015 meeting was the informal performance discussion.

Non disclosure of relevant information

[237] Ms Opai was disadvantaged because she was not given the underlying information that would have enabled her to have understood and responded to the alleged performance concerns.

[238] The personal grievance Ms Opai raised on 5 March made it clear that Senior Sergeant Mullin had failed to provide specifics of the alleged performance concerns. Police should therefore have provided those underlying documents to her in 2015, when she first made that complaint.

[239] Ms Opai's personal grievance letter specifically asked for all information relating to the performance issues that had been raised with her on 3 March. At that time Police said that the only documents relevant to the 3 March meeting were Senior Sergeant Mullin's diary notes and the memorandum he prepared following the 30 January meeting, which was handed to Ms Opai during the 3 March 2015 meeting.

[240] Police are expected to keep diary notes of key matters. If Senior Sergeant Mullin had been raising concerns about Ms Opai's performance with her then those should have been reflected in his diary notes, and these diary notes should have been provided to Ms Opai in early 2015.

[241] As it turned out, when the diary notes were produced to the Authority it was discovered that the information recorded by Senior Sergeant Mullin at the relevant time was inadequate and insufficient to have justified a performance improvement plan being suggested as the next step.

[242] It was unfair for Ms Opai not to be given specific information about the concerns that would have enabled her to understand them and respond, particularly in light of her view that she was meeting performance expectations.

Assessment of specific performance concerns recorded in the diary notes

[243] The diary notes recorded two issues. The first related to Ms Opai's failure to do performance appraisals of the WAs she supervised during the performance year, while the second concern related to her alleged absences during work hours from the public counter.

[244] In terms of the performance appraisal by Ms Opai of WAs she had worked with, the 2013/2014 review of the public counter and the changed duties and reporting lines together with the restructure made it unclear as to who was responsible for preparing which performance appraisals, and when.

[245] Although Senior Sergeant Mullin did email Ms Opai about performance appraisals, further clarity was required before this could legitimately become a poor performance concern. It was also unreasonable for Senior Sergeant Mullin to have required Ms Opai to have conducted performance assessments on peers that she was having to work alongside after she had accepted the FMSO position on 2 March 2015.

[246] Regarding the absences from the public counter, the dates and periods of absence had not been recorded and therefore Ms Opai was unable to properly respond to them. Ms Opai's evidence was that she was only away from the public counter for legitimate work-related reasons, such as if she was meeting with another employee or manager or attending HR and the like.

[247] There was no record or evidence to suggest that Ms Opai had repeated her absences during work hours from the public counter after Senior Sergeant Mullin discussed that with her about on 16 October 2014.

[248] There was also insufficient evidence to establish that Ms Opai did not have a reasonable explanation for being away from the public counter on the occasion that was discussed with her in October 2014. She said she had been speaking to Senior Sergeant Traill about her previous year's performance appraisal, but Senior Sergeant Mullin apparently did nothing to check out her explanation.

[249] An alleged absence from the public counter under such circumstances in October 2014 should not have been used in March 2015 as evidence that Ms Opai's performance was so poor that the next step would be a performance improvement plan.

Updating of the Operations Manual (desk file)

[250] The updating of the Operations Procedures Manual was an ongoing process that occurred on an ad hoc, as and when required, basis. The Police did not identify any updates to the Operations manual that Ms Opai had been directed to do but had not done.

[251] This concern should not have been grounds for a finding by Police that Ms Opai's performance was so poor that the next step would be a performance improvement plan.

Management of the volunteers

[252] Senior Sergeant Mullin's decision to give Ms Opai "*ownership over the volunteers*" involved allocating her responsibility for work that was not part of her normal duties or job description. This new task was not properly explained to her, nor were timeframes established for undertaking it.

[253] At the time this new volunteer task was given to her, Ms Opai was in the middle of a restructuring process with the Police, she was suffering serious ill health and was away from work a lot, she had taken lengthy annual leave, and her position had been disestablished.

[254] A fair and reasonable employer could not justify treating Ms Opai's failure to complete the volunteers task over the December 2014 and January 2015 period as a legitimate performance concern in all the circumstances.

Finding on the 3 March disadvantage grievance

[255] Police failed to discharge its onus of establishing that its actions, and how it acted, were justified in accordance with the s 103A(2) justification test in the Act.

[256] It was also not clear, even after the Authority's lengthy investigation meeting, which diary notes Senior Sergeant Mullin had been relying on in his 3 March 2015 memorandum, or what specific information he had relied on to support each alleged performance concern.

[257] After Ms Opai raised her disadvantage grievance on 5 March with Police regarding the 3 March 2015 meeting, Police should have taken adequate steps to investigate the factual basis for Senior Sergeant Mullin's performance concerns, in order to ascertain whether they were fairly and reasonably at the point where it was appropriate for him to have advised Ms Opai that the "next step" would be a formal process. That did not occur, which was unfair to Ms Opai.

[258] Accordingly, Ms Opai's disadvantage grievance relating to the 3 March 2015 meeting with Senior Sergeant Mullin succeeds.

Did the way Police dealt with Ms Opai's 2014/2015 performance appraisal unjustifiably disadvantage her?

[259] On 4 March 2015 Senior Sergeant Mullin emailed Human Resources a copy of the draft 2014/2015 performance appraisal he had completed for Ms Opai, that he had dated 2 March 2015.

[260] On 6 March 2015 Ms Opai put Police on notice that she was suffering from stress related illness that she attributed to its actions towards her.

[261] On 17 March 2015 Senior Sergeant Mullin emailed Human Resources an updated draft performance appraisal for Ms Opai. This version had updated the core competencies and included more detailed comments. It appeared to have been updated on 3 March 2015 after his meeting with Ms Opai.

[262] The 17 March 2015 updated draft was the version of the 2014/2015 performance appraisal that was presented to Ms Opai and signed by Senior Sergeant Mullin on 2 September

2015, with the exception of the final paragraph in the comments box beginning “*since February this year....*”

[263] This meeting on 2 September was the first time that Ms Opai had seen the adverse comments Senior Sergeant Mullin had made in her 2014/2015 performance appraisal. On 10 September 2015 Ms Opai raised a disadvantage grievance relating to her performance appraisal, during which she also recorded her belief the Police’s unreasonable treatment of her was a hazard to her in the workplace.

[264] This arose within the context of Ms Opai having already raised unresolved employment relationship problems (ERPs) about comments her former supervisor Senior Sergeant Culpan had included in her 2012/2013 performance appraisal document. Similar comments were repeated again (giving rise to a new ERP) in her 2013/2014 performance appraisal.

[265] Ms Opai pointed out that the adverse performance appraisal was based on the 3 March 2015 meeting which she had disagreed with. Ms Opai said that although she had sought specifics of the performance concerns, her issues about that March meeting had still not been resolved, even after she had raised a personal grievance about it. That was a critical omission by Police.

[266] Ms Opai had the following specific concerns regarding her 2014/2015 performance appraisal:

- (a) That it created an unsafe environment for her, both during the meeting which had occurred on 3 March 2015 and afterwards, when Police failed to take practical steps to address her concerns by considering whether the comments made by Senior Sergeant Mullin were fair;
- (b) That there was no finalised performance appraisal for Ms Opai for the year 2014/2015 despite Police telling her that it would be finalised. Ms Opai did not have any further appraisals during her time in the Police, which she believed resulted from the ERPs she had raised relating to Senior Sergeant Culpan’s disputed comments in her 2012/2013 and 2013/2014 performance appraisals;
- (c) The appraisal process was unfair because she was not given sufficient particulars of the performance issues Police were concerned about, which in turn had undermined her ability to adequately respond;

- (d) It breached the Police Performance Management Policy because her perspective was not heard and there was no attempt by Senior Sergeant Mullin to agree to any of the content of his draft 2014/2015 performance appraisal with her. It also breached the 'no surprises' principle that the Police operated on regarding performance issues.

Health problems

[267] In March 2015 Ms Opai experienced further health issues and she advised Police she was suffering a stress related illness. On 30 March 2015 Ms Opai suffered an adverse health event which resulted in permanent health issues for her. She claimed that her treatment by Police had caused or contributed to those health problems.

[268] Notification of health issues to Police should have alerted it that Ms Opai's situation had to be taken seriously and handled sensitively. That did not occur.

Obtaining copy of performance appraisal

[269] In June 2015 Ms Opai applied for a vacant internal position so she wanted to see her performance appraisal in advance of her interview for that potential new role. On 1 September 2015 Ms Opai emailed Senior Sergeant Mullin asking who would be completing her 2014/2015 appraisal.

[270] Senior Sergeant Mullin replied that he had completed it up until February and then provided it to Human Resources, so Ms Opai should contact HR. When Ms Opai did so, HR told her that it did not have a copy but advised that Senior Sergeant Mullin would still have one.

[271] The following day (2 September) Ms Opai asked Senior Sergeant Mullin to provide her with a copy of the performance appraisal that he had given Human Resources. Senior Sergeant Mullin replied by asking Ms Opai to contact him and she arranged to go and see him in his office when he got back to work.

[272] Ms Opai said that she went upstairs to the Professional Conduct office (which Senior Sergeant Mullin had returned to) to obtain a copy of her performance appraisal from him. He

asked her into a room, then read through the draft performance appraisal word for word, beginning to end, making some comments as he went but not inviting Ms Opai to participate or reply.

[273] Senior Sergeant Mullin then signed the performance appraisal in front of Ms Opai and asked her to do likewise. Ms Opai told Senior Sergeant Mullin she would not be signing the appraisal because she did not agree with it.

Content of the draft performance appraisal

[274] The draft 2014/2015 performance appraisal:

- (a) Had nothing filled in for the annual objectives section. Senior Sergeant Mullin could not explain why that was the case;
- (b) It rated Ms Opai the lowest possible standard in four of six criteria that applied and a “*standard*” in two criteria and a “*slightly less than agreed*” in one criteria.
- (c) It made a number of criticisms that Ms Opai strongly disputed.

[275] Ms Opai was concerned (among other things) that the performance appraisal had resulted her in being assessed after only 64 days at work, some of which time she was engaged in the 2014 restructuring that had resulted in the disestablishment of her position.

Police response to performance appraisal concerns

[276] The Police responded to Ms Opai’s personal grievance on 14 October 2015, by saying that if she did not want to discuss the performance appraisal then Police would take her response into account and finalise the appraisal. That response was unfair, unreasonable and unsatisfactory.

[277] Police never did appropriately consider Ms Opai’s response or finalise her 2014/2015 appraisal. In particular, Police never fully, fairly or adequately considered whether Ms Opai’s criticisms of Senior Sergeant Mullin’s draft performance appraisal of her might be objectively unfair.

[278] That failure was a breach by Police of its obligation under s 4(1A) of the Act to be active and constructive in establishing and maintaining a productive employment relationship, in which the parties were among other things responsive and communicative.

Breach of contract

[279] A performance appraisal is a contractual entitlement under clause 5.4 of the collective agreement. Clause 5.4(b) of the collective agreement entitled Ms Opai to an “*appraisal review*” when an appraisal could not be resolved with their “*Controlling Officer*”.

[280] That should have, but did not occur, in breach of Police’s contractual obligations to Ms Opai. That unjustifiably disadvantaged her.

Involvement of Human Resources

[281] Ms Opai’s suggestion that there was something improper about Senior Sergeant Mullin emailing Human Resources a draft of his performance appraisal is not accepted. It was reasonable for him to have wanted to have obtained advice on it.

Timing of performance appraisal

[282] Senior Sergeant Mullin should have completed part of a performance appraisal for the time that he had supervised Ms Opai before he transferred back to his pre-secondment role, ie in February 2015, but he did not do so. The completion of a performance appraisal required him to have met with Ms Opai and that had not occurred.

[283] Even if Senior Sergeant Mullin had prepared the draft while he was still the O/C Station, he failed to discuss it with Ms Opai while he was still her supervisor. That deprived her of an opportunity to address his concerns when they were fresher in everyone’s minds.

No consultation about performance appraisal

[284] There was insufficient evidence to objectively establish that many of the comments that had been included in the adverse 2014/2015 appraisal had been fully, properly or adequately discussed with Ms Opai by Senior Sergeant Mullin during the appraisal year.

[285] This should have happened at the time that these issues and concerns arose. The only documentation of conversations about performance issues having occurred was what had been recorded in Senior Sergeant Mullin’s diary notes, which were inadequate. These minimal diary notes did not justify the extent of the adverse comments and assessment that is reflected in the 2014/2015 performance appraisal.

[286] When Senior Sergeant Mullin and Ms Opai met on 2 September her evidence was that he had talked at her instead of engaging her in a mutual exchange of information. The Authority accepted that evidence, as there was nothing in the appraisal document to show there had been any attempt to engage Ms Opai.

No advance notification of performance appraisal meeting

[287] Ms Opai turned up in Senior Sergeant Mullin's office thinking that she was just going to be given a copy of her performance appraisal. She was therefore unprepared for what occurred.

[288] Ms Opai was not expecting to be the subject of an impromptu performance appraisal meeting on 2 September and was not adequately prepared to participate in one. She had not been provided with any relevant documentation or advance notice that an appraisal meeting was going to be conducted with her. She had no opportunity to take advice or to prepare for performance appraisal discussions.

[289] Senior Sergeant Mullin admitted to the Authority that this was the worst performance appraisal he had ever prepared out of the 50 he had done over his career. He said he had sent a draft to Human Resources because he was concerned at how adverse it was.

[290] Police should have known that the adverse content and the history of unresolved issues, including other previous performance appraisals, meant that a performance appraisal meeting with Ms Opai had to be handled strictly in line with applicable policies and procedures. The decision to have a performance appraisal meeting without notice was unjustified.

Breach of Performance Management Policy

[291] The way that the Police conducted itself regarding the 2014/2015 performance appraisal was a breach of its performance management process. Ms Opai's perspective was not heard and there was no real attempt to discuss or agree the content of the adverse appraisal with her.

[292] Police also failed to adhere to its own widely understood approach of "no surprises" regarding performance appraisal matters.

Failure by Police to investigate Ms Opai's concerns about her performance appraisal

[293] A cursory examination of the draft performance appraisal and Senior Sergeant Mullin's diary notes should have alerted Police to an apparent disconnect between what had apparently been discussed with Ms Opai during the performance year and what had been recorded in her performance appraisal.

[294] Ms Opai's specific concerns that backdated to her 3 March 2015 meeting with Senior Sergeant Mullin were not addressed. That failure compounded the problems associated with her 2014/2015 performance appraisal because the performance concerns she had disputed were carried over into her appraisal. That was unjustified.

Inadequacy of performance appraisal

[295] There was also no adequate reflection or assessment within the performance appraisal of the various issues that could reasonably have been expected to have had an adverse impact on Ms Opai's performance during the appraisal year. These included litigation with the Police, multiple unresolved ERPs, unresolved personal grievances and her health problems.

[296] The adverse comments that were made about Ms Opai were devoid of detailed times, dates, names or examples. This left her unable to respond.

[297] The fact that this document was sent to HR on two occasions meant that these issues should have been picked up and addressed before anyone from Police held a performance appraisal meeting with Ms Opai.

[298] The background to the 2014/2015 performance appraisal made it important for Police to ensure that if Senior Sergeant Mullin was going to make such seriously adverse comments about Ms Opai, then he needed to be very clear about what examples he was relying upon, and he needed to provide her with supporting information about each example, so that she had a real and genuine opportunity to respond to the adverse assessment that had been made about her.

[299] The Authority did not accept the Police submissions that the appraisal contained a transparent account of Ms Opai's performance during the time that he was her supervisor. Transparency would have required appropriate documentation to support the assessments made about her. That evidence was lacking.

[300] Although Senior Sergeant Mullin's evidence to the Authority was that he had taken Ms Opai's absences from the workplace during the appraisal period into account, the Authority did not accept that evidence, because there was no evidence of that in the appraisal document.

Delay in having performance appraisal meeting

[301] The timeframe for meeting with Ms Opai about her appraisal was also of concern. Although Senior Sergeant Mullin returned to Professional Standards in February of 2015, the meeting about Ms Opai's performance appraisal occurred in September 2015.

[302] There was no satisfactory explanation for that delay, particularly in light of the fact that HR had been involved and in the face of Ms Opai's involvement of counsel and the raising of personal grievance claims.

[303] The Authority did not accept the Police's submissions that Senior Sergeant Mullin conducted the September meeting in accordance with Police expectations of a "*final appraisal meeting*" as per the Police Performance Management Policy. Ms Opai was not given an opportunity to respond to the draft performance appraisal during the 2 September 2015 meeting.

[304] Nor was there sufficient evidence to support Senior Sergeant Mullin's claim that he had a regular dialogue with Ms Opai during the time that he was her supervisor.

Failure of FMCC to finalise Ms Opai's 2014/2015 performance appraisal

[305] Although the FMC Coordinator, (Ms Corder) had taken over supervision of Ms Opai from Senior Sergeant Mullin for the remainder of the 2014/2015 appraisal year, Ms Corder did not contribute to the 2014/2015 performance appraisal.

[306] The given reason for that was that Ms Corder felt unable to add to the draft appraisal because Ms Opai had only attended work for 27 shifts over the period 3 March to 30 June 2015.

[307] That refusal to finalise Ms Opai's 2014/2015 performance appraisal was unfair to Ms Opai. It was also contrary to the applicable Police performance appraisal policy that required managers who had supervised staff for part of a year to provide a performance appraisal for the part of the year that they had been in a supervisory position. That should have, but did not occur, thereby unjustifiably disadvantaging Ms Opai.

Ms Opai was disadvantaged?

[308] Ms Opai was disadvantaged because the failure of Police to finalise her 2014/2015 performance appraisal, meant that she had no finalised performance appraisal for her for the 2015/2016, 2016/2017 or the 2017/2018 performance appraisal years.

[309] That meant Ms Opai did not have positive comments or good ratings in an appraisal that she could quote or refer to in applications for interviews for new positions, either within Police or outside of Police, for the last four years of her employment.

Finding on performance appraisal grievance

[310] Ms Opai faced an adverse assessment of her performance, that occurred in a situation where she was completely unprepared and unsupported, and she was deprived of any relevant information in circumstances where Police knew she had already challenged the alleged performance concerns. That was not how a fair and reasonable employer could have dealt with the appraisal issue.

[311] The manner in which Police dealt with Ms Opai's 2014/2015 unjustifiably disadvantaged her.

Summary of findings on each of Ms Opai's disadvantage grievances

[312] Ms Opai succeeded with two of her three unjustified disadvantage grievance claims.

[313] Ms Opai's unjustified disadvantage claim regarding the disestablishment of her WO role as a result of the 2014 restructure did not succeed.

[314] The Police had genuine reasons, based on reasonable grounds for implementing the 2014 restructuring proposal that disestablished Ms Opai's WO position and it did so in a procedurally fair manner.

[315] Ms Opai's claim that the meeting Senior Sergeant Mullin had with her on 3 March 2015 unjustifiably disadvantaged her succeeds. The performance concerns he raised, the way he did that and his advice to her that the next step was a formal performance improvement plan, was not what a fair and reasonable employer could have done in all the circumstances.

[316] Ms Opai's claim that the way Police dealt with her 2014/2015 performance appraisal unjustifiably disadvantaged her succeeds. She was left without a finalised performance appraisal for the 2012/2013, 2013/2014 and 2014/2015 performance years. Her specific concerns were not adequately investigated or addressed.

What, if any, remedies should Ms Opai be awarded?

[317] Ms Opai is entitled to an award of distress compensation under s 123(1)(c)(i) to compensate her for the humiliation, loss of dignity, and injury to feelings she has suffered as a result of her two successful unjustified disadvantage grievances.

[318] Ms Opai was a particularly vulnerable employee at the time the two successful disadvantage grievances arose. She had a number of unresolved ERPs with the Police. She had formed a subjective belief that Police were wanting to remove her from her employment and her health had significantly deteriorated.

[319] The unjustified disadvantages she suffered played into her worst fears about the Police improperly targeting her and increased her sense of grievance towards Police. She told the Authority that the 3 March meeting and poor performance appraisal "*instantly felt that the briefing paper by Senior Sergeant Culpan had been given life again*".

[320] Ms Opai said that after the 3 March meeting she began to experience migraines. Ms Opai told the Authority that she didn't know how to put into words the effect all of this has had on her because she has suppressed her feelings for such a long time. She said that the extent of her distress was so great she did not think words could do it justice.

[321] Ms Opai described how she considered Senior Sergeant Mullin "*psychologically affected me with his continuous put downs about my previous past performance, by telling untruths about my performance under his supervision and by failing to genuinely support me as a manager*". She said that the way she had been treated by Senior Sergeant Mullin created esteem issues in her and destroyed her passion for the job.

[322] In March 2015 Ms Opai put the Police on notice that she considered the workplace unsafe and that she was suffering from what she believed was work stress related ill health.

[323] Against that background, Ms Opai then experienced compounded distress, humiliation and injury to feelings due to the way her 2014/2015 performance appraisal was dealt with. The

fact that HR were aware of this appraisal and the background issues regarding the 3 March 2015 meeting but did not step in to resolve the matter aggravated the distress that Ms Opai was already suffering after the 3 March meeting.

[324] Ms Opai has obviously been seriously and significantly adversely affected as a result of her successful disadvantage grievances.

[325] The Authority considered it appropriate to award one global amount to reflect the distress she has suffered in respect of both grievances because, although they were standalone disadvantage claims, they were somewhat related in nature.

[326] The Police is ordered to pay Ms Opai \$20,000 under s 123(1)(c)(i) of the Act as distress compensation in recognition of the humiliation, loss of dignity, and injury to feelings she has suffered.

Should remedies be reduced under s 124 of the Act?

[327] Having determined that Ms Opai was unjustifiably disadvantaged, s 124 of the Act required the Authority to consider the extent to which her actions contributed to the situations that gave rise to her successful grievances, and if required to reduce remedies accordingly.

[328] Contribution denotes blameworthy conduct that has been proven on the balance of probabilities. The Authority does not consider that Ms Opai's remedies should be reduced under s 124 of the Act.

What, if any, costs should be awarded?

[329] Ms Opai as the predominantly successful party is entitled to a contribution towards her actual legal costs.

[330] The parties are encouraged to resolve costs by agreement. However, if that is not possible then Ms Opai has 21 days to file her costs submissions and Police then have 21 days to file reply submissions.

[331] The parties are specifically invited to identify any factors they say should result in the Authority's usual notional daily tariff being adjusted in this particular case.

Rachel Larmer
Member of the Employment Relations Authority