IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 35
CRC 12/07

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	CHRISTINE LORRAINE COY Plaintiff
AND	THE COMMISSIONER OF POLICE Defendant

Hearing:	19 August 2010 14-18, 21 and 23-25 November 2011 6-8, 12-16 and 20-22 March, 29-30 May and 13-14 August 2012 (25 days) (Heard at Christchurch)
Appearances:	S Fairclough, counsel for plaintiff A Russell, S McKechnie, R Chan and J Catran, counsel for defendant
Judgment:	24 March 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

A **The plaintiff was not dismissed constructively by the defendant.**

B **The plaintiff was disadvantaged unjustifiably in her employment by the defendant in a number of respects particularised in the judgment.**

C **The plaintiff's claims to compensation for those personal grievances are limited to compensation under s 123(1)(c) of the Employment Relations Act 2000.**

D **The parties are to attempt to determine compensation for those personal grievances including with the assistance of a mediator if required.**

E **Costs are reserved.**

F Leave is reserved for either party to apply on notice for the Court to fix remedies and/or costs.

REASONS

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Introduction

[1] The issues in this proceeding between a former police officer and the Commissioner of Police as her employer, include:

- whether the Commissioner disadvantaged Christine Coy unjustifiably in her employment; and
- whether Ms Coy was dismissed constructively;
- if so, whether she was dismissed unjustifiably;

- if appropriate following a further hearing, the remedies to which Ms Coy may be entitled.

[2] The events with which the case is concerned occurred in 2002 and 2003. The case was filed as long ago as 2007 and its lengthy and intermittent progress towards this judgment should be explained briefly. Ms Coy was not professionally represented at the outset. Initially, her claim was dealt with by the Court at the same time as that of another former police officer in similar and associated circumstances, Bruce Ramsay. During 2007 and 2008 a number of interlocutory issues affecting both files were dealt with together but Mr Ramsay's claims were, by agreement, heard first and separately in 2009 by Judge CM Shaw. Mr Ramsay was unsuccessful in his claims against the Commissioner.[1] Ms Coy's case was postponed by consent until after Mr Ramsay's had been finalised.

[3] A combination of a number of further contentious interlocutory issues, questions about the plaintiff's representation and, very significantly, the effects of the Christchurch earthquakes, meant long delays before this proceeding could eventually come to trial and be concluded. The hearing in fact began on 19 August 2010, shortly before the first Christchurch earthquake, when the Court sat to take the evidence of two of the defendant's witnesses who had returned temporarily to New Zealand from their overseas domiciles. Consistent and significant under-estimates of hearing times by counsel, the unavailability of the plaintiff's files and difficulties in finding Christchurch courtrooms since the earthquakes have exacerbated those delays further. Twenty-five hearing days were spread over many months and conducted in various venues. The delay in issuing this judgment after the conclusion of the hearing is the Court's responsibility for which I apologise to the parties.

The justiciable scope of the claims

[4] In an interlocutory judgment,[2] the Court dealt with the dual questions of what events could constitute Ms Coy's justiciable disadvantage grievances, and the scope

[1] *Ramsay v Commissioner of Police* [2009] ERNZ 81.
[2] *Coy v Commissioner of Police* CRC12/07, 19 November 2007.

of background evidence on which she would be entitled to rely in support of her grievances.

[5] That situation arose because it was clear from the plaintiff's original pleadings that she wished to air numerous and wide-ranging complaints about her work dating back to about 1994 when, as a traffic officer employed by the Ministry of Transport, she transferred statutorily to the Police as a constable. Those complaints included not only alleged maltreatment of the plaintiff as an employee, but also misconduct by others (including particularly her supervisor Sergeant Glen Smith) which did not affect the plaintiff adversely or at least affected her only peripherally and not disadvantageously.

[6] At [6] of that judgment the Court concluded that: "Some events going back even to 1994 may be relevant to the establishment of a case of constructive dismissal …". In the same paragraph the Court added:

> So while the plaintiff is not entitled to rely on events that occurred prior to 90 days before she raised the relevant personal grievances as independent disadvantage grievances, neither should she be prevented from adducing any evidence at all about those events to support her justiciable grievances. Such evidence of events at that time will have to be relevant to the grievances that remain alive.

[7] At [12] and following in the same interlocutory judgment, the Court defined the temporal scope of the plaintiff's justiciable disadvantage grievances. Although concluding, without difficulty, that Ms Coy's letter to the Commissioner of 20 March 2003 raised an unjustified disadvantage grievance, it held that the same could not apply to Ms Coy's oral advice to Inspector David Gaskin on 3 or 4 December 2002 that: "I can tell you now I am going ahead with a personal grievance because I think I have been personally treated very badly." Although Ms Coy did not contend that this oral advice alone raised a grievance, the difficult question was whether her follow-up to this, in the form of a written communication to Inspector Gaskin on 22 December 2002, constituted the raising of a personal grievance. The material text of that letter is set out at [14] of the interlocutory judgment of 19 November 2007 and I will not repeat it here.

[8] The Court concluded that "by a narrow margin" Ms Coy's letter of 22 December 2002 did meet the tests for raising a grievance under s 114(2) when read in conjunction with the plaintiff's oral advice to Inspector Gaskin on 3 or 4 December 2002. The Court held, therefore: "It follows that the plaintiff is entitled to raise as grievances only events that occurred in the previous 90 days, that is on or after 23 September 2002."

[9] Whilst a good deal of the hearing was taken up with evidence of earlier events (and a similar proportion of the extensive documentation also covers this historical period), the judgment must focus principally on what happened after 23 September 2002 to determine whether Ms Coy was disadvantaged in her employment by unjustified action by the Commissioner during that period. There is also the plaintiff's claim that she was dismissed constructively and unjustifiably by the Commissioner. Relevant events leading to her resignation must be taken into account irrespective of when those may have occurred although, generally, the more historic those events, the less relevant they will be to determining whether there was a constructive dismissal.

[10] Unfortunately for the plaintiff, this case illustrates the arguable inadequacy of the personal grievance procedure where an employee's complaint is about historical alleged ongoing incidents of maltreatment in employment. That is so, in particular, where those allegations relate to the acts or omissions of an immediate supervisor who is substantially removed from the employer's human resources personnel or other senior management in the organisation's hierarchy.

[11] If one accepts (solely for the purpose of these general comments) the validity to her of the plaintiff's numerous historic complaints against her supervising sergeant in his dealings with her, Ms Coy elected (or if she did not do so deliberately, is deemed to have elected) to put up with these over a long period. If she did not so elect, she opted at least to deal with them other than by the legal formality of raising a personal grievance within 90 days of the occurrence of each.[3] It is this temporal jurisdictional limitation which prevents a grievant such as Ms Coy from raising with

[3] As required by s 114(1) of the Employment Relations Act 2000 if such personal grievances are to be actionable.

the employer and then bringing accumulated historical grievances to the employment law institutions (the Authority and the Court) where more than 90 days has passed since the occurrence of each individual incident.

[12] For those reasons, the number and nature of Ms Coy's complaints are significantly limited, although extensive evidence dating from about 1992, when the plaintiff took the constabular oath was heard and has been considered.

[13] The Court permitted relevant earlier events, about which she now complains, to be treated as background evidence related to the justiciable personal grievances and, in particular, to determine whether Ms Coy was dismissed constructively and, if so, unjustifiably. Unfortunately, considerable, sometimes inordinate, time was spent in evidence about these particular events that occurred between 1995 and 2002. Because the rights and wrongs of these events are not for determination in this case, but only affect the probabilities of justiciable events, they will not be recounted in this judgment.

[14] By agreement from an early stage in the litigation, the hearing and, therefore, this judgment deal only with questions of liability. If any or all of the grievances are upheld, remedies for those will first be the subject of mediation in an attempt to settle them or, if that is not successful, then following a further hearing about those issues.

The pleadings

[15] These determine the issues between the parties. They are particularly important in this case because the evidence has ranged both widely and intensively over the last 10 years of the plaintiff's employment.

[16] The latest operative statement of claim is the plaintiff's third amended statement of claim dated 13 October 2011, allowed by leave after the hearing had commenced (albeit to take the evidence of overseas-based witnesses) in August 2010. This third amended statement of claim was also filed to comply with the Court's directions narrowing the plaintiff's justiciable disadvantage personal

grievance allegations to those relating to events which occurred after 23 September 2002.

[17] In respect of each of the first and second (unjustified disadvantage) grievances, the sole remedy sought is compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity, and injury to feelings in the sum of $50,000 or such other sums as the Court considers appropriate. The plaintiff's third grievance (unjustified constructive dismissal) seeks remedies including:

- the plaintiff's loss of earnings as a senior constable "to the date when she might reasonably have expected to retire in a sum to be assessed";
- lost benefits for the same period; and
- s 123(1)(c)(i) and (ii) compensation of $120,000 or such other sum as the Court considers just.

[18] The three personal grievances can be categorised temporally as follows.

[19] The first (unjustified disadvantage) grievance concerns events which commenced on 27 September 2002 relating to the plaintiff's decision not to charge the driver of a vehicle (who will be referred to as "C") in relation to events a few days previously. The second (unjustified disadvantage) personal grievance dates from about 1 March 2003, commencing with the plaintiff's supervisor's return from leave and his treatment of her until 8 May 2003. The third grievance (unjustified constructive dismissal) concerns the foregoing events and others leading up to the plaintiff's application to disengage as a member of Police on or about 26 September 2003, and the defendant's acceptance of that medical disengagement application.

[20] The plaintiff's first cause of action (unjustified disadvantage) asserts at para 9 of the latest statement of claim that the events set out at paras 5-7, individually and in combination, amounted to unjustified and unreasonable action by the

Commissioner which affected the plaintiff to her disadvantage. These deal with a number of issues which can be summarised as follows:

- Sergeant Smith's response to Ms Coy's decision not to charge C;
- Sergeant Smith's report and its consequences about the finding of a cannabis bullet;
- Sergeant Smith's inclusion of a report on these matters in a shared computer folder;
- advice to other police staff that the plaintiff would not be returning to work;
- placing the plaintiff under the supervision of a less senior member; and
- receipt of critical reports from Inspector Gaskin.

[21] The plaintiff's second cause of action arises out of the grievance that she submitted on 8 May 2003 and deals generally with her treatment by Sergeant Smith in March 2003 which she claims caused her to take sick leave and disadvantaged her unjustifiably. The particulars of this unjustified disadvantage grievance are set out in paras 10-15 of the third amended statement of claim and include allegations about:

- restrictions on the plaintiff's freedom of movement;
- unduly greater scrutiny than applied to other staff;
- repeated references to the plaintiff's grievance;
- attempts to restrict the plaintiff's access to her union, the Police Association; and

- that the above amounted to attempts to discredit and isolate the plaintiff resulting in her becoming unduly stressed and taking sick leave from 9 April 2003.

[22] The plaintiff's third cause of action claims that she was dismissed constructively and unjustifiably. The particulars in support of this claim are set out in paras 16-28 of the third amended statement of claim and can be summarised as follows:

- the defendant's inadequate response to the plaintiff's (disadvantage) personal grievances;

- the defendant's unlawful and unfair attempts to exclude the plaintiff from her workplace by removing her station keys and subsequently changing the locks of her police station;

- the defendant's refusal to deal with underlying trust and interpersonal issues as illustrated by the contents of two rehabilitation meetings on 31 July and 5 September 2003;

- a general complaint about the defendant's treatment of the plaintiff after raising her two disadvantage grievances and about her treatment "throughout her service"; and

- the defendant's acceptance of the plaintiff's application to disengage from the police.

[23] The plaintiff says, the defendant does not contend otherwise, and I agree, that a resignation, agreed to by the Commissioner on the grounds of psychological incapacity under s 28D[4] of the then operative Police Act 1958, did not exclude recourse to a claim of constructive dismissal: see, for example, *Hawkins v Commissioner of Police.*[5]

[4] I will refer to this as a PERF resignation or disengagement, the acronym representing the Police Early Retirement Facility referred to commonly as such.
[5] *Hawkins v Commissioner of Police* [2007] ERNZ 762 at [29]-[33].

[24] The starting point for examination of the defendant's acts or omissions towards the plaintiff will be, therefore, the defendant's treatment of the plaintiff arising out of the C-related driving and associated incidents which took place on 23 September 2002. Before that, however, it is necessary to set the scene in which these events occurred, because their context is important to their consequences. I also outline the relevant statutory context in which these grievances must be judged.

Background

[25] This case centres on the Temuka police station in South Canterbury and police officers either based there or otherwise responsible for them. Serving that town and the surrounding rural areas, the station was under the charge of a Sergeant (at most relevant times Sergeant Smith) and a number of constables, many of whom, because of their lengths of service, held the rank of senior constable. Constable Coy joined the Station in about 1992 following the merger into the Police of former Ministry of Transport traffic officers of which she had been one. Temuka police station was also responsible for two smaller rural sub-stations to which its officers would be assigned from time to time.

[26] Temuka was a satellite station in the South Canterbury District, the office of which was co-located with the larger urban Timaru police station. Temuka's sergeant was answerable to an inspector as district commander based at Timaru, at all relevant times Inspector Gaskin. Because of its larger size, Timaru station also had another inspector, a senior sergeant, several sergeants and a larger number of constables reporting to them. Inspector Gaskin was also responsible for those staff in the same manner as he was for the officers at the Temuka station.

[27] Inspector Gaskin was, in turn, answerable to the management of the Police for the Canterbury District based in Christchurch. At the relevant times, the district commander in Christchurch was Superintendent Sandra Manderson. There were also Police human resources personnel based in Christchurch, both constabular officers and non-sworn staff. At relevant times these included, among others, Inspectors David Lennan and Dawn Bell. They succeeded a non-sworn human

resources manager, Mike Dodge, who died soon after being appointed there and becoming involved in Ms Coy's employment relationship problems.

[28] Ultimately, responsibility for Canterbury District policing rested with the office of the Commissioner in Wellington although most of the events with which this case is concerned occurred at Canterbury District level or below.

[29] Although a dedicated police officer whose performance assessments noted consistently her willingness to work additional duties to assist colleagues or for the purpose of a particular operation, Ms Coy was content both to remain in rank as a constable, and to be a South Island rural officer. In the expectation of being based long-term at the small Geraldine police station, Ms Coy purchased a property at Woodbury near Geraldine following an initial period of suburban policing in Christchurch. Her transfer to Temuka, instead of Geraldine as she hoped, both placed her under more direct supervision at a larger station and required 30 minutes' driving to and from work. Until late in her career at least, she was permitted both to use a patrol car and to treat her commuting time as duty time. This enabled Ms Coy to go home for meal breaks. Subsequently, however, she had to provide her own transport to and from work and, for a period, was prohibited by Sergeant Smith from leaving the district covered by the Temuka station (which excluded her home) while on duty without his permission. The plaintiff was precluded from taking meal breaks at home. I deal in more detail with this event subsequently in this judgment.

[30] Although receiving consistently and generally satisfactory performance assessments, attention to administrative detail and paper work was not Constable Coy's strong suit but she was not alone in that regard at Temuka. Sergeant Smith also found some of the administrative parts of his job irritating and tedious, so although he was, at times, critical of Ms Coy concerning aspects such as her file preparation and closure, he also could fairly be and was criticised, including by Inspector Gaskin, for his inadequate performance assessment of the staff under his supervision and similar administrative responsibilities and requirements. My general impression of the Temuka station led by Sergeant Smith in the late 1990s and early years of the 21st century, was that it was a relaxed station consisting of long-term and experienced officers who performed adequately for the requirements of the area the

station covered but for at least some of whom bureaucratic requirements were to be fulfilled only as and when necessary.

Applicable legislation and its interpretation

[31] Employment of a police officer in New Zealand is unique in a number of ways. Sworn police officers,[6] who are all "constables" (irrespective of the ranks held and including the Commissioner himself), hold both statutory and common law office as constables. Except for the Commissioner, police officers are his employees. They were, at the times with which this case is concerned, subject to a variety of legislative provisions including the Police Act 1958 and the Police Regulations 1962 (in force at the time of Ms Coy's employment) and the Employment Relations Act. The parties' employment relationship was also subject to both delegated legislation and policies and procedures, to which I will refer as required.

[32] At the time with which this case is concerned, tests of justification for disadvantages in, and dismissals from, employment, were dealt with solely by judge-made law. In 2003, the first s 103A of the Act had yet to be enacted. The most recent and authoritative statement of the test of justification (in that case for dismissal but applicable also to disadvantage grievances) was set out in the judgment of the Court of Appeal in *W & H Newspapers Ltd v Oram* as follows:[7]

> [44] … whether it was open to the employer, acting fairly and reasonably, to have seen that [dismissal] as the appropriate response to [the employee's] conduct.
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> …
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> [46] … [whether after a fair and reasonable] investigation … the employer, having regard to the nature of the business of [the employer and having regard to other relevant circumstances] … reached the conclusion that [the employee's] conduct in the circumstances meant that he had lost the confidence of his superiors that he could be relied upon in the future. We have no doubt that a fair and reasonable [employer of the employee] could form that view. It was a view open to the employer, notwithstanding the appellant's previous employment record with the [employer].

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[6] The events with which this case is concerned occurred before the advent of the Policing Act 2008 which changed the descriptions of what were formerly known as "sworn" and "non-sworn" police staff. I will use the previous terms.

[7] *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29, [2000] 2 ERNZ 448 (CA).

[33] In relation to all grievances, the plaintiff relies upon breaches by the defendant (by his managers and supervisors of the plaintiff) of statutory codes and rules including General Instructions (GIs), and other rules and procedures regulating the Commissioner's employment of police officers and governing their duties.

The law of constructive dismissal

[34] Because the plaintiff's third personal grievance alleges unjustified constructive dismissal, it is also necessary to apply the law in New Zealand relating to this cause of action. Unlike personal grievance law, constructive dismissal has not changed between 2003 and now. The law applying to constructive dismissal is set out most authoritatively in the judgment of the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc).*[8] That judgment has not subsequently been revisited by the Court of Appeal or the Supreme Court and has been followed by the Employment Court. It consolidates previous case law and identifies the following (non-exhaustive) examples of when a resignation from, or abandonment of, employment by an employee may nevertheless amount to a constructive dismissal of the employee by the employer. At p172 of the ERNZ report and following, the Court of Appeal held as follows:

> In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in the *Auckland Shop Employees* case. But in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in *Woods v WM Car Services (Peterborough) Ltd* quoted in the *Auckland Shop Employees* case. As the Judge put it:

[8] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA) .

> "In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd v Austin* [1978] IRLR 322 and *Post Office v Roberts* [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts*.
>
> "We regard this implied term as one of great importance in good industrial relations . . ."
>
> The importance of such a term has been emphasised since, for instance in *White v Reflecting Roadstuds Ltd* ...

[35] It is appropriate, also, to set out a passage from the more extensive discussion by the Court of Appeal in an earlier constructive dismissal case, *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd*.[9] As in *Auckland Electric Power Board*, the judgment in *Auckland Shop Employees* was delivered by Cooke J. The Court defined constructive dismissal as follows:

> … It would be undesirable to try to visualise all the kinds of case which the Arbitration Court could properly treat as constructive dismissals, but it is not difficult to list some.
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> The concept is certainly capable of including cases where an employer gives a worker an option of resigning or being dismissed; or where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign. …
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> A third category consists of cases where a breach of duty by the employer leads a worker to resign. …
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> …
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> It may well be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity (see *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243). No formulation of duties in general terms can relieve a tribunal from assessing the overall seriousness of the particular conduct about which a complaint is made. And the seriousness of any breach of an employer's duties will often be important in deciding whether a resignation was in substance a dismissal. …

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[9] *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374, 376, (1985) ERNZ Sel Cas 136 at 139, 141.

[36] Although the plaintiff does not claim that the defendant gave her expressly an option of resigning or being dismissed, in the Court's interlocutory judgment of 19 November 2007 records that:[10]

> Ms Coy categorises what she contends was her long-term mistreatment by her supervising sergeant and exacerbated by other supervisory officers, as being a course of conduct with the deliberate and dominant purpose of coercing her to resign.

[37] Even if that ground of constructive dismissal is not established, however, the plaintiff says that the Commissioner's breach or breaches of duty towards her were so significant and their probable prospective repetition such that these amounted to a fundamental breach by the employer. She claims this entitled the plaintiff to elect to treat the contract of employment as having been repudiated by the Commissioner, in other words a dismissal. In accordance with the long-established case law on constructive dismissal just summarised, the plaintiff must also prove that her resignation was a consequence of the defendant's conduct towards her which was foreseeable to the defendant.

[38] In closing submissions to the Court, however, the plaintiff's counsel Mr Fairclough identified the principal ground of constructive dismissal as being the defendant's breaches of contractual and statutory employment obligations that amounted to a repudiation of the employment relationship by the defendant. Although not abandoning the deliberate coercion of resignation ground, Mr Fairclough accepted its weaker foundation on the evidence heard by the Court.

Implied obligations of good faith?

[39] Although counsel for the plaintiff acknowledges that the events with which this case is concerned occurred before the 2004 parliamentary enhancement of good faith obligations under the Act,[11] the plaintiff says the Commissioner was nevertheless under such obligations. That is said to be for two reasons: First, there was an implied contractual duty of good faith and, second, the Commissioner was obliged statutorily to be a "good employer". Mr Fairclough submitted that a good

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[10] *Coy v Commissioner of Police*, above n 2 at [10].
[11] Employment Relations Amendment Act 2004, ss 5-6.

employer was obliged to act in good faith and that if the employer failed to be a good employer, that employer acted in bad faith and was, thereby, in breach of obligations to be a fair and reasonable employer.

[40] Whilst that analysis of the legal position may have had some more traction if these events had happened after 2004, the position before those statutory amendments is well illustrated in case law and does not go as far as the plaintiff would now have it. There were, as between the parties, implied contractual obligations of trust, confidence and fair dealing but, as the case law shows, that did not extend to the particular obligations for which Parliament legislated in 2004 and upon which, therefore, the plaintiff cannot rely.

[41] The enactment by Parliament in 2004 of enhanced express good faith provisions was its response to the judgments of the Court of Appeal in *Coutts Cars Ltd v Baguley*[12] and *Auckland City Council* v *New Zealand Public Service Association Inc*.[13] The latter case concerned the propriety of dealings between an employer and employees (represented by a union) affected by proposed restructuring and, potentially, redundancies. The full (Employment) Court had held:[14]

> [76] What is required of parties to employment relationships is that they should be energetic in positively displaying good faith behaviour as contrasted with just avoiding any such examples of bad faith behaviour as may be expressly defined and prohibited. …
> …
>
> [87] What was the extent of the respondent's duty to the applicant? It was the duty to deal with it in good faith. It will not have done so if it has misled or deceived the PSA directly or indirectly or has done anything that was likely to mislead or deceive the PSA. However, these definitions are not exhaustive and the duty of good faith is plainly wider than merely abstaining from conduct that is misleading or deceptive. We do not find it helpful to focus (as the respondent's case does) on the matters enumerated in s 4(4), as s 4(5) makes it clear that these are examples only.
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> [88] The obligation on parties to employment relationships to "deal with" each other in good faith extends to all dealings, including omissions as well as actions and silence as well as statement. It is not good faith for parties to such relationships to conceal from each other what it may be material to the other to know. In this case the council's knowledge of the PSA's acute

[12] *Coutts Cars Ltd v Baguley* [2001] ERNZ 660, [2002] 2 NZLR 533 (CA).
[13] *Auckland City Council v New Zealand Public Service Association Inc* [2003] 2 ERNZ 386, [2004] 2 NZLR 10.
[14] *New Zealand Public Service Association Inc v Auckland City Council* [2003] 1 ERNZ 57.

> interest in the Birch review put it on notice that it would need to consider its position carefully in the face of repeated requests for information from the PSA. To enable it to consult effectively about the changes the council resolved to implement, the PSA required information about these matters that the defendant refused to share with it.
> …
> [102] Section 4(4) does not, without more, itself provide an obligation on parties to an employment relationship to consult. But the general obligation to act in good faith in employment relationships in s 4, and the common law of employment dealing with obligations of trust, confidence and fair dealing as determined by the Courts, may both impose such a requirement, in which case good faith will then be required in those consultations the law obliges the parties to undertake.

[42] On appeal, the Court of Appeal set aside the Employment Court's findings, saying that the statutory requirements and the common law obligations of trust, confidence, and fair dealing could not be extended in the manner found by the Employment Court. So the law governing the obligations of the parties in this case (being 2002-2003) is as it was stated by the Court of Appeal in the *Auckland City Council* case.

[43] The 2004 amendments to the Act included, in particular, the insertion of a new and expanded s 4. It was intended to change the position established by the Court of Appeal and to reinstate the obligations on employers that the Employment Court had determined. This is illustrated by the almost identical statutory wording with that used by the Employment Court in its judgment in the *Auckland City Council* case. That interpretation has been confirmed by this subsequently.[15]

[44] So, for the plaintiff, the legal position must be that which the Court of Appeal determined to be the law before the 2004 statutory amendments came into effect, by which time, of course, it was too late for Ms Coy.

[45] Nor do I think that the very general so-called "good employer obligation" under the state sector-specific employment law can be used to the same effect. Section 56 of the State Sector Act provides:

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[15] *Maritime Union of New Zealand Inc v Ports of Auckland* [2010] NZEmpC 32, (2010) NZELR 257 at [80].

> **56 General principles**
> (1) The chief executive of a department must—
> (a) operate a personnel policy that complies with the principle of being a good employer; and
> (b) make that policy (including the equal employment opportunities programme) available to its employees; and
> (c) ensure its compliance with that policy (including its equal employment opportunities programme) and report in its annual report on the extent of its compliance.
> (2) For the purposes of this section, a **good employer** is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring—
> (a) good and safe working conditions; and
> (b) an equal employment opportunities programme; and
> (c) the impartial selection of suitably qualified persons for appointment (except in the case of ministerial staff); and
> (d) recognition of—
> (i) the aims and aspirations of the Maori people; and
> (ii) the employment requirements of the Maori people; and
> (iii) the need for greater involvement of the Maori people in the Public Service; and
> (e) opportunities for the enhancement of the abilities of individual employees; and
> (f) recognition of the aims and aspirations and employment requirements, and the cultural differences, of ethnic or minority groups; and
> (g) recognition of the employment requirements of women; and
> (h) recognition of the employment requirements of persons with disabilities.

[46] These provisions are linked closely to s 7 (Employment principles) of the Police Act 1958 (now repealed) which provided:

> The Commissioner shall operate a personnel policy that complies with the principle of being a good employer by following, subject to this Act, as closely as possible and as if he or she were the chief executive of a Department, the provisions of sections 56 and 58 of the State Sector Act 1988.

[47] Parliament can therefore be seen to have defined the so-called good employer obligation quite restrictively and in a way that did not include what are now the statutory good faith obligations under the Act. The s 4 obligations have at least confirmed for general application those earlier statutory good employer obligations, and expanded them in all cases including in state sector employment.

The defendant's theory of the case - 'reverse engineering'?

[48] In her final submissions on behalf of the defendant, Ms Chan asserted that the plaintiff's claims had been largely "reverse engineered". By this counsel meant that, to create a number of grievances, the plaintiff had both revived historical dissatisfactions which she had, at the time, let pass, and had relied on events which had only come to her knowledge first through the litigation process. Counsel submitted that the plaintiff should not be allowed, in this way, to recreate or to freshly create grievances in litigation. Further, counsel submitted that the plaintiff had, from a very early stage, been intent upon airing these grievances about her treatment and her allegations of misconduct by other officers, in the Employment Court. Ms Chan submitted that the plaintiff really had no genuine intention of resolving these issues with her employer to their mutual benefit. The defendant's case is that the plaintiff's motivation was to blow the proverbial whistle on other, principally more senior, police officers and staff, even at the cost of sacrificing her career to do so.

[49] While it is true that, for several months before disengaging from the Police in 2003, Ms Coy referred on a number of occasions to having her accumulated dissatisfactions with the defendant considered in "the Employment Court", I think those were both rhetorical statements and uttered out of an increasing frustration by her that her grievances were not being addressed by the defendant as she wished them to be. I do not accept the defendant's broad contention that Ms Coy had no genuine intention of resolving at least her early grievances. Nor do I accept, as it was put very generally for the defendant, that the plaintiff's principal motivation was to bring down other more senior police officers, sacrificing her own career to do so. In 2002 and early 2003 Ms Coy was still motivated to continue as a police officer, although at the same time insisting that her complaints of maltreatment be dealt with. By the time she went on long-term sick leave in early April 2003, however, that aspiration of maintaining her career must have appeared increasingly unrealistic. Again without going so far as counsel for the defendant did in closing submissions, or so absolutely, I do accept that historical contretemps with Sergeant Smith and

some other supervisors in which Ms Coy acquiesced at the time, subsequently became, or re-emerged as, grounds for complaint.

Plaintiff's 22 December 2002 personal grievance – the "C" incident

[50] This is the first of the three grievances in which the plaintiff claims she was treated disadvantageously and unjustifiably by the defendant. This was in relation to inquiries into the role of a person, who will be referred to as "C", in offences committed by another person who will be referred to as "N". There is an order prohibiting publication of the names or other details identifying these persons (and others involved in offending or alleged criminal offending dealt with in this case). These orders were made by consent and are now made permanent non-publication orders pursuant to cl 12 of sch 3 to the Act. The identities of these people do not affect the outcome of the case. The relevant events surrounding the C incident and subsequently, which form the basis of the plaintiff's personal grievance, are as follows.

[51] On the early evening of Sunday 23 September 2002 Constable Coy was the sole police officer on duty in the area covered by the Temuka police station. She received and investigated a complaint about the manner in which a car was being driven, and interviewed witnesses. Upon inquiry about the registration of the vehicle, Ms Coy ascertained that it was associated with N with whom she was familiar and who she knew was the subject of outstanding arrest warrants from Christchurch.

[52] Later in the evening Ms Coy responded to a 111 emergency complaint call from a passenger in another vehicle (driven by C) which it was alleged the N-associated vehicle was pursuing around Temuka. The complainant's vehicle, driven by C, had allegedly been run off the road and the two occupants of the N-associated vehicle had attempted to assault the occupants of the C-driven vehicle with what appeared to be a bat or similar weapon. The C-driven vehicle took evasive action which, unassociated with a pursuit by another vehicle and attempted assaults, may have amounted to dangerous driving.

[53] The plaintiff located and stopped the vehicle driven by N and he was arrested. The plaintiff located a wooden bat or club and a knife in the vehicle. This had occurred by the time two backup patrol vehicles from Timaru arrived. The plaintiff then took N to the Temuka police station to uplift warrants for outstanding fines before taking him to Timaru where he was to be held in custody. After further inquiries with witnesses to these events in Temuka, Constable Coy then finished her shift.

[54] In the previous week when the plaintiff had ascertained N's presence in Temuka, she had discussed with Sergeant Smith what should be done. Sergeant Smith's view was that N should be told to leave Temuka immediately, although the warrants for his arrest were in the course of being sent from Christchurch. Ms Coy's view was that the Police should wait until the warrants were received and that N could then be arrested. It also came to Ms Coy's notice at about the same time that N was involved in the cultivation of cannabis at the address at which he was living in Temuka. It appears that the plaintiff's strategy for dealing with N was accepted, or at least that Sergeant Smith had not got around to running him out of town, before the driving incident just described.

[55] On the day following N's arrest, 24 September 2002, with the assistance of detectives from Timaru and the plaintiff, N's cannabis operation was shut down. Drugs and associated equipment were seized. The plaintiff, in response to an offer of help from Sergeant Smith about the driving incident, asked him to assist by taking the statements of three of a number of witnesses to the events. Sergeant Smith subsequently responded that he had not been able to obtain statements from two of the three although they would provide their own statements at the station in the following days. In the event, this did not occur and none of the three witnesses appears to have been interviewed by a police officer.

[56] Sergeant Smith had dealt previously with C, the driver of the vehicle intimidated by N and who had been treated by the plaintiff as a complainant in the driving and assault affair. Upon his first significant involvement with the events on 24 September 2002, Sergeant Smith called out from his office to the plaintiff who was also at the Temuka police station: "Charge that [C] – he drives like a bloody

idiot." The plaintiff had not yet then interviewed C but she was the officer in charge of the inquiry and had a greater familiarity with all aspects of it than did Sergeant Smith at that time. The plaintiff did not charge C, either immediately or subsequently.

[57] On 26 September 2002 the plaintiff interviewed C at the Temuka police station. He was the driver of a vehicle and girlfriend, a passenger, had made the 111 emergency call about the pursuit of their vehicle by N and N's threats of, or attempts at, violence against them when he ran their vehicle off the road. C declined to answer the plaintiff's questions unless he knew that he was not going to be charged with any driving offences. The plaintiff told C that Sergeant Smith wanted him charged. C was a prime witness to the events involving N but the plaintiff believed that if other accounts of the incident were correct, C would have had a defence to any relevant driving offences committed by him in the course of evading or escaping from N. The plaintiff concluded that in order to prove an assault by N using a weapon, it was necessary to treat C as a complainant and witness and not a potential accused. Accordingly, the plaintiff advised C that she would not herself charge him with any driving offence.

[58] On that basis C agreed to tell her what had happened and did so. In addition to believing that C had a defence (which was confirmed by the statement he subsequently made to her), the plaintiff was also mindful that during her interview of him, she could caution him if she considered that he might disclose the commission of an offence by him for which he could not have had a defence or other justification. However, this did not prove to be necessary in the course of the plaintiff's interview of C.

[59] Finally, in this regard, the plaintiff was aware from recent events in Timaru that a similar situation had arisen in an unrelated driving incident, where the same course had been taken by another constable and no charges had been brought in respect of driving offences committed by someone in similar circumstances to C's.

[60] Sergeant Smith's interviews of two witnesses on 27 September 2002 appeared to confirm that N's vehicle, pursuing C's at high speed, swerved violently

to cut off C after which N got out of his vehicle and approached C's vehicle with a piece of wood in his hand.

[61] Nevertheless, later on the morning of 27 September 2002 Sergeant Smith called the plaintiff to his office and again said: "I want you to charge that [C]". The plaintiff replied: "Not me Sarge" in response to which Sergeant Smith told her forcefully that he was in charge and that she had to do as she was told. The plaintiff attempted to point out that she had not cautioned C in the course of taking his statement which might mean that this was inadmissible against him. Sergeant Smith responded that the statement could still be used in evidence. The plaintiff asked the sergeant for a written direction to charge C and Sergeant Smith responded that he would give her one. The plaintiff's position was that further attempts to persuade Sergeant Smith of the correctness of her decisions (including not C) would be futile but that if directed in writing to do so she would comply, knowing that responsibility for attempting to use an inadmissible statement would not then be sheeted home to her.

[62] The plaintiff was then about to go on leave. She intended to re-interview C on her return and upon receiving a written direction, to charge him, although no such direction was ever provided by Sergeant Smith. Later on 27 September 2002 Sergeant Smith told the plaintiff that he had "read [C's] statement. He had an opportunity to go down King Street", thereby being able to extricate himself from N's pursuit of him. The plaintiff did not make any comment in response.

[63] Later again that day, Sergeant Smith asked Ms Coy to sign her annual performance appraisal which he had just completed. This had included a comment that the plaintiff had trouble with "involved inquiries". The plaintiff commented to Sergeant Smith that the N file would be seen as a complicated one. Having signed the appraisal form, the plaintiff then commenced 10 days' leave without further reference to these events.

[64] The plaintiff returned to work from leave on Friday 11 October 2002. Before doing so, she had been advised by colleagues that Sergeant Smith had prepared a report about the C matter that was very critical of her and that this had been

forwarded to Sergeant Smith's immediate supervisor, Inspector Gaskin in Timaru. Ms Coy's colleagues had become aware of this because Sergeant Smith's report was held in a common folder on the station's computer intranet. As such, it was accessible to, and apparently accessed by, other staff at the station. The plaintiff herself received a copy of Sergeant Smith's report on 10 October 2002 when she called into the station on the day before her leave was scheduled to finish.

[65] Also during the period of the plaintiff's leave, Sergeant Smith approached at least one other constable based at Temuka to have C charged with a driving offence. In the presence of Constable John Mawhinney, Sergeant Smith directed Constable Graeme Walker to charge C with driving offences arising out of the incident. Constable Walker's response was that the sergeant should wait until the plaintiff returned to duty from her leave as he (Sergeant Smith) had directed her to do so. Sergeant Smith then directed Constable Mawhinney to re-interview C about the driving incident and he did so. Constable Mawhinney's recollection of his interview and its outcome is that it was his view that C was justified in what he may have done in that he was fleeing from a person who was pursuing him and attempting to assault him with a weapon.

[66] In the event, C was never charged in relation to this incident. N was charged, convicted and imprisoned for his role in it and in relation to the unlawful drugs matters.

[67] As mentioned previously, on 2 October 2002 during the plaintiff's leave, Sergeant Smith reported to Inspector Gaskin about the plaintiff's performance of her duties under the heading "Failed to carry out investigation as directed". This report centred on Sergeant Smith's direction to the plaintiff to prosecute C for his driving on 23 September 2002 and her alleged refusal to do so. Sergeant Smith's report to Inspector Gaskin of 2 October 2002 contained not only allegations relating to her dealing with C, but also dealt with her alleged failure to adequately secure a cannabis 'bullet', an event unconnected with the C allegations. It is necessary, therefore, to deal with that issue.

[68] Before her departure on leave, the plaintiff had received a small quantity of cannabis wrapped in silver foil known colloquially as a 'bullet' which had been handed in to the station by a member of the public. Nothing was known about the criminal liability of any person in this regard. In these circumstances, there was little that could or should have been done with this item other than to arrange for its disposal, to complete an appropriate record of this and, in the meantime, to secure the cannabis. The plaintiff had not done so by the time she went on leave and had left the 'bullet' in her correspondence tray in the constables' room at the Temuka police station which was shared with other sworn officers and to which the station's non-sworn watchhouse keeper also had access. The room was not, however, otherwise accessible by members of the public.

[69] During Ms Coy's absence on leave, Sergeant Smith attempted to find a piece of correspondence in her tray and discovered the bullet. His inquiries revealed that no steps had been taken to otherwise secure, destroy, or document this item and in these circumstances Sergeant Smith saw fit to report the plaintiff to Inspector Gaskin for her failures to do so.

[70] This was a technical non-compliance by the plaintiff with procedural requirements involving a relatively innocuous, albeit unlawful, item which, although insufficiently secured and documented, was nevertheless very unlikely to fall into nefarious hands. It is difficult not to conclude that the cannabis bullet was made the subject of a formal complaint by Sergeant Smith to Inspector Gaskin as a result of the former's resentment at what he considered to be the plaintiff's disobedience of his instructions over the C incident. The formal reporting of the cannabis bullet incident was a makeweight intended by Sergeant Smith both to make more serious his complaint against the plaintiff, and to bring her into line for what he considered was her general laxness with regulatory compliance obligations.

[71] Also on 2 October 2002 during her absence on leave, the plaintiff was subjected purportedly to disciplinary sanction by Sergeant Smith who restricted her duties and placed her under the supervision of one of her more junior colleagues, Constable Mawhinney. Sergeant Smith did so in reference to the adverse reports that he had provided to Inspector Gaskin and before the inspector had acted on these

reports. Sergeant Smith directed that the plaintiff was not to attend what he described as any "complicated jobs" unless she was under the supervision of Constable Mawhinney. Although the plaintiff complains (justifiably in my view) of having been belittled publicly by her colleagues' knowledge of these constraints, she accepts that they were meaningless in practice because she continued to be rostered for weekend shifts during which she was the sole police officer working in the area and so attended jobs irrespective of their complexity.

[72] Sergeant Smith went on long service/pre-retirement leave on about 11 October 2002, at about the same time as the plaintiff returned from her leave. In the sergeant's absence, he was replaced temporarily at Temuka by Sergeant Malcolm Lowrey who, after discussions with the plaintiff on 15 October 2002, returned her immediately to full duties without restriction or supervision.

[73] After her return from leave, the plaintiff made a detailed reply to Sergeant Smith's report against her in a written report that she sent to Inspector Gaskin on 18 October 2002.

[74] In correspondence dated 11 November 2002, Inspector Gaskin responded to the plaintiff's comprehensive explanation of the C and cannabis bullet matters. He accepted that the plaintiff may have been somewhat confused about what Sergeant Smith wanted her to do in relation to charging C. However, he concluded that the plaintiff had acknowledged that Sergeant Smith had told her on 24 September 2002 that he wanted her to charge C with a driving offence. Inspector Gaskin concluded that when the plaintiff interviewed C on 26 September 2002, she neither cautioned him nor notified him of his "rights pursuant to the Bill of Rights". The Inspector concluded: "When interviewing a suspect for an offence as directed by your supervisor your judgment in regard to this was incorrect." He continued:

> Your failure to carry out this basic interview requirement unfortunately does not caste you in good light. Sergeant Smith acknowledges he was angry when you informed him that we were not charging [C]. In his position I must admit I would have been too.
>
> …
>
> In future if you are told to carry out an investigation in a particular manner you will do so. Failure to perform the basic requirements of an interview when you believe the offender has offended against any statute or regulation is incompetent.

[75] Under the concluding heading "Action" Inspector Gaskin stated:

> Although I have already spoken to you this year on a separate matter I do not intend to report either of these matters to the District Headquarters. Both are examples of poor judgment and should be dealt with as performance issues. Diary Notes will be placed on your Personal Appraisal for the 02-03 Appraisal year. If you wish to continue to work as a Constable in Temuka you should carefully examine your personal performance as these reported incidents are indicators which show some areas of judgment that are lacking.

[76] On 14 November 2002 the plaintiff was advised by Sergeant Lowrey that Inspector Gaskin and Sergeant Smith (officially on leave) were coming to the Station to talk to her. With the assistance of her colleague, Constable Ramsay, the plaintiff made contact with her Police Association representative at Timaru, indicating that she did not wish to speak to Sergeant Smith. In these circumstances Inspector Gaskin came alone to the Station and spoke to the plaintiff about her response to Sergeant Smith's report. In the course of those discussions the plaintiff indicated her frustration with what she perceived to be continual criticism of her by Sergeant Smith and the adverse effects on her. Inspector Gaskin indicated that she would have to talk to Sergeant Smith sooner or later and the sooner the better. He advised the plaintiff that Sergeant Smith did not hold any grudges against her.

[77] On 22 November 2002 the plaintiff wrote to Inspector Gaskin requesting records of discussions between him and Sergeant Smith and copies of any documents sent by Sergeant Smith to him regarding the C inquiry as it related to her and Sergeant Smith's complaint about her.

[78] Inspector Gaskin replied on 25 November 2002 indicating that the matters contained in Sergeant Smith's 2 October report would be dealt with by way of the Police's appraisal system. Inspector Gaskin denied that there were any conversations between him and Sergeant Smith about the inspector's decision and that he expected Sergeant Smith to accept his decision about the sergeant's complaint.

[79] Between 4 and 11 December 2002 Inspector Gaskin inquired of a number of other staff at the Temuka Station about complaints that Senior Constable Ramsay had made against Sergeant Smith. The plaintiff met and discussed these Ramsay

complaint matters with Inspector Gaskin on 4 December 2002 over the course of one hour and 40 minutes. Ms Coy also discussed her own concerns about Sergeant Smith with Inspector Gaskin and indicated to him that she would be submitting a personal grievance about the way in which she was being treated at work.

[80] On 11 December 2002 Inspector Gaskin reported to Inspector Lennan (Canterbury District Human Resources) about what he (Inspector Gaskin) had referred to as "dysfunctionality" at the Temuka Station. Included amongst Inspector Gaskin's advice to Inspector Lennan was that the performance appraisal system at Temuka had broken down and that Sergeant Smith, as the officer in charge of the station, needed to address this. Inspector Gaskin acknowledged a degree of his own responsibility in failing to appreciate and do something about that breakdown earlier. He described the plaintiff as one of two "problem officers" in the Temuka area.

[81] On 22 December 2002 the plaintiff wrote to Inspector Gaskin confirming her advice in a discussion with him on 4 December 2002 that she would proceed with a personal grievance based on claims of "harassment, denial of procedural fairness, intimidation, victimisation, and professional mismanagement". The plaintiff told Inspector Gaskin that she would provide full details of her grievance in the new year after receiving assistance from the Police Association and other professional advice. It was the plaintiff's hope that these advices would ensure that Inspector Gaskin and Police human resources staff would put in place strategies to deal with the conflict between the plaintiff and Sergeant Smith before the latter's return from long service leave in late March 2003.

[82] During Sergeant Smith's leave, the plaintiff was being assessed by his reliever at Temuka, Sergeant Lowrey. Inspector Gaskin's view was that if problems persisted after Sergeant Lowrey's assessment, a decision would need to be made to remove the plaintiff from Temuka Station before Sergeant Smith's scheduled return in late March 2003.

Decision – first disadvantage personal grievance

[83] Applying the test as formulated by the Court of Appeal in the *W&H Newspapers* case (set out at [32] of this judgment), I have concluded that the plaintiff was disadvantaged unjustifiably in her employment by the actions of her supervisor and manager, Sergeant Smith. The sergeant's adverse report was submitted to Inspector Gaskin without the plaintiff, who was on authorised and prearranged leave, having an opportunity to know of the allegations made by her sergeant against her or of having an opportunity to have an input into the report made to the inspector. That was particularly so in relation to Sergeant Smith's inquiry into the cannabis bullet of which the plaintiff had no knowledge and no opportunity to make any explanation. At worst, her failure to deal with the cannabis bullet as she should have was one of delay. In all the circumstances, it was a very minor omission which would usually have warranted, at most, a verbal reprimand from her supervisor. As I have concluded, Sergeant Smith included the cannabis bullet incident as a makeweight to his own complaint about the plaintiff's disobedience in relation to the C incident.

[84] That said, however, Inspector Gaskin's response to Sergeant Smith's complaint did involve the plaintiff and provided her with an opportunity to explain her side of these events before Inspector Gaskin determined what was to be the consequence of them. In respect of the cannabis bullet alone, I find that any disadvantage to the plaintiff in her employment by Sergeant Smith was short-lived and minimal, and was able to be alleviated by the procedure for dealing with it adopted by Inspector Gaskin.

[85] As to her actions following the C motor vehicle incident, and her refusal to charge C without a written direction to do so from Sergeant Smith for which she asked but he did not provide, the justification for the performance warning delivered by Inspector Gaskin is more complex and finely balanced.

[86] The plaintiff did not comply with Sergeant Smith's initial direction to charge C although this was, in all the circumstances, not a considered, reasoned or balanced instruction from the sergeant. It was shouted at the plaintiff from another room, without much knowledge of the relevant circumstances. It was more the sergeant's

response to his view of C from previous encounters with him than a considered decision on known facts and taking account of the law. I do not think, in these circumstances, that the plaintiff can be criticised for pursuing her investigation of this incident which still required witnesses to be interviewed and involved, principally, serious offending by N.

[87] A couple of days later, when he was better informed, Sergeant Smith reiterated the direction to charge C although, by that stage, the plaintiff had interviewed C after both having assured him that she herself would not charge him with an offence in relation to the incident. She had also interviewed C without cautioning him.

[88] As Inspector Gaskin acknowledged at the time, Sergeant Smith's (serious) allegation of disobedience of an order by the plaintiff was not as clear-cut as Sergeant Smith alleged. She told the sergeant that she would not charge C without a written direction by the sergeant to do so. She said that she gave this conditional response as a result of her concerns which had arisen from previous incidents that she would be held responsible personally for the failure of any prosecution, even although she may have been directed by Sergeant Smith to institute it. On the background evidence heard and seen by me, that was not an unreasonable concern that Ms Coy held. The defendant's case was not that it was unnecessary to have a written instruction or even that this may not have been appropriate. Rather, I find that although Sergeant Smith was aware that his direction would only be complied with if it was made in writing, he elected not to do so or at least failed to do so before the plaintiff went on leave as he was aware she would later the same day.

[89] However, having inquired into Sergeant Smith's adverse report, and having included the plaintiff in those inquiries, I conclude that Inspector Gaskin was fairly entitled to treat the incident as one of poor or inadequate performance by the plaintiff which would be subject to review and a requirement that the interpersonal relationship between the constable and her sergeant was to be addressed and improved. That is not to say that Ms Coy's responses to Sergeant Smith's directions to charge C were poor or inadequate performance by her of her duties. Rather, it was not unlawful or unreasonable for Inspector Gaskin to have dealt with them as such.

The consequences to the plaintiff were adverse but not significantly so and, most importantly, not unjustifiably so.

[90] Next, Sergeant Smith's inclusion of his disciplinary report in a shared folder available to, and thereby accessed by, some of the plaintiff's work colleagues was, in all the circumstances, unreasonable and unfairly disadvantageous to the plaintiff. Although I have not been persuaded to the necessary high standard that this was a deliberate act on the part of Sergeant Smith with the purpose of denigrating the plaintiff, or otherwise further disadvantaging her in employment, it was nevertheless at least careless of Sergeant Smith and did, unnecessarily and inappropriately, cause the plaintiff embarrassment and distress.

[91] I turn to the next element of the grievance. The purported placement of the plaintiff under the supervision of another and less experienced constable also disadvantaged her unjustifiably in her employment. This could only reasonably have been perceived, and was perceived, as a disciplinary measure, as was Sergeant Smith's accompanying purported direction to the plaintiff that she was not to be engaged with "complicated jobs". Disciplinary consequences of adverse reports had to await appropriate investigation by, and were to be at the direction of, a more senior officer. Despite these purported sanctions being removed after a relatively short time by Sergeant Smith's temporary reliever, Sergeant Lowry, damage had been done to the plaintiff's situation including amongst colleagues.

[92] For these reasons also I conclude that, as the Commissioner's agent in employment matters, Sergeant Smith's actions in these regards disadvantaged the plaintiff unjustifiably in her employment.

Second (or augmented first) personal grievance of 8 April 2003

[93] By a one page report of 8 April 2003, addressed to the Commissioner, the plaintiff advised him of what she described as a formal request for "an extension" of her earlier personal grievance which was raised on 20 December 2002. This second (or augmented first) grievance was based on the treatment to which she said she had been subjected by Sergeant Smith following his return from his period of long leave

to resume his role as the officer in charge at Temuka. It covers the period immediately following that addressed in the first grievance above but continued for a matter of only a week or so.

[94] Ms Coy's complaint was as follows:

> Since Sgt SMITH'S return to the Temuka Station, I have been subjected to "special" treatment including:
>
> - o restrictions to my freedom of movement during meal breaks and other working hours;
> - o two reports which have been accusative and judgmental in nature and rely on unsubstantiated and factually incorrect statements;
> - o a continued denial of procedural fairness;
> - o a level of micro-scrutiny of all of my work which is greater than other members of the station, or that I have been subjected to in the past;
> - o continued reference to the personal grievance in an intimidatory and condescending manner; and
> - o an attempt to restrict my access to association assistance and therefore an attempted infringement of my rights as a sworn officer.
>
> All of the above has occurred over a contact period of less than four hours covering several days. I believe that his behaviour is aimed at intimidating me, discrediting me and isolating me from my support base.
>
> As a result of the above treatment I have now reached the point where I am on stress leave.
>
> Again I make the above requests based on legal advice to you as my employer.

[95] Shortly after his return from his long leave, on 31 March 2003, the plaintiff was called by Sergeant Smith into his office. The sergeant had indicated that the plaintiff might wish to be represented and she asked Constable Mawhinney to accompany her. Sergeant Smith directed the plaintiff not to leave the Temuka area when on duty except where police work necessitated this. He confirmed that this restraint on her activities included not going home for meal breaks, as she had done until then, and as other staff in similar situations were permitted to do. Ms Coy's home was out of the Temuka Station's area. This appears to have been the only

reason for the plaintiff to have regularly left the station's area, other than on police business. Such travel to and from her home for meal breaks was treated as patrol duties for traffic enforcement purposes. There was no apparent operational reason for Sergeant Smith to change this long-established practice. Its justification can only have been disciplinary. The sergeant was not permitted to impose such disciplinary sanctions in these circumstances.

[96] Sergeant Smith also directed the plaintiff that she was not to travel to Timaru to consult with her Police Association representative during duty periods when she was required to be in the Temuka Station area. The plaintiff's Police Association representative was a police officer based in Timaru. I infer from all the evidence that there had in the past been a somewhat relaxed practice of officers occasionally travelling to Timaru to speak to Police Association representatives during duty periods. The restriction that Sergeant Smith purported to place on the plaintiff related only to duty-time travel for the specific purpose of consulting with the representative: the performance of the plaintiff's duties often necessitated travel to the Timaru Police Station for duty-associated purposes.

[97] Ms Coy perceived this restriction as being one intended to deprive her of union representation at a time of significant stress in her relationship with her supervisor.

Decision – second (or first augmented) disadvantage personal grievance

[98] Because this second personal grievance repeats some elements of the plaintiff's first grievance which I have already determined, I will deal only with those which were raised for the first time by the plaintiff's 8 April 2003 report to the Commissioner.

[99] I uphold, in part, this claim to unjustified disadvantage. Sergeant Smith's purported restriction on Ms Coy from leaving the Temuka Station's area other than on police business during duty times disadvantaged her. Her travel to and from her home for meal breaks, but during which travelling time she was undertaking justifiable road policing patrol work, was a longstanding arrangement known and agreed to by Sergeant Smith. Its prohibition imposed by Sergeant Smith is not

reconcilable with the defendant's legitimate and justifiable objectives of seeking to have the plaintiff improve the quality of her work generally, as was the outcome of Inspector Gaskin's inquiry into Sergeant Smith's adverse reports. It is difficult to conclude other than that this was a punitive action taken by the plaintiff's supervisor.

[100] Whilst both disadvantageous and, in all the circumstances, unjustified, viewed objectively the consequences to the plaintiff were not particularly serious. I was left with the impression from the plaintiff's evidence that it was the fact of the prohibition ordered by Sergeant Smith rather than the consequences in practice of having to take meal breaks other than at home, that rankled with the plaintiff.

[101] Otherwise, however, I have concluded that the plaintiff's fresh complaint raised in her 8 April 2003 communication did not establish unjustified disadvantages to the plaintiff in her employment. The period from Sergeant Smith's return to duty at the Temuka Station and the submission of the grievance on 8 April 2003 was short – about one week. Indeed, in a letter to the Commissioner of 8 April 2003, the plaintiff confirmed that the events occurred during her contact with Sergeant Smith covering less than four hours over several days. A day later, on 9 March 2003, the plaintiff went on sick leave, never to return effectively to duty.

[102] I have already dealt with the matter of adverse reports and the purported restrictions on the plaintiff's movement. I do not consider that, apart from these incidents, there was "a continued denial of procedural fairness". That allegation was not elaborated on in the plaintiff's communication of 8 April 2003 and has not been established in evidence.

[103] There was what the plaintiff then categorised as "a level of micro-scrutiny of all of my work" which did not apply to other Temuka officers and which was more intense than over the previous years of her career. I have concluded, however, that this was the justifiable consequence of Inspector Gaskin's conclusions about the increasingly dysfunctional relationship between the plaintiff and Sergeant Smith and of the inspector's justifiable expectation of an improvement by the plaintiff in the performance of her duties. Although, with the exceptions which I have found amounted to unjustified disadvantage, such increased scrutiny of the plaintiff's

performance may have caused her to consider that she was disadvantaged, it was not unjustified in all the circumstances.

[104] I accept that Sergeant Smith did, on occasions during the relevant period, refer to the plaintiff's grievance, and that it was inappropriate for him to have done so. However, this did not affect adversely the investigation and resolution of the first personal grievance and so did not disadvantage the plaintiff in that regard. That grievance was dealt with by Canterbury District staff and although known to Sergeant Smith and an inappropriate topic for discussion by him in his interactions with the plaintiff, this did not have the consequence of affecting the plaintiff disadvantageously in having her grievance investigated fairly and fully.

[105] Finally, I am not satisfied that Sergeant Smith purported to restrict the plaintiff's access to Police Association representation and assistance. Whilst Sergeant Smith did give direction about the plaintiff visiting Timaru whilst on duty and without his agreement for the purpose of conferring with an Police Association representative, this was not an unreasonable restriction on the activities of an officer expected to be on duty and available in the Temuka area. Other ways of getting Association advice and assistance were not closed off to the plaintiff.

[106] Because of the mixed findings in respect of this second raised personal grievance and its inseparability in many respects from the first-raised personal grievance, I propose simply to find that, in respect of those acts or omissions on behalf of the Commissioner which I have concluded affected the plaintiff unjustifiably to her disadvantage in employment, the plaintiff does have a personal grievance pursuant to s 103(1)(b) of the Act.

Constructive dismissal claims

[107] The plaintiff's interpersonal conflicts with Sergeant Smith and, more latterly and secondarily, Inspector Gaskin led her to take increasing numbers of ever longer and continuous periods of sick leave, more latterly categorised informally as "stress leave". This, in turn, triggered a monitoring and rehabilitation process about which the plaintiff also complains as a contributor to her unjustified constructive dismissal

grievance. The rehabilitation process involved not only the plaintiff and her supervisors but a range of others including a police welfare officer, the plaintiff's general practitioner, a psychologist consulted by the plaintiff, and human resources staff within the Police, the latter of who were, deliberately, not the same personnel assigned to deal with her concurrent personal grievances.

[108] The plaintiff's claim to unjustified dismissal arises substantially out of these events. This is the plaintiff's main grievance. Mr Fairclough identified the following six breaches of the employment duties of the defendant towards the plaintiff which he asserted both caused her to disengage and, because of their wrongfulness, should cause that resignation to be treated as an unjustified dismissal.

[109] The first duty said to have been breached is the defendant's statutory obligation to be a "good employer". The second is the alleged breach by the defendant of his implied contractual obligation to act fairly and reasonably in his dealings with the plaintiff. Third, although acknowledging that this was not, in 2003, a statutory obligation, Ms Coy alleges that the defendant breached his implied duty to act in good faith. Fourth is an alleged breach or breaches of the defendant's implied contractual obligation not to act in a manner calculated to destroy the relationship of trust and confidence between the parties. Penultimately, the plaintiff relies on a breach of the defendant's further implied duty to take reasonable steps to protect her from psychological injury or damage. Finally, the plaintiff says that the defendant breached his duty not to cause her further psychological injury by reason of his actions.

[110] Addressing the (first) allegation of breach of implied duty to act in good faith, the plaintiff refers to a number of documented policies and other regulatory controls affecting police employment which, Mr Fairclough submitted, pointed to an existence of an implied duty to act in good faith between these parties.

[111] These include, first, the defendant's sexual harassment policy which includes, under the heading "Victimisation", a reference to s 66(1) and (2) of the Human Rights Act 1993. In particular, Mr Fairclough relied on the reference in that policy to acting "in bad faith", contending, as I understood the submission, that this

indicated that there was an implied contractual obligation on the defendant to act in good faith.

[112] The next policy is the defendant's "Rehabilitation Police – Guidelines for Management and Rehabilitation". Counsel relied on an introductory information statement by the then Commissioner (in 2001) and also to the body of the policy where, at para 4(1)(e)(i) under headings "Guidelines for supervisors … general information for managing time off work … consequence of non-participation", the following paragraph appears:

> (i) The absence management process depends on co-operation and good faith between and (sic) members and their supervisors. As a usual condition of employment, both sworn and non-sworn members have a duty to maintain regular contact with their supervisor and to reasonably co-operate with a rehabilitation policy aimed at a return to work.

[113] The next regulatory document relied on is the Police's GI 1A series. In particular, General Instructions Supplement – Internal Affairs Complaints, Discipline and Procedure (IA 100 – IA 132) provides at IA 107 in relation to "Consultation with the Police Complaints Authority"[16] where there is a reference to complaints "not made in good faith". Mr Fairclough's submission is that this reference also confirms that "at the time there were concepts of good faith in the air".

[114] Counsel then referred to a number of statements made by witnesses in evidence. When Inspector Lennan, then Human Resources Manager for the Canterbury District, was asked whether the offer of a welfare transfer of the plaintiff from Temuka to Timaru was one made in good faith, he confirmed that this was so. Likewise, counsel pointed to the evidence of Inspector Gaskin when he said that he spoke to June Penn "frankly and in good faith". Next, former Inspector Bell (also for a relevant period the district human resources manager) used the words "good faith" when referring to one of her letters. Finally, counsel pointed to the plaintiff's letter to the Commissioner of 20 March 2003 where she herself referred to making a submission "in good faith" as she did indeed use the same phrase in her disengagement report.

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[16] Now the Independent Police Conduct Authority.

[115] It is tempting to conclude that the plaintiff has conducted a word search of the phrase "good faith" in the evidence and the relevant documents and has put forward the occasional existence of this phrase as evidence that there were mutual expectations of good faith obligations between the parties in 2002 and 2003, irrespective of the sense in which the phrase may have been used in evidence or in those documents. It is an unachievable leap to conclude thereby that, as counsel put it, a "multitude of references … indicates that good faith was an implied duty embraced in the employment relationship between the Commissioner and members of the Police" at the relevant time.

[116] It will be apparent that I do not accept the foregoing as establishing, in 2002 and 2003, an implied contractual obligation on the parties to conduct their employment relationship "in good faith" as that term is now contained in the Act and as it has been interpreted by the Courts. But even if I am wrong in that regard, I do not consider that the defendant's actions, through his relevant agents in their dealings with the plaintiff at the relevant times, breached fundamentally such good faith obligations to the extent that he can be said to have repudiated their agreement.

[117] Evidence of an absence of good faith dealings by the defendant towards the plaintiff and, therefore, evidence of breach of this implied obligation of good faith dealing and, in turn, of the existence of unjustified disadvantage, was said to be the June 2003 realisation by the plaintiff of a number of things she believed had been done in relation to her by representatives of the defendant. These revelations came as a result of the passing on to Ms Coy of documents obtained by Constable Ramsay in relation to his own dispute with the Commissioner emanating from his interpersonal dispute with Sergeant Smith. These disclosures, made whilst Ms Coy was still employed by the Commissioner, included what counsel submitted was evidence of Inspector Gaskin's attempt unilaterally to transfer Ms Coy from Temuka to Timaru; significant bias against the plaintiff in reports prepared by Inspector Gaskin; Sergeant Smith blaming Ms Coy for problems on a domestic violence investigation file; and evidence of Inspector Gaskin's awareness by that time that Sergeant Smith "would fudge the property account to manipulate station inspections" which the plaintiff says ought to have alerted Inspector Gaskin to the truth of the plaintiff's assertions made to him during the July 2003 disciplinary meeting that

property appeared to come and go irregularly from the Temuka station's property room. Counsel also submitted that Ms Coy's assessment of those reports was confirmed when she obtained her own subsequent disclosure of them in September 2003 at about the time of her disengagement.

[118] These submissions for the plaintiff engage the defendant's broad contention that the plaintiff is not entitled to "reverse engineer" grievances, or at least that these are not amenable to the statutory grievance resolution process. I agree with that part of the defendant's contention that it is not open to the plaintiff to subsequently rely on historical allegedly unjustified actions of which she was aware at the time but chose then to ignore, or at least not to make the subject of complaint.

[119] However, the position is different when it comes to acts or omissions by the employer in relation to the grievant of which she may not have been aware or sufficiently or completely aware at the time of their occurrence, but which nevertheless disadvantaged her in employment and unjustifiably. The statutory definition of a disadvantage grievance does not include a requirement that the grievant must be aware of the impugned action at the time of its occurrence. Indeed, to imply such a requirement would undermine significantly the efficacy of the statutory grievance procedure, because unjustified actions in employment disadvantaging a grievant are often conducted covertly or otherwise without the full contemporaneous appreciation of them by the grievant. If an employer's conduct towards an employee meets the statutory definition of an unjustified disadvantage, then it is not necessary for the grievant to have known of those facts at the time before being able to raise and prosecute a personal grievance in reliance on them. That is reinforced by the reference in s 114(1) of the Act (dealing with the time for raising a grievance) to the entitlement of an employee to raise a grievance within 90 days beginning with the date on which the action alleged to amount to a personal grievance came to the notice of the employee if this was a later date than the date on which that action occurred. This element at least of the defendant's broad "reverse engineering" defence does not succeed.

[120] Next, the plaintiff relies on what she contends was Sergeant Smith's unjustified access to her personal grievance details whilst she was still employed

and, thereby, the Commissioner's wrongful conduct in providing this information and what was described in counsel's submissions as "unrestricted access to potential witnesses". The plaintiff says that, not having been required by the Commissioner to respond in a report to her grievance, Sergeant Smith nevertheless did so on his own initiative including after he had spoken to potential witnesses. The plaintiff says that in view of her personal grievance allegations of intimidation, harassment, and victimisation, and in view of the history of Sergeant Smith's conflicts with other Temuka station staff, the manner in which the defendant dealt with the plaintiff's first and second grievances was unjustified and disadvantaged her.

[121] Mr Fairclough submitted that the Court should not accept Sergeant Smith's denial in evidence of these allegations, saying that his evidence was not credible and that he sought to obfuscate the situation in his answers in cross-examination by introducing extraneous issues. In summary, counsel for the plaintiff submitted that the defendant, in giving Sergeant Smith open access to her personal grievance and to witnesses in an unconstrained fashion, did not treat the plaintiff with natural justice or equitably, and the result of this attempt to protect the managerial structure was to subvert any future investigation of the plaintiff's complaints.

[122] I turn next to the claims of a disadvantageous rehabilitation process put in place for the plaintiff. This included several important rehabilitation meetings. Mr Fairclough focused on the late July 2003 rehabilitation meeting[17] chaired by Mr Dodge. He emphasised the evidence that before this meeting Ms Coy had advised the defendant through her welfare officer that she did not wish to meet with Inspector Gaskin but that he attended the meeting despite this objection which was repeated by the plaintiff at its commencement. Counsel submitted that even when it was pointed out by the plaintiff's husband that the rehabilitation policy allowed the attendance of a proxy on behalf of the employer, and that Ms Coy's medical advice was that she should not interact with her superiors, this was ignored. The plaintiff says that this can only lead to one conclusion, that Inspector Gaskin was not concerned with her welfare and acted beyond the rehabilitation policy's guidelines. Counsel pointed out that Inspector Gaskin acknowledged in his evidence that there was an alternative to his personal attendance at this rehabilitation meeting. This

[17] What is known to the parties, and will be referred to, as "Rehab 2".

event was said to have impacted negatively on Ms Coy and contributed to her decision to disengage.

[123] The next event relied on by the plaintiff occurred on 4 September 2003, the day before the next scheduled rehabilitation meeting known as "Rehab 3". On that day Ms Coy was advised that Welfare Officer Ann Taylor had breached the confidentiality said to have been owed by her to the plaintiff. That was by the welfare officer playing to Inspector Gaskin a recording of a private message that Ms Coy had left on Ms Taylor's voicemail, following which Inspector Gaskin had transcribed the message and placed it on the relevant file. Counsel submitted that this was a breach of trust by the defendant in the sense that the Welfare Officer was Ms Coy's "only remaining lifeline" to the Police organisation and that, in the circumstances, Ms Taylor's was a breach of trust which impacted negatively on Ms Coy. She says this was confirmed subsequently by the Privacy Commissioner upon the plaintiff's complaint to that agency. Although having a role to promote and enhance the welfare of the employee, the Welfare Officer was, in this regard, an agent of the Commissioner so that Ms Taylor's breach of trust just described is said to be attributable to the defendant.

[124] The next submission relates to the provision of a redacted version of the Penn report to Ms Coy on 5 September 2003. Ms Penn had been commissioned to independently investigate the plaintiff's grievances and the related situation at Temuka and to report to the defendant on these. In mid-June 2003 Ms Coy had been provided with a partial version of the Penn report by Constable Ramsay, the report having dealt not just with Ms Coy's personal grievance but also with the broader subject of the dysfunctionality of the Temuka police station. The blanking-out in each version of the report seen by Ms Coy were different, having been bespoke redactions for the different disclosures of it to Mr Ramsay and to the plaintiff. Counsel submitted that it was likely that matters relating to Ms Coy alone would have been redacted from the June 2003 Ramsay version of the Penn report so that she would not have been aware of adverse observations about her. What was disclosed to the plaintiff, subsequently, however, was that both Sergeant Smith and Inspector Gaskin had made comments to Ms Penn about the plaintiff, which counsel categorised as "lies" intended generally "to demonise Ms Coy and paint her as the

problem". Counsel submitted that in these circumstances, the plaintiff lost any remaining element of trust in her immediate management. Their comments to Ms Penn were said to have shown clear prejudice against the plaintiff, indicating that she was unlikely to get a fair hearing from her area commander, Inspector Gaskin.

[125] Mr Fairclough submitted that although Sergeant Smith now says that Ms Penn's reporting of his comments was taken out of context, the sergeant did not seek to correct those errors at the time in order to put them into what he said in evidence was their proper context. Although the evidence is that Sergeant Smith did not see or seek to obtain a copy of the Penn report to see what may have been attributed to him (and which would have enabled him to identify contextual mistakes), counsel submitted that nevertheless some of the comments that were made by Sergeant Smith and Inspector Gaskin could not have been ameliorated by being re-contextualised, including the directly quoted comments recorded in Ms Penn's report.

[126] The final rehabilitation meeting (Rehab 3) took place on 5 September 2003. It was called at short notice and without the plaintiff knowing what was to be discussed, despite having requested an indication of this. It was attended by a newly appointed human resources staff member of the defendant (Kelly Philip) who did not have more than a superficial knowledge of the complex background to the meeting and the rehabilitation programme at that stage. Also present was Senior Sergeant Schwartfeger who also did not have a full knowledge or appreciation of the background including the various reports and medical advice.

[127] Counsel submitted that when Senior Sergeant Schwartfeger's proposed solution of a transfer to Timaru was put to Ms Coy and she objected, Ms Philip downplayed those objections. Mr Fairclough submitted that Senior Sergeant Schwartfeger's only focus was on filling a vacancy, and making Ms Coy feel guilty about being on sick leave, a matter against which he had been warned at the first rehabilitation meeting in April 2003.

[128] Counsel submitted that when Ms Coy raised the significant factor of her distrust of the defendant and of unilateral exclusion from the Temuka station, this was not, or at least insufficiently, discussed. Counsel submitted that the defendant's

representatives at the rehabilitation meeting also appeared to ignore medical advice provided at the defendant's request or it appeared not to have been fully understood by Ms Philip. Counsel emphasised the plaintiff's evidence that at the end of this meeting she did not consider that she had been listened to and that her mistrust of the defendant (organisationally) had increased rather than having been addressed.

[129] In the course of that meeting (Rehab 3) Ms Coy disclosed that she had filled out PERF papers and was seriously considering putting them in following which she "broke down" and left the meeting for a period. Counsel submitted that this must have put the defendant on notice of a critical point having been reached in the employment relationship and indeed that information was conveyed to Inspector Bell who was then responsible for the rehabilitation process although not present at the meeting.

[130] Counsel submitted that it was significant that Ms Coy was not aware at the time of Rehab 3 that the psychologist, Mr Dugdale, had intervened and written to the Wellness/Welfare Office of Police in Wellington warning it of what was happening to Ms Coy. On 9 August 2003 Mr Dugdale had advised the Wellness/Welfare Office that Ms Coy was "embroiled in staff relationship issues in her area and this is having a considerable impact on her health. She is currently on stress leave and is likely to be so for some time yet." On 22 September 2003 Mr Dugdale reported similarly:

> I last saw this officer last on 16/9/03 and she continues to be unfit for work. At the request of Christchurch HR I furnished a report to them dated 11 August, indicating that I considered attempting a return to work without first addressing the relationship and mistrust issues with her employer, would almost certainly exacerbate the symptoms and delay rehabilitation. Since then she, as directed, attended a rehabilitation meeting. Her perception is that this focused solely on work rehabilitation, with no attention to addressing staff relationship and trust issues causal in her stress. This is unfortunate as it has done nothing to reduce the stress symptoms.

[131] Counsel emphasised that for reasons apparently to do with the defendant's internal communication mechanisms, Mr Dugdale's advice was not conveyed to Inspector Bell who was in charge of Ms Coy's rehabilitation, or to any other relevant decision maker. Counsel acknowledged that there may have been a deliberate (figurative) fire wall put in place to protect the privacy of such advice as Mr Dugdale conveyed. Mr Fairclough submitted, nevertheless, that the defendant's rehabilitation

policy required that relevant medical information about the rehabilitation of a member should be conveyed to decision makers (including those making decisions about personal grievances) and that the apparent failure to do so in this case was not a fault attributable in any way to the plaintiff.

[132] Next, counsel pointed out that at the end of the Rehab 3 meeting, Ms Coy was given a letter from Inspector Bell. This letter, dated 5 September 2003, dealt with the plaintiff's personal grievance complaint and, in particular, her Official Information Act (OIA) request for relevant documents. The contents of that letter affecting the plaintiff's personal grievance and OIA disclosures are unexceptional. Towards its conclusion, however, it dealt with the question of rehabilitation. Inspector Bell wrote:

> I have asked the Welfare Officer, Kerry Taylor to contact you to arrange a rehabilitation meeting with a view to facilitating your return to work as soon as possible. There are some alternative duties that we would like to discuss with you as part of the rehabilitation process. There is now a considerable body of evidence that shows the longer a person is off on sick leave, the more difficult it becomes to return to the workplace. As we see it, there are some alternatives and we seek your input to a rehabilitation plan with the goal of achieving your return to work as soon as possible. It is not an option for us to continue paying you whilst you are on 'stress' leave awaiting a Court date in the Employment Court to have your grievance heard. In the event that you are not going to be well enough to return to work for an extended period then the Commissioner will have no alternative but to consider whether you must be retired from service.
>
> I remind you that General Instructions clearly state that a member who is off work for more than five days requires a signed medical certificate from a registered medical practitioner, ie, your own doctor, advising that you will be off work and the period of time you will be off work. The medical certificate is only valid for one month and must be renewed if the illness extends beyond this time.
>
> …
>
> I look forward to hearing from either you or your lawyer about my proposal that the parties attend mediation, and also seek your positive participation in the rehabilitation process.

[133] Counsel was critical of the content and tone of this letter in view of the psychologist's advice to the defendant that Ms Coy needed to be dealt with in a sensitive manner. The letter impacted negatively on Ms Coy and, in particular, she believed that she was being threatened with dismissal.

[134] On 16 September 2003 Ms Philip wrote to Ms Coy following up on the Rehab 3 meeting offering the plaintiff an opportunity to work in Timaru. Counsel was critical of this correspondence also, submitting that it indicated an unpreparedness to listen to the plaintiff who had made it clear at the Rehab 3 meeting that she did not wish to go to Timaru. Mr Fairclough submitted that it was not sufficient to say that the letter simply confirmed the parties' disagreement about a transfer to Timaru but that Ms Philip's letter had to be considered subjectively from the point of view of the plaintiff and of the psychological impact of it upon her. Counsel criticised the defendant for having heard both the plaintiff's refusal to transfer to Timaru and her reasons for not doing so, but still holding out that offer as part of her rehabilitation. Counsel did agree that the test of what a fair and reasonable employer could have done in the circumstances was not a grievant-subjective test but still submitted that the employer failed to take sufficient account of the plaintiff's medical condition at the time. Mr Fairclough emphasised the psychologist's written advice to the defendant following the Rehab 2 meeting that:

> Despite this, she was under pressure to return to work, describing how her superiors seemed to see this simply as an industrial one while not acknowledging the health effects. Given Constable Coy's mental state it would seem unwise to expect her to return to work if the relationship and trust issues that precipitated her stress had not been dealt with.

[135] Mr Fairclough submitted that not only was the defendant's stance following the rehabilitation meeting "grossly insensitive" but it was contrary to the defendant's rehabilitation policy which, at 5(9) ("Existence of workplace or disciplinary issues") (c) provided:

> In most cases it will be appropriate for the member and their supervisor to at least proceed to the rehabilitation planning meeting stage before deciding if some other intervention is needed to ensure
> - The safety of the workplace for the member's rehabilitation and
> - The fairness of expecting the member to resume duties.

[136] Counsel also highlighted, at cl 5(7) ("Alternative duties") of the rehabilitation policy at (b):

> The principles in arranging for suitable work are:
> - The work must be safe for the employee to do and it must not aggravate the member's medical condition.
> - The work needs to be meaningful.

- The work arranged and the hours worked should be compatible with the employee's capabilities and medical condition.

[137] Counsel emphasised Inspector Bell's awareness that Ms Coy did not want Inspector Gaskin to be involved in her rehabilitation process and Inspector Bell's acceptance that there could have been a new rehabilitation meeting involving different people and offering different alternative solutions in these circumstances. Mr Fairclough submitted that there was, in these circumstances, a clear disconnection between Inspector Bell's intention and expectations on the one hand, and Ms Philip's and/or Senior Sergeant Schwartfeger's stances during the Rehab 3 meeting.

[138] Counsel submitted that by the time the plaintiff came to lodge her disengagement request, it appeared to her that nothing had been done to try to resolve any of her personal grievances except the engagement of Ms Penn and the provision of her (Ms Penn's) report to the Commissioner. Even these were inadequate in the plaintiff's view and, counsel submitted, she had requested both an independent investigator from within the Police and status reports on how her grievances were being dealt with in view of the (only partial) coverage of issues by Ms Penn.

[139] However, that appeared to be about to be addressed, if not rectified, by Inspector Bell's letter of 25 September 2003 indicating the inspector's intention to approach the situation afresh and in a manner with which the plaintiff agreed. The letter was too late because by the following day, 26 September 2003, the plaintiff had submitted her PERF application. This included initially a summarised account, running to about two pages, of the plaintiff's dissatisfactions with the defendant, although that account was subsequently removed by someone (not ever identified) within Police, presumably to conform with the usual format of such applications and perhaps also to enhance the chance of the application to disengage being accepted. It is interesting to note that these changes were effected without reference to Ms Coy, including removing and repositioning her signature on the document to make it appear as if that was how it had been lodged originally. The plaintiff's point was that if the PERF application had been received and considered in its original form, it would have been open to the defendant not to have accepted it initially but rather,

even then, to have attempted finally to deal with the substance of the plaintiff's issues as indeed appeared to be Inspector Bell's intention also.

[140] Although that was possible, I consider it unlikely; that is, improbable. It is more likely, in all the circumstances, that the PERF application would have been returned to Ms Coy with a request that it be re-submitted in a revised, usual and more acceptable form. In these circumstances, however, it is simply not possible to predict what Ms Coy would have done, but such was her firm intention to disengage and so clearly had she already evidenced her views about her treatment by the defendant, that I think the most probable outcome would still have been the submission and acceptance of her application for disengagement.

The plaintiff's unjustified constructive dismissal grievance – additional events

[141] As already noted, events which are relevant to determining whether the plaintiff's resignation by disengagement was a constructive dismissal and, if so, if that was unjustifiable, are not time-limited as such, although events closer in time to that resignation will tend to be more influential. The plaintiff's case is that in addition to those events which she claimed constituted her unjustified disadvantage grievances with which I have just dealt, a number of other incidents or events which occurred after 8 April 2003 contributed significantly to what she contends was her constructive dismissal.

[142] I propose to deal with each of these events separately.

The plaintiff alleges she was "locked out" of the station

[143] As with all officers based there, Ms Coy had a set of keys to the Temuka police station and other sets of keys for the other rural substations at which she sometimes worked. In addition to needing to have access to those stations for scheduled duties, there was also a variety of other reasons that officers might have for visiting these stations including at times when other staff were not present.

[144] Late one evening, when it was closed for the night and Ms Coy was on sick leave, she used her keys to enter the Temuka station for a brief period. She did so for the legitimate function of delivering, outside business hours, a medical certificate confirming her continued inability to perform duties. She had previously been directed to deliver such certificates personally to the station after having once asked another constable to take the certificate in on her behalf. Once previously, also, Ms Coy had delivered a medical certificate and had been questioned about it and the background circumstances by Sergeant Smith. She wished to avoid a repetition of that incident.

[145] At this time, Superintendant Manderson, as the commander of the Canterbury Police District consisting of more than 1,000 widely-spread staff, was aware of conflict at the Temuka station between some staff (principally Constable Ramsay and, to a lesser extent, Constable Coe) and Sergeant Smith. She was made aware of this situation by Inspector Gaskin as part of his regular appraisal of the South Canterbury District for which he was responsible. Superintendant Manderson was not aware of the detail of that interpersonal conflict involving the plaintiff but knew that Canterbury District human resources staff were dealing with it, because she was also briefed, appropriately, by them from time to time.

[146] Returning from a meeting at the Timaru police station one day during the period of the plaintiff's stress leave in 2003, Superintendant Manderson followed her practice of trying to call in on smaller police stations as and when she could do so, to "show the flag" as it were. Temuka was en route as the Superintendant was returning by car to Christchurch and she dropped in at the station unannounced. Few staff were present, perhaps only the watchhouse keeper and Constable Mawhinney. I am satisfied that Sergeant Smith was not there at the time of the Superintendant's visit. In the course of chatting with Constable Mawhinney, he mentioned to the Superintendant that he was concerned that Constable Ramsay, who was then on stress leave, had keys to the station and, therefore, to its secure firearms cabinet. Constable Mawhinney was sufficiently concerned about Constable Ramsay's psychological state that he felt compelled to relate this to the Superintendant. Superintendant Manderson adopted Constable Mawhinney's concerns and, before departing from Temuka, telephoned Inspector Gaskin to arrange to have Constable

Ramsay's access to the Temuka station disabled. I am satisfied that Constable Mawhinney did not include any reference to Constable Coy in his advice of concern to Superintendant Manderson, nor did the superintendent refer to the plaintiff when communicating with Inspector Gaskin. I find that Superintendant Manderson left it to Inspector Gaskin as to how Constable Ramsay's keys were to be recovered from him or how he was to be otherwise prevented from entering the Station, and what he was to be told about that action.

[147] Inspector Gaskin delegated the task of recovering Constable Ramsay's keys to Senior Sergeant Malcolm Schwartfeger. I conclude that Inspector Gaskin probably told Senior Sergeant Schwartfeger that the reason to be given for the removal of the keys was that these were needed by relievers. This was an untrue explanation but one to be given to avoid reference to the sensitive issues of Constable Ramsay's psychological state and the possibility that he might harm himself or others, using firearms available to him at the Temuka station. By default, because of a perceived need for consistency, it was to be the reason given to the plaintiff as well.

[148] I am satisfied, also, that the decision to recover the plaintiff's station keys, in addition to Constable Ramsay's, was taken by Inspector Gaskin on the basis that Constable Coy was perceived to be an ally of Constable Ramsay, a fellow trouble-maker, and that she, too, was then on stress leave. No concern about access to station firearms had been expressed to Superintendent Manderson in relation to the plaintiff. Further, no consideration appeared to be given to two other factors affecting Constable Coy. The first was that she was a licensed owner of several hunting firearms stored at her home but in respect of which no action was to be, or was, taken. The second consideration, which applied to the plaintiff's circumstances but may also have applied to Constable Ramsay's, was that although the return of keys directly related to the Temuka station, the plaintiff held keys to one or two other smaller stations at which she relieved from time to time and at which stations firearms were also held. The return of these stations' keys was not required of the plaintiff, although it is difficult to imagine that their return for the use of relievers could not have been at least as important.

[149] Later that same afternoon, Inspector Gaskin's directions were acted upon. When Senior Sergeant Schwartfeger arrived at Ms Coy's residence at Woodbury, he was met outside the home by the plaintiff's husband, John Langbehn. Mr Langbehn was suspicious of Senior Sergeant Schwartfeger's reason for arriving unannounced at the plaintiff's home while she was on long-term sick leave, and was both defensive and less than completely cooperative with the Senior Sergeant. Mr Langbehn was at pains to emphasise that the plaintiff would not disobey a lawful order (including to surrender her station keys) but insisted that this should be given in writing.

[150] Although, as Mr Langbehn himself said in evidence, Senior Sergeant Schwartfeger could have given a handwritten direction for the return of the keys there and then, the Senior Sergeant regarded Mr Langbehn's refusal to obtain the keys from the plaintiff and to hand them over immediately, as a refusal to comply with the orders of Inspector Gaskin and Superintendant Manderson. Rather than to force the issue at the plaintiff's home, Senior Sergeant Schwartfeger reported to Inspector Gaskin that he had been unable to obtain the station keys from the plaintiff. A decision was then taken to have a locksmith change the station's locks and new keys provided although this in fact did not occur until at least the following day.

[151] There was no suggestion, either at the time or in evidence, that the plaintiff may have posed the same, or a similar, risk to that which was perceived in respect of Constable Ramsay. Rather, I infer, the decision to seize the plaintiff's keys as well as Constable Ramsay's lay in Inspector Gaskin's belief that Ms Coy should also be denied unfettered access to the station because of her allegiance to Constable Ramsay in his own conflict with Sergeant Smith and because she, too, was absent from the station on long-term stress leave.

[152] There is no evidence to suggest that the impetus for the removal of the plaintiff's station keys came from Sergeant Smith despite the fact that he would probably have been made aware that while the station was closed and unattended on the previous night, the plaintiff had gone there to leave a further medical certificate for him. There is no evidence, either, that the initial impetus for these events having come from Constable Mawhinney, that this constable was aware of the plaintiff's

recent nocturnal visit to the station. So, it is probable that the timing of those two events (the visit to the station and the changing of the locks) was innocently coincidental.

[153] In view of the number of station key sets that then existed (between 28 and 30 for a station with a total staff of perhaps one-third of that number), and in the absence of any evidence of relieving staff then needing keys for access to the station, I accept that this justification for seizure of Ms Coy's keys was a ruse, and an unconvincing one at that. So, too, were subsequent attempts by the defendant to justify the need for the immediate return of the keys; that is that Ms Coy should not have had access to station firearms. Not only was Ms Coy herself a licensed firearm holder and frequent hunting user of them, but no attempt was made to revoke her firearms licences and to seize her own firearms as could have occurred if the defendant's concerns had been genuine. Ms Coy was justifiably upset both that she had been, as she put it, "locked out" of her workplace, and that she had been lied to about the reasons for this.

[154] By changing the station's locks and not giving her new keys, the defendant achieved Ms Coy's exclusion from her station except, of course, when it was open for business and/or when she might have been issued with a replacement set of keys which she never was. Even her entitlement to go into the station when it was open for business would have been no more than that of any member of the public.

[155] Without making any comment on the propriety of Constable Ramsay's exclusion from the Temuka station, this exclusion of Ms Coy from the station was ill-considered, over-reactive and had the predictable effect of causing a further and significant deterioration of the employment relationship between her and the defendant. The excuse proffered to the plaintiff for doing so was untrue, and subsequent attempt to augment that justification and to prevent Ms Coy's access to information about these events, only exacerbated an already fraught employment relationship. If it was not intended to bring about Ms Coy's resignation or abandonment of employment (which motive the evidence does not establish), then these were actions on the part of the employer that did not assist in attempting to improve the employment relationship and Ms Coy's ability to return to duties, as the

defendant was attempting to do through the rehabilitation programme in which the parties were then engaged.

[156] The plaintiff's case that the defendant's restriction of her duties and the removal of her station keys was unjustified disadvantageous conduct, is based on the following. First, it is alleged that the defendant, by Superintendant Manderson and/or Inspector Gaskin and/or Senior Sergeant Schwartfeger, failed to follow GI 1A Internal Affairs 125. Mr Fairclough submitted that this was the only lawful way for the Commissioner to restrict an officer's access to a police station or indeed to place any other similar restriction on a member of police.

[157] GI 1A 125 provides materially, under the heading "Duty Stand-Down" that a member may be "prohibited from entering any Police premises unless on lawful business" or "unless otherwise authorised expressly by the region or district commander". This power was exercisable in a number of circumstances which Mr Fairclough submitted were not complied with by the defendant in Ms Coy's case. First, the prohibition upon entry could only be effected during a period in which the issue of the member's suspension or dismissal was being considered, "or for any reasonable purpose". Next, a prohibition on entry was to be considered where there was a risk that the member might hinder investigative procedures or interfere with police operations or disrupt in any way local police routines or prejudice the public interest. Next, where such risk was assessed to arise, the power to prohibit entry to police premises was to be exercised by a region or district commander and was to be by way of a written order specifying any one or more of the indices of a duty stand-down including a prohibition on entering police premises. Next, such a written order was to remain in effect for a period not exceeding 30 days from the date of its issue and this advice was to be contained in the written order. Such an order could be renewed in writing. Finally, a copy of such an order was to be forwarded to the Police's Officer Commanding Internal Affairs.

[158] Associated with this, the plaintiff's case is that Sergeant Smith's purported restriction upon the plaintiff's constabular powers following the C/N incidents was similarly unlawful in the sense that it had no regulatory basis.

Constructive dismissal?

[159] The plaintiff says that her resignation was in law a constructive dismissal because the defendant's breaches of his employer duties to her were so serious that they amounted to a repudiation of the employment agreement, that they caused her resignation (disengagement as a constable) and that the risk of this was reasonably foreseeable to the defendant. In addition, the plaintiff has asserted that the defendant's treatment of her at relevant times was with the dominant and deliberate motive of causing her to end her employment by disengagement.

[160] Because of the existence of unjustified acts committed on the defendant's behalf by the plaintiff's supervisors (some of which were reprehensible), it is a very arguable question as to whether, overall, there was a constructive dismissal of the plaintiff at least on the repudiation ground.

[161] I deal first with the head of constructive dismissal that is more clearly and easily decided. This is the plaintiff's contention that the Commissioner's actions (through his relevant managerial staff) in relation to the plaintiff were undertaken with the deliberate and dominant purpose of bringing about the end of their employment relationship by her resignation. The plaintiff's case has, not unnaturally, focused principally upon Sergeant Smith's dealings with her and, to a lesser extent, those of Inspector Gaskin. For reasons already set out, I have concluded that, in a number of respects, Sergeant Smith dealt with the plaintiff in a manner which disadvantaged her in her employment unjustifiably. But that is not the same as, and falls short of, the high standard required to decide the dominant and deliberate purpose ground of constructive dismissal.

[162] Having regard to all the documentary evidence and, in particular, to the evidence that Sergeant Smith gave from the witness box, I am not satisfied on the balance of probabilities that he was motivated by a desire to compel Ms Coy to resign or disengage or to abandon her employment as a police officer. That is not to say that Sergeant Smith always acted, in relation to the plaintiff, out of altruistic and proper motives. I accept that some of his dealings with her, which were unjustifiably disadvantageous to her, were motivated by a wish to minimise or conceal his own

managerial shortcomings and performance failings. It could not be denied that there were times when Sergeant Smith might have wished that the plaintiff would move or be moved away from the Temuka Station. But that was not the same as having a deliberate and dominant motive to end her police career. I have already commented on the plaintiff's adamant refusal to consider reasonable voluntary transfer offers made to her and even, at times, on her insistence that it should be Sergeant Smith and the station's civilian watchhouse keeper who should be transferred away from Temuka and not her.

[163] Although at times Sergeant Smith made life difficult for the plaintiff and, on occasions, did so unlawfully, I am not satisfied on balance that this was coercion by the sergeant with the deliberate and dominant purpose of bringing about her disengagement from the Police as occurred.

[164] I have reached a similar conclusion in relation to the interactions between Inspector Gaskin and the plaintiff. The plaintiff's allegations of maltreatment by Inspector Gaskin were less trenchant or at least fewer than those advanced against Sergeant Smith. I would categorise the inspector's dealings with the plaintiff as strict, occasionally tough but not unfair, and assuredly without deliberate and dominant motivation to bring about the plaintiff's disengagement by coercion.

[165] My conclusions in respect of other police personnel who dealt with either the plaintiff's disadvantage grievances or with her rehabilitation programme, are clearly that not only was there not a deliberate and dominant motive of ending her employment, but that the defendant's acts and, therefore, motives illustrated a desire to attempt to preserve that relationship and, in the case of the rehabilitation programme, to improve it.

[166] On several occasions during the deterioration of the plaintiff's working relationship with Sergeant Smith, the defendant opposed temporary or permanent transfers of the plaintiff so that she would not be required to work either under Sergeant Smith's supervision or with the watchhouse keeper at Temuka, a non-sworn employee who was also alienated from her. Temporary transfers offered included to Timaru (on terms which would not have disadvantaged the plaintiff in terms of duty

time) and, permanently, to Christchurch. The plaintiff herself made at least one application for another South Island rural sole-charge position but was unsuccessful in this.

[167] At all relevant times Ms Coy was adamant that she did not wish to leave her home at Woodbury or to be based further from it than at Temuka. It was both at times explicit and implicit in her attitude that it was Sergeant Smith and the watchhouse keeper who should be transferred by the defendant rather than she. Ms Coy was aware, certainly by 2003, that Sergeant Smith was within a short time of retirement and had taken his long retiring leave which was indicative of his intention to relinquish his role at Temuka. However, the plaintiff could not be persuaded to accept even a temporary transfer to separate her and Sergeant Smith until he retired.

[168] Although the plaintiff's stated reason for not agreeing to a temporary transfer to Timaru was the presence there of Inspector Gaskin, I am satisfied from the evidence that, had she transferred to the Timaru police station (including in a traffic enforcement role which she preferred), Ms Coy would not have been under the immediate or even any significant supervision by Inspector Gaskin. The latter was the officer in charge of the South Canterbury sub-district which included Temuka and other small stations. Timaru urban policing was under the control of another inspector who, in turn, had a staff of non-commissioned officers and constables working in sections in and around that city with none of whom the plaintiff had any interpersonal conflict. Inspector Gaskin was located in a separate building some distance from the main Timaru police station.

[169] With the benefit of hindsight, it was unfortunate that the plaintiff could not have been persuaded to agree to a temporary transfer to Timaru until Sergeant Smith's retirement as officer in charge of the Temuka station. It is significant that these opportunities were made available to the plaintiff by the defendant. They were fair and realistic opportunities in all the circumstances.

[170] Many of the same issues just dealt with also arise for consideration when deciding the plaintiff's alternative constructive dismissal grounds; that is,

fundamental breach amounting to repudiation of the employment relationship and agreement between the parties.

[171] I am satisfied that any relevant breaches of his employment obligations by the Commissioner to Ms Coy as an employee, were not such that could reasonably have caused her resignation to be treated as a dismissal. Nor was it reasonably foreseeable to the defendant that this would ensue, at least until this possibility was mentioned by her on 5 September 2003. That is not to say that this is not the plaintiff's genuine perception which relies upon a cumulative history of dissatisfaction over many years, although in many respects not established objectively by evidence. The constructive dismissal tests are not satisfied by the subjective beliefs of the grievant. Rather, breaches of employment obligations and their seriousness must be assessed objectively and there is substantial difference between Ms Coy's assessment and that of the Court based on the evidence. That is not to say that some aspects of the plaintiff's treatment, as an employee over more than 10 years at Temuka, were not individually flawed. But a constructive dismissal is to be assessed to a standard of repudiatory breach of employment obligations by the employer. Although, in many respects, Sergeant Smith was the defendant's agent in dealings with the plaintiff, so too were others more senior in the hierarchy than Sergeant Smith, and whose actions and motivations must be assessed. In the case of Inspector Gaskin, any unjustified disadvantages he caused to be suffered by the plaintiff were fewer and less serious than those of Sergeant Smith. In the cases of others in the defendant's hierarchy, these were of lesser consequence still.

[172] Addressing each of the plaintiff's claims in support of her overall contention of constructive dismissal (set out between paras 16 and 28 of her third amended statement of claim as summarised at [7] of this judgment), I conclude as follows.

[173] The defendant did not respond inadequately to the plaintiff's two disadvantage personal grievance claims. It was incumbent on the defendant to address these not when they were made vaguely and/or inadequately as the first claim was initially, but from the time that they contained sufficient particulars to enable the defendant to identify the plaintiff's grievances and to know how the plaintiff wished to have them dealt with by the employer. For much of the time

between 20 December 2002, when the plaintiff raised her first justiciable personal grievance, until she disengaged from service in September 2003, she was on long-term leave for psychological reasons. She was, however, subject to a rehabilitation programme which meant that she remained in touch with her employer's representatives from time to time. In the context of whether this contributed to a repudiation of the plaintiff's employment agreement, the manner in which the defendant dealt with the plaintiff's two disadvantage personal grievances had necessarily to take into account these circumstances and, in particular, to work in conjunction with, and not impede or otherwise put at risk, that rehabilitation programme.

[174] It was an appropriate response by the defendant to the disadvantage grievances that he engaged an independent consultant, Ms Penn, to investigate and report on not only the circumstances of Ms Coy's grievances but, more broadly, and arising out of their central issue, relationship dysfunctionalities within the Temuka police station. Those investigations were solution-focused, as was appropriate to the nature of the plaintiff's grievances.

[175] There was, however an apparently insuperable obstacle to their resolution. Although it would have been beneficial to have removed the reporting relationship between the plaintiff and Sergeant Smith and perhaps even, more indirectly, between the plaintiff and Inspector Gaskin, the plaintiff was opposed implacably to residing elsewhere than in Woodbury. That limited her station options geographically, at least within the parameters of reasonable travelling distances to and from work. Combined with this was the plaintiff's increasingly firm view that Sergeant Smith and, preferably also, the watchhouse keeper at the Temuka station should be removed from that location to allow for the plaintiff's return there. As a mechanism for settling the plaintiff's grievances, however, the Commissioner was not empowered to put in place such a solution affecting Sergeant Smith and/or the watchhouse keeper. Ms Coy was made aware of this by the defendant at all relevant stages. To have done as the plaintiff wished in this regard would have been unattainable without the agreement of those other persons (which agreement would not have been forthcoming) and, if imposed upon them, would probably have brought about further personal grievances or other legal proceedings by them.

Consideration was therefore given to the possibility of a transfer of the plaintiff to Ashburton but a position was not available there. The plaintiff rejected the defendant's option of a transfer to Christchurch.

[176] Finally, the plaintiff rejected the defendant's proposals for her transfer, either temporarily or longer-term, to duties at the Timaru police station. She did so in part because of the home-to-work travelling distance and driving times but, principally, because she did not wish to work where Inspector Gaskin was stationed. That refusal to consider a transfer to Timaru was, in my assessment, an unreasonable response by the plaintiff to a reasonable and acceptable temporary transfer of her for what would have been the relatively short period before Sergeant Smith's retirement. As the evidence establishes and as was pointed out to the plaintiff at the time, Inspector Gaskin had overall command of the South Canterbury sub-district. He did not, however, have any greater degree of immediate command over constables based at the Timaru police station than he had over constables at Temuka where the plaintiff wished to return, albeit (as was her wish) without Sergeant Smith and the watchhouse keeper. Inspector Gaskin was located physically in a building and within a managerial structure that was separate from officers based at the Timaru police station who were supervised immediately by sergeants, senior sergeants, and another inspector.

[177] Attempts by the defendant to resolve the plaintiff's personal grievances, in conjunction with her rehabilitation plan including exploring and explaining such possible transfers, was not only a reasonable way of dealing with those personal grievances raised by the defendant, but was justifiable in all the circumstances of her rehabilitation programme.

[178] Finally, in this regard, no criticism can be levelled at the defendant about any relatively minor delays in addressing the plaintiff's two disadvantage personal grievances. These were brought about by combinations of resignations and transfers of other staff, the death of one, and the necessity to deal with the plaintiff's complex situation in these circumstances. Nor can the plaintiff complain justifiably in this regard when the defendant also had to deal with an increasing intensity and frequency of requests for documents and other official information made by the

plaintiff in relation to her personal grievances. While the plaintiff was entitled to ask for the disclosure of relevant documents and the defendant did not suggest otherwise, she cannot justifiably complain that this delayed the potential resolution of her two grievances.

[179] For the foregoing reasons, I do not agree that the defendant's response to Ms Coy's two disadvantage personal grievances was inadequate and to the extent that she may have been further disadvantaged, the defendant's actions were not unjustified.

[180] The next series of events which the plaintiff says breached her legitimate expectations of the defendant's conduct towards her so that he must be taken to have repudiated their employment agreement, relates to her partial exclusion from the Temuka police station by the changing of its locks. I have dealt with these events separately at [143]-[158], but must now determine whether they amounted to or contributed to a repudiatory breach and, thereby, to a constructive dismissal of the plaintiff.

[181] It is necessary to identify precisely to what the plaintiff was subjected by the defendant's actions in this regard. She claims that she was "locked out" of the Temuka Station or prohibited unjustifiably (and unlawfully) from entering her workplace.

[182] The plaintiff was not, however, prohibited completely from entering the station. The effect of changing the station's locks, and not providing the plaintiff with new keys to them, was to preclude her from entering the station premises when no one else was present or, when it was open, by other than the public entrance. Whilst the defendant could, theoretically, have directed the plaintiff's exclusion from the station at all times and in all circumstances, Inspector Gaskin's actions in changing the locks after not being able to obtain Ms Coy's keys did not go to that extent. Not only would she have been as entitled as any other member of the public to enter the public areas of the station for legitimate purposes, but there was no prohibition upon her being admitted to secure parts of the premises with the assistance or cooperation of another officer or staff member. The plaintiff was on

long-term sick leave and so, apart from leave certificates and rehabilitation purposes, had fewer reasons to be on the Temuka station premises during that leave than if she had been working as usual. The defendant's actions did not preclude her, for example, from collecting mail which she had arranged to be delivered to the station, or even necessarily from accessing some police-associated work benefits using a computer there.

[183] Although not excusing or finding justified the disadvantageous and misleading conduct by the defendant's representatives when demanding the return of her station keys and subsequently not allowing her full access, the plaintiff's case does not go so far as to establish that the defendant repudiated the parties' employment agreement by excluding her from some access to her workplace.

[184] Next, the plaintiff says that she was justified in treating her employment agreement as having been repudiated by the employer because of his refusal to deal with underlying trust and interpersonal issues, as was evidenced by events at the two rehabilitation programme meetings attended by the parties on 31 July and 5 September 2003.

[185] I have concluded that the defendant did not refuse or fail completely to deal with the plaintiff's trust and interpersonal issues which underlay her stress and, therefore, were at the heart of the rehabilitation process. The defendant did, however, fail or refuse in a number of material respects to deal with those issues adequately and properly including in accordance with the expert psychological advice he had received and, in some respects, in accordance with the employer's rehabilitation policy. The distinction between these failures or breaches and the plaintiff's case of repudiation because of a refusal to deal with them is not unimportant. That is because, despite the failures and breaches, I have concluded that the defendant was committed to attempting to rehabilitate the plaintiff as illustrated by the time and resources allocated to that exercise.

[186] Nor is the question of repudiation in this regard to be determined solely or even substantially by the results of the rehabilitation programme. Put another way, it cannot be said that the failure to rehabilitate the plaintiff means that the defendant

was in fundamental breach of, or otherwise repudiated, the parties' employment agreement.

[187] Next, the plaintiff says that the defendant repudiated their employment agreement by the manner in which he treated her after she raised her two disadvantage grievances and generally throughout her career as a police officer, the period of about 10 years from 1992 to 2002.

[188] I find against this part of the plaintiff's claim. Once the plaintiff's grievances were properly and sufficiently identified, the defendant cannot be criticised for the way in which he addressed those grievances including, more latterly, after it became clear that the plaintiff was suffering from a psychological condition which necessitated her taking long-term stress leave.

[189] The plaintiff's complaints were taken seriously and were dealt with, properly in my assessment, as part of a broader consideration of dysfunctional relationships at the Temuka Station. An external consultant (Ms Penn) was engaged and undertook an investigation which included the appropriate involvement of the plaintiff. Neither the plaintiff's grievances nor the wider station dysfunctionality were simple and clear-cut issues and they assumed a greater degree of complexity after 9 April 2003 when the plaintiff both went on long-term sick leave and became increasingly sensitive about these issues and defensive in her dealings with representatives of the defendant.

[190] In these circumstances, the defendant's treatment of the plaintiff's personal grievances did not so breach her employment agreement that it amounted to or contributed to a repudiation of it. Nor can the defendant's responses to those grievances be categorised as unjustified.

[191] Dealing next with the plaintiff's allegation of repudiatory conduct by the defendant as employer for the whole of her 10 years' service as a police officer until 2002, I do not propose to rehearse every incident over that period encompassed in the plaintiff's evidence. To do so would unduly lengthen an already long judgment. I have, however, considered and reflected on that evidence, both incident by

incident, and in the context of a working relationship which, as illustrated by the plaintiff's regular performance assessments, was mutually satisfactory. Although, as I have already concluded, from time to time over that period Sergeant Smith was critical of the plaintiff and, in the last year of her employment, so too was Inspector Gaskin on occasions, such criticisms and their consequences were founded on instances where those supervisors had cause to criticise or report adversely on the plaintiff.

[192] To use one very early example, which was raised and emphasised by the plaintiff in her evidence, she once reported for duty whilst still affected adversely by alcohol consumed at a Christmas work social function the previous evening. Sergeant Smith stood the plaintiff down from duty and, correctly also in my view (and as the plaintiff appears to have accepted at the time), reprimanded her. Subsequently, the plaintiff sought to blame Sergeant Smith for allowing or not preventing her from being intoxicated when she was expected to be commencing duty. Although this incident may have been referred to in passing subsequently, the event itself appears to have been a one-off; the plaintiff did not have issues with her alcohol consumption; and it did not count against her in a number of career events such as her selection for duty as part of the contingent of police sent to the Solomon Islands (as part of a multi-national combined military and police operation known colloquially as RAMSI) where the plaintiff performed creditably in difficult and unusual circumstances.

[193] Similar analyses can be applied to other incidents in her police career relied on by the plaintiff as evidence of, or at least contributing to, a repudiatory breach of contract by the Commissioner. After consideration of each such incident, however, I have concluded that these historical events (although not recounted in this judgment) did not amount or contribute to repudiatory breach by the Commissioner.

[194] To summarise my earlier conclusions about the claim of constructive dismissal, whilst not without fault in aspects of the performance of his role in his dealings with the plaintiff as the officer in charge of the Temuka station, those matters about which he reported the plaintiff to Inspector Gaskin for inadequacies or breaches of duties were ones in which the plaintiff was at fault. The purpose of this

reporting was both to achieve compliance with required standards (for example, of file preparation) and to improve the standard of the plaintiff's performance of her duties in her own interests. I am satisfied that Sergeant Smith did not criticise or report the plaintiff to Inspector Gaskin with the object of getting rid of her as a police officer at Temuka or for other unjustifiable or improper motives. Nor were Inspector Gaskin's dealings with the plaintiff imbued with such motives.

[195] Finally, the plaintiff categorises the defendant's conduct as repudiatory because he accepted her application to be discharged on grounds of medical incapacity. Logically (and as the plaintiff indeed submits), if this submission is correct, the defendant could only have acted fairly, reasonably, and in compliance with his contractual obligations to the plaintiff by refusing to grant her application to disengage. Her application was supported by medical evidence that it would not be in her best interests to remain as a police officer. In these circumstances, the plaintiff was driven to argue that the defendant should either have refused to entertain her application to disengage under s 23 of the Police Act, or to have received and then declined the application.

[196] The plaintiff's application for a PERF disengagement was not an ill-considered or hasty decision reached by her. It had been contemplated by her for some time before it was made. It had been mentioned by her in a rehabilitation meeting when she said that she was formulating her application. Her application had to meet certain minimum criteria and did so. In these circumstances, it is not difficult to imagine that if the defendant had acted as the plaintiff now says he should have, there would have been further complaint and, potentially, legal proceedings against the defendant for failing or refusing to accept and process the disengagement application.

[197] The plaintiff may then, or now with the benefit of hindsight, have wished the defendant to have realised belatedly her serious intentions and sought to have persuaded her to pull back from the brink. However, the defendant was not in breach of either his contractual or his statutory obligations as employer by accepting, considering, and approving the plaintiff's application. This alleged particular of fundamental and repudiatory breach does not succeed.

[198] For the sake of completeness I address the plaintiff's six heads of alleged breach of employment duties by the defendant said to have constituted or led to her unjustified constructive dismissal. These are summarised at [108]-[109] of this judgment.

[199] The first duty breached is said to have been the Commissioner's to "act fairly and reasonably" towards the plaintiff. Whilst in some respects (but not in others) the defendant's treatment of the plaintiff constituted her unjustified disadvantage in employment, that does not extend to such a finding of unfair and unreasonable treatment of an employee that this was a fundamental breach evidencing the defendant's repudiation of that agreement.

[200] Next was said to be a breach of the defendant's obligation to be a "good employer". I did not understand the plaintiff to say that this was an obligation on the defendant which expanded upon the statutory requirements just set out under the relevant Police Act and State Sector Act requirements. These are, upon analysis, narrower and more confined than the phrase "a good employer" may suggest. Nothing done by the defendant towards the plaintiff amounted to a breach of those statutory requirements and, on the plaintiff's case, if they were implied terms and conditions of her employment.

[201] The next allegation was a failure by the defendant to act "in good faith" towards the plaintiff. I have already dealt in detail with the absence of a contractual foundation to this obligation. Although the appropriate and relevant implied duty would have been to have expected the defendant to have had trust and confidence in the plaintiff (and vice versa), the evidence does not establish a breach of that implied duty.

[202] Next, the plaintiff claims that the defendant acted in breach of the implied common law contractual obligation not to act in a manner calculated to destroy the relationship of trust and confidence. I have just concluded that the defendant did not breach such an obligation and it follows, therefore, that he did not act in a manner calculated to destroy those integral elements of their employment relationship.

[203] Penultimately, the plaintiff says that the defendant breached his implied contractual obligation to take reasonable steps to protect her from psychological injury or damage. It does not follow necessarily that because the plaintiff did suffer psychological injury or damage, that her employer must thereby have failed to take reasonable steps to protect her therefrom. The plaintiff's case is that the psychological injury or damage suffered by her was attributable to her treatment by Sergeant Smith. The supervisory relationship between a sergeant and one of the constables for whom he was responsible and, vice versa, between the constable and the sergeant to whom she reported, was not one inherently liable to bring about psychological injury or damage. Rather, it was the dysfunctional personal relationship between the plaintiff and Sergeant Smith which did so or at least contributed significantly to those consequences for the plaintiff. Therefore, until the defendant (at the most immediate level in the person of Inspector Gaskin) became aware of both that dysfunctionality and of the risk to the plaintiff's psychological health, it would not be reasonable to expect the defendant to have taken reasonable steps to have protected it. The evidence establishes, however, that by the time those matters could reasonably have been said to have come to Inspector Gaskin's notice, let alone to that of other supervisory staff responsible for dealing with such matters, the plaintiff was already suffering psychology injury or damage. It follows that the defendant cannot be said to have been liable for failing to take reasonable steps to protect the plaintiff in these circumstances.

[204] Finally, and as a variation on the penultimate ground just determined, the plaintiff says that the defendant was subject to an implied contractual obligation not to cause her further psychological injury or damage. This breach is premised on duties arising once the plaintiff's condition and the probable causes of, or contributors to, it had become known to the defendant. For reasons set out elsewhere in this judgment I have concluded that some of the defendant's acts or omissions in relation to the plaintiff's rehabilitation programme both failed to deal reasonably with the plaintiff's psychological state and in some respects exacerbated it. I have categorised these acts and omissions as unjustified disadvantages to the plaintiff in her employment and these breaches of the implied contractual obligation are compensable as such. They do not amount, however, to such a fundamental

breach of the plaintiff's employment agreement that the defendant can be said to have repudiated it thereby.

[205] For the foregoing reasons, the plaintiff does not succeed in her claim of unjustified constructive dismissal. As noted already, however, that does not dispose justly of several of the plaintiff's complaints of treatment by the defendant over the last months of her employment and, in particular, in relation to the rehabilitation programme to which she was subject.

Application of s 122 Employment Relations Act 2000

[206] Although rarely applied, I have concluded that the circumstances put forward by the plaintiff in support of her unjustified constructive dismissal grievance, support the application of s 122. This provides: "Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged."

[207] Although the events which the plaintiff alleges amounted to an unjustified repudiation by the defendant of its employment agreement with the plaintiff have not been found to amount to constructive dismissal, a number of those events nevertheless constituted unjustified disadvantages to the plaintiff in her employment. They therefore qualify, under s 122, as being unjustified disadvantage personal grievances pursuant to s 103(1)(b) of the Act. The allegations and the defendant's justifications for what occurred were canvassed thoroughly in evidence and were subjected equally thoroughly to an application of the personal grievance tests. So, although counsel for the plaintiff did not seek to invoke s 122, I consider it is nevertheless open to the Court and not unfair to either party to do so in this judgment.

[208] The remedies that may flow to the plaintiff from individual instances of unjustified disadvantage in her employment will not be the same as she sought or the Court may have granted, if she had been found to have been dismissed unjustifiably. The plaintiff's termination of employment by medical disengagement did not amount

to a dismissal in law. But invoking s 122 will allow the plaintiff to have vindicated her justifiable complaints about the process that led to her voluntary disengagement.

[209] These unjustified disadvantages included the inappropriate disclosure to Inspector Gaskin by Police Welfare Officer, Ms Taylor, of a private communication received on her telephone voicemail from the plaintiff. Although, as a welfare officer, Ms Taylor was a representative of the defendant and not of the plaintiff, there was, nevertheless, an expectation of confidentiality in such communications. At the very least, if Ms Taylor had wished to pass on the plaintiff's comments that were clearly made with an expectation of privacy, the welfare officer ought to have sought the plaintiff's consent to do so. Likewise unjustified was Inspector Gaskin's use of the communication passed on to him by Ms Taylor. It was transcribed and placed on an official file.

[210] These events were disadvantageous to the plaintiff at a particularly delicate time in her rehabilitation programme and employment generally, and the dealings with that communication by the Commissioner's representatives were unjustified.

[211] So, too, was Inspector Gaskin's insistence upon attending personally the plaintiff's third rehabilitation meeting disadvantageous and unjustified. Although the inspector responsible ultimately for the plaintiff's employment in the South Canterbury District, Inspector Gaskin was aware that a significant element both of the plaintiff's psychological condition for which the rehabilitation programme was in place, and significant elements of her personal grievances, pertained to his working relationship with the plaintiff. Of most significance in this issue, however, was the specialist psychological advice which had been made available to the defendant that such participation in the rehabilitation programme would not contribute to its success. At that point, the rehabilitation process was under the control of Inspector Bell who, if she did not know of this professional psychological recommendation about rehabilitation, ought to have done so as the rehabilitation policy contemplated. The plaintiff's objection at the rehabilitation meeting to Inspector Gaskin's participation was ignored and his continued presence and participation contributed both to the failure of rehabilitation and to the plaintiff's commitment to disengage from police service. It is significant that the defendant now accepts that someone

else could have attended instead of Inspector Gaskin to address and have input into practical operational considerations arising from the rehabilitation. The inspector's involvement in this way in the rehabilitation process, and his failure to stand aside from it, disadvantaged the plaintiff in her employment and did so unjustifiably.

[212] Finally, I have concluded that the defendant's participation in the Rehab 3 meeting disadvantaged the plaintiff in her employment in several other respects. The meeting was called at short notice, which it should not have been in all the plaintiff's circumstances. There was no clear agenda, which was also important for the success of the rehabilitation programme in the particular circumstances that prevailed in late August/early September 2003. Although resulting from unavoidable personnel changes, the defendant's representatives at that rehabilitation meeting were inadequately briefed and/or knowledgeable about the circumstances that had led to it. In these circumstances, the meeting focused unduly on a return to duty by the plaintiff at the Timaru Station on transfer from Temuka. Although I have already concluded that the defendant's proposal in this regard was not unreasonable in all the circumstances, the absence of alternatives or a preparedness to consider alternatives on the part of the defendant's representatives made less likely the prospect of a successful rehabilitation and more likely the plaintiff's already-signalled disengagement. Overall, the conduct by the defendant of the third rehabilitation meeting disadvantaged the plaintiff unjustifiably in her employment.

[213] For the foregoing reasons and although not constituting an unjustified constructive dismissal of the plaintiff, Ms Coy was nevertheless disadvantaged unjustifiably in her employment in relation to those events which occurred during the period of her leave between 9 April 2003 and her disengagement.

An observation

[214] The following is not intended as a comment about any other cases of rehabilitation programmes put in place for police officers in circumstances of psychological injury which I imagine occur from time to time. I am conscious also that the events of this case took place more than 10 years ago and so may not necessarily reflect what happens in similar circumstances nowadays.

[215] It is trite to say that psychological illness or injury is not as easily observable, at least to lay people, as, for example, physical injuries such as broken limbs. Such illnesses are, nevertheless, no less real and in some instances more difficult to address and resolve under a rehabilitation programme. Whilst it is important to involve operational supervisors in such rehabilitations as part of formulating a programme to return to appropriate duties, expert opinion about the causes of an employee's psychological illness or injury, and strategies to alleviate and attempt to ensure non-repetition must be allowed to play their important role in rehabilitation. That is particularly so where the natural inclination of lay persons will sometimes be to under-estimate the significance of the psychology of an injury or illness and to think that rehabilitation can be achieved irrespective of the difficult and long-running interpersonal conflicts at the heart of it. That is not to suggest an absence of commitment to the ideal of rehabilitation or even the good faith of those managing the process. Rather, it is the importance of getting and taking into account professional expert advice even if this may seem counter-intuitive to those charged with managing a difficult employment environment.

Remedies for unjustified disadvantages

[216] The unjustified disadvantages in her employment did not cause the plaintiff to lose remuneration. She was, at all relevant times until her disengagement (which was not a dismissal), on pay. The only remedies available to the plaintiff for those disadvantage grievances are monetary compensations under s 123(1)(c)(i) of the Act. Because the parties have not had an opportunity to give consideration to what might be appropriate remedies for the unjustified disadvantages that the plaintiff suffered between 8 April 2003 and her disengagement later that year, I propose to reserve the fixing of those monetary remedies to allow an opportunity to settle them by negotiation or with the assistance of mediation. Leave is reserved for the plaintiff to apply, on notice, to fix these remedies if no such settlement can be achieved.

Costs

[217] The plaintiff has been partly successful in her claims. I will reserve questions of costs until remedies have been concluded, either by agreement or fixed by the

Court, and the opportunity to do so will also allow the parties to settle costs if they are able to. Leave is likewise reserved for either party to apply for an order for costs.

GL Colgan
Chief Judge

Judgment signed at 10 am on Tuesday 24 March 2015