IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 85
ARC 60/12

proceedings removed from the Employment Relations Authority

BETWEEN	DANIEL SEAN RAMKISSOON Plaintiff
AND	THE COMMISSIONER OF POLICE Defendant

Hearing:	Rotorua and Tauranga 19, 20, 21, 22, 23, 26 and 27 August (Rotorua) and 11, 12 and 13 November (Tauranga) 2013 and by written submissions filed on 20, 21 and 27 November 2013
Appearances:	P Brosnahan, counsel for plaintiff E Child and R Groot, counsel for defendant
Judgment:	7 July 2017

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The plaintiff was disadvantaged unjustifiably in his employment by his non-appointment to the role of station sergeant at Opotiki.

B The plaintiff was not disadvantaged unjustifiably in his employment by the defendant's application to him of its Rehabilitation Policy and otherwise in relation to its treatment of him during his period of illness.

C The plaintiff's disengagement from the Police on medical grounds (resignation) did not constitute his constructive dismissal by the defendant.

D As to remedies for his personal grievance under A above, the defendant is to pay to the plaintiff:

- **pursuant to ss 123(1)(b) and 128 of the Employment Relations Act 2000, a sum equivalent to the difference between (a) the remuneration received by the plaintiff as a senior constable at**

Whakatane from 1 July 2009 until the cessation of such paid sick leave, and (b) the remuneration the plaintiff would have been paid as station sergeant at the Opotiki Police Station, together with the full amount of any remuneration lost on this (b) basis after the end of the plaintiff's paid sick leave and until 22 August 2011; and

- **the sum of $30,000 as compensation for humiliation, distress and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000; and**

- **interest on the foregoing amounts of lost remuneration loss compensation at the rate of five per cent per annum calculated on a monthly basis from the dates of their accrual to the date of payment of these sums by the Commissioner to the plaintiff; and**

- **leave is reserved to either party to apply for orders fixing these sums in the event that agreement on their amounts cannot be reached between the parties;**

- **costs are reserved but timetabled if they cannot be settled.**

REASONS

INDEX

1 Introduction

[1] Former Police Officer Daniel (more commonly known as Sean) Ramkissoon has three personal grievances which were removed by the Employment Relations Authority to this Court for hearing at first instance.[1] He says he was disadvantaged unjustifiably in his employment (two separate grievances) and that he was dismissed constructively and unjustifiably by his employer, the Commissioner of Police (his third grievance). The remedies claimed by Mr Ramkissoon include:

- reinstatement as a police officer with the rank of sergeant;
- compensation for lost remuneration;
- compensation for distress and humiliation under s 123(1)(c)(i) of the Employment Relations Act 2000; and
- costs.

[2] Mr Ramkissoon's first grievance in time is what I will call "the Opotiki non-appointment" grievance. This claims that he was disadvantaged in his employment unjustifiably because his appointment to the position of station sergeant at Opotiki in 2009, which he says would have also seen him promoted from senior constable to the rank of sergeant, was revoked unlawfully and unjustifiably. Included in this claim is that the Commissioner's review of that appointment, which resulted in its revocation, amounted to an unjustified disadvantage to him.

[3] Next in time is what I will call Mr Ramkissoon's 'rehabilitation management grievance'. This relates to what he says was his treatment by his employer when he suffered distress and psychological injury following his non-appointment to Opotiki in 2009, the appointment review process and his consequent non-appointment and non-promotion. Mr Ramkissoon says that although there was put in place a rehabilitation plan to address these conditions and to return him to fitness for work,

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1 *Ramkissoon v Commissioner of Police* [2012] NZERA Auckland 316.

this was mismanaged and undermined over a long period and repeatedly, in ways that will be identified subsequently.

[4] Mr Ramkissoon's third grievance is that his medical disengagement (in effect his resignation) from the Police in August 2011 was, in law, a constructive dismissal of him by his employer, the Commissioner of Police (the Commissioner). The absence of justification for his constructive dismissal is substantially the same conduct claimed in respect of his second (rehabilitation) grievance.

[5] The case not only deals with three separate grievances covering an extensive period of Mr Ramkissoon's employment but also necessarily examines such other complex areas as the interpretation and application of the Police's injury or illness rehabilitation procedures. Also raised for consideration, perhaps for the first time, is the Police's appointments review process, including the lawfulness of its application in this case. The proceeding also raises issues of the application of good faith obligations under the Employment Relations Act to the implementation of such detailed policies and procedures. In addition to the evidence of many witnesses, the case has produced voluminous quantities of documentary evidence which have required lengthy consideration.

[6] I regret very much the very long delay in deciding this case and issuing this judgment.

[7] The relevant events in this case span several years and relate, although not exclusively, to more than one of Mr Ramkissoon's grievances. Relevant documentary records including, in particular, extensive and detailed police policies covering the employment of officers, have required analysis because compliance with them and even, in some instances, their fundamental legality, has been challenged by the plaintiff. No forensic stone was left unturned either by the plaintiff in the prosecution of his causes of action, or by the Commissioner in his defence of those allegations.

2 Which sections 103A and 125 apply to which grievances?

[8] The Employment Relations Amendment Act 2010[2] amended both s 103A (tests for justification for dismissal or unjustified disadvantage in employment) and s 125 (the tests for an order for reinstatement in employment). This case consists of three separate grievances, each of which arose at a different time and one of which arose, arguably, after the new tests under ss 103A and 125 came into effect. It is therefore necessary to determine which of the new or old tests for justification applies to each grievance and whether the new or old s 125 reinstatement test applies to the unjustified constructive dismissal grievance, there being no claim for a remedy of reinstatement in employment for the other grievances.

[9] These questions are not simply of academic or legalistic interest. The two different s 103A tests apply different standards to the determination of justification by the Court. The pre-1 April 2011 'would test' established an arguably stricter or higher standard to be met by the employer than the post-1 April 2011 'could test' which requires overall justification to be determined by a reference to a range of justifiable responses by the employer.[3] The new and current s 103A also adds some specific minimum procedural requirements to the test. These are not easy to apply in the case of an alleged constructive dismissal consisting of a succession of events over a lengthy period culminating in the ending of the employment relationship ostensibly by the employee but which must, to be actionable as a grievance, be categorised in reality as being at the employer's initiative.

[10] The leading case on the transition from the former to the current s 103A is *Allen v C3 Limited*.[4] In that case the employee was dismissed on 18 March 2011, less than two weeks before new s 103A came into effect on 1 April 2011. The parties in that case accepted, as did the Court, that because the dismissal occurred before the new s 103A commenced, the previous s 103A applied to the decision of the grievance. The Court in *Allen* noted that there were no express transitional provisions in the amending legislation, at least that applied to s 103A. In these circumstances the Court relied on the constitutional presumption that legislation does

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2 Employment Relations Amendment Act 2010 (No 125) which came into force in 1 April 2011.
3 See *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466.
4 *Allen v C3 Ltd* [2012] NZEmpC 124, [2012] ERNZ 478.

not have retrospective effect. It was also significant that, in both its new and old forms, s 103A focuses on the actions of the employer at the time of dismissal. The Court also found significant ss 17 and 18 of the Interpretation Act 1999 which provide:

> **17 Effect of repeal generally**
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> (1) The repeal of an enactment does not affect—
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> (a) the validity, invalidity, effect, or consequences of anything done or suffered:
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> (b) an existing right, interest, title, immunity, or duty:
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> (c) an existing status or capacity:
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> (d) an amendment made by the enactment to another enactment:
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> (e) the previous operation of the enactment or anything done or suffered under it.
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> (2) The repeal of an enactment does not revive—
>
> (a) an enactment that has been repealed or a rule of law that has been abolished:
>
> (b) any other thing that is not in force or existing at the time the repeal takes effect.
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> **18 Effect of repeal on enforcement of existing rights**
>
> (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
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> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

[11] In *Allen*, reinstatement was also sought and the parties did not agree on which of the pre- or post-1 April 2011 reinstatement tests applied under s 125. In this regard, also, the Court placed considerable emphasis on s 18 of the Interpretation Act. It found that it was unnecessary for proceedings to have been commenced for an "existing right" to accrue. The Court wrote:

> [65] Sections 18(1) and (2) relevantly refer to the "*bringing* or completing" of proceedings that relate to an existing right. This suggests that an "existing right" can accrue before the commencement of legal proceedings, consistently with s 17(1)(b), which provides that the repeal of an enactment does not affect an existing right. The evident focus of s 18 is the existence or otherwise of an existing right, rather than whether proceedings relating to that right have been commenced or completed.
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> …
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> [76] I am satisfied that having regard to the circumstances of the case the plaintiff had an existing right to have the issue of his possible reinstatement

> determined under the repealed s 125. … [N]either the fact that the right had not been claimed nor determined by a judicial body, nor the fact that the right was unquantified or contingent, is decisive. The right to reinstatement under old s 125 could only exist if the Authority or Court found that there was a personal grievance and that reinstatement was practicable. The fact that other events would have to occur before the right could be exercised does not prevent there being an existing right. That is especially so in this case where the contingency is a decision of a judicial body, beyond the control of the plaintiff.

[12] The Court also touched on the question, although concluded that it did not need to decide it, in *Drader v Chief Executive of the Ministry of Social Development.*[5] There the Court noted that "the compelling reasoning in the *C3* case, following the *Gwilt* decision, and the general presumption against retrospectivity would have led me to apply those decisions, should that have been necessary".[6]

[13] I start with the decision of this issue as it relates to the Opotiki non-appointment grievance. That arose in July 2009 when the plaintiff became aware that his appointment to the position of station sergeant was cancelled and the review of his application refused. The Opotiki non-appointment grievance came to the plaintiff's notice when he returned to work from leave on about 29 June 2009. That grievance was raised with the Commissioner on either 13 July 2009 (by the plaintiff's solicitors) or 23 July 2009 (by the Police Association). His statement of problem covering this grievance was filed in the Employment Relations Authority on 20 May 2010. The case was subsequently removed by the Authority for hearing at first instance in this Court. So this grievance is to be determined according to the law as it stood before 1 April 2011; that is it is a 'would test' (as opposed to a 'could test') grievance to be determined by the now superseded s 103A.

[14] As to Mr Ramkissoon's rehabilitation grievance, it is less easy to define when this arose because it spans about two years of attempted rehabilitation which ended with his application for disengagement from the Police in June 2011. The vast majority of the relevant events upon which this grievance is founded occurred before 1 April 2011, and a relatively few happened after that date. The plaintiff disengaged medically from service with the Police with effect from 22 August 2011. The

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5 *Drader v Chief Executive of the Ministry of Social Development* [2012] NZEmpC 179, (2012) 10 NZELR 419.

6 At [93]; referring to *Gwilt v Briggs & Stratton New Zealand Ltd* [2011] NZEmpC 159.

plaintiff's unjustified constructive dismissal grievance was raised with the Commissioner on 30 August 2011. This disadvantage grievance was incorporated in the same statement of problem filed in the Authority as contained the plaintiff's Opotiki non-appointment grievance. What is relevant to the transitional question, however, is when the events constituting the grievance occurred.

[15] The conduct in issue having occurred in almost all cases before 1 April 2011, justification for that conduct is to be assessed as the law then stood. That is, justification for the second (rehabilitation) grievance is to be determined by the 'would' test which was included in pre-1 April 2011 s 103A.

[16] I conclude in this part of the decision with the last in time of the three grievances, Mr Ramkissoon's claim that he was dismissed constructively and unjustifiably. His first notification of his intention to disengage was given to the defendant after 1 April 2011. His employment ended in August 2011. The current s 103A (the 'could') test is therefore applicable to the question of justification if he was dismissed constructively.

[17] So far as Mr Ramkissoon's claim to reinstatement in employment goes, my conclusion will be that this is, and can only be, brought in relation to the unjustified dismissal grievance.[7] Not only is reinstatement now not the primary remedy for an unjustified dismissal as it was before 1 April 2011, but the Court must also be satisfied that it is both practicable and reasonable to order the plaintiff's reinstatement.

3 Background facts

[18] Mr Ramkissoon was from the Republic of South Africa and enlisted in that nation's police service at the age of 18. After a varied police career of about 10 years in South Africa during which time he advanced in rank, the plaintiff emigrated to New Zealand and chose to live in Whakatane. Despite his previous police service probably assisting him to be accepted for training as a New Zealand police officer in early 2000, Mr Ramkissoon started again on the bottom rung of the police ladder.

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[7] *Creedy v Commissioner of Police* [2011] NZEmpC 104, [2011] ERNZ 285 at [8]-[9].

He was a probationary constable, although expecting realistically that his prior learning and experience would enable him to progress in the Police more quickly than other new recruits. That appears to have occurred.

[19] After training, Mr Ramkissoon was first posted to the Whakatane Police Station and he completed his two-year probation successfully. He later studied for and completed a management diploma at Massey University with the approval of, and funding assistance from, the Police. His colleagues and supervisors commented very favourably on all aspects of his performance as a police officer. Mr Ramkissoon enjoyed both the job and working in the Whakatane and wider Eastern Bay of Plenty areas. By preference, he was engaged principally on front line (General Duties Branch or GDB) duties on shift work, opting not to move into the Criminal Investigation Branch (CIB) or similar specialised policing work, at least as early as he might have. Mr Ramkissoon was, nevertheless, intent upon advancing his police career by promotion and in different branches.

[20] From time to time, Mr Ramkissoon was an acting sergeant, including for a period of three months in Whakatane during 2004, having occasional responsibility for staff and policing of the sub-areas of Opotiki, Edgecumbe and Kawerau, and including court prosecutorial duties. Mr Ramkissoon was briefly a field training officer (FTO) assisting with on-the-job training of probationary constables. In 2006 he was nominated by his area commander to attend a 12-month leadership and business course, the completion of which counted towards a senior sergeant's qualification, a New Zealand Institute of Management Diploma, and other relevant and useful qualifications. He describes this as an intense course which placed high demands on him. It had only a 37 per cent pass rate, and was a course from which a number of his colleagues withdrew. By all accounts, he was then looking forward to a long, satisfying, and successful police career.

[21] Mr Ramkissoon attributes the dramatic change in his fortunes as a police officer to his presence at the Whakatane police station and his observation of an incident there on 23 October 2006, what is known to the parties and will be

described in this judgment as the "Whakatane four" or the "F incident".[8] Mr Ramkissoon observed part of that incident where an uncooperative prisoner, suffering from psychological illness, was seriously assaulted by four other police officers (two sergeants and two constables). Although all four officers were subsequently acquitted by a jury of criminal charges arising out of that incident, I am able to categorise the incident as one of serious assault because of the subsequent judgment of the High Court[9] in a damages claim by the prisoner in which the Court not only found that he had been assaulted by the four officers but in which the Attorney-General, on behalf of the Commissioner as defendant, conceded as much. The same conclusions can be drawn from the Independent Police Conduct Authority's Report on the incident.[10]

[22] Mr Ramkissoon was a witness to a part of that incident in the cells area of the Whakatane police station. The incident was recorded by video cameras as was Mr Ramkissoon's presence. I should emphasise, lest there be any doubt about it, that Mr Ramkissoon was not an active participant in the incident, was not charged with any criminal offence, and indeed was a witness for the prosecution at the trial of the four officers. It was his treatment by the Police leading up to, at, and following the criminal trial of the Whakatane four, that Mr Ramkissoon says coloured and began to infect his previous and mutually positive employment relationship and led eventually to what was his medical disengagement from the Police. The incident and Mr Ramkissoon's treatment by the Commissioner in relation to it are, however, background events and not the subject of his grievances.

[23] There is little, if any, disagreement by the defendant with Mr Ramkissoon's account of relevant background events until late October 2006. Thereafter, however, the parties diverge, at times sharply and critically, and it is necessary to decide, on the balance of probabilities, a number of relevant parts of the evidence on which there is such disagreement.

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8 Although there is no prohibition on publication of the prisoner's name, it is unnecessary for the decision of this case.

9 [2010] NZAR 445.

10 Independent Police Conduct Authority *Use of Force …*, 6 August 2010 <www.ipca.govt.nz/Site/media/2010/2010-Aug6-…aspx>.

[24] It is appropriate therefore at this point to say something about Mr Ramkissoon's credibility. I had a good opportunity to observe him giving evidence-in-chief and being cross-examined and re-examined as a witness over the course of some three and a half days. Also, in common with many other police employment cases, this is one in which there are comprehensive documentary records of almost all relevant events. This includes email correspondence which has taken over substantially (but not completely) from not only letter writing but, in many cases, from the uniquely styled police report writing undertaken formerly on typewriters.

[25] There were elements of his evidence for which Mr Ramkissoon can be criticised. For example, he tended almost by default to attribute the worst interpretation to others' correspondence where this affected him and where such correspondence emanated from persons whom he believed were against him. He was unprepared to acknowledge the possibility of more benign and tenable interpretations of documents, even those that could not reasonably bear the meaning and significance he attributed to them. Not uncommonly in employment cases, however, I assess that to be more a consequence of his embattled psychological state than of the truthfulness or accuracy of his recollection of events. In that latter regard, I found the plaintiff generally to be an honest and fair witness of fact who answered questions carefully, precisely, and not in a way calculated to portray a distorted version of the truth.

[26] There is another witness on whose credibility I should comment briefly. This was Wayne Annan, at relevant times the Police's most senior HR person holding the office of General Manager, Human Resources (GM:HR). Mr Annan has since left the Police. Counsel for the defendant asserted in submissions that Mr Annan had been confused in cross-examination. I infer from this criticism of Mr Annan's evidence that the defendant now wishes that Mr Annan had given different evidence, more in line with the defendant's theory of the case. Quite apart from inviting the Court in effect to disbelieve or downplay the evidence of a significant witness called by the same party, I found Mr Annan's evidence to be credible for the most part. He was put forward by the defendant as a witness of truth as, in relevant matters, I find him to have been. That is not to say that his evidence is all accepted and absolutely: I have some doubts about some parts of it. Nevertheless, I am satisfied that when

informed fully but belatedly of background information, Mr Annan made informed and realistic concessions including, principally, to settle the plaintiff's non-appointment grievance by offering him the Opotiki station sergeant position. There is no suggestion on the defendant's case that Mr Annan was not entitled to do this and Mr Annan's inherent sense of following that course has been amply but unfortunately illustrated by this proceeding.

[27] Because the events following the Whakatane four incident are relevant background but do not support a separate cause of action, they can be described summarily. Remarkably, Mr Ramkissoon was the only officer at the station during the incident who completed a written report about it on the same day. This was submitted by him to the officer in charge of the station, Senior Sergeant Bruce Jenkins. Although some detail was added later, the plaintiff's subsequent accounts of what he observed did not conflict with his contemporaneous statement. His account of his observations, other statements, and eventually his evidence at the criminal trial, and how they were received and dealt with by the team of detectives investigating the incident, were the commencement of his deteriorating employment circumstances.

[28] A police investigation into the activities of officers who dealt directly with the prisoner began within a week or so of these events. An investigation team led by a senior detective from Auckland made rigorous inquiries as a result of which the Whakatane four were charged with criminal offences, went to trial before a jury in Tauranga, and were subsequently acquitted.

[29] The investigation team was very concerned that all its eye witnesses were police officers at the same station who, it was believed, might or would be supportive of their accused colleagues. From an early stage, if only because of the video recordings of the events, the Whakatane four were likely to be charged with serious offences. It was made clear to Mr Ramkissoon and others in his position that if they assisted the inquiry team, including giving evidence in support of the Crown's case, they would be looked on favourably by the Police and protected. Conversely, the clear impression was conveyed to them, I conclude deliberately, that if they did not do so, there was the possibility of criminal charges and/or internal disciplinary

charges or, after the trial, even prosecutions for perjury. Whether these were ever realistic possibilities is not to the point. Mr Ramkissoon and others in a similar situation felt under considerable pressure to modify and tailor their statements and not to give evidence that might be seen inappropriately to favour their accused colleagues. It was implicit in all of this that those officers who were not perceived by the Police as having co-operated in the prosecution, would not face an easy future in the Police, especially at Whakatane. For several, including the plaintiff, that was prophetic. The aftermath of the investigation and trial still affected some Whakatane police staff almost seven years later, although less acutely than at times closer to the events.

[30] This pressure on the plaintiff (and others) continued for the duration of the police investigation of the incident and then leading up to the trial of the four accused, more than a year afterwards. It continued, albeit diminishing over time, long after the conclusion of the prosecutions and the employment investigations of the four officers had concluded.

[31] One illustration of the pressures placed on the plaintiff and his colleagues was that on the morning after the jury's "not guilty" verdicts in Tauranga, the then Area Commander rang a representative of the Police Association to advise him that consideration was being given to prosecuting for perjury up to three or four police officers who had given evidence at the trial and who were based at the Whakatane station. This number represented between one-half and one-third of the number of officers within that class and engendered considerable anxiety amongst that whole constabular group that included the plaintiff. Although it appears that there was probably no such investigation, or certainly any prosecutions as were threatened, and that the information was conveyed as an ill-advised and intemperate response to the jury's verdict, nonetheless it set the scene for continuing apprehension and disquiet at the Whakatane station which affected the plaintiff significantly.

[32] Despite requests for, and the holding of, meetings and discussions about these events in an attempt to put them behind the station's staff, the Whakatane station remained a divided and, in some respects, an unhappy workplace for the plaintiff and others. Mr Ramkissoon began to consider his options including those that might

enable him to continue to live in the general area but to be away from the Whakatane station environment.

[33] An opportunity presented itself in 2009 when a vacancy arose for the position of station sergeant at Opotiki, about 50 kilometres by road east of Whakatane where Mr Ramkissoon lived with his wife. The Opotiki station sergeant was second in charge to the senior sergeant at Opotiki who was responsible for the area's policing.

[34] Mr Ramkissoon applied for this position in February 2009. This was an operational role and a so-called "hard to fill" position. Mr Ramkissoon believed that he was, at least in part, qualified to senior sergeant level and had also completed his university papers for inspector level qualification. He was interested in the Opotiki position because it offered the opportunity to get away from what he regarded as the persistently negative environment at the Whakatane station as well as to progress his career in the Police by promotion and different experience. He hoped to continue to live in Whakatane and to commute to Opotiki.

[35] Mr Ramkissoon had noticed a brief advertisement for the Opotiki station sergeant role in one of the regular publications circulated among staff containing numerous position vacancies. The initial advertisement contained minimal, but the essential, information including that it was open to persons holding "office of Constable". In 2009 that was a neologism, replacing what had previously been known as a "sworn member" of police. What used to be called "non-sworn staff" had also been renamed "police employees" at the same time. So, to use the then still familiar terminology, it was clear from the first advertisement seen by the plaintiff that only "sworn officers" could apply for the vacancy.

[36] Mr Ramkissoon was unsure whether the restriction to those holding "office of Constable" allowed him to apply. That was also because, despite holding both the rank of Constable and that "office", Mr Ramkissoon had completed a number of academic qualifications necessary for promotion to the higher ranks of senior sergeant and inspector. A number of these qualifications had been undertaken with the knowledge of the Police and the costs of doing some of them had been met by the defendant.

[37] Despite uncertainties about his ability to apply, Mr Ramkissoon obtained a more detailed job description for the vacant position. This revealed that there were several specific requirements for appointment. These included that the appointee had either to then hold the rank of sergeant "substantively" (that is, that the applicant then held that actual rank), or be qualified to do so and so might do so in an acting capacity until formally attested. At that time, many constables appointed to a sergeant's role would only undertake their Police College sergeants' qualifications after appointment to the role and within the period of about two years after that date. At that time, also, it was the practice that such appointments of constables would be designated as "temporary sergeants" until all qualifications were obtained. That practice at the time was widely known within the Police and was known to the plaintiff. It was a practice sanctioned by the Police's Appointment Review Policy to which I will refer in more detail later.

[38] Before applying, Mr Ramkissoon telephoned the officer in charge of the Opotiki station, Senior Sergeant Richard Miller, who was also designated to chair the Appointment Panel for the station sergeant's position. At the time of Mr Ramkissoon's call in February 2009, Snr Sgt Miller was on holiday away from the Opotiki station. After Mr Ramkissoon disclosed his uncertainty about his qualifications to Snr Sgt Miller, the latter confirmed his own uncertainty also, but recommended that Mr Ramkissoon should put in an application before the closing date, which was fast approaching, to preserve his position. This would be on the basis that his entitlement to be appointed could be established later if he was the preferred candidate. There was at least one other applicant who had similar or perhaps even lesser qualifications for the Opotiki position than Mr Ramkissoon's.

[39] When he discussed his uncertainties with Snr Sgt Miller, Mr Ramkissoon was heartened by the Senior Sergeant's advice that he should put in an application anyway, although he continued to refrain until the last days from doing so. It transpired later, however, that Snr Sgt Miller was not then himself qualified formally to manage the appointment process, although another member of the appointment panel was so qualified.

[40] On about 19 February 2009, four days before applications closed, Mr Ramkissoon was contacted by Snr Sgt Miller recommending him to apply for the position because, the Senior Sergeant said, the latter had received advice from Tania Welch of the Police's Bay of Plenty Human Resources (BOPHR)[11] that anyone holding the "office of Constable" could apply for the job under the Police's relevant new policy.

[41] Senior Sgt Miller cannot now recall, and has no surviving records of, these matters, but I accept the plaintiff's evidence that he later telephoned Mr Ramkissoon to advise him that he (Snr Sgt Miller) had been in touch with the District Human Resources Office about the qualifications questions the plaintiff had raised.

[42] In these circumstances, Mr Ramkissoon completed an application which included his confirmation that he was qualified to "apply for the vacancy". This belief was based on the advice he had received from Snr Sgt Miller and other information known to him from police directives. Mr Ramkissoon also relied on Snr Sgt Miller's advice to him that at least one other questionably qualified applicant had also applied. Mr Ramkissoon emphasised that, at all times, including then, he did not try to hold himself out to be a sergeant or to have sergeant qualifications. Rather, he says that he held some senior sergeant's and some inspector's exam qualifications, but that he was able nevertheless to apply for the Opotiki vacancy. Also significant in his decision to apply was the then prevailing practice of appointing constables as temporary sergeants who completed their formal qualifications subsequently.

[43] As already noted, included on the application form that was signed by him and certified as correct by ticking a "yes" box, Mr Ramkissoon affirmed that he held "the necessary qualifications to apply for this position". The alternatives on the printed application form (known as POL 212) were, in effect, either that he was not qualified, or that qualification was not applicable. With the benefit of hindsight as the plaintiff acknowledges, it would have been preferable for Mr Ramkissoon to have written on his application form that he was unsure whether he was qualified to apply, and to have made reference specifically to those qualifications which he did

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[11] The human resources office of the Bay of Plenty region under which the Whakatane and Opotiki stations came.

and did not hold. However, he did not do so, instead affirming, in answer to the printed questions, that he was qualified to apply by ticking the appropriate box.

[44] In his accompanying curriculum vitae under "Educational Achievements", however, Mr Ramkissoon listed his academic qualifications but not the specific sergeant's promotional qualifications which he did not then hold. Also in his application for the vacancy, Mr Ramkissoon advised that he was proposing to take leave to travel overseas between 25 April and 19 June 2009. The significance of this advice lies later in the narrative.

[45] The plaintiff's application was processed at BOPHQ (Bay of Plenty Area Headquarters) in Rotorua. There was a checklist for human resources staff to complete in respect of this vacancy before applications were referred to the Appointment Panel. This checklist required the person completing this to "check eligible to apply ie exams, certifications" after the receipt of applications. This requirement was ticked off, although when that was done and by whom at BOPHQ is not clear. It was probably shortly before 3 March 2009 when the file was sent on to the Chair of the Opotiki Appointment Panel. That was sent with a letter dated 3 March 2009 from Human Resources Assistant Kelly Corcoran to Snr Sgt Miller. This letter pointed out, among other things, that "The applicants for this vacancy are to be considered in accordance with the New Zealand Police Appointments Policy 2005, by … appointing the people best suited to positions based on merit"."

[46] Mr Ramkissoon's application had been processed by BOPHR including, mistakenly the defendant now says, as to his qualifications. His application, along with others similarly screened, was sent to the interview panel for short-listing a smaller number of applicants for interview. Senior Sgt Miller, as Chair of the interview panel, assumed, from receiving Mr Ramkissoon's application processed by BOPHR, that it regarded Mr Ramkissoon as being qualified for appointment. In these circumstances the Appointment Panel's focus was on the comparable merits of the several applicants who were short-listed, including Mr Ramkissoon.

[47] By letter dated 20 March 2009 Snr Sgt Miller advised Mr Ramkissoon formally that he had been shortlisted by the Panel for a "competency-based interview" which was to take place on 27 March 2009.

[48] The plaintiff was interviewed by the Appointment Panel on that day. Mr Ramkissoon believed that he had excelled at the interview as a result of Snr Sgt Miller's subsequent advice to him that he had been selected unanimously as the preferred candidate for the Opotiki sergeant's position. Senior Sgt Miller and the Panel recommended Mr Ramkissoon for appointment. The written document doing so does not include reference to the plaintiff's qualifications. The panel assumed that these had been checked by BOPHR from applications made and short-listed. The panel recommended that if, for any reason, Mr Ramkissoon was not to be appointed, then no other applicant met the criteria for appointment and, in these circumstances, no substitute appointment should be made from the applicants.

[49] The Appointment Panel's advice of recommendation addressed to the District Commander (Superintendent Gary Smith) and dated 3 April 2009, recommended Mr Ramkissoon's appointment to the position of station sergeant at Opotiki "at the rank of sergeant and remuneration band". The Panel recommended that if Mr Ramkissoon declined the appointment, the position should be re-advertised. This recommendation was signed off by Snr Sgt Miller on 6 April 2009 and was approved by Supt Smith on 14 April 2009.

[50] The appointment process listed how it was to continue after the Panel had recommended Mr Ramkissoon as the appointee. It required that BOPHR complete another checklist. This was signed off by Tania Welch of BOPHR on 14 April 2009. It also confirms that the application, recommendation letter and checklist were sent to the District Commander for sign-off. The evidence is that the District Commander was asked to sign off the appointment before the qualification checks had been done, and he did so.

[51] Ms Welch completed the checklist in relation to the recommendation for appointment of Mr Ramkissoon. Although not answering positively or negatively the standard question "Does the member have the necessary qualifications for the

position?", she listed Mr Ramkissoon's qualifications and, importantly, his "Outstanding [in the sense of yet to be attained] Qualifications". These latter qualifications included, first, a qualification called "Management 101". The evidence established, however, that Mr Ramkissoon had been permitted to enter directly the Management 201 course and, subsequently, Management 301, both of which papers he had passed. It seems clear that, in these circumstances, he would have been credited with the lesser qualification of Management 101 if he had not already held it. This was subsequently accepted by the Police in a re-assessment of the plaintiff's qualifications.

[52] The remaining two "Outstanding Qualifications" were said to be "CPK (Sgt)" and the "Qualifying course (Sgt)". The CPK (Sgt) course was in fact completed by Mr Ramkissoon within the following few months and the practice at that time was that the sergeant's qualifying course was completed at the Police College after such appointments had been made.

[53] This checklist was completed by Ms Welch on 14 April 2009 but does not appear to have itself been checked by a more senior human resources person as the appointments procedure contemplates.

[54] Next, on 20 April 2009 Snr Sgt Miller advised Mr Ramkissoon by telephone to complete all the Opotiki vacancy documentation before the plaintiff left New Zealand for an extended period of leave. The plaintiff contacted by telephone Tracy Robinson at BOPHR who prepared a form of contract and asked Mr Ramkissoon to go to his station to receive it by fax, which he did. Mr Ramkissoon made some proposed alterations to the contract regarding allowances and then advised Ms Robinson that he was flying from Whakatane to Auckland at lunchtime on the following day and so would like to get the contract completed on the morning of his departure for Auckland.

[55] The defendant's formal offer of the position of station sergeant at Opotiki was contained in a letter dated 20 April 2009 to the plaintiff over the hand of Tracey Robinson (Human Resources Assistant). It included advice that appointment was dependent on the plaintiff's formal acceptance by signing and dating the

acknowledgement and acceptance section on the back of the letter, initialling each page of the letter and returning the initialled and signed letter to the Human Resources Office. The offer was open until 23 April 2009, some three days later. Mr Ramkissoon was advised: "We will write to you again after we have received your acceptance of this offer and following notification of your appointment to advise whether your appointment is confirmed or is subject to review". There was a section of the letter of offer entitled "COMPLETION OF QUALIFICATIONS FOR RANK". This provided:

> The Commissioner has directed that you complete MGMT 101, CPK & Practical Duties by April 2011. It is acknowledged that you may be eligible to apply for Recognition of Prior Learning in relation to MGMT 101. Please note that any enquiry in relation to this will need to be applied for independently through the correct channels in accordance with the LMC Promotion framework. …

[56] As to the provisional nature of the appointment and the possibility of a review of it, the letter continued:

> Your appointment is subject to review; hence you are initially classified as a provisional appointee. If you accept this offer, your provisional appointment will be published in the TEN-ONE publication. Internal applicants have seven days from the date your provisional appointment appears in TEN-ONE in which to request a review. At the expiry of those seven days we will be able to formally advise you whether your appointment is confirmed or if a review has been lodged. If a review is lodged then your appointment cannot be confirmed and remains provisional until a formal review process has been completed.
>
> I will advise you immediately if any review is lodged and the outcome once the review is complete. If a review is upheld, this may result in the cancellation of your appointment.
> …

[57] The reference to "internal applicants" being entitled to apply to have the appointment reviewed, was confusing. It could have meant other applicants for the Opotiki vacancy who were within the organisation but who had been unsuccessful; or it could more obtusely have meant simply an applicant for review who was within the organisation. Mr Ramkissoon (and others) understood the former meaning; in fact the wording of the relevant policy supported the latter, but this was not made clear in the advice to the plaintiff.

[58] Mr Ramkissoon signed and returned his acceptance of the offer on 20 April 2009.

[59] Contrary to the defendant's stance, at least until the hearing, I conclude that Mr Ramkissoon did not mislead Ms Robinson or anyone else about when he was leaving or otherwise pressure her to complete the paperwork. He had disclosed on his application document (the POL 212) that he would be overseas from 25 April 2009 to 19 June 2009, and also discussed with Ms Robinson by telephone that he would be in Auckland from the afternoon of 21 April 2009 for his university graduation ceremony later that week. Mr Ramkissoon had made clear his scheduled travel to Auckland on 21 April 2009 and thence onward overseas four days later on 25 April 2009. The significance of these conclusions will relate to the manner in which the review of appointment application was dealt with by the defendant.

[60] It was only at this point (20 April when the signed contractual documentation was returned to BOPHQ), that BOPHR first considered that Mr Ramkissoon might not in fact have been qualified for appointment. That was despite the plaintiff having been advised that he was to be appointed and having accepted formally the Commissioner's offer of provisional appointment, including allowing him time to complete those qualifications after appointment.

[61] At about 11.30 am on 21 April 2009, as Mr Ramkissoon and his wife were preparing to fly from Whakatane to Auckland, the plaintiff received a telephone call from Ms Welch advising him that he could no longer be offered the Opotiki position because he was not qualified for it. She asked him whether he was aware of the specific requirement of the position that an appointee be qualified by examination. Mr Ramkissoon advised that he was not, and said that Snr Sgt Miller had advised him that he was eligible to apply because the job was advertised as requiring the holding of the "office of Constable". Ms Welch said that she would have to consult her own manager and "the College". I infer that meant someone at the Police College. Her advice was that she (and the Police) were unable to stand by the offer that had been made on the previous day. She apologised to Mr Ramkissoon and said that she wished to let him know as soon as possible before he left the country that the job was being re-advertised and that he would not be eligible to apply for it. Ms

Welch told Mr Ramkissoon that it was not his fault that the Police sent him for training on a qualification for a senior sergeant's course, rather than a sergeant's course. Ms Welch admitted to him that it (the offer that had been made to, and accepted by, him) was "our [the Police's] stuff up" and apologised.

[62] When Mr Ramkissoon asked whether the decision to revoke his appointment was "set in concrete", Ms Welch replied that it was not; that Inspector Sean McManus was looking at it but that he wanted the plaintiff advised before he departed the country, that the job was to be re-advertised and that Mr Ramkissoon would be ineligible to apply.

[63] When Mr Ramkissoon inquired of Ms Welch about the views of the BOPHR Manager, Inspector Kevin Taylor, her reply was that he was not pleased that she had overlooked the qualification requirements. Ms Welch's advice was that Mr Ramkissoon should talk to Snr Sgt Miller, think over the position, and get back in touch with the HR office.

[64] Upon his arrival in Auckland on 21 April 2009, Mr Ramkissoon contacted his Police Association representative (Graeme McKay) and gave him an account of events. Mr Ramkissoon told Mr McKay that he was preparing to attend his Massey University graduation ceremony in Auckland before leaving New Zealand for South Africa on Saturday 25 April 2009 and sought Mr McKay's assistance.

[65] Also on 21 April 2009, Ms Welch completed a report about the matter in which she stated that it was the decision of Insp Taylor that the "offer [of appointment] should be withdrawn". In her report Ms Welch conceded that on 14 April 2009 she had overlooked what she had been told was the requirement that applicants were to be qualified by exam to take up the position and the rank of sergeant. Significantly, Ms Welch's report of 21 April 2009 makes no allegation of dishonesty on the part of the plaintiff, or of misleading the Panel, or of putting any pressure on Ms Robinson to send out the contract, despite these serious allegations being made subsequently by Insp Taylor against Mr Ramkissoon.

[66] Ms Welch's 21 April 2009 report on the appointment which she provided to Insp Taylor said:

> On 14/4/09 the file was checked by me and it was overlooked that the position required that the [applicants] "be qualified by exam to the rank of Sergeant", and the recommendation was forwarded to the District Commander for consideration. The District Commander signed the recommendation. The member's application stated that he was qualified for the position and the HRA Kelly Corcoran had signed off that the member was certified.

[67] After pointing out the uncompleted qualifications, Ms Welch's report continued:

> On 20/4/09 Constable Ramkissoon rang the HR office and spoke to Tracy Robinson advising that he had been recommended for the position and wanted to receive the letter of offer prior to going on extended leave overseas. He indicated to her that he was leaving Tuesday 21st April 2009. She prepared the letter and sent it to him, which he signed and returned by fax on 20th April 2009.
>
> Tracy was checking the file and noticed that the PD stated the specifications and raised it with me. I rang the panel chairperson and the member at the earliest opportunity. Constable Ramkissoon was disappointed and thought that his educational qualifications to date could be cross credited towards his Sergeants level. However, upon discussing this with Inspector Sean McManus he has advised that the tertiary study advised by the member is not eligible to be cross-credited to the outstanding paper/exam.
>
> As discussed you [advised] that the offer should be withdrawn because the member isn't eligible to apply. This has been discussed with the member and the Chairperson. Constable Ramkissoon isn't happy with the decision and has advised that Graeme McKay, Police Association is acting on his behalf.

[68] On 22 April 2009 Mr Ramkissoon contacted Snr Sgt Miller by telephone and confirmed the latter's understanding that anyone holding the "office of Constable" was entitled to apply for the vacancy. Senior Sgt Miller confirmed to Mr Ramkissoon that he (Snr Sgt Miller) had got this advice from the BOPHR office.

[69] On the evening of 22 April 2009 the Police Association's Mr McKay advised Mr Ramkissoon that after initial discussions with Inspector Taylor, the Police then intended to allow his provisional appointment to stand and to advertise this in the "Ten One" staff newsletter to allow applications to be made to review the appointment. This changed the initial advice Ms Welch had conveyed to the plaintiff

that Insp Taylor had directed that his appointment was to be revoked and that he was not eligible to apply for it again.

[70] The application for review of the Opotiki appointment recommendation was made by HR assistant Tania Welch. On 21 April 2009 Ms Welch had advised her Bay of Plenty HR Manager, Insp Taylor, of what she knew of the events relating to the appointment process including an acknowledgement of fault on her own part. Insp Taylor's advice had been that the offer should be withdrawn. Ms Welch did advise the plaintiff of the withdrawal of the offer of appointment but, as already noted, that was subsequently revised at Insp Taylor's direction after the Police Association's representations on the plaintiff's behalf. The appointment was allowed to stand, subject to the exercise of the review process.

[71] In an email dated 24 April 2009 to Ms Welch, after advising her that he had decided to advertise the plaintiff's provisional appointment "and the review process [be] allowed to take its course", Insp Taylor concluded with the statement: "It will be reviewed". I have concluded that the impetus for the review, instigated in the name of Ms Welch, emanated essentially from Insp Taylor.

[72] In these circumstances, Mr Ramkissoon considered he really had no choice but to allow the review process to run its course. That permitted what he believed was a period to allow other applicants for the vacant Opotiki position to claim and demonstrate disadvantage to them following which, as he understood it, an independent review committee would undertake a full review of the appointment and the process. This was the commonly held understanding of the internal appointment review process at the time. Mr Ramkissoon then advised Snr Sgt Miller of these events and decisions, as it appeared to Mr Ramkissoon that Snr Sgt Miller had not been involved in the events of recent days, despite having chaired the Appointment Panel.

[73] The plaintiff's provisional appointment to the position of station sergeant at Opotiki was announced in the Ten One magazine of 8 May 2009. Mr Ramkissoon had by then left New Zealand (on 25 April 2009) believing that if an unsuccessful applicant for the Opotiki role appealed, there would be a review to be decided on its

merits. He had given Ms Welch his cell phone number on 21 April 2009 and had advised her that he could be reached on that number overseas, at his own cost if that was necessary. This advice was provided by Mr Ramkissoon in relation to the appointment and, implicitly also, the review processes.

[74] Apparently accepting a substantial degree of responsibility for the errors which she concluded had led to Mr Ramkissoon's appointment, Ms Welch said that she proposed to Insp Taylor that she herself would lodge an application to review the plaintiff's appointment under the relevant policy. It was, however, still then possible, at least theoretically, that a disappointed applicant for the position could have done so or, indeed, any other member of the Police. Ms Welch was a police employee, not a holder of the office of constable; she was a civilian who had no wish to be, or prospect at all of being, appointed to the Opotiki sergeant's role. As it transpired, however, there was no other challenge to the appointment. Ms Welch's offer ensured that there was a challenge to the appointment. This provided Insp Taylor with another opportunity to do what he had originally intended (and had instructed Ms Welch to do), which was to make out a case to cancel the plaintiff's appointment.

[75] Ms Welch, who was responsible operationally to Insp Taylor, duly lodged a brief letter seeking to review the plaintiff's provisional appointment but then played no further part in that process. Insp Taylor then assumed the role of providing information about the appointment, and the review of it by Ms Welch's appeal, to the Police's GM:HR, Mr Annan. Inspector Taylor's report to Mr Annan was the sole (and important) evidence on which Mr Annan acted. Inspector Taylor's report to Mr Annan was the subject of trenchant criticism by counsel for the plaintiff, not only as to its form and erroneous contents but also for what counsel Mr Brosnahan submitted were its significant omissions. In these circumstances, it has been appropriate to examine this important report closely and I will do so at [78].

[76] By letter dated 15 May 2009 Insp Taylor wrote to the plaintiff advising that he (Insp Taylor) had received a request for review of the plaintiff's provisional employment from Ms Welch. Mr Ramkissoon was then out of the country and difficult, but not impossible, to contact, at least by telephone or by email. Neither Insp Taylor's letter nor its contents was communicated directly to the plaintiff. Not

unreasonably in these circumstances, Insp Taylor had emailed Mr McKay, the plaintiff's Police Association representative, attaching a copy of the former's letter to the plaintiff advising of the review. Enigmatically, this email appears to be dated almost four years earlier, 19 October 2005. No explanation for this obvious error has been able to be given and no similar errors appear from any of the other numerous emails sent at about that time by Insp Taylor. Nothing turns on this error, however. By communicating with Mr McKay of the Police Association, Insp Taylor did try reasonably to bring this review application to the plaintiff's notice.

[77] It appears that the Association's Mr McKay did not contact the plaintiff about the review so that Mr Ramkissoon himself knew nothing of it until he returned to the country more than a fortnight later. Nevertheless, Mr McKay did attempt to influence the course of events although without involving the plaintiff. Mr McKay engaged with Insp Taylor and with senior staff at Police Headquarters in Wellington about these matters.

[78] On 15 May 2009 Insp Taylor wrote to Mr Annan about "review of appointment: Station Sergeant at Opotiki" (copied to Ms Welch). Amongst Insp Taylor's advice to Mr Annan was the following:

> One of the six applicants is Senior Constable RAMKISSOON, who indicated on his application (Pol212) that he held the necessary qualifications to apply for this position.
> …
> … The Panel Chairpersons letter of recommendation did not mention the special requirement (ie being qualified by examination to the rank of Sergeant).
> Senior Constable RAMKISSOON spoke to Human Resources Assistant on the 20th of April and asked for his offer to be sent that day as he would be out of the country from 1pm the next day on holiday for a period of six weeks. …
> …
> **Process issues:**
>
> In meeting Senior Constable RAMKISSOON's request, a final check re the recommended applicants qualification to the rank of Sergeant was not completed. This check was completed by the BOP HR Unit after the offer was forwarded, and it became apparent that Senior Constable RAMKISSOON is not qualified by examination to the rank of Sergeant. Senior Constable RAMKISSOON therefore does [not] meet the requirements of this vacancy.

> Senior Constable RAMKISSOON was advised, and during discussions with the Police association Field Officer it became apparent that he was not leaving the country until Saturday the 25th April (travelled to Auckland on the 21st of April).
>
> To continue and appoint an applicant to a position that he/she is not qualified to apply for would undermine the credibility of the Appointments Process.
>
> **Recommendation:**
>
> That the provisional appointment of Senior Constable RAMKISSOON not be confirmed and the vacancy be cancelled (as per the panels recommendation should Senior Constable RAMKISSOON decline the position).
>
> The position will then be re-advertised.

[79] Also on 15 May 2009 Insp Taylor emailed Mr McKay of the Police Association and copied that email to the plaintiff, although at his police.govt.nz email address to which the plaintiff did not have access while on leave overseas. This letter was sent to Mr McKay by Insp Taylor because of a request that the Police Association representative be the point of contact in the plaintiff's absence overseas. The letter stated:

> The HR Manager, Bay of Plenty District has received a request for review of your provisional appointment to the above vacancy. The request has been received from Tania Welch.
> **Your appointment therefore cannot be confirmed pending the outcome of the review. You are advised not to commence <u>any</u> action regarding starting in this position.**

[80] On 21 May 2009 Insp Taylor advised Ms Robinson as to the review of the provisional appointment: "I've followed the policy re my role and procedure and made a recommendation direct to the gm:hr" (General Manager: Human Resources).

[81] On 19 May 2009 Insp Taylor emailed Mr Annan enclosing a "background" document about the matter. There is no evidence that this material was copied to either Mr Ramkissoon or to his Police Association representative. Nor had Inspector Taylor's earlier report to Mr Annan been copied to the plaintiff or his representative.

[82] The next relevant event/document was an email from Mr Annan to Insp Taylor, copied to Ms Welch, on 22 May 2009 stating simply: "Kevin, I agree with your recommendation". As a result, Insp Taylor immediately emailed Ms Welch

asking her to arrange "for the corrective action/notification etc to take place". A short time later Ms Welch emailed Ms Robinson asking her to "make the necessary arrangements as per GM:HR decision" including to cancel the vacancy, to advertise a new vacancy to be considered by the same Panel and to notify Mr Ramkissoon by email via the Police Association. Ms Robinson attempted to do so on 25 May 2009 stating to Mr McKay:

> …
> I am writing to advise the General Manager: HR has considered the submissions received in relation to the provisional appointment of Constable Ramkissoon … and he has instructed that the appointment [cannot] be confirmed and the vacancy should be cancelled and re-advertised.
>
> Please advise the member accordingly.
>
> For your information a new vacancy number will be created and the position will be re-advertised in Ten One 321a published on Friday 5 June 2009.

[83] Ms Robinson's email of 25 May 2009 did not reach Mr McKay of the Police Association because, apparently remarkably, it was sent by Ms Robinson to a non-existent email address. It was re-sent to the same address on 4 June 2009, despite there having been no response from Mr McKay to the 25 May 2009 email to him as would have been expected had he received that earlier email.

[84] In the Ten One list of vacancies posted on 19 June 2009, the re-advertisement of the position was notified but changed from its earlier version to provide: "Must reside within 30 minutes of Opotiki. Although not noted in the Ten One advertisement, the position description remained largely the same as its predecessor by specifying that applicants "Must be qualified by exam to the rank of Sergeant".

[85] On 30 June 2009 by email, Mr McKay of the Police Association took up the plaintiff's cause with Deborah Chan, the Appointments Manager, Organisational and Employee Development, at Police National Headquarters. Not having received a reply to his email of 30 June 2009, Mr McKay again emailed Ms Chan on 6 July 2009 asking for a response to enable Mr Ramkissoon to consider his future options. In addition, Mr McKay inquired: "Is it appropriate for the re-advertisement of this vacancy to be put on hold until you have considered this matter?"

[86] Ms Chan responded to that prompting, saying that Mr Ramkissoon had misrepresented himself in his application, and that he had misled BOPHR and the Appointment Panel. Ms Chan declined to assist and, in particular, to agree to Mr McKay's suggestion that the vacancy process be put on hold.

[87] On 7 July 2009 Insp Taylor forwarded to Ms Chan by email his previous email correspondence with Mr Annan. In response to Insp Taylor (copied to Ms Welch) on the same day, Ms Chan noted: "The email I received from Graeme McKay did not contain all the pertinent information as you would have noticed!"

[88] Not only was Mr Ramkissoon not advised personally of the review application or decision (although he was contactable), he was not advised of the re-advertising of it including that the closing date for applications was set before his known scheduled return to New Zealand. As already noted, Insp Taylor also restructured and rewrote the position requirements, removing the alternative to what is known as the "substantive" clause affecting applicants' qualifications and adding a requirement that the appointee reside within 30 minutes' travelling time by road from Opotiki. This, Mr Ramkissoon said in evidence, appeared to prevent him from being appointed unless he moved from Whakatane closer to, or indeed to, Opotiki which he was reluctant to do. So too did the stricter qualification requirement appear to disqualify him from applying. This was also consistent with the Police Association's advice to him.

[89] Mr Ramkissoon returned to New Zealand later in June 2009. He had not heard from either his Police Association representative or the Police during his absence. He was then advised by colleagues that there had been a review of the appointment, although not instigated by another applicant. Rather, it had been made by a non-sworn or non-constabular member of the BOPHR office itself in which the initial decision to revoke his appointment had been made by Insp Taylor. He learned of the outcome of the review at the same time.

[90] On 7 July 2009 Insp Taylor emailed Insp Robert Jones, then the officer in charge of the Eastern Bay of Plenty Area, to the following effect:

> I believe one of "your" Senior Constables has returned from [an] extended period of leave and gone on "stress leave". I am told this relates to his recommendation for appointment to the position of Sergeant, Opotiki [being] overturned on review. The basis of the review was that he applied for the job stating he was qualified for promotion – when in fact he wasn't.
>
> Can you please ensure as Acting Area Commander that (if my information is correct) a rehab process is initiated and that this situation is managed.
> …

[91] On 8 July 2009 Ms Chan replied to Mr McKay of the Police Association more fully and formally:

> … I confirm that I have been advised that this matter was considered by the GM HR a few weeks ago. He agreed that the provisional appointment of Senior Constable RAMKISSOON (SCR) not be confirmed as he did not meet the special requirement that the appointee be substantively qualified to the rank of Sergeant.
>
> As discussed, as this matter has already been dealt with by the GM:HR there is little point in raising the matter with me.
>
> FYI however I was advised that SCR stated in his application that he was substantively qualified as a Sergeant which the Panel took into account as part of their deliberations. Also, after being advised he was the preferred applicant, SCR rang HR and put some pressure on an HR Assistant to send out an offer on that same day as he said he was going overseas the following day (which was not correct). In the haste to send out the offer, the usual check on qualifications etc was not done prior to the offer being sent to SCR. If the check had been done the offer would not have been made as SCR was not substantively qualified.

[92] In the absence of Ms Chan as a witness, I infer that she reached these conclusions by reference to Insp Taylor's erroneous advice to Mr Annan, and repeated the Inspector's errors without independent inquiry, certainly of Mr Ramkissoon who had by then returned to Whakatane. Ms Chan repeated, by adoption, those wrong and damning allegations against the plaintiff.

[93] Shortly after Ms Chan emailed Mr McKay on 8 July 2009, Insp Taylor emailed the plaintiff's Area Commander, Insp Rob Jones, advising him that Mr Ramkissoon had falsified his application, that he was not "legitimately ill" (the plaintiff had by then just gone on sick leave) and instructing Insp Jones to put Mr Ramkissoon on a rehabilitation plan and to ensure that the situation was "managed".

[94] By mid-July 2009, it had become clear that the plaintiff was unlikely to be appointed to the Opotiki sergeant's vacancy following usual appointment and review processes. These events to this point constitute Mr Ramkissoon's unjustified disadvantage (non-appointment) grievance.

[95] About six months after Mr Ramkissoon's provisional appointment to the Opotiki posting was cancelled, the vacancy was eventually re-advertised. By that time, Mr Ramkissoon was qualified formally (by examination) to apply for it, even if he had not been previously. He attributed his continued failure or refusal to re-apply to the addition of a new travel-time restriction on the appointee which had not been specified previously for that position. This was that the appointee would have to reside within 30 minutes' travelling time of the Opotiki station.

[96] That, or similar restrictions, were, however, not uncommon features of a number of police vacancies at that time. There was a need for an officer (especially the officer at many times in charge of a station) to travel on occasions to his or her station at other than scheduled duty sign-on times. That was necessary to deal with the sorts of unpredictable emergency and other occurrences that arise and cannot otherwise be covered in small stations isolated from larger police resources. A travel time restriction was a justifiable condition of appointment in appropriate cases. Whether that was subsequently imposed for bona fide reasons is, however, another question in this case. It is perplexing that such a significant condition was not needed when the post was first advertised. No cogent explanation was given for its subsequent imposition. The station sergeant role at Opotiki had not changed otherwise. There is no suggestion that the restriction was omitted erroneously from the first appointment process. As will be seen, it was portrayed inaccurately as strictly applicable. It was reasonable, in my assessment, for Mr Ramkissoon to conclude that it was pointless applying again for the position, in his view so apparently opposed was BOPHQ and Insp Taylor in particular to his appointment.

[97] The defendant's case is also now that, although expressed originally as precisely a 30-minute travelling time restriction, this was, in practice and would have been in the Opotiki case, a reasonably flexible limitation. That was in the sense that an otherwise preferred candidate would not have been rejected simply because he or

she lived a few more than 30 minutes from the station as the plaintiff did. Indeed, the evidence is that the eventually successful applicant for the Opotiki station sergeant position was resident about 35 minutes', or more, travelling time from the station. Mr Ramkissoon's residence in Whakatane was about 40-43 minutes' travelling time from Whakatane.

[98] It is notable also that Mr Annan's subsequent intended offer of the Opotiki appointment to Mr Ramkissoon contained no such conditions. I deal subsequently with this significant offer of settlement. I infer that this apparently but misleadingly inflexible travel time restriction on the appointment was imposed either to exclude Mr Ramkissoon or at least to discourage him from applying subsequently. He was not ever told that this was a flexible restriction and had (from the advertisement) the justifiable expectation that it was not. The plaintiff was misled by the omission of this advice to him when it was known that he was very keen to have the Opotiki role.

[99] Mr Ramkissoon did, however, apply for other vacancies in the region although he was not successful in obtaining any of these. I conclude, however, that his non-appointments to these other vacancies were not unreasonable, and was not for ulterior or improper reasons as he believed they were. I will explain briefly why I have reached this conclusion adverse to the plaintiff's case.

[100] Highlighted particularly by the plaintiff was his application for a role as District Court Prosecutor at Whakatane. Mr Ramkissoon was the only one of five applicants who was not interviewed for that position. He believes that he was excluded wrongly and for improper motives from the final short list of candidates who were interviewed. When, however, the evidence about this process was examined on its merits, I am satisfied that his application failed at the first hurdle for justifiable reasons. It was not blocked for improper reasons of prejudice against him. Mr Ramkissoon lacked the same technical experience for the role as the four short-listed candidates had. The advice of the Chair of the selection panel that it had no need to consider Mr Ramkissoon's application further, was based on that assessment of the merits of the five candidates combined with the wish to interview four unless all five were then ranked about equally. That the plaintiff had acted on occasions as

a prosecutor in District Courts was not determinative of or even particularly influential in, the decision.

[101] I am further satisfied, on balance, that concerns which one of the selection panel members expressed about Mr Ramkissoon's failure to progress beyond that stage of the appointment process, were unfounded. They resulted from her assessment of Mr Ramkissoon professionally rather than, as he believes, from her concern that she had been improperly pressured into rejecting his application at that point.

[102] There were other applications that the plaintiff made but in which he was also unsuccessful. There was no similar evidence about these as there was in relation to the Whakatane Prosecutor position. I am not satisfied, as I would have needed to be to uphold his allegation, that Mr Ramkissoon was the victim of improper motivation or bad faith, denying him appointment to those positions. It is significant that these knock-backs were by different appointment panels and not from any influence exercised on them by BOPHR.

[103] As previously adverted to, it is important to record that later in 2009 an offer to settle the plaintiff's Opotiki non-appointment grievance featured in the evidence without objection and is, in my assessment, significant both as to justification for the defendant's conduct towards the plaintiff, and to his remedies. When Mr Annan was apprised accurately and of more of the picture than had been disclosed to him by Insp Taylor's report, and on the basis on which he (Mr Annan) directed the cancellation of the plaintiff's provisional appointment, Mr Annan agreed to meet with the plaintiff and his then counsel with a view to settling the grievance. Mr Annan intended and arranged to offer to Mr Ramkissoon the opportunity to take up what was then the still vacant position of station sergeant at Opotiki although without holding formally the rank of sergeant, until the plaintiff was able to qualify for that appointment. Indeed Mr Annan directed that this offer of settlement was to be made to the plaintiff. The offer of settlement that Mr Annan was prepared to extend to the plaintiff was, in reality, the offer of appointment that had been made to Mr Ramkissoon originally but without the condition of a potential review of the appointment attaching to it. Although belatedly, Mr Ramkissoon could not then have

asked justifiably for a better offer in settlement of this grievance as Mr Annan was prepared to make him.

[104] For reasons, however, which remain a mystery to Mr Annan, what he intended and directed to be the Commissioner's offer of settlement was never extended to the plaintiff as would probably have resolved his first grievance had it been accepted by Mr Ramkissoon, as I conclude it would have been. It was not a case of the plaintiff having been made an offer that he rejected after consideration and advice. That this grievance was not settled on the terms intended by Mr Annan, appears to have been a result of it not being communicated to the plaintiff by someone or some persons in the Police's HR hierarchy. That is surprising because Mr Annan had authority to make such an offer, was the person within the Police empowered to do so and was not able to be overridden or contradicted by HR staff on such matters. For want of the offer that would probably have been accepted and obviated the need for raising this grievance, matters deteriorated further. In evidence Mr Annan regretted that the grievance had not been settled as he recommended and instigated. He went so far as to say that the Police had lost a valued officer.

[105] I now return to the chronology of events. At this point in the saga, the attention turns from the facts underlying the non-appointment grievance to those that inform the decision about Mr Ramkissoon's rehabilitation grievance. As already noted, shortly after his return to New Zealand and to duty in early July 2009, Mr Ramkissoon went on sick leave and his supervisor was directed to place him on a rehabilitation programme. Inspector Taylor, who initially directed this course of action, was clearly dubious about the genuineness of Mr Ramkissoon's illness which kept him from returning to work on his return from leave, following the Opotiki non-appointment circumstances.

[106] On the night before Mr Ramkissoon was due to return to duty after his leave (on Monday 29 June 2009), he rang the Whakatane Station's Snr Sgt Jenkins indicating that he was stressed but hoped that this would be able to be addressed when he received a reply about his non-appointment complaint from the Police Association. Mr Ramkissoon advised Snr Sgt Jenkins that he was expecting to be back at work by Thursday 2 July 2009. He was reminded by his supervisor of the

requirement to supply a medical certificate if he was absent from work for longer than three days.

[107] When Mr Ramkissoon was still not back at work by Monday 6 July 2009 and had not provided a medical certificate, the local staff welfare officer was informed and the plaintiff's immediate supervisor, Sgt Mouncher, was asked to visit him and instigate a rehabilitation procedure, which he did. Inspector Taylor at BOPHR had already recommended to the plaintiff's local superiors that his absences be monitored and dealt with because they were, in Insp Taylor's view, suspect.

[108] On 7 July 2009 Insp Taylor emailed the Insp Jones, then responsible for the Eastern Bay of Plenty area, drawing to the latter's attention that the plaintiff was then on "stress leave" which was, in Insp Taylor's view, attributable to his non-appointment to the Opotiki vacancy. Inspector Taylor urged Insp Jones, in the latter's capacity as acting Area Commander, to ensure that the rehabilitation process was initiated and the situation "managed". Inspector Jones, in turn, referred this matter to the plaintiff's station supervisor, Snr Sgt Jenkins, inquiring of the latter whether Mr Ramkissoon's situation needed to be monitored or whether all was in hand.

[109] Also on 7 July 2009 Mr Ramkissoon received a visit from Police Welfare Officer Jenni-Lee Reardon. As a result of that visit, Mr Ramkissoon was referred to a psychologist in private practice (Kevin Mist) under the Police's Trauma Policy. Mrs Reardon's recorded grounds for the referral were "Feeling of lack of fairness in process … Sleep deprivation/frustration … Work Relationship Conflict".

[110] The psychologist's initial report to the Police attributed his condition to the Opotiki vacancy decision and its consequences.[12] These were said to have caused "some symptoms of stress". Other manifestations of this condition in Mr Ramkissoon were assessed to include inability to sleep, obsession about his current work situation, lack of motivation, isolation, and a frustration with the lack of assistance that he perceived he was receiving from the Police Association. The psychologist also reported Mr Ramkissoon's complaints about his treatment during

[12] I include within this attribution, the appointment review process and its outcome.

the Whakatane four investigations and prosecutions and, in particular, that he was told that he had not been completely truthful when giving evidence. Also significant was Mr Ramkissoon's recent advice that he was to lose his field training officer role at Whakatane.

[111] The psychologist advised:

> I am working with management at Whakatane to get a rehab process started for [Sean] so that we can get [Sean] back to work.
>
> I feel that [Sean] is losing faith in the organization and the transparency of the situation around his latest application. …
>
> [Sean] would appreciate your assistance in getting some strategies together re his sleep deprivation, and also some strategies around dealing with this conflict, working through it and believing in the systems.

[112] A rehabilitation plan was drawn up promptly by agreement between the plaintiff and the Police on 8 July 2009. The treatment goal was stated to be "to get back to work full time" with the aim that this was to be on Monday 13 July 2009 at which time the plan would also be reviewed. The agreement was that Mr Ramkissoon would resume work on day shifts in the Whakatane Police Property Squad, returning to section (general) duties with the assistance of his immediate sectional supervisor, Sgt Mouncher, four to six weeks later.

[113] The agreed rehabilitation plan included his placement on duties away from the high demands and unpredictable environment of front line general duties involving shift work. Mr Ramkissoon was allocated an investigative role in an office known as LET (Law Enforcement Team) associated with the Whakatane CIB. This was a day shift role with more predictable routines and with a supervisor in whom Mr Ramkissoon had significant confidence.

[114] As to the nature of the intended ongoing treatment plan, the psychologist reported to the Police:

> CBT counselling and assisting and monitoring the member as he returns to the workplace place …. The employment issues resulting in this members requiring time away from work is still ongoing, and monitoring this member until resolution of those issues will be important.

[115] On 14 July 2009 Mr Mist requested an extension of his role, advising: "This member is experiencing complex occupational stress and is currently on a rehab plan. Further session required to continue to assist the member stabilise symptoms and monitor rehabilitation." It was reported that "[s]ome progress" had been made and that the plaintiff "has gained understanding and is managing stress and work issues better. Symptoms have stabilised."

[116] Mr Ramkissoon did return to work on Monday 13 July 2009 after two weeks' absence for illness. He was deployed on day shifts in the station's LET dealing with property offence investigations. He was not part of his previous GDB front line section working shifts and was replaced therein temporarily. The plaintiff worked away from potentially confrontational, unpredictable and dangerous situations. His temporary work was nevertheless valuable dealing with the ongoing problem of burglaries in the area, and he used his policing skills to perform this.

[117] On 17 July 2009 Snr Sgt Jenkins advised Insp Jones by email that he had arranged for the plaintiff to work in LET which was closely associated with the CIB office at Whakatane:

> … for a short term deployment on the basis his own section was had (sic) sufficient staff, LET was under strength and our highest risk was around burglaries. I believed [it] would assist reintegrate him back into the work force.

[118] On 20 July 2009 Insp Taylor emailed Insp Jones emphasising that Mr Ramkissoon had to produce a medical certificate for his two weeks' absence and this would need to show that he was unfit to return to work. Inspector Taylor's email continued:

> Had 2 weeks off, so there must have been a significant issue and he therefore requires a clearance. I'm not sure about this reintegrating into the workforce? without any form of rehab process.

[119] In the same email about the plaintiff's rehabilitation, Insp Taylor then referred to the Opotiki grievance as follows. The use of italics for emphasis is mine:

> *FYI there is an ongoing issue with [Police National Headquarters Human Resources] over Opotiki Sgt position*. They are dealing with the [Police Association] and his lawyer who are pushing for him to be appointed. I

> believe this is at the heart of all this. *I am not supportive of his appointment, he submitted a false application re quals*.

[120] I have already referred to Insp Taylor's opposition to Mr Ramkissoon's appointment to Opotiki and to his manager's (Mr Annan's) attempts to settle the plaintiff's grievance by so appointing him. This email not only confirms that conclusion but affects, potentially, the assessment of the plaintiff's rehabilitation treatment.

[121] Upon receipt of Insp Taylor's email, Insp Jones emailed Snr Sgt Jenkins, asking him to follow up to obtain Mr Ramkissoon's medical certificate. Inspector Jones's email continued. Again, the use of italic emphasis is mine:

> … Can you comment on him requiring rehab back into the workplace. *Was the reason for his absence really stress related or was it symptomatic of the fact that he was just plain p###ed off he has been declined the OP job?* Not that his medical certificate would indicate that.
>
> I have seen him today and *he looks like a box of fluffies* but I know where KT [Inspector Taylor] is coming from – if we don't do a rehab plan then at some stage down the track this could go pear-shaped again and we won't be able to demonstrate we managed Sean.

[122] Inspector Jones concluded this email by asking Snr Sgt Jenkins not to forward that email (set out above) to anyone else.

[123] Although only very occasionally, during his rehabilitation programme Mr Ramkissoon did undertake some front line and acting supervisory duties. For example, he headed a small contingent of Whakatane Police assigned to a music festival in Rotorua known as 'Ragamuffin'. As I understand it, however, these duties did not include night shifts.

[124] Mr Ramkissoon's initial rehabilitation supervisor was Sgt Mouncher, although he was soon replaced by Snr Sgt Jenkins. Inspector Taylor kept a close eye on the progress of the rehabilitation plan, as did the Welfare Officer, Mrs Reardon. On 4 August 2009, for example, Snr Sgt Jenkins advised Insp Jones who, although based at Rotorua, was responsible for the operations of the Whakatane Station, that:

> Just to give you a heads up that another situation is developing with Sean Ramkissoon.

> I gave him notification today that he would be required back on section as at 28 Aug …
>
> It appears he is going to play the stress card again, telling me we weren't being fair and taking his welfare into consideration and that his sleep patterns were just starting to settle down doing day shifts. He also expects me to run the section short staffed to accommodate him.
>
> I have asked Neil [Mouncher] to revisit his rehab plan.
>
> In the meantime I have asked Jon McKenzie [Mr Ramkissoon's supervisor in LET) to give [another officer] notification that he may be required back on section on 28/8 if a psych report determines Sean isn't capable. I have also told Sean that we would look at putting him back into Section 5 doing early and late shifts only to accommodate his sleep patterns.

[125] Inspector Jones replied by email to Snr Sgt Jenkins, copying this to Insp Taylor on the same day, 4 August 2009. Inspector Jones agreed, emphasising the need for a rehabilitation plan and that staff welfare needs were monitored carefully. He considered that Snr Sgt Jenkins would have to manage the plaintiff's rehabilitation and that Mrs Reardon (the Welfare Officer) should also be involved and, if necessary, Sgt Mouncher. Inspector Jones advised:

> There is no need for him to go back on stress leave that I can see. He appears happy but that said, he needs to be supplying us Medical Certificates etc.

[126] Finally in this series of correspondence was Insp Taylor's email to Insp Jones sent on 5 August 2009 materially as follows:

> Not surprised personally. I also had big problems with the initial course of action to appease Sean on his RTW [return to work], and the decision given behaviours for EBOP to appoint as an FTO.
>
> 1. There has to be a robust rehab plan – I hope there has been one from day one ???
> 2. Get the SWO [Staff Welfare Officer] involved, and probably a psych – only a report from psych will influence point 3
> 3. Remember we don't play the industrial blackmail game – if operationally he is required back on section give him a change of duties.
> 4. If Sean has been away from section for more than 289 days (ie on other duties) his FTO allowance is to cease until he returns to section

[127] At the time this correspondence took place between the two Inspectors and the Senior Sergeant, Mr Ramkissoon's rehabilitation plan had been in place for three weeks and he had seen the psychologist, Mr Mist, twice by then. Mr Ramkissoon was scheduled to see the psychologist again, was still on prescribed medication, but

it was then being suggested that he might be instructed to go back onto general front line duties, albeit without night shifts.

[128] On 4 August 2009 Snr Sgt Jenkins approached Mr Ramkissoon in the Whakatane Station's Burglary Squad office. He told the plaintiff that he wished him to return to general front line duties because Section 5 was short-staffed by one. Mr Jenkins's advice was also that Mr Ramkissoon's position was on section and that he needed to return there.

[129] Mr Ramkissoon protested, saying he was only three weeks into a rehabilitation plan, seeing a psychologist and on medication. He said that putting him back on section as proposed by the Senior Sergeant would harm him and, potentially, colleagues. Mr Ramkissoon pointed out that the LET position he was then occupying was vacant in any event and another officer from GDB would be required to replace him there if he went back on section. The plaintiff also said that Snr Sgt Jenkins had given him and his supervisor in LET the impression that this was a long-term alternative placement for him.

[130] Senior Sgt Jenkins disagreed saying that the allocation to LET was only for six weeks until Mr Ramkissoon could return to front line duties. The plaintiff said that although he liked shift work and general duties, he would not return to these whilst he was being treated and on medication. He said that shift work would exacerbate his sleeping and coping issues and that there was a risk to his health and safety.

[131] Senior Sgt Jenkins responded that the plaintiff had no choice but to do as he was directed. Mr Ramkissoon indicated to Snr Sgt Jenkins that he would be prepared to consider alternatives and the latter suggested undertaking day and late (but not night) shifts on section. The plaintiff responded to this and to a proposal that he work in the Whakatane Station Watch House. He said that would be too stressful in the current circumstances and would simply make matters worse.

[132] Senior Sgt Jenkins insisted that the move back to section would have to take place including because Mr Ramkissoon was not in the LET job "on merit". The

plaintiff said that he was doing well on the rehabilitation programme and appreciated the assistance that he had been given but it would be harsh to undo that progress. His next rehabilitation meeting had been scheduled for between four and six weeks after the commencement of that process, but that was then still a little time away.

[133] On 27 August 2009 Mrs Reardon (staff welfare officer) emailed Mr Mist, noting that he (Mr Mist) had not been consulted about the plaintiff's return to work plan concerning appropriate hours and shifts. Mrs Reardon advised that the plaintiff was then on day shift at LET in Whakatane "as there [were] some issues around his sleep management". The email to Mr Mist continued:

> [They] are now looking at returning [Sean] to shiftwork as his usual work day would consist of. What I have asked is to ensure we get some feedback from you whether you would support [Sean] now returning to shift work and if he is in your opinion still suffering sleep issues.

[134] On 11 September 2009 Mrs Reardon emailed Snr Sgt Jenkins and Insp Jones, having spoken to the psychologist in response to her email of 27 August 2009. This email advised:

> Can we please organise a rehabilitation meeting with [Sean] for next Wednesday when I am down [in the Bay of Plenty].
>
> Kevin [Kevin Mist, Mr Ramkissoon's psychologist] has suggested that it be a step by step process back to full time front line duties.
>
> I have discussed the following.
>
> [Sean] be aligned back to his section – Kevin supports
> [Sean] works only days and lates, and is able to work in the Watch house or other duties – Kevin supports
>
> One of Kevin's concerns is that at the moment [Sean] is lacking some confidence with needing to deal with attending and making urgent decisions on the front line.
>
> Kevin is confident that if [Sean] is aligned with his section and gets back into his usual work environment that the step by step process with getting back on front line will not take long.

[135] The proposal above referred to Mr Ramkissoon working only two out of the usual pattern of three shifts, omitting night shift work in an attempt (between approximately 11 pm and 7 am on the following morning) not to aggravate the plaintiff's sleep problems.

[136] On 17 September 2009 the plaintiff emailed Mrs Reardon and copied into this communication Insp Jones, Snr Sgt Jenkins, Sgt Mouncher and Mr Ramkissoon's then Police Association representative, David Pettinger. While taking issue with some of her comments about his confidence, Mr Ramkissoon did point out again that his stress-related conditions stemmed from the employment problem (the Opotiki non-appointment) in which he had been, and was in some respects still then, involved. He recorded that, with the assistance of a rehabilitation plan, he had been able to reach "some semblance of normality in my work life together with the assistance, coaching and support that I am receiving from my current manager [Det Sgt] Jon [McKenzie]." The plaintiff continued:

> Whilst Kevin Mist and I have discussed my return to shift work at my request, we were clear that any premature change not in keeping with the rehab plan will have a negative effect on my progress and I believe that the support from my current manager is paramount to restoring my health and wellbeing. I am realistic that I will be required to return to my previous position at some stage but on the same token, I have a responsibility to ensure that I am fit and well before returning to that position.
>
> There have been a number of discussions regarding [watch house] duties and late shifts which does little to resolve my issues. The [watch house] has been identified as a very high stress environment by most staff. In my current position, I am thriving in regards to reaching the goals set for my rehab plan and being productive to a full extent rather than being on light duties.
>
> I was put on this rehab plan in order to return to work in some capacity and then progressing under the guidance of the medical assistants to my original position. I have requested the support of management in this regard and I have established from the section supervisor that the section is currently working well and will be up to strength when I can change my duties.

[137] Mrs Reardon's response to Mr Ramkissoon's assessment was conciliatory and supportive. She said that although the psychologist had not addressed the watch house as an area of issue, she was happy to ask for a written report with recommendations about that from him.

[138] On 18 September 2009 Mrs Reardon wrote to the psychologist, noting the plaintiff's resistance to working alongside his section. She said:

> …
> Obviously all I want is for [Sean] to be supported properly back to his 'usual' position which is outlined in the rehab policy. I also don't want [Sean] rushed if that is not helpful to [Sean].

> I do believe that at the moment no one is pressuring [Sean], and that up until now there has been no suggestion that [Sean] could not stay where he is until such time as he is well enough to return to shiftwork with his section.
>
> It may be that you will need to put your recommendation in writing so that I do not misquote or be (sic) misunderstand your thoughts.
>
> The other option is that you attend one of the rehabilitation meetings if you are available at all over the next 2 weeks. …

[139] Mr Mist responded to Mrs Reardon later that day indicating his preparedness to write a report or to go to a rehabilitation meeting in Whakatane, but pointing out that it was important that he speak with the plaintiff before he did so. Mr Mist indicated that had an appointment booked for the plaintiff on 1 October 2009 so was confident that a report could be sent on the following day.

[140] On 23 September 2009 the plaintiff emailed Mrs Reardon indicating that he and the psychologist were examining timeframes for a change in duties and said that he believed that the current course of action was in keeping with the arrangements of alternative duties as outlined in the Rehabilitation Policy as follows:

> - the work must be safe for the employee to do and it must not aggravate the employee's medical or physical condition;
> - the work needs to be meaningful;
> - the work arranged and hours worked should be comparable with the employee's capabilities and medical or physical condition;
> - the treating medical practitioner must agree that rehabilitation work is appropriate.

[141] On 25 September 2009 Mrs Reardon wrote again to Mr Mist, copying the email to Snr Sgt Jenkins, asking:

> Can you please prepare a report to be tabled at the rehabilitation meeting for [Sean] (Daniel) [Ramkissoon]. The report should outline recommendation in support [of] [Sean] returning to his previous role prior to going off work on sick leave.
>
> It is important that [Sean] is part of the consultation re: your report so that everything is kept very transparent.
>
> Once your report has been received then a rehab meeting can be held.

[142] Mr Mist's psychological report to Snr Sgt Jenkins dated 5 November 2009 recorded that Mr Mist had seen Mr Ramkissoon on six occasions and that:

> The overall assessment indicates that Constable Ramkissoon has developed good coping strategies and is managing stress appropriately. The current full-time duty in the Burglary / Property Squad has provided the Constable routine which he responds well [to]. It is also a positive working environment for him.

[143] Among the psychologist's recommendations were that the plaintiff be included in the rehabilitation planning process and that "alignment to his shift":

> … may best be made in a progressive manner. That is, develop a five step plan, where the Constable does not [advance] to the next step until he is comfortable and feeling confident in doing so. The stepped plan should be developed in consultation with Constable Ramkissoon.

[144] The psychologist recommended ensuring that the plaintiff was working with positive people whom he could trust and that he be in a position that was "routine", to which he appeared to respond well where there was consistency, predictability and an ability to develop expectations.

[145] Mr Mist advised: "At this time a proactive role, such as enquiry work would best suit, rather than a 'predominantly] reactive role." Finally, the psychologist recommended that a contact person be appointed with whom the plaintiff was comfortable communicating, such a person to provide support and monitoring and to receive advice and to discuss in confidence any issue that may arise with Mr Ramkissoon.

[146] Consequently, on 7 January 2010 a new rehabilitation plan was agreed with Mr Ramkissoon. The ultimate treatment goal was changed to: "Return to full time front line duties" with a date for review of 5 February 2010. It was agreed that by 15 January 2010 the plaintiff would obtain a medical certificate from his general practitioner outlining requirements to continue alternative duties with minimal shift work. By 5 February 2010 the plaintiff was also to attend a consultation with the psychologist (Mr Mist) to obtain an up-to-date report on his progress since the last report, his current state, and his anticipated progress. Mr Ramkissoon was to continue duties in the LET office with Det Sgt McKenzie to continue to be his mentor and contact person.

[147] Because there was some dispute about the ultimate goal of rehabilitation, I will examine the relevant plans. The first agreed rehabilitation plan dated 8 July 2009 had specified, as its treatment goal, "To get back to work full time" and, as its return to work goal, "Back to work on Monday the 13th of July". By 7 January 2010 the agreed treatment goal had been amended to "Return to full time front line duties", the same wording as applied to the return to work goal of that later date.

[148] The rehabilitation meeting of January 2010 was recorded by Mr Ramkissoon and a transcript of what was said was made. No issue has been taken with the accuracy of that transcript. Mr Ramkissoon explained that his sleep problems were associated with shift work, including even as much as one night shift general duty as he completed on the previous New Year's Eve, and how these prevented him from sleeping sufficiently to undertake a following period of duty. The plaintiff linked that to the personal grievance that he had undertaken in relation to the Opotiki non-appointment which was still continuing to be the subject of discussions, including in mediation, with the defendant at that time.

[149] Following the rehabilitation meeting of 7 January 2010 Mr Mist wrote to Police on 11 February 2010, having met with the plaintiff at the Police's request. Amongst Mr Mist's observations were the following:

> The Constable was apprehensive about the interview and the nature of the assessment, and therefore, a full clinical assessment was not possible. However, it was my observation based upon the Constable's statements and demeanour, that the level of stress being experienced by the Constable at this time is significant. Constable Ramkissoon asserts that this is due solely to employment matters.

[150] To set out in similar detail all of the subsequent interactions between the plaintiff and the numerous representatives of the defendant who dealt with his rehabilitation, both recorded and unrecorded, would further elongate an already detailed judgment. Having reconsidered the voluminous evidence about this period, the following summary of the relevant interactions in 2010 and 2011 establishes the following.

[151] Five further renewed rehabilitation plans were agreed and put in place between 7 January 2010 and 12 April 2011, although no medical (GP) reports were

provided by Mr Ramkissoon until May 2010, and only two psychological reports were provided after July 2009. The dearth of expert opinion was particularly apparent in the latter half of 2009 and during 2010. The Commissioner was not provided with any formal diagnosis of a specific medical or psychological illness or disorder until 2011 in what was known as the Laven report prepared by a further independent expert.

[152] Of particular significance, however, was Mr Ramkissoon's September 2010 report from his general practitioner. This was prepared and presented at a time when Mr Ramkissoon was performing alternative temporary duties not involving shift work or other acute requirements of front line police officers. At the time of the September 2010 medical report Mr Ramkissoon was subject to another rehabilitation plan.

[153] At about the time this report was received, local responsibility for these matters fell to the newly-appointed Area Commander, Inspector Sandra Venables. She considered that there were difficulties in staffing GDB and, in view of the length of time Mr Ramkissoon had been away from these, Insp Venables wished to consider whether and when his prognosis on his rehabilitation plan would enable him to return to his previous duties. At about the same time, Mr Ramkissoon had provided a medical certificate from his general practitioner which included the advice that the plaintiff was "fit to return to full duties". Given that the plaintiff was then working full-time, albeit not on shifts and not in the more stressful environment of front line policing, Insp Venables assumed that the doctor's reference to "full duties" meant GDB duties on shift work. The doctor's prognosis appeared then to have indicated a significant improvement in Mr Ramkissoon's state of health from that on which she (the doctor) had reported some four months previously in May 2010. Further, Insp Venables considered that the LET work then being undertaken by Mr Ramkissoon was strictly unnecessary, and his services were needed in GDB.

[154] Accordingly, on 28 October 2010 Insp Venables met with the plaintiff to discuss her proposal that he then return to GDB duties. Mr Ramkissoon was unprepared to commit to this without consideration and advice and a period for this was allowed by the Inspector although Mr Ramkissoon did not subsequently get back to her and there were difficulties in contacting him.

[155] Accordingly, on 20 December 2010 Insp Venables issued a formal direction to Mr Ramkissoon to return to GDB duties with effect from 4 January 2011. Insp Venables considered she was empowered to give such a direction on no less than 14 days' notice.

[156] Mr Ramkissoon objected to the direction and went on further sick leave on 24 December 2010. Inspector Venables sought further details and medical evidence of his condition but, apart from relying on the contents of an earlier report from Mr Mist (which was by then about a year old), the plaintiff did not furnish Insp Venables with the information she sought.

[157] So, with effect from 31 December 2010, the plaintiff began a lengthy further period of sick leave in reliance on a doctor's certificate which purported to clarify the GP's September 2010 certificate on which Insp Venables had relied. The Inspector took the view that rather than a clarification of previously uncertain advice, the plaintiff's doctor's certificate of 31 December 2010 purported to change the nature of the advice the doctor had previously provided. This appeared to the Inspector to be with a view to certifying that Mr Ramkissoon had not previously been, and was still not, well enough for front line GDB duties.

[158] Despite being sceptical about these assertions of Mr Ramkissoon's circumstances and prognosis, Insp Venables nevertheless did not insist upon the plaintiff returning to front line duties as she had directed. Instead, further rehabilitation plans were put in place with his agreement. The defendant accepts that Mr Ramkissoon's health had deteriorated, justifying his taking leave between 31 December 2010 and 9 March 2011 when the defendant sought the plaintiff's agreement to a further rehabilitation plan. The plaintiff was by then unco-operative, however, and there was no contact with his supervisors for a period of about two months despite the defendant attempting to contact him by home visits, letters and phone calls, particularly during January 2011. Mr Ramkissoon ultimately advised the defendant that he would be represented by a lawyer and requested that all communications about these matters be undertaken with her.

[159] On 24 January 2011 Det Snr Sgt Greg Standen, under whose general direction Mr Ramkissoon had previously been working, instructed relevant CIB staff

and some others (but not all staff at the Whakatane Station) not to contact the plaintiff. This direction, which came to Mr Ramkissoon's notice, upset him and was the subject of a complaint by him. Having heard the evidence of the relevant people and considered the documentation, I accept (as does the defendant and his witnesses) that although the email was unclearly and poorly worded, the defendant's intention was to insulate Mr Ramkissoon from work concerns for the sake of his own (then) poor health. It was not, as Mr Ramkissoon suspected and believed, an ill-intended strategy to deprive him of friendship or collegial support. That response was understandable because of the unfortunate wording of the email but the communication was not sinister and indeed Mr Ramkissoon continued to receive support including visits from other colleagues at the Whakatane Police Station before and after that email.

[160] The defendant insisted that Mr Ramkissoon was obliged to communicate with relevant supervisors and others in the matter of his rehabilitation and this was both a condition of the then applicable rehabilitation plan and of the Police's Rehabilitation Policy generally. The defendant says he was entitled to adopt the more formal tone of communications he sent to Mr Ramkissoon because of what appeared to be his deliberate lack of co-operation in implementing that rehabilitation plan. I conclude, however, that rather than deliberate disobedience, the plaintiff's lack of co-operation at this time was probably attributable to his increasingly embattled psychological state.

[161] With the assistance of Mr Ramkissoon's lawyer, another rehabilitation meeting was eventually arranged for 1 March 2011. The outcome of this was a further agreed rehabilitation plan which included another temporary non-front line role for the plaintiff. The goal of this new plan was again his "return to full front line duties". Mr Ramkissoon was also to be under a new supervisor, Sergeant Yvonne Parker, in an attempt to avoid what he categorised as disadvantageous personality conflicts with some previous supervisors.

[162] Following this new plan, Mr Ramkissoon returned to his alternative and temporary work on 9 March 2011. Sgt Parker monitored the plaintiff's rehabilitation issues but, contrary to his assertion, I conclude that she did not also monitor

separately his work performance, at least beyond the degree of monitoring that was usual and expected in the hierarchical supervision arrangements in the Police.

[163] At that time the Whakatane Station was undergoing some significant internal refurbishment which took place while the station continued in full operation. This resulted in some inconvenience, noise and dust in working areas. Although these temporary conditions were tolerated by most staff, if only because they were to be short-term and the results would be beneficial, Mr Ramkissoon objected to the conditions in which he had to work. He said also that they brought him into sight, if not contact, with some supervisory staff with whom he had been in conflict previously. He also complained that he was given demeaning work at this time such as filing, although I conclude the defendant's intention was to provide him with non-stressful, or less stressful, work. Although Mr Ramkissoon complained about changes of hours at this time, also, these had been agreed to by him and his lawyer at the 1 March 2011 meeting.

[164] There was a further rehabilitation meeting with Mr Ramkissoon on 12 April 2011. A further and updated rehabilitation plan was agreed to after a medical certificate presented at the meeting confirmed his ability to undertake what might be described colloquially as further "light duties".

[165] Mr Ramkissoon was, however, absent from work on further sick leave from 14 April 2011, and never returned thereafter. Four days later, on 18 April 2011, the plaintiff notified his supervisors that he was on stress leave, that he would not be returning to work, and that he would probably seek medical disengagement from the Police.

[166] By then, Mr Ramkissoon's own sick leave entitlements had been exhausted. He was, however, able to continue to receive payment under leave-bank arrangements in which the sick leave entitlements of all police officers were accumulated and available for use by some who required more leave than others.

[167] True to his 18 April 2011 advice, Mr Ramkissoon then applied to disengage under s 76 of the Policing Act; his application was supported by medical and psychological reports, confirming that he was unfit for further duty. The plaintiff's

application for disengagement was granted by the defendant in early August 2011 and his formal disengagement occurred with effect from 22 August 2011.

[168] As at the dates of giving his evidence, Mr Ramkissoon had not worked again and he and his wife had moved to reside in Thailand although returning to New Zealand for the purpose of the hearing.

4 Relevant policies and procedures

[169] It is appropriate here to examine in more detail the Police's relevant detailed written policies and procedures affecting these claims. These are some of the standards against which the Commissioner's acts and omissions are to be judged.

Appointments

[170] The Police's Appointment Process Policy provided generally that:

> NZ Police is committed to appointing the people best suited to positions based on merit. This is to ensure all appointments made are based on the skills, behaviours, abilities and competencies necessary to carry out their roles effectively, efficiently and in keeping with the core values of NZ Police. The robustness and transparency of the appointment process will be enhanced by putting processes in places such as training panel members to perform their responsibilities, analysing the actual requirements of the position, and using appropriate selection tools.

[171] "Merit" in relation to an appointment was defined:

> The person best suited to the position is the applicant who, in the opinion of the Commissioner, is the person who closest meets the position requirements; and/or shows the potential to perform well in the position, given a reasonable period of time for familiarisation and/or training; and/or displays the personal attributes and temperament relevant to the position; and/or has general health that will allow for the performance of all duties and functions of the position.

[172] Among the general principles of the policy were that the process was to be "consistent, fair and transparent." In practice, these principles mean that:

- the person best suited to the position based on merit is appointed;
- all applicants shall have access to the same information to ensure that they understand the appointment process and the role for which they are applying;

– the appointment process is consistent, fair and transparent;
– the appointment process is robust and objective, and processes and recommendations are documented;
– all short-listed applicants are interviewed;
– all panels are required to follow a standard planned process and use competency-based interviewing and reference checking as selection tools, but may also elect to use additional selection tools such as ability testing and personality profiling;

…

– NZ Police encourages all suitably qualified applicants, regardless of seniority, to apply for advertised positions.

[173] Among the "Criteria for Promotion" was, very importantly for this case:

> *No employee can be promoted to a higher rank* unless the employee has passed any necessary qualifying examinations or standards for that rank and successfully completed any qualifying course prescribed for that rank by the Commissioner. (emphasis added)
>
> *Employees may be appointed to positions above their rank*, and receive the applicable remuneration, but they will remain at their prescribed rank until they have completed the necessary qualifications to be promoted. (emphasis added)

[174] The part of the policy addressing approval of the panel's recommendation provided that this would be sent to an approving manager who was required to have confidence in the robustness and integrity of the process used by the Panel and was required to be confident that the person best suited to the position had been identified. An approving manager could query a panel's decision and request further information and could decline to approve a recommendation for appointment.

[175] As to offers of employment to preferred applicants, the policy provided:

> Approval for an offer of appointment, including terms and conditions of employment, will be gained before the preferred applicant is contacted. Following approval, the Panel Chairperson will contact the preferred applicant to advise their recommendation for appointment has been approved. The preferred applicant will be advised of the key terms and conditions of the offer of employment or appointment and that a letter detailing the offer will follow.
>
> A preferred applicant will be advised that the offer is conditional until such time as they have:
> – formally accepted the offer in writing; and
> – it is confirmed that no reviews have been lodged; or
> – it is confirmed that any reviews have been resolved.

[176] As to "Notification of Appointment", the policy provided:

> **Notification of Provisional Appointment**
> Provisional appointments are not to be notified until a conditional offer, including terms and conditions of employment, has been made and the conditional offer has been accepted in writing.
>
> The offer is conditional upon the provisional appointment being notified in the TEN-ONE and the conclusion of any review period. Provisional appointments cannot be confirmed until completion of either the notified period for review of appointment and/or completion of any review lodged in respect of appointment to the vacancy.

Review of appointments

[177] At the heart of the disadvantage/non-appointment grievance is the separate but related Appointment Review Policy which was applied by the defendant to the plaintiff's provisional appointment. It says itself that its aim is "to generate confidence in the fairness and equity of the selection and appointment process …". The purpose of this policy was also "to outline the mandatory requirement for Police to provide a review process for Appointments and to outline the process undertaken for reviewing appointments". That is a reference to a statutory imperative to this effect under s 62 of the Policing Act 2008.

[178] Section 62 requires the Commissioner to put in place a review process in the same way as is required by s 65 of the State Sector Act 1988. That requires a procedure for reviewing those appointments made within the Police that are the subject of any complaint or challenge by another police employee. I deal separately with the more fundamental question raised in this case of whether the process itself was lawfully promulgated. The following analysis of it assumes, in the meantime, that it was lawfully in effect at relevant times or that, even if it was not approved, it was what the defendant purported to follow.

[179] I will set out first the relevant specific parts of the Appointment Review Policy. Next, I will summarise the scheme of the policy by reference to its provisions and for the purpose of applying them to the established facts.

[180] The review process was applicable "to NZ Police employees, who have a complaint about: … all appointments to bands A - J and bands One to Two; …"

which included the Opotiki appointment. As already noted, the Review Policy was promulgated pursuant to a statutory requirement and it "aims to generate confidence in the fairness and equity of the selection and appointment process on the part of members of the NZ Police and the organisation". The "Policy Objective" (3.2) was:

> … to provide an effective process to deal with a member's concern about an appointment. This includes having defined people within the organisation whose role is to identify and address possible breaches on process and merit grounds as soon as possible. Where a review is unresolved at the District HR Manager level it will be referred to [an] Independent Review Committee to assess information and make recommendations on appointment reviews.

[181] The first applicable principle was that:

> a review may only be raised on the grounds of either process (eg the correct process was not followed) and / or merit (eg not all the relevant information about applicant(s) was taken into consideration when making the decision on who is best suited for the position);

[182] The next principle under cl 4 of the policy was:

> a review is not a contest between an applicant for review and a provisional appointee. It is based on a reviewing applicant's belief that he / she is the best person for the position based on the specified position requirements and competencies, …

[183] Given the defendant's case that any police employee could apply for a review, this provision appears at least enigmatic.

[184] Clause 5.2 of the Appointment Review Policy provided:

> A member will submit a request for review via email, fax or letter, and send it to the relevant HR Manager within seven (7) consecutive days of the date of the appointment being formally notified.
>
> The relevant HR Manager will:
>
> - acknowledge receipt of the review request (by email or letter);
> - notify the Panel Chairperson, and the recommended appointee;
> - send to the applicant for review the appropriate sections of the "*Recommendation for Appointment*" with the necessary deletions included (refer to section 9);

- advise the applicant for review that they have ten (10) consecutive days from the date the review information is sent to them to submit their review submission with the relevant HR Manager;

- advise the HR Manager Recruitment and Appointment at PNHQ who will arrange for the Appointment Review database to be updated.

[185] Clause 6 of the Appointment Review Policy provided materially:

> **6.1** ***Role of the HR Manager***
>
> The purpose of the relevant HR Manager checking the appointment process is to ensure the correct process has been followed, and where it has not, to ensure a speedy resolution for both the provisional appointee and the applicant for review.
>
> The relevant HR Manager will:
> …
> - as appropriate, interview the Panel Chairperson and/or other panel members and/or the Approving manager and/or the applicant for review either face-to-face and/or by telephone and/or video conference;
>
> …
> *The relevant HR Manager will not have been involved in the appointment under review. If they have been involved (eg as a panel member) the review will be immediately referred to the HR Manager Recruitment and Appointments.* (emphasis added)
>
> **6.2** ***Process Check Outcomes***
>
> If the relevant HR Manager [cannot] identify any issues that would result in the appointment decision being overturned the review will be referred to the Independent Review Committee.
>
> If the relevant HR Manager identifies the selection process has failed to apply correct process then they will prepare a report for the Commissioner (delegated to the General Manager Human Resources) recommending that the appointment should be not be confirmed and recommending the corrective action to be implemented, such as:
>
> i) re-assessment of interviewed applicants by a new appointment panel;
> ii) a further interview of one or more applicants;
> iii) re-consideration of the short-list;
> iv) cancelling and re-advertising the position;
> v) another option or combination of options that addresses the issues raised by the relevant HR Manager's review.

[186] The scheme of the Appointment Review Policy (some of the formal detail of which I have set out above) is as follows. Although usually resorted to by an unsuccessful applicant for an appointment, the review process can be triggered by

"any member who is not an applicant for a position". Such a person's concerns "will be considered by the General Manager: Human Resources who will initiate an appropriate review based on the substance of the concerns raised …". The review process is to be "… transparent, robust, timely [and to follow] due process that is readily accessible …".

[187] Clause 5.2 of the policy requires a member seeking a review of a provisional appointment to submit a request for review in writing to the relevant HR Manager. That HR Manager will acknowledge receipt of the review request; notify the Appointment Panel Chairperson and the recommended appointee of the request for a review; send to the applicant for review appropriate sections of the Appointment Panel's recommendation; advise the applicant for review that he or she has 10 consecutive days to submit review submissions; and advise the HR Manager of Recruitment and Appointment at Police National Headquarters of the fact of the review application.

[188] An applicant for review is then to prepare a submission that must incorporate the grounds for the review (being either or both of what can be described by the shorthand words "process" and "merit"); provide sufficient information to demonstrate that the processes and/or merit grounds are of such a nature and significance as to have affected the selection decision; and highlight and discuss those specific areas of the employment process and/or the position requirements that support the reviewing members' statements.

[189] The policy provides that no new information (meaning information that was not originally included in the application material provided by the non-appointed member) can be included to support the grounds for review.

[190] The policy then provides for what is described as a "process check" by the HR Manager. The purpose of this is to ensure that the correct appointment process is followed, "… and where it has not, to ensure a speedy resolution for both the provisional appointee and the applicant for review". This is to be done by the relevant HR Manager checking all material made available to the Appointment Panel relating to the appointment process for the vacancy concerned and, "as appropriate,

interview[ing] the Panel Chairperson and/or other panel members and/or the Approving Manager and/or the applicant for review either face-to-face and/or by telephone and/or video conference …".

[191] The HR Manager is then to evaluate the complaint fairly and thoroughly, making sure all issues relevant to the complaint are considered; reach a decision on the basis of these deliberations; carry out these investigations; and respond to the applicant for review within 10 consecutive days.

[192] There is then an election to be made as to which of two tracks to follow in the process. If the relevant HR Manager cannot identify any issues that would result in the appointment decision being overturned, the review is to be referred to a body known as the Independent Review Committee. This is defined in cl 4.1.4 of the policy as:

> A committee established by the Commissioner comprising of an independent Chairperson, a member representing the Commissioner and a member representing the appropriate service organisation, to consider and report on complaints made about an appointment.

[193] If the relevant HR Manager identified that the Appointment Panel had failed to apply correct process, then he/she was to prepare a report for the Commissioner (in practice delegated to the GM:HR), recommending that the appointment should not be confirmed and recommending the corrective action to be implemented.

[194] Where the recommendation of the HR Manager was that the Panel's decision be cancelled, the HR Manager was to make a separate report to the HR Manager, Recruitment and Appointments about other actions that could be taken to improve or increase understanding of the appointment process. A report of this nature did not, however, constitute formally part of the outcome of the review process.

[195] In addition to the particular requirements of the Review Policy, it is acknowledged by the defendant that relevant provisions of the Employment Relations Act also applied to the appointment review process. These include what are generally termed the good faith requirements contained in s 4 of that Act. These include that the employer and employee were to deal with each other in good faith

and, in particular, not to mislead or deceive the other or to do anything that was likely to mislead or deceive the other, whether directly or indirectly.[13] Section 4(1A) provides that the parties are to be "active and constructive in establishing and maintaining a productive employment relationship" in which they are, among other things, "responsive and communicative".

[196] If the employer's proposed decision would, or was likely to, have an adverse effect on the continuation of the affected employee's employment, the Commissioner was to provide to the plaintiff access to the information relevant to the continuation of this employment about the decision and an opportunity to comment on the information to the Commissioner before the decision was made.[14]

Rehabilitation management

[197] There are a number of policies and legislative provisions against which the contentions about the plaintiff's rehabilitation grievance must be judged. It is necessary to set these out before analysing the evidence of a large number of relevant events to determine the defendant's compliance with those policies.

[198] First was the New Zealand Police Code of Conduct (known as Police General Instruction C303). This was promulgated by the Commissioner under reg 30 of the Police Regulations 1992. It affected not only dealings between police officers and others in the community, but also between the Commissioner (and his representatives) and other police officers (employees of the Commissioner) in their employment relationships. That is seen, for example, by the reference to the Commissioner's obligation to act as a good employer and to deal with employees in good faith. The obligations of the Commissioner included:

- to maintain open communication and share information where appropriate;

- to respect the right to privacy and treat people with dignity;

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13 Employment Relations Act 2000, s 4(1).
14 Section 4(1A)(c).

- to take all practicable steps to provide a safe and healthy working environment;

- to provide a workplace free from harassment and unlawful discrimination;

- to provide appropriate performance management, disciplinary and dispute procedures and an opportunity to redress unfair or unreasonable treatment; and

- to meet all legal requirements as an employer.

[199] Police employees (including the plaintiff and his managers and supervisors who acted on the Commissioner's behalf in his dealings with Mr Ramkissoon) also had Code of Conduct obligations. They were to:

- obey all lawful and reasonable instructions unless there is good and sufficient cause to do otherwise;

- abide by the provisions of all New Zealand legislation, instructions, standards, policies and procedures set by the Police;

- act professionally at all times; and

- support their colleagues in the execution of their lawful duties and challenge any improper behaviour, as appropriate, including reporting it.

[200] Under a heading "Fairness and impartiality", all employees had "… a responsibility to act with fairness and impartiality in all dealings with their colleagues and the public, and to be seen to do so, avoiding any potential or perceived conflicts of interest."

[201] Other obligations on employees included:

> Employees avoid situations that might compromise, directly or indirectly, their impartiality or otherwise calls into question an employee's ability to deal with a matter in a fair and unbiased manner. Employees inform their managers where any actual or perceived conflict of interest could arise.

[202] Under the heading "Respect for people and property", employees were expected to treat all people with courtesy and respect:

> - Employees are fair and just in carrying out their duties, irrespective of their personal beliefs, values and philosophies.
> - Employees respect the rights of all persons and treat members of the public and other employees with courtesy and respect.
> - Employees avoid oppressive, harassing or overbearing behaviour or language.
>
> …
> - Employees observe and protect the rights of others to privacy and confidentiality.
> - Employees avoid any behaviour in the workplace that may cause unreasonable distress to colleagues or interfere with their ability to carry out their duties.
>
> …

[203] The next relevant police policy was that about employment relationship problems. This policy:

> - details processes to be followed and the obligations and responsibilities of the Commissioner of Police and Police employees for resolving the employment relationship problems arising during the course of the employee's employment
> - is consistent with the Commissioner's commitment to act as a good employer.

[204] Principles applying to all employment relationship problems included:

> - Both parties to the employment relationship must act in good faith.
> - The parties are encouraged to use dialogue and exchange relevant information to try to resolve employment relationship problems, referring to mediation if the problem cannot be resolved first through informal dialogue.
> - Employees have the right to be represented at any stage of the process for resolving an employment relationship problem.
> - The primary parties to a problem, usually the employee and their supervisor, must have the initial responsibility for resolution unless the proposed resolution raises issues of organisational significance or the problem:
>   – relates to actions or inactions by the employee's supervisor which would not be appropriate for the supervisor to deal with, or

– involves some other reason that would justify escalating responsibility to a person more senior than the employee's supervisor.

Ideally the parties will continue to work constructively in their day to day duties while the process for resolving employment relationship problems is followed. However, if that is not appropriate in the particular circumstances the parties may consider alternative duties or working arrangements while the problem is worked through.

[205] Among the application in practice within the Police of "good faith" as set out in s 4 of the Employment Relations Act, the policy stated that it included:

- both parties providing sufficient information about a problem to enable them to consider resolution
- not acting in a way that will or is likely to mislead or deceive the other party
- listening to the other party's point of view
- being prepared to consider whether the matters raised by the other party justify modifying a previous decision or position in relation to the alleged problem
- being respectful and constructive when communicating with the other party about an alleged problem and stating any reasons for disagreement with their stated position

  …
- limiting involvement to those who are directly involved in the problem or its resolution.

[206] The next relevant source of obligations was the Police Rehabilitation Policy itself. It set out the processes to assist the safe and early return to work of employees who became ill or who had been injured. It set out the responsibilities of the different parties involved. It was based on the presumption that in most cases an employee would, with appropriate assistance, treatment and rehabilitation support, return to full duties.

[207] General principles applicable throughout the rehabilitation process included:

- maintenance at work, or early and appropriate return to work, with medical certification, is in the best interests of those employees who become ill or who have suffered an injury
- rehabilitation of employees will be conducted in accordance with NZ Police values
- supervisors are responsible for initiating and managing the rehabilitation of their employees
- employees are entitled to have a support person present
- all medical information will be kept confidential and separate from other personnel files

- all matters relating to disciplinary action will be dealt with outside the rehabilitation process
- workplace rehabilitation is finite and at the appropriate time, the merits of each employee's situation will be addressed on a case by case basis.

[208] The rehabilitation processes were to be confidential on the conditions set out in the Health Information Privacy Code 1994 under the Privacy Act 1993.

[209] Supervisors of staff were expected to "take the lead role in initiating and managing the rehabilitation of their employees" and in this were to be supported by human resources managers, welfare officers and, where appropriate, third party administrators and relevant health professionals. The policy provided:

> The rehabilitation process continues until the employee has been medically cleared to resume their pre-illness or injury role or *an alternative role* if the pre-illness or pre-injury role is not an appropriate option. (emphasis added)

[210] The Rehabilitation Policy also recognised "… that some employees will not regain fitness for their pre-illness or pre-injury role and in those cases voluntary or compulsory leaving the Police on medical grounds will be considered on a case by case basis."

[211] "Best [practice] rehabilitation" included that:

> …
> - A rehabilitation plan being developed and agreed upon as soon as appropriate
> - Regular meetings being held where all parties attend and the rehabilitation plan is updated as appropriate
> - the rehabilitation process continuing until the ill or injured employee returns to their pre-illness or pre-injury role or an alternative role
> - specialist medical advice being sought where appropriate.

[212] Under the heading "Alternative duties" the policy provided:

> Some rehabilitation plans involve a period of partial or alternative duties as part of the rehabilitation process.
> …
> Suitable alternate duties will ensure that:
> - the work is safe for the employee to do and will not aggravate the employee's medical or physical condition
> - the work will be meaningful
> - the work arranged and hours worked will be compatible with the employee's capabilities and medical or physical condition
> - the treating health practitioner must agree the work is appropriate.

[213] The policy also dealt with "Non-participation", recording that the rehabilitation process depended on cooperation and good faith between all parties and that, as a usual condition of employment, employees had a duty to maintain regular contact with their supervisors and to cooperate with agreed rehabilitation plans. Employees in default of these obligations (without good cause) could be considered to be "un-cooperative" and if such actions were considered to constitute a performance issue, they could on a case by case basis be subject to disciplinary procedures.

[214] Employees had the right to:

> … expect NZ Police to…
> …
> - provide accommodation within the workplace allowing for rehabilitation
> - provide support and resources necessary for rehabilitation
> - not initiate unrelated disciplinary matters during the course of rehabilitation
> - allow the employee to bring a support person to all meetings

[215] Employees had a responsibility to:

> - provide their supervisor with all relevant medical certificates
> - inform their supervisor at the earliest opportunity with regard to their injury or illness
> - make themselves available to attend rehabilitation meetings as soon as possible after the commencement of the incapacity
> - keep their supervisor informed of any changes in their circumstances
> - abide by the agreed rehabilitation plan.

[216] Employee responsibilities in circumstances of injury or illness included: "If you need to take more than five days off work", to send medical certificates (using the appropriate Medical Council medical certificate for absences due to illness) to employees' supervisors as soon as possible; to expect supervisors to contact employees to discuss their needs and also to provide them with information about their responsibilities relating to rehabilitation; and to expect contact from a welfare officer if this was appropriate. It was a specific requirement of employees that "Your supervisor will ask you to sign a consent (this is part of the POL645) so that Catalyst and Police are able to discuss your rehabilitation needs with your health professionals." "Catalyst" was an external provider of rehabilitation services to the Commissioner and police employees.

[217] As a part of the Police's Health and Safety Policy was the Commissioner's commitment to "Health services" including to implement policies and procedures to manage sickness absences and to support and rehabilitate sick staff.

[218] The rehabilitation policy also set out the role of "Welfare officers", one of whom featured in this case. In relation to rehabilitation, a welfare officer's role was to provide advice to the employee about the rehabilitation process, to provide assistance and support to the supervisor in relation to the rehabilitation process and, where appropriate, to assist the supervisor to develop a rehabilitation plan and associated documentation, to attend rehabilitation meetings, and to maintain contact with health professionals for complex rehabilitation cases.

[219] The Police's Employment Relationship Problem Policy addressed the resolution of disputes including those which arose as a result of the Police failing to implement the Rehabilitation Policy in an appropriate manner; the employee failing to carry out his or her responsibilities under the policy; or, as a result of a particular rehabilitation plan, not providing either party with the desired outcome. The policy offered two options: first, the employee could raise a personal grievance under s 103 of the Employment Relations Act or, second, the Police could begin disciplinary processes under its Code of Conduct.

[220] Where a dispute arose during the rehabilitation process and was unable to be resolved at District Human Resources (HR) level, the HR Manager, Wellness and Safety at Police National Headquarters was to be the dispute resolution manager. Such disputes were to be referred in confidence to that HR manager.

[221] The Rehabilitation Policy's standard medical consent form, which recorded the Commissioner's responsibilities under the Health Information Privacy Code 1994, authorised an employee's general medical practitioner to provide a report and recommendations in relation to the officer's health. This was to be on the understanding that the information was sought to assist in rehabilitation and support needs that would form the basis of a rehabilitation plan. There was no provision in the medical consent form allowing the Police to contact a general practitioner

directly to seek information without the express consent of the employee as that practitioner's patient.

[222] Penultimately, there was the Police Health and Safety Policy. Among its general requirements were that the Commissioner was to provide a work environment that was as safe and healthy as possible, minimising the risk of being injured or becoming ill while working for the Police. The policy covered the mental and psychological harm caused by anxiety, harassment, verbal abuse or discrimination and the like.

[223] Finally, there were the general employment legislative provisions relating to all employment relationships. The effect of these included those in which an employee was absent from work for medical reasons or otherwise incapacitated. In these circumstances, the general obligations of good faith under s 4 of the Employment Relations Act continued to apply to both the employer and the employee. Those requirements to deal in good faith under s 4(1)(a) included, in particular, not to mislead or deceive one another or engage in conduct likely to mislead or deceive, whether directly or indirectly. Under s 4(1A)(b) the parties had to be "active and constructive in … maintaining a productive employment relationship in which parties [they] are, among other things, responsive and communicative …". Under s 4(1A)(c) if an employer proposed to make a decision that would, or was likely to, have an adverse effect on the continuation of employment of an employee, the employer had to provide access to information, relevant to the continuation of the employee's employment, about the decision; and an opportunity to comment on the information to the employer before the decision is made.

[224] Finally, s 4(5) confirmed that these obligations were examples and did not limit the instances in which good faith conduct may have been required between an employer and an employee.

[225] Rehabilitation of a police officer suffering injury or illness may be seen to have imposed very significant obligations on the Commissioner but also on affected officers. The goals in all cases of rehabilitation exercises were to be the return in

good health to an officer's previous role in the Police. Alternative roles, in the event of unsuccessful rehabilitation to former ones, were also provided for. The Rehabilitation Policy, and other relevant policies and procedures affecting rehabilitation, appear not to have distinguished expressly between physical and psychological illness or injury. It is, however, trite to observe that there are significant differences between the circumstances of an officer suffering a bone fracture in the course of duty who is keen to return, on the one hand, and those of an officer such as Mr Ramkissoon, suffering psychological illness or injury attributable to maltreatment by supervisory staff of the Commissioner, who may develop associated mistrust and persecutory conditions. The application of these policies about and affecting rehabilitation must, therefore in practice, be flexible to accommodate this range of injuries or illnesses. Their application in this case to Mr Ramkissoon's circumstances must be examined in that way.

5 The applicable personal grievance law

[226] I have already determined the application to this case of different provisions relating to the tests of justification for personal grievances and to the remedy of reinstatement if that is applicable. Because different grievances may have to be examined by different standards for temporal reasons, I will set out: the particulars in respect of each; what the parties must establish for the Court to determine whether or not there has been established the relevant grievance; and, if so, what remedies may be applicable.

[227] As set out in [13] above, Mr Ramkissoon's non-appointment grievance has to be determined under the pre-1 April 2011 test for justification. Under s 103A (2) of the Act at that time, the Court must consider whether the Commissioner's actions, and how he acted, were what a fair and reasonable employer would have done in all the circumstances at the time the action occurred. Mr Ramkissoon having established an apparent injustice in this regard, the onus of justification moves to the Commissioner. The Court is required to examine both what the employer did, and how the employer did it, sometimes referred to as the 'substantive' and 'procedural' tests of justification. Those tests are cumulative in the sense that the Commissioner

must establish justification for both, if Mr Ramkissoon's grievance is not to be found to have been justified.

[228] As to the second grievance, that alleging that the plaintiff was disadvantaged unjustifiably by the Commissioner's management of his Rehabilitation Policy in respect of Mr Ramkissoon, the same legal principles are applicable as with the first grievance.

[229] Finally, the unjustified (constructive) dismissal grievance raised by Mr Ramkissoon is to be decided under the new (and current) s 103A test. Assuming that the plaintiff was dismissed constructively (which is disputed), it is whether the Commissioner's actions, and how the Commissioner acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. For the reasons set out in the judgment of the full Court in *Angus*,[15] this post-1 April 2011 test is less stringent than the former 'would' test providing an employer with a lower compliance threshold. The test now is not what the Court considers that a fair and reasonable employer would have done and how, but rather whether a fair and reasonable employer in all the circumstances could have done justifiably what the employer did.

[230] The proceeding has also raised three discrete legal issues with which I will deal separately. The first separate legal issue concerns whether Mr Ramkissoon's non-appointment (and accompanying non-promotion) can constitute in law a disadvantage grievance. Next, the second and third separate issues address the legality of the Commissioner's policies and procedures. None of the personal grievance decisions turns, at least entirely, on the fundamental lawfulness of the Commissioner's policies and procedures. However, the issues having been raised and contested, I should address them. They deal broadly with the questions of the status of a police policy which was not approved by the State Services Commissioner as required by legislation; and with the powers of the Commissioner to direct police officers to undertake particular duties; and more particularly when such officers are subject to ongoing rehabilitation plans.

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15 *Angus v Ports of Auckland Ltd*, above n 3.

[231] Because Mr Ramkissoon claims that his disengagement (resignation) amounted to a constructive dismissal, it is necessary also to outline briefly the requirements of what might be termed this legal fiction. Discussing these tests is not only for the purpose of deciding this case. It may also be helpful more generally because what constitutes constructive dismissal appears often to be misunderstood among employees and some of their representatives.

[232] The plaintiff's pleadings did not disclose what it is he says should cause the Court to treat what was a resignation (albeit technically a discharge at the request of the employee on medical grounds) as a dismissal by the Commissioner. There are several such circumstances recognised by the law but which are inapplicable to this case.[16] For example, there is no suggestion that Mr Ramkissoon was given an ultimatum by the Commissioner that if he did not resign he would be dismissed.

[233] There is no finite class of identified and described constructive dismissals. Whether the end of employment is a constructive dismissal will turn on the particular facts of the case and an assessment of the real origin of the initiative to end the employment. That is not to say that there is a constructive dismissal only if the employer intended the relationship to end. An employer's conduct in breach of the employment agreement may amount to a repudiation of the contract without the employer intending the end of the employment to be the outcome. Even if there is a constructive dismissal, justification for it will still need to be dealt with separately. There can be cases of justified constructive dismissal, although conduct constituting the constructive dismissal will frequently also lack justification under s 103A.

[234] Counsel, Mr Brosnahan, was asked in closing submissions to identify the basis in law for the plaintiff's contended constructive dismissal. He submitted that the breaches by the defendant of the terms and conditions of the plaintiff's employment were of such a serious nature and so repeated that, in law, the plaintiff was entitled to elect to regard the contract as breached fundamentally by the defendant. This, counsel said, could also be treated by the plaintiff as a repudiation of the contract by the employer. In this case, Mr Brosnahan submitted, Mr Ramkissoon could treat the contract as having ended at the initiative of the

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[16] See *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA).

defendant, so that his disengagement at his request was, nevertheless in law, his dismissal by the Commissioner.

[235] Further, counsel submitted that by August 2011 when Mr Ramkissoon's employment ended, the circumstances were such that he could have had no reasonable confidence that the defendant would cease those alleged breaches, or not otherwise act in breach, and would comply with his obligations to his employee. Put another way, his case is that by mid-2011, Mr Ramkissoon had no real option but to disengage from the Police voluntarily and then sue for unjustified constructive dismissal.

[236] There has also been, in New Zealand law at least, a longstanding requirement that a resignation or abandonment of employment by an employee in these circumstances will have been reasonably foreseeable by the employer if this is to amount to constructive dismissal. This rule was laid down by the Court of Appeal as long ago as in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)*.[17] The judgment of the Court of Appeal, delivered by Cooke P, expressed the test as follows:[18]

> … 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.

[237] It is, I think, safe to say that in this case, the reasonable foreseeablity test would have been established, if only by the fact that in April 2011 Mr Ramkissoon advised his employer, expressly and clearly, both that he would not return to work and that he was considering statutory disengagement from the Police, as indeed occurred several months later. This stated intention related clearly to his rehabilitation treatment. Decision of the plaintiff's claim of constructive dismissal will turn on whether this disengagement by resignation was caused by a breach or breaches of duty on the part of the employer, and the seriousness of any such breaches. I deal with this later in the judgment.

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17 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 1 ERNZ 168, [1994] 2 NZLR 415.

18 At 172.

6 Can non-appointment constitute an unjustified disadvantage grievance?

[238] There is a further legal issue raised by this case that goes to the jurisdictional heart of the first disadvantage grievance. There is Court of Appeal authority to the effect that an employee's non-appointment to a position with the same employer may not at law constitute an unjustified disadvantage grievance (now under s 103(1)(b)) if:[19]

> … the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was … affected to the employee's disadvantage by some unjustifiable action by the employer …

[239] In *Victoria University of Wellington v Haddon* a temporary employee was not appointed to a similar position but of indefinite duration with the employer.[20] The Employment Tribunal, at first instance, disallowed a belated application by the employee under what was then s 34 of the Employment Contracts Act 1991 (the equivalent of the current s 122 of the Employment Relations Act 2000). The Adjudicator held that the alleged unjustified disadvantage grievance was the same as the unjustified dismissal grievance which had been brought and which the Adjudicator dismissed.

[240] The full Employment Court upheld the employee's appeal on that point.[21] However, a majority of the Court of Appeal (Lorde Cooke of Thorndon dissenting) defined a disadvantage grievance narrowly in the judgment of the majority delivered by Gault J. The definition of an unjustified dismissal then contained in s 27(b) of the Employment Contracts Act was, for material purposes, the same as affects this case. It was:

> That the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer (not being an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment contract).

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19 See Employment Relations Act 2000, s 103(1)(b).

20 *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139, [1996] 2 NZLR 409 (CA).

21 *Haddon v Victoria University of Wellington* [1995] 1 ERNZ 375.

[241] Gault J relied on the earlier judgment of the Court of Appeal in *Wellington AHB* v *Wellington Hotel, etc IUOW*[22] which had considered the meaning of the phrase "the worker's employment" the in s 210 of the Labour Relations Act 1987, the predecessor to s 27 of the Employment Contracts Act. The Court of Appeal in the earlier case said:[23]

> Employment in the sense of the activity or state of affairs to which the contract relates may end, but the contract under which those obligations arose (the contract of employment itself) will remain in existence while there are continuing rights and obligations under it. Examples of the latter are obligations of confidence on the part of the employee, obligations on the employer to pay a commission or share of profits of an amount only ascertainable at a later date, or obligations as in this case to offer re-employment in certain circumstances. It is important to bear in mind this distinction between the employment activity and the employment contract under which it is carried on. With respect, the expression 'employment relationship' which the Labour Court used tends to blur it.

[242] The Court of Appeal in *Wellington AHB* concluded that the word "employment" used in s 212 of the Labour Relations Act was confined to "the employment activity", what it described as the "on the job situation". This was said to include, but not exhaustively, the physical conditions of employment, the environment in which the work was required to be performed, the amenities and facilities available to the worker, the payment to which the worker was entitled, and matters of that kind. It also concluded that "Contractual conditions in the wider sense can be broken but it is not appropriate to speak of them as 'affected' by unjustifiable action by the employer."[24]

[243] The Court of Appeal in *Haddon* rejected submissions that it should broaden the predecessor Court's definition of the phrase "the employee's employment" so that it should be interpreted in effect as "the state of being employed" including "employment opportunities" with the same employer.

[244] Summarising the arguments for the respondent in *Haddon*, Gault J wrote:[25]

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22 *Wellington Area Health Board* v *Wellington Hotel etc IUOW* [1992] 2 ERNZ 466, [1992] 3 NZLR 658, 661-662.
23 At 469-470, 661-662.
24 At 470, 662.
25 *Haddon* (CA), above n 20, at 148.

> All of these arguments were put forward by [counsel] as indications supporting the conclusion that the "employee's employment" is affected disadvantageously if prospects for employment to another position with the same employer are prejudiced. It rests upon the assumption that existing employment with a reduced prospect of securing a new appointment after expiry of the present appointment is less advantageous than the existing employment without that reduced prospect. But the existing employment is unaffected. It is the prospect of securing new employment that is affected and that is not within the wording of s 27(1)(b).

[245] The Court of Appeal in *Haddon* was not persuaded to depart from its earlier judgment in the *Wellington AHB* case.

[246] The Court of Appeal did, however, distinguish the circumstances of those two cases, which it described as being "quite different", from those in cases such as *NZ Air Line Pilots Assn IUOW* v *Air NZ Ltd*.[26] That case concerned unjustified action by the employer in relation to the non-promotion of a permanent employee which was held to have given rise to a personal grievance. The employee's employment continued following the non-appointment. The Court of Appeal in *Haddon* concluded:[27]

> … Where opportunities for promotion are an element in a particular employment relationship the employee reasonably can expect fair treatment when those opportunities arise. Unfair treatment then may disadvantage the employee in his or her employment. The same cannot be said of a situation in which promotion in the normal course to a new position is not contemplated in the employment relationship. …

[247] I have concluded that Mr Ramkissoon's case falls within what might be called the *Air NZ* exception to *Haddon*. All the evidence points to Police appointments, and their sometimes necessarily accompanying promotions in rank, as being contemplated in the employment relationship between the Commissioner and police officers. Had Mr Ramkissoon been unsuccessful in his application for appointment on reasonable and lawful grounds, his employment as a senior constable would still have continued. His allegedly unfair treatment by the Commissioner in failing to abide by the defendant's own policies would have disadvantaged the plaintiff in his employment. In this sense, the plaintiff's

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26 *NZ Air Line Pilots Assn IUOW* v *Air NZ Ltd* [1992] 3 ERNZ 73.

27 *Haddon* (CA), above n 20 at 149.

unsuccessful application for appointment to Opotiki may constitute an unjustified dismissal personal grievance.

7 A non-approved appointment review policy?

[248] Whilst the hearing was adjourned between August and November 2013, Mr Ramkissoon discovered that the Police's appointment review procedure had not been approved by the State Services Commissioner as required by a combination of s 62 of the Policing Act 2008 and s 65 of the State Sector Act 1988. The Commissioner does not disagree that he had not obtained the approval of the State Services Commissioner for his appointment review process pursuant to s 65(2) of the State Sector Act. The Commissioner, however, submits that this, of itself, does not cause Mr Ramkissoon's non-appointment to the Opotiki role to be invalid and/or to otherwise constitute or contribute to a personal grievance.

[249] Although not insubstantial time (and no doubt effort) was devoted to addressing this interesting question, whether the policy was lawfully approved or not does not affect the essential question at issue for this Court. That is whether what the Commissioner did, and how he did it, were what a fair and reasonable employer would have done in all the circumstances. Whether the application of this unapproved policy caused the invalidity of some of the defendant's actions, the fact of the matter is that the defendant purportedly followed it and it is the fairness and reasonableness of those actions, or omissions, that is for decision.

[250] Acknowledging, however, the effort to which the parties, and the Commissioner in particular, went to address the question, I make the following observations.

[251] Accepting, as I have noted, that the Appointment Review Policy was not approved by the State Services Commissioner under s 62 of the Policing Act and s 65 of the State Sector Act, the Commissioner's case is that the policy retains its earlier lawfulness from its promulgation at a time before 2008 when the State Services Commissioner's approval was not required. Neither statute specifies the consequence of a failure to obtain approval for such a policy. The Commissioner

says that until the Policing Act came into effect in 2008, all that was required of him under s 11 of the Police Act 1958 was to consult with the State Services Commissioner on the appointment review policy, which he did.

[252] Mr Brosnahan for the plaintiff did not go so far as to submit that the absence of approval by the State Services Commissioner meant that there was, in law, no valid and effective policy, so that the Opotiki non-appointment review undertaken in this Court may be said to have been a nullity. Such an argument may have led to the next logical step that the Commissioner's offer of appointment and Mr Ramkissoon's acceptance of it, would have meant his appointment to the Opotiki station sergeant's position was valid and lawful. That is not, however, the plaintiff's case.

[253] Mr Child submitted that the procedural changes made by s 62 of the Policing Act did not repeal, at least immediately, what had until then been a valid review policy pursuant to s 11(1) of the Police Act 1958. Mr Child invoked s 17(1)(a) of the Interpretation Act 1999, providing that the repeal of an enactment does not affect the validity or effect of anything done before repeal. More significant is said to be s 21 of the Interpretation Act. This provides that anything done in the exercise of a power under a repealed enactment, which is in effect immediately before the repeal, continues to have effect as if it had been exercised under any other enactment that, with or without modification, replaced or corresponds to the enactment repealed and under which the power could have been exercised. Counsel relied on the confirmatory judgment of the High Court in *Housiaux v Kapiti Coast District Council.*[28]

[254] Mr Child also submitted that s 62 of the Policing Act 2008 does not purport to revoke, repeal or otherwise extinguish any existing policy and there is no reason why the substance of such a policy should not continue to exist unchanged under a new legislative regime. In particular, counsel submitted that the Policing Act cannot be read to say that the defendant was required, immediately upon the coming into force of s 62, to establish and have approved a compliant appointment review policy, and that a lacuna was created until those steps had been taken. Counsel for the

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[28] *Housiaux v Kapiti Coast District Council* HC Wellington CIV-2003-485-2678, 19 March 2004 at [55].

Commissioner acknowledged his (the Commissioner's) obligation to adhere to the requirements of s 62 when he undertakes a review of this policy, which was apparently in train at the time of the hearing. Fundamentally, the Commissioner's position is that any failure to comply with s 62 of the Policing Act (which is denied) does not mean that decisions made purportedly under the policy were invalid for that reason. As counsel pointed out, many appointees to positions (and unsuccessful aspirants) benefited from the existence of the policy after 2008 and it would be undesirable, even senseless, to declare legally ineffective, decisions made in those cases.

[255] Counsel for the Commissioner submitted that the consequence of non-approval should be gauged by an assessment of the consequences of that breach of the statutory requirement including by reference to the nature and purpose of it and the nature and effect of the consequences of invalidation. In this regard counsel relied on a number of cases including that of the Court of Appeal in *Sestan v Director of Area Mental Health Services Waitemata District Health Board.*[29]

[256] Next, Mr Child submitted that there is nothing before the Court to suggest that the pre-2008 policy should or would not have been approved by the State Services Commissioner had it been subject to the s 62 approval process.

[257] I favour the Commissioner's position on the consequences of non-approval by the State Services Commissioner of this pre-2008 policy. Given the criticism in this judgment of the Commissioner's failures to comply with the policy, and with the statutory good faith obligations that it necessarily affected, it would not be surprising if the Commissioner was to review the content of the Appointment Review Policy (if he has not done so already) with a view to submitting a revised policy to the State Services Commissioner for approval. That is, however, not a matter on which this Court is empowered to make any directions and should be regarded as an observation only.

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[29] *Sestan v Director of Area Mental Health Services Waitemata District Health Board* [2007] 1 NZLR 767 (CA) at [44]-[45], [90].

[258] Lawful or not, the acts or omissions of the Commissioner in purporting to apply his policy are for consideration by the Court as to their reasonableness and fairness, and in light of the plaintiff's reasonable expectation in law that the Commissioner would adhere to a policy promulgated by himself for the benefit of police employees generally.

8 Lawfulness of change of duties direction

[259] At the hearing the plaintiff challenged the lawful basis for Insp Venables's unilateral direction to the plaintiff to change his duties from work in CIB to GDB, front line section duties. Inspector Venables purported to give that direction to the plaintiff both orally and in writing although, when challenged in cross-examination at the first hearing about the source of her power to do so, she said she could not identify that immediately. The Inspector was nevertheless confident that she was empowered to do so on no less than 14 days' notice and that she would be able to identify the formal source of that power within a short time. At the resumed hearing, however, the defendant, through Insp Venables, was not able to identify such an express power of the Commissioner to transfer the plaintiff unilaterally in his circumstances at the time. When the point was taken by Mr Brosnahan in final submissions, I allowed the parties a period after the conclusion of the hearing to file memoranda identifying the authority for the Inspector's direction to Mr Ramkissoon to comply with her change of duties direction.

[260] Counsel for the defendant has been unable to find any such independent power formally recorded in statute, subordinate legislation, or other police operational policies or instructions. That is enigmatic, given the Inspector's confidence that such a power existed and, consistently with this, that it was exercisable by her on no less than 14 days' notice. It may be that Insp Venables's apparently mistaken assumption was shared by other officers so that this was a longstanding and widespread misapprehension within the Police. As things stand, however, I must conclude that the Inspector was not able in law to redirect the plaintiff's duties as she purported to do involving such a non-existent power, at least to the extent that it cut across an agreed and still-operating rehabilitation plan, and would have had the effect of concluding that plan prematurely.

[261] Counsel for the defendant nevertheless seeks to fall back on more general Commissioner entitlements under s 65 of the Policing Act. This provides:

> **65 Power to temporarily assign, second, and locate employees and other persons within Police**
>
> (1) The Commissioner may, subject to any applicable employment agreement, but without complying with sections 59(1) and 60(1)—
>
> (a) assign a Police employee to a temporary position in the Police:
>
> (b) assign a person to a position in the Police:
>
> (c) second a Police employee to a position with another employer:
>
> (d) relocate a Police employee—
>
> (i) on the graduation of that person from initial recruit training; or
>
> (ii) within the district in which the employee is stationed, and at the employee's existing level of position, to meet Police requirements, after considering the employee's circumstances and the merit of all employees who have indicated an interest in the position; or
>
> (iii) on the return of that person to duty from an overseas assignment, leave without pay, parental leave, or other special leave; or
>
> (iv) to fill a vacancy in a temporary international assignment, after considering all employees who have indicated an interest in the position; or
>
> (v) in order to rotate an employee within the district in which he or she is stationed; or
>
> (vi) for substantial welfare or personal reasons:
>
> (e) locate a person who is rejoining the Police as an employee.
>
> (2) Subsection (3) applies if—
>
> (a) the Commissioner assigns a person to a temporary position under subsection (1)(a) or assigns a person to a position under subsection (1)(b) without complying with sections 59(1) and 60(1); and
>
> (b) the person has occupied that position or been on that secondment for a period of at least 14 months.
>
> (3) The position occupied, or the secondment, must be considered to have been vacated by that person and, subject to any applicable employment agreement, any further assignment to or secondment of that position must be dealt with in compliance with sections 59(1) and 60(1).

[262] I have concluded that what Insp Venables purported to do by directing Mr Ramkissoon to resume GDB duties, was not encompassed within her statutory powers under s 65. Alternatively, even if it was, I have concluded that a fair and reasonable employer would not have exercised such a discretionary power in view of

the expert evidence then in the possession of the Police about Mr Ramkissoon's condition. His prognosis for recovery if he was then put back on front line shift work would have been the consequence of Insp Venables's direction, and would have been antithetical to his rehabilitation plan then in place.

[263] I have reached this first conclusion, about the inapplicability of s 65, in these circumstances for the following reasons. The word "temporarily" in the title to the section may be interpreted either to define only the word "assign" or, alternatively, it may qualify each of the substantive powers to "assign, second, and locate …". Either way, s 65 addresses powers to direct staff temporarily. To direct an officer to return to previous duties is not to temporarily assign, second or locate that officer. Subsection (1)(b) was inapplicable because Insp Venables's direction was not an assignment of Mr Ramkissoon "to a position" in the Police. The other paragraphs of subs (1) are clearly inapplicable. Inspector Venables appropriately described the nature of this exercise as a "return to duties" (RTD): that is a return to a particular type of duty previously performed. It is also improbable in my view that she may have been intending to apply a power under s 65 because she considered that 14 days' notice was required for its valid exercise. Section 65 contains no such time limitations. The balance of the section does not assist in the Commissioner's assertion of a lawful power to direct a constable to return to previous duties on 14 days' notice, as was purportedly done in Mr Ramkissoon's circumstances.

[264] The defendant's fall-back position is, notwithstanding, that this was an instruction that was lawful for Insp Venables to give to Mr Ramkissoon because it was consistent with the conclusion of his rehabilitation plan under which he had been assigned only temporarily to duties with the CIB. So, the defendant contends, the authority for the direction, which is challenged, was in effect under the rehabilitation plan which was agreed to by Mr Ramkissoon. That is even although this was not specified in the plan and there was no reference, for example, to a minimum period of notice to the plaintiff for the conclusion of it. This was said by Mr Child to have been "an ordinary and necessary consequence" of the rehabilitation plan ending. Counsel submitted that the Inspector's direction to resume general (section) duties on shifts was not to a position which was new to the plaintiff but was, rather, to his original role. It was said to have been given when the defendant

considered, reasonably, that the grounds for moving him temporarily from that original role had ended. That is said to be emphasised by the use of the phrase "return to section" in the documents that were generated at the time.

[265] In these circumstances, the defendant contends that it is unnecessary to look for additional specific authority for the direction in legislation, contract, or policy. Rather, the defendant says this direction was a normal incident of management not requiring the plaintiff's agreement but, rather, effecting the conclusion of the rehabilitation plan to which the plaintiff had agreed. The direction was said to have been made following consultation with the plaintiff. Mr Child emphasised the contemplation of the Rehabilitation Policy that a rehabilitation will continue "until the employee has been medically cleared to resume their pre-illness or injury role"; that the policy expects supervisors to "take the lead role in initiating and managing the rehabilitation"; and that the policy does not describe any particular process, formality or form for concluding a rehabilitation plan.

[266] Turning to the particular rehabilitation plan agreed with Mr Ramkissoon, Mr Child highlighted its goal as being "return to Fulltime Frontline duties"; its expectation for monthly medical certificates "until the [plaintiff] is cleared to return to Fulltime frontline duties"; and that it envisaged Mr Ramkissoon continuing in the CIB position "in the meantime" and "until medical clearance [is] received to return to Fulltime frontline duties".

[267] Addressing the circumstances leading to Insp Venables's directive, Mr Child submitted that the Inspector believed, reasonably, at the time of giving Mr Ramkissoon that direction, that his medical certificate of 8 September 2010 constituted the necessary medical clearance so that his rehabilitation was, at that time, complete. The submission concludes that all that remained was for the previously agreed outcome to be effected. Mr Child submitted that this was also consistent with the Inspector's view that the subsequent rehabilitation plan in 2011 was a 'new' rehabilitation exercise rather than a continuation or development of a previous one.

[268] Mr Brosnahan for the plaintiff submitted, first, that the leave reserved by the Court at the end of the hearing was only for the defendant to produce, or produce reference to, a document or other provision authorising this direction. Counsel submitted that the Court did not go so far as to allow counsel for the defendant to make further submissions as he did, seeking to validate the directions on grounds other than Insp Venables had invoked expressly.

[269] Mr Brosnahan's is, however, too narrow an interpretation of the Court's intention and direction. The plaintiff having challenged the legitimacy of the Inspector's direction to Mr Ramkissoon, I allowed the defendant a period to persuade me of its legitimacy. That was not limited to the production of a document confirming this power and I consider Mr Child's submissions were able to be made as they were. In any event Mr Brosnahan has also made submissions in reply.

[270] Mr Brosnahan pointed to Insp Venables's evidence which was to the effect that generally (ie in relation to all staff supervised by her, not just Mr Ramkissoon) she was entitled to move officers within her area on appropriate notice. She asserted that by giving written notification of a change of duties, she was able to move staff to different duties on no less than 14 days' notice, which is what she did with Mr Ramkissoon.

[271] Mr Brosnahan emphasised, however, that this instruction was effected by a use of a standard New Zealand Police form (POL 366A) describing the change of duties as a "transfer" and the reason for it as "staff rotation". Counsel submitted that Mr Ramkissoon's circumstances were not ones in which he was being transferred for reasons of staff rotation between types of duties. Rather, the Inspector's purported direction was, at best for the defendant, one pursuant to the rehabilitation plan.

[272] Next, Mr Brosnahan emphasised that the formal written notice from Insp Venables to the plaintiff dated 20 December 2010 did not refer specifically to the plaintiff's completion of his rehabilitation plan although the Inspector did refer to a conversation between the two on 28 October 2010 on the subject of returning to sectional duties. The reason provided by the Inspector in the memorandum to the

plaintiff of 20 December 2010 was that "… due to operational requirements I am reassigning you to return to GDB sectional duties as of the 4th January 2011".

[273] In an email sent on 30 December 2010 Insp Venables advised the plaintiff's station supervisor (Snr Sgt Jenkins) that she had given the plaintiff "the correct notice of the CoD (Change of Duties] …" and commented that "… he is operationally required as we are short on section, he has a full medical clearance saying he is fit for full duties and he has completed his rehab plan".

[274] As I have already concluded and alternatively, insistence on compliance with the exercise of such a discretionary power would have been unjustified in all the circumstances of this case given Mr Ramkissoon's psychological condition and the content of his rehabilitation arrangements. It was not the logical next step after a successfully concluded rehabilitation plan. Any clearance for a return to these duties had not been given by Mr Mist, the expert engaged for the rehabilitation programmes. Fortunately for the defendant, however, Insp Venables stayed her hand, and did not insist upon that return to duties when presented with further evidence of the plaintiff's condition. The effect of this change of mind by the Inspector must be assessed as part of the overall grievance, and of the fairness and reasonableness of the defendant's treatment of the plaintiff.

[275] Although Insp Venables's unauthorised direction to Mr Ramkissoon clearly caused him further distress and may even have delayed or set back progress on his rehabilitation plan, in the end the Inspector backed away from insisting on compliance with it. Rather, Insp Venables considered, justifiably even if belatedly, that continuing with a rehabilitation plan or plans was the better course in all the circumstances. I do not consider that the Inspector's RTD direction disadvantaged Mr Ramkissoon in his employment to the extent that it may have caused the treatment of him during this long period of rehabilitation to have been unjustified.

9 Decision of non-appointment and appointment review grievance

[276] I have concluded that the defendant's breaches of the relevant policies, and of the Employment Relations Act in this regard, were manifold, fundamental and

serious. The Commissioner, by Insp Taylor and Mr Annan, misapplied the defendant's Appointment Policy and, in particular, reference to that part of the policy set out at [173] of this judgment ("Criteria for Promotion") where questions of appointment to positions, and associated promotions in rank, were dealt with separately. The effect of the first paragraph provided that Mr Ramkissoon could not be *promoted* to the rank of sergeant unless he had passed the necessary qualifying examinations and standards for that rank and successfully completed any qualifying course prescribed for it.

[277] Dealing, however, with appointment to *positions* above current rank, the second paragraph set out at [173] allowed the Commissioner to appoint Mr Ramkissoon to the Opotiki station sergeant position and for him to receive the applicable remuneration for that position, but meant that the plaintiff would remain formally at his rank of senior constable until he had completed the necessary qualifications for promotion to sergeant.

[278] So not only was this common practice in the Police at the time but it was sanctioned expressly by the Appointment Policy. Had Mr Ramkissoon been appointed as recommended by the Appointment Committee and as confirmed by BOPHR, and in the absence of a review upholding the Committee's decision, he would have moved to the Opotiki role. He would have been paid the appropriate remuneration for that role held by a sergeant, but would have remained, formally, a senior constable in rank but designated an acting or temporary sergeant.

[279] The defendant was not justified in purporting to act contrary to his policy which permitted both what Mr Ramkissoon sought, and his appointment by the defendant to that position. His non-appointment disadvantaged him in his employment and was unjustified.

[280] I move next to the second element of this grievance which focuses on the Commissioner's acts and omissions under the appointment review process.

[281] I accept that, in his absence from New Zealand, the plaintiff was difficult to communicate with, but this was by no means impossible. He had, nevertheless,

asked the Police that communications about these matters be made to his Police Association representative. Mr Ramkissoon was contactable by mobile phone (and thereby by SMS or text message) outside New Zealand. He had made it clear that he would bear the cost of this advice sent to him in South Africa. But even the defendant's advice given to Mr McKay was, in accordance with the policy and statutorily, minimal and inadequate. Mr McKay was told of the fact of the application for review by Ms Welch and of the outcome of that, although the latter advice was given very belatedly because of a fundamental and enigmatic email addressing error. There was no attempt, as could have been made reasonably, to involve Mr Ramkissoon in the review process as was required by both the review policy and with the statutory obligations of good faith dealings in that process.

[282] I have concluded that the application for review, although in the name of Ms Welch was, in reality, Insp Taylor's way of seeking to have the provisional appointment nullified. This was the alternative course adopted by Insp Taylor after he had cancelled the appointment but had been persuaded by Mr McKay to reconsider this decision. Ms Welch's application was, nevertheless, sent to Insp Taylor, who referred it to Mr Annan. Inspector Taylor controlled what was sent to Mr Annan. The only information that Mr Annan had on which to act was that supplied by Insp Taylor. Inspector Taylor was in a conflicted situation and allowed his predisposition against the plaintiff to infect the outcome of the review. Inspector Taylor effectively instigated Ms Welch's review application and then prepared the essential information on which the decision of it was made by the GM:HR. The Inspector should have referred the review to another HR person to handle, but he did not do so.

[283] Inspector Taylor breached the requirement that, as a "relevant HR Manager who had been involved in the appointment under review", he should immediately refer the review to the HR Manager, Recruitment and Appointments.

[284] Next, Mr Annan did not "initiate an appropriate review" as required by the policy in circumstances where the concerns were raised by a police (non-sworn) employee who was not an applicant for the position. Rather, Mr Annan simply accepted Insp Taylor's submissions, largely uncritically. Inadequate reasons were

given at the time by Mr Annan for his decision to allow Ms Welch's application for review. Nor was the plaintiff included in the process as he ought to have been as a matter of policy compliance and natural justice and, as I have concluded he could have been, albeit with some, but not insuperable, difficulty. This was not a minor matter for either party and warranted careful and compliant treatment which it did not receive.

[285] Inspector Taylor's submissions to Mr Annan cannot be described as objective or neutral. They were also inaccurate, but were not able to be corrected because the plaintiff had no chance to do so as I am satisfied he would have done had he been given such an opportunity. Although purporting to be objective, when one reads Insp Taylor's submissions to Mr Annan of 15 May 2009 with knowledge of the background, they were neither accurate nor objective. For example, they included the following: "Senior Constable RAMKISSOON spoke to a Human Resources Assistant on the 20th of April and asked for his offer to be sent that day as he would be out of the country from 1pm the next day on holiday for a period of six weeks."

[286] I am satisfied that not only does this record erroneously what happened but, on the information supplied by his staff, Insp Taylor could not reasonably have come to such a conclusion. Inspector Taylor was relying on accounts provided to him by others. The plaintiff did indeed speak with a human resources assistant on 20 April 2009 and asked that his offer be expedited because he was going to be travelling out of the country. But Mr Ramkissoon made it clear to the HR office that he was travelling to Auckland on the following day and that he would not be out of the country until several days after that. That was consistent with the written information that Mr Ramkissoon had supplied to the Appointment Panel and which was available to Insp Taylor from the panel's records. Even if Mr Ramkissoon were to be difficult (but not impossible) to contact after he left New Zealand, there was the period of up to five days during which he was going to be in Auckland. This would have enabled him to have received and responded to correspondence about these matters in the same manner as he did on 20 April 2009 before he departed for Auckland, that is by going to a police station fax machine, receiving, signing and returning the documentation.

[287] Next, under the heading "Process Issues", Insp Taylor attributes the error to a member of his staff in not making a final check on qualifications to "meeting Senior Constable RAMKISSOON'S request". The inference is (and it was the defendant's case at least in July 2009) that the plaintiff applied unreasonable and improper pressure to the HR staff member and her error was attributable to this pressure. Combined with the implicit allegation by Insp Taylor that the information that Mr Ramkissoon conveyed to Ms Robinson about his departure date was misleading, the report sought unjustifiably to shift blame for the errors from the BOPHR office to the plaintiff. That was factually inaccurate, and prejudicial in a material respect to Mr Ramkissoon.

[288] Next, the evidence establishes that the check by the HR staff member that Insp Taylor says was completed after the offer was forwarded, was in fact completed before the offer was forwarded as the HR documentation establishes. These documents were available to Insp Taylor. His advice to Mr Annan, upon which the latter acted, was wrong and prejudicial. Inspector Taylor failed to check independently and objectively what he was told by others seeking to correct their own errors, before repeating this inaccurate and prejudicial account

[289] Inspector Taylor's submissions to Mr Annan imply that it was only in discussions with the Police Association representative that it first became apparent that Mr Ramkissoon was not leaving the country until 25 April 2009. That was not a tenable conclusion. The correct information had been conveyed by Mr Ramkissoon to Ms Robinson in telephone discussions on 20 April 2009 and he had set out in writing on his paper work to Appointment Panel, the dates of his absence from New Zealand. That information was available to Insp Taylor.

[290] Even if Mr Annan was entitled, in "initiating an appropriate review based on the substance of the concerns raised", to follow the standard review procedure under the policy, that was not adhered to. Ms Welch was the complainant member even although I have found that she was acting, at the least, according to Insp Taylor's expectations of her in doing so. In breach of the policy, Insp Taylor did not acknowledge receipt of Ms Welch's review request; did not notify the Panel Chairperson (although he did take steps to notify the recommended appointee); did

not send to Ms Welch the appropriate sections of the Appointment Panel's recommendations; and did not advise Ms Welch that she had 10 days in which to make submissions to him. Nor did Insp Taylor advise the HR Manager, Recruitment and Appointment at Police National Headquarters of the review.

[291] These several omissions are less significant in themselves than they are in suggesting that the review process outcome was regarded by Insp Taylor as a foregone conclusion, the same conclusion as the Inspector himself had reached before directing the cancellation of the offer of appointment to the plaintiff.

[292] Next, it was not Ms Welch who made submissions in support of the review but, rather, Insp Taylor. Although in doing so he disclosed his true hand as the person intent upon disqualifying the plaintiff from his provisional appointment, it was Ms Welch and not Insp Taylor who was required to do so under the policy.

[293] Neither Insp Taylor nor Mr Annan interviewed the Panel Chairperson and/or other Panel members as I conclude it was appropriate to do and as, in these circumstances, the policy required.

[294] There is another aspect of the defendant's application of the Appointment Review Policy that was erroneous, and affected Mr Ramkissoon disadvantageously. The defendant's case is that the policy dealt with review applications in different ways depending upon whether they were categorised as what were described as "procedural", "merits", or a combination of both. The witness best placed to give evidence about this, Mr Annan, conceded that the body of the policy did not make this differentiation clear. Although it is discernible from the flow chart that is attached as an appendix to the policy, Mr Annan agreed that this flow chart or wiring diagram was an explanatory aid and could not be applied in substitution for the policy if a step or procedure was absent from, or in contradiction to, the latter. It appears that the policy has operated in practice as only a two-track scheme because of a perpetuated belief within the Police that this was so, rather than having applied the policy according to its constituents.

[295] Assuming, however, that the policy dealt with applications for review by classifying them as one of three types ("process", "merits", or a combination of both), the challenge to Mr Ramkissoon's provisional employment brought by Ms Welch was treated as a "process review" and so was dealt with summarily by Mr Annan.

[296] As Mr Annan conceded in his evidence, however, there were elements of "merits" in the decision under review. That is not to say that there were not elements also of "process", but the policy allowed for just such a mixed categorisation by requiring it to be dealt with in the same way as a "merits" review. That required the referral of the review to an independent committee for examination but this did not occur in Mr Ramkissoon's case. The Review Policy was applied incorrectly by the defendant, and to the plaintiff's disadvantage.

[297] This is a case of much more than minor or technical breaches that may have been inconsequential and excusable. The breaches of the policy were multiple and, collectively, significant. Had they not been committed, the outcome of the review may well have been different. Even a brief analysis of these events in light of the policy would have revealed the defendant's significant non-compliance. I conclude that it was no mere coincidence that Mr Annan thereafter and relatively promptly, offered to settle this grievance by appointing Mr Ramkissoon to the Opotiki vacancy. I conclude that Mr Annan would not have done so without himself concluding that there were these multiple breaches and that the disadvantage to the plaintiff should be remedied in the way Mr Annan directed. Mr Annan's instinct to acknowledge fault by proposing settlement was in stark contrast to the self-defensive and exculpatory strategy of insisting that the defendant was wholly justified in his treatment of the plaintiff.

[298] I deal next with breaches of good faith dealing under the Employment Relations Act, which obligations I have concluded were required of the defendant in the review process. The defendant accepted that he was subject to these general employment law obligations.

[299] The defendant failed to ensure that the plaintiff had an opportunity to know of the case against him (the contents of Insp Taylor's submissions of 15 May 2009 sent to Mr Annan) and to allow him to refute or otherwise comment on these. They contained inferences of serious impropriety and dishonest conduct by the plaintiff. There was a failure to accord the plaintiff natural justice in a process which had the potential to, and did, remove from the plaintiff the benefits of a provisional appointment. Although the Policing Act and the policy are silent on this issue, in such circumstances the s 4 good faith obligations of the Employment Relations Act, and the requirements of natural justice, meant that Mr Ramkissoon should have had these opportunities, did not, and his employment was affected adversely by those failures.

[300] This was not what might be called a run-of-the-mill review application by another applicant who had not been appointed and in which the respective merits of the employees were in issue. This was not only what the policy describes as a "process" issue, but one in which it was alleged by Insp Taylor that the appointment process had been perverted by the applicant for the position and was not simply by an error on the part of the Panel. Mr Ramkissoon was entitled in law to expect that the defendant would both comply with the rules of natural justice and act towards him in good faith, but I have concluded that the defendant did neither, at least sufficiently.

[301] All of these failures just described constituted an unjustified disadvantage to the plaintiff in his employment. There being no other challenge by review to his provisional appointment, the consequences of the flawed review process applied by the defendant, ought not to have deprived the plaintiff of the Opotiki appointment.

[302] In addition to the Opotiki non-appointment being a disadvantage personal grievance on its own, these events, when they became known to the plaintiff, were the catalyst of ongoing and increasing complaint and disillusionment by him. These caused and contributed materially to his incapacity and his need for rehabilitation (and thereby to his rehabilitation grievance). They contributed ultimately to his resignation or disengagement which is the subject of his unjustified constructive dismissal grievance.

[303] Although both the rules of natural justice and the statutory good faith requirements are applicable to police appointment reviews, the application of those standards in practice will vary depending on their circumstances. In this case those circumstances, and the potential consequences for the provisional appointee, were such that a high and robust standard of adherence to them was necessary. That standard of adherence was not met by the defendant and an injustice to the plaintiff was perpetrated.

[304] However, having so decided in respect of the Opotiki non-appointment grievance, I should add this note of caution. This is not a case of the more usual Appointments Review Process which occurs frequently so that it should not necessarily be taken that the judgment affects, in the same way as in this case, many more such common cases. This was, by any account, an extraordinary situation. The application for review was made by an administrative staff member who was, by her own account, at least partly responsible for the errors that she alleged in her review application had tainted the provisional appointment. That administrative staff member was, although not directed, then at least expected strongly to lodge the application for review by a human resources manager who had already determined that the appointment process was flawed and to whom the application for review was made.

[305] There may have been genuine grounds for a review of the sufficiency of qualifications question, despite the Appointments Policy allowing the plaintiff to be appointed to the vacant position with his then qualifications. There were also, however, assertions that the provisional appointee (the plaintiff) had misled the Panel dishonestly and had placed improper pressure on administrative staff to process the Panel's recommendation to enable an offer to be made and accepted, which was responsible for those processing errors being made. In these circumstances this was not a review of the sort that the policy contemplated being dealt with promptly and without any involvement of the provisional appointee. This judgment decides no more broad a case than the extraordinary one disclosed on these facts.

[306] For remedial purposes, it is necessary to determine what would have been the probable outcome of Mr Ramkissoon's provisional appointment to Opotiki had the

Commissioner not acted unjustifiably in the appointment and the appointment review process. Although to a degree speculative, the Court must apply a wide variety of known relevant facts to this assessment. It must also acknowledge the probability of other counter-factuals than Mr Ramkissoon's preferred scenario that he would have succeeded in the role of station sergeant at Opotiki and have subsequently thrived in his police career.

[307] What would have been the consequence for Mr Ramkissoon if the review application had been categorised correctly under the policy, and the other flaws in its application to Mr Ramkissoon had not occurred? This inquiry is necessary to determine whether the outcome would have differed had the Appointment Review Policy and the rules of natural justice and good faith been followed.

[308] Although initially advising Mr Ramkissoon that the Police could not continue to offer him the position, the defendant elected then to declare the plaintiff provisionally appointed. Why Insp Taylor changed his mind about this is not difficult to ascertain, at least by inference. Mr Ramkissoon had been offered, and had accepted formally, albeit provisionally, appointment to the Opotiki position. It was at least problematic, perhaps even more difficult in law, to withdraw an offer which had already been made and accepted. It is, however, unnecessary to decide this point of law and I do not do so. The appointment was, however as noted, provisional or conditional in the sense that if another police employee sought to have it reviewed and if the review disclosed that the appointment ought not to have been made, then Mr Ramkissoon was at risk of losing the position to which he had been appointed provisionally. There was, however, no application by an unsuccessful applicant or, indeed, any other sworn police officer eligible to apply.

[309] What precisely would then have happened to Mr Ramkissoon's application is unclear because, in the circumstances of a review being sought by someone other than an unsuccessful applicant, the Commissioner was required to develop an appropriate process for the review but did not do so, at least other than inadequately. Clearly, the applicant for review, who was not an unsuccessful applicant, could not have been appointed in substitution for the plaintiff. She did not hold the office of Constable and indeed had no desire to be the station sergeant at Opotiki in any event.

She had been at least expected and encouraged to seek the review by Insp Taylor whose wish was that the review would be upheld, the appointment cancelled, and the vacancy re-advertised. That latter outcome was consistent with the Appointment Panel's view that if Mr Ramkissoon did not accept the provisional appointment, it should be re-advertised because none of the other applicants interviewed would have been suitable for the position in the Panel's opinion.

[310] Mr Ramkissoon's provisional appointment should have become unconditional in the sense that the condition attaching to it (a successful review) was not satisfied. In these circumstances he ought to have been appointed on the other conditions contained in the parties' agreement including that he would satisfy examination and other qualification requirements within the specified period. This was allowed for in the Appointment Policy. He would probably have done so on the evidence heard and seen by me. That is also consistent with the outcome Mr Annan intended be offered to the plaintiff in settlement of his grievance, but was not achieved. Had it been, this litigation may have been avoided and Mr Ramkissoon would have remained a police officer. For how long that would have continued is the imponderable, but it is safe to conclude on the evidence that he would not have suffered the breakdown he did if he had been the station sergeant at Opotiki.

[311] It is, in my view, very regrettable, not only for the plaintiff but for the defendant as well, that Mr Annan's appropriate and justifiable decision to make what was an acceptable, and what would almost certainly have been an accepted, offer of settlement to the plaintiff, was not conveyed to him or otherwise carried through. On the evidence in this proceeding, I am confident that Mr Ramkissoon would have fulfilled the formal qualifications for promotion to sergeant as he did in most respects, in any event, by the end of 2009. As station sergeant at Opotiki, he would have been unlikely to have fallen or fallen further into the increasingly debilitated state that he did remaining at Whakatane in the period until his disengagement. Indeed, all the signs point to a probable resumption of his career progression within the Police had this opportunity been grasped as Mr Annan intended it should be in late 2009. Instead, as Mr Annan himself said in evidence, the Police lost, to the organisation's disadvantage, not to mention the plaintiff's, a capable and promising officer.

[312] I conclude that the plaintiff was disadvantaged significantly and unjustifiably in his employment by his treatment in relation to his application for appointment as station sergeant at Opotiki. I will deal with remedies for this grievance later in this judgment beginning at [327].

10 Decision of rehabilitation management grievance

[313] Apart from some initial scepticism and cynicism among some of the plaintiff's supervisors about the genuineness of his state of health, there is no reliable evidence that Mr Ramkissoon was not genuinely unwell psychologically or otherwise that he required a period of leave and then alternative duties within which to recuperate and rehabilitate himself. The expert evidence confirms the genuineness of those conditions. The defendant's case was not advanced on any other basis. So I start from that standpoint in examining how that established disability was addressed by the defendant but including also the plaintiff's role in that exercise. It was, nevertheless, very unfortunate that some of the plaintiff's supervisors approached this matter cynically in the face of evidence of genuine illness.

[314] Mr Ramkissoon's rehabilitation programme, which was made up of a number of sequential agreed rehabilitation plans, ran from the beginning of July 2009 until mid-2011. By then, he had given up on seeking to be rehabilitated to enable him participate effectively in front line police duties which was the agreed and legitimate goal of the programme. In April 2011, shortly after the implementation of what was to be the last agreed rehabilitation plan, Mr Ramkissoon had indicated his intention to seek disengagement from the Police on medical/psychological grounds.

[315] As already noted, particularly at the outset but also from time to time over that period of two years, some supervisors both expressed scepticism about the genuineness of Mr Ramkissoon's illness, and proposed assertive steps and directions to return him to front line duties. The plaintiff's particular criticisms of this must be viewed in the overall context of events during that period.

[316] Mr Ramkissoon's diagnosed illness was recognised by his employer and assistance to both manage and overcome this was provided substantially in

accordance with the relevant policies and procedures. The plaintiff received significant professional and other assistance including, especially, from such people as his Welfare Officer, Mrs Reardon. He was also assisted by his supervisors in the temporary alternative duties which he undertook in LET and the CIB at Whakatane. With the benefit of professional medical and psychological advice, he was also offered opportunities to return to GDB duties although not on night shifts which seemed to be at the heart of his sleep problems.

[317] It is correct also, as the defendant says especially of 2011, that Mr Ramkissoon was less co-operative in the rehabilitation process than he could have been, although the extent to which this might have been attributable to his psychological condition is uncertain.

[318] There is independent corroboration, in the form of his psychologist's reports, of concerns within police management that the plaintiff's illness was connected closely to his Opotiki non-appointment grievance which should have been, but was not ever, settled. There is little doubt that a prompt and reasonable settlement of this grievance, as Mr Annan proposed, would have enhanced significantly the plaintiff's chances of a full return to work. However, that does not mean that the defendant's failure in this regard causes his rehabilitation efforts to have been unjustified.

[319] As I have already noted in relation to the Opotiki non-appointment, after Mr Ramkissoon went on sick leave in early July 2009, the defendant moved promptly to provide him with Welfare Officer support. There was also put in place a rehabilitation plan which had the objective of returning him to his former duties within a period of between four and six weeks. The first agreed rehabilitation plan was put in place from 8 July 2009. Its agreed objective was to allow Mr Ramkissoon to return to his pre-illness role in GDB at Whakatane. In the meantime, he was placed temporarily in the station's LET office. This first rehabilitation plan also made available to the plaintiff the services of a registered psychologist, Kevin Mist, with the initial costs at least being met by the Commissioner. Mr Ramkissoon's work in LET did not involve shift work. I am satisfied that the plaintiff's work in LET was always intended and agreed to be a temporary reassignment of the use of his policing skills until he could return to his pre-illness role in GDB.

[320] Unfortunately for both parties, however, Mr Ramkissoon did not provide the Commissioner with sufficiently frequent and detailed reports of his condition and prognosis from both the psychologist and his general medical practitioner. Mr Ramkissoon was working for most, if not all, of these periods of proposed rehabilitation and on sick leave for the balance, particularly in the latter periods.

[321] From time to time over the remainder of 2009, and when useful communications could be established by the Commissioner with Mr Ramkissoon, there were tensions over the duration and nature of the alternative work he was performing. However, the outcome of these was that this alternative work remained available to him and Mr Ramkissoon did not return to front line duties. The expert psychological information indicated clearly that improvement of the plaintiff's psychological state was dependent on a satisfactory resolution of his Opotiki non-appointment grievance. This, as I have already set out in this judgment, did not occur, although it ought to have done so later in 2009.

[322] Mr Ramkissoon had become genuinely and seriously unwell upon his return from leave at the beginning of July 2009. His illness was psychological but manifested itself also in physical attributes such as sleep disorders and a loss of his robustness to perform front line police duties. That the defendant applied and pursued extensive efforts to rehabilitate Mr Ramkissoon over the following period of more than two years is also testimony to the defendant's acceptance of a genuine and debilitating psychological state and not, as several senior officers believed, that this was, or was founded on, a form of "industrial blackmail" to obtain his reappointment to the Opotiki staff sergeant position. I am satisfied overall, however, that expert assessments of Mr Ramkissoon's psychological guided rehabilitation efforts over a period of more than two years rather, than prejudicial scepticism.

[323] It is necessary to record, also, that Mr Ramkissoon's debilitated state did not preclude him from working for much of that period. What was, and would have been, inconsistent with a successful rehabilitation and return to full duties, which was the agreed object of all rehabilitation plans, was undertaking GDB duties, that is front line policing, on rotating shifts and, in particular, night shifts. At most times during that extended period Mr Ramkissoon was fit for, and did perform, mutually useful duties in branches other than GDB work including with the Whakatane CIB

and LET teams. There he worked regular hours and days without the risk of shift work consequences. The vacancy on his GDB section was, at least for the first year of that period of rehabilitation, able to be filled ad hoc although, from the appointment in September 2010 of Insp Venables as Area Commander, the defendant perceived a greater need to have Mr Ramkissoon back on his old section and undertaking GDB shift work.

[324] Standing back from the minutiae of the multitude of events covered by the evidence in the period of the plaintiff's ill-health from 1 July 2009 to 22 August 2011, I conclude that the defendant's conduct was what a fair and reasonable employer would have done, both in terms of what was done and how it was done. It follows that the plaintiff's second claimed (rehabilitation) personal grievance must be, and is, dismissed.

11 Decision of unjustified dismissal grievance

[325] To establish a constructive dismissal, the plaintiff relies very substantially upon his treatment by the Commissioner as employer over the period of almost 26 months from early July 2009 until he disengaged from the Police on 22 August 2011. The plaintiff must establish that the reality of the ending of his employment was not, in effect, a resignation (disengagement) but was at the initiative of the employer because of a breach or breaches which, taken together, allowed the plaintiff to treat these as so repudiatory that they amounted to a dismissal. If that is established, it will also be necessary to determine that such a constructive dismissal was unjustifiable although, inevitably, these two theoretically separate questions overlap significantly. The Opotiki non-appointment events do not come into this consideration. They are background to it but the defendant's breaches in this regard have constituted a separate grievance.

[326] The plaintiff having failed to make out that he was disadvantaged unjustifiably in his employment by the Commissioner's treatment of him over those almost 26 months, it has not been possible for him to establish nevertheless that he was constructively dismissed. The conclusion of his unjustified disadvantage grievance relating to illness and rehabilitation essentially dictates the outcome of his

dismissal grievance. Although in very difficult circumstances for him, I have concluded that Mr Ramkissoon's application to disengage, and the Commissioner's acceptance of this application which was supported by evidence of his inability to continue as a police officer, amounted to a resignation and not a dismissal. This grievance must be, and is, dismissed. In these circumstances there is no requirement for the Commissioner to justify such a dismissal. Even if the plaintiff had established a constructive dismissal of him by the Commissioner, the justification I have found for his treatment by his employer over his period of illness would probably also have justified a constructive dismissal of him.

12 Remedies

Reinstatement

[327] Before considering the merits of Mr Ramkissoon's claim to reinstatement, the particular circumstances of this case throw up a legal barrier to this remedy. Mr Ramkissoon has succeeded in his Opotiki non-appointment disadvantage grievance. He was unjustifiably disadvantaged by the Commissioner in both not being appointed to the Opotiki station sergeant position and by the Commissioner's subsequent failure to conduct a fair and therefore lawful review of that appointment (and opportunity for the relevant promotion). Mr Ramkissoon was also disadvantaged unjustifiably by the Commissioner's failure to offer him a remedy for his non-appointment personal grievance as Mr Annan directed.

[328] There is case law on whether reinstatement to a former role is available to a 'disadvantage grievant' such as Mr Ramkissoon in these circumstances. Ironically, the case in which this issue was determined was also one of a police officer, *Creedy v Commissioner of Police.*[30]

[329] The only difference between the two cases, and which is immaterial in my view, is that whilst Mr Creedy was entitled in law to bring an unjustified disadvantage grievance, he was out of time to bring an unjustified constructive

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30 *Creedy*, above n 7.

dismissal grievance by operation of law. Mr Ramkissoon's dismissal grievance has not been upheld on its merits.

[330] The Court examined this issue at [8]-[9] of its *Creedy* judgment materially as follows:

> [8] Reinstatement is a remedy available to an employee who has been disadvantaged unjustifiably in employment. It is considered and ordered more commonly where an employee has been dismissed from employment unjustifiably, but is not limited to that sort of personal grievance. Any order for reinstatement must be practicable. What reinstatement means in the case of an unjustified disadvantage grievance is not the same as its meaning as a remedy for unjustified dismissal. In the latter situation, an order for reinstatement revives the previously severed employment relationship between employer and employee by requiring that relationship to be resumed with the employee continuing to be employed in the same position, or one no less advantageous, to that held before dismissal.
>
> [9] That is not, however, the position where reinstatement is a remedy for unjustified disadvantage. In many, perhaps most, cases of this type of grievance, an employee may be disadvantaged unjustifiably in employment but the employment relationship continues. The Authority or the Court may find that there was an unjustified disadvantage in that continuing employment for which the remedy should be reinstatement. In these circumstances reinstatement is a remedy to redress the disadvantage and to put the ongoing employment back on the same footing as it was before the disadvantage occurred. An example might include a unilateral demotion of an employee by an employer involving loss of responsibility, loss of status and loss of income. If this is found to have been unjustified, an order for reinstatement will have the effect of re-placing the employee in the position and employment circumstances as they were before the disadvantage occurred. In other circumstances an employee may complain of an unjustified disadvantage in employment but subsequently resign in circumstances in which there can be no claim to an unjustified dismissal, whether constructive or not. That is Mr Creedy's position in this case. In such cases any order for reinstatement cannot include the re-placement of the employee in the previous employment relationship with the employer that was ended by resignation or other circumstance except unjustified dismissal.

[331] The Court found that the reinstatement of the then former police officer (Mr Creedy) some years after his disengagement was not available as a remedy for an unjustified disadvantage grievance which occurred in the course of that employment. That is, in effect, the same position as Mr Ramkissoon's.

[332] Because I have concluded that Mr Ramkissoon was not dismissed constructively and unjustifiably by the plaintiff and because reinstatement is not an

available remedy for the non-appointment disadvantage grievance, there cannot now be an order for Mr Ramkissoon's reinstatement.

[333] I should add that even if the plaintiff might otherwise have qualified for consideration of the remedy, I entertained substantial doubts about its practicability and/or reasonableness in all the circumstances. Whilst it may have been possible for Mr Ramkissoon to have been reinstated as a police officer elsewhere in New Zealand, the forward-looking test under s 125 of the Act requires the Court to consider carefully whether that remedy will not only be advantageous to a grievant but will not be significantly disadvantageous to the employer and other affected people including other police staff.

[334] As Mr Child for the Commissioner summarised in concluding his cross-examination of Mr Ramkissoon, the plaintiff had been trenchantly critical of a large number of managerial police personnel. Some, although not all, are still on the job in the region and in several instances may now hold more senior ranks. I agree with Mr Child that some of that criticism by Mr Ramkissoon was intemperate and unwarranted. Although no doubt heart-felt by him, it is surprising that much of it was put forward in evidence in the extreme form it was. There is an inherent tension in all cases, no less in this, between damning and sometimes hyperbolic criticism of those perceived to be responsible for the claimed personal grievance and, at the same time, asserting that there should be reinstatement with, and closely amongst, those criticised, and that this will work harmoniously. That is not to say that Mr Ramkissoon's challenge to his non-appointment and his treatment in the appointment review process was inappropriate. It clearly was justified as this judgment confirms. On its own, his approach to that part of his case would not have precluded a 'reinstatement' which had the effect of appointing him to the Opotiki station sergeant's role. But it is the effect of events after July 2009 which means that remedies for his non-appointment grievance cannot be considered in isolation.

[335] I would not have had sufficient confidence, based on the evidence, of Mr Ramkissoon's ability to be reinstated as a police officer to have made such an order even if it had been available to him.

[336] I turn now to the other remedies claimed for the plaintiff's established grievance. Other than extensive evidence in support of his claims to compensation under s 123(1)(c)(i) of the Employment Relations Act and about reinstatement, the plaintiff's case did not address adequately the other monetary remedies claimed by him. There was, for example, little evidence of his remuneration losses offset against other employment or remunerative work undertaken by him. I must do the best I can on this basis and because the plaintiff clearly deserves remedies for the wrongs perpetrated against him.

Compensation

[337] The statutory minimum for lost remuneration compensation to be provided by the Court is the lesser of the plaintiff's lost remuneration or three months' ordinary time remuneration. That amount as compensation for the Opotiki non-appointment/review grievance should be calculated from the date the grievance arose, that is the date upon which the defendant confirmed the cancellation of the Opotiki appointment following the review process. Offset against that sum would have to be the amount of any remuneration earned by Mr Ramkissoon during the following period, which will be a factor in this case. That is because the plaintiff continued to be employed, and was paid for sick leave, during that period. Any difference between notional and actual employment loss compensation will reflect the salary and allowance differences between a senior constable based at Whakatane undertaking GDB duties, and the salary and allowances that Mr Ramkissoon would have received had he taken up the role of station sergeant at Opotiki. That is because of my conclusion that the plaintiff should have been appointed to Opotiki and would have been, had his grievance not arisen or had been settled.

[338] The intent of this remedy for lost remuneration is to reflect Mr Ramkissoon's loss of remuneration as a result of his non-appointment to Opotiki as station sergeant with effect from 1 July 2009. That compensation cannot, however, be open-ended and I consider that the appropriate end point for its calculation is the date on which the plaintiff disengaged from the Police, 22 August 2011.

[339] Mr Ramkissoon is also entitled to interest at the rate of five per cent per annum on these remuneration arrears. That, too, is a complicated exercise because of the existence of regular pay cycles which, for the purpose of this judgment, I have assumed to be monthly. So the parties will need to calculate each month's shortfall between 1 July 2009 and 22 August 2011 for the purpose of an interest calculation on each pay cycle's pay.

[340] Leave will, therefore, be reserved to either party to apply to the Court to determine exact amounts of remuneration loss compensation if these cannot be agreed.

[341] Turning to compensation for non-economic loss under s 123(1)(c)(i) of the Act, there is substantial evidence of very significant negative consequences incurred by Mr Ramkissoon as a result of the unjustified action of the Commissioner. Those were, first, in not appointing the plaintiff to Opotiki, and then confirming his refusal to appoint him following a significantly flawed appointment review process. The plaintiff became aware distressingly of that review decision, and how it was reached, whilst he was still employed. I agree with Mr Brosnahan's submission that it is untenable to submit, as the defendant does effectively, that Mr Ramkissoon was overly sensitive to that information and for too long. Nor is it right, as counsel for the defendant submits, that all Mr Ramkissoon really has to complain about is the loss of the expectation of appointment and promotion for a period of one day before he was told that the offer which he had accepted was then cancelled. Given the background to his applying for the Opotiki role which I have summarised earlier in this judgment, it is unsurprising that the plaintiff suffered significantly and for a long period from the consequences of the unjustified disadvantage perpetrated on him.

[342] I have considered whether any remedies, and particularly compensation under s 123(1)(c)(i) should be reduced for contributory fault under s 124. In view of the appointment policy set out at [162], it is not correct, as counsel for the defendant points out, that Mr Ramkissoon may have avoided subsequent events by having provided more information about his qualifications when he applied for the Opotiki role. He fell within the criteria for appointment even on the evidence of qualifications he adduced. I consider that in all the circumstances, any remedy

reduction would be so miniscule or non-existent that, as a matter of overall justice and equity, it is inappropriate.

[343] The proven consequences of the plaintiff's mistreatment by the defendant in the appointment and review processes mean that compensation should be real, proportionate but not over-generous. Against that, the serious and long-term consequences to Mr Ramkissoon of that disadvantage and unjustified treatment warrants a realistic award, not as punishment for what were the egregious breaches of that policy but to address, to the extent that money can, the significantly long-lasting effects on him.

[344] In arriving at a figure to settle this grievance I have taken account of its unique circumstances; of other awards generally made by the Court; and the guidance provided by the Court of Appeal to making these awards in such judgments as *Commissioner of Police v Hawkins*,[31] approving this Court's statements in *Simpsons Farms Ltd v Aberhart*[32] (departing from the restrictive approach that the Court of Appeal had adopted previously in *NCR (NZ) Corp Ltd v Blowes*);[33] and the Court of Appeal's remarks in *Grace Team Accounting Ltd v Brake.*[34]

[345] Accordingly, in respect of the Opotiki non-appointment grievance, the plaintiff is entitled to an award of compensation in the sum of $30,000 under s 123(1)(c)(i) of the Act.

13 Costs

[346] The parties have enjoyed mixed success in this proceeding. At their request, and to allow counsel an opportunity to negotiate and hopefully agree on costs, this final element of the case is reserved. If any application is to be made, this should be

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31 *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZILR 381 at [63]-[77].
32 *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at [76]-[79].
33 *NCR (NZ) Ltd v Blowes* [2005] ERNZ 932 (CA).
34 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2014] ERNZ 129 at [113].

by memorandum filed and served within two months of the date of this judgment, with any replies likewise filed and served within one month thereafter.

GL Colgan
Chief Judge

Judgment signed at 3 pm on 7 July 2017