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**IN THE HUMAN RIGHTS REVIEW TRIBUNAL [2023] NZHRRT 19**

**I TE TARAIPUNARA MANA TANGATA**

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	<b>Reference No. HRRT 003/2019</b>
<b>UNDER</b>	<b>THE HUMAN RIGHTS ACT 1993</b>
<b>BETWEEN</b>	<b>MALCOLM KING</b>
	<b>PLAINTIFF</b>
<b>AND</b>	<b>COMMISSIONER OF POLICE</b>
	<b>DEFENDANT</b>

**AT AUCKLAND**

**BEFORE:**

**Mr RPG Haines ONZM QC, Chairperson**

**Ms J Foster, Deputy Chairperson**

**Ms PJ Davies, Member**

**Ms S Stewart, Member**

**REPRESENTATION:**

**Mr SRG Judd and Mr J Suyker for plaintiff**

**Ms G Taylor for defendant**

**DATE OF HEARING: 31 August, 1, 2, 3 and 4 September 2020**

**DATE OF DECISION: 4 August 2023**

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**DECISION OF TRIBUNAL<sup>1</sup>**

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**[1]** Mr King has severe claustrophobia and has done for over 50 years following an awful prank being played on him by his workmates when he was a teenage apprentice panel beater that involved him being shut in a car boot and included him being sprayed with a fire extinguisher while he was in the boot. Since this incident Mr King has suffered panic attacks and anxiety in small spaces where he cannot see airflow and he has

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<sup>1</sup> [This decision is to be cited as *King v Commissioner of Police* [2023] NZHRRT 19.]

adjusted his life to try to avoid these situations.

**[2]** In early 2013 Mr King's partner ended their long-term relationship. Following this at various times in 2013 and 2015 Mr King was arrested for trespass and breaches of a protection order and detained in Police custody. This proceeding concerns ten separate occasions, all in 2013 except one, when Mr King was in Police custody and because he could not see airflow suffered severe claustrophobia symptoms. Mr King claims Police discriminated against him on these occasions by failing to reasonably accommodate his disability, claustrophobia.

**[3]** The Tribunal acknowledges and apologises for the lengthy delay in issuing this decision.

### **THE CLAIM**

**[4]** Mr King claims Police discriminated against him in breach of Part 1A of Human Rights Act 1993 (HRA) by failing to reasonably accommodate his disability (severe claustrophobia) on the following ten occasions when he suffered severe claustrophobia symptoms because he could not see airflow:

**[4.1]** On 10 March 2013 when he was put in a holding cell at Manukau Police Station.

**[4.2]** On 10 March 2013 when he was put in the dayroom cell at Manukau Police Station.

**[4.3]** On 11 March 2013 when he was transported in a police van from Manukau Police Station to Papakura District Court.

**[4.4]** On 11 March 2013 when he was put in a cell at Papakura District Court.

**[4.5]** On 6 May 2013 when he was put in a holding cell at Manukau Police Station.

**[4.6]** On 9 July 2013 when he was put in a cell at Manukau Police Station.

**[4.7]** On 9 July 2013 when he was put in a cell at Manukau District Court.

**[4.8]** On 9 July 2013 when Police put him in a prison van to be transported from Manukau Police Station to Mount Eden Correction Facility.

**[4.9]** On 10 July 2013 when he was put in a cell at Manukau District Court.

**[4.10]** On 19 March 2015 when he was transported in a police van from Manukau Police Station to Papakura District Court.

**[5]** Police do not deny Mr King suffered claustrophobic symptoms on the above ten occasions, but they deny their treatment of Mr King on these occasions amounts to either direct or indirect discrimination, on the grounds of his disability, in breach of the HRA, Part 1A.

**[6]** As emphasised by Police in this case Mr King does not allege Police's facilities, policies or processes are systemically discriminatory to people with claustrophobia. Mr King expressly acknowledged that Police did accommodate his claustrophobia on many occasions in practical ways that worked, and he says this shows Police

discriminated against him by failing to accommodate his claustrophobia on the above ten occasions.

## LEGAL FRAMEWORK

**[7]** The HRA, Part 1A prohibits discrimination by the legislative, executive, or judicial branches of the Government or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law; see s 3 of the New Zealand Bill of Rights Act 1990 (NZBORA).

**[8]** Section 20L of the HRA, provides when acts or omissions of those persons or bodies are in breach of Part 1A as follows:

### **20L Acts or omissions in breach of this Part**

- (1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.
- (2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission—
  - (a) limits the right to freedom from discrimination affirmed by that section; and
  - (b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.
- (3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment

**[9]** Section 19 of NZBORA provides that everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA.

**[10]** The prohibited grounds of discrimination are set out in HRA, s 21 and include disability as defined in HRA, s 21(h). Claustrophobia is undisputedly a disability for the purposes of the HRA.

**[11]** What amounts to discrimination contrary to NZBORA, s 19 is not defined in the HRA but has been judicially determined. That test is that set out by the Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 (*Atkinson*) at [55], [109] and [135]–[136]:

**[11.1]** First, there must be differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination.

**[11.2]** Second, there must be a discriminatory impact (meaning that the differential treatment imposes a material disadvantage on the person or group differentiated against).

**[12]** Discrimination contrary to NZBORA, s19 can arise directly as a result of treatment or effects. Discrimination can also arise indirectly when neutral laws, rules, and practices, that apply to everyone, have the effect of treating people differently based on a prohibited ground.

[13] There must be a causative link between the treatment or effects complained of and the prohibited ground. Discrimination is not about intent and a plaintiff does not need to prove the defendant intended to engage in prohibited discrimination. While the differential treatment or effects must be “on the basis” of the prohibited ground it does not need to be the sole reason or even the predominant reason for the treatment or effect. The prohibited ground need only be a material factor. See *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49]–[50] and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [53] to [64].

[14] To help determine whether there is differential treatment or effects as between persons or groups in analogous situations on the basis of a prohibited ground of discrimination comparators can be useful. Comparators are those who are in analogous or comparable circumstances apart from the prohibited ground of discrimination. If all else is the same, it is easier to infer that the prohibited ground of discrimination is a material factor in the difference in treatment or effects. See *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51]; *Attorney-General v IDEA Services Ltd (in Statutory Management)* [2012] NZHC 3229, [2013] 2 NZLR 512 (*IDEA Services*) at [139].

[15] As is provided for in HRA, s 20L, once a plaintiff has established that an act or omission has limited the right to freedom from discrimination affirmed by NZBORA, s 19, the issue then becomes whether the defendant can prove that limit on the freedom from discrimination is a justified limit under NZBORA, s 5.

[16] Section 5 of NZBORA provides that, subject to s 4 of that Act, the NZBORA rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[17] If the limit on NZBORA, s 19 is not a justified limit under NZBORA, s 5 then the act or omission will be inconsistent with NZBORA, s 19 and will be discrimination in breach of HRA, Part 1A.

## ISSUES

[18] To determine whether Police have discriminated against Mr King in breach of HRA, Part 1A on the grounds of his disability (severe claustrophobia) the Tribunal must determine the following issues:

[18.1] Whether Police limited Mr King’s right to be free from disability discrimination affirmed by NZBORA, s 19.

[18.2] And, if so, whether the limit on Mr King’s right to be free from disability discrimination is justified under NZBORA, s 5.

[19] If Police have discriminated against Mr King in breach of HRA, Part 1A, the Tribunal must determine what remedy he should be granted.

### **DID POLICE LIMIT MR KING’S RIGHT TO BE FREE FROM DISABILITY DISCRIMINATION**

[20] At all times when Mr King was in custody, it is undisputed that Police policies and procedures provided that all persons in custody, are to be kept safe, secure, and cared for, including that special care is given to those with physical or mental health needs. Given the wide range of needs and vulnerabilities of individuals in custody, the policies

provided Police discretion as to how they respond in the circumstances to the specific needs of a person in custody. Although the policies did not expressly address how persons with claustrophobia were to be treated there is no dispute Police should take steps to alleviate a person's claustrophobia symptoms if they could do so and it was safe to do so.

**[21]** It is undisputed that Police were obliged under their policies and procedures to take special care of Mr King's physical and mental health needs while in custody.

**[22]** Mr King claims Police limited his right to be free from disability discrimination on ten occasions by failing to reasonably accommodate his claustrophobia. The essence of his complaint is that on some occasions while he was detained, Police did not take account of his claustrophobia related needs and therefore failed to take any or sufficient steps to alleviate his claustrophobia-related symptoms. Mr King describes the alleged omissions of Police as a failure to reasonably accommodate his claustrophobia.

**[23]** Mr King submitted his case could be approached as one involving either direct or indirect disability discrimination. He also submitted that a different approach is required to be taken to cases (such as this one) under HRA, Part 1A alleging disability discrimination compared to those cases involving discrimination on other prohibited grounds. He submitted this was because persons or bodies to which Part 1A applies are obliged by the United Nations Convention on the Rights of Persons with Disabilities to provide reasonable accommodation for people with disability.

**[24]** Police submitted that the language of "reasonable accommodation" complicates matters unnecessarily in this case. We agree. This is because the policies and procedures that apply to people in Police custody already require an individualised approach to be taken, and for people's physical and mental health needs (including those that arise from a disability as defined in the HRA) to be accommodated where it is reasonable to do so.

**[25]** Accordingly, the Tribunal does not need in this case to consider the question of whether a different approach is required under Part 1A in cases involving disability discrimination. That question is best left for a case where the facts are such that the issue of whether there is a duty on persons or bodies to which Part 1A applies to provide reasonable accommodation for people with disability must be determined.

**[26]** The question in this case is whether Police's failure to meet their obligations to Mr King is either directly or indirectly discriminatory.

**[27]** Police accepted that direct discrimination could arise where a disabled person in custody receives less favourable treatment than non-disabled persons. Police also accepted that such less favourable treatment can occur by omission, such as through a failure to provide medical care to a certain group in custody.

**[28]** Police, however, submitted the case brought by Mr King was properly characterised as one of indirect discrimination. We do not agree.

**[29]** Indirect discrimination can arise when neutral laws, policies, and practices which apply to everyone have the effect of treating a group differently based on a prohibited ground of discrimination. This is not such a case. This case does not involve a neutral policy and it is not alleged that the policy is at fault or underinclusive, such as in the case of *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624 that Police submit is an indirect discrimination case analogous to that brought by Mr King.

**[30]** In *Eldridge* the Supreme Court of Canada found the failure by British Columbia to fund sign language interpreters for deaf people when receiving medical services was indirectly discriminatory. The Court distinguished the concept of direct discrimination and adverse effects discrimination. It noted adverse effects discrimination was especially relevant in the case of disability as governments rarely singled out disabled people for discriminatory treatment, and further that it was often the failure to take into account the adverse effects of generally applicable laws that amounted to discrimination, at [64]–[65]. The Court agreed with the claimants that sign language interpretation services were necessary for effective communication and without an ability to communicate effectively with their doctor deaf people would not receive the same standard of health care. That difference was held to be discriminatory.

**[31]** This case is an omission case, but it is not, analogous to *Eldridge*. That case involved a group indirect effect on the deaf community and whether there was an obligation to fund so that the failure to do so was discriminatory. This case is simply about one individual where there is already an accepted obligation in place and the question is whether there has been a failure to meet that obligation.

**[32]** In particular, the issue in this case is not about the failure to have in place a policy to ensure disabled people do not receive less favourable treatment in custody. That policy is already in place. Further, it is not a neutral one, but a targeted one that requires special care to particular people on an individual basis, including those like Mr King, who from time to time require special care to ensure they are not treated less favourably while in custody. The failure at issue in this case is not an indirect one. Rather, to the extent that discrimination arises, it arises directly from the failure of Police to apply their policy to Mr King.

**[33]** Accordingly, to determine whether Police limited Mr King's right to be free from disability discrimination the first question that needs to be asked is whether Police failed to apply its policy to Mr King that obliged Police to take account of his claustrophobia needs.

**[34]** If it is found that Police did fail to take account of Mr King's claustrophobia needs, that failure will be a limit on his right to be free from disability discrimination as Mr King will be able to establish both limbs of the s 19 test for discrimination are met.

**[35]** It is undisputed that claustrophobia is a disability for the purposes of the HRA. If Police failed to take account of Mr King's claustrophobia needs, it follows as a matter of logic that Police will have treated him less favourably than those without claustrophobia who do not need special care. It can be readily inferred that claustrophobia is the reason for, or at least a material factor in the differential (less favourable) treatment. Accordingly, the first limb of the s 19 test is met as the failure amounts to differential treatment as between himself and persons in analogous or comparable situations on the basis of his disability (claustrophobia).

**[36]** The second limb of the s 19 test requires Mr King to establish the discriminatory treatment had a discriminatory impact on him, that is viewed in context it imposes a material disadvantage on him. In this case there is no dispute that if Police have failed to take account of his claustrophobia needs that the impact on him was a material disadvantage. Police accept Mr King experienced acute psychological and physical symptoms on each of the ten occasions that form the basis of his claim.

**[37]** It is for Mr King to prove that Police limited his right to be free from disability discrimination on each of the ten occasions he alleges he was discriminated against. If

he can prove that on any of these occasions Police failed to take account of his claustrophobia needs, he will for the reasons set out above have proved that Police limited his right to be free from disability discrimination.

[38] The Tribunal will now turn to consider whether on each of the ten occasions Mr King can prove Police failed to take account of his claustrophobia needs.

#### **Occasion one: being put in a holding cell on 10 March 2013**

[39] On arrival at Manukau Police Station on 10 March 2013, the arresting officers put Mr King in one of the holding cells. This was so that they could brief the custody sergeant on the reason for his arrest and was in accordance with the standard procedure. Mr King said he told the arresting officers he could not go into the holding cell because he had claustrophobia and the officers said he would not be in there long, so he accepted that and went in.

[40] The holding cell had no visible airflow, the cell had a food hatch in the door, but it was not open. After a few minutes in the cell Mr King started to have a panic attack and suffer other claustrophobia symptoms so he banged on the door and was taken out for processing.

[41] The arresting officers were aware Mr King had claustrophobia as he told them when they were putting him in the cell. The officers, however, could not have known that his claustrophobia needs were such that it was not appropriate to put him in the holding cell (that had no visible airflow) even for a short time as it was Mr King's own evidence that he accepted that he would not be in the cell long and went in without further objection.

[42] Given this and that Mr King was removed from the cell after a few minutes because he banged on the door Police cannot be found on this occasion to have failed to take account of Mr King's claustrophobia needs.

[43] Mr King has not proved that the alleged discriminatory omission occurred on this occasion. It follows that he cannot establish that Police limited his right to be free from disability discrimination on this occasion.

#### **Occasion two: being put in the dayroom cell on 10 March 2013**

[44] When Mr King was processed a formal assessment and evaluation of his condition was done. Police policies and procedures require Police to individually assess every person in custody to identify their health and safety risks so their custody can be managed appropriately to ensure theirs and others safety and wellbeing.

[45] Mr King's assessment identified his risk category as "in need of care and frequent monitoring" (as he was assessed as being in need of care he is treated as an "at risk person"). The evaluation report noted he had "superficial cuts to his wrists...which he did earlier on today, saying he did this to get attention from his ex-partner" and was "anxious...claustrophobic ... breathing quite rapidly".

[46] Mr King said after processing he was taken to a cell that looked the same as first one and he objected telling Police "I need to see air" so they put him in a bigger cell known as the dayroom cell.

[47] The dayroom cell was large with some of the walls being glass so persons could be observed but there was no visible air flow. Mr King began panicking, he was

hyperventilating and sweating. Mr King stood by the cell window that is clearly visible to staff at the counter and gestured for help but was ignored. Mr King began convulsing. He then tied his t-shirt around his neck in a kind of knot holding it up like he was choking himself and continued gesturing for help. Police then took Mr King out of the cell.

[48] Mr King was taken to a changing room with the door left open and he began to calm down. He stayed in that room with a Police Officer until he saw the doctor. The doctor gave Mr King medication to calm down and asked him about his claustrophobia. At the doctor's suggestion Police then put Mr King in a cell with the food hatch in the cell door left open so he could see air flow and he was alright.

[49] Police admit that after Mr King saw the doctor, they were aware of his claustrophobia and that he needed special care in custody because of this. Police however were aware of Mr King's claustrophobia and his need to see air before he was put in the dayroom cell. This evaluation report noted he was "claustrophobic" and Mr King was specifically put into the bigger, dayroom cell because he had objected to being put in a smaller cell because of his need to see air.

[50] Police were accordingly aware of Mr King's claustrophobia needs before he was put in the dayroom. The Police cannot however be found to have failed to take account of Mr King's claustrophobia needs by putting him in the dayroom cell as they were trying to meet his claustrophobia needs by putting him in that bigger cell.

[51] The Tribunal is however satisfied that Police failed to take account of Mr King's claustrophobia needs by leaving him in the dayroom cell after he began to suffer claustrophobia symptoms. From this point the Police could see that being in the dayroom cell did not meet Mr King's claustrophobia needs, yet his gestures for help were ignored and he had to draw attention to his predicament by feigning suicide. Police's own witness Inspector Brand said she would expect that upon the Police becoming aware of a condition they would ask the person in detention how the condition was to be managed and that it is expected Police would quickly respond to any concern from prisoners.

[52] Mr King has proved that Police failed to take account of his claustrophobia needs on this occasion. Accordingly for the reasons set out above at [34]–[37] Mr King has established that Police limited his right to be free from disability discrimination by leaving him in the dayroom cell at Manukau Police Station on 10 March 2013 after he began to suffer claustrophobia symptoms.

### **Occasion three: being transported in police van on 11 March 2013**

[53] On the morning of 11 March 2013 Mr King was put in a Police van at Manukau Police Station and taken to Papakura District Court. Mr King said that he told the officer putting him in the van he was claustrophobic and that he could not go in there and officer's response was that he had been given a window seat, so it was clear to Mr King he had to get in. The window was in the rear door of the van, and it was frosted so you could not see through it. Mr King began hyperventilating after a few minutes in the van and he was scared, anxious and sweating. Mr King was still hyperventilating as he got out of the van, and he said one of the other prisoners told the officers to look after him as "he's freaking out".

[54] Police were aware by this point that Mr King had claustrophobia and he needed special care in custody because of this to ensure his safety and wellbeing. Police's own evidence was that it was expected that officers would discuss with each other Mr King's condition and the ways in which it would be managed. Police policies expressly require



officers to pass on information that might be relevant to care and safety to whoever takes over responsibility for the person's custody. Further, Mr King told the officer putting him in the van that he (Mr King) was claustrophobic.

[55] Police acknowledged they could subject to resourcing possibly have transported Mr King by Police car rather than in a transport van. No evidence was given by Police that on this occasion that would not be possible due to resourcing or any other reason.

[56] Mr King has proved Police failed to take account of his claustrophobia needs on this occasion. Accordingly for the reasons set out above at [34]–[37] Mr King has accordingly established that Police limited his right to be free from disability discrimination by transporting him in a police van on 11 March 2013 from Manukau Police Station to Papakura District Court.

#### **Occasion four: put in a cell with no vent at Papakura District Court on 11 March 2013**

[57] Once at the Papakura District Court on 11 March 2013 Mr King was put in a small cell that had no vent or food hatch in the door. Prior to being put in the cell, Mr King had told the officer he was claustrophobic.

[58] Once in the cell Mr King began hyperventilating and sweating, so he banged on the door and pleaded with the officer that came to put him in a cell with a vent. The officers responded by giving Mr King a paper bag to breathe into and when he said that was not going to help as he needed to see air, the officer told him to “deal with it” and closed the cell door.

[59] Mr King was sweating and hyperventilating to such an extent he was terrified. He then deliberately knocked himself out by hitting his head on the cell wall in order to get out of the situation and overcome his fear of being in the cell. After an unknown amount of time Mr King was let out of the cell and eventually released from custody that day.

[60] Police were well aware by this point that Mr King had claustrophobia and needed to see airflow when in a cell and this should have been communicated to the officers at court. Police acknowledged there were other ways they could have managed Mr King's custody that meet his claustrophobia needs while waiting for his court appearance. Such as holding him in a larger cell (Mr King's own evidence was that being held in a large cell had worked for him on one occasion when he was held in District Court cells), having the cell door open while he was under constant observation or holding him at the Police Station rather than court cells pending his Court appearance. No evidence was brought by Police that on this occasion they would have been unable to provide any of these alternative options to locking Mr King in the small cell that had no vent.

[61] Mr King has proved Police failed to take account of his claustrophobia needs on this occasion. Accordingly for the reasons set out above at [34]–[37] Mr King has established that Police limited his right to be free from disability discrimination by putting him in a cell with no vent at Papakura District Court on 11 March 2013.

#### **Occasion five: put in a holding cell with a closed food hatch at Manukau Police Station on 6 May 2013**

[62] Mr King was arrested on 6 May 2013. Unbeknown to Police at the time of his arrest he hid a razor blade in his clothes as he thought cutting his wrists would be a way to get attention so he would be let out of a confined space. On arrival at Manukau Police Station the arresting officers put Mr King in a holding cell. He told them he had acute

claustrophobia and needed to have the food hatch open, but the officers did not open the food hatch and closed the doors saying that they would only be a couple of minutes.

[63] Once in the holding cell Mr King started hyperventilating and sweating and tried to get attention by banging on the door and gesturing that he was having trouble breathing. The officer at the counter observed him but waved him off. Mr King became more distressed, and to get the officers attention he cut both his wrists with the razor blade. After Mr King held his bleeding wrists up to the window he was then immediately taken out of the cell.

[64] Police submitted that the arresting officers could not have been aware of Mr King's claustrophobia needs as he had not yet been processed and Police had not yet had an opportunity to conduct a check on the information held about Mr King on the Police National Intelligence Application ("NIA") electronic system.

[65] There was NIA alert regarding Mr King's claustrophobia that had been entered on the system on 27 March 2013. That alert was entered following Mr King making a complaint to Police, shortly after he was released from custody on 11 March 2013, about how he had been treated while in custody and their failure to recognise his claustrophobia. That NIA "Information Alert – Mental Health, Safety" stated:

KING suffers chronic Claustrophobia. If in an enclosed space, he needs to feel the flow of air through any form of open vent. This will assist when dealing with KING who otherwise will become agitated and sweat profusely as evident when dealt with by IWW453 on 25/03/13. KING will then remain co-operative and compliant.

[66] While the arresting officers may not have had an opportunity to see the NIA alert, they were aware that Mr King had claustrophobia, that it was acute and that he needed the food hatch open. Police brought no evidence to show why on this occasion Mr King's request for the food hatch to be opened was not responded to by the officers at least discussing the request with him. Nor did Police bring any evidence as to why Mr King was not immediately attended to once he began to suffer claustrophobia symptoms and banged on the door. As already has been noted Inspector Brand's evidence was that it is expected Police would quickly respond to any concern from prisoners, including banging on a door or talking on an intercom.

[67] Given these circumstances the Tribunal is satisfied that Police failed to take account of his claustrophobia needs by putting him in the holding cell and not immediately attending to him when he began to suffer claustrophobia symptoms.

[68] Mr King has proved that on this occasion Police failed to take account of his claustrophobia. Accordingly for the reasons set out above at [34]–[37] Mr King has established that Police limited his right to be free from disability discrimination by putting him in a holding cell at Manukau Police Station on 6 May 2013 and not immediately attending to him when he began to suffer claustrophobia symptoms.

#### **Occasion six: being put in a cell with the food hatch closed at Manukau Police Station on 9 July 2013**

[69] Mr King was arrested on 9 July 2013 and taken to the Manukau Police Station. The previous week Mr King had been hospitalised following an attempted suicide. At the Police station he was assessed as being in need of care and frequent monitoring, was put in a suicide gown and placed in a cell for at risk persons.

[70] Mr King told the officer putting him in the cell he needed the food hatch open

because he was claustrophobic, but she closed the cell door without opening the food hatch. Mr King immediately pressed the cell buzzer to gain staff's attention, but nobody responded. He was hyperventilating and sweating and started to panic. He tried to calm himself down by chewing wet toilet paper and then got down on his hands and knees to suck air through the gap at the bottom of the door. An officer then came and opened the food hatch, and he calmed down.

**[71]** The Tribunal is satisfied Police failed to take account of his claustrophobia needs by putting him in the cell with the food hatch closed for the following reasons.

**[72]** Police were aware of Mr King's claustrophobia needs as the NIA alert would have been checked when he was formally assessed. In addition, Mr King specifically advised the officer placing him in the cell that he needed the hatch open because he was claustrophobic. No reason was given by Police as to why the food hatch was not opened when Mr King was placed in the cell or why nobody attended to Mr King when he pressed the cell buzzer. As already noted, Police's own evidence was that it was expected Police would respond quickly to any concern from prisoners.

**[73]** Mr King has proved that on this occasion Police failed to take account of his claustrophobia. Accordingly for the reasons set out above at [34]–[37] Mr King has established that Police limited his right to be free from disability discrimination by putting him in a cell without opening the food hatch at Manukau Police Station on 9 July 2013 and not immediately responding to him when he pressed the cell buzzer.

#### **Occasion seven: being put in a cell with no vent at Manukau District Court on 9 July 2013**

**[74]** In the afternoon of 9 July 2013, Mr King was taken to the Manukau District Court. At the Court he was put in small cell that had no vent or windows. Mr King told the officer that he was claustrophobic, but the officer did not respond and locked him in. Mr King started to suffer claustrophobia symptoms and he banged on the door. When nobody came, he broke off the zip on the overalls that he was wearing and cut one of his wrists deeply so he could get out of the situation. Mr King was then immediately taken out of the cell.

**[75]** Police knew from the NIA alert that because of Mr King's claustrophobia he needed to feel the flow of air. Police policies required this information to be passed on to the officers at Court as it was relevant to his care and safety. Police provided no evidence it was not possible on this occasion for them to use one of the acknowledged alternatives to locking Mr King in the cell (as noted above at [60]) on this occasion. Nor was any evidence provided as to why Police did not respond when Mr King banged on the door.

**[76]** Mr King has proved that on this occasion Police failed to take account of his claustrophobia. Accordingly for the reasons set out above at [34]–[37] Mr King has established that Police limited his right to be free from disability discrimination by putting him in a cell with no vent at Manukau District Court on 9 July 2013 and failing to immediately respond when he banged on the door.

#### **Occasion eight: being put in a prison transport van on 9 July 2013**

**[77]** On the evening of 9 July 2013 Police took Mr King back to the Manukau District Court and put him in a prison transport van as he was to spend the night in Corrections custody at Mount Eden Corrections Facility. The van had small cages that each held a single prisoner and that had no opening window or vent. Mr King told the police officer

putting him in the van that he was claustrophobic and asked to put in the forward-facing cabin seat in handcuffs, but the police officer refused his request. Within a minute of being in the van Mr King started panicking and hyperventilating. During the trip Mr King eventually began convulsing and passed out.

[78] Mr King was not in Police custody when he was being transported in the van, but he was in Police custody prior to being transported and it was Police who put him in the van. Police were well aware by this point that Mr King needed for his own safety to feel air flow in a confined space because of his claustrophobia. That very afternoon because of his claustrophobia Mr King had cut his wrist in order to get out of a cell. Police policies required them to advise Corrections (who were taking over responsibility for Mr King) of his specific care and safety needs. There was no evidence provided by Police to show that this occurred or that the Police Officer putting Mr King in the van had a reason for not advising Corrections of Mr King's request. Mr King's undisputed evidence was that none of the Corrections officers he dealt with knew he was claustrophobic until he told them. Further Mr King's evidence was that when he travelled back from the prison the next morning the Corrections officers allowed him to sit in the cage handcuffed with the door opened and he was alright because he could see air.

[79] The Tribunal is satisfied that Police failed to take account of Mr King's claustrophobia needs by putting him in the prison transport van without advising Corrections of his claustrophobia and his request to travel in the front seat.

[80] Mr King has proved that on this occasion Police failed to take account of his claustrophobia. Accordingly for the reasons set out above at [34]–[37] Mr King has established that on this occasion Police limited his right to be free from disability discrimination by putting him in the prison transport van on 9 July 2013 without advising Corrections of his claustrophobia and his request to travel in the front seat.

#### **Occasion nine: being put in a cell with no vent at Manukau District Court on 10 July 2013**

[81] On 10 July 2013 Mr King was returned to Manukau Police Station. He was then taken by Police to the Manukau District Court, and he was put in a small cell with no vent. Mr King became distressed as he was suffering claustrophobic symptoms and he banged on the door. An officer responded to the banging and when Mr King told him he was claustrophobic the officer left the cell door open and stood nearby. From then onwards Mr King was fine.

[82] Police knew from the NIA alert that because of Mr King's claustrophobia he needed to feel the flow of air. Police policies required this information to be passed on to the officers at Court as it was relevant to his care and safety. Police provided no explanation as to why the cell door could not have been left open initially with the officer standing by or why any other alternative to locking him in the small cell with no vent was not available on this occasion. The Tribunal is satisfied Police on this occasion failed to take account of Mr King's claustrophobia needs by putting him in the cell.

[83] Mr King has proved that on this occasion Police failed to take account of his claustrophobia. Accordingly for the reasons set out above at [34]–[37] Mr King has established that Police limited his right to be free from disability discrimination by putting him in a cell with no vent at Manukau District Court on 10 July 2013.

## **Occasion ten: being transported in a Police van on 19 March 2015**

**[84]** On 19 March 2015, Mr King was transported in a police van from the Manukau Police Station to the Papakura District Court. He told the officer who was putting him in his van that he was claustrophobic and could not go in the van. The officer responded in the same way the officer had when Mr King was put in the police van in March 2013 - he said Mr King could have a window seat and he was put in the van. When being transported Mr King was hyperventilating, sweating, and panicking, but his claustrophobic attack on this occasion was less severe because he had been given medication that morning to calm him.

**[85]** Police knew from the NIA alert that because of Mr King's claustrophobia he needed special care in custody to ensure his safety and wellbeing. Police's own evidence was that it was expected that officers would discuss with each other Mr King's condition and the ways in which it would be managed. Police policies expressly require officers to pass on information that might be relevant to care and safety to whoever takes over responsibility for the person's custody. Further, Mr King told the officer putting him in the van that he was claustrophobic.

**[86]** Police acknowledged they could subject to resourcing possibly have transported Mr King by Police car rather than in a transport van. No evidence was given by Police that on this occasion that would not be possible due to resourcing or any other reason.

**[87]** Accordingly, the Tribunal is also satisfied that on this occasion Police failed to take account of Mr King's claustrophobia needs by transporting him in a police van on 19 March 2015.

**[88]** Mr King has proved that on this occasion Police failed to take account of his claustrophobia. Accordingly for the reasons set out above at [34]–[37] Mr King has established that Police limited his right to be free from disability discrimination by transporting him in a Police van on 19 March 2015 from the Manukau Police Station to the Papakura District Court.

### **Summary**

**[89]** For the reasons given above the Tribunal has found the Police limited Mr King's right to freedom from disability discrimination by failing to take account of his claustrophobia needs on nine occasions as follows:

**[89.1]** Leaving him in the dayroom cell at Manukau Police Station on 10 March 2013 after he began to suffer claustrophobia symptoms.

**[89.2]** Transporting him in a Police van, where he could not see air, on 11 March 2013 from Manukau Police Station to Papakura District Court.

**[89.3]** Putting him in a cell with no vent at Papakura District Court on 11 March 2013.

**[89.4]** Putting him in a holding cell at Manukau Police Station on 6 May 2013 and not immediately attending to him when he began to suffer claustrophobia symptoms.

**[89.5]** Putting him in a cell without opening the food hatch at Manukau Police Station on 9 July 2013 and not immediately responding to him when he pressed the cell buzzer.

**[89.6]** Putting him in a cell with no vent at Manukau District Court on 9 July 2013 and failing to immediately respond when he banged on the door.

**[89.7]** Putting him in the prison transport van, where he could not see air, on 9 July 2013 to be transported from Manukau Police Station to Mount Eden Corrections Facility without advising Corrections of his claustrophobia and his request to travel in the front seat.

**[89.8]** Putting him in a Court cell with no vent and then failing to immediately respond when he banged on the door, at Manukau District Court on 10 July 2013.

**[89.9]** Transporting him in a Police van, where he could not see air, on 19 March 2015 from Manukau Police Station to Papakura District Court.

**[90]** The Tribunal must now consider whether this limit on Mr King's right to freedom from disability discrimination is a justified limit under NZBORA, s5.

### **IS THE LIMIT ON MR KING'S RIGHT TO FREEDOM FROM DISABILITY DISCRIMINATION JUSTIFIED**

**[91]** Police have the onus of establishing that the limit on Mr King's right to freedom from disability discrimination, the failure to take account of his claustrophobia needs on nine occasions (the limiting measure) is a justified limit under NZBORA, s 5.

**[92]** The legal test for justification under NZBORA, s 5 is set out by Tipping J in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] and is applied in discrimination cases, see *Atkinson* at [143]. The *Hansen* test requires the defendant to establish the limiting measure is prescribed by law and that:

**[92.1]** The purpose of the rights limiting measure is sufficiently important to justify curtailing the right to be free from discrimination;

**[92.2]** The measure is rationally connected to its purpose;

**[92.3]** It impairs the right no more than is reasonably necessary to achieve that purpose; and

**[92.4]** The degree of intrusion on the right is proportionate to its purpose.

**[93]** When applying the *Hansen* test all parts of the test must be met to establish the limiting measure at issue is a justified limitation.

**[94]** In this case no issue arises as to whether the limiting measure was prescribed by law as Police were at all times acting under lawful authority when they had Mr King in their custody.

**[95]** Police submitted that in respect of the remainder of the *Hansen* test the Tribunal should consider the following:

**[95.1]** It is an essential part of police functions to detain people in enclosed spaces. They must be able to securely hold and contain people in order to operate.

**[95.2]** They must also transport people safely and securely to court, often in the context of managing several detainees, to fulfil their legal obligation (including s 23(3) of (NZBORA) to be brought as soon as possible before a court or competent tribunal.

**[95.3]** Having generally applicable policies and processes for vulnerable people in police custody is important, as it ensures the consistent, safe treatment of persons in custody. This is particularly so given the large volume of detainees at Manukau Police Station (one of the busiest in the country) and in court cells.

**[95.4]** There are practical limits on what Police can do to alleviate claustrophobia in custody, based on the design of facilities, security, and staffing resources.

**[96]** The validity and the importance of the above matters are not in dispute. This case is however about the individual treatment of Mr King, it is not about whether Police's facilities and processes are systemically discriminatory to people with claustrophobia. As already noted, Mr King expressly acknowledged that on other occasions Police did take account of his claustrophobia needs.

**[97]** The limiting measure that Police must justify is their failure to take account of Mr King's claustrophobia needs on the nine occasions.

**[98]** The first limb of the *Hansen* test requires Police to establish that the purpose of the limiting measure is sufficiently important to justify curtailing Mr King's right to be free from disability discrimination.

**[99]** Police did not show that there was any particular purpose for their failure to take account of Mr King's claustrophobia needs on nine occasions. No evidence was brought to show that the purpose of the failure on any of the nine occasions was safety and to ensure he was securely held. Assuming that was the purpose it is a sufficiently important purpose to justify limiting Mr King's right to be free from disability discrimination to meet the first limb of the test.

**[100]** Leaving aside whether the failure on the nine occasions was rationally connected to that purpose the third and fourth limbs of the test are clearly not met. That is because the evidence shows as discussed above that on each of the nine occasions Police could have taken account of Mr King's claustrophobia needs while still ensuring he was being securely held. Accordingly, the failure to take account of Mr King's claustrophobia needs on the nine occasions could not be shown to be reasonably necessary to achieve the purpose and would not be proportionate.

**[101]** Police have not established that the limit on Mr King's right to be free from disability discrimination under NZBORA, s 19 is justified under NZBORA, s 5.

**[102]** The Tribunal is accordingly satisfied that Police, by failing to take account of his claustrophobia needs on nine occasions (summarised above at [89]) have breached Part 1A of the HRA by discriminating against Mr King because of his disability (claustrophobia).

**[103]** We now turn to assess remedy.

## REMEDY

### Declaration

[104] Mr King seeks a formal declaration under s 92I(3)(a) that Police breached Part 1A of the HRA. On the facts of this case there is nothing that could justify the withholding from Mr King of a formal declaration of the Tribunal finding that Police have breached Part 1A of the HRA by discriminating against him because of his disability (claustrophobia).

### Damages for humiliation, loss of dignity and injury to feelings

[105] Mr King seeks an award of damages under HRA, ss 92I(3)(c) and s 92M(1)(c) of no less than \$50,000 for humiliation, loss of dignity, and injury to feelings (emotional harm).

[106] The general principles relevant to the assessment of these three heads of damages discussed in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 (*Hammond*) at [170] and *Marshall v IDEA Services (HDC)* [2020] NZHRRT 9 at [88]-[92] and [101]-[107]. When assessing the appropriate level of damages for emotional harm the following factors are relevant.

[106.1] There must be a causal connection between the discrimination suffered and the resulting harm.

[106.2] The award of damages is to compensate for humiliation, loss of dignity and injury to feelings, not to punish the defendants. The conduct of the defendant may be a relevant consideration to the extent it exacerbates or mitigates the harm suffered by the aggrieved individual (Mr King).

[106.3] The circumstances of humiliation, loss of dignity and injury to feelings are fact specific and turn on the personality of the aggrieved individual (Mr King).

[107] Three bands were identified in *Hammond* at [176] as a rough guide for awards for damages for emotional harm, the Tribunal noting such awards are fact-driven and vary widely. The lower band for the less serious cases is up to \$10,000. The middle band, for serious cases between \$10,000 and \$50,000. The highest band, for the most serious category of cases is in excess of \$50,000.

### Emotional harm suffered by Mr King

[108] Police do not dispute that if the Tribunal is satisfied that Police subjected Mr King to disability discrimination, he would be able to establish the discrimination caused him a degree of humiliation, loss of dignity and injury to feelings.

[109] Police, however, emphasised there were other factors present in Mr King's life that contributed to his deteriorating mental health between 2013 and 2015. Mr King acknowledged in his evidence that the loss of his partner, being subject to a protection order, being in Police custody for charges that were dismissed before being heard and being the victim of a home invasion when he was assaulted during 2013 caused him to suffer grief, frustration, stress and feelings of being victimised. Mr King also acknowledged that he has suffered from anxiety and depression before the discrimination, and he does not claim his depression worsened because of the discrimination or that it made him suicidal (and the evidence shows the reason he feigned suicide in Police custody was so he would be removed from the confined space he was in).



**[110]** While Mr King's mental health may have been impacted by other stressors in his life the Tribunal has no hesitation in finding that the discrimination Police subjected him to caused him to suffer significant emotional harm for the reasons set out below.

**[111]** On each of the nine occasions Mr King was discriminated against he suffered claustrophobia symptoms, including asking for air, hyperventilating, sweating, anxiety and panic. On the first occasion Police subjected Mr King to disability discrimination his claustrophobia symptoms were so severe he began convulsing and feigned suicide to get out of the situation. On three subsequent occasions he was so distressed and terrified (including because of the rate of his hyperventilation) he deliberately harmed himself in order to get out of the situation, once by knocking himself out by hitting his head against the cell wall and twice by cutting his wrists. On another occasion his claustrophobia symptoms were so severe he began convulsing and passed out.

**[112]** On a different occasion Mr King's claustrophobia symptoms were so severe he was having trouble breathing so he resorted to chewing wet toilet paper and trying to suck the air from under the cell door to calm himself. Mr King described that as one of the most humiliating events of his life as he was wearing a suicide gown and he had pressed the cell buzzer numerous times to gain attention but the staff at the counter were looking at him but deliberately ignoring him and were laughing and joking.

**[113]** Mr King told the Tribunal that his fear of not seeing air and not knowing if there is air is a feeling that is hard to describe, but he said if a person has claustrophobia as bad as he has, it is like being put in a coffin with a lid on and he thinks he will die from suffocation.

**[114]** Mr King described the times he was in custody when Police did not take account of his claustrophobia as traumatic, horrific and the worst episodes of his life. Mr King said the night he was in Police custody from 10-11 March 2013 was the most terrifying night of his life and he described being physically and mentally exhausted following this. He was so traumatised by this time in Police custody when he was arrested on 6 May 2013, he deliberately hid a razor blade in his clothes so he could use it to get attention if necessary to get out of a confined space (and he did use it to cut his wrists).

**[115]** The injury to feelings that Mr King has suffered from the repeated instances of discrimination is significant, it includes him suffering intense distress, anxiety, extreme fear and panic. Not only did Mr King suffer significant injury to feelings at the time he was discriminated against these feelings were long lasting and some continue to this day.

**[116]** The psychological impact of the discrimination has been ongoing for Mr King as it has increased his claustrophobic symptoms in the sight of police vehicles and caused him anxiety and distress. Mr King described the difference in his claustrophobia since these events with the police has been "ten-fold". He said he had previously been able to be on a plane but now is not able to. Mr King said he has flashbacks when he sees police cars and he described being upset for day after following a prison van on the motorway recently.

**[117]** Mr King's evidence of the psychological impact on him from the discriminatory treatment was supported by independent expert evidence given by Dr Ian Goodwin, a consultant psychiatrist.

**[118]** Dr Goodwin's evidence was that Mr King has a diagnosis of severe claustrophobia and his symptoms of panic in a confined space are extreme, leading him to harm himself in order to be removed from such situations on three occasions when in Police custody.

Dr Goodwin noted Mr King remains fearful of being confined in such a manner again which appears entirely justified based on the intensity of his reactions to previous confinements.

[119] Dr Goodwin's conclusion was that while Mr King does not fulfil the criteria for PTSD, following being confined in police custody on a number of occasions he now displays symptoms of PTSD, including exacerbation of anxiety on viewing police cars or prison transport vehicles. Dr Goodwin also concluded that Mr King's hypervigilance and triggers have increased, and his anxiety has been exacerbated by his being confined in police custody.

[120] Mr King submitted that in addition to the humiliation and injury to feelings he also suffered a loss of dignity as a result of the discrimination, in that he was treated as if his humanity was worthless. The Tribunal accepts Mr King did suffer a loss of dignity as a result of the discrimination.

### **Assessment of damages**

[121] Mr King seeks damages of not less than and significantly more than \$50,000 on the basis that the emotional harm he experienced from the repeated discriminatory treatment was substantial and the claim is in the most serious category deserving of an award in the highest band as outlined in *Hammond*.

[122] Police submit that a declaration and a moderate award of damages within the first and low band outlined in *Hammond* is sufficient to compensate Mr King for emotional harm in this case. They also submitted that Mr King's delay in bringing these proceedings is relevant to the assessment of damages. Police acknowledge that some of the delay might be attributed to the IPCA complaint and the Human Rights Commission proceedings but submit the delay prejudiced their defence of the claim.

[123] The Tribunal must take into account the conduct of the parties when deciding what, if any, remedies to grant under HRA, s 92(4).

[124] Mr King has done nothing that would disentitle him to damage or reduce the amount. Mr King always acted with respect towards Police on each occasion which he was subject to discriminatory treatment. He expressly and repeatedly told Police officers that he had claustrophobia.

[125] Mr King specifically tried to prevent further incidents of discrimination by complaining to Police shortly after he was released from custody on 11 March 2013 as set out above at [65].

[126] Mr King complained to IPCA in April 2015 shortly after the last occasion in which he was subjected to discriminatory treatment. Mr King's complaint to the Human Rights Commission was made in February 2017 approximately two years after the last occasion he was discriminated against. A mediation took place in June 2017 and the parties were unable to reach a resolution, however on 19 June 2017 the Police made the following "Information Alert - Mental Health, Safety" entry in NIA:

"Mr King suffers from a medically diagnosed condition of chronic acute claustrophobia. It is critical that if Mr King is arrested and held in custody he needs to be properly assessed and placed into a cell with an opened food hatch. His condition and the requirement for open air flow must also be made known to any other agencies, such as Corrections if he is to be transported and placed in their care. Thorough and detailed notes must be made on NIA regarding his care whilst in custody, in particular a record of the food hatch remaining open."

**[127]** The Tribunal considers there is nothing undue about the delay in Mr King bringing this case. The Police had notice of the IPCA complaint in early 2015 and the HRA complaint in early 2017. Although Police claimed they were prejudiced in the defence of the claim by the delay in bringing this matter they did not provide any evidence or detailed submissions to support that claim.

**[128]** As to Police's conduct, in most instances as soon as they were aware of their failure to take account of Mr King's claustrophobia needs, they took steps to address their failure. However, this did not always occur and in some instances the manner in which Mr King was treated by Police exacerbated his emotional harm, such as when he was initially ignored when he tried to get attention and had to take more drastic measures (such as harming himself) than banging on a door or pushing the intercom buzzer. Further, at times comments were made to Mr King to suggest that his claustrophobia was not a real disability, such as when he was told to "deal with it" by a police officer.

**[129]** More importantly Police repeatedly subjected Mr King to disability discrimination despite him being a vulnerable prisoner (each time he was in custody Police assessed him as being an "at risk" prisoner who needed care) and despite Mr King taking specific steps to alert Police of his claustrophobia needs. This deepened Mr King's distress and fear. Not only did Mr King suffer the severe consequences of the discrimination on each of the nine separate occasions it occurred it has had a long-lasting impact on him.

**[130]** Police submitted that a moderate award of damages within the first and low band outlined in *Hammond* is sufficient to compensate Mr King for emotional harm in this case. Police also submitted the appropriate quantum should be commensurate with awards under NZBORA, for mistreatment in custody such as in breach of s 23(5), the example of *Taunoa v Attorney General* [2007] NZSC70, [2008] 1 NZLR 429 is given in that context. In that case \$35,000 was awarded to Mr Taunoa for 32 months on a behaviour management regime that was in breach of s 23(5).

**[131]** Care must be taken in equating the assessment of damages the Tribunal is required to make in this case under the HRA for emotional harm arising from discrimination in the custodial context, with the assessment of public law compensation under NZBORA for a breach of NZBORA, s 23(5). The latter is not limited to a consideration of what is appropriate to adequately compensate the victim of the breach for the emotional harm suffered. Further and importantly, the assessment of what is adequate compensation for the emotional harm suffered as a consequence of a breach of the HRA, or as a consequence of breach of NZBORA, s 23(5) is always fact specific and turns on the personality of the aggrieved individual.

**[132]** The facts of the *Taunoa* case on which Police rely are very different to this case in respect of the impact of the breach on Mr Taunoa. Although Mr Taunoa was subjected to an unlawful regime in breach of his rights under NZBORA over a lengthy period one of the reasons the damages award was reduced on appeal from \$65,000 to \$35,000 was because it was sufficient compensation for the intangible harm personally suffered by him from the breach. See Blanchard J at [273] where he notes Mr Taunoa did not suffer any measurable mental deterioration or other consequence from the breach, although it was likely to have caused some aggravation of his existing psychological difficulties. See also Tipping J at [333].

**[133]** In this case the impact on Mr King, the emotional harm he suffered as a result of the discrimination is significant and has been long-lasting. Mr King suffered repeated instances of discrimination where the degree and intensity of his subjective feelings of

emotional distress was extreme, he was terrified and thought he was going to die. There is a substantially subjective element to the assessment of humiliation, loss of dignity, and injury to feelings.

**[134]** A global assessment must be made taking into account the intensity of the emotional harm that Mr King suffered on repeated occasions. When making the damages assessment for the emotional harm suffered by Mr King the Tribunal cannot compensate him for any depression and anxiety he already suffered prior and separately from the discrimination.

**[135]** In our view \$45,000 is an appropriate response to adequately compensate Mr King for being subjected to disability discrimination on multiple occasions. Serious emotional harm was suffered in this case such that it falls at the top of the middle band identified in *Hammond*. On each occasion the discrimination was only for a relatively brief period, but it was repeated and had a significant effect on Mr King who because of his disability suffered severe distress and mental anguish as he thought he was going to die. Further it has had a long-lasting impact on him.

### **Training Order**

**[136]** Mr King also seeks a training order be made under HRA, s 92I(3)(f).

**[137]** Mr King submitted that the Police have shown misunderstanding in the application of NZBORA and HRA, particularly in respect of how persons with claustrophobia should be treated while in custody. Mr King noted that the Police witnesses had not had any training related to claustrophobia. It was submitted that without a training order, there is a real risk Police will continue to mistreat disabled persons when they come under Police control, given the severity and importance of Police's powers it is essential they are well resourced when it comes to issues of human rights law, including issues of discrimination.

**[138]** Police submitted that such an order is not warranted or necessary to raise awareness of the non-discrimination provision under the HRA and Police's obligations under the HRA. Police submitted their policies already referenced the NZBORA and are designed to ensure Police conduct is rights compliant. Police submitted to the extent they were unaware of the needs of persons with claustrophobia, the current proceedings have served an educative purpose and that Police are now aware of their obligations with respect to persons with claustrophobia.

**[139]** The Tribunal accepts that Police are now well aware of their obligations under the HRA with respect to persons with claustrophobia. We agree with Police that a training order is unnecessary, and we decline to make it.

### **ORDERS**

**[140]** For the reasons given above, the decision of the Tribunal is that:

**[140.1]** A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that the Commissioner of Police breached Part 1A of the Human Rights Act 1993 by discriminating against Mr King because of his claustrophobia.

**[140.2]** Damages of \$45,000 are awarded against the Commissioner of Police for humiliation, loss of dignity and injury to the feelings of Mr King.

## **COSTS**

**[141]** Mr King seeks costs. Costs are reserved. Should the parties be unable to agree on costs, the parties are to file a joint memorandum providing a timetable for the filing of costs submissions within 14 days after the date of this decision.

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**Mr RPG Haines ONZM QC**  
**Chairperson**

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**Ms J Foster**  
**Deputy Chairperson**

.....  
**Ms P J Davies**  
**Member**

.....  
**Ms S Stewart**  
**Member**