IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 57
CRC 8/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	Q Plaintiff
AND	THE COMMISSIONER OF POLICE Defendant

Hearing: (26-30 January, 2-5 and 12-13 February 2015)
(heard at Christchurch)

Appearances: A Shaw, J Behrnes and M Dutkiewicz, counsel for the plaintiff
S Turner and S Clark, counsel for the defendant

Judgment: 7 May 2015

JUDGMENT OF JUDGE B A CORKILL

Table of contents

Introduction

[1] Mr Q, formerly a long-serving senior constable, challenged a determination of the Employment Relations Authority (the Authority) dismissing three grievances which he had raised.[1] This challenge now involves two only.

[2] The first challenge relates to a determination that New Zealand Police (Police) were justified in imposing a written warning with regard to the manner in which Mr Q conducted himself at meetings held on 28 April 2010 (the first incident).

[3] The second was that Police were justified in dismissing Mr Q because he had breached Code of Conduct (the Code) provisions by using excessive and unnecessary force against a member of the public at the Boogie Nights nightclub on 9 May 2010 (the second incident).

[4] Mr Q claims that he has a grievance in respect of each of the two incidents, and that he is entitled to significant remedies including reinstatement. Police contend the steps they took were fair and reasonable; and that even if liability were to be established, remedies should be reduced by 100 per cent.

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1 *Q v The Commissioner of Police* [2013] NZERA Christchurch 12.

[5] The Court heard evidence from multiple witnesses as to each incident and received a substantial quantity of relevant documents, all of which has assisted in assessing the respective contentions.

[6] For reasons given in an interlocutory judgment following submissions made at the commencement of the hearing, it was necessary to make a wide range of non-publication orders (two of which were interim and will be reviewed after this judgment is issued); and an order that certain parts of the hearing be heard *in camera*.[2] In making those orders I held that there were exceptional circumstances in that Mr Q was, at material times, employed by Police in a specialist Unit (the Unit), and that potential harm would occur were details of its operation and identity of its members to become public. For the same reasons, it has been necessary in this judgment to refer to some of the relevant events in a way that ensures the orders made at the commencement of the hearing are not undermined.

Background

[7] Mr Q was at the time of the hearing aged 57 years and married with two young children. He joined Police in 1982 as a constable; by October 2011 when he was dismissed, he was a senior constable.

[8] From 1985 to 1988, Mr Q was a member of the Criminal Investigation Bureau (CIB). After some concerns as to work performance he was transferred to general duties in the uniform branch.

[9] In 1992 he became a member of the Unit. His service with the Unit was interrupted in 1994, when he was transferred away from it against his will. As a result he was on sick leave for 16 months, returning to work in June 1996 when he undertook a team policing role. The relevant circumstances were in due course considered by the Employment Tribunal, which in late 1996 reinstated him to his former role within the Unit.[3] The parties agreed that there should be a cooling off period of one year, following which his service with the Unit resumed.

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2 *Q v The Commissioner of Police* [2015] NZEmpC 8.

3 *Q v Commissioner of Police* ET Christchurch CT138/06, 19 December 1996.

[10] In the claim which Mr Q brought before the Tribunal alleging disadvantage for the transfer out of the Unit, the Tribunal found that the real reason for his transfer was to resolve disharmony and not because of operational requirements.

[11] Mr Q said there were the "expected teething issues" when he returned to the Unit, but it was subsequently noted that he reintegrated smoothly. Thereafter he was given performance ratings which ranged from positive to commendable and on one occasion, outstanding. From time to time Mr Q filled the roles of Relieving Sergeant (of the Unit or as Team Leader) with the appreciation of his supervisors, particularly in the period 2000 to 2007.

[12] From time to time he also received commendations for the professional and competent manner in which he performed his duties. Long service and good conduct medals were awarded, although due to controversial circumstances, there was delay in respect of his 14-year medal.

[13] In early 2008, three members of the Unit initiated personal grievances jointly. These grievances related to allowance issues and as to whether a tenure policy would be enforced. The issues which were the subject of the personal grievances were described as significant and caused considerable unrest within the Unit.

[14] In approximately October 2008, following mediation, the grievances were settled. As part of the resolution, the two sergeants who were team leaders within the Unit (Sergeant O and Sergeant P) were rotated elsewhere and undertook other duties. Acting Detective Senior Sergeant T (Detective Senior Sergeant T), who had relevant experience, was appointed relieving Officer in Charge (OC) of the Unit and then assumed the actual OC role as well as that of an allied Unit. He also acted as Sergeant in charge of one of the teams within the Unit. He introduced changes that were not universally popular with staff.

[15] In November 2008, Mr Q suffered a heart attack which resulted in him not working for the Unit until June 2009. Upon his return, Mr Q shared responsibility for managing one of the teams within the Unit (together with another staff member) until Sergeant O returned in September 2009. Mr Q then became a member of his

team. Detective Senior Sergeant T later said he identified some faults with Mr Q's work performance, and that he appeared not to have kept up with general trends in policing. He said Mr Q was spoken to on several occasions about outstanding timesheets. Detective Senior Sergeant T prepared a Performance Appraisal in August 2009 which Mr Q considered was inadequate; he requested a reassessment.

[16] An agreed outcome of the settlement of the 2008 personal grievances was that a review of practices of the Unit would be undertaken by an external officer, Senior Sergeant Stewart. He advised members of the Unit of his terms of reference in July 2009, emphasising that the review was to assess whether current practices met Police requirements; it was made clear that the review would have a forward-looking focus. Staff were asked to contact Senior Sergeant Stewart if they had issues they wished to discuss. He produced a confidential report and recommendations which the District Commander, Superintendant Cliff, decided should be implemented. Senior Sergeant Stewart was also appointed as a neutral person to whom members of the Unit could refer if need be.

[17] In early 2010, the Unit and two other groups moved to shared premises. As a result, a policy needed to be developed with regard to appropriate use of the premises. Detective Inspector Long, who managed the group of which the Units were part, required Detective Senior Sergeant T and a manager of one of the allied Units, Detective Senior Sergeant D, to draft a suitable document.

[18] After it was finalised, it was decided that it should be presented to a meeting of affected staff. A copy of the document was emailed to staff on 12 April 2011 in anticipation of the meeting which was scheduled for 28 April 2011.

The first incident - preamble to meeting on 28 April 2010

[19] A consideration of the first incident requires a focus not only on events as they unfolded at a meeting of the specialist Units on 28 April 2010, but also events leading up to it.

[20] On 26 April 2010, Detective Inspector Long contacted Mr Q to say that he would like to speak with him about two matters after the upcoming meeting; one of

those related to correspondence Mr Q had sent to the Human Resources Manager, (Mr Shield) as well as to Superintendant Cliff.

[21] The background to this issue was that Mr Q had requested a copy of the review prepared by Senior Sergeant Stewart (the Stewart Review). He had verbally requested the document in late February 2012; Senior Sergeant Stewart declined the request since his review referred to confidential employment matters. Mr Q accordingly directed a formal request under the Official Information Act 1982 (OIA) to Superintendent Cliff on 4 March 2010. Mr Shield responded on 24 March 2010 offering to meet and to discuss the issue.

[22] Mr Q declined the offer to meet. Mr Shield then formerly declined the OIA request on 31 March 2010, but said he remained willing to consult with Mr Q further in order to see if there was some information that could be released.

[23] On 13 April 2010, Mr Q wrote to Mr Shield in the following terms:

> I refer to your email and letter on 31 March 2010 (on behalf of Mr Cliff) which I received today.
>
> I (and my colleagues) regard this response as utter nonsense, and as an insult to our intelligence, serving only to perpetrate, indeed accentuate, the suspicion and mistrust within the [Unit].
>
> You would appear to be quite ignorant of your statutory obligations, however, if on the other hand you are aware but notwithstanding opt to persevere with "a determination" of complete non-disclosure essentially on the basis of personal "preference", then this can only be described as pure arrogance, thereby excluding the chance of any fruitful meeting.
>
> The … Review was precipitated by the Personal Grievance proceedings initiated by three [Unit] members jointly. The crux of that matter was (an allegation of) high-handed arbitrary administration, i.e. (bureaucratic) bullying. This matter was settled in favour of the three applicants without a full court hearing. Sadly, in recent years on three other separate occasions (from a [Unit] of only twelve), other members have been reluctantly compelled to initiate personal grievance proceedings against the Police Administration. Similarly, each case centred on high-handed arbitrary administration, and unfortunately each case had to be resolved externally by way of a full court hearing. In each instance the matter was resolved emphatically in favour of the applicant, reflecting poorly on both the integrity and intellect of senior Police.
>
> From your conspicuous lack of good faith on this occasion, it appears lessons have not been learned, necessitating the need for this matter to be now referred externally. In the meantime, you and Mr [Cliff] would do well to acquaint yourselves with the Police Code of Conduct.

[24] Detective Inspector Long wished to discuss this letter because he was concerned that apparently inappropriate comments were being made to the District Commander by staff under his management.

[25] Mr Q agreed to meet Detective Inspector Long as requested; he also suggested that the proposed group meeting be followed by a meeting with members of the Unit only. Mr Q thought this would provide a good opportunity to discuss the review, and "for all of us to properly confront the problem of [Detective Senior Sergeant T's] general work performance". However, I find that Detective Inspector Long was unaware that Detective Senior Sergeant T's performance would be discussed but rather thought a meeting with the Unit would provide a timely, opportunity to meet and discuss any issues members might have.

[26] On the evening of 27 April 2010, while ensuring all windows and doors of the Unit's premises were properly closed, Mr Q noticed and uplifted property from Detective Senior Sergeant T's work area which he considered were inappropriate in that location, given a clean desk policy. He removed the items he found. He said he knew he would be seeing Detective Senior Sergeant T at the meeting scheduled for the following day, and "he would get the items back then". He took them home.

Meeting of 28 April 2010

[27] About 18 to 20 people attended the meeting of 28 April 2010 which was chaired by Detective Inspector Long. The first part of the meeting was attended by the three Units which together occupied new premises which were the subject of the drafted policy.

[28] After the commencement of the meeting Mr Q, in a manner considered peremptory by both Detective Inspector Long and Detective Senior Sergeant T, raised an issue regarding the cancellation of a particular task which the Unit was to have undertaken. A brief explanation was given by Detective Inspector Long. Mr Q said the reason he raised this was from concern as to whether Detective Senior Sergeant T had revealed information inappropriately causing the task to be cancelled.

[29] Detective Senior Sergeant D then delivered a PowerPoint presentation about the proposed policy. In doing so he referred to provisions relating to the importance of maintaining a clean desktop. At this point Mr Q produced a plastic bag containing the property he had removed on the previous evening from Detective Senior Sergeant T's desk and made reference to its contents. He handed the plastic bag to Detective Senior Sergeant D. Detective Senior Sergeant T was embarrassed by these actions.

[30] The meeting which involved members of the Unit only then took place. A variety of topics were discussed, including the District Commander's decision to operate a Peak Loading Roster (PLR). This involved the deployment of all staff holding constabulary powers, including members of the Unit, to certain front line police duties on a rotating basis. Such duties were not normally undertaken by members of the Unit.

[31] The discussion then turned to the release of a copy of the Stewart Review, under the OIA. One issue which arose was whether staff in fact supported Mr Q in this initiative. Detective Inspector Long told Mr Q that other members of the Unit did not wish to be associated with his request. Detective Senior Sergeant T disagreed and said he had staff support. Detective Senior Sergeant T asked staff whether they supported Mr Q. None responded. Mr Q then asserted that Detective Senior Sergeant T had a copy of the Stewart Review notwithstanding his denial; this led to Detective Senior Sergeant T asking Mr Q whether he was calling him a liar.

[32] Mr Q also asked Detective Inspector Long whether it was possible to have supervisors rated by their staff; discussion on this matter resulted in Mr Q asserting that Detective Senior Sergeant T was "regularly making far too many fundamental flaws".

[33] It is common ground that the discussion between Mr Q, Detective Inspector Long and Detective Senior Sergeant T was heated. The meeting then broke up.

[34] Mr Q then met with Detective Inspector Long as previously agreed. Detective Inspector Long told Mr Q that he did not think the way he had raised his

issues was appropriate; these should have been raised, he said, in a more constructive manner. Mr Q did not accept this. He said issues regarding Detective Senior Sergeant T had been outstanding for some time and had to be raised on behalf of the Unit. Detective Inspector Long considered that Mr Q was unrepentant and unapologetic for the approach he had adopted.

Events following meeting of 28 April 2010

[35] On 3 May 2010, Detective Senior Sergeant T lodged a complaint alleging Mr Q had breached the Code. This complaint was made after Detective Senior Sergeant T had raised his concerns at Mr Q's conduct with Detective Inspector Long and Detective Inspector M.

[36] In Detective Senior Sergeant T's complaint he said that Mr Q had removed property from his office without permission and behaved in a manner which caused him distress.

[37] He described his interactions with Mr Q over the 10 months preceding the meeting. He said Mr Q appeared to not have kept up with general trends in policing and had limited ability with regard to computers and log-keeping; he also raised concerns as to the way in which he had handled the request for a copy of the Stewart Review.

[38] Detective Senior Sergeant T referred to the events which had occurred at the meeting and concluded by stating that he considered Mr Q's actions were a misconduct matter. He considered that the relationship between the two had broken down irreparably. He voiced concerns regarding Mr Q's mental health and felt it would "be a dangerous situation to allow him to continue duty in the [Unit] environment in any form". He also noted that Mr Q was on the PLR on the week commencing 3 May 2010 attached to the Beat Section.

[39] The complaint was provided to Detective Inspector M, as was a report which he had requested from Detective Inspector Long which summarised his recollections of the meeting.

[40] Detective Inspector M was already concerned about Mr Q; this was because the request made by Mr Q for a copy of the Stewart Review had been referred to him by Mr Shield. He considered the tone of Mr Q's letter of 13 April 2010 to be "surprising, unusual and completely inappropriate". Having regard to recent dysfunction within the Unit, he was concerned that Mr Q's state of mind may have consequences for the Unit in its entirety. There was also potential for conflict between Mr Q and other members of the Unit who he believed had strained relationships with Mr Q. He had hoped to meet with Mr Q and a welfare officer to address these concerns.

[41] However, it had not been possible to convene such a meeting prior to the meeting of the Units on 28 April 2010. The reports from Detective Senior Sergeant T and Detective Inspector Long led Detective Inspector M to conclude that the way Mr Q had conducted himself at the meeting could be a symptom of stress and inability to cope, and that it was all the more important for Mr Q to meet with a Police Welfare representative. He accordingly established a meeting with Mr Q and Mr Manhire, a welfare officer, which was to take place on 7 May 2010. However, Mr Q was unavailable due to illness and the meeting eventually took place on 10 May 2010.

[42] A transcript of what occurred at this meeting on 10 May was produced as Mr Q recorded it, albeit without the knowledge of the other participants. The following account is based on the recording he made.

[43] After indicating that the meeting was a "welfare check", Detective Inspector M said that a complaint had been made, which would be dealt with by Mr Mikaera, the Professional Practices Manager.

[44] There was then discussion concerning the OIA request. Detective Inspector M stated that he considered the tenor of the correspondence to be "irrational" because of accusations and underlying threats contained in the letter. He said this raised concerns as to Mr Q's wellbeing; those concerns were reinforced by what occurred at the meeting, and the events preceding it when he searched his supervisor's desk. Detective Inspector M told Mr Q he was displaying symptoms of

stress and that it would be appropriate for him to see a Police psychologist. It was also suggested that Mr Q "step away" from the work environment of the Unit for a time since it was causing stress and irrational behaviour.

[45] Mr Q did not accept that he had behaved inappropriately. He said that if there was any irrationality, it was in response to his request for a copy of the Stewart Review, and because Detective Senior Sergeant T was making fundamental flaws on a regular basis.

[46] Mr Q asked whether the proposal that he see a psychologist and stand aside was an order or a request. Detective Inspector M confirmed that it was a request; Mr Q said he would consider the matter.

[47] There was also discussion as to why Mr Q had not attended work in the previous week; he said he had an upset stomach, although had not seen a doctor. He said it was pointless getting a medical certificate as he was now better and he had been able to attend work under the PLR on the previous Saturday which was 8 May 2010. He had enjoyed an earlier PLR duty and had been looking forward to the Saturday night duty as well. Detective Inspector M sought a response from Mr Q by the end of the following day as to the offer of support from a psychologist and the possibility of him working elsewhere. Mr Q said he would take some time to consider this possibility. In fact he did not respond on the following day.

[48] On 14 May 2010, Mr Q was seen by Ms Beekhuis, a Clinical Psychologist who had regularly provided clinical services to Police. In a subsequent request to Police for approval to conduct further consultations, she summarised information she had obtained from Mr Q. She recorded that she did not consider his "interpretation of events to be irrational", although she had strongly challenged his handling of the situation he described. She then said:

> … Has won several PGs before. Is being particularly black & white right now, & likely to jeopardise the need for others to be given time to handle the ruffled feathers of other parties to this conflict … I'm concerned about his wellbeing; could well be [burnt] out.
>
> …

[49] Mr Mikaera wrote to Mr Q on 25 May 2010, advising him that it was alleged he was in breach of the Code and inviting him to an investigation meeting. The allegations were:

1) That on 28 April 2010 he attended a meeting at which he "presented" a bag that had property from the office and desk of Detective Senior Sergeant T. It was alleged that the property had been removed from Detective Senior Sergeant T's office without permission or reasonable excuse.

2) That at the meeting he had behaved in a manner which caused Detective Senior Sergeant T unreasonable distress by his actions as described in the first allegation, and by the conduct and language used towards Detective Senior Sergeant T.

3) That at the meeting he had acted in an insubordinate manner towards Detective Senior Sergeant T.

[50] On 6 July 2010, Mr Q's lawyer wrote to Inspector McKeown, Inspector of Professional Standards PNHQ (Police National Headquarters), who by this time had become involved. Dealing with the formal allegations, the lawyer attached a full statement prepared by Mr Q and submitted:

a) As to the removal of property without permission or reasonable excuse, it was agreed that there was no formal permission from Detective Senior Sergeant T to do so. However, it was contended that Mr Q was under a lawful duty and obligation to seize the materials given the nature of the premises. Mr Q was also required to report what had happened. He would have been liable to a non-performance investigation had he not done so. The meeting had been called by superiors for the express purpose of addressing such issues as these.

b) As to the statements made at the meeting, it was not denied that some distress may have resulted. It was submitted however that there was nothing in Mr Q's manner that caused such distress; that any distress would have arisen from the "substantive failings" on Detective Senior

Sergeant T's part which had been brought to light. Consequently any such distress was not unreasonable. It was also a consequence of a lawful requirement to disclose breaches on the part of Detective Senior Sergeant T.

c) The third allegation related to insubordination. There was a failure to specify what behaviour was relied on; consequently the assertion was "null and void for [want] of particularity". It was implicit that the behaviour underpinning the allegation was that which related to the previous two assertions, neither of which could be sustained.

d) It was also asserted that the steps which had been taken were an attempt to utilise the circumstances of a supervisor's "hurt feelings and dented ego to remove an independently-minded officer from the [Unit]". The lawyer stated Mr Q had been advised to "put his formal rights to one side", providing the matter was brought to a speedy conclusion. The lawyer suggested that Mr Q return to his duties with the Unit on 12 July 2010.

[51] The next day Inspector McKeown wrote to Mr Q's lawyer acknowledging receipt of the information which had been provided, and asking whether Mr Q wished to take part in an investigation meeting. Mr Q's lawyer confirmed on 14 July 2010 that an investigation meeting was not required and asked for advice as to the outcome of the investigation.

[52] On 22 July 2010, Detective Inspector Long provided detailed comments regarding the statement Mr Q had submitted. In summary, he stated that issues relating to Detective Senior Sergeant T's work with the Unit had never been raised with him, or any other person to his knowledge. If there were any issues, he would have expected that to have happened. Detective Inspector Long said that at the 28 April 2010 meeting, Mr Q's comments had not been endorsed by other members.

[53] Detective Inspector Long described the conversation he had with Mr Q following the meeting including Mr Q's response that he had no regrets as to how he had handled the matter. He told Mr Q that if there were genuine issues there were

more appropriate and constructive ways in which they could have been raised. He concluded that Mr Q had raised issues in an adversarial manner and displayed animosity towards Detective Senior Sergeant T. The issues were consuming Mr Q in a "particularly negative manner to the detriment of his own work performance and personal objectivity". Mr Q was exhibiting what he believed was an "unfounded and unhealthy mistrust of management", and that there was some form of conspiracy surrounding Unit issues.

[54] On 23 July 2010, Inspector McKeown suggested that Mr Q and members of the Unit undertake a confidential and open discussion at mediation. Mr Q's lawyer responded by email on 28 July 2010. The lawyer asked whether Mr Mikaera had completed his investigation report and if so, whether a copy was available. He said that the question of whether Mr Q or any other member of the Unit received a copy of the Stewart Review would now be determined by the Ombudsman, since Mr Q had lodged a request for the report with the Ombudsman's office. The only real issue was the question of Mr Q's reintegration to the Unit, since he had not yet returned to work. Mr Q believed he – and Detective Senior Sergeant T – would undertake their duties in a normal manner. If there were issues, these could be the subject of discussion. In short, there was not at this stage agreement that the matter should proceed to mediation.

[55] Mr Mikaera completed his investigation report on 26 July 2010. He recorded the information which had been provided by Detective Senior Sergeant T and Detective Inspector Long. He also recorded the submissions made by Mr Q's lawyer together with the information provided by Mr Q himself.

[56] In analysing the information which had been obtained, Mr Mikaera concluded:

a) Whilst the responses to the allegations to the effect that Mr Q's actions were appropriate had some logic, they failed to take into account the principles of the Code. Particular reference was made to the principle regarding respect for people, which required a member to treat all people with dignity and respect, and in particular to avoid any

behaviour in the workplace that may cause unreasonable distress to colleagues. Reference was also made to the principles of loyalty, good faith and professionalism wherein employees have a duty of trust and fidelity requiring them to act in a manner that is efficient, competent and loyal.

b) Mr Q had taken a "very public path to display the articles" he had found. The correct and prudent course would have been to inform Detective Inspector Long about the articles in private, so that he would have had the opportunity to take appropriate supervisory action with Detective Senior Sergeant T if required. As Mr Q had previously stated that he was the most experienced member undertaking such work in New Zealand, he should have known what the appropriate action was in the circumstances.

c) The meeting was attended not only by members of the Unit but others. Mr Q had not attempted to speak directly with Detective Senior Sergeant T about that matter. He also did not raise any issue with Detective Inspector Long or with the default manager, Senior Sergeant Stewart. An approach to any of these persons would have been reasonable and appropriate in the circumstances.

d) In relation to the insubordination assertion, Mr Q's language and demeanour towards Detective Senior Sergeant T had been described as aggressive. Detective Senior Sergeant T had stated that he had been told by members of the Unit that Mr Q was agitated and intended to "have a go at him at the meeting". It appeared that staff had voiced their concerns about Mr Q to Detective Senior Sergeant T and Detective Inspector Long before and after the meeting. Mr Q had been openly defiant of Detective Senior Sergeant T; his actions had the potential to create division within the Unit.

e) Mr Q had presented the items at the meeting in a manner that would cause maximum embarrassment to Detective Senior Sergeant T; he had

not acted in the best interests of the Unit, Detective Senior Sergeant T or Police. Consequently, the allegations were substantiated.

f) He concluded that a finding of possible misconduct was appropriate and that the matter should be referred to the Progressive Disciplinary Process (PDP).

[57] Superintendent Cliff endorsed the conclusions of the investigation report, taking the preliminary view that the behaviours were possible misconduct. The report was then forwarded to Mr Q's lawyer on 6 August 2010.

[58] The lawyer wrote to Police on 27 August 2010. After discussing return to work issues, he submitted that it was not appropriate to refer the matters to PDP. He said there were flaws in the process and in the conclusions of the report. Returning to the suggestion of mediation, he said this had been recommended to Mr Q subject only to Police confirming that the PDP be discontinued. If not, the PDP process would have to take place first.

[59] On 4 September 2010, an earthquake occurred in Christchurch, the response to which required significant input from Police including personnel involved in the PDP. This contributed to some delay at this stage of the process.

[60] On 16 September 2010, Inspector McKeown stated in a letter that as there was not a consensus as to the basis which mediation could be conducted, Police would continue with the PDP.

[61] Mr Mikaera wrote to Mr Q's lawyer on 23 September 2010 explaining that there was now an opportunity for written submissions to be made directly to the District Commander, and/or an appointment could be made to meet him personally. Reference was also made to the fact that a second complaint had been received. That is discussed more fully below.

[62] On 22 October 2010, Mr Q's lawyers wrote to Mr Mikaera asserting, in summary, that there was no basis for a finding of "possible misconduct", that

attending a disciplinary meeting was unnecessary, and requesting notification of the Police decision.

[63] On 26 October 2010, Superintendent Cliff wrote to Mr Q recording that it was common ground that there did not need to be a disciplinary meeting. Superintendent Cliff stated that he considered Mr Q's responses indicated he did not accept the gravity of his conduct and the potential impact on his role as a member of Police. He had accordingly reached the preliminary decision that Mr Q should be issued with a first written warning for a period of 12 months. Under the PDP, Mr Q was offered the opportunity of making submissions in writing or meeting with him in person.

[64] On 3 November 2010, Mr Q's lawyer wrote to Mr Mikaera advising that submissions on the preliminary decision would be forwarded within the stipulated timeframe. In passing, a concern was raised as to whether other officers present at the meeting had been interviewed. It was submitted that their evidence would support Mr Q's version of events and establish there was no basis for a suggestion of insubordination.

[65] On 5 November 2010, Mr Q's lawyer presented detailed submissions on the preliminary decision. It was submitted that the decision breached fundamental principles by failing to take into account relevant considerations, by failing to give reasons, and by a demonstration of predetermination or bias. In the course of the submissions the point was made again that Police should interview at least some of the other officers who were present at the meeting, for example Sergeant O, as well as others who had allegedly told Detective Inspector Long and Detective Senior Sergeant T that Mr Q was not speaking for them at the meeting. It was submitted that hearsay only had been relied on. In conclusion, confirmation was sought that the disciplinary procedure should now be regarded as being at an end.

[66] Superintendent Cliff was unable to deal with the matter immediately because he was overseas, a fact which Mr Mikaera conveyed to Mr Q's lawyer on 16 November 2010. Then there was a major disaster at Pike River on the West Coast on 19 November 2010. Superintendent Cliff was thereafter extensively involved in

supporting and providing relief to the District Commander there. Whilst he was away from Christchurch, there was a senior officer relieving for him with regard to his District Commander functions, however in the interests of continuity disciplinary matters were not dealt with by that person.

[67] Mr Q's lawyer wrote to Mr Mikaera on 2 December 2010 stating that Mr Q was extremely concerned that a final decision had still not been made. It was explained that the delay was not assisting Mr Q' recuperation and was in fact exacerbating the effects on his health.

[68] Mr Mikaera responded on 6 December 2010 acknowledging the concerns raised, but also advised that Police held a very different perspective on the issue of delay. Police were willing to enter into consultation via mediation, if this were considered useful.

[69] A copy of the first warning now signed by the District Commander was attached to the email. The warning stated the three allegations had been established. It stated that corrective action was required. That is, Mr Q was not to remove property from the Unit's base including Detective Senior Sergeant T's office without permission or reasonable excuse; he was not to behave in a manner that caused unreasonable distress to other employees or persons on Police premises; and he was not to act in an insubordinate manner towards supervisors or managers. The warning stated that any further misconduct on his part would result in further disciplinary action which could also potentially include a disciplinary hearing for serious misconduct; such a hearing could result in dismissal. The warning was valid for 12 months.

[70] In the course of the above process, there were also protracted discussions as to whether Mr Q would return to work with the Unit. He had consistently stated that he saw no reason why this should not occur. Police had disagreed with the result that a Notice of Duty Stand Down was served on 17 May 2010, and Notices of Restricted Duties on 14 June 2010 and 12 October 2010, the effect of which were that he was not permitted to return to work with the Unit but alternative work was available elsewhere. Mr Q attended his GP throughout this period, obtaining medical

certificates which confirmed he was unfit for work. On 29 October 2010, the rehabilitation coordinator met with Mr Q to discuss a suitable rehabilitation programme to assist him returning to work. The coordinator subsequently recorded that Mr Q said his GP had given him instructions not to return to work at present and that he was reluctant to advise of the diagnosis, though this would be given in due course.

[71] When the warning was issued, Mr Q was still subject to a Notice of Restricted Duties because he was now the subject of an investigation in respect of the second incident. He did not return to work for the Unit – or elsewhere within Police – then or subsequently.

The parties' submissions – first incident

[72] For Mr Q it was submitted in summary:

a) The matter should be analysed in terms of the criteria set out in *Wellington Road Transport etc IUOW v Fletcher Construction Company Limited,*[4] which was approved by Judge Travis in *Fuiava v Air New Zealand*[5] where the Court indicated that where appropriate the Court would consider the conduct of the worker, the conduct of the employer, the history of the employment, the nature of the industry and its customs and practices, terms of the contract, terms of any other relevant agreements and the circumstances of the dismissal. The Court also has regard to good industrial practice which includes some consideration of the social and moral attitudes of the community. Counsel's submissions focused on these factors.

b) As regards the conduct of the plaintiff, Mr Q genuinely held the belief at all relevant times that Detective Senior Sergeant T's actions were in breach of a relevant policy relating to the Unit's premises; that he was obliged to hand over items and discuss concerns of performance in the manner he did; that the meeting was a "no rank" meeting, which Mr Q

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4 *Wellington Road Transport etc IUOW v Fletcher Company Ltd* (1983) ERNZ Sel Cas 59 (EmpC); [1983] ACJ 653.

5 *Fuiava v Air New Zealand* [2006] ERNZ 806 (EmpC).

understood allowed him and other members of the Unit to discuss issues on a frank and open basis for the betterment of the squad; and that he was not disrespectful as had been alleged. Particular reliance was placed on the evidence of Senior Constable N who gave evidence at the hearing as to the appropriateness of Mr Q's actions.

c) It was submitted that the conduct of Police as employer was unjustifiable. Principally, Mr Mikaera's investigation was flawed because there was undue reliance on the information provided by Detective Senior Sergeant T and Detective Inspector Long. No interviews of other employees were conducted. Relevant information was not considered such as whether the policy was finalised and whether Detective Senior Sergeant T was in breach of this by leaving the property Mr Q uplifted in or on his desk; and generally that Mr Mikaera simply "rubber-stamped" the accounts he was given by Mr Q's superiors.

d) Turning to the history of the employment, it was submitted that Mr Mikaera should have properly examined issues as to Mr Q's previous performance and disciplinary history having regard to the adverse remarks made by Detective Senior Sergeant T and Detective Inspector Long on this subject. Nor did Mr Mikaera fully explore the fact that the meeting was held on a "no rank basis". Police had breached their own General Instructions as well as obligations in the Code and the collective employment agreement. Having regard to the nature of the Unit, the desirability of open and frank discussion should have been specifically considered. Community standards might well have supported this.

e) Mr Mikaera's report was unreliable and unsafe for Superintendent Cliff to act on. He should have referred the matter back to Mr Mikaera to reinvestigate, noting that it took him four months to finalise his decision so that there was ample opportunity for this. The flaws were identified by Mr Q's lawyer in his letters of 3 and 5 November 2010. It was clear from evidence called for the plaintiff particularly that of

Senior Constable N, that the descriptions given by Detective Senior Sergeant T and Detective Inspector Long were inconsistent with what actually occurred.

f) The actions of Mr Mikaera and Superintendent Cliff were unjustifiable, and these had caused disadvantage to Mr Q.

g) It was also submitted that Mr Q's case was not genuinely considered and was affected by predetermination; and that there was excessive delay in dealing with the matter.

[73] For Police it was submitted in summary:

a) A full analysis of the relevant legal principles was provided.

b) A breach by an employee of an employer's policies and procedures contained in a Code could justify disciplinary action; here the Code was provided to Mr Q and he was bound by it both under the Police Act 1958 and under the collective employment agreement. He had never claimed he was ignorant of his obligations under that document.

c) The actions of the plaintiff constituted misconduct, and the decision to impose a first written warning was one which a fair and reasonable employer would have made in all the circumstances. In particular:

- The plaintiff acted in a manner that caused significant embarrassment to Detective Senior Sergeant T in front of his manager, colleagues and subordinates. His actions demonstrated significant disrespect for a superior officer and went beyond any acceptable method of raising concerns. Even if the meeting was "no rank" (which was in doubt) that did not permit an employee to breach the Code.

- There were a number of alternative and more suitable options available to the plaintiff to utilise if he genuinely felt there were

serious concerns about Detective Senior Sergeant T. Instead, he attempted to "shame" his supervisor.

- He had no regrets in making the comments at the meeting.

- A first warning was the lowest available sanction. In applying it the defendant fairly and reasonably balanced the level of conduct and employment history of the plaintiff with his unrepentant attitude and the defendant's need to set appropriate standards of behaviour.

c) Mr Q's conduct was predetermined. It was not spontaneous. Senior Constable N's evidence was that Mr Q had taken it upon himself to raise the issues regarding Detective Senior Sergeant T's performance. He knew there were other avenues available, but he did not utilise them. His reasons for rejecting alternatives were neither reasonable nor sustainable.

d) The removal of items from a superior's office was unjustified. It was submitted that Mr Q had already planned to raise issues about Detective Senior Sergeant T at the meeting, presenting the items removed from Detective Senior Sergeant T's office to bolster his allegations.

e) In deliberately choosing to raise performance allegations about Detective Senior Sergeant T, as well as allegations about breaches of the new policy, the obligations of the Code were breached. The defendant's case was that regardless of whether Mr Q's concerns about the items were well founded – which was not accepted – the way in which he raised his concern was unjustified and breached the Code.

f) It was submitted that a fair process had been followed in terms of the criteria of the *New Zealand (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd* decision.[6] Dealing with the specific process concerns raised for Mr Q:

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[6] *New Zealand (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582 (EmpC).

- Mr Mikaera's decision not to interview everyone present at the meeting was reasonable and did not result in any disadvantage or unfairness.

- Any delays were reasonably explained; the majority of delays were due to Mr Q and/or his lawyers, not Police. Although the delay in making a final decision was not preferable from the defendant's perspective it did not result in any unfairness or disadvantage.

Summary of issues

[74] I propose to deal with the issues raised by the parties in their submissions in the following sections:

a) Relevant documents.

b) Relevant legal principles.

c) Context.

d) Reliability of information obtained.

e) Delay issues.

f) Justification of warning.

Relevant documents

[75] There are a number of documents which create the context within which it is necessary to assess the issues arising in this challenge in respect of both incidents. It is convenient to describe them all in this section of the judgment.

[76] The starting point is the Police Act 2008 (the PA), which came into force on 1 October 2008. It provided that Police were the same organisation as that which

had existed immediately prior to the commencement of the Act under the Police Act 1958 and other related statutes.[7]

[77] Section 8 of the PA describes the applicable principles on which the statute is based, as follows:

> **Principles**
>
> This Act is based on the following principles:
>
> a) principled, effective, and efficient policing services are a cornerstone of a free and democratic society under the rule of law;
>
> b) effective policing relies on a wide measure of public support and confidence;
>
> c) policing services are provided under a national framework but also have a local community focus;
>
> d) policing services are provided in a manner that respects human rights;
>
> e) policing services are provided independently and impartially;
>
> f) in providing policing services every Police employee is required to act professionally, ethically and with integrity.

[78] Sections 19 to 21 of the PA provide for standards of behaviour for Police employees. In particular, the statute requires the Commissioner to prescribe a Code for Police employees stating the standards of behaviour expected from them.[8] It further provides that it is the duty of every Police employee to conduct himself or herself in accordance with that Code.[9] The statute expressly states that the Code would be taken to have been communicated to a Police employee when it had been brought to his or her personal notice.[10]

[79] The Commissioner prescribed such a Code. He introduced it with the following comment:

> This Code, to be read in conjunction with the changes to the Police Regulations, marks transition from the semi-military style of managing behavioural issues in Police to a more mainstream employment practice. I

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7 Policing Act 2008 s 7(2).
8 Section 20(1).
9 Section 20(2).
10 Section 21(2) and s 29(2)(b).

> have several intentions in proceeding in this direction: First, I want the standards of behaviour to be expressed in a clear, simple and principled manner, so that everyone in Police understands their professional responsibilities. Secondly, I want the Code to focus us on the judgements people make about how they behave. This will place more clearly the responsibility on each of us to consciously behave within the values framework that is so important for Police. Thirdly, it will lessen the adversarial nature of the process of dealing with issues as they arise, bringing a more sensitive, timely and proper process of inquiry and decision making – thus lessening the impact of managing behavioural issues on both employees of Police and the organisation.
>
> I encourage everyone to understand the Code and how it is intended to be applied. It is critical that everyone approaches this new method with an open mind and in good faith. The result will be the provision of further assurance to the community of the quality of people who collectively comprise the New Zealand Police.

[80] An allied document is the Supervisors' Guide to the Code of Conduct (the Supervisor's Guide). I shall describe its contents shortly, but it is important to note its statement that the introduction of the Code, along with new systems for managing employees based on modern employment principles, arose from significant recommendations made by the Commission of Inquiry into Police Conduct 2007.

[81] Considered together, it is clear that the provisions of the new PA and the principles described in the Code were very significant steps which were taken to update the way in which employment obligations were to be understood and performed by Police employees.

[82] The Code obviously reinforces the necessity of maintaining a high standard of personal and professional conduct; all employees are required to work to the high ethical standards. To that end, there is an emphasis on the principles of:

- Honesty and integrity
- Loyalty, good faith and professionalism
- Fairness and impartiality
- Respect for people and property
- The importance of confidentiality

- How breaches of the Code will be dealt with
- Specific examples of misconduct
- Specific examples of serious misconduct

[83] In 2003, a statement of "Core Values" had been issued. These continued to apply at the time of the events considered in this challenge. They emphasised the requirements of proper behaviour including professionalism, respect, and commitment to Maori and to the Treaty of Waitangi.

[84] There are two procedural documents which are relevant for the purposes of the challenge. The first, already mentioned, is the Supervisors' Guide. It gives a step-by-step description of processes which were to apply under the Code, along with templates to enable supervisors to implement those processes consistently within the organisation.

[85] In the case of a disciplinary complaint, the following steps are described:

a) An initial assessment is made of the behaviour which is the subject of complaint to determine whether it should be treated as a performance matter, as a breach of the Code constituting misconduct or serious misconduct, or as a possible criminal matter.

b) Once the initial assessment has been conducted, it is considered by the Employee Practices Manager, the local District Human Resources Manager, and the Professional Standards Manager, so that it may be appropriately categorised.

c) Once categorised, the information is reported to the District Commander/National Manager who will confirm the decision as to whether the matter is:

- A performance issue, in which case it would be referred back to the supervisor for management.

- A misconduct issue requiring investigation, in which case it would be referred for PDP if there is possible misconduct; or to a disciplinary hearing if there is possible serious misconduct.

- A criminal issue, in which case it would be referred to Professional Standards for investigation.

d) At a disciplinary meeting held according to the PDP, the employee must be clear about the allegations that have been made and must have a full and fair opportunity to respond to the allegations. Following such a meeting a preliminary decision is made by the decision-maker. The decision-maker is required to consider the following in making its decision: the requirements of the employee's role; past employee performance; whether the standards of behaviour and consequences of breaching those standards have been adequately communicated; and the responses made by the employee including any mitigating circumstances. An opportunity is offered for the making of submissions either in person or in writing. If a finding of misconduct is upheld, a warning may be issued to the employee. A first warning is given for an initial breach; this may be followed by a second warning and a final warning.

e) If it is concluded that behaviour is potentially serious misconduct, the matter must be referred to an Assistant Commissioner or Deputy Commissioner. If the recommendation of the investigator is confirmed, a person is appointed to conduct a disciplinary hearing and report findings of fact to the Commissioner. Copies of all information gathered during the initial assessment, categorisation and disciplinary investigation must be provided to the appointed person who will decide how the inquiry into serious misconduct will be carried out. The independent person conducting the inquiry is referred to as a "panel member", since they are chosen from a panel approved by the Police Association which includes a number of senior lawyers and employment law specialists. A person holding delegated authority from the Commissioner of Police to make final decisions on potential serious

misconduct cases would then consider the report of the independent investigator and other information as provided by the relevant District Commander and a representative of National Police Headquarters. A preliminary decision would be reached and advised to the employee for response orally or in writing; consideration would be given to those responses and a decision then made as to outcome. If the decision is to dismiss the employee, that person is offered the option to seek an alternative outcome having been advised of the decision to dismiss.

[86] The New Zealand Police Collective Agreement (the collective Agreement) for constabulary employees, for the period 1 July 2010 to 30 June 2012, was an employment agreement made between the New Zealand Police Association Inc and the New Zealand Police under the PA. It covered all Police employees holding the office of constable who were not holding an appointment as a Commissioned Officer, such as Mr Q. Section 7 of the Collective Agreement related to discipline and dismissal. It confirmed that:

- The Commissioner would issue to each employee a copy of the Code of Conduct which placed obligations and rights on the employee and employer that should be observed at all times.

- It set out 11 principles which were to be followed when dealing with disciplinary matters, of which the following are relevant for present purposes:

    - The employee was to be advised of the specific matter(s) causing concern and a reasonable opportunity provided for the employee to provide any reasons or explanations.

    - The employee was to be advised of the corrective action required to amend their conduct and given a reasonable opportunity to do so.

    - Before any substantive disciplinary action is taken, an appropriate investigation would be undertaken by the employer.

- Matters of misconduct would be the subject of a progressive warning system.

- For matters categorised as serious misconduct the employee could be subject to dismissal without the application of progressive warnings.

- In order to dismiss an employee there would be a consideration of the facts of the matter and any mitigating circumstances. Due process and policy are to be adhered to.

Legal Principles I

[87] Because the first written warning was imposed on 6 December 2010, the appropriate test for justification is that contained in s 103A of the Employment Relations Act 2000 (the Act) in its pre 1 April 2011 form.

[88] The principles which applied at that time are well known and uncontroversial. In summary:

a) The Authority and the Court are required to consider what the employer did and how the employer did it, to determine what a fair and reasonable employer would have done and how in these circumstances.[11]

b) The justification test of the section does not give an unbridled licence to substitute the Court's views for that of an employer.[12]

c) The justification for dismissal must be determined on an objective basis, that is from the point of view of a neutral observer.[13] The Court may, on an objective analysis, reach a different conclusion from that of the employer.[14]

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11 *Air New Zealand Ltd v Hudson* [2006] ERNZ 415 (EmpC) at [119]; *X v Auckland District Health Board* [2007] ERNZ 66 (EmpC) at [94].

12 *Air New Zealand Ltd v Hudson*, above n 11, at [120]; *X v Auckland District Health Board*, supra, above n 11, at [94].

13 *Air New Zealand Ltd v Hudson* and *X v Auckland District Health Board*, supra.

14 *Air New Zealand Ltd v Hudson* and *X v Auckland District Health Board*, supra.

d) As well as determining the question of justification on an objective basis, it is necessary to consider all the circumstances at the relevant time. Relevant in this regard is the dicta of Williamson J in *Wellington Road Transport IUOW v Fletcher Construction* where, in a list which was not meant to be exhaustive, it was stated:[15]

> [T]he Court considers the conduct of the worker, the conduct of the employer, the history of the employment, the nature of the industry and its customs and practices, the terms of the contract (express incorporated and implied); the terms of any other relevant agreements; and the circumstances of the dismissal.

The Court also has relevant regard to good industrial practice which includes some consideration of the social and moral attitudes of the community.[16]

e) In *Air New Zealand v V* the Court confirmed that the requirement that the assessment of the employer's actions be conducted in the light of the circumstances at the time the dismissal or action occurred necessarily includes the dismissal or disadvantageous action itself. That means that the section requires a consideration not just of the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer's ultimate decision in light of that finding.[17]

Context

[89] It is evident from the investigation report prepared by Mr Mikaera and Superintendent Cliff's subsequent decision-making that the principles of the Code were central to the report.

[90] The Code was plainly a significant document. As already mentioned, the Supervisors Guide confirmed that it was introduced to govern the conduct of all Police employees along with new systems for managing employees based on modern employment principles, these being significant recommendations from the

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15 *Air New Zealand v V* [2009] ERNZ 185 (EmpC) at [30].

16 *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59; [1983] ACJ 653 at 70; affirmed by the full Court in *Air New Zealand v V*, above n 15, at [30].

17 *Air New Zealand v V*, above n 15, at [36].

Commission of Inquiry into Police Conduct 2007. Section 20(2) of the PA imposed a statutory duty on all employees to conduct themselves in accordance with a Code promulgated by the Commissioner; and this was reinforced by the provisions of the collective agreement which applied to constabulary employees including Mr Q.

[91] I have also referred to the significant comment from the Commissioner as to the importance of the Code, which included statements as to standards of behaviour which would place a responsibility on each employee to consciously behave within the values framework that was considered important for Police.

[92] Mr Q acknowledged that on 30 January 2008 he received a copy of the Code, that it was his obligation to read and understand it and that he could be subject to the disciplinary procedures existing in Police disciplinary procedures for breaches. From then on he was bound by the Code's provisions.

[93] In August 2008, an incident occurred wherein it was recommended that there should be a discussion with Mr Q as to the need to comply with the Code in certain respects. Whether or not that discussion occurred, the letter itself emphasised the importance of the Code as a reference point for core values.

[94] In evidence Mr Q accepted that the document was an important one for Police officers, that he needed to be up-to-date with it, and that it set out very clearly the expectations of Police officers and how they were to carry out their duties.

[95] Mr Q stated that he had not received training in respect of the Code, although it is apparent that Superintendent Cliff intended that all employees would receive this. Two other Police employees confirmed that they too had not received training on the Code. Be that as it may, the language of the Code is straightforward; it is easy to understand, and Mr Q appropriately accepted that he was aware of his obligations.

[96] Furthermore, in *Chief Executive of the Department of Inland Revenue v Buchanan*[18] the Court of Appeal made it clear that the proper approach is to consider whether, in all the circumstances of the case, the employee could be expected to know of relevant obligations. It was held that where the employer had made a

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[18] *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767 (CA).

concerted effort to ensure that employees were aware of the Code, then it was entitled to expect employees to meet their contractual obligations to comply with its provisions. In that case the particular obligations of secrecy and impartiality were not unusual or unexpected for employees of the particular employer given its statutory obligations, and this too was a relevant fact.[19]

[97] I find that in all the circumstances Mr Q could be expected to know of the obligations of the Code; and indeed was well aware of them. Police were entitled to place emphasis on the provisions of the Code and it is unsurprising that they did so when considering the particular allegations that arose from Detective Senior Sergeant T's complaint.

Reliability of information obtained

[98] A significant challenge was advanced for Mr Q as to the reliability of information obtained. It was submitted there should have been interviews of persons other than those who had provided information for the purposes of the investigation. Whilst the decision-makers had information from Detective Senior Sergeant T, Detective Inspector Long and Mr Q, it was submitted that a fair and reasonable employer would have obtained further information from others.

[99] It is convenient to consider this submission with regard to the analysis undertaken by Mr Mikaera in his investigation report, which was then considered by Superintendent Cliff.

[100] Mr Mikaera concluded that there was no argument Mr Q had removed property from Detective Senior Sergeant T's desk. This was conceded by Mr Q, was uncontroversial, and did not require any further information.

[101] He also stated that he did not believe there was an issue that Mr Q "presented" the items at the meeting on 28 April 2010. Whilst Mr Q made it clear that he did not remove the items he brought to the meeting from the plastic bag in which he had placed them, he did acknowledge that he had provided them in the bag to Detective Senior Sergeant D. That fact was not in issue either.

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[19] At [37].

[102] Next, Mr Mikaera referred to Mr Q's contention that he was acting under the new policy, and he had no option but to secure the subject property. It had been submitted by Mr Q's lawyer that the provisions of the policy required him to take this step and that it justify his actions. This assertion did not require any further information; rather it was a fact which needed to be evaluated.

[103] Mr Mikaera then said he considered that Mr Q's actions were not unreasonable as regards to Detective Senior Sergeant T, because they were in consequence of a lawful act. That too was a matter of evaluation in the particular circumstances for which further information from others was not required.

[104] Mr Mikaera recorded that a legal submission had been made that the third allegation of insubordination was "null and void" for want of particularity, and because the first two allegations were not established, the third must also fall. That was a legal point which did not require further information.

[105] Mr Mikaera said that from a narrow perspective the points made for Mr Q had some logic, but they failed to take into account the principles of the Code, which he then set out. That is not a conclusion which required further information.

[106] Next was his statement that Mr Q had taken a very public path in acting as he did, and that the correct and prudent step would have been to inform Detective Inspector Long of the articles in private so that he could take the matter up with Detective Senior Sergeant T. Later in his report he said that neither raised the issue with the default manager, Senior Sergeant Stewart. He considered that these actions would have been reasonable and appropriate.

[107] Mr Q himself had provided information on this point. He said that referral to others would be futile and inappropriate, and that in the case of Detective Inspector Long a "head in sand" approach would be adopted.

[108] Mr Q's assertions were clear. Further information from other attendees was not necessary to evaluate this proposition. The difficult history within the Unit was well known. Issues had been explored via a process which included the review conducted by Senior Sergeant Stewart, followed by his appointment as a neutral point of reference to whom members could refer if need be. The question was

whether it was appropriate for Mr Q to bypass the avenues which were available within the organisation, and which would normally be expected to be utilised given the hierarchal structure of Police, rather than confronting Detective Senior Sergeant T in front of persons for whom he was responsible as a supervisor. That was an issue which required evaluation rather than further information.

[109] A related issue was Mr Q's assertion that the meeting was, he said, conducted on a "no rank" basis, so that participants were free to speak their minds; and that the tone of the meeting was established by Detective Senior Sergeant D at the outset of the meeting when he said that members needed to speak their minds in respect of performance issues. Mr Q's evidence was that Detective Senior Sergeant D was blunt in encouraging "no holds" participation but he also accepted that "respect was a given". This too was an assertion that did not require further information. The issue was whether it was appropriate in those circumstances for staff when speaking candidly to override the principles of respect and professionalism which the Code described.

[110] A further issue which was discussed by Mr Mikaera in his report related to the language and demeanour used by Mr Q towards Detective Senior Sergeant T. When giving evidence, Superintendent Cliff stated that he did not consider that the interviewing of others was necessary because:

> Essentially we had acknowledgment that [Mr Q] had gone into [Detective Senior Sergeant T's] office and taken the items. He acknowledged that he did make the comments publicly in front of others. The tone, there was some difference in terms of the way in which [Mr Q] described it as opposed to [Detective Senior Sergeant T]. But, essentially, there was a lot of common ground on what had happened. There clearly wasn't common ground on the impact that it had or the reasonableness of what had happened in terms of the impact it had on [Detective Senior Sergeant T].

[111] There were a range of views expressed as to Mr Q's demeanour in the accounts which Mr Mikaera had obtained. Detective Senior Sergeant T said he thought Mr Q was "in an aggressive state of mind", and that he appeared to be "wound up" and "agitated". He had been lost for words at Mr Q' outburst about his work performance. Detective Inspector Long focused on the content of what occurred at the meeting, rather than demeanour. However, it is apparent that he regarded Mr Q as having targeted Detective Senior Sergeant T in a relentless fashion.

For example, he characterised Mr Q as having scoffed at a remark made by Detective Senior Sergeant T as to whether he had a copy of the Stewart Review. He told Mr Q immediately after the meeting that he did not approve of the way in which he had raised the issues. He considered Mr Q was displaying animosity towards Detective Senior Sergeant T and was acting in an adversarial manner.

[112] For his part, Mr Q said that although he knew at the outset some issues would attract "some sensitivity", a diplomatic approach was best; he said he had spoken in a casual or calm way. He portrayed matters on the basis that it was Detective Senior Sergeant T who became agitated, made rude remarks, became heated in his responses and eventually lost control.

[113] Senior Constable N gave evidence to the Court as to what happened at the meeting, suggesting that Mr Q had adopted a "normal conversation tone" and that Detective Inspector Long had let the meeting get out of control. But he agreed that the meeting was "uncomfortable". He had known that Mr Q would raise issues concerning Detective Senior Sergeant T; and had gone as far as preparing a button which he was wearing under his jacket on the evening prior to the meeting which was "tongue-in-cheek" but was to support Mr Q. It is clear that Senior Constable N aligned with Mr Q's position. He too had issues with regard to the management of the Unit, and could not be regarded as an independent observer. His evidence was also, at times, vague and hesitant. I am not persuaded that his recollections as to Mr Q's demeanour are determinative.

[114] Although Detective Inspector Long did not give evidence there are two reports which he prepared regarding the matters at issue, as well as transcripts of conversations he held with Mr Q at the time regarding the events. I find that Detective Inspector Long's recollection was expressed in moderate terms, and that it was appropriate to regard his evidence as reliable, as Mr Mikaera in effect did when he concluded that Mr Q was openly defiant of Detective Senior Sergeant T. It was asserted that Detective Inspector Long was a friend of Detective Senior Sergeant T's and that this coloured his account. However, the evidence was that Detective Inspector Long had also known Mr Q a long time and considered him to be a friend as well as a colleague. I do not consider that Detective Inspector Long deliberately

or inadvertently distorted his report so as to support Detective Senior Sergeant T. I find Mr Mikaera had a good perspective as to what had occurred in the form of Detective Inspector Long's evidence, which was reliable in the circumstances; he did not need to interview others to obtain more information as to Mr Q's demeanour.

[115] The other issue on which there was not a consensus was the effect of what occurred at the meeting regarding Detective Senior Sergeant T. Mr Q himself reported that Detective Senior Sergeant T looked upset. Given the pointed way in which he referred to Detective Senior Sergeant T's property at the meeting and the criticisms he made of him, this was to be expected. Nor was the issue contested by Mr Q. Rather, it was his position that it was necessary for him to take the steps he did and it was unfortunate that Detective Senior Sergeant T became affected by the process.

[116] The meeting which was scheduled for 28 April 2010 had a long lead-up. It was against a background of considerable frustration as far as Mr Q was concerned, catalysed by criticisms – as he saw it – of his performance by Detective Senior Sergeant T; his failure to obtain a copy of the Stewart Review relating to work practices of the Unit, and above all as evidenced by the OIA letter he wrote to Mr Shield wherein he made inappropriate remarks about not only Mr Shield but also Superintendent Cliff. I have no doubt that what was to occur at the meeting had been discussed between members of the Unit including Senior Constable N, but it does not follow that all Mr Q's colleagues in the Unit supported Mr Q. They were asked at the meeting whether they did, and nobody responded. Indeed, a number of Unit members had previously approached Detective Inspector Long and advised that they did not share Mr Q's views.

[117] It is an agreed fact that the meeting became heated which is unsurprising. Mr Q was in a frame of mind where he wanted to publicly humiliate Detective Senior Sergeant T, with whom he disagreed on a range of professional matters.

[118] Having regard to the circumstances leading up to the meeting, I consider it is more probable than not that Mr Q was anxious as to what would occur; he had decided to publicly confront Detective Senior Sergeant T, which was a bold strategy.

It is more probable than not that he was anxious and at times assertive, as recorded in the accounts given by Detective Senior Sergeant T and Detective Inspector Long. I do not consider that interviewing further witnesses would have led to a different conclusion on this point than that reached by Mr Mikaera and Superintendent Cliff.

[119] A further reason given by both Mr Mikaera and Superintendent Cliff for the decision not to interview others was that the Unit had been through a very difficult period, and was now in a rebuild phase. It was their view that it was not desirable that potential disruption be caused by interviewing members of the Unit, including Sergeant O who had returned to the Unit not long beforehand. Superintendent Cliff said he was satisfied that there was sufficient congruence between the various versions to allow a decision to be made.

[120] The history of disharmony was a relevant circumstance which the employer was entitled to take into account. I find that this factor also constituted a valid reason for not undertaking interviews with others given the extent of information which was in fact available to Mr Mikaera.

[121] Mr Mikaera and Superintendent Cliff were both clear that the matter under consideration was a "possible misconduct" matter, likely to attract a lower sanction. This is a yet further factor which I consider they were entitled to take into account in determining whether or not further persons needed to be interviewed.

[122] I consider the decision they made not to seek further information from third parties was in all the circumstances a decision that a fair and reasonable employer would take.

Delay issues

[123] Two broad submissions were made on behalf of Mr Q in support of an assertion of delay:

a) The unjustifiable actions of the defendant caused disadvantage to Mr Q for the purposes of s 103(1)(b) of the Act because:

- He was unilaterally taken away from a position which he very much enjoyed.
- He was placed on stand-down and then restricted duties.
- He was prohibited from applying or being considered for promotion, when he was seeking to do so.
- He was required to endure a seven-month wait to learn of the outcome.
- He was required to use his contractual entitlements rather than receive his salary during that period.
- He received a warning after 29 and a half years' of service.
- His mental health deteriorated.

b) Separately, it was submitted that the period of delay for resolution of this matter was excessive, especially as it was considered by Mr Mikaera to be a "low level matter" and one which he wished to have "resolved as soon as possible".

[124] The defendant submitted that the delays throughout the process were reasonably explained, and indeed that the majority of them were due to the plaintiff and/or his lawyer, not the defendant.

[125] These were in part contributed to by events beyond the control of Police, such as the first Canterbury earthquake on 4 September 2010, and the Pike River disaster on 19 November 2010 – both of which created emergencies which utilised significant Police resources, and meant in particular that Mr Mikaera or Superintendent Cliff were unable to make decisions required of them at those times. At other times there were delays on the part of Mr Q (for example the deferment of the investigation meeting).[20] Another example occurred after the preliminary decision was forwarded to Mr Q's lawyer on 6 August 2010. After correspondence

[20] Initially from 2 June 2010 to 18 June 2010, then to 25 June 2010 followed by advice on 28 June 2010 that there was no need for an investigation meeting.

between the parties as to whether mediation would occur, on 23 September 2010 Mr Mikaera asked whether Mr Q would attend a disciplinary meeting; there was no response from the lawyers until 22 October 2010. There were reasons for these delays, for example, the absence of the relevant lawyer overseas.

[126] Most of the assertions recorded above relate to post-incident events. There is no claim of personal grievance with regard to Police decisions to stand-down Mr Q or to restrict his duties. That issue was originally pleaded for Mr Q, but was discontinued prior to the hearing.[21] Accordingly, there is no issue before the Court to the effect that the various procedural steps which were taken by Police up to the date of the decision when the warning was imposed were unjustified.

[127] Delay could be relevant to an issue of procedural fairness if for example that factor compromised the reliability of information obtained in an investigation process. There is no evidence that there was any delay in the obtaining of relevant information – indeed the core information which Mr Mikaera obtained (that is the reports of Detective Senior Sergeant T and Detective Inspector Long) were forwarded to Mr Q by 25 May 2010. Mr Q provided a substantive response in his statement which was attached to his lawyer's letter of 6 July 2010. There is no evidence that the information supplied within that context was compromised as to accuracy through the lapse of time.

[128] In short, I do not consider that delay factors compromised the fairness of the disciplinary process.

Was the warning justifiable?

[129] I must finally consider whether the imposition of the warning was an action that a fair and reasonable employer would have done in all the circumstances at the time it was imposed, when considered on an objective basis.

[130] It is submitted for Mr Q that he genuinely held the belief that he was entitled to proceed as he did. Reliance was placed on his belief that Detective Senior Sergeant T's actions were in breach of the policy which was under discussion, and

[21] By way of memorandum of counsel dated 4 December 2013.

that he needed to hand over these items and discuss performance concerns at the meeting in the way that he did; finally that since the meeting was on a no-rank basis, this meant that issues could be discussed on a frank and open basis for the betterment of the squad.

[131] I am satisfied that none of these concerns, even if correct, justified Mr Q's conduct at the meeting.

[132] Mr Q could have spoken directly with Detective Senior Sergeant T, Detective Inspector Long, or the default manager, Senior Sergeant Stewart. Mr Q stated that these, and superior officers such as Detective Inspector M and Superintendent Cliff, were all inappropriate persons with whom to discuss these issues. His reasons for not doing so were implausible. For example he said that Detective Inspector Long would "place his head in the sand", yet he chose to embarrass Detective Senior Sergeant T at a meeting chaired by Detective Inspector Long who was the senior manager in attendance. He had met Detective Inspector Long two days previously and requested a meeting to discuss Unit issues; if he had concerns about his supervisor that was the ideal time to raise them with a superior officer, given the hierarchal structure. He rejected the possibility of speaking with Detective Inspector M, because he said he was a good friend of Detective Senior Sergeant T and the issue would have fallen on deaf ears. But as I have found, that factor applied equally to him. He ruled out Senior Sergeant Stewart (the independent go-to person), because he had dealt with administration matters rather than operational performance; yet he was also couching the issues as pertaining to adequate resources, a matter which Senior Sergeant Stewart had addressed. He did not consider the District Commander to be a suitable person, because he had "a lot of important admin stuff to deal with", and the issue would have been delegated – yet at the same time he said that what was at stake was really a resource issue requiring an additional staff member in order to relieve Detective Senior Sergeant T as an overburdened manager. It was entirely appropriate for Police to conclude that the issue could have been raised with any one of these persons. Also relevant is Superintendent Cliff's evidence that the culture within Police is one of praise publically, criticise privately.

[133] The removed items could have been provided to such a person rather than presented at a meeting, or they could have been secured in a lock-up area at the Unit's premises. The fact this did not occur suggested Mr Q deliberately decided to confront Detective Senior Sergeant T publically. Subsequently, Mr Mikaera and Superintendent Cliff were entitled to conclude that Mr Q had gone about raising his concerns in an inappropriate manner.

[134] Nor is a belief that the meeting was conducted on a "no-rank basis" – a reason for proceeding as Mr Q did. As Superintendent Cliff stated "taking away rank does not mean that someone can be abusive or disrespectful to somebody". It was the issues of respect and professionalism which were at the forefront of the conclusions reached. Mr Q stated at the time, and again when giving evidence, that he addressed Detective Senior Sergeant T in a respectful way as best he could, as did Senior Constable N. As I have found, that was not the case. It was open to the decision-makers to find that Mr Q took a step that was deliberately provocative when he presented Detective Senior Sergeant T's property at the meeting in a manner that was apparently designed to embarrass. He realised at the time that it was having this effect yet persevered regardless.

[135] Some reliance was placed on a suggestion that, because of the adverse comments made by Detective Senior Sergeant T and Detective Inspector Long regarding Mr Q's work performance, that aspect should have been explored more fully.

[136] The reality is that the key point which persuaded Mr Mikaera to recommend a warning, and for Superintendent Cliff to accept that recommendation related to the way Mr Q conducted himself at the meeting towards Detective Senior Sergeant T. That was the focus of their concerns; background factors such as Detective Senior Sergeant T's previous criticisms of Mr Q were secondary. The conclusion that there was an unacceptable derogatory attack on a supervisor in front of others was justified on the information which was obtained and considered. It was also appropriate to determine that Mr Q's responses indicated he did not appreciate the gravity or impropriety of his conduct. It was obvious that those principles were significant to Police with its emphasis on high behavioural standards.

Conclusion as to first incident

[137] Standing back and assessing all the circumstances on an objective basis, I hold that the imposition of the first written warning by the defendant was what a fair and reasonable employer would have done at the time. That decision was substantively and procedurally justified. I dismiss the challenge in respect of the first incident.

The second incident - chronology

[138] Overnight on Saturday/Sunday, 8-9 May 2010, Mr Q was required to work in uniform in Christchurch Central City under the PLR, which as mentioned earlier was an initiative in the Canterbury District requiring all sworn officers working elsewhere to assist frontline staff on a rotational basis. It will be recalled that this was a topic that was discussed at the meeting of 28 April 2010.

[139] Mr Q had undertaken such an assignment 10 weeks previously, from a Monday to a Wednesday.

[140] On this occasion, when attending licensed premises known as the Boogie Nights nightclub, Mr Q detained an intoxicated young woman for disorderly behaviour when she took his hat. He said she was trying to evade its return and that it was necessary to remove her by the use of moderate force. He released her outside the nightclub without charge after having a stern discussion with her.

[141] The defendant undertook a disciplinary process including an investigation conducted by a senior employment lawyer, Mr Kynaston. It was his conclusion that the member of the public who complained, Ms V, was treated in a harsh and unjustified way so that Mr Q's conduct amounted to serious misconduct at the lower end of the scale. In due course, it was determined that dismissal was appropriate which occurred on 14 October 2011.

[142] Mr Q challenged the disciplinary process on substantive and procedural grounds. However, at the hearing it was conceded on his behalf that the circumstances amounted to misconduct which would have justified the imposition of

a warning, as well as a referral to training, counselling or therapy, along with supervision.

[143] A description of the events relating to what occurred at the Boogie Nights nightclub, and as to the process of investigation thereafter can best be obtained by considering the information as it came to hand following the incident. Because the extent of the evidence which was ultimately received was significant, in this judgment I summarise the account of each witness when first given, and consider any further relevant points made by that witness in any subsequent interview as is appropriate when discussing particular points of challenge.

[144] On 11 May 2010, Ms V lodged an online complaint with the IPCA regarding the incident. In essence she said:

- She and friends walked into Boogie Nights when two Police officers accompanied by two Military Police officers were leaving it.
- She had been drinking prior to coming to the bar and unfortunately made the decision to remove the hat of one of the officers. This was an action she regretted and not one she would have chosen if not influenced by alcohol.
- This provoked a response that she believed amounted to an excessive use of force. She explained she was approximately five foot five inches and of petite build. The officer placed her in a headlock/choke-hold which cut off her air supply at times.
- She said witnesses saw her face was red and her eyes streaming. The officer dragged her to the entrance and pushed her into the wall slamming her upper chest numerous times whilst yelling in her face.
- He then dragged her outside, when all four officers departed.
- She was trying to obtain security footage which she believed would assist.

[145] An email was forwarded to Police on 19 May 2010 from Major Magnus Latta attaching accounts from the two Military Police officers involved. This followed a telephone call from Major Latta to Senior Sergeant Newton. Briefly, the recollection of each was as follows:

a) Lance Corporal J, who was one of two Military Police officers who worked on the PLR on 8-9 May 2010 with Mr Q and another Police officer, Sergeant I, explained that:

- The female had grabbed the head-dress of a constable who managed to get it back. He then grabbed the female in a "rear choke hold" and moved her to the hallway entrance to the dance floor and started yelling at her.

- She was saying sorry and answering back by saying "I didn't mean it".

- He thought the constable did not like her answering back and then placed her in a "rear choke hold" and moved her to the outside of the bar and started yelling at her again when she started to cry.

- They then continued on foot patrol.

b) Lance Corporal K said in his email:

- When he and his three colleagues walked past a group of females, one of them removed the hat of the first Police officer; that officer retrieved the hat and gave a warning.

- He walked past the group of females. He then looked back and noticed the second Police officer restraining a female; he was not wearing his hat.

- The group became very disruptive and were attempting to approach, so he and his colleague stood between them.

- The female who had taken the hat was taken outside and she apologised.

[146] On 26 May 2010, the Independent Police Conduct Authority (IPCA) sent a request to Police seeking further information about Ms V's complaint. The following day it was established that the Police officers involved on the 8/9 May 2010 incident were Mr Q and Sergeant I.

[147] Sergeant I was requested to provide an account of what had occurred. In summary he said:

- On the relevant night Boogie Nights nightclub was visited on three occasions, the second being about midnight when the incident occurred.

- Sergeant I led the way in and out. When leaving an area adjacent to a dance floor, and just before stepping down to a corridor leading out to the street, a female grabbed Sergeant I's peaked cap off his head and put it on her head. Sergeant I told her he did not appreciate this and retrieved it. He then carried on.

- Sergeant I was halfway down the corridor when one of the members of the Military Police brought to his attention the fact that Mr Q was speaking to another female. He gathered she had removed Mr Q's cap as well.

- At the end of the conversation Mr Q indicated to the female that because of her intoxication she was to leave the bar. The female protested but was escorted from the premises.

- Other than when Mr Q walked the female out, Sergeant I did not see him touch the female.

[148] This information was forwarded to the IPCA. Police recommended that the matter be regarded as a category three matter for investigation – that is, a Police investigation which would then be reviewed by IPCA. However, on 8 June 2010 the IPCA advised Police that the designation should be category 2; that meant that IPCA

considered it was a serious complaint which required referral to Police for investigation, subject to proactive IPCA oversight. It also meant that after the complainant had been notified of the findings and outcome, Police would forward their file to IPCA so the adequacy of the Police investigation could be assessed and if necessary further investigation could be directed.

[149] By 28 June 2010 Mr Mikaera had received the complaint for investigation; he asked Senior Sergeant Newton to undertake an initial assessment.

[150] Soon after, Senior Sergeant Newton attempted to obtain CCTV footage from the Boogie Nights nightclub. He was advised that the video from the night in question had been permanently overwritten. Consequently he did not view any CCTV footage. Nor is there evidence that any was provided to Ms V in response to her request for it.

[151] On 23 August 2010, Mr Mikaera and a Senior Sergeant visited Ms V. She confirmed that she was happy for Police to deal with the matter as they saw fit. It was explained one outcome could be a decision not to process the matter, a possibility which was accepted by Ms V. She said that she did not wish the officer to lose his job. She accepted that she should not have touched the officer's hat but thought his actions were wrong.

[152] In a letter to Mr Mikaera of 24 August 2010 Senior Sergeant Newton summarised the information which had been obtained, including Ms V's views. It was his recommendation that as she did not wish the matter to be considered on a criminal basis, that no injuries were sustained and that she had admitted she was intoxicated and had acted in a disorderly manner, it was not necessary for the incident to be the subject of a criminal charge. However, he considered Mr Q's actions to be excessive in the circumstances. If force was used as indicated a Tactical Options Report (TOR) should have been submitted. He considered that the matter needed to go to a categorisation panel, where a decision could be made as to whether it should be considered as misconduct. If so, a Code investigation would need to be commenced. A categorisation meeting was then held on 26 August 2010 and it was agreed that there was a Code issue.

[153] For completeness, Senior Sergeant Newton was requested to undertake an assessment applying the Solicitor-General's Prosecution Guidelines. In his report to the District Commander of 21 September 2010, he concluded that while the elements of an offence were made out on a prima facie basis, it was not in the public interest to prosecute; the views of the complainant were a significant factor in that decision.

[154] On 30 September 2010 Superintendent Cliff confirmed that the allegation of excessive force should be progressed under the Code rather than by way of a prosecution.

[155] Mr Mikaera forwarded to Mr Q a notice of investigation meeting in relation to the incident on 1 October 2010. Disclosure documents were attached. A meeting was proposed for 11 October 2010 to investigate the complaint.

[156] On 2 November 2010 Mr Mikaera advised Mr Q's lawyer that the District Commander considered that if substantiated the allegation of excessive force would indicate "a total loss of control and judgment". Accordingly, it was not seen as appropriate for him to return to an operational role with the Unit at that time.

[157] Mr Q's lawyer requested CCTV footage on 15 November 2010, and advised that there would be a delay in the presentation of his submissions pending its receipt. The next day, Mr Mikaera advised the lawyers that Police had been unsuccessful in obtaining any video footage.

[158] On 10 January 2011, one of Ms V's friends, Ms W, sent an email to Mr Mikaera describing her recollection of events as follows:

- She said that after she and her friends walked into the Boogie Nights nightclub, she removed the hat of a Police officer and was reprimanded; she said this was appropriate.

- Ms V removed the hat of another officer which "resulted in physical abuse". She said the officer grabbed Ms V at the throat and pushed her against the wall. Her head hit the wall a few times. He then "twisted

her arm behind her in a lock and pushed in through the crowd and [on to] the footpath."

- The officer's colleagues did not do anything to stop his behaviour. What Ms V had done was silly but she was not intending to cause any harm. She felt the officer had no right to treat Ms V the way that he did.

[159] On 22 January 2011, Mr S, a former Police officer and supervisor of Mr Q, but now a private investigator, obtained a written statement from another friend of Ms V's, Ms X. He did so on behalf of Mr Q. She said in summary:

- She felt Ms V put a hat on her head, then she felt someone grab the hat and also some of her hair. She turned around and faced an angry Police officer who was speaking loudly to her. She could not recall what he said, and did not know if she could have heard in any event because of the noise level in and around the bar and dance floor.

- It all happened very quickly and the next thing she could recall was seeing Ms V held in a headlock by, she thought, the same Police officer who had removed the hat from her head. He then dragged Ms V backwards down the steps to the area in the corridor just off the street. She recalled Ms V losing her footing and regaining it as she was taken to a coat check area.

- When they got to that area, she recalled seeing Ms V with her back against the wall in the corridor. She saw Ms V sobbing and struggling for breath. Ms V was not trying to move away, and she believed the Police officer was holding Ms V in that position so as to make a point to her.

- Then Ms V was led out of the club and she could not recall how this occurred except that the removal was physical. She understood that Ms V was not permitted to return for the night. The officers then departed.

- She went on to say that the next morning Ms V, Ms X, Ms W and two others met and discussed what had happened. They were all of the view that the force used was excessive. They went to the Police station on that day or the following day, and were told to contact the IPCA to submit a complaint, which they did.

[160] On 28 January 2011, Mr Q provided an initial response to the allegations which had been made. In summary he referred to the following topics:

- The work to which he had been assigned and the arrival of himself and three colleagues at Boogie Nights just after midnight. He said he had vast experience of such work.

- As they were walking out and just before they got to a corridor, Sergeant I's hat was removed from his head by "a drunk young girl" who placed it on her head. Sergeant I retrieved this and she was given a stern warning.

- Five seconds later Mr Q's hat was snatched from his head from behind. He spun around to discover a young girl darting away with his hat into the crowded nightclub.

- He chased her about 10 metres and grabbed her shoulder to stop her and snatched his hat back. She then tried to move off so he immediately restrained her. He did this by taking his right hand off her right shoulder and placing it on her left shoulder with his right arm around her neck. At the same time he placed his left hand around her right elbow. This is a technique he used for small drunk people so that he could readily "steer" them.

- He then swiftly marched her towards the street, at which point she began to resist arrest. She became quite hysterical and irrational saying such things as "it was an accident", "it wasn't me", "I promise I'll never do it again", "you can't kick me out, you've got your hat back", "you can't kick me out, all my friends are inside". She also became tearful.

- He considered she was obviously drunk and totally unreasonable. It was still very noisy in the corridor and given that she was resisting, he stopped and held her against the wall and yelled at her that she was drunk and was not going back to the nightclub under any circumstances. She attempted to move back. He placed his right hand against her sternum area. It was apparent that she was not going to behave so he again engaged the same technique so as to steer her to the footpath. This was not a "head lock" or "choke hold or a "carotid hold". The technique was "tame", and was "particularly useful for small drunk females".

- Outside he released her in front of the doorman and told him not to allow her back into the premises under any circumstances. She started to yell that he should not treat her like that and she was going to make a complaint. He told her that she was very lucky not to be facing charges immediately back at the watch-house, and once she sobered up, if she wanted to make a complaint then she should telephone the IPCA.

- But for other responsibilities which the group had that night he would not have released her from arrest without charging her.

- His supervisor, Sergeant I, witnessed the incident and did not direct him to submit a TOR. Mr Q had been away from this type of duty for 14 years and had never heard of a TOR. The amount of force used was moderate at most and the complainant suffered no actual personal injury.

- He went on to make comments as to the accuracy of other statements, particularly that of Lance Corporal J which he said was mere guess work and at odds with other statements.

[161] On 3 February 2011, Mr Mikaera completed his investigation report. He summarised the evidence which had been obtained. In analysing that information, Mr Mikaera referred to a submission made for Mr Q that there were inconsistencies

in the various witness statements. He acknowledged this, but stated that in his experience that was "neither unexpected nor unusual".

[162] Mr Mikaera considered there were in fact consistencies in the accounts which had been obtained; Mr Q did have his hat removed, he did remove a female from the Boogie Nights nightclub by the use of a hold, the hold was across the neck area of the complainant and he held the complainant against a wall. Mr Q described the hold as tame, however the impact upon the complainant and witness accounts painted a very different picture. The complainant had been struggling for breath with her air supply cut off due to the hold placed on her. It had been described as a headlock/choker hold. Further, she was pushed against a wall with her head being observed hitting the wall. Since he said he was so experienced, Mr Mikaera considered he should have known that a TOR should have been filed.

[163] The "catch and release scenario" was flawed. Mr Q had stated that he released the complainant so as to focus on the core tasks of the particular operation that he said were being conducted, but Mr Q had ignored the instructions pertaining to that operation which were to intervene at an early stage and show a positive police presence for minor offences before they escalated. Although Mr Q stated the event was insignificant, others did not consider this to be so.

[164] In his investigation report, Mr Mikaera concluded that the matter was "possible serious misconduct", and that it should be referred to the National Disciplinary Committee for consideration.

[165] On 4 February 2011, the District Commander agreed that the case was one of possible serious misconduct. On 8 February 2011, it was considered by the National Disciplinary Committee and referred to a disciplinary hearing. The Committee's recommendation was communicated to Mr Mikaera on 16 February 2011. On 18 February 2011, Mr Q was advised that a disciplinary hearing was to be convened. Information regarding the process was provided, together with advice that the person appointed to undertake the hearing would contact him shortly. A fact sheet about the intended process was attached.

[166] Mr Q was advised on 28 March 2011 that Mr Kynaston had been provisionally appointed to conduct the disciplinary hearing, and that he had seven working days to advise whether there were any conflicts of interest. On 15 April 2011, Mr Kynaston's appointment was confirmed. On 12 May 2011, he convened a telephone conference with Mr Mikaera and two representatives from the New Zealand Police Association (Police Association) who were representing Mr Q. He outlined the persons to whom he anticipated speaking; he said that he intended to speak to them individually by telephone or in person, and would provide file notes of his discussion in advance of the hearing which it was agreed would be held on 14 June 2011.

[167] On 25 May 2011, Mr Sydney, a senior member of Police Staff Safety Tactical Training (SSTT) Canterbury, prepared a statement for the investigation on issues relating to carotid holds.[22] He emphasised that a carotid hold is a static hold and not intended in any way to be used as an escort technique. In such a situation, a TOR must be submitted.

[168] On 27 May 2011, Mr Kynaston commenced his interviewing process with a telephone interview with Ms V. He then interviewed Lance Corporal J in person on 7 June 2011, followed by Sergeant I on 7 and 10 June 2011, Ms W on 9 June 2011 and Lance Corporal K on 13 June 2011, all of whom were also interviewed by phone.

[169] A disciplinary hearing was held with Mr Q on 14 June 2011. The evidence is that five hours, 37 minutes of questioning took place, over the course of a day, with breaks from time to time. The meeting was recorded, and a copy of that recording was provided to the parties after the hearing. There is no evidence as to whether Mr Kynaston prepared a transcript. However, such a record was prepared for the hearing in this Court.

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[22] The STT Instructions Guide describes this as a neck restraint that incapacitates an individual by the officer applying pressure on the carotid arteries in the individual's neck, thereby restricting the blood supply to the brain.

[170] Mr Kynaston commenced the disciplinary hearing by describing the process; both the steps he had taken and those which he proposed to take during and after the meeting.

[171] Mr Q then spoke. He described his background in the Police, and current responsibilities in the Unit. An outline of the PLR was given. Mr Q also referred to relevant training on holds.

[172] Mr Q then described the events of the night in question. He referred to Ms V ducking away from him in a crowd. He said he did not want to be made a fool of and "see my [hat] being thrown all over the dance floor and me chasing it like a puppy dog", or it being "flushed down the ladies' toilet" so he caught up with her and grabbed her shoulder. He recalled that she had a conspicuous look of absolute "shock horror" when she turned and saw him, a policeman in uniform looking above her basically saying, "I've got you, you drunk, stupid, little girl". He said "I was pleased to get her too because it is insulting doing that to me or any Police officer really". Later he said he felt pleased with himself that she had been given a "jolly good shock". Her right hand was carrying the hat which was "poking out as she was moving through the crowd". There was a brief attempt to move off but he had a good grip on her so she was not going anywhere. He had his right hand on her. He had to give a "jolly good tug" to retrieve his hat in his right hand. He then demonstrated the hold (which was as he had described it in his earlier written statement). He wanted to "basically smother her, holding her tight with his right arm across her front to her left shoulder so that she could not move away". He placed his left arm on her right elbow so as to be able to steer her. He then marched her past her friends to some steps, although he could not recall how many there were. He wanted to get her outside as quickly as possible and speak with her. He considered the hold to be "relatively innocuous".

[173] He said that Ms V began to resist him so he turned her against the wall of the corridor, placing his right hand on her and telling her very firmly "you're not going anywhere but out of this night club, that you are dumb, drunk little girl and don't think for one second you have got any right to be staying here". He said that there was then a string of nonsense from her which was "it wasn't me, I won't do it again,

I didn't mean it, it was an accident, you've got your hat back, you can't throw me out, all my friends are here".

[174] When telling her that she was not going anywhere, he pushed her back a couple of times, perhaps even three times. The only real reason he stopped was to reposition himself because he had a relatively tame hold, and needed to readjust his grip. She was quite emotional, crying and sobbing. He said he had spoken to her very loudly; he was yelling at her because it was noisy, but he was not screaming. He acknowledged he was angry, although he said this was "controlled anger". He considered the incident to be relatively insignificant. The fact she was emotional and crying and upset was a good thing from his point of view. It gave her a "dammed good fright". He then said that he didn't want to be engaging with "this highly emotional nutter, drunk girl any more on the footpath"; he wished to stick to the evening's core task, so a decision not to charge her and to leave was not a hard one. She had obviously suffered an emotional upset which was good. He thought she had it coming, and that she deserved it.

[175] After leaving the nightclub, he said he would have spoken to Sergeant I as to "how dumb is that – your girl was dumb – we got dumb and not just dumb and dumber. Here we got dumb and very dumber … she is lucky that she's not getting charged with disorderly behaviour". That was the end of the matter.

[176] Mr Q said that he was 100 per cent certain as to his account concerning everything. Others were not aware that he had to chase Ms V, and that is why CCTV footage was so crucial. Of the officers involved, he was the only person who saw the entire incident. He thought Lance Corporal J was attempting to be too helpful; he therefore had serious reservations regarding Lance Corporal J's recollections. He said the force used was more or less moderate; and would not cause pain, but she would have no room to move. He did not engage Ms V's neck. He said that he had not considered whether she was under arrest or whether he was simply detaining her. He was attempting to remove her quickly, for her own safety and for his safety. It came down to commonsense and reasonableness in the heat of the moment, based on training that was ingrained.

[177] Mr Mikaera also spoke at the disciplinary hearing, emphasising that the first option for a Police officer was communication. Sergeant I had adopted an approach based on communication, although he accepted the situation involving him was different.

[178] Later in the interview Mr Q discussed particular aspects of the incident. He felt Ms V had been unpredictable and that she had "taken off like a rocket".

[179] When he left Ms V, he did not consider that she was in need of specific care from anyone other than her own immediate friends, particularly after having learned what he hoped was a valuable lesson. Mr Q felt that Ms V's loss of breath should be seen as hyperventilation, rather than obstruction of her windpipe; it was due to shock and embarrassment rather than physical hurt.

[180] He said he was aware of the requirement for a "use of force" report to be provided, but he had not filed one for over 14 years. Although Ms V said she was going to file a complaint, such statements are common and normally amount to nothing. If he had thought there was any chance of this occurring, he would have charged her with disorderly behaviour. He emphasised that if more than moderate force had been used, a report would have to be put in.

[181] The meeting concluded with Mr Q highlighting the multiple inconsistencies which he believed arose from the other accounts given, and as to procedural concerns he had including the absence of CCTV footage.

[182] On 7 July 2011, one of the Police Association legal officers wrote to Mr Kynaston highlighting concerns over the process being adopted, and as to the inadequacies of the investigation into potential criminal liability including the failure to secure CCTV footage.

[183] Mr Kynaston spoke with Ms X on 19 July 2011 so as to clarify some matters which she had discussed with Mr S.

[184] On 22 July 2011, Mr Kynaston spoke to Mr Sydney. As a result of this interview, Mr Kynaston recorded his understanding that the hold described by Mr Q would be considered acceptable by Police providing the circumstances justified that level of force, and the neck was not engaged. If the neck was engaged accidentally, a TOR should be submitted. He recorded that Mr Sydney had explained that all officers were trained to start at the lower end of the scale, and to consider whether communication was appropriate in the first instance. He anticipated that from the training Mr Q had undertaken, he would have received instruction in calming restraints, since these were taught as part of the SSTT annually.

[185] After he had listened to a recording of the disciplinary meeting Mr Q sent Mr Kynaston a further submission on 8 August 2011. He said that he considered the hold he conducted to be necessary, reasonable and appropriate. The rationale or philosophy behind the hold used was the adoption of minimum force by way of a leverage and balance mechanism, which permitted containment of a person of fragile composition unaccustomed to being physically contacted and in an emotional state. The swift engaging of the hold could produce some shock, and a moderate amount of force or compression on the upper chest area from holding the person moderately tight could produce breathlessness. Whilst there was the option of using a wristlock or an arm-bar, on this occasion he opted to use "the tried and true". He did not accept that a sore chest, throat or collarbone could have resulted from his actions. If there was in fact some engagement of Ms V's neck with the crook of his arm accidentally when she stumbled with her footing on steps, then the amount of force and time involved would be insufficient to cause an injury. He reiterated his concerns as to process issues, the consequence of which he had not been advised of the complaint in a timely way. He again critiqued statements made by other witnesses.

[186] On 16 August 2011, Mr Kynaston concluded and issued his disciplinary report. It will be necessary to refer to aspects of his findings in detail later in this judgment, but in summary:

a) He described the process which had been adopted.

b) He referred to credibility issues, and concluded that the lapse of time had doubtless affected recollections for which he had made allowances. He considered that the consumption of alcohol, and shock or surprise at what had occurred, would have impacted on some witnesses' recollections. Subject to what he said about Sergeant I, his impression after talking to the witnesses and reading what they had written was that they were genuine and had all done their best to recall the events for the purposes of the investigation. There was sufficient congruence between the different witnesses' accounts to enable him to reach his findings. In places, he had given Mr Q the benefit of the doubt given the seriousness of the allegations and potential consequences for him. He found Sergeant I's lack of recollection surprising, and questioned whether he had given the full story from his perspective. In light of his limited recollection, and having regard to the evidence of others he had given this evidence very little weight.

c) He referred to Mr Q's concerns about the conduct of the Police investigation, and stated he did not intend to make a finding on what Police should or should not have done since that was not relevant for his purposes. It would have been preferable, from his perspective, to have access to more detailed statements taken closer to the date of the events, and CCTV footage would have assisted had it been available.

d) He found that there was no requirement to use only the holds referred to in the SSTT, and it would have been acceptable for Mr Q to apply the holds that he did, providing the circumstances justified that. The question was whether the force used, with regards to the particular holds that were applied, was "necessary and reasonable in all the circumstances" as indicated in the "Use of Force" chapter of the relevant Police Manual. He had considered what the various individuals had said about the parties' actions, the environmental factors that were in play, the reasons why Mr Q said he had applied the holds which he adopted, why he considered them to be necessary and

reasonable, Ms V's reaction and the impressions of the different witnesses. He considered the use of force at three different stages:

- *Stage one*: when Ms V was first restrained and moved to a stationary point near the entrance/exit corridor of the nightclub.
- *Stage two*: when Mr Q held Ms V at a stationary point against the wall.
- *Stage three*: when Mr Q moved Ms V from that point down the corridor and outside.

e) However, he was conscious that these stages occurred in real time, in a dynamic environment, and he made allowance accordingly.

f) He summarised Mr Q's Police background, including the absence of a particular briefing or training for the role which he undertook on 8/9 May 2010; and generally in SSTT. He concluded that Mr Q was clearly familiar with different holds, the requirement to use force only where necessary and reasonable, and the need to adopt a hierarchical approach. He considered that use of force options are not now as flexible as they once might have been or as Mr Q suggested. Apart from the rights and safety of the individuals to whom the force is applied, there were significant reputational issues for Police and a real risk of civil or criminal liability for individual officers if excessive force was applied.

g) He described Ms V's background, including her height and build as well as her acknowledgment that she was under the influence of alcohol at the time of the incident, although she was not stumbling or slurring and remained aware throughout.

h) He then described the disparate accounts that were given as to what occurred after Ms V took Mr Q's hat. After summarising those recollections he said that he did not accept Mr Q's account that Ms V was running into the crowd or making a determined effort to get away

with his hat. Having spoken to Ms V and the other witnesses, and taking into account Mr Q own impression that Ms V was not a "rat bag type", he considered that Ms V's actions were in the nature of a very foolish prank rather than an attempt to get away with Mr Q's hat. He was reinforced in this view by the fact that Mr Q was present with another Police officer and two Military Police, all of whom were by the entrance and whom Ms V had evidently walked past. He also observed that Ms X was the sober driver for the group and she recalled the hat being placed on her head and her hair being pulled, which she acknowledged would not have been deliberate. He accepted Ms X's evidence as being credible.

i) He referred to the hold itself, stating that the different accounts were broadly consistent. He described the hold in detail.

j) He noted Mr Q's belief that a lesser restraint would have resulted in resistance and an attempt to grab someone as Ms V was walking out or that she would assault him in some way. A wristlock or an arm bar would, Mr Q had said, be more painful than the hold he applied. However, Mr Kynaston considered that on the basis of Mr Sydney's information, these holds would be applied in a painless way, although pain could be applied if the individual did not comply. He referred to the various statements which Mr Q had made in the interview which led to a conclusion that he was angry at Ms V.

k) He concluded that although there was no physical pain or injury associated with the particular hold applied by Mr Q, it was nevertheless an invasive hold. He accepted that Mr Q had good reasons for escorting Ms V out of the premises swiftly. However, he did not consider it was necessary or reasonable for him to apply the level of force he did. Ms V was not a flight risk; nor did she present a danger to Mr Q. Even were he to accept that Ms V had tried to escape into the crowd as Mr Q said, he apparently had been able to restrain her effectively with just a "heavy hand". Ms V was apparently shocked at being caught. Given their relative difference in size and authority and

the hierarchical approach required, there was no need to go straight to the "smother/steer" hold that Mr Q described. It was not reasonable to do so. The use of force at this stage was excessive.

l) He then discussed what occurred at stage two, (the stationary point). Having described the various accounts, including Mr Q's own evidence that he was angry at the time and that he had even deliberately exaggerated the circumstances so as to give Ms V a "jolly good fright", he found that Mr Q was influenced by frustration and anger, and that he wanted in part to intimidate and humiliate Ms V so as to teach her a lesson. These were not appropriate reasons for using force under the "Use of Force" chapter in the relevant Police manual. It was not necessary or reasonable in his view for Mr Q to hold Ms V up against a wall with the heel of his hand pushed up against the base of her neck.

m) With regard to stage three (from the stationary point to outside) he described the evidence he had received, noting that there was no evidence of any resistance by Ms V as she was being led out. In light of everything that had occurred to that point, and the evidence of Lance Corporate J and Lance Corporal K, it was neither necessary nor reasonable to "march" Ms V out in this way. He noted that Mr Q said that by this time Ms V's demeanour had changed to "one of defeat" and that he was no longer yelling at her but talking to her firmly about not going back in to the nightclub. He was confident that Ms V would not be a risk to herself or cause other problems later. The way Mr Q and Ms V acted at stage three of the incident reinforced his view that Ms V was not as intoxicated or irrational as Mr Q had suggested.

n) On the issue of whether a TOR should have been completed, Mr Kynaston noted that Police did not agree the force was moderate, but Mr Q had a genuine view that it was and consequently there was no breach of Police policy on this aspect.

o) Turning to the issue of misconduct, he considered that Mr Q's treatment of Ms V was harsh and unjustified and amounted to misconduct; the

question was whether it amounted to serious misconduct. He referred to relevant provisions of the Code, including the obligation to act with integrity, to proactively protect Police interests' and to exercise sound discretion and judgment to treat all people with dignity and respect, to act fairly and justly when carrying out duties and to avoid oppressive and overbearing behaviour or language.

p) He found that these obligations were breached. He considered that Mr Q reacted angrily and aggressively to the situation and used excessive force by restraining and removing Ms V as he did, holding her up against a wall and yelling at her in abusive terms, all of which took place in plain view of other members of the public. He did not appear to have considered less invasive forms of restraint, consistent with the hierarchical approach in which he had been trained. Ms V was a young woman, small by comparison to Mr Q, she did not present a danger or a flight risk. He found that Mr Q knew that Ms V did not present any risk at least by the time he got her to the stationary point and turned her around. He found that Mr Q had little or no regard for the impact that his conduct had on Ms V at the time, and in fact saw her obvious distress and embarrassment as a good thing. It was noted Mr Q had steadfastly maintained that he had done nothing wrong and that the force used was reasonable, unremarkable and consistent with his training and past experience in team policing. He found that Mr Q's views in this regard were genuine, but misplaced.

q) He said that had Mr Q's use of force been limited to that used at stage one, and had Mr Q treated Ms V appropriately after that, he would probably have found this to be an overreaction on Mr Q's part, not amounting to misconduct.

r) He then said:

> Overall, however, taking the three stages together, I consider that [Mr] Q's conduct amounts to serious misconduct, albeit at the lower end of the serious misconduct scale. The fact that he had not used force in over fourteen years, the absence of a specific briefing before going back to the frontline roster, the

> dynamics of the situation and his belief that he acted appropriately are all matters that I have taken into account. The particular aspects of [Mr] Q's conduct that outweigh those factors and put it into the serious misconduct category in my view are the inclusion of *"excessive force"* as an example of serious misconduct in the *Code of Conduct*, the fact that [Mr] Q reacted angrily and let that get the better of him, the nature and extent of the force used in the absence of any real risk or resistance, and the fact that [Mr] Q used the force he did, not only to move Ms V out, but to humiliate and intimidate her. I do not consider there to be any deficiencies in the formal Police training that might have contributed to this situation.

s) He concluded that the non filing of a TOR did not amount to misconduct or serious misconduct, or in any way aggravate Mr Q misconduct. Had such a report been filed, however, it would have been an opportunity at a very early stage for him to have presented his views as to what had occurred.

[187] A copy of the report was provided to Superintendent Cliff on 18 August 2011. He then forwarded a report to Inspector McKeown summarising Mr Q's employment history, disciplinary history, performance appraisals, comments on the incident which was the subject of the disciplinary report, and conduct over the previous 15 months. He then concluded:

- Mr Q had demonstrated no insight with regard to the behaviour held to amount to serious misconduct, and that left him with no confidence it would not be repeated.

- He had showed a consistent pattern of non-engagement over the past 15 months.

- A lack of confidence was shown by Mr Q in his employer having regard to the comments made at the disciplinary hearing concerning the SSTT training, and his recording of a conversation of his supervisors.

- Mr Q could only accept his version of events and attempts to discredit others in the face of overwhelming evidence to the contrary.

- There were no mitigating factors that would support Mr Q's continued employment.

- He considered that gross errors of judgement had been demonstrated, and recommended that Mr Q should be dismissed.

[188] On 19 August 2011, Inspector McKeown prepared a summary of the matter for Mr Busby, National Manager of Employment Relations who had delegated authority from the Commissioner to reach a preliminary decision as to outcome. In his report:

- He summarised the conclusions of the disciplinary hearing report, the views expressed by the District Commander, (including organisational risks), and referred to Mr Q's previous employment history.

- He referred to the seriousness of the breach and concluded Mr Q's behaviour was of a nature that could warrant the termination of employment for serious misconduct.

- He also referred to similar cases under the Code where employees had used excessive force; these showed a range of outcomes.

[189] After considering these reports, Mr Busby wrote to Mr Q on 22 August 2011. He said his preliminary decision was that the allegations which had been brought against him were established so that he should be dismissed from employment with Police. He indicated that submissions as to the preliminary decision could be made to him in writing or in person. He could also express his views as to an appropriate outcome in the circumstances. Such a response should be given within seven days. Initially, Mr Q indicated that he would make oral submissions. A meeting for this purpose was arranged for 19 September 2011. However, Mr Q was admitted to hospital on that day, and consequently the meeting could not proceed. The Police Association then provided submissions on Mr Q's behalf, which it will be necessary to consider in detail shortly. In summary, Mr Q did not accept that he used excessive force in his dealings with Ms V, and contended that the force he used was necessary, reasonable and appropriate in all of the circumstances. Mr Q argued that Mr Kynaston's findings were incorrect and unjustified.

[190] Attached to the submission was a document prepared by Mr Q, which provided a comprehensive critique of Mr Kynaston's findings. In summary he rejected Mr Kynaston's findings as to the degree of force used, asserted that there was an unfair process, bias and a lack of thoroughness in the investigation; challenged Mr Kynaston's conclusions as to credibility with regard to the witnesses whose evidence he considered; and challenged the conclusions Mr Kynaston had reached as to justification and misconduct. He concluded that Mr Kynaston could not make a legitimate finding of misconduct at any level because:

- The investigation was fundamentally inadequate, flawed and in breach of the rules and concept of natural justice.
- Conclusions had been drawn which were baseless and wrong.
- Irrelevant matters had been considered.
- Proper consideration or weight had not been given to other matters such as the "unique nature of the policing environment".
- Flawed reasoning had been adopted.

[191] On 1 October 2011, Mr Q attempted to email submissions on penalty to Mr Busby. An incorrect email address was inadvertently utilised so that Mr Busby did not receive the document. In it he referred to errors contained in the reports which had been produced (particularly as to his employment history as summarised by Inspector McKeown); and emphasised that he was desperate to return to his usual job. He stated his employer could certainly have trust and confidence that if ever required to eject a drunk, disorderly and hysterical young person from licensed premises, it could certainly have the trust and confidence that the saga would not be repeated. "Some patchwork [may be] required for some personality issues, but that would not present insurmountable obstacles given a good measure of good will and accountability".

[192] On 5 October 2011, Mr Busby again wrote to Mr Q by way of notification of the disciplinary outcome. Mr Busby referred to the submissions which had been made expressing conclusions which I shall consider in detail later.

[193] On 14 October 2011, Mr Busby wrote to Mr Q, recording that no application for an alternative outcome had been made. Since no new relevant factors had been raised, Mr Busby confirmed his decision to dismiss Mr Q from his employment under s 70(b) of the PA Act. The dismissal would take effect immediately.

The parties' submissions – second incident

[194] For Mr Q it was submitted in summary:

a) Mr Mikaera's investigation was flawed in multiple respects which meant that the information he had obtained was unreliable, and a conclusion of potential serious misconduct should not have been reached.

b) Because of the flaws, Superintendent Cliff should have referred the matter back to Mr Mikaera for re-investigation; alternatively he should have directed that the matter was appropriate for performance management or for referral to the progressive disciplinary process as possible misconduct.

c) Mr Kynaston's analysis was flawed having regard to the credibility issues he was required to consider, contextual issues and the parties' explanations. He should not have reached the conclusions he did with regard to each of the three stages of the incident. Mr Kynaston should have recognised that at stage one Mr Q's perceived cumulative assessment was that Ms V was a flight risk; at stage two it was not correct to conclude the evidence showed a slowing down by Ms V; and at stage three confusing and inconsistent evidence was not properly resolved. It was also submitted that Mr Kynaston referred to both the old and new legal tests of justification, described the hold which was adopted erroneously, and did not acknowledge that there was a valid arrest which was relevant to the degree of force used.

d) Mr Busby's decision was flawed because he failed to query numerous flaws in Mr Kynaston's reports; failed to deal properly with multiple

issues arising from Superintendent Cliff and Inspector McKeown's reports including disparity issues, and should not have decided to dismiss Mr Q.

[195] For Police it was submitted in summary:

a) The finding that excessive force was used, that he was unwilling to accept alternatives which were available and that there were alternative views; the process adopted was full, fair and reliable, as well as long. Mr Q's account of events, as given at the disciplinary hearing was central to the case, and the decisions made were largely based on his own admissions and statements.

b) When the matter was referred to Mr Busby, he reached decisions which were open to him. He took into account Mr Q's previous significant service, and did not place any weight on historic IPCA complaints which were set out in a letter received from Inspector McKeown, or take into account the first written warning. He was entitled to rely on Mr Kynaston's report, since he considered the process which had been adopted by Mr Kynaston, and fully considered Mr Q's concerns about inconsistencies and credibility findings. He received extensive written submissions from both the plaintiff and his lawyer, which he considered before making the decision to dismiss. A fair process was followed, with no disadvantage being caused by delays. Nor was there a case of disparity. Accordingly, Police were justified in dismissing Mr Q.

Summary of issues

[196] I propose to deal with the issues raised by the parties in their submissions as follows:

a) Relevant documents.

b) Relevant legal principles.

c) Mr Mikaera's investigation and report.

d) Disciplinary process conducted by Mr Kynaston.

e) Process conducted by Mr Busby.

f) Mr Busby's acceptance of Mr Kynaston's conclusions.

g) Other factors relevant to the dismissal decision.

Relevant documents

[197] Reference has already been made to the majority of the documents which provide the context within which this aspect of the challenge must be assessed. However, because the conduct which gave rise to the dismissal commenced as a complaint to the IPCA, it is necessary to refer with more specificity to documents which are relevant or are asserted to be relevant to that context. Under s 12 of the Independent Police Conduct Authority Act 1988, its functions are to:

a) Receive complaints alleging misconduct or neglect of duty by any member of Police, or concerning any Police practice, policy or procedure affecting a complaint; and

b) Investigate incidents in which a member of Police (acting in the execution of his/or duty) causes or appears to have caused death or serious bodily harm.

[198] Under that Act, when the IPCA receives a complaint it may carry out its own investigation or refer the matter to the defendant for investigation under the oversight of the IPCA. The document "Police investigations of complaints and notifiable incidents" outlines the manner in which these processes are to operate. As already mentioned there are five categories used by the IPCA in respect of all complaints and notifiable incidents, ranging in seriousness. Provisions as to standards of investigation are also stipulated, including expected timeframes.

[199] For Mr Q it was submitted that certain Police General Instructions were relevant. These were:

- IA101(5), which states that the primary objective of an internal investigation:

> … must be to leave a complainant and a member under investigation each in the belief that he or she has been treated fairly.

- IA111(5), which in describing investigation procedure states:

> The investigator is expected to use the same skills and diligence in a complaint investigation as would be used in any criminal investigation.

[200] It is clear that these General Instructions relate to complaints initiated with the IPCA; thus they potentially apply to this incident, but not the first incident.

[201] However the evidence also established that the General Instructions were cancelled on 14 June 2010; thereafter the relevant provisions regarding IPCA complaints were described in the "Police investigations of complaints and notifiable incidents" document. The replacement document set out key principles which were to underpin the Police complaint process:

- To ensure complaints are investigated in a fair, timely and effective manner.

- To ensure that all reasonable steps were taken to investigate complaints and notifiable incidents.

- To ensure that complaints and notifiable incidents were investigated within the guidelines of good practice, without bias or conflict of interest.

- All employees were to have the right to be advised of any allegations against them and the right to respond to those allegations.

[202] These changes followed the introduction of the Code in 2008 when there was a change from what was described as a semi-military disciplinary process to a more mainstream process where an independent person ran a disciplinary hearing prior to any decision to dismiss, this being viewed as an important step in the process to

ensure fairness. Previously a disciplinary hearing was undertaken by a panel constituted under the Police Regulations 1992.

[203] In this case, the complaint made by Ms V to the IPCA was not formally referred by the IPCA for investigation until 8 June 2010. The District Commander was requested to initiate the investigation. The complaint was received just as the General Instructions were being replaced. In those circumstances I do not consider that the subsequent processes should be assessed on the basis of General Instructions that were all but phased out.

[204] Reference has already been made to the provisions of the Code. Relevant provisions of the Code for present purposes are the obligations to:

- Act with integrity.
- Avoid bringing New Zealand Police into disrepute.
- Abide by provisions of all New Zealand legislation including policies and procedures set by Police.
- Act professionally at all times.
- Be aware of the impact as a result of behaviour and decisions.
- Exercise sound discretion and judgement.
- Maintain a professional image.
- Treat all people with dignity and respect.
- Act in a way that is fair and just when carrying out duties.
- Respect the rights of all persons and treat members of the public with courtesy and respect.
- Avoid oppressive or overbearing behaviour or language.

[205] The Code also refers to "treating a person harshly" as an example of possible misconduct, and "use of excessive force" as an example of possible serious misconduct.

[206] Turning to the issue of use of force, the following documents contain relevant guidance:

a) Police Manual on Use of Force: this set out the circumstances in which a Police officer may legally use force. The policy states that when a person is justified or protected from criminal responsibility in making or assisting to make any arrest, that justification or protection will extend to the use of force that is necessary to overcome forceful resistance, unless the matter can be resolved in a less violent manner. The policy goes on to state that where a person is lawfully authorised to arrest another person, or is justified in doing so, the authorisation or justification applies to such force as is necessary to prevent the other person escaping in order to avoid arrest, or escaping after the arrest, unless the escape or issue can be prevented by reasonable means in a less violent manner.

b) Tactical Options Framework: according to evidence given to the Court all Police officers operate under, and receive training on this framework, which has two overriding principles:

- The use of minimum force to achieve an objective.
- Reduction of risk to staff and maximisation of their safety in achieving objectives.

Police are trained to approach tactical options by starting at the low end of the scale of the available options. If an offender is engaged, an officer should first consider whether communication is appropriate in the first instance. If not, a hands-on escort (such as holding the individual's elbow or hand) should be considered, before escalating to a restraint hold or to a more significant response if appropriate. If a

> restraint is necessary, the degree of force must be reasonable, proportionate and necessary.
>
> Reasonableness is based on the officer's "perceived cumulative assessment". That requires an assessment, plan and action relative to the situation and subject's behaviour. Behaviour is determined by considering whether the behaviour is cooperative, passive resistant, active resistant, assaultive, or whether their actions are intended to, or likely, to cause grievous bodily harm or death.
>
> The Tactical Options Framework requires the officer to continuously assess the situation and act in a reasonable manner according to the circumstances.

[207] Mr Sydney confirmed that defensive tactics training is an annual requirement for all sworn officers. He stated that for the 13 years prior to the incident defensive tactics training has included a component on the use of "calming restraints" and escort techniques. He said that communication skills and lower level restraint should always be attempted before escalating to restraining an individual around the neck region.

Legal Principles II

[208] Because Mr Q was dismissed after 14 October 2011, the applicable justification test was contained in s 103A of the Act in the form which was enacted to take effect from 1 April 2011. The question therefore is whether or not the defendant's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[209] In opening, counsel for Mr Q submitted that the "would" test applies with regard to the investigation and decisions undertaken by Mr Mikaera and Superintendent Cliff since these steps were taken before 1 April 2011; and that the "could" test applies with regard to Mr Kynaston's disciplinary hearing and Mr Busby's decision to dismiss the plaintiff, since those steps were taken after 1 April 2011.

[210] I do not consider this submission to be consistent with the plain reading of the section; it requires that the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred.

[211] It is legitimate to consider the defendant's actions leading up to the decision to dismiss, including the investigation and disciplinary process. This is relevant to an assessment of how the employer acted and thus whether the decision to dismiss was justified in all the circumstances at the time the dismissal occurred on 14 October 2011. No separate cause of action for instance by way of a disadvantage personal grievance was pleaded with regard to those aspects of the process that occurred prior to 1 April 2011. Thus, the Court must consider how the employer acted in all the circumstances at the time the dismissal occurred.

[212] It is clear that the Court is no longer to determine justification (what the employer did and how the employer did it) by a single standard of what a notional, fair and reasonable employer in the circumstances would have done; and there may be more than one fair and reasonable response or other outcome that is justified.[23] With regard to procedural fairness, the current test allows for more than one possible justifiable outcome and more than one possible justifiable methodology.[24]

[213] I accept the submission made for the plaintiff that the dicta of the Court of Appeal in *Air Nelson Ltd v C*[25] is of assistance:

> Section 103A requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by [the employer] when carrying out its enquiry and of its decision to dismiss [the employee]. Within that enquiry into fairness and reasonableness the Court is empowered to determine whether [the employer] had a sufficient and reliable evidential basis for concluding that [the employee] had been guilty of misconduct.[26]

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23 *Angus v Ports of Auckland (No 2)* [2011] ERNZ 466 (EmpC) at [22]-[23].

24 At [35].

25 *Air Nelson Ltd v C* [2011] NZCA 488, (2011) 8 NZELR 453 at [19].

26 These factors were elaborated on by Judge Perkins *in Gazeley in Oceania Group (NZ) Ltd* [2013] NZEmpC 234, (2013) 11 NZELR 276 at [45]-[46].

[214] Counsel for the plaintiff confirmed that relevant to justification in this case were two of the four tests relating to fair procedure, namely:[27]

> (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> ...
>
> (d) Whether the employer genuinely considered the employee's explanation in relation to the allegations against him, before dismissing him.

[215] Also relevant is the statutory requirement that the Court must not determine a dismissal solely because of defects in the process if the defects were minor, and did not result in the employee being treated unfairly.[28] And as has often been stated, the employer's actions are not to be subjected to minute scrutiny in an effort to find fault, no matter how minor.

Mikaera investigation and report

[216] Before considering the particular issues raised for Mr Q, it is necessary to analyse the investigation and disciplinary processes against the provisions of the Supervisor's Guide, which contains a number of inbuilt checks and balances that appear to be intended to achieve compliance with s 103A(2) of the Act.

[217] The Supervisors' Guide, after dealing with preliminary matters relating to the establishing of an investigation, describes the disciplinary process. First, an investigation meeting must be held with the employee, the objective of which is to gather all relevant information about the allegations made. It is to be made clear that this is an investigation/fact-finding meeting and not a disciplinary meeting. These points were traversed in the notice of investigation meeting which Mr Mikaera sent to Mr Q on 1 October 2010, which followed the decision to treat the complaint as a disciplinary matter rather than a criminal matter.

[218] The Supervisors' Guide also contains provisions relating to the interviewing of relevant persons. It states that, depending on the circumstances of the allegations, it may be appropriate to interview other persons who have information pertaining to

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[27] Employment Relations Act 2000, ss 103A(3)(a) and (d).
[28] Section 103A(5).

the alleged misconduct; it goes on to provide that this may occur before or after the investigation meeting with the employee.

[219] Then, at the end of the process, the person conducting the investigation process is to "collate relevant documentation", and prepare an Investigation Report to the decision-maker. A suggested layout for the Disciplinary Report is given; save for one detail in which I comment below, this suggested layout was adopted in the present case.

[220] The propriety of the steps undertaken by Mr Mikaera when investigating have to be assessed against what was required of him under the Supervisors' Guide. I find that the guidelines made it clear he had a discretion as to whether he needed to interview persons at an investigation meeting; this would depend on the particular circumstances. Relevant to any decision in that regard was the fact that the process was an initial screening process which might or might not lead to the possibility of a disciplinary process then being conducted. If so, that process would involve the holding of a disciplinary hearing, which would be a more comprehensive proves. If there was possible serious misconduct, that hearing would be conducted by an independent decision-maker.

[221] Given that the focus of Mr Mikaera's process was on initial fact finding, I do not consider that there was a procedural flaw because on the information he had before him he did not interview any of the potential witnesses or staff from the Boogie Night nightclub such as waitresses and bar staff, or any other members of Ms V's group of friends. There is no evidence that information from any of those persons would have led to a different outcome.

[222] It was submitted that Mr Mikaera, or Mr Newton at his direction, should have secured CCTV footage from the Boogie Nights nightclub in a timely manner. Efforts were made by Mr Newton to obtain this footage, shortly after he became involved following his receipt of Mr Mikaera's letter of instructions of 28 June 2010. Mr Newton said he spoke to two persons about this; the first was the duty manager at Boogie Nights who said he did not know how to operate the CCTV system; and then a second person who told him that the video from the night in question had been

permanently overwritten. Ms V also attempted to recover the footage, but there is no evidence that she was successful.

[223] Initially, Ms V's complaint was in the hands of the IPCA who advanced a request for information. There was a time-lag from the date when the IPCA categorised the complaint and requested the Commissioner to conduct an investigation on 8 June 2010, the instructing of Superintendent Cliff by Inspector McKeown on 10 June 2010 to commence that investigation, and the request to Mr Newton to action the matter on 28 June 2010. The request for the footage was made soon after the instruction was given to undertake an investigation. Furthermore, there is no reliable evidence as to when the CCTV footage was overridden, and whether, if recovered, it would actually have assisted having regard to such factors as camera angle, the distance of the camera from the incident and clarity of picture having regard to lighting. The issues had to be approached on the basis of the obtained information, not on the basis of speculation regarding information that had not been obtained. I do not consider that the inability to access the CCTV footage in these circumstances was a fatal flaw in the disciplinary process.

[224] It is submitted that a further concern is the redaction of information from Mr Newton's reports when he was considering potential criminality of Mr Q's actions. It was submitted that had Mr Mikaera referred to the redacted information, the approach of subsequent decision-makers might have been different. This information related to statements which Ms V had made to the effect that she declined to make a formal statement, did not want Mr Q to lose his job, did not want a criminal charge to be laid, and regretted her actions because she was intoxicated and was acting in a disorderly manner.

[225] But Mr Mikaera was aware of these factors because he had spoken to Ms V; and Superintendent Cliff was also aware of them because Mr Newton's final (and unredacted) report was addressed to and considered by him. It was obviously their conclusion that notwithstanding this information there were conduct issues which Police should explore. I do not consider the fact that this information was not included in Mr Mikaera's report to have invalidated the conclusions that he and

Superintendent Cliff reached. I will consider the position with regard to subsequent decision-makers later.

[226] Next, it was submitted that Mr Mikaera, in analysing the information received from the various witnesses, did not adequately explore the many inconsistencies which existed in the various accounts given by witnesses. For the purposes of this submission it is necessary to have regard to the nature of the process which he was tasked to undertake. As already explained, Mr Mikaera was conducting an initial fact-finding and information-gathering process. His report was to contain a summary of the situation together with a recommendation as to the future course of action to be taken by the District Commander or National Manager.

[227] A submission on the topic of witness inconsistency was addressed to Mr Mikaera by Mr Q's lawyer. Mr Mikaera considered that submission and responded to it. In his report he said that the witness statements were simply a perception of individual witnesses of events they had observed and that it was neither unexpected nor unusual for there to be differences. He also identified inconsistencies in the evidence which allowed him to reach a broad conclusion as to the core facts. After evaluating those, he then concluded that there were a range of concerns which potentially constituted serious misconduct. Then he considered the contention made by Mr Q that the hold he adopted on Ms V was "tame"; however, the account given by the complainant and other witnesses painted a very different picture. The hold had been described as a headlock/choke-hold; and Ms V was observed being pushed against a wall with her head hitting the wall. Whilst he said the incident was insignificant this was not the view of others: a complaint had been lodged and two unsolicited emails were received from the Military Police members which referred to the incident. On that basis, Mr Mikaera recommended that the investigation findings be forwarded to the National Disciplinary Committee for further consideration. That meant that a formal disciplinary process would be undertaken where Mr Q would have further opportunities to provide information and submissions, and to engage with decision-makers. I consider Mr Mikaera's analysis was appropriate for the fact-finding investigation he was required to undertake.

[228] A further criticism was made that Mr Mikaera did not put Mr Q's responses to Ms V or any other witness, for response. It was also submitted that Mr Mikaera did not properly consider the influence of Ms V's friends on her evidence at the time she made her complaint; information about this was obtained, for example in Ms X's statement. Given Mr Mikaera's role, I do not consider that he was required to assess and reach a conclusion on these evidential issues. Detailed evaluation of issues such as these would be conducted by the independent investigator for the purposes of the investigation hearing.

[229] It was submitted that a scene examination should have been undertaken. I do not consider that the circumstances were such that it was vital for any decision-maker to undertake a formal scene examination. The layout of the premises was sufficiently clear.

[230] It was submitted that Mr Mikaera merely "collated" the documents. According to the Supervisors' Guide, collation of relevant documentation was an aspect of his role. He also said that he "carried out an investigation per se on the documents". It is evident from his report that this is what he did.

[231] Next it was submitted that Mr Mikaera had adopted a "rubber-stamp" mentality to the investigation. Given the nature of the process in which he was engaged, and having regard to the analysis he conducted in his report, I do not accept this submission. A process of actual evaluation of the information obtained is evident. Nor do I accept that the process conducted by Mr Mikaera was flawed and should not have resulted in a recommendation of potential serious misconduct. On the facts he had gathered, the recommendation was open to him.

[232] It was also contended that given alleged flaws, Superintendent Cliff should not have referred the matter on for a serious misconduct investigation, but rather should have made other decisions such as referring the matter back to Mr Mikaera to undertake a fuller investigation, or for performance management, or to enable a consideration of possible misconduct only.

[233] Superintendent Cliff considered that the circumstances described to him involved a young woman who presented no threat, that Mr Q had grossly over-reacted and used excessive force, and that there was no acknowledgment that his behaviour was unacceptable.

[234] Because I do not accept that the process was affected by a plethora of flaws, I conclude that these opinions and the decision to refer the matter on was one that was open to Superintendent Cliff on the evidence which was summarised in Mr Mikaera's report.

[235] In his evidence, Mr Q stated that he was prejudiced because he was not informed that Ms V wanted an apology; he said that if he had known that he said he could have provided one. Mr Mikaera's response, which I accept, is that this was unlikely given Mr Q statement made prior to dismissal that he would never apologise, and would never accept any finding of misconduct.

[236] I consider that the process undertaken by Mr Mikaera led to conclusions which were appropriate given his role; as was the acceptance of his recommendation by Superintendent Cliff.

Disciplinary process conducted by Mr Kynaston

[237] The Supervisors' Guide contained provisions governing the disciplinary hearing. A person had to be appointed to conduct a disciplinary hearing and report findings of fact. A date for the hearing was to be fixed within 28 days of being confirmed in the role; and copies of all information gathered during the initial assessment, categorisation and disciplinary investigation were to be provided to the appointed person who would decide how the enquiry would be conducted.

[238] The terms of reference which were provided to Mr Kynaston emphasised that the disciplinary hearing which he was required to conduct should be inquisitorial rather than adversarial, and the way in which the hearing was undertaken would be flexible and informal taking into account the principles of natural justice. It was stated that there were no fixed procedural requirements, and that established employment law principles would apply. A hearing date was to be established within

10 working days of the appointment being confirmed. As investigator, Mr Kynaston could obtain and rely on information from a number of different sources, *including* interviewing any person before, during or after the disciplinary hearing, provided that natural justice requirements were met. The fact sheet provided to Mr Q at the inception of the process emphasised that the process would be flexible, and that the person conducting it could rely on information from a number of different sources. The report was to be provided no later than four weeks after the date of the disciplinary hearing, although if that deadline could not be met, Police were to be advised immediately.

[239] Two preliminary issues should be dealt with, before focusing on the conclusions reached by Mr Kynaston. The first relates to the reliability of the information he obtained, while the second relates to errors in his report.

Reliability of evidence

[240] It was submitted that some witnesses were unreliable when it came to assessing credibility. Mr Kynaston addressed this issue in his report. He concluded that the lapse of time had no doubt affected the recollection of those involved, and he made allowances accordingly. He thought that the consumption of alcohol and shock or surprise would have also had an impact. Overall, subject to the comments he made about Sergeant I, his impression after talking to the witnesses and reading what they had written was that they were genuine and had done their best to recall the events under review. He considered that whilst he could not determine precisely everything that occurred, there was a sufficient congruence between the different witnesses' accounts for him to reach his findings. However, he acknowledged that given the seriousness of the allegations and potential consequences, Mr Q should be given the benefit of the doubt in some instances. These conclusions recognised that inevitably there were variations of account due to a range of factors. Such variations are neither unusual nor unexpected. A commonsense approach was taken to the assessment of those accounts, with the information which was provided by Mr Q himself being prominent. I shall be analysing this issue further shortly, but I find that the preliminary remarks he made as to reliability were fair and reasonable.

[241] A related submission was that there was an element of bias to the extent that there was "simply no acceptance of any of the plaintiff's explanations". That is contrary to what Mr Kynaston stated in his report; he gave the benefit of the doubt to Mr Q on multiple issues.

[242] Particular criticisms were made as to the reliability of Ms X's evidence, in that it was suggested it was given from self-interest. It was submitted that she drove the complaint and influenced Ms V in the process. Although I have concerns about one aspect of her evidence (to which I shall return shortly), it could not be said that the information provided by her – or Ms V or Ms W – was tainted by such factors. They personally had nothing to gain. It is reasonable to conclude they complained out of concern as to what had happened so that the appropriate authority could consider whether they needed to take any steps. They did not specify a desired outcome.

[243] It was also submitted that there was no self interest as far as Lance Corporal K, Lance Corporal J and Sergeant I were concerned, so that their evidence should have been preferred. However, if the complaint was upheld, then those persons could be criticised for not having intervened in the incident in a more significant way. Mr Kynaston was entitled to examine their evidence carefully: he was concerned about Sergeant I's lack of recollection and whether he may have been protecting Mr Q; he found he could not take that issue further. These were conclusions which were plainly open to him.

[244] Criticisms were made as to the way in which Mr Kynaston had obtained evidence. It was noted that only two persons were interviewed in person, whilst the remainder were spoken to by telephone. As already mentioned, the Supervisor's Guide left any issue as to mode of interview to the discretion of the investigator. Although an interview by telephone may in some circumstances not provide a decision-maker with an adequate opportunity of assessing credibility, I do not consider that the decision to proceed in this way constituted procedural unfairness in this instance. Mr Kynaston was able to conclude that there was a congruity between the various witnesses' accounts; which in effect allowed him to cross-check. It appears that permitted him to conclude that the information was reliable and did not

need to be tested by in-person interviews or by further questioning. Where he felt further questioning was in fact needed (as he did in one instance) he did so. But more importantly, Mr Kynaston held a telephone conference with representatives for Mr Q and with Police representatives to discuss his intended process. At that teleconference, Mr Kynaston made it clear that he intended to speak to witnesses individually by telephone or in person, and would provide file notes of his discussion in advance of the hearing. There was no objection to this proposal. He then proceeded as agreed. I do not consider that an assertion of procedural unfairness is made out on this point.

[245] It was also suggested that it was unclear as to how Mr Kynaston had treated the information obtained from Mr Q at the long investigation meeting. Subject to minor typographical errors[29] and a reference in the description of the hold given to Mr Kynaston by Mr Q to which I shall refer shortly, the information obtained at the investigation hearing is essentially accurate. Some of Mr Q's information was correctly quoted in a verbatim form. I do not consider the way in which Mr Kynaston reproduced information which was conveyed to him was unfair.

[246] Next it was suggested that Ms V and her friends were not tested in the same way as was Mr Q at the investigation meeting. I do not consider that the circumstances were such that witnesses other than Mr Q needed to have their information tested when it was his information which Mr Kynaston largely accepted. This was not a case where crucial credibility assessments had to be made to establish a factual basis for an assessment of the allegations which the employee found.

[247] A concern was expressed as to the length of the investigation meeting, and whether fatigue affected the interview. However, Mr Kynaston recognised the meeting had been long, and provided Mr Q with an opportunity to listen to the recording of the investigation hearing and submit further comments, an opportunity which he took.

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[29] Date of disciplinary hearing and an incorrect reference to "flea in the ear", which was expressed as "fling in the ear".

[248] It was also submitted Mr Kynaston should have undertaken further questioning on key points. It is clear from the transcript of the interview with Mr Q that questioning was largely by way of open-ended questions. Mr Q had a liberal opportunity to explain all matters, both at the meeting itself and in writing subsequently. It is my assessment that the questioning undertaken by Mr Kynaston was fair and reasonable and covered all matters which he could be expected to cover.

Errors

[249] I now deal with the submission that Mr Kynaston's report contained significant errors.

[250] The first of these is that Mr Kynaston made reference to both the old and new tests of justification in his report and in an email he wrote to the parties. In his report when discussing process issues and whether it was fair and reasonable to continue with his process and reach a decision, he said he would apply a standard of what a fair and reasonable employer "could and would do in the circumstances". Later, when considering whether there was possible serious misconduct, he stated the conduct needed to be assessed objectively "having regard to what a fair and reasonable employer would determine in all the circumstances". On 18 July 2011, Mr Kynaston sent an email to Mr Q representatives and to Mr Mikaera, and in doing so referred to the "would" test. None of the recipients challenged this.

[251] Counsel for Mr Q submitted that this meant there was either confusion as to the appropriate test or, more likely, the wrong test was applied some four and a half months after the test for justification had been amended. Counsel went on to contend that meant the report was based on an incorrect legal test of justification. It was also submitted that Mr Kynaston did not apply "more than one possible justifiable outcome and more than one possible justifiable methodology".

[252] If Mr Kynaston applied the "would" test then he applied a more stringent test than he needed to. Such an approach would have created additional protection for the employee. Whilst it would have been preferable for the new test to have been referred to correctly, I do not consider this issue has resulted in prejudice to Mr Q.

Nor do I accept that Mr Kynaston was required to consider and then choose more than one possible justifiable outcome. As I commented earlier when discussing the relevant legal principles, it is clear that when applying the 'could' test there needs to be an assessment as to whether the actual outcome was within the range of potential methodologies or possibilities; that does not mean that an employer, or its representative needs to identify a range of potential outcomes and then determine which one is appropriate.

[253] The second error relates to the description contained in Mr Kynaston's report of the hold which Mr Q adopted. In considering this issue, it is to be noted that Mr Kynaston said Mr Q was a tall man of athletic build, and that Ms V was approximately five-foot-five-inches in height and described herself as being of petite build. Mr Kynaston recorded the hold in this way:

> In terms of the hold itself, the different accounts are broadly consistent. [Mr] Q says that he restrained Ms V first by putting his right hand on Ms V's right shoulder, and then moved from that position, once he had retrieved his hat, to putting his right arm around her neck/chest area with his right hand on her left shoulder, so that his arm was below her actual neck with the elbow pointed down. With his left hand, [Mr] Q held Ms V's left elbow.

[254] Mr Q explained to the Court that with his left hand he in fact held Ms V's right elbow. This was clearly recorded in his written statement; he had explained that it was a technique he used for small drunk people so that he could readily "steer" them. At the disciplinary hearing he gave a demonstration of this hold, making the same point.

[255] The evidence given by other witnesses which led to Mr Kynaston concluding there was broad consistency focused on the nature of the hold around Ms V's chest/neck area. Lance Corporal J thought Mr Q had put his left arm around Ms V's neck and that his other arm was free: plainly Mr Kynaston did not accept this account. No other witness referred to the issue of whether Mr Q was holding Ms V's elbow and if so which one.

[256] In the following paragraph of his report Mr Kynaston alluded to the fact that Mr Q stated he did not engage Ms V's neck, a contention which he accepted. This

passage of the report confirms Mr Kynaston accepted Mr Q's description on the key issue of the hold which was adopted.

[257] Mr Q's written account was clear and precise. Mr Q gave a demonstration to the Court of the hold which I do not doubt was similar to that given to Mr Kynaston. Mr Q also told Mr Kynaston in his written submissions that he fully "contained" or "smothered" her, a description which Mr Kynaston accepted. I find that in reliance of the evidence he had, Mr Kynaston intended to accept the specifics of Mr Q's account and that the reference to the left elbow in his report is a mistake. I also find that this mistake did not alter the accuracy of his overall analysis and his ultimate assessment of the degree of force used.

[258] There were two other factual errors in the report – the first was a reference to the disciplinary hearing having occurred on 13 July 2011, when it took place on 14 June 2011; and his quotation of a statement attributed to Mr Q that Ms W needed "a good fling in [her] ear", when what he had said was "you need a good *flea* in your ear". I do not regard these errors as being of any significance.

Stage one – first restraint

[259] Against the background of those issues, I turn to consider the analysis undertaken by Mr Kynaston with regard to each of the three stages of the incident which he identified, and whether the evidence were such that it could be said the allegations were not properly investigated or resolved.

[260] Stage one, in Mr Kynaston's analysis summarised the position from when Ms V was first restrained until her arrival at a stationary point near the entrance/exit corridor of the nightclub.

[261] Before dealing with the particular concerns, I note that it is clear Mr Kynaston's findings were largely based on Mr Q's own account. Specifically, he accepted:

- Mr Q's reasons for wishing to escort the complainant out of the premises swiftly.

- Mr Q's account of the hold he used, with the exception being the reference to the right elbow which was a mistake; in particular he accepted that Mr Q had not adopted a carotid hold.

- Mr Q's statement that he did not apply a hold that would cut off Ms V's breath, although he may have engaged her neck when moving her down some steps, but that would have been accidental and he could not recall it.

- His account that his hold on Ms V was to "smother" or "overwhelm".

[262] Mr Kynaston did not accept Mr Q's opinion that the level of force was necessary or reasonable in the circumstances. In particular he did not accept that the complainant was a flight risk or that she presented a danger to Mr Q; but in assessing that issue he relied on Mr Q's own account that:

- He had earlier been able to restrain her effectively with just a "heavy hand" on her shoulder.

- He had a good grip of her when he had his hand on her shoulder and that she was not going to get away, and that even she attempted to do so it was "thwarted by [his] heavy hand".

[263] This issue required an evaluation of Mr Q's own account. In his analysis as to what he had been told by Mr Q, Mr Kynaston did not accept that there was a need to go straight into a "smother/steer" hold as described by Mr Q himself. In reaching this conclusion he took into account relative difference in size and authority; Mr Q's training which required an officer to approach tactical options by starting at the lower end of the scale – that is communication – before moving to a hands-on escort before escalating to a restraint hold. He also took in to account that any force should be proportionate to the circumstances; and that Mr Q had been fully trained in defensive tactics on a number of occasions and the hold he applied was neither approved nor taught in that context. Nor did he accept the hold was necessary to prevent intervention by other people in the nightclub, since none of the other witnesses referred to having any concerns about the crowd. He also considered that

his use of a restraint hold was motivated by anger, a conclusion which was based on Mr Q's own statements.

[264] Having identified the key elements of Mr Kynaston's conclusions I turn to the concerns raised by counsel for Mr Q. It was submitted that Mr Q, using his perceived cumulative assessment at the relevant time considered Ms V to be a flight risk. For the purposes of this point it is first contended in effect that Mr Kynaston did not consider adequately the difference of views after Ms V grabbed Mr Q's Police hat. In his report Mr Kynaston described the various differing accounts which included:

a) Mr Q said that Ms V took off into the crowd and was making a determined effort to get away with the hat.

b) Ms X said the hat was placed on her head by Ms V and that Mr Q retrieved it; but Ms V was not trying to get away.

c) Lance Corporal J said that he turned around and observed that Mr Q had his hat taken off him; and that he managed to grab it back and place Ms V in a "choke hold".

d) Ms W said Ms V had removed Mr Q's hat and started to walk away, progressing only a step before she was restrained.

e) Ms V, who said she removed Mr Q's hat and put it on her friend's head.

[265] In discussing this issue Mr Kynaston placed reliance on the fact that Ms X was the sober driver for the group of which Ms V was a part. Ms X had told him that she recalled the hat being placed on her head and her hair being pulled. The difficulty with this conclusion is that it does not explain how Mr Q would have known that it was Ms V who removed the hat, and that he was able to follow her after retrieving the hat from Ms X. He was walking in the opposite direction to Ms V at the time of removal so that he would not have known who removed it. There is a difficulty as to timing; on Ms X's account, Mr Q spoke angrily to her then "went to [Ms V] from me". Ms X also said that she "presumed' Mr Q had grabbed

the hat from her as she did not see this happen. By contrast, Mr Q was adamant that he followed Ms V who was carrying the Police hat in her right hand.

[266] I consider that Mr Kynaston had evidence before him that required a conclusion that Mr Q's account as to who took the hat was correct. Ms X's account on that particular point was apparently based on supposition and was less accurate or reliable.

[267] Next, it was submitted that Mr Kynaston should have found that Ms V was making a determined effort to get away from Mr Q, and that there was resistance on her part when he apprehended her.

[268] There were conflicting accounts as to how far Ms V had moved following removal of the hat – from one step according to Ms W, to 10 metres according to Mr Q.[30] Mr Kynaston made no finding as to the distance moved; rather he focused on Ms V's intentions. He concluded that Ms V's actions were in the nature of a very foolish prank, rather than a deliberate attempt to get away with Mr Q's hat. He recorded that no person to whom he spoke said Ms V was trying to get away (other than Mr Q). Mr Kynaston also took into account Mr Q's own impression that Ms V was not a "rat-bag type", and the fact that she was a trainee teacher. He was reinforced in his conclusion by the fact that Mr Q was present with another Police officer and two Military Police officers all of whom were by the entrance, the inference being that she could not have got away if she had tried to do so. These were legitimate factors which it was open to Mr Kynaston to consider in the question of whether Ms V was determined to get away from Mr Q or to resist him. I find it was also open to Mr Kynaston to conclude that these factors were more significant than the actual distance travelled.

[269] On the basis of the information he obtained, I consider Mr Kynaston was entitled to conclude that the emphasis should be on the nature of Mr Q's conduct

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[30] When interviewed by Mr S and Mr Q in October 2014, Ms V said she moved a distance which was equivalent, Mr S said, to 5.8 metres. This particular account was not before Mr Kynaston; given the conclusion I have reached on the issue of distance, it is not necessary to consider this particular recollection further, or the circumstances in which it was given.

rather than on the question of the identity of the person from whom he retrieved the hat, or the distance moved by Ms V.

[270] Of critical importance was what happened once Mr Q apprehended Ms V. According to the information given to Mr Kynaston he restrained her firmly with a "heavy hand" and engaged his hold suddenly which shocked Ms V. Mr Kynaston's analysis focused on what then followed from Ms V's apprehension by Mr Q. He concluded in effect that constructive communication should have been attempted at that point and was not; he considered that Mr Q escalated the situation by a hold that was not reasonable in the circumstances; it was catalysed by an angry reaction to the removal of his hat.

[271] An issue was raised as to whether there was an adequate consideration of the issue of Mr Q's perceived cumulative assessment of the situation and the behaviour of the subject. Mr Sydney had provided information to Mr Kynaston on this topic which Mr Kynaston acknowledged when he recorded that he had taken account of environmental factors together with reasons why Mr Q said he applied the holds he did, and why he considered them to be necessary and reasonable. I consider appropriate consideration was given to that information.

[272] Also important is the finding that had Mr Q's use of force been limited to that which was used at stage one, and had he treated Ms V appropriately thereafter, Mr Kynaston would probably have found this to have been an over-reaction on Mr Q part, not amounting to misconduct. Again, I consider this was a balanced finding which was well open to Mr Kynaston on the evidence.

Stage two – stationary point

[273] Stage two of the incident related to the situation where Mr Q held Ms V at a stationary point against a wall. Mr Kynaston recorded Mr Q's statement that as Ms V realised she was going to be escorted out of the nightclub, she began to resist by slowing down. He recorded that Mr Q considered he needed to make it clear to Ms V that she would not be allowed back into the nightclub and that he needed to adjust his grip; he therefore turned her around, put her against the wall and held her

there with the heel/side of his hand across her neckline with his forearm elevated. Mr Kynaston analysed the accounts given by others, and recorded Mr Q also stating that by this time he could tell Ms V was not a "rat-bag type girl", and other than trying to slow down as they were leaving, there was no evidence of any resistance. Then he recorded Mr Q's acknowledgment that he yelled at Ms V, who he said was in a highly emotional state and was saying contradictory things. Mr Q had acknowledged that he was angry at the time. He considered Ms V's reaction to be foreseeable in light of the extent of force used.

[274] On the basis of this evidence Mr Kynaston accepted that part of Mr Q's motivation for acting as he did was to control Ms V and get her out of the nightclub promptly. Whilst Mr Q had every right to do this, he was "influenced by frustration and anger and wanted in part to intimidate and humiliate Ms V so as to teach her a lesson." As summarised earlier he held that it was not necessary or reasonable to hold Ms V – a small, young woman in a highly upset state – up against a wall with the heel of his hand pushed up against the base of her neck.

[275] For Mr Q it is submitted that, having regard to various statements made by other witnesses, to the effect that Ms V was "quite hysterical" and "active resistant", and "struggled to a degree" the evidence showed she was more than just slowing down, as Mr Kynaston found. It was submitted that she was actively resistant.

[276] It was Lance Corporal K who said Ms V was active resistant; but he also said that Ms V was trying to get Mr Q off her as someone would in that situation. Lance Corporal J said she looked uncomfortable and he heard her apologise. These assessments were plausible and consistent; they were obviously based on what had been observed.

[277] Ms W said Ms V had her hands on Mr Q's arm trying to get it off. Ms X observed Ms V sobbing and struggling for breath. Ms V said she was not trying to move back into the nightclub. Mr Q believes that these witnesses are unreliable because they were intoxicated. The assessment of sobriety of witnesses was one which Mr Kynaston had to make; he was assisted in this by considering the level of detail they were able to provide and the consistency of that detail as between those

who had been drinking. Also relevant was the plausibility of their recollections. Mr Q was entitled to accept their accounts for the reasons he gave. I am satisfied that Mr Kynaston reached conclusions with regard to stage two which were available to him.

Stage three – stationary point to outside

[278] Mr Kynaston's analysis as to what occurred from the stationary point to a position which was outside the nightclub (stage three) commenced with a consideration of what Mr Q himself said. He recorded Mr Q's statement that Ms V was placed in the same "smother/steer" hold which was applied at stage one, and proceeded in this way down the corridor until they were outside and he released her. He accepted Mr Q's evidence that he did not apply a headlock or choke-hold at this stage. He said there was no evidence of resistance by Ms V as she was being led out.

[279] For Mr Q it was submitted that the evidence relating to this stage is confusing and inconsistent, and that Mr Kynaston should have clarified no fewer than five different accounts as to the method of removal.

[280] I do not agree. He accepted the account which Mr Q himself gave. He also considered the information provided by the two Military Police who were closely following him. He found that there was no evidence of any resistance by Ms V as she was being led out, and on that basis and in light of everything that had occurred to that point it was neither necessary nor reasonable to march Ms V out.

[281] In short, Mr Kynaston's analysis of stage three of the incident proceeded on the basis of Mr Q's own account as to what he had done, together with the surrounding circumstances as described by two colleagues and Mr Kynaston's evaluation of the propriety of Mr Q's conduct all of which were a fair and reasonable assessment.

[282] A submission was made for Mr Q that Ms V's actions could have constituted disorderly behaviour or even minor theft, so that Mr Q therefore had grounds to arrest. In his interview with Mr Kynaston, Mr Q said at one stage he did not

consider whether she was under arrest; but at another stage he said that the moment he laid hands on her she was under arrest.

[283] Police witnesses stated that the process of arrest has to be carried out within the context of relevant policies, such as the Police Manual on Use of Force, and the Tactical Operations Framework. The use of force must be supported not only by legal authority, but must also be reasonable, proportionate and necessary.

[284] The Court of Appeal in *Arahanga v R* made it clear that arrest may occur by words or conduct;[31] an arrest does not necessarily require the use of force. Mr Kynaston considered that there should have been a "lesser restraint", and said that he would expect a "lesser hold to create less aggravation". The adoption of the "smother/steer" could not be justified on the basis that Mr Q was arresting Ms V.

[285] Lastly, I do not consider the redaction of parts of Mr Newton's correspondence that was provided to Mr Kynaston was a significant flaw. The redacted information related to names of persons whose identity could be readily inferred; or related to Ms V's statements that she regretted her behaviour and did not want Mr Q to lose his job – these being facts that were available to Mr Kynaston from other sources available to him such as Mr Mikaera's interview with Ms V on 23 August 2010.

Conclusion as to Mr Kynaston's report

[286] I have considered all points raised for Mr Q as to the process adopted by Mr Kynaston and as to the conclusions he reached. Although I have disagreed with the conclusions he reached on one matter, in the end that is not in my view a significant issue. Overall, I find that Mr Kynaston's report contains a careful and considered analysis of the numerous issues he was required to assess, and that he was entitled to reach the conclusions which are recorded in the report.

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[31] *Arahanga v* R [2013] 1 NZLR 189 (CA) at [44] and [45].

Process conducted by Mr Busby

[287] It will be recalled that once Mr Kynaston's report was available, a district report was prepared by Superintendent Cliff, and the matter was then referred by Inspector McKeown to Mr Busby in a yet further report to make the relevant decisions on behalf of the Commissioner. He considered the findings made by Mr Kynaston, and in his letter of 22 August 2011 said he had reached a preliminary decision that the allegations were established and that Mr Q should be dismissed from his employment with Police. He was offered the opportunity of making submissions either in writing or in person.

[288] Due to Mr Q's hospitalisation, this did not proceed. Instead, a written submission was forwarded by the Police Association for Mr Q, accompanied by a detailed submission from Mr Q personally.

[289] Having considered that material, Mr Busby wrote a detailed letter to Mr Q on 5 October 2011 dealing with matters which he characterised as "key submissions". He said he had decided that dismissal should proceed, but offered Mr Q an opportunity to request an alternate outcome within seven days, in accordance with the provisions of the Supervisors' Guide. As no application in that regard was forwarded, Mr Busby gave notification of a final decision in his letter of 14 October 2011. He confirmed his decision to dismiss pursuant to s 70(b) of the PA; the dismissal was to take effect immediately.

[290] Of particular importance when considering this stage of the disciplinary process are the submissions forwarded by a Police Association lawyer and the accompanying critique.

[291] In his document Mr Q provided detailed submissions to support his contention that the findings of Mr Kynaston as to the degree of force used should be rejected. He said that a moderate degree of force was both reasonable and necessary. He also raised a range of process issues. He asserted that Mr Kynaston's conclusions demonstrated bias.

[292] Mr Q's lawyer reinforced his contentions. She also commented on the information which had been provided by Mr McKeown and Superintendent Cliff.

Particular emphasis was placed on statements made by Inspector McKeown as to Mr Q's employment history, and statements made by Superintendent Cliff to the effect that Mr Q had failed to engage with Police over the previous 15 months which contributed to a recommendation that he should have his employment terminated. The submissions concluded by noting that Mr Q had been well reported in his 2008/2009 performance appraisal often achieving results in the "better than agreed" category. It was also emphasised that Mr Kynaston's finding was "low end seriousness" and that dismissal was the "absolute maximum penalty" which any employer could impose; "dismissal should only follow in cases where the serious misconduct was at the upper end of the spectrum." The lawyer also referred to Ms V's view that Mr Q should not lose his employment, submitting that this should be a relevant factor for penalty. It was stated that Mr Q would, if in the same situation again, react differently.

[293] In his notification of disciplinary outcome of 5 October 2011, Mr Busby dealt with some but not all of these issues. He stated in summary:

a) Whilst a more timely process would have been helpful in terms of better recollection of events and the potential for assistance from CCTV evidence, he did not believe that the delays prevented Mr Q from defending the allegations. The process had been agreed between representatives.

b) The conclusions as to anger and motivation were reasonable.

c) The fact that excessive force was listed as potential serious misconduct under the Code was a relevant consideration, although it did not automatically mean that a finding of excessive force would always result in serious misconduct.

d) Regarding the unique nature of policing and the rationale for low tolerance for excessive consumption of alcohol, Mr Kynaston had considered the fact that force may be necessary when dealing with offenders. Mr Busby did not consider, however, that low tolerance for excessive drinking justified the inappropriate use of force.

e) The fact that Mr Kynaston believed there was no breach of policy as to the submission of a TOR did not change the fact that Police did not agree that the force was moderate; nor did the fact that if force had only been used at stage one mean that such force was acceptable. It was noted that Mr Kynaston had considered overall conduct at each stage of the incident in order to give a balanced picture.

f) Mr Kynaston had considered the circumstances overall and appeared to have balanced the sometimes conflicting accounts and given Mr Q the benefit of the doubt on some matters. This was appropriate given the serious nature of the allegations and the potential outcome. Findings of fact had been reached on the balance of probabilities.

g) It was noted that the document from the Police Association asserted Mr Q would react differently in future. Mr Busby doubted this, given Mr Q's contention that he had acted appropriately. Whilst he may genuinely believe he was correct, Mr Busby was not confident that an incident of this nature would not be repeated.

h) He concluded by stating that he had considered all submissions, and was of the opinion that the points raised in mitigation did not outweigh the serious concerns he had in relation to Mr Q's behaviour. The failure to accept any wrongdoing led him to a clear conclusion he could not have trust and confidence in him remaining as a Police employee. That loss of trust and confidence appeared to be irreparable.

Mr Busby's acceptance of Mr Kynaston's conclusion

[294] In his submissions, counsel for Mr Q stated that Mr Busby failed to query many aspects of Mr Kynaston's report including the alleged errors which have already been analysed, and the various concerns as to evidence, such as inconsistencies and methods of interviewing.

[295] I am satisfied that Mr Busby carefully reviewed all these aspects of the report. That is evident from the notes he made at the time, and his elaboration of

those notes when giving evidence. Furthermore, I have to a substantial degree held that Mr Kynaston was entitled to reach the conclusions he did. Consequently I find that it was fair and reasonable for Mr Busby, having reviewed the report carefully, to conclude that it was reliable and that he could adopt its conclusions.

[296] However, the primary focus of his review was on the concerns raised regarding the reliability of the findings made by Mr Kynaston; less obvious is the extent to which other matters raised in submissions by Mr Q's lawyer at the time were considered.

Other factors relevant to dismissal decision

[297] In evaluating the range of factors to be considered as to the justification of dismissal, the starting point must be the requirements of the Code. It states that in determining whether an employee's behaviour constitutes a breach of the Code, regard should be had to the following factors:

- The nature and circumstances of the activity.
- The position, duties, and responsibility of the employee.
- The consequences of the activity on the ability of the employee to fulfil his or her duties and responsibilities.
- The effects of the activity or its consequences on internal or external relationships.
- The manner in which similar behaviour has been treated by Police under its Code.
- The effect of the behaviour on Police's trust and confidence in the employee.

[298] The Code goes on to provide that the seriousness and consequences of any breach depend on the circumstances in which it occurs. The Code states that:

> In the main, breaches will fall under the heading of misconduct or serious misconduct, the latter being sufficient to justify dismissal having followed due process. However, depending on an assessment of the facts and the

> degree of the breach, behaviour listed as misconduct can be treated as serious misconduct, and vice versa.

In this proceeding there has been no challenge to the propriety of that statement.

[299] The first submission made by Mr Q's Police Association lawyer related to Mr Kynaston's finding that the conduct amounted to serious misconduct, albeit at the lower end of the scale. The lawyer said that the consequence of dismissal should only follow in cases where serious misconduct is at the upper end of the scale.

[300] In his notes, Mr Busby recorded this statement:

> Either Kynaston is correct and it MUST be dismissal, or he's wrong and it may (or may not) be misconduct at all.

[301] This statement appeared to suggest that Mr Busby considered that if Mr Kynaston was correct in his conclusions then dismissal had to follow.

[302] When giving his evidence, Mr Busby stated that he understood the reference to the serious misconduct being at the lower end of the scale meant that he had a latitude to decide not to dismiss but that he considered there were other factors such as Mr Q's refusal to accept wrongdoing and the issues as to trust and confidence which meant that it was more likely he would need to dismiss. The effect of his evidence was that taking into account factors such as Superintendent Cliff had raised relating to trust and confidence, the decision had to be one of dismissal.

[303] There is no doubt that under the Code and indeed as a matter of law the finding of serious misconduct did not automatically mean that Mr Q had to be dismissed. Mr Kynaston's characterisation of the conduct as being at the lower end of the scale of serious misconduct was a significant finding which needed to be confronted. Yet the notification of disciplinary outcome made no reference to this issue, although it had been raised by the Police Association. A fair and reasonable employer could have concluded that this was a conclusion that required consideration of an outcome other than dismissal.

[304] The Police Association submitted that prior to the incident with Ms V, Mr Q had only been in a frontline role for one shift and that it had been at least 14 years since he had performed any frontline or general policing duties. Mr Kynaston considered this issue, together with the absence of a specific briefing before being placed on the frontline roster. These were factors which were appropriately taken into account when reaching his ultimate conclusion.

[305] However, it was appropriate for the Police Association to raise this aspect of Mr Q's history with Mr Busby as a mitigating factor when considering whether dismissal could be appropriate. In my view since Mr Q's lawyer raised this issue, it was a matter that required express consideration. Had cognisance been given to the fact that it was over a decade since Mr Q had been placed in a frontline situation of the kind that occurred here; a fair and reasonable employer could have regarded that as a mitigating factor at the stage where outcomes were being considered.

[306] Next, the lawyer raised a number of issues as the description of Mr Q's employment history given in Inspector McKeown's report and in Superintendent Cliff's report.

[307] Information concerning that history was relevant to such issues as to the consequences of the activity upon the ability of the employee to fulfil his or her duties and responsibilities, and as to the effect of that behaviour on the Police's trust and confidence in the employee. These were relevant factors for consideration under the Code.

[308] In this context, reference was made to Inspector McKeown's statement that there had been "significant incidents regarding [Mr Q] previous employment history and previous matters which have been subject to IPCA investigation or complaint".

[309] The first incident related to the imposition of a warning which at that time was under challenge. Mr Busby told the Court that he did not place weight on the warning which had been given in the previous year as it was disputed. He also said he did not consider the IPCA complaints, and that he did not consider four complaints over a 29-year period was "particularly high".

[310] I find that although the reference to previous significant incidents was potentially prejudicial and there was no express consideration of this factor in Mr Busby's notification of outcome, it was not a factor that influenced Mr Busby's decision-making and there is accordingly no flaw in this regard.

[311] Turning to Superintendent Cliff's report, the first issue raised was the concern that Mr Q had not accepted and continued not to accept, that he had done anything wrong. On this point the submission from the Police Association lawyer were ambiguous. On the one hand it was contended that Mr Q was being disciplined for something he did not do; and on the other hand it was submitted that if the same situation occurred again Mr Q would react differently. In his response, Mr Busby indicated that the effect of these statements was that he could not have confidence that an incident of this nature would not recur. However, the difficulty with this conclusion is that no specific consideration was given to the consequences of the conduct on Mr Q's ability to fulfil his duties and responsibilities as a member of the Unit. It was a requirement of the Code that this factor be considered in that context. As a member of the Unit Mr Q was not required to undertake frontline policing, and that he did so on 8/9 May 2010 was unusual. A fair and reasonable employer needed to consider this issue in the circumstances; doing so could have led to a consideration of outcomes other than dismissal.

[312] At the hearing of the challenge, witnesses were questioned and submissions were made to the effect that both Inspector McKeown and Superintendent Cliff failed to provide information to Mr Busby on Mr Q's previous performance reviews, many of which were positive. However his Police Association lawyer expressly stated that there was no other documented employment history which could reasonably be relied upon in determining the appropriate penalty. Particular reference was made in submissions to the 2008/2009 performance appraisal, with the point being made that that Mr Q had achieved results in the "better than agreed" category. The lawyer did not provide additional performance appraisals, or suggest that Mr Busby needed to obtain them. In those circumstances he could not be criticised for not doing so.

[313] The next issue raised by Mr Q's lawyer related to Superintendent Cliff's statement that Mr Q had electronically and covertly recorded conversations with Canterbury staff; this caused him, he said, additional concern and was one of the reasons that led to a conclusion that Mr Q had a lack of confidence in his employer. It was submitted for Mr Q that he did not dispute this had happened, but it was submitted this did not demonstrate there was such an absence of trust and confidence in the employment relationship that it should be terminated. Rather, some work was necessary to repair the relationship with Police which Mr Q was willing to undertake.

[314] That issue is related to the next submission to the effect that Superintendent Cliff had contended that Mr Q had failed to engage with Police over the previous 15 months; Superintendent Cliff said this was also a factor which supported termination. In response Mr Q's lawyer told Mr Busby that within that period Mr Q had been embroiled in a dispute with Police over the justification of the warning. His absence from the workplace related to this dispute and should not contribute to the decision to dismiss him from his employment.

[315] However, the factors referred to in support of Superintendent Cliff's criticism that Mr Q had not engaged for some 15 months were not straightforward. Superintendent Cliff's letter to Inspector McKeown stated that Mr Q had not been at work since 17 May 2010, "electing to remain away from work without pay rather than engage with staff. He has steadfastly declined to engage in a rehabilitation process and has refused to tell his employer what it is that affects his ability to work". It could not be fair and reasonable to rely on this fact as a ground for dismissal when the subject of the disciplinary process related to different circumstances, namely the use of excessive force on a particular occasion. That said, there is no evidence that Mr Busby took these statements by Superintendent Cliff into account when deciding to dismiss him although it would have been desirable to have indicated this in the notification of outcome.

[316] A related contention is that Mr Busby should have sought further information from Superintendent Cliff about Mr Q's medical condition and other issues relating to rehabilitation. I do not agree that this was required when Mr Q's lawyer did not

raise this possibility, saying only that Mr Q was prepared to return to work and was adamant he could perform his duties to an excellent standard.

[317] At the hearing some criticism was directed at Mr Busby for failing to confront the "would/could" statement in Mr Kynaston's report. It is not clear that Mr Busby directed his mind to this error, but as I have found that it was not causative of an incorrect approach, I do not consider Mr Busby erred by failing specifically to address it.

[318] A matter not referred to by Mr Q's lawyer, but referred to in detail at the hearing of the challenge, related to disparity issues. Inspector McKeown in his report to Mr Busby, made brief reference to seven cases, in which employees were apparently found to have used excessive force. In two other cases there were resignations; in another instance the case was referred back for employment investigation; in a further two instances there was a finding of no misconduct and negotiations between Police and the Police Association were ongoing; the sixth one (relating to a Senior Sergeant) was the subject of a final warning and demotion; and the final instance was being dealt with at mediation.

[319] There was no advice as to the identity of the employees involved or the circumstances of any incident, or of any other fact that would assist in understanding whether these were or were not "similar cases". Nor was there any information as to length of service, position held or any other details of employees' circumstances.

[320] This issue was not raised in the Police Association's submissions. In any event, in *George v Auckland Council*, Judge Inglis held that it could not be right that an employer can adequately meet an argument of disparity simply by asserting that the issue was not raised by or on an employee's behalf during the course of a disciplinary process,[32] a conclusion with which I respectfully agree.

[321] In *Samu v Air New Zealand Ltd* the Court of Appeal stated that if there is a prima facie case of disparity, or enough to cause enquiry to be made by the Court into that issue, the employer may be found to have been dismissed unjustifiably

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[32] *George v Auckland City Council* [2013] NZEmpC 179 at [68]; [2013] ERNZ 675.

unless an adequate explanation was forthcoming.[33] It was further stated that if there is an adequate explanation for the disparity it becomes irrelevant.

[322] In the present case, the Code required this issue to be addressed. Other instances of apparent similarity were presented, however the information which was provided to Mr Busby was vague and lacking in detail. On the face of it, none of the examples confirmed that an employee had actually been dismissed for a breach of the Code involving an excessive use of force. Mr Busby was confident that the resignations were in the context of employees who were undergoing a disciplinary process. He speculated that there was perhaps a preliminary decision of dismissal or even a final decision of dismissal.[34]

[323] I find that the circumstances raised a prima facie case of disparity. An adequate explanation as to whether Mr Q's case was or was not similar to others was not given. I cannot rule out the possibility that a proper evaluation of similar cases may have led to a conclusion that dismissal was not an option that had been followed in cases that were similar. No definite conclusion can be reached given the lack of detail in respect of any of the cases referred to on that point; Mr Q is entitled to the benefit of that doubt since it was the responsibility of the employer to consider this issue properly under the Code.

[324] In summary, I find that express consideration should have been given to the fact that the established serious conduct was at the lower end of the scale, that Mr Q had not been placed in a frontline situation for more than a decade, that the impact of the established misconduct on Mr Q's duties and responsibilities as a member of a Unit where frontline policing was undertaken rarely, if at all was not considered, and that there was a failure to assess properly the manner in which similar behaviour had been treated by Police because appropriate detail of similar cases was not provided or obtained.

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[33] *Airline Stewards and Hostesses of NZIUOW v Air NZ Ltd* [1985] ACJ 952, 954 (CA) cited in *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 (CA) at 639.

[34] Evidence was given at the hearing regarding other cases where the use of excessive force was alleged, but the information as to those was also lacking in detail and in the end does not assist the Court.

[325] Given those issues, I must conclude that a decision to dismiss Mr Q was not one that a fair and reasonable employer could have taken in all the circumstances. I also accept the submission made for Mr Q that options other than dismissal were appropriate for consideration, such as a written warning, a referral to training, counselling or therapy, as well as supervision.

[326] To that extent Mr Q's challenge succeeds.

Remedies

Reinstatement submissions

[327] I turn now to remedies and begin with the main remedy which was sought for Mr Q, that of reinstatement to the Unit. It was submitted that reinstatement is practicable and reasonable because in summary:

a) Mr Q would return to a role he had held for 14 years prior to his dismissal, during which he had received very good performance reviews from a number of different supervisors.

b) He would be most unlikely to use his constabulary powers in that role (specifically those relating to arrest and use of force).

c) Detective Inspector M, Detective Senior Sergeant T and Detective Inspector Long were no longer involved with the Unit.

d) He had been successfully reintegrated to the Unit after an earlier Employment Tribunal decision.

e) Sergeant O had satisfactorily reintegrated into the Unit after a difficult time in 2007/2008.

f) There was no evidence of any Unit members not wanting him back.

g) He could receive training on the Code which he had not previously undertaken.

h) He would be receptive to that and other training, as confirmed by Dr Webb and Ms Beekhuis.

i) His mental health was expected to improve dramatically upon reinstatement.

j) He could receive counselling to assist with reinstatement.

k) His work with the Unit was his passion. He is very good at that work. He has a real desire to be reinstated to the Unit.

[328] For Police, it was submitted that it is not practicable or reasonable to reinstate Mr Q to his former position because in summary:

a) There was no acceptance of wrongdoing, such that trust and confidence could be restored. This had been a key factor when deciding whether to terminate. Mr Q still maintained that Police views were wrong on all counts and that his conduct was appropriate in every respect.

b) Mr Q's attitude and conduct was fundamentally incompatible with core Police values and modern policing. It was not Mr Q's role as a modern Police officer to teach people lessons as he had asserted. His comments to Ms V demonstrated a lack of respect to a member of the public.

c) Mr Q's decision to interview Ms V with Mr Cody in October 2014 and to actively mislead her as to his identity was indefensible. That conduct was deceptive and highly manipulative and caused Ms V significant distress. This too was inconsistent with core Police values.

d) Mr Q's conduct in approaching Detective Senior Sergeant T in public and abusing him was similarly indefensible. No remorse or apology had been offered for this conduct.

e) Given recent conduct, Police were of the view that Mr Q did not have the values, judgment or emotional balance required to be employed as a member of Police.

f) There were numerous examples in the evidence of mistrust and lack of good faith towards management and superiors which was a further

concern, such as secretly recording meetings and accusing the District Commander of being a bully.

g) Mr Q demonstrated during the hearing that he continued to be mistrustful of his employer, stating for example that Detective Inspector M had been part of a "conspiracy" or an "orchestrated scheme" whereby Detective Senior Sergeant T would not have to interact with him again; and that Police had deliberately eliminated the CCTV footage at the Boogie Nights nightclub.

h) At the time of the hearing in the Court it was four years and nine months since Mr Q had worked for Police. This was a significant factor rendering reinstatement impracticable. Given the length of absence, Mr Q would need to undergo and pass all of the defendant's standard testing and training for recruits which could take over a year. There were also concerns as to whether he could maintain the work ethic and drive required to be a Police Officer.

i) It would be wrong to order reinstatement in circumstances where there had been a high degree of contribution to the circumstances. It would not be right to disregard the serious misconduct: *Irvine's Freightlines Ltd v Cross*.[35]

j) The contributory conduct in the present case was so significant that any remedies should be "significantly reduced by 100 per cent", since Mr Q was entirely the author of his own misfortune.

Legal principles as to reinstatement

[329] It has long been the case that it is necessary to establish whether it is practicable to provide for reinstatement. In *New Zealand Educational Institute v Board of Trustees of Auckland* (the NZEI case) the Court of Appeal approved the following statement:[36]

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35 *Irvine's Freightlines Ltd v Cross* [1993] 1 ERNZ 424 (EmpC) at 445.

36 *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416; subsequently affirmed in *Lewis v Howick College Board of Trustees* [2010] NZCA 320, (2010) 7 NZELR 539 at [2].

> Whether … it would not be practicable to reinstate Mr Bell involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[330] In the NZEI case the Court of Appeal confirmed that the main elements in determining practicability are:[37]

- The onus is on the employer to establish that reinstatement is not practicable.
- Practicability is not the same as possibility. What is possible is not necessarily practicable.
- The interests of the parties and the justice of their cases are to be balanced with regard to not only the past but particularly to the future.
- Practicability involves considering whether the employment relationship can be successfully re-imposed on the parties.
- The Court may consider matters that were outside the reasons for a dismissal when assessing whether the employment relationship can be re-imposed. A broad approach is to be taken.

[331] In 2011, reinstatement ceased to be the primary remedy under the Act. Also, reasonableness was added as an aspect of the test. As to this requirement the full Court in *Angus* stated:[38]

> [65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament had now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad enquiry into the equities of

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37 *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*, above n 36, at 416-417.

38 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [65]-[68].

> the parties' cases so far as the prospective consideration of reinstatement is concerned.
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> [66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.
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> …
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> [68] … The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.39

Discussion: reinstatement

[332] Mr Q told the Court that his primary objective is and always had been to get his job back with the Unit. He believes that it is both practicable and reasonable for him to assume that role where, with suitable support, he would become fully effective notwithstanding all that has passed since May 2010. He emphasises that he is very committed to the work of the Unit, and says that he knows he is very good at it. He also points to his effective transition back into the Unit following his successful Employment Tribunal case when he obtained an order of reinstatement in 1996.

[333] A factor which is significant in this case when considering reinstatement is the point which was at the centre of Police consideration of both the first and second incidents. It relates to whether or not Mr Q has accepted wrongdoing such that trust and confidence could be restored. The Court has concluded that it was appropriate for Police to have imposed a first written warning, contrary to Mr Q' belief. Whilst Mr Q had a legal right to challenge that conclusion and has done so in the Authority and again in this Court, his strident views on this issue are an example of what was described by Dr Webb as "his very intellectual, pedantic and technical analysis of every aspect of … events reflects his obsessional personality and need for justice and

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[39] These concepts were discussed and considered recently in *Edwards v The Board of Trustees of Bay of Islands College (formerly Carol Anderson, Ltd Statutory Manager of Bay of Islands College)* [2015] NZEmpC 6 at [287].

just process". Given that evidence, it will be difficult for Mr Q to accept the Court's findings, and to move on.

[334] A further example of Mr Q's difficulty in accepting that he is at fault in these matters is demonstrated by his formal position in this proceeding. It was submitted on his behalf that in respect of the second incident a finding of misconduct was appropriate, but not serious misconduct. However, for much of the period since that incident, he has asserted that he was entirely justified in responding to the removal of his Police hat in the way that he did. There was no real acceptance of the fact that his actions constituted misconduct that required a warning. In respect of the second incident he told Mr Busby "I would never apologise, just as I will never be accepting of any finding of any misconduct". As recently as March 2013, Mr Q told the Authority, following the issuing of its determination that the two incidents arose where two people, Ms V and Detective Senior Sergeant T "simply suffered embarrassment precipitated by their own improper behaviour". That attitude was demonstrated by the way in which Mr Q spoke to Ms V during the incident, where he made numerous remarks which demonstrated a total lack of respect and anger.

[335] During the hearing itself, there was no real acknowledgment of misconduct, despite the formal concession. Mr Q continued to contend that his conduct towards Ms V was necessary and reasonable. He told the Court that Ms V deserved to "have some consequence ... yes and if all that was, was an emotional upset, that was a really good thing". Mr Q says he would do things differently now but his description of the key events does not demonstrate any understanding as to what went wrong. I accept the submission that his views are in many respects fundamentally incompatible with core Police values and modern policing. What is of concern is that Mr Q has no real insight as to this reality.

[336] Also of concern to the Court are the incidents following dismissal where Mr Q was abusive to Detective Senior Sergeant T and to a lesser extent Detective Inspector M, in public; and the serious error of judgment demonstrated when he elected to accompany Mr S to interview Ms V in late 2014 in preparation for the hearing before the Court, where he did not disclose his identity. He asked questions of Ms V without telling her that he was the officer involved and as if he was not the

officer involved. When she subsequently learned of this she said that she felt very uncomfortable that his identity had not been revealed; she correctly said it was very disrespectful; she also said that she found his manner threatening and intimidating.

[337] These post-incident behaviours cannot be dismissed on the basis that Mr Q was obviously under some stress because the proceedings in the Authority and/or the Court were yet to be heard. They reinforce the concern expressed by Police that Mr Q does not understand the impact of his actions; he has a tendency to escalate situations unnecessarily or minimise the impact of his own behaviours on others.

[338] I have referred to the evidence given by Dr Webb as to Mr Q's anxiety driven obsessional-compulsive behaviours, which she also referred to as "a transient anxiety response". She said that Mr Q has been able to manage episodes when such has occurred, and that they appeared to arise from the stress of his successive employment-related conflicts with Police. She also stated that the obsessional behaviours did not occur in the workplace when Mr Q was working in the Unit. That observation is not supported by the evidence I have heard. The conduct giving rise to the first written warning was obsessional and it occurred in the workplace. I am not satisfied that such behaviours would not recur in the workplace were Mr Q to be reinstated.

[339] Ms Beekhuis stated on the basis of her dealings it would be possible to assist Mr Q to modify his "cognitive style", but she could not predict how possible this would be until "giving it a go". A further difficulty is that Ms Beekhuis did not consider whether the prospects of overcoming these difficulties would be more difficult if Mr Q' challenge only succeeded to some extent, as is now the case.

[340] I find there are doubts as to the extent to which Mr Q's anxieties could be satisfactorily managed so that his obsessional compulsive behaviours would not recur given the findings made by the Court.

[341] It is also relevant to note that were Mr Q to be reinstated, the position would be that the first written warning, which the Court has found was justified would have run its course, since it was imposed on 6 December 2010 for a period of 12 months.

However, the findings in relation to the second incident would mean that misconduct had occurred which should be the subject of a (second) warning along with other outcomes. There are two consequences of this – the first is that Mr Q would not be returning to employment on the basis that he was free of blame or with a clean slate; the second is that due process would need to be undertaken to settle the terms of the warning, including its content and length. The terms of other outcomes such as supervision, training and counselling or therapy would also need to be settled under an appropriate process. There is also an issue as to where Mr Q might work, it being the case that there is not currently a vacancy in the Unit for him. These factors mean that reinstatement, were it to occur, would take place in a complex situation which in my assessment could well lead to yet further disputes between the parties, given the protracted and difficult history of both the incidents which the Court has been required to review.

[342] I acknowledge that at times Mr Q has received very positive ratings and appreciation for his work in Police, especially in the early 2000s. However, his employment history has also had its setbacks. The positives of Mr Q's work record cannot override the factors to which I have referred so as to justify an order of reinstatement.

[343] Nor do I consider that the successful reintegration which occurred after the Employment Tribunal decision is a relevant precedent now. There, Mr Q returned to the Unit having been vindicated; unlike the present case which has resulted in significant criticisms of Mr Q.

[344] The cumulate effect of the factors I have discussed is that I must conclude that it is neither practicable nor reasonable for reinstatement to be ordered.

Reimbursement of lost income

[345] Section 128(2) of the Act requires the Court to order reimbursement for income lost as a result of an unjustified dismissal, being the lesser of three months' ordinary time remuneration, or the amount of the plaintiff's loss. Any award beyond the minimum is a matter of discretion under s 128(3) subject to a consideration of the

obligation to mitigate any losses and as to any issues of contribution under s 124 of the Act.

[346] In closing submissions, counsel for Mr Q advised the Court that he seeks lost wages from 7 January 2011 to the date of the decision of this Court, which is a period of more than four and a half years.

[347] I first consider Mr Q's endeavours to obtain work following his dismissal. He stated that upon dismissal he considered obtaining alternative work and subsequently applied for positions around this time with three entities. However, his applications were unsuccessful. He also said that he had survived on savings and limited rental income. There is no doubt that Mr Q has not received income from employment for the three months which followed his dismissal. Under s 128(2) he is entitled to a sum equivalent to three months' ordinary time remuneration.

[348] It is next necessary to consider whether the Court should exercise its discretion to direct remuneration in respect of actual losses beyond the three-month period.

[349] Mr Q submits that his loss continued over that period and that he did not consider it appropriate to obtain substitute employment. He believed that because he was intending to obtain his position back with Police, any alternate position he obtained was never going to be long-term as would be required. He said that to persevere with such an application would not have been fair to any third party employer or other applicants. A further factor was that any meaningful position would have required productivity and efficiency which was beyond him, considering his stress and anxiety levels. For Mr Q, the central submission is that given the serious flaws of the Police process, and the significant effects upon Mr Q (specifically his mental health) it is submitted that he is entitled to full reimbursement of salary subject to contribution assessments. It is further submitted that the processes were so flawed, inappropriate and unfair that it would not be said with any confidence what the outcome may have been if a proper process had been

followed: *Solid Energy New Zealand Ltd v Manson*.[40] Consequently Mr Q should not be denied reimbursement of lost remuneration in full.

[350] The defendant submits that Mr Q has not discharged his onus of satisfying the Court as to efforts made to obtain alternate employment; nor has he mitigated any losses he may have suffered. Mr Q had made a conscious effort not to seek to be reemployed, so that this case has parallels with *Argosy Imports Ltd v Lineham*, wherein the Court held that the employee lost remuneration not as a result of his dismissal but from his decision not to seek work.[41]

[351] Counsel went on to submit that in *Telecom NZ v Nutter* the Court of Appeal held that the actual loss suffered by the employee sets an upper ceiling on any award and is a logical starting point; but full compensation must be assessed in light of all contingencies which might have resulted in termination of the employee's employment.[42] The Court in *Nutter* had cautioned that moderation should be applied by the Courts; where there has been an unjustifiable dismissal an award of more than 18 months' remuneration would be at the "higher end of the exercise of the discretion".[43] These principles were confirmed in *Sam's Fukuyama Food Services v Zhang*.[44]

[352] The theoretical starting point for any assessment of lost remuneration is the period from the date of dismissal to the date of the hearing before the Court, which in the present case is in excess of four years. There have been delays in the prosecution of the matter in this Court. The challenge was filed on 18 February 2013 but was not heard until early 2015. The proceeding could have been brought on for hearing at an earlier date. Both parties acquiesced in the delay which occurred in bringing the matter on for hearing. For this reason alone it would not be appropriate for the Court to exercise its discretion for the full period up to the date of hearing.

[353] However, the Court is required to assess all contingencies. I cannot rule out the possibility that had Mr Q continued to work for Police, other issues may have

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40 *Solid Energy New Zealand Ltd v Manson* [2009] NZEmpC 130 at [46].
41 *Argosy Imports Ltd v Lineham* [1998] 3 ENRZ 976 (EmpC), at 981.
42 *Telecom NZ v Nutter* [2004] 1 ERNZ 315 (CA) at [81].
43 At [78].
44 *Sam's Fukuyama Food Services v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [24]-[26].

arisen that could have impacted on his ability to continue as a Police employee, whether of a performance nature or having regard to health issues. It is clear that Mr Q has a strong sense of what he perceives to be his rights in a particular situation which he is inclined to pursue if he considers it appropriate. The Court cannot rule out the possibility that other incidents might have occurred which may have arisen so as to affect his employment. These factors have to be considered against the background reality that when Mr Q ceased working for Police (May 2010), two incidents had occurred in close proximity which it has been held would each have justified the imposition of a warning. Also relevant, although to a lesser extent, are Mr Q's health issues which at times have impacted on his ability to work at all, or to a limited extent. No detailed evidence has been provided as to health prospects one way or the other, but the Court cannot ignore that factor in its assessment.

[354] I must then consider the issue of mitigation. Reference has already been made to Mr Q's views as to the obtaining of alternate employment post-dismissal. No detailed information has been provided even in respect of the three positions to which it is said an application for employment was made. The explanation for this stance is that Mr Q's personality-type and obsessional compulsive behaviour condition meant he became totally absorbed by correcting what he felt was an unjust situation so that he could not contemplate other work; and this has created stress to the point of him suffering significant lethargy.

[355] Since this assertion is supported by the evidence of a health professional, Dr Webb, I accept that this has been the reality. However, it is not a complete justification. In my assessment, this factor is entitled to weight when considering mitigation in the initial stages which followed dismissal, but not for the entire duration of the period for which he has been unemployed. In the end, Mr Q chose not to seek work.

[356] Taking all factors into account, I find that it is appropriate to exercise my discretion to extend the claim for lost wages beyond the three-month period to a period in total of 12 months, subject to contributory conduct factors.

[357] The parties should attempt to calculate that loss by agreement, but I reserve leave to Mr Q to apply further to fix the sum if agreement cannot be reached.

Superannuation entitlements

[358] Mr Q seeks reimbursement of lost superannuation entitlements from 7 January 2011, to the date of decision of the Court.

[359] For the same reasons as apply in respect of the application for lost remuneration, I order reimbursement of Mr Q's employer contributions to the Police Superannuation Scheme, for a period of 12 months, subject to contribution issues.

[360] If the parties are unable to agree quantum, leave is reserved to Mr Q to apply for suitable directions.

Wages for period prior to dismissal

[361] Mr Q seeks reimbursement as to what are termed "contractual entitlements" which were paid to him without consent during the period that he was off work, from 26 May 2010 to 7 January 2011. He accepts that sick leave entitlements were properly paid.

[362] In this period, Mr Q sick leave entitlement expired on 2 August 2010. Thereafter, wages continued to be paid by the employer applying leave entitlements such as physical competence test leave, payments for time off in lieu, annual leave, accrued alternative days for working on statutory holidays, shift-workers' leave and long service leave.

[363] The amended statement of claim pleads that this claim should be dealt with under s 131 of the Act, which provides that where there has been default in payment to an employee of any wages or other money payable, the whole or any part may be recovered by the employee. The submission made at the hearing, by contrast, stated that there had been deductions in breach of s 5 of the Wages Protection Act 1983 (the WPA), which provides that deductions from wages payable to a worker must be made with the written consent or written request of a worker; further that the claim

was advanced under s 123(1)(b) of the Act which provides for reimbursement for wages or other money lost as a result of the grievance.

[364] The defendant submits that no loss was incurred in the period, because at all relevant times work was available to Mr Q by way of alternative duties which he chose not to perform.

[365] In my view none of these provisions apply:

a) There has not been a default in payment of wages or other monies under s 131 of the Act. Entitlements in various forms were paid for as long as possible even although Mr Q declined to attend the workplace when work was available.

b) There were no deductions from wages contrary to s 5 of the WPA.

c) As for the claim under s 123(1)(b) of the Act, the established grievance is the decision to dismiss rather than adopt an alternative outcome. The amounts for which a claim is made do not relate to the established grievance. They were utilised because Mr Q declined to attend the workplace.

[366] As already mentioned, the Court was advised that Mr Q's stand down from 17 May 2010 and his placement on restricted duties from 15 June 2010 was originally an issue in this proceeding, but the claim in that regard was discontinued. That may have been one means by which the propriety of the steps taken by the employer could have been tested. I express no view as to whether a cause of action could have been established, or whether the Court would have concluded there were consequences giving rise to an entitlement to remedies.

[367] This application is dismissed.

Compensation for humiliation, loss of dignity and injury to feelings

[368] Mr Q seeks a compensatory award under s 123(1)(c)(i) of $50,000 for his unjustified dismissal grievance. He also sought $10,000 for his unjustified

disadvantage personal grievance, but as that has been dismissed there can be no such award.

[369] A convenient summary of factors relevant to this issue is contained in the following passage in *Hall v Dionex Pty Ltd*:[45]

> Commentators have recently noted that average compensatory awards made by the Court have remained at stagnant levels for the last 20 years, despite the inflationary effect it might otherwise be expected to have increased them. They further note that while in *NCR(NZ) Corp Ltd v Blowes* the Court of Appeal attempted to set an "upper limit" on compensatory awards of $27,000, consistent with inflation from the award of $20,000 made in *Telecom South v Post Office Union Inc*, if a similar inflationary approach was applied today an upper limit for compensation would be $33,000. By contrast, between July 2013 and July 2014 awards in this Court were said to have ranged from between $3,000 and $20,000 with the average award before taking contribution into account being $9,687.50.[46]

[370] I also remind myself that Parliament expects moderation in the making of awards; and that it is not the purpose of compensation to punish an employer.[47] The effect on a grievant must be considered. Compensation must be commensurate with the evidence of the degree of harm caused to a plaintiff.

[371] Mr Q has succeeded on only one of his personal grievances. It is reasonable to assume that some of the consequences he has described arose from the imposition of the first written warning and the efforts involved in dealing with that issue, albeit unsuccessfully.

[372] That said, there is no doubt that Mr Q has been personally affected in the multiple respects described by himself and his wife in evidence; and confirmed by the evidence of Mr Q's general practitioner, Ms Beekhuis, and Dr Webb.

[373] As far as the dismissal grievance is concerned, I am persuaded that it is fair to assess the time it took to complete the disciplinary process when assessing whether compensation should be paid in the present circumstances. Ms V made her

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45 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [87], per Judge Inglis.

46 The commentary was contained in a paper presented to New Zealand Law Society 10th Employment Law Conference, October 2014 at 457; the cases referred to in this extract are *NCR(NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA) at [40]-[42], and *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA).

47 *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159 (CA).

complaint to the IPCA on 11 May 2010; the decision to dismiss was notified on 14 October 2011. Some factors were beyond the control of the parties, for example the occurrence of the first Canterbury earthquake on 4 September 2010 during the initial investigation which caused some delay when Mr Mikaera was required for other duties.[48] Mr Newton's process took three months; Mr Mikaera's process took five months; Mr Kynaston's process took six months; and Mr Busby's process took two months (all approximate assessments).

[374] Standing back, the total period involved was longer than was desirable; each of these phases could, except for the last, have been conducted in a more timely way. I find the prolonged duration of the processes relating to the second incident enhanced the stress factors suffered by Mr Q. This is relevant when assessing compensation.

[375] Having regard to the factors I have identified above and the legal principles involved, I consider that an appropriate award is $17,500, subject to consideration of contributory conduct.

Contributory conduct

[376] Section 124 of the Act requires the Court when deciding both the nature and extent of remedies to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if so, whether those actions require a reduction in the remedies that would otherwise have been awarded accordingly.

[377] The requirements of the section were recently discussed by Chief Judge Colgan in *Harris v The Warehouse Ltd*. He observed that when considering the language of s 124, the situation that "gave rise to that personal grievance" is the series of relevant events which caused the employee to have been dismissed or disadvantaged unjustifiably.[49] He then said:

> Long standing case law establishes that there must be more than simple cause and effect shown. The employees' actions must be culpable or

[48] There is no evidence that the Pike River tragedy delayed the process.
[49] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178].

> blameworthy or wrongful actions which must have contributed, for example, to a complaint of serious misconduct which, following investigation, brought about the dismissal of the employee.

[378] For Mr Q it was submitted that his actions were neither causative nor culpable nor blameworthy in any respect. For Police it was submitted that contributory conduct was substantial, and to the extent that any remedies were potentially available they should be reduced by 100 per cent.

[379] The second incident arose because of Mr Q's overreaction to an incident at the nightclub where he was on patrol. His formal case in this Court was that his actions constituted misconduct. I have found Police were justified in accepting Mr Kynaston's opinion that the conduct was serious misconduct albeit at the lower end of the scale. I consider that the second incident gave rise to the complaint which ultimately resulted in the grievance; and that Mr Q' conduct during the second incident was indeed blameworthy.

[380] I do not accept the submission, however, that remedies should be completely extinguished. The defendant erred in its disciplinary process as a result of which I have found that Mr Q should not have been dismissed; his personal grievance has accordingly been established and Police must carry some responsibility for this.

[381] It was submitted for Mr Q that he was set up to fail by Police, in that he was not prevented from going on frontline duties despite significant concerns about his mental health, and because Mr Q was "rusty" on account of the fact that he had not been on the frontline for 14 years. Nor was there any briefing, adequate supervision or training. These are factors which should be weighed into the scales when determining conduct for s 124 purposes, but they do not relieve him of personal responsibility for the events that occurred.

[382] Standing back I consider an appropriate reduction of remedies is 40 per cent. This will apply to the awards for lost wages, superannuation entitlement and the award for compensation for humiliation, loss of dignity and injury to feelings.

Interest

[383] Mr Q seeks interest in respect of his remedies, pursuant to cl 14 of Sch 3 of the Act. Interest may be payable for monetary awards, though not compensation, from the date when the cause of action arose and the date of payment in accordance with the judgment, as the Court thinks fit. Interest applies at the rate described under s 87(3) of the Judicature Act 1908 (JA). The discretion to award interest is to be exercised as the justice of the case requires.[50]

[384] In accordance with standard principles, I consider that Mr Q is entitled to be compensated by way of interest for the fact that he was entitled to monetary awards which to this point have not been paid.

[385] The one caveat is that there have been some delays in bringing the challenge to the point of hearing which should not result in an additional liability for interest as far as the defendant is concerned. A further relevant consideration is that interest should not be payable for a period when the wages would not have become payable (that is during 2011-2012), at least in full.

[386] The fairest approach will be to order payment on the financial awards from a date which is 12 months after dismissal, 14 October 2012 to the date of payment at the JA rate. If the parties are unable to agree on this sum, leave is reserved to Mr Q to apply to the Court for it to be fixed.

Conclusion as to second incident

[387] The decision to dismiss was not a conclusion which a fair and reasonable employer could have reached in all the circumstances of the case at the time when the dismissal occurred, as assessed on an objective basis. To that extent, the challenge succeeds and the Authority's decision is set aside.

[388] Police are to pay Mr Q lost wages for a period of 12 months from the date of dismissal, reduced by 40 per cent. Mr Q is also to be paid his employer superannuation entitlements for the same period, also reduced by 40 per cent.

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[50] *Attorney-General v N* [2002] 1 NZLR 651, [2001] ERNZ 629 (CA) at [26].

Interest is payable on both such amounts from 14 October 2012 to the date of payment at the JA rate. The parties are to resolve quantum issues directly if at all possible, but leave is reserved to either party to apply to the Court for directions.

[389] Police are to pay Mr Q compensation under s 123(1)(c)(i) in the sum of $10,500.

Outstanding issues

[390] As discussed with counsel at the hearing, non publication issues will need to be dealt with and are the subject of a separate minute.

[391] The parties should attempt to resolve any issues that may exist as to costs. If either party chooses to apply for costs, that application should be filed within 28 days, supported by evidence and submissions; the other party may then file a response, together with evidence (if any) and submissions.

B A Corkill
Judge

Judgment signed at 4.30 pm on 7 May 2015