

NOTE: This determination contains an order prohibiting publication of certain information at [99].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 706
3229280

BETWEEN THE ESTATE OF ANTHONY
DALE KAHAKI
Applicant

AND COMMISSIONER OF
POLICE
Respondent

Member of Authority: Peter Fuiava

Representatives: Margaret Matthew, counsel for the Applicant
Nicola Cuervo and Louise Robertson, counsel for the
Respondent

Investigation Meeting: 25 March 2025 in Hamilton

Submissions and information received: 12 March, 13 April and 1 August 2025 from the
Applicant
12 March, 6 May and 1 August 2025 from the
Respondent

Determination: 3 November 2025

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] In broad terms these are claims of unjustified disadvantage now brought by the estate of the late Senior Constable Anthony Date Kahaki who sadly died in August 2024 after a brave battle against mantle cell lymphoma. Consequently, he was not able to attend the investigation meeting into his personal grievances with his employer the Commissioner of Police. SC Kahaki is survived by his two children and his wife Sacha who attended the investigation meeting.

How has the Authority investigated?

[2] For my investigation, I received from SC Kahaki his written witness statement which he affirmed with me by telephone from his hospital bed at a Shanghai Hospital where he was undertaking potentially lifesaving experimental stem cell therapy.

[3] In support of SC Kahaki's case, I also received written witness statements from licensed private investigator and retired Police Senior Sergeant William Hetaraka and Senior Constable Neale Williams. Although the evidence given by Mr Hetaraka and SC Williams provided helpful background information to my investigation, it was the documentary evidence spanning some 1,400 pages across three common bundles that were of greater assistance in resolving the issues that needed to be investigated and determined.

[4] For the Commissioner of Police, I received written witness statements from Superintendent and District Commander for Waikato District, Bruce Bird, Superintendent and director of leadership and development at the Royal New Zealand Police College (RNZPC), Andrew Mortimore, Inspector and road policing manager for Waikato District, Jeffrey Penno, and Inspector and operations and support manager for Waikato District, Neil Faulkner.

[5] All witnesses answered questions under oath or affirmation from me and the parties' representatives. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What were the issues?

[6] Several issues were agreed upon by the representatives by joint memorandum which were endorsed in a third minute from the Authority dated 24 April 2024. In broad terms, the issues relate to six disadvantage grievances and an alleged breach of good faith by the respondent. However, rather than itemise the grievances here, for ease of convenience, these have been summarised into subheadings instead set out later in this determination.

[7] It may be noted that two issues were subsequently removed from my investigation from the parties themselves. The first was a claim of alleged retaliatory conduct amounting to discrimination which SC Kahaki's counsel, Ms Matthew withdrew on his instructions. The second was a claim of an alleged overpayment in sick leave payments to SC Kahaki which Supt. Bird confirmed at the investigation meeting that the Police were no longer pursuing.

What happened?

[8] In March 2024 the representatives provided the Authority with a 60-page agreed summary of facts which is relevantly summarised below.

[9] SC Kahaki's policing career began in 1988 with the then Ministry of Transport. Following its merger with the Police, he attended the RNZPC and became a Police Constable in mid-1993 and served predominantly in the Waikato District in various specialist roles. He was promoted to Senior Constable in 2004.

[10] In September 2016, SC Kahaki attended a traumatic roadside fatality and subsequently developed post-traumatic stress disorder for which he required time off from work for several months until he was cleared to work in July 2017. Unfortunately, he was then diagnosed with stage four mantle cell lymphoma and having already used his paid leave entitlements, remained off work on leave without pay while he received medical treatment.

[11] SC Kahaki was cleared to return to work in early May 2018 but was redeployed to light duties only and not to front-line policing. His return to work was gradual with his hours increasing from five to 20 hours of work per week.

[12] In April 2019, SC Kahaki became the district fleet manager for the Waikato District, a role that was relatively new and had recently become vacant. He initially reported to the deployment manager for the district who was Insp. Penno at the time and then Insp. Tim Anderson from 1 May 2019 to date.

[13] In November 2019, Insp. Penno became the road policing manager for the Waikato District. In early February 2020, SC Tony Gardner started working on a project for Insp. Penno that concerned the District's fleet resourcing and operations. A

change in reporting line in May 2020 saw SC Kahaki as district fleet manager report to the road policing manager for Waikato District (Insp. Penno).

[14] The pair had their first one-on-one meeting following the change on 19 May 2020 during which time Insp. Penno set out his expectations for their supervisory relationship and discussed SC Kahaki's health.

[15] On 15 July 2020, Insp. Penno and SC Kahaki met to discuss his health, leave recording and balances and completed an updated return to work plan for him. Insp. Penno also queried why SC Kahaki had a police vehicle in his possession (an unmarked blue Holden) and subsequently took the keys to the vehicle from him.

The Report

[16] On the evening of 19 July 2020, Insp Penno emailed Insp. Andrew Mortimore, who was the district prevention manager for the Waikato District at the time, a draft report about SC Kahaki (the Report). Once completed, the Report made a number of serious allegations of disproportionate assignment of work to a particular vehicle repair supplier, unlawful conversion of a Police vehicle, fraudulent use of a Police fuel credit card, unauthorised modification of Police vehicles and failure to submit timesheets and record holidays and leave.

[17] The following day, Insp. Penno submitted to Insp. Mortimore the first of two updates to the Report which included additional dates and a further concern about unauthorised modification of Police vehicles. The second update followed a rehabilitation meeting between Insp. Penno and SC Kahaki on 21 July 2020 in which SC Gardiner attended as SC Kahaki's support person. SC Kahaki would later claim that SC Gardiner had been instructed by Insp. Penno to gather covert evidence against him, which is denied.

[18] It is common ground that the allegations made in the Report about disproportionate assignment of work, fraudulent use of a Police fuel credit card and unauthorised modification of Police vehicles were not raised or discussed with SC Kahaki by Insp. Penno.

[19] The Report was subsequently forwarded to senior HR advisor for the Waikato District, Cheree Rastovich, and Insp. Neil Faulkner, the district's police professional conduct manager at the time. The Report was then forwarded to Supt. Bruce Bird as district commander for Waikato District who passed it on to the National Integrity Unit (NIU) to determine whether it was a matter for the NIU to investigate.

The Supplementary Report

[20] On 22 July 2020, Insp. Penno emailed a supplementary report about SC Kahaki to Supt. Bird and detective superintendent Greg Cramer of the NIU that alleged theft of a Hard Armour Plate which was no longer in the unmarked blue Holden vehicle that was removed from SC Kahaki's possession on 15 July 2020.

SC Kahaki stood down

[21] On 22 July 2020, Insp. Faulkner met with SC Kahaki and served him with three letters from Supt. Bird that stated that the Police had commenced an investigation into allegations of corruption, unlawful conversion of a Police vehicle and fraudulent use of a credit card; that he was being stood down from duty for a 30-day period; and proposed that he be placed on restricted duties while an investigation took place.

[22] On 28 July 2020, SC Kahaki's Police Association representative, Bobbi Richardson, emailed Ms Rastovich that SC Kahaki did not wish to comment on the Police's proposal to place him on restricted duties. A medical certificate from his GP was provided to Police which said that he was fully unfit for work. SC Kahaki did not return to work from that point onwards.

[23] On 7 August 2020, SC Kahaki was emailed a letter from Supt. Bird placing him on restricted duties.

Information requests and extensions sought

[24] On 16 September 2020, SC Kahaki's criminal lawyer, Mike Curran, made the first of several information requests about his employment, health and about the Police's criminal investigation into the Report allegations. The Police sought extensions of time to respond because of the amount of information that was being requested. A further extension was sought in January 2021 because a staff member was on sick leave and additional information had been identified that required further consultation. It was

agreed with SC Kahaki's lawyer for disclosure to be sent to in batches as and when these became ready.

[25] In early February 2021, Police provided SC Kahaki with a bundle of documents that mainly contained information relating to his health and the leave he had taken. However, other information, including the Report itself, were withheld because it related to an ongoing criminal investigation. The letter from Police that accompanied the disclosed documents ended with the statement "Please consider this request now closed."

[26] During this period, there were further communications between return to work advisor, Debbie Wareham, and Ms Richardson about SC Kahaki's eventual return to work. On 21 September 2020, Insp. Mortimore telephoned and sent a follow-up text to SC Kahaki to see how he was. He replied shortly afterwards that was feeling crushed, worthless and stressed, that he was getting a lot of support from his colleagues, that his health had taken a dive and that he hoped that his accusers were happy. Insp. Mortimore replied that he was sorry to hear this and proposed catching up with SC Kahaki the following week for coffee.

Invitation to be interviewed in respect of criminal investigation into the Report

[27] In early December 2020, SC Kahaki was invited to attend an interview by NIU senior investigator and detective senior sergeant Neil Hilton. However, Mr Curran advised that while SC Kahaki did not consent to an evidential interview, he would consider providing written answers to written questions put to him in advance.

[28] On 15 January 2021, Det. Snr. Sgt. Hilton wrote to Mr Curran and explained that Police were amenable to the interview being completed in this way but that he would not be able to provide questions in advance. Det Snr. Sgt. Hilton further advised that the NIU's investigation had identified potential concerns about SC Kahaki's use of the Police's National Intelligence Application (NIA) which did not appear to relate to his Fleet Manager role and advised that this matter would also be asked about in any interview. In the end, despite Police's invitation and a follow up email that Mr Curran did not respond to, SC Kahaki did not participate in an interview with the NIU.

NIU's findings into the Report allegations

[29] On 25 February 2021, Det. Snr. Sgt. Hilton finalised his report in which he found:

- (a) no evidence to substantiate the allegations of fraudulent credit card use or disproportionate assignment of work to a particular vehicle repair supplier (i.e. corruption);
- (b) evidence to substantiate some of the allegations of unauthorised modification of Police vehicles (in particular, changing wheels) and failure to submit timesheets and record holidays and leave, but suggested that those allegations might be more effectively resolved by way of professional conversation; and
- (c) evidence to substantiate the allegation of unlawful conversion of a Police vehicle, but suggested that this allegation might be more effectively resolved as an employment matter.

Leadership Report

[30] Det. Snr. Sgt. Hilton also finalised a separate NIU report (25 February 2021) which noted that during the period SC Kahaki was Fleet Manager it appeared that he received little or no supervision beyond superficial welfare checks on his health. The report further stated that SC Kahaki was left to devise his own strategies, priorities and decision-making model and that he was given no direction in terms of the priorities of the role and his actions and decision making were not subject to any review or oversight.

[31] Police's national charging panel considered the NIU's investigation report and decided not to charge SC Kahaki. Insp. Faulkner both telephoned and sent a follow-up email (19 April 2021) to Ms Richardson to advise her of the decision not to charge. Later that same day, SC Kahaki emailed Insp. Faulkner that he received his advice from his union representative. In reply, Insp. Faulkner said he was doing his best to make sure things were being looked at from every angle. In a further email from SC Kahaki in which he thanked the inspector, SC Kahaki stated that the medications he had been taking had helped, including for a stomach ulcer he had been diagnosed with in October 2020.

Police's categorisation of the NIU's report

[32] On 5 May 2021, a four-person assessment panel which included Insp. Faulkner and senior HR advisor for Bay of Plenty District, Diane Lawson, completed a categorisation assessment form in light of the NIU report and recommended that the only thing that needed to be followed up was the unauthorised use of a Police vehicle allegation (the unmarked blue Holden) and potential NIA breaches that required further fact finding.

Correspondence with representative

[33] On 22 June 2021, SC Kahaki's employment lawyer, Simon Middlemiss, advised Police that his firm had been instructed to act. Counsel's letter advised that SC Kahaki had suffered considerable stress in respect of Police's management of the allegations about his conduct. On his behalf, they sought an update on his information disclosure requests.

[34] HR advisor Ms Rastovich was by this time largely absent from work after being diagnosed with a terminal illness and subsequently passed away in 2021. Consequently, Ms Lawson provided HR assistance with Police's processes in respect of SC Kahaki. In the circumstances, an extension of time to respond to his information request was sought.

[35] On 27 August and on 20 September 2021, Mr Middlemiss sought an update from Ms Lawon on the status of the Police's employment investigation.

[36] On 1 October 2021, counsel was advised by Ms Lawson that Supt. Bird would shortly be commencing an employment investigation into the allegation that SC Kahaki had used a police vehicle without authorisation, and commence criminal and employment investigations into an allegation that he had accessed NIA without proper purpose. The same day, counsel raised a personal grievance of unjustified disadvantage for SC Kahaki in relation to Police's delays in providing disclosure and progressing its investigations. It was also alleged that Insp. Penno had told an external supplier that Police had suspended SC Kahaki.

[37] On 11 October 2021, Mr Middlemiss received written confirmation of the above from Supt. Bird which resulted in counsel seeking further particulars of the allegations

and making related information requests. Although Ms Lawson queried whether the scope of the information requests could be narrowed, SC Kahaki declined to do so and requested that disclosure be provided in batches as and when those were ready.

[38] On 5 November 2021, Insp. Faulkner emailed SC Kahaki that NIU's investigation could not be progressed until COVID-19 alert levels had lowered but that he would keep in contact with the NIU and look for ways that the investigation could be progressed quickly. Apart from keeping SC Kahaki informed, Insp. Faulkner was not involved with in the actual investigation itself.

[39] SC Kahaki responded to Insp. Faulkner's email the following day, querying when Police's processes would end, who was driving them, and why. He stated that he was having a tough time, that the experience was soul-destroying, and that there was only so much a person could take.

[40] Insp. Faulkner replied that no one at Police was trying to prolong the process and that the only matters that remained ongoing was the employment investigation into the police vehicle allegation and the investigations into the NIA allegation. Although Insp. Faulkner had not been able to influence the progression of the employment processes, he was trying to get the criminal investigation into the NIA allegation progressed.

Further personal grievances raised

[41] On 2 December 2021, Mr Middlemiss wrote to then Assistant Commissioner Richard Chambers to whom Supt. Bird reported. A further personal grievance of unjustified disadvantage was raised concerning Police's non-disclosure of information and ongoing delays. The personal grievance described the emotional impact on SC Kahaki including that he was taking anti-depressants and experiencing suicidal ideation.

[42] Asst. Comm. Chambers replied that same day that Supt. Bird and Ms Lawson would respond on his behalf which they did. Their response included an apology for the time it had taken to properly inform SC Kahaki of the employment allegations about his conduct and proposed that the parties attend mediation.

NIU's investigation report into NIA allegations

[43] On 20 December 2021, Det. Snr. Sgt. Hilton of the NIU finalised his investigation report finding no evidence to substantiate the allegation of criminal activity in respect of SC Kahaki's NIA use, but identified a number of unexplained NIA searches which might potentially be concerning to Police from an employment perspective.

[44] After considering the NIU's investigation report, the Police national charging panel decided not to charge SC Kahaki. On 1 February 2022, Insp. Faulkner advised SC Kahaki and his Police Association representative, Ms Richardson, that in relation to the NIA matters, the test for charging had not been met. SC Kahaki emailed Insp. Faulkner stating that he was not sure what to say but that he was sad, gutted and wound up.

Employment investigation into NIA allegations commence

[45] On 2 February 2022, Insp. Faulkner, Insp. Tim Anderson and a new senior HR advisor, Emma Berridge, prepared a categorisation assessment form in relation to the NIU's investigation report into the NIA allegations and recommended that an employment investigation take place.

[46] On 28 February 2022, Ms Berridge emailed Mr Middlemiss written confirmation from Supt. Bird of an employment investigation into allegations that SC Kahaki had inappropriately accessed information from NIA without legitimate reason and on one occasion shared a photo from NIA with a member of the public. Ms Berridge also emailed documents attached to the NIU's report into the NIA allegations and the majority of the documents attached to its report into the allegations set out in the Report from Insp. Penno.

Additional personal grievance raised

[47] On 11 March 2022, Mr Middlemiss raised an additional personal grievance of unjustifiable disadvantage on SC Kahaki's behalf about delays in providing requested information, and delays in relation to procedural steps taken. It was claimed that the NIA audit had been carried out to "dredge up" information to be used against SC Kahaki and that Supt. Bird should, instead of delegating matters to someone else, investigate

and make his own factual findings about the police vehicle and NIA allegations and be the decision maker.

[48] Through its lawyers, the Police responded to SC Kahaki's personal grievances apologising for the delay but not accepting that he had been unjustifiably disadvantaged in his employment. Concerns were raised on behalf of the Police about SC Kahaki's engagement with and participation in employment investigations. Police's willingness to attend mediation was reiterated.

[49] On 28 June 2022, the parties were scheduled to attend mediation. However, before it took place, SC Kahaki was advised of new information from Supt. Bird that a Highway Patrol clerk had reviewed the NIA log for work purposes and discovered a search from SC Kahaki which the clerk referred to Insp. Penno who immediately referred the matter to Insp. Mortimore, who advised Ms Berridge, who then advised Supt. Bird.

[50] SC Kahaki was advised that the Police would now be undertaking an audit of his NIA use from 9 September 2020, and that the Waikato District categorisation panel would then meet to discuss any criminal or employment concerns that might arise. SC Kahaki was invited to provide information in response by 20 June 2022 which his lawyer Mr Middlemiss subsequently requested be extended.

Police vehicle allegation addressed

[51] Mediation went ahead on 28 June 2022 and following an informal conversation between Insp. Dean Anderson and SC Kahaki in respect of the police vehicle allegation, the matter informally addressed with no disciplinary outcome. SC Kahaki signed a letter acknowledging that he intended to comply with Police's expectations in relation to the use of Police vehicles going forward.

Further NIA searches raised

[52] During this time, the Police, through its lawyers, advised SC Kahaki's lawyer that a subsequent audit had identified a large number of further NIA searches that were of concern. On 30 June 2022, Supt. Bird wrote to SC Kahaki enclosing the results of the audit which had identified 487 NIA searches that he appeared to have undertaken

that were not for a legitimate work related purpose and when SC Kahaki was medically certified as fully unfit for work and was on sick leave at the time.

[53] In reply, Mr Middlemiss sought information about the use of NIA and expressed the view that previous correspondence from the Police had not included an instruction to SC Kahaki that he could not access NIA while on sick leave. Police subsequently wrote to SC Kahaki and attached copy of Police's Off-Duty Interventions policy and advised him that its expectations in relation to the use of NIA were well understood internally, that training was provided on its use, and reminders were circulated regularly. The letter also included a copy of the notice of restricted duties letter dated 7 August 2020 (see [23] above) and stated that SC Kahaki should not be accessing NIA except in exceptional circumstances.

[54] SC Kahaki stated that he had no recollection of receiving the notice of restricted duties and disputed that NIA searches while on sick leave was prohibited by Police policy.

[55] A further categorisation assessment form was prepared on 1 September 2022 which recommended that an explanation be sought from SC Kahaki about the NIA searches as there did not appear to be enough information for the Police to be satisfied that these had been undertaken for work-related purposes.

[56] Mr Middlemiss emailed the next day declining a request made by Police to attend mediation and that matter was causing significant damage to SC Kahaki's mana and reputation. The email further stated that he had ceased to import his cancer medication and reduced the amounts he was taking over the previous year due to the rising costs in dealing with the employment matter, and that he intended to focus his resources on preparing an Authority claim so that he could find closure and clear his name.

[57] On 16 September 2022, Ms Berridge emailed Mr Middlemiss a letter from Supt. Bird which stated that of the 487 NIA transactions that SC Kahaki had undertaken between the period from 9 September 2020 to 17 June 2022, Police wanted to hear from him about 30 specific areas of concern that were itemised in the letter. It was Supt. Bird's preliminary view that SC Kahaki's conduct amounted to serious misconduct and

invited him to attend a disciplinary meeting on 3 October 2022 or to respond in writing. He was further advised of Police's decision to rescind his restricted duties status in light of a written undertaking from SC Kahaki dated 22 July 2022 that he would not access NIA unless he returned to work on full duties. Supt. Bird's letter stated that Police would instead undertake monthly audit monitoring of SC Kahaki's NIA use and that he could return to his substantive role once he obtained full medical clearance and undertaken mandatory training requirements.

[58] On 21 September 2022, SC Kahaki raised a further personal grievance alleging that Police should not have commenced a disciplinary process and neither should it have made a preliminary decision without first having given him an opportunity to respond. The personal grievance letter further stated that SC Kahaki had no wish to meet with Supt. Bird as he had no confidence in his ability to be objective and fair-minded. Police were advised that a claim would be filed in the Authority.

[59] In late October 2022, Ms Matthew's firm commenced acting for SC Kahaki and raised a further personal grievance on his behalf on 11 November 2022 for alleged breaches of good faith and discrimination. Police were advised that SC Kahaki felt emotionally and physically exhausted, had been suffering from a stomach ulcer for the past year and a half due to stress, had been brought to the brink of suicide by Police's processes, and felt that it wanted him to resign which he was not prepared to do. Ms Berridge acknowledged SC Kahaki lawyer's letter and reminded him of the support that was available to him.

[60] In December 2022, Police through its lawyers responded to SC Kahaki's personal grievance stating that he had not been unjustifiably disadvantaged or discriminated against in his employment. It sought to obtain more information about his health and wellbeing noting that he could not remain on sick leave indefinitely.

[61] On 16 December 2022, SC Kahaki said in response that he felt threatened and that he had lost trust and confidence in Police whose approach was inconsistent, heavy-handed, excessive and intimidating. While he prepared in relation to the NIA allegations written feedback for the Police to consider, he requested that it make its decision without further delay.

[62] The disciplinary process concluded on 15 March 2023, when Supt. Bird reached a final decision to issue SC Kahaki with a two-year written warning backdated to 7 July 2022 when his written undertaking had been given. Police also advised SC Kahaki that he would be required to undertake an e-learning module on privacy and set out its expectations of him in relation to NIA use going forward.

[63] On 12 May 2023, SC Kahaki lodged his statement of problem in the Authority. Police's statement in reply was filed on 5 July 2023. The parties attended directed mediation but matters did not resolve there.

What is the relevant law?

[64] When the Authority considers whether an action by an employer is justifiable it does so by applying the test of justification at s 103A of the Act. In determining justification of actions, the Authority or the Court does not consider what it may have done in the circumstances but considers on an objective basis whether the actions of the employer, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.¹

[65] As part of this process the Authority or the Court must consider the four procedural fairness factors set out in s 103A(3) of the Act which in a disadvantage setting requires consideration to be given to whether: having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before taking action; whether the employer raised the concerns with the employee before taking action against the employee; whether the employer gave the employee a reasonable opportunity to respond to the concerns before taking action; and whether the employer genuinely considered the employee's explanations (if any) before it took action.

[66] The Authority may take into account other factors as appropriate and must not determine an action (or a dismissal) to be unjustified solely because of minor defects in the process that did not result in the employee being treated unfairly.

¹ The Act, s 103A(2).

Issue one: Whether SC Kahaki’s supervisor, Insp. Penno, failed to raise the concerns set out in the Report about SC Kahaki’s conduct with SC Kahaki, and give him an opportunity to respond to those prior to escalating the Report, and whether this unjustifiably disadvantaged SC Kahaki?

[67] Insp. Penno’s 21 July 2020 report states from its outset that it is a “synopsis of risk that has been exposed to Police” and the risk to which the inspector speaks of in his report is the institutional knowledge that he claimed only SC Kahaki knew. Insp. Penno wished to mitigate that risk which on its face is fair and reasonable from a succession planning and sharing of information perspective.

[68] Although SC Kahaki has alleged that Insp. Penno did not like him and that there was a racial element in the Report, this was not my impression of Insp. Penno who gave his evidence in a very matter of fact way. That said, I find that someone in Insp. Penno’s position who did not know much about what SC Kahaki did as district fleet manager could reasonably be expected to make inquiries at the subsidiary or lower level first before escalating matters higher. Such an approach does not necessarily require Insp. Penno to have spoken to SC Kahaki and therefore not have compromised any subsequent criminal investigation assuming that one was required.

[69] Insp. Penno and SC Kahaki were not strangers to each other. Even though they worked in different areas with SC Kahaki in the road police section and Insp. Penno in general duties policing, they served in the same region and there was a brief period in April 2019 when Insp. Penno’s role as deployment manager for Waikato District required him to supervise SC Kahaki for a time. However, it was not until early 2020, as road policing manager, was Insp. Penno required to supervise SC Kahaki but even then, SC Kahaki’s circumstances had changed following a serious illness that meant he was working light duties as district fleet manager for 20 hours per week. While he was still in the Police, he was no longer front line.

[70] The extent to which Insp. Penno and SC Kahaki personally crossed paths with each other in 2020 would also have been limited as a result of the COVID-19 pandemic and subsequent nationwide lockdown from 26 March to 27 April 2020. SC Kahaki’s compromised immunity also meant that for his own health and safety, he was required to work from home taking him away from his colleagues in the office.

[71] To be fair to Insp. Penno, no one in Police at that time had a good understanding of SC Kahaki's district fleet coordinator role and what was expected of him in this position. This was what NIU senior investigator and Det. Snr. Sgt Neil Hilton had found in his Leadership Report which relevantly states:

During this period that Constable KAHAKI was the Fleet Manager it appears that he received little or no supervision beyond superficial welfare checks on his health. I believe that as a result Constable KAHAKI was left to devise his own work strategies, priorities and decision-making model, was given no direction in terms of the priorities of the role and his actions and decision making were not subject to any review or oversight.

[72] Det. Snr. Sgt. Hilton did acknowledge in his Leadership Report that SC Kahaki's workplace practices had not helped matters because when he was appointed into the fleet manager in April 2019, he seemed "mostly disinterested" with his induction that his predecessor, Senior Constable Aberhart, had given him. I note also Insp. Penno's frustration around the lack of communication he experienced with SC Kahaki who would not answer his phone when he called, could not be found in order for Insp. Penno to meet with him, and that it appeared to him that SC Kahaki was intentionally keeping his colleagues in the dark as to what he was doing. However, even so, Det. Snr. Sgt. Hilton observed:

What contact KAHAKI did have with supervisors was then limited to discussions about his welfare. When this is coupled with Constable KAHAKI's lack of engagement with Constable Aberhart, I believe it led to a situation in which Constable KAHAKI was able to create and implement his own operating procedures and build his own relationships with external partners with no effective oversight.

... It appears that Constable KAHAKI believing that he is acting in the best interests of the organisation undertook activities that do not always comply with policy or best practice and pushes the boundaries and as a result creates risk for himself, the District and the organisation.

[73] To be clear, Det. Snr. Sgt. Hilton's Leadership Report does not cover the NIA misuse allegations which would arise much later. Notably the Leadership Report looks at the allegation of corruption with respect to a disproportionate number of referrals made by SC Kahaki to one motor vehicle repair supplier. To a lesser extent, the Leadership Report looks at the unlawful use of a police vehicle allegation also.

[74] Regarding the corruption allegation, Insp. Penno stated in the Report that he had been told by the Police's insurer that it considered it "extremely odd and unusual" that SC Kahaki was preferring one vehicle repair supplier in particular. Insp. Penno would go on to allege that SC Kahaki had a "very close business relationship" with the family that owned the vehicle repair business and that the relationship "transcended into a personal friendship."

[75] However, the subsequent NIU investigation cleared SC Kahaki of any criminal wrongdoing or corruption, finding no information to suggest that, beyond a work-related relationship, that there was any other personal or business relationship between SC Kahaki and the family that owned the business.

[76] Det. Snr. Sgt. Hilton's Leadership Report goes on to observe:

The final factor is Constable KAHAKI'S illness which created a situation in which his supervisors, attempting to be supportive of his treatment requirements and the times in which he was able to work have allowed him free rein to work from where he wanted to, when he wanted to with very little or no supervision.

Given Inspector PENNO's comments around Constable KAHAKI's reputation and his work practices, it seems unfortunate that this was not more directly addressed, and processes put in place to monitor and review his activities... If he had been under closer supervision, the fact that he was potentially circumventing established policy and procedures and was not seeing the risk that he was introducing to the Police would have been identified earlier and dealt with before it got to this level.

[77] There were ways that Insp. Penno could reasonably have got some answers to his questions without compromising a potential criminal investigation such as having an informal discussion with SC Kahaki's predecessor SC Aberhart. Had that occurred, Insp. Penno may have discovered that SC Kahaki's approach of using a preferred vehicle repair supplier was not too dissimilar to SC Aberhart's.

[78] It is acknowledged that before the Report was escalated, Insp. Penno had spoken to his supervisor, an experienced officer and a qualified detective who is no longer with Police. However, how robust that discussion was is not known and in any event the former detective would have been in the same position of ignorance with respect to what the baseline requirements of the district fleet manager role were in order to make any meaningful comparison with how SC Kahaki was doing things.

[79] This is not to say that someone in Insp. Penno's position is required to undertake a preliminary criminal investigation before escalating the Report. However, when an employer knows very little of an employee's role which the Leadership Report makes clear was the case here, it is incumbent on the employer to find out more at the subsidiary level before escalating matters higher.

[80] It is acknowledged that this will be challenging for the Police in its dual capacity both as employer and law enforcer. When serious allegations have been made against staff and where not all of the facts are known, it may have no other choice but to commence a criminal investigation. However, in the present case, Insp. Penno's Report was deficient to the extent to which he had familiarised himself with SC Kahaki's role before he decided to escalate his report. Put differently, the escalation of the Report was premature and disadvantaged SC Kahaki unjustifiably. This was not the action of what a fair and reasonable employer could have done in the circumstances.

Issue two: Whether SC Kahaki was unjustifiably disadvantaged by the Report containing false allegations which have harmed his reputation and mana in the context of the parties' employment relationship and amount to bias/predetermination?

[81] It was submitted that the Report lacked a proper foundation because Insp. Penno had never properly discussed his concerns with SC Kahaki. However, a lack of foundation is not the same as making a false complaint. While I have found that it was premature for Insp. Penno to have escalated his Report when he did, the matters raised were not false in the sense of being fabricated or made up for the purpose of deception. Issue two is not made out.

Issue three: Whether SC Kahaki was unjustifiably disadvantaged by unreasonable delays in Police's disclosure of documents and information concerning the employment allegations after its criminal investigations had concluded?

[82] The length of time it took Police to complete its two criminal investigations is a matter for the Independent Police Complaint Authority and not this Authority. That said, there was a delay of almost seven months between the conclusion of Police's first

criminal investigation and the start of its employment process in respect of SC Kahaki's alleged unlawful use of a police vehicle.

[83] I accept that the impact of the COVID-19 pandemic and the death of a senior HR staff member for the Police has contributed to the delay. There were several information requests by SC Kahaki that were extensive in scope which had a contributing effect on timeliness as well. However, even so, as a large organisation, the Police have greater access to resources available to it and is better placed to meet the unprecedented and unique set of challenges that it found itself in at that time.

[84] During this seven-month period, SC Kahaki was receiving medication for a stomach ulcer that he had developed, was anxiously waiting at home, stressed and felt worthless. The delay affected him physically, mentally and spiritually with respect to his mana and self-worth to both his family and to his local community. Police knew about SC Kahaki's sensitivities and vulnerabilities namely his PTSD and his terminal illness diagnosis of mantle cell lymphoma. The impact of the delay could have been mitigated by a more timely release (even in redacted form) of Insp. Penno's Report once the decision was made that there would be no criminal investigation regarding the corruption allegations and alleged dishonest use of a fuel card.

[85] Although the employment process with respect to the alleged dishonest use of a police motor vehicle would not commence for another seven months, the Report's corruption and fuel card allegations could have at least been disclosed to SC Kahaki much sooner than they were sparing him from being kept in the dark for months about these allegations. SC Kahaki was unjustifiably disadvantaged by this action which a fair and reasonable employer would not have done in the circumstances.

Issue four: Whether SC Kahaki was unjustifiably disadvantaged by the Police failing to notify him that its criminal investigation had concluded; updating SC Kahaki on the status of any employment investigations in relation to concerns set out in the Report; and/or keeping him informed about the effect of any employment investigations on his employment?

[86] I accept that through Insp. Faulkner, Police kept SC Kahaki informed of its criminal and employment investigations. However, a fair and reasonable employer

could have provided SC Kahaki a redacted version of the Report much sooner than it did.

Issue six (as issue five was withdrawn): Whether the findings, and outcome, of Police's disciplinary process in relation to SC Kahaki's use of NIA on his Police phone unjustifiably disadvantaged him?

[87] Unfortunately SC Kahaki's evidence on this point could not be tested in the usual way. In short, it was SC Kahaki's position that as he was only working part time, he had not kept up to date with Police's various communications and instructions about the acceptable use of information and ICT. Further, SC Kahaki stated that he never received any emails from Police notifying him of its various policies that were relevant to NIA use.

[88] While this may be the case, SC Kahaki has been a sworn police constable for over 30 years and I cannot accept as plausible that over this significant period of time, SC Kahaki had not been informed of the proper use of NIA including when he is off duty. He may not have known all the relevant policies by name but even so, this does not excuse him from having undertaken 487 NIA transactions during a period he was certified as being fully unfit to work. I accept Supt. Bird's evidence on this point that there is plenty of training and internal reminders provided to staff about the correct and proper use of NIA which Police are protective about given the sensitive and personal information the system contains.

[89] Given the volume and number of searches by SC Kahaki, Supt. Bird's decision to commence an employment disciplinary process was one that a fair and reasonable employer could have done in the circumstances. It was appropriate and consistent with Police policy that the decision maker be Supt. Bird and there is correspondence from SC Kahaki's lawyers that this was what he also wanted notwithstanding his reluctance to meet with him and subsequent assertions of a loss in trust and confidence in his impartiality. I am satisfied that Supt. Bird approached matters with an open mind and without bias.

[90] In terms of procedural fairness, Supt. Bird did take into genuine consideration SC Kahaki's responses in reaching his finding of serious misconduct and deciding to impose a final disciplinary warning. I may have given SC Kahaki a shorter period of

one rather than two years but it is not the role of the Authority to substitute its decision for what a fair and reasonable employer could have done in the circumstances.

[91] Given the privileged position Police have with respect to information held within the NIA, there is a commensurate high level of trust placed by the public with Police use of that information which is sacrosanct. With that background in mind, Supt. Bird's outcome of a two-year final warning for SC Kahaki backdated to 7 July 2022, coupled with further e-learning training for him strikes the right balance between denunciation, deterrence and rehabilitation. It is a decision that falls within the range open to the notional fair and reasonable employer.

Issue seven: Whether Police breached its good faith employment obligations to SC Kahaki and if so, whether this was deliberate, serious and sustained or with the intention of undermining the parties' employment relationship?

[92] A penalty for a breach of good faith under s 4A of the Act is intentionally set at a high level and the circumstances here fall well short as it cannot be said that Police's actions were deliberate or intended to undermine the relationship.

Conclusion

[93] For the reasons given above, I find that SC Kahaki was unjustifiably disadvantaged in his employment with respect to Insp. Penno's action in escalating his Report having not first taken steps to first familiarise himself with SC Kahaki's fleet manager role. SC Kahaki was also unjustifiably disadvantaged by Police's delay in commencing its employment investigation after it had completed its first criminal investigation. Finally, SC Kahaki was further unjustifiably disadvantaged by not being provided with a redacted copy of Insp. Penno's report as soon as the first criminal investigation was completed. Doing so would have spared SC Kahaki from further unnecessary stress and anxiety which only made worse his already compromised psychological and physical challenges both of which Police knew about.

Compensation

[94] Mr Hetaraka gave evidence of the impact on SC Kahaki and recalled being told that after attending a police Christmas party in 2020 SC Kahaki felt absolutely whakama and worthless in front of his peers and their families. Mr Hetaraka's written witness statement to the Authority further records that in November 2021, SC Kahaki

had said to him in a telephone conversation that he was down in the dumps and mentioned taking his own life. This prompted Mr Hetaraka to speak to SC Kahaki's lawyers to warn them of his mental state and that he was a suicide risk.

[95] It is accepted that employment investigations are inherently upsetting and distressing for those who are the subject of such processes. However, in SC Kahaki's case, Police knew he had a history of PTSD and that he had been terminally ill. An employer can be expected to take reasonable steps to manage or mitigate risks that could exacerbate known sensitivities and vulnerabilities.

[96] Ms Matthew submits that SC Kahaki's case deserves a very high award of compensation for hurt and humiliation. Ms Cuervo for the Police submits that any remedies awarded should be at the lower end of the spectrum. Cumulatively considered, I find the circumstances of this case fall in the middle of the range at \$25,000. I make no allowance for contribution under s 124 of the Act as I am satisfied that SC Kahaki has not himself contributed to those disadvantage grievances which have been established.

Lost wages

[97] On SC Kahaki's behalf, Ms Matthew has sought the remedy of lost wages. However, while SC Kahaki was initially stood down on full pay, he was subsequently placed on restricted duties. He was not suspended or stopped from returning to work due to Police's criminal and employment processes. Although SC Kahaki never returned to work after 28 July 2020, this was of his own accord having provided his employer with a medical certificate that he was fully unfit to work. There is no basis to make an award of lost wages.

Reasonable expenses

[98] Given the outcome of this investigation in which SC Kahaki has been successful, it is appropriate that his estate be reimbursed the filing fee of \$71.55 that he paid to lodge his statement of problem with the Authority.

Non-publication order

[99] Police seek a non-publication order in relation to sensitive and confidential NIA information about members of the public who have not had any involvement in this

investigation either as a party to this proceeding or as a witness. A permanent non-publication order is made with respect to this NIA information. Out of an abundance of caution I did check with Ms Matthew on 1 August 2025 whether a non-publication order was required for SC Kahaki but was advised that it was his wish for the decision to be made public.

Orders

[100] The Authority makes the following orders:

- (a) The Commissioner of Police to pay the estate of SC Kahaki compensation of \$25,000 without deduction under s 123(1)(c)(i) of the Act by Monday 1 December 2025; and
- (b) The Commissioner of Police is to reimburse the estate of SC Kahaki the filing fee of \$71.55.

What about costs?

[101] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, SC Kahaki's estate may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum, the Commission of Police will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[102] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.²

Peter Fuiava
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.