

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2014-092-1026  
[2018] NZHC 2267**

BETWEEN

MELISSA JEAN OPAI  
Plaintiff

AND

THE ATTORNEY-GENERAL OF NEW  
ZEALAND  
Defendant

Hearing: 2, 3, 4, 5 and 6 July 2018  
(Closing submissions filed 20 July 2018)

Counsel: N W Woods and P Amaranathan for Plaintiff  
M F McClelland QC and N S Ridder for Defendant

Judgment: 30 August 2018

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**JUDGMENT OF BREWER J**

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*This judgment was delivered by me on 30 August 2018 at 3:00 pm  
pursuant to Rule 11.5 High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Rice Craig (Papakura) for Plaintiff  
Crown Law (Wellington) for Defendant

## **Introduction**

[1] Ms Opai sues the Attorney-General on behalf of the New Zealand Police in defamation.

[2] Ms Opai worked on the Public Counter at the Counties Manukau Police Station. She alleges defamatory statements were made about her by members of the Police, particularly by Senior Sergeant Laurie Culpan (S/Sgt Culpan), who was for a time Ms Opai's manager as the Officer-in-Charge of the Counties Manukau Police Station. Ms Opai brings five causes of action, alleging various publications of five defamatory documents or statements.

## **Background**

[3] Ms Opai began working for the Police in 2005. In most respects, she appears to have been a model employee. The diligence and responsibility she brought to her role in the Public Counter was commended by her superiors.

[4] However, it also appears that her sense of responsibility caused friction with other staff at the counter, which in turn became a cause for concern for the station's management. It seems Ms Opai took issue with the professionalism of other staff members and felt obliged to make two formal complaints about their timekeeping habits. One was made in December 2012, the other in January 2013.

[5] In March and May 2013, Ms Opai sent a pair of emails expressing concerns about the employment of two other staff members. Ms Opai was herself the subject of a complaint about her own timekeeping in November 2013. She raised an employment relationship problem in the same month, relating to what she perceived as an unfair performance review which is the subject of the first cause of action.

[6] I make it clear that in setting out these events I do not criticise Ms Opai. It is just that the events occurred and her managers had to respond to them. Ms Opai's complaints go to how they responded.

[7] S/Sgt Culpan was seconded to the role of Officer-in-Charge in February 2013 when Ms Opai's regular manager, S/Sgt Traill, was sent on a professional development opportunity. One of the tasks he had to perform was Ms Opai's annual review. This is a formal process which includes completing a standard document. There is space for general comments. Procedure required a draft of the review document to be provided to Ms Opai for her comment. In this case, Ms Opai took serious exception to a paragraph of S/Sgt Culpan's general comments. She showed it to S/Sgt Culpan's superior, Inspector Wilkie, on 13 August 2013 and succeeded in getting the draft review changed. Nevertheless, Ms Opai raised a personal grievance against S/Sgt Culpan on 23 October 2013. Her first cause of action is that the first draft was defamatory.

[8] Ms Opai's problems with S/Sgt Culpan continued. S/Sgt Culpan was a member of a three-person review team looking, among other things, at the staffing requirements of the Public Counter where Ms Opai worked. He wrote a briefing paper for the review team setting out his views on possible reforms. Ms Opai's second cause of action is to the effect that portions of the briefing paper were defamatory of her.

[9] In November 2013, S/Sgt Culpan received a complaint about Ms Opai from another staff member. He compiled a standard report (called a 258 report) about the complaint, with comments about how it might be dealt with. He sent the report to the superior officer whose responsibility it was to receive such reports and to decide how they would be dealt with. Ms Opai's third cause of action pleads that parts of the 258 report defame her.

[10] As a result of the complaint against Ms Opai (which did not result in formal disciplinary action), and because of the history of complaints by staff members against each other, Inspector Wilkie, S/Sgt Culpan's superior, convened meetings with the section work groups concerned. She and S/Sgt Culpan spoke generally about their expectations. Ms Opai's fourth cause of action is to the effect she was defamed during these meetings.

[11] S/Sgt Culpan was required as part of his job to keep a sort of diary of events occurring relevant to his duties. The Police refer to entries in the diary as "diary

notes”. One purpose of the diary notes is so other managers can see quickly what has been happening. Diary notes include matters relating to staff. Ms Opai’s fifth cause of action is that diary notes made by S/Sgt Culpan defame her.

### **Elements of defamation**

[12] The issues in this case are not complicated, and the causes of action cover mostly the same legal grounds for liability or defence. To avoid repetition, I will set out here the relevant law.

[13] The elements of defamation are well established. It must be proved that:

- (a) A defamatory statement has been made;
- (b) That is about the plaintiff; and
- (c) Has been published by the defendant.

[14] On the issue of whether a statement is defamatory, the definition of Lord Atkin is often cited. He said that a defamatory statement is one that may tend to lower the plaintiff in the estimation of right-thinking members of society.<sup>1</sup> Other formulations refer to discrediting the plaintiff,<sup>2</sup> or to a statement that is calculated to injure the plaintiff’s reputation by exposing him/her to hatred, contempt or ridicule.<sup>3</sup>

[15] There is a requisite threshold of harm. In *CPA Australia Ltd v The New Zealand Institute of Chartered Accountants*, Dobson J endorsed the English standard that requires serious harm.<sup>4</sup> In *Sellman v Slater*, Palmer J preferred a “more than minor harm” threshold.<sup>5</sup> It would be a very fine decision to hold a statement caused more than minor harm but not serious harm. It is not a decision I have to make in this case.

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<sup>1</sup> *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin.

<sup>2</sup> *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 (CA) at 584 per Scrutton LJ.

<sup>3</sup> *Parmiter v Coupland* (1840) 151 ER 340 (Exch Ch).

<sup>4</sup> *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854, (2015) TCLR 149 at [120].

<sup>5</sup> *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [68].

## Defences

### *Limitation*

[16] The defendant claims that several of the alleged publications are time-barred by the Limitation Act 2010. By a combination of ss 11(1) and 15 of that Act, a defamation claim must be brought within two years of the alleged publication. Several pleadings, especially those first included in the fifth amended statement of claim dated 1 June 2017, are said to fall outside of this period.

### *Qualified privilege*

[17] The Court of Appeal recently summarised the law on qualified privilege in *Durie v Gardiner*:<sup>6</sup>

[36] The classic definition of qualified privilege is that it arises where the maker of the impugned communication has “an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest to receive it”. Where the privilege arises, it protects false and defamatory assertions of fact. It is qualified as opposed to absolute because the privilege may be lost if the plaintiff proves the maker of the statement took improper advantage of the occasion of publication or was predominantly motivated by ill-will.

(Citations omitted)

[18] This is the primary point of legal contention between the parties. The defendant’s position is that qualified privilege provides a complete defence to all the alleged publications. This is because, the defendant says, the employment context in which the statements were made conferred upon the makers of the statements a legal, social and moral duty or interest to make them. Ms Opai and the others who received them had a reciprocal interest to receive them. Reliance is placed on Canadian case *Wood v Plewes* to support this position:<sup>7</sup>

[Qualified privilege] is meant to promote the giving and receiving of uninhibited communications in circumstances where the public interest requires a free exchange of information ... That protection is necessary in the workplace, as candid communication between company personnel is necessary for effective business operations. Employees and employers alike have an interest and duty in exchanging information that touches on the proper functioning of the business, including relations between employees.

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<sup>6</sup> *Durie v Gardiner* [2018] NZCA 278.

<sup>7</sup> *Wood v Plewes* 2014 BCSC 318.

[19] Ms Opai disagrees with the defendant's approach. Her essential position is that there was no established relationship between her and S/Sgt Culpan, so no occasion of qualified privilege arises as of right. Given the Police are a public body, in such circumstances they are bound to adhere to their public law duties in order to avail themselves of the defence. Ms Opai referred me to a number of English Court of Appeal cases to buttress her position.<sup>8</sup> I did not find them particularly helpful, nor applicable to the New Zealand context. Much of the discussion in those cases centred on whether the public body had conformed with treaty obligations under the European Convention on Human Rights. Moreover, I am not convinced it can be said that there was no relevant pre-existing relationship between Ms Opai and S/Sgt Culpan given her history of employment with the Police.

[20] The rebuttal of qualified privilege requires proof to the civil standard of either ill-will on the part of the maker of the statement, or of the maker taking improper advantage of the occasion of privilege.<sup>9</sup>

[21] Ill-will has been described as knowledge or recklessness as to whether the statement was false<sup>10</sup> or a desire to injure the plaintiff.<sup>11</sup>

[22] Improper advantage also connotes concepts of recklessness<sup>12</sup> and otherwise refers to seeking some private advantage unconnected with the duty which constitutes the reason for the privilege.<sup>13</sup>

### *Honest Opinion*

[23] The elements of the defence of honest opinion were set out by Mallon J in *Durie v Gardiner*.<sup>14</sup> I will adopt her Honour's summary:

- (a) The words complained of are an expression of opinion;

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<sup>8</sup> *Kearns v General Council of the Bar* [2003] EWCA Civ 331, [2003] 1 WLR 1357; *Wood v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1638; see also *Clift v Slough Borough Council* [2010] EWCA Civ 1484, [2011] 1 WLR 1774.

<sup>9</sup> Defamation Act 1992, s 19.

<sup>10</sup> *Karam v Parker* [2014] NZHC 737 at [216].

<sup>11</sup> *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215 at [80].

<sup>12</sup> *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at 401.

<sup>13</sup> *Williams v Craig* at [80].

<sup>14</sup> *Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72 at [115].

- (b) The facts upon which the opinion is based are indicated in the publication at issue or are generally known;
- (c) Those facts are proved to be true or not materially different from the truth; and
- (d) The opinion must be held genuinely.

### **First cause of action – the draft performance review**

#### *The alleged defamatory material*

[24] On 7 July 2013, S/Sgt Culpan drafted a performance review for Ms Opai relating to the period 1 July 2012 to 30 June 2013. Ms Opai takes issue with aspects of the review, namely those found within the concluding comments. She says they are defamatory. I set out the review's concluding comments in full:

Mid year discussion held with S/Sgt CUPLAN 21/02/2013.

Melissa has developed a technically strong team and as one of the most senior of the Public Counter supervisors is often used as a sounding board for procedural change. Melissa also holds the portfolio for maintaining and updating the operational procedures manual which is a credit to her tenacity and organisational prowess.

Melissa has a strong sense of responsibility to the police and her team. This sense of responsibility ensures that Melissa and her team are up to date with all training, leave balances are within requested levels, files are generally prepared to a high standard and completed on time.

**Unfortunately this sense of responsibility can be misdirected and be viewed by others as malevolence, or ill-will.** This is evidenced on a number of occasions where Melissa has circumvented her supervisor and taken issues direct to senior management. On each occasion this has been explained as happenstance and backed up by assurances there was no intent to by pass (sic) her supervisor, rather it was a matter of circumstance. Melissa's challenge for the coming year will be to focus on her continued development and that of her team and not concern herself with the goings on of her colleagues and peers.

(Emphasis added)

[25] I will refer to this as "the first draft". The final paragraph of the first draft, particularly the emphasised portion, is the subject of Ms Opai's complaint. She says its contents are false and defamatory, meaning to convey that:

- (a) Ms Opai has a misdirected sense of responsibility; and
- (b) Ms Opai has acted malevolently.

[26] S/Sgt Culpan presented a copy of the first draft to Ms Opai at a meeting between them on 2 August 2013. On 16 August 2013, Ms Opai emailed S/Sgt Culpan, disputing the allegedly defamatory aspects of the first draft:

- (a) The fact that her sense of responsibility is perceived as malevolence by others is beyond her control and fails to take into account her duty to challenge the unethical behaviour of staff;
- (b) Of the two investigations that she set in motion, one of them was completed in such a way that it vindicated her decision to raise the corresponding complaint;
- (c) She has always conformed to standards set by the organisation when challenging the behaviour of other staff; and
- (d) She has never intentionally bypassed S/Sgt Culpan in the chain of command, but rather made use of open-door policies which had been made clear to her.

[27] On 23 August 2013, S/Sgt Culpan replied to Ms Opai's email, attaching a revised review. He told her to ignore the first draft as it had been "sent in error". The revised version of the review replaced the draft's final paragraph with the following comments:

Unfortunately this sense of responsibility can be misdirected and be viewed by others in a very poor light which can be alienating and does not foster a harmonious work environment. On several occasions Melissa has circumvented her supervisor and taken issues direct to senior management. For the next appraisal year I would like her supervisor to ensure that if she has matters to raise she does this only with her direct supervisor. Melissa's challenge for the coming year will be to focus on her continued development and that of her team and not concern herself with the matters related to her other colleagues and peers.

[28] I will refer to this as "the second draft".



[29] Ms Opai does not take issue with the second draft. Her allegations centre on the first draft. In essence, she contends:

- (a) The language used went beyond that necessary to convey a legitimate concern.
- (b) The allegations made are false; the occasions on which Ms Opai is said to have bypassed the chain of command are not explained in any detail.
- (c) S/Sgt Culpan was only seconded to his posting in February 2013. He therefore would not have had time to form his own assessment of Ms Opai's performance and character; any negative perceptions he communicated were likely to have been communicated to him by Inspector Wilkie who viewed Ms Opai's team as dysfunctional.
- (d) The positive comments in the opening paragraphs of the first draft served only to sharpen the contrast with the later criticisms. They therefore amplified the defamatory effect of the review rather than mitigated it.

[30] The defendant disputes that the first draft could be understood to convey any defamatory meaning. First it is pointed out the first draft does not state that Ms Opai has a misdirected sense of responsibility or has acted malevolently, merely that others could view her in this way. Further, the defendant highlights the importance of viewing the words in their context: that is, within a performance review. A reasonable person would understand that the nature of performance reviews is to encourage professional development through constructive criticism. Moreover, the first draft provides an overall positive assessment of Ms Opai.

*The alleged publications*

[31] Ms Opai submits that S/Sgt Culpan published the performance review to the following parties at the following times:

- (a) Inspector Wilkie sometime in September 2013;

(b) Ms Bryan-Wells sometime in September 2013; and

(c) S/Sgt Traill sometime in April or May 2014.

[32] In addition, Ms Opai says she was duty-bound to provide a copy of the review to Superintendent Tims in her quest to have it retracted and corrected. This was done on 23 October 2013.

[33] Similarly, Ms Opai suggests the report would have been read by S/Sgt Tierney, Sergeant Grant and Ms Carstens sometime during 2015 after she applied for a new position.

[34] The defendant raises several counter-arguments. I will go through them.

#### *Inspector Wilkie*

[35] S/Sgt Culpan denies providing Inspector Wilkie with a copy of the first draft. He does, however, accept that on 20 September 2013 he provided her with a copy of the second draft. This was confirmed by Inspector Wilkie. As has been stated, Ms Opai has not alleged that the contents of the second draft are defamatory in any way.

[36] Further, Ms Opai accepted she went to see Inspector Wilkie on 13 August 2013 to discuss her performance. In doing so, she took with her a copy of the first draft and provided it to Inspector Wilkie. This was confirmed by the Inspector. Therefore, if the first draft was in fact published to Inspector Wilkie, this was done by Ms Opai and not S/Sgt Culpan.

#### *Ms Bryan-Wells*

[37] The defendant submits that, in the first place, Ms Opai provided Ms Bryan-Wells with a copy of the first draft. This was in the context of complaining about the use of the word “malevolence”. Ms Bryan-Wells then passed on Ms Opai’s complaints to S/Sgt Culpan, who subsequently provided Ms Bryan-Wells with a

further copy of the first draft in the context of seeking her advice about changing the wording of the review.

[38] Given that Ms Opai first provided a copy of the first draft to Ms Bryan-Wells, the defendant says that S/Sgt Culpan cannot be said to have published the first draft to her.

*S/Sgt Traill*

[39] S/Sgt Culpan denies providing S/Sgt Traill with a copy of the first draft. For his part, S/Sgt Traill recalled something about reading a performance review containing the word “malevolence”, but could not be certain as to whether he received this from S/Sgt Culpan or Ms Opai. Moreover, by the time Ms Opai suggests the publication was made to S/Sgt Traill (April or May 2014), the reference to malevolence had been removed from the second draft, which S/Sgt Traill was unaware of. The defendant therefore submits his evidence is unreliable and that Ms Opai cannot prove that the first draft was published to him.

*Superintendent Tims*

[40] The defendant submits the evidence shows that Ms Opai sent Superintendent Tims both the first and second draft on 23 October 2013. There is nothing to indicate that Superintendent Tims read or accessed either one.

[41] Ms Opai submits she was duty-bound to provide Superintendent Tims with the abovementioned documentation in the course of pursuing a related employment relation problem. However, the defendant points out that this gives rise to a defence of absolute privilege. Section 121 of the Employment Relations Act 2000 provides:

**121 Statements privileged**

Any statements made or information given in the course of raising a personal grievance or in the course of attempting to resolve the grievance or in the course of any matter relating to a personal grievance are absolutely privileged.

[42] The defendant therefore argues that if they were held to be vicariously liable for Ms Opai’s re-publication of the first draft to Superintendent Tims, they would be protected by absolute privilege.

[43] In any other case, the defendant argues they should not be held liable for Ms Opai's re-publication of the first draft because:

- (a) Ms Opai was not under a positive duty to re-publish the first draft to Superintendent Tims; and
- (b) If she was, S/Sgt Culpan was not aware of the facts or circumstances out of which that duty arose when he published the first draft to Ms Opai.

*S/Sgt Tierney, Sergeant Grant, Ms Carstens*

[44] The defendant argues that Ms Opai has provided no evidence that these alleged publications occurred. There is only speculation.

[45] In any case, the alleged publications are said to have been made in 2015. This proceeding commenced in 2014. The defendant therefore suggests in order to include these allegations in her claim, Ms Opai would have had to seek the leave of the Court to file an amended statement of claim pursuant to r 7.77(4) of the High Court Rules 2016. No such application has been made.

*Harm*

[46] Ms Opai speaks of her reaction to the first draft. She responded immediately to deny the unfavourable comments made in it. This is said to be an indication of the seriousness of the harm the review caused her "otherwise impeccable good character".

[47] The defendant refutes this, suggesting the level of harm caused to Ms Opai's reputation by the first draft of a performance review, which was subsequently amended, could only be very much at the lower end of the scale, falling short of the requisite threshold of harm. Even adopting Palmer J's lower threshold of more than minor harm, insufficient damage to Ms Opai's reputation has been done by any publication of the first draft.

### *General defences*

[48] In the event I were to consider any of the allegedly defamatory publications were made out, the defendant raises a number of affirmative defences which protect them from liability. They are these:

- (a) Consent;
- (b) Qualified privilege; and
- (c) Honest opinion.

[49] I will go through each in turn.

### *Consent*

[50] The defendant claims Ms Opai consented to the publication of the first draft in the email she sent to S/Sgt Culpan on 16 August 2013.<sup>15</sup> The excerpts upon which the defendant relies are as follows:

I advise that I am very happy with my Performance Appraisal for this period, however, the portion below taken from the Concluding Comments I struggle to be fully accepting of in terms of my personal performance.

I outline my concerns as follows:

...

I will be back on Tuesday 20th. Should you feel that your concluding comments should remain as they are, then my appraisal can be submitted to HR unsigned.

[51] The defendant acknowledges it could not be inferred from these comments that Ms Opai was consenting to have the first draft published to the world at large. However, it is pointed out that all the publications Ms Opai takes issue with could fairly be regarded as being internal publications for the purposes of Human Resources, thereby falling within the scope of her consent.

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<sup>15</sup> This was in the course of expressing objection to the allegedly defamatory aspects of the first draft, summarised at [26].

### *Qualified privilege*

[52] The defendant submits the process of a manager providing an employee with a performance appraisal necessarily is covered by qualified privilege.

[53] The defendant further submits Ms Opai does not make any argument to the contrary. Rather, her stance appears to be that S/Sgt Culpan's failure to comply with the organisation's "no surprises" policy negates the defence of qualified privilege. That policy is stated as follows:

#### Final appraisal meeting

At the end of the appraisal year a supervisor/manager meets with each employee to review the year's performance against the KRAs/objectives/competency targets set at the beginning of [sic] year. Both the supervisor and the employee should prepare for this meeting.

The meeting must contain 'no surprises'. A 'no surprises' environment is achieved by regular dialogue with an employee and the provision of sufficient relevant, useful information about performance.

New objective and development goals should be set at or subsequent to this meeting.

[54] The defendant disputes that the policy was breached. It is pointed out that the concluding comments in the first draft were geared towards encouraging and challenging Ms Opai to address aspects of her professional conduct throughout the following year. Moreover, S/Sgt Culpan first presented the first draft to Ms Opai at a meeting on 2 August 2013. This began a consultative process throughout which the draft was updated and amended taking into account the concerns expressed by Ms Opai.

[55] The defendant submits it is clear S/Sgt Culpan was not predominantly motivated by ill-will or taking improper advantage. Any suggestion to the contrary by Ms Opai is said to be purely fanciful and unsupported by the evidence.

[56] The crux of Ms Opai's allegations here is that the allegedly defamatory comments were made to silence her in retaliation to the concerns she had previously raised as to the conduct of other staff members. This is all said to be part of an ongoing campaign to vilify her.

[57] S/Sgt Culpan, in his brief of evidence, responded to these allegations as follows:

While the plaintiff says she has been the subject of a malevolent campaign within Police to vilify her, I have never seen any evidence of this. In my view, the plaintiff has reacted to comments she does not like by seeing conspiracy which is not there. To the best of my knowledge, there is not, and has never been, any campaign

*Honest opinion*

[58] The defendant submits that, if the defamatory meanings of the first draft are held to arise, then they were the genuinely held opinion of S/Sgt Culpan: namely that Ms Opai has a misdirected sense of responsibility and has acted malevolently.

[59] S/Sgt Culpan explained his perception of Ms Opai in his brief of evidence:

I viewed the plaintiff in a very positive light when I started in the role of Officer in Charge of the Station. Over time I had come to realise that she had a tendency to involve herself in the business of other people in the workplace, and I thought she would do well to focus on her own work rather than what others were doing.

I only began to form these views about the plaintiff when I sought and obtained updates from Human Resources on the two investigations (into Ms Stark and Ms Skilton) and I received the plaintiff's complaints about Harry Wang and Deepak Kalra.

[60] Later, S/Sgt Culpan gave evidence that he received emails referring to Ms Opai's "malicious intent" for making complaints about other staff members and that on one occasion he had to reprimand Ms Opai for holding herself to other staff as operating on his authority when this was not the case.

[61] Overall, this is said to form a substratum of facts upon which S/Sgt Culpan honestly formed the opinion expressed within any defamatory statements.

*Discussion*

[62] There is nothing in the first cause of action. First, the Police have a well-established annual reporting system. S/Sgt Culpan, despite recently being seconded to the role of Ms Opai's manager, had a duty to appraise her performance.

[63] Second, I do not consider the first draft to be defamatory. The third paragraph has to be read in the context of the whole of the draft review which is overall a positive one. The context of the concluding comment makes that clear. Ms Opai is not being accused of acting malevolently.

[64] Third, if the first draft is defamatory:

- (a) There is no relevant publication. The first draft was not published by S/Sgt Culpan. It was published by Ms Opai. It need not have been. Ms Opai could, and should, have discussed the first draft with S/Sgt Culpan first.
- (b) There is no harm, at least none caused by S/Sgt Culpan. The first draft was amended by S/Sgt Culpan after Ms Opai complained. It never formed part of her official record. Any harm to Ms Opai's reputation subsequently was caused by her continuing complaints.
- (c) Qualified privilege clearly applies. Regardless of the policy of "no surprises", S/Sgt Culpan had a duty to provide Ms Opai with a draft of his annual appraisal. He had a duty to provide her with his candid and considered views on her performance. He did. It was just between them. Ms Opai had a corresponding interest to receive the first draft. She was entitled to comment on it and seek to have it changed if she did not agree with any part of it. Ms Opai exercised that entitlement and obtained change. There was no taking of improper advantage and nor were the comments motivated by ill-will.

[65] I will not discuss the other defences raised. It is unnecessary.

### **Second cause of action – the briefing paper**

[66] On 1 November 2013, S/Sgt Culpan completed a briefing paper. The defendant says this was part of S/Sgt Culpan's duties in the course of his role on a review team. The paper was prepared in furtherance of a review of the staffing counter of the Counties Manukau policing district, in accordance with section 7 of the Police



Employees' Employment Agreement 2012-2015 and the Restructuring Policy. Specifically, its purpose was to address supervisor numbers and facilitate better rostering practice.

[67] Ms Opai draws the Court's attention to the following parts of the briefing paper:

In February 2013 I commenced a secondment as O/C Station Manukau. During this time I have made a number of observations including but not limited to:

...

3. There is a culture where casual employees are engaged as a matter of course as opposed to having an actual requirement.
4. Management style and expectations differ between sections (Watchhour (sic) officers) causing poor communication, disruption to service delivery and silos which contribute to unnecessary friction and disfunction (sic).
5. The root cause of this tension appears to have been through a power struggle by some supervisors, a void in leadership and management from previous O/C Station, and a truncated investigation into two employment complaints.
6. This "culture" is now disproportionately impacted upon by two of the remaining supervisors.
7. Through the better use of existing supervisors (a proposed change to the supervisors rosters), the use of existing supervision within the wider work groups (FMC, DCU, DCC, ASN) I believe there is opportunity to achieve:
  - Two supervisors' positions can be freed up for use elsewhere
  - FTE hours can be better matched to demand
  - Existing service delivery can be maintained and standards improved
  - The culture can be positively impacted
  - The remaining Officers can be performance managed or exited

[68] Ms Opai states that she is one of the two supervisors referred to, and that the paper contemplates two methods to bring her employment to a close: performance management or termination. She says that S/Sgt Culpan did not prepare the paper under a directive from senior management, but rather did so as a "tit for tat" response to the personal grievance she had raised. The content of the paper, she says, was

intended to mean that her employment performance was substandard and that she was suspected of misconduct to an extent that warranted inquiry.

[69] The defendant responds that the suggested meanings are overpitched. They say that all Ms Opai has done is scrutinise a draft paper for words she perceives to be about her and condense them in a way that misrepresents the overall tone and purpose of the briefing paper.

[70] Even if the publications were made out and the defamatory meanings accepted, the defendant submits the relevant passages of the briefing paper are “incapable of having caused a sufficient degree of harm to the plaintiff’s reputation” and are “no more serious than accusing someone of bad manners or having a poor fashion sense”.

*The alleged publications*

[71] Ms Opai submits that S/Sgt Culpan published the briefing paper to the following parties at the following times:

- (a) On an unknown date, to Inspector Wilkie;
- (b) On an unknown date, to Ms Bryan-Wells; and
- (c) In November 2014 to Inspector Shearer and Ms Bryan-Wells.

[72] It is also submitted that on or about 5 March 2014, S/Sgt Culpan left the briefing paper on S/Sgt Traill’s desk, in full view of anyone who happened to walk past. There it was seen by S/Sgt Traill, Ms Jones and Mr McLeish.

[73] In addition, Ms Opai says the briefing paper was sent to Superintendent Tims by members of the review team and that in March 2014 she herself was duty-bound to send a copy to Inspector Brady in the course of pursuing her complaint.

[74] S/Sgt Culpan admits providing a copy of the briefing paper to Inspector Wilkie and Ms Bryan-Wells, as they were both members of the review team. He also admits

providing S/Sgt Traill with a copy as part of the handover process when S/Sgt Traill recommenced his position in March 2014.

[75] Further, S/Sgt Culpan admits providing Inspector Shearer with a copy of the briefing paper, but only after he specifically requested it. Being his superior, S/Sgt Culpan was duty-bound to provide Inspector Shearer with a copy once this request had been made. The defendant also notes it is dubious that Inspector Shearer would have been able to identify Ms Opai, being more concerned with the briefing paper's characterisation of S/Sgt Traill's poor leadership, namely the reference to "a void in leadership", with which he had seemingly taken issue.

*Ms Jones and Mr McLeish*

[76] S/Sgt Culpan acknowledges he left a copy of the briefing paper on S/Sgt Traill's desk. However, he says he did so in an Eastlight folder without the intention of it being seen or read by any person other than S/Sgt Traill.

[77] Ms Opai's position is that S/Sgt Traill showed the briefing paper to staff, including Ms Jones and Mr McLeish on a training day. S/Sgt Culpan denies he knew anything about a training day and maintains he cannot be held responsible for any unanticipated actions taken by S/Sgt Traill as regards the paper.

*Superintendent Tims*

[78] S/Sgt Culpan denies sending Superintendent Tims the briefing paper. As far as he is aware, the Superintendent never received it.

[79] Inspector Wilkie's evidence is she does not even recall reading a copy until S/Sgt Traill brought it to her attention. She states that it would only have been sent to Superintendent Tims if it had been finalised as a discussion paper, but that it never made it past the draft stage.

[80] The defendant submits that, in any event, this claim of publication is time-barred. It was only pleaded in the fifth statement of claim on 1 June 2017. Therefore,

to avoid the relevant limitation period it would have had to have been published after 30 May 2015, which is clearly not the case.

*Inspector Brady*

[81] Ms Opai says she sent Inspector Brady a copy of the briefing paper as the Inspector was investigating her employment relations complaint at the time. The defendant submits there is no evidence of this. If there was, S/Sgt Culpan could not be held accountable for such a publication. The defendant raises the same arguments as in relation to Ms Opai's supposedly duty-bound publication of the first draft of the performance review to Superintendent Tims.<sup>16</sup>

*Qualified privilege*

[82] Ms Opai submits the briefing paper was prepared by S/Sgt Culpan without authority and was in effect targeted at her as opposed to being a genuine paper on structural review, and is therefore outside the ambit of qualified privilege.

[83] The defendant disputes this, submitting Ms Opai's claims are purely fanciful. It is pointed out that the briefing paper was part of a broader review, one of the outcomes of which was the institution of structural changes in the operation of the Public Counter for which Ms Opai expressed approval. Reliance is placed on the evidence of Inspector Wilkie:

8. One of the responsibilities I was given by Superintendent John Tims, the District Commander, on my arrival as Case Management Inspector was to review a number of the non-sworn (not constabulary) positions within the workgroups that reported to me. These positions included... the Public Counter.

...

25. When Senior Sergeant Culpan came into the role of Officer in Charge of the Station in January 2013, I asked him to review the need for staff to be in long-term relieving roles and to address the ongoing issues with the Public Counter. Over time, I also asked him to do what he could to address what appeared to be a negative culture of Public Counter staff complaining about each other and making allegations and counter-allegations about work ethics, timekeeping, and bullying,

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<sup>16</sup> See discussion at [40]-[43].

and to address the use of long-term relievers acting in Public Counter roles.

...

27. To progress this initiative, we established a 'Review Team' (comprised of myself, Senior Sergeant Culpan, and Christine Bryan-Wells from Human resources) ...

...

31. As a result of his time and motion study, Senior Sergeant Culpan recommended the Public Counter would operate most effectively if the five sections worked under three supervisors, with the supervisors working early and late shifts only...

32. ... I recall that I discussed [S/Sgt Culpan's recommendation] with Melissa. ... I recall that she said she wanted to 'champion' the proposed changes with her team and the other supervisors. She emailed Senior Sergeant Culpan confirming her support for the roster change on 29 October 2013.

34. I asked Senior Sergeant Culpan to review the need for staff to be in long-term relieving roles and to address the ongoing issues with the Public Counter... The review was not targeted at Melissa. In any event she supported the roster change that resulted from the review.

...

36. I had asked Senior Sergeant Culpan on 31 October 2013 to create a document that captured the discussions the Review Team had had to date so that Superintendent Tims could be fully informed...

37. As things turned out, because the review that proposed to adopt Senior Sergeant Culpan's recommended roster changes to the Public Counter roster was already underway, the Briefing Paper was never finalised and sent on to Superintendent Tims. The Briefing Paper did not go any further than the first draft Senior Sergeant Culpan prepared. If it had been finalised, it would have gone to Superintendent Tims as a discussion paper.

...

39. ... It did not name Melissa and was not about her.

[84] I accept Inspector Wilkie's evidence.

### *Honest opinion*

[85] In the event that the defamatory meanings submitted by Ms Opai are attributed to the briefing paper, S/Sgt Culpan maintains they are his honestly held opinion:

The opinions I expressed in the draft Briefing Paper were my genuinely held opinions that I came to after my work in reviewing the Public Counter and the discussions I had with the Review Team during 2013.

[86] I accept S/Sgt Culpan's evidence in this regard.

### *Discussion*

[87] As with the first, there is nothing in the second cause of action. S/Sgt Culpan was a member of a review team. The briefing paper was produced for the review team and as part of the review. I accept that members of the review team might have identified Ms Opai as one of the "remaining supervisors" and, if so, S/Sgt Culpan's statements might have tended to lower Ms Opai in their estimation. But, there is no evidence of any harm caused that would cross the threshold of even "more than minor" harm. This was an internal document intended for two other people.

[88] Qualified privilege clearly applies. S/Sgt Culpan had a duty to be candid and clear in preparing the review paper. The people he provided it to had a corresponding interest in receiving it. There was no ill-will or taking improper advantage.

[89] I do not need to discuss the defence of honest opinion, although I would find the contents of the briefing paper represented S/Sgt Culpan's honest opinion.

[90] I would also hold the cause of action to be time-barred.

### **Third cause of action – the 258 report**

[91] On or about 5 November 2013, S/Sgt Culpan wrote a code of conduct report about Ms Opai (the 258 report). The report referred to a complaint about Ms Opai made by one of her colleagues, Ms Jones. It is titled "Breach of the Code of Conduct". It is addressed to Inspector Brady. The relevant parts of the report are as follows:

This report refers to the alleged breaches of the Code of Conduct by the subject Melissa OPAI.

...

On 10th October 2013, I received a written complaint from one of OPAI's colleagues... I believe the complaint has come about as these sections cross

over and there have been issues simmering under the surface with regard to allocation of work and treatment of her staff.

It would appear that these issues have reached a tipping point resulting in the attached email and formal complaint. It is noted that Miss OPAI was herself the author of a similar complaint in 2013 made against Miss Zoe STARK for almost identical behaviours.

I quote from the email of the complaint as follows:

*“On a more serious note I would like to bring to your attention that I have noticed the below discrepancies of timesheets and times that Mel and her section leave at the end of my shift. See table showing the times in question, the actual times noted are times my staff and I have diary noted...”*

...

For the purpose of this report, I have only indicated times for Miss OPAI however the originating email is attached.

It is my opinion that if the staff named in the email/complaint have left early without correctly filling out timesheets, it will have been sanctioned by Miss OPAI although I have not traversed this point with those identified.

Dependent upon your direction, I believe the two implicated Watchhouse Assistants can be dealt with my (sic) means of professional conversation and diary note.

I believe that these actions fall under the general headings of Honesty and Integrity and dependent upon interview with Miss OPAI, may be viewed as misconduct in that they represent repeated absence from duty or place of work without proper reason or authorisation.

For your categorisation and direction.

[92] Ms Opai submits that the following defamatory meanings arise from the 258 report:

- (a) She is dishonest;
- (b) She lacks integrity;
- (c) She is a hypocrite given that she authored a similar complaint in 2013;
- (d) There were grounds for inquiring into her misconduct, depending on consultation with her, possibly resulting in disciplinary action.

[93] On 4 December 2013, Ms Opai requested that an investigation be made into the allegations. She says that on 11 March 2014, Inspector Brady gave her verbal confirmation that an investigation of the complaint had been carried out and it was not upheld.

[94] Again, Ms Opai claims that the 258 report was a retaliatory response to the personal grievance she had raised against S/Sgt Culpan on 23 October 2013.

[95] The defendant disputes this, repeating the defence that the alleged defamatory meanings are overpitched and that the purpose of the 258 report was to record details of a received complaint and forward it to the appropriate person for categorisation. Moreover, it is pointed out that the report records receiving a complaint alleging only minor infractions and that it contains nothing in the way of an indication that the complaint was to be upheld.

[96] Overall, the complaint is said by the defendant to have been of a trivial nature. In his brief of evidence, S/Sgt Culpan gave evidence that he did not think the matters raised in the complaint warranted investigation.

*The alleged publications*

[97] Ms Opai submits that S/Sgt Culpan published the 258 report to the following parties at the following times:

- (a) On or about 5 November 2013 to Ms Bryan-Wells;
- (b) On or about 5 November 2013 to Inspector Wilkie;
- (c) On or about 5 November 2013 to Ms Watson;
- (d) On or about 5 November 2013 to Inspector Brady;
- (e) Between April and May 2014, to S/Sgt Traill;
- (f) Between July 2014 and January 2015, to S/Sgt Brand.



[98] Ms Opai also alleges that on an unknown date, somebody sent the 258 report to Superintendent Schwalger and Police Human Resources North Shore.

[99] S/Sgt Culpan admits providing a copy of the 258 report to Inspector Brady and that he left a redacted version of the report (with the names of the staff members other than Ms Opai removed) in an envelope on S/Sgt Traill's desk in March 2014. The other alleged publications are denied.

[100] S/Sgt Culpan acknowledges that he emailed Ms Watson in Human Resources a draft version of the 258 report, but not the final report. He says that he therefore did not publish the complained about report to Ms Watson.

[101] S/Sgt Culpan denies publishing the 258 report to Ms Bryan-Wells, Inspector Wilkie, S/Sgt Brand, Superintendent Schwalger and Police Human Resources North Shore. He points out Ms Opai has raised no evidence to establish these alleged publications; rather, she seems to assert that there must have been general circulation of the 258 report among these parties and that S/Sgt Culpan should be held accountable for this.

[102] The defendant argues further the claimed publications to S/Sgt Brand, Superintendent Schwalger and Police Human Resources North Shore are time-barred.<sup>17</sup>

[103] The defendant repeats the qualified privilege argument it made in respect of the briefing paper. The processing of the Jones complaint by way of a 258 report and forwarding it to Inspector Brady is said to be a clear occasion of qualified privilege.

[104] Moreover, the defendant submits that Ms Opai has raised no basis for rebutting the privilege. The suggestion the report was prepared for a retaliatory purpose is dismissed as a wild allegation completely unsupported by the evidence. Indeed, S/Sgt Culpan gave evidence that he was unaware of Ms Opai's personal grievance until early 2015.

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<sup>17</sup> Following the same reasoning as with respect to the alleged publication of the briefing paper to Superintendent Tims; see discussion at [80].

[105] Ms Opai submits it was inappropriate for S/Sgt Culpan to publish the 258 report to Inspector Brady. S/Sgt Culpan maintains he did so following advice:

114. I spoke to Ms Bryan-Wells in Human Resources about what to do about Ms Jones' complaint. She advised me to refer the matter to Inspector Brady... I also talked to Inspector Wilkie about Ms Jones' email. She was disappointed we had received another complaint from a member of the Public Counter team about a colleague. She agreed that I should refer it to Inspector Brady.

[106] Inspector Brady himself confirms this was the correct approach:

62. It was quite usual for me to receive this kind of report, drawing my attention to a complaint received by a manager or supervisor about the conduct of one of their team. If a manager or supervisor becomes aware of concerns that have been identified or raised about an employee's conduct, it was Police's expectation that the manager or supervisor would raise the matter with PPC or with Human Resources. By referring the matter to me, Senior Sergeant Culpan did exactly as Police would have expected of him on receipt of the email from Ms Jones.

[107] I heard considerable evidence about the verifiability of the allegations made by Ms Jones by referring to Ms Opai's timesheets. This boiled down to conflicting interpretations of the relevant PeopleSoft records, the timekeeping software used by the organisation. Ms Opai's case is that S/Sgt Culpan should have checked the time records and had he done so he would have seen there was no substance to the complaint. The fact he did not goes to ill-will on his part. However, I accept S/Sgt Culpan's evidence that he did not think checking the time records would help him resolve the complaint. In any event, the purpose of the 258 report was simply to record the received complaint in a preliminary way, rather than to deliver a conclusive determination of its validity or even to suggest that it may or may not have some merit.

[108] There was also much discussion as to whether S/Sgt Culpan's preliminary investigation of Ms Jones' complaint and his subsequent referral of the complaint to Inspector Brady complied with the organisation's Code of Conduct Supervisors' Guide. Various arguments were advanced on both sides. I did not find the discussion particularly helpful as to whether the publication of the 258 report was protected by qualified privilege. This is not an inquiry into whether S/Sgt Culpan complied with any relevant internal processes. It is an action in defamation. The relevant question

here is whether S/Sgt Culpan was motivated by ill-will in publishing the 258 report or otherwise took improper advantage of the occasion when doing so.

### *Discussion*

[109] Once again, there is nothing in this cause of action. In the context of the 258 report, there is no defamatory statement. Further, there was no harm. S/Sgt Culpan received a complaint against Ms Opai. He was obliged to respond to it. He did so by making the report to the officer whose responsibility it was to decide what, if any, action should be taken.

[110] In any event, qualified privilege clearly applies. S/Sgt Culpan had a duty to prepare the report and Inspector Brady and S/Sgt Traill (as Ms Opai's manager) a corresponding interest in receiving it. There was no ill-will or improper advantage.

[111] I would also hold the cause of action to be time-barred.

### **Fourth cause of action – section meetings**

[112] Ms Opai pleads that between 26 November 2013 and 20 December 2013, Inspector Wilkie and S/Sgt Culpan falsely and maliciously spoke the following words to the organisation's section work groups across five meetings:

We need to outline expectations of staff around timelines, time sheets, work load, breaks, hand over to other section ...

Specifically there is no issue with leaving work early on authority of your supervisor, and in consultation with the next shift depending on work load. But this is to be accurately shown on your timesheets. You are entitled to two short breaks during the day and half an hour for lunch. The lunch needs to be co-ordinated to ensure appropriate coverage of the counter during the crossover of sections discussions needed to be had to ensure the preceding section has sufficient time to finalise their correspondence prior to the shift finishing ...

Formal action will be taken in the event of further irregularities around timesheets.

[113] Ms Opai says these words were meant and understood to mean:

- (a) She had displayed poor work practices;

- (b) She had inaccurate timesheet recording; and
- (c) The workgroup for which she was responsible had displayed poor work practices and inaccurate timesheet recording.

[114] The words were said to have been repeated at five separate meetings:

- (a) On 26 November 2013 at 1.45 pm to Ms Jones' section;
- (b) On 4 December 2013 at 1.50 pm to Ms Stark's section;
- (c) On 4 December 2013 at 2.15 pm to Mr McLeish's section;
- (d) On 18 December 2013 at 2.20 pm to Ms Opai's section; and
- (e) On 20 December 2013 at 9.30 am to Ms Moore's section.

[115] The defendant disputes that the above words were published as Ms Opai suggests. Ms Opai was not present at any of the meetings. Nor has she called evidence from anyone who was. Instead she has reconstructed what she suspects was said from a job sheet prepared by Inspector Wilkie:

26/11/13

1345 hrs Meet with Jones' section, Phillipa Searle (casual employee) and Haohan (Harry) Wang along with Jones and Culpan. Outline expectations of staff around timeliness, timesheets, work load, breaks, hand over to other sections.

Specifically they were told that there is no issue with leaving work early on authority of your supervisor, and in consultation with the next shift depending on work load. This is then to be accurately shown on their timesheets. They are entitled to two short breaks during the day and half an hour for lunch. The lunch needs to be co-ordinated to ensure appropriate coverage of the counter during the crossover of sections discussions needed to be had to ensure the preceding section has sufficient time to finalise their correspondence prior to the shift finishing.

...

4/12/13

1350 hrs Meet with Culpan, Zoe Stark (Supervisor), and her section, Josie Salt and Raima Moore.

Expectations outlined as done with previous sections.

...

[116] In the job sheet Inspector Wilkie goes on to make the same record in respect of the other section groups to whom Ms Opai alleges the defamatory statements were made, at the times alleged by Ms Opai.

[117] This reconstruction is the crux of the defendant's objection to this cause of action. S/Sgt Culpan denies that Inspector Wilkie actually said the words alleged. He says the conversation during the meetings was centred on generic issues of timekeeping and breaks. This is corroborated by Inspector Wilkie.

[118] Importantly, both maintain that Ms Opai was not identified by name during the meetings and that all discussions were of a general nature. Ms Opai contends she would have been readily identifiable as the target of the comments by those who attended the meetings. In part, this is because on 3 December she says she left a meeting with Inspector Wilkie in tears following a professional discussion regarding the Jones complaint. Inspector Wilkie describes the purpose of the meeting as follows:

103. The purpose of the meeting was simply to advise Melissa that we had received a complaint about her and her section and that Police did not propose to investigate it, but instead to set its expectations of the whole workgroup. I do not believe I said anything to Melissa that she could interpreted (sic) as inconsistent with that purpose.

[119] Ms Opai claims she was seen leaving this meeting visibly upset. She says the organisation's grapevine would have done the rest and that it would not have been difficult for the other staff members to "join the dots".

[120] The defendant refutes this, pointing out there is no evidence that Ms Opai was seen leaving the meeting with Inspector Wilkie in tears or even that she was upset at all. The evidence from Inspector Wilkie was that the meeting had gone well. In addition, even if Ms Opai was seen to be upset, this could have been for a number of reasons.

[121] The defendant submits that, in any case, the argument is time-barred, as it was only included in the fifth statement of claim dated 1 June 2017, whereas the allegedly defamatory comments were said to have been made in late 2013.

### *Discussion*

[122] This cause of action cannot succeed for a number of reasons:

- (a) First, Ms Opai has not proved that the words alleged to have been spoken at the meetings were in fact spoken. Inspector Wilkie's job sheet is the only record of what was said at the meetings. It is a generic summary.
- (b) Second, I accept the evidence of Inspector Wilkie and S/Sgt Culpan as to the purpose of the meetings and what was said. Ms Opai was never mentioned. I accept the job sheet gives a generic account of the overall sense of what was said, but I do not find this is defamatory of Ms Opai.
- (c) Third, even assuming Ms Opai is right as to what was said, and even if those present drew inferences adverse to Ms Opai, there is no evidence of harm. By the time of the meetings, the difficulties between Ms Opai and some of her fellow employees were well known.
- (d) Fourth, qualified privilege clearly applies. The meetings were for genuine reasons and relevant to the respective employment roles of the participants. There was no improper advantage nor ill-will.
- (e) Fifth, the cause of action is time-barred.

### **Fifth cause of action – diary notes**

[123] The final cause of action concerns a series of official diary entries S/Sgt Culpan made in respect of Ms Opai. The document is titled "Diary notes – Melissa OPAI – 2013-14 performance year". The relevant excerpts are as follows:

12 July Took a complaint to Brendan RYAN in what has been described as an attempt to scuttle Deepak and Harry WANG's police enrolments. – Email conformation (sic) from Brendan Ryan

...

5 Nov Complaints about timekeeping. This has been resulted (sic) however is listed for your reference.

[124] The following defamatory meanings are alleged:

- (a) Ms Opai acted maliciously towards Deepak and Harry Wang's Police enrolments; and
- (b) Complaints had been received regarding Ms Opai's timekeeping, which was a black mark upon her employment performance.

[125] Ms Opai submits that the diary notes were published by S/Sgt Culpan to the following parties:

- (a) In March 2014 to Inspector Wilkie;
- (b) Between April and May 2014 to S/Sgt Traill following the completion of S/Sgt Culpan's secondment;
- (c) On an unknown date to S/Sgt Mullin;
- (d) In September 2014 to Inspector Shearer; and
- (e) Between July 2014 and January 2015 to S/Sgt Brand.

[126] S/Sgt Culpan admits to publishing the diary notes to S/Sgt Traill. This occurred when S/Sgt Culpan handed his role over to him at the end of his secondment. S/Sgt Culpan denies all other publications.

[127] It is acknowledged that S/Sgt Culpan provided S/Sgt Brand with Ms Opai's draft performance appraisal for the 2013/14 year. However, in evidence S/Sgt Brand could not recall reading the diary entries being included in the draft:

48. I emailed Senior Sergeant Culpan a copy of the Melissa's (sic) appraisal on 25 July and asked that he add in his comments. I advised him that he was to have all of the performance appraisals for the staff that reported to him when he was Officer in Charge of the Station updated to include his comments, and to forward them to Senior Sergeant Traill... The paragraph of comments Senior Sergeant Culpan had included in Melissa's appraisal did not appear to me to contain any negative references or to have any ill-will associated with it.

[128] The defendant submits there is no evidence of any of the other alleged recipients receiving the diary notes. This is supported by the alleged recipients themselves. For example, S/Sgt Mullin said:

68. I have no recollection of Senior Sergeant Culpan giving me a copy of his diary notes about Melissa and I do not believe that I have ever seen a copy of them.

[129] The defendant also argues the alleged defamatory meanings are not sustainable. The comment that her complaint "has been described as an attempt to scuttle" cannot be interpreted as meaning that she has acted maliciously. Similarly, it is pointed out that the diary notes record the timekeeping issues as having been resolved. In any case, even if these defamatory meanings are accepted, the defendant denies they could cause Ms Opai's reputation any more than minor harm.

[130] The defendant also submits the publication to S/Sgt Traill was covered by qualified privilege as all witnesses agree it was appropriate for a person in S/Sgt Culpan's position to pass on relevant information about staff performance to his successor. Moreover, there is nothing in the publication of the diary notes that betrays ill-will or an improper purpose. The fact that the 258 report had been found to be unsubstantiated is said to be immaterial in this respect. S/Sgt Culpan was obliged to provide full disclosure of all relevant information during handover.

### *Discussion*

[131] This cause of action also cannot succeed. I accept the defendant's argument. In short, if the diary notes are defamatory, then there is no proof of harm. In any event, the defence of qualified privilege would apply.



## **Result**

[132] As the hearing of this case progressed I was increasingly saddened. Ms Opai worked her way to a responsible position in the Police. She had the respect and admiration of her superiors. Then S/Sgt Traill, her manager, was replaced on secondment by S/Sgt Culpan who did not know her. Ms Opai was shocked by his first draft of her annual appraisal. Her reaction included going to S/Sgt Culpan's superior and later extended to raising a personal grievance. The first draft was amended. But, Ms Opai began to see malice behind any action of S/Sgt Culpan. I understand there is a number of personal grievances against the Police currently before the Employment Relations Authority. I fear Ms Opai is now obsessed with the way she perceives she was treated as an employee. This case is in point. There is no basis for a defamation case given the employment context, the nature of the statements complained about and the processes being followed when they were made. Really, Ms Opai's complaints are how she was treated as an employee and they go beyond the snapshot of her employment shown to me in this case. I raised this with Ms Opai's counsel. It was made clear that one of the main reasons for bringing this claim in defamation was that potential yield in damages was greater than that possible in the Employment Relations Authority.

[133] Ms Opai's causes of action are dismissed.

## **Costs**

[134] The defendant is entitled to costs. His memorandum is to be filed and served within 15 working days of the delivery of this Judgment. Ms Opai may reply within a further 15 working days.