EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101277/14

Held in Glasgow on 12, 13, 14 & 15 December 2016, 10, 11 & 12 January 2017 and 20, 21, 22, 23, 27, 28 & 29 November 2017 and Members' Meeting held 3 January 2018

Employment Judge: Robert Gall
Members: Iain Macfarlane
Marion Perrett

Mr Jeffrey Hughes — **Claimant**
Represented by:
Mr K Maguire - Advocate

Civil Nuclear Police Authority — **Respondents**
Represented by:
Mr C McNeil QC

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claim brought in terms of Section 48(1) of the Employment Rights Act 1996 of detriments said to have been suffered due to acts or deliberate failures to act of the respondents done on the ground that the claimant had made protected disclosure(s) is unsuccessful.

REASONS

E.T. Z4 (WR)

1. This case called for Hearing in December 2016. The Hearing was commenced at that point. Further dates had been set down for January 2017. During the course of the Hearing in January 2017 both parties stated to the Tribunal that discussions had taken place in relation to possible settlement and it now looked as if settlement would be possible. They sought that the case be sisted to enable settlement discussions to proceed. That occurred.

2. Ultimately it did not prove possible to settle the case. Further dates were set down for Hearing. In the interim Judicial Mediation took place. It did not prove possible to reach agreement in course of that mediation.

3. The case therefore proceeded during the dates in November 2017. It concluded on 29 November 2017.

4. The claimant was represented throughout the proceedings by Mr Maguire. The respondents were represented by Mr McNeil. A joint bundle of productions was lodged. A supplementary bundle of productions was also lodged. References in this Judgment to productions are references to productions within the bundle unless otherwise stated.

5. Witness statements were prepared and lodged. Witnesses spoke to those statements in giving evidence, supplementing the statements by referring to documents or by providing additional information by way of expansion upon the matters set out in their respective statements.

6. The following parties appeared as witnesses:-

- The claimant.

- Donald McMillan, Sergeant with the respondents at Hunterston.

- Andrew Baird, Police Constable at Hunterston.

- Gordon Allan, Detective Inspector, Head of Professional Standards Department with the respondents.

- Allan MacRae, former Operational Unit Commander ("*OUC*") at Hunterston.

- Richard McWhirr, Sergeant, who completed a health and safety report in relation to the claimant.

- Martin O`Kane, Superintendent.

- Duncan Worsell, Chief Superintendent.

- Caroline Ashfield, HR officer for North and Scotland.

- Hazel Deans Chief Inspector.

- Tim Needham, Chief Inspector.

7. The following parties are relevantly mentioned at present:-

- Gerard Findlay, Sergeant with the respondents and line manager of the claimant.

- Alan Gillies, Sergeant with the respondents.

- Nigel Dennis, Police Federation Chief Executive.

8. The claimant had made a disclosure to the respondents which it was agreed was a protected disclosure in terms of the Employment Rights Act 1996 ("*ERA*"). It related to the frequency of patrols at Hunterston. The respondents did not accept that there was a foundation for the view of the claimant in relation to inadequacy in the patrols carried out. The claimant also in May 2013 alleged falsification by Sergeant Findlay of records relating to patrols. In circumstances detailed below, the respondents concluded that, although the records of patrols were not entirely accurate, there was no falsification by Sergeant Findlay.

9. The accepted protected disclosures were made in early and mid February 2011.

10. The claimant said that he had suffered detriment due to acts or deliberate failures to act done by the respondents on the ground that he had made a protected disclosure. The respondents denied that this was so. They accepted that the claimant was correct in saying that certain acts occurred or decisions were made. They said, however, that these acts or decisions were not connected in any fashion with the fact that the claimant had made protected disclosures.

Facts

11. The following were found to be the relevant and essential facts as admitted or proved.

General Information

12. The claimant was born on 14 October 1969. He commenced employment with the respondents on 14 May 2007. His role with the respondents was as an Authorised Police Firearms Officer ("*AFO"*). He was initially stationed at Torness Nuclear Power Station. He was transferred to Hunterston Nuclear Power Station in January 2011.

13. The structure of the respondents is that there is a Chief Constable. The Chief Constable reports to the Civil Nuclear Police Authority which is an arms` length organisation. There is a Deputy Chief Constable ("*DCC*"). On the executive of the respondents, in addition to the Chief Constable and DCC, there are 2 Assistant Chief Constables and the Business Director.

14. The respondents operate very much on a hierarchical basis. Below the executive there are 3 Divisional Commanders. One of those is Duncan Worsell. He is a Chief Superintendent. There are 3 Divisional Superintendents. One of those has responsibility for the 4 power sites which include Hunterston and Torness. That role was filled by Superintendent Brian Stephenson. He was succeeded by Superintendent Heather Green, who was herself succeeded by Superintendent Martin O'Kane. He was in post from 2014. The Divisional Chief Inspector responsible for Hunterston and Torness was, between 29 October 2012 and July 2015, Chief Inspector Tim Needham. The person to whom Chief Inspector Needham initially reported was Superintendent Brian Stephenson. Prior to Chief Inspector Needham holding the post it was held by Chief Inspector Jim Weeden. From July 2015 to May 2016 the Chief Inspector responsible for Hunterston and Torness was Chief Inspector Hazel Deans.

15. At Hunterston, as with other like power stations, there is an Operational Unit Commander ("*OUC*"). From approximately 2007 the OUC at Hunterston was Inspector Allan MacRae. Inspector MacRae retired in January 2017. Reporting to Inspector MacRae at Hunterston were 4 Sergeants, each of whom was responsible for a small unit known as a section. The claimant

worked within the section of officers of which Sergeant Findlay was the Section Sergeant. There were between 10 and 12 Police Officers in each section.

16. As OUC Inspector MacRae was responsible for budgetary matters, personnel matters on site at Hunterston, liaison with superiors and Sergeants and also delivery of the required operational matters at Hunterston.

17. An important aspect relating to security at the site at Hunterston is that patrols are carried out. That involves patrols on foot from time to time and by vehicle. Different areas of the site are patrolled at different times. There requires to be an element of unpredictability about the timing and extent of these patrols.

18. The Duty Sergeant had responsibility for arranging the patrols. A schedule of proposed times for patrols was drawn up by the Sergeant. The Sergeant was generally not personally part of the teams which carried out the patrols. The sheets confirming the patrol times would then be completed after the scheduled times of patrols.

19. There was relatively little day to day management of the claimant and other Constables by the Sergeants. Decisions on issues such as which officers were to be appointed mentors, or appointed as Acting Police Sergeants (APS), who was to attend courses and the making of entries on the spreadsheet known as a PIL Chart which recorded overtime shifts worked by officers and which formed the basis of allocation of overtime to officers, were all matters handled and dealt with by the OUC.

20. As a Sergeant, Sergeant Findlay could revoke the claimant`s AFO status on a short term basis if he was of the view that the claimant, or indeed any other AFO, was not in an appropriate state of mind to be carrying a firearm. This might occur if, for example, there had been a domestic dispute involving the AFO or some other upsetting incident out of or within work. A Sergeant has no authority to remove the capacity of an AFO to act as such on anything

other than a very short term basis, the decision in that circumstances being made by the Sergeant at a time when the firearm is potentially being issued to the officer.

The Claimant

21. The claimant is someone who will set out his position in relation to any particular point. He is prepared to advance any proposition which he regards as correct or as worthy of support and to challenge any decision taken with which he does not agree. He has a particular focus in advancing claims to financial sums which he regards as being due to him.

22. He became Federation Secretary at Hunterston around July 2011. He saw this as an opportunity to "*argue about everything and not get into trouble*". He made that comment in an email to a former colleague at Torness, the email appearing at page 4 of the bundle. Later that year, on 12 November, the claimant sent an email to the same former colleague stating:-

> "*as usual am causing a ruckus, now is the time for the annual leave submission and the place is in an upheaval …"*

He went on to refer to "*the gloves*" going on.

23. When the claimant has formed a view upon a particular matter he finds it very hard to depart from any such view, notwithstanding any contrary opinion and basis for that contrary opinion which might be expressed to him. He finds it extremely difficult to accept any view other than his own as being correct or as being one which should prevail. The claimant also tends to approach any discussion with the respondents on a particular point, whether in correspondence or in face to face meetings, in a defensive and suspicious frame of mind. He does not tend to be expansive in discussion or in emails. He tends to the view that there is an underlying motive for any decision made which is contrary to the view he has or decision he would have taken.

Sergeant Findlay

24. Sergeant Findlay did not have a particularly friendly relationship with his working colleagues. He was not viewed by them with any real affection. He "*had words*" with some of his colleagues from time to time. In addition to the claimant, encounters of that kind arose between Sergeant Findlay and Sergeant McMillan and Sergeant Findlay and PC Baird. On an occasion the lock on Sergeant Findlay`s locker had been sealed with superglue or some other substance. Inspector MacRae spoke with Sergeant Findlay as to possible investigation of this action. This was with a view to finding the culprit. Inspector MacRae informed PC Baird that Sergeant Findlay had said to him that there would be a long list of people who might have a motive to damage his property and that any enquiry being made into the event would not be an easy one.

Protected Disclosures

25. The claimant made a disclosure to the respondents in February 2011 of concerns which he had. That disclosure related to patrols at Hunterston and the frequency of those patrols. That was accepted by the respondents as being a protected disclosure in terms of ERA.

26. In September 2012 the claimant met with Superintendent Brian Stephenson. He repeated his disclosure in relation to issues he perceived with patrols. He did not make at this time a protected disclosure as to there being bullying. His email of 29 October 2012 to Superintendent Stephenson was the first time he had raised that topic with Superintendent Stephenson. That email makes an allegation without any information or detail. It was not a protected disclosure in terms of the ERA.

27. A protected disclosure was however made by the claimant in relation to alleged bullying when he met with Chief Inspector Needham on 22 November 2012 and gave him details of conduct he regarded as being bullying.

28. On 2 May 2013 the claimant met with Chief Inspector Needham. He said to Chief Inspector Needham at that time that Sergeant Findlay was not, in the carrying out of patrols, complying with the patrol records. This was an allegation by the claimant that patrol records were being falsified.

Finding in Fact and Law

29. The statements by the claimant to Chief Inspector Needham on 22 November 2012 and on 2 May 2013 were protected disclosures. This was as the information was

- that bullying of the claimant was taking place, that being a breach of the implied term of the employment contract between the claimant and the respondents. That was information as to a failure by the respondents to comply with a legal obligation. Alternatively, it was a risk to the health of the claimant. The disclosure therefore was a qualifying disclosure in terms of Section 43B(1)(b) or (d).

- that patrols being carried out under the auspices of Sergeant Findlay did not comply with the patrol records compiled comprised a qualifying disclosure in terms of Section 43B(d) of ERA. The information was to the effect that although records showed patrols being done at particular times, patrols were not in fact being carried out at those times. It was being suggested that fewer patrols than ought to be carried out were being carried out, notwithstanding records apparently showing that patrols had been carried out. In a similar way to the disclosure made in February 2011 by the claimant that patrols were not being carried out with the frequency with which they ought to be

carried out, this disclosure in May 2013 related to a potential risk to health and safety of employees and the public in general.

Absence of the Claimant

30. The claimant has had 4 periods of sickness, attributable to the matters specified in respect of each one in this note:-

- 24/1/12 to 16/5/12 - Viral Infection
- 26/5/12 to 14/6/12 – Appendicitis
- 28/10/13 to 21/11/13 – Elbow Injury
- 31/3/14 to 22/3/15 –Work related stress

Alleged detriments

31. The claimant alleged that there were 19 detriments suffered by him due to the making by him of the protected disclosures set out above. The Judgment now deals with those alleged detriments in turn. The headings detailing each alleged detriment are taken from the claimant's written submissions.

Detriment 1 - The respondents deny claimant`s requests to carry out acting Police Sergeant duties

32. There is one APS per section. There was a period when PC Gilmartin was involved in a handover and was therefore an APS at the time when PC Carswell was also an APS in the section in question. The handover period was of short duration and PC Gilmartin became the sole APS after the handover session. The claimant applied to undertake duties as an APS in August 2012. He had earlier made an application on 21 February 2011. There was at that earlier point no vacancy.

33. At this time, in August 2012, the claimant also made it known that he was interested in becoming a mentor to junior officers.

34. Inspector MacRae met with the claimant to discuss his application to become an APS and to become a mentor. To become an APS a Constable required to be fully qualified as an AFO. If an officer is off sick on a long term basis retraining as an AFO is required. Level of absence/attendance is an appropriate aspect to consider when assessing an application to become an APS or Mentor.

35. When the claimant applied to become an APS in August 2012 his sickness record was such that he had 2 periods of absence. He had been absent between 24 January 2012 and 16 May 2012 and also 26 May 2012 and 14 June 2012.

36. Inspector MacRae discussed with the claimant his application to become an APS and a mentor. In course of that discussion it became plain that an important motivating factor in the application made by the claimant at this point was the financial reward by way of additional payment which the posts of APS and mentor each carried with them. That was said by the claimant to Inspector MacRae to be of more significance than developing younger officers.

37. Given this comment by the claimant and his absence record, Inspector MacRae did not consider it was appropriate to appoint the claimant as APS or mentor at this point. He noted the claimant`s interest as he was of the view that it might be that the claimant`s approach altered over time.

38. On a subsequent occasion, the precise date of which is unknown, the claimant was offered by Inspector MacRae the role of APS in a different section to that in which he worked. This offer was rejected by the claimant. The claimant told Sergeant Findlay, who then informed Inspector MacRae,

that if he wasn`t to obtain a position of APS in relation to his own section he did not regard it as a role he wished to perform with any other section.

39. The claimant subsequently became an APS in relation to his own section when the then APS was no longer to be in that role. This was at the commencement of October 2013. It was a decision made by Inspector MacRae.

40. These decisions made by Inspector MacRae that the claimant would not be appointed APS or mentor in August 2012 were unaffected by the fact that the clamant had at that point made protected disclosures. They were made for the reasons stated which were appropriate operational reasons.

Detriment 2 - Sergeant Findlay acting aggressive towards the claimant and the claimant threatened by Inspector MacRae

41. There are two aspects to these detriments alleged.

42. In November 2011 the claimant sent Inspector MacRae an email regarding the PIL chart. He was of the view that it was more appropriate for the PIL chart to be completed with totals shown in hours. He asked Inspector MacRae whether Inspector MacRae would wish him to undertake this task.

43. Sergeant Findlay then emailed the claimant saying that he understood the proposal had been made by the claimant to Inspector MacRae. He said that Inspector MacRae appeared to be under the impression that the claimant was making the proposal in his official capacity as Federation Secretary. He went on to express concern with the manner in which the point was progressed "*particularly when it would appear that none of the membership at Hunterston were consulted in the first instance*." Sergeant Findlay said that he thought an explanation from the claimant would be helpful.

44. The claimant replied to Sergeant Findlay as follows:-

> "*Gerry,*
>
> *just to clarify, if I carry out any function as Hunterston Federation Secretary then i would sign off in the appropriate manner.*
>
> *Jeff."*

A copy of the emails is at page 6 of the bundle.

45. Following receipt of this email, and it would appear somewhat irritated by its content which he regarded as being unhelpful and as not clarifying the point, Sergeant Findlay asked the claimant to come to his office. Words were exchanged between Sergeant Findlay and the claimant. The claimant left the office in what appeared to be an angry fashion. He did not respond to Sergeant Findlay`s insistence that he return to the office.

46. Inspector MacRae was contacted. He attended shortly after the incident had occurred. He noted that the claimant was quite coloured in the face. He appeared to be upset as far as Inspector MacRae was concerned and to be highly agitated.

47. Both Sergeant Findlay and the claimant were spoken to by Inspector MacRae with a view to establishing what had happened. Inspector MacRae noted that Sergeant Findlay was calm and that his demeanour contrasted with that of the claimant.

48. Inspector MacRae said to the claimant that the claimant should apologise to Sergeant Findlay. Inspector MacRae expressed the view that there might be a requirement for a psychological assessment of the claimant. The claimant apologised unreservedly to Sergeant Findlay. The claimant was not forced to apologise to Sergeant Findlay. The apology arose in the circumstances

detailed above. The actings of Sergeant Findlay and those of Inspector MacRae as narrated in this judgment were not, in relation to this matter, done on the ground that the claimant had made a protected disclosure or disclosures.

Detriment 3 – Respondent refused to allow the Claimant to attend Police Treatment Centre at Auchterarder

49. A Police Treatment Centre existed at Auchterarder, and may still exist there. The claimant wished to attend that centre. In order to be able to attend that and to obtain any treatment, the claimant, and any other Police Officer, required to be a member of the Charitable Welfare Scheme. At the time when the claimant sought treatment through the centre at Auchterarder he had not been paying subscriptions and so was not a member of the Charitable Welfare Scheme. The decision as to whether any Police Constable is able to attend the Treatment Centre at Auchterarder is not one which can be made by Inspector MacRae. He is not in a position to refuse any such request or to grant it. Inspector MacRae telephoned Nigel Dennis to clarify with him whether the claimant was able to attend the Treatment Centre. It was established that it was not possible given the fact that the claimant had not subscribed to the appropriate fund at that point. Inspector MacRae tried to obtain funds with a view to assisting the claimant. That, however, did not prove possible to achieve.

50. There was no decision by Inspector MacRae that the claimant could not attend the Police Treatment Centre at Auchterarder. He was simply ineligible, not having paid any subscription or contribution. This was a matter therefore unrelated to any protected disclosure made by the claimant. A different officer who had used the Centre at a time when the claimant thought that officer was not a scheme member had in fact joined the scheme before making use of the Treatment Centre.

Detriment 4 - Respondent refuses Claimant`s request to sit Sergeant`s promotional exam at alternative location

51. The claimant was scheduled to sit an exam in relation to becoming a Sergeant. This was set for 28 April 2012. The location of the exam was to be Whitehaven.

52. By email of 10 April 2012 the claimant sent to Inspector MacRae a request that Inspector MacRae make enquiries about the claimant sitting the exam at Hunterston. The claimant referred to a Constable who had, he said, been able to sit the exam at Torness. A copy of that email appeared at page 59 of the bundle.

53. Inspector MacRae was a Senior Invigilator in relation to the Sergeant`s exam. He had become a Senior Invigilator during the course of 2011. The PC to whom the claimant referred as having sat the Sergeant`s exam at Torness rather than at one of the examination centres had sat that exam prior to a change in the examination system. That change involved a requirement that examinations be sat only at specific venues and in the presence of a Senior Invigilator and an assistant. Inspector MacRae was aware of those changed requirements. When he received the email from the claimant he referred it onwards to the Promotion & Examination Team in Oxfordshire. That was in an email dated 17 April 2012, a copy of which appeared at page 62 of the bundle. In that email Inspector MacRae referred to the request from the claimant that he sit the exam at Hunterston. Inspector MacRae said in relation to that question raised by the claimant:-

> "*I believe I know the answer, however, I would be obliged if you could reply and I will pass on the information to him."*

54. By email of 18 April 2012, a copy of which appeared at page 61 of the bundle, the Exam Administrator replied, commencing the email by saying:-

> "*I realise that this may be a disappointment for PC Hughes, but it is not possible now for an individual to sit the promotion exam in a separate location from the 3 centres already agreed with MPNA where we have Invigilators available to administer the exam."*

The email went on to say that if PC Hughes wished to sit the exam he was required to travel to Whitehaven to undertake it.

55. The decision that the claimant could not sit the exam at Hunterston was not a decision of Inspector MacRae. He was not able to influence that decision given the requirements of the examination provisions. He did not, by his email of 17 April 2012 influence, or seek to influence, the reply of 18 April 2012 confirming that sitting the exam at Hunterston was not possible. The decision that the claimant required to sit the exam at Whitehaven followed from the provisions applicable for the sitting of this exam and was not in any way associated with or done on the grounds that the claimant made a protected disclosure.

Detriment 5 – Respondent refuses Claimant`s request to become Tutor Constable (Mentor)

56. As referred to above, in August 2012 the claimant made a request to become a Mentor in relation to more junior Constables. This application was not supported by Sergeant Findlay. A decision on the application was taken by Inspector MacRae. Inspector MacRae communicated his decision by note dated 31 August 2012. His decision was, as detailed above, made on the basis of the absences of the claimant and his recent resumption of full duties, together with the claimant's comment regarding there being a financial motive to the application being made. A Constable who became a Mentor, PC Matchett had a lesser number of absences than the claimant and his absence

was for a shorter period than that of the claimant. It was important that Mentors had a good attendance record given their role in supporting and coaching those to whom they would become Mentors.

57. The decision that the claimant would not become a Mentor was not done on the ground that the claimant had made a protected disclosure.

Detriment 6 – Respondent unfairly raises the Claimant`s "*overtime count"*

58. The respondents operate a system where they try to ensure that there is fairness in allocation of overtime duties. A spreadsheet is maintained known as a "*Payment In Lieu Chart*" (PIL Chart). In determining who was to be offered overtime, the score ascribed on the PIL Chart to each Officer was considered. The Officer with the lowest PIL Chart was next in line to be offered overtime. When an Officer then worked overtime hours or indeed refused the opportunity to work overtime hours, his score on the PIL Chart increased. This meant that he took "*a backward step*" in the "*queue*" for overtime opportunities.

59. It was recognised by the respondents that if someone was off on sick leave the number ascribed to them on the PIL Chart would remain constant. This was as no overtime was being worked by that Officer in that circumstance. Others who were at work during that time and who therefore had the opportunity to work overtime would see their PIL Chart score increase. This would mean that someone returning from long term sick had almost certainly a lower score on the PIL Chart than someone who had been at work. The respondents` view was that this was inappropriate. Firstly, it gave an advantage in securing overtime to someone returning from sickness absence. Secondly, it might well be unfair for health reasons for overtime to be offered to such an Officer returning from sick leave. It might put that Officer under pressure to work overtime hours when health remained an issue. Working those extra hours might not be helpful to the Officer's health.

Alternatively, it might see the Officer refusing overtime due to health concerns, then seeing his or her PIL score increase because of that.

60. A copy of the PIL Chart for August 2012 appeared at page 92 of the bundle. In relation to the claimant it showed a score of 10 at the beginning of the month and 17 at the end of the month. There were entries showing an increase of 3 during the month. The 4 extra days taking the end of month total for the claimant to 17 came about as a result of a manual adjustment made by Inspector MacRae. The figure of 4 additional days was arrived at by Inspector MacRae by his application of the normal procedure which applied in the situation of an Officer returning from absence. In that circumstance the figure in the PIL Chart is amended to become the average figure of colleagues at that point. That is done for the reasons outlined above and to ensure that such an Officer returning from sick leave is on an equal footing with Officers who have been present during the period of sick leave on the part of that Officer. In the claimant`s case this meant that he moved from 10 to 14 days, putting him on an equal footing with other Officers. This was, as mentioned, the standard practice applied in that situation. The claimant then worked 3 overtime shifts as noted in the PIL Chart, taking his end of month PIL score for August to 17.

61. The decision taken by Inspector MacRae was not an act done on the ground that the claimant had made a protected disclosure.

62. The claimant also raised around October 2012 concerns with Inspector MacRae that he was not receiving overtime hours.

63. In an email from Madison Innes of 11 December 2012 to Inspector MacRae, which appeared at pages 133 and 134 of the bundle, Ms Innes said in relation to overtime for the claimant:-

"*However, I can only follow the last instruction that was given, and that was that PC Hughes was not to be detailed for overtime until further notice."*

64. Overtime is only offered to AFOs. There had been at an earlier date an email sent by Inspector MacRae to supervisors. That email was sent on 19 September 2012, a copy of it appeared at page 95(a) of the bundle. It read:-

"*Supervisors*

Please note that [the claimant] is not to be allocated any short notice PIL`s with immediate effect. This is only in relation to the dates 20.9.12 to 26.9.12 at the moment."

65. Although it is not entirely clear, it appears that Ms Innes misunderstood this instruction when relayed to her. There was no evidence of any different instruction at any point being given to her or to anyone else within the respondents` HR or payroll sections as to overtime allocation for the claimant.

66. The decision or act of Inspector MacRae was a decision appropriately taken and was not done on the ground of any protected disclosure made by the claimant. The acting of the respondents on the basis of the understanding of Ms Innes was also not an act done on the ground of the claimant having made any protected disclosure.

Detriment 7 – Claimant`s alleged underpayment for overtime at Torness

67. In April 2013 the claimant worked scheduled overtime at Torness. He received payment at a lesser rate than he regarded as appropriate and at a lesser rate than he understood fellow officer who worked the same shift to have been paid. There was potential disagreement between the claimant and the respondents as to travel time which the claimant was to be paid in relation

to this overtime shift. He set out his position in a note which appeared at page 159 of the bundle.

68. After investigation and consideration the respondents made payment to the claimant in respect of the hours which he regarded as being the appropriate basis for payment. The decision initially taken by the respondents to pay the claimant less than he regarded himself as being due was not an act done on the ground that the claimant made a protected disclosure. It was a decision made due to a difference in view as to the travel time which was to be paid to the claimant. It was not a decision taken by inspector MacRae. The decision was taken in the respondents' planning department which is based at Dounreay. There was in any event no detriment to the claimant in that payment at the rate which he regarded as being the appropriate one was made to the claimant shortly after the initial decision had been reached.

Detriment 8 – Not insisted upon

Detriment 9 – Respondent fails to carry out properly serious concerns investigation into disclosures made by the Claimant.

69. As detailed above, the claimant in his protected disclosure in September 2012 to Superintendent Stephenson set out his concerns in relation to the level of patrols carried out by the respondents. Superintendent Stephenson had investigated this matter and a reminder had been issued to all supervisors regarding the minimum level of patrols which were required. The claimant was informed of this.

70. In course of the meeting between the claimant and Superintendent Stephenson there had been no mention by the claimant of an allegation of bullying.

71. When the claimant received the email from Superintendent Stephenson of 29 October 2012 confirming the position with regard to the reminder being issued in respect of carrying out of patrols, he replied to it. The email from Superintendent Stephenson appears at page 107 of the bundle. The claimant`s reply appears at page 106 of the bundle. The claimant replied in the following terms:-

> "*thanks very much for your response below it was very much appreciated, can I please ask who is dealing with my allegation of being bullied or is that a separate matter altogether? who should i be speaking to with regards to the serious matter of bullying?"*

72. Superintendent Stephenson replied by email on 30 October 2012. A copy of that email also appears at page 106 of the bundle. He wrote:-

> "*I am somewhat confused as I was unaware that you had made an allegation of bullying. During our recent meeting you confirmed to me that your only issue was the subject of the report of serious concern, how the patrol strategy was being applied at Hunterston. I specifically asked you if you had any issue with serving at Hunterston after having made such a report and you confirmed to me that you had not. In the circumstances can I please advise you to submit a formal Grievance as soon as possible through your OUC providing in details your reasons for your allegation of bullying.*
>
> *I am also now obliged to review the process being applied in regard to your report of serious concern in view of your allegation of bullying as I am concerned that there is more to this matter than I was previously made aware of."*

73. The claimant, notwithstanding this advice to submit a grievance, did not do so at this time or at any other time.

74. Superintendent Stephenson was very concerned about the view of the claimant that he had raised an issue as to bullying with him. Superintendent Stephenson was quite clear that the claimant had not done this. He was concerned that the claimant believed that he had raised this matter. This was of particular concern to him given that the claimant was an AFO and therefore carried weapons. He was concerned to the mental state of the claimant and risks associated therefore with the carrying of a weapon by the claimant. He therefore sent an email to Chief Inspector Needham requesting that he become involved. A copy of that email appeared at page 109 of the bundle. It was sent to Chief Inspector Needham shortly after the email from Superintendent Stephenson to the claimant on 30 October 2012. It read:-

> "*I will give you a detailed briefing on the report of serious concern referred to below on my return from leave. Essentially, the issue of how the patrol strategy was being applied has been resolved. I will need you to speak to key individuals to confirm that this is the case and that the required level of patrolling is maintained going forward. However, on a more serious matter, I will need you to look closely at PC Jeff Hughes as I am concerned that he may have psychological issues that may necessitate his removal from firearms duties. I had a lengthy interview with PC Hughes at the end of September in order to assess if I should remove him from firearms, however, during the meeting he appeared rational and made none of the allegations of bullying that had brought the Officer to my attention at that time. As you can see from the email below PC Hughes appears to be fired up again which causes me concern for a number of reasons."*

75. On receipt of this email Chief Inspector Needham spoke with Inspector MacRae to ascertain his view as to whether the claimant was exhibiting any signs which might mean that it was inappropriate that he carry a firearm. Inspector MacRae said to Chief Inspector Needham that he did not have a concern in that regard in relation to the claimant at that point. The claimant therefore retained his firearms authority.

76. Chief Inspector Needham became involved in investigation of this matter. He spoke with Superintendent Stephenson prior to embarking upon the enquiry. It was confirmed to him by Superintendent Stephenson that the issue of patrolling had been dealt with. An eye was to be kept on that area. The matter with which Chief Inspector Needham was to deal was that of alleged bullying. He was conscious that he had no detail of what the allegations of bullying comprised. None had been given to Superintendent Stephenson. Chief Inspector Needham spoke with Detective Inspector Gordon Allan of the Police Standards Department given that potential misconduct might be involved. Detective Inspector Allan confirmed to Chief Inspector Needham that an initial fact finding enquiry should be carried out as this would help establish if potential misconduct was involved. It would also obtain details of what it was that the bullying was said to involve. If any misconduct issues were revealed, the person who might be subject of misconduct would be made known. That might lead to further investigation in accordance with the appropriate regulations.

77. On 22 November 2012 Chief Inspector Needham met with the claimant. The claimant said to Chief Inspector Needham that concerns which had led to him raising the issue of patrols at an earlier point had not been dealt with. Chief Inspector Needham said to the claimant that his understanding was that the issue of patrolling had been dealt with. The claimant did not raise at this point specific allegations of falsification of patrolling records. He went on then to provide information as to the allegations of bullying behaviour he made. The claimant referred to APS duties, mentoring opportunities, allocation of overtime, annual leave allocation, allocation of additional rest days, promotion examination, the Police treatment Centre and visits to that, a matter in relation to the wearing of ear defenders and an issue regarding passes for the respondents` site.

78. Chief Inspector Needham investigated these allegations made by the claimant. He obtained information from Inspector MacRae as to the reasoning for particular decisions made by Inspector MacRae of which the claimant was

critical and which the claimant had referred to as being instances of bullying. He considered documentation in relation to the PIL Chart and the addition of 4 made to the PIL number of the claimant following his absence on sick leave in 2012. He considered all the other matters raised with him by the claimant. He made appropriate and reasonable enquiries in order to enable him to come to a view. The view which he reached was that there were appropriate reasons for decisions taken and that, notwithstanding the view of the claimant, there had been no bullying or victimisation or singling out of the claimant for any mistreatment or detriment.

79. In light of the fact that the claimant had said to Chief Inspector Needham that he did not regard the patrol issue as having been resolved, Chief Inspector Needham examined patrol records together with information from the swipe system used on site, known as ADACS. From that examination, Chief Inspector Needham was satisfied as to the level of patrol activity being undertaken.

80. A report was then prepared by Chief Inspector Needham and submitted to Superintendent Stephenson. The report was submitted on 7 December 2012 although it erroneously bears the date of 7 December 2011. A copy of that report appears at pages 137 to 140 of the bundle. It dealt with the matters raised by the claimant and also addressed the point which Superintendent Stephenson had initially referred to Chief Inspector Needham. Addressing that point, the report states that the claimant "*appeared rational and coherent and gave no rise to any concerns about his suitability to carry a firearm. He does, however, seem to be very focused upon the issue of the application of CTX options at the unit*." CTX is an abbreviation for counter terrorism.

81. The recommendation of Chief Inspector Needham in the report appears at page 139 of the bundle. He recommended the following course of action:-

> "1. *With respect to the application of CTX options it is clear the patrolling time has increased at Hunterston since PC Hughes*

first highlighted issues at the unit. I recommend that I meet with the OUC and direct him to ensure that all CTX options are being utilised. I will periodically audit CTX option sheets and during visits to Hunterston I will personally ensure that all CTX options are being applied.

2. *With respect to the allegations of bullying, I do not believe that the allegations made by PC Hughes can be substantiated as bullying and harassment but instead I believe them to be a series of minor unrelated incidents which through PC Hughes` lens appear to be victimisation. There is some evidence that local policies have not been strictly adhered to with respect to such things as the PIL Chart and annual leave rotas. However, nothing that PC Hughes told me or showed me leads me to believe that these have been deliberately manipulated to cause a detrimental effect to PC Hughes. I will discuss with the OUC the application of PIL Charts and annual leave charts etc and ensure that policies around their use are being applied correctly. I will ensure that Insp MacRae* (sic) *briefs all supervisors to the effect. I will then speak to PC Hughes informing him of my decision and reasons behind them and informing him that in relation to this allegation no further action will be considered.*

As stated earlier, PC Hughes seems to be very focused on the issue of the OUC and his supervisor not applying CTX options correctly. I do not believe that he will readily accept that this matter has now been dealt with, however, I intend to make it very clear to him that in my view this is the case."

82. It was the view of Chief Inspector Needham that mediation would be helpful between the claimant and Sergeant Findlay and Inspector MacRae with a

view to establishing common ground and resolving difficulties, thereby increasing harmony within the unit.

83. A meeting took place between Chief Inspector Needham and the claimant on 16 January 2013. During the course of his visit to the site at that time Chief Inspector Needham observed patrolling activity on both day and night shift and found all to be as it should be.

84. When Chief Inspector Needham met with the claimant on 16 January 2013 Chief Inspector Needham explained the view at which he had arrived, that being as set out in his report to Superintendent Stephenson. He said that he would look at any fresh evidence which the claimant brought to him in relation to victimisation or bullying. He explained his position in relation to the investigation of patrolling which he had carried out. In his view the matter was closed. The claimant, however, did not accept the findings. Chief Inspector Needham formed the impression from the claimant`s reaction that the claimant remained of the view that the way in which he thought that the respondents should be operating to protect the facilities and nuclear material was correct.

85. On 2 May 2013 Chief Inspector Needham met again with the claimant. The claimant repeated the allegations of bullying which he had earlier made to Chief Inspector Needham. It was explained to him that these matter had already been considered by Chief Inspector Needham and that, without any new information, they would not be reconsidered. The claimant also repeated his allegations that patrols were not being carried out as they should be. He was specific at this point as to the actions or inactions of Sergeant Findlay. He said that Sergeant Findlay was, in carrying out the patrols, not complying with the patrol records. This amounted in effect to an allegation of falsification of records. It was the first time anything which might be taken as being such an allegation had been made by the claimant.

86. Given the reference by the claimant to records and the inaccuracy of those as against the patrols carried out, Chief Inspector Needham asked the claimant to obtain some documentary evidence supporting the allegations which he made. The view which Chief Inspector Needham had was that it was important to the claimant that punitive action be taken against Sergeant Findlay.

87. In light of the allegations made, Chief Inspector Needham was concerned that there might be potential misconduct on the part of Sergeant Findlay. He therefore spoke once more with Detective Inspector Allan of PSD. He was again advised by Detective Inspector Allan that a proportionate fact finding enquiry should be carried out and that if potential misconduct was exposed by reason of that enquiry, the appropriate regulations could then be invoked.

88. The claimant met with Chief Inspector Needham once more on 11 July 2013. At that time he provided paperwork relating to patrols involving Sergeant Findlay. Chief Inspector Needham took a statement from the claimant and obtained from him the patrol records which the claimant had brought with him. This meeting related to that topic. The claimant made no allegations of bullying at this meeting.

89. As Chief Inspector Needham had carried out perusal of the ADACS record at an earlier point, he was of the view that it was for that reason and with a view to ensuring total impartiality, appropriate that a "*fresh pair of eyes*" look at the records and consider this matter. He therefore requested Inspector John Hannah OUC at Torness, to become involved and consider records supplied by the claimant and also any information from the ADACS system and any other relevant information as he saw it.

90. That investigation was carried out by Inspector Hannah. The results of it were passed to Chief Inspector Needham. They were communicated by Chief Inspector Needham to the claimant on 20 January 2014.

91. The report from Inspector Hannah appeared at pages 205 to 209 of the bundle. Chief Inspector Needham considered that report. Based on it he was of the view that the level of patrol activity was satisfactory. He was also of the view that there was no basis for an allegation of misconduct. Patrol records were not 100% accurate. Where the claimant had said that patrols were not undertaken as recorded, Inspector Hannah found that on several occasions they had been conducted but slightly outwith the times stated. Chief Inspector Needham spoke with Sergeant Findlay as to the accuracy required in relation to record keeping relative to patrols. He made a note of that conversation. The note of it appeared at pages 365 and 366 of the bundle.

92. When speaking with the claimant on 20 January 2014 Chief Inspector Needham informed him of his view as detailed above. The claimant disagreed with the view taken by Chief Inspector Needham. Chief Inspector Needham was of the view that the claimant seemed unable to grasp that it would not be expected that the Sergeant would be a patrolling officer, and that the Sergeant`s role would be to co-ordinate daily activity and to be immediately available to deploy resources under command of the Sergeant if there was any incident.

93. The investigation carried out by Chief Inspector Needham was a reasonable and proportionate one. He was not influenced either in carrying out steps or in not carrying out any steps by the fact that the claimant had made protected disclosures. There was no relevant detriment suffered by the claimant in relation to these events.

Detriment 10 – Respondent refuses to allow the Claimant to attend Bronze Commanders Course – leadership development course

94. In July 2013 the claimant sought to attend a leadership development course and a Bronze Commanders` course. These courses are of advantage in relation to development and potentially when consideration for promotion is undertaken. The claimant was nominated by Inspector MacRae for such

courses when Inspector MacRae felt that the claimant was ready and able to complete that training. Inspector MacRae had regard in determining whether that was or was not his view at any stage to the claimant`s attendance/absence and his period of non-deployment. Both leadership and Bronze Commander training are courses which are initially targeted towards those who are already Sergeants. The claimant was not a Sergeant or APS in July 2013. Any APS is offered a course if there is a place available and if, having regard to attendance and deployment, it is considered appropriate. A Sergeant who has failed to pass any such course has a prior call on any available places and will therefore be offered a place prior to that opportunity being given to an APS.

95. The decisions not to offer the claimant a place on both the Bronze Commander course and the leadership course in July 2013 were not acts done on the ground that the claimant had made a protected disclosure. The decision was made on the principles applied on a standard basis in filling places for such courses.

Detriment 11 – Chief Inspector Needham allegedly saying that the Claimant had "*grassed everyone up at the unit*" for not carrying out patrols they were supposed to be doing

96. There was no evidence to substantiate this remark as having been made by Chief Inspector Needham. The claimant formed the view that it had been made as a result of being told by a fellow officer that a different officer had said that this had been said to him.

Detriment 12 – Respondent refused to agree to pay for physiotherapy for the Claimant

97. In January 2014 the claimant raised with Inspector MacRae the possibility of the respondents paying for private physiotherapy. Inspector MacRae referred this matter to the respondents Occupational Health Department ("*OHD*"). He

was informed by the OHD Doctor that she did not support private physiotherapy for the claimant and that she had said to the claimant that he should see his GP. Inspector MacRae spoke with the claimant and informed him of the procedure before referral. The decision taken was not to make arrangements for private physiotherapy for the claimant and not to make payment relative to that. It was not a decision taken on the ground that the claimant had made protected disclosures. It reflected the position of the respondents in relation to such matters for anyone within their employment.

Detriment 13 – Respondent takes approximately 4 months to arrange Claimant`s appointment with Clinical Psychologist

98. On 22 January 2014 the claimant sent to Inspector MacRae an email asking if CNC personnel had access to Clinical Psychologists and, if so, whether it might be possible that Inspector MacRae could arrange an appointment for him. A copy of that email appeared at page 377 of the bundle.

99. That day Inspector MacRae prepared a referral to OHD. A copy of that referral appeared at pages 378 and 379 of the bundle. Given the request by the claimant that he might be referred to a Clinical Psychologist in relation to bullying, Inspector MacRae was concerned as to the mental health of the claimant. He at that point suspended the firearms authorisation of the claimant. A copy of the report completed by Inspector MacRae in that regard appeared at pages 380 and 381 of the bundle.

100. The appointment with the Psychologist occurred on 30 April 2014. There was no lack of action or intervention by Inspector MacRae resulting in the time passing between referral and the appointment. It is unclear why the appointment took just over 3 months to take place. There is no credible evidence before the Tribunal that any other Officer had arrangements made for any similar type of referral within a shorter time frame than occurred in relation to the claimant. Sergeant Baird gave no evidence of that being the case as far as he was concerned. If there was any delay in making

arrangements, that was not an act or deliberate failure to act done on the ground that the claimant had made protected disclosures.

Detriment 14 – Actions carried out by Sergeant Findlay investigating and reporting the claimant to the Respondents concerning the circumstances of the Claimant`s return from Bisley after firearms course

Detriment 15 - Suspension and disciplinary action taken against the claimant because of the events detailed at point 14

101. AFOs are required to attend training at Bisley from time to time. The courses involved are demanding both physically and mentally. Given that, and given the travel time between homes around Glasgow and Bisley, in allocating time for attendance at the training event time is also included for travel. When therefore a course concludes at Bisley the subsequent day is designated a travel day. This is for safety reasons and for the health of the AFOs attending the course in that they are to stay over in Bisley following the final day of the course and then to travel north to their home around the Glasgow area on the following day.

102. It was formerly the case that the respondents were more relaxed as to AFOs leaving Bisley on the day of conclusion of the training and travelling north. In some instances it may still be possible for such travel to take place if, for instance, there are various officers in the car and the driving is to be shared. Permission, however, requires to be obtained if travel is to occur immediately following the course either in the situation just described or in the event of some pressing domestic requirement for return of the Officer to his or her home.

103. The claimant attended Bisley for a 2 day course on 23 and 24 September 2013. Three nights accommodation in a hotel was booked. There was a travel day allocated to him in respect of the day before the conference commenced

and the day after it concluded. The claimant was rostered in the duty roster as being absent from work due to travel on those days.

104. At pages 534 and 538 of the bundle forms appeared. Those were signed by the claimant on 23 and 24 September 2013 respectively. They related to the training at Bisley on those days. Just above the claimant`s signature on each of those forms there appears the following, in bold:-

> "***Accommodation***
>
> ***I have been informed that where I have been given a travel day following refresher training, I will not commence my journey home until the start of my normal working day following this training. This will ensure sufficient rest prior to travel.***"

105. The claimant was aware that he should not travel home on the day of conclusion of the course.

106. A member of the claimant`s wife's family had been ill in the period prior to September 2013. The training in Bisley was conducted on a Monday and Tuesday. At around 5pm on the Monday the claimant`s wife telephoned him and, due to the health of her family member, requested that the claimant return home immediately. The claimant, however, did not do this. He decided that it was more important to stay on the course with a view to obtaining his firearms "*ticket"*. He therefore remained in Bisley and completed the following days training. He was aware that he should contact Inspector MacRae if his plan was to depart from Bisley on the final day of training, the Tuesday, after training had been completed. He had an office number for Inspector MacRae. He also had Inspector MacRae`s mobile number. He made one attempt to contact Inspector MacRae on the mobile number for Inspector MacRae on the Tuesday afternoon. He was unsuccessful in making contact with Inspector MacRae. He did not try to contact anyone else or to telephone the office.

107. The claimant left Bisley on the afternoon of Tuesday 24 September 2013. He travelled home. Given that he had arrived home, the following day which was designated a travel day from his point of view would then have been a working day or a day on which he ought to have taken annual leave if he was not to attend work. The claimant made no contact with the respondents to explain that he had returned home and to outline why this had occurred. He simply absented himself from work on 25 September 2013. On his return to work on 26 September 2013 he made no mention of having travelled back from Bisley on 24 September 2013 and having been absent form work on 25 September 2013 for a reason other than travelling home.

108. There had been an earlier application by a different Officer for permission to return home at conclusion of a course in Bisley. Inspector MacRae had refused that application.

109. A further Officer had travelled home after such a course in Bisley without obtaining consent so to do. Disciplinary proceedings followed in relation to that Officer, whose name was Gibson. That Officer had an earlier warning on his file. Given that fact and in light of the breach by him of the requirement not to travel on the final day of the course, that Officer was dismissed. Detective Inspector Gordon Allan was the dismissing officer.

110. It is unclear exactly when the respondents "*tightened up*" on any practice which may have developed as to Officers travelling back from Bisley on the final day of training. By September 2013, however, that "*tightening up*" had occurred. The claimant was aware that he ought not to travel unless he had specific permission so to do, and that permission potentially might not be granted or might be granted only in specific and pressing circumstances.

111. On 29 January 2014 Sergeant Findlay submitted a report to the respondents regarding the claimant having travelled home from training in Bisley on the last day of training. This related back to the travel by the claimant on 24

September 2013. A copy of the report made by Sergeant Findlay appeared at pages 522 and 523 of the bundle.

112. Sergeant Findlay explained in his report that he had attended the street outside the claimant`s house at 7am on 25 September 2013. He had noted the presence of a car which he believed to be a hired car. He took photographs of the vehicle.

113. In the period between 25 September 2013 and 29 January 2014 Sergeant Findlay established that the vehicle was indeed a car hired by the claimant. On the basis that the vehicle was outside the claimant`s house in the early hours of 25 September 2013, he concluded that the claimant had travelled home from Bisley when he ought not to have. He ought to have been setting off from Bisley in the morning of 25 September 2013. Sergeant Findlay then sought to establish whether the claimant had consent to be home earlier than ought to have been the case. He also sought to establish whether arrangements had been made by the claimant to have a day of leave on 25 September 2013 rather than simply not be at work whilst ostensibly travelling home from Bisley. He also sought to establish whether the claimant had made an expenses claim for overnight accommodation on 24 September 2013.

114. The report prepared by Chief Inspector Needham, referred to in relation to alleged detriment 9, detailing that in his view there had not been bullying of the claimant through, amongst other elements, conduct which the claimant alleged had occurred at the hands of Sergeant Findlay, was concluded with the outcome being communicated to the claimant on 20 January 2014. Sergeant Findlay was spoken to by Chief Inspector Needham around that time and given advice regarding record keeping in relation to patrol logs. The course of action adopted by Chief Inspector Needham with Sergeant Findlay in this regard did not amount to anything which was part of formal misconduct hearings. It was, in effect, an informal word, one stage below formal misconduct proceedings being instituted.

115. As stated, Sergeant Findlay was, after 25 September 2013, seeking to check some facts. The precise reason why it took until 29 January 2014 to submit his report in relation to the actings of the claimant is unknown.

116. On receipt of the report from Sergeant Findlay, which was accompanied by copies of the photographs taken by him, Detective Inspector Gordon Allan undertook an investigation.

117. In course of that investigation in any interaction with him the claimant was assisted by Nigel Dennis, CEO of the Federation. Mr Dennis sent to Detective Inspector Allan an email on 6 February 2014. It was sent with the knowledge and authority of the claimant. A copy of it appeared at page 521 of the bundle. It contained the following:-

- *"Police Constable Hughes acknowledges and accepts that he left F.T.U (South) early on the day in question and in doing so disobeyed lawful orders and instructions. There are, however, compelling reasons as to why this occurred and he shall expand on these when provided with the opportunity during interview.*

- *Police Constable Hughes is going through a difficult period in his life and accepts he may well have submitted a claim for an `Overnight Allowance` on the day in question. If this were to be the case this was done in complete error and not with any dishonest intent.*

- *Police Constable Hughes wishes to register his apologies and regret at an early stage of the investigation. He acknowledges that he has fallen below the standards of professional behaviour on this occasion and will provide the rationale for this one off lapse to the Investigating Officer.*"

118. This response was to a notice of alleged breach of standards of professional behaviour issued to the claimant and acknowledged by him on 4 February 2014. A copy of that document appeared at pages 519 and 520 of the bundle. The misconduct alleged was that, in breach of instruction, the claimant had travelled home soon after conclusion of the training and that no permission had been sought to travel on the training day. It was further alleged that an expense claim had been submitted for the overnight allowance on 24 September 2013 to which there was no entitlement as the claimant had not stayed in the hotel on that night. It was said that the expense form showed that a toll charge had been paid for the southbound journey but that no claim had been made in respect of a toll charge for the return journey. It was also said that the expense form showed that the vehicle had been refuelled at 16:34 on 25 September 2013. It was stated that it was suspected that the toll charge had not been claimed and the refuelling of the hire car had taken place late in the day of 25 September 2013 both in:-

> "*a dishonest attempt to conceal the fact that you had breached the course instructions and travelled when you knew you should not have. The net effect of this is that you did not perform your duty on a rostered travel day, nor did you request annual leave or time off that day*."

119. An investigation meeting was held by Detective Inspector Allan. A record of the interview appeared at pages 541 to 548 of the bundle. It was a transcript from the recording of the meeting.

120. The claimant was accompanied by Mr Dennis.

121. At the outset of the meeting Detective Inspector Allan asked whether there had been sufficient pre-interview information to allow the claimant to take part in the interview and to answer the allegations. The claimant confirmed that this was the case. The claimant made a statement as to the circumstances. He accepted that he had signed the forms at pages 534 and 538. He accepted that there were standing instructions saying that he should stay

overnight and not travel the following day. The following passage appears in the transcribed notes of the meeting at page 547 of the bundle, JH being the claimant and GA being Detective Inspector Allan:-

"*GA* *Did you breach orders and instructions by travelling home on 24 September 2013, the second day of your training?*

JH *Yes*

GA *Did you perform any duty on the allotted travel day, 25th?*

JH *No Sir*

GA *Did you make any attempt to reconcile that day, that 12 hours with your OUC by way of requesting time off in lieu or annual leave?*

JH *No, Sir*

GA *Why not?*

JH *On my return to work obviously I have dealt with the issues at home, and on my return to work my focus was on going to work, doing my job and doing everything . Not telling them was purely an error on my part and I hold my hands up to that. There was no – there was no – there was no intent."*

122. At conclusion of the misconduct interview Detective Inspector Allan asked the claimant and Mr Dennis whether they were satisfied with conduct of the interview. Both of them said that they were satisfied.

123. The misconduct was therefore admitted by the claimant. He was suspended on 4 February 2014. There was no comment by Detective Inspector Allan during this interview that in his view the claimant's conduct did not amount to misconduct.

124. It is unknown precisely why Sergeant Findlay visited the street where the claimant lives at 7am on 25 September 2013 save that he thought there may have been misconduct by the claimant in travelling home early from the training course in Bisley.

Finding in Fact and in Law

125. This action by Sergeant Findlay is, on the balance of probabilities, viewed as having been done on the ground that the claimant had made a protected disclosure in the sense that a protected disclosure had materially influenced (in the sense of being more than a trivial or minor influence) the decision to report the claimant. Being aware, however, of misconduct on the part of the claimant, there was a duty on Sergeant Findlay to make the report of that misconduct to the respondents. Further, the claimant having admitted the misconduct there was no detriment caused to him by the report made by Sergeant Findlay. Given the misconduct and the admission of it, the decision to suspend the claimant was not an act done on the ground of the claimant having made a protected disclosure. Similarly, given that the misconduct was admitted as having occurred, suspension of the claimant at time of the charge of misconduct was not a detriment suffered due to an act or deliberate failure to act done on the ground of the claimant having made a protected disclosure.

Detriment 16 – Claimant refused permission by Sergeant Gilles to use the computer to print documents required for the Tribunal proceedings

126. In April 2014 the claimant attended his place of work. This was with consent of the respondents and was to enable him to access the computer and potentially to print documents in relation to the Tribunal proceedings.

127. The claimant was of the view that utilising the computer within Inspector MacRae`s office would assist him as it would enable him to have privacy and confidentiality given that other computers were in the office and were networked to a printer in the Officers' rest area. Sergeant Gilles explained to the claimant that he could not use that particular computer as he (Sergeant Gillies) required use of it for the entire day. There is no evidence in terms of which it can be found that the decision of Sergeant Gilles on this point was done on the ground that the claimant had made protected disclosures. The claimant did not suffer any detriment as a result of these events in April 2014 in that he obtained free access to data and his account by attending Torness in June 2015. His travel expenses were paid relative to that visit. This is confirmed by an email to the claimant of 1 June 2015 which appeared at page 619 of the supplementary bundle. The claimant exercised that access over a period of 4 days for approximately 3 hours per day at that point.

Detriment 17 – Respondent contacts Claimant excessively while Claimant attending Police Treatment Centre at Auchterarder

128. In April 2014 the claimant was in attendance at the Police Treatment Centre in Auchterarder. Chief Inspector Needham sent an email which appeared at page 450 which was followed upon that page and the subsequent pages through to 457 by emails relating to the same topic.

129. The email from Chief Inspector Needham on 7 April 2014 read:-

> "*Dear Jeff*
>
> *I understand that you would like to meet with a Senior Officer to discuss your concerns. I am aware that you are currently at the Police Treatment Centre for 2 weeks and therefore I have contacted you via your personal email address which I hope you can access, if I haven`t had a response to this email by Friday I will try you on your personal mobile number. I would like to meet with you to further discuss your*

concerns. Please could you let me know if you would be available to meet with me at Greengarth on your return from the Police Treatment Centre the week commencing 21/4/14."

130. By email 49 minutes later the claimant relied:-

"*Morning Sir,*

Hope all is well with yourself.

With regards to your email below, my understanding is that we have met on several occasions since I first made my allegations in September 2012, you have listened to my allegations and carried out an investigation, I listened to your reasonings behind your findings, I was not happy with the result of your findings so as a result I had requested a meeting as advised by Nigel Dennis with the DCC I requested this meeting in January 2014 which I CC`d you a copy of, as the DCC is involved with my misconduct allegation he has informed that even though he would like to but he could not at the present time deal with my serious allegations of bullying, an Officer`s falsifying official police documents thus putting public/nuclear safety at risk and my continued threats to whistleblow, taking into account that I have spoken to you previously to discuss my concerns I now think it is appropriate to discuss this with someone at a higher level such as the DCC, ACC, Chief Constable or other government authoritie`s (sic) *such as IPCC or IPT.*

Your advice and guidance would be most welcome,

Thanks very much for your time, have a nice day."

131. The emails went on during the course of 7 April 2014 (2 in number), 8 April 2014 (3), 9 April 2014 (4), 11 April 2014 and 21 April 2014 (1 email each day) and 22 April 2014 (2). There was no indication at any stage from the claimant that he was unhappy about the contact. His own participation in the email chain was with a view to arranging meetings with senior personnel. The contact with the claimant was not excessive. If it was to be so considered, it was not an act done on the ground of the claimant having made a protected disclosure. There was no detriment to the claimant due to any act or deliberate failure to act done on the ground that he had made a protected disclosure.

Detriment 18 – Respondent`s conclusion in health and safety investigation that the Claimant was not suffering from work related stress but experiencing "*stress at work*"

132. Sergeant Richard McWhirr was transferred to Hunterston from Torness on 24 February 2014. He had had no previous involvement with the claimant prior to arriving at Hunterston from Torness. He was appointed Liaison Support Officer for the claimant given the lack of his previous interaction with the claimant and given difficulties between the claimant and other personnel at Hunterston.

133. Sergeant McWhirr was assigned to collate all information for a health and safety report in relation to the absence of the claimant. This is a standard procedure undertaken by the respondents in cases of absence where the reason for absence is potentially something for which there might be responsibility on the part of the respondents. This was regarded as being an appropriate step to take in relation to the claimant given reference in fit notes to the claimant being absent from work due to work related stress.

134. The areas which Sergeant McWhirr was to address involved him seeking information from the claimant as to:-

- The views of the claimant upon what had caused his absence and as to his potential return to the workplace.

- The views of the claimant as to barriers which were preventing his return to the workplace.

- The views of the claimant as to what he felt the respondents could do by way, for example, of any reassurances which he might require in order to facilitate his return to work.

135. Sergeant McWhirr sought information from the claimant on these and any other relevant matters. The claimant was, however, unco-operative. He stated several times to Sergeant McWhirr that he had already given information to the respondents on all the matters which were being raised with him by Sergeant McWhirr.

136. A copy of a medical report prepared by Professor White in relation to the claimant and dated 18 March 2014 appeared at pages 413 and 414 of the bundle. A medical report in relation to the claimant had also been completed by Dr David Scott on 2 May 2014. A copy of that appeared at pages 470 and 471 of the bundle.

137. Sergeant McWhirr did not have access to those medical reports. Whilst the claimant mentioned Dr Scott to Sergeant McWhirr, he did not say that there was a report available. He gave no consent to Sergeant McWhirr to access these reports. He simply said to Sergeant McWhirr that he was not going to repeat himself in relation to information which the respondents already had or which he had already given to them. He did not ever alert Sergeant McWhirr to where he might obtain that information.

138. Sergeant McWhirr produced his report on 11 November 2014. A copy of it appeared at pages 709 to 727 of the bundle.

139. The conclusion reached by Sergeant McWhirr was set out in a passage which appeared at page 726 of the bundle. It reads as follows:-

> *"In order to provide some guidance to my conclusion I refer to the definition of work related stress as used by the Government Health & Safety Executive, namely*
>
> > *`The adverse reaction people have to excessive pressures or other types of demand placed on them at work`*
>
> *In the case of PC Hughes, from his perspective he would, I gather, claim that he has been placed under excessive pressure due to his perceived denial of overtime payment, training opportunities and bullying by his line management.*
>
> *From the available evidence I did not find proof of excessive demands being placed on PC Hughes. He performed the role of AFO, without additional demands or workload and with the required level of knowledge and training for his role. He does not appear to have been tasked with any duties beyond his capabilities, nor has he been given additional responsibilities beyond his capabilities.*
>
> *PC Hughes` present circumstances appeared to be related to his ability to cope with the challenges which he has raised against his employer and his perception that he has suffered due to the actions (or inaction) of the Force."*

140. The report by Sergeant McWhirr concluded with an entry in the section headed "*Learning Points*". It referred to disappointment on the part of the claimant that investigation of the complaint had taken so long and that there

had been a "*lack of punitive action against his line management following his reports*." Sergeant McWhirr stated that a prompter investigation may have had the same result but would have eliminated one of his complaints.

141. Sergeant McWhirr was impartial. He was prepared to criticise decisions taken by the respondents if that was regarded by him as being an appropriate response. The information which he had was much restricted due to the non-co-operation of the claimant and the absence of any information from him as to the medical reports of Dr Scott and Professor White, together with the absence of any consent on his part for Sergeant McWhirr to access those reports. The conclusion reached by Sergeant McWhirr was that the claimant had suffered stress at work but had not suffered work related stress in the sense of the definition by the Government Health & Safety Executive. His view was that this did not qualify as an industrial/work related injury. He noted that the claimant had been offered counselling through the force Employee Assistance Programme. He also noted that the claimant had been offered mediation between himself and his line managers. He recommended that further assistance or advice might be required following upon the result of the Employment Tribunal case which by then had been presented by the claimant. He said that it might be an advantage to have PC Craig submit Welfare Contact Reports in the future. The claimant had expressed a preference that PC Craig become involved as his Liaison Officer. PC Craig was subsequently appointed Welfare Liaison Officer.

142. The conclusion reached by Sergeant McWhirr was not an act done on the ground that the claimant had made a protected disclosure. There was no relevant detriment to the claimant through the actings of Sergeant McWhirr.

Detriment 19 – Claimant not permitted to return to work despite being "*certified fit*" to return to recuperative duties from on or around mid-December 2014.

143. The period relevant to the claim came to a halt on 7 August 2015. From February 2014, the claimant did not attend work. The claimant accepted that he was guilty of misconduct. A 12 month written warning was issued to him on 13 July 2014. There was an appeal lodged by the claimant, which was unsuccessful.

144. The claimant contacted Caroline Ashfield, HR Officer with the respondents for North & Scotland on 5 December 2014. He stated that his GP had just issued him with a fit note confirming that he may be fit for work taking account of a phased return and amended duties and that he would benefit from being re-introduced to the workplace, together with further treatment. Ms Ashfield made contact with Chief Inspector Needham and with Finola Robinson, Occupational Health Nurse with the respondents. She passed on the information which the claimant had given to her in relation to his GP`s fit note. This was on 5 December 2014 in an email which appeared at page 698 of the bundle.

145. Ms Robinson replied that day. She stated that her understanding of the situation was that there was no consent from the claimant to approach his GP or specialist for a report. He had refused that consent and had referred in a conversation with Ms Robinson to counselling or specialist help which he had received. He did not, however, state to her with whom any such counselling had taken place, when that had occurred and what type of counselling was involved. Ms Robinson stated in the email at page 698 of the bundle to Ms Ashfield and Chief Inspector Needham, the following:-

> "*Personally, I do not feel that we can consider allowing a return to work in any capacity without this information, as we do not know what*

recuperative duties are appropriate for him and have no clear picture regarding his mental health status."

146. At this point the claimant was keen to return to work at Torness. The respondents were, however, aware that there had been an issue when the claimant was previously stationed at Torness. The claimant had experienced stress related absence whilst working there. This was as he was living away from his family. The decision was therefore taken by the respondents that it was not appropriate for the claimant to return to work at Torness due to these medical issues. The respondents determined this at a management discussion meeting held on 22 December 2014. Notes of that meeting appeared at pages 732 and 733 of the bundle.

147. At that meeting it was also determined that a further management discussion or RAP should be held in the new year in relation to the claimant. Concerns were expressed that the claimant might potentially resume a firearms role. A referral was to be initiated to Ms Robinson to ascertain whether the claimant was medically fit to return to the workplace and to determine whether he met the respondents` medical standards as he had been receiving treatment for anxiety and stress. Ms Robinson was to attempt to obtain the claimant`s consent to have the latest letter from Dr Scott exhibited to her. The decision taken was that the claimant could not return to work pending a review by Occupational Health. A firearms role for the claimant was considered to be a matter of concern given previous behavioural issues which the claimant had exhibited in the workplace and also given the significant issues which he had with the respondents. The outcome of the meeting was made known to the claimant`s Welfare Liaison Officer. When the claimant became aware of the decision of the respondents, he sent an email to Ms Robinson of 8 January 2015. A copy of that appeared at page 743 of the bundle. He expressed the view that, as his doctor had said he was fit enough to return to work on recuperative duties, he disagreed with the decision taken by Ms Robinson. Ms Robinson submitted that email to Ms Ashfield and Chief Inspector Needham.

148. In replying to the claimant on 8 January 2015 Ms Robinson noted that Professor White said that he believed that further psychological intervention by him would be of benefit to the claimant`s mental health and that he (Professor White) would advise the respondents to consider funding this as soon as practicable.

149. The respondents requested information from the claimant to contact Professor White to establish the number of sessions required, the cost of those sessions and the timescale involved in provision of treatment by him. This was in an email to the claimant from Ms Ashfield of 9 January 2015. A copy of that email appeared at page 739 of the bundle.

150. The respondents approved funding for the claimant to receive treatment from Professor White for 5 sessions to be followed by a report enabling them to consider potential further treatment. This was on 15 February 2015. Professor White submitted an invoice on 2 March 2015 seeking payment in advance in respect of 5 sessions. That payment was made by the respondents. The claimant was due to commence treatment with Professor White in the week subsequent to 6 March 2015. Ms Robinson was of the view that she could not reconsider or review the claimant`s fitness to return to work until she received the report from Professor White.

151. The claimant`s GP issued to the claimant a fit note which the claimant submitted to the respondents on 6 March 2015. That stated that the claimant was fit for work "*indefinitely*".

152. Professor White`s report was received by Ms Robinson on or immediately prior to 23 March 2015. On 23 March 2015 she confirmed to Ms Ashfield that the report stated that in the opinion of the author the claimant was fit to return to work. Ms Ashfield in reply, both emails appearing at pages 822 of the bundle, said that the matter would proceed to RAP. She expressed concern as to the dispute which the claimant had with the respondents remaining

unresolved, with the claimant having turned down mediation and with the Employment Tribunal case still in process.

153. The claimant was aware that return to work was not as simple as obtaining a letter from his GP expressing a view that he was fit for work.

154. In January 2015 the claimant made a complaint to the Procurator Fiscal regarding operational issues at Hunterston. This was a matter referred to Police Scotland for investigation. The outcome of this investigation was not known until 4 April 2016. On that date it was confirmed that there would be no further action in relation to the allegations of criminal conduct which the claimant had made.

155. During the course of the investigation carried out by Police Scotland from January 2015 till April 2016, Police Scotland recommended to the respondents that it would be better that the claimant did not return to Hunterston to work there. There remained ongoing issues between the claimant and other employees at Hunterston. The respondents wished to address those workplace issues, in the interest of the claimant as well as of the organisation itself, by there being mediation involving the claimant and his colleagues at Hunterston. Any such session of mediation would almost certainly involve discussion of matters which were the subject of investigation by Police Scotland. It seemed inevitable therefore that a full and frank discussion of any such matters would not be possible given the ongoing investigation by Police Scotland.

156. The respondents considered the position with regard to return to work of the claimant at Risk Assessment Panel ("*RAP*") meetings. These meetings involve attendance by various personnel within the respondents` organisation. A Divisional Commander at Chief Superintendent rank chaired each such meeting. There were representatives from HR, Occupational Health and firearms. Consideration is given at such a meeting to the background of the case of an individual Officer and as to the current position

both in respect of health and any other relevant matters. The RAP is tasked with determining whether the Officer can return to work and if so on what basis. In conducting the RAP, the respondents always seek to have an Officer return to work as quickly as possible, whilst having regard to the duties of a particular Officer, which will generally involve carrying firearms.

157. A RAP took place on 9 April 2015. Notes of that meeting appeared at pages 832 and 833 of the bundle. The RAP was chaired by Chief Superintendent Worsell.

158. At the RAP the Chief Medical Officer confirmed that the claimant was fit to return to work. Given the nature of the illness by which the claimant had been affected, involving mental health concerns, there would, as standard, be a 6 month monitoring period. This was as the respondents had a requirement for an Officer to be free from symptoms for six months before the Officer could be returned to AFO training or duties.

159. As to potential return to the workplace, the view reached by the RAP was that it was not possible for the claimant to return to the workplace at this time given that he would not at this stage participate in mediation and that mediation was felt to be necessary as part of return to the workplace. Further, given the investigation by Police Scotland and the view expressed by that organisation as to the claimant returning to the workplace and given that mediation would involve discussion of matters which were subject to that investigation, again there was a barrier to returning to work of the claimant. The absence had been due to stress caused by the situation in the workplace. The stressors remained unresolved without mediation being possible. The RAP concluded that there was a risk that if the claimant returned to work he might prejudice his own recovery given that mediation and resolution of the workplace issues was not possible. Alternatively, or in addition, there was a risk that there would be prejudice to the Police investigations if the claimant was to return to the workplace.

160. The respondents recognised, however, that there had been specialist advice stating that the claimant was fit for all duties. They did not consider that he could return to work at Hunterston for the reasons set out above. If he was to work elsewhere for the respondents, he could not work at that time as an AFO given the requirement for 6 months freedom from illness and given a requirement for retraining and refresher courses as an AFO. Any posting elsewhere, in addition, involved the respondents in meeting extra costs relative to the claimant in that they would require to pay his travelling costs and accommodation costs. Moving any of the other officers with whom the claimant had had disagreements would also involve additional accommodation and travel costs on the part of the respondents. Given the medical information available as to the claimant being fit for work, the respondents restored the claimant to full pay with effect from 22 March 2015, notwithstanding his physical absence from the workplace.

161. The respondents considered the claimant`s potential return to work at a RAP meeting on 28 May 2015. A copy of the notes from that meeting appeared at pages 898 and 899 of the bundle.

162. At that meeting potential return to work of the claimant at Torness was considered. This ultimately did not prove possible for medical reasons given earlier issues for the claimant when last he worked at Torness, as mentioned above.

163. The RAP meeting also led to a referral to OHD for the claimant in connection with supporting the return to work plan in relation to the claimant. As to a precise date of return, the respondents remained concerned as to the Police Scotland investigation and its completion given the restrictions recommended due to the ongoing investigation.

164. A management discussion in relation to the claimant was held on 26 June 2015. Notes of that discussion appeared at pages 926 to 931 of the bundle. The meeting was held for three purposes. Those were:-

> "*1. Clarify the medical perspective and what if any actions are required.*
>
> *2. What if any form of AFO training is required within the Officer`s 6 month restriction in line with medical standards.*
>
> *3. Pathway for Officer`s return to the workplace in association with the ongoing PSoS (*Police Service of Scotland*) investigation. Progress around mediation, following Divisional RAP."*

165. Action points arising from the meeting on 26 June 2015 appear at page 931 of the bundle. The respondents were conscious of what they believed to be contradictory medical evidence as to the claimant`s fitness for work. The referral to OH was therefore to be accelerated. A gap analysis was to be carried out to determine what training requirements the claimant had in relation to firearms. Arrangements were made for him to be fitted with fresh body armour. In seeking to arrange training, the respondents wished to avoid a situation where the claimant might be present on training with other Officers based as Hunterston with whom he had issues. That might cause a difficulty both for the claimant and for those other Officers. An offer of mediation was again to be made to the claimant with a view to assisting with resolution of workplace issues. The respondents sought to put that in place in contact with ACAS in August 2015.

166. Any decisions taken by the respondents regarding the return to work of the claimant in the period to 7 August 2015 were decisions appropriately taken in light of the medical information available to the respondents and that which they sought to gather, together with the issues as to possible return to work of the claimant in light of concerns as to workplace relationships and the

ongoing Police Scotland investigation. No decisions taken by the respondents as to the claimant`s return to work during this time were done on the grounds that the claimant had made protected disclosures. There was no relevant detriment to the claimant through the actings of the respondents, albeit there was some frustration on the part of the claimant as to the time taken in this process.

Events after 7 August 2015

167. The respondents sought to place the claimant on a training course in October of 2015. This possibility was rejected by the claimant as he said that the notice given to him of the course was too short. Deployment of the claimant to Torness was considered by the respondents. That possibility was rejected by the respondents themselves however. This decision was made by them due to previous issues for the claimant which had occurred when he worked there. Travel and accommodation costs of deploying the claimant elsewhere made any such possibility inappropriate.

168. There was no evidence of any acts or omissions of the respondents in the period after 7 August 2015 which provided a basis for the view that acts or omissions of the respondents prior to 7 August 2015 had been done on the ground that the claimant had made protected disclosures.

The Issues

169. The issues for the Tribunal were as follows:-

1. What were the protected disclosures made by the claimant and when were those made?

2. Were there any acts or deliberate failures to act done by the respondents on the ground that the claimant had made a protected disclosure, which acts or deliberate failures to act subjected the claimant to a detriment?

3. If there was any detriment suffered by the claimant, what was that detriment?

4. If there was a detriment which had been suffered by the claimant due to an act or deliberate failure to act by the respondents done on the ground that the claimant had made a protected disclosure, what, if any, compensation fell to be awarded to the claimant?

Applicable Law

170. The law in relation to protection from detriments applicable when a worker has made a protected disclosure has altered in the last few years. The provisions currently in place relate to disclosures which were made after 25 June 2013. This is confirmed in terms of Section 24(6) of the Enterprise & Regulatory Reform Act 2013.

171. The disclosures in this case, both that agreed and that contended for by the claimant, were made prior to 25 June 2013. The applicable law therefore is such that the addition in terms of Section 19 of the Enterprise & Regulatory Reform Act 2013 of Section 47B(1A) of ERA is not of relevance. That addition provides for liability on the part of an employer for detriments by co-workers of a claimant. Prior to its addition, as confirmed in the case of ***Fecitt -v- NHS Manchester [2012] ICR 372*** ("***Fecitt***") an employer was not vicariously liable for detriments which may have been suffered by a whistleblower due to acts done by a fellow worker on the ground of a protected disclosure made by that whistleblower.

172. That position therefore pertains in this case in that any acts or deliberate failures to act which may, in the view of the Tribunal, have been done on the ground of the claimant having made a protected disclosure (and which have caused detriment for the claimant) do not, if done by a co-worker, provide a basis for a claim.

173. Further, the addition by Section 17 of the Enterprise & Regulatory Reform Act 2013 of the requirement that to be a qualifying disclosure a disclosure must be made in the public interest is not relevant in the decision making of the Tribunal given that it is effective in relation to disclosures made after 25 June 2013. To be a qualifying disclosure in this case the disclosure requires, however, to have been made in good faith.

174. A qualifying disclosure is in terms of Section 43B of ERA, taking account of the points just mentioned, a disclosure which was made in good faith which tends to show one or more of the following:-

> "*(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which she is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;*
>
> *(d) that the health or safety of any individual has been, or being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

175. In the case of ***Parkins -v- Sodexho Ltd [2002] IRLR 109*** ("***Parkins***") confirmed that breach of a term of a contract of employment fell within the terms of Section 48(3B)(1)(b) as being a breach of a legal obligation. There is an implied obligation of mutual trust and confidence in the contract of employment. An employer bullying an employee or permitting that would be in breach of that implied term.

176. In ***Royal Mail -v- Jhuti [2017] EWCA Civ 1632*** ("***Royal Mail***") disclosures had been made after 25 June 2013. The view was expressed by the Court of Appeal that the employer could be vicariously liable in terms of Section 47B including subsection 1A thereof in respect of the actings of the claimant`s immediate manager.

177. The relevant terms of Section 48 of ERA in place at the time applicable to this case provide that an employee may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of Section 47B. When that occurs, it is for the employer to show the ground on which any such act or deliberate failure to act was done.

178. A claim must be presented prior to the end of the period of 3 months beginning with the act or failure to act to which the complaint relates or, where the act or failure to act is part of a series of similar acts or failures, the last of them. This is in terms of Section 48(3) of ERA.

179. The claim in this case was presented on 29 April 2014. A claim is timebarred insofar as it founds upon any detriment said to have been suffered by the claimant resulting from an act prior to 30 January 2014 unless the act is part of a series of acts and one of the acts in that series of acts occurred in the period of 3 months leading up to the presentation of the claim.

180. The date for presentation of the claim can be extended if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of 3 months. There was no evidence or submission in this case addressing any such argument.

181. Detriment was said in the case of ***Ministry of Defence -v- Jeremiah [1980] ICR 13*** ("***Ministry of Defence***") *to be putting under a disadvantage*". It was stated that a detriment exists "*if a reasonable worker would or might take the view*" that an action by an employer was in all circumstances to his detriment.

182. The law in relation to loss is not set out given the decision made by the Tribunal.

183. In terms of ***Fecitt***, Section 47B of ERA is infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) an employer`s treatment of a whistleblower.

Submissions

Submissions for the Claimant

184. Mr Maguire tendered written submissions for the claimant. A copy of those is annexed to this Judgment. What follows is a brief summary of the submissions for the claimant.

185. It was submitted for the claimant that protected disclosures had been made. Those comprised the disclosure accepted as being a protected disclosure, the claimant raising his concerns in February 2011 as to patrols and their frequency at Hunterston. The further disclosure by the claimant of bullying and repetition of his concerns as to patrolling and frequency of that in September 2012 also constituted protected disclosures.

186. The proposition advanced by Mr Maguire for the claimant was that there were 19 detriments which were done on the ground of the claimant having made protected disclosures. He set out those 19 detriments. He sought to persuade the Tribunal on the evidence led that these were instances of the claimant being put under a disadvantage and that the reason that had occurred in each instance was because of the protected disclosures made by the claimant.

187. The position advanced for the claimant was that the actings of Sergeant Findlay and of those above him in the respondents` organisation constituted actings by the employer such that the liability existed. It was accepted that where reference had been made to actings of fellow officers, no liability existed. Arguments were advanced in relation to loss which the Tribunal ought to award in the event of success on the part of the claimant.

Submissions for the Respondents

188. Mr McNeil also tendered a written submission. A copy of that is attached to this Judgment. What follows is a summary of the submission made on behalf of the respondents.

189. It was argued by Mr McNeil for the respondents that there was only one protected disclosure, namely that made in February 2011. That related to concerns expressed by the claimant as to the frequency of patrols at Hunterston. Any repetition of that was also a protected disclosure. The complaints, however, as to bullying and victimisation did not constitute protected disclosures. They were essentially grievances or complaints about work conditions. There was no legal requirement to carry out patrols at particular times or to keep any specific records of patrols done. The report made of alleged falsification was not a protected disclosure.

190. Mr McNeil addressed the 19 detriments founded upon by Mr Maguire for the claimant. The respondents had, he said, properly explained why they had taken particular decisions. They had discharged the onus upon them to show that the ground for these acts was, put in brief terms, standard operational decision making.

191. Insofar as there was a difference between the evidence that the Tribunal heard from the claimant and that which it heard from witnesses for the respondents, Mr McNeil highlighted various instances where the claimant had, he said, contradicted the version he had set out in the pleadings or alternatively gave evidence which did not square with the written record of meetings. He cast doubt upon the claimant`s reliability and credibility. He said that it was recognised that Sergeant Findlay and the claimant clashed on a personal level. Sergeant Findlay was someone with whom the claimant had difficulties. Others also had difficulties with Sergeant Findlay but were not in a position of having "*blown the whistle*". The claimant clearly had a grudge against Sergeant Findlay. The claimant sought retribution against Sergeant Findlay. As a general point the claimant did not alter his view once he had reached a conclusion. He refused to accept that an error or discrepancy in recording information was anything other than falsification of records. He took great exception to Sergeant Findlay having taken pictures outside his house. Those pictures, however, revealed wrongdoing on the part of the claimant. It was important to keep in mind that the claimant accepted that he was guilty of misconduct.

192. Mr McNeil submitted that detriments had not occurred in the instances where the claimant believed that they had occurred.

Discussion & Decision

193. The Tribunal was conscious in its consideration of the evidence and submissions in this case that it can be difficult for a claimant to establish the reason why a respondent has taken a particular action. A respondent is hardly

likely to "hold its hands up" and to accept that it took decisions for improper reasons. A Tribunal therefore requires, as this Tribunal did, to consider carefully the reasons put forward by a respondent for taking particular actions. The Tribunal requires to consider the actions taken and the surrounding circumstances. It requires to look at the individual actions involved and also to have regard to the overall events as it may be that whilst individual instances are not conclusive in themselves, by examination of the broader picture the overall position may become clearer. That may be supportive of the view taken by the claimant as to why a particular decision was taken or course of action embarked upon.

194. The Tribunal kept all of that in mind in this case. It considered the individual instances. It also had regard to the overall position and what might properly be drawn from the totality of the facts and circumstances.

Protected Disclosures

195. The view of the Tribunal was that the claimant made an allegation in his email of 29 October 2012. He did not make a protected disclosure to Superintendent Stephenson as he did not raise alleged bullying with him face to face. In the email a very basic allegation was made - "*bullying*" - with no information being supplied. A protected disclosure was however made on that topic when the claimant gave Chief Inspector Needham details of alleged bullying when they met on 22 November 2012. The claimant was making a protected disclosure as that term would be interpreted at the time of this that meeting in November 2012. It was a disclosure as to breach of the implied term of trust and confidence in that what was being disclosed was alleged bullying by the employer through Sergeant Findlay and Inspector MacRae. Although it would, under the provisions effective from 25 June 2013, be argued that this was not a matter in the public interest, that provision was not in place at time of this matter being highlighted to Chief Inspector Needham. The case of ***Parkins*** highlighted the ability successfully to argue that breach of a term of an employment contract constituted breach of a legal obligation.

Indeed that case largely led to the amendment to the statute to introduce a requirement that any disclosure had to be in the public interest. There was no significant evidence to demonstrate anything other than that the statement made to Chief Inspector Needham was made in good faith.

Alleged acts done on the ground of protected disclosures

196. The Tribunal was presented with two different versions as to why particular acts occurred. The claimant alleged that his protected disclosures were, applying the statutory test as interpreted, more than a trivial or minor element in the reason for acts having occurred. The respondents presented evidence explaining why they had taken particular decisions and that those decisions were effectively "*standard*" in the circumstances which pertained, entirely or almost entirely unrelated to the fact that protected disclosures had been made.

Assessment of Witnesses

197. The claimant was clearly quite convinced in his own mind that the respondents had acted badly towards him and had taken decisions to his prejudice because of the fact that he had made protected disclosures. There was a real degree of passion about the manner in which he gave his evidence.

198. Unfortunately, however, the claimant was not viewed by the Tribunal as being particularly credible or reliable. Sometimes this was in relation to the events he detailed as having occurred. Sometimes it was in relation to the conclusions he drew from decisions made by the respondents.

199. The approach of the claimant on transferring to the respondents` base at Hunterston in January 2011 was of some significance in this regard. Within a few months he had volunteered to become Federation Secretary. He referred in an email of 25 July 2011 to a former colleague to this being good

as it enabled him to argue about everything and not get into trouble. He referred in a subsequent email, this time of 12 November 2011 to the same former colleague to "*as usual*" "*causing a ruckus*". He was clearly someone prepared to, and perhaps even keen upon, causing ripples if in his view that was appropriate.

200. When that approach was put together with an element of his character which he accepted in cross-examination as existing, a degree of conflict between the claimant and the respondents perhaps seemed inevitable. The claimant accepted that once he had made his mind up about something he **could not** change his beliefs. This applied unless he was proved wrong. He therefore, as was demonstrated in some of his email exchanges with the respondents, was somewhat terse and defensive in his interaction with the respondents. He did himself no favours in many cases. Thus, for example, he did not clarify in a civil fashion whether he had acted as Federation Secretary in sending an email to Sergeant Findlay. Further, he refused to co-operate with Sergeant McWhirr at a later date by providing him with details of or access to medical reports which might have supported his position. These are but two examples.

201. The combination of the claimant being convinced that he was right in particular matters and being convinced that others were treated differently and better to him proved to be a fateful combination for the claimant. Where he believed that others had been treated differently and better to him, he did not take steps to verify that or to explore fully the circumstances of any such individual whom he believed to be in that position. He simply "*got it into his head*" that an individual was in the same circumstances as he was yet had been treated better than the way in which he had been treated. On the evidence the Tribunal heard there were, however, sound reasons for differentiation in treatment.

202. It was also of significance in the view of the Tribunal that the claimant thought that various people *"had it in for him*" due to the protected disclosures which he made. It was hard to accept that this was right given the extensive number of people who would then have had to have been acting in that fashion either in concert, to back one another up or potentially because each of them took ill towards the claimant due to his having made protected disclosures. It was not impossible of course that one of those scenarios had occurred. The evidence, however, simply did not support that and indeed supported the conclusion that there were genuine reasons for the decisions taken by the respondents in each of the instances when it was said that detriments had occurred.

203. The claimant was also prone to exaggeration. This did not assist his credibility or reliability. He referred to a remark which Sergeant Findlay had made to him as to the claimant not understanding big words, as being treatment which was torture and was degrading and a breach of the terms of Article 3 of the European Convention on Human Rights which prohibits inhuman or degrading treatment or punishment. He said in evidence in relation to the misconduct meeting held with Detective Inspector Gordon Allan, a tape recording of which had been transcribed with the transcribed notes appearing in the bundle, that he had only received papers immediately prior to the meeting, and that Detective Inspector Allan had said that the complaint which the claimant potentially faced was not such as to amount to gross misconduct or even misconduct. The transcript of the recording of the interview did not support the claimant on either point. Indeed, it contradicted his evidence. He also appeared to be of the view that he had not in fact committed any particular wrongdoing despite having accepted prior to the meeting, through his representative, that he acknowledged and accepted that he had disobeyed lawful orders and instructions and may well have submitted an expenses claim for an overnight allowance when he had not in fact stayed overnight. The claimant made comments in his statement to the Tribunal as to what Sergeant McMillan had said to him as to a comment by Inspector MacRae. Sergeant McMillan made no such comment in his written statement

and was not in fact asked about this in his evidence. The claimant adopted a position in evidence that he had not been permitted to become a Sergeant as being a Sergeant would enable him to gain access to records. This was not a proposition advanced in his written pleadings, despite the claimant having had legal advice at the time the claim was made and indeed having submitted a supplementary statement. He also said in evidence that any lawful order could not be given in a direct manner or aggressive fashion. He said that to be lawful an order must be issued by the Sergeant in question "*with humility and humanely*". This did not strike the Tribunal as being credible in terms of the reality of an instruction in circumstances where armed guards are protecting nuclear power plant establishments containing nuclear material.

204. Where there was a conflict of evidence the Tribunal preferred the evidence from whichever of the respondents` witnesses gave that contradictory evidence. It had little hesitation in accepting their evidence in the event of such a conflict. The respondents` witnesses were open and convincing in giving their evidence. The claimant, however, despite the strength of the view which he held, was not in general terms a credible or reliable witness.

205. Despite having accepted that he had committed wrongdoing in travelling home from Bisley on the last day of the course rather than on the following day, in claiming an overnight allowance by way of expenses and in absenting himself from work without making contact and without seeking either a day of leave or some other arrangement that would apply on the day when he ought to have been travelling but was in fact at home, the claimant at Tribunal continued to present to the Tribunal as if he had done nothing wrong. His position amounted to a claim that Sergeant Findlay was the wrongdoer by taking photographs which established beyond doubt that the claimant was guilty of misconduct, a charge which the claimant accepted as being valid at the time. His explanation as to why he had not contacted Inspector MacRae to seek permission to come home early did not strike the Tribunal as being a genuine reflection of events on the day in question.

206. There were two strange passages of evidence, one from Detective Inspector Allan and one from Inspector MacRae. Detective Inspector Allan said that he had said to the claimant in September 2012 that he thought the claimant might be ill and that the claimant appeared paranoid about the points he was raising and should perhaps see his doctor. Detective Inspector Allan said that the claimant replied to him "*I am paranoid, my doctor says I am paranoid*". In giving evidence the claimant denied having made this remark. Inspector MacRae said that when the claimant first spoke to him about becoming an APS and in particular about becoming a Mentor, he said in conversation with Inspector MacRae that the reason he wished to pursue becoming a Mentor was because there was a financial benefit to him. Again the claimant in giving evidence denied making that remark.

207. The claimant`s position was that no such remark had been made by him. It would have been stupid for him to make either of these remarks, he said. The Tribunal`s assessment was that the remarks had, however, been made. They accepted the evidence from both Detective Inspector Allan and Inspector MacRae that these remarks had particularly stuck with them as they were so surprising. In the view of the Tribunal it would have been odd for these remarks to have been made up by these witnesses. Both of these witnesses were regarded as being credible by the Tribunal. Detective Inspector Allan in particular was regarded as a very straightforward and fair witness, seeking to give the Tribunal a genuine account to the best of his recollection. He was prepared to make concessions if he regarded that as being appropriate. The Tribunal did not regard it as being likely that either of these witnesses would have made up the remarks about which they gave evidence.

208. As a further instance of evidence which led the Tribunal to have doubts as to the credibility and reliability of the claimant, the claimant`s comments on two aspects of the misconduct meeting are worthy of comment.

209. Firstly, the claimant was clear both in his written statement and in his oral evidence that he had never been informed that he could submit any further evidence to the misconduct meeting. He said that no one had ever said that it was possible for him to bring papers and to submit those. However, the explanatory notes, of which he received a copy at time of the notice being given to him of the misconduct meeting and which he referred to as saying that he could bring witnesses, also stated that the claimant was to provide the respondents with copies of any document he intended to rely on at the misconduct meeting. When this was highlighted to the claimant he accepted that he had therefore been made aware that presentation of documentation to that meeting was possible and that it was not true to say he had not been told that he could present documents.

210. Secondly, the claimant`s position in his written statement and in evidence at the Tribunal was that he questioned the legality of the actings of Sergeant Findlay when he took photographs outside the claimant`s property. His evidence was that he had raised this with Mr Dennis, the Federation CEO. Mr Dennis, the claimant said, had said to the claimant that questions could only be asked about that matter after the meeting concluded.

211. In cross-examination the claimant accepted that the whole point of him advancing the proposition that there had been an illegal act was that the disciplinary proceedings should not have been brought as there was at their foundation an illegal act. The claimant said when this was put to him in cross examination that this had “hit the nail on the head”.

212. This therefore comprised in the claimant`s mind an answer to the misconduct charge in that it was based on evidence illegally obtained. Given that circumstance it seemed extraordinary, to the point of being incredible, that Mr Dennis would have precluded the claimant advancing that argument during the course of the misconduct hearing, or indeed that the claimant would have refrained from advancing that argument. Further, given the fact that the claimant had by the time of the misconduct hearing, accepted that he was

guilty of misconduct and had confirmed that, this whole passage of evidence simply did not ring true.

Detriments Alleged

213. The Tribunal considered very carefully the evidence in relation to the alleged relevant detriments. It considered whether there was a detriment at all in some instances. It considered in each instance whether any alleged detriment could be viewed as being done on the ground of the claimant having made a protected disclosure. It kept in mind that the onus was on the respondents to show the ground on which any act or deliberate failure to act was done. It weighed very carefully the evidence from the claimant and his witnesses and that from the witnesses for the respondents. It considered the alleged relevant detriments and reasons for them individually. It also stood back from that exercise and considered whether looking at the overall picture there might be evidence which led to a different view from that arrived at in relation to each incident on its own. It kept in mind that the disclosures had occurred prior to 25 June 2013. It was necessary therefore for the Tribunal to consider whether an alleged detriment said to be due to the actings of particular personnel within the respondents` organisation was due to actings by the employer or was in fact due to actings of fellow employees.

Actings of the Employer?

214. Taking the last point first, it was accepted by the claimant that actings of fellow Police Officers were not actings for which vicarious liability existed on the facts of this case having regard to the fact that Section 47B(1A) of ERA was not in place at that time. The Tribunal considered the structure of the respondents` organisation with the various tiers of management and the different levels of authority vested in particular posts.

215. The conclusion which the Tribunal came to was that there was quite limited authority in the post of Sergeant. That post contrasted with that of Inspector, the post occupied by Mr MacRae. The Inspector was the OUC. He had authority in relation to the vast majority of matters relative to the respondents and their operations at Hunterston. He was, in effect, the respondents` *"man in charge*" at Hunterston. The Tribunal was satisfied that acts or deliberate failures to act by Inspector MacRae which were done on the ground that the claimant had made a protected disclosure would properly be viewed as acts or deliberate failures to act by the employer, with liability therefore resting with the respondents. It was equally satisfied, however, that acts or deliberate failures to act by Sergeant Findlay done on the ground of the claimant having made a protected disclosure were not properly viewed as acts or deliberate failures to act by the employer. They did not therefore attract liability on the part of the respondents in terms of the legislation in place in relation to this case.

216. There was a degree of authority on the part of Sergeant Findlay over the claimant. The claimant was one of 10 or 11 Officers who Sergeant Findlay, for example, organised for patrol duties. Sergeant Findlay also had authority to refuse to issue a weapon to an Officer such as the claimant on a particular day. He did not, however, have authority to make any lasting or longer term decisions in that area. It seemed to the Tribunal, looking at the authority of Sergeant Findlay, that it took the definition of the employer too far to regard that as extending to the employer being embodied by Sergeant Findlay. That was so in relation to any person at the rank of Sergeant.

217. For the avoidance of doubt, the Tribunal was clear that actings by parties of the ranks of Inspector and above properly fell to be regarded as acts or failures to act by the employer rendering the respondents liable in this case for any detriments by such parties done on the grounds that the claimant had made a protected disclosure.

General Comment

218. The claimant clearly saw the decisions about which he complained as being contrary to his interest. He genuinely felt them to be unfair. He had made protected disclosures. It does not follow, however, that, having made a protected disclosure, decisions made by an employer which might not be ones with which the employee agreed, or which might be ones which the employee regarded as being unfair, were detriments in that the employer is taking those decisions because the employee made a protected disclosure.

219. The mindset of the claimant was commented upon by various of the respondents` witnesses as being that the world was against him. It did seem to the Tribunal that this was the starting point for the approach of the claimant in considering any decision of the respondents. The claimant did not at the time of events in the workplace or during the Hearing before the Tribunal accept that there might have been a genuine basis for decisions reached by the respondents. He would start his evaluation on a false premise in some instances. Thus, he was firmly of the view that whilst he had been told that there would only be one APS at any point, this was contradicted by the fact that there were two at one stage. That meant that turning down his own application on the basis that there was already one APS could not be justified. He failed, however, to appreciate or even to accept that there were two Officers in the post as APS for a very short time due to handover between one APS and the succeeding APS. The claimant also failed to recognise that there had been a change in the examination system, resulting in it no longer being possible by the time he applied to sit the exam in a location other than a designated exam centre. Hunterston was not a designated exam centre. He then read into the email from Inspector MacRae an attempt to persuade the respondents not to permit him to sit the exam other than at a designated exam centre. Any objective reading of that email, however, could not have so concluded.

220. The individual alleged detriments are now dealt with. Given, however, that much of the view which the Tribunal took turns upon credibility of witnesses and its findings of fact, relatively little is said about some of the particular instances of alleged detriment.

Detriment 1 – The decision upon the Claimant`s application to carry out APS duties

221. The Tribunal accepted the explanation given by Inspector MacRae as to why the claimant did not become an APS at the time when he initially sought to become an APS. The claimant, in the view of the Tribunal, at best misunderstood the position with regard to there being two APS posts and therefore no basis for refusing his application on the ground that there was only one post of APS per section. It was satisfied that Inspector MacRae had taken the decision in relation to the claimant`s application unaffected by the fact that the claimant had made a protected disclosure. The fact that the claimant was approved for APS duties by Inspector MacRae in October 2013 underlined to the Tribunal that there was no "*prejudice*" held against the claimant by Inspector MacRae in relation to the application by the claimant for a post as APS. Attendance/absence was an appropriate matter for consideration in reaching a decision upon the application, as were motivation of the applicant and availability of a post.

Detriment 2 – Sergeant Findlay acting aggressively towards the Claimant and the Claimant being threatened by Inspector MacRae

222. In the view of the Tribunal, on the evidence it heard and looking to the relevant documentation, this was a situation where Sergeant Findlay had, for understandable reasons, raised a question with the claimant. The reply from the claimant had been somewhat terse and oblique. It was not surprising that Sergeant Findlay had sought to clarify the position in person with the claimant. One word had led to another and there had been a clear disagreement between the claimant and Sergeant Findlay. Inspector MacRae

had investigated the matter and had spoken to both the claimant and Sergeant Findlay. The Tribunal accepted that Inspector MacRae had not simply supported Sergeant Findlay`s version of events by immediately accepting his response. He had given genuine consideration to the circumstances and had assessed the position. The Tribunal accepted that the claimant had apologised to Sergeant Findlay without there being duress or a threat or any requirement that he apologise to avoid punishment. There was no detriment to the claimant and no act, whether by Sergeant Findlay or Inspector MacRae, which was done on the ground that the claimant had made a protected disclosure.

Detriment 3 – Claimant refused permission to attend the Police Treatment Centre at Auchterarder

223. This was not a decision made by Inspector MacRae or Sergeant Findlay. It involved application of a requirement of the scheme involved, namely that the Officer be a member of it before attendance at the Police Treatment Centre was possible. The claimant apparently misunderstood the position in respect of a different Officer who attended, as the claimant thought that he was not a member of the scheme when in fact he had joined it prior to attending the Treatment Centre.

Detriment 4 – Location of the Sergeant`s promotion exam

224. This again was a decision reached by application of the relevant rules and requirements of the respondents which were in place and which applied to all Officers. Those rules precluded the claimant from being able to sit the exam at Hunterston. Different earlier rules meant that it was possible to sit the exam at different locations. Those rules were no longer in place when the claimant made his application. This was not therefore a decision within the "*gift*" of Inspector MacRae or Sergeant Findlay. In sending the email which he did (at page 62 of the bundle) asking the question as to the possibility of the claimant sitting the exam elsewhere but stating that he believed he knew the answer,

Inspector MacRae was not doing anything other than asking the question and indicating his awareness of the regulations. Any detriment was in no way associated with an act of the respondents done on the ground that the claimant had made a protected act.

Detriment 5 – Refusal of Claimant`s application to become a Mentor

225. The decision taken by Inspector MacRae was taken on the basis that the claimant had been absent over two periods and also as Inspector MacRae was unconvinced by the claimant`s discussion with him in which reference was made by the claimant to the financial benefit of being a Mentor as being a motivating factor for the claimant. Inspector MacRae did not rule out the claimant becoming a Mentor in the future. His decision was taken on grounds which had nothing to do with the claimant having made a protected disclosure. Whilst the claimant referred to PC Machet who had been permitted to become a Mentor, PC Machet had not been absent as often or for as long a period as had the claimant. It was of importance that Mentors had a good attendance record.

Detriments 6 & 7 – Overtime – PIL Chart and Overtime at Torness

226. Inspector MacRae adjusted the PIL Chart on return of the claimant from long term sickness absence. This was a step taken when any Officer returned from long term sick leave. It was not therefore peculiar to the claimant. The thinking was not to penalise any such person but rather to ensure that they were not advantaged by virtue of having a low PIL score on their return, thereby rendering them more likely to receive the offer of overtime than other Officers who had been present at work during their absence. There was also a desire to offer a degree of protection to an Officer returning from long term sick leave by avoiding the scenario of that Officer being offered overtime at an early stage of their return due to having a PIL score and feeling under pressure to work that overtime in circumstances where longer hours might not be

something which for health reasons should properly be worked by such an Officer.

227. In carrying out the addition of a notional 4 days to the PIL score of the claimant Inspector MacRae was not doing this act on the ground that the claimant had made a protected disclosure.

228. The claimant was paid the time which he sought in respect of working overtime at Torness. His complaint was that it took longer than it ought to have taken in his view for that payment to be made. The claimant had to support his view that he should be credited with 3 hours travel and not 2 hours travel. The initial decision was taken and overtime entered by the respondents` planning department at Dounreay. On submission of the explanation from the claimant the sum which he claimed was paid to him. Insofar as there may have been any initial underpayment to the claimant, that was not done by the respondents on the ground that the claimant had made a protected disclosure. It was not an act by Inspector MacRae or Sergeant Findlay.

Detriment 8

229. Alleged detriment 8 was not insisted upon by the claimant at time of submission given that treatment was said to involve the actings of a fellow PC.

Detriment 9 – Serious concerns investigation and alleged failure to carry this out properly

230. The Tribunal accepted evidence that the claimant had initially only raised with Superintendent Stephenson his concerns about adequacy of patrolling. He had not initially raised with Superintendent Stephenson the issue of bullying. The fact that the claimant thought that he had raised that matter with Superintendent Stephenson was of concern to Superintendent Stephenson.

That is revealed in the email exchanges between the claimant and Superintendent Stephenson. Chief Inspector Needham then became involved in examining the issue of alleged bullying. It was understandable that he initially took the view that the matter of the adequacy of patrols had been dealt with and that the claimant was saying nothing new to him in that regard.

231. The investigation by Chief Inspector Needham into the bullying allegation was viewed by the Tribunal as being perfectly reasonable. It explored the relevant points and relevant personnel were asked appropriate questions.

232. Chief Inspector Needham informed the claimant of his decision upon the claims of bullying made by the claimant. The claimant did not accept these. The claimant repeated the allegations. This was an example of the claimant simply adhering to his view notwithstanding anything which was said to him by the respondents. From the evidence before the Tribunal the response of the claimant was basically to take the stance that the outcome both in respect of patrolling activities and bullying allegations was simply wrong. He did not offer fresh or further information initially in relation to either matter. In May 2013 he made allegations of falsification of records by Sergeant Findlay. This was a further protected disclosure as set out above. Chief Inspector Needham asked for details and paperwork. A fact finding investigation was carried out at the behest of Chief Inspector Needham. That involved Inspector Hannah, being brought in as an independent party. The conclusion was that whilst some of the recording was inaccurate, there was no falsification of records. This again was not something which the claimant was prepared to accept. His view was that he was right and that any inaccuracy in recording evidenced falsification.

233. In the view of the Tribunal the evidence demonstrated that the respondents had taken the claimant`s protected disclosures seriously and had carried out appropriate enquiries. Chief Inspector Needham concluded that the claimant sought punitive action against Sergeant Findlay and that that was his driving

force. That seemed to the Tribunal on the evidence it heard from Chief Inspector Needham, from the claimant, from Inspector MacRae, and from Chief Superintendent Worsell in particular, to be a fair view to have reached.

234. The Tribunal concluded that there was no detriment to the claimant and that no act or deliberate failure to act in this regard had been done on the ground that the claimant had made a protected disclosure.

Detriment 10 – Bronze Commander course and leadership development course decision taken by the respondents in relation to the Claimant

235. The Tribunal was satisfied as to the explanation given by the respondents for their actings in refusing the claimant a place on these courses. Priority is given to Sergeants and those of the rank of APS, even in circumstances where anyone in either of those categories had earlier failed a course. On the evidence the Tribunal was satisfied that there was no act or deliberate failure to act by the respondents in this regard done on the ground that the claimant had made a protected disclosure.

Detriment 11 – Alleged remark by Chief Inspector Needham to PC Goodall, reported to the claimant by PC McCue that the Claimant "*grassed everyone up*" for not carrying out patrols they were supposed to be doing

236. The Tribunal was faced with the evidence of Chief Inspector Needham that he had not made this remark as against evidence from the claimant that he had been told by a fellow Police Constable (PC McCue) that the remark had been made by Chief Inspector Needham, not to that Police Constable but to a third Police Constable (PC Goodall). The Tribunal accepted the evidence from Chief Inspector Needham that he had not made this remark. It seemed to the Tribunal to be strange remark for him to have made. The allegation that the remark had been made by Chief Inspector Needham did not have the ring of credibility about it. In addition, there was a lack of reliability in relation

to the information which the claimant had as to this statement allegedly having been made.

237. The Tribunal was satisfied that the remark had not been made.

Detriment 12 – Request for physiotherapy and Respondents alleged refusal to pay for that

238. On the evidence, this was a matter with which Inspector MacRae was involved. The Tribunal accepted evidence that Inspector MacRae had not said to the claimant the respondents would not pay for this treatment. The Tribunal accepted the evidence from Inspector MacRae that he had highlighted to the claimant the procedure to be followed where referrals were to be made.

239. This was another instance of a decision not going the way which the claimant wished it to. The actings of the respondents were, however, in accordance with standard procedures. There was no act or deliberate failure to act done on the ground that the claimant had made a protected disclosure.

Detriment 13 – Psychological assessment – time taken to arrange this

240. The claimant had requested that Inspector MacRae make arrangements for him to be assessed by a Clinical Psychologist. This occurred on 22 January 2014. The appointment ultimately took place on 29 April 2014.

241. The request was therefore processed and arrangements were made. The complaint appeared to be that it has taken longer for that visit to be arranged than for a Clinical Psychologist appointment to be arranged in respect of Sergeant Baird. The claimant sought to draw the implication that the longer wait on his part had been due to the fact that he had made a protected disclosure. There was, however, no evidence to support that. Indeed Sergeant Baird, who gave evidence, did not speak to the arrangement for his

own medical examination and what the circumstances were as to the timing of the appointment which he obtained. Inspector MacRae appropriately referred the matter to OH. The Tribunal was satisfied that the appointment had taken place in the normal course of events and that there had been no act by the respondents, for example, in delaying the appointment deliberately. Equally there had been no deliberate failure to act by, for example, not processing the request for appointment through standard or normal channels. There had been no act or deliberate failure to act done on the ground that the claimant had made a protected disclosure.

Detriments 14 and 15 – Investigation by Sergeant Findlay and statement made by him and subsequent suspension and misconduct proceedings against the Claimant

242. Sergeant Findlay travelled to the street where the claimant lived in the early morning of 25 September 2013. The claimant ought not to have returned home at that point in that he had no permission so to do. He was in fact at home. He had travelled in direct breach of the respondents stipulation and the undertaking which he himself had signed. He went on to commit further misconduct by not making contact with the respondents to arrange a day of holiday or to come to some other agreement with them in respect of 25 September. Instead he retained the day of 25 September 2013 as a travel day, although not travelling. He did not attend work that day.

243. Sergeant Findlay had attended the claimant`s property, in all probability, due to having an awareness that the claimant had returned home early in breach of the relevant stipulation and undertaking given by the claimant. It was hard, for example, to take the alternative view which might have been that he was checking regularly on the property. There was no evidence to support that as being a practice which he followed.

244. On attending the property Sergeant Findlay became aware that the claimant had in fact returned early in breach of the respondents` stipulations and the undertaking given by the claimant. He was therefore aware of potential misconduct on the part of the claimant. It was his duty then to report that to the respondents. He did not, however, do that immediately. He waited until 29 January 2014 to report this matter to the respondents. He was subjected to sanction in respect of that delay in reporting the issue.

245. There was no detriment caused to the claimant by Sergeant Findlay attending the property. Anything which might be viewed as a detriment arose from the report made by Sergeant Findlay. The difficulty from the claimant`s perspective was that this report set out misconduct and that the misconduct was admitted by the claimant. This was not therefore a malicious report by Sergeant Findlay of some pretended wrongdoing. Sergeant Findlay was following his duty in making the report of the misconduct (albeit later than ought to have occurred). The misconduct had occurred, as the claimant accepted. The sanction of suspension and the finding of misconduct both followed the admission of the claimant that misconduct by him had occurred.

246. As to whether the act of Sergeant Findlay in reporting the misconduct in January 2014 was an act done on the ground that the claimant had made a protected disclosure, the Tribunal came to the view that it was done on that ground in that this was more than a minor or trivial element in the decision to act as he did. It was conscious that Chief Inspector Needham had completed his report and had informed the claimant of the outcome on 20 January 2014. Chief Inspector Needham also gave advice to Sergeant Findlay with regard to record keeping in relation to patrol logs on conclusion of the investigation. That would therefore have been around 20 January 2014.

247. The Tribunal did not have the advantage of hearing evidence of Sergeant Findlay in order to understand more fully the reason why he made the report on 29 January 2014. It took account of the explanation given by Sergeant Findlay to the respondents which appeared at pages 514 and 515 of the

bundle. It was said by Sergeant Findlay that he required to ascertain whether permission had been granted to the claimant to return home early from Bisley. He then had checked fuel receipts and expenses claims in respect of the stay and travel.

248. It seemed to the Tribunal, however, that it was more likely than not that the report had been made by Sergeant Findlay in January 2014 following upon his becoming aware of the protected disclosure made by the claimant as to concerns with adequacy of patrol timings given that just a few days prior to making the report Sergeant Findlay had been spoken to regarding the accuracy of recording of patrol times.

249. The Tribunal therefore concluded, on the balance of probabilities, that the act of Sergeant Findlay in reporting the misconduct by the claimant had been done, in the sense of the reason being to more than a minor or trivial extent, on the ground that the claimant had made a protected disclosure.

250. For reasons set out above, however, the Tribunal was of the view that applying the test under the terms of ERA at the time, an act of Sergeant Findlay was not an act of the employer. Any detriment therefore was not due to an acting of the employer but due to the acting of a fellow worker.

251. If the Tribunal is wrong on that matter, it was quite satisfied, however, that reporting misconduct was not a detriment and that suspension in accordance with the appropriate and normally applicable procedures of the respondents in the circumstances which pertained was not a detriment. If the Tribunal is wrong on that, it was satisfied that the reason for detriment, if detriment it was, was the claimant`s conduct, or rather misconduct.

Detriment 16 – Refusal by the Respondents to allow the claimant to use a computer in connection with Tribunal proceedings and obtaining evidence

252. It was said by the claimant the refusal of Sergeant Gillies to allow him access to a computer which Sergeant Gillies was operating on the day when the claimant appeared at the respondents` premises was an act done on the ground that the claimant had made a protected disclosure. In the view of the Tribunal, however, there were other computers available had the claimant wished to obtain access to documents. There were other printers available had he wished to print off documents. Using the computer which Sergeant Gillies was using might have been the optimum solution in terms of privacy. Sergeant Gillies was, however, engaged in the use of that computer. That the respondents were not motivated by the fact that the claimant had made a protected disclosure was confirmed in that they made arrangements at a later stage for the claimant to have a block of time extending to 5 days when he could access documents and the system freely. He was paid for that time and for travel time.

253. The Tribunal was satisfied that the act of Sergeant Gillies was not done on the ground that the claimant had made a protected disclosure. On the same basis as is referred to above in relation to Sergeant Findlay, the Tribunal was also satisfied that the actings of Sergeant Gillies would not in any event be actings of the respondents as employers and therefore not actings for which the respondents were liable in terms of the legislation applicable at the time.

Detriment 17 – Alleged excessive contact with the Claimant whilst the Claimant was at the Police Treatment Centre

254. The Tribunal was entirely satisfied on the evidence that the contact from Chief Inspector Needham was in response to a request from the claimant and was unobjectionable to the claimant. The claimant participated freely in exchanges which followed upon the contact. There was no hint whatsoever of any discomfort on the part of the claimant, stress or unease at that contact

or the level of contact. The tone of the correspondence reflects willingness by the claimant to participate in the email correspondence. That correspondence was with a view to setting up a meeting between the claimant and Superintendent Stephenson, something which the claimant had requested. In the view of the Tribunal there was no detriment. Certainly any acts of Chief Inspector Needham were not done on the ground that the claimant had made a protected disclosure.

Detriment 18 – Investigation by Sergeant McWhirr and conclusion reached

255. The appointment of someone to carry out a report as was carried out by Sergeant McWhirr was a standard procedure followed by the respondents in circumstances which existed in relation to the claimant at that time. The appointment of Sergeant McWhirr as the claimant`s Liaison Support Officer was a step taken for understandable reasons given that he had recently transferred from Torness and that there were known to be issues between other personnel at Hunterston and the claimant.

256. Sergeant McWhirr came to the view which he did in terms of the report. That was a reasonable view for him to take on the information which he had. He did not have access to the medical reports from Dr Scott and Professor White. The claimant, however, had it in his hands to ensure that Sergeant McWhirr did have access to those reports. He did not ever provide consent or indeed give any indication as to the content of those reports. He did not co-operate with Sergeant McWhirr in providing any information to him in connection with the task being undertaken by Sergeant McWhirr. The claimant simply kept stating that he had already supplied information and that he did not wish to repeat himself.

257. The claimant was clearly dissatisfied with the report of Sergeant McWhirr. Insofar as he says that this contradicted the views of the medical practitioners, it was of high relevance that he himself had precluded access to reports from those medical experts by Sergeant McWhirr.

258. There was no act or deliberate failure to act by the respondents done on the ground that the claimant had made a protected disclosure. Further, the actings of Sergeant McWhirr, as a Sergeant, were not in the view of the Tribunal acts by the employer, as detailed earlier in relation to Sergeants Findlay and Gillies. If, however, the Tribunal is wrong on that point, there was no detriment due to any act done on the ground that the claimant had made a protected disclosure.

Detriment 19 – Claimant not being permitted to return to work despite being certified as being fit to return to recuperative duties from around mid-December 2014

259. It was accepted by the claimant that the issuing of the certification from his doctor was the first step in returning to work rather than conclusive of the appropriateness of the claimant returning to work immediately thereafter. It was not possible for the claimant to return to duties as an AFO immediately as there is 6 month period of monitoring during which there must be no recurrence of symptoms. That is understandable in circumstances where an AFO is by definition handling live ammunition and in possession of a firearm.

260. The respondents undertook the standard procedures of holding RAP meetings to assess the risks and steps which might be taken to return the claimant to the workplace. In relation to Hunterston, they were conscious of the Police Scotland investigation and of the recommendation from Police Scotland that during the time of that investigation it would be preferable if the claimant was not back in the workplace at Hunterston. Mediation was also viewed as being of much significance, yet not possible in circumstances where the issues which would require to be addressed at mediation could not be explored between the different parties who would be involved in mediation due to the Police Scotland investigation. The underlying situation therefore of issues at Hunterston remained. The decision taken by Chief Superintendent Worsell that the claimant was not to return to Hunterston was made on the basis of possible risk to recovery of the claimant and due to the continuing

presence of workplace issues at Hunterston, which issues could not be tackled for the reasons identified immediately above. The claimant, however, was restored to full pay with effect from 22 March 2015, that being the date on which the respondents accepted that medically he would have been fit to return to duties.

261. The claimant`s absence from work continued during the period of the requirement for the 6 month period of stability. Attempts were made to organise training for the claimant, without success. This was to some extent due to unavailability of training places and dates. It was also due to the claimant taking the view that the notice period given to him for training in October was too short. The respondents considered alternative work locations for the claimant. They were conscious, however, that he could not be fully operational at that point. Deploying him to Torness was not considered appropriate given previous issues when the claimant worked there. That was a reasonable position on the part of the respondents. Deployment elsewhere was considered inappropriate given the additional travel and accommodation costs which would be incurred by the respondents. That was also a reasonable view on the part of the respondents.

262. Decisions during this time were not taken or done on the grounds that the claimant had made a protected disclosure. The respondents' reasons are evidenced in the RAP meetings and other correspondence. The Tribunal accepted the evidence of Chief Superintendent Worsell which in the view of the Tribunal fully explained why decisions were taken as to the claimant not returning to work. This evidence and the supporting documentation was convincing to the Tribunal in establishing that the reason for any actings of the respondents in this regard was not related in any fashion to a protected disclosure made by the claimant.

Conclusion

263. In summary therefore the Tribunal accepted the evidence from the respondents as to the reasons for their actings or failures to act in relation to the matters which the claimant alleged as detriments. Cogent reasons were given. Save for one instance, the Tribunal was entirely satisfied that the decisions made by the respondents and their acts or any deliberate failure to act on their part were not done on the ground of the claimant having made a protected disclosure. In many instances there was no evidence of a detriment.

264. The one situation in which the Tribunal concluded that an act had been done on the ground of a protected disclosure made by the claimant (i.e. the making of the protected disclosure had been more than a minor or trivial element in the doing of the act) was the decision by Sergeant Findlay to report the claimant`s misconduct. As set out above, the Tribunal were of the view, however, that the actings of Sergeant Findlay were not acts by the employer. Further, and even if wrong upon that matter, the Tribunal was of the view that there was no detriment to the claimant in circumstances where what was reported to the respondents was firstly something which it was the obligation of Sergeant Findlay to report and secondly, was admitted misconduct.

265. For these reasons the claim is unsuccessful.

Employment Judge: Robert Gall
Date of Judgment: 05 January 2018
Entered in register: 09 January 2018
and copied to parties