EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J Cox		British Transport Police Authority

Heard at: London Central **On**: 18-22 and 25-29 November 2019

Before: Employment Judge Stout
Mr D Kendall
Mr M Reuby

Representations
For the claimant: Mr J England (counsel)
For the respondent: Ms A Reindorf (counsel)

RESERVED JUDGMENT ON LIABILITY

1. The unanimous judgment of the Tribunal is that the Claimant's claim that the Respondent subjected him to detriments on the ground that he made protected disclosures is not well-founded.

2. The claim is dismissed.

REASONS

Contents

Introduction

1. The Claimant has been employed by the Respondent since 5 July 2010 in the office of Police Constable. He has been on long-term sick leave since 14 October 2018. The Respondent is the British Transport Police Authority, which is the employer of the Claimant and responsible for the British Transport Police (BTP). BTP is a national police force for the railways providing policing services to the rail operators, their staff and passengers throughout England, Scotland and Wales. In these proceedings the Claimant claims that he was subjected to unlawful detriments for having made protected disclosures contrary to s 47B of the Employment Rights Act 1996 (ERA 1996).

The issues

2. By an application made on 7 November 2019, some two weeks before the hearing the Claimant applied to amend his claim in three respects. That application was determined at the start of the hearing and we allowed the amendments (which were not opposed by the Respondent) for reasons which we gave at the time.

3. The issues to be determined were agreed between the parties and are set out in Schedules of Protected Disclosures and Detriments which are, with the amendments agreed by the parties at the hearing and in the light of our judgment on the amendment application, appended to this judgment. There are in those Schedules seven alleged protected disclosures and sixteen alleged detriments (including some sub-disclosures and detriments) and we refer to them as “Disclosure 1”, “Detriment 2” etc in this judgment.

The Evidence and Hearing

4. We heard evidence from the Claimant, and from the following witnesses for the Respondent:
    a. Sergeant (PS) Timothy Johnson;
    b. Inspector (Insp) Stuart Downs;
    c. Acting Inspector (TPI) Juliet Owens;
    d. Chief Inspector (CI) Mark Lawrie;
    e. Alison Williams (Senior HR Advisor);
    f. Sub Divisional Commander Matthew Allingham;
    g. Arthur Churchill (HR Manager).

5. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties’ statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

6. We explained our reasons for various case management decisions as we went along.

7. Both counsel prepared thorough and helpful written closing submissions, in addition to making oral submissions. We have taken their submissions into account and intend no disrespect to their excellent work in not referring to every point they have made in our judgment.

The law

8. The nature of this case is such that it is appropriate to set out the law on protected disclosures first and then to apply the law to our findings of fact as we go along. Doing otherwise would either involve unnecessary repetition of facts found in our conclusions section, or make our conclusions difficult to follow because of the need to cross-refer back to the background facts. The time point, however, we deal with separately at the end of the judgment.

Detriments for making protected disclosures

9. Under s 47B ERA 1996, a worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure.

10. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

11. Section 43B(1) ERA 1996 defines a protected disclosure as a qualifying disclosure, being *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more"* of a number of types of wrongdoing. These include, (b), *"that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"* and, (d), *"that the health or safety of any individual has been, is being or is likely to be endangered"*.

12. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

13. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the Employment Appeal

Tribunal in *Blackbay Ventures (trading as Chemistree) v Gahir* (UKEAT/0449/12/JOJ) [2014] ICR 747 (against which judgment the Court of Appeal refused permission to appeal: [2015] EWCA Civ 1506). At para 98 Judge Serota QC gave guidance as follows:

> "1. Each disclosure should be identified by reference to date and content.
>
> 2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.
>
> 3. The basis on which the disclosure is said to be protected and qualifying should be addressed.
>
> 4. Each failure or likely failure should be separately identified.
>
> 5. Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. …
>
> 6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and … whether it was made in the public interest.
>
> 7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act."

14. In the light of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325, paras 24-26, it was for a time suggested that a mere allegation could not constitute a disclosure of information. However, in *Kilraine v Wandsworth LBC* [2018] ICR 1850 the Court of Appeal clarified that "allegation" and "disclosure of information" are not mutually exclusive categories. What matters is the wording of the statute; some 'information' must be 'disclosed' and that requires that the communication have sufficient *"specific factual content".* The case of *Dray Simpson v Cantor Fitzgerald Europe* (UKEAT/0016/18/DA), unreported 21 June 2019, makes a similar point in relation to the use of questions in an alleged protected disclosure. In that case, the Employment Appeal Tribunal held (para 42) that the fact that a statement is in the form of a question does not prevent it being a disclosure of information if it *"sets out sufficiently detailed information that, in the*

employee's reasonable belief, tends to show that there has been a breach of a legal obligation".

15. It is to be noted, since it is of some significance in this case, that the statute does not require that the Claimant identify or otherwise refer to the legal obligation when making the disclosure (a point that was accepted by the Employment Appeal Tribunal in *Bolton School v Evans* [2006] IRLR 500 at para 41 and not questioned on appeal by the Court of Appeal in that case: [20076] EWCA Civ 1653, [2007] ICR 641). Evidently, though, whether a particular disclosure of information 'tends to show' a breach of a legal obligation in the absence of any reference to a legal obligation will be a question of fact in each case.

16. What does matter is that the Claimant has a reasonable belief that the information disclosed tends to show one of the matters in s 43B(1), i.e. that the information disclosed tended to show that someone had failed, was failing or was likely to fail to comply with one of the legal obligations set out there. The word *"likely"* appears in the section in connection with future failures only, not past or current failings. In *Kraus v Penna Plc* [2004] IRLR 260 at para 24 the Employment Appeal Tribunal held that *"likely"* in this context means *"more probable than not"*. On this point, *Kraus v Penna* was not over-ruled by *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026, but in *Babula* the Court of Appeal did over-rule *Kraus* in relation to the approach to be taken to assessing the reasonableness of the Claimant's belief.

17. In the light of *Babula* (ibid, paras 74-81), what is necessary is that the Tribunal first ascertain what the Claimant subjectively believed. The Tribunal must then consider whether that belief was objectively reasonable, i.e. whether a reasonable person in the Claimant's position would have believed that all the elements of s 43B(1) were satisfied, i.e. that the disclosure was in the public interest, and that the information disclosed tended to show that someone had failed, was failing or was likely to fail to comply with a relevant legal obligation. The Court of Appeal emphasised that it does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not.

18. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: *Darnton v University of Surrey* [2003] ICR 615.

19. The Court of Appeal in *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007 (see especially paras 14-17 and 25) has recently confirmed that it is the Claimant's subjective belief that must be assessed when considering the public interest element as well. Again, the Tribunal must first ascertain what that subjective belief is, and must then assess whether the Claimant's subjective belief in this respect is objectively reasonable. The Court of Appeal emphasised that the Claimant's motive in making the disclosure is not necessarily relevant to this assessment: in an appropriate case, a claimant may be motivated by personal interest but still have a reasonable belief that the disclosure is in the public interest.

20. Prior to the amendment to s 43B of the ERA 1996 by the Employment and Regulatory Reform Act 2013, s 17 to introduce the 'public interest' requirement, it had been held (in *Parkins v Sodexho* [2002] IRLR 109) that a disclosure concerning a breach of the employee's own contract could be a protected disclosure. In *Chesterton Global and anor v Nurmohamed* [2017] EWCA Civ 979, [2018] ICR 731 the Court of Appeal (*per* Underhill LJ at para 36) made the following observations about the policy intent of the introduction of the 'public interest' requirement:

> "The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers—even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest."

21. The Court of Appeal in that case approved guidance formulated by counsel as to the matters that may be relevant to assessing the reasonableness of the Claimant's belief that a disclosure is in the public interest (para 34):

> "(a) the numbers in the group whose interests the disclosure served …;
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
> (c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
> (d) the identity of the alleged wrongdoer—as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"—though he goes on to say that this should not be taken too far.

22. If a protected disclosure has been made, the Tribunal must consider whether the Claimant has been subjected to a detriment *"on the ground that"* he has

made a protected disclosure (s 47B(1)). This means that the protected disclosure must be a material factor in the treatment: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 at paras 43 and 45.

23. The burden of proof is on the Claimant to establish a protected disclosure was made, and that he or she was subject to detrimental treatment. However, s 48(2) provides that it is then *"for the employer to show the ground on which any act, or deliberate failure to act, was done"*. However, it has been held that, although the burden is on the employer, the Claimant must raise a *prima facie* case as to causation before the employer will be called upon to prove that the protected disclosure was not the reason for the treatment: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 at para 40 (deciding this point so far as dismissal cases are concerned, persuasive *obiter* on the same point for detriment cases). As such, the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at paras 115-116 and *Dahou* ibid at para 40.

24. Finally, on the day that the parties made their closing submissions in this case, the Supreme Court handed down judgment in *Royal Mail Ltd v Jhuti* [2019] UKSC 55. That case concerned a claim of automatic unfair dismissal for having made a protected disclosure contrary to s 103A ERA 1996. The situation was one which the Supreme Court described at paragraph 41 as *"extreme"* and *"not … common"*. The dismissal decision had been taken in good faith by a manager on the basis of evidence of poor performance presented by the claimant's line manager. However, the Tribunal found that the line manager had dishonestly constructed the evidence of poor performance in response to a protected disclosure made by the employee. At para 60 the Supreme Court concluded as follows:

> 60. In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X , courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A

> should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

25. Counsel for the Claimant in this case made two submissions: first, he submitted (and we accept) that there is no reason why the principle in *Jhuti* about the circumstances in which the state of mind of one employee can be attributed to the employer should not apply to detriments cases under s 47B as it does to automatic unfair dismissal cases under ss 98(1) and 103A. This is because both causes of action require the employer's 'reason' or 'ground' for acting to be shown. Secondly, Mr England submitted that the principle in *Jhuti* would apply not just to situations where there has been dishonest presentation of facts to the decision-maker, but also more widely to situations where an individual has manipulated the actions of other employees in order to retaliate against them for making a protected disclosure. In this respect, it seems to us that the Supreme Court in *Jhuti* at paras 51-53 approved (*obiter*) the (also *obiter*) view expressed by Underhill LJ in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704 that, while facts known to others in the organisation but not to the decision-maker cannot be attributed to the decision-maker, *"the motivation of [a] manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation"*. However, the Supreme Court at paragraph 53 limits this (as did Underhill LJ) to situations in which the manipulating manager has in fact played a part in the decision-making process, such as by carrying out the investigation stage of that process. In our view, the Supreme Court's judgment in *Jhuti* is not authority for any wider principle that where an individual has manipulated the actions of other employees in order to retaliate against a claimant for making a protected disclosure, that motivation is to be attributed to the individual who takes the decision to dismiss or subjects the individual to a detriment - save where the manipulation in fact amounts to a situation within the *ratio* of *Jhuti* (i.e. where there has been dishonest presentation of facts to the decision-maker so that the ostensible reason for the decision-maker's action is an 'invention').

The facts

26. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

27. The Claimant has been employed by the Respondent since 5 July 2010 in the office of Police Constable. He had previously served for 30 years with the Metropolitan Police Service (MPS). On his retirement he was awarded a long service and good conduct medal, among other commendations detailed in his witness statement.

28. For the first two years of the Claimant's employment with BTP he was placed with other police constables on the Emergency Response Unit (ERU). The principal function of the ERU is driving emergency response lorries. These are large vehicles similar to fire engines and weigh approximately 14 tonnes gross. They contain life-saving and rescue equipment. They are used to provide emergency response to incidents on the transport network, including person under train (PUT) incidents and terrorist and other emergencies. They are branded as police vehicles and use "blue lights" to get to emergencies, hence the need to have police officers as drivers. When on an emergency call there are usually four persons in the vehicle. The lorries are also accompanied by a small van carrying a London Underground Network Incident Response Manager and Police medics. The combined team is known as a Network Incident Response Team (NIRT).

29. By the time of the matters with which these proceedings were concerned, there were four ERU bases at Camden, Stratford, Acton and Battersea. The Claimant was predominantly based at Camden. There were originally two ERU lorries and two smaller back-up trucks, but in 2017 five new lorries were introduced. The introduction of these new lorries is relevant to these proceedings as it meant that there was an increased need for drivers in order to ensure these lorries are always available to save lives where needed.

30. When the Claimant started on the ERU in 2010 there were no Police Sergeants assigned to the unit. Police Sergeants (PS) were introduced in 2012 to supervise and manage the team. PS Timothy Johnson became the Claimant's line manager at that time. He was responsible for a team of seven officers at the Camden ERU base and soon also took on responsibility for Stratford ERU base which had a further six officers from 2012. PS Johnson retired on 14 October 2018 and is now an Incident Controller for TfL.

31. Some of the Respondent's witnesses (in particular Inspector Downs) were of the view that the Claimant resented the arrival of the Police Sergeants. However, the Tribunal finds that the Claimant did not have any issue with the arrival of the Sergeants *per se*. Indeed, both the Claimant and PS Johnson confirmed that their relationship was good for a number of years prior to the events with which these proceedings are concerned.

32. The Claimant's cousin is married to Chief Constable Crowther. This is a fact that the Claimant chose to make most of the Respondent's witnesses aware of at an early stage in his dealings with them. We do not find that it had any bearing on the matters raised in these proceedings.

33. The other important matter to record by way of background is that in BTP, as in the MPS, a rank system operates and all junior officers must follow the

orders of superior officers. This system reflects regulation 20 of *The Police Regulations 2003* (the 2003 Regulations) which provides that: "*Every member of a police force shall carry out all lawful orders and shall at all times punctually and promptly perform all appointed duties and attend to all matters within the scope of his office as a constable"*. The Standards of Professional Behaviour in Schedule 1 to *The British Transport Police (Conduct) Regulations 2015* (the 2015 Regulations) further require that *"Police officer only give and carry out lawful orders and instructions. Police officers abide by police regulations, force policies and lawful orders."* The importance of this system in emergency situations is obvious, but all witnesses were agreed that the system applies at all times, not just in emergency situations. That is not to say that orders cannot be questioned, as Inspector Downs explained, but they must be followed at the time they are given and only questioned later through the proper channels. What the proper channels were is significant in this case and we return to it below.

The shift system, officer monitoring and the local roster

34. The ERU has to be staffed so as to ensure that there is always someone available to drive the emergency response vehicles. In addition, officers will need from time to time to attend training. Police Sergeants and other more senior officers will also have other duties to attend to in terms of line management, administrative and planning responsibilities.

35. Originally a 12-hour shift system was in place for both Police Constables and Police Sergeants on the ERU. This required that officers work 4 x 12-hour shifts per week. In 2013, an Inspector Tanner (who had taken over responsibility for the ERU in October/November 2012) introduced a new shift system for the Police Sergeants so that they did 5 x 8/10-hour shifts per week. The purpose of this was to enable them better to supervise their teams as it meant that the Police Sergeants would work alongside different Police Constables as the shifts rotated. One consequence of it was that if the Police Sergeant had to work a 12-hour shift so as to cover for the absence of a Police Constable (for example) they would acquire overtime or time off in lieu (TOIL).

36. Because Camden ERU base did not have access to BTP computer systems, the Claimant offered to produce a local roster to enable officers to see what shifts they were working without having to access BTP systems. The Claimant maintained this roster, often in his own time and from home.

37. It was always acknowledged by all parties, however (including the Claimant), that the local roster was not the official roster. Official shift and work records were kept on the central Duty Management System (DMS).

38. Actual shifts worked were for a number of years recorded locally in handwritten duty books by individual officers. The Claimant told the Tribunal that he had retained four or five paper duty books at home which were due to be thrown away.

39. Within the DMS is an electronic Book On Book Off (BOBO) system which requires officers to log on and off shifts electronically, and on which overtime worked must be recorded. This has to be done weekly at a BTP computer terminal to ensure that an officer is paid correctly.

40. Although police constables are rostered to work specific shifts, which they must keep to, more senior officers often have more flexibility as to when they work. Inspector Downs, TPI Owens and Chief Superintendent Allingham all gave evidence that there can be flexibility in shifts where the shifts are not providing essential cover for a particular service or event.

41. The Respondent has multiple ways of identifying the whereabouts of an officer at any given time, although not all are wholly reliable. The Force Police Radio system should show each officer's availability and duty status, and the Airwave radio should also show location. Officers also have a Force Oyster travel card which will record all travel on the card (Johnson, para 34).

42. TPI Owens gave evidence that overtime is recorded on DMS and must be approved by a supervisor. TPI Owens also explained to the Tribunal that DMS is monitored by central HR and there are automatic triggers for investigation where an officer exceeds a particular level of overtime in any particular period. Sergeant Johnson's evidence (paragraph 35) was that any inappropriate high earners are challenged on a monthly basis by the Finance department or flagged to the Chief Inspector for governance and scrutiny.

Previous issues on the ERU team

43. PS Johnson gave evidence that during 2012/13 there were a number of issues on the team. An Inspector Tanner was in place for seven months, during which time he removed four PCs for what he alleged were serious crimes of fraud. Inspector Tanner also accused PS Johnson of failing to sign pocket notebooks and failing to set Personal Development Reviews (PDRs). Inspector Tanner was posted elsewhere in May 2013.

44. In his claim form and in his witness statement in these proceedings, the Claimant included by way of what he said was background information, that on 11 October 2013 he presented a briefing to Assistant Chief Constable (ACC) David McCall about possible illegality in relation to the procurement of Emergency Fire Agency Driving courses by an inspector within the BTP. He says that the Independent Police Conduct Commission (IPCC), now the Independent Office for Police Conduct (IOPC), investigated his allegation, and that a gross misconduct charge was made against that inspector, but not upheld at a hearing in August 2015. This is not, however, relied upon by the Claimant as a protected disclosure in these proceedings and the Claimant has not suggested that he was less favourably treated in any way as a result of making this complaint. We have not found it relevant to our judgment.

Disclosure 1 – 25 April 2016 email

45. From at least the start of 2016 the Claimant started maintaining a contemporaneous log of work-related incidents (those for 2016 are at pp 269-310; those for 2017 at pp 632-774).

46. The first alleged protected disclosure that the Claimant relies on is an email of 25 April 2016 that he sent to PS Johnson (pp 235-6). The Claimant notes the sending of this email in his log as *"Report submitted to Sgt Johnson about my concerns of his duties"*. The email is lengthy, but the tenor of it is that PS Johnson is not keeping to his rostered shift pattern and is arranging his shifts to his own benefit, and not applying to himself the same efforts to save money that he applies to others. The email includes the following paragraphs on which weight has been placed in these proceedings (typographical errors in the original are retained, as they are in all quotations in this judgment):

> "For reasons I am not aware of, and certainly since February 2015 when I have been able to view the duty books, your shift pattern is the exception as opposed to the rule. You departed from your rostered shift times on no less than 125 occasions from February to December 2015, without explanation in the duty book and, (to the best of my knowledge) every shift thus far in 2016. There is well documented evidence that your sanctioned, or preferred, eight or ten hour shifts tend to start at 0700 or 0800. If these are changes to your previously approved roster, you have yet to ask me to change it on the roster I put out and (again to the best of my knowledge) yet to have it reflected on the DMS system.
>
> You have recently alluded to the fact that due to cutbacks, overtime and expenses are being scrutinised more than ever and we have to save money… You also recently informed me that my petrol claims would no longer be entertained – although I am led to believe others' will be, including that of your own.
>
> The opportunity to maximise efficiency and cost cutting appears to have been overlooked in respect of your own duties for some time now.
> …
> Research I have done has revealed that since January 2014, to April 1st 2016, you have been compensated by 464 hours of pay or TOIL. This compares to 101 hours for PC Treves, 213 hours for PC Davis, 135 hours for PC Beeken, 237 hours for PC Twyman and 260 hours for myself. The majority of your overtime was earned as the result of extending your eight or ten hour shifts, to cover shortfalls in shift cover. Your overtime total will be increased further by 71 hours from now until 29th July as a direct impact of PC Beekens' retirement, to address shortfalls in shift cover (54 hours @ 1.33 = 71 hours).
>
> Some might consider these extended shifts as a great inconvenience for you, impacting on your work/life balance. Some might see it as your having the opportunity to significantly increase your net pay and/or TOIL balance. Your overtime submissions do not give rise to adverse scrutiny because

> 'Maintaining ERU cover' is something we are contractually obliged to provide to London Underground, and they present as there being no other option to providing it. Both situations could be greatly negated by your returning to the shift length worked on this unit.
> …
>
> I believe that the current system lacks objectivity, and possibly even integrity, in that you are the author of the ERU duties, perversely benefiting each and every time you post yourself to a shift that cannot be filled. On the few occasions you work a cancelled rest day, there is little perceived detrimental effect on your home or social life and normally to your advantage. I cannot see how your predominantly mid or late afternoon finishing times and weekend off duties, together with your cost inefficient shift length pattern, benefits anyone but yourself, both domestically and financially.
> …
> On the subject Meetings with stakeholders/dealings with management. These seem to have increased post 2014 and would explain your increased absence from the Camden base. I am aware that PSD asked colleagues at Stratford ERU about their 'failure' to raise concerns they had about their supervisors' lengthy and unexplained absences. All I would say at this stage, is that when I have been asked by our stakeholders what times you are on and where you are, I have invariably been unable to tell them which is both frustrating and embarrassing.

47. The Claimant concludes by stating that he was considering seeking an objective review of the situation at senior officer level.

48. The Claimant contends (para 11) that the allegations in this email were allegations of a criminal offence (fraud) and/or failure to comply with a legal obligation, including the requirement to obey lawful orders and to carry out duties 'punctually and promptly perform all appointed duties and attend to all matters within the scope of his office as a constable' (reg 20 of the Police Regulations 2003 ("the 2003 Regulations"), by which BTP officers are required to abide, by virtue of British Transport Police Conduct Regulations 2015 ("the 2015 Regulations")). Alternatively he contends that the allegations were of failure to be 'diligent in the exercise of … duties and responsibilities', to be honest, act with integrity, not to compromise or abuse their position and to behave in a manner which does not discredit the police service or undermine public confidence in it (Sch 1 of the 2015 Regulations).

49. The Claimant maintains these are matters of public interest, involving the spending of public money.

The Tribunal's assessment of Disclosure 1

50. The Tribunal accepts that the Claimant subjectively believed that the information disclosed in his email of 25 April 2016 tended to show that PS Johnson was failing or was likely to fail with these legal obligations. In accordance with the legal principles that we identify above, the Tribunal must

consider whether the Claimant's belief in this regard was objectively reasonable. With regard to this first alleged disclosure the Tribunal finds as follows:

a. The Claimant could not reasonably have believed that the information contained in this email tended to show fraud. All he says in this email is that PS Johnson has changed his shifts, not that he has failed to work shifts for which he has been paid. So far as overtime is concerned, his complaint here is that the 8/10-hour shift system for sergeants means that they get overtime every time they cover a 12-hour shift. This is inefficient and not the most economic way of arranging shifts (as Insp Downs was later to acknowledge), but it is not fraud and the Claimant could not reasonably have thought so. Indeed, even he does not suggest in this email that it is fraud, although as set out below he was later happy to use that term to characterise his complaints about PS Johnson;

b. However, we accept that the Claimant could reasonably consider that PS Johnson moving his shifts on 125 occasions to more sociable times tended to show a failure 'to punctually and promptly perform all appointed duties and attend to all matters within the scope of his office as a constable' and/or failure to be 'diligent in the exercise of … duties and responsibilities', and/or abuse of position. Although we heard evidence that Sergeants enjoy flexibility with regard to shift times, judging matters from the Claimant's perspective, we can see that the changes in shift time could reasonably be regarded as 'tending to show' that PS Johnson was abusing those flexibilities. In this respect, we have taken into account that the Claimant accepted in cross-examination that he did not know whether or not PS Johnson had authority to change his shift times in the way that he had. However, given the evidence we heard about Sergeants having flexibility about precise shift times for which authorisation was not required, we do not consider that the fact that the Claimant was unaware of whether the changes were authorised changes the fact that he could reasonably consider the changing of shifts on so many occasions tended to show dereliction of duty on PS Johnson's part;

c. Further, we accept that the Claimant could reasonably consider this to be a matter of public interest, potentially involving as it did the efficiency of the ERU, which performs significant public duties and is funded by public funds. It also potentially affected all the officers on the ERU, not just the Claimant. Although the ERU is a small unit this is, we find, a factor that supports the reasonableness of the Claimant's belief that this particular disclosure was in the public interest.

51. It follows that we accept that the email of 25 April 2016 contained a protected disclosure regarding PS Johnson moving his shifts on 125 occasions, but the rest of the email was not a protected disclosure.

Events immediately subsequent to Disclosure 1

52. PS Johnson forwarded the Claimant's email of 25 April 2016 on to both Inspector Donovan and TPI Owens immediately. His email to Inspector Donovan (p 236E) states: *"Submitted for your attention as this would appear to be an attack or a slur on me and questions my integrity. I can guarantee there is no wrong doing on my part whatsoever and I think it would appear to be sour grapes from the individual concerned".* His email to TPI Owens (p 236A) reminds her of the reasons why he has been working overtime. He stated: *"Should you like to discuss anything with me then let me know, although personally speaking I think it's sour grapes. Over some minor things."* In his evidence to the Tribunal PS Johnson was adamant that he would not have done anything wrong because he was close to retirement and would not be so stupid as to jeopardise his police pension, particularly after the issues that arisen on the unit under Inspector Tanner's charge.

53. Inspector Donovan replied within the hour on 25 April (p 236E). He said *"Now I have had a chance to read it this can't be left and is more detailed than I was expecting. I would suggest firstly you have a chat with PC Cox to discuss the content of this email and document the outcome. … It appears PC Cox would benefit from a move and is concerning himself with issues that aren't his problem. I suggest you bring this to the attention of TPI Owens in any event."* (PS Johnson had already emailed TPI Owens.)

54. On 26 April 2016 PS Johnson issued an email to all those on the Camden ERU Local Roster that the *"local roster"* published by PC John Cox *"will no longer be referred to"* (p 237). PS Johnson gave evidence that this was on Insp Owens instruction. In oral evidence Insp Owens appeared initially to have forgotten this, although she later said that her *"first reaction"* had been to say that the local roster should no longer operate and the Tribunal accepts accordingly that the sending of this email by PS Johnson was indeed at TPI Owens' instruction. In this respect, the Tribunal takes into account that PS Johnson's initial reaction was to refer the Claimant's email to his superiors and we do not consider that, having done so, he would unilaterally have sent the email of 26 April 2016.

55. PS Johnson's email of 26 April 2016 is noted by the Claimant on his daily log and from this point on his log becomes increasingly focused on the activities of PS Johnson.

56. On 3 May 2016 PS Johnson provided some further information to Insp Owens (p 237A), who he understood was due to meet with the Claimant. This email appears to include a cut and pasted version of a draft of what PS Johnson later included in the Claimant's Personal Development Review for the year (as to which see below). This version includes the following:

> "PC Cox makes representations in a message sent out concerning a number of matters such as welfare time management etc as well as questioning the duties performed by his first line manager. This will be addressed at Insp level on the 4th May by TPI Owens. In December 2015 he brought certain

> matters to my attention such as New Years Eve partnership working despite being given an audience with Sean Watters the ERU manager agreed to disagree.
>
> His recent suggestion in an e mail to compile a register of Toil/Pay for overtime in the interests of fairness! This would be duplicitous, the Force already keeps records and is NOT PC Cox's role as an Constable on the ERU. He needs to be sensitive, as well cautious, not be seen as "overstepping the mark". Many would view the shift worked by the PC's as a "job with benefits" and he has failed to grasp that of late. Perhaps he needs to stake a big step back and consider this … The Captain of a war ship, 2carries out rounds!" ensuring it's fit to fight he doesn't clean the ship as perhaps he used to. The Sgt on the unit now has a more demands on his time by various IT systems, it cannot be carried out on a part time basis as well as now supervising 12 PCs with matters that "Do not concern him!" PC Cox is at a cross roads I feel he is unhappy on the team he works with, there is a personality clash with one individual, possibly a second (Steve Payne and Paul Willis both engineers) which is over something that started out as trivial, but has festered into other matters. Is not great harmony on the team. I've spoken to PC Cox regarding this and given him an option to move away and his reply is it would be the same for any other officer that went on that team and not fair on them. I feel this situation has ground him down a little as it's a situation that John can't really influence."

57. On 6 May 2016 the Claimant attended a meeting with Acting Insp Owens to discuss the matters he had raised in his email of 25 April 2016. In a personal note made at the time (p 259) he described this meeting as an *"in depth"* discussion of *"all of my email"*. At this meeting he mentioned that his cousin was married to the Chief Constable. Having discussed matters with the Claimant at this meeting, TPI Owens took the view (recorded in the notes at p 237B and repeated to us in oral evidence) that, contrary to her initial thought, the local roster could continue provided that she was copied into every email including changes to ensure that it can be checked with the central DMS. The notes also record TPI Owens' view that PCs should be given the first opportunity to cover "BHW/RDW backfill" opportunities, and that the Sergeant roster needs to be discussed as *"it is felt that its not fit for purpose"*. TPI Owens also indicated that the Claimant's approach may appear disrespectful to his supervisor. She also asked him if he was happy to remain on the ERU, and recorded his answer (p 237E) that he was.

58. The Claimant was concerned about this comment, noting in his daily log (p 260) that he was uncertain whether it was a genuine welfare query or a veiled threat, although he did not complain about it at the time. The Tribunal finds that this was not a 'veiled threat'. The Tribunal notes that this was also Inspector Donovan's initial reaction as expressed on his email of 25 April 2016 and, further, that a number of the Respondent's witnesses (in particular CI Lawrie) considered that moving units was relatively common. CI Lawrie specifically said that he did not consider it to be detrimental treatment, provided that it was discussed with the officer. The Tribunal infers that it is relatively common for team moves to be used in the force to deal with

relationship issues and that TPI Owens' enquiry was thus a standard response. Many individuals in the Claimant's position might have wanted a move if they were unhappy with their then management and we find there was nothing untoward in TPI Owens asking the Claimant that question.

59. On 10 May 2016 PS Johnson emailed the team instructing that Book on Book Off (BOBO) entries were now to be updated on the last day of any set of shifts by attending BTP premises on the way home (p 244). This was on TPI Owens instruction. The Claimant considered that this impacted on his and colleagues' time while off-duty and he experienced some difficulties in complying with the new requirements, which at the time he also considered to be unlawful because it required officers to work after the end of their shift, although he has made no complaint about this in these proceedings (paras 16-17 and p 405). On the same date, TPI Owens emailed the Claimant reinforcing that whatever he published on his roster must now match 'Self Service' on DMS and pointing out various respects in which it did not (p 243). It is also on this date that the Claimant first records in his daily log (p 276) that he considers there has been retaliation against him for his email of 25 April 2016. He wrote: *"I'm getting the impression that the problems highlighted by myself (lack of Sgt Johnson's duties, excessive overtime and selfish attitude with duties) together with A/Insp Owen's lack of supervision of Sgt Johnson duties and fear of going against Insp Donovan's decision to change Tim J's duties (at great expense to the overtime budget) have resulted in myself and fellow constables are being directives which are not only 'punitive' – but quite possibly against Police Regs"*.

60. The Claimant gave evidence that on 16 May 2016 PC Davies told him that PC Fillary had mentioned that he was having to cover numerous shifts because PS Johnson was no longer able to do so following the Claimant's complaint (C para 18). The Claimant also recorded this incident in his contemporaneous daily log and we therefore accept his evidence. He argues that this shows PS Johnson's resentment of him for raising the complaints, although he does not rely on these incidents as detriments in these proceedings. We accept in general terms that PS Johnson would not have made these remarks were it not for the Claimant's complaints. However, it does not follow from this that PS Johnson subjected the Claimant to any detriment for making protected disclosures and we address the reasons for the treatment that the Claimant complains of in these proceedings below.

<u>Detriment 1 – Personal Development Review (PDR)</u>

61. On 18 May 2016 the Claimant received the first draft of his annual PDR (pp 226-234). The section of the PDR completed by PS Johnson states:

> "PC Cox is an officer who has completed over 30 years' service with the Metropolitan Police and has approximately 5 year's service with BTP. He is not seeking promotion and is in a specialist role, he has a good sense of right and Wrong, he is generally a man of principal. He has been very

> supportive in the last 4 years whilst I've been his line manager, as reflected in my supervisory reviews I've written in his previous PDR's.
>
> He has made a couple of off duty arrests which show his morale duty even at his length of service which is commendable. One of these incidents occurred in Brighton whereupon he held a man in a groundpin for around 15 minutes until the arrival of Sussex officers. Resulting in Health scare for PC Cox and a visit to the local hospital A&E when he was bitten during the detention of a suspect who had HIV. Thankfully it was established this was low risk, and after tests PC Cox donates blood and platelets both in his own time and approximately 33% in work time as he has a rare blood group and platelets.
>
> Since the inception of the ERU, PC Cox volunteered to compile a Local roster for benefits of all concerned, which I acknowledge; This is at odds with a now dedicated duties officer within resource planning and now needs to be handed over for them to deal. PC Cox on a whole gets on well with 4 members on his team. There has been a difference of opinion with part of the engineering team which affected the dynamics however we have discussed the options to resolve it.
>
> I have highlighted to my line manager the recent tone of communication where you wanted to address a few concerns, this was discussed and expectations given on how to address a supervisor. PC Cox documents the various incidents that he has attended throughout the course of the year and I thank him for his efforts."

62. PS Johnson accepted in cross-examination that the reference here to *"the recent tone of communication"* was to the 25 April 2016 email, but it was not this part of the PDR that the Claimant complains about. The Claimant complains in these proceedings that the PDR contained an inaccurate negative comment that he had a difference of opinion with a team member and that there had been a discussion about it. He raised this complaint at the time by email of 18 May 2016 (p 245) as follows:

> "I wish to place on record that I do not accept the part of your writeup in which you state 'PC Cox on a whole gets on well with 4 members on his team. There has been a difference of opinion with part of the engineering team which affected the dynamics however we have discussed the options to resolve it'."

63. On 19 May 2016 PS Johnson and the Claimant met (p 246). PS Johnson's evidence (para 51) was that the Claimant at this meeting said that the reason for his concern was that he was being highlighted for having differences of opinion when others were not and that he wished to take Police Federation advice before PS Johnson responded. PS Johnson accordingly postponed the meeting to allow the Claimant to take advice and come back to him. An email in the bundle from PS Johnson to TPI Owens of 1 July 2016 reflects PS Johnson's account of this meeting, which we accordingly accept.

64. The Claimant in his statement (para 19) had originally denied that there had been any difference of opinion. He corrected that in evidence in chief to say that there had been a slight difference of opinion, but he disagreed that it had been discussed with him. So far as this issue is concerned, we do not need to resolve the dispute between the Claimant and PS Johnson as to the extent to which the Claimant had fallen out with his colleagues or whether there had been a discussion about it. What is relevant to these proceedings is whether PS Johnson genuinely believed that what he wrote in the first PDR about this was correct. We find that he did. This is because PS Johnson's evidence on this in his witness statement and orally was consistent with what he originally wrote in the PDR and he was able to provide details as to his understanding of how the difference of opinion arose and how he discussed it with the Claimant at the time when standing next to the lockers. The Claimant, however, had initially denied any difference of opinion at all, but then changed his evidence and we therefore consider that his recollection of matters is not as reliable as PS Johnson's.

65. The Claimant gave evidence that on 11 June 2016 PC Treves informed him that PS Johnson had told him he could tell him he had done a night shift. He considered that this was a condescending and glib remark which unnecessarily highlighted to one of his peers what he regarded as the confidential concerns he had raised in his email of 25 April 2016 (C para 25). In a similar vein, the Claimant gave evidence that on 15 July 2016 PC Treves informed PS Johnson about some concerns, to which PS Johnson replied words to the effect of *"Have you been speaking to Coxy?"* (C para 26). Again, this reflects the Claimant's contemporaneous log and we accept his evidence. The Claimant suggests that this indicated that PS Johnson had now marked him down as a complainer. As with previous similar comments, we accept that PS Johnson made the comment and that he did so because of the Claimant's complaints in his 25 April 2016 email, but the same point applies as we made previously: it does not follow that PS Johnson subjected the Claimant to any of the detriments relied on in these proceedings because he had made a protected disclosure.

66. In July 2016 the Claimant's PDR was rewritten following his challenge. PS Johnson and TPI Owens were adamant that this was not because the original PDR was incorrect, but because they were content to remove the information he challenged in the light of him being concerned about it. We accept the Respondent's evidence in this respect because we have accepted for the reasons set out above that PS Johnson genuinely believed what he had written in the first PDR was correct.

67. The rewritten PDR read as follows:

> "PC Cox is an officer who has completed over 30 years' service with the Metropolitan Police with a varied background and a wealth of knowledge, experience and skills that he has transferred over to the BTP where he has seen 5 years service. He enjoys this specialist role and has embraced the challenges that are presented.

> He is self motivated and works well with minimum supervision and he has evidenced this by ensuring that he keeps current with operational and technical changes within the BTP. I am particularly impressed with his suggestion of working with the case progression team which will allow him to build his knowledge on Niche and how to input stop and search, intelligence reports and submit files which has limited opportunity in the ERU due to the nature of the role.
>
> It is also very important that he maintains his licence classification which he has evidenced and again this demonstrates his self motivation and has recently attended the EFAD refresher obtaining a GOOD pass.
>
> Since the inception of the ERU, PC Cox volunteered to compile a roster for benefits of all concerned due to officers not having regular access to self service, this is a local arrangement and I have asked PC COX to ensure that this matches DMS to prevent any confusion, I am also aware that he does this work in his own time and the team and I are very grateful.
>
> PC COX has a very good presence and conducts himself professionally being very aware of Make a difference/VITAL behaviours, 20:20:10 and organisational expectations where he makes a great contribution with his the team to work towards reducing disruption."

The Tribunal's assessment of Detriment 1

68. In our judgment, the Claimant's complaint about the inclusion in the first version of the PDR of what he considered to be an inaccurate negative comment that he had a difference of opinion with a team member and that there had been a discussion about it, is not something that he could reasonably have regarded as a detriment. As the Claimant accepted in evidence, he had in fact had a difference of opinion with a colleague, he merely disputed that it was with two colleagues or that there had been a discussion about it. He complained about this and the comment was removed (and, indeed, the whole PDR was rewritten in what we would describe as a more professional style). Overall, the PDR both in its original form and in its rewritten version was positive about the Claimant. In the circumstances, what the Claimant alleges to be a detriment was a trivial matter that the Claimant could not reasonably have considered to be to his disadvantage in the circumstances in which he thereafter had to work.

69. Even if we are wrong about that, we find that the comment was not included because the Claimant had written Disclosure 1 (the email of 25 April 2016), and certainly not because of the limited part of that email that we have found constituted a protected disclosure. Part of the PDR did relate to the 25 April 2016 email (the sentence about the tone of recent email correspondence), but not the comment about which the Claimant complains.

Report to PSD

70. On 12 September 2016 the Claimant emailed Chief Constable Crowther asking for the email of an appropriate officer to whom he could present allegations of fraud (p 250). The Claimant's cousin is married to CC Crowther, hence the direct approach. He was not (he says) seeking special treatment. He alluded to a previous approach he had made to CC Crowther: *"As before, it might be prudent if you were distanced from this matter."* He requested he be introduced to an appropriate officer as he was concerned that he might otherwise be identified as the source of the allegations. He did not give detail of the allegations but suggested that there were issues with *"honesty and integrity of the duties he performs"* which *"impact on the welfare of those under his commence [and] also overtime payments"*. The Claimant gave unchallenged evidence that CC Crowther's staff officer told him to refer the case to CI Dermody at BTP's Professional Standards Department (PSD).

71. On 16 September 2016 the Claimant delivered a report to BTP's Professional Standards Department (PSD) in relation to the allegations (pp 251-3, 254-67). This report dealt with a number of matters and included a large number of extracts from the Claimant's daily log. Among other things, it included an allegation that the 8/10-hour shift pattern for sergeants introduced in 2014 by Inspector Donovan had been at the behest of PS Johnson in order to enable him to earn more money to finance the recent purchase of a horse for his daughter. The Claimant then complained about various results of the new roster which he considered to be unfavourable, including that PS Johnson's overtime hours were double that of his constables and constables had experienced more cancelled rest day workings at weekends. It referred to the Claimant's email of 25 April 2016 and quoted that in full. It also quoted a paragraph said to have been written by DCC Hanstock (p 259) to the effect that existing shift patterns were barriers to clear and effective planning and add to overtime costs. The Claimant referred to his meeting with TPI Owens of 6 May 2016 stating that it had been an *"in depth"* discussion of the issues he had raised, but also raising his concern about her question about whether he wanted to remain on the ERU, although he said this was *"Mentioned for context only – no complaint being made at this stage"*. Under a heading *"Damage to BTP's reputation"* the Claimant referred to PS Johnson's lack of presence being increasingly noticed by immediate LU (London Underground) colleagues. Under a heading *"Fraud?"* the Claimant included an entry from his log dated 31 August 2016 which stated as follows:

> "Having looked at my duties at whilst at St Pancras BTP, I notice that on 23.9.16 I am the core driver from 0700-1500 instead of being 'spare'. Sgt Johnson will be on duty from 1100-1900 and will cover driving duties from 1500-1900, when night duty officer takes over.
>
> I am reminded of the last time I was on my 8 hour shift and Sgt Johnson worked in conjunction with me. This was on 18.12.15 (my Father's Birthday). At that time Sgt Johnson chose to cancel his rest day work and had had to cancel his subsequent 19.12.15 and 20.12.16 rest days, to cover the abstraction of an officer.

> Usual practice would have been for my 8 hour tour of 18.12.15 to be extended by four hours to cover until 1900 – and Sgt Johnson remaining on rest day.
>
> Remembered wondering why he would want to come in on his rest day – and failing to see the requirement to do a 12 hour cancelled rest day – I was able to cover until 1500.
>
> He could (should?) have come in at 1100 and banked and 8 hour RDIL, resulting from this 1100-1900 work day – something he sees as the appropriate thing to do on 23.9.16. – (see my local roster from 2015 below. I hope it makes sense to you)"

72. The Claimant then set out his local roster from 2015 which showed PS Johnson for 18 December 2015 as "*DAYS"*. He then quoted from an email that PS Johnson had sent him on 1 December 2015. We have the whole of that email exchange in the bundle (p 234A). It starts with the Claimant emailing PS Johnson about various matters concerning the local roster and it includes the following:

> "Noted on roster – however a few anomalies I've spotted
> 11th December Paul Twyman is Training 8. He might appreciate 4 hrs O/T (and Jules won't have to come in in the middle of a block of rest days). I also appreciate Paul is imminently moving
>
> 18th December: As above except I'm Training 8. I'll take 4 hours pre-planned and it saves you coming in on a rest day
>
> 4th January Jules is in all day – and you've shown yourself DAYS as well (from 10-6pm). This was probably varies prior to Jules being posted."

73. PS Johnson replied as follows (so far as relevant):

> "11th December – Paul is at the point of moving so don't want to complicate it anymore Jules is happy to come in …
>
> 18th December would have given it to you but that further complicates RDIL that I've now pre-booked and complicated further by dates that have come up for my daughters i/views for midwifery at several unis Kingston/Middx and Bournemouth. Sorry I will give you the next 4 hrs when your on a shorter day remind me.
>
> …
> Hold fire on any other changes being pumped out as I'm going to see duties on Thursday as various training keeps coming in for all officers and becoming a bit of a challenge."

74. In his report to PSD of 16 September 2016, having set out the middle paragraph of PS Johnson's email above, the Claimant then speculated as to

the basis on which PS Johnson had changed a number of shifts around that date. In relation to 18 December 2015, he stated as follows:

> "c) As regards 18.12.15 – did he claim unnecessary overtime? (2 or 4 hours as previously mentioned) when he was only required to perform a minimum 8 hour shift that day, to cover the 12 hour day shift.
>
> If he did claim overtime, was it Fraud because he would no doubt have stated he was 'Maintaining ERU cover' – the inference and misrepresentation being it had been necessary in order to maintain it. Or, is it not Fraud – because he actually did 'Maintain ERU cover' that day, albeit for four hours more than was necessary? These are understandable things are crossing my mind that I am trying to reason through – should I have considered them at the time?
>
> I trusted the right thing was being recorded, scrutinised and authorised at the time – I hope they were. But, the views I had about his honesty, integrity and leadership from when he first joined us, have increasingly become much less positive now."

75. In his witness statement (para 33) the Claimant summarised his concern about PS Johnson's conduct on 18 December 2015 somewhat differently as follows:

> "I noticed that on 23rd September 2016 Sgt Johnson was due to work a 1100-1900 shift, enabling him to cover driving duties from 1500, when my duty finished, until 1900 hrs when the night duty officer came in. I remembered the same shift cover scenario occurring on 18th December 2015 but that on that date, Sgt Johnson had worked from 0700-1900 hrs, and claimed overtime. This seemed to me to involve Sgt Johnson working 4 hours overtime unnecessarily as he could have worked from 1100 to 1900 as was planned for 23rd September 2016, I had raised this with him in an email exchange with him at the time. I remembered the date as it is my dad's birthday. I knew Sgt Johnson's shift pattern. I couldn't understand why Sgt Johnson had not made the same arrangements in December that he did in September 2016. Working overtime which is not needed could be fraud. I was very concerned about this and turned it over in my mind for a few days."

76. When the Tribunal questioned the Claimant at the hearing as to how he knew that PS Johnson worked 12 hours and claimed overtime on 18 December 2015, he was at first not sure, but then said that the record of "DAYS" in the local roster set out above was what PS Johnson had entered in the Duty Book and that "DAYS" meant 12 hours. The Tribunal notes, however, that it is clear from the Claimant's own email of 1 December 2015 (set out above) that "DAYS" does not always mean 12 hours – in that email it meant 8 hours (10-6pm). PS Johnson was not sure what "DAYS" meant or what hours he actually worked on that day. It is clear from the Claimant's report to PSD that the Claimant did not know whether or not PS Johnson had claimed overtime for 18 December 2015. It is also clear from the Claimant's own choice of words in his report to PSD that he understood that even if PS Johnson had

claimed overtime, whether or not that could constitute fraud would depend on whether when doing so PS Johnson 'represented that it was necessary to do so in order to maintain ERU cover'. This is a matter of which the Claimant had no knowledge. PS Johnson had duties other than maintaining ERU cover since he was also a supervisor of 12 other officers. Moreover, the reasons that PS Johnson gave to the Claimant at the time for working that day (i.e. in the email of 1 December 2015) were that he was unable to work on other days around that time and had apparently moved shifts to accommodate personal commitments. He thus had other reasons why he needed to work the shift that he did apart from 'maintaining ERU cover' (as the Claimant put it).

Tribunal's assessment of the fraud allegation re 18 December 2015 shift

77. This report to PSD of 16 September 2016 is not itself relied on by the Claimant as a protected disclosure, although the allegation made in it as to the commission of a fraud by PS Johnson on 18 December 2015 is repeated by the Claimant in many of his later disclosures and so we deal with the reasonableness of the Claimant's belief here.

78. While we accept that the Claimant believed at the time he made this report to PSD (and still does) that PS Johnson had acted in breach of a legal obligation (whether fraud or police duties under the 2003 or 2015 Regulations) in working the shift he did on 18 December 2015, we find that his belief that the information he disclosed in this report tended to show any such breach is not reasonable. On its face, the report does not make a positive allegation of 'fraud', nor does it disclose facts that would tend to show 'fraud' had been committed. Rather, it asks a series of questions about whether overtime was claimed by PS Johnson, what had been represented by PS Johnson and what he did on the shift. It is, in all material respects, not a disclosure of information at all, but speculation. Moreover, for the reasons we have identified at paragraph 76 above, we do not accept that the Claimant even had a reasonable belief that PS Johnson had worked for 12 hours that day. This was simply not a matter within his knowledge and he ought to have known that.

<u>PSD investigation</u>

79. The Claimant did not hear anything further from PSD about this report for some months. During the intervening period the Claimant discussed the 'fraud' he considered that he had discovered in relation to PS Johnson's duty on 18 December 2015 with two colleagues. His log entry reads *"I speak to [PD] and [EP] during a Pizza lunch having left ZT, about Tim J's action on the 18th December 2015. They don't spot the Fraud in the scenario – stating it was morally wrong. Penny pointed out that 4 hours on my rate of pay would have been the cheaper option. They concede it might be Fraud after I explain"*.

80. On 30 November 2016 the Deputy Chief Constable Hanstock published an article 'Doing the Right Thing' about challenging authority and doing the right thing even when no one is watching (p 268A). The article announced that new challenge forums were being set up at which the force's policies and procedures in this respect could be discussed.

81. On 5 January 2017, the Claimant emailed Detective Inspector (DI) Dermody asking for an update on the allegations he had made in his report of 16 September 2016 (pp 312-3). He acknowledged that in accordance with usual PSD procedures he would not be told about the progress of investigation into allegations made against PS Johnson, but he wanted to know if the investigation was 'ongoing'. He also said that there were *"further issues which have come to light which shed some doubt as to his honesty and integrity"*. He said *"My email highlighted his failure to keep to his duties (on some 125 occasions). In all probability false entries were subsequently put on the BOBO system by him"*. In this email he also raised a concern which has not featured in his claim in these proceedings about a *"directive"* issued by TPI Owens which he considered to be *"unlawful and punitive"* in relation to the submission of BOBO entries (the Claimant's concern was that TPI Owens had said these should be done in own time). He said that he wanted to know what the status of the investigation was as he wished to attend one of the DCC's Do The Right Thing events but did not consider he should if investigations were ongoing.

82. DI Dermody responded on 5 January 2017 stating:

> "I have spoken about the issues you raise with our Appropriate Authority. I feel that they pose a risk to the ERU therefore in the first instance I believe that the more proportionate response is for the management of the ERU to deal with the issues. With that in mind I have spoken to Supt Jordan and CI Clarke who will look at the issues on their unit. Clearly I have offered them PSD support if required."

83. The next day (6 January 2017), the Claimant met with DI Dermody (para 42). The Claimant considered that DI Dermody appeared to sympathise with his concerns. DI Dermody emailed Chief Inspector (CI) Clarke, and the newly appointed Inspector Downs, after this meeting, copying in the Claimant, as follows:

> "I have had a meeting today with PC Cox (above). He is one of your Camden based ERU officers and has written the email below and also sent the attached document to PSD in September 2016. I have briefly spoken to Supt Jordon yesterday about this. You may or may not be aware that historically the ERU has come to the attention of the PSD on a number of occasions which has resulted in lengthy and complex investigations. PC Cox is clearly not happy with some of the practices presently undertaken on the unit. I have expressed the view to PC Cox that issues such as these are more proportionately and practically dealt with by local management that PSD. Putting aside historic events that occurred before your arrival now is

> a perfect opportunity to tackle these issues such as rosters, booking on/off procedures etc raised by this officer."

84. A number of the Respondent's witnesses (Insp Downs and CI Lawrie) characterised this action by DI Dermody as being a finding of 'no case to answer' by PSD. In cross-examination of the Respondent's witnesses, reference was made to the PSD Complaints and Misconduct Policy, paragraph 3.1.3 which provides: *"Employees are encouraged to raise their concerns through an appropriate member of local management or with PSD … directly. PSD should always be notified in the first instance in cases of corruption and serious misconduct…"*, and to paragraph 3.1.5 which provides that PSD will assess the allegations as one of the following: *"1. No further action required – insufficient grounds for any action or investigation; 2. Suitable for local management action, for example words of advice or a Management Action File Note; 3. A performance issue to be dealt with local under the appropriate standard procedures; 4. A grievance to be dealt with under the Resolution procedure; 5. Grounds for a misconduct or gross misconduct investigation*. *In circumstances 1-4, the matter will be referred back to local management."* It was suggested by the Claimant that in referring this matter back to local management DI Dermody had not concluded that there was 'no case to answer' but that there was a 'case to answer' to be investigated by local management under point 2. above. We find that the Respondent's witnesses' characterisation of PSD's assessment as being that there was 'no case to answer' is correct. It is clear from the policy that if there is a misconduct case to answer, it is retained by PSD for investigation under point 5 of the policy. Anything other than that can properly be characterised as being a 'no misconduct case to answer' decision by PSD. Moreover, it is clear from the subsequent more formal assessment of the matter by PSD (to which we return to below) that this was indeed PSD's view.

85. Insp Downs was deputed to look into the issues, and he contacted the Claimant immediately informing him that he was reviewing matters and indicating that he would arrange to meet with him to gain a comprehensive picture (p 315). They in fact met later that same day (Downs, para 18). Inspector Downs's oral evidence was that it lasted three hours. We accept that it was a long meeting, but do not accept that it lasted three hours. That is an exaggeration. It is convenient to deal at this point with a submission that the Claimant's counsel made in closing submissions that Inspector Downs had made a number of errors or wrong assumptions in his evidence (including as to assuming the Claimant disliked the introduction of sergeants in 2012 and that he had exaggerated the time for which the Claimant had been complaining) which he submitted showed that Insp Downs viewed the Claimant in a negative light because of the complaints he had raised. While we accept that Insp Downs at times spoke or wrote in exaggerated terms about the Claimant and his complaints (and the assertion the meeting lasted for three hours is one such), we do not consider that this shows any malicious intent on his part, or any lack of fairness in the way that he dealt with the Claimant. On the contrary, we find that he gave due consideration to the matters that the Claimant put before him and ultimately as we set out below reached a fair and balanced conclusion in relation to the issues raised when

he reported to Superintendent (Supt) Jordan on the outcome of his investigations.

86. In any event, we find that Insp Downs did give the Claimant considerable time at that first meeting, and invited him to submit any further evidence he had. On 17 January 2017 the Claimant provided a lengthy briefing note (pp 317-336) which was essentially the same as the 16 September 2016 report to PSD, but included some additional material (p 330). The additional material comprises extracts from the Claimant's daily log for the period 16 September 2016 to 12 January 2017. By this point the log contains detailed notes as to PS Johnson's activities and whereabouts, including frequent questions and speculation from the Claimant about the same when he does not have the facts. It also contains a proposal for new shift arrangements which the Claimant considered may address the problems (p 336). He followed this up on 27 January 2017 with further information about more effective shift patterns that used to be worked (pp 337-8).

87. Around this time Insp Downs also spoke with two other PCs on the ERU, PC Treves and PC Davis about a number of other matters relevant to them, but in the course of which these PCs also suggested it would be beneficial for sergeants to return to the 12-hour shift pattern. The Claimant has suggested (p 358) that PC Treves and PC Davis also complained about PS Johnson, but we accept Insp Downs' evidence on this point as, of the witnesses we have heard, only he can know what matters the other constables raised with him.

88. Insp Downs was questioned about his reaction to the Claimant's allegations. Insp Downs was clear in his evidence, which is entirely consistent with his handling of the matter at the time, that he did not consider there was anything in the Claimant's allegations of misconduct. He was emphatic that working shifts, including overtime, and getting paid for them is not fraud. He said that fraud would be claiming to work a shift but not actually doing so. He did, however, agree with the Claimant that the 8/10-hour shift system for sergeants was inefficient and he considered it should be changed.

89. Insp Downs reported back to the Claimant on 3 February 2017 on where he had got to and his impression was that the Claimant was content with that (para 26).

90. On 10 February 2017 PS Johnson asked the Claimant to provide evidence of his attendances for blood donations during duty time 'for scrutiny'. The Claimant considered he had been singled out in this respect. The Claimant showed PS Johnson the texts from the Blood Donor Service, but PS Johnson did not actually scrutinise them to see if they tallied. This was recorded by the Claimant in his daily log. It was a matter that the Claimant raised in his second protected disclosure of 6 March 2017 (below) to Insp Downs. Insp Downs was asked about this in cross-examination. He explained he had not seen the need to investigate it as he thought it was reasonable for PS Johnson to ask for evidence, and also for him to be satisfied immediately with what was provided rather than conducting a full scrutiny of the information.

91. On 17 February 2017 the Claimant sent Insp Downs two further emails (pp 339-41) about PS Johnson's behaviour in relation to his duties and suggesting that he was acting improperly by not revealing he was a 'spare officer' available for other duties, and that he was unnecessarily exposing him to confrontation with one of the ERU engineers.

Disclosure 2 – 6 March 2017 emails to Insp Downs

92. On 6 March 2017 the Claimant sent Insp Downs two more emails in relation to ERU Management concerns (pp 342-343 and 344-51), both of which are relied on by the Claimant as protected disclosures. The first of these contained further concerns about the shifts and things that other officers had said. In it the Claimant also raised concerns about finding himself in a *"slightly uneasy position"* as a result of his perception that Insp Downs' consideration of his previous complaints needed to be kept from PS Johnson and that if he *"put up too much of a façade of indifference"* when discussing shifts with colleagues they might go to PS Johnson or Insp Downs and that *"This might be sooner than you want under the circumstances"*. In his witness statement, Insp Downs stated that he was surprised by the Claimant thinking he should be vague or secretive as he felt he had been clear that there was no hidden agenda. He said *"It was almost as if the Claimant perceived it to be a game rather than working together to develop and enhance the ERU"*. Under cross-examination, he stood by this, and added that it was necessary to be looking at the shift system again at this point because the ERU was shortly to get five new lorries and so rosters would need to be changed to ensure that these could be staffed at all times. We find that the Claimant's email to Insp Downs reflects his deeply held suspicions regarding PS Johnson. Those suspicions for the most part went beyond what was reasonable for the reasons we set out in the course of this judgment and we find Insp Downs' characterisation of this email to be reasonable in the circumstances.

93. This first email does not contain anything that could be classed as a protected disclosure.

94. The second email does not either, but it attached a further extract from the Claimant's daily log from 16 January 2017 to 6 March 2017. The log includes further detailed notes as to PS Johnson's comings and goings with queries as to whether PS Johnson has properly recorded these on DMS. It included the incident about the platelet donation we have referred to above (paragraph 90). This latter is not relied on as a protected disclosure. The alleged protected disclosures concern again the issues with PS Johnson's overtime claims, including the allegation about the 18 December 2015 shift, and a new allegation that PS Johnson failed to stop after an accident.

95. So far as the allegation that PS Johnson failed to stop after an accident is concerned, this is set out in the Claimant's log entry for 27 February 2017 as follows:

> "I get a phone call from PC Treves at 0940 alerting me to a 'damage found' incident involving Sgt J the previous Friday (24th).
>
> Incorrect reporting of POLCOL / Fail to Stop collision involving Sgt Johnson?
>
> Apparently when PC Davis had returned from covering Acton's vehicle and was doing his take over inspection of Camden's vehicle. He discovered noticeable damage to the housing on the N/S wing mirror and pointed this out to Sgt J. (Sgt J had been out to a 'one under' but I cannot remember the station). Sgt J remarked words to the effect that it must have happened 'when the vehicle was unattended'.
>
> PC Davis apparently reported the matter to the ERU Duty Manager. At the time of writing, I do not know if Sgt J has updated the vehicle log book / informed a Supervisor of the damage caused to the vehicle whilst in his custody.
>
> It is NOT known whether Sgt J parked the vehicle and exposed the N/S mirror to the passing traffic (ie on the offside of the road).
>
> I understand these the trucks have CCTV which has a 30 day shelf life which would corroborate Sgt J's assertion that it was done without his having any knowledge – this was pointed out to Sgt J by PC Treves.
>
> PC Treves subsequently sees Sgt J making an extensive entry in his PNB whilst sat in the lorry. Whether this is in relation to this involvement in the collision and lack of reporting at the time is not known. (Date observation made cannot be remembered by me.)"

96. It is important to note in the context of this incident that when the ERU lorry is being driven there are at least three other people in the vehicle in addition to the driver.

Tribunal's assessment of Disclosure 2

97. The Claimant alleges that his emails to Insp Downs tended to show that PS Johnson had failed to attend work when he was rostered to do so, had been absent from work when rostered to be at work, and was failing properly to carry out his duties in breach of the 2003/2015 Regulations that we have previously set out. He further alleges that the emails tended to show that a criminal offence had been committed (fraud, failure to stop/report an accident) and/or there had been a failure to comply with a legal obligation, namely the requirement to obey lawful orders and to carry out duties as required by reg 20 of the Police Regulations 2003 (C para 53).

98. We accept that the Claimant subjectively believed there had been such breaches of legal obligations. However, so far as the allegation about the 18 December 2015 shift is concerned, we find that the Claimant could not reasonably have believed this to be a breach of any legal obligation, let alone

fraud for the reasons set out at paragraphs 77-78 above. This is not therefore a protected disclosure.

99. Likewise, so far as the allegation of failure to stop after an accident is concerned, although the Claimant's log entry poses the question as to whether there has been a failure to stop, it does not include any disclosure of information that tends to show that. The fact that the wing mirror had been damaged does not tend to show that PS Johnson failed to stop after an accident. The information disclosed includes the perfectly plausible explanation that the damage occurred when the vehicle was parked. Moreover, the Claimant would have known that had the accident occurred while PS Johnson was driving there would have been three other people in the vehicle with him such that it was highly *unlikely* that there had been a failure to stop after an accident. This is not therefore a protected disclosure.

100. The emails to Insp Downs of 6 March 2017 are therefore only protected disclosures insofar as they contain the disclosures of information about 125 changes of duty which we have already found to be a protected disclosure (see above paragraphs 50-51).

101. In this respect, we have considered whether the Claimant's belief that this information tended to show a breach of a legal obligation remained reasonable following its rejection by PSD. We are, just, persuaded that it remained reasonable for the Claimant to hold this belief until he was told categorically by Superintendent Jordan on 19 May 2017 (as to which see below) that PSD did not consider the matters identified constituted misconduct. At that point, we find, the Claimant should have accepted the assessment of PSD and Insp Downs. This is because it was not for the Claimant to assess what PS Johnson's duties were. Once PS Johnson's superiors had looked at his allegations and made clear that they were not concerned with his 125 changes to his shifts, that should have been an end of it. It was only reasonable to consider that PS Johnson was, or may, not have been diligently performing his duties until his superiors made clear that they considered he had been.

102. At the time that Disclosure 2 was made, though, this aspect of the Claimant's belief remained reasonable and Disclosure 2 is a protected disclosure in the same limited respect as Disclosure 1.

Disclosure 3a – 20 March 2017

103. On 17 March 2017 the Claimant attended one of the 'Do the Right Thing' roadshows and at the event he spoke to CC Crowther. The Claimant emailed Insp Downs afterwards saying that CC Crowther had taken an interest in the *"supervisory and professionalism issues"* regarding PS Johnson, acknowledged that Insp Downs was *"now dealing with them"* and said that he had mentioned to the CC *"how you have substantially driven the role of the ERU forward, since your arrival"*. Insp Downs regarded this as a positive

move forward for the Claimant and an indication that he was moving on from the matters that had been concerning him. He was surprised and disappointed to find subsequently that this was not the case.

104. On 20 March 2017 the Claimant emailed CC Crowther (pp 355-8) indicating that he was not satisfied with the response to his allegations to date, and the fact that there had been no formal investigation or formal disciplinary action against PS Johnson, and that he had even had his duty roster *"simplified and changed to times that were more domestically agreeable!"*. CC Crowther responded saying his report should be sent to the Deputy Chief Constable (DCC), Adrian Hanstock. This the Claimant did, leaving the report at Force Headquarters on 20 March 2017 (pp 357-8). This report is relied on by the Claimant as a protected disclosure. It was a short summary of the issues the Claimant had raised previously, although with certain variations. Thus regarding his email of 25 April 2016 the Claimant said that in that email he *"highlighted that he had varied his duty times <u>without proper authority</u> on no less than 125 times, between February and December 2015, and (to the best of my knowledge) every shift in 2016 prior to my email being sent"* (emphasis added). This was not however what the Claimant had said in his email of 25 April 2016. In that email he had rightly acknowledged that he did not know whether PS Johnson had had authority to vary his shifts. He also referred to TPI Owens instruction regarding BOBO (which is not relied on as a detriment in these proceedings), and to the 18 December 2015 duty which he described as *"at best misrepresentative, and at worst Fraud"* but provided no supporting information about this.

Tribunal's assessment of Disclosure 3a

105. Because this includes a repetition of the allegation about changing duty times which we found to be a protected disclosure when it was first made on 25 April 2016, we accept that this report to DCC Hanstock also contains a protected disclosure. The addition of the words *"without proper authority"* make no difference at this point to the reasonableness of the Claimant's belief. The other matters referred to in this report are not, however, protected for the reasons that we have set out above in relation to Disclosures 1 and 2.

<u>Events immediately subsequent to Disclosure 3a</u>

106. DCC Hanstock's response on 20 March 2017 (p 352) indicated that he considered the issues the Claimant raised were in parts 'alarming' and thanking him for *"taking time to set out [his] thoughts succinctly and appropriately"*. He said he would be *"meeting the Head of PSD on Wednesday when I will discuss the most appropriate approach with him but I would suggest this will likely involve a combination of a professionalism investigation and divisional leadership intervention"*.

107. DCC Hanstock passed the matter on to Detective Superintendent Gareth Williams (Head of PSD), who in turn sought a briefing from DI Dermody who

had looked at the matter previously. On 21 March 2017 DI Dermody provided a briefing, attaching the report that the Claimant had sent to PSD on 16 September 2016. Materially, he said this:

> "I met with PC Cox in person at Camden on the 6th January 2017 to discuss his concerns. I identified they were regarding cultural issues or bad practices (for example the ERU do not have access to BTP computers to book on and off). I explained to PC Cox that it was possible for PSD to investigate PS Johnson. I also mentioned that a number of other investigations were carried out against previous supervisors on the unit.
>
> However I highlighted that the unit was under new management in the form of Supt Will Jordan, CI Gary Clarke and Inspector Stuart Downs and that it would be proper and proportionate to let them deal with the issue sin the first instance.
>
> …
> This issue was directed to the management of the unit to deal with. Clearly PC Cox is still not happy with this approach. I have not been able to contact Inspector Downs to identify what progress has been made to address the issues as he is presently off work."

108. The Claimant followed this up with further emails on 22 March 2017, including his original email to PS Johnson of 25 April 2016 (pp 375-6). DCC Hanstock thanked him for *"being willing to let me know when something doesn't feel right"* (p 374).

109. On 22 March 2017 DCI Nick Brook of the PSD completed a PSD Assessment Form (p 390). This classed the matter as *"Not misconduct"*. It suggested that a number of issues from past investigation of the ERU in relation to time-keeping and expenses appeared not to have been addressed and that this should be passed back to the chain of command to deal with. The Assessment included what appears to be a veiled reference to the Claimant's daily log being inappropriate: *"Clearly from the information provided there are a number of issues that need to be addressed in relation to the efficiency and culture of the team, and this includes the actions of officers who appear to be undertaking detailed investigations of team members/supervisors without the appropriate management oversight being in place."*

110. 22 March 2017 was the day that a police officer was stabbed outside the Houses of Parliament. The Claimant noted in his log that PS Johnson left work at approximately 1450 hours and that a London Underground engineer said to him that PS Johnson *"couldn't get out of the door quick enough"*. Later (on 30 March 2017) the Claimant noted that he had heard that PS Johnson had been instructed by PC Twyman at about 1520 that he was to stay on duty, but he did not do so. PS Johnson gave evidence about this incident. He said that his wife had just had a second cancer diagnosis and at the time the news of the Westminster attack broke and he had been discussing with his son whether or not to pay privately for his wife's cancer treatment. It was the end of his shift and he had let the relevant people know that he was going

home. An email of 25 April 2017 in the bundle from PS Johnson (p 443A) suggests that he had left work before the order to stay. The Claimant has relied on this incident as further evidence in support of his belief that PS Johnson was not adhering to his duties. It is not such evidence. PS Johnson left work at the end of his shift to deal with personal matters. As such, he was not subject to the order to remain on duty that was made after the end of his shift.

Disclosure 3b – 7 April 2017 report to DCC Hanstock

111. On 7 April 2017 the Claimant submitted a further *"'full' and up to date report in relation to Sgt Johnson and other matters"* to DCC Hanstock on 7 April 2017 (pp393-439). This brought together the various previous reports/complaints he had made, including each of his previous alleged protected disclosures and runs to some 43 pages. As previously, the Claimant gave evidence that he considered that these tended to show that a criminal offence (fraud) had been committed and/or that there had been a failure to comply with a legal obligation namely the requirement to obey lawful orders and to carry out duties punctually and properly (reg 20, 2003 Regulations) and the requirement on police officers to abide by police regulations, force policies and lawful orders and to act with honesty and integrity, not to compromise or abuse their position and to behave in a manner which does not discredit the police service or undermine public confidence (sch 1, 2015 Regulations). He considered the public interest was again use of public monies.

Tribunal's assessment of Disclosure 3b

112. Disclosure 3b is a repeat of Disclosures 1, 2 and 3a. Again, we accept that this contained a protected disclosure to the limited extent that we have already found, but not otherwise.

Events immediately subsequent to Disclosure 3b

113. An email in the bundle from DCI Nick Brook of PSD shows that he reviewed the Claimant's report and reported to colleagues (including Insp Downs and Supt Jordon; his views were also passed to DCC Hanstock). DCI Brook's email states:

> "There is no change in my stance on this since my original assessment which I maintain is balanced and proportionate. I met with Superintendent Jordon on Monday 27th March 2017 and then spoke with Inspector Downs who has line managerial responsibility for this team.
>
> The main allegations in respect of RDW are unfounded as Superintendents authority is required to work rest days. A Sergeant simply can't invent a roster that generates overtime in this way. I've left this as a management issue for B Division to deal with.

> Whilst I appreciate that the organisation should be open to challenge (where appropriate) PC Cox having raised his concerns needs to let his management team run his unit.
>
> Stuart [Downs] – can you give me an update during the week as to whether you have uncovered any concerns since we met?"

114. Insp Downs (para 43) had not uncovered any further concerns. He had by this stage met with PS Johnson and CI Casey at Force Headquarters to discuss matters (Johnson para 53). There were no notes taken of this meeting.

115. He also met with DI Dermody on 11 April 2017. He informed DI Dermody that he intended to return sergeants to a 12-hour shift pattern and DI Dermody confirmed that PSD was happy with his approach.

116. The Claimant also sent Supt Williams an email about PS Johnson on 21 April 2017 (p 441). In it he brought Supt Williams' attention to what he considered to be further improper conduct by PS Johnson on 13 April 2017 when PS Johnson had taken a day off, but the Claimant said the ERU duties showed him doing a 1000-1900 shift. He said *"I am concerned that in all probability Sgt Johnson would have contacted our Duties office to make these changes, but would appear to have conveyed the impression he would be resuming to his usual 1000-2000 on this day NOT the leave he had said he needed to take. I understand DCC Hanstock is monitoring allegations I have made against PS 7116 Johnson but I do not think it right to appraise him of this development directly."* Supt Williams acknowledged the Claimant's email (p 441).

117. On 30 April 2017 Insp Downs reported to Supt Jordan as to his findings in relation to the Claimant's allegations (p 443C). The material parts of that report are as follows:

> "On reviewing the material after PSD had found no case to answer but concluded that it should be dealt with locally; allegations contained within that by working twelve hour shifts to cover gaps in the roster the Sergeant was committing Fraud are unsubstantiated and are a consequence of having shorter core hours than the periods expected to be covered. While this may be an inefficiency created by the change in roster it is not Fraud on the part of the Sergeant.
>
> The lack of Force IT and supervision meant that initially rosters were managed by PC Cox using home computing; when Sgt Johnson took this under this control this was not well received by PC Cox. The deployment of BTP personnel to operating locations with Force IT and the utilisation of email outside the PNN is not something which should be allowed to continue. It is entirely appropriate that the sergeant manages the rosters and duties on BTP IT. The fact that he has to do so away from the ERU locations is not of his making, but a situation perpetuated by the Force.

> In April 2016 PC Cox sent an email to Sgt Johnson, containing some of the allegations, I would suspect that if this email had been sent from the Sergeant to the PC there would be allegations of bullying and over bearing Supervision. The tone and manner of the email are not appropriate and were I understand challenged by the T/Insp [Owens].
>
> Following the meeting with PC Cox and the review of the material I did meet with Sgt Johnson to discuss the points made. While I do feel that the beliefs of whole scale wrong doing are in PC Cox's mind, I also feel that Sergeant Johnson needs to "be the Sergeant" and take charge/lead by example in a manner that would not leave him open to any potential allegations. …
>
> On numerous times it is clear from the material supplied by PC Cox that he is contacting colleagues (on and off duty) to obtain information about Sgt Johnson …
>
> Having previously spoken to PC Cox, along with the "Governor's Communiques" to the teams so that they know what developments are taking place and why, I hoped that a corner had been turned and the matters of the past could be progressed on. However with the latest raising of matters which are being dealt with following the Chief Constable's road show, PC Cox 'crusade' against Sgt Johnson appears to be continuing unabated.
>
> The situations outlined I believe have come about by a combination of factors:
>
> Systemic failings; ack of BTP IT, reduced BTP Inspector level supervision, underutilisation of assets/failing to realise the full potential of the police resources/combined ERU capability. Short term addressing of issues arising rather than long term vision.
>
> Sgt Johnson – While performing the role of supervisor to an adequate/below adequate standard he has failed to be as effective a Suprevisor of a largely autonomous unit as he could be, being more re-active to developments rather than being a driving force behind them. Once he is tasked and given direction he delivers.
>
> PC Cox – Overstating relationship with the Chief Constable, spending his time looking for 'evidence' against Sgt Johnson and in doing so spreading disaffection/damaging morale."

118. Insp Downs made recommendations to address each of the above matters including in relation to PS Johnson's personal development (to the extent of suggesting that if PS Johnson did not rise to the challenge of proactively developing the ERU in a dynamic way this *"should result in a positing to a role such as Custody Sergeant"*).

119. So far as the Claimant is concerned, Insp Downs reported:

> "PC Cox – should be thanked again for raising his concerns but discouraged from his campaign against Sgt Johnson, which is prejudicial to the maintenance of good order/discipline. Equally his over referencing of his relationship to the Chief Constable is to be discouraged. A failure to focus his energies on the role of a Police ERU specialist should result in a review of his development/consideration of a posting which may better allow him to use his energies."

120. The Tribunal considers that this was a fair and balanced report by Insp Downs. It demonstrates that Insp Downs had taken the Claimant's concerns seriously despite what the Tribunal considers to be reasonable criticisms of the way the Claimant was conducting himself with regard to PS Johnson. In its robust criticism of PS Johnson, it also demonstrates that Insp Downs would have been quite prepared to deal with any misconduct on his part had he found evidence of it.

121. In July 2017 Supt Jordan met with PS Johnson to discuss the outcome of Insp Downs' investigation. The *"be the sergeant"* point mentioned by Insp Downs in his report was evidently something that impressed itself on PS Johnson as he mentioned it in his witness statement (para 54) and several times in evidence.

122. The Tribunal asked PS Johnson what impact Insp Downs' changing of the shifts back to 12 hours had on him personally. PS Johnson said that it was better because it meant he only had to come in four days per week rather than five. He acknowledged that it had had some financial impact because he got less overtime payments, but this was only about £40 per month and he could *"live with that"*.

Disclosure 4 – 19 May 2017

123. On 19 May 2017 the Claimant met with Supt Jordan to discuss the outcome of Insp Downs' investigation (pp 447-448). Although the Claimant was not shown Insp Downs' report he was told that Insp Downs accepted that the roster for Sergeants on the team had not been effective and this will be addressed with a new 12-hour roster. The notes of the meeting prepared by Supt Jordan conclude: *"I confirmed with John that he wanted to stay on the unit and that he could maintain a professional relationship with the Sergeant"*.

124. During the meeting the Claimant alleges he raised health and safety concerns about PS Bute (Stratford ERU) who had worked back-to-back 12-hour shifts at Camden and Stratford and taken an 'I' graded call (urgent, blue light, siren) during the second shift. The Claimant says this is not permitted by BTP's standard operating policies. This allegation is not recorded in the notes of the meeting. Insp Downs gave evidence (para 49) that his impression was that the Claimant raised this because he saw it as an opportunity to get PS Bute into trouble, rather than as the health and safety

concern it was. He said that he formed the view that the Claimant considered that PS Bute was up to something under-hand rather than motivated to cover the duty in order to keep the ERU operational.

125. Nonetheless, Insp Downs investigated the allegation, which had taken him by surprise in front of the Superintendent. In his first email to PS Bute on the subject on 27 May 2017 he was careful not to mention that it was the Claimant who had brought the matter to his attention (p 448C). In cross-examination he said that this was because he had not wanted to put the blame on the Claimant and it would have been wrong for him to say that the Claimant had told tales. However, having received a full explanation from PS Bute which he evidently considered to be more than satisfactory (PS Bute had in fact slept between the shifts and believed that he was rostered for the day shift), Insp Downs did then in his subsequent email reveal that it was the Claimant who had told him. Counsel for the Claimant submitted that he was thus on his own evidence *"shooting the messenger"*. Insp Downs went on to make clear to PS Bute that this should not happen again and took steps to ensure that in future all staff knew they were booked off day shifts when they have covered preceding night shifts (p 448G). We find that this sequence of emails does not show Insp Downs *"shooting the messenger"* or trying to get the Claimant into trouble with his colleagues because of the complaints he had raised. As we read the emails, Insp Downs' initial email is very carefully expressed because at that stage he is making preliminary inquiries that he is conscious may concern a potential disciplinary matter. Once PS Bute gives him a full explanation, he recognises it is not a potential disciplinary matter and he relaxes and mentions the Claimant's name only because he is then giving PS Bute a fuller picture of the background to his more formal email. He is not seeking to get the Claimant into trouble, however, and the fact that he makes clear that working the day shift should not have happened indicates his acknowledgment that the Claimant was right to raise the matter.

126. The Claimant gave evidence that PS Bute was not referred to professional standards as happened for another similar incident (albeit one where there was a minor accident on the second shift) (para 77). However, the Claimant had not of course seen the full explanation that was provided by PS Bute as to why the incident occurred, together with the information that PS Bute had slept between the shifts and was confident he was not tired and was safe to drive.

127. On 21 May 2017 DCC Hanstock sent an email to the Claimant explaining the outcome of the enquiries into the issues he had raised (p 446). So far as material this stated:

> "I am aware the Det Supt Williams discussed your concerns with Chief Superintendent Fry and in addition DCI Brook met with Superintendent Jordan and Inspector Downs to consider the points you raised and recommend a review of ERU activities. This review has now concluded and following discussion between PSD and B Division I am advised that a professional assessment has concluded that no misconduct investigation is appropriate at this time. However, I am aware that relevant changes have

been made to ERU shift patterns and a number of individuals have been included in the review discussions and there has been follow up action planning.

…
I am therefore satisfied that following significant assessment by senior members of the force there is no further requirement for PSD involvement in relation to the allegations and points you have made, I consider them to have been proportionately explored, assessed and appropriately investigated. I am reassured that the Division has taken the claims seriously and introduced remedial measures to encourage change sin culture, including personal meetings between the sub-divisional Commander, you and PS Johnson.

I have concluded that the matters raised as potential officer misconduct are now closed and B Division Command Team will assume responsibility for any additional managerial oversight or scrutiny of ERU activities from here on.

Thank you nonetheless for getting in touch and whilst I am always open to contact to anyone in the force, I do think that you may find it speedier to discuss any future concerns with trusted line managers within the division in the first instance."

Tribunal's assessment of Disclosure 4

128. We find that the raising of the two back-to-back 12-hour shifts by the Claimant was a protected disclosure. We find that the information he disclosed to Insp Downs at the meeting on 19 May 2017 did tend to show that there had been misconduct and/or a failure to comply with BTP's standard operating policies which is a breach of Sch 1 to the 2015 Regulations which requires police officers to abide by police regulations, force policies and lawful orders. Although the Claimant has not specifically identified the policy which prohibits two 12-hour shifts being worked back-to-back, we consider it is obvious that this is not in accordance with BTP policy and, indeed, Insp Downs clearly thought it was not. It was also obviously at least potentially a health and safety risk, as Insp Downs also recognised. It was also reasonable for the Claimant to believe that this was a disclosure in the public interest because there is an obvious risk to the public if a tired officer is driving an ERU vehicle through the streets of London. It was a matter that required investigation, which Insp Downs duly did, and took action to ensure that it did not happen again.

Detriment 2 – emails of 3 and 17 August 2017

129. On 30 July 2017 PS Johnson emailed the team about duties, including a specific note to the Claimant *"PC Cox please cover Camden ERU on Thursday 3/8/17, on Friday 4/8/17 you should have time to carry out BTP correspondence/e learning Bobo and any pre course First Aid course"*.

130. On 3 August 2017 the Claimant duly covered Camden ERU. He gave evidence that he was the only person on duty at Camden ERU and that he was having difficulty studying for a Medic course that was coming up because he had to keep answering the phones. By email of 3 August 2017 (p 455), copied to Insp Downs, he asked Sergeant Johnson to come and cover for him. The tone of his email was, we find, sarcastic. He wrote: *"Assuming that you do not have 12 hours of BTP IT correspondence to do, your prompt attendance at Camden would be greatly appreciated. I am struggling to concentrate on my Medic course studies, as the only location currently available is within the mess room. My desire to drown out the TV and other associated distractions cannot be obtained, due to my responsibility to monitor the radio. My eight hour tour tomorrow will be taken up with updating BOBO, reading Intranet notices, compiling a report to Ch Insp Casey for the overtime you were unwilling to sign off some weeks ago, arranging for the repair of my Blackberry phone which (were it working) might inform me that I have clothing ready for collection at AHQ. The opportunity to do pre course Medic studying therefore looks unlikely."* PS Johnson telephoned him, then sent an email (p 455), copied to Insp Downs and PS Baker and PS Bute.

131. The Claimant's evidence was that in the telephone call PS Johnson simply said 'no' he would not cover for him. PS Johnson could not remember what he said but he did not imagine he just said 'no'. We accept PS Johnson's account because it is clear from PS Johnson's email response that, subsequent to the call, he had made further efforts to assist the Claimant. His email (p 455), which was copied to Insp Downs, PS Baker and PS Bute, reads:

> "Sorry John,
>
> Having covered Camden for 6 shifts in the last seven days, I too have some catching up before returning to cover six shifts at Camden as well as a Jesip Assurance visit next week.
>
> You currently have approximately 4 training days, 8 day shifts and some 7 night shifts to complete any pre-medic training for a course commencing on the 11th September, this is considerably more than some of your other colleagues had access to.
>
> I've spoken to the Camden team leader this afternoon Mr Gary Fulcher thereby ensuring you have access to a suitable study environment for the remainder of this shift, the same conditions as afforded to your colleagues PCs Andy Marlow and Julian Bush.
>
> If you start this afternoon you will even have an advantage over PC Fillary who won't be in apposition to commence his pre course work till the 10th August."

132. The Claimant considered that this email was unnecessary because PS Johnson had already phoned him. He considered it to be patronising about

how he might complete the Medic coursework, and inappropriate that PS Baker and PS Bute were copied in. It was suggested to PS Johnson in cross-examination that the reason why he sent this email and copied in PS Baker and PS Bute as well as Insp Downs was because he was trying to control the Claimant and assert his authority because he saw him as a serial complainer. PS Johnson did not wholly accept this. He said that what he was trying to do was, as instructed by Superintendent Jordan at his meeting in the summer, "be the sergeant". He was trying to manage the Claimant, to ensure that he treated him demonstrably fairly and in his words to leave him no "wriggle room" for complaint. He copied in PS Bute and PS Baker because he considered it important that they all be in the picture.

133. Following a later conversation with PC Marlow on 7 October 2017, the Claimant also considered that PS Johnson had treated him less favourably regarding the training than PC Marlow (C para 84) who he said had been allowed *"to study and complete his online Medic course modules on about four occasions whilst he was 'spare' and that, unlike [the Claimant], he had been allowed to remain as a spare officer at the Camden ERU base whilst doing so, even after his Medic course had finished. It was much easier to carry out studying as a spare officer, as you would not then be the officer with primary responsibility for monitoring/responding to calls."*

134. PS Johnson subsequently forwarded his email exchange to Insp Downs on 5 August 2017. Insp Downs indicated that he agreed with PS Johnson's stance (p 454). In particular, he noted that *"Given that the ERU is deployed 12% of the time this means out of the 212 hours of duty that you have identified* [which we take to be a reference to the number of shifts the Claimant had to go before the training] *only 25 hours will be deployed leaving 187 hours or 15.58 twelve hour shifts for study."*

135. During this period the Claimant identified what he considered to be further wrongdoing by PS Johnson, specifically he considered he had spotted PS Johnson wrongly claiming overtime for short-notice (less than 15 days' notice) for shifts. He raised this with him in an email of 6 August 2017 (p 457), copying in Insp Downs and PS Bute. His email is again sarcastic in tone: *"I find it slightly strange that you were able to research DMS and cite precisely the days left until my Medic course – and yet have been unable in all the time since PC Treves' leave has been on DMS, review it diligently enough to identify his abstraction requiring redressing".* He then identified various reasons why he considered PS Johnson should have identified the problem earlier, accused him of *"oversight"* and creating a *"situation … of your making – for which you are rightly 'falling on the sword'"*. He added a PS *"I don't know why you haven't chosen to take Friday 18th August off, as one of the RDIL's owed, thereby reducing the extended length of days you will be working?"*

136. PS Johnson provided an explanation to Insp Downs in emails of 8 August 2017 (pp 462-5) of what was going on with leave, in particular that he had agreed at short notice to cover a shift for Paul Twyman (of which the Claimant was not aware), as well as covering for PC Treves. We find his explanation to be reasonable.

137. On 17 August 2017 PS Johnson emailed the Claimant, copying in Downs, Bute and Baker, to cover three shifts at Acton ERU on 6, 7 and 8 September 2017 (p 466), saying that there should still be time to complete the Medic pre-coursework while covering the depot. Insp Downs gave evidence that at Acton officers generally get plenty of time to deal with administration because the lorries are only out on calls for 12% of the time (para 54). PS Johnson in his email also stated that on 8 September 2017 the Claimant should do an *"8 hr shift BTP IT Correspondence"*.

138. The Claimant took offence at PS Johnson's email of 17 August 2017 and he contends that this too amounted to bullying and a detriment. He replied on 6 September 2017 (copying in the same people) stating that he felt that with his extensive experience (of which he cited numerous examples) he knew how to organise a study plan for the BTP Medic course *"without your help (or your implying to the others CC'd in your email, that I am in need of such guidance"* (p 471). Later that day the Claimant raised his concerns about PS Johnson's treatment of him in a conversation with CI Darg in the canteen (para 97).

139. In the meantime, on 25 August 2017 the Claimant had made arrangements to move the dates for a First Aid course from 25 October to 6 September 2017. This was in order to enable him to have a period of annual leave from 24-27 October 2017. He then informed PS Bute and PS Johnson by email of 26 August 2017 (p 468), although that email was seeking authorisation for the annual leave, not seeking authorisation for the change in date of First Aid course. The Claimant asked PS Bute to authorise as PS Johnson was at that point on annual leave. The annual leave was duly authorised by PS Bute (p 469). The Claimant then mentioned the First Aid Course again to PS Johnson by text on 5 September 2017 (p 470). It is apparent from PS Johnson's response to that text (*"Ok thought that was the 26th Sept or Oct have you swapped with Ronnie?"*) that he had not taken in the information about the First Aid course included in the Claimant's email of 26 August 2017 (probably because he was on holiday at the time). Once the Claimant explained, PS Johnson said *"Oh ok"*.

The Tribunal's assessment of Detriment 2

140. The Claimant complains that PS Johnson's emails of 3 and 17 August 2017 were detriments to which he was subject because of Disclosure 1 (the email of 25 April 2016). We find that neither of these emails could reasonably be considered by the Claimant to be a detriment. The tone of them is markedly conciliatory, accommodating and reasonable given the tone of the Claimant's emails to which they are a response. It is the Claimant's emails which are sarcastic and patronising, not PS Johnson's. It is also apparent from the emails that the Claimant has not been treated less favourably that PC Marlow. Although it might be preferable to study while a 'spare', it is apparent from PS Johnson's 3 August email that the Claimant had plenty of time to study (many more than 4 shifts). It is evident from the emails that PS Johnson has taken some care to ensure that the Claimant does have both time and a

suitable location to complete his Medic coursework. That the Claimant felt he could not make use of the room that PS Johnson arranged (for reasons which he did not communicate at the time) does not detract from the reasonableness of PS Johnson's efforts in this regard. Moreover, it is the Claimant who first copies others in to the correspondence, by copying in Insp Downs. The fact that PS Johnson considers it appropriate also to keep PS Baker and PS Bute in the loop is wholly reasonable and not bullying.

141. In any event, even if we were to accept that these emails constituted a detriment, we do not consider that they were materially influenced by the part of Disclosure 1 that we have found to be protected. This was just one element of the email of 25 April 2016 sent some 16 months' previously. To the extent that PS Johnson's management of the Claimant had changed at this point, we find that was largely because of Supt Jordan's instruction to him to 'be the Sergeant' and the result of that was PS Johnson was taking additional care in his management of the Claimant. We do find that, as was broadly accepted by PS Johnson in cross-examination (his 'no wriggle room' point) that PS Johnson did by this stage anticipate that the Claimant might make complaint about any small mis-step on his part. However, that is a consequence of the number and frequency of the Claimant's complaints, the vast majority of which we have found either not to be protected disclosures, or have not even been relied on by the Claimant as protected disclosures in these proceedings, and not because of the one protected aspect of the 25 April 2016 email.

<u>Disclosure 5 – 7 September 2017 – argument between the Claimant and PS Johnson and allegation of bullying</u>

142. On Thursday 7 September 2017 the Claimant was due to be working in Acton ERU as instructed by PS Johnson in his email of 17 August 2017, but went to Camden ERU first to collect uniform and equipment. He saw PS Johnson who asked that he work at Acton ERU the next day as well. This was a change to what PS Johnson had originally said in his email of 17 August 2017. The Claimant's and PS Johnson's account of the subsequent conversation differ.

143. The Claimant says that he asked not to go to Acton the next day because he needed access to BTP computer systems to catch up with some IT work. The Claimant said to PS Johnson that he felt he had been bullying him. In the Schedule of Disclosures it states that *"The claimant said Sgt Johnson had been bullying him. He gave the example that another officer had been allowed time to study for his Medic course when he was 'spare', but the Claimant was not given any such opportunity"*. The Claimant said (para 102) that in response to this PS Johnson told him that he could speak to PS Baker about his Medic course if he had any issues. He said that PS Johnson then rang PS Baker and passed his mobile phone to him so that he could speak to PS Baker. The Claimant said in his witness statement that reference to PS Baker was irrelevant as he had completed his pre-course Medic modules the day before and the work he wanted to catch up with on 8 September 2017

was other admin work for which access to BTP systems was needed. For this reason, the Claimant spoke only briefly to PS Baker, saying that he was being placed in a compromising position regarding his interaction with PS Johnson that was going on. He then handed the phone back to PS Johnson. He denied that in doing so he made any inappropriate noises or facial expression.

144. PS Johnson's evidence about this conversation was that he needed someone to cover at Acton on 8 September 2017 and that there was no reason why the Claimant could not do what he needed to at Acton. Although there is no access to BTP IT systems at Acton, there are computers with access to the internet which would enable him to complete any training requirements, and his Blackberry gave access to emails, shift information, overtime, TOIL, change of duties etc, although not all email attachments. PS Johnson also considered that the Claimant had time after his First Aid course on 6 September to complete anything he needed to do on BTP IT systems. PS Johnson's understanding was that the reason the Claimant advanced for objecting to going to Acton was that he needed time to complete his Medic coursework. We find PS Johnson's understanding in this regard to be reasonable given that the Claimant had (on his own evidence) (i) complained that others had had more time to do their Medic coursework and (ii) not told PS Johnson that he had completed his. We find that it was unreasonable for the Claimant to consider PS Johnson's concern about the Medic coursework and his contacting of PS Baker (who was responsible for that course) to be 'irrelevant' given that it was the Claimant who had brought up the question of the Medic coursework. PS Johnson said that the Claimant's response to him saying he needed to go to Acton was *"stubborn and unprofessional, saying 'well I'm not going to Acton'"* and that he *"would speak with the Chief Inspector or someone higher as I was bullying him"* (para 64). PS Johnson's evidence was that he then called PS Baker hoping that he might be able to reassure the Claimant about the Medic coursework or otherwise mediate the situation, and that the Claimant thrust the phone back into his hand making a *"nahhh noise"* and *"a gurning face"*.

145. Regarding this incident, we prefer PS Johnson's evidence. We find that the Claimant was (unreasonably) angered by PS Johnson's changing his roster for 8 September 2017, that he (again unreasonably) considered that PS Johnson ought somehow to have known he had completed his Medic coursework. In those circumstances, we consider it is likely that when handing the phone back to PS Johnson he made some physical gesture of anger and annoyance as described by PS Johnson and we find that he did so. We do not find that the fact that PS Johnson did not record this particular detail in the Written Record of Meeting (WROM) he issued later that day, but did record it in the subsequent Management Action File Note (MAFN) (as to both of which see further below), means that his recollection of this aspect of the conversation is to be doubted. The WROM was prepared in relative haste after the meeting and it is understandable that it did not contain all the details.

Tribunal's assessment of Disclosure 5

146. The Claimant maintains that the allegation of bullying he made orally to PS Johnson on 7 September 2017 was a protected disclosure as bullying is a breach of Sch 1 of the 2015 Regulations. He further maintains that this was a matter of public interest because misconduct by police officers is a matter of public interest and BTP is funded by public money.

147. While we accept that the Claimant subjectively believed this was bullying and misconduct, we are not satisfied that the Claimant even subjectively believed at the time that this was a matter of public interest and we understood him to accept in cross-examination that it was not or, at least, may not, be. In any event, we find that the Claimant could not reasonably have considered this to be bullying or a matter of public interest. Not everything that happens to employees of public authorities, including the police, is a matter of public interest. This issue concerns no one but him and PS Johnson. This is a purely private employment matter.

148. Further, we consider that it was not reasonable for the Claimant to consider that PS Johnson's actions constituted bullying. We find that this incident on 7 September 2017 was a product of the resentment that the Claimant had for PS Johnson at this time because his allegations against him had not been upheld when he continued to believe that PS Johnson lacked integrity and was committing almost daily acts of misconduct – a belief that was, we find, unreasonable, including in relation to the aspect of that belief that we found was reasonable when he first raised it on 25 April 2016 (we have explained our reasons for this at paragraph 101 above). There was no good reason for the Claimant not to go to Acton and it was not bullying to require him to do so. The emails of August 2017 revealed the extent of the Claimant's animosity to PS Johnson at this point. He was ready to be angered by everything that PS Johnson did. On this occasion, he was very upset about the change of plan for 8 September and vented his frustration. It was not bullying by PS Johnson and the Claimant could not reasonably have believed that it was.

149. This allegation of bullying was accordingly not a protected disclosure.

<u>Detriments 3 and 4 – 7 September 2017 – the Written Record of Meeting (WROM)</u>

150. Following the argument with PS Johnson on the morning of 7 September 2017 the Claimant did go to Acton ERU. PS Johnson then telephoned CI Tara Doyle, who was relatively new in post. He spoke to her because Insp Downs was away. He explained to her what had happened, including that the Claimant had accused him of bullying. She told him that he should go to Acton and do what BTP calls a Written Record of Meeting (WROM). This is not a process set out in any disciplinary policy. It is simply a meeting of which a formal written record is taken and placed on the officer's file. PS Johnson did as CI Doyle had instructed.

151. The Claimant wanted a friend (ie a BTP Federation Representative) present, but PS Johnson refused. In evidence, he said that CI Doyle had told him that the Claimant did not need a Federation Representative for a WROM. He did however allow the Claimant to record the meeting on his mobile phone and we have the transcript (p 476A). He also said he could have someone else present if he wanted, and so Darren Barker (Acton ERU Team Leader) was asked to come in.

152. At the meeting, PS Johnson explained *"As I've said this is a written record of meeting. That's all. The title of the meeting is Lawful Orders"*. He then stated:

> "The reason for the discussion at approximately 6:55 hours today I gave you a lawful instruction. You were directed to attend Acton ERU for duty today and the 8ths September. You declined to attend on 8th September, citing reasons of IT work, and you would only attend Acton if it suited you, that I was bullying you and was treating you less favourably than others. This is in spite of the fact that you had more time to prepare than your peers for your medical course. Your attitude to me is one of being disruptive and not helping in attempting to staff other locations. You are not following lawful orders and not performing duties as to my direction. What do you have to say?"

153. The Claimant answered *"No comment"* and this was recorded on the WROM. He asked again to take Federation advice and also to speak to a friend who was a Chief Inspector. The Claimant's view, expressed in the meeting, was that he was being subject to disciplinary action. He said that he would be pursuing the matter of PS Johnson's attitude to him with a senior officer and taking Federation advice. PS Johnson initially asked the Claimant to take Federation advice and speak to his Chief Inspector friend on the phone while on shift on 8 September, but he then agreed that the Claimant could take advice and not cover at Acton ERU the next day. The Claimant also complained that when PS Johnson telephoned him to call him to the meeting he had done so from a room where someone else (the London Underground ERU manager) was present and thus breached his confidence. He said in the meeting that this was also bullying. PS Johnson said that he considered it appropriate for the ERU manager to know that the Claimant would be in a meeting and therefore not able to answer a call.

154. The Claimant did not sign the notes of the meeting because he considered them to be factually incorrect (pp 477-83), although we find the WROM appears accurately to reflect what was said in the meeting according to the transcript.

155. The Claimant said in his witness statement that CI Doyle directed PS Johnson to deal with the matter by way of a WROM and that CI Doyle did this because she was aware of the Claimant's disclosures and wished to avoid scrutiny of her officers (para 120). In cross-examination he suggested that CI Doyle had directed the WROM because PS Johnson presented to her a skewed version of the facts.

156. We have not heard evidence from CI Doyle, but we accept PS Johnson's account of his conversation with her and we find that he did not present a *"skewed"* version of the facts of that incident on 7 September 2017. He openly reported to her his genuine account of what had been a difficult meeting, together with the allegation of bullying.

The Tribunal's assessment of Detriments 3 and 4

157. The Claimant contends that in issuing a WROM PS Johnson and CI Doyle were subjecting him to a detriment ('sanctioning him') in retaliation for all of the previous protected disclosures he alleges he made.

158. We accept that the issuing of the WROM was a detriment. Although not a formal stage in the disciplinary process, it was a formal record of poor conduct and as such could reasonably be regarded as a detriment.

159. For the reasons we have set out above, we have found that only part of two of those disclosures (Disclosure 1 and Disclosure 4) constituted protected disclosures. We find that the issuing of a WROM by PS Johnson, on CI Doyle's instruction, was not materially influenced by either of those protected disclosures.

160. As to PS Johnson, our reasons for rejecting that alleged Detriment 2 was motivated by the Disclosure 1 (above, paragraph 141) apply equally here. We have not received evidence that PS Johnson even knew about Disclosure 4, but if he did, we do not accept that it played any material part in his decision to issue the WROM. Disclosure 4 related to the back-to-back 12-hour shifts done by PC Bute and thus did not concern PS Johnson directly. PS Johnson's reasons for issuing the WROM are clear: they were because of the Claimant's behaviour (in refusing to go to Acton as instructed and because he had been disrespectful) and because CI Doyle told him to.

161. As to CI Doyle, she was relatively new in post at this point and the Claimant's case in relation to her rests principally on what might be termed the *Jhuti* argument (see above paragraph 24). That argument fails on the facts we have found: PS Johnson did not present a 'skewed' version of the facts to her, let alone an 'invention' of the kind necessary to bring this within the *ratio* of *Jhuti*. Even allowing for the fact that, as in Underhill LJ's example in *Orr,* PS Johnson was 'participating in the decision-making process' in this case, he was not manipulating matters because of any protected disclosure for the reasons given in the previous paragraph.

162. Moreover we would add, so far as the allegation of bullying made by the Claimant in the course of the incident on 7 September 2017 is concerned (Disclosure 5), we have found that not to be a protected disclosure, but even if it was, we do not find that had any material influence on either PS Johnson or CI Doyle. We find that they would still have issued a WROM even if the Claimant had not alleged bullying. They issued the WROM because of the Claimant's behaviour (in refusing to go to Acton as instructed and because he had been disrespectful), not because of any allegation he had made.

Disclosure 5b – 8 September 2017 to DS Pine at PSD

163. On 8 September 2017 the Claimant attended at Camden ERU base and then at Acton ERU base, taking care to ensure that he was booked in at both places. He took himself off driving duties as he had slept badly the night before. He then left Acton ERU, informing Mr Roy Kenneth (London Underground ERU Manager), and went to FHQ. He hoped there to obtain the advice he had told PS Johnson he wanted to take from a *"Chief Inspector friend"*, specifically CI Darg who he had met the previous week on the First Aid course.

164. In the meantime, on that same morning of 8 September 2017, when PS Johnson was in fact off duty, he spoke to CI Doyle to tell her what had happened at the WROM. She directed that the Claimant could take Federation advice whilst covering Acton and that he should not have permitted him to have time off to take advice. He accordingly tried to call the Claimant at 09.09 to tell him this, but the Claimant was on a train and missed the call, so PS Johnson sent the Claimant a text at 09.13 as follows:

> "Go to Acton please and you can get any legal advice and speak to a friend from that location. When you arrive please send me an [email] from a terminal to confirm your arrival time after you have checked your vehicle equipment. Message sent at 0915 hrs 8th Sept. Thanks Tim J PS 7116"

165. The Claimant did not do as instructed, but continued to FHQ where he hoped to find CI Darg, but he was out of the office. In his witness statement (para 134) the Claimant said that he *"could not"* comply with PS Johnson's text because he had relieved himself from driving duties previously. While we accept that not being able to drive meant that the Claimant could not fulfil his ERU role, we do not accept that this meant that he could not return to Acton as instructed.

166. As CI Darg was not available, the Claimant then went direct to BTP's Professional Standards Department to report what he considered to be bullying by PS Johnson as a result of his having made prior whistle-blowing allegations. He spoke to DS Pine and explained the whole history, including his fraud allegations. He contends that what he said orally at this meeting amounted to a further protected disclosure. After the meeting DS Pine emailed Nick Brook and CI Doyle (p 485) to report that the Claimant had attended the PSD offices at approximately 09.30 and that the Claimant appeared *"extremely emotional and visibly upset"*. He reported that:

> "PC Cox stated that he was being bullied at work by his supervisor and that nothing was being done about it so he felt he needed to bring it to our attention. He explained that he had previously raised issues over timekeeping and neglect of duties in respect to his sergeant, PS 7116 Johnson. He said that there had been a PSD investigation following these allegations, but was not clear on the date they were made, but I understand

> them to have been raised with the last 18 months. He started to state how he and other members of the team had seen PS Johnson changing duty days without authority, and other issues he had with PS Johnson".

167. He stated that the Claimant said that he had been so concerned about the WROM he had stayed up all night worrying about it which is why he was too upset/tired to be a in a fit state to drive and had self-declared himself unfit. He reported that the Claimant had mentioned his connection with Chief Constable Crowther because *"he found 'by mentioning his connection, I am able to raise the glass ceiling that appears"*. He reported that after the initial 20-minute meeting in the morning, the Claimant had returned to the PSD office at approximately 13.30 when he appeared to be simply *"checking in"* and was *"told that the matter had been referred to CI Doyle who would be dealing with it"*. It appears that in waiting in the building and returning to the PSD offices in the afternoon the Claimant had misunderstood what had been said in the morning by DS Pine, who evidently had not been expecting him to return. In any event, the Claimant did not go back to Acton at all on 8 September 2017, but went to Camden ERU to book off his shift at 15.00.

168. The Claimant alleges, and we accept, that in his conversation with DS Pine he mentioned all his previous allegations against PS Johnson in relation to performance of duties and overtime.

The Tribunal's assessment of Disclosure 5b

169. For the reasons we have given already, most of the Claimant's disclosures were not protected disclosures when they were first made, and by this point even Disclosure 1 was no longer protected for the reasons we have set out at paragraph 101 above. As to Disclosure 4, insofar as this was repeated to DS Pine at this meeting, this remained a protected disclosure for the reasons set out at paragraph 128 above.

<u>Detriments 5, 6, and 8 – 28 September 2017 – the Management Action File Note (MAFN) and move to temporary role at Brewery Road Custody Suite</u>

170. The week after the events of 7/8 September 2017, the Claimant took and passed the Medic Course and then went on pre-booked annual leave. He was not at work again until 28 September 2017. No one from the Respondent contacted the Claimant during this period, although he was reported to have been *"fine"* on the Medic Course.

171. While the Claimant was away from work Insp Downs returned from annual leave (on 19 September) and at this point was made aware by CI Doyle and PS Johnson of the events of 7 and 8 September 2017, including that the Claimant had alleged PS Johnson was bullying him. Insp Downs gave evidence (para 57) that he did not think PS Johnson was bullying the Claimant but rather *"that the Claimant was bullying PS Johnson and pursuing a course of [conduct] which could be harassment"*. On 22 September 2017 Insp Downs spoke to Roy Kenneth on the phone who told him that (on 8

September) the Claimant had gone to Acton but appeared as if he had not slept and *"was not in a position to drive/was not safe"* and appeared to be *"very angry"* (p 486D).

172. It is clear to the Tribunal that during the period the Claimant was away from work Insp Downs decided, having discussed the matter with CI Doyle and PS Johnson, that the Claimant should be issued with a Management Action File Note (MAFN), which is a form of warning or informal action short of formal disciplinary procedures, and that the Claimant should be at least temporarily removed from the ERU. Arrangements were made to issue the MAFN and to redeploy the Claimant to Brewery Road custody suite on his return to work. This required planning because cover for the Claimant's ERU shifts had to be arranged in advance.

173. The MAFN (p 487) was typed up by PS Johnson, under the direction of Insp Downs. It is headed *"File Note Type: Conduct"* and states:

> "Event 1:
> In a communication sent to you on the 21st May 2017 by Deputy Chief Constable (DC) Adrian Hanstock you were directed as follows. John …. 'I do think that you may find it speedier to discuss any future concerns with trusted line managers within the division in the first instance'.
>
> Event 2:
> Approximately 0655 hours on the 7th September 2017 I gave you a lawful instruction. You were directed to attend ACTON ERU for duty that day and the 8th September. You declined to attend on the 8th September citing reasons of IT work and you would only attend Acton if it suited you. When you handed Sergeant Johnson's mobile phone back to him having spoken with Sgt Baker you mimicked Sgt Johnson by making a gurning noise and snarling directly at him. Having being given the opportunity to speak with another line manager namely Sgt Baker, you contradicted the mentioned direction by the DCC by going direct to PSD on the 8th September to speak to PSD staff.
>
> The above events breached the Police Code of Ethics.
>
> ...
>
> Advice/Direction
> Failing to follow a lawful instruction is a contravention of the Police Code of Ethics and Police Conduct Regulations. A record of this incident will be recorded on your personal file and further incidents could lead to further Unsatisfactory Performance Procedures.
>
> Improvement Plan
> 1. Be civil to your colleagues and in particular your line manager.
> 2. To follow all reasonable instructions directions by a line manager.
>
> Retention Period

… This file note will remain on the personal file for 12 months."

174. On 28 September 2017 the Claimant returned to work for a night duty. In the presence of Inspector Downs, PS Johnson served him with the MAFN (pp 487-8). The Claimant declined to sign it. Insp Downs also told the Claimant (and noted in his pocketbook at the time) that he was being taken off driving as given the way he had reacted with the WROM he could not take the risk that he would not be fit to drive after being served with the MAFN and thus pose a risk to other road users. To ensure service, therefore, he was to go to the custody suite at FHQ. Insp Downs gave evidence that the Claimant was *"very angry"* (para 61) and that for this reason he offered to refer him to Occupational Health, although his pocket notebook suggests that the Claimant started to get angry after the Insp Downs had offered to refer him to OH. In any event, the Claimant did not wish to be referred, and Insp Downs did not consider a referral to be necessary as the assessment of fitness to drive was one he felt he could make without medical input. Insp Down's note also records that he asked the Claimant if he had anything to say, but he declined. The Claimant then said that he had a dossier of all the issues and may speak to his MP about it. Insp Downs said that they should try to deal with it internally and asked him when he was next on day duty so that they could meet to speak. He said (and noted in his pocketbook) that the Claimant could bring a friend or representative to the meeting and that he did not mind what rank that person was. (In evidence Insp Downs said that he was rather hoping the Claimant would bring the Chief Constable.) Insp Downs' note also records that at the end of the meeting the Claimant did say that he had gone to Acton as instructed, but Insp Downs pointed out that he had not done his duty but had gone to PSD instead.

175. The Claimant argues (paras 141-143) that the MAFN did not comply with Standard Operating Procedure in three respects:

    a. When appropriate, managers are expected and encouraged to intervene at the earliest opportunity to prevent misconduct or poor performance occurring and to deal with such cases in a proportionate and timely way through management action (para 2.1.2);
    b. File Notes are not intended as a substitute for formal disciplinary action, poor performance or attendance action (para 2.1.4);
    c. All file notes arising from poor performance or conduct should contain a reference number obtained from FHQ HR or PSD, following consultation with those departments and prior to the file note being signed by the subject (para 3.1.1).

176. The Claimant further complains that the process followed denied him the opportunity to formally contest the inaccurate circumstances as described and tarnished his reputation. The Claimant's Counsel referred to paragraphs 3.2.3 and 3.2.4 of the policy which provide that where the subject does not agree to the file note, it may be appropriate to amend it to take account of his views without compromising its purpose. Where that is not possible, the subject's views should be recorded and placed on the file next to the file note. It was alleged that the Claimant had not been given that opportunity.

177. We find that there was no significant breach of the policy in issuing the Claimant the MAFN. It was used as the policy intends, i.e. as a first step in recording a conduct/performance issue which did not itself warrant disciplinary or other formal action. The absence of a reference number from FHQ HR or PSD is a technical breach of the policy but one committed, we find, because in practice this aspect of the policy is routinely not followed. PS Johnson had spoken to HR before issuing the MAFN but had not been given a reference number. Further, we find that the Claimant did in practice have an opportunity to put forward any response he wished to make to the MAFN, but the only point he made was that he had gone to Acton on the morning of 8 September. This was true but, we find, immaterial since he had only done that after the WROM the previous day and, further, he did then leave his shift to go to PSD contrary to the direction from DSS Hanstock cited in the MAFN and did not return to Acton despite PS Johnson's text message ordering him to do so.

The Tribunal's assessment of Detriments 5, 6 and 8

178. Both the MAFN and the way it was served by PS Johnson and Inspector Downs are relied on as detriments imposed because of the alleged protected Disclosures 1-5b.

179. We accept that these were detriments. We find that aspects of the MAFN were inappropriate. It was, as the Respondent subsequently held in the course of the grievance process, inappropriate for DCC Hanstock's email to be cited in the MAFN as if it was an order. It was not. Moreover, (contrary to the view taken by CI Lawrie at the grievance stage – as to which see below), the standard operating procedure PSD Complaints and Misconduct Policy (para 3.1.3) does envisage that an employee may take up a matter direct with PSD rather than local management, even if it is not a matter of serious misconduct. It is also unfortunate that the MAFN does not refer to PS Johnson's text message order that PS Johnson should return to Acton and take advice by telephone from there as, we find, this was as a matter of fact part of the reason why the MAFN was issued.

180. However, the question for us is whether the Claimant's previous disclosures formed any material part of the reason for issuing the MAFN. Even if they were all protected disclosures (and we have found for the most part they were not), they were not a material part of the reasons why the MAFN was issued. We find that the reasons for issuing the MAFN were almost completely captured in what was written on the MAFN at the time, i.e. the incident on 7 September 2017 for which he had already been given a WROM, together with his actions in going straight to PSD on 8 September 2017 when he had previously been advised by DCC Hanstock to take up issues with local management first. The fact that under the policy any officer is in principle entitled to take any matter to PSD does not affect the fact that the reason why PS Johnson and Insp Downs (with the approval of CI Doyle) issued a MAFN is because they considered that in the Claimant's case going to PSD was not the right course of action because his allegations had already been

investigated by PSD and he had been advised (they thought, ordered) to take up issues first with local management. Moreover, as already noted, we find that a material part of the reasons why Doyle, Downs and Johnson acted as they did was because the Claimant had not followed PS Johnson's text message order to return to Acton and had not, in fact, returned to Acton at all that day. The substance of it was, so far as the Respondent's witnesses were concerned, that on two days running the Claimant had not done what he had been asked to do and they felt he had become unmanageable.

Detriment 7 – 28 September 2017 – removal from driving duties

181. As set out above, when issuing the MAFN on 28 September 2017 Insp Downs also relieved the Claimant from driving duties. The relief from driving duties was subsequently confirmed by Insp Hook (BTP Driving Standards Unit) (pp 493-4) as follows: *"Pc Cox has stated to his supervision that he has felt unfit to drive recently and as such, until I am advised by Insp Downs that the matter has been resolved Pc Cox is removed from driving duties"*. The Claimant contends, and we accept, that his self-assessment that he was not fit to drive related only to 8 September 2017. The decision to remove him from driving duties on 28 September 2017 was, we find, Insp Downs'.

Tribunal's assessment of Detriment 7

182. The Claimant suggests that the decision to remove him from driving duties this was a detriment to which he was subjected because he had made protected disclosures. We accept that it was a detriment, but find it was not because he had made any protected disclosures. The reason was, we find, neatly captured in what Insp Downs actually said to the Claimant at the time and recorded in his pocketbook as we have set out above, i.e. that he was being taken off driving as given the way he had reacted with the WROM Insp Downs could not take the risk that he would not be fit to drive after being served with the MAFN.

183. Moreover, we note that the Driving Standards Policy and Procedure at paragraph 6.12.1 is clear that *"When deploying Police Officers or Staff to drive, line managers must give due consideration to safety issues. For example, authorising someone to drive after a long shift at 4 o'clock in the morning may not be safe for the driver."* And at para 6.12.10 *"There are clearly many more health and safety issues associated with driving BTP vehicles. All enquiries in relation to occupational road risk matters should be referred to the Vehicle Fleet Manager or Occupational Health Advisors who have responsibility for all policy matters in this area of expertise."* We find that Insp Downs acted in accordance with that policy in making a judgment call about whether the Claimant was safe to drive following the issuing of the MAFN and that he sought appropriate authority thereafter from the Vehicle Fleet Manager.

184. That said, since it is relevant to a later part of our judgment, we record that we do consider that the tenor of the Driving Standards Policy is that where someone is considered unfit to drive because of anger or stress issues, that should normally be referred to Occupational Health (OH). We accept that Insp Downs offered on 28 September 2017 to make such a referral which the Claimant declined, but we consider that it was nonetheless inappropriate for the driving suspension subsequently to be continued ostensibly on medical or quasi-medical grounds without seeking input from OH.

Detriments 9 and 10 – Claimant removed from role and transferred to Crime Action Unit

185. On 29 September 2017 Insp Downs emailed the Claimant informing him that *"as promised"* he had arranged a meeting with him on 6 October 2017 at 14.00. He asked whether he had been able to take Federation advice and offered the Claimant counselling (Care First), and other options including Railway Chaplains, Staff Associations and OH. The Claimant replied to say that he had spoken to the Federation Representative and asked him to be in attendance at the meeting. He also asked if he could have the driving suspension revoked via a driving 'review' (p 495). Insp Downs' response on 30 September (p 496) thanks the Claimant for his confirmation regarding the meeting, but says that regarding driving the suspension was likely to remain in place until after the 'current matter' is resolved, with a practical assessment of driving ability possibly taking place afterwards.

186. The Claimant did not attend the meeting on 6 October 2017. The Claimant says that (after consultation with his Federation Representative, PC Mark Bishop) he requested the meeting on 6 October 2017 be cancelled in favour of a formal meeting with another senior officer. The subsequent grievance investigation (p 829) found that the Claimant had failed to check that the request to cancel the meeting had been approved. That finding accords with the evidence we heard, which is that the Claimant in fact met with the Federation Representative at or around the time that he should have been meeting with Insp Downs and did not actually check with him that the meeting had been cancelled. Insp Downs thought the meeting had been rearranged to 3pm and mentioned this when he wrote to the Claimant on 6 October 2017 about his 'non-attendance' (p 499). In that email, Insp Downs explained he saw the Claimant's 'non-attendance' as part of a pattern of the Claimant not following orders and not being able to maintain a professional relationship with PS Johnson. He said the meeting had been arranged to enable the Claimant to present his dossier but as he had not attended those matters could not be progressed. He said the Claimant was to be moved to the Crime Action Team. He did not take forward any of the Claimant's complaints. The material parts of Insp Downs email are as follows:

> "…failure to attend the meeting for which you are on duty (0700-1900) as instructed (amended start time as stated at the request of your Federation Rep) is in line with the ongoing pattern of behaviour regarding failure to

> follow orders and instructions for which Sgt Johnson served you a [MAFN] last week. Moreover in the meeting with Supt Jordan at the resolution of the previous allegations you made against Sgt Johnson you stated you could maintain a professional relationship with Sgt Johnson from information in the MAFN and email you have demonstrated that this is not the case. Such behaviour and failure to conduct yourself as reasonably expected needs to be addressed and rectified. With that in mind I believe that you would benefit from closer supervision in a new environment giving you a fresh start with new colleagues…
>
> If you have evidence of wrongdoing then please bring this to my attention in order that it can be explored appropriately. In the meantime I look to you to utilise your thirty eight years policing experience positively in support of those younger in service with whom you will be working on the Crime Action Team and wish you all the best for this new posting."

187. In his witness statement (para 72), Insp Downs articulated his reasons for deciding to move the Claimant off the unit as being: *"due to his irrational behaviour, his unreliability, failure to follow orders/instruction/work with minimal supervision and that he could not for safety reasons, in good conscience, be permitted to drive. It was not because he flagged up structural issues/practices. Indeed these observations were welcomed and addressed."*

188. In a later email from DCI Brook of PSD to DCC Hanstock (p 566) it was suggested that he was moved because his *"behaviour in front of industry… was increasingly reputationally damaging"*. The email suggests that this is the way that CI Doyle expressed it to DCI Brook in a telephone call. Insp Downs was asked about this in evidence and said that it was a reference to the fact that in the ERU BTP works with partner agencies including LU and the incidents with the Claimant were taking place in front of representatives of those other agencies. We do not consider this point adds anything material to the reasons for the move.

The Tribunal's assessment of Detriments 9 and 10

189. The Claimant contends that the removal from his role on Camden ERU and transfer to Crime Action Team were detriments to which he was subjected because of the protected disclosures he had made. He felt it was a 'punishment move' (para 168). We accept that these were detriments, but disagree that the reason for them was any protected disclosure the Claimant had made. We find that the reasons for the move were those set out by Insp Downs in his witness statement at paragraph 72 (quoted above), together with the reasons set out in his email of 6 October 2017. We acknowledge that the reasons in the email and the reasons in the witness statement are not the same, but we find that reflects the different context in which Insp Downs was writing in each document. It does not indicate any lack of credibility on Insp Downs' part. At root, the reason for the move was that the relationship between the Claimant and PS Johnson had broken down completely as a result of the Claimant's failure to conduct himself professionally following the

dismissal of his earlier allegations against PS Johnson by PSD, Insp Downs and Superintendent Jordan. The Claimant had, as Insp Downs and PS Johnson repeatedly stated in evidence, become *"unmanageable"* and that was the reason for the move, not any previous disclosures or complaints.

190. We should add, since it is material to a later part of our decision, that while we have found that the move was not a detriment to which the Claimant was subjected for making protected disclosures, we do consider that there was a degree of unreasonableness in the way it was handled by Insp Downs. The evidence before us shows that moves between teams are relatively common and routinely used as a means of dealing with relationships issues that have arisen. CI Lawrie was clear that a move could not reasonably be considered as a detriment provided it was properly discussed. In this case, it was not discussed because the Claimant did not turn up to the meeting that Insp Downs had called. We find that the Claimant was at fault in failing to check that the meeting had been cancelled. We find that Insp Downs reasonably expected his attendance, and we accept that in the circumstances Insp Downs could reasonably have considered that the Claimant had failed to follow another order. However, we still consider that informing the Claimant by email that he was to be moved teams, without first at least attempting to ascertain why the Claimant had not attended or to speak to him by other means such as by telephone, was not reasonable in the circumstances.

<u>October 2017 – involvement of CI Darg</u>

191. Insp Downs gave evidence (para 66), which we accept, that he had a conversation with CI Darg on 11 October 2017 in which he suggested that the Claimant may be able to return gradually to police driving by driving the custody vehicle (which does not use blue lights and is not emergency response). He said however that CI Darg approved the driving suspension and did not approve his proposal to gradually bring the Claimant back into police driving. Insp Downs said that CI Darg stated that the Claimant was to remain suspended from driving indefinitely because he was too stressed to drive.

192. However, on 12 October 2017 the Claimant met with CI Darg and provided him with a briefing on what had happened (pp 506-518) which began with the email of 25 April 2016 and brought matters up to date. CI Darg was evidently impressed with the Claimant's account and wrote to CI Doyle after speaking with the Claimant to express his concerns about the MAFN. He stated:

> "It was issued for disregarding a lawful order by not complying with the instruction given by the DCC … however the email from the DCC was guidance on other ways to raise issues more quickly, not an instruction and could not (in my view) ever be construed as a direct order not to contact PSD to raise any concerns of wrong doing – which is what the MAFN appears to have been explicitly issued for.

> This is wholly inappropriate and leaves the Organisation highly vulnerable to an allegation of Bullying or attempting to stifle any further 'whistleblowing'.
>
> Whilst there may be other aspects of PC Cox's behaviour that may require management guidance, as there are always two sides to every dispute, I would ask you to consider that this particular MAFN should be withdrawn.
>
> Secondly, I have discussed the withdrawal of PC Cox's driving authority with him; he has categorically assured me that his declaring himself unfit to drive on one date was wholly due to the stress of the ongoing issues with his line managers on the ERU… he views the removal of his driving authority as another aspect of bullying and having spoken to Stuart, I don't think that's been properly evidence or written up.
>
> Lastly John also views being forced off the ERU to a hub team as a punishment move, the rationale for which has not been clearly communicated to him.
>
> This is causing him considerable distress and again could be seen as an extension of bullying his line managers, if not fully evidenced and justified."

193. CI Darg also wrote to Insp Mark Hook of the Driving Standards Unit on 12 October 2017, copying in the Claimant but not any member of his line management, asking him to amend the wording of the driving restriction to reflect that it was temporary at PC Cox's own assessment and stating that his fitness to drive would now be assessed *"independently of his immediate line management"*.

194. CI Lawrie who subsequently investigated the Claimant's grievance gave evidence to the Tribunal that he had taken a dim view of CI Darg's involvement in the Claimant's case. He did not elaborate, but we infer that this was because CI Darg had intervened at the Claimant's behest before checking the Claimant's account with line managers and doing so (with the email to Mark Hook) in a way that undermined the line managers.

195. Also on 12 October 2017 the Claimant met with TPS Malisz (pp 503-504) for a WROM to introduce herself and discuss his new role on the Crime Action Team. In this meeting he made clear that after his 'appeal' to CI Darg, he was expecting to be moved back to the ERU after a couple of weeks. He said that if he had to stay on the Crime Service Team permanently or for a long period of time he would leave BTP as he was not willing to learn Niche (the new crime management system). He felt that all the specialist training he had received while on the ERU would be wasted and to make the most of his skills and knowledge he should be moved back to the ERU which is where he wanted to be.

196. On 13 October 2017 CI Doyle responded (p 524B) to CI Darg to say that she did not see why the MAFN should be revoked or reworded and that if the Claimant needed it explained again he could have a meeting with Stuart Downs and his Federation Rep. She said she *"would not be keen for any supervisor to have any meeting with John on his own"* and that *"If John has any concerns re bullying, wrong doing etc then he knows he can report it … We can discuss on Monday, however John arriving at Acton to work with industry colleagues and not behave in a professional manner is not what we want to present to them and therefore he is not suitable to work on the unit."*

197. The same day CI Darg emailed Superintendent Gilmer from which it is apparent that Superintendent Gilmer had not been consulted about the move. CI Darg stated (p 524):

> "Looks like they have got rid of an officer causing problems for them then and dumped him on us.
>
> To be fair to him I'm not happy they have acted according to process and may have left us organisationally vulnerable to an allegation of bullying and possibly even constructive dismissal now he's gone sick with stress.
>
> … They have rushed this through as a means of managing him out of Ops."

198. Again, we find that in writing this email, CI Darg was over-hasty as he had not got the full picture.

Start of sickness absence

199. On 14 October 2017 the Claimant was instructed by CI Doyle to return his building and locker keys. Later that day, he reported sick and has remained off work since that date. He was subsequently diagnosed with anaemia.

200. The Claimant was referred to OH, who on 23 October 2017 gave the opinion that the Claimant had no underlying health conditions and, based solely on information provided by the Claimant, recommended that there be a work stress risk assessment on his return to work and that the role transfer should be reconsidered (pp 526-8).

201. On 8 November 2017 the Claimant submitted a complaint to PSD alleging bullying (pp 529-30) and saying that he would attend in person on 10 November 2017 to provide further evidence. DCI Brook responded on 9 November 2017 saying that he was happy to facilitate a short meeting, but that he was fully aware of the case history. The Claimant felt this response was dismissive.

Disclosure 6a – 10 November 2017 – the grievance

202. On 10 November 2017 the Claimant attended PSD and handed DI Dermody two documents entitled Executive Summary v 3 and Statement of Facts v 3 (pp 537-540 and 541-564). This repeated all the disclosures previously made including the bullying allegations against PS Johnson. There were also new elements included in these documents concerned the issuing of the MAFN, the driving suspension and his removal from the ERU role and transfer to the Crime Action Unit. The Claimant contended in his witness statement (para 188) that the information about these elements tended to show *"that there had been a failure to comply with a legal obligation namely the requirements on police officers to abide by police regulations and force policies, to treat colleagues with respect and courtesy, to act with fairness and impartiality and to behave in a manner which does not discredit the police service or undermine public confidence in it"* contrary to Sch 1 to the 2015 Regulations. He also stated (para 190) that he considered these matters to be of public interest because BTP is funded by public money and actions that endanger the health and safety of police officers and the public are matters of public interest.

The Tribunal's assessment of Disclosure 6a

203. For the reasons we have already given, save for what was previously Disclosure 4, none of the matters raised previously were by this point (see paragraph 101) protected disclosures.

204. So far as concerns the new matters, we are prepared to accept that the Claimant subjectively believed at the time that these were matters of public interest, but we find that belief was not reasonable. These further bullying allegations purely concern the Claimant and his personal employment relationship with PS Johnson, Insp Downs and CI Doyle. They do not concern any wider body of employees. Nor do they have any significant impact on public spending. In this respect, we acknowledge that moving an officer from an area in which he has been trained to one in which he has not no doubt has some public financial implication, but so does almost every deployment decision, as well as all time spent by officers in dealing with interpersonal issues rather than active policing. The public funding factor does not turn what is a purely personal employment dispute into a matter of public interest.

205. If we are wrong about that, then we record that we would accept that with regard to the issuing of the MAFN, the driving suspension and the transfer to the Crime Action Unit, the Claimant's belief that he was being treated unfairly (in breach of the 2015 Regulations) at this point was reasonable. Although we have found that none of this treatment was materially influenced by the Claimant's previous disclosures, there were as we have noted above (paragraphs 179, 184 and 190) a number of respects in which the MAFN was inappropriate, the driving suspension (although temporarily lawful) should not have been continued without a referral to occupational health and the transfer to the Crime Action Unit without having first discussed it with the Claimant was unduly hasty.

Events immediately following the submission of the grievance

206. A further OH report was made on 14 November 2017 stating that the Claimant would welcome a meeting with the Superintendent or an independent body (pp 574-5).

207. A PSD Assessment form of 14 November 2017 (p 576) records PSD's view that the Claimant's 10 November 2017 submission should be dealt with under the Force Resolution SOP as a grievance. CI Lawrie was appointed to investigate the grievance.

208. On 2 December 2017 the Claimant attended hospital for a gastroscopy, the results of which showed that he was H-pylori (helicobacter pylori) positive.

Disclosure 6b – 4 December 2017

209. On 4 December 2017 the Claimant attended a Stage 1 grievance meeting with CI Lawrie and Alison Williams (HR). Pages 588-590, 775-783. The Claimant provided updated versions of his Executive Summary and Statement of Facts. He felt the meeting went well, although CI Lawrie considered that the Claimant was becoming dismissive of the process. This difference of perspective is not one that we need to resolve.

210. On 8 December 2017 the Claimant commenced attending counselling sessions through the Respondent's Care First facility.

211. On 19 December 2017 the Claimant sent CI Lawrie some additional points to consider (pp 629-30). CI Lawrie accepted he had received these.

Tribunal's assessment of Disclosure 6b

212. Disclosure 6b is an updated version of Disclosure 6a, but there are no material new elements. Accordingly, our findings in relation to Disclosure 6a (above paragraphs 203-205) apply equally here.

Detriments 11 and 12 – Grievance investigation report, 23 February 2018

213. On 23 February 2018 CI Lawrie provided the Claimant with his Stage 1 grievance investigation report (pp 817-831). That report included, in the narrative background section, the following:

    a. In relation to 8 September 2017, *"PC Cox left Acton ERU without notifying his line management of his intention to. Sgt Johnson was made aware of this and called PC Treves to find out where PC Cox was. He also attempted to contact PC Cox but was unable and so followed with a text message."*

b. In the notes of CI Lawrie's interview with PS Johnson, *"Without the knowledge of PS Johnson, PC Cox rearranged a 1st Aid refresher for the 6th September which finished at 1300. This was in contradiction to an instruction given to PC Cox beforehand to report for duty on that date at Acton ERU and had been done to allow PC Cox to book a period of leave. However, this rearranged training still gave Cox prep time for his Medic pre-coursework."*

214. The report includes 'findings' from the investigation as to whether each aspect of the grievance is upheld, partially upheld or not upheld. He partially upheld some of the Claimant's grievances, but not most of them. He concluded that the relationship between the Claimant and PS Johnson had broken down and that this had affected the relationship between the Claimant and Insp Downs. He recommended mediation be explored, and alternative posting and that there be a timeframe agreed for return to work.

215. We also record, since it is relevant to Detriment 13 below, that the report includes quotes from the Claimant's email correspondence with CI Darg (set out above at paragraphs 192-194) and notes (p 825) that what CI Darg said to the Claimant about the driving suspension in those emails (i.e., broadly, that it was unreasonable) was inconsistent with what he had said to Insp Downs about it on 11 October 2017 (as to which see our findings above paragraph 191). This particular evidential dispute is not resolved by CI Lawrie in the report, and does not appear to have had any bearing on CI Lawrie's findings and conclusions.

216. The Claimant contends, and we accept, that the inclusion of findings, a conclusion and recommendations in this investigation report is in breach of paragraph 12.9.3 of the Grievance Policy and Procedure (p 1068) which provides: *"The investigation report should not include an outcome but sets out the facts (or sets out accounts where events are disputed)."* However, we heard evidence from Alison Williams who was advising CI Lawrie at this stage that the inclusion of findings at the investigation stage is normal practice. CI Lawrie himself did not accept that there was any breach of the procedure, and we accept that in his mind he did not view 'findings' as being 'an outcome'. In our judgment, the inclusion of 'findings' is a technical breach that does not advance the Claimant's case in any way. We consider that it would not be sensible for an investigation report, at least one of this length, not to include findings. The findings are required as it is the only way that the investigating officer can set out the view of the facts that he has reached on the evidence. The same cannot be said of the 'conclusion' and 'recommendations' aspects of this report. We return to this element in due course.

Tribunal's assessment of Detriments 11 and 12

217. The Claimant complains that the inclusion in the grievance report of the references (paragraph 213 above) to his having moved his First Aid course in September 2017 without permission, and having left Acton ERU on 8 September 2018 without permission were detriments (Detriment 11) to which

he was subjected by CI Lawrie and/or PS Johnson for having made Disclosures 6a and 6b. The Claimant considers that these were misconduct allegations and that they were introduced by CI Lawrie based on false information provided by PS Johnson. The Claimant claims that it was also detrimental (Detriment 12) that the Respondent failed to deal with these allegations as disciplinary matters.

218. As to what was included in the report about the First Aid course, we find that this did not constitute a detriment. The Claimant had in fact rearranged the First Aid course without PS Johnson's knowledge because he did it unilaterally while PS Johnson was on holiday, and only copied him in to an email in which he sought authorisation from PS Bute not for moving the First Aid course, but for the annual leave that this then enabled him to take. See above paragraph 139.

219. As to what was included in the report about leaving Acton ERU on 8 September 2017, we accept that the Claimant could reasonably consider this to be a detriment, because as a matter of fact at the point that he left Acton ERU on 8 September he considered that he had PS Johnson's permission to leave and it was not until he had already left that he received PS Johnson's text message informing him he did not. However, this is a very minor point in the report, which appears to have been written in this way because CI Lawrie did not have as firm a grip on the precise chronology of events as we do now. It does not feature in the findings section of the report.

220. We find that neither of these matters in fact constitute 'misconduct allegations' against the Claimant. They are simply included in the report as factual background. It would have been obviously unreasonable and detrimental in the circumstances for the Respondent to have treated them as disciplinary matters. Equally, it is obviously *not* a detriment to the Claimant that they were not treated as disciplinary matters.

221. In any event, in relation to both these matters, we find the Claimant's prior disclosures had absolutely nothing to do with CI Lawrie's reasons for including them in the report. He was simply recording the facts as he found them to be.

222. The Claimant's Counsel in closing submissions made further arguments about Detriments 11 and 12, but grouped them together with Detriment 13. We find that the arguments he raises in relation to Detriments 11 and 12 properly relate to Detriment 13 and we therefore deal with them below.

<u>Disclosure 7 – 9 April 2018</u>

223. On 22 February 2018, shortly before the grievance investigation report was finalised the Claimant was informed by Alison Lawrie that it would be with him shortly and offered a date for a meeting to discuss it (p 843). There was then further correspondence in which the Claimant sought time to respond as he

was taking legal advice. On 7 March 2018 Alison Williams enquired of the Claimant how he intended to respond to the report, whether he wished to meet or respond in writing. The Claimant indicated he would make representations in writing, which he did on 9 April 2018. On 12 April 2018 this was acknowledged and he was offered a chance to meet, but again stated that he did not wish to meet in person.

224. Disclosure 7 is the submission that the Claimant made on 9 April 2018 (pp 846-904) in response to CI Lawrie's Stage 1 grievance report. This close-typed, 58-page document, raises all (or most of) the previous alleged protected disclosures again and seeks to take apart almost every line of CI Lawrie's report. It contains no over-arching grounds or summary. It is very difficult to read. It includes complaints about the references to the First Aid course and the 8 September 2017 issue (Detriments 11 and 12 above), but it is fair to say that these do not 'leap out' of the document.

The Tribunal's assessment of Disclosure 7

225. Insofar as Disclosure 7 repeated reference to Disclosure 4 it was still to that (very) limited extent a protected disclosure, but not otherwise. In particular, we do not find that the Claimant's complaints about the references in the report to the First Aid course or leaving Acton on 8 September 2017 (Detriments 11 and 12) could reasonably have been considered by him to constitute breaches of legal obligation on the part of either PS Johnson or CI Lawrie. Viewed objectively even from the Claimant's point of view, these points of the report simply and obviously simply reflect PS Johnson's genuine recollection of events and CI Lawrie's genuine findings as to the facts.

Events immediately following Disclosure 7 – contact with ACAS

226. On 14 April 2018 the Claimant's sick pay reduced to half pay in accordance with the Respondent's usual policy.

227. On 2 May 2018 the Claimant contacted ACAS and a certificate was issued on 3 May 2018.

Detriment 13 – 18 May 2018 – Stage 2 grievance outcome

228. On 18 May 2018 the Claimant was informed that CI Lawrie had reviewed his response to the grievance in the light of the Claimant's representations, but decided not to change his findings. This completed Stage 2 of the grievance process and the Claimant was offered a right of appeal.

The Tribunal's assessment of Detriment 13

229. The Claimant complains that CI Lawrie did not properly investigate his grievance and that this was subjection to a detriment because he had made Disclosures 6a, 6b and 7.

230. The Claimant's counsel in closing submissions elaborated on the Claimant's claim, arguing that *"the 'investigation' carried out in respect of C's grievance belies a simple acceptance of what he is told by the more senior officers, failure to revert to C at all and decision not to follow up any evidence that may assist C, such as the clash between [Insp Downs'] evidence and the contemporaneous emails from CI Darg. Moreover, the procedure is railroaded through with a 'concluded' set of outcomes provided way before various stages that are designed to benefit C and allow him to have his say"*. He argues that the Tribunal must ask itself why the Claimant was treated in this way and sets out (at para 29 of his Closing Submissions) 10 reasons why the Tribunal should conclude that the Claimant's prior protected disclosures materially influenced CI Lawrie's approach. The Claimant's counsel does not at this point confine himself to the pleaded case that it was Disclosures 6a, 6b and 7 that motivated CI Lawrie. Rather, he makes the broader case which we intend no disrespect in summarising as being that the witnesses he interviewed (especially PS Johnson and Insp Downs) conveyed to him the impression that the Claimant's complaints were becoming a burden on the organisation and that he was dismissive of them as a result.

231. We find that the Claimant's grievance was properly and reasonably investigated by CI Lawrie. We consider that overall CI Lawrie did an impressively thorough and careful job of investigating what was a complex and substantial matter. That he was not (quite) as detailed in his approach as we have been in these proceedings does not in any way alter the fact that it was a very reasonable investigation given that it was undertaken (as is entirely appropriate) by a serving CI with many functions other than dealing with employee grievances. We do not find that he simply accepted what he was told by senior officers. On the contrary, his findings are balanced and some of the Claimant's grievances are partially upheld. The issues with CI Darg (see above paragraph 213) are entirely peripheral and CI Lawrie was right to think that he could not assist (see also our findings in relation to CI Darg at paragraphs 194 and 198 above). CI Darg was not actually a witness to any of the events about which the Claimant was complaining. The 'clash' of evidence between CI Darg and Insp Downs was ultimately irrelevant to the allegations that CI Lawrie had identified the Claimant as raising. There was no need for him to investigate it further or reach a concluded view as to whose evidence he preferred. While we acknowledge Counsel's point that CI Lawrie failed to identify the Claimant's complaints about removal from driving duties as a separate allegation requiring investigation, the truth is that it was quite a difficult task for CI Lawrie to identify what the specific complaints were, and the Claimant certainly did not assist with the further representations he made on 12 April 2018.

232. Further, so far as the process is concerned, we have addressed the question of breach of the policy above at paragraph 214. We do not consider that this created any unfairness in the Claimant's case. The investigation report was written after CI Lawrie had met with the Claimant in person and considered his representations. Were it not for the terms of the policy, it would be perfectly fair and reasonable for the report to set out findings, conclusions

and recommendations and for the individual then to have a right of appeal against it. Given the terms of the policy, it would have been preferable if the report had only included the findings and not the conclusions or recommendations, but the fact is that by including it, the Claimant actually had a chance to respond to the report before it was finalised by CI Lawrie at Stage 2. Had he submitted a more focused document at this point, or one that raised more clearly some problem with the original report, we would have expected CI Lawrie to revisit his report accordingly. As it is, the Claimant's submission of 12 April 2018 was not focused and we cannot see that it identifies clearly any particular issue with the report that would have required CI Lawrie to revisit it. As such, we find CI Lawrie acted reasonably in simply confirming his report in the Stage 2 outcome.

233. We do not therefore find that the detriment alleged by the Claimant is made out since his grievance was properly investigated. Even if it was not in some respect, or even if the Claimant's case is to be understood as simply a complaint that his grievance was rejected (which we would accept to be a detriment), we find that this was not because of any protected disclosure that the Claimant had made. Such disclosures as we have found to be protected were a very small part indeed of Disclosures 6a, 6b and 7. CI Lawrie was simply dealing with the Claimant's grievance as best he could and not acting in response to any protected disclosure. Moreover, neither PS Johnson or Insp Downs sought to manipulate CI Lawrie's investigation because the Claimant had made the two disclosures we have found to be protected (Disclosures 1 and 4). There is nothing here that would found liability on the *Jhuti* principle.

<u>Detriment 14 – The grievance appeal (22 June 2018)</u>

234. On 25 May 2018 the Claimant appealed the Stage 2 Outcome (pp 926-928).

235. On 1 June 2018 the Claimant's claim in these proceedings was received by the Employment Tribunal.

236. On 22 June 2018 the Claimant attended the Stage 3 appeal meeting with PC Bishop his Federation Representative. The meeting was chaired by Superintendent Allingham and he was accompanied by Mr Churchill (HR). We have a transcript of that meeting (pp 930-960). At that meeting Supt Allingham began by asking the Claimant to *"expand"* generally on his grounds of appeal (p 931). The Claimant then spoke at length. Supt Allingham then endeavoured to clarify precisely which findings of CI Lawrie the Claimant was disputing. In the process of doing so, he asked the Claimant about his having changed his First Aid course to 6 September 2017 in order to facilitate annual leave later that month. This was a matter that had, we find, leapt out at Supt Allingham as a point of concern as changing of training courses like that should have had authorisation at Superintendent level and he clearly wished to ask the Claimant about this. The Claimant responded by saying that they were on *"tricky grounds"* in that respect (p 938) and that he would not wish to answer such an allegation without Federation advice. Supt Allingham

acknowledged this and paused to allow the Claimant to do so. On his return, they then discussed it and the Claimant presented his email evidence of obtaining authorisation. He spoke at lengthy about it, and Supt Allingham then changed the subject to discuss the MAFN (p 941).

Tribunal's assessment of Detriment 14

237. The Claimant maintains that Supt Allingham's treatment of him during the stage 3 meeting in focusing on the allegation about the First Aid course, was a detriment to which he was subjected for having made Disclosures 6a, 6b and 7.

238. We find that Supt Allingham's questioning of the Claimant was a detriment because, although it is apparent that Supt Allingham had no intention of pursuing the matter as a disciplinary, he was anxious to highlight to the Claimant that this aspect of the Claimant's conduct had not gone unnoticed. However, we find that Supt Allingham's raising of this point had absolutely nothing to do with any prior disclosures by the Claimant. It was very clear to us that Supt Allingham simply considered this to be improper conduct that should not be allowed to go entirely unmarked.

Detriment 15 – 28 June 2018 – Stage 3 grievance outcome

239. On 28 June 2018 the Claimant was informed by Supt Allingham of the Stage 3 outcome (pp 962-966). In summary, Supt Allingham concluded that the MAFN was poorly worded but justified and proportionate, although he considered it should be reduced in length. He suggested a new posting on the response team as he did not consider the ERU would be the best place for the Claimant's well-being. He did not refer any allegations for investigation.

Tribunal's assessment of Detriment 15

240. The Claimant contends the Stage 3 outcome was a detriment because it failed to properly address or resolve his complaints. He argues that Supt Allingham acted in this way because he had made Disclosures 6a, 6b and 7. The Claimant's counsel in his Closing Submissions at paragraph 33 suggests that it is clear that the Stage 3 outcome was materially influenced by the Claimant's protected disclosures because only *"lip service"* was paid to the grievance process by Supt Allingham.

241. We disagree. Supt Allingham's task at the appeal stage was to consider CI Lawrie's report, and the Claimant's grounds of appeal and assess whether there was any reason to reach any different conclusion to CI Lawrie. He was not required to undertake further investigation unless he considered that the Claimant had identified some error that required that. In interview it was appropriate that, having given the Claimant a chance to say anything further to supplement his written submissions, he should then proceed simply to clarify which specific points of CI Lawrie's conclusions he disagreed with. He

was not bound to give the Claimant opportunity to expand even further on what he had already said in writing and had an opportunity to address further orally. Likewise, the reasons given in the outcome later are sufficient to explain why the appeal is not upheld. They do not look like 'lip service' to us, but reflect Supt Allingham's independent assessment of the case. The fact that he had misread CI Lawrie's report in thinking that CI Lawrie had interviewed five people when he had in fact only interviewed two people in addition to the Claimant and had otherwise only received written evidence from three of them is an understandable misreading/misquoting and is not material.

242. In the circumstances, we find that the detriment alleged by the Claimant is not made out as we consider that the Stage 3 outcome did properly address and resolve his complaints. Again, however, if the claim is in fact to be considered as if the mere dismissal of his grievance appeal was a detriment we in any event find that this was not a detriment to which he was subject because he had made protected disclosures. Such disclosures as we have found to be protected were a very small part indeed of Disclosures 6a, 6b and 7 and we find Supt Allingham dealt with the grievance appeal in the way that he did simply because that was how the facts of the matter appeared to him to be.

Detriment 16 – 5 July 2018 – refusal to refer the Claimant to OH

243. By email of 29 June 2018 the Claimant email Arthur Churchill (HR advisor to Supt Allingham) noting that *"my future role has relied heavily on health issues, as being the factor for my not being returned to my old role".* He asked that a medical report *"on the question of whether it would be detrimental – or indeed beneficial – for me to return to my previous role and team on the Emergency Response Unit?"*.

244. This request was refused by Mr Churchill, after consultation with Supt Allingham (pp 967-70) in the following terms:

> "As stated in the grievance appeal outcome letter the decision to transfer you to another post is based on the fact that issues explored in the grievance have caused you to go long term sick due to work related stress. Therefore, taking into consideration the circumstances and the potential future relationships with other officers if you returned to the EIU the decision is you will transfer to another post upon resuming to duty. This is a management decision based on the need for a fresh start and not to cause any impact on your well-being in the future. In view of this there no need for medical advice on this issue.
>
> As you are currently sick the Sickness Absence SOP will be applied and line managers will determine whether any Occupational Health advice is required in supporting you back to work. I am expecting this to commence shortly."

Tribunal's assessment of Detriment 16

245. The Claimant contends that this was a detriment to which he was subjected because of Disclosures 6a, 6b and 7.

246. Supt Allingham in the Stage 3 grievance outcome based his conclusion that the Claimant should not be posted back to the same team on the ERU on his view that this would be detrimental to the Claimant's well-being. He regarded this as commonsense given the breakdown in relationship between PS Johnson and the Claimant, and we agree. However, we can understand why, given the way the decision was expressed by Supt Allingham, the Claimant considered that a referral to OH would be appropriate and we therefore accept that he could reasonably regard Mr Churchill's refusal as a detriment.

247. However, we do not consider that the refusal had anything to do with the minor aspects of Disclosures 6a, 6b and 7 that we have found to be protected disclosures. The reasons were twofold: first, because Supt Allingham regarded his conclusions as being 'commonsense' requiring no medical input; secondly, because Mr Churchill considered that it was inappropriate for there to be an OH referral as part of the grievance process. He considered that to be a matter for line management in deciding how to approach the Claimant's return to work.

Events after the grievance procedure

248. Detriment 16 is the last alleged unlawful act in these proceedings and therefore we do not need to record what has happened between the parties since then. However, in summary, the Claimant has remained off work. Ill Health Procedures have been commenced, but are currently in abeyance. The Claimant applied to remain on full pay, but this was declined. His application to remain on half pay was granted and he remained on half pay until 30 January 2019, but he is now on zero pay.

Conclusions on Liability

249. In the circumstances, for the reasons set out above, we have in summary found that:

    a. Disclosure 1 (25 April 2016 email to PS Johnson) was a protected disclosure insofar as it disclosed information about PS Johnson having changed his shifts on 125 occasions, but not otherwise;

    b. Disclosure 4 (19 May 2017 to Insp Downs and Supt Jordan, concerning PS Bute's back-to-back 12-hour shifts) was a protected disclosure;

c. None of the other Disclosures were protected disclosures, save that Disclosures 5b, 6a, 6b and 7 were protected to the limited extent that they repeated Disclosure 4;

d. Detriment 1 (the PDR) was not a detriment and, in any event, not done on the ground of any protected disclosure;

e. Detriment 2 (PS Johnson's emails of 3 and 17 August 2017) were not detriments and not, in any event, done on the ground of any protected disclosure;

f. Detriments 3 and 4 (the WROM of 7 September 2017) was a detriment, but not done on the ground of any protected disclosure;

g. Detriments 5, 6 and 8 (the MAFN and move to the temporary role at the Brewery Road Custody Suite on 28 September 2017) were detriments, but not done on the ground of any protected disclosure;

h. Detriment 7 (removal from driving duties on 28 September 2017) was a detriment, but not done on the ground of any protected disclosure;

i. Detriments 9 and 10 (removal from ERU and transfer to Crime Action Unit) were detriments, but not done on the ground of any protected disclosure;

j. Detriments 11 and 12 (inclusion in the Stage 1 grievance investigation report of allegations about (i) moving First Aid course and (ii) leaving Acton ERU without permission on 8 September 2017) - the first was not a detriment, the second was, but neither were done on grounds of any protected disclosure;

k. Detriment 13 (18 May 2018 Stage 2 grievance outcome – failure properly to investigate) was not a detriment in the form alleged by the Claimant (because there was no failure properly to investigate); insofar as failure to uphold the grievance was a detriment, this was not done on grounds of any protected disclosure;

l. Detriment 14 (Supt Allingham's questioning of the Claimant about the First Aid course in the grievance Stage 3 meeting) was a detriment, but not done on grounds of any protected disclosure;

m. Detriment 15 (failure properly to investigate or resolve the Claimant's complaints at Stage 3) was not a detriment in the form alleged by the Claimant (because there was no failure properly to investigate); insofar as failure to uphold the grievance appeal was a detriment, this was not done on grounds of any protected disclosure;

n. Detriment 16 (refusal to refer the Claimant to OH on 5 July 2018) was a detriment, but it was not done on grounds of any protected disclosure.

Jurisdiction: the time point

250. In the light of our conclusions on liability there is no need for us to determine whether the claims were in time. However, for completeness we record briefly our findings in this respect too.

The law

251. For detriment claims under s 48 ERA 1996, there is a three month time limit for the claim to be presented to the employment tribunal. Where an act or omission is part of a series of similar acts or omissions, the three month limit runs from the last of them: s 48(3)(a) ERA 1996. This requires that there be some link between the acts which makes it just and reasonable to treat them as having been brought in time: *Arthur v London Eastern Railway* [2007] IRLR 58. An act may also be regarded as extending over a period under s 48(4), in which case time runs from the last day of the period over which the act continues. In discrimination cases it has been held that an in-time act that is not unlawful cannot provide the 'link' to an unlawful out-of-time act: see *South Western Ambulance Service NHS Foundation Trust v King* (UKEAT/0056/19/OO) at paras 32-33. We see no reason why the same principle should not apply to protected interest disclosure cases.

252. If the tribunal is satisfied that it was not reasonably practicable for a claimant to present the claim within three months of the acts complained of, it should consider the complaints if they were presented within such further period as the tribunal considers reasonable: s 48(3)(b).

253. This is the same test as applies in unfair dismissal cases. The tribunal must first consider whether it was reasonably feasible to present the claim in time: *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129. The burden is on the employee, but the legislation is to be given a liberal interpretation in favour of the employee: *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] IRLR 562. It is not reasonably practicable for an employee to bring a complaint until they have (or could reasonably be expected to have acquired) knowledge of the facts giving grounds to apply to the tribunal, and knowledge of the right to make a claim: *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212. Where an employee has knowledge of the relevant facts and the right to bring a claim there is an onus on them to make enquiries as to the process for enforcing those rights: *Trevelyans (Birmingham) Ltd v Norton* [1991] ICR 488.

254. If the tribunal finds it was not reasonably practicable to present the claim in time, then the tribunal should consider whether the claim has been brought within a reasonable further period, having regard to the reasons for the delay and all the circumstances: *Marley (UK) Ltd v Anderson* [1996] IRLR 163, CA.

This case

255. These proceedings were commenced on 1 June 2018 after a period of ACAS conciliation between 2 May 2018 and 3 May 2018. Accordingly, any claim occurring prior to 3 February 2018 was *prima facie* out of time. That means that Detriments 1 to 10 were *prima facie* out of time, unless they are part of a series of acts with Detriments 11 to 16. Although Detriments 1 to 10 involve one set of officers (Johnson, Doyle, Downs) and Detriments 11 to 16 principally involve another set (Lawrie, Allingham, Churchill), we consider that the necessary link is present in principle to create a 'series' of acts because CI Lawrie interviewed PS Johnson and Insp Downs and because the grievance was generally considering the actions of the officers involved previously. However, if as we have found all acts in time are not unlawful, the decision in *Southwestern Ambulance Service v King* would mean that any earlier unlawful act would be out of time in any event.

256. Further, we find that it would have been reasonably practicable for the Claimant to have presented his claim about Detriments 1 to 10 earlier than he did. This is because the Claimant had access to Police Federation advice throughout, and had in fact consulted the Federation as early as 19 May 2016 (above paragraph 63) about what he even then perceived to be acts of retribution by management for his having complained about PS Johnson. There is no reason why, once he had submitted his grievance on 10 November 2017 he could not have commenced proceedings at that point. The Claimant was suffering ill-health, but not to the extent that he was unable to participate in the grievance process and, we find, it would have been reasonably practicable for him to put in his claim to the Tribunal earlier. The Claimant initially contended that he was awaiting the outcome of the grievance process, but in the end he submitted the claim before that process was completed in any event. It was no obstacle to him submitting the claim.

Overall conclusion

257. The unanimous judgment of the Tribunal is that the Claimant's complaint that he was subjected to detriments for having made protected disclosures is not well-founded and is dismissed.

Employment Judge Stout

16 Dec 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

17/12/2019

FOR THE TRIBUNAL OFFICE