Appeal No. UKEAT/0304/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

Heard at the Tribunal
(conducted remotely)
on 25 – 26 February 2021
Judgment handed down on 4 June 2021

Before

THE HONOURABLE MRS JUSTICE STACEY
MR D BLEIMAN
MRS M V McARTHUR BA FCIPD

THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE — APPELLANT

(1) MR ANDREW ASTON
(2) MR JOHN SCHOFIELD
(3) MR JOHN BYRNE

RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	Mr Simon Gorton QC (One of Her Majesty's Counsel) Instructed by: Greater Manchester Police Legal Services c/o Openshaw Complex Lawton Street Openshaw Manchester M11 2NS
For the Respondents	Mr Jack Feeny (Of Counsel) Instructed by: Penningtons Manches Cooper LLP 125 Wood Street London EC2V 7AW

SUMMARY

TOPICS: WHISTLEBLOWING, PROTECTED DISCLOSURES, JURISDICTIONAL/TIME POINTS & PRACTICE AND PROCEDURE

The Employment Tribunal did not err in its approach to the question of causation in a protected interest disclosure detriment claim and it correctly applied the burden of proof. However the contents of a witness statement made in separate employment tribunal proceedings by one of the police officers about whom protected interest disclosures had been made which criticised the first claimant (the respondent to the appeal) was protected by judicial proceedings immunity (JPI) and could not constitute a detriment. Most regrettably the JPI point had not been raised before the tribunal. Bearing in mind the importance of the JPI doctrine to the integrity of the judicial process, in exercising its discretion in accordance with the guidance in *The Secretary of State v Rance* [2007] IRLR 665 the appeal tribunal allowed the point to be raised for the first time on appeal. The appeal on the JPI ground was allowed and in exercising its powers under s.35(1)(a) Employment Tribunals Act 1996, the tribunal's decision was substituted with a finding that detriment 19 which was based on the witness statement protected by JPI was not well founded.

THE HONOURABLE MRS JUSTICE STACEY

Introduction

1. This is an appeal from a judgment from the Manchester region of Employment Tribunals before Employment Judge Tom Ryan with members Mr G Pennie and Ms V Worthington. The appellant before the appeal tribunal, the Chief Constable of the Greater Manchester Police, was the respondent before the tribunal and the respondents to the appeal were the claimants below. The claims were brought by 3 serving police officers – Detective Inspector Andrew Aston (serving at the time as Acting Deputy Chief Inspector), Police Sergeant John Schofield and Police Constable John Byrne, under the public interest disclosure (or whistleblowing) provisions of S47B Employment Rights Act 1996 (the Act). We shall continue to refer to the parties by reference to their status before the tribunal.

2. The hearing took place over 28 days on various dates between 18 June and 30 November 2018. There were 19 witnesses and a bundle comprised of over 6,000 pages. A reserved judgment with reasons was sent to the parties on 31 May 2019.

3. The case concerned alleged qualifying and protected disclosures as defined in the Act made by the claimants in connection with their investigation into misconduct, corruption and possible criminal offences committed by a number of officers including senior officers up to the rank of Assistant Chief Constable (ACC) within the Greater Manchester Police force. 18 separate protected disclosures were relied on and 26 detriments alleged. The tribunal found that 13 matters amounted to protected disclosures within the meaning of the Act, a finding which is not challenged by the respondent, and that the claimants had been subjected to 4 of the claimed detriments (17, 18, 19 and 20) on the ground of having made the protected disclosures. The protected disclosures were made over a period from 2 March 2015 to 7 July 2016 mainly by DI Aston but one by all three of the claimants (PD 13) and some by DI Aston and just one of the other claimants (PD 10 and PD 11). The detriments found were the failure to offer a promised

exit strategy for any of the claimants by 1 January 2016 (detriment 17), comments implicitly critical of DI Aston by CS Bruckshaw made on 15 August 2018 (detriment 18), adverse comments about DI Aston accusing him of malpractice made by CI Williams in her own employment tribunal proceedings on 25 November 2016 (Detriment 19) and DCC Pilling's statement to the press which was critical of all three claimants on 15 January 2017 (Detriment 20). The first claimant had been subjected to all of the four detriments, and the second and third claimants to detriments 17 and 20.

Grounds of appeal

4. Of the original five grounds of appeal, three were permitted to proceed to a full appeal hearing following a preliminary hearing. Ground 1 was a challenge to the tribunal's findings on causation and the sufficiency of the causal link between the disclosures relied on and the detriments said to have been caused by the disclosures. The error was said to be a failure to identify what the precise motivating protected disclosure was for each detriment on which the claimants succeeded. It was linked to ground 2 which challenged the tribunal's finding of the reason for the treatment complained of in detriments 18 and 19 and the tribunal's approach to the burden of proof. It was said that the tribunal had found a non-protected disclosure related explanation for the treatment complained of in these two detriment allegations and it was therefore not open to the tribunal to find in favour of the claimants and had thus been a perverse conclusion. Ground 3 was a discrete point that the tribunal should have dismissed detriment 19 on grounds of judicial proceedings immunity (JPI), even though it had not been raised by the respondent at the tribunal hearing.

Background facts

5. The facts of the case were complex. The employment tribunal judgement runs to 82 pages with 595 paragraphs, 466 of which contain the facts. It will be helpful to set out a brief overview before addressing the specific details relevant to the grounds of appeal.

6. The narrative starts in Asda supermarket in Ashton-Under-Lyne on Friday 19 September 2014 with an allegation of shoplifting and common assault on a security guard by a customer. However the customer who had been arrested was a serving police officer, PS Pendlebury. What commenced as a simple shoplifting case eventually led to allegations of the serious criminal charge of perverting the course of justice being made against PS Pendlebury and more senior officers up to the rank of Chief Superintendent and allegations of police misconduct up to and including the level of Assistant Chief Commissioner (ACC) within the Greater Manchester police force. It led to the involvement of both the Counter Corruption Unit (CCU) and Professional Standards Branch (PSB) who referred the case to what was then the Independent Police Complaints Commission (IPCC) (now Independent Office of Police Complaints (IOPC)).

7. The claimants were police officers in the Neighbourhood Policing Team in Rochdale (which includes Ashton-under-Lyne) where DI Aston was Acting Detective Chief Inspector. DI Aston was initially appointed with management oversight of the investigation by CS Sykes, territorial commander of Bury and Rochdale and then became Senior Investigating Officer (SIO) in late February 2015. By end of March 2015 all three claimants appear to have been seconded to work full-time on the criminal investigation code named Operation Ratio.

8. The investigation initially uncovered evidence that PS Pendlebury's wife and her friend and hairdresser had perverted the course of justice and that they had fabricated evidence and made a number of false allegations about the Asda security guard in an attempt to undermine the prosecution case against PS Pendlebury. They both pleaded guilty in the Crown Court to the offence of perverting the course of justice. PS Pendlebury was also charged with perverting the course of justice. He pleaded not guilty to two counts of perverting the course of justice and one count of conspiracy to pervert the course of justice in addition to the original charges of common assault and shoplifting and was acquitted after trial by a jury. He was however dismissed from the police for gross misconduct in connection with unrelated matters.

9. DI Aston and his team also discovered evidence that they believed raised issues of improper interference in the proceedings against PS Pendlebury and professional misconduct and criminal offences by three senior officers - Inspector Maria Donaldson (PS Pendlebury's line manager), CS Lee Bruckshaw (Inspector Donaldson's commanding officer whose role included overseeing custody and criminal justice) and CI Clara Williams who was at the custody suite at Ashton-Under-Lyne police station where PS Pendlebury should have been taken following his arrest at Asda ("the Senior Officers"). During the course of their investigation they also investigated a separate report of sexual harassment that had been made against CS Bruckshaw by one of his colleagues, which the claimants considered was well founded from the evidence that they had seen, although the respondent did not act on the allegations.

10. DI Aston's team discovered that before arriving at Ashton-Under-Lyne police station on 19 September 2014 the arresting officer, PC Bullough, had been contacted and told not to take PS Pendlebury into the custody suite but to park outside and contact Inspector Donaldson. He did as he was instructed and waited in the police vehicle with PS Pendlebury outside the station. A little while later Inspector Donaldson arrived in the car park with a custody sergeant from Ashton-Under-Lyne police station. The custody sergeant informed PC Bullough that he was not authorising PS Pendlebury's detention in custody and Inspector Donaldson told him that the matter was 'best dealt with by way of summons' and instructed him to de-arrest PS Pendlebury. PC Bullough duly de-arrested PS Pendlebury who therefore did not enter the custody suite and was not charged. Instead he received a summons in the post to attend the police station to assist with police enquiries. He was subsequently charged with shoplifting and common assault.

11. DI Aston and his team's investigation uncovered evidence, including from authorised searches of the telephone and computer records of CS Bruckshaw and Inspector Donaldson, that led them to have a reasonable belief that they had perverted the course of justice and were guilty of police misconduct by seeking to interfere with the prosecution of PS Pendlebury with a view

to getting the charges dropped. Their actions had included lobbying the CPS and senior officers within the force. DI Aston reported matters to his superiors, the CCU and PSB which in turn referred the matter to the IPCC[1].

12. DI Aston himself personally briefed a number of Gold (senior management) team meetings during the course of 2015 and updated CS Sykes frequently. Written reports were also regularly submitted, for example on 18 March 2015 for a Gold meeting.

13. The tribunal found that on 11 May 2015 an "exit strategy" for the claimants was discussed by Steve Liston of the IPCC at a meeting attended by DCC Hopkins and DS Retford from CCU which was to be put in place on the claimants' return to normal duties at the end of the investigation. At that stage DCC Hopkins had hoped that the IPCC would take over the investigation and so the return to normal duties would be imminent. The IPCC did not agree to take over the investigation but authorised a "managed investigation" whereby DI Aston remained the Senior Investigating Officer, DS Retford, head of the CCU within the PSB, was appointed to oversee the investigation which was under the overall management of the IPCC. The IPCC considered that given the complexity of the investigation and the stage that it had reached, that for the purposes of continuity it should remain within the force albeit under their supervision. The claimants therefore continued as lead investigators and did not return to normal duties until January 2016.

14. The IPCC referred the matter of the claimants' allegations and evidence of the Senior Officers having conspired to pervert the course of justice and misconduct in a public office to the CPS who considered that there was insufficient evidence to charge and advised against bringing criminal proceedings.

[1] One issue for the tribunal to resolve (detriment 2) was whether there had been a delay in referring the matter to the IPCC which had caused the claimants a detriment. The tribunal found that the reason for the delay was not on grounds of the disclosure and in any event no detriment was suffered because of the delay.

15. DI Aston and his team also compiled a further document setting out the details of their concerns in relation to other officers which suggested misconduct in a public office and other failings and misconduct matters on 6 October 2015 (PD 13). Their document was seen by a number of senior officers within the force. The officers named in PD 13 included Inspector Craig and Sergeant Greene and alleged involvement of senior officers up to the level of Assistant Chief Constable, namely ACC Copley and ACC Shewan. The tribunal found that this document was seen by the then Chief Constable who was given a copy.

16. After the CPS decision not to prosecute any of the officers and PS Pendlebury's acquittal what the tribunal called the 'misconduct phase' commenced. There was an assessment of whether any of the officers should face disciplinary charges. At the same time a number of reviews ordered by CC Hopkins were conducted by DCI Hussey, DCI Flindle, and the Major Crime Review Unit (MCRU) in December 2015 through to May 2016. The claimants considered that the reviews were undermining of them and their work and left them vulnerable to unfair criticism and DI Aston was particularly critical of the decision by CC Hopkins to commission the MCRU review which was relied on as a detriment in a number of respects. But the tribunal did not find that these detriment claims (such as detriment 8 and 9) were made out. It was clear that DI Aston and PS Schofield were under considerable pressure at that time and at one point themselves almost risked the possibility of facing disciplinary investigation, but no further steps were taken in that direction. Complaints made by PS Pendlebury's wife, Zoe Wilkinson, and also his mother were dismissed as vexatious and CS Bruckshaw's criticisms of DI Aston were also dismissed.

17. Gross misconduct disciplinary charges were commenced against CS Bruckshaw and Inspector Donaldson and misconduct charges against CI Williams for their behaviour and involvement in PS Pendlebury's prosecution and misconduct charges were suggested, but not ultimately pursued, against a number of others. The MCRU review resulted in concerns being raised about the manner in which the criminal investigation interviews of CS Bruckshaw and

Inspector Donaldson had been conducted by a specialist interviewer drafted in for the purpose. As a result their interviews were not relied on in the misconduct allegations and the proceedings were downgraded from gross misconduct to misconduct.

18. The disciplinary proceedings fizzled out. CS Bruckshaw promptly resigned when the charges were downgraded (under the police rules an officer is not permitted to resign pending unresolved gross misconduct proceedings, but may do so when facing a lesser misconduct charge) which ended the disciplinary proceedings against him. Inspector Donaldson went off sick with stress and the proceedings were permanently stayed. CI Williams' behaviour was found to be misconduct for which she was given 'management advice.' 'Management action' was taken in respect of ACC Shewan for not disciplining CS Bruckshaw over his email to the CPS about the prosecution of PS Pendlebury.

19. Two of the officers who involved themselves in PS Pendlebury's case then publicly criticised DI Aston: CS Bruckshaw by issuing a media statement critical of DI Aston (det.18) and CI Williams in a witness statement in employment tribunal proceedings that she subsequently brought against the respondent alleging public interest disclosure detriment against her manager, Superintendent Chris Hankinson (det.19).

20. Finally, after CI Williams' proceedings had been resolved, DCC Pilling issued a press statement about the proceedings which also criticised DI Aston (det.20).

21. The tribunal meticulously went through each of the alleged protected disclosures and made very detailed findings about what had been said by whom, to whom and when, and then went on to make specific findings for each one. It also found that the work of DI Aston and his colleagues in Operation Ratio was reasonably well known about by senior officers in the force and that the officers being investigated knew that they were being investigated by the three claimants.

22. Applying the factual narrative to the law and the many protected disclosures and detriments claimed, the tribunal carefully considered the necessary ingredients of a protected and qualifying disclosure. It considered that a disclosure that complies with s.43B is still a protected and qualifying disclosure even if it is the job of a claimant, such as a police officer to, for example report criminal offences. It still attracts the protection of the Act.

23. The tribunal decided that many of the claimants' disclosures alleged amounted to qualifying and protected disclosures under the Act, helpfully summarised in a table at para 464. The PDs made by DI Aston dated from 2 March 2015 to 7 July 2016 and those made by PS Schofield and PC Byrne from 18 June to 6 October 2015. The tribunal then considered whether the claimants had been subjected to any of the detriments claimed on grounds of having made the protected disclosures it found had been made.

Detriment 17 "not offered an exit strategy despite Superintendent Retford's promises"

24. The tribunal found that in the spring of 2015 DS Retford told the claimants that the respondent would ensure that they each had an exit strategy on the conclusion of the investigation. The prospect was first raised by Mr Liston at a meeting in May 2015 after CS Bruckshaw had made criticisms of DI Aston investigating him because of what CS Bruckshaw called "bad blood" between them referring to an incident many years previously. The criticism had not led to DI Aston being removed from the investigation. The tribunal considered that "the rationale for the need for an exit strategy was obvious":

> **"511. ….. [The] Claimants were investigating senior police officers for offences which are tantamount to corruption in the exercise of their duties. Not only was there a potential in any event for some form of reprisal or disadvantage at the conclusion of the investigation but, in addition, the involvement of DI Aston into an investigation of CS Bruckshaw rendered such a reprisal more likely. This was all in the context that 3 criminal investigating officers from a neighbourhood policing team, because of the circumstances we have described, effectively took on a role that PSB officers and/or the IPCC might have undertaken.**
> **512. If as long before as May 2015 the understandable need for an exit strategy upon the conclusion of the investigation was recognised by DS Retford then at the conclusion of the investigation the lack of that strategy being explored amounted to a detriment.**
> **513. We have recorded what happened in the event and, as we set out below, there were additional detriments. Whether, if an exit strategy had been created and implemented, the claimants would have suffered no other detriments is not**

> **relevant. The officer who was managing the claimant's investigation on behalf of the respondent promised the strategy and the respondent did not carry it forward, whatever the outcome of the strategy might mean, that failure was a detriment to the claimants."**

Detriment 18: "CS Bruckshaw's statement to the media on 15 August 2016"

25. The tribunal described how CS Bruckshaw went to the press after the gross misconduct charges against him were dropped and although DI Aston was not mentioned by name, made clear references to him in very critical comments about the investigation which duly appeared in an article in the Manchester Evening News. An unnamed spokesman for the respondent also criticised the enquiry conducted by the claimants stating that it had taken too long, had not been carried out in the effective manner that "we always aspire to", that it took too long to reach the eventual conclusion and "we are always working to ensure that we can take learning from situations when things do not go as well as we would want and as such a full review will take place".

26. In its conclusions the tribunal noted that it was not in dispute that the article was a detriment to DI Aston and explained that it did not accept the respondent's submission that the detriment was not because of protected disclosures. It found:

> **"548. In our judgment it is an all but inescapable inference that CS Bruckshaw would have known of disclosures of information by DI Aston to more senior officers within the respondent's force. He knew that DI Aston was the investigator from the outset. He had objected to his appointment. He knew of the investigation into PS Pendlebury, Zoe Wilkinson and Natalie Lester because he had made representations to the CPS. He knew at the time of the interviews the scope of the matters about which he was being questioned. He knew the nature of the potential disciplinary charges because of the misconduct papers and evidence having been served upon him which in itself was founded upon the results of the investigation and the information that had been reported in the disclosures PD 7, PD 8 and PD 9 [disclosures by DI Aston to DCI Hussey, Superintendent Mallon, CS Sykes, DI Robertson and ACC Copley] in April and May 2015.**
> **549. There was no evidence that he was aware of PD 10 and PD 14 which were the disclosures about the alleged sexual harassment.**
> **550. When, on 15 August 2016, CS Bruckshaw gave his interview to the BBC he not only criticised the investigators as a group but also alluded directly to DI Aston. We accept he may have been in part motivated by a belief that DI Aston held a grievance against him. It is not likely that that was the sole motive for the statement of the BBC. We accept the submission that on the balance of probabilities it was partially motivated at least by the disclosures made by DI Aston. The respondent did not adduce any evidence to rebut that inference.**
> **551. the inferences that we have drawn to not however extend to PS Schofield and PC Byrne. As a matter of fact we have not found that they made protected**

> **disclosures specifically about CS Bruckshaw. Moreover we do not think it is safe to draw the inference that CS Bruckshaw would have believed that they themselves had made protected disclosures."**

Detriment 19: "accused of malpractice by CI Williams on 25 November 2016, the date of CI Williams witness statement in her tribunal proceedings"

27. Meanwhile CI Williams had herself instituted employment tribunal whistleblowing proceedings against the respondent on 12 January 2016. She alleged that she had been subjected to a detriment after making protected disclosures about her line manager, Superintendent Chris Hankinson. CI Williams' allegations included an assertion that she was only investigated and interviewed by DI Aston because he was friends with Superintendent Hankinson. The claim was defended by the Greater Manchester Police and both DI Aston and DS Schofield were to be witnesses for the defence. In CI Williams' witness statement she alleged that DI Aston had been unprofessional when asking her questions so that he could compile her statement and that she had subsequently been interviewed in an unprofessional manner. DI Aston considered that CI Williams had criticised him "to get back at me for making her a suspect in the criminal investigation".

28. At CI Williams' tribunal hearing she gave evidence in accordance with her witness statement on 25 November 2016 including the criticism of D I Aston, but she then withdrew her case after she had given evidence and before DI Aston and the other witnesses for the respondent had given their evidence. CI Williams tribunal claim was settled on 13 January 2017 on undisclosed terms that involved no payment to her from the respondent.

Detriment 20: "DCC Pilling's statement to the media on 15 January 2017"

29. On 15 January 2017, after she had withdrawn her ET claim, CI Williams went to the press. DCC Pilling drafted a press statement in response to an article that had appeared in the Manchester Evening News in which he stated:

> **"…some elements of the IPCC managed investigation were not carried out in the effective manner that we always aspire to and it took too long to reach the final conclusion. However, we maintain that the investigation was one which needed to be carried out…"**

30. None of the claimants had been named in the original article but they considered that the criticism was directed at them as the "criminal investigation team" and the claimants considered that DCC Pilling had made the statement to put the claimants down because they had made protected disclosures.

31. In its discussion and conclusions the tribunal recited the evidence and counsels' submissions. It had no difficulty in drawing the conclusion that any follower of this story in the press or on social media, in addition to officers of the respondent and acquaintances of the claimants, would be able to identify them as the "criminal investigation team." They were precisely and accurately described as the IPCC managed investigation. It found:

> **"572. DCC Pilling was conciliatory in his evidence. He accepted that his comment about the enquiry taking too long could not fairly be applied to the criminal investigation conducted by the claimants. He accepted that he had not been at GMP at the time of the criminal investigation, and timing was not a criticism raised by the MCRU report. However, he said that it was his belief from his oversight of the matter that the investigation did take too long to get to a conclusion. The Tribunal accepts the respondent's submission that he was clearly referring to the entire process i.e. criminal investigation, misconduct process and subsequent events. It was supported by the fact that DCC Pilling subsequently asked John Armstrong to look at the PSB management of the investigation and to consider, for example, "as to why the hearing for Bruckshaw/Donaldson was downgraded at such a late stage from PSB side of things … mainly for me to understand the delay"."**

The tribunal considered that it was significant that

> **"The statement was about the investigation as a whole when only the interviews were identified as deficiencies, and the reference to the investigation taking too long was not one that was justified."**

The tribunal then stated as follows:

> **"576. It is correct to remember that none of the disclosures were made directly to DCC Pilling. He had succeeded CC Hopkins earlier in the year. It was not suggested that DCC Pilling was not aware of the entire process which included the disclosures that we have found to be protected.**
> **577. It is not necessary for us to find that the disclosures resulted in DCC Pilling, or any officer of the respondent, bore ill will towards the claimants when taking a particular action or making a deliberate omission. If the treatment, consciously or unconsciously is motivated by the disclosure, in a way that is more than trivial that would suffice. Having regard to our earlier findings we are satisfied that the way in which the statement was expressed was so motivated.**
> **578. We then ask whether the allegation can succeed having regard to the explanation of DCC Pilling that he wished to be "balanced". We recognise that this sort of situation is difficult for the respondent. Nevertheless, since in the**

> **respects we have identified the press statement was not balanced in the way submitted by Mr Feeney we are not persuaded that on the balance of probabilities the statement was not, at least in part, motivated by the disclosures."**

32. The tribunal then directed itself on the relevant law in relation to detriment and causation and cited **Blackbay Ventures v Gahir** [2014] ICR 747 paragraph 98(7) in full as set out below.

33. It summarised what it understood to be Mr Feeny's submission that it would be an artificial exercise to cross-reference each individual protected disclosure to each detriment as a number of disclosures involved substantially the same information being disclosed to different recipients at different times. The **Blackbay** guidance was to avoid a rolled-up approach which risked reaching illogical findings of detriments being caused by disclosures that post-dated detriments. In this case, the disclosures could be sorted into different groupings by subject matter – PS Pendlebury (perverting the course of justice), CS Brucksaw (perverting the course of justice and sexual harassment) and Williams – Pendlebury (perjury). It agreed with an approach that would

> **"avoid the tribunal having to delve into which individual disclosure was in the mind of each individual provided it [the ET] was satisfied that when the act or failure occurred, on the balance of probabilities, the perpetrator of the detriment was aware that the claimant had made a disclosure and it had more than a trivial influence on their reason for acting of failing to act."**

34. The tribunal also directed itself in accordance with **International Petroleum Ltd v Osipov** UKEAT/0058/17, per Simler P, paragraphs 82-84 as also set out below.

35. No mention was made by the respondent of JPI in relation to CI Williams' statement in its ET3 or detailed response to the claimant's claims and nor was it raised at any time during the hearing. It was mentioned for the first time towards the end of the Claimants' comprehensive closing submissions at paragraph 271 of 297 of a 51 page document which noted, in passing, that the respondent had not pleaded witness immunity as a defence. The tribunal judgment makes no mention of it.

The law

36. Section 47B ERA 1996 provides:

> **"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."**
> **By s.48(1A) "A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.**
> **…**
> **(2) On a complaint under subsection… (1A)… It is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

37. As set out in **Harrow LBC v Knight** [2003] IRLR 140 at para 16 "it is thus necessary in a claim under s.47B to show that the fact that the protected disclosure had been made, caused or influenced the employer to act (or not act) in the way complained of: merely to show that 'but for' the disclosure the act or omission would not have occurred is not enough….. [to] answer the question whether [the protected disclosure] formed part of the motivation (conscious or unconscious)" of the alleged statutory tortfeasor.

38. A suggested approach to where a number of disclosures are relied on was set out in **Blackbay** at para 98:

> **"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.**
> **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. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied on and it will not be possible for the appeal tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.**

6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the "old" law whether each disclosure was made in good faith; and under the "new" law 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.
8. The tribunal under the "old" law should then determine whether or not the claimant acted in good faith and under the "new" law whether the disclosure was made in the public interest."

39. More recently the approach to causation was summarised by Simler P in **Osipov** in paras 82 – 84:

"82. It is common ground that "s.47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower": see Fecitt v. NHS Manchester [2012] IRLR 64, an approach that mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer's treatment of employees and workers.
83.The words "on the ground that" were expressly equated with the phrase "by reason that" in Nagarajan v. London Regional Transport 1999 ICR 877. So the question for a tribunal is whether the protected disclosure was consciously or unconsciously a more than trivial reason or ground in the mind of the putative victimiser for the impugned treatment.
84. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done". In the absence of a satisfactory explanation from the employer which discharges that burden, tribunals may, but are not required to, draw an adverse inference: see by analogy Kuzel v. Roche Products Ltd [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure."

Submissions

40. Mr Gorton QC's argument for the respondent in ground 1 is that the tribunal clearly erred in declaring in paras 469-471 of its judgment that it did not need to follow **Blackbay**. They did need to apply **Blackbay**, they failed to do so and by failing to do so had failed to make the findings necessary to establish a causal link between the protected disclosures that the tribunal found had been made and the 4 detriments it upheld. The error affected each of the findings on the 4 upheld detriments.

41. Ground 2 asserts that the tribunal has not made the necessary findings to support a finding of protected interest disclosure detriment in detriments 18 and 19 and the conclusions were

A inconsistent with earlier findings as to knowledge and motivation in the decision. In order to reach their conclusions the tribunal must have erroneously reversed the burden of proof, which was not in accordance with the guidance in **Osipov**.

B 42. The respondent submitted that as a matter of law and logic JPI operates above the level of adversarial party and party interest as a doctrine of public policy. The appeal tribunal's duty is to ensure that the JPI doctrine is enforced and not transgressed and the tribunal's decision on detriment 19 cannot stand. In the alternative it was argued that if this tribunal had merely a

C discretion, not a duty, to consider entertaining the JPI point on appeal, the discretion should be exercised in favour of allowing the point to be taken on appeal for the first time, applying the relevant factors necessary to the exercise of the discretion as set out in **Secretary of State v**

D **Rance** [2007] IRLR 665 by HHJ McMullen QC.

43. For the claimants Mr Feeny submitted that the tribunal had not, in fact, failed to follow the guidance in **Blackbay**, had applied it to the particular facts of the case and he had not invited

E the tribunal to deviate from **Blackbay**. In any event the case had a unique context since all the protected disclosures were made first to initiate, and then in furtherance of, the criminal investigation (Operation Ratio) into specific individuals who were senior officers within the respondent force and CS Bruckshaw and CI Williams knew they were being investigated by the

F claimants.

44. Mr Feeny submitted that Ground 2 was no more than an impermissible attack on the findings of fact made by the tribunal which were for it to make and the burden of proof provisions

G had been correctly applied.

45. On ground 3, the claimants argued that it would be inequitable to both the claimants and the tribunal for JPI to be raised for the first time on appeal. The respondents were a well-funded

H public body and the claimants had even drawn the respondent's attention to the point in their closing submissions. The failure of the respondent to address the point before the tribunal was

inexcusable. It should have been taken below and in all the circumstances the matter should not be allowed to be considered for the first time on appeal. Furthermore the discretionary factors highlighted by Mr Gorton QC pointing in favour of the respondent were outweighed by the important principle of finality of litigation and the perception of fairness towards individuals taking on a public body.

Analysis and conclusions

46. The starting point is the statutory wording in s.47B ERA 1996 that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure. The tribunal had this firmly in mind when it approached its task of establishing what, if any link there was between the protected disclosures it had found and the detriments alleged. It clearly directed itself in accordance with **Osipov** and understood the legal test of causation and the burden of proof provisions.

47. In relation to each of the upheld detriments it determined, as facts, that there was an act or deliberate failure to act which subjected the claimants to detriment. It then identified the dates of the detriment – detriment 17 on 1 January 2016, detriment 18 on 15 August 2016, detriment 19 on 25 November 2016 and detriment 20 on 15 January 2017. It assessed whether the claimants had made protected disclosures by that point of time and identified which ones. The tribunal made express findings about the state of knowledge of CI Williams, CS Bruckshaw and DCC Pilling. It analysed and distinguished which disclosures were known of by whom, for example finding that CS Bruckshaw did not know of the disclosures concerning sexual harassment allegations made against him, so that those disclosures could not have formed any part of the reason or grounds for the detriments alleged to have been meted out by him. It carefully analysed and tested the claimed causative link between the disclosures and detriments claimed by reference to each claimant separately and avoided lumping them all together or adopting a broad brush rounded up

approach. It explains why many of the claimants' claims were rejected and only 4 detriments were made out.

48. In relation to detriment 17 the tribunal found as a fact that an exit strategy had been promised to each of the claimants and readily accepted and understood why an exit strategy was agreed for the claimants and why it was needed. The tribunal carefully considered the chronology to avoid the pitfall identified in **Blackbay** at para 98(7). It was then entitled to conclude that the failure to make good on the promise was on grounds of the disclosures made. It listened to the respondent's evidence that there was a change in personnel at the very top of the organisation at the end of 2015, but it is apparent from the tribunal's conclusions that the protected disclosures which had contributed to Operation Ratio up to the point of January 2016 were a material influence on the failure to provide the protection by means of exit strategy that had previously been promised. It was a conclusion open to the tribunal on the facts.

49. In detriment 18, before the tribunal the respondent appeared to have accepted that it was vicariously liable for CS Bruckshaw's press statement and did not raise it as a defence to the claim. The tribunal noted that CS Bruckshaw had known that the claimants had made protected disclosures that suggested he had committed criminal offences and breached police conduct regulations, but that he did not know of the sexual harassment allegations. The tribunal was satisfied that his knowledge of their criminal investigation and allegations relating to PS Pendlbury was causative, pursuant to s.47B, of his press statement denigrating and criticising DI Aston. The tribunal did not accept the respondent's submission that it was all to do with the historic "bad blood".

50. For reasons which will become apparent when ground 3 is considered below, it is not necessary to analyse detriment 19 under grounds 1 and 2 of the grounds of appeal. In relation to detriment 20, the tribunal once again made clear findings and explored the link between the protected disclosures made and the detriment complained of. It carefully considered the

explanation proffered by the respondent and DCC Pilling, but concluded that the s.47B causation test was met because given the inaccuracies in DCC Pilling's statement it was in part motivated by the disclosures.

51. On a close analysis of the tribunal's findings therefore, it is clear that it has correctly construed the statute, understood and applied the causation test and not fallen into the trap identified in **Blackbay.** To the extent that paragraphs 469 - 471 suggest otherwise it is at worst infelicitous wording. At best, the respondent has misunderstood what the tribunal was saying. **Blackbay** is not to be read as a gloss on the statute, but as explained in the opening sentence of paragraph 98 is a suggested approach which may be helpful in some cases. It is the statute that falls to be interpreted, not the case law.

52. In this case, the tribunal analysed each alleged detriment with conspicuous care, exploring, in depth, by close reference to the evidence and its findings of fact, what the ground was for the act complained of and the state of knowledge of the actor and in doing so, which claimant had made which protected disclosure and established the necessary causal link in relation to 4 of the 26 detriments alleged. It correctly discounted and ignored the alleged disclosures that it found did not meet the test of a qualifying and protected disclosure and checked that the disclosure pre-dated the detriment complained of. It found that the causal link was not made out in 22 of the detriments claimed.

53. Turning to ground 2, which was to some extent parasitic on ground 1, the respondent challenges the tribunal's approach to the burden of proof.

54. It has been held that these provisions do not create a reverse burden of proof, but if an employer fails to show an innocent ground or reason the tribunal may, and no doubt frequently will, draw an adverse inference, but is not bound to do so (see for example **London Borough of Harrow v Knight** [2003] IRLR140 at para 20 and **Kuzel v Roche Products Limited** [2008]

IRLR 530 para 40). In the surprisingly unreported case of **International Petroleum Ltd v Osipov** UKEAT/0058/17 at para 115 Simler P (as she then was) summarised the law as follows:

> **"(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v Knight at paragraph 20.**
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

55. In detriment 18 the respondent's submission that the tribunal "resorted to the burden of proof" to reach its conclusion is inaccurate. It is clear from paragraph 550 that it made a positive finding on balance of probabilities that CS Bruckshaw was partially at least motivated by the disclosures. It is a fairly natural and obvious inference that the reason why a person lashes out at a whistleblower who has made disclosures that result in misconduct allegations that lead to that person's resignation is criticising the whistleblower on grounds of whistleblowing. One can see why the tribunal rejected the historic "bad blood" alternative explanation. For the reasons set out in ground 3 below it is not necessary to examine detriment 19 further.

56. Ground 2 is no more than an attempt to re-argue the facts found by the tribunal in exactly the kind of "pernickety critique" deplored so often by the Court of Appeal (see for example **Fuller v LB Brent** [2011] EWCA Civ 267). The tribunal identified the correct legal test in accordance with the statute and the relevant case law, **Osipov**, **Malik v Csenkos** UKEAT/0100/17/RN and **Harrow**. It applied it to the facts and reached its conclusions. In weighing the evidence it noted the respondent's submissions and noted too that there can often be, indeed usually are, mixed reasons or grounds for things that are done or not done. It acknowledged that some of DCC Pilling and CS Bruckshaw's motivations may not have been to do with the protected disclosures the tribunal had found, but went on to find that the protected disclosures had sufficient influence to be causative within the meaning of s.47B. That was the tribunal's task. It fulfilled it.

Judicial proceedings immunity (JPI) Ground 3

57. There is no doubt that CI Williams' witness statement given in her employment tribunal proceedings is covered by JPI and that detriment 19 was entirely based on her witness statement. The only issue is whether the respondent's failure to either plead JPI or raise it at any stage during the course of the proceedings, even after it had been referred to in the claimants' written closing submissions, was an insuperable barrier against raising it for the first time on appeal.

58. In order to answer the question it is necessary to consider the basic principles of both JPI and the principles to be applied to new points of law being argued for the first time in the appeal tribunal. Where JPI applies, a witness in judicial proceedings will enjoy absolute immunity from any action brought on the basis that his or her evidence is false or malicious or indeed careless (**Darker v Chief Constable of the West Midlands Police** [2001] 1AC 435 per Lord Hope pp.445H – 446B). It does not involve any exercise of discretion by the court or tribunal. It "is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say" (per Lord Hoffmann in **Taylor v Director of the Serious Fraud Office** [1999] 2AC 177 at para 208). It is recognised that JPI may sometimes benefit dishonest or malicious witnesses but that is accepted as a price that has to be paid (per Lord Hope p. 447B – C) in order "to protect the integrity of the judicial process and hence the public interest" (**Heath v Commissioner for the Metropolis** [2005] ICR 329 para 17 per Auld LJ).

59. In **Rance** HHJ McMullen QC helpfully conducted a thorough review of the authorities relevant to the exercise of the Employment Appeal Tribunal's own jurisprudence relating to the admission of new points on appeal that had not been taken before the first-tier employment tribunal. He noted in paragraph 37 that he considered that time limits for bringing a claim under what was then the Equal Pay Act 1970 was a matter of jurisdiction which cannot be waived by the parties (see Lord Denning MR in **Dedman v British Building and Engineering Appliances**

Ltd [1973] IRLR 379). However, he appears to have gone on to conclude that the ability to allow a new point of law to be argued in the appeal tribunal will always be discretionary. He set out in paragraph 50 the following principles of law:

> **"(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; Jones paragraph 20.**
> **(2) The discretion covers new points and the re opening of conceded points; ibid.**
> **(3) The discretion is exercised only in exceptional circumstances; ibid.**
> **(4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; ibid.**
> **(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; Barber v Thames Television plc [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in Jones. It remains discretionary.**
> **(6) The discretion may be exercised in any of the following circumstances which are given as examples:**
> **(a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: Kumchyk v Derby City Council [1978] ICR 1116, EAT Arnold J and members at 1123.**
> **(b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. Wilson v Liverpool Corporation [1971] 1 WLR 302, 307, per Widgery LJ.**
> **(c) The new point enables the EAT plainly to say from existing material that the Employment Tribunal judgment was a nullity, for that is a consideration of overwhelming strength; House v Emerson Electric Industrial Controls [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in Barber at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; Glennie paragraph 12 citing House.**
> **(d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the Employment Tribunal; Glennie paragraph 15.**
> **(e) The EAT can see an obvious knock-out point; Glennie, paragraph 16.**
> **(f) The issue is a discrete one of pure law requiring no further factual enquiry; Glennie paragraph 17 per Laws LJ.**
> **(g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist Tribunal is required; Laws LJ in Leicestershire paragraph 21**
> **(7) The discretion is not to be exercised where by way of example;**
> **(a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; Barber paragraph 20 as interpreted in Glennie paragraph 15.**
> **(b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; Jones paragraph 20.**
> **(c) The point was not taken below as a result of a tactical decision by a representative or a party; Kumchyk at page 1123, approved in Glennie at paragraph 15.**
> **(d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance Tribunal; Leicestershire paragraph 21.**
> **(e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; Glennie paragraph 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in Barber) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in Russell v Elmdom Freight Terminal Ltd [1989] ICR 629 EAT Knox J and**

members). See the analysis in Glennie at paragraphs 13 and 14 of these two cases.
(f) What is relied upon is the high value of the case; Leicestershire paragraph 21."

60. We found no direct authority to support the respondent's bold primary submission that the tribunal was bound to allow the respondent's appeal since it concerned JPI. We preferred the approach in **Rance** and to treat it as an important factor in the consideration in the exercise of our discretion. Where conduct covered by JPI which has a material bearing on the outcome of a claim is overlooked at first instance it clearly constitutes exceptional circumstances entitling serious consideration to be given to raise the matter for the first time on appeal. It however remains discretionary and is not necessarily a trump card.

61. The point raised is purely a question of law and this tribunal is in possession of all the material necessary to dispose of the point fairly without recourse to a further hearing. No additional facts are required. The fact that the point is one of JPI also weighs heavily in favour of exercising the discretion to allow the appeal because of the important public policy considerations in the JPI principle.

62. Weighed against the points in the respondent's favour were three matters: the principle of finality of litigation and the importance of parties bringing all relevant points to the tribunal's attention at first instance; that the issue must have arisen either because of a lack of skill by the represented party or a deliberate tactical decision. Mr Gorton QC, who was new to the case, could not or was not able to say which, simply stating that the point was not taken by counsel. It is worth reiterating how highly regrettable it was that the respondent did not take the point before the tribunal and that neither the respondent nor the tribunal picked up Mr Feeny's reference to JPI in the claimants' closing submissions. But, as the cliche goes, we are where we are now.

63. Bearing in mind the importance of the JPI doctrine and the integrity of the judicial process and the factors weighing in the respondent's favour set out above, we consider that this is one of

the very rare cases where the appeal tribunal should exercise its discretion to allow the point to be raised for the first time on appeal.

64. Having decided to exercise our discretion to allow the point to be raised on appeal it follows that the appeal on ground 3 must be allowed. Through the respondent's failure to draw the tribunal's attention to JPI in relation to the witness statement of CI Williams given in her own proceedings, the tribunal erred. Without the error, the result would have been different. If the tribunal had appreciated that CI Williams' witness statement attracted absolute immunity, the tribunal would have realised that it did not have the jurisdiction to consider detriment 19 and it would have been dismissed. Accordingly, pursuant to our powers under s.35(1)(a) Employment Tribunals Act 1996 we dismiss the tribunal's conclusion that detriment 19 was a well-founded claim (See **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] IRLR 544).

65. In the smallest of nutshells, the tribunal found that acting in the public interest and in their duty as police officers, the claimants had reported misconduct and criminality by their fellow and superior officers whom they believed had misused their public office, closed ranks and sought to interfere with the prosecution of a dishonest police officer, PS Pendlebury. The risk of retaliation was apparent from an early stage from the complaints made by CS Bruckshaw about DI Aston and became a greater risk when the IPCC decided that the claimants should continue with the investigation themselves instead of the IPCC taking it over. Each of the claimants had been given assurances that they would be protected by the respondent and that at the end of their investigation they would be provided with an exit strategy, although the details of what that might entail were not clear. However those promises were not fulfilled and the claimants were left exposed in post. The conduct of DI Aston in the investigation was then publicly criticised by CS Bruckshaw and DCC Pilling subjected all the claimants to a detriment in his public criticism of the "criminal investigation team" following the collapse of CI Williams' tribunal case. The tribunal was entitled to find that what happened to the claimants in this case in relation to detriments 17, 18

A and 20 was exactly the mischief that the Public Interest Disclosure Act 1998 was intended to address.

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