RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Quarm**

Respondents: **The Commissioner of Police of the Metropolis**

Heard at: **London East Hearing Centre**

On: **30 November 2018**

Before: **Employment Judge Moor**

Representation

Claimant: In person

Respondents: Mr N De Silva, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. the Respondent's application to strike out the claims is refused;

2. the Claimant's application to strike out the response is refused;

3. the Claimant's allegation that he was subject to detriments contrary to section 39 and section 27 of the Equality Act 2010 (victimisation) have little reasonable prospects of success. The Claimant is ORDERED to pay by **4pm on 27 January 2019** a deposit of £75 as a condition of continuing to advance that allegation;

4. the Claimant's allegation that he was subject to detriments contrary to section 47B of the Employment Rights Act 1996 (protected disclosures) has little reasonable prospects of success. The Claimant is ORDERED to pay by **4pm on 27 January 2019** a deposit of £75 as a condition of continuing to advance that allegation;

5. the Claimant's application for a deposit order is refused.

REASONS

1 The Claimant is a serving Detective Constable with the Respondent.

2 By an ET1 presented on 5 July 2018 the Claimant presented claims of race discrimination by way of victimisation, contrary to section 39 and 27 of the Equality Act 2010 ('EQA'); and, in the alternative, that he was subject to the same detriments contrary to 47B of the Employment Rights Act 1996 ('ERA') i.e. for having made protected disclosures.

3 At a Preliminary Hearing on 21 September 2018, EJ Brown ordered that this Preliminary Hearing (Open) be heard to consider:

3.1 The Respondent's applications:

3.1.1 to strike out of the Claimant's claim, because it had no reasonable prospects of success; or

3.1.2 that the Claimant pay a deposit as a condition of him continuing to advance the following allegation or argument namely: that the reason for Sergeant Keating's decision was that the Claimant had made a protected disclosure.

3.2 The Claimant's applications:

3.2.1 to strike out of the Respondent's response; or

3.2.2 that the Respondent pay a deposit order as a condition of it continuing to advance its response

both on the basis that he alleges it is factually inaccurate for the Respondent to say that police officers cannot make complaints about other officers serving under the same Chief Officer pursuant to s29(4) of the Police Reform Act 2002 ('PRA').

3.3 While not specified in the notice of hearing, both parties came prepared to deal with and make submissions about an additional argument in the Respondent's deposit order application – that a deposit should be paid as a condition of the Claimant advancing the allegation that the reason for Sergeant Keating's decision was that the Claimant had done protected acts (his victimisation claim). I have decided that Rule 54 of the Employment Tribunal Rules 2013 ('the Rules') does not preclude me from deciding this further application because both parties came prepared to make submissions about it and therefore consented for it to be determined.

Issues in the Claim

4 EJ Brown judged the Respondent's draft list of issues to better set out the issues to be decided at a full hearing. She ordered the Claimant fill in the gaps of that draft list on or before 28 September 2018. He did this orally at the beginning of this hearing.

5 The List of Issues that is now agreed between the parties is appended to this Judgment and Reasons so that can be used as a separate document if the matter goes to a full hearing.

Relevant Background

6 In essence this is a claim about the handling of a complaint (by Sgt Keating) about the handling of a complaint (by DS Murphy) about the handling of a complaint (by Insp O'Connell). It is contended by the Respondent that the vast majority of that original complaint was dismissed after a 20-day hearing before another Employment Tribunal and/or considered in full by Insp O'Connell. The Claimant has brought claims in the Tribunal about each prior stage of the complaint handling. I would be easy become confused about what this particular claim is about. I reserved my decision in order to take care to consider it on its merits. I am not influenced by the prior judgments of the Tribunal. In this decision I consider whether the Claimant and Respondent have no or little reasonable prospects of success in their respective cases in this claim.

7 The following is the procedural chronology. I have set it out in full in order to understand the background to this claim. If the matter goes to a hearing it will be of use to the Tribunal. I have therefore also appended it to this Judgment and Reasons so that it can be copied into the trial bundle for that purpose. DPS = Department of Professional Standards within the Respondent force. IPCC = Independent Police Complaints Commission which is now IOPC = Independent Office for Police Conduct.

Jul 2011	Claimant (Q) reports concerns to DPS and IPCC.
3 Sept 2011	DPS informs Q, under the PRA 2002, it cannot consider complaints from one officer against another in the same force. Q told to look at the Wrongdoing Policy whereby he could report to his line manager or call Right Line anonymously (132) and/or take legal advice.
Feb-Apr 2015	6th-9th claims: 20 day hearing London South ET (the Baron ET). Q brings s47B detriment claim relying on alleged protected disclosures in report entitled *The Ridiculous*
1 Jul 2015	Baron ET judgment and reasons dismissing 6th-9th claims (118-169).
19 Oct 2015	Q makes a 29 point report of wrongdoing to IPCC: the most recent were complaints about evidence given by officers at ET and one of Q's managers during and after the hearing. (I have not seen that report, EJ Russell, without hearing evidence about it, took the view that the majority of the allegations in it were matters determined by Baron ET.]

16 Nov 2015 DPS receives report of wrongdoing from IPCC

11 Jan 2016 (183A) Response by **Insp O'Connell**, of DPS, who decides to take no further action on basis that '*vast majority [of points raised] were similar to or intrinsically linked to those within your recent ET.*' Of the new points, paragraphs 23-29, he decided '*there is no new information that meets the threshold to instigate any form of misconduct investigation'*.

9 Mar 2016 ET claim 3200244/2016 (10th claim) brought against Insp O'Connell's investigation, decision and the subsequent failure to offer an appeal to IPCC. The heads of claim = direct race discrimination, victimisation and protected disclosure detriment (s47B ERA).

27 May 2016 (184) EJ Russell refused to strike out 10th claim but ordered deposits should be paid in respect of the allegations that Q had been denied an internal appeal; that there was no assessment of his complaint and/or that it was closed down on the grounds of direct race/victimisation/protected disclosure. This view was on the basis that it appears that the complaint '*does appear to rehearse in very large part the complaints which the [Baron] Tribunal had considered and rejected. There is evidence to suggest that the report was an attempt to re-open matters and challenge by a different method findings with which he disagreed. If that is the case and if that was the reason for Insp O'Connell's decision not to proceed, it is unlikely to be found to be an act of detriment or discrimination*.'

16 Aug 2016 10th claim struck out: Q having failed to pay the deposits.

25 Aug 2016 11th claim (2207623/2016) presented. Claim was whether the Respondent (Ms Brownrigg) should have undertaken a severity assessment of the 19 Oct 2015 complaint and whether that was race victimisation.

2 Aug 2017 IPCC sent a further complaint from Q to DPS. It appears this included the report *The Complete Ridiculous* – which refers to the 'draft report *The Ridiculous'*. The introduction appears to suggest that the problem is that Q himself has not been pursued by his employer for four '*preventable deaths*' (193).

7 Sept 2017 EJ Tayler and members dismissed the 11th claim on the basis that there was no detriment. (That claim is to be heard on appeal, HH Eady QC having allowed the appeal to go to a full hearing on 19 September 2018.)

14 Sept 2017 **DS Murphy**, of DPS, informed Q that his complaint of 2 Aug 2017 would not be recorded for two reasons: section 29 PRA 2002 and regarding wrongdoing because it had already been reviewed by Insp O'Connell (whose decision she set out). She took the view that the further complaint '*is again an amalgamation of your previous reports*' (215A). That his various reports had been reviewed and no misconduct found and that the recent Tribunal had again found against him. She told him of his right to

appeal to IPCC.

Late 2017 — Q presented 12th claim (3201225/2017) that DS Murphy's decision not to record was race discrimination (direct, victimisation) and protected interest disclosure detriment.

27 Feb 2018 — EJ Jones struck out 12th claim has having no reasonable prospect of success. (On 7 Nov 2018, Laing J allowed a full appeal to be heard of that decision. The first question being whether Murphy right in law about s29 PRA.)

22 Jun 2018 — (229ff) Complaint to IPCC about DS Murphy's conduct in refusing to record prior complaint. He alleged that DS Murphy deliberately refused to record his concern despite her awareness that section 29(4) did not prevent it; and despite her awareness of section 29D of the Police and Crime Act 2017 that supported whistleblowing. He alleged she deliberately did not do so because she was 'aware of police criminal networks operating within the DPS' and, put simply, she wanted to protect her colleagues (232). He attached a chronology of events to 'understand whom DS Murphy was allied to and whom she was protecting'.

27 Jun 2018 — **Sgt Keating**, of DPS, decides not to record the complaint against DS Murphy for two reasons: s29 PRA; and that the complaint *'is an abuse of the complaints process'*.

5 Jul 2018 — 13th claim (this one) about Sgt Keating's decision.

8 In essence, the Claimant argues that Sgt Keating's decision not to record his complaint subject him to a detriment. He contends that Sgt Keating made that decision, not for the reasons set out in his letter, but either because the Claimant had done protected acts (by bringing race discrimination proceedings in the Tribunal) or because he had made protected disclosures.

9 It is not in dispute that Sgt Keating knew the Claimant had brought Tribunal claims: they are referred to in his letter. Plainly they are to protected acts under the EQA.

10 The disclosures relied upon are the complaints made about DS Murphy's conduct: including, for example, the allegation that she '*dishonestly misused section 29(4) PRA to close down'* his concern; and that she was in breach of her lawful obligation to challenge wrongdoing.

Submissions

11 Both the Claimant and Mr de Silva provided written submissions supplemented by oral submissions during which they helpfully answered my questions. I summarise what I understood their main points to be.

12 Mr de Silva, for the Respondent, centred his main argument on what he referred to as 'causation'. He argued that at the claims had no/little prospect of success because

the reasons set out in Sgt Keating's letter made sense. They were not obviously wrong and did not call, therefore, for an alternative explanation. Therefore, the Claimant would not be able to prove facts from which the Tribunal might draw an inference that the real reason for the treatment was a protected act or alleged protected disclosure.

12.1 First, he argued Sgt Keating was right to interpret section 29 PRA as preventing a 'complaint' by one officer against another officer serving under the same chief officer. A complaint in the IPOC and DPS is a term of art meaning a complaint by a member of the public.

12.2 Second, even if there was a reasonable dispute about Sgt Keating's first reason for not recording the complaint, his second reason, that it was an abuse of process, was unassailable.

12.2.1 The complaint did contain much of the information the Claimant had already litigated before the Employment Tribunal and/or had been reviewed and/or investigated and the outcome communicated to the Claimant. The Claimant had no reasonable prospect of undermining that part of the decision and it could not be said that it was made because he had raised a protected act or protected disclosure. Mr De Silva relied upon EJ Russell's observation in an earlier deposit order application that Mr O'Connell's determination [188] does appear to rehearse in large part complaints that had been made. Likewise that was Sgt Murphy's decision at 215. That material supports Sgt Keating's decision.

12.2.2 The complaint was indeed a way of circumventing the process. The Claimant's avenue of redress was an appeal or judicial review.

12.2.3 In other words there was nothing to show that Sgt Keating had got this deliberately wrong and the claim should be struck out.

12.3 He argued that the Claimant had little prospect of establishing that he had made protected disclosures.

12.3.1 The alleged disclosures that Sgt Murphy had committed a crime were wild and unsupported. For example, under section 26 of the Criminal Justice and Courts Act 2015, the claimant would have to show that she knew that she was acting improperly and for a benefit or to achieve a detriment and there was no evidence of that here.

12.3.2 There was no Non-Discrimination doctrine. The Claimant was not on the Unreasonable Complainant's list and this was mere assertion.

12.4 He submitted that the Claimant had no reasonable prospect of establishing the detriments he alleged. In particular:

12.4.1 issue 4.1: he had not been blocked from raising the concerns, just not as a complaint. Sgt Keating had referred in his decision to the other

processes in place to report concerns about behaviour and informed the Claimant that those other processes should be used (246). He described these as the whistleblowing policy and the existence of an anonymous telephone line for officers, Rightline and the grievance procedure;

12.4.2 the Claimant had not by the refusal to record the matter as a complaint, been prevented from discharging the full range of his duties.

12.5 He drew my attention to Wright (see below) that I should assess the application in the light of the way the Claimant puts his case.

12.6 He reminded me that it was only in a rare case, where the reason for an act or refusal to act was disputed, that strike out in a discrimination or public interest disclosure case should be granted. He was careful to draw my attention to the relevant tests. That there was a high threshold in establishing a claim had 'no reasonable prospect'. But those authorities observed in a plain and obvious case the Tribunal could do so.

12.7 As to means, he acknowledged the Claimant had debts but also pointed out the significant equity the Claimant had in his home. He argued that the Claimant's means allowed a £500 deposit to be awarded in relation to each head of claim.

13 In his helpful submissions, the Claimant's main points were:

13.1 He had a good argument that the first grounds for Sgt Keating's decision, the reliance on s29 PRA, was wrong.

13.1.1 He had a current appeal, going to a full hearing at the EAT, against the reasoning of EJ Jones in ET claim number 3201225/2017. This claim concerned DS Murphy's decision to refuse to record a complaint using the same reasoning as Sgt Keating, under section 29 PRA. The appeal point in that case is whether the ET had misunderstood the statutory framework relating to the complaint. At the sift stage, the EAT considers it arguable that DS Murphy's approach to the complaint was wrong in law and if that is right there was a 'big question' about why she made the decision which she did. (see 'Reasons Allowed to Proceed by Laing J dated 7 November 2018 in EATPA 0215/18).

13.1.2 Sgt Keating should have treated his complaint under Schedule 3 paragraph 11 of the Police Reform Act 2002. On the basis that what he was complaining about was para 11(2)a the conduct appeared to have resulted in the death or serious injury of any person (303. I asked the Claimant whether I should look at the Regulations under 11(2)(c) in the alternative and he expressly stated he was not relying on them.

13.1.3 He illustrated this point by referring to how Cheshire Police had dealt with a bullying complaint about another police officer (388).

13.1.4 He also relied on 252, a letter from IOPC (the IPCC's new incarnation). Who informed him that he can raise a 'concern' about a current officer but not a 'complaint'. They refer him to the IPCC's Statutory Guidance at section 6.4. The IPOC explained that the decision to record and refer the conduct lies with the DPS and there is no right of appeal.

13.1.5 He relied also on the College of Policing Guidance that while section 29 stopped complaints against a police officer serving in the same force, it did not stop him from raising a concern [269].

13.1.6 He relied on an example at p100 where the IPCC had made the matter the subject of a local investigation. And argued Sgt Keating could have brought his concern to a more senior officer's attention by way of an internal report. He argued that Sgt Keating should have assessed the severity of the misconduct alleged and sent it to the IPCC or dealt with it internally.

13.1.7 He argued also that the reason why Sgt Keating did not refer his complaint as a conduct concern was because Sgt Keating knew him to be a person who had brought race discrimination allegations to the Tribunal and/or because his complaint about Sgt Murphy amounted to a protected disclosure. He relied on Home office guidance that reporting any breach of the standards of professional behaviour should be regarded as a qualifying disclosure.

13.2 As to Sgt Keating's second reason for his decision, the Claimant agreed that if he had been revisiting old complaints, that would have been an abuse of process. But it was not because of three matters he contended Sgt Keating should have picked up in the chronology attached to his complaint: 7 November 2014 and 23 May 2015 (that matters were going missing in the DPS); and 25 January 2016 (that nothing had happened in relation to a complaint). He argued he had not complained about these matters before and Sgt Keating should have seen this.

13.3 As to protected disclosure he argued he had not only alleged Sgt Murphy committed a crime/breach of legal obligation, but he had included information that he reasonably believed tended to show this. For information he relied on his allegation that she had failed to report his concerns as conduct matters and that was to protect others in the DPS.

13.4 The Claimant relied upon the same submissions to contend that the Respondent's response in reliance on Sgt Keating's first reason at paragraph 17 of the ET3 had no reasonable or limited prospects of success. He sought a strike out or deposit order.

Law

Equality Act: Direct Race Discrimination, Section 39

14 Under Part V of the EQA it is unlawful to subject a police officer to a detriment by way of victimisation as defined under section 27 EQA.

15 The meaning of 'detriment' was considered in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL (para 34). To find a detriment the Tribunal:

> '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work*'.

An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

16 Section 27 of the EQA: *'(1) A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.*

17 A protected act under section 27 includes bringing proceedings under the EQA.

18 Under section 47B it is unlawful to subject a worker to a detriment on the ground that he had made a 'protected disclosure'.

19 The disclosure must be '*of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*

> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, …'*

Tribunal Power to Strike Out for No Reasonable Prospects of Success

20 Rule 37 of the Rules allows a Tribunal to strike out a claim where it has '*no reasonable prospect of success'*. It is right that there should be this high threshold because to strike out a claim without a hearing on the evidence is a draconian step.

21 In discrimination claims, where the reason for the treatment is in dispute, it would only be in a very exceptional case that the Tribunal could strike out the claim. There is good reason for leaving that dispute to be determined after hearing the evidence: a person does not usually advertise discriminatory grounds for their actions and it is only after hearing oral evidence about the reason for them and about the context that the Tribunal might be able to draw an inference that such grounds exist. There are also good public policy reasons for making sure such cases are tried after a full hearing, see the guidance of the Court of Appeal in Anyanwu v South Bank Students Union and others [2001] ICR 391 para 34. These principles apply equally in 'whistleblowing' claims, see Ezsias v N Glamorgan NHS Trust [2007] ICR 1126 CA, paragraphs 30-32.

22 The higher courts have acknowledged that even in discrimination cases where, on the claim at its highest, there is no claim in law or it is a plain and obvious case that there are no reasonable prospects of success, the Tribunal should strike out the claim because there is the strong public policy purpose of preventing hopeless claims from taking up the time and money of the other party and the Tribunal. Thus, for example, if a Claimant cannot show on his claim at its highest that he has been subject to any detriment, this would be a plain and obvious case to strike out. It would not involve the Tribunal looking at the reason for the treatment, but at the alleged treatment itself.

Deposit Orders

23 Rule 39 of the Rules gives the power to make a deposit order. If an Employment Judge considers that the argument put forward in relation to any matter to be determined has little prospect of success, he or she may order that party to pay a deposit of an amount not exceeding £1000 as a condition of being permitted to take part in the proceedings relating to that matter. Before making the Order the Judge must take reasonable steps to ascertain the ability of the party to comply with the Order. The amount of any order made must not represent a bar to continuing.

24 If a Claimant pays the deposit, but the Tribunal hearing the claim decides that matter against the Claimant for substantially the same reasons as the Judge making the Order, then it shall treat the Claimant as acting unreasonably unless the contrary be shown and award costs against the Claimant (Rule 39(5)). Thus, even if the Claimant can meet the deposit, if a deposit order is made he must think carefully about continuing to argue that particular matter because of the costs risk.

25 When considering a Deposit Order application, the Tribunal may conduct a provisional assessment of the legal and factual matters, including credibility.

26 In considering a deposit order, the Tribunal should take account of the way in which the Claimant puts his case, para 75 Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14/JOJ the EAT.

Police Reform Act 2002

27 Section 29(4) PRA provides that: '*In this Part references, in relation to any conduct or to anything purporting to be a complaint about any conduct, to a member of the public do not include references to—*

> *(a) a person who, at the time when the conduct is supposed to have taken place, was under the direction and control of the same chief officer as the person whose conduct it was;*'

28 The IPCC's statutory guidance at section 6.4 provides '*Conduct matters may come to light where a person who is prevented from being a complainant by the PRA 2002 raises issues that satisfy the definition of a conduct matter. The person raising the issue may be treated as an interested person if the matter is treated as a recordable conduct matter*.'

29 Sch 3 para 11(1) and (2) of the Police Reform Act 2002, in force from 1 April 2004, provide:

> *'11(1) Where (a) a conduct matter comes … to the attention of the police authority or chief officer who is the appropriate authority in relation to that matter, and (b) it appears to the appropriate authority that the conduct involved in that matter falls within sub-paragraph (2), it shall be the duty of the appropriate authority to record that matter.*
>
> *11(2) Conduct falls within this sub-paragraph if (assuming it to have taken place) – (a) it appears to have resulted in the death of any person or in serious injury to any person;'*

30 The College of Policing – Reporting Concerns Report (undated), sets out at para 2.15 and 2.16:

> '*2.15 As a police officer … you can report concerns directly to the IPCC in any circumstances. The statutory limitations on the circumstances in which you can make a complaint under* ***section 29 of the PRA do not prevent you from reporting a concern to the IPCC****.*
>
> *2.16 Concerns can be reported by writing a letter or via the IPCC report line. This is a dedicated phone line and email address for police officers … to report concerns of wrongdoing in their workplace.* ***This facility is for use in cases where wrongdoing reveals or suggests a criminal offence has been committed or where there is evidence of conduct that would justify bringing disciplinary proceedings. It is not for cases that can be dealt with appropriately through the force grievance process.****'* (my emphases)

Paragraph 2.17 goes on to state that the IPCC cannot then investigate without a referral from the relevant force (270): this can come from the DPS.

Analysis of Strike out and Deposit Applications

Detriments

31 It seems to me perfectly arguable that, if an employer refuses to hear an employee's concern, a reasonable employee might regard himself as disadvantaged.

32 Whether in fact the Claimant has been subject to a detriment in this case may depend a more careful look at the options Sgt Keating and the Claimant had open to them.

32.1 Sgt Keating directed the Claimant to the other ways of bringing a complaint. It could be argued, therefore, that the complaint was not closed down, just this avenue for it. If the Claimant actively chose not to, for example, bring a grievance, does that mean he was still subject to a detriment?

32.2 Alternatively, if Sgt Keating could have referred the matter as a conduct matter, but chose not to, then that would be likely to be a detriment.

33 Given that there are these valid arguments on both sides of the dispute, I cannot decide, from what I have heard today, that the Claimant has no prospects or little prospects of success in establishing that he was subject to a detriment in this avenue of his complaint about PS Murphy being closed. While the Claimant told me he chose not to bring a grievance, he also pointed to the College of Policing Report that suggested to him he could go via the IPCC. The issue of detriment is going to have to be determined after hearing all of the evidence on the procedures available to both the Claimant and Sgt Keating might have chosen to refer his complaint into.

34 The remaining detriments set out in the list of issues seem parasitic upon the first. And issue 4.4 seems to me more a matter of remedy. I do not, therefore, make separate decisions about them on this application.

Reason for Sgt Keating's Decision

35 The Claimant contends that Sgt Keating's reasoning is incorrect and therefore Tribunal can infer that his real reasons for refusing to record the complaint were because the Claimant had brought claims of race discrimination and/or on the ground that he had made protected disclosures. He contended Sgt Keating wanted to cover-up the allegations the Claimant had made and/or protect his colleagues from being investigated. I pause to observe the reason might be more mundane, but still, unlawful, if Sgt Keating had simply seen the Claimant as a trouble-maker by having brought the earlier claims.

36 The Respondent contends that there is nothing surprising in Sgt Keating's reasoning and therefore no facts upon which the Tribunal could decide that it was made because of the protected acts and/or alleged protected disclosures.

37 On the face of Sgt Keating's letter he set out two reasons for his decision. They each stood alone being in the nature of procedural bars.

Sgt Keating's First Reason: Section 29 Police Reform Act

38 Both parties agree that section 29 PRA does not allow a police officer to 'complain' to the IPCC about another officer serving under the same chief officer. On the basis of submissions before me, and my brief reading of section 29(4), it appears that Sgt Keating was *technically* correct on the basis of that section alone. The argument of the Claimant is that he should have read that section in the light of the other guidance and this would have allowed him to record the complaint.

39 The Claimant submits Sgt Keating should have treated his complaint as a conduct matter and referred it on. Whether the Claimant has a point will depend on a careful look at all the relevant procedures and Sgt Keating's reasoning.

39.1 It may be that para 6.4 of the IPCC Guidance applied, but that Sgt Keating considered the allegation, for the same reasons, did not qualify as a 'recordable conduct matter', the appropriate threshold for which under

Schedule 3 of the Police Reform Act, so far as is relevant, is that it had to be a complaint causing death or serious injury. Plainly DS Murphy's actions did not cause death or injury. If it was this paragraph that applied, then the Claimant would be unlikely to succeed.

39.2 The Claimant referred Sgt Keating to the College of Policing Report at para 2.15 and 2.16 at the beginning of his complaint (229). Para 2.16 records that it is *only* where the officer wants to complain about a crime or conduct justifying disciplinary proceedings that he can go to the IPCC and not where the matter could be dealt with through the grievance procedure. There may well be a grey area here, as many potential disciplinary matters are likely to be possible to be dealt with through the grievance procedure. Only the evidence will show whether this Report applied and whether or not Sgt Keating took into account of these paragraphs and, if so, what view he reached.

39.3 If the Claimant is right and Sgt Keating should have treated the matter as a conduct matter, there is also a question as to why he did not. It may be he made a genuine error. Or it may be that he was influenced not to do so by the fact that the Claimant had done a protected act or made a protected disclosure.

40 In my judgment the Claimant's reliance on para 6.4 of the IPCC Guidance and Sch 3 PRA have little reasonable prospect of success because DS Murphy's actions complained about did not cause death or injury. But there is an arguable point on how the Police College Reporting Concerns Report was to be read, if at all, with section 29 PRA. If so, then there may be room for arguing that his first reason is incorrect.

Sgt Keating's Second Reason

41 Sgt Keating decided that the complaint was an abuse of process, because DS Murphy's decision had already been appealed and an appeal from it lay in a judicial review. He concluded that the complaint about DS Murphy was 'an attempt to circumvent that route'.

42 The Claimant agrees that if he had been revisiting old complaints, that would have been an abuse of process. He argues that it Sgt Keating should have picked up in the chronology attached to his complaint that he had raised 3 new matters: 7 November 2014 (239), 23 May 2015 (240) and 25 January 2016 (241). He argued he had not complained about these matters before and Sgt Keating should have seen this.

43 None of the three allegedly new matters in the Claimant's chronology are about actions of DS Murphy. It would have been very difficult indeed, in my judgment, for anyone to have read them as new complaints about her.

Conclusions

44 There appears to me to be a dispute in relation to Sgt Keating's first reason for refusing to record the complaint. First about whether PRA applies on its own or whether

the College of Policing report set a different threshold. And second, even if Sgt Keating applied the procedure incorrectly, then there is a dispute about whether, in doing so, he was influenced by the protected acts and/or alleged protected disclosures. Third, while the second reason looks far more appropriate on its face, it is not the kind of case where it is so plain and obvious on the papers alone that it would be appropriate to strike out. I have not heard evidence, and what appears to be pretty clear on the papers, may look different after hearing evidence. Given these disputes and applying the relevant principles, I cannot find that the Claimant has no prospects of success in arguing there might be an alternative, unlawful reason for the treatment. I refuse the Respondent's application to strike out.

45 For similar reasons, I refuse the Claimant's application to strike out. He has not shown that Sgt Keating's reasons were obviously wrong.

46 Whether the Claimant has little reasonable prospects in establishing that Sgt Keating made the decision because he had done protected acts and/or made the alleged protected disclosures is a different question. I have applied Wright and been careful to look at the way in which the Claimant puts his case in relation to the second of Sgt Keating's expressed reasons for the decision.

47 In my view, if a decision maker sets out two reasons for a decision, the first is in some doubt but the second is perfectly good to justify the decision, it will be far harder albeit not impossible to persuade a Tribunal that there was the influence of another unlawful reason (whether it be the protected act or alleged protected disclosures).

48 Here it seems to me that Sgt Keating's second reason for the rejection of the complaint is, on the face of it, an extremely sound one. Indeed the Claimant agreed that, if he had not been raising anything new, his complaint about DS Murphy would have been an abuse of the procedure.

49 I have looked at those three matters in the chronology attached to the complaint that the Claimant alleges to be new. On the face of the papers they are nothing to do with DS Murphy's approach to his complaint or to do with her more generally. Nor are they new in time. Nor does the complaint highlight them as particular issues the Claimant wanted to complain about.

50 In my judgment, therefore, the Claimant will have little reasonable prospect of persuading a Tribunal that in the light of those 3 matters, his complaint about DS Murphy was not a repeat of old complaints. He will therefore have little reasonable prospect of persuading a Tribunal that Sgt Keating's decision that this was an abuse of process was incorrect or not genuine. That being so, then in my judgment, he also has little reasonable prospect of persuading a Tribunal that Sgt Keating had another unlawful ground or reason for his decision (in the form of the prior tribunal proceedings or the alleged disclosures). This is because, as the second reason was a procedural bar to the complaint, there would be no basis for Sgt Keating to have been influenced by another (unlawful) reason for decision.

51 I therefore have the power to make a deposit order in respect of both claims. Before I consider whether to do so I have considered the Claimant's means.

52 I heard evidence of the Claimant's means. He currently earns approximately £2400 net per month. He has about £165,000 equity in his home. He has outstanding debts of £47,000, including £30,800 in costs to the Respondent from court and tribunal claims, some of which are a charge on his home. His expenditure breakdown suggests that his outgoings are greater than his disposable income by £388 per month. He is presumably keeping up this situation by adding to his credit card debts. He is within his credit card limits. Of his monthly expenditure, £100 is 'miscellaneous expenditure'; £160 is costs to the Met and £167 is to pay off a service charge debt of about £10,000 to his landlord.

53 I must have regard to the fact that the Claimant is a man of means in the sense that he still has over £100,000 worth of equity in his home, even after his debts have been accounted for. I have not therefore taken into account the current money he is paying off his debts to the Met or his landlord: they could all ultimately form a charge on his property. I have taken the view that, if he wished, he could reduce the 'miscellaneous expenses', which do not appear to include any of the essentials of child maintenance; mortgage; fuel; water; communication; travel; insurances; food; and other household matters which are all covered elsewhere in the breakdown. It seems to me therefore that, even against this tight budget, the Claimant can afford to pay modest deposits in respect of both claims. A deposit at the level of £75 for each claim would be affordable and not, in my judgment, an absolute bar to proceeding. It should, however, provide pause for thought. Another way of putting it is that the Claimant has a valuable asset against which he could borrow. As such, in my judgment, he has the means to pay such amounts. Bearing in mind his budget, I have set a longer time than usual for the paying of the deposits to 27 January 2019.

Claimant's Application for Deposit Order

54 I have taken the view that the first reason is arguable either way and that the second reason appears sound. In those circumstances, I do not agree that the Respondent's response has little prospects of success. I do not therefore make a deposit order against them.

Case Management

55 If the deposits are paid, then, as I indicated at the hearing, the current listing can be met and the Case Management Orders made by EJ Brown must be complied with. The parties may agree a slight change to the timetable without deferring to the Tribunal if that would assist.

56 There is the question, however, whether this claim ought to be stayed until the outcome of the appeal and any subsequent decision in claim number 3201225/2017. In the alternative, there might be some merit, if the appeal is successful, in hearing those claims together. I will leave the parties to consider their positions on this and make appropriate applications if so advised.

The Litigation Generally

57 The comments I make now are a serious attempt to have the parties stand back

and look at where they have arrived. It cannot be ignored that much money, time and, no doubt, stress has been expended on both sides by these many claims. How can this pattern of claims be broken? The Claimant has an ongoing sense of grievance; the Respondent must still deal with this claim and appeals. Would mediation or arbitration help to resolve this dispute? Whereby someone trusted by both sides looks at the complaints the Claimant still has that have not been determined, if any, and considers them.

_____

Employment Judge Moor
Dated: 7 December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that/those allegation(s) or argument(s), a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the allegation(s) or argument(s) to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the allegation(s) or argument(s) to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation(s) or argument(s) against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 916 5015. The PHR Administration Team will only discuss the

deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

✂----------

DEPOSIT ORDER

To: **HMCTS Finance Centre**
The Law Library
Law Courts
Small Street
Bristol
BS1 1DA

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order

AGREED LIST OF ISSUES

1. The issues between the parties was finalised at the hearing before EJ Moor on 30 November 2018 as follows.

Protected Disclosure Claims

2. The Claimant relies on the document (4 page document and appended chronology) sent to the Independent Office of Police Conduct ('IOPC') on 22 June 2018.

3. In relation to this:

3.1 was there a disclosure of information, which in the Claimant's reasonable belief tended to show:

(a) a criminal offence had been committed, namely:

i perverting the course of justice; and/or

ii corrupt and improper exercise of police powers and privileges contrary to s26 of the Criminal Justice and Courts Act 2015 ('CJCA')?

(b) Failure to comply with a legal obligation, namely:

i obligations under the Police Codes of Ethics as to honesty and integrity, orders and instructions, reporting wrongdoing and equality and diversity. **The Claimant particularises these allegations at paragraph 2.D1 at page 55 of the bundle, in summary that:**

- DS Murphy and Sgt Keating dishonestly misused section 29(4) PCA to close down the Claimant's protected disclosures when other complaints by Met officers against fellow officers had not;
- this misuse was in breach of the Respondent's whistle blowing and equality policies;
- they failed in a lawful obligation to challenge wrongdoing;
- this was unequal treatment.

ii gross misconduct under the Police Conduct Regulations 2012? The Claimant relies on Regulations 1.12 (honesty and integrity); 1.14 (authority, respect and courtesy); 1.15 (equality and diversity) and 1.27 (challenging and reporting improper conduct).

(c) that health and safety had been or was likely to be endangered; or

(d) concealment of information tending to show that criminal offences had been committed?

3.2 In relation to whether the Claimant held a reasonable belief, is the reasonableness of any belief affected by:

(a) the fact that at all material times section 29(4) PRA remained in force?

(b) the fact that the Claimant asserted that Sergeant Keating had ignored section 29 of the PRA (added by the Policing and Crime Act 2017), which provision is not yet in force?

(c) the fact that matters relied upon by the claimant as being relevant background, and in part repeated in the Main ET pleadings (eg at para 40) have been the subject of previous employment tribunal proceedings which failed or were found to have little reasonable prospect of success (in case no. 3200244/2016) or no reasonable prospect of success and to be totally without merit (case number 3201225/2017) concerning the allegations against DS Murphy of failing to report matters raised by the Claimant?

3.3 Did the Claimant hold a reasonable belief that the disclosure was made in the public interest?

3.4 If so was the disclosure made in accordance with

(a) s43(C) ERA?

(b) s43F ERA? In particular did the Claimant reasonably believe that:

i the alleged relevant failure fell within the matters for which the IOPC is prescribed, namely the disclosure relating to the conduct of a person serving with the police; and

ii the information disclosed, and any allegation contained in it, were substantially true?

4. If so, since 25 June 2018, has the Claimant been subjected to a detriment by any act or deliberate failure to act by the Respondent (through Sgt Keating or officers within the Respondent's Professional Standards Department ('PSD') by any of the following matters alleged by the Claimant to arise from Sgt Keating's letter dated 27 June 2018:

4.1 preventing the Claimant from whistleblowing by referring to the Claimant's concerns as a 'complaint' and refusing to record or investigate this on the basis of s29(4) of the Police Reform Act 2002;

4.2 preventing the Claimant discharging the full range of his duties as a serving police officer by illegitimate blocking of complaints of race discrimination/victimisation and criminal offending by police; and/or

4.3 amplifying workplace hostility against the Claimant; and/or

4.4 blighting the Claimant's future employment practices; and/or

4.5 treating the Claimant less favourably than whistleblowing by officers whose concern led to Operation Embley.

The Claimant identifies David Longhurst as an officer in addition to Sgt Keating alleged to have exercised such influence and others if they become apparent on disclosure.

5. Was the alleged detrimental act or deliberate failure to act done on the grounds that the Claimant had made any of the alleged protected disclosure(s)?

Race victimisation claims

6. Did the Claimant do a protected act by virtue of:

6.1 presenting race discrimination proceedings against the Respondent in cases 320244/2016; 2207623/2016; and 3201225/2015.

The claimant does not now rely on 6.2 as a separate protected act.

7. Did Sgt Keating believe that the Claimant had done or may have done any of the above alleged protected acts?

8. Since 25 June 2018 was the Claimant subjected to a detriment by Sgt Keating or other officers (David Longhurst) within the Respondent's PSD by the matters set out at issue 4 above.

9. If so, was the Claimant subjected to the detriments by Sgt Keating because the Claimant had done any of the above protected acts or because Sgt Keating believes he had done or may do any of the above protected acts? As to this, did the Respondent have, and apply to the claimant, a No Discrimination Doctrine, as alleged at para 42 of the ET1.

10. Remedy (see para 10 of the Draft List of Issues).

Procedural Chronology

DPS = Department of Professional Standards within the Respondent force.

IPCC = Independent Police Complaints Commission, which is now

IOPC = Independent Office for Police Conduct.

Jul 2011	Claimant (Q) reports concerns to DPS and IPCC.
3 Sept 2011	DPS informs Q, under the PRA 2002, it cannot consider complaints from one officer against another in the same force. Q told to look at the Wrongdoing Policy whereby he could report to his line manager or call Right Line anonymously (132) and/or take legal advice.
Feb-Apr 2015	6th-9th claims: 20 day hearing London South ET (the Baron ET). Q brings s47B detriment claim relying on alleged protected disclosures in report entitled *The Ridiculous*
1 Jul 2015	Baron ET judgment and reasons dismissing 6th-9th claims (118-169).
19 Oct 2015	Q makes a 29 point report of wrongdoing to IPCC: the most recent were complaints about evidence given by officers at ET and one of Q's managers during and after the hearing. (I have not seen that report, EJ Russell, without hearing evidence about it, took the view that the majority of the allegations in it were matters determined by Baron ET.]
16 Nov 2015	DPS receives report of wrongdoing from IPCC
11 Jan 2016	(183A) Response by **Inspector O'Connell** of DPS who decides to take no further action on basis that '*vast majority [of points raised] were similar to or intrinsically linked to those within your recent ET.*' Of the new points, paragraphs 23-29, he decided '*there is no new information that meets the threshold to instigate any form of misconduct investigation'*.
9 Mar 2016	ET claim 3200244/2016 (10th claim) brought against Insp O'Connell's investigation, decision and the subsequent failure to offer an appeal to IPCC. The heads of claim = direct race discrimination, victimisation and protected disclosure detriment (s47B ERA).
27 May 2016	(184) EJ Russell refused to strike out 10th claim but ordered deposits should be paid in respect of the allegations that Q had been denied an internal appeal; that there was no assessment of his complaint and/or that it was closed down on the grounds of direct race/victimisation/protected disclosure. This view was on the basis that it appears that the complaint '*does appear to rehearse in very large part the complaints which the*

[Baron] Tribunal had considered and rejected. There is evidence to suggest that the report was an attempt to re-open matters and challenge by a different method findings with which he disagreed. If that is the case and if that was the reason for Insp O'Connell's decision not to proceed, it is unlikely to be found to be an act of detriment or discrimination.'

16 Aug 2016 10th claim struck out: Q having failed to pay the deposits.

25 Aug 2016 11th claim (2207623/2016) presented. Claim was whether the Respondent (Ms Brownrigg) should have undertaken a severity assessment of the 19 Oct 2015 complaint and whether that was race victimisation.

2 Aug 2017 IPCC sent a further complaint from Q to DPS. It appears this included the report *The Complete Ridiculous* – which refers to the 'draft report *The Ridiculous'*. The introduction appears to suggest that the problem is that Q himself has not been pursued by his employer for four '*preventable deaths*' (193).

7 Sept 2017 EJ Tayler and members dismissed the 11th claim on the basis that there was no detriment. (That claim is to be heard on appeal, HH Eady QC having allowed the appeal to go to a full hearing on 19 September 2018.)

14 Sept 2017 **DS Murphy**, of DPS, informed Q that his complaint of 2 Aug 2017 would not be recorded for two reasons: section 29 PRA 2002 and regarding wrongdoing because it had already been reviewed by Insp O'Connell (whose decision she set out). She took the view that the further complaint '*is again an amalgamation of your previous reports*' (215A). That his various reports had been reviewed and no misconduct found and that the recent Tribunal had again found against him. She told him of his right to appeal to IPCC.

Late 2017 Q presented 12th claim (3201225/2017) that DS Murphy's decision not to record was race discrimination (direct, victimisation) and protected interest disclosure detriment.

27 Feb 2018 EJ Jones struck out 12th claim has having no reasonable prospect of success. (On 7 Nov 2018, Laing J allowed a full appeal to be heard of that decision. The first question being whether Murphy right in law about s29 PRA.)

22 Jun 2018 (229ff) Complaint to IPCC about DS Murphy's conduct in refusing to record prior complaint. He alleged that DS Murphy deliberately refused to record his concern despite her awareness that section 29(4) did not prevent it; and despite her awareness of section 29D of the Police and Crime Act 2017 that supported whistleblowing. He alleged she deliberately did not do so because she was 'aware of police criminal networks operating within the DPS' and, put simply, she wanted to protect her colleagues (232). He attached a chronology of events to 'understand

whom DS Murphy was allied to and whom she was protecting'.

27 Jun 2018 **Sgt Keating** decides not to record the complaint against DS Murphy for two reasons: s29 PRA; and that the complaint *'is an abuse of the complaints process'*.

5 Jul 2018 13th claim (this one) about Sgt Keating's decision.