



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4123618/2018 and 4102670/2019 (V)

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**Held in Glasgow on 2 – 5 February 2021
Deliberations 15 – 17 February 2021**

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**Employment Judge D Hoey
Tribunal Member Muir
Tribunal Member O’Hagan**

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Mr Lucky Isah

**Claimant
Represented by:
Ms L Neil -
Solicitor**

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Police Scotland

**Respondent
Represented by:
Dr A Gibson -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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1. The claim of direct race discrimination with regard to the recruitment process (in 2014 and 2015) was lodged after 3 months from the date of the act to which the complaint relates, was not conduct extending over a period and was not brought within such period as the Tribunal finds was just and equitable, all in terms of section 123 of the Equality Act 2010, and accordingly that claim is dismissed.

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2. The claim of direct race discrimination with regard to the period of time the claimant spent in Greenock (ending on 26 June 2017) was lodged after 3 months from the date of the act to which the complaint relates, was not conduct extending over a period and was not brought within such period as

the Tribunal finds was just and equitable, all in terms of section 123 of the Equality Act 2010, and accordingly that claim is dismissed.

3. The claim of direct race discrimination with regard to the claimant's dismissal brought under section 13 of the Equality Act 2010 is ill-founded and is dismissed.
4. The claim of harassment related to race brought under section 26 of the Equality Act 2010 was lodged after 3 months from the date of the act to which the complaint relates, was not conduct extending over a period but was brought within such period as the Tribunal finds just and equitable, all in terms of section 123 of the Equality Act 2010, but having considered the merits of that claim, the claim is ill-founded and is dismissed.
5. The claim of victimisation brought under section 27 of the Equality Act 2010 is ill-founded and is dismissed.
6. Each of the claims is therefore dismissed.

REASONS

1. This hearing involved 2 separate claims that had been combined. The first was a claim for race discrimination covering claims in respect of recruitment (in 2014/2015), probationary training (in 2017), line management harassment (in 2017/2018) and the fixing of a gross misconduct hearing (in 2018) which was lodged on 14 December 2018. The second claim was lodged on 25 February 2019 and was in respect of race discrimination (essentially in relation to the decision to dismiss him in 2019) and for notice pay.
2. There had been a number of case management preliminary hearings at which case management was discussed and agreed. The claims were combined and heard together.
3. This hearing had been fixed for 5 days but careful case management and timetabling together with the parties working together allowed the case to conclude within 4 days.

4. The hearing was conducted remotely via CVP with the claimant's solicitor, the claimant and the respondents' solicitor attending the entire hearing, with witnesses attending as necessary, all being able to be seen and heard, as well as being able themselves to see and hear. There were a number
5 of breaks taken during the evidence. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.
5. Prior to the hearing commencing and having considered the case papers, and
10 having sought a list of the parties' witnesses, I alerted the parties to the fact that I had a family connection and friend who were both serving police officers. While it seemed to me that there were no connections with this case nor any reason why I could not fairly hear this case, I wanted to ensure the parties had no concerns. The parties were given details and both parties confirmed
15 that they were content that no issues arose with regard to my hearing the case.
6. Written witness statements had been provided by each of the witnesses together with an agreed bundle running to 338 pages. Additional documents were added during the course of the hearing.
- 20 7. The claimant's agent wished to introduce and refer to the final report of Dame Angiolini from November 2020 entitled "Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing". This report runs to 488 pages, but the claimant's agent stated that she was essentially only relying on a few passages in chapter 9 (which dealing with
25 complaints in the context of inclusion, diversity and discrimination). It was in accordance with the overriding objective to allow reference to be made to the relevant excerpts in light of the issues arising in this case. The claimant's agent had also submitted an up-to-date schedule of loss with bank statements from the claimant.
- 30 8. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing

with matters justly and fairly taking account of the issues, cost and proportionality.

Issues to be determined

9. The parties had also worked together to agree a list of issues setting out the issues to be determined which were as follows (having deleted the issues that the parties agreed were not live issues). I adopt the wording used by the parties, but I shall refine this and deal with them in a slightly different order as set out below.

DIRECT DISCRIMINATION

- 10 **1 Is the claimant's complaint brought in terms of section 13 of the Equality Act 2010 ("the 2010 Act") that he was subjected to less favourable treatment during the recruitment period of October to December 2014, time barred because it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?**
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- 2 If yes to 1, is it just and equitable to extended the period within which this part of the claim may be brought?**
- 3 If yes to 2, was the claimant subjected to less favourable treatment because of his race during the recruitment period of October to December 2014?**
- 20
- 4 Is the claimant's complaint brought in terms of section 13 of the 2010 Act that he was subjected to less favourable treatment by being compelled to take a component of the recruitment process (the fitness test) twice, time barred because it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?**
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- 5 If yes to 4, is it just and equitable to extended the period within which this part of the claim may be brought?**

- 6 If yes to 5, was the claimant subjected to less favourable treatment because of his race by being compelled to take a component of the recruitment process twice?
- 7 Is the claimant's complaint brought in terms of section 13 of the 2010
5 Act that he was subjected to less favourable treatment by being placed on an action plan (on 9 February 2017) time barred as it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?
- 8 If yes to 7, is it just and equitable to extended the period within which
10 this part of the claim may be brought?
- 9 If yes to 8, was the claimant subjected to less favourable treatment because of his race by being placed on an action plan?
- 10 Is the claimant's complaint brought in terms of section 13 of the 2010
15 Act that he was subjected to less favourable treatment by his supervisors making false allegations against him including that he fell asleep while on duty (on around 19 January 2017) time barred as it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?
- 11 If yes to 10, is it just and equitable to extended the period within which
20 the claim may be brought?
- 12 If yes to 11, was the claimant subjected to less favourable treatment because of his race by his supervisors making false allegations against him including that he fell asleep while on duty?
- 13 Is the claimant's complaint brought in terms of section 13 of the 2010
25 Act that he was subjected to less favourable treatment by Inspector Thompson when he disobeyed a direct order to discontinue his action plan (around 9 February 2017) time barred as it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?

- 14 If yes to 13, is it just and equitable to extended the period within which the claim may be brought?
- 15 If yes to 14, was the claimant subjected to less favourable treatment because of his race by Inspector Thompson disobeying a direct order to discontinue his action plan?
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- 16 Is the claimant's complaint brought in terms of section 13 of the 2010 Act that he was subjected to less favourable treatment by Sergeant McDougall falsely stating that he had not been up to date with his crime reports (on around 28 January 2017) time barred as it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?
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- 17 If yes to 16, is it just and equitable to extended the period within which the claim may be brought?
- 18 If yes to 17, was the claimant subjected to less favourable treatment because of his race by Sergeant McDougall falsely stating that he had not been up to date with his crime reports?
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- 19 Are the alleged acts set out at 1, 4, 7, 10, 13 and 16 one-off acts with continuing consequences, or a continuing act culminating in the claimant's dismissal?
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- 20 Was the claimant subjected to less favourable treatment because of his race by the act of dismissal on 28 February 2019?

HARASSMENT

- 21 Is the claimant's complaint brought in terms of section 26 of the 2010 Act that Sergeant Singh engaged in unwanted conduct related to the claimant's race time barred as it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?
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- 22 If yes to 21, is it just and equitable to extended the period within which the claim may be brought?

23 If yes to 22, did Sergeant Singh engage in unwanted conduct related to the claimant's race which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5 **VICTIMISATION**

24 It is agreed that the protected acts relied upon are lodging a grievance on or around 15 February 2017 and lodging an Employment Tribunal claim on 14 December 2018 (with number 4123618/2018), which are agreed to be protected acts.

10 25 Did the respondent victimise the claimant by subjecting him to a detriment, by subjecting him to disciplinary proceedings for gross misconduct which ultimately led to his dismissal, because he raised a grievance on or about 15 February 2017 alleging race discrimination?

15 26 Did the respondent victimise the claimant by subjecting him to a detriment, by subjecting him to disciplinary proceedings for gross misconduct which ultimately led to his dismissal, because he lodged Claim Reference Number 4123618/2018 in the Employment Tribunal on 14 December 2018

20 10. The parties agreed that it had been confirmed at the last preliminary hearing that the hearing would also determine remedy and the Tribunal would consider what losses, if any, arose from the unlawful treatment, if so found.

11. Although a claim for notice pay had been included in the claim form, the claimant had in fact been paid notice and this was no longer being pursued.

25 **Evidence**

12. The Tribunal heard from the claimant, Mr MacArthur (who dealt with vetting and the recruitment process), Chief Inspector Gallagher (who investigated the claimant's grievance in 2017 and supervisory issues when the claimant moved to Paisley), Superintendent Kennedy (who determined the claimant's

grievance in 2017), Sergeant Singh (who had line managed the claimant for around 18 months) and Chief Superintendent McDowall (who led the professional standards department which managed the process that led to the claimant's dismissal). The Tribunal was able to consider each of these witnesses' statements together with their oral evidence, each witness having confirmed their statements to be accurate and given the chance to provide relevant supplementary evidence, and with the witnesses having been cross examined and asked relevant questions.

13. The Tribunal is able to make the following findings of fact, which are limited to facts which are necessary to determine the issues. Despite the parties having been ordered to provide a statement of agreed facts, this had not been done, but the written witness statements assisted the Tribunal and the parties in identifying where the agreements were. In the event of dispute, the Tribunal has considered the full factual matrix and relevant evidence to determine, on the balance of probabilities, what happened. The decision reached by the Tribunal was unanimous.

Facts

14. The claimant was a police officer with the respondent having commenced his office on 22 June 2015, with his service ending on 28 February 2019. The claimant is black and was born in Nigeria. He is a competent writer and speaker of English having been educated in English, from school age and having successfully completed degrees in Industrial Chemistry (in Nigeria) and Master of Science (from Glasgow Caledonian University) and an accelerated law degree (at Strathclyde University).
15. The respondent is the police authority responsible for policing within Scotland. It is a disciplined organisation that depends upon rank and structure and the trust of those who serve as police officers.
16. The conduct of police officers is dealt with via Police Service of Scotland (Conduct) Regulations 2014. Those regulations detail the procedure in the event of suspected gross misconduct of a serving police officer. A formal investigation is required to take place, with the officer being invited to a

hearing which has the power to dismiss an officer in the event of gross misconduct being identified and established.

Recruitment

- 5 17. The claimant first applied to be a police constable in 2014 having passed the necessary exams and fitness test. He then became subject to the vetting process.
18. A number of rules and checks existed. Firstly, it was necessary for all candidates to have resided in the UK for at least 3 years. The claimant had done so.
- 10 19. Secondly, in order to confirm an appointment, the respondent requires to vet all candidates. The rules in place at the time of the claimant's appointment required the respondent to be sure there were no convictions in place for the duration of the candidate's adult life. For candidates who have resided in the UK for their adult life this is done by checking the relevant databases. For
15 candidates who have spent part of their adult life living outside the UK, a certificate from the relevant country is required confirming that no relevant convictions exist.
20. The claimant had understood that this vetting was only in respect of the 3 last years prior to application, but the requirement was in respect of the entirety of
20 the applicant's adult life. He was able to subsequently satisfy this requirement.
21. The vetting form (which was not before the Tribunal) required candidates to state whether or not they had ever been investigated by the police or if there had otherwise been any adverse dealings with the police (including when the individuals' particulars had been noted but excluding where the person was a
25 witness or a complainer).
22. The vetting form completed by the claimant was not produced but the parties agreed that in answer to this question the claimant said there was nothing to disclose.

23. Upon processing the claimant's application, the senior vetting officer discovered an adverse entry within the relevant police database which had disclosed that police had been called by the claimant's partner in 2014 alleging that the claimant had threatened to remove their child out the country.
5 The database noted that an interim interdict had been in place.
24. Another entry in the system had disclosed that the claimant had called the police to report alleged racial abuse in a previous role, but no action had been taken due to the lack of evidence. That was not considered an adverse entry given the claimant had been the complainer.
- 10 25. The senior vetting officer concluded that the claimant had not disclosed a relevant event since he had been involved in a matter whereby his particulars had been taken by the police. He decided that he would recommend the claimant's application be declined. In his view this was an integrity issue as he believed the claimant had not been honest.
- 15 26. The claimant's application was passed to Detective Inspector Westmoreland to consider. She concluded that the claimant's application should not proceed due to the claimant's failure to disclose his dealings with the police pertaining to the domestic matter.
- 20 27. The claimant was advised as to the decision on 21 January 2015. On 22 January 2015 the claimant appealed against the decision explaining that the police had attended his then residence in January 2014. He had not been arrested nor charged or convicted and he had not received any warning. He stated that police did not note his particulars. As a result, the claimant did not believe this to be an adverse dealing with the police. He stated that it was his
25 wife who had called the police and there had been an argument with his wife. The claimant had taken his child to the childminder. The previous day the claimant had received an interdict preventing him from taking his daughter abroad. He said he did not have this intention and that the court had awarded him overnight contact with his daughter.
- 30 28. On 19 February 2015 Detective Chief Inspector Morrison wrote to the claimant having reviewed the vetting decision. His letter noted that the vetting form is

quite clear asking “have you EVER been investigated or had any otherwise adverse dealing with the police not included above, [which relate to fixed penalty notices], but including your particulars being noted by police other than as a witness or a complainer.” He said: “Given the circumstances you have outlined in your letter I would expect you to have completed this section. We expect all potential recruits to demonstrate the highest degree of honesty and integrity. That said, I am content to accept your explanation and rationale for not completing this section.”

29. The letter continued: “With that in mind, I am satisfied that your betting application may be reconsidered. However, I must stress that as an organisation we must authenticate the documentation you have produced from the Nigerian authorities and satisfy ourselves that there are no third-party risks arising from the information provided. Therefore, I cannot provide a timescale, but I can assure you it will be attended to as soon as reasonably practicable. You will be notified in due course of the outcome.”

30. The respondent carried out the relevant background checks and approved the claimant’s application and on 9 June 2015 the respondent wrote to the claimant formally offering the role of probationary police constable. The letter stated that the Chief Constable was making the claimant an offer of employment and that provisional arrangements had been put in place for the claimant’s basic training at the Police College from 22 June 2015 for a 12 week initial training course with location being confirmed thereafter. The letter also noted that the job was subject to Conditions of Service and Rules and Regulations and legal requirements.

31. The claimant confirmed his acceptance of the offer of appointment on 10 June 2015.

32. The last fitness test the claimant had done, which he had passed, had become out of date, since over 6 months had elapsed, and he was required to undergo a second test, which he passed.

33. The respondent introduces new constables in cohorts (i.e. groups of new officers) which train together. The claimant was invited to the first available training session following his appointment.

34. The claimant was aware of the right to claim unlawful discrimination in an Employment Tribunal in 2015 but he chose not to do so since he “did not think it would get resolved”. Once he secured the role, he was content to proceed and build his career, but he was a person who would always challenge any racial discrimination he perceived.

Greenock posting

35. Following the claimant’s training he was posted to Greenock. The reports for his first year of probation were generally good with some minor matters for development being identified. There was no suggestion that the claimant was unlikely to pass his probation. The claimant was the only black officer in Greenock at the time.

Action Plan to be introduced

36. On 9 February 2017 the claimant was called to a meeting by Inspector Thompson and Sergeant McDougall. He was told that there was a perception that he was underperforming and would be subject to an action plan. The claimant was unhappy with this suggestion and lodged a grievance on 3 March 2017. The action plan had stemmed from a suspect interview in which the claimant had been very tired and may have fallen asleep.

Claimant complains about action plan

37. The Tribunal was not provided with a copy of the grievance, but it had the outcome report which was prepared by Chief Inspector Gallagher and submitted on 3 March 2017. The grievance was about the instigation of the action plan.

38. The claimant believed that he was the only officer who had been placed on an action plan, despite appearing to carry out the role competently. He thought that the reason for the treatment was his race. The grievance

stemmed from the meeting of 9 February 2017 and the perceived underperformance of the claimant.

39. On 17 February 2017 the claimant was called to a meeting to discuss his grievance. The claimant attended that meeting with a representative from “Semper” (the ethnic minority police officers’ representative body), Chief Superintendent Downie and Superintendent Kennedy. The meeting discussed what the grievance was about, and timescales were agreed. The claimant stated that he believed the issues within his grievance were racially motivated. He was advised that his grievance would be forwarded to the Human Resources department and the professional standards department for assessment in relation to misconduct or criminality.
40. The HR team reviewed matters and concluded that there was no criminality or misconduct, and that the professional standards department should consider matters. They did and concluded that the matter should progress as a grievance which it did.
41. The claimant’s welfare was also discussed, and it was mutually agreed that the claimant would carry out a community policing role based in Greenock town centre during the inquiry.

Grievance investigation

42. Chief Inspector Gallagher was appointed to investigate the grievance and he undertook a detailed investigation as to the claimant’s grievance. He discovered the following facts.
43. Following a domestic incident involving the claimant at which the police were called (to his home) on 1 May 2016 the claimant was provided with advice from the attending police in terms of his conduct and role as a police officer. On 4 May 2016 Inspector Thompson (the claimant’s second line manager) and Sergeant McKay (the claimant’s first line manager) who had appropriately been made aware of the incident met with the claimant to discuss his welfare.
44. There was mutual agreement that a move to community policing would assist the claimant given his domestic circumstances. An occupational health

referral was also made. Inspector Thompson was of the view that the claimant had been counselled by Sergeant McKay about previous instances of falling asleep at work. There had been no record of such instances and Inspector Thompson had accepted his opinion was incorrect.

- 5 45. The claimant moved to the community policing team and was line managed by Sergeant Lawrie and partnered with Constable Ward which happened from May 2016.
- 10 46. On 16 May 2016 Inspector Thompson met with Sergeant Lawrie to discuss the claimant. Chief Inspector Gallagher noted that there was a dispute as to what was said at this meeting. Sergeant Lawrie suggested that Inspector Thompson had raised concerns about the claimant's communication skills and that Sergeant Lawrie "had his work cut out" with the claimant. Inspector Thompson maintained he had no issues with the claimant's communication style, nor would he have said that Sergeant Lawrie would have "his work cut out" with the claimant. There was a dispute over whether Inspector Thompson had an issue with the way the claimant speaks and his communication style. Having reviewed matters and spoken with the individuals, Chief Inspector Gallagher was of the this was not about the way the claimant spoke English (or his Nigerian accent) but his communication and use of the police radio (and some written communications) and his knowledge of the phonetic alphabet.
- 15 47. The occupational health report confirmed the claimant was fit for operational duties and a move to the community policing team was sensible.
- 20 48. On 2 July 2016 Sergeant Lawrie had noted that the claimant was settling in well with community policing. On 4 July 2016 Sergeant McKay made enquiries with the training team as to a draft action plan in relation to the claimant. Sergeant McKay believed that there had been insufficient details records to justify the action plan, but this was a discussion of which Inspector Thompson had no recollection. An action plan would ordinarily only be introduced following performance concerns having been properly documented.
- 25 30

49. Sergeant Lawrie had the perception that the claimant “was being treated in a manner different to others but could not quantify this further”.
50. On 15 July 2016 Sergeant McKay completed a personal development review with 8 of the 9 competences being rated as competent. One competency was
5 rated as “developing” which was use of radio, phonetic alphabet and occasional errors in written work.
51. On 14 November 2016 Sergeant Lawrie completed the claimant’s third appraisal rating the claimant as competent in all competencies. Constable Ward had not been consulted in respect of the claimant’s performance.
- 10 52. On 19 January 2017 Constable Ward and the claimant were dealing with an incident. During an interview the claimant became extremely tired. Constable Ward was of the view that the claimant had “dozed off on 3 occasions during the interview”. The claimant had accepted that he started to fall asleep but maintains he walked about the interview room to refresh himself. Constable
15 Ward had reported that the claimant had dozed off on a couple of occasions while on mobile patrol, but this had not been considered out of the ordinary and had informally counselled the claimant about being asleep on active duty. Others had taken a nap during refreshment breaks when on night duty.
53. Constable Ward had informed Sergeant McDougall that the claimant had
20 fallen asleep during a suspect interview. Sergeant McDougall informed Inspector Thompson of this and asked for guidance, including in relation to the Procurator Fiscal given the potential impact on the case. Inspector Thompson had not made contact with the Fiscal to check the position.
54. On 25 January 2017 Inspector Thompson emailed Sergeant McDougall, with
25 questions regarding sleep and welfare to be asked of the claimant. Inspector Thomson had conceded that alternative courses of action should have been considered at this stage, rather than an action plan, on the basis of actual (documented) evidence.
55. On 28 January 2017 a welfare discussion took place with Sergeant McDougall
30 and Constable Ward and the claimant. The claimant had been advised that

he was failing in his appraisal objectives and had failed to update crime reports appropriately. As such he was going to be placed on an action plan.

56. Sergeant MacDougal accepted during the investigation that only 2 of the claimant's 69 crime reports had been considered and there were no real issues with the 2 reports since external input was needed. The claimant had sent Chief Inspector Brown an email complaining about Sergeant McDougall on 29 January 2017 which was read on 6 February 2017 which led to a meeting with Inspector Thompson, Sergeant McKay and Sergeant McDougall on 9 February 2017.
57. The outcome of that meeting was disputed. Inspector Thompson believed he was to proceed with the action plan, but Chief Inspector Brown believed further information was needed before the action plan could proceed.
58. Later that day the claimant was advised by Inspector Thompson and Sergeant McDougall that he was being placed on an action plan. The claimant refused and the grievance was lodged.

Conclusion of investigation

59. Chief Inspector Gallagher met with 11 individuals in the course of his consideration of the grievance which included all of the individuals named by the claimant in his grievance. He specifically asked those officers who had worked with the claimant whether they had witnessed any conduct that could be viewed as racism. None of the officers said they had witnessed anything of this sort.
60. When Chief Inspector Gallagher had met with Inspector Thompson, he had attended with his Scottish Police Federation Representative and had prepared a detailed statement. That was due to the potential severity of the issues in question since it was being suggested by the claimant that Inspector Thompson had acted unlawfully towards him, which had the potential to adversely affect Inspector Thompson's career. It was not therefore surprising that he took that matter seriously. Chief Inspector Gallagher found no unlawful treatment by Inspector Thompson.

61. The report stated that “No overt racism was detected during this investigation.” The word “overt” was emboldened and underlined. By “overt” racism, Chief Inspector Gallagher meant that he had discovered no evidence of racism from the information before him. There was nothing before him that suggested to him the claimant had been treated differently because of race.
62. The report continued that: “Inspector Thompson wholly refutes the allegation that his actions were motivated by racism. He believed he was acting in the claimant’s best interests to support him towards successfully completing his probation. He accepted evidence he thought supported his actions does not in fact exist”.
63. Under the heading of “Possible Resolution” Chief Inspector Gallagher noted that part of his role is to consider possible solutions to the grievance. He stated that during the meetings “no overt racism has been identified in the treatment” of the claimant. He stated that: “However, there are a number of matters in terms of supervisory action that those involved, with hindsight and consideration of available recorded evidence acknowledge now were not appropriate courses of action.”
64. He noted that nobody disputed that the claimant was tired “perhaps to the extent where he may have been falling asleep during a suspect interview in a case being dealt with on petition” and lack of diligence in carrying out duties is not acceptable, but all the surrounding evidence should be considered. It would be appropriate to ensure the claimant was told he was not being placed on an action plan. He was on course to complete his probation.
65. With regard to the claimant feeling that he had been discriminated against, Chief Inspector Gallagher concluded that the supervisory failings should be explained to him. Chief Inspector Gallagher concluded that: “It is very important to let the claimant know as soon as possible that no overt racism has been detected during these investigations.” He also suggested that the claimant may wish to be offered a move to another sub-division, which should be the claimant’s decision.

66. Chief Inspector Gallagher had considered the evidence before him carefully. The only material before him that suggested the claimant had been treated differently was Sergeant Lawrie who had indicated that he thought the claimant was treated differently (by Inspector Thompson) (which included reference to Sergeant Lawrie having his “work cut out” and the claimant having communication skills issues, but Sergeant Lawrie had been asked specifically if he believed there to have been any treatment due to race and said no. We find on balance that “communication skills” within the policing context meant issues with regard to use of the phonetic alphabet and use of the police radio. There was no evidence to suggest it was the way in which the claimant spoke English or his Nigerian accent. There was no material from which Chief Inspector could conclude that the claimant’s race was in any way a factor in or a reason for his treatment in Greenock.
67. With regard to recommendations, Chief Inspector Gallagher stated that contact should be made with the Procurator Fiscal to deal with the claimant’s actions during the relevant interviews. It was correct of Inspector Thompson to have advised the claimant that the Procurator Fiscal should be advised as to what had happened but that had not been actioned. It should have been.
68. There had been no lack of honesty on the part of Sergeant McDougall with regard to the claimant’s crime report skills and management of the claimant but rather a lack of knowledge as to the process.
69. With regard to driver training, which had been an issue for the claimant, he noted that the practices should be improved and that for those with little experience of manual gears, a period of tuition rather than assessment may be appropriate.

Meeting to discuss grievance outcome

70. Superintendent Kennedy considered the report carefully and having reviewed the evidence, accepted its conclusions entirely. In the same way that Chief Inspector Gallagher had done so, Superintendent Kennedy verified the position with both the professional standards department and the HR team with regard to how best to progress matters. Both departments confirmed that

the correct way to proceed was to deal with the matter in terms of a grievance (and the performance management/developmental outcomes). He was satisfied that there was no misconduct in relation to any officer (nor any criminality). That was a reasonable conclusion to reach. He concluded that there was no evidence of any racism. That was also a reasonable conclusion to reach.

71. On 11 April 2017 the claimant attended a grievance meeting with his representative and Superintendent Kennedy. The claimant was told that the outcome of his grievance would be that probationer management training would be introduced to all chief inspectors, inspectors, sergeants and tutor constables.

72. As a result of issues discovered during the grievance process, the 4 officers who had been responsible for the shortcomings would be subject to action plans to address the performance issues that had been identified.

73. Evidence notes wrongly applied to the claimant's personnel file were removed and the action plan was withdrawn, as was the warning that had been incorrectly applied. The claimant would transfer to response policing based in Paisley on or around 26 June 2017 (which was with his agreement). The final recommendation was that driver training change to provide tuition to officers not familiar with manual gear changes.

74. The action plan (which was to be removed) itself had been precipitated because the claimant had almost fallen asleep during an interview. That was a serious matter but was to be considered as a welfare issue. There had been a lack of evidence to justify the imposition of an action plan.

Claimant accepts outcome of grievance

75. The claimant considered the outcome and confirmed that he was satisfied his grievance had been resolved, albeit he maintained that he believed the actions of Inspector Thompson had been motivated by racism.

76. On 12 April 2017 the claimant was sent a letter by Superintendent Kennedy which referred to the grievance meeting on 11 April 2017 and enclosed a copy

of the Outcome of Grievance form which confirmed the outcomes of the grievance and proposed resolution. If he agreed with the outcome, he was to sign and return. If he wished to appeal, he should complete and return the appeal form. The claimant returned the form indicating that the resolution was acceptable on 19 April 2017.

Claimant passes his probation

77. The claimant successfully completed his probation and became a Constable in the course of June 2017.

Move to Paisley

78. The claimant transferred to the response policing team in Paisley on or around 26 June 2017. The relevant shift comprised 3 sergeants and an inspector (Inspector Feroz). Those individual collectively managed 26 constables on the shift. Each sergeant managed around 8 or 9 constables at one time and Sergeant Singh was the claimant's line manager, whose duties were to carry out daily briefings, deploy the constables, monitor incidents dealt with by the constables each day, hold debriefs and deal with any welfare, performance and attendance issues.

79. Sergeant Singh was a member of the black and minority ethnic community and a member of Semper. He had also assisted in the Angiolini review in terms of providing input from his perspective and given his experiences. On a day-to-day basis Sergeant Singh worked in a busy office with other sergeants working in close proximity to him for most of the time.

80. A constable's duties comprised working as part of the response team, attend daily briefings and deal with inquiries to which they were allocated. That could include attendance at emergency calls. Attendance at court was necessary as required.

81. While the type of work required of a Constable is broadly similar irrespective of the location, some areas can be more challenging than others. Paisley was one of the busiest subdivisions in the country covering one of the most

deprived areas of the country with a high level of violence. It was fast paced and challenging, in both respects more so than Greenock.

5 82. Inspector Feroz told Sergeant Singh that the claimant was joining the team from Greenock. He was not given any information as to issues that claimant had during his service in Greenock nor the reasons for his move. Sergeant Singh had been told the claimant was joining the team and he was instructed to treat him in the same way as he would treat any other officer with that level of service and experience.

10 83. Sergeant Singh was curious as to why the claimant moved to Paisley and during a discussion with the claimant within a few weeks of his starting in Paisley the claimant advised Sergeant Singh that while he was in Greenock he had welfare issues (that involved his daughter and that he was not feeling well). Those issues had been resolved. He also told Sergeant Singh that an Inspector had treated him unfairly when he was at Greenock. Sergeant Singh
15 wanted to assist the claimant to realise his potential. He had experience of moving bases himself and was committed to developing the claimant as he was his other officers.

84. There were around 2 black officers within Paisley.

20 85. It is common practice for constables to be deployed in pairs. For those officers carrying out their probationary period or for a period following successful conclusion of the probationary period to consolidate knowledge, they are paired with an experienced tutor constable. The claimant was paired with Constable Purdie who was an experienced officer with over 20 years' service.

Concerns arise following operational duties in Paisley

25 86. Sergeant Singh discovered shortly following the claimant's move that the claimant had a number of performance issues. These were reported to him by the claimant's tutor constable and colleagues.

30 87. The first area of concern was in relation to completion of operational statements. An issue had arisen with regard to the style used by the claimant. Sergeant Singh considered that the statement was of poor quality. It was not

in chronological order and not in the correct format. Sergeant Singh also reviewed a witness statement the claimant had taken within his notebook which lacked detail, had not been signed and was of a poor standard. Sergeant Singh explained to the claimant how statements should be taken and presented, and it was agreed that future statements would be reviewed.

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88. Sergeant Singh was also seeking to assist the claimant with regard to his driving. He had previously failed 2 attempts at the basic driving course. The claimant had said this was due to his limited experience of using manual transmission. Sergeant Singh identified this as a training need and sought to arrange additional support for the claimant at the driving training centre.

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89. Sergeant Singh had been told by the claimant's tutor constable that the claimant had been struggling with operational systems and had needed constant prompting. His tutor constable was instructed to work with the claimant to help him understand the systems and approach to be taken.

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90. Sergeant Singh discovered that the claimant had been unable to properly prepare and complete a missing person's report. This incident involved a high-risk situation. Both the claimant and his tutor constable had struggled to complete the reports and associated paperwork which required Sergeant Singh to take control. The tutor constable, although very experienced, had previously relied on others to carry out this task and was not proficient in it. It was a task that a newly qualified police constable ought to be able to complete. Sergeant Singh was sufficiently concerned that he introduced a log for that officer in an attempt to assist her in acquiring the necessary skills to carry out this task.

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91. Constable Purdie found it difficult to work with the claimant. She was concerned he was struggling with areas of operational policing and required a large degree of prompting. Sergeant Singh discussed matters with Inspector Feroz and it was agreed that the claimant work with another experienced officer.

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92. On 7 August 2017 the claimant was appointed to work with Constable Knox who had been a top performer. Sergeant Singh considered that the claimant

would be able to learn from him. Although the claimant believed Constable Knox was a close friend of Sergeant Singh, he was not. Constable Knox was a direct report of Sergeant Singh and had been appointed to work with the claimant with a view to helping him improve his performance.

5 **Evidence log**

93. Sergeant Singh took the management and development needs of the officers under his charge very seriously and sought to work with his team to improve performance and realise their best possible potential. If issues arose, Sergeant Singh would advise the individual of the issue and of the corrective action needed. If it was clear that the issues arising were of a serious/repetitive nature (i.e. not one off errors), Sergeant Singh would create a written log to ensure there was a note of the concern in writing. That written log was used for training and development purposes and informed personal development discussions.
- 10
94. A log had been kept in relation to the claimant's initial tutor constable who had difficulty in completing the missing persons paperwork to ensure this developmental need was monitored and resolved.
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95. Similarly, a log was kept in relation to the claimant by Sergeant Singh. He began the log within a few weeks of the claimant beginning his work in Paisley. This was done because Sergeant Singh was concerned that there were a number of performance issues and when he decided to retain the details, he included information that had occurred in the week or so prior to writing the log to ensure there was a record of the issues that concerned Sergeant Singh in relation to the claimant's performance. The issues included concerns about statement writing and the inability to complete missing person's statements. The claimant was told about the log by Sergeant Singh and that issues arising would continue to be recorded.
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- 25
96. We did not find that Sergeant Singh asked Constable Knox to clandestinely report upon the claimant, as believed by the claimant. The log contained matters pertaining to the claimant's actions which were communicated to him
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during the course of his duties. The content of the log was not always negative and did include incidents that arose that were not the fault of the claimant.

97. The log was a management tool used by Sergeant Singh to allow him to capture relevant actions. It was intended to assist those whose details were recorded and inform performance management discussions to aid improvement. It also included positive comments where appropriate. It had 5 columns. The first was the enquiry number, followed by the date and time and then the name of the source of the issue. The largest column was headed “update” and had details of the issue in question with the final column being entitled “issue identified” which dealt with the type of issue arising, such as statement taking, efficiency or knowledge of police systems.

Further issues with the claimant’s performance arise

98. The claimant’s new tutor constable had a number of serious concerns about the claimant’s performance. One concern arose in relation to the preparation of a crime report. Another issue was in relation to officer safety. In September 2017 during an operational incident the claimant and Constable Knox were dealing with an abusive member of the public who was intoxicated. Constable Knox took control of the person’s arm when his behaviour escalated. Constable Knox believed the claimant’s actions were slower than they ought to have been in the circumstances. Another officer present at the scene had witnessed this issue, which concerned him, to the extent he reported matters to Sergeant Singh. In his view the claimant had not acted as quickly as he ought to have acted. Constable Knox confirmed to Sergeant Singh that this was his understanding too. Sergeant Singh spoke with the claimant, who denied any wrongdoing. There was no reason for Sergeant Singh not to believe the other 2 officers who had come to him with genuine officer safety concerns. This was not the only officer safety concern that Sergeant Singh had discovered in relation to the claimant during the time he line managed the claimant. Constable Knox requested that he no longer be partnered with the claimant. The claimant did not want to be partnered with Constable Knox.

99. Other issues with regard to the claimant's performance included errors made by the claimant when dealing with the safe and recoding of sums stored. An audit had discovered that the written records appeared to disclose a significant shortfall in the money stored within the safe as against the actual amount, but this was due to the claimant's error in recording the sums.
100. The claimant was struggling with the fast pace of response policing within the shift in which he worked at Paisley.

Claimant given chance to experience other areas of policing

101. To assist the claimant with his experience he was given and took the opportunity to work in other areas of policing. He spent time in case management to see how statements and case reports are prepared and processed. He also spent time dealing with the vulnerable person database and in the court branch.
102. The reason why the claimant was given the opportunity to work in other areas of policing was because Sergeant Singh wanted to help the claimant gain an understanding of how other areas of the operation worked. Thus, his work in the court team would allow him to see how evidence was adduced thereby showing why the statements were to be produced in a certain way. His work in case management also showed how case progression worked. This decision was in no sense whatsoever connected to the claimant's race. It was solely to assist the claimant. The claimant agreed to the moves, which he found interesting.

Performance review

103. At the end of September 2017, the claimant had his performance development conversation with Sergeant Singh.
104. The claimant completed the self-assessment on 19 September 2017. He stated that on service delivery he had not consistently achieved the necessary standard with regard to paperwork. He stated that he felt time pressures affected the quality of his work and that he would better manage his time to

improve. He also stated that he was yet to achieve his basic driving and there was a plan in place to assist him to achieve this by liaising with driver training.

5 105. The review summary that was inserted into the document by Sergeant Singh stated that the claimant had transferred on 25 June 2017. He was punctual and of even temperament but had not been performing to the required level. Several areas had been identified as requiring development, including missing persons reports, reports, statement taking and driver assessment. There had been a number of occasions where key information had been missing in written work, but the claimant had been given support. There were
10 some serious operational concerns. The claimant also appeared to be withdrawn from his peers and he was encouraged to take more of a lead. Secondments were to be arranged to assist him and Sergeant Singh was positive with regard to the outlook.

15 106. Sergeant Singh had also recommended the claimant take an active part in delivering the e-brief at the start of each shift, which Sergeant Singh believed would assist the claimant in taking the lead and becoming more involved with his colleagues. The claimant was reluctant to do so, as he believed that was a task ordinarily undertaken by probationary officers.

20 107. Sergeant Singh took his responsibilities as Sergeant seriously and was concerned that the claimant, one of the officers under his control, was not performing at a level to be expected of someone with that experience and service. He had raised the issues with the claimant but those officers working with the claimant continued to raise concerns that the claimant was not improving.

25 **Concerns raised about claimant's performance**

108. During September 2017 Sergeant Singh raised concerns about the claimant's performance with the Chief Inspector pertaining to the shift (Chief Inspector Gallagher) by email. The email stated:

30 *"Please find attached reports which document the performance related issues in respect of the claimant. There can be no avoidance (sic) that his*

performance is not meeting the requisite standard of an officer with his level of service.

The claimant transferred to response policing on 25 June 2017. He was not subject to any development plans. Therefore, my assessment is based on the standard which would be expected of an officer outwith probation....

Since taking up post within my team his performance has been exceptionally poor. This is in sharp contrast to the information within his previous reports. I have implemented counter measures to improve his performance which are recorded on the attached documents.

It should be noted that despite his failures there has been slow and gradual improvements notwithstanding not to the standard expected of an officer of his level. I have summarised his improvements below.”

109. The email referred to a statement taken from a victim which was of an acceptable standard (in November 2017) and that in December 2017 the claimant worked well with another team and demonstrated a willingness to learn. The claimant has also presented at a diversity led event and shared his experiences with the community which led to a letter of thanks from the organiser and that the claimant had attended a career development workshop which was positive.

110. The email stated that on 18 September 2017 the claimant had indicated he was struggling with the pace of response policing. The volume and frequency of the claimant's mistakes had a detrimental impact upon the claimant's relationship with his colleagues. On a personal level, Sergeant Singh felt that the claimant was better suited to community policing which would provide him with opportunities to lead at a more controlled pace with close supervision.

111. The email concluded that the claimant did not perceive he had any training or developmental needs other than basic driving which, to Sergeant Singh, suggested the claimant had poor self-awareness or had become protective of his shortcomings. Sergeant Singh stated he was fully committed to supporting the claimant's development as required. Sergeant Singh believed that the

claimant was withdrawn from the team and this work would encourage greater involvement. This had nothing to do with the claimant's race or language skills. There never had been any suggestion that Sergeant Singh had any concerns about the claimant's ability to speak English.

- 5 112. While the log ran to 40 or so pages these contained examples of different areas of concern and included repeated examples in relation to the same concern. Chief Inspector Gallagher was of the view that there were 3 key points in relation to the claimant's performance. He considered that the quality of the record keeping in relation to the claimant's performance was "night and
10 day" when compared the record keeping that had existed in Greenock. He trusted the judgment of Sergeant Singh and Inspector Kyle and had no reason to doubt the veracity of the log. Sergeant Singh wished to ensure he kept his Chief Inspector up to date given his serious concerns in relation to the claimant, which he considered part of his duty.

15 **Claimant agrees to a move**

113. Chief Inspector Gallagher discussed the email and attachments with Superintendent Kennedy, and it was agreed that a meeting take place with the claimant to discuss the issues. The claimant attended the meeting with Chief Inspector Gallagher and his representative (from Semper, the ethnic
20 minority police officers' representative body). The claimant conceded that things were difficult for him and it was agreed that rather than work in response policing the claimant would move to work with the community policing team. That was actioned In May 2018 (and had been delayed due to the claimant's absence from work (from March 2018 to May 2018) due to a
25 family bereavement).

114. The claimant was able to carry out his tasks within these other departments competently. One of the reasons we found that the claimant struggled with his work in Paisley while working in Sergeant Singh's shift was due to the fast
30 pace of the response work needed in that department. The pace needed and response was something the claimant himself had identified in his performance review as being an issue.

Claimant fails to attend police office before court on 13 February 2018

115. On 13 February 2018 the claimant was scheduled to work a shift from 7am until 4pm. He had also been cited to attend court at 9.45am to give evidence in a case that day. The claimant was the corroborating officer. Another officer,
5 Constable McKirdy, was the reporting officer.
116. At the morning briefing in 13 February 2018 at around 7am Sergeant Singh asked if anyone knew where the claimant was since he had not attended. Constable Panther advised Sergeant Singh (in the presence of the other officers at the start of the briefing) that the claimant had told him the previous
10 day (as they were working together) that the claimant planned on going straight to court that morning, rather than attending the office first. Constable Panther had said that he told the claimant he ought to attend the morning briefing at 7am in uniform and then go to court.
117. Sergeant Singh discussed the matter with an Inspector (Inspector Kyle) who
15 instructed Sergeant Singh to contact the claimant, which he did around 7.20am. The claimant was asked if there were any welfare issues or personal reasons for not attending the start of the shift. The claimant said there was not. He said that he was going straight to court at 9.45am.
118. Sergeant Singh instructed the claimant to attend the office as soon as
20 practicable. That instruction was given to Sergeant Singh within earshot of another Sergeant, Sergeant Hamill. The claimant confirmed that he understood the instruction.
119. Sergeant Singh left the office following that call to deal with another matter. Inspector Kyle noted that the claimant had not attended the office and spoke
25 to Chief Inspector Gallagher about the matter. They were concerned that the claimant had failed to follow a direct instruction. Chief Inspector Gallagher instructed 2 sergeants to locate the claimant and to confirm in his notebook that he had been ordered to attend the office. When the Sergeants located the claimant, he did not have his notebook with him.

120. When on duty police officers should always have their police issue notebook with them. When in court, this provides the direct evidence of the information about which the officer is giving evidence but also if the officer requires to deal with any issue while at court, it is essential matters can be noted in the usual way in the notebook.
121. No issues had been raised with Constable McKirdy, a white Scottish man, who had been the reporting officer for the case in question and his attendance at court. We find that he had attended court as he had been cited to attend. Unlike the claimant Constable McKirdy had not failed to attend his shift when rostered to do so, had not failed to follow an instruction of a superior officer and there was no evidence that he did not have his police issue note book in his possession.
122. Sergeant Singh returned to the office around 11.30am. The claimant returned to the office around 12 noon. He had been asked to meet Inspector Kyle, with Sergeant Singh in attendance. He was asked why he had not attended the police office that morning and explained that he believed he was to attend court directly and be released thereafter. The claimant was shown the electronic entry which showed the claimant having been rostered to work a full shift that day. The claimant maintained that he thought he was to report to court at 945am.
123. Inspector Kyle asked the claimant if he had discussed matters with Constable Panther the preceding day and what he had been told but the claimant was reluctant to discuss what had been said and he refused to confirm or deny that he had been told that normal practice was to attend the police office at the start of the shift and then attend court. The claimant said that he had followed the procedure he followed when he worked at Greenock but was unable to provide specific details.
124. Inspector Kyle advised the claimant that it was important to attend shift when rostered so officers can be deployed prior to attending court if necessary. Inspector Kyle also noted that as the claimant was not the reporting officer for the matter in which he was to give evidence, it was possible that his evidence

might not have been needed (which meant it was important to attend the office first and be used efficiently). That was in fact what happened as the claimant had been released without the need to give evidence.

125. The claimant was asked if he understood the instruction given by Sergeant Singh to attend the office. He said he did but believed he was to attend court.
5 He was asked why he had disregarded the instruction and was unable to explain, other than repeat his view that he believed he was to attend court.

126. The claimant was told that the matter would be reported to senior management for review and consideration.

10 **Matter reported to senior management**

127. On 14 February 2018 Inspector Kyle submitted a report in relation to the above incident to the area commander (which he had told the claimant would happen). He set out the facts as above. He also stated that this was the second time the claimant had failed to report for duty as per his rostered
15 hours. He said that on a particular day in October 2017 the claimant had failed to attend for his shift. The claimant had maintained that the leave had been authorised, but the system did not reflect that.

128. Inspector Kyle also stated in his report that being asked to return to the office by 2 sergeants, who attended court to speak with him, was “an overreaction
20 and intimidation”. It was noted that the claimant did not have his notebook in his possession.

Assistant Chief Constable decides to take action

129. On 12 March 2018 the Assistant Chief Constable considered the note and directed that a formal investigation be undertaken in terms of the Police
25 Service of Scotland (Conduct) Regulations 2014. An investigation inspector was appointed on 29 March 2018 but due to the claimant’s absence had to await his return to work to progress matters. The allegations that the claimant was to answer had been drafted by the professional standards department in light of the report that had been provided. The inspector that was appointed

was required to investigate the matter fully, with the matter being remitted to a hearing, if necessary.

Disciplinary process

130. Upon the claimant's return to work following his absence, on 9 May 2018,
5 Inspectors from the Professional Standards Department met the claimant and advised him that a gross misconduct investigation was being undertaken.
131. The allegations being considered were that the claimant had failed to attend for duty on 13 February 2018 at 7am, that having been instructed to attend as soon as reasonably practicable by Sergeant Singh, the claimant did not do so
10 and thereby failed to comply with a lawful order and that the claimant did not have in his possession on 13 February 2018 when in court his police issue notebook and was unable therefore to carry out his duties and responsibilities as a police officer.
132. The investigating inspector carried out an investigation. He took statements
15 from 15 individuals. The statements from the officers in question confirmed the position as set out above. The claimant was given full details of the investigation including the statements from the officers in question.
133. On 7 June 2018 the claimant sent an email to the Inspector giving his
20 response to the allegations and making reference to institutional racism within the respondent. This email was not before the Tribunal. The email from the claimant was in essence his reply to the allegations but focussed on the claimant's perception that he had been subject to racism. He said that he had suffered racial discrimination when at Greenock and that Sergeant Singh had harassed him. The email did not, however, focus on the issues that had been
25 raised, namely the claimant's failure to attend the office when rostered, his failure to follow a direct instruction and his failure to have his police issue notebook in his possession.
134. While there was no evidence led in relation to precisely what happened to that
30 email, the claimant accepted that some form of investigation took place with some statements being taken. Some of the individuals who had given

statements to the investigator had been those whose conduct the claimant had raised, including Constable Knox, Sergeant Singh, Inspector Kyle but their focus was in relation to the issues under investigation.

5 135. The claimant did not follow his email up or raise the issue further. The focus was in relation to the 3 allegations the claimant faced.

136. The claimant had been given the full set of papers in relation to this matter. He had copies of the statements and evidence which had been taken. He had the support of his advisers, the Scottish Police Federation, who had considered the supporting paperwork. The claimant acted with the benefit of
10 such support and with knowledge of the full case against him.

Claimant's accepts he was guilty of each allegation

137. On 4 October 2018 the claimant submitted a notice of acceptance under regulation 15(5) of the Police Service of Scotland (Conduct) Regulation 2014. This document referred to the 3 allegations individually, failing to attend for
15 duty at 7am, failing to follow an instruction to attend the office as soon as practicable and failing to have his notebook in his possession when at court. Under the section entitled "response to the allegation" in relation to each allegation, separately, the claimant ticked the box stating that he accepted the allegation (as opposed to did not accept). He then ticked the box stating that
20 he did not accept the conduct, which he admitted, amounted to gross misconduct. The significance of that document was that the hearing that was fixed would consider the severity of the outcome rather than whether or not the allegations were established. It was up to the claimant to choose what, if any, evidence he would take to that hearing since as the claimant had
25 admitted the conduct, it was not necessary to lead any evidence to prove the conduct had occurred.

138. Section 3 of the document submitted by the claimant stated that the claimant had 10 working days to provide any mitigation where the conduct was accepted, set out what allegations are denied if they are denied and provide
30 the names and addresses of any witnesses proposed to rely upon, including

a summary of their evidence. The claimant did not rely upon any witnesses and instead submitted a plea in mitigation.

139. The plea in mitigation that was submitted was written by the Scottish Police Federation on the claimant's behalf. It stated that the claimant had already admitted the allegations and that his admission together with the plea in mitigation should be taken into account. The claimant fully accepted his failings but did not accept his conduct amounted to gross misconduct.
140. The plea stated that the claimant had negated the need for witnesses sparing them inconvenience and discomfort and understood his errors and the wider ramifications and that his actions had an impact upon the public and good name of the respondent. The plea stated that given the circumstances the claimant can continue as a police officer.
141. Having set out the claimant's history and background and the claimant's personal circumstances (including choosing to pursue a law degree which he was due to complete in June 2019), the plea then stated he had 3 years of police service. The claimant felt he did not have the full support of his supervisors, some of whom he believed made attempts to have him dismissed by falsely claiming he was falling below the required standard. He had raised a grievance citing racial discrimination against those supervisors and said he received an apology for the way he was treated. It was in his interest to move to his current post in June 2017, but he felt those supervisors still had an influence and he believed he was treated less favourably due to the colour of his skin.
142. The plea stated: *"Whilst I cannot comment specifically on the circumstances that have caused the claimant to feel the way he does or indeed what the contents of the grievance were or the resolution, this is his perception and it is very real to him"*.
143. The plea in mitigation concluded by referring to the fact that the claimant is not the first nor the last officer to fail to report for a shift. His understanding was that it was permissible. He accepted that when informed he should attend *"no amount of misunderstanding regarding scope or local arrangements can*

excuse the failure to obey a lawful order. For the claimant he felt that he had a difficult relationship with his supervisors and whilst this does not excuse the failure to obey an order it is offered only to show that things between the two were far from ideal. We are a disciplined organisation and without everyone's commitment to the rank structure the police would cease to function."

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144. With regard to his failure to have his notebook, and therefore be prepared for court, this need not be the case since he was reporting directly to the court. Nevertheless the plea acknowledged that the best evidence was contained in his notebook which he did not have in his possession. The repercussions of not having this vital piece of evidence could have been great for the trial. The plea noted that he would not be the first nor last to have done this, but he has learned a lesson. The plea concluded: *"I hope that you can consider that there were other factors involved in events leading up to this incident and that you can see beyond this error in judgment on the claimant's part."*

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15 **Claimant wishes to change his position**

145. On 21 November 2018 the claimant sent an email to his advisers, the Scottish Police Federation, who had submitted the plea in mitigation on the claimant's part (with his instructions). He stated: *"Over the last couple of days I have been reading the statements by the witnesses against me. Many of the statements contain false information... Please could you withdraw my plea in mitigation with immediate effect? I would like to cross examine all 18 witnesses against me. I am currently preparing a list of witnesses I would like to call."*

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146. On 21 November 2018 the Assistant General Secretary (Conduct) of the Federation replied to the claimant's email in the following terms: *"Quite frankly I am surprised by the content of your email and it is clear that you neither value or accept the advice you have received up to this point. Several weeks ago Lorna returned, in line with the regulatory requirements, the regulation 15(5) form in which you accepted the conduct as yours but did not accept it amounted to gross misconduct Additional mitigation was submitted at that time, provided by you, again all in line with the regulatory timescales. I am*

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unaware of any provision within the misconduct regulations which would allow you to withdraw an admission you have already made and effectively change how you intend to continue. If you are only now reading the statements there is little I can respond to that. The information contained within the statements
5 in the pack is entirely secondary when you have admitted the conduct.

You will have received a regulation 17 form in which you are asked to agree the witness statements. If you agreed them then in all likelihood the full pack will already have been passed to the chair. I can confirm however that both Lorna and I were fully versed in the contents of your gross misconduct pack
10 and all our advice provided up to this point was based on that.

Further to that I must remind you that you admitted to both Lorna and I that you had in fact attended at court despite your Sergeant calling you before you had left your home instructing you to parade at the office. There is no way that either Lorna or I could represent you should you pursue this matter as you
15 describe in your email given that you admitted this conduct to us. You are entirely free to pursue this matter but you would need to correspondence directly with the DCC as a matter of urgency and as I say there is no provision for any of this in the regulations. I have no idea what response you would get from them.

20 Whilst I appreciate your views on this matter and the gross misconduct you face, I can see no reason given the information you have already supplied me to reconsider the advice I have already provided.

For the avoidance of doubt the SPF will not be making any further representations on your behalf until you confirm what you intend to do here.”

25 147. The claimant met his advisers and agreement as to a way ahead was reached. The claimant would not formally change his position but instead another “plea in mitigation” would be submitted. No witnesses would be called by the claimant and no request would be made for witnesses to attend the hearing.

The Claimant attends the hearing and submits additional information

148. The claimant attended the gross misconduct hearing which took place on 29 January 2019. It was chaired by Chief Superintendent Scott. The claimant had not decided to lead any evidence at the hearing and had not decided to call any witnesses. The formal paperwork submitted by the claimant still had him as having accepted each of the allegations but disputing that they amounted to gross misconduct.

149. Around the time of the hearing the claimant had submitted "additional information" to the plea in mitigation that had been submitted. It stated as follows:

"The investigating officers reports contains a statement from Constable Panther which provides that the claimant had a conversation with him regarding his attendance at court the following day. He also stated that the claimant told him his intentions and that the claimant was informed that he should be attending the office not reporting directly to court. The claimant would like it noted that although he would have menial conversations with Constable Panther he was not someone he regarded as a friend and would not have discussed his attendance at court with him. The claimant has no recollection of this conversation and is adamant this never took place.

Also contained in the report is an account from Sergeant Singh which provides a different version of what was said on the call he made from what the claimant remembers. From the claimant's memory, the call was far more laid back than is now purported.

Finally I would ask that you bear in mind the claimant's belief that after he had raised a grievance and was transferred from Paisley to Greenock (sic) he never received the fresh start he was hoping for. He believed that there was negativity attached to him when he arrived and that he was judged more harshly than others simply because he had raised a grievance and was perhaps viewed as a trouble maker. I think we would all agree that following any move in the Police there are always jokes made as to why a person has been moved and invariably it is always viewed in a negative manner.

Unfortunately this went beyond rumour and speculation and in his opinion manifested itself in unfair treatment.”

150. The Chair of the hearing considered the information the claimant had provided given the claimant had not led any evidence at the hearing nor did ask that any of the witnesses who had provided statements attend.

Outcome of hearing

151. Chief Superintendent Scott considered matters in detail and issued an outcome. The outcome runs to 4 pages.
152. Under the heading “effect on public confidence in the police service” it is said that the conduct in this case has the potential to significantly undermine confidence in the police service. This is because discipline is crucial and failure to attend service is a serious concern to the public and because the system relies on professional conduct of police officers.
153. The mitigation was considered, including the fact the claimant has no other misconduct disposals and that he had previously been described as reliable, conscientious and diligent.
154. Reference was made to the fact the claimant waived his right to have witnesses attend which removed inconvenience and unnecessary distraction from serving the public. He then stated that: *“I confess that when I read the investigating officer’s report and file of evidence it concerned me deeply that a serving police constable could receive, understand and then ignore without any justification a direct order by his supervisor and concoct falsehoods in an effort to excuse and mitigate this insubordination and neglect of duty. I have to say that my overall impression is that your acceptance of responsibility for your conduct is qualified and that whilst you say you are sorry and that it won’t happen again, you don’t accept that it was gross misconduct and you’ve challenged the integrity of some of the officers who have provided statements, namely Constable Panther and Sergeant Singh.*

My view is that having waived your right to have these witnesses attend the hearing and having admitted the conduct to then allege they have

misrepresented events in their witness statements is of concern to me and I don't feel there would be any merit in now calling these witnesses to the hearing as it would be your word against theirs and I have no reason to question the veracity of their accounts.

5 *The nature of the allegations is compounded by your conduct and failure to fully accept your responsibility. As such any mitigation would need to be of a unique significance. Had there been any evidence whatsoever of you being the victim of racial discrimination I would consider this to be such a mitigating factor.*

10 *You stated that part of your reason for being here is due to the colour of your skin. If that is your perception then I am extremely sorry to hear that because it goes against all the morals and values of the respondent. However there has been nothing presented to me in evidence that supports that perception and I can confidently state that any officer, regardless of their race or any*
15 *other protected characteristic would have a hearing in respect of the allegations in question today.”*

155. He then referred to the statement from Chief Inspector Gallagher which referred to the outcome of the grievance and the plea in mitigation which rereferred to the apology. The outcome stated:

20 *“This concerned me, so I telephoned Chief Inspector Gallagher and Superintendent Kennedy who confirmed that in short the outcome of the grievance investigation was that there was no racist behaviour rather an inept approach by a number of supervisory and senior officers to what was a welfare issue for you as opposed to a performance issue the consequence of*
25 *which these officers were given remedial action to improve their understanding of the correct approach in these matters. You and your representative accepted this disposal and agreed that it did not constitute racial discrimination. Therefore the inference in your plea in mitigation that you received an apology for racially discriminatory behaviour is at best*
30 *disingenuous.*

You have failed to accept responsibility for your own actions in presenting what the evidence clearly shows is an untrue account in seeking to explain the reasons for your failure to obey a lawful order. You have maintained that attending direct to court was a matter of common practice from your time at Greenock The analysis of [the data] shows you attending for duty [at the office] before court on 5 occasions in 2016 at which time you were posted to Inverclyde.

Moreover in relation to your failure to attend court with your notebook you have stated that you were in possession of printed statements instead. However the analyses of the report shows that you had not printed out copies of statement pertinent to the case.

Based on the balance of probabilities both of the foregoing examples of your preparedness to concoct false accounts to justify your gross misconduct led me to conclude that your integrity is wholly lacking. This coupled with your additional preparedness to ignore a lawful order are issues which cannot be ignored.

This type of behaviour cuts to the heart of the core values of a police officer and constitutes conduct incompatible with the office of constable. It demonstrates a disregard and lack of respect [for rank, colleagues, the needs of the public and the reputation of the service].

In conclusion having considered all the options open to me and closely examined the available material, my decision is to dismiss you with notice. Your notice period will be 28 days.”

156. On 7 March 2019 the respondent wrote to the claimant noting that he had been overpaid by £197.87 which was in respect of a cycle to work scheme payment.

Earnings

157. While employed by the respondent the claimant earned a net weekly basic pay of £451.73. The claimant searched for alternative employment and eventually secured a permanent role. This role involves the claimant working

from 1 January to 31 August and is paid the net weekly sum of £243. He received universal credit in the weekly sum of £75 for 43 weeks. From 24 December 2020 the claimant's universal credit payments increased to £138.23 each week.

5 **Observations on the evidence**

158. The witnesses sought to give evidence to the best of their knowledge and belief. We were conscious of the time that had passed given some of the issues arising were over 5 years ago. The time factor did have an impact to an extent on the evidence since one of the relevant witnesses, Detective Chief
10 Inspector (who had allowed the claimant's appeal regarding his application), had retired. There were also a number of occasions where it was clear the officers in question struggled to recall precisely what had happened or why given the time that had passed. A good example of this was in relation to the date the claimant became subject to Sergeant Singh's control. The passage
15 of time had clearly affected the memory of the witnesses and was something we had to take into account in assessing the evidence.

159. With regard to conflicts in evidence, we found that the evidence led by the respondent's witnesses was more credible than that of the claimant. This was particularly so in relation to Sergeant Singh. We found him to be an impressive
20 witness. He was concerned to ensure the claimant was able to realise his potential and took his management duties and responsibilities seriously. He was also keen to ensure officers from the black and minority ethnic community prospered in the respondent's organisation.

160. While the claimant strongly believed that the conduct to which he had been
25 subject was related to his race, the claimant candidly accepted when asked, that there was no evidential basis for this as such. He felt that it was his race but was unable to point to why this was so nor provide any evidence from which an inference of race being a reason for the treatment could be found. It was a strongly held belief by him. As a result of his belief, he was unable to
30 see why Sergeant Singh was doing what he did. The best example of this was the keeping of the log which had the purpose of helping the claimant by

ensuring issues were noted and could be monitored. That was an attempt to help the claimant improve and was not intended to hinder him in any way. There was no evidence whatsoever that showed that Sergeant Singh treated the claimant in the way he did because of race. The claimant had no evidence of this or than his belief.

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161. We have sympathy with the claimant given his treatment in Greenock, which was due to inept management rather than race, as Chief Inspector Gallagher concluded in clear terms. The claimant did secure his appointment (winning his appeal) and did complete his probation which were significant achievements. Our focus was on the evidence before us and in particular considering the reason why the treatment he received happened applying the law, being conscious that rarely is discrimination overt or even conscious. We considered the evidence carefully and preferred the clear and often corroborated evidence of Sergeant Singh.

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162. Chief Inspector Gallagher was clear in the reason for the treatment. His investigation was thorough and if there had been any evidence that supported the claimant's belief, he would have raised it. Reference to "overt" racism was unfortunate but did not support what the claimant's agent suggested, which was that there must have been covert racism. That was not what he said since he found no evidence when asking those colleagues who had worked with the claimant if they had any reason to believe race had been the reason why the claimant was treated in the way he was. There was no evidence. Although Sergeant Lawrie believed that there was a difference in treatment this was not stated to be because of race.

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163. Chief Inspector Gallagher considered the evidence he had and concluded that there was no evidence that the reason why the claimant had been treated in the way he had was due to race – it was due to mismanagement. We found that credible. Chief Inspector Gallagher's conclusion was upheld by Superintendent Kennedy who considered matters afresh.

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164. We considered the terms of Dame Angiolini's report, the relevant excerpts of which were put to the relevant witnesses, but we did not consider that to assist

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us in the current matter. We did take account of the cultural issues referred to in the report and the difficulties faced generally with black and minority ethnic communities within the police, but we considered the facts, namely what happened to the claimant and why that was so. Evidence of other officers did not assist in determining what happened in relation to the specific incidents in this case

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165. Where there were disputes in evidence, we preferred the evidence of Sergeant Singh who was clear in what he did and why. Thus, when asked about keeping a log, Sergeant Singh was clear that he did for all officers whom he considered required assistance in improvement, which included a colleague of the claimant, who was Scottish and a woman. Race was irrelevant. Improving performance was the sole reason for that action.

166. The first evidential issue we required to resolve was the suggestion by the claimant that Sergeant Singh was a close friend of Constable Knox and this relationship had led to the claimant being treated unfavourably. We found no evidence to substantiate this. Although it was the claimant's belief, there was no basis for that belief and the claimant gave no reason to support the assertion. Sergeant Singh treated his officers equally and fairly and we found that he had a good relationship with his direct reports.

167. We did not accept the claimant's assertion that Constable Knox had been instructed to keep a clandestine note of failings by the claimant and secretly report them to Sergeant Knox. We found that the Sergeant Singh had given the claimant the opportunity to learn from a high performing officer with the chance to improve. We found that the claimant struggled in some respects, which appeared to relate to the fast pace and different environment that the work in Paisley involved in contrast to the other postings where the claimant had worked.

168. Sergeant Singh was diligent in his duties to assist his officers and seek to help them improve. It was for that reason that he introduced his log in relation to the claimant. We do not accept the claimant's evidence that he did not know of it and we preferred the evidence of Sergeant Singh. We found that the

claimant was told that a written note was taken in relation to the claimant's performance, good and bad. That log informed the performance discussion that took place. The claimant was aware during that discussion of the issues that concerned Sergeant Singh and was given full details of them.

5 169. The fact that Sergeant Singh had kept a log of other officers who were not performing to the required standard, including an officer of a different race and gender from the claimant, supported our conclusion that the keeping of the log was entirely unrelated to race but solely in respect of performance management and was Sergeant Singh diligently carrying out his management
10 duties as Sergeant.

170. The next conflict we had to resolve was the issue with regard to the claimant's conflict with Constable Knox. Constable Knox was a high performer and Sergeant Singh had decided to partner the claimant with Constable Knox to assist the claimant. His previous partner, Constable Purdie, had found it
15 difficult to work with the claimant given the necessity she found to constantly prompt the claimant. We found that Constable Knox also found it difficult to work with the claimant on occasion. When an issue arose as to officer safety Constable Knox was concerned that the claimant had not acted quick enough. That lack of prompt action had been an issue that had been raised previously with the claimant (by his former tutor constable). We preferred the evidence
20 of Sergeant Singh in this regard and found that the claimant had not acted as quick as he ought to in the incident in question (in September 2017). This culminated in Constable Knox asking Sergeant Singh to change his partner. We find that explanation to be more credible than the claimant's suggestion
25 that it was the claimant who raised concerns with Inspector Kyle that led to the claimant no longer being partnered with Constable Knox.

171. The issue as to what had happened in relation to Constable Knox and the claimant was one of the examples as to where the time that had passed had impacted upon the cogency of the evidence. Due to the time that had passed
30 it was difficult for Sergeant Singh to recall precisely what had happened.

172. We also accepted Sergeant's Singh's evidence that he believed from the information being reported to him that the claimant was struggling with operational policing in the area in question. While there was some dispute in the evidence as to the difference, we did accept that the operational policing environment in Paisley was likely to be busier than what the claimant had previously experienced in Greenock. We found Sergeant Singh to be credible and clear that he took the claimant at face value, working with him from the information he received from the officers that worked with the claimant. We accepted that the claimant struggled with the response policing role in the Paisley shift. The issues that arose were with his performance in relation to the tasks identified by Sergeant Singh. There was no connection whatsoever to the claimant's race.
173. We did not accept the claimant's assertion that Sergeant Singh had ever indicated that he had an issue with the claimant's English or the way he spoke. We did not accept that the claimant had been told by Sergeant Singh to read the e-brief to "improve his English". We preferred the evidence of Sergeant Singh who explained the reason for reading the e-brief was to encourage the claimant to interact with his colleagues better, an issue that had been identified as a concern. We did not accept that had the effect of humiliating and embarrassing the claimant. He was a valued member of the team and Sergeant Singh wanted to help the claimant progress and become more involved in the team. Reading the e-brief was one way to do so. We accepted Sergeant Singh's evidence that the claimant's race was entirely irrelevant to the issue at stake. Sergeant Singh's principal and sole concern was to assist the claimant and improve his performance.
174. We found no evidence that Sergeant Singh shouted at the claimant or otherwise acted in an inappropriate way towards the claimant. We accept the claimant may not have liked the instructions Sergeant Singh gave him, such as reading the e-brief and feedback as to his officer safety and response, but this was part of Sergeant Singh's duty, something he took very seriously. Sergeant Singh was keen to ensure each of those officers under his control improved and reached a suitable standard and reached their potential. Race

was entirely irrelevant to this issue. In the claimant's evidence he stated that Sergeant Sing was "always angry and always shouting" but we did not consider that credible and found Sergeant's Singh's evidence to be preferable.

5 175. We also did not accept the claimant's assertion that Sergeant Singh had threatened the claimant with arrest with regard to the error in the safe log. We found Sergeant Singh's evidence to be more credible and more likely than not to be correct.

10 176. With regard to the events of 13 February 2017 we did not accept the claimant's assertion that Constable McKirdy did not attend court. We did not find the claimant's evidence in this regard to be credible. The claimant did not raise this matter at the time. We also note Constable McKirdy's statement that was provided to the investigation wherein he stated that while he could not recall specifically, he "must have attended" because he was the reporting officer and was cited to attend. Further, we are satisfied that if Constable
15 McKirdy had been in the same position as the claimant, namely failed to attend at the police station when rostered to do so, he would have been treated in precisely the same way as the claimant. We preferred Sergeant Singh's evidence in this regard.

20 177. With regard to what the claimant was told by Sergeant Singh as to his attendance at the office before court, we preferred the evidence of Sergeant Singh to the claimant. The claimant argued that the discussion was more general and that in essence he did not consider there to have been an instruction to attend the office. That contradicts what Sergeant Singh says.
25 Moreover, there are a number of other sources of evidence that support what Sergeant Singh says. Firstly, Sergeant Hamill provided a statement to the investigation wherein she confirmed that she heard Sergeant Singh on the telephone with the claimant. She specifically recalled him telling the claimant that "I expect you to report here as soon as possible for duty" and that it was
30 clear that the claimant had been given an order or instruction to do so. The claimant's position was that Sergeant Singh had called him early in the morning of 13 February to tell him to attend the office after court but there

would be no reason why such a call would be made at that time if the only reason was to tell the claimant to come to the office after court. It was more likely than not that Sergeant Singh called the claimant firstly to check his welfare given his surprising absence and secondly to require him to attend the office as soon as reasonably practicable before court.

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178. The claimant had argued that the electronic system somehow supported his position and yet the information shown to him upon his return to the office supported the position advanced by the respondent. The claimant's assertion that he thought he was on holiday was not credible from the evidence. This was not something the claimant had raised at the time (nor is it within his claim form). We found the evidence of Sergeant Singh on this point clear; he issued the claimant with an instruction. The claimant was unable to provide a rational response when asked by Inspector Kyle why he believed that he could still proceed to court first.

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179. The fact that the claimant subsequently accepted that he was guilty of the conduct when presented with the charges (albeit arguing it did not amount to gross misconduct) was important. That acceptance had been done with the knowledge of his advisers, the Scottish Police Federation, who had fully considered the statements and information obtained and had taken the claimant's instructions. He had admitted to them that he had failed to follow the instruction. He had not told them that there was no instruction from Sergeant Singh and accepted that there had been, which was contrary to his later position.

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180. We found support for this position from the evidence presented in relation to what had happened the previous day when the claimant had a discussion with his colleague, Constable Panther. Constable Panther had told the claimant, when the claimant said that he would not attend the office before court, that the practice in Paisley was to attend court. The claimant was unable to explain to Inspector Kyle why he did not consider that to be accurate (and instead followed what he said the practice was in Greenock). The claimant was told what the practice in Paisley was and chose not to follow it, despite knowing what it was. We did not find the claimant's evidence credible in this regard.

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Law

Jurisdiction

181. The complaints of disability discrimination were brought under the Equality Act 2010. By section 42(1) the office of constable is to be treated as
5 as employment by the chief officer and responsible authority. Thus, while police officers are not employees, they are covered by the Equality Act 2010 in respect of the claims before this Tribunal.

182. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

10 Burden of proof

183. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

“(2) *If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*”
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(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.”*

184. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

20 185. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

25 186. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v**

Nomura International plc 2007 ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

5 187. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

188. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

10 Time limits

189. The time limit for Equality Act claims appears in section 123 as follows:

“(1) Proceedings on a complaint within section 120 may not be brought after the end of –

15 *(a) the period of three months starting with the date of the act to which the complaint relates, or*

(b) such other period as the Employment Tribunal thinks just and equitable ...

(2) ...

(3) For the purposes of this section –

20 *(a) conduct extending over a period is to be treated as done at the end of the period;*

(b) failure to do something is to be treated as occurring when the person in question decided on it”.

25 190. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** 2003 IRLR 96 which deals with circumstances in

which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52:

5 *“The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of “an act extending over a period.” I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a*
10 *“policy” could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is “an act extending over a period” as distinct from a succession of unconnected*
15 *or isolated specific acts, for which time would begin to run from the date when each specific act was committed.”*

191. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.
- 20 192. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.
- 25 193. In **Barclays v Kapur** 1991 ICR 208 the then House of Lords held that a discriminatory practice can extend over a period. The key issue is to distinguish between a continuing act and an act with continuing consequences. The Court held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which
30 extend over a period of time

194. Since 6 May 2014, anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See section 140B of the Equality Act 2010 and **Luton Borough Council v Haque** 2018 UKEAT/0180/17.

Extending the time limit

195. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

196. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- The Tribunal should have regard to the prejudice to each party.
- The Tribunal should have regard to all the circumstances of the case which would include:
 - o Length and reason for any delay
 - o The extent to which cogency of evidence is likely to be affected

- The cooperation of the respondent in the provision of information requested
- The promptness with which the claimant acted once he knew of facts giving rise to the cause of action
- 5 ○ Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

197. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1), but that it was often useful
10 to do so. The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account.

198. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the
15 Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

199. That has to be tempered with the comments of the Court of Appeal in **Chief
20 Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

200. Finally we have also taken into account the judgment of Underhill LJ in **Lowri
25 Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed.

Direct discrimination

201. Discrimination is defined in section 13(1) as follows: “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”
202. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: “On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”
203. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person.
204. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed** 2009 IRLR 884, in most cases where the conduct in question is not overtly related to [the protected characteristic], the real question is the “reason why” the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. That is what the Tribunal has been able to do in this case.
205. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** 2009 IRLR 884 the Employment Appeal Tribunal recognised two different approaches from two (then) House of Lords authorities - (i) in **James v Eastleigh Borough Council** 1990 IRLR 288 and (ii) in **Nagaragan v London Regional Transport** 1999 IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan**, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged

discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the application of E) v Governing Body of the Jewish Free School and another** 2009 UKSC 15. The burden of establishing less favourable treatment is on the claimant.

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206. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of **Anya v University of Oxford** 2001 IRLR 377.
- 10 207. In **Glasgow City Council v Zafar** 1998 IRLR 36, also a (then) House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.
- 15 208. In **Shamoon v Chief Constable of the RUC** 2003 IRLR 285, a (then) House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as he was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.
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209. It is also important to note that the treatment would be “because of the protected characteristic” if it was “a substantial or effective though not necessarily the sole or intended reason for the treatment” (**R v Commission for Racial Equality** 1984 IRLR 230).
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210. We took account of chapter 3 of the Code of Practice on Employment issued by the Equality and Human Rights Commission, which deals with direct discrimination.

211. In terms of section 26 of the Equality Act 2010:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and 25

5 (b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

212. Section 26(4) of the Act provides that:

10 “(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B;

the other circumstances of the case;

whether it is reasonable for the conduct to have that effect.”

15 213. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill:

20 *“In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other*

25 *circumstances (subsection 4(b)).”*

214. The Equality and Human Rights Commission's Code of Practice states (at paragraph 7.18) that in deciding whether or not conduct has the relevant

effects account must be taken of the claimant's perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

215. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906).

216. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant's dignity or creating the relevant environment) the claimant's perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (**Lindsay v LSE** 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words "intimidating, hostile, degrading, humiliating and offensive" and said "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught".

217. We took account of chapter 7 of the Code of Practice on Employment issued by the Equality and Human Rights Commission, which deals with harassment.

Victimisation

218. Victimisation in this context has a specific legal meaning defined by section 27: 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.
- (1) Each of the following is a protected act--

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- 5 (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.
219. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
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220. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the “reason why”. In other words, the protected act must be an effective and substantial cause of the treatment, it does not need to be the principal cause.
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221. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC** 2013 ICR 337.
- 20 222. We took account of chapter 9 of the Code of Practice on Employment issued by the Equality and Human Rights Commission, which deals with victimisation.

Submissions

223. Both parties had provided lengthy written submissions which were spoken to at length on the final day of the hearing. Both agents were able to deal with questions that arose. The Tribunal carefully considered the submissions that were presented, both in writing and orally, together with the evidence presented to the Tribunal and productions to which the Tribunal’s attention
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was directed. The decision reached by the Tribunal was unanimous. We deal with the relevant submissions under each of the issues below.

Decision and reasons

224. We turn now to each of the issues, agreed by the parties as to be determined by the Tribunal.

Direct discrimination

225. We consider firstly the issues with regard to the recruitment process. We are able to consider them together because the respondent's agent accepted that at the very least the claim of direct discrimination with regard to the recruitment process was an act extending over a period (if established). It is therefore appropriate to consider the claims within that period together. The issues are:

1. **Is the claimant's complaint brought in terms of section 13 of the Equality Act 2010 ("the 2010 Act") that he was subjected to less favourable treatment during the recruitment period of October to December 2014, time barred because it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?**
2. **Is the claimant's complaint brought in terms of section 13 of the 2010 Act that he was subjected to less favourable treatment by being compelled to take a component of the recruitment process (the fitness test) twice, time barred because it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?**

226. The claimant contacted ACAS to inform them that he intended to raise a claim on 30 October 2018. The ACAS early conciliation certificate was issued on 28 November 2018. The claim was lodged on 14 December 2018. We accept the respondent's submission that claims in respect of acts prior to 1 August 2018 are accordingly time-barred. The claimant's agent accepted that the claim of direct discrimination (with exception of the claim relating to the dismissal) is

time barred. The claimant argues that the claims were lodged within such period as was just and equitable or that they form part of a continuing act of discrimination leading up to and including the dismissal such that the claims are in time. We will consider that below.

5 227. The respondent's agent asserted that the exact date as to when the claimant was compelled to take a component of the recruitment process for a second time is not averred but it is likely to be around May 2015 as this is just before the claimant was appointed as a probationary police constable. It must have been before his start date in June 2015. It is the respondent's position that the
10 allegation that he was subjected to less favourable treatment by being compelled to take a component of the recruitment process twice is significantly out of time. It is alleged to have occurred more than three months prior to the claimant contacting ACAS. This was not disputed by the claimant's agent.

15 **3. If yes, is it just and equitable to extended the period within which this part of the claim may be brought?**

The claimant's agent's submissions

228. The claimant's agent argued that if it was not accepted that the claimant was subject to a continuing act of discrimination, the claims in relation to direct
20 discrimination that were out of time (all except the dismissal) and the claim of harassment should be extended because it is just and equitable. It was submitted that while the Keeble factors should be considered, the emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing.

25 229. The claimant's agent argued that the evidence was not materially affected, since even the oldest claim, that relating to recruitment was dealt with by the hearing of evidence from Mr McArthur. In respect of the claimant's allegations in respect of his Action Plan, the report of Chief Inspector Gallagher permitted the tribunal to know accurately and in full what was decided. In respect of the
30 harassment claim regarding Sergeant Singh, we had the benefit of his action plan and his memory of events appeared to be strong.

230. The claimant's agent referred to **Berry v Ravensbourne National Health Service Trust** [1993] ICR 871. In this case, it was considered appropriate to extend the time limit for discrimination claims include where a claim of race discrimination was additional to and overlapped with an existing unfair dismissal complaint which was made in time but had not yet been heard. The claimant elected not to escalate his more minor concerns with his employer in order to prevent facing additional hardship during his employment. On his dismissal it became apparent that his earlier grievance and his Employment Tribunal claim were influencing the decision maker, and so it was necessary for him to raise the earlier acts of discrimination. In the claimant's submission, the claimant should not face hardship for his decision to continue with his employment, in which he was already facing discrimination and elect only to raise these claims with the Employment Tribunal on his dismissal.

The respondent's agent's submissions

231. The respondent's agent argued that it would not be just and equitable to extend the time limit. He submitted that the burden is on the Claimant to persuade the tribunal that it was just and equitable to extend time - **Robertson v Bexley Community Centre (trading as Leisure Link)** [2003] IRLR 434, para 25: *"A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time."*

232. He noted that the burden is on the claimant to persuade the Tribunal to exercise discretion. He submitted that the claimant had not done so. Even if the Tribunal considered the claimant had done enough to discharge that burden, it requires to decide whether to exercise the discretion. Referring again to **Robertson v Bexley Community Centre (trading as Leisure Link)** [2003] EWCA Civ 576, para 25: *It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and*

equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

233. The respondent's agent emphasised that there is no set checklist to go through - "*the only requirement being that it does not leave a significant factor out of account*" - **Abertawe**, para 18. The Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA, made clear that there are two factors that are "*almost always relevant*" when considering the exercise of any discretion whether to extend time – (a) the length of, and reasons for, the delay and (b) whether the delay had prejudiced the Respondent "*for example, by preventing or inhibiting it from investigating the claim while matters were fresh*" (para 19).

234. The claimant avers that the allegation dates back to October 2014 and ends at December 2014. However, it appears that what he is actually talking about occurred in January 2015 to June 2015. He does not actually talk to any treatment he received in the period October 2014 to December 2014. It was argued that this is indicative of the difficulties which the delay in bringing this case has caused in the cogency of the evidence and what the claim actually is about. This is a factor the Tribunal can take into consideration when deciding whether it is just and equitable to extend time. It was submitted that it cannot be just and equitable to extend time for a claim which the claimant himself cannot properly articulate, given the length of time which has passed.

235. The claim is some 3.5 to 4 years out of date which was argued as very significant. It would be just and equitable to extend time for bringing a claim back that length of time. The claimant's explanation for the delay in bringing these claims is that he had been given the job in June 2015 so did not wish to pursue the matter anymore. It was submitted that this reason does not stand up to a proper analysis given the fact that he has now raised it when he is facing dismissal in December 2018. It is not just and equitable to allow a claim of direct discrimination simply because it suits the claimant to raise it when he did. He was either subjected to direct discrimination during the recruitment process or he was not. If he decided not to pursue that at that time that is his choice. The respondent's agent argued that it suggested to

him he did not really believe that at the time. The reason for this delay is because in November/December 2018 it became in the claimant's own interests to "throw as much mud" at the respondent as he could when in June 2015 it did not suit his needs to raise a claim. That reason does not make it just and equitable to extend time.

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236. It is not known to the respondent what advice, if any, was received by the claimant. It was argued that the claimant provided no evidence to suggest that advice given to him was incorrect or misled him in any way. However, it is clear that this is not a case where the claimant was ignorant of his rights since he avers that "I decided to make an employment claim. I contacted ACAS and received the reference R049720/15.". The claimant had an early conciliation certificate. That has not been produced by him however. He did not raise a claim in June 2015 when it would have been on time. If he had honestly believed what he is alleging now then he would have done so then. The reasons for the delay were not related to the claimant's lack of knowledge of his rights. He did not act promptly when he knew of his rights to raise a Claim.

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237. The respondent's agent accepted that the Tribunal must also consider the relative prejudice that extending the time would cause to the parties. The prejudice to the claimant is clear, as he will have his claims struck out. However, the Tribunal must also take into account the prejudice to the respondent. The cogency of the evidence has been affected by the delay. The respondent witnesses' reliability has been called into question simply because of the delay in bringing these proceedings. The respondent struggled to locate documents. Mr Morrison had long since retired from the Police. He was not called as a witness.

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238. The respondent's agent also argued that the delay allowed the claimant to introduce evidence about two people visiting his house and him only been offered a job after he had approached ACAS and it was impossible for the respondent to challenge that appropriately. This delay has effectively allowed the claimant to muddy the waters. It simply should not be allowed to proceed.

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239. It was submitted that the merit of the Claim is a factor that should be considered when determining whether or not it is just and equitable to extend time for bringing a claim - **Rathakrishnan v Pizza Express (Restaurants) Ltd** (EAT) [2016] ICR 283. In **Rathakrishnan** Judge Peter Clark, held that the matter should be referred back to the Employment Tribunal to decide the issue of exercising the discretion "*taking account of the balance of prejudice and the potential or demerits of the... claim*". It is submitted that this is a case where the claim is lacking in merit.

240. Now having heard evidence, it is clear that there is no evidence to support the claimant's position that anything which occurred during the recruitment process which was done because of his race. It was clearly done because of valid Police rules and procedure.

241. With regard to taking the fitness test twice claim, the respondent's agent argued this part of the Claim is 3.5 years out of time and so it was not just and equitable to extend time. He asserted that we do not even know from the claimant's case as it was presented who told him to do the fitness test again, when he did the fitness test again and what he was told as to why he required to do it again. The delay led to a lack of specification which has led to an issue with the cogency of the evidence and the ability of the respondent to defend this claim.

Decision

242. Looking at the matters giving rise to the claim in respect of direct discrimination for acts arising during the recruitment process, we are not satisfied that the claim was raised within such other period as we consider just and equitable.

243. The conduct in question ended in June 2015. The claimant candidly accepted that he could have raised a claim within 3 months of that date. Instead, he chose not to do so. He believed that since he had been offered the position, he would move on. He said he was pragmatic. He was aware of his right to raise proceedings but chose not to do so.

244. We considered each of the factors set out in the authorities in reaching our decision.

245. We firstly considered the prejudice to each party noting that there is always prejudice to both sides whatever we decide. We did take account of the fact that if we did not allow the claim to proceed, the claimant would be prejudiced as the claim would not be considered. Nevertheless, the claimant did have adequate time in which to raise his claim and he chose not to do so. The prejudice suffered by the respondent would be the effect time had upon the memories of the relevant witnesses. There were some areas of the evidence where the memories of the witnesses had been affected. We balanced the respective prejudice in our consideration.

246. With regard to the length and reason for any delay we took account of the lengthy delay that was occasioned and the fact that the claimant had chosen not to raise a claim at the time of the events. The delays were very lengthy. The claimant had the opportunity to raise the matter at the time and have the matter judicially determined, which would have allowed the issues he faced to have been raised and properly examined, at the relevant time. The failure to do so affected the evidence before us.

247. The latter point emphasises the extent to which cogency of evidence is likely to be affected since in this case the evidence was affected. We take account of what the respondent's agent says in that regard. The inability of the claimant himself to clearly articulate the time matters happened combined with the fact Mr Morrison had long retired and the difficulty locating documents going back to the time in question are significant factors of which we take account. While Mr McArthur was able to use the computer system the time that had passed did have an impact upon his recollection of matters.

248. There were no issues with regard to the cooperation of the respondent in the provision of information requested but we do take account of the promptness with which the claimant acted once he knew of facts giving rise to the cause of action. He knew at the time that he had a claim and that he believed his race was a reason for the treatment. Despite that he chose to accept the

matter and move on. We take into account that the claimant was embarking upon a new career but equally the claimant was clear that he always challenged behaviour he considered to be related to race. He had the opportunity to do so on this occasion but did not do so until significantly later.

5 249. This is not a case where the steps taken by the claimant to obtain advice once he knew of the possibility of taking action was a live issue since the claimant was aware of the position but instead chose to take no formal steps. It was a conscious decision of the claimant not to take matters forward.

10 250. We placed considerable weight on the need for a fair hearing, which is equally applicable to both the claimant and the respondent. We preferred the respondent's submissions in this regard. We also considered the authorities relied upon by the claimant's agent but distinguished them. In **Berry** the unfair dismissal claim was overlapping with the discrimination claim. We considered the facts of this case to be different.

15 251. Having balanced all of the factors we decided that the claim in respect of recruitment was not raised within such a period that was just and equitable. It would not be fair and just to allow this claim to proceed. The period of time beyond the original limitation period was very significant. The cogency of the evidence has been affected. The claimant made a choice not to proceed.
20 From the evidence before the Tribunal the claimant has not discharged the onus of showing that it is just and equitable to extend the time and we do not exercise our discretion to do so.

25 252. The claims of direct race discrimination in relation to the recruitment process were raised outwith the statutory timescale and they were not raised within such a period as was just and equitable.

3 If yes to 2, was the claimant subjected to less favourable treatment because of his race during the recruitment period of October to December 2014?

30 253. While we concluded that the claims were raised outwith the statutory time scale and it was not just and equitable to allow them to proceed, and given

our conclusion below that they did not form part of an act extending over a period and therefore the Tribunal did not have jurisdiction to consider the matter, we decided to consider from the evidence we heard whether or not the treatment was by reason of race (in the event we were wrong in our earlier conclusion). We are conscious that the time that had passed did have an impact upon the evidence but given the seriousness of the issues raised, we considered it would be useful to the parties to understand what our decision in this issue would be if the Tribunal did have jurisdiction to consider it.

The claimant's agent's submissions

254. The claimant's agent noted that the recruitment application process began in September 2014. At this time the claimant was invited to attend a fitness test which he anticipated would allow him to progress with the recruitment process, and he passed. The claimant's agent argued that from the evidence provided by Mr McArthur, vetting officer and retired Police Sergeant we learned the following:
- the claimant was listed twice on a "Vulnerable Persons Database";
 - the claimant was unlikely ever to have been told he was being placed on this database;
 - the first entry was defined as an "adverse dealing" with the Police;
 - the first entry referred to a civil matter, specifically, an interim interdict;
 - that he was the decision maker who elected to withdraw the claimant's vetting;
 - that he was aware that the standard of proof for civil matters was lower than the standard of proof for criminal matters;
 - that he was aware that the interim interdict did not afford the police a power of arrest;

- the claimant's wife had called in relation to the interim interdict. It was this event that led to the claimant being defined as a so-called "Vulnerable Person";
- 5 • the second entry related to the claimant having made a complaint to the police;
- the vetting form does not define an "adverse dealing", but does provide the example of an occasion where the applicant is required to give their particulars to the Police;
- 10 • he viewed the claimant's failure to disclose the adverse dealing to be an "integrity issue"

255. The claimant advised that he had no knowledge of being placed on such a database at any time. He also stated that he had never been asked to provide his particulars to the Police following his wife's call, albeit the police clearly had his particulars to ensure the matter was recorded and dealt with. On receipt of written confirmation of the withdrawal of his application, the claimant immediately wrote a letter of appeal, which was then upheld on 20 February 2015.

256. The claimant compares his treatment in relation to this withdrawal with the treatment of a hypothetical white, Scottish applicant who was not delayed in their recruitment to the police due to having their application withdrawn. It is the claimant's position that the fact that his application was withdrawn was "because of" his race. Despite the rationale asserted by Mr McArthur that the decision was made due to the claimant's "adverse dealing" with the Police and his failure to disclose this matter, in ascertaining the "reason for" this decision to withdraw the application, the fact that the claimant was judged to lack integrity must be appreciated. There was a readiness on the part of the decision-maker to believe that that the claimant lacked integrity due to the failure to disclose an "adverse dealing" with police. The race of the claimant would be apparent to the decision-maker by virtue of the background checks he was conducting on the claimant. The claimant does not believe that a

white, Scottish applicant would have been refused vetting for having such an entry on the Vulnerable Persons Database.

257. It was argued that this matter can be further illustrated in noting that rather than having lacked integrity, the claimant had answered the questions on the form entirely honestly. When completing the form, he had been guided by the information on the form provided. In response to his appeal, the claimant received a letter from Mr Morrison, who advised that he would have expected the claimant to fill out this section of the form.
258. Within this letter, progression of the claimant's vetting application is also discussed. In this letter, it is said that the claimant's vetting application would be considered and that authentication from the Nigerian authorities would be required. In his evidence, the claimant advised that he had been told while undergoing training that, ordinarily, an applicant to the Police would be subject to close examination of the previous three years of his life only. It was evident from this letter that the vetting process would encompass a period of his life in which he lived in Nigeria, this was more than the requisite 3 year period. The claimant understood this also to be less favourable treatment to which he was subject because of his race. Had he been born in Scotland, rather than Nigeria, the claimant would not be subject to scrutiny for more than 3 years of his life, even if he had lived abroad for a period of time, provided that he satisfied the condition of living in the United Kingdom for a continuous period of 3 years prior to making an application to join Police Scotland. Accordingly, the claimant would not have been delayed in his progression with his police career.
259. The claimant understood, from the letter provided in response to his appeal, that his vetting process was delayed on two occasions, firstly by the withdrawal of his application and, secondly, by the additional vetting. The claimant provided raised ACAS Early Conciliation as a consequence of these incidences of direct discrimination and provided the reference number in his claim form. However, just shortly after his raising this matter with ACAS, he received confirmation of his reappointment: on 9 June 2015. Due to this delay, he was required to re-take his fitness test, which had become obsolete. This

is the subject matter of the second act of direct discrimination. By the time he took up his post, he was 6 months behind training and had lost 6 months' worth of salary. Further, he had been told that he was dishonest, which caused him some distress and "still affects" him "to this day".

- 5 260. Finally, the claimant's agent submitted that in spite of this treatment, the claimant remained resolute in his desire to join the Police Service and took a "pragmatic" approach to the matter. He did not pursue the claim to the Employment Tribunal due to his desire to "progress". This is an approach we saw the claimant take many times in the face of adversity in the course of giving his evidence. He remained of the view that both the withdrawal of his application and the requirement for him to re-take his fitness test was less favourable treatment due to his race.

The respondent's agent's submissions

- 15 261. The respondent's agent submitted that the vetting process was carried out as normal by the respondent during the recruitment period. The vetting process was not restricted to any time period or related to the period of time resident in the UK. It is an assessment of the suitability of a candidate to be a police officer. Vetting takes into account all relevant information, including personal details, family and domestic circumstances, personal character and financial circumstances.

- 20 262. If a white Scottish applicant had lived abroad for a period of time prior to living in the UK for a continuous period of 3 years then matters pertaining to personal details, family and domestic circumstances, personal character and financial circumstances which may have occurred during that period living abroad would be taken into account.

- 25 263. The respondent's agent submitted that the claimant appears to be suggesting that vetting should only relate to the previous three years of residence within the UK. This is simply untrue. He could not tell the Tribunal who told him that. That would have been an error on the part of the recruitment team. Mr McArthur was quite clear on the actual process. The vetting was done because it was an essential and valid recruitment step. It was delayed
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because the claimant had not revealed that an interdict had been taken out against him and that the Police had cause to visit his home in January 2014 because his wife had phoned them following an argument. Mr McArthur highlighted this matter, and the decision was taken not to pass his vetting because of that fact, not because of his race.

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264. The claimant appealed and on review his explanation for not disclosing this was accepted and he passed his vetting. He was then appointed as a Cadet at the next available intake.

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265. It was submitted that there is no evidence whatsoever in support of his accusation that the delay to his application was because of his race. It cannot be inferred from the facts because the police visit and the fact of the interdict taken together with his non-disclosure of the police visit to his home was a serious matter which had to be taken into account. It is abundantly clear that is why his security vetting was originally declined. In regard to the need to obtain a Police Clearance Certificate every foreign national and every UK national who has spent time abroad has to go through this process. The fact that the claimant was given the benefit of the doubt after his explanation and on review he passed the security vetting does not in any way suggest that Mr McArthur was wrong to raise it. Indeed, it was submitted that Mr Morrison says in his letter he would have expected the claimant to have raised it. However, the fact he was given the benefit of the doubt rather calls into question the accusation by the claimant that there was racism at play. If there was an institutionally racist organisation, they had the perfect excuse to exclude the claimant from the police at the earliest stage.

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266. Finally, the respondent's agent submitted that the claimant's position that he had to go to ACAS and was then given an offer is not adequately pled. In any event it does not stand up to scrutiny. It was clear that the claimant was going to be accepted into the police after Mr Morrison's letter of February 2015. The further delay was simply due to the fact that cadets are taken in cohorts to commence a training class together, rather than having individual start dates.

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267. With regard to the fitness test claim, the respondent's agent noted that the claimant accepted that he was required to take a fitness test twice due to the fact that the first one he completed was out of date due to the time it took to complete his vetting as a consequence of his failure to disclose a court order which had been made against him which then required to be investigated. The requirement to do the fitness test again was not because of his race but because of a delay between his initial assessment and appointment caused by the claimant's failure to disclose relevant information and that having to be reviewed. It was because of the Police requirements to carry out the fitness tests. It is too remote to argue that because the delay in the vetting process was because of his race (which is denied obviously) then the requirement to do the fitness test again was because of his race. One does not automatically follow on from the other

Decision

268. The first claim with regard to recruitment relates to the "extraneous vetting to which he was subject by virtue of his Nigerian nationality during the recruitment process". We accept the respondent's submission that the reason why the claimant was subject to the scrutiny he faced was solely (and only) because of his residence position. The clear evidence from the respondent, which we accepted, was that all candidates, irrespective of their race, are subject to the same checks. This means that all candidates require to satisfy the respondent that for the duration of their adult life they have not been subject to any relevant offences. For those who stayed in the UK, such checks can be undertaken by the respondent. However, for candidates who have spent periods of their adult life abroad, a certificate from the relevant authority is needed to establish the position. The treatment of the claimant was no different to any other candidate. A white Scottish applicant who had lived in Nigeria for the same time as the claimant would have been treated in precisely the same way.

269. The reason why the claimant was subjected to the checks was not because of his race but because of where he had spent some of his adult life, namely outside the UK. That is not unlawful direct discrimination.

270. We found no evidence to support the assertion that the recruitment process and decisions taken in relation to the claimant were because of race. The vetting officers applied the rules. We do not accept the submission that
5 concluding the failure of the claimant to disclose his dealings with the police was an integrity issue shows less favourable treatment. That was a reasonable conclusion open to the vetting officers given the nature of the role and the need for absolute honesty. Mr McArthur believed that the claimant's particulars had been noted by the police since his details had been recorded
10 by them on the police system. That ought to have been known by the claimant. His conclusion was reasonable (and entirely unrelated to the claimant's race). The claimant's agent's submissions are not upheld.

271. The fact the claimant may have been misinformed as to the recruitment process such that he believed checks did not extend beyond the 3 year period
15 does not alter the reason why he was treated in the way he was. He was unable to challenge the respondent's evidence that the rules were clear. It would be surprising if candidates who had spent their entire adult life in the UK had their full history checked but candidates from outwith the UK did not have their full history checked also. The claimant's race was entirely irrelevant
20 to the decision taken in this regard. In no sense whatsoever could it be said that the reason why the claimant was treated in the way he did with regard to recruitment was race. That claim has no merit.

272. With regard to the taking of the fitness component twice claim, we agree with the respondent's agent's submissions. Being compelled to take a component
25 of the recruitment process twice relates to the fact that the claimant required to undergo a second fitness test since at the point the offer was made to the claimant following the review of the decision, over 6 months had expired since his last fitness check. The reason why the claimant had to take a component of the recruitment process twice was therefore only due to the time it took to
30 resolve the claimant's appeal. Every candidate whose application is processed at a point when 6 months has elapsed since the last fitness test would require him having to take the test again. The claimant's race was in

no sense whatsoever related to the requirement to take the fitness test again and this claim is ill founded.

273. While it had not been set out as a separate issue, the claimant's agent in her written submissions suggested that "being delayed in beginning his employment with Police Scotland" was also an act of less favourable treatment because of race and we considered that. We do not accept the claimant's agent's submissions that race was in any way relevant to the decision to delay his appointment. Mr McArthur was clear in his evidence which we accepted that he believed the failure by the claimant to disclose his previous dealing with the police was a matter that affected his integrity and therefore the application was rejected. While the claimant did not consider the dealings he had with the police to be adverse, the approach of Mr McArthur was reasonable. His decision was entirely unrelated to the claimant's race. Any delays in the process were due to the rules of recruitment and the information the claimant provided and entirely unconnected to race. This claim has no merit.

274. Had this been a matter in respect of which the Tribunal had jurisdiction we would have found that the claim of direct racial discrimination in relation to the recruitment process had no merit.

275. The next set of claims and issues related to the period of time the claimant spent in Greenock, essentially during his probationary period. These claims were grouped together as such by the claimant's agent in her submissions. The respondent's agent also accepted that they were connected given the persons involved. We therefore consider those issues now. The relevant issues are:

7 Is the claimant's complaint brought in terms of section 13 of the 2010 Act that he was subjected to less favourable treatment by being placed on an action plan (on 9 February 2017) time barred as it was not presented to the Tribunal at the end of the period of three months starting with the date of the act to which the complaint relates?

10 **10 Is the claimant's complaint brought in terms of section 13 of the
2010 Act that he was subjected to less favourable treatment by
his supervisors making false allegations against him including
that he fell asleep while on duty (on around 19 January 2017) time
barred as it was not presented to the Tribunal at the end of the
period of three months starting with the date of the act to which
the complaint relates?**

10 **13 Is the claimant's complaint brought in terms of section 13 of the
2010 Act that he was subjected to less favourable treatment by
Inspector Thompson disobeyed a direct order to discontinue his
action plan (around 9 February 2017) time barred as it was not
presented to the Tribunal at the end of the period of three months
starting with the date of the act to which the complaint relates?**

15 **16 Is the claimant's complaint brought in terms of section 13 of the
2010 Act that he was subjected to less favourable treatment by
Sergeant McDougall falsely stating that he had not been up to
date with his crime reports (on around 28 January 2017) time
barred as it was not presented to the Tribunal at the end of the
period of three months starting with the date of the act to which
the complaint relates?**

20 276. The claimant contacted ACAS to inform them that he intended to raise a claim
on 30 October 2018. The ACAS early conciliation certificate was issued on 28
November 2018. The claim was lodged on 14 December 2018. The time limit
for the claimant to bring a claim for discrimination expired three months after
the alleged discriminatory act. The alleged acts prior to 1 August 2018 are
accordingly time-barred.

25 277. The date as to when the claimant alleges that Sergeant McDougall falsely
stated that he had not been up to date with his crime reports is not averred.
However, the latest this could have been is 13 February 2017 because this is
the date his grievance was raised. This was not disputed by the claimant's
agent.

278. The respondent's agent submitted that the date as to when the claimant alleged Inspector Thompson disobeyed a direct order to discontinue his action plan is not averred. However, the latest this could have been is 13 February 2017 because this is the date his grievance was raised.
- 5 279. The respondent's agent noted that the date as to when the claimant was placed on an action plan is not averred and appears to have been discussed on 9 February 2017. The respondent's agent pointed out that the claimant was never actually placed on an action plan *per se* as on 15 February 2017 he raised a grievance which led to the action plan being cancelled. It is the
10 respondent's position that the allegation that he was subjected to less favourable treatment by being placed on an action plan is significantly out of time, it being 9 February 2017. It is alleged to have occurred more than three months prior to the claimant contacting ACAS. The claimant's agent does not dispute that the claim is on the face of it, out of time.
- 15 280. It is not disputed that the claims of direct discrimination arising from events when the claimant was at Greenock are out of time.

8 Is it just and equitable to extended the period within which the claims relating to the claimant's time at Greenock may be brought?

- 20 281. The claims in respect of the claimant's treatment while at Greenock are around 18 months out of time. The claimant's agent argues that the claims should be allowed to proceed as it is just and equitable to do so. She argued the cogency of the evidence had not been affected as the Tribunal had Chief Inspector Gallagher's report.
- 25 282. The respondent's agent argued that the reason why the claimant did not pursue the claim at the appropriate time was simply because he accepted the outcome and the actions (his move to Paisley) and wished to move on. To then say 18 months later that the treatment was direct discrimination when he
30 did not appeal internally and only complained to the Employment Tribunal when facing dismissal calls into question his credibility on this point.

283. The respondent's agent argued that there is no general principle that it will be just and equitable to extend the time limit where the claimant is seeking redress through an ongoing internal procedure (**Apelogun-Gabriels v Lambeth** 2002 ICR 713,CA para 10, confirming the principle set out in **Robinson v Post Office** [2000] IRLR 804). In any event there was no significant delay in the conclusion of the claimant's grievance. He raised it on 13 February 2017 and got an outcome on 19 April 2017.

Decision

284. Looking at the matters giving rise to the claim in respect of direct discrimination for acts arising during the claimant's time in Greenock, we are not satisfied that the claim was raised within such a period that was just and equitable.

285. The claimant knew of the right to claim but chose not to do so. He strongly believed that he had been unlawfully treated but took no further action. The conduct in question took place around 18 months before the claim was raised. The claimant could have raised a claim within time but chose not to do so. He believed that his grievance had been resolved, even although he still maintained that he had been subject to unlawful treatment. He did not appeal against the outcome, even although he believed there to be unlawful discrimination. The claimant did also not raise any issue with regard to Inspector Thompson ignoring an order or raise any issue with regard to Sergeant McDougall falsely relying on crime reports. These issues were not raised by the claimant at the time. The matter had essentially been resolved when the claimant decided to accept the grievance outcome in relation to his time in Greenock and move on with his career in Paisley.

286. We considered each of the factors set out in the authorities in reaching our decision.

287. We firstly considered the prejudice to each party noting that there is always prejudice to both sides whatever we decide. We did take account of the fact that if we did not allow the claim to proceed, the claimant would be prejudiced as the claim would not be considered. Nevertheless, the claimant did have

adequate time in which to raise his claim and he chose not to do so. The prejudice suffered by the respondent would be the effect time had upon the memories of the relevant witnesses. There were some areas of the evidence where the memories of the witnesses had been affected. Although we did
5 have Chief Inspector Gallagher's report, he did note in his evidence that the issues arising had occurred some time ago and the time lag did have an adverse impact upon memory. We balanced the respective prejudice in our consideration.

288. With regard to the length and reason for any delay we took account of the
10 lengthy delay that was occasioned and the fact that the claimant had chosen not to raise a claim at the time of the events. The delays were lengthy, 18 months. The claimant had the opportunity to raise the matter at the time and have the matter judicially determined, which would have allowed the issues he faced to have been raised and properly examined, at the relevant time.
15 The failure to do so affected the evidence.

289. There were no issues with regard to the cooperation of the respondent in the provision of information requested but we do take account of the promptness with which the claimant acted once he knew of facts giving rise to the cause
20 of action. He knew at the time that he had a claim and that he believed his race was a reason for the treatment. Despite that he chose to accept the matter and move on.

290. This is not a case where the steps taken by the claimant to obtain advice once he knew of the possibility of taking action was a live issue since the claimant was aware of the position but instead chose to take no formal steps.

25 291. We placed considerable weight on the need for a fair hearing, which is equally applicable to both the claimant and the respondent. While it is important to the claimant (and society generally) to have claims of discrimination heard, it is also fair to those involved with the claims to have notice of them within a reasonable period of time to allow matters to be dealt with justly. The time that
30 had passed in this case and the circumstances surrounding the decision not to raise the claim significantly affects the ability to have a fair hearing.

292. Having balanced all of the factors we decided that the claim had not been raised within such a period that was just and equitable. The period of time was significant in this case. The claimant had decided to move on with his career. The issues arising occurred over 18 months before the claim form had been lodged and memories were undoubtedly affected. From the evidence before the Tribunal the claimant has not discharged the onus of showing that it is just and equitable to extend the time and we do not exercise our discretion to do so.

293. We decided therefore that the claims of direct race discrimination in relation to the claimant's time at Greenock were not raised within such a period that was just and equitable.

9 If yes to 8, was the Claimant subjected to less favourable treatment because of his race by being placed on an action plan?

294. While we concluded that the claims were raised outwith the statutory time scale and it was not just and equitable to allow them to proceed, and given our conclusion below that they did not form part of an act extending over a period and therefore the Tribunal did not have jurisdiction to consider the matter, we decided to consider from the evidence we heard whether or not the treatment was by reason of race (in the event we were wrong in our earlier conclusion). We are conscious that the time that had passed did have an impact upon the evidence but given the seriousness of the issues raised, we considered it would be useful to the parties to understand what our decision in this issue would be if the Tribunal did have jurisdiction to consider it.

The claimant's agent's submissions

295. The claimant's agent submitted that the claimant raised a grievance on 3 March 2017, which related to the decision to place him under a performance review or "action plan". This is the subject matter of this part of the direct discrimination claim. He became aware of this decision on 9 February 2017. The grievance was investigated thoroughly by Chief Inspector Gallagher, who found evidence of some concerning conduct by the claimant's superiors, specifically, Inspector Thompson, who was the most senior of the police

officers named in the report and against whom the claimant raised his grievance. It was submitted that his actions indicated that the claimant's race was the reason why he was subjected to direct discriminatory. It was submitted that Inspector Thompson was found to have:

- 5 (a) begun the process of implementing an "action plan" under the auspices that the claimant had fallen asleep on duty, without any written record or report to substantiate this assertion;
- (b) persisted in raising this action plan, despite having been advised of (a) by his subordinate, Sergeant Mackay;
- 10 (c) discussed his unspecified "concerns" about the claimant with his new line manager, in particular, referring to the way he spoke;
- (d) insisting that the claimant remained on "monthly reports" following completion of his probationary period;
- (e) threatened to report the claimant to the Procurator Fiscal;
- 15 (f) used unsubstantiated failures to meet objectives as justification to place the claimant on the action plan.
- (g) Advised Sergeant Mackay, incorrectly, that there were other occasions that the claimant had fallen asleep.

20 296. It was argued that the list above showed that Inspector Thompson was undeterred in his intention to have the claimant placed on an Action Plan, and that this Action Plan would persist, despite having no justification for this. The claimant's agent argued that it was telling that Chief Inspector Gallagher candidly advised that he considered that the claimant to be correct to refuse to be placed under the Action Plan. Further, it was submitted that the
25 discussion Inspector Thompson had with Sergeant Lawrie indicated the underlying motivation in subjecting the claimant to unfavourable treatment: his race. Sergeant Lawrie reports Inspector Thompson referring to the way the claimant spoke and his communication skills as being problematic. What is evident is that the claimant speaks with a Nigerian accent. It is for this

reason, it was argued, that Inspector Thompson complains about the claimant's communication to Sergeant Lawrie.

297. It was argued that the claimant was subject to less favourable treatment due to the fact that his colleagues, and in particularly his superiors, are given the strong message that the claimant's performance is poor by virtue of him having been placed on an Action Plan.

298. Finally, it was submitted that Sergeant McDougall only had the opportunity to cause damage to the claimant's reputation by adding to his Action Plan to suggest that he had failed to complete crime reports due to the fact that he had ensured that such a plan was in place and this only came about "because of" the claimant's race. Aside from this matter, the claimant holds the view that Sergeant McDougall did report issues with his crime reports due to influence from Inspector Thompson, who had displayed covert racism.

The respondent's agent's submissions

299. The respondent's agent denied that the reason for the treatment was race. He submitted that the allegation was investigated by Chief Inspector Gallagher as part of the claimant's grievance which was raised on 13 February 2017. He then submitted a detailed report on 3 March 2017. The respondent's agent noted the Tribunal heard evidence of CI Gallagher: He was independent of all this. He was a credible and reliable witness. He had been extremely fair to all parties in his investigations. He did not shy away from criticising the way in which the claimant's senior officers had gone about implementing the action plan and the reasons for it. However, he was also clear that he could see no evidence that this had been done because of the claimant's race. He would not have been slow in saying if he had thought that race was the factor behind the way in which the claimant had been treated. There was according to him no overt racism. In effect he could find evidence of the claimant not being managed appropriately, but not evidence that this inappropriate management was done because of his race.

300. The respondent's agent asked the Tribunal to bear in mind Chief Inspector Gallacher spoke to 11 different people as part of the Investigation. He asked

5 them all if they had witnessed racism or anything which would suggest to them the claimant had been treated differently because of his race. None of them told him they had. He has 26 years' experience in Policing. He was clearly independent. He is an experienced investigator. He reached the view that there was no need to pursue the Senior Officers for gross misconduct. He did not feel the need to refer the matter to professional standards. He did not find that anyone had lied.

10 301. The respondent's agent also noted that the outcome of the grievance was decided by Superintendent Kennedy. There was essentially a second pair of eyes over the evidence. Superintendent Kennedy did not believe it necessary to refer anyone to conduct which he most certainly would have done if there was evidence of racism. The claimant was satisfied that his grievance had been resolved although he still felt Inspector Thomson's actions were motivated by racism. Importantly the claimant provided no evidence himself to back up these claims. He also did not appeal the outcome of the grievance.

15 302. It was submitted that it cannot be inferred from the actions of his senior officers to place him on an action plan that they did so because of his race. The senior officers clearly had genuine concerns in regard to the claimant's ability to perform his role as a police officer. They had held a meeting to discuss the action plan between themselves. They were not colluding to act in a racist way. There were genuinely held views in regard to the claimant's performance. The claimant disagreed with their views, but not because of his race, he just felt he had been performing satisfactorily. The Senior Officers fell into error by not properly recording and noting their concerns which was unfair to the claimant, but it cannot be inferred that it was racism being directed at the claimant.

20 303. The respondent's agent concluded by saying that there can be little doubt that if Chief Inspector Gallagher had found that there had been actions by the senior officers which had been motivated by racism. he would not have hesitated to raise these matters

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Decision

304. This issue is whether the placing of the claimant on an action plan was because of his race. We preferred the respondent's agent's submissions in this regard. We accept that there was no express basis found by Chief Inspector Gallagher for placing the claimant on the action plan, but we find no evidence that race was in any way connected to the decision. There were some concerns as to the claimant's performance but these from the evidence available did not justify an action plan being instituted. The reason the action plan had been introduced or the catalyst for it was the belief that the claimant had been very tired during a suspect interview and could have been about to fall asleep. That was a serious issue.
305. Both Chief Inspector Gallagher and Superintendent Kennedy carefully considered the evidence before them. While Sergeant Lawrie had said that he thought the claimant was being treated differently he did not say that was because of race (or even could be because of his race). In fact, he told Chief Inspector Gallagher that there was no evidence of racial discrimination. If he believed race to have been relevant, he would have said.
306. Similarly, Sergeant Lawrie believed that Inspector Thompson had said that he had his "work cut out" in having to manage the claimant and that the claimant had communication issues. Those issues were related to the claimant's knowledge of the phonetic alphabet and radio communication skills and not connected to the claimant's use of English or Nigerian accent. That was the conclusion reached by Chief Inspector Gallagher who spoke to the individuals and we have no reason to doubt that to be the position. On that basis there was no basis to find that the behaviour encountered by the claimant at Greenock was connected to race at all.
307. We are satisfied from the evidence we heard that race was in no sense whatsoever the reason why an action plan was introduced. It was introduced due to the mismanagement of the claimant's senior officers who ought to have considered the matter as a welfare matter. Those individuals did not properly manage the claimant and action plans were introduced as a result. We do not

accept that the claimant's race was in any sense related to the decision in this case. That claim is ill founded.

308. While not set out specifically as an issue, the claimant's agent argued in her written submissions that the decision not to suspend the action plan was an act of direct race discrimination. We do not accept that it was. The evidence obtained by Chief Inspector Gallagher showed that Inspector Thompson believed the action plan was to proceed, even if he was mistaken in his belief. There was no evidence to suggest that race was in any way connected to that action. The claim is ill founded.
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309. We carefully considered each of the issues set out by the claimant's agent as evidencing, in her submission, direct racial discrimination. We did not accept her submission. The action plan was instigated because the officers in question believed there were performance issues, albeit the issues ought to have been dealt with as welfare matters. The persistence with the plan arose as a result of a misunderstanding as to what was to happen. Inspector Thompson believed the plan was to be introduced. The concerns Inspector Thompson raised with Sergeant Lawrie not stated to be due to race. Inspector Thompson and those managing the claimant at the time believed that there were issues with the claimant's performance. They may have been mistaken given the absence of documented evidence to support their belief but there was no basis whatsoever to link that belief or mismanagement with the claimant's race.
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310. Threatening to report the claimant to the Procurator Fiscal was legitimate since the claimant's actions had the potential to impact upon the investigation process and the failure of Inspector Thompson to inform the Procurator Fiscal was something Chief Inspector Gallagher required to be remedied.
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311. Similarly, the belief of the claimant's line managers that he was not meeting his objectives and that there were other occasions the claimant fell asleep were matters of management linked to the belief of the claimant's managers. There was no basis to suggest that any difference in treatment was due to the claimant's race. There was no basis upon which the Tribunal could infer race
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was a reason for the treatment. In any event we are able to make findings of fact from the evidence we heard that in respect of each of the incidents relied upon in respect of the claims of direct race discrimination arising during the period the claimant was at Greenock, race was in no way a reason for the treatment. Those claims, had the Tribunal jurisdiction to consider them, would have been dismissed.

12 If yes to 11, was the claimant subjected to less favourable treatment because of his race by his supervisors making false allegations against him including that he fell asleep while on duty?

312. While there were no express submissions by the claimant in relation to this allegation, the position was clear. The claimant believed that the suggestion he fell asleep was false and made because of his race.

313. The respondent disputed this. In any event this point formed part of the claimant's grievance. It was submitted that there was no evidence that the allegation that he fell asleep while on duty was made because of his race. It was submitted that it is debatable whether the allegation was entirely false. It may have been exaggerated, but the claimant himself accepted he had nodded off. The Procurator Fiscal had to be informed.

314. The evidence before the Tribunal showed that the claimant accepted that he was very tired and may well have begun to fall asleep during the interview. We do not accept that the claimant's race was in any way connected to the assertion that the claimant had done so. We considered that the only reason why this matter was raised by the claimant's colleagues was due to the seriousness of the issue. Falling asleep during an interview is clearly of considerable seriousness and we agree with the respondent's submission. This was not less favourable treatment because of race.

15 If yes to 14, was the claimant subjected to less favourable treatment because of his race by Inspector Thompson disobeying a direct order to discontinue his action plan?

315. While there were no direct submissions by the claimant in relation to this it was clear that the claimant believed the decision to proceed with the action plan was because of race. The respondent's agent noted that this allegation formed part of the claimant's grievance. He submitted that it was open to
5 debate whether Inspector Thompson did disobey a direct order to discontinue the claimant's action plan as there was some dubiety as to the conversation he had with Chief Inspector Brown. There was no actual finding by Chief Inspector Gallacher that Inspector Thompson disobeyed a direct order to discontinue the claimant's action plan. He found that different people had
10 different views as to the content of the conversation and the outcome agreed. However, even if that is a finding the Tribunal make there is no evidence before them to allow them to find that this was done because of the claimant's race.

316. We considered the evidence before the Tribunal and uphold the respondent's
15 submission in this issue. We are satisfied that the reason why Inspector Thompson considered with the action plan was because he believed he was entitled to do so. He disputed that he had been told to delay matters and the discussion was unclear. We are satisfied that the claimant's race was in no sense whatsoever connected to the decision. This claim is ill-founded.

20 **18 If yes to 17, was the claimant subjected to less favourable treatment because of his race by Sergeant McDougall falsely stating that he had not been up to date with his crime reports?**

317. Notwithstanding our decision above, we considered this issue. We are
25 satisfied that the reason why Sergeant McDougall stated the claimant had not been up to date with his crime reports was because he had looked at 2 reports and reached this conclusion. We accept that he did not look at a representative sample and the reports that he did consider were in fact not delayed due to the claimant's fault, since other input was needed. The reason why Sergeant McDougall had so acted was due to his management skills at
30 that time. He believed that he was assisting the claimant and helping him improve. While there was no basis from the documents before Sergeant

McDougall, there was no suggestion whatsoever that the claimant's race was a reason for the treatment.

318. As with the other findings, we did not require to have recourse to the burden of proof provisions since we are able to make direct findings of fact as to the reason why the respondent acted. In any event there is no evidence that would allow an inference to be made that the reason for the treatment could have been race.

19 **Are the alleged acts set out at 1, 4, 7, 10, 13 and 16 one-off acts with continuing consequences, or a continuing act culminating in the claimant's dismissal?**

The claimant's agent's submissions

319. The claimant's agent argued that the dates of direct discrimination brought to the Tribunal by the claimant are between 2015 and 2017. The claimant also brings claims of harassment and victimisation. The relevant date for the claim for the claim of victimisation are somewhat easier to pinpoint. These dates of these claims relate to the date of the detriments the claimant experienced, namely being subject to disciplinary proceedings, which was confirmed on 18 September 2019 and the dismissal, which was confirmed on 29 January 2019. The harassment ceased with Sergeant Singh's line management of the claimant on 9 May 2018.

320. The claims above range between the dates of 22 February 2015 and 29 January 2019. The claimant raised his first Tribunal claim on 14 December 2018. The claimant asserts that he was subject to a continuing act of discrimination between the dates of 22 February 2015 and 29 January 2019. The relevant date for such a continuing act ends with the last date of the discriminatory conduct. In this case, the claimant asserts that the relevant date is 29 January 2019.

321. It was argued that **Hendricks v Metropolitan Police Commissioner** [2002] EWCA Civ 1686 shows that there is no need to show that there was a policy, rule or regime for there to be a continuing act. The Court of Appeal stated that

the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably.

322. It was the claimant's position that, as is shown by Dame Angiolini's report, there is a culture of racism endemic within the police service. In fact, one police officer advised that it was extremely difficult to be promoted to the position of Sergeant if the individual was from a black, Asian or ethnic minority background. It was argued that it was evident from each of the claims made by the claimant that inherent within them was a prevention of him progressing as a police officer. This is proven, it was argued, by the final discriminatory act being his dismissal. The claimant's agent argued that the fact that the claimant's discrimination was continuing can be seen in the following facts:

- The claimant was delayed in his appointment to Police Scotland by virtue of the withdrawal of his vetting application;
- Following this refusal, there was a delay in his approving his vetting;
- the claimant was placed in Greenock where he was subjected to discriminatory acts by his superiors;
- discriminatory acts relating to his superiors only became apparent to the claimant as a result of having raised a grievance due to the discriminatory act. It was argued that all of these acts resulted from a negative, discriminatory stance against him taken by Inspector Thompson, who had influence and power over Sergeant McDougall who engaged in discriminatory acts. Further, Sergeant McDougall was only able to undertake this act of discrimination, by virtue of the claimant being subjected to the action plan which was discriminatory;
- As a consequence of the claimant's successful grievance, the claimant was moved to Paisley Police Station and under the line management of Sergeant Singh who, it was alleged, subjected the claimant to harassment, best exemplified by his placing the claimant on an action plan. He did so immediately on the claimant's arrival to his department,

which shows his motivation for doing so to be due to his knowledge that the claimant raised a grievance complaining of discrimination against his superiors. Sergeant Singh admitted to being aware of this from at least two weeks into the claimant's placement. This is when, as per Sergeant Singh's account, the claimant was placed on the action plan unjustly;

- The action plan continued and is evidence of discriminatory treatment throughout the claimant's placement at Paisley Police office;
- Due to having made Chief Inspector Gallagher aware of the claimant's perceived shortcomings and of the claimant's 2017 grievance, Chief Inspector Gallagher had a readiness to believe negative reports of the claimant and sent police officers to retrieve the claimant from Paisley Sheriff Court. This action legitimised the complaints of the claimant's misconduct on 13 February 2018 and assisted in having him disciplined and dismissed.
- Further, it was argued that the claimant's earlier grievance formed part of the deliberation of the dismissing officer. It is specifically noted that he made a call to both Chief Inspector Gallagher and Superintendent Kennedy during his deliberations that this matter formed part of his considerations in coming to the conclusion to dismiss the claimant. He believed the claimant to be "disingenuous" for stating that he received an apology from Superintendent Kennedy in his plea in mitigation. However, what is evident from the plea in mitigation was that the claimant said he had been apologised to for the way he was treated. It continued to be the case that the claimant understood himself to have been racially discriminated against and he did receive an apology for his treatment. The claimant was not disingenuous. The dismissal was the final act of discrimination and was both direct discrimination and victimisation.

The respondent's agent's submissions

323. The respondent's agent argued that the conduct set out at issues 1 and 4 is one course of conduct extending over a period running from October 2014 to June 2015. The end of that period is June 2015 when the claimant was

appointed. The claimant then worked as a Police Officer until his dismissal on 28 February 2019. He does not complain or raise a grievance about the way he was treated pre-appointment until he lodges a claim with the Employment Tribunal on 14 December 2018. In no way can the alleged acts set out at 1 and 4 be brought in time as part of a continuing act cumulating in the claimant's dismissal.

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324. Separately the respondent's agent argued that the conduct set out at issues 7, 10, 13 and 16 is essentially part of a course of conduct which led the claimant to lodge a grievance on 13 February 2017. This was conduct extending over a period which ended on 13 February 2017. The claimant accepted the outcome of the grievance and agrees to a move. There is then a completely separate incident which subsequently resulted in his dismissal. It was asserted that in no way can the alleged acts set out at issues 7, 10, 13 and 16 be brought in time as part of a continuing act cumulating in the claimant's dismissal.

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325. The respondent's agent noted that each individual act alleged to form part of the continuing act must actually be discriminatory. If any of those alleged acts are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act. He also argued that the appropriate test for a "continuing act" is whether the employer is responsible for "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (**Hendricks v Metropolitan Police Commissioner** [2003] ICR 530). In **Hendricks**, the Court of Appeal set out the test to be applied when considering whether a complaint is part of an act extending over a period (Mummery LJ): *"The focus should be on the substance of the complaints...was there an ongoing situation or a continuing state of affairs in which officers...were treated less favourably? The question is whether an act extending over a period as distinct from a succession of unconnected or isolated specific acts"*. [at 544]. To amount to a continuing act conduct has to share a number of features including being sufficiently linked in subject matter, participants and time.

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326. The Court of Appeal in **Aziz v FDA** 2010 EWCA Civ 304 noted that in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'. That is of particular relevance
5 in this case. The individuals involved in regards to the recruitment period of October 2014 to June 2015 were entirely different individuals involved in any other allegation. There is no evidence that those involved in the later allegations had any knowledge of the circumstances pertaining to the claimant's recruitment. The persons involved in the claimant's recruitment
10 had no involvement in the claimant's grievance. The less favourable treatment averred relating to the recruitment period of October 2014 to June 2015 is an entirely unconnected incident to the other alleged incidents.
327. It was submitted that the individuals, the location of the incidents and the whole nature and context of the incidents raised by the claimant in his
15 grievance form a separate and distinct course of conduct to the allegations pertaining to his recruitment. The claimant accepted the offer of the job in June 2015. He does not pursue a standalone claim at that time. He then raised a grievance on an entirely different matter in February 2017. The substance of these two complaints are different. There is nothing to say they
20 represent an ongoing situation. They involve entirely different departments, entirely different issues and entirely different individuals. There are two very distinct blocks of complaints which are unconnected specific acts. It is not enough in itself for the claimant to say well it is all racism and that is the link. There requires to be more than that.
- 25 328. Then there is the dismissal which is not out of time as that is a third separate and distinct act. It is not alleged that he was dismissed because of issues dating back to his recruitment and vetting. It is not alleged that he was dismissed due to issues dating back to his grievance. He is dismissed for a very specific incident of misconduct. He is in a different police station, in a
30 different role, he has different managers.

329. The respondent's agent concluded this issue by arguing that the only link to all these incidents is the claimant falsely accusing people of racism when his own actions are called into account.

Decision

5 330. We considered this issue carefully. We reminded ourselves of the law in relation to this matter as set out above. We noted that a continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. We took account of what Mummery LJ said. Our focus is on the substance of the complaints. The question is whether that
10 is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed. The focus in this area is on the substance of the complaints — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing
15 act by the employer.

331. For the avoidance of doubt, and in passing, we must record that we found no evidence whatsoever of any policy or regime of race discrimination (including, for the avoidance of doubt, any attempt to punish an officer who raises complaints of unlawful discrimination and protect those who are guilty of
20 discrimination, as the claimant suggested in evidence).

332. In order to decide whether there is a continuing act, the acts involved must in fact be discriminatory. We have found that the acts in question were not unlawful. As a consequence, they cannot form an act extending over a period and for that reason alone the claims should be dismissed.

25 333. Nevertheless, we considered even if they had been unlawful acts whether they should be considered as part of an act extending over a period. In doing so we examined the facts carefully. We found the respondent's agent's submissions in this regard wholly meritorious.

334. Firstly, we agreed that the conduct set out at issues 1 and 4 is one course of
30 conduct extending over a period running from October 2014 to June 2015.

The end of that period is June 2015 when the claimant is appointed. That was in essence the recruitment issue. The recruitment process was conducted by a defined set of individuals and the issues relied upon were discrete and unconnected to any of the other acts. The claimant got appointed and worked
5 as a Police Officer until his dismissal on 28 February 2019. He did not complain or raise a grievance about the way he was treated pre-appointment until he lodged his claim on 14 December 2018. The recruitment process was a standalone act and not part of a continuing course as contended by the claimant. Those claims are out of time.

10 335. Secondly, we accepted that the conduct set out at issues 7, 10, 13 and 16 are essentially part of a course of conduct which led the claimant to lodge a grievance on 13 February 2017. This related to the issues encountered by the claimant when at Greenock. It was conduct extending over a period which ended on 13 February 2017. The claimant accepted the outcome of the
15 grievance and agreed to a move to Paisley. While we accept Paisley is within the same overall division of the respondent, it is a separate office with separate lines of responsibility and control. We found no evidence to link what happened to the claimant in Greenock with what happened in Paisley. The ultimate commander is the same, but the direct reports are different. The acts
20 of the respondent in Greenock were discrete and separate to those relied upon subsequently. Those claims were also raised out of time.

336. The final act was the dismissal which itself was a standalone act and entirely unconnected to any of the previous acts. The dismissal was not related to any of the claimant's actions at Greenock nor of the actions that he says were
25 unlawful in Paisley. It was due to his conduct on the day in question which was unconnected to any previous alleged act of discrimination. It was a standalone act. The claim in respect of that act was within time. That claim, however, did not require the other claims in order to proceed and was not predicated in any way on the previous claims. It was a separate act and
30 separate claim.

337. We considered the authorities carefully to consider whether the employer is responsible for "an ongoing situation or a continuing state of affairs" in which

the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents and focused on the substance of the complaints. We did not find any ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. We found no conduct extending over a period in the sense required by section 123(3) of the Equality Act 2010 and instead found a succession of unconnected or isolated specific acts.

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338. We accept that it is possible to have conduct extending over a period where the forms of discrimination differ but there needs to be some form of connection linking the treatment together. We took into account the claimant's agent's submission as to alleged institutional racism and we carefully considered the passages in the Angiolini report and we carefully considered the evidence before the Tribunal from those present at the time. We considered whether the same or different individuals were involved in those incidents. The individuals involved in regard to the recruitment period of October 2014 to June 2015 were entirely different individuals involved in any other allegation. There is no evidence that those involved in the later allegations had any knowledge of the circumstances pertaining to the claimant's recruitment. The persons involved in the claimant's recruitment had no involvement in the claimant's grievance or matters arising in Greenock. The less favourable treatment relating to the recruitment period of October 2014 to June 2015 is an entirely unconnected incident to the other alleged incidents.

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339. Similarly, the individuals, the location of the incidents and the whole nature and context of the incidents raised by the claimant in his grievance form a separate and distinct course of conduct to the allegations pertaining to his recruitment. The claimant accepted the offer of the job in June 2015. He does not pursue a standalone claim at that time. He then raised a grievance on an entirely different matter in February 2017. The substance of these two complaints is fundamentally different. There is nothing to say they represent an ongoing situation. They involve entirely different departments, entirely different issues and entirely different individuals. There are two very distinct blocks of complaints which are unconnected specific acts. We agree with the

respondent's agent that it is not enough in itself for the claimant to allege that "racism" is the link. There requires to be more than that, something that suggests there was an act extending over a period and that the conduct was in some way connected. We found no connection at all and found the acts to be entirely separate and discrete acts.

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340. We carefully considered the argument that as shown by Dame Angiolini's report, there could be a culture of racism endemic within the police service and that one police officer advised that it was extremely difficult to be promoted if the individual was from a black, asian or ethnic minority background. The promotion issue was not relevant to this case. The issue was whether there was a culture of racism such that the claimant was prevented from carrying out his role somehow because of a culture whereby race changed the way the claimant was dealt with. We found no evidence of that whatsoever. The colour of an officer's skin was in no way related to any of the acts relied upon in this case.

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341. We also looked at the specific acts relied upon to determine whether there was an act extending over a period. As we said above there were discrete periods involving separate and on occasion independent staff and lines of command. The recruitment process was entirely separate to the operational issues which themselves were entirely separate from the disciplinary process, each with different staff and command structures.

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342. We do not accept that there was a connection between issues the claimant encountered at Greenock and Paisley. Sergeant Singh managed the claimant in an appropriate and fair way. There was no connection at all to his race. Any issues the claimant had at Greenock were not considered relevant and he was managed by his performance at Paisley. It is not correct to say that discriminatory treatment continued in Paisley but even if there was such treatment, that was entirely separate from the treatment in Greenock which itself was separate from the disciplinary process.

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30 343. We do not accept the claimant's agent's submissions that because Sergeant Singh made Chief Inspector Gallagher aware of the claimant's perceived

shortcomings and of the claimant's 2017 grievance, Chief Inspector Gallagher had "a readiness to believe negative reports of the claimant as to events from 13 February 2019". Sergeant Singh raised concerns legitimately and Chief Inspector Gallagher reached his own conclusions.

5 344. The fact that the dismissing officer made specific reference to the grievance did not somehow link the events which were entirely separate and independent acts.

345. Having carefully considered the evidence before us and applied the authorities, we conclude that there is no conduct extending over a period and
10 the claims were standalone or discrete claims. On that basis the direct discrimination claims, aside from those relating to the dismissal, were out of time and the Tribunal has no jurisdiction to consider them.

20 Was the claimant subjected to less favourable treatment because of his race by the act of dismissal on 28 February 2019?

15 **The claimant's agent's submissions**

346. The claimant's agent submitted that in the subsequent investigation the claimant admitted that he had made a mistake in reading his roster. He had thought that he was due to carry out duty when he was to be at court, but this was simply the time he was scheduled to be at court. It was submitted that
20 the reporting officer for this case, Constable Martin McKirdy did not arrive at all. The claimant explained that he had spent two years at Greenock Police Office prior to moving to Paisley and during the two years he reported directly to Greenock Sheriff Court whenever he was cited to attend court during an early shift. It was only at the end of the court session that he made his way to
25 the police office. This was never a problem with his supervisors. This was the practice at Greenock Police Office. He also alleged that he did what he thought was right, namely went with his understanding of his roster per the electronic record. Finally, in relation to the third allegation he explained that he elected not to bring his notebook to court as the only evidential record in
30 relation to this case contained within the notebook were witness statements,

which he had printed, and carried with him. He sent the statements electronically to the Procurator Fiscal.

347. It was submitted that none of the explanations was accepted by the investigating officer. In fact, the claimant was held to have accepted all of the allegations against him, which was not the case. The claimant had been
5 represented and supported in the process by the Scottish Police Federation who provided two pleas in mitigation on behalf of the claimant. The first of them highlighted the view that the claimant's conduct did not amount to gross misconduct. Each of them raised the fact that the claimant believed that he
10 was experiencing racial discrimination and that this discrimination was influencing the decision to dismiss him.

348. The claimant believed that Sergeant Singh, who sustained a course of harassment against him, was instrumental in the events that led to his dismissal. Sergeant Singh admits to having input into the memo provided to
15 the Professional Standards Department which led to the claimant being investigated. Further, Sergeant Singh misrepresented the discussion he had with the claimant by phone by claiming that he had provided an order to the claimant to attend the Police office. This was not accurate. The claimant asserts that these actions were instrumental in his dismissal, particularly as
20 one of the matters identified as particularly serious was the fact of the claimant having disobeyed a "lawful order". These matters ostensibly led to the claimant's dismissal.

349. The claimant's agent submitted that Sergeant Singh's motivations for his part in the claimant's dismissal can be seen from his "continual harassment" of the
25 claimant. If it accepted that Sergeant Singh harassed the claimant because of his race, the claimant's agent invited the Tribunal to accept that the actions of Sergeant Singh above amounted to harassment, which was a large contributor to the claimant's dismissal.

350. It was argued that PC McKirdy, who was the reporting officer in the case
30 calling in court on the day the claimant did not report for duty did not attend court whatsoever. This conduct was more serious than that of the claimant's.

He is white and Scottish and, it appears from the evidence of Mr McDowall, suffered no consequence of this failure. The treatment of him in this case provides a useful comparator to the treatment the claimant received because of his race.

5 **The respondent's agent's submissions**

351. The respondent argued that the claimant was not dismissed because of his race. He was dismissed because of his failure to failing to obey orders and carry out instructions. The respondent's agent asked the Tribunal to find Mr McDowall as credible and reliable on this point.

10 352. The respondent's agent argued that whilst the Tribunal has not heard evidence from dismissing officer, it was abundantly clear from the documents within the bundle, taken together with the evidence of Mr McDowall that the reason for the claimant's dismissal was because he accepted that he had acted in the way alleged, that the Professional Standards Department
15 considered that this conduct amounted to gross misconduct and that the dismissing officer agreed with that assessment. What is entirely absent is any suggestion that the dismissal was because of his race. There is not even any evidence available to the Tribunal which would allow the Tribunal to make any inference of such a suggestion.

20 353. If the claimant had not acted in the way he had acted on 13 February 2018 then there would not have been any conduct proceedings. The claimant even today accepts that he acted in the way alleged in allegation 1 and 3. There is corroborated evidence available to the decision maker that he acted in the way alleged in regard to allegation 2. The only question was whether or not
25 it amounted to gross misconduct.

354. It was submitted that Mr McDowall gave a clear explanation as to why such conduct would amount to gross misconduct. Any Police Officer acting in the way the claimant had acted would have been dismissed. He argued that the Claimant had not helped himself. In full possession of all the witness
30 statements and having taken advice from the Scottish Police Federation he admitted the conduct in question on 4 October 2018. The Tribunal should be

live to the fact that this is not confusing or ambiguous conduct. He either acted in this way or he did not. He admits he did. In doing so he was in possession of all the statements. The advice was based on the content of the statements. Even if the claimant had not read them, his advisors had.

5 355. It was then submitted that on 21 November 2018 the claimant wished to backtrack. He is advised that if he wished to do so he had to alert Professional Standards Department. He did not do so. Effectively it was argued that the Federation were saying: "if you do this we can't ethically continue to represent you". There was then a compromise reached between the claimant and the
10 Federation and the tactic was to maintain the admission (given the serious implications that has for integrity and honesty of a Police Officer) but to submit a further plea in mitigation. This clearly backfired as the claimant attended the hearing admitting the charges but still wishing to attack the integrity of the witnesses, who at the end of the day are only talking to the conduct. This
15 approach clearly did not impress the dismissing officer. The claimant was dismissed because he disobeyed a lawful order and turned up to court without his notebook (something Mr McDowall has not done in 30 years' service and which is drilled into cadets as being vitally important). His plea in mitigation was disingenuous.

20 356. Finally, the respondent's agent noted that this is not an unfair dismissal claim and it is not for the Tribunal to query whether they think this amounted to gross misconduct and whether dismissal with notice was reasonable. The Tribunal have to be satisfied that the dismissal was because of his race. In summary there was no evidence to infer that.

25 **Decision**

357. The Tribunal considered this issue in great detail and carefully assessed the evidence placed before us. We took account of the fact that the dismissing officer did not attend to give evidence and applied appropriate weight to that. The reasoning for the dismissal was as set out in the disposal which we
30 critically assessed. The issue is whether or not the dismissal was because of race. Having carefully analysed the evidence before the Tribunal we are

satisfied that the reason for the claimant's dismissal was entirely unconnected to race. We are satisfied there is no evidence which would allow an inference to be made that race could be a reason for the dismissal.

5 358. The dismissing officer was clearly aware that the claimant had previously raised concerns about having been subject to racial discrimination. The grievance the claimant raised led to further enquiries as to the position. We took account of the fact that the dismissing officer misunderstood what the apology that was issued was for when he concluded that the claimant was disingenuous, and we considered that which we did within the context of the
10 dismissal reasoning. We have taken into account that the claimant did not appeal against the grievance, but it was clear that he remained of the view that he had been discriminated against.

15 359. The outcome reasons clearly set out the very specific and detailed reasons for the claimant's dismissal. He was dismissed entirely and solely due to his conduct. We analysed that intensely given the absence of the author as a witness and we carefully considered this matter taking account of the claimant's position and her submissions in that regard.

20 360. We accept the respondent's agent's submission that the plea in mitigation submitted by the claimant was disingenuous. He had accepted the conduct in respect of each of the 3 allegations. It is not correct to say that he had only partially accepted the conduct since he explicitly accepted that he was guilty of each of the 3 allegations in full and the hearing was about whether or not the conduct which was admitted was gross misconduct or not. He did not accept that they amounted to gross misconduct, but he accepted the facts
25 had been established. The fact that he changed his position was not clear until around the day of the gross misconduct hearing when the further plea in mitigation was submitted which sought to challenge the veracity of the witness statements (albeit indirectly). It was not surprising that the decision maker was concerned as to the integrity of the claimant in the circumstances of this case.

30 361. The exchange between the claimant and his Federation showed that the claimant accepted he was responsible for each allegation. Those

representatives stated that the claimant had been clear to them in accepting he was responsible for the conduct giving rise to each of the 3 allegations and in particular that he had been given an instruction which he did not follow (an admission which he later sought to withdraw). As a police officer, it ought to have been clear to the claimant that when he accepted each of the 3 charges, that was not an equivocal action. It was not unreasonable for the dismissing officer to take the claimant at face value when he said he had been guilty of all 3 allegations. The communication with his advisers shows that he had told that that he had been given a clear instruction by Sergeant Singh which he had not followed. He then decided that he would change his position once he had read the statements some time later.

362. The claimant then sought to withdraw his acceptance of the facts. He said it was because he had read the statements. It is not clear why the reading of the statements resulted in the claimant now believing that he was not guilty of the facts in respect of each of the allegation (and his Federation advisers were clearly equally unsure how such a change in position had occurred). It is not clear why the claimant chose to accept he was guilty of the allegations before reading the full information he had been given since that allegation was clearly about the claimant's failure to follow the order. He accepted he had failed to follow the order. His representatives had read the information and were absolutely clear that the claimant had advised them that he was guilty of each allegation (and that he had told them he had failed to follow the order) and wished to focus on the severity of the action. No explanation was given for the claimant's attempt to argue that he was essentially not guilty of the conduct in question in a plea in mitigation, which by definition suggests guilt but seeks to present evidence as an explanation for the acts in question.

363. We considered the claimant's argument that he was "advised" to accept the allegations and move on and then changed his mind considering the statements, but the claimant was a police officer and knew the importance attached to telling the truth and to ensuring due process was followed. The claimant clearly told those representing him that the allegations were made out and in particular that he had failed to follow the order and attend the office.

364. It was clear that the dismissing officer did not consider the claimant's explanation as to misreading the roster to be credible. The claimant had been told by Constable Panther about the practice in Paisley, even if the approach in Greenock was different. The absence of the claimant's notebook was a serious failure given the purpose of the notebook (as primary evidence and to ensure notes can be taken if something happened when on duty). The fact the claimant had sent statements electronically did not alter the fact the best evidence, his notebook, was not in his possession.
365. We did not consider it surprising that the dismissing officer was concerned by the claimant's decision to seek to change his position in his pleas in mitigation and argue that he was not in fact guilty of the charges. That was a serious issue as to the claimant's approach given the facts and the process, bearing in mind the claimant was a police officer. It materially affected the claimant's credibility.
366. Given we found no evidence of any unlawful treatment of the claimant by Sergeant Singh the claimant's submission that such conduct supports the argument that the dismissal was related to race is ill-founded. The claimant had failed to comply with a lawful order from Sergeant Singh.
367. We did not consider Constable McKirdy's position to be of assistance. His circumstances were materially different to those facing the claimant. There was no evidence that he had failed to attend for duty when rostered or that he failed to comply with an instruction from a superior officer or failed to have his notebook in his possession.
368. Constructing a hypothetical comparator whose circumstances (aside from race) were not materially different to the claimant, we consider the treatment would have been identical. Any officer who appeared to have done what the claimant had done would be treated in precisely the same way as the claimant was treated. The claimant's race was entirely irrelevant and unconnected to the decision to dismiss.
369. We carefully considered the claimant's evidence when he stated that he believed there was a culture, which he said was supported by the Angiolini

report, of protecting those who are racist and punishing the victim. He believed that there was a cover up for those who had been racist, and he believed that most of his colleagues had been part of this, especially senior officers. We examined the evidence before us carefully and considered the terms of the Angiolini Report. We were mindful of the fact that racism can occur where people are not conscious of it and that a culture can develop. We found no evidence to support the claimant's belief from the material put before this Tribunal. While it was a strongly held belief of the claimant, we found no evidence that would support that assertion.

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10 370. The claimant in cross examination initially maintained that there was overt racism demonstrating that race was the reason why he had been treated but he changed his position and accepted that in fact there was no overt racism but rather it was his belief that race was the reason for his treatment. There were no facts from which an inference of race being a reason for the treatment could be made.

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20 371. In this case there was a difference in treatment. We found nothing to suggest race could be the reason for the treatment. In her oral submissions the claimant's agent relied upon the events in Greenock as evidencing race as a reason but Sergeant Lawrie had alleged that the claimant was being treated differently from other officers. He also alleged that Inspector Thompson had told him he had his "work cut out" in managing the claimant and suggested the claimant may have "communication" issues. We found that this referred to use of the phonetic alphabet and communication via the police radio, which was how other officers understood it. We found no evidence to support the assertion this was in any way related to how the claimant spoke English in terms of his Nigerian accent. Those who worked with the claimant in Greenock were specifically asked by Chief Inspector Gallagher if any treatment of the claimant could be related to his race and no one said it was, including Sergeant Lawrie. There was no evidence that race was a reason for the treatment the claimant received or in any way connected to the treatment.

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30 372. We also note that some of the significant points raised by the claimant during the course of this hearing were not raised by him during his dismissal hearing.

It was not said in terms by the claimant during the hearing, for example, that he believed the charges had been brought because of his race and there was no mention whatsoever of any comparison with Constable McKirdy.

5 373. We did not require to apply the burden of proof provisions since we were able to make direct findings as to the reason for the treatment. We considered the claimant's agent's submissions in relation to burden of proof which essentially argued that there is no longer a 2 stage test (referring to the Employment Appeal Tribunal's judgment in **Royal Mail v Efofi** UKEAT/023/16. It was argued that there was no longer any burden of proof on the claimant at the first stage. While we doubt that this is a correct representation of the law, we apply the reasoning from the Supreme Court from **Hewage**, which observed that "it is important not to make too much of the role of the burden of proof provisions" and that the provisions "will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other." We are in such a position in this case.

20 374. The claimant's agent accepted that there was no specific fact from which an inference of race discrimination could be inferred with regard to the dismissal (aside from the issues in Greenock some years prior to the dismissal, involving different officers). The claimant's race was entirely irrelevant to his dismissal. The dismissing officer himself specifically referred to the claimant's belief and excluded it making clear why he was dismissing the claimant. If we had been unable to make direct findings of fact as to the reason for the treatment, we would have found no *prima facie* case, in other words we would have found no basis to infer that race could have been a reason for the claimant's treatment. In any event we are able to find, as a fact, that race was in no sense whatsoever a reason for the treatment.

30 375. We are satisfied from the evidence before the Tribunal that the reason why the claimant was dismissed was entirely unconnected to race. Race was in no sense whatsoever connected to his dismissal. He was dismissed because the claimant had not attended his shift when he was rostered to attend, the

claimant had failed to follow an instruction of a superior officer and because he did not have his notebook with him when he was on duty. Those were the only reasons why the claimant was dismissed. His claim that his dismissal was an act of direct race discrimination is therefore ill-founded.

5 **Harassment**

21 **Is the claimant's complaint brought in terms of section 26 of the 2010 Act that Sergeant Singh engaged in unwanted conduct related to the claimant's race time barred as it was not presented to the Tribunal at the end of the period of three months starting**
10 **with the date of the act to which the complaint relates?**

376. The respondent's agent submitted that the alleged unwanted conduct related to a period from June 2017 to 5 May 2018 when the claimant was transferred to Community Policing. The claimant contacted ACAS to inform them that he intended to raise a claim on 30 October 2018. The ACAS early conciliation certificate was issued on 28 November 2018. The claim was lodged on 14
15 December 2018. The alleged acts prior to 1 August 2018 are accordingly time-barred. It is the respondent's position that the allegation that he was subjected to harassment during the period June 2017 to May 2018 is out of time. The claimant's agent did not dispute that these claims were out of time.
20 It appeared to us unclear when the period of harassment to which this claim related stopped, and therefore whether the claim is in fact out of time, but given our reasoning below, this issue is academic.

22 **If yes to 21, is it just and equitable to extend the period within which the claim may be brought?**

377. The claimant's agent argued it was just and equitable to allow the claim to proceed. The respondent's agent disagreed and argued that the claimant's representative sought to discredit Mr Singh on the recollections of his start date. The claimant's pleadings did not specify the start date and it was argued this was an example of the difficulty delay has caused to the cogency of the
30 evidence.

378. We considered this matter in detail. We concluded that the claim was raised within such period that it was just and equitable to allow the claim to proceed. We considered each of the factors set out in the authorities in reaching our decision.

5 379. We firstly considered the prejudice to each party noting that there is always prejudice to both sides whatever we decide. We did take account of the fact that if we did not allow the claim to proceed, the claimant would be prejudiced as the claim would not be considered. The prejudice suffered by the respondent would be the effect time had upon the memories of the relevant
10 witnesses. There were some areas of the evidence where the memories of the witnesses had been affected but not in any material way given the limited time that had passed. We balanced the respective prejudice in our consideration.

15 380. With regard to the length and reason for any delay we took account of the delay that was occasioned and the fact that the claimant had chosen not to raise a claim at the time of the events. The delay was around 7 months which is potentially considerable bearing in mind the impact upon memory in the fast paced police environment. We considered, however, that the impact upon the evidence was minimal and Sergeant Singh was able to recall most of the
20 material events and issues. We took account of the impact of the delay in considering the evidence.

381. There were no issues with regard to the cooperation of the respondent in the provision of information requested.

25 382. This is not a case where the steps taken by the claimant to obtain advice once he knew of the possibility of taking action was a live issue.

383. We placed considerable weight on the need for a fair hearing, which is equally applicable to both the claimant and the respondent. Clearly having his discrimination claim heard is important to the claimant (and society generally) but equally it is important to be fair to the respondent. We did not consider the
30 time that had passed to materially affect the cogency of the evidence given

the ability Sergeant Singh had to remember matters and the clarity of the evidence before us on this issue.

384. Having balanced all of the factors we decided that the claim was raised within such a period as we considered just and equitable and decided that we did have jurisdiction to consider this claim. From the evidence before the Tribunal the claimant has discharged the onus of showing that it is just and equitable to extend the time and we decided to exercise our discretion to do so.

23 If yes to 22, did Sergeant Singh engage in unwanted conduct related to the claimant's race which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

The claimant's agent's submissions

385. It was submitted that the acts of harassment to which Sergeant Singh submitted the claimant "included":

(a) Electing to keep a log of the claimant's performance, to provide evidence in support of his dismissal. Sergeant Singh kept a log on only 1 other of his subordinates. The log appears to start on the day the claimant began working under Sergeant Singh and continued until the end. Sergeant Singh advised that at the beginning of his employment he was "instructed" to treat the claimant "like any other constable". It was argued that this indicated that he had a reason to treat him differently and it can be inferred that the reason for this treatment was either due to the claimant's race, or the fact that he had moved office as a result of a successful grievance against his superiors in which he alleged racial discrimination;

(b) The log criticised the claimant for his inability to perform a task which an officer of 20 years' experience could not do. This is purported to be the reason for the inception of the log. It is an unfair basis for such a log. This had severe ramifications for the claimant as it was evident that he was being subject to additional scrutiny as a result of the log being introduced;

- (c) It was suggested that the claimant was deficient in report writing, officer safety skills and his knowledge and skill in use of police systems and recorded in this report;
- (d) There was no explanation as to when the log would be ceased and, consequently, when the claimant would be treated like the rest of the constables in his command;
- (e) The claimant was not advised that a log was being kept, nor advised he could view it. If he had, he would have complained about it;
- (f) The log was produced to the claimant's Chief Inspector without his knowledge. On this occasion, the Chief Inspector thought Sergeant Singh had been overly critical of the claimant's performance.
- (g) Sergeant Singh caused the claimant to be seconded to other departments allegedly due to being deficient as a police constable. Although he knew this not to be the case, the claimant went on to have a four-week stint at the Concern Hub, Case Management, and other ancillary police departments. In the end, there was no adverse report on my performance.
- (h) During the claimant's Performance Development Conversation (Staff Appraisal) with Sergeant Singh about 19/09/2017, he recommended that the claimant read the e-brief (brief report read out at the start of the shift to all officers), in order to improve his English and speak properly. He was offended by Sergeant Singh's recommendation for two reasons. Firstly, he felt that Sergeant Singh was not concerned about his ability to communicate in English, but instead he made the recommendation as a result of hatred due to ethnic origin and the distinct Nigerian accent. Secondly, the practice at the time in his work group was for probationary officers mostly to read the e-brief. He was not a probationary officer at the time; Sergeant Singh intended to humiliate and embarrass him in front of colleagues.
- (i) Sergeant Singh paired the claimant with another much more experienced police constable with over ten years' experience who had been instructed explicitly to clandestinely make a note of any failings and report.

(j) Sergeant Singh regularly scolded and shouted at the claimant, most notably following an event when the claimant and his partner encountered a violent member of the public, and both of them used police techniques to take control of the situation successfully. During and immediately after the incident, his colleague did not indicate to him that he was not satisfied with his officer safety techniques. On return to the office, he was confronted angrily by Sergeant Singh. He was shouting at him.

386. The claimant's agent noted that the tribunal may prefer the evidence of Sergeant Singh on this matter and that he did not shout or become angry with the claimant. However, it is noted that the log, the details of which were not made known to the claimant and which was provided to Chief Inspector Gallagher are evidence of the matter for which the claimant received hypercriticism. Chief Inspector Gallagher himself felt that the details recorded therein only identified 3 issues of development, despite the log running to 40 pages and being presented to him as evidence of the claimant's failures.

387. Finally, it was submitted that the fact that Sergeant Singh was the claimant's line manager increased the distress that the claimant experienced due to this matter. The claimant was unable to challenge the treatment and criticism he received effectively. Again, the fact that the claimant was willing to endure the treatment face-to-face is evidence of his pragmatism. He considered that he would endure the treatment on a face-to-face basis, but when it became apparent that the claimant's performance was being logged and the details were kept from him, he understood that this was a matter which could not be allowed to continue and complained. Chief Inspector Gallagher allowed him to move to other departments, where there were not the same criticisms levelled at the claimant, which serves to prove the hostile environment in which he worked under.

The respondent's agent's submissions

388. The respondent argued that "of all the claimant's false allegation of wrong doing by the respondent this one is the most ridiculous." He argued that it would be difficult to find a more supportive line manager than Sergeant Singh

and did not accept that the conduct was genuinely unwanted. It certainly should not have been unwanted. It was supportive to help and assist the claimant to reach the level of competence needed. It was submitted that there was no valid basis for the allegation that Sergeant Singh engaged in any unwanted conduct related to the claimant's race. Sergeant Singh engaged in conduct related to failings in the claimant's performance.

389. If the Tribunal was to find from somewhere that Sergeant Singh did, it was argued that there is no evidence that this had the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Sergeant Singh gave credible evidence as to the purpose of his conduct towards the claimant. It most certainly was not his purpose to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment.

390. It was argued that there was no credible evidence which would suggest that it even had the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. While it was submitted that this is a matter for the Tribunal, the respondent's agent did not recall a significant amount of evidence whether by the claimant talked to this. His evidence was more of the tone of disparaging Sergeant Singh, not that he was particularly impacted by anything. The ultimate outcome was a move to the community policing team.

391. It is an interesting factor in this case that whilst the senior manager's concerns about the claimant's performance during 2016 could not be evidenced, very quickly after his transfer to a completely different manager, very serious and very real concerns about his conduct came to light. These can be explained by the different nature of the job, Paisley being particularly challenging. However, it showed the significant value of good record keeping which Sergeant Singh has engaged in.

392. Sergeant Singh embarked upon a number of steps to support the claimant. This was not unwanted conduct, the definition being something the person would rather not have happened to them. A conscientious police officer

should have welcomed this input and support. If the claimant found it to be unwanted that reflects badly on him, not Sergeant Singh. The purpose of the conduct was to seek to address the claimant's reported performance issues. The effect of the conduct should have been that the claimant engaged and responded to the support being given.

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393. It was argued that it was simply not the case that any of the conduct related to the claimant's race. It related to the fact that serious and genuine performance issues were being raised about him. The claimant's representative spent significant time "nit-picking" over Mr Singh's record keeping but not one question was put to him that would support a contention that anything he did related to the claimant's race. Harassment is not the same as direct discrimination. It is not sufficient to say that it can merely be inferred that unwanted conduct related to the claimant's protected characteristic. There has to be some kind of connection between the alleged unwanted conduct and the protected characteristic. It is simply not enough to say that the claimant is black therefore conduct towards him relates to his race.

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394. In determining whether particular conduct is "related to" a protected characteristic, a tribunal must make a clear finding of fact, based on the evidence before it. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** UKEAT/0039/19 a tribunal upheld a complaint of harassment related to race (the claimant being a British-Asian Indian), following a comment made by a psychiatrist, and overheard by the claimant, about Islamic State (ISIS). Allowing the employer's appeal, the Employment Appeal Tribunal found that the Tribunal had failed to make a clear and distinct finding that the conduct related to the claimant's British-Asian Indian race. At best, it had formed this view on the basis of a "perception" of ISIS as "an international organisation connected with Asian people, in particular those in such areas as Pakistan, Afghanistan and Iran". This was not a proper finding, because there was no evidence before the tribunal to support it. It was not something of which the tribunal could take judicial notice. The fact that the claimant considers that the conduct was related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser.

395. It was submitted that there was no evidence that Sergeant Singh believed that black people should not be in the police or something like that; quite the opposite. It simply cannot be said that anything he did related to the claimant's race. It is a bold statement made by the claimant with absolutely
5 no substance to back it up. In this case there is simply no evidence that Sergeant Singh's performance management of the claimant related to the claimant's race in any way shape or form.

396. It was argued that it was "absurd" to suggest that a log was being kept to build a case against him. He wished a BAME constable to progress. He was happy
10 to have the extra pair of hands. Why would he wish to build a case against him? It is an illogical and unevidenced proposition in its entirety.

Decision

397. The Tribunal considered this carefully. We accepted the evidence of Sergeant Singh. While the claimant's agent submitted that the acts relied upon were
15 "examples" of the conduct on which the claim is based, there was no other conduct relied upon and we consider those acts as the acts giving rise to the claim. We deal with them in turn and assess the matter generally from the evidence before us.

398. Firstly, it was alleged that electing to keep a log of the claimant's performance
20 was unwanted conduct. While the claimant considered the purpose of the log to provide evidence in support of his dismissal it was a management tool to assist performance. Sergeant Singh used the log as a way to record performance issues. The fact he kept the log for other staff was significant since it showed that it was a management tool and unrelated to the claimant's
25 race. We do not accept the claimant's agent's submission that the log was evidence of over bearing management. While Chief Inspector Gallagher noted that an ideal approach would have been somewhere between the absence of written records (such as was the position in Greenock) and the log maintained in Paisley, there was no suggestion that the content was in
30 any way inappropriate. It recorded details of issues with regard to the

claimant's performance, issues about which the claimant had been verbally notified.

399. The fact Sergeant Singh was "instructed" to treat the claimant "like any other constable" with similar experience and service was indicative of how the respondent works. We did not consider that to be indicative of differential treatment but in fact reflective of the desire to treat the claimant precisely as anyone else. It was more likely to be related to the fact that the claimant had been subject to a transfer and as such nothing adverse should be implied from such an act. We do not accept (and there is no evidence to suggest) that this was in any way connected to the claimant's race, or the fact that he had moved office as a result of a successful grievance against his superiors in which he alleged racial discrimination. We did not consider the keeping of a note of performance to be unwanted conduct as such. It was conduct relating to performance. In any event it was entirely unrelated to race. It did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

400. Secondly, it is alleged that the log criticised the claimant for his inability to perform a task which an officer of 20 years' experience could not do. While the claimant's agent argued that this was an unfair basis for keeping a log, we are of the view that this act alone demonstrated good reason for keeping the claimant's performance under review. Sergeant Singh was clear in his evidence that the act in question was something a constable of the claimant's service and experience should be able to do. He was unable to carry out the task. The fact the claimant's tutor constable was also unable to complete the task was of considerable concern to Sergeant Singh (so much so that he commenced performance management of that individual too). It was entirely reasonable given the issue in question for Sergeant Singh to do what he did in these circumstances. Even if it could be said that being subject to criticism for performance failings was unwanted, it was entirely unrelated to race.

401. We find that none of the facts relating to the log could have had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile,

degrading, humiliating or offensive environment for the claimant. Even if the claimant did not like having his performance managed, or for robust discussions to take place, they were entirely appropriate discussions and actions. The requirements of the definition were not present.

5 402. Thirdly, it was suggested that the claimant was deficient in report writing, officer safety skills and his knowledge and skill in use of police systems and recorded in this report. We accepted Sergeant Singh's evidence that from the information presented to him he was satisfied the claimant demonstrated the failures. It is unclear the extent to which this is "unwanted conduct" given the
10 conduct was factually correct assertions about how the claimant performed under the circumstances in question but there was absolutely no connection whatsoever to the claimant's race.

15 403. This issue did not have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Even if the claimant did not like having these issues raised, the actions of Sergeant Singh were entirely appropriate and part of his managerial role. They were entirely appropriate discussions and actions. The requirements of the definition were not present.

20 404. Fourthly, it was argued that because Sergeant Singh was able to provide no explanation as to when the log would be ceased and, consequently, when the claimant would be treated like the rest of the constables in his command. The evidence was that if there were no issues the log would not be required. That is not unreasonable. Further that is not unwanted conduct and has no connection whatsoever to the claimant's race. It did not have the purpose or
25 effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was appropriate to retain the log. If no issues arose, the log would not be needed.

30 405. Fifthly, the claimant was not advised that a log was being kept, nor advised he could view it. If he had, he would have complained about it. We did not accept that assertion by the claimant. We considered that the claimant was told by Sergeant Singh that the issues he discussed with the claimant

pertaining to his performance were being recorded. Given the log was about the claimant's performance it is unclear why the claimant would have complained given his desire to improve his performance. We do not see how an alleged failure to tell the claimant about a log could be unwanted conduct related to race. The actions of Sergeant Singh were entirely unconnected to race and solely based upon his duty to manage the claimant in the performance of his role. The claimant knew that there were issues, they were given to him during his performance discussion, and he accepted himself that there were issues. It did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

406. Sixthly, the log was produced to the claimant's Chief Inspector without his knowledge. It was argued that Chief Inspector thought Sergeant Singh had been overly critical of the claimant's performance. It is unclear how this conduct (even if found to be true) could amount to unwanted conduct related to the claimant's race. Sergeant Singh had a responsibility to manage the claimant's performance. He chose to do so by identifying issues of concern, raising these with the claimant and taking a note of the issues and keeping his Chief Inspector in the loop as it were. In some respects, the issues noted were not due to the fault of the claimant. In other respects, there were very serious shortcomings. That assisted Sergeant Singh in having performance discussions with the claimant. Sergeant Singh was sufficiently concerned about the claimant's performance that he raised it with his superior officer. In doing so, Sergeant Singh made it clear that he wanted to assist the claimant to improve and would do whatever it took to do so. The production of the log to the Chief Inspector is not unwanted conduct related to race. It is entirely unconnected to race. The issues being raised were not incorrect but represented what Sergeant Singh considered to be performance concerns from his dealings with those on his shift. Even if the Chief Inspector considered the log to be overly critical, that was not in any way unwanted conduct related to the claimant's race.

407. This issue did not have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Even if Sergeant Singh had been overly critical, that did not have the purpose or effect of creating a humiliating or offensive environment. The Chief Inspector was of the view that there were themes emerging from the log which related to the claimant's performance. The claimant might not have liked having these issues raised but the actions of Sergeant Singh were entirely appropriate and part of his managerial role. The requirements of the definition were not present.
408. Seventhly, it was argued that Sergeant Singh caused the claimant to be seconded to other departments allegedly due to being deficient as a police constable. Although he knew this not to be the case, the claimant went on to have a four-week stint at the Concern Hub, Case Management, and other ancillary police departments. In the end, there was no adverse report on my performance. We found that the reason the claimant was moved to other areas was to ensure he was given as wide experience as possible of other areas of policing. The claimant did not object to being moved and such action cannot amount to unwanted conduct. This was not unwanted conduct and was in no way connected to race. Given the claimant enjoyed the experience (and did well) such action could not have had the purpose or effect of creating an offensive or degrading environment. The statutory definition has not been satisfied.
409. Eighthly, it was asserted that during the claimant's Performance Development Conversation (Staff Appraisal) with Sergeant Singh, he recommended that the claimant read the e-brief (brief report read out at the start of the shift to all officers), in order to improve his English and speak properly, that he was offended by the recommendation for two reasons. Firstly, he felt that Sergeant Singh was not concerned about his ability to communicate in English, but instead he made the recommendation as a result of race. Secondly, the practice at the time in his work group was for probationary officers mostly to read the e-brief. Thus, Sergeant Singh intended to humiliate and embarrass him in front of colleagues. We accepted Sergeant Singh's evidence on this

issue. The claimant was asked to contribute to the briefings in this way to encourage him to get more involved in the team. It was a positive step to becoming a team member. It was in no sense whatsoever connected to race. We also do not accept that it had its purpose to humiliate the claimant. It was directed to involve the claimant with the team. It was an appropriate way to manage a performance issue that arose. It did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

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410. Ninthly, it was argued that Sergeant Singh paired the claimant with another much more experienced police constable with over ten years' experience who had been instructed to clandestinely make a note of any failings and report. We did not accept Sergeant Singh had instructed Constable Knox to make clandestine notes of failings. If there were failings, Constable Knox was to work with the claimant in improving them but there was no reason why such failings should not be reported to the Sergeant in question to ensure performance activity was kept under review. The conduct was not related to race in any way and the conduct was clearly not done with the purpose or effect of creating the relevant outcomes for this to be harassment.

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411. Finally, it was alleged that Sergeant Singh regularly scolded and shouted at the claimant, most notably following an event when the claimant and his partner encountered a violent member of the public, and both of them used police techniques to take control of the situation successfully. It was argued that during and immediately after the incident, his colleague did not indicate to him that he was not satisfied with his officer safety techniques and on return to the office, he was confronted angrily by Sergeant Singh who was shouting at him. He was stupefied for two reasons. Firstly, as is usual with police constables, his colleague did not bring this to his attention first. Instead, he took it directly to a supervisor. Secondly, Sergeant Singh did not conduct any enquiries to find out what actually, instead he jumped to the false conclusion that he was deficient in officer safety skills as suggested by his colleague. We do not accept from the evidence we heard that Sergeant Singh scolded and shouted at the claimant. This allegation is not made out. Sergeant Singh did

5 seek the claimant's position, which was that he had acted appropriately but 2
officers disagreed. This was a serious issue that Sergeant Singh could not
ignore. It was entirely unrelated to race. It was purely to deal with a concern
as to the claimant's approach to an officer safety matter. It did not have the
purpose or effect of violating the claimant's dignity or of creating an
intimidating, hostile, degrading, humiliating or offensive environment for the
claimant.

10 412. We find that the respondent's agent's submissions are meritorious, and we
uphold them. The actions of Sergeant Singh relied upon as alleged
harassment by the claimant were entirely unconnected to race. Sergeant
Singh wanted the claimant to achieve a satisfactory level of performance as
he did each of his officers. He treated his officers in the same way and if there
were concerns of performance that were of sufficient seriousness, a log would
be kept to assist the discussion. That ensured the performance discussions
15 were meaningful and evidence based and allowed both the officer and line
manager to assess improvement as time passed. We found no basis for this
claim.

20 413. We took a step back to assess the position and determine whether there was
any merit in the suggestion that the treatment to which the claimant was
subject (by Sergeant Singh) was generally in any way connected to race (and
unwanted conduct that amounted to unlawful harassment). We are satisfied
that race was entirely unconnected to the treatment relied upon by the
claimant. There was no basis whatsoever for the assertion that race was a
reason.

25 414. As the treatment was not related to race, the claim is ill-founded.

415. We also considered that each of the acts in question did not have the purpose
or effect of violating the claimant's dignity, or creating an intimidating, hostile,
degrading, humiliating or offensive environment for the claimant.

30 416. Having carefully considered the evidence before the Tribunal we find that the
claim in respect of unlawful harassment is ill-founded.

Victimisation

417. It was agreed that the protected acts relied upon are lodging a grievance on or around 15 February 2017 and lodging an Employment Tribunal claim on 14 December 2018 (with number 4123618/2018), which are both agreed to be protected acts.

25 Did the respondent victimise the claimant by subjecting him to a detriment, by subjecting him to disciplinary proceedings for gross misconduct which ultimately led to his dismissal, because he raised a grievance on or about 15 February 2017 alleging race discrimination?

The claimant's agent's submissions

418. The claimant's agent submitted that the claimant relies on two protected acts, namely the grievance raised in 2017 in which he raised concerns of race discrimination and his application to the Employment Tribunal made on 14 December 2018 in which he raised a claim of victimisation. The claimant considered that he was subject to the detriments of being subject to disciplinary proceedings and dismissed as a consequence of engaging in the protected acts.

419. The claimant's agent emphasised that in order for victimisation to be established, it is not the case that it requires to be consciously motivated.

420. The claimant's agent candidly accepted that the detriments to which the claimant was subject do not, on the face of it, appear to be motivated by the claimant's protected acts. The time line was important however and she referred to the following:

- the claimant emailed Inspector Neil on 7 June 2018 to make a complaint in relation to his treatment (specifically the ongoing race discrimination he experienced during his police career, now before the Tribunal). It highlighted issues pertaining to his 2017 grievance. As a result, the respondent engaged in a "perfunctory" investigation into his concerns, which was far smaller in scope and scale than either the investigation into

his grievance in 2017, or the investigation into his own alleged misconduct which began in 2018. The investigation was not conducted in the manner which the claimant would inspect of a police investigation into his conduct which provides proof of his victimisation. He received no information as to who was investigating the matter, nor was he provided with an investigation report.

- On 18 September 2018, the claimant was information that the allegations constituted gross misconduct was to be subject to disciplinary proceedings which is evidence of the fact that the claimant's claim of racial discrimination in 2017 prompted this decision;
- On 30 October 2018, the claimant notified ACAS of his claims of racial discrimination, victimisation and harassment.
- The claimant lodged his first ET1 on 14 December 2018.
- The disciplinary hearing regarding the claimant's conduct took place on 29 January 2019. It was decided to dismiss him with one month of notice. This decision was entirely disproportionate. The investigating officers did not take account of the reasons he provided for his failings on 13 February 2018, nor was he treated the same as Constable McKirdy, who was not disciplined for the matter.

421. From the timeline above, it was submitted that it was evident that it was known to the respondent from 2017 onwards that the claimant was not willing to endure less favourable treatment on the grounds of his race and that he would continue to raise concerns regarding discrimination if it had the power to damage his reputation and career progression. This was further underlined by the claimant lodging the first ET1: he was unwilling to let the matter of his discriminatory treatment be brushed aside in the manner in which the respondent was seeking to do.

422. The decision to investigate the claimant and dismiss him for the allegations (which he had been advised by his Federation representative did not amount to gross misconduct) was entirely disproportionate. This is further evidenced

by the fact that the claimant sought to rescind his acceptance of the allegations, which was not permitted by the respondent. By contrast to the claimant's conduct, Constable McKirdy, who is a white, Scottish police officer made the more serious error of failing to turn up at court at all, despite being
5 the reporting officer (and therefore the more necessary officer) in the case. He did not face gross misconduct allegations. This would have become known to Superintendent McDowall had it been the case. To further underline the claimant's case, it can be seen that his email of 7 June 2018 was largely ignored. It was argued that the respondent did not want to acknowledge the
10 "inherent racism", just as they had prior to his transfer from Greenock.

The respondent's agent's submissions

423. The respondent argued that this is a "false allegation". The claimant's grievance was fully investigated. It was fully resolved, and outcomes were actioned. The claimant did not appeal the grievance. He was moved to a
15 different police office. Mr McDowall had absolutely no involvement or even knowledge of the grievance. The respondent's agent argued that there is ample evidence as to why the claimant was subjected to disciplinary proceedings for gross misconduct which ultimately led to his dismissal; it was because he had failed to obey orders and carry out instructions. It had
20 absolutely nothing to do with and is entirely unconnected to a grievance he had raised and had been resolved over a year previously.

Decision

424. We considered the evidence carefully. The detriment relied upon was the subjecting the claimant to disciplinary proceedings which led to dismissal (as
25 opposed to the dismissal itself). This was something upon which clarification was sought during submissions, but we note the written submission refers to dismissal as being a detriment. For the avoidance of doubt, we considered the entire disciplinary process, including the dismissal, as the detriment

425. The issue was therefore whether the decision to embark upon disciplinary proceedings and then dismiss the claimant was because of his grievance. The
30 claimant's agent was right to accept that there is no obvious link between the

grievance which was lodged and the decision to implement proceedings and dismiss the claimant. The decision to implement proceedings and dismiss the claimant was because on the face of it claimant had been guilty of serious conduct, failing to attend for a shift, failure to follow an instruction from a superior officer and failure to have his police issue notebook with him. We considered the evidence.

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426. We were satisfied the reason for disciplinary proceedings being instituted and the reason why the claimant was dismissed was entirely unconnected to the grievance the claimant raised about race discrimination. In other words, the grievance was in no sense whatsoever connected to the disciplinary process or dismissal.

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427. The grievance the claimant raised had been dealt with and the claimant had confirmed he was satisfied with the outcome, even if he still believed he had been discriminated against. He did not appeal. The evidence before the Tribunal was clear in that the grievance was considered resolved. Matters had moved on. The claimant moved to Paisley and passed his probation. He began his career in policing.

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428. We noted that the grievance was referred to in the outcome of the hearing that led to the claimant's dismissal. Chief Superintendent Scott telephoned Chief Inspector Gallagher and Superintendent Kennedy who confirmed that the outcome of the grievance investigation was that there was no racist behaviour. The outcome disclosed inadequate performance of supervisory and senior officers to what was a welfare issue which led to remedial action for those officers. That was correct.

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429. We noted that the outcome stated that: "You and your representative accepted this disposal and agreed that it did not constitute racial discrimination. Therefore the inference in your plea in mitigation that you received an apology for racially discriminatory behaviour is at best disingenuous.". In fact, the claimant did not accept that there was no racial discrimination since he was clear that he remained of the view that there was racism, but the fact of the grievance was not a reason for the decision since

the outcome continued to say that the failed to accept responsibility for his actions in failing to obey a lawful order. That was an error by the dismissing officer.

5 430. We considered whether that error could result in the grievance being connected to the dismissal or disciplinary process in a relevant way. We were satisfied that it was not. The error related to the dismissing officer's belief that the claimant had accepted there was no racial discrimination when he did believe so. The grievance was, however, not in any way a part of the reason for the claimant's dismissal or the disciplinary process. We examined the reasons for the disciplinary process and dismissal carefully and were satisfied
10 that the only reason for the action was the claimant's conduct. his failure to attend the office before going to court, his failure to follow his superior officer's instruction and the failure to have his notebook with him.

15 431. We were mindful of the fact that conscious motivation is not needed as the question is what the reason for the treatment was. We looked at each of the acts referred to by the claimant's agent in her submissions.

20 432. The fact that the claimant had responded to the investigation by alleging discrimination did not by itself suggest that the decision to take action was in some way related to the grievance in 2017. There was no doubt (and it was accepted) that the respondent knew the claimant had lodged a grievance and believed that he had been subject to racial discrimination.

25 433. Neither party provided the Tribunal with the email the claimant sent, but we found that it did not focus specifically on the allegations faced. It was not suggested by the claimant that his grievance was the reason for the disciplinary process. His focus was in relation to alleged racism. Even if the points raised by the claimant were not fully investigated, the matter was not followed up by the claimant. For example, there is no reference to the points during the hearing by the claimant. The focus was only on the 2 "pleas in mitigation". No attempt was made by the claimant to bring any witnesses.

30 434. We do not accept the claimant's agent's submissions that telling the claimant he was to be subject to gross misconduct allegations is evidence that the

grievance the year before prompted the decision. The reason for the allegations were because of the claimant's conduct which he knew was being reported to senior managers.

5 435. We analysed the evidence carefully. The respondent knew the claimant believed he had been discriminated against by reason of his race and that he would take steps to protect his position.

10 436. We do not accept the submission that the action taken was entirely disproportionate. The 3 allegations were potentially very serious given the nature of the respondent's organisation and the importance of following orders, attending for work and having the notebook in one's possession when on duty. These are extremely serious and did have the potential to amount to gross misconduct. The actions of the claimant in seeking to challenge the facts in his pleas in mitigation weighed heavily in the decision maker's mind. The outcome was clear and considered.

15 437. We also do not accept that the failure to allow the claimant to rescind his acceptance of the allegations was somehow evidence of victimisation (or other unlawful discrimination). The claimant was a police officer. He ought to have known the importance of telling the truth. He either accepted he was guilty of the allegations or he did not. He confirmed to the respondent (and his
20 Federation) that he was guilty of the allegations and in particular that he had failed to follow a direct order from a superior. He then sought to change his position (albeit indirectly in his pleas in mitigation) and argue that in fact he was not guilty since he was not given an instruction. He did accept, however, that he did not attend the office when rostered to do so and that he did not
25 have his notebook in his possession.

30 438. We did not consider a comparison with Constable McKirdy to be of assistance. He was not part of the claimant's team and did not fail to attend for work when required nor fail to have his notebook on his possession when on duty. The issue is whether the disciplinary proceedings (and dismissal) were in any way connected with the grievance the claimant raised. They were not.

439. We also do not accept the claimant's agent's submission that the respondent sought to ignore "inherent racism". The issue under consideration was the claimant's conduct on the day in question. That was not affected by the claimant's perception as to his treatment elsewhere.

5 440. In short, the grievance was in no sense whatsoever a reason for the actions relied upon. That was a historical matter that was not related to the decisions that were taken. While the dismissing officer was in error as to the reason for the apology and the claimant's belief as to the existence of racism at the time, the grievance was not a substantial or effective cause of the action relied upon. The only reason was the claimant's conduct.

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441. This claim is ill-founded.

30 **Did the respondent victimise the claimant by subjecting him to a detriment, by subjecting him to disciplinary proceedings for gross misconduct which ultimately led to his dismissal, because he lodged Claim Reference Number 4123618/2018 in the Employment Tribunal on 14 December 2018?**

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Submissions

442. The claimant's submissions are as set out above. The respondent's agent noted that the commencement of the disciplinary proceedings for gross misconduct significantly pre-date the lodging of the claim. The raising of the claim had nothing whatsoever to do with the Respondent subjecting him to disciplinary proceedings for gross misconduct which ultimately led to his dismissal. The proceedings were effectively commenced on 13 February 2018 when a memo which had been written by Inspector Kyle and approved and sent to by Chief Inspector Gallagher was sent to Professional Standards.

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443. It was argued that the claimant was well aware that disciplinary proceedings were running prior to him raising his claim. The claim was raised on 14 December 2018. The claimant had attended a fact finding meeting prior to this date.

444. Whilst the date of dismissal itself was on or around 30 January 2019, post-dating the lodging of the claim, it was submitted that there was no evidence to suggest that Chief Superintendent Scott was aware that the claimant had even raised a claim. It was in the very early stage with the respondent submitting a response and did not concern him. There is no evidence that the disciplinary process was influenced by the claimant raising his first claim. There was, however, a significant amount of evidence to support the real reason for the conduct of the respondent. It was clearly not because the claimant had done this protected act.

10 **Decision**

445. We considered the evidence carefully. The detriment relied upon was the subjecting the claimant to disciplinary proceedings which led to dismissal (as opposed to the dismissal itself). This was something upon which clarification was sought during submissions, but we note the written submission refers to dismissal as being a detriment. For the avoidance of doubt, we considered the entire disciplinary process, including the dismissal, as the detriment

446. The issue was therefore whether the decision to embark upon disciplinary proceedings and then dismiss the claimant was related to his raising the Tribunal claim. The claimant's agent was right to accept that there is no obvious link between the claim which was lodged and the decision to implement proceedings and dismiss the claimant. The decision to implement proceedings and dismiss the claimant was because on the face of it claimant had been guilty of serious conduct, failing to attend for a shift, failure to follow an instruction from a superior officer and failure to have his police issue note book with him. We looked at the evidence.

447. We were satisfied the reason for disciplinary proceedings being instituted and the reason why the claimant was dismissed was entirely unconnected to the claimant's raising of the Tribunal claim. In other words the Tribunal claim was in no sense whatsoever connected to the disciplinary process or dismissal.

448. The Tribunal claim was raised on 14 December 2018. There was no evidence that the raising of the claim was connected to the referring of the claimant's

conduct to senior managers and the subsequent process and dismissal. The only reason why disciplinary procedures were invoked was because of the claimant's conduct on the day in question. The evidence was very clear. The 3 allegations arose from the claimant's conduct and he was told that the matter would be referred to senior managers for consideration. It was so referred. As a result, given the severity of the conduct, it was deemed, and reasonably deemed, to be a matter that could potentially amount to gross misconduct. The disciplinary process then took place.

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449. Our decision is supported by the claimant's evidence in cross examination. When the fact that the claim was raised in December 2018 was put to him together with the fact the event in question occurred in February 2019 with the decision to refer matters to senior management occurring shortly after and it was suggested that the raising of the claim post-dated the conduct relied upon in the victimisation complaint, the claimant said that he thought it showed that the victimisation was because of the grievance. In other words, the claimant appeared to accept that the raising of his claim was not connected to the treatment relied upon in this complaint.

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450. We were mindful of the fact that conscious motivation is not needed as the question is what the reason for the treatment was (and that the raising of the claim need not be the or even a principal reason as long as it was a reason for the treatment). We looked at each of the acts referred to by the claimant's agent in her submissions.

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451. The fact that the claimant had responded to the investigation by alleging discrimination did not by itself suggest that the decision to take action was in some way related to the Tribunal claim. There was no evidence that those who took the decision to progress disciplinary proceedings knew of the Tribunal claim. There was no suggestion that the dismissing officer knew of the claim.

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452. We do not accept the claimant's agent's submissions that telling the claimant he was to be subject to gross misconduct allegations is evidence that raising the Tribunal was related to the decision. The reason for the allegations were

because of the claimant's conduct which he knew was being reported to senior managers.

5 453. We analysed the evidence carefully. The respondent knew the claimant believed he had been discriminated against by reason of his race and that he would take steps to protect his position.

10 454. We do not accept the submission that the action taken was entirely disproportionate. The 3 allegations were potentially very serious given the nature of the respondent's organisation and the importance of following orders, attending for work and having the notebook on one's possession when on duty. These are extremely serious and did have the potential to amount to gross misconduct.

15 455. We also do not accept that the failure to allow the claimant to rescind his acceptance of the allegations was somehow evidence of victimisation (or other unlawful discrimination). The claimant was a police officer. He ought to have known the importance of telling the truth. He either accepted he was guilty of the allegations or he did not. He confirmed to the respondent (and his Federation) that he was guilty of the allegations (including that he had failed to follow a direct instruction). He then sought to change his position and argue that in fact he was not guilty since he was not given an instruction. He did
20 accept, however, that he did not attend the office when rostered to do so and that he did not have his notebook in his possession.

25 456. We did not consider a comparison with Constable McKirdy to be of assistance in this regard. He was not part of the claimant's team and did not fail to attend for work when required nor fail to have his notebook on his possession when on duty. The issue is whether the disciplinary proceedings (and dismissal) were in any way connected with the grievance the claimant raised. They were not.

30 457. We also do not accept the claimant's agent's submission that the respondent sought to ignore "inherent racism". The issue under consideration was the claimant's conduct on the day in question. That was not affected by the claimant's perception as to his treatment elsewhere.

458. In short the reason for the treatment was in no sense whatsoever connected to the raising of the Tribunal claim. The only reason was the claimant's conduct.

459. This claim is ill-founded.

5 **Remedy**

460. Given our decision above we do not consider the issue of remedy. The parties' respective submissions are within the Tribunal file.

Conclusion

461. For the above reasons each of the claims is dismissed.

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Employment Judge: David Hoey
Date of Judgment: 03 March 2021
Entered in register: 11 March 2021
and copied to parties

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