EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112618/18

Heard in Edinburgh on the 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th August and the 3rd September 2021

Employment Judge Porter
Tribunal Member J Grier
Tribunal Member T Jones

Mrs R Malone	**Claimant** **Represented by** **Mr Allison, advocate**
The Chief Constable of the Police Service of Scotland	**Respondent** **Represented by** **Mr Healey, solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal that the Tribunal has jurisdiction to hear the claimant's claims. The claimant's claims of victimisation succeed in their entirety. The claimant's claim of direct discrimination is dismissed.

Introduction

1. The claimant was a police officer with the respondents from the 9th June 2009 until the 2nd April 2020 when she retired on grounds of ill health. In these proceedings she claims direct discrimination under s13 of the Equality Act 2010 and victimisation under s27 of the Equality Act 2010.

2. The case has a lengthy procedural history. The ET1 was received on the 17th July 2018 and the ET3 on the 23rd August 2018. There were Preliminary Hearings on Case Management in the case on the 28th September 2018, the 24th January 2019, and the 25th May 2020. There were Preliminary Hearings on Amendment on the 11th September 2019 and the 4th December 2020. The case was listed for a final hearing on liability in October and November 2019 but was postponed on application of the claimant who had recently applied for ill health retirement. A further Hearing on Liability was listed for January 2020 but was postponed on application of the claimant pending resolution of her ill health retirement application. A further Hearing on Liability listed for May 2020 was postponed as a result of the COVID-19 pandemic.

3. The case was listed again for a Hearing on Liability for ten days commencing 16th August 2021. At the Hearing on Liability time bar was reserved in respect of some but not all of the issues. The evidence was heard between the 16th and the 20th August 2021 and submissions were heard on the 3rd September 2021.

4. In advance of the Hearing on Liability the parties liaised with one another and produced a Joint Statement of Facts and Joint List of Issues. The Joint Statement of Facts is replicated in this Judgment as it provides framework to the Tribunal's Findings in Fact. In their discussion and decision, the Tribunal followed the agreed Joint List of Issues.

5. For the claimant, Tribunal heard evidence from the claimant herself, Richard Creanor (formerly a Detective Sergeant with the respondents) Sergeant Simon White, Sergeant Rachel Coates, Constable Zara Taylor and Inspector Andrew Malcolm. Witness Orders were granted for the attendance of the witnesses Richard Creanor, Simon White, Rachel Coates and Zara Taylor. For the respondents, evidence was heard from Inspector Keith Warhurst, Inspector

Alan Findlay, Linda Russell (formerly an Area Commander within Armed Policing), Superintendent Steven Irvine, Michaela McLean (formerly an HR Business Partner with the respondents), Chief Superintendent Andrew McDowall, Lisa Scott HR Advisor, Ross Haggarty HR Business Partner, Superintendent David Pettigrew and Alasdair Muir, People Partner, HR . A Witness Order was granted for the attendance of the witness Michaela McLean. Witness statements were utilised at the Hearing on Liability and, with the exception of the claimant, were read out in advance of cross examination of the witnesses.

6. Details of the hierarchy within the respondents of the witnesses was agreed by the parties and appears at the end of the agreed Joint Statement of Facts.

7. The case was heard on the CVP/Kinly platform. The parties agreed a Joint Bundle of Documentation which was numbered **1-707**. A supplementary Bundle of Documentation was also produced and numbered **1- 103**.

8. At the outset of the Hearing there was a discussion on the relevancy of evidence on the culture within Armed Policing with particular reference to witnesses Rachel Coates, Richard Creanor, Simon White and Zara Taylor. The Tribunal ruled that such evidence was admissable as it gave context to the claimant's claims.

JOINT STATEMENT OF FACTS

(The numbering in this document is that of the parties)

1. The Claimant started work as a Police Constable with the Respondent on the 9th of June 2009.

2. From 2009 to 2016, the Claimant worked in Response & Community Policing in Bathgate and Livingston.

3. On or about September 2016, the Claimant successfully completed 10 weeks firearm training course to become Authorised Firearms Officer ('AFO') in the Respondent's Armed Response Vehicles Team.

4. In October 2016, the Claimant transferred to the post of AFO based in Edinburgh, Fettes Team 1. In 2016, there were two female AFO's working in a team of twelve AFO's.

5. In late 2016, of the 60 AFO's in the Respondent's Edinburgh ARV Division, 4 were women.

6. On becoming an AFO in Fettes Team 1, the Claimant reported to Sergeant Keith Warhurst ('KW').

7. On or about May 2017, KW became a Temporary Inspector.

8. On the 10th of January 2018, the Claimant was copied into an email sent by KW with the heading 'pairings' (pages 336 to 337 in the Bundle).

9. On Monday 15th January 2018, the Claimant met with KW and TI Finlay to complain about the content of KW's 10th January 2018 email.

10. The Claimant's complaint was that KW's 10th January 2018 email was sexist.

11. On the week beginning 15th January 2018, several AFO's contacted CI Russell to complain about KW's 10th January 2018 email.

12. On the 20th of January 2018, CI Russell contacted the Claimant to discuss KW's 10th January 2018 email.

13. On the 2nd of February 2018, the Claimant submitted a grievance which included a complaint about KW's 10th January 2018 email.

14. On the 5th of February 2018, the Claimant emailed her grievance to PSD who said they could not deal with the matter.

15. On the 8th of February 2018, the Claimant and her colleague, Freya Palmer, accompanied by Andy Malcolm of the Scottish Police Federation, met CI Russell to discuss KW's 10th January 2018 email.

16. The Claimant was on annual leave from the 9th to 18th February 2018.

17. On the 17th of February 2018, the Claimant was admitted to Accident & Emergency and diagnosed with gastro-esophageal reflux and epigastric tenderness.

18. On the 19th of February 2018, the Claimant telephoned TI Finlay who told her that she would be temporarily withdrawn from firearms duties.

19. On the 26th of February 2018, the Claimant attended a Women & Firearms Forum chaired by CI Russell.

20. On the 26th of February 2018, following the Women & Firearms Forum, the Claimant met with CI Russell, accompanied by Andy Malcolm, to discuss her grievance.

21. On the 2nd of March 2018, the Claimant attended a mediation meeting with CI Russell and KW accompanied by Andy Malcolm. During the mediation meeting KW apologised for the 10th of January 2018 email and the Claimant accepted his apology.

22. On or about March 2018, the Claimant complained to HR about CI Russell being given responsibility of dealing with her grievance.

23. The Claimant submitted a GP sick note for the period 19th to 20th March 2018 which stated, '*dyspepsia aggravated by work-related stress'*.

24. On the 23rd of March 2018, KW referred the Claimant to Optima requesting that before her firearms licence could be returned a Report was needed from her GP.

25. On the 10th of April 2018, the Claimant met with CI Russell to discuss a Grievance Outcome Report CI Russell had prepared and the matter of the Claimant's firearms licence.

26. On the 11th of April 2018, the Claimant gave Optima authority to contact her GP.

27. On 13 April 2018 the Second version of the Grievance Outcome report was sent to the claimant (page 356)

28. On the 25th of April 2018, the Claimant submitted a request to be transferred out of ARV.

29. On the 8th of May 2018, the Claimant emailed HR and CI Russell to complaint about CI Russell's Grievance Outcome Report (pages 386 to 389).

30. On the 16th of May 2018, the Claimant met a member of the Respondent's HR Team along with Mr Andy Malcolm (SPF).

31. On the 16th of May 2018, the Claimant met with CI Russell and Rosemary Neilson (HR) accompanied by Mr Malcolm (the Respondent's minute of this meeting is contained at pages 391 to 396).

32. On the 23rd of May 2018, CI Russell prepared a third version of her Grievance Outcome Report (page 398 - 405)

33. On the 24 May 2018, a third and fourth (and final) version of CI Russell's Grievance Outcome Report was prepared (pages 407 to 414).

34. On the 24th of May 2018, the Claimant was transferred out of ARV to J Division Response.

35. On the 18th of June 2018, the Claimant submitted further complaints to HR ('the second grievance') (pages 420 to 434).

36. On the 6 June 2018, the Claimant invoked the ACAS Early Conciliation Procedures. The ACAS certificate was issued on 20 June 2018 (page 6)

37. The Claimant was absent from duties with work-related stress in the period 24th of June 2018 until her retirement on the 2nd of April 2020.

38. By letter dated 5th July 2018, Ms McLean (HR) informed the Claimant's that she did not consider her second grievance to be competent (pages 435 to 436).

39. On the 17th of July 2018, the Claimant submitted a Form ET1.

40. On the 13th of August 2018, Michaela McLean emailed the Claimant confirming her original decision not to progress the second grievance and suggesting that she raise her complaints with PD (pages 437 to 438).

41. On the 23rd of August 2018, the Respondent's submitted a Form ET3.

42. On the 18th of September 2018, the Claimant raised a complaint with PSD (page 443).

43. By email dated 19th September 2018 (page 467), PSD acknowledged receipt of the Claimant's complaint.

44. On the 28th of November 2018, PSD confirmed to the Claimant that her complaints would be addressed by them and passed to PSD Conduct for assessment (page 510).

IHR victimisation

45. The Claimant was assessed by Optima Health on the 10th of April 2019 (pages 526 to 537).

46. On the 23rd of May 2019, the Claimant emailed the Respondent's HR Department asking to be considered for ill-health retirement.

47. In support of her IHR application, the Claimant also submitted Reports from her GP (page 555).

48. As part of her IHR application, the Claimant privately instructed Dr Simon Petrie, Chartered Clinical Psychologist, who prepared a Report dated 11th July 2019 (pages 538 to 556).

49. On the 3rd of October 2019, the Claimant was assessed by the Respondent's SMP, Dr David Watt, of Optima Health.

50. On the 11th of October 2019, Dr Watt prepared a Report for the purpose of the Claimant IHR application (pages 557 to 565).

51. On 23rd October 2019 Lisa Scott wrote to the Claimant (page 578) to explain that in light of the SMP's report the next stage of the process.

52. The author of the document at pages 699-700 is Lisa Scott. It is dated 23rd October 2019.

53. The author of the 'details of division' section of the document (page 700) was Supt Gregg Banks, who is the Support Superintendent for J Division.

54. On the 23rd of October 2019, the Claimant emailed the Respondent's HR Department to advise that she accepted Dr Watt's Report and recommendations (page 581).

55. The Claimant's IHR application was considered at a Postings Panel Meetings on the 25th of October 2019

56. On the 29th of November 2019, the Respondent's Solicitor emailed the employment tribunal (pages 591 to 592).

57. On the 12th of December 2019, the Respondent's Solicitor wrote to the ET stating that the Claimant's PSD file was closed based on a misunderstanding (pages 522 and 523).

58. By email dated 12th December 2019 to the employment tribunal the Respondent's Solicitor stated that the Respondent's IHR process was entirely independent of the Claimant's employment tribunal proceedings (pages 599 to 600).

59. On the 13th of December 2019, Mr Alasdair Muir (Senior HR Business Partner with the Respondent) emailed the Claimant's Solicitor stating that the November 2019 Posting Panel '*felt strongly that some small amount of further factfinding should be undertaken to ensure that a fully rounded*

recommendation on IHR might be made to SPA via the Police Scotland Director of People & Development.' (Page 601).

60. On the 5th of March 2020, the Claimant was contacted by the SPA and informed that her IHR application had been approved.

61. On the 2nd of April 2020, the Claimant was retired on the grounds of ill-health.

62. On the 3rd of August 2020, the Claimant recovered the documents referred to at Schedule 1 attached under a Subject Access Request she submitted to the Respondent on the 18th of April 2020.

Schedule 1

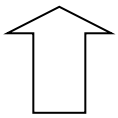
An email from Lisa Haggerty (10.15) dated 23rd October 2019 (page 579)

An email from Ross Haggerty to Lisa Scott (10.54) dated 23rd October 2019 (page 580); and

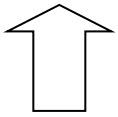
An email from Alasdair Muir to D Pettigrew & Others (15.53) dated 16th December 2019 (page 602)

Hierarchy of Witnesses and other Cast Members.

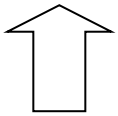
1. **Chief Superintendents**: Matthew Richards and Andrew McDowall*



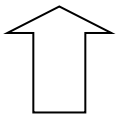
2. **Superintendents**: Steven Irvine and David Pettigrew.



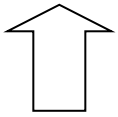
3. **Chief Inspectors**: Linda Russell



4. **Inspectors**: Keith Warhurst, Alan Finlay and Andrew Malcolm



5. **Sergeants**: Richard Creanor, Simon White, Rachel Coates, and Guy Sinclair



6. **Police Constables**: Rhona Malone, Freya Palmer, and Zara Taylor

Police Staff with no rank: Alasdair Muir, Lisa Scott, Ross Haggarty, and Michaela McLean.

**In November 2018 when the PSD referral was made, Mr McDowall held the rank of Superintendent.*

FINDINGS IN FACT

The Findings in Fact made by the Tribunal should be read in conjunction with the Agreed Facts in the Joint Statement of Facts

9. The claimant was a respected and committed police constable who had an exemplary record prior to joining the respondents Armed Response Vehicles ('ARV') in October 2016, The claimant had not experienced personal difficulties or conflict with her colleagues or management in her career up to that date. The Tribunal considered it worthy of note that the claimant was Runner-Up Probationer of the Year in 2011. The claimant gave compelling evidence that she had loved her role as a police officer.

10. In order to join ARV the claimant completed a ten week residential training course in Aberdeen. She did so at considerable personal sacrifice as she was a single parent with three children. The claimant said in evidence that her ultimate goal was to become a close protection officer.

11. The two female Authorised Firearms Officers ('AFOs') within Fettes Team 1 were the claimant and Freya Palmer.

12. The Tribunal accepted the claimant's evidence, together with the evidence of the witnesses Rachel Coates, Richard Creanor, Simon White and Zara Taylor and finds that the culture within ARV was, in the words of Richard Creanor, an *'absolute boys club culture'* and in the words of Rachel Coates *'horrific*.'

13. The Tribunal accepted in evidence the examples of the *'absolute boys club'* or *'horrific'* culture given by the claimant's witnesses. In March 2017 Keith Warhurst had a conversation with Richard Creanor and said of Zara Taylor: *'you are going to end up fucking that.'* Richard Creanor told Zara Taylor about this remark sometime in 2018, after she herself had raised Tribunal proceedings against the respondents.

14. The Tribunal accepted the evidence of Richard Creanor and found that in March 2017 Keith Warhurst referred to a colleague's pregnant partner as *'a right fat bitch'* / *'a fucking fat bitch.'*

15. The Tribunal accepted that when Rachel Coates became an AFO she was told by the Chief Firearms Instructor (CFI) that women should not be AFOs because they menstruated and this would affect their temperament. The Tribunal also accepted the evidence of Rachel Coates that she asked the CFI if women AFOs could have trousers and a top instead of a one piece to wear and explained to him that a one piece meant that women had to take off their gun belts and armour when going to the toilet. The Tribunal accepted the evidence of Rachel Coates that in response the CFI told her to *'fuck off.'*

16. The Tribunal accepted the evidence of the witnesses Richard Creanor and Simon White that there was a WhatsApp Group of Sergeants within Fettes Team 1 which comprised Keith Warhurst, Richard Creanor, Simon White, Paul Weatherburn, and Guy Sinclair. The WhatsApp Group was used to send both work and leisure related messages. Following his promotion to Temporary Inspector in May 2017 Keith Warhurst posted images of topless women on the WhatsApp group. Simon White then messaged Keith Warhurst and told him that such images were inappropriate.

17. The Tribunal accepted the evidence of Richard Creanor that in April 2018 he overheard Keith Warhurst calling one of the female Police Investigators and Review Commissioner (PIRC) agents '*a wee lassie'.*

18. The Tribunal heard uncontested evidence from Zara Taylor that she raised a Tribunal claim due to inadequate PPE for women in the ARV Division which was settled by the respondents. The uncontested evidence of Rachel Coates and Zara Taylor was that they transferred out of the ARV Division as they were not confident that the sexist culture within the ARV division was going to change and felt that their sex was always going to be a barrier to promotion.

19. On the 10th of January 2018 Keith Warhurst sent an email to Guy Sinclair, the claimant's Sergeant and line manager. The claimant, Freya Palmer and Alan Findlay were copied into the email **(336-337)** which stated:

'Guy

I am going to plunge in with both feet and open myself up to being accused of being sexist!

For operational reasons I don't want to see 2 x female officers deployed together when there are sufficient male staff on duty.

This is based upon my experience in the firearms and routine policing environment, other than the obvious differences in physical capacity, it makes more sense from a search, balance of testosterone perspective. It is not a reflection on either Rhona or Freya!

If you want to discuss my door is open.

Ladies,

For the purpose of transparency I have included you in this email.

Likewise if you want to discuss my door is open.

Regards

K'

20. The Tribunal accepted the evidence of the claimant, Rachel Coates, Richard Creanor and Linda Russell that the email of 10th January contained an order or direction from a senior police officer to the effect that women could no longer be deployed together when there were sufficient male staff on duty. The evidence of Alan Findlay was that a legitimate reading of this email was that it contained an instruction that two women should not be deployed together when there were sufficient male staff on duty.

21. The Tribunal accepted the evidence of Linda Russell and Steven Irvine that the email of 10th January 2018 did not express the views of senior management. The Tribunal accepted the evidence of Linda Russell that following the email she contacted all supervisory staff to let them know that the email of 10th January 2018 did not represent the views of senior management and was not to be actioned. The order or direction of 10th January 2018 was therefore never implemented. The Tribunal accepted the evidence of Linda Russell that she said to Keith Warhurst that she was *'extremely disappointed in him.'* The Tribunal also accepted the evidence of Steven Irvine that he was furious about the email which he considered to be *'overtly sexist.'*

22. The Tribunal accepted the evidence of Rachel Coates that Keith Warhurst's email of the 10th January 2018 was widely discussed within ARV Division and beyond. Rachel Coates' evidence was that she was '*angry and horrified''* at the content of the email, and that discussions with other female AFOs had indicated that women AFOs were '*really annoyed, flabbergasted and gobsmacked'* by the email. The claimant gave evidence that she was '*shocked and upset'* by the email.

23. On the 15th of January 2018 four out of the five Sergeant AFOs in Team 1 complained to Linda Russell about the content of the email of the 10th January 2018.

24. Also on the 15th January 2018 the claimant had an impromptu meeting with Keith Warhurst and Alan Findlay regarding the content of Keith Warhurst's email of 10th January 2018. The meeting took place in a room shared by Keith Warhurst and Alan Findlay who were both, at that stage, ranked two grades higher than the claimant. The claimant expressed her shock and anger at the content of the email and stated that it had been both offensive and sexist. At that meeting Keith Warhurst attempted to justify his email on the basis of *'method of entry'* referring to the physical force required when an AFO or police officer requires to break down doors. By his own admission, Alan Findlay '*intervened to assist Keith Warhurst and explain the thought process in relation to mixed pairings for operational reasons.'*

25. The Tribunal accepted the claimant's evidence that at that meeting she was '*firm and forthright'.* The Tribunal accepted the evidence of Alan Findlay that the impromptu meeting deteriorated and accepted the evidence of Keith Warhurst that the meeting became '*heated'*. The essence of the discussion was that the claimant felt that the email was sexist; Keith Warhurst, on the other hand, was trying to defend the email and state that it was not sexist. The evidence of Alan Findlay was that the claimant was not calm in the course of this discussion.

26. In cross examination, Alan Findlay accepted that in the course of the *'heated'* discussion, he made a statement along the lines of that set out in his witness

statement at paragraph 14 namely: '*Rhona, I can see you are becoming frustrated and upset by what is being discussed with Keith, as a firearms officer you should be able to discuss this in a calm/restrained and controlled manner, doing anything other than that may result in a review of your operational fitness and ultimately may result in a temporary withdrawal and I don't want to progress to that.'* In cross examination he accepted that whilst the claimant had not been calm at the meeting on the 15th January 2018 her behaviour had not got to the stage where it would be appropriate to effect a temporary withdrawal of her firearms duties. At the meeting on the 15th January 2018 Alan Findlay did not state to Keith Warhurst that his conduct at that meeting could result in a temporary withdrawal of his firearms duties.

27. On the 20th January 2018 Linda Russell contacted the claimant by telephone to discuss the email of the 10th January 2018. At that time Linda Russell had been in post as Area Commander within armed policing for some five weeks. The post of Area Commander within armed policing was her last appointment prior to retirement and according to the evidence of Linda Russell she was committed to making improvements within the culture of armed policing. The Tribunal accepted the uncontested evidence of the claimant that in the course of this telephone conversation Linda Russell stated that she was trying change the culture within firearms but at the same time was trying hard to brush off the email and defuse the situation.

28. The Tribunal accepted the evidence of the claimant that her upset over the email was compounded by her knowledge of Keith Warhurst's previous attitude and conduct towards women and the culture within ARV generally. On the 2nd February 2018 the claimant lodged a grievance **(338).** The grievance concluded with stating:

> *'To clarify, my grievance is in respect of*
> *1 To being shouted at by TPI Warhurst with regards to a payment I believed I was entitled to claim, to be treated differently and the circumstances surrounding it.*
> *I believe this to be unfair and unlawful*

2 To me being falsely accused of throwing my utility belt with a loaded weapon.
I believe this to be unfair and unlawful
3 To being discriminated against due to my gender
I believe this to be unfair and unlawful
4 To an oppressive and discriminatory course of conduct towards me as detailed above, potentially because of my sex
I believe this to be unfair and unlawful to which I am covered under the discrimination protected characteristics criteria.' **(342)**

29. The respondents have a Standard Operating Procedure ('SOP') on Grievance which is found at **126** onwards. The SOP states: '*3.5(b) Every effort must be made to resolve the grievance as quickly as possible and within a maximum of three months from the date the grievance raised, wherever possible.'* **(131)**. The SOP provides for an informal procedure whereby an officer can attempt to resolve grievances with their line manager in the first instance **(134-135)** failing which a formal procedure is followed **(136-139).**

30. Paragraph 5.1 of the SOP provides: '*Every effort should be made to resolve the issues raised at each stage of the procedure as quickly as possible and within the stated time limits. When these timescales are expected to be exceeded with just cause, written notification of the reasons for the delay and revised timescales must be provided to the individual raising the grievance. Any extension to the set time limits should, where possible, be agreed by the individual (in writing).'* **(140)**

31. On the 14th February 2018 Lynsey McPherson, Senior HR advisor with the respondents emailed Chief Superintendent Matt Richards and stated:

'Hi Matt,
Please find attached a further grievance for your area-this one is from Armed Policing in Fettes.....Having a read at this one it may be beneficial for someone outwith armed policing to have a look at it, at CI level- the main complaint is against an Inspector. Just to get a guide

from yourself as to who you would like to appoint this to? We will then allocate an HR Advisor to support them and advise on the next steps.' (**351**- **352**) Commander Matt Richards replied via PC Yvonne Hall by email dated 15th February 2018 which stated: *'CS Richards has read the Grievance and has appointed CI Chris Scobbie to investigate. Can you please confirm who the HR Advisor will be and keep us updated.'* **(351)**.

32. CI Scobbie was a serving officer outwith armed policing. Linda Russell emailed CI Chris Scobbie on the 19th February 2018, copying in Superintendent Steven Irvine, CI Matt Richards and Inspector Alan Findlay and stated '... *At this stage, it would not be advisable, in my opinion, for CI Scobbie to attempt to progress the grievance without allowing her own line managers to resolve at an informal stage. Both myself and T/Inspector Findlay will maintain regular, appropriate contact with Rhona throughout her period of absence.'* **(350)**. From that point on Linda Russell dealt with the claimant's grievance. She was not the claimant's line manager (who remained Guy Sinclair) and was several ranks above the claimant. The evidence of Michaela McLean was that such a re-allocation of a grievance was very rare; she had never witnessed this on any other occasion in her seven years' experience of working in HR with the respondents.

33. At no point did Linda Russell disclose to the claimant that CI Scobbie had previously been allocated her grievance or that the advice from HR was that someone outwith armed policing be allocated the grievance.

34. In evidence, Linda Russell said that in the course of a telephone call CI Matt Richards had told her to take over the grievance and resolve it, whether formally or informally. The Tribunal were unable to resolve this evidence with the evidence of the email sent by CI Matt Richards appointing CI Chris Scobbie to investigate the grievance **(351)**. The Tribunal concluded that by insisting she dealt with the grievance Linda Russell, as the newly appointed Area Commander within armed policing, sought to contain the issues raised in that grievance within the department that she had just been appointed to.

35. The claimant's grievance was the first grievance Linda Russell had dealt with in her career with the respondents.

36. Following the meeting with Freya Palmer, Linda Russell and Andy Malcolm on the 8th February 2018 the claimant telephoned HR to complain that Linda Russell had been passed her grievance to deal with. The claimant referred to this telephone call in her second grievance **(424)**.

37. On the 26th February 2018 there was a Women in Firearms Forum. The Tribunal accepted the evidence of Rachel Coates that Linda Russell approached her in the toilets and told her that there should be no more discussion about the email of 10th January 2018 from Inspector Warhurst. Earlier, Rachel Coates had referred to that email at the Forum, calling it '*the elephant in the room'.*

38. At the end of the Forum the claimant, together with Andrew Malcolm, met with Linda Russell to discuss the claimant's grievance. In cross examination, Linda Russell admitted that she suggested that the claimant was transferred to Stirling or Maddiston at this meeting, and said by way of explanation that such a transfer would be for *'welfare reasons'* as the claimant lives nearer Stirling and Maddiston than Edinburgh. The *'welfare reasons'* included the fact that the claimant was off work with stress and had recently lodged a grievance. The Tribunal found the claimant's evidence to be entirely credible when she said that she did not agree to such a transfer as she felt it would imply that she had done something wrong; and that she simply wanted to have her grievance dealt with and return to Team 1 in Fettes. The Tribunal found that the suggested transfer was an attempt by Linda Russell to resolve the grievance without having to air the issues contained therein.

39. At the meeting on the 26th February 2018 the claimant agreed to mediation as an alternative to the formal grievance process. The respondents Grievance SOP states:

'4.2 Mediation

Mediation is an informal means of conflict resolution, which involves a facilitated meeting by a formally trained independent in house mediator. The purpose of mediation is to seek a mutually agreeable solution to resolve an issue at work without the need to progress to the formal grievance procedure.' **(135)**

40. The mediation meeting took place on the 2nd March 2018. Present were the claimant, Andrew Malcolm, Linda Russell and Keith Warhurst. The meeting took place at Bathgate Police Station. Linda Russell acted as mediator, although she had no training in mediation. The Tribunal accepted the evidence of Michaela McLean when she stated that it was not appropriate for a mediation to take place in the absence of a trained mediator.

41. The evidence of the claimant, Keith Warhurst and Andrew Malcolm was that at the mediation meeting on 2nd March 2018 Keith Warhurst apologised to the claimant about the matters raised in her grievance and for his email of 10th January 2018. The claimant's evidence was that she left the mediation meeting in the belief that all her complaints had been dealt with. Keith Warhurst's evidence, given under cross examination, was that he thought that the outcome of the mediation was that all matters had been resolved. Andrew Malcolm's evidence (given in his witness statement at para 10) was that the claimant accepted Keith Warhurst's apology and that so far as she and the Police Federation were concerned all matters were resolved. The Tribunal therefore concluded that that at the meeting on the 2nd March 2018 a '*mutually agreeable solution to resolve'* had been achieved in terms of the Grievance SOP **(135)**. In these circumstances the Tribunal found that the mediation should have been the end of the claimant's grievance process.

42. Notwithstanding this, and contrary to the provisions of the respondents' Grievance SOP, Linda Russell proceeded to progress the formal Grievance Procedure and to investigate and prepare a Grievance Report. She did so without advising either the claimant or Keith Warhurst. Further, she did so notwithstanding the fact she was not the claimant's line manager which the Tribunal found was contrary to the respondents' grievance SOP **(136)**.

43. Ultimately, there were four versions of Linda Russell's Grievance Report **(356,364,398, 407)**. The final version of the Grievance Report was dated the 23rd of May 2018, almost four months after the claimant raised her grievance. The Tribunal observed that this timeframe was outwith the timescales contained within the SOP. The Tribunal accepted the evidence that the reason there were four Grievance Reports was because the claimant was unhappy with the contents of each Grievance Report and had requested amendments to each version of the Report. The claimant's position in evidence was that she remained unhappy with the fourth and final version of the Grievance Report.

44. The Tribunal noted that the evidence of Andrew Malcolm was that he did not understand why Linda Russell went on to investigate the claimant's grievance and prepare Grievance Reports. His evidence was that the Mediation of 2nd March concluded matters and '*it was very much a matter of 'case closed''* (**para 14** of his witness statement). He also went on to state that: '*I remember, at the time, thinking why on earth these Grievance Outcome Reports were prepared; they were unhelpful; so much time was spent going over old ground and on matters which I had understood had been resolved. These Reports did nothing to assist the parties, especially the claimant, to move on.'* (**para 14** of his witness statement). The Tribunal found that this evidence resonated with the evidence of the claimant and Keith Warhurst, that the mediation meeting of the 2nd March 2018 resolved matters to everyone's satisfaction. The Tribunal found that Linda Russell's explanation for proceeding to prepare Grievance Reports contrary to the SOP as she wanted to be '*open and transparent'* to be an explanation that was wholly unsatisfactory.

45. The Tribunal found in fact that at no point in the four versions of the Grievance Report was it acknowledged that the email of 10th January 2018 was sexist and discriminatory. The Tribunal found in fact that point 4 of the claimant's grievance, being '*an oppressive and discriminatory course of conduct towards me as detailed above, potentially because of my sex'* (**342**) was never addressed in the Grievance Reports.

46. The Tribunal found in fact that there was no basis in fact to apportion blame to the claimant by the inclusion in the Reports of the statement: '*Both T/Inspector Warhurst and Constable Malone agreed to communicate with each other in a more appropriate and respectful way'* variations of which are found in every version of the four Grievance Reports **(359, 367, 402,** and **411)**.

47. The Tribunal found Linda Russell's evidence in this respect to be wholly unconvincing when she stated for the first time in re-examination that this statement was included as communication between the claimant and Keith Warhurst on the issue of her overtime had not been satisfactory.

48. It is a matter of agreement that on the 19th February 2018 Alan Findlay told the claimant that she would be temporarily withdrawn from firearms duties. It is not in dispute that on the 23rd March 2018 Keith Warhurst referred the claimant to Optima, the Occupational Health Advisers requesting that they obtain a report from the claimant's GP before her firearms licence could be returned. Neither is it in dispute that prior to that date the claimant's GP had signed her off as being unfit to work. At the time of the referral by Keith Warhurst the claimant's GP had already agreed she was fit to return to work.

49. The Tribunal accepted the evidence of Keith Warhurst that this was the first time that he had made a request via Optima for further information from a police officer's GP.

50. The Tribunal accepted unchallenged evidence that the requirement for a GP report would delay the claimant's return to full duties and delay a return of her firearms licence. The claimant's unchallenged evidence (which was accepted by the Tribunal) was that should further enquiries be necessary on the issue of her fitness to return to full duties then other, quicker routes would be to refer her to Optima itself for a report or to obtain a medical report from the respondents' Chief Medical Examiner. The Tribunal accepted the unchallenged evidence of the claimant that on the 9th April 2018 she had a telephone consultation with Optima and that in the course of that conversation she spoke to an Occupational Health Adviser, Joan Malloy, who told her that

there should be no need for a referral to her GP before reinstating her firearms licence as her GP had agreed she was fit to return to work.

51. The Tribunal accepted the evidence of the claimant that the delay in her return to full duties resulted in a lack of confidence and a feeling of isolation on her part which, in turn, led to her requesting a transfer from ARV on the 25th April 2018 **(380)**.

52. The evidence of Keith Warhurst was that he, along with Linda Russell, had taken a decision that a referral should be made to the claimant's GP as she had been absent with work related stress and therefore a report should be ordered '*for accountability purposes.'* However, Keith Warhurst was not the claimant's line manager at the relevant time. The claimant's line manager was Guy Sinclair. The Tribunal found that no credible explanation was provided as to why Keith Warhurst was the individual who instigated obtaining a GP report in circumstances where he was not the claimant's line manager and the claimant had an outstanding grievance against him. In evidence Linda Russell stated that had it not been for the claimant's grievance then the claimant's GP would '*probably not'* have been contacted for a further report prior to her return to full firearms duties.

53. It is a matter of agreement that on the 10th April 2018 the claimant met with Linda Russell to discuss a Grievance Report prepared by her and that on the 16th May 2018 the claimant, along with Andrew Malcolm, met with Linda Russell and Rosemary Neilson of HR to again discuss the Grievance Report. Minutes of the latter meeting are to be found at **391-396.**

54. The Tribunal preferred the evidence of the claimant to that of Linda Russell and found that at the meeting on the 10th April 2018 Linda Russell was hostile to her and dismissive of her complaints. The Tribunal also preferred the evidence of the claimant to that of Linda Russell and found that at the meeting on the 16th May 2018 Linda Russell was again dismissive of her complaints, rolled her eyes and said that she did not agree that there was any evidence to justify the claimant's sex discrimination allegations. In accepting the evidence of the claimant over that of Linda Russell on this issue the Tribunal had regard

to the fact that they accepted the evidence of Simon White when he stated that in April/May 2018 he had a conversation with Linda Russell in the course of which Linda Russell described aspects of the claimant's grievance as '*petty.'*

55. The Tribunal accepted the evidence of Linda Russell, given in cross examination, that at the meeting on the 16th May 2018 she did raise with the claimant the issue of a further withdrawal of firearms unless the claimant could *'move on.'* In cross examination she accepted that by '*move on'* she meant '*move on'* from the claimant's grievance and the claimant's reluctance to accept the Grievance Reports prepared by her.

56. An ACAS certificate was issued on the 6th June 2018. It is a matter of agreement that on the 17th July 2018 the claimant submitted an ET1 in which she alleged acts of discrimination on the part of the respondents.

57. It is also a matter of agreement that on the 18th June 2018 the claimant submitted further complaints to HR ('the second grievance') **(420)**. On the 4th July 2018 Michaela McLean, then an HR Business Partner, met with the claimant and Andrew Malcolm. She advised the claimant that the second grievance was not a competent grievance and that the claimant was outwith the timescales in the Grievance SOP to appeal the first grievance. The meeting was followed up with a letter of the 5th July 2018 **(435)** addressed to Andrew Malcolm. In that letter Michaela McLean stated that she did not consider the second grievance to be a competent grievance; and went on to explain that '*The recent submission provided by PC Malone reiterates the matters raised during her original grievance, which have been addressed'.* This letter was followed up by a letter to the claimant from Michaela McLean of 13th August 2018 which concluded: '*From the information you present below, it does not appear that you are submitting an appeal, but wish to highlight your dissatisfaction in the way this was handled by CI Russell. In raising an additional grievance, around this matter, can I ask what your preferred resolution would be?.... If you believe you have been victimised as a consequence of raising a grievance, for example if you have suffered less favourable treatment as a result, I would suggest this is a matter that is referred*

to Professional Standards for their consideration, rather than this being progressed as a grievance, but this would be dependent on what the resolution you are seeking is.' **(438)**

58. The Tribunal found in fact that at no point was consideration given by Michaela McLean to extending the time limit for presenting an appeal in terms of paragraph 5.1 of the Grievance SOP **(140)**.

59. The Tribunal accepted the evidence of Michaela McLean, given in cross examination, that the second grievance contained 22 new complaints on the issue of the handling of the first grievance by Linda Russell **(432-433)**. Further, the Tribunal accepted the evidence of Michaela McLean in cross examination when she conceded that it was not the role of HR to prevent grievances proceeding as the Grievance SOP provides: *'3(g) Management must take action in relation to a grievance.... Line Managers should contact HR for advice in these circumstances.'* **(130)**

60. Michaela McLean's explanation was that the heading 'Victimisation' above the 22 new complaints **(432)** led her to conclude that the second grievance should be referred to PSD. The Tribunal found this explanation to be unsatisfactory as by Michaela McLean's actions the claimant was effectively precluded from following the grievance procedure set out in the respondents' Grievance SOP.

61. It is a matter of agreement that the claimant had submitted her ET1 by the time of Michaela McLean's letter of 13th August 2018.

62. The claimant submitted a complaint to the Professional Standards Department ('PSD') on the 18th September 2018 in accordance with the advice of Michaela McLean **(443)**. It is a matter of agreement that her complaint was acknowledged by PSD on the 19th September 2018 **(467)**, there was further correspondence in October 2018 **(493-494)** and that by letter to the claimant of the 28th November 2018 Samantha McCluskey advised her that her complaints would be addressed by PSD **(510).** It is not disputed by the respondents that thereafter the claimant's complaint was forwarded to Andrew McDowall who took no action in respect of her complaint. His explanation for

taking no action was simply that he receives thousands of emails; in his words, he '*dropped the ball.'*

63. The Tribunal accepted the evidence of Andrew McDowall (given in cross examination) to the effect that that at the material time the existence of the claimant's ET proceedings *'could well have been'* brought to his attention.

64. The Tribunal found in fact that in April 2019 there was a communication from PSD to PIRC Enquiries in which PSD advised that: '*There are no live or closed complaints on our system that have been made by Ms Malone'* **(518)**.

65. It is a matter of agreement that on the 23rd of May 2019 the claimant applied for ill health retirement. It is a matter of agreement that on the 25th October 2019 there was a meeting of the Postings Panel at which the claimant's application for ill health retirement was discussed. To this end, the Tribunal accepted the evidence of Alasdair Muir that the sole function of the Postings Panel is to determine whether an individual meets the ill health retirement criteria.

66. The Tribunal accepted the evidence of Alasdair Muir that by 25th October 2019 the claimant met all the criteria for ill health retirement as the Postings Panel were by then in receipt of two unequivocal medical reports from Dr Petrie and Dr Watt that were wholly supportive of her application, being unequivocal in their terms that the claimant was unable to return to work with the respondents **(538-554** and **557-565).**

67. The Tribunal accepted the evidence of Alasdair Muir, given under cross examination, that the reason why the claimant's ill health retirement application was not advanced on the 25th October 2019 was because he had a '*general feeling of unease'* which on further enquiry under cross examination was stated by him to be the existence the claimant's Tribunal proceedings.

68. The Tribunal noted that the reasons given by Alasdair Muir for the Postings Panel's failure to process the claimant's application for ill health retirement on the 25th October 2019 were that further information should be considered by

Dr Watt, being the respondents' Selected Medical Practitioner ('SMP') and that consideration should also be given to commissioning an independent psychiatric report **(582).** In cross examination Alasdair Muir conceded that following the 25th October 2019 Postings Panel he neither provided further information to Dr Watt for his consideration nor did he advance the proposition that an independent psychiatric report should be commissioned.

69. It is a matter of agreement that on the 13th December 2019 Alasdair Muir emailed the claimant's solicitor and then stated: '*I confirm that I chaired the internal Postings Panel which met on 27th November 2019. At this meeting the panel felt strongly that some small amount of further fact finding should be undertaken to ensure that a fully rounded recommendation on IHR might be made to the Scottish Police Authority via the Police Scotland Director of People and Development. This is quite a commonplace course of action, particularly where there are considerable complexities to the case, Part of this did involve a request for further information in order to be satisfied that Dr Watt had been provided with all relevant case history and supporting documentation. It was not clear to the Postings Panel from the papers provided that this had been the case.'* **(601)**

70. The Tribunal found this correspondence to be entirely contradictory to an email sent by Alasdair Muir to David Pettigrew on the 16th December 2019 in which he stated: '*If you recollect attached form relates to the J Div Officer we considered at 27/11 Postings Panel but did not make a decision on due to Employment Tribunal Proceedings pending which we felt merited caution. Albeit, reason fed back was to give consideration to seeking of our own independent psychiatric assessment.'* (**602**)

71. The Tribunal found that Alasdair Muir gave no cogent explanation as to why he provided the claimant's solicitor with reasons that were entirely incorrect for the delay in processing the claimant's ill health retirement application. The Tribunal found the actions of Alasdair Muir in sending this correspondence to be neither honest nor reasonable.

72. Further, no explanation was given by Alasdair Muir as to why, on the 13th December 2019, he referred to a Postings Panel discussing the claimant's ill health retirement on the 27th November 2019 when no such discussion had then taken place.

73. The Tribunal accepted the evidence of the claimant that by the 25th October 2019 she was experiencing severe financial hardship in that her sick pay had run out and she had no other sources of income.

74. The failure of the respondents to consider the claimant's ill-health retirement on the 25th October 2019 caused a Hearing on Liability listed for January 2020 in these proceedings to be postponed.

75. In 2019 Keith Warhurst was promoted by the respondents to the rank of Inspector.

OBSERVATIONS ON THE EVIDENCE

The claimant

76. The Tribunal found the claimant to be an entirely credible and reliable witness, whose evidence was all the more impressive given that she remains unwell. In reaching this conclusion the Tribunal observed that in her evidence the claimant presented as an individual who gave her evidence as truthfully as possible, and who attempted to the best of her ability to give straightforward answers to all questions posed to her in cross examination.

Rachel Coates, Richard Creanor, Simon White and Zara Taylor

77. The above witnesses attended the Tribunal under Witness Order. The Tribunal found all of these witnesses to be credible and reliable.

78. Insofar as Rachel Coates was concerned, the Tribunal observed that she is a Police Sergeant within the respondents, with 24 years experience. When it was put to her that her version of events regarding her encounter with Linda Russell on the 26th February 2018 was incorrect, she pointed out to Mr Healey that, as a serving police officer, she has no motive to lie. In the absence of any reason

whatsoever to lie about a specific passage of events some three years ago, the Tribunal believed the account given by Rachel Coates of her encounter with Linda Russell in February 2018.

79. On the issue of her evidence regarding the culture within armed policing generally, the Tribunal observed that at times Rachel Coates was not composed and clearly was still affected by the culture her time as an AFO. Against this background Tribunal found her account of the culture within armed policing to be entirely credible.

80. The Tribunal found Richard Creanor to be an impressive witness. His evidence was delivered in an intelligent and measured manner against a backdrop where he made it clear in evidence that not only does he continue to hold the respondents in high regard but that he loved the 13 years that he spent with the respondents. To this end the Tribunal noted that Richard Creanor had had a successful career within the respondents and had been promoted on a number of occasions.

81. It was put to Richard Creanor in cross examination that he was not telling the truth with regard to his evidence regarding Keith Warhurst. In response, Richard Creanor pointed out that he had no possible motive for not telling the truth in circumstances where he was giving evidence under witness order; his wife is a senior police officer; and he himself has a senior role within Scottish Government. On reflection of this evidence, Tribunal accepted that there was no basis for Richard Creanor not to tell the truth.

82. Again, with Simon White, the Tribunal found no basis as to why a serving police officer with 26 years' experience would attend the Tribunal under Witness Order and lie under oath. Against this background the Tribunal found the evidence of Simon White-and in particular the evidence regarding Keith Warhurst sending topless images on a WhatsApp group and his evidence that in April/May 2018 CI Russell described the claimant's grievance as 'petty' - to be entirely credible.

83. Zara Taylor is a serving police officer of 13 years' experience. Again, the Tribunal could conceive of no reason as to why she would attend the Tribunal and not give truthful evidence. Zara Taylor's evidence was of assistance to the Tribunal both in respect of the culture within armed policing and in respect of her conversation with Richard Creanor in 2018 when he told her of Keith Warhurst's comments to him on meeting Zara Taylor, namely that: *'you're going to end up fucking that'.*

84. The Tribunal considered it necessary to make Findings in Fact from the evidence of the witnesses Rachel Coates, Richard Creanor, Simon White and Zara Taylor as the Tribunal accepted the claimant's evidence that her upset at the email of 10th January 2018 was compounded by her knowledge of Keith Warhurst's previous attitude and conduct towards women.

Andrew Malcolm

85. The Tribunal found the witness Andrew Malcolm to be a credible individual who gave his evidence in a straightforward manner, entirely fitting with his status as Inspector, his 29 years' service and his four years' experience within the Scottish Police Federation. The Tribunal found his evidence to be of particular assistance on the claimant's claims of victimisation in respect of Inspector Warhurst's insistence that Optima obtain a report from the claimant's GP; Linda Russell's handling of the grievance and the mediation; and the respondents' failure to treat the claimant's second grievance as a competent grievance.

Keith Warhurst

86. The first witness for the respondents that the Tribunal heard evidence from was Keith Warhurst. The Tribunal found the evidence of Keith Warhurst to be contradictory, confusing and ultimately incredible. He repeatedly failed to give a clear answer to questions put to him in cross examination. Insofar as the email of 10th January 2018 was concerned, Keith Warhurst said on different occasions during cross examination that the underlying reason for that email was one of the following: (i) to open up dialogue (without stating how this would

be achieved); (ii) because he had concerns about the claimant and Freya Palmer's training and abilities on Method of Entry; (iii) because a mix of sexes could assist in calming down volatile situations; and (iv) experience. Against that background it was unclear what, if any were the motives of Keith Warhurst in sending the email of the 10th January 2018 which was the catalyst of the chain of events leading to this Tribunal Hearing.

87. There was no cogent explanation provided as to why Keith Warhurst had instigated a referral to the claimant's GP via Optima in March 2018 when the claimant's line manager at the time was Guy Sinclair. There was no recognition from Keith Warhurst of the appropriateness of making such a referral in circumstances where the claimant had submitted a grievance on the 2nd February 2018 which included complaints about Keith Warhurst. The Tribunal observed that, further, this was the first time Keith Warhurst had instigated a referral to an AFO's GP.

88. On the issue of whether Keith Warhurst had sent either a video clip of topless women or a series of images of topless women on a group Whatsapp the Tribunal preferred the evidence of the witnesses Richard Creanor and Simon White whose evidence was clear that such images had been sent by Keith Warhurst. The Tribunal found no reason why these witnesses would lie under oath, particularly on such a specific issue. In respect of this issue, the Tribunal noted that under questioning from the Employment Judge Keith Warhurst stated under oath that he was 'fairly confident' that he had not sent such images; but later stated in cross examination that he categorically did not send such images to the Whatsapp group. The Tribunal found that this change in evidence to be another factor leading them to conclude that the evidence of Richard Creanor and Simon White should be preferred on this issue.

89. Again, the Tribunal preferred the evidence of Richard Creanor that Keith Warhurst had said to him *'you're going to end up fucking that'* on meeting Zara Taylor in 2017. Zara Taylor gave evidence that Richard Creanor had told her about this remark in 2018. The Tribunal could find no reason why Richard

Creanor would lie on such a specific matter and why Zara Taylor would perpetuate that lie with reference to a conversation some three years ago.

90. On a similar vein the Tribunal believed the evidence of Richard Creanor and found that Keith Warhurst had referred to a colleague's pregnant wife as a *'right fat bitch'* or a *'fucking fat bitch'.*

91. The Tribunal noted the position of Inspector Warhurst to be that both Richard Creanor and Simon White were liars and had personal vendettas against him which had been ongoing since 2018. The Tribunal observed that both the witnesses Richard Creanor and Simon White gave evidence under Witness Order and found it unbelievable that these witnesses would go to the lengths of making up specific allegations years after the events in question.

92. The claimant's representative took issue with the veracity of Keith Warhurst's witness statement in circumstances where Keith Warhurst in evidence stated that his witness statement had been altered by the respondents' solicitors. The Tribunal observed that they had ample opportunity to assess the evidence of Keith Warhurst through supplementary questions in chief, a lengthy cross examination and re-examination.

Alan Findlay

93. Inspector Alan Findlay gave evidence on a number of issues, notably the allegation that he had victimised the claimant by threatening to remove her firearms authority during the meeting on the 15th January 2018. The Tribunal heard evidence that the meeting had been called by Keith Warhurst to apologise for his email. The Tribunal observed that the meeting took place in the office shared by Keith Warhurst and Alan Findlay; and that the Tribunal accepted the clear evidence of the claimant that she was *'firm and forthright'* rather than emotional in expressing her views that the email was sexist and offensive.

94. The Tribunal accepted the evidence of the claimant that at the meeting Alan Findlay tried to defend the email sent by Keith Warhurst. This was not denied

by Alan Findlay in his own evidence to the extent that he stated he *'intervened to assist Keith Warhurst and explain the thought process in relation to mixed pairings for operational reasons.'*

95. In his witness statement, Alan Findlay gave evidence that he *'commented something along the lines of 'Rhona I can see you are becoming frustrated and upset by what is being discussed with Keith, as a firearms officer you should be able to discuss this in a calm/restrained and controlled manner, doing anything other than that may result in a review of your operational fitness and ultimately may result in a temporary withdrawal and I don't want to progress it like that.'* The Tribunal noted that this comment was made to the claimant only (and not to Keith Warhurst) against a background where, (according to the evidence of Keith Warhurst) the meeting had become heated and (according to Alan Findlay) had deteriorated.

96. In his evidence, Alan Findlay stated that the claimant's behaviour had not got to the stage where he considered that removal of firearms was appropriate; but that the claimant was not calm or restrained at the meeting. Against this background the Tribunal observed that Alan Findlay admitted that the fact that the claimant was '*frustrated and upset'* by her firmly held views on the sexism inherent in the email of 10th January 2018 could, in his view, ultimately lead to withdrawal of her firearms. The Tribunal observed that it was noteworthy that such a 'threat' was not made to Inspector Warhurst who was the other participant in the 'heated' discussion.

Linda Russell

97. Prior to her retirement, Linda Russell was a senior police officer, being Area Commander within Armed Policing having responsibility for firearms officers within the North and East of Scotland. She took up this role in late 2017. She made it clear at the outset of her evidence that she attended the Tribunal Hearing voluntarily; and gave her evidence in chief in a confident manner. However, in cross examination Linda Russell failed to answer certain key questions. These questions were, in essence, why she had dealt with the

claimant's grievance contrary to the advice of HR who recommended that it be handled by an individual outwith armed policing, namely CI Scobbie; why she acted as a mediator on the 2nd March 2018 when the respondents' grievance SOP states that mediations should be conducted by a formally trained in house mediator and she had received no such training ; why, contrary to the respondents' grievance SOP, she continued to investigate the claimant's grievance following a successful mediation on the 2nd March 2018; why, overall, she failed to follow the respondents' grievance SOP; why she failed to acknowledge in her Grievance Reports that the email of 10th January 2018 was discriminatory; why, despite four Grievance Reports she failed to deal with the fourth and final element of the claimant's grievance, being an oppressive and discriminatory course of conduct towards her because of her sex; and why she continually sought to apportion blame to the claimant within her Grievance Reports by suggesting that both Inspector Warhurst and the claimant should communicate with each other in a more appropriate and respectful way.

98. The Tribunal collectively had a perception of an individual who, five weeks into her final post prior to retirement had been faced with having to deal with the email by Keith Warhurst and its fallout. Linda Russell's own evidence was that she was disappointed in the email of 10th January 2018 which, in her own words, she felt *'set us back.'* The Tribunal formed the view that Linda Russell did not wish her final years of her successful career within the respondents to be overshadowed by a grievance of sexism handled externally to the department which might result in criticism of sexism within of armed policing being an area in which she, as a female Area Commander, sought to effect a change of culture. The Tribunal formed a view that Linda Russell was exasperated by the claimant's refusal (as she saw it) to accept her verbal assurances about culture change and her four versions of the Grievance Report.

99. The Tribunal preferred the evidence of Simon White to that of Linda Russell to the effect that he gave clear evidence that Linda Russell described the claimant's grievance to him as 'petty'. The Tribunal could find no reason why Simon White, a serving police officer, might lie on this very specific issue.

Steven Irvine

100. The Tribunal considered the evidence of Superintendent Steven Irvine noteworthy in that he acknowledged in cross examination that the email of 10th January 2018 was *'overtly sexist'* and stated that he had been *'furious'* about it. The Tribunal also observed that insofar as the issue of the GP referral was concerned, the evidence of Steven Irvine was that *'to an extent he agreed'* that it was self evidently inappropriate that Keith Warhurst dealt with the referral to Optima to instruct a GP report on the claimant's health.

Michaela McLean

101. In assessing the evidence of Michaela McLean the Tribunal took into account that Michaela McLean no longer works for the respondents, was attending under Witness Order and was giving evidence about events that had taken place several years prior to the Tribunal. Notwithstanding that, the Tribunal observed that Michaela McLean was able to be specific on certain matters but that her evidence in respect of why the claimant's second grievance was not a competent grievance was entirely opaque. To this end, the Tribunal observed that under cross examination Michaela Mclean accepted that the claimant's second grievance of the 18th June 2018 contained 22 new points concerning the behaviour of Linda Russell none of which had not appeared in the first grievance as at the time of the first grievance the claimant had not met with Linda Russell.

102. The Tribunal also observed that in terms of the respondents' Grievance SOP it is not the role of HR to prevent grievances proceeding. This was acknowledged by Michaela McLean in evidence.

103. In evidence, Michaela McLean relied upon the fact that the claimant had missed the deadline of seven days within the Grievance SOP for appealing against the grievance outcome. In doing so the Tribunal observed that Michaela McLean had no regard to provision within the SOP for extension to

time limits or to the admitted fact that the respondents themselves had not adhered to the time limits set out in the SOP in their processing of the claimant's grievance.

Andrew McDowell

104. Andrew McDowell gave evidence on the issue of the PSD failing to investigate the claimant's complaint in November 2018 after it was forwarded to him by Sergeant Bruce Ritchie. The Tribunal found the evidence of Andrew McDowell implausible to the extent that his explanation for the failure on the part of PSD to investigate the claimant's complaint of November 2018 was simply that he receives thousands of emails. The Tribunal found such an explanation to be wholly unsatisfactory given that Andrew McDowall is a high ranking police officer who is in charge of PSD. There was no explanation given as to why there was no record of the claimant's complaint in the correspondence to PIRC of April 2019. The only explanation given was that Andrew McDowall *'dropped the ball'* at the material time.

105. The Tribunal noted that in cross examination Andrew McDowell admitted that the claimant's ET proceedings *'could well have been'* brought to the attention of PSD at the material time.

Alasdair Muir

106. The Tribunal heard evidence from the witnesses Lisa Scott, Ross Haggerty, David Pettigrew and Alasdair Muir on the issue of the claimant's ill health retirement. The Tribunal found the witness Alasdair Muir to be the most significant of these witnesses on the issue of the claimant's claim of victimisation in respect of the respondents' delay in handling her application for ill health retirement.

107. Importantly, Alasdair Muir was unable to provide an explanation as to why the claimant's claim for ill health retirement was not processed at the Postings Panel on the 25th October 2019. Further, Alasdair Muir was unable to justify

why the reasons given by him on the Postings Panel Outcome of the 25th October 2019 were that further information should be considered by Dr Watt and that consideration should be given to an independent psychiatric report when on the evidence this was clearly not the case.

108. Further, the Tribunal found Alasdair Muir to be a witness who was unable to explain or justify to any extent the terminology used in the email sent by himself to the claimant's solicitor Margaret Gribbon on the 13th December 2019 when read alongside the email sent by him on the 16th December 2019 to David Pettigrew, recovered by the claimant under her SAR request. To this end, aside from saying that his email to Margaret Gribbon was poorly worded, he was unable to explain why, in justifying the delay in processing the claimant's ill health retirement application, he stated that the panel had *'felt strongly'* that *'some small amount of further fact finding'* should be undertaken, such fact finding being further information supplied to Dr Watt for his consideration. He admitted under oath that this email was entirely inconsistent with his email three days later dated the 16th December 2019 to David Pettigrew which stated that a decision had not been made on the claimant's ill health retirement application *'due to Employment Tribunal Proceedings pending which we felt merited caution.'* Significantly, he was unable to explain why, in the email to David Pettigrew, he went on to state: *'albeit, reason fed back was to give consideration to seeking of our own independant psychiatric assessment.'* aside from stating in his witness statement that this sentence is *'poorly worded'.* Against this background the Tribunal found that the actions of Alasdair Muir in providing misleading information to the claimant's solicitors were neither honest nor reasonable.

109. Neither was Alasdair Muir able to explain why reference was made to a discussion on the claimant's IHR application at a Postings Panel on the 27th November 2019 when no such discussion had taken place.

The Law

Direct Discrimination

110. **S13** of the Equality Act 2010 provides:

> *'(1) 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.'*

111. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. In **R v Governing Body of JFS and the Admissions (2009) UKSC 15**, the Supreme Court gave guidance on the issue of how to determine the reason for the claimant's treatment. Lord Phillips, then President of the Supreme Court, stated that in deciding what were the 'grounds' for discrimination, a court or tribunal is required to identify the factual criteria applied by the respondents as the basis for the alleged discrimination. Lord Phillips went on to identify that there are two routes by which to arrive at an answer to this factual inquiry. The first route is where there is no dispute at all about the factual criterion applied by the respondents, as was the case in **James v Eastleigh Borough Council 1990 ICR 554 HL;** the second is where the reason for the less favourable treatment is not immediately apparent- in other words where the act complained of is not inherently discriminatory. **Amnesty International v Ahmed 2009 ICR 1450 EAT** is authority for the proposition that the 'but for' test in earlier authorities remains relevant in the latter type of case, where the reason for the less favourable treatment is not immediately apparent.

112. Insofar as comparators are concerned, s 23 of the Equality Act 2010 provides:

> *'23 Comparison by reference to circumstances*
> *(1) 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.'*

113. The Tribunal found it of assistance to consider the **EHRC Code** of **Practice on Employment** ‘the Code' on the issue of direct discrimination. Paragraph **3.4** of the Code states: ‘*To decide whether an employer has treated a worker ‘less favourably’ a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer’s treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.’*

114. Paragraph **3.14** of the Code provides: *‘Direct discrimination is unlawful, no matter what the employer’s motive or intention, and regardless of whether the less favourable treatment of the worker is conscious or unconscious. Employers may have prejudices that they do not even admit to themselves or may act out of good intentions-or simply be unaware that they are treating the worker differently because of a protected characteristic.’*

115. **Baldwin v Brighton and Hove City Council (2007) IRLR 232** is EAT authority for the proposition that in order for a direct discrimination claim to be successful, the less favourable treatment must have actually happened. It is insufficient for there merely to be an intention to discriminate.

Victimisation

116. **S27** of the Equality Act 2010 provides:

‘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,

(2) 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;

(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'

117. On the meaning of 'detriment' the Tribunal had regard to the words of Lord Hope of Craighead in **Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) (2003) UKHL para 35** wherein it was stated: '*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment'.'*

118. The Tribunal had regard to the Code and particularly paragraph 9 onwards. Paragraph **9.8** states: *'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage....'* Paragraph **9.9** of the Code states: *'A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.'*

119. In order to succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment because he or she did a protected act or because the employer believed he or she had done or might do a protected act. The essential question in determining the reason for the claimant's treatment: what, consciously or subconsciously motivated the employer to subject the claimant to the detriment?

120. However, the test is not precisely one of causation. The case of **Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL** involved

the refusal of a reference to the police force to which Mr Khan had applied for a post in circumstances where Mr Khan had an outstanding Tribunal application against the appellants. The House of Lords overturned the Court of Appeal and found that the real reason for the refusal of a reference to the claimant was that the provision of the reference might compromise the Chief Constable's handling of the Tribunal proceedings and that that was a legitimate reason. At paragraph **77** of his judgment Lord Stott gave helpful guidance on the issue of causation in cases of victimisation when he stated that: *'The words 'by reason that' suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified.'*

121. The case of **Khan** is also authority for the proposition that employers, acting honestly and reasonably, can take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. At paragraph **31** of his judgment Lord Nicholls of Birkenhead stated: '*Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings.... (the) Act cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably. Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who brought the proceedings.'*

122. The approach in **Khan** was reconsidered by the House of Lords in the context of equal pay claims in the case of **Derbyshire and ors v St Helens Metropolitan Borough Council and ors 2007 ICR 841, HL**. At para **68-69** of the judgement Lord Neuberger of Abbotsbury stated: *'69 As already mentioned, it seems to be that in practice, the 'honest and reasonable' test*

suggested by Lord Nicolls in paragraph 31 of Khan would, at least in any case I can conceive of, be very likely to yield precisely the same result ...It is hard to imagine circumstances where an 'honest and reasonable' action by an employer, in the context or conduct of an employee's equal pay claim, could lead to 'detriment' as that term has been considered and explained in the cases to which I referred, on the part of the employee....'

Burden of Proof

123. **S 136** of the Equality Act 2010 states:

'Burden of Proof
(1) This section applies to any proceedings relating to a contravention of the Act.
(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.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

124. In **Fennell v Foot Anstey LLP EAT 0290/15** Her Honour Judge Eady QC stated: *'Although guidance as to how to approach the burden of proof has been provided by this and higher appellate courts, all judicial authority agrees that the wording of the statute remains the touchstone.'*

125. **Igen v Wong 2005 ICR 931, CA** remains the leading case in this area of law. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (ie on balance of probabilities) - is the second stage engaged, whereby the burden then 'shifts' to the respondents to prove – again on balance of probabilities- that the treatment in question was 'in no sense whatsoever' on the protected ground.

126. In **Hewage v Grampian Health Board 2012 ICR 1054** Lord Hope made it clear that the statutory burden of proof provisions only have a role to play where there is room for doubt as to the facts necessary to establish discrimination; however in a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance.

127. In **Laing v Manchester City Council (EAT) 2006 ICR 1519** Elias J (President) described the provisions of s136 thus: '*Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error of law to fail to do so. There is no purpose in compelling tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up..'* (**para 76**)

Time Bar

128. **S123** of the Equality Act 2010 provides:

> *'Time Limits*
> *(1) Proceeding on a complaint within section 120 may not be brought after the end of -*
> *(a) the period of 3 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.*
> *(3) For the purposes of this section -*
> *(a) conduct extending over a period is to be treated as done at the end of the period.'*

129. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434**, **CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now s123(1)(b)of the Equality Act 2010,

there is no presumption that they should do so, The onus remains on a claimant to convince a Tribunal that it is just and equitable to hear the claim.

130. **Chohan v Derby Law Centre (2004) UK EAT** is authority for the proposition that the fault of a claimant's legal adviser should not necessarily be visited upon them when considering whether to extend time in a discrimination case.

131. In **British Coal Corporation v Keeble 1997 IRLR 336,** the EAT identified a checklist of factors to take into account when considering whether to allow a claim of discrimination which is out of time. This checklist was revisited in the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640**. In that case Lord Justice Leggatt in the Court of Appeal stated: '*First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble) 1997 IRLR 336) the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account..... That said, factors which are always relevant to consider when exercising any discretion whether to extend time are (a) the length of, and reasons for the delay and (b) whether the delay has prejudiced the respondents (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision.'*

132. Insofar as what constitutes *'conduct extending over a period'* is concerned, the Tribunal was guided by the Court of Appeal in the case of **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA**, subsequently approved in **Hale v Brighton & Sussex University Hospitals NHS Trust UKEAT/0342/16**. In overturning the EAT in **Hendricks**, the Court of Appeal stated that the focus should have been on the substance of the claimant's allegations that the Police Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. Lord Justice Mummery stated at **para 52:** *'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 or isolated specific acts, for which time would begin to run from the date when each specific act was committed.'*

133. **Submissions for the claimant**

The undernoted summary submissions were provided by the claimant's representative

Timebar

134. The claims in relation to the non-receipt of the second grievance (LOI, para 25-29) and PSD's failure to investigate the Claimant's complaint's (LOI, para 29-30) were allowed by way of amendment on 9 December 2020. The Respondent now concedes that the GP claim (LOI, para 7-8) was in time as well as the IHR claim. Any argument about timebar is restricted to the other heads of claim. Those claims are in time because either/both (i) the claims were sufficiently foreshadowed in the originating ET1; and (ii) the claims up to and including the PSD failure to investigate are a course of conduct for the purposes of s.123(3)(a). In the alternative, those claims have been brought within a time period which is just and equitable, having regard to the whole circumstances.

Direct Discrimination

The email of 10 January 2018 sent by Inspector Warhurst amounts to direct discrimination on the grounds of sex. This is a 'criterion' case. The email was, in substance, a direction or requirement applicable only to female AFOs in the Claimant's team. Whether it was subsequently countermanded does not detract from it being unfavourable treatment at the time meted out. It was self-evidently sent because of the Claimant's/the other officers sex, as that is what the email says on its face. There is no non-discriminatory reason given within the email. To the extent the Tribunal now needs to look beyond the email to consider the alternative purpose now advanced by the Respondent (inexperience), (i) the evidence does not support that account as genuine and (ii) the broader context of Inspector Warhurst's attitude about and behaviour towards females fatally undermines that position.

Victimisation

The Tribunal is not only entitled, but it is obliged to consider the broader context in dealing with the 2 stages of the burden of proof under s.136(2) and (3). It requires to do so to make primary facts, prior to deciding, firstly, whether to draw the inference the Claimant invites at stage 1 and, secondly, whether to accept any non-discriminatory reason given by the Respondent at stage 2 [Anya v University of Oxford [2001] ICR 847 at para 9-10]. Unless the true reason found is entirely non-discriminatory, s136(2) requires the Tribunal to draw the inference established.

Alan Findlay – threat of withdrawal of firearms authority

The Claimant's account of what was said is to be preferred. The Claimant having asserted that the email was sexist (a protected act), Inspectors Warhurst and Findlay disputed that. In the context of that discussion the statement 'do I have to look at taking your guns' was made. That, in context, was a detriment. It was because of the Claimant's protected act. What the Claimant said and how she said it are not severable. In any event, on Inspector Findlay's account she never got to the stage of meeting the criteria for such removal.

The GP Report Claim

The important context is that this was done by Inspector Warhurst, at a time after the Claimant's grievance (a protected act) and before any suggestion that she would mediate or resolve this informally. It was more invasive than a standard optima referral, but in any event it was the imposition of an additional hurdle prior to her return to work. That hurdle is a detriment. It was because of the grievance. Per Linda Russell, the Respondent would 'probably not' have continued to insist upon it otherwise. In any event, the fact it was requested by Inspector Warhurst means that even if the others were not motivated by discriminatory reasons, it is sufficient that he was.

Linda Russell Claims

The context to these is CI Russell having come into her role to address the culture, which included issues about challenges faced by Women in Armed Policing. She tried to take control of the grievance and wanted to control the narrative. She became increasingly frustrated with the Claimant's unwillingness to let it go or accept her (CI Russell's resolutions). All of the conduct complained of is supported in evidence and each complaint amounts to something a reasonable person in the Claimant's shoes might view as a detriment. In assessing the reasons for this, either there was a calamitous pattern of failures and unfortunate coincidences or there was an underlying motive as ascribed to her by the Claimant. Her intervention on 19 February to deal with the grievance and her final 'threat' to the Claimant about return of her firearms authority on 16 May 2018 are both significant in drawing the inference invited.

The Failure to Treat the Second Grievance as a Competent Grievance

An employee being prevented from exercising their rights under an agreed grievance procedure (and by effect their entitlements under the ACAS Grievance Code) is a detriment. Ms McLean accepted that it was the Claimant's reference to 'victimisation' that lead to her refusing to allow the grievance to be received. No

other, non-discriminatory decision was put forward. Irrespective of any late appeal, the final 22 bullet points raised were clearly procedural or fairness points which were apt for consideration under a grievance. If the Respondent thought they were conduct issues, then it was for them to treat them as such (not simply refuse the Claimant a remedy altogether).

The IHR Claim

The documents speak for themselves. The emails at pages 601-602 of the bundle make clear Mr Muir mislead the Claimant and her Solicitor. The delay is clearly a detriment. It was accepted that the claim would have been dealt with within 6-8 weeks of 24 October 2019, but for the delay. It is now accepted that the reason for delay was the possibility of prejudice to the Respondent's position in the ET claim. That is not severable from the claim itself, which is a protected act.

135. **Submissions for the Respondents**

The undernoted summary submissions were provided by the respondents' representative.

Direct Discrimination – The Email

The Respondent submits that:

Firstly, the email was not an order and so no less favourable treatment occurred.

Secondly, if it was an order then it was an order being made to Sergeant Sinclair and not to the claimant and so if there was less favourable treatment it was not of the claimant.

Thirdly, there can be no less favourable treatment because the proposed pairings rule did not actually happen.

In any event the real reason Inspector Warhurst sent the email was because he had a concern about the Claimant and Ms Palmer being paired together because of their experience and this was an unfortunate way of addressing that with Sgt Sinclair.

Victimisation

Alan Finlay and the Threat to Withdraw Firearms.

The Respondent submits that the reason for any comment being made to the Claimant was not because of a protected act but because the Claimant was coming close to displaying contra-indicators which would result in her authority being temporarily withdrawn.

The GP Report Claim

Obtaining a GP report is something which is done by the Respondent in order for them to be satisfied that a returning AFO is fit to carry a weapon. It is not always done, but was done in this case. Inspector Warhurst was conscious of the fact that the claimant had been signed off sick by her GP and so wanted the GP to confirm that she was fit. That was the reason for requesting the information. The request had nothing to do with the protected act.

Transfer Our of Team 1

This was not a detriment. It was a reasonable proposal to make in the circumstances and the claimant was not pressurised at all into accepting it. In any case the reason the proposal was made was not because of the protected act.

Linda Russell's Conduct

It is denied that Linda Russell behaved hostilely towards the claimant at either the meeting on 10th April or 16th May.

As to the former, the claimant had ample opportunity to raise this with her SPF Representative and did not do so. In fact she repeatedly engaged thereafter with Linda Russell with a view to resolving her grievance.

As to the latter, the comment made in relation to the firearms authority was because Linda Russell was concerned that the claimant's grievance (which is by its nature an emotional process) would affect her ability to safely carry a gun. That, and not the protected act, was the reason for any comment. That is corroborated by Andrew Malcolm's evidence that this was all about the claimant's emotional state.

The Way in Which the Grievance was handled.

Linda Russell handled the grievance to the best of her ability. To the extent that there were errors with the process, these were down to her inexperience in handling grievances and not because she wanted to control a situation which might look bad for her personally.

She arrived at conclusions in the grievance which were perfectly reasonable and permissible for her to do. The grievance outcome was not adversely impacted by the substance of the grievance. Linda Russell did not resolve the claimant's grievance in a detrimental way at all, and in particular, it was not impacted because of the protected act.

The Failure to Treat the Second Grievance as a Competent Grievance

Michaela McLean's decision to reject the second complaint insofar as it was an appeal was perfectly within the terms of the grievance procedure; it was made outwith the 7 day time limit for appeals.

Her decision to reject the other matters were because she thought what the claimant really wanted was to punish Inspectors Law and Warhurst which was not the purpose of the grievance and she thought that the matters relating to Linda Russell were conduct matters which needed to be dealt with elsewhere. Her decisions were not because the claimant did a protected act.

PSD Fails to Investigate the Complaints

This was an oversight on the part of Andrew McDowall

The IHR Claim

Those involved in the claimant's IHR application were aware of the ongoing tribunal claims and they wanted to be cautious because of that.

This does not mean that they have victimised the claimant. The law permits opponents in litigation to act differently to how they might otherwise act if litigation was not ongoing.

They were also in unfamiliar territory because the claimant had lodged her own medical report.

To the extent that there was any delay in processing the claimant's application this was not because she had brought tribunal proceedings and so there is no link between the protected act and the detriment.

Discussion and Decision

136. In determining this case the Tribunal had regard to the issues as formulated by the parties.

137. **The 'Email' Claim: Direct Discrimination – Section 13**

Did the Respondent treat the claimant less favourably than her male colleagues when Keith Warhurst sent his email dated the 10th January 2018?

If so, what was their less favourable treatment?

Was the reason for that less favourable treatment because of the claimant's sex?

138. In answering these issues the Tribunal had regard to the facts as found by them. Firstly, the Tribunal accepted the evidence of Rachel Coates, Richard Creanor and Linda Russell that the email of the 10th January 2018 contained an order or direction that women could no longer be deployed together when there were sufficient male staff on duty. Secondly, the Tribunal found that shortly after the email was sent Linda Russell contacted all supervisory staff to let them know that the email did not represent the views of senior management and was not to be actioned. The order or direction of 10th January 2018 was therefore never implemented.

139. After having regard to the Code paragraph **3**.**1** the Tribunal found that the less favourable treatment was the deprivation of a choice of being deployed with another female officer.

140. The Tribunal had regard to the case of **Baldwin v Brighton and Hove City Council,** cited above, and found that the less favourable treatment did not actually happen in that the order or direction of Keith Warhurst was countermanded by Linda Russell. For this reason, the claimant's claim of direct discrimination must fail.

141. For the sake of completeness, the Tribunal found that had the order or direction been implemented then that order or direction would have fallen into the category of being an inherently discriminatory or 'criterion' case as identified by Lord Phillips in the case of **R v Governing Body of JFS and the Admissions** cited above. In determining this the Tribunal had regard to the wording of the email of 10th January 2018 itself and in particular the order or direction that two females should not be deployed together for reasons which included *'balance of testosterone.'* In reaching this conclusion, the Tribunal also had regard to the evidence of Steven Irvine when he said that the email of 10th January 2018 was *'overtly sexist'.*

142. **The 'Threat of firearms authority being removed' Claim: Victimisation – Section 27**

Did the claimant do a protected act during a conversation with Keith Warhurst and Alan Findlay on 15 January 2018?

Did Alan Findlay threaten to remove the claimant's firearms authority during this conversation?

If so, was this a detriment?

If so, was the reason for that detriment because the claimant had done a protected act?

143. The starting point for the deliberations of the Tribunal in this claim of victimisation is the concession by the respondents in their fuller submissions that at the meeting on the 15th January 2018 the claimant did a protected act in that she complained that the email of 10th January 2018 was sexist.

144. The Tribunal accepted the evidence of Alan Findlay that in the course of the meeting on the 15th January 2018 he made a statement along the lines of: '*Rhona, I can see you are becoming frustrated and upset by what is being discussed with Keith, as a firearms officer you should be able to discuss this in a calm/restrained and controlled manner, doing anything other than that may result in a review of your operational fitness and ultimately may result in a temporary withdrawal and I don't want to progress to that.'*

145. After having regard to paragraph 9.9 of the Code, the Tribunal found the statement of Alan Findlay to be a detriment being a threat of withdrawal of her firearms duties. The Tribunal found it was reasonable for the claimant to take this threat seriously, given that Alan Findlay, as an Inspector, was two ranks higher than her.

146. In determining whether the reason for that detriment was because the claimant had done a protected act the Tribunal turned to the provisions of s136 of the Equality Act 2010 and the shifting burden of proof. To this end, the Tribunal

found in fact that the meeting on the 15th January deteriorated and became 'heated' as Keith Warhurst attempted to justify his email of 10th January; but that at no time did Alan Findlay consider that the claimant behaved in such a way as to merit a temporary withdrawal of firearms. The Tribunal also found in fact that the threat was made to the claimant only and not to Keith Warhurst who was the other party in the 'heated' discussion.

147. The Tribunal considered that these facts were sufficient to reverse the burden of proof. The Tribunal then considered the respondents' position, which was that the comments Alan Findlay made to the claimant were because he thought she was coming close to the point where a temporary withdrawal might be required.

148. In determining that the respondents had not discharged the burden of proof upon them, the Tribunal considered it important that such a threat was not made to Keith Warhurst also and, further, that at no point did Alan Findlay consider that the claimant's behaviour at that meeting had got to the stage where a temporary withdrawal of firearms was merited.

149. For these reasons the claimant's claim of victimisation in respect of the actions of Alan Findlay on the 15th January 2018 succeeds.

150. **The 'Optima Health Report' Claim: Victimisation – Section 27**

Was the Respondent's requirement that the claimant obtain a GP report prior to the reinstatement of her firearms license a detriment?

If so, was the reason for this detriment because the claimant had done protected act?

151. In considering these issues, the Tribunal determined firstly that the claimant's grievance of the 2nd February 2018 was a protected act as within it she complained of sex discrimination.

152. On the issue of whether the requirement to obtain a GP report could constitute a detriment, the Tribunal had regard to their Findings in Fact that the

requirement for a GP report would delay the claimant's return to full duties. The Tribunal also found in fact that the delay in the claimant's return to full duties as a firearms officer resulted in a lack of confidence and a feeling of isolation on the claimant's part which, in turn, led to her requesting a transfer out of ARV in April 2018.

153. The Tribunal then proceeded to consider whether the reason for this detriment was because the clamant had done a protected act.

154. In their deliberations, the Tribunal turned again to s136 of the Equality Act 2010 and the reversing burden of proof. To this end, the Tribunal found in fact that Keith Warhurst (being the individual who made the request for a GP report) was not the claimant's line manager at the material time. Further, this was the first time that he had requested a GP report before an officer returned to full firearms duties. The Tribunal also found in fact that at the material time Joan Malloy of Optima told the claimant that there was no need for a referral to her GP on the issue of reinstating her firearms licence as her GP had agreed she was fit to return to work. The Tribunal also found that other, quicker routes to obtain further medical information would have been to refer the claimant to Optima itself or to the respondents' Chief Medical Examiner. Finally, the Tribunal found that the claimant's grievance of 2nd February 2018 had complained about sexist conduct on the part of Keith Warhurst.

155. For these reasons the Tribunal concluded that the burden of proof passed to the respondents in respect of the requirement on the part of Keith Warhurst that the claimant obtain a GP report. In deciding that the respondents had not discharged that burden, the Tribunal had regard to the explanation given by Keith Warhurst and Linda Russell which was that a GP report had to be commissioned for accountability purposes. The Tribunal considered that such an explanation did not discharge the burden of proof upon the respondents in circumstances where the claimant had had a conversation with Optima (Joan Malloy) who assured her that such there was no need for such a referral in circumstances where her GP had agreed she was fit to return to work; Keith Warhurst was the individual who requested the GP report; Keith Warhurst was

not the claimant's line manager; and Keith Warhurst was the subject of complaint in the claimant's grievance of 2nd February 2018.

156. For all these reasons the Tribunal finds that the claimant was victimised in respect of the referral to her GP via Optima in March 2018.

157. **The Linda Russell Claims: Victimisation – 27**

Transfer out of Team 1

Did Linda Russell suggest to the claimant at their meeting on the 26th February 2018 that she be permanently transferred out of Team 1 to Stirling?

Alternatively, did Linda Russell suggest to the claimant that she be temporarily transferred out Team 1 to Stirling?

Did either of these proposals amount to a detriment?

Was the reason for either of these proposals because the claimant had done a protected act?

158. In determining these issues, the Tribunal had regard to the fact that the meeting on the 26th February 2018 was to discuss the claimant's grievance of 2nd February 2018. The 'protected act' was therefore the grievance of the 2nd February 2018.

159. In cross examination, Linda Russell admitted that she suggested to the claimant that she be moved either temporarily or permanently to Stirling or Maddiston at the meeting on the 26th February 2018. In determining that such a suggestion could amount to a detriment, the Tribunal had regard to their Findings in Fact that the claimant did not agree to such a transfer as she felt it would imply she had done something wrong; and that she simply wanted to have her grievance dealt with and return to Team 1 in Fettes. The Tribunal considered that the claimant's evidence on this issue amounted to something which '*an individual concerned might reasonably consider changed their*

position for the worse or put them at a disadvantage' in the words of para 9.8 of the Code.

160. The Tribunal found in fact that the suggested transfer was an attempt by Linda Russell to resolve the grievance without having to air the issues contained therein.

161. In deliberating this issue the Tribunal considered the facts, namely that the proposal for the claimant to move to Stirling/Maddiston was made by Linda Russell at a meeting the sole purpose of which was to discuss the claimant's grievance; that such a move could amount to a detriment; and that the proposal was made, at least in part, because the claimant had submitted a grievance. In these circumstances the Tribunal did not consider it necessary to revert to the burden of proof provisions and finds that the claimant was victimised at the meeting on the 26th February 2018 in respect of the proposed move to Maddiston/Stirling.

162. **Handling of Claimant's Grievance**

Was Linda Russell's handling of the Claimant's grievance (including: (i) her conduct towards the Claimant on 10 April 2018; (ii) her conduct towards the Claimant on 16 May 2018) – or any part of it - a detriment?

If so, was the reason for that detriment because of a protected act?

163. In deliberating this issue, the Tribunal found that the 'protected act' was the claimant's grievance itself.

164. The Tribunal found in fact that Linda Russell's handled the claimant's grievance without regard to the respondents' own HR advice and Grievance SOP. In particular, she took over the grievance contrary to the advice of HR who recommended that it be handled by an individual outwith armed policing, namely CI Scobbie; she acted as a mediator on the 2nd March 2018 when the respondents Grievance SOP states that mediations should be conducted by a formally trained in house mediator which she was not; she continued to investigate the claimant's grievance following a successful mediation on the

2nd March 2018 contrary to the respondents' Grievance SOP; she continued with the claimant's grievance in circumstances where she was not the claimant's line manager contrary to the respondents' Grievance SOP; and she failed to deal with the fourth and final element of the claimant's grievance despite producing four grievance reports. Further, the Tribunal found in fact that Linda Russell had no basis to apportion blame by including the sentence: *'Both T/Inspector Warhurst and Constable Malone agreed to communicate with each other in a more appropriate and respectful way.'* in her Grievance Reports.

165. The Tribunal noted that Linda Russell did not comply with the Grievance SOP timelines. The claimant's position remained that she was dissatisfied with the fourth and final version of the Grievance Report.

166. In determining these issues the Tribunal noted that they found in fact that at the meetings on the 10th April and 16th May 2018 Linda Russell was dismissive of the claimant's complaints and hostile to the claimant.

167. After considering all of their Findings in Fact, the Tribunal determined that the handling of the grievance by Linda Russell amounted to a detriment. In reaching this conclusion, the Tribunal considered, with reference to paragraph 9.8 of the Code, that the handling of the grievance by Linda Russell changed the claimant's position for the worse and put her at a disadvantage. In reaching this conclusion the Tribunal had particular regard to the facts that Linda Russell continued to investigate the claimant's grievance following the successful mediation on the 2nd March 2018; that Linda Russell remained an Area Commander within Armed Policing at all material times and was not the claimant's line manager; that the four versions of the Grievance Reports produced thereafter sought to apportion some blame to the claimant; and that the claimant remained dissatisfied with the fourth and final version of the Grievance Report.

168. The Tribunal then proceeded to determine whether the reason for that detriment was because of a protected act, in this case the raising of the grievance. In determining that it was because of a protected act, the Tribunal

had regard to their observations on the evidence of Linda Russell wherein they concluded that Linda Russell did not want her final years with the respondents to be overshadowed by a grievance of sexism handled externally, together with the evidence of Simon White when he said that Linda Russell had described the claimant's grievance as '*petty'.* The Tribunal also considered the fact that they accepted the claimant's own evidence of Linda Russell being dismissive of her grievance at the meetings on the 10th April 2018 and the 16th May 2018.

169. In finding that the claimant was victimised in the handling of her grievance, the Tribunal considered it unnecessary to refer to the shifting burden of proof as they were in a position to make positive findings on the evidence.

170. **Threat re. Firearms Authority on 16 May 2021**

Did Linda Russell threaten to delay restoring the claimant's fire arms authority if she continued to raise issues about her grievance and/or the way her grievance was being handled?

If so, was this behaviour a detriment?

If so, was the reason for this detriment because the claimant had done a protected act?

171. The Tribunal commenced their deliberations on this issue by determining that the protected act was the claimant's grievance of the 2nd February 2018.

172. In evidence (under cross examination) Linda Russell admitted that at the meeting on the 16th May 2018 she did raise with the claimant the issue of a further withdrawal of firearms unless the claimant could *'move on'* Under further cross examination Linda Russell accepted that by '*move on'* she meant move on from the claimant's grievance and the claimant's reluctance to accept the Grievance Reports prepared by her.

173. The Tribunal considered this to be a threat and, as such, a detriment which the claimant was entitled to take seriously (para 9.9 of the Code). In reaching this conclusion the Tribunal was mindful of their Findings in Fact that to become a

firearms officer the claimant had had to undergo a 10 week training programme; and that her ultimate goal was to become a close protection officer, which would involve the use of firearms.

174. The Tribunal concluded that this detriment was because of the claimant's grievance. To this end, the Tribunal relied upon Linda Russell's own evidence in stating that unless the claimant could move on from the grievance and her reluctance to accept the Grievance Report then Linda Russell would have to consider a further withdrawal of her firearms authorisation.

175. As the Tribunal were in a position to make positive findings on this issue they did not consider it necessary to revert to consider the shifting burden of proof.

176. **The 'Failure to Treat the Second Grievance as a Competent Grievance' Claim**

Did the correspondence and attachments from Andy Malcolm to Michaela McLean dated 18th June 2018 amount to or contain a grievance to which the respondent's grievance SOP applied?

Should the respondent have treated this correspondence as a 'competent' grievance and investigated in line with their procedures?

Did the respondent's decision not to treat the second grievance as a competent grievance or amount to a detriment?

If so, was the reason for that detriment because the claimant had done a protected act?

177. In determining these issues, the Tribunal considered firstly what the protected act or acts were in respect of this claim of victimisation. The Tribunal concluded that the protected acts, in this instance, were the original grievance of the 2nd February 2018 coupled with the raising of ET proceedings by the claimant. To this end an ACAS certificate was issued on the 6th June 2018 and an ET1 including claims of discrimination was submitted by the claimant on the 17th July 2018.

178. The Tribunal had regard to their own Findings in Fact in determining that the correspondence of 18th June 2018 from Andy Malcolm to Michaela McLean did amount to a grievance under and in terms of the Grievance SOP. To this end the Tribunal accepted the evidence of Michaela McLean, given in cross examination, that the second grievance contained 22 new complaints on the issue of the handling of the first grievance by Linda Russell. Michaela McLean's explanation for this was that the 22 new complaints came under the heading of 'Victimisation.' The Tribunal found this explanation to be wholly unsatisfactory in circumstances where Michaela McLean conceded that it was not the role of HR to prevent grievances from proceeding in terms of the Grievance SOP.

179. Against that background, the Tribunal found that the respondents should have treated the correspondence of 18th June 2018 as a competent grievance. The Tribunal found that the respondents' failure to do so amounts to a detriment. In reaching this decision, the Tribunal found that the actions of Michaela McLean effectively precluded the claimant from following the grievance procedure set out in the respondents' SOP which, in terms of paragraph 9.8 of the Code changed the claimant's position for the worse and put her at a disadvantage.

180. In determining whether the reason for that detriment was because the claimant had done a protected act, the Tribunal had regard to s 136 of the Equality Act 2010 and the shifting burden of proof. In deciding that the burden of proof had shifted, the Tribunal had regard to their Findings in Fact, that the claimant submitted a grievance in February 2018 which was the subject of four Grievance Reports by Linda Russell and which had not reached a satisfactory conclusion so far as the claimant was concerned; that by the time Michaela McLean wrote her letter of the 5th July 2018 the respondents would have been contacted by ACAS; and that by the time Michaela McLean wrote her letter of the 13th August 2018 the claimant's ET1 had been received. The Tribunal also had regard again to the fact that Michaela McLean conceded that it was not the role of HR to prevent grievances from proceeding.

181. The Tribunal then considered the respondents' explanation for why the second grievance was not allowed to proceed as a competent grievance under and in terms of the respondents' Grievance SOP. To this end the respondents state that Michaela McLean was entitled to conclude that the respondents' Grievance SOP was not a suitable mechanism for resolving the issues the claimant was raising as she was claiming victimisation and was asking for the relevant officers to be held to account. However, this analysis does not explain why Michaela McLean prevented the claimant from proceeding with the second grievance in circumstances where it is not the role of HR to prevent grievances proceeding.

182. In all of these circumstances it is the decision of the Tribunal that the claimant's claim of victimisation in respect of the respondents' failure on 5th July 2018 to treat the claimant's second grievance as a competent grievance succeeds.

183. **The 'PSD Failure to Investigate the Claimant's complaints' Claim**

Did the PSD's failure to investigate the claimant's complaints (which is conceded) amount to a detriment?

If so, was reason for this treatment because the claimant had done a protected act?

184. In determining these issues, the Tribunal considered the protected acts to be (i) the claimant's first and second grievances; and (ii) the Tribunal proceedings.

185. It is a matter of agreement that the PSD failed to investigate the claimant's complaints. To this end there is an outstanding issue as to whether the claimant's case is that there was a single failure on the part of Andrew McDowall on or around the 28th November 2018, or whether their case is that there was an ongoing failure on the part of the PSD to investigate the claimant's complaints.

186. In determining this issue the Tribunal had regard to the claimant's case as pled. To this end, paragraphs 54 and 55 of the claimant's Amended Pleadings state: '*54 …. the Claimant raised complaints with the PSD including a complaint*

about CIR's handing of the first grievance. In an email dated 28th November 2018 the Respondents confirmed to the Claimant that her complaints would be referred to the PSD. The Claimant alleges that the PSD took no steps to investigate her complaints. 55 It is alleged that the respondents' refusal to treat the claimant's second grievance as a competent grievance and/or the PSD's failure to investigate her complaints amount to victimisation.' **(47)**. After consideration of the amended ET1 the Tribunal concluded that there has been sufficient notice by the claimant of claims in respect of both the failure of Andrew McDowall on the 28th November 2018 and an ongoing failure on the part of PSD to investigate the claimant's complaints.

187. The respondents concede that the failure of Andrew McDowall on the 28th November 2018 was a detriment. The Tribunal finds that the ongoing failure by PSD to investigate the claimant's complaints also amounts to a detriment. To this end, the Tribunal observed that the failure of PSD to investigate the claimant's complaints denied her recourse to any investigation of her complaints in circumstances where her second grievance had not been dealt with under the respondents' Grievance SOP. The Tribunal concluded that such a failure changed the claimant's position for the worse and put her at a disadvantage, all in terms of paragraph 9.8 of the Code.

188. In determining whether such detriments were because the claimant had done a protected act, the Tribunal had regard to s136 of the Equality Act 2010 and the provisions on the shifting burden of proof. In finding that the burden of proof had shifted the Tribunal had regard to their Findings in Fact that by the time the claimant made her complaints to PSD she had brought two grievances and, further, had served an ET1 on the respondents alleging acts of discrimination. The Tribunal found the explanation of the respondents that the failure to deal with the claimant's complaints was because he receives thousands of emails to be implausible, as was his explanation that he '*dropped the ball.'* The Tribunal noted that the explanation of the respondents was given by Andrew McDowell who at the material time held the rank of Chief Superintendent.

189. For these reasons the Tribunal finds that the claimant's claims of victimisation succeed in respect of PSD's failure to investigate her complaints.

190. **The 'IHR' Claim**

Did the Respondent delay the processing of the Claimant's IHR application?

If so, did this amount to a detriment?

Did the Respondent mislead the Claimant, her Solicitor and the employment tribunal about the reasons for the delay in the processing of her IHR application?

If so, did this amount to a detriment?

Was the reason for any or all of this treatment because the Claimant had a protected act?

191. In determining these issues, the Tribunal finds that the protected act was the raising by the claimant of Tribunal proceedings on the 17th July 2018.

192. It is a matter of agreement that the claimant's IHR application was considered by a Postings Panel on the 25th October 2019. On the evidence of Alasdair Muir the Tribunal found in fact that on the 25th October 2019 the claimant met all criteria for ill health retirement as the Postings Panel were then in receipt of two unequivocal medical reports from Dr Petrie and Dr Watt that were wholly supportive of her application. The Tribunal found in fact that the real reason why the claimant's ill health retirement application was not processed then was a '*general feeling of unease''* on the part of Alasdair Muir, which he admitted was caused by the existence of the Tribunal proceedings. The Tribunal also found in fact that by 25th October 2019 the claimant was experiencing severe financial hardship in that her sick pay had run out and she had no other sources of income. The Tribunal found also that the delay in processing the claimant's IHR application resulted in a postponement of a Hearing on Liability in these proceedings that was listed for January 2020.

193. In view of these Findings the Tribunal determines that the respondents did delay the processing of the claimant's IHR application and that this did amount to a detriment for the claimant.

194. In determining whether the respondents misled the claimant, her solicitor and the ET about the reasons for the delay in the processing of her IHR application the Tribunal had regard to their Findings in Fact that the correspondence from Alasdair Muir to the claimant's solicitor of the 13th December 2019 contradicted his correspondence to David Pettigrew on the 16th December 2019; and that Alasdair Muir was unable to give any cogent explanation as to why he had given the claimant's solicitor incorrect reasons for the delay in processing the claimant's IHR application. This correspondence is not covered by judicial immunity, as alleged by the respondents, as it does not come under the category of *'pleading or other document'* envisaged by the Court of Appeal in **Lincoln v Daniels (1958 L No 394) CA** founded on by the respondents.

195. Against the background of this evidence the Tribunal found in fact that Alasdair Muir did mislead the claimant, her solicitor and the Tribunal on the reasons for the delay of the processing of the claimant's IHR application. The Tribunal considered such misleading information to cause detriment to the claimant in that her solicitors were then unable to properly advise her. To this end the Tribunal had regard to paragraph 9.8 of the Code and determined that the claimant was put at a disadvantage because of the misleading information provided to her solicitor.

196. In deciding whether such detriments were because the claimant had raised ET proceedings, the Tribunal had regard to the evidence of Alasdair Muir that a '*general feeling of unease'* was the reason why he did not process the claimant's IHR application on the 25th October 2019; and that *'general feeling of unease'* was caused by the existence of the ET proceedings.

197. In considering this issue, the Tribunal had regard to the case of **Chief Constable of West Yorkshire Police v Khan** founded on by the respondents. To this end, the Tribunal observed that in Lord Nicolls of Birkenhead proposed an *'honest and reasonable'* test for employers and that this test was approved

in **Derbyshire and ors v St Helens Metropolitan Borough Council & Ors.** The Tribunal found in fact that by providing misleading information to the claimant's solicitors Alasdair Muir did not act either honestly or reasonably.

198. In reaching their determination on these claims of victimisation the Tribunal again had regard to the provisions of the shifting burden of proof. To this end, the Tribunal found that (i) the respondents had all information before them to process the claimant's IHR application on the 25th October 2019; (ii) the reason why the claimant's IHR application was not then processed then was because of a '*general feeling of unease'* on the part of Alasdair Muir, caused by the existence of the Tribunal proceedings; (iii) in terms of his correspondence of the 13th December 2019 Alasdair Muir misled the claimant's solicitors on the reasons why the claimant's IHR application was delayed and such misleading information was neither honest nor reasonable. In view of these facts, the Tribunal considered that the burden of proof shifted to the respondents.

199. The Tribunal determined that in the light of these findings, the respondents' explanation that they were entitled to be cautious due to the existence of the Tribunal proceedings (and that they would exercise the same caution whatever the proceedings) does not discharge the onus of proof in circumstances where the respondents misled the claimant's solicitors on the real reason for the delay in processing the claimant's IHR application.

200. It is for all of these reasons that it is the decision of the Tribunal that the claimant succeeds in her claims of victimisation on the processing of her IHR application and the provision of misleading information to the claimant's solicitors on the 13th December 2019.

201. **Jurisdiction**

Were all aspects of the claimant's claims lodged within the time limit provided for within s.123(1)(a)?

In respect of any of those which were not, were they submitted within a time period which the tribunal considers just and equitable, in all the circumstances?

202. In determining these issues, the Tribunal had regard to the fact that the respondents concede that the claimant's claims of victimisation in respect of Keith Warhurst's insistence that Optima obtain a report from the claimant's GP in March 2018 and the respondents' handling of the claimant's IHR application and provision of misleading advice to her solicitors are timeous. The Tribunal also had regard to the fact that by judgment dated the 4th December 2020 the Tribunal allowed an amendment in respect of the claimant's claim that the PSD failed to investigate her complaints **(124)** and therefore that claim is timeous also.

203. All other claims brought by the claimant in these proceedings were introduced by amendment in 2019 which was allowed by Judgement of the 11th September 2019, subject to the issue of time bar **(99)**. To this end, the Employment Judge then determined that such claims were not foreshadowed in the ET1.

204. The Tribunal considered that there was merit in the claimant's argument that the claimant's claims constitute *'conduct extending over a period'* as defined in **Commissioner of Police of the Metropolis v Hendricks.** However, given the history of this case, the Tribunal considered that the correct approach to determine the issue of time bar is by starting with the premis that all other claims brought by the claimant in these proceedings are prima facie time barred. These claims are the claimant's claim of direct discrimination, being the email of 10th January 2018; and her claims of victimisation, being the suggestion by Linda Russell on 26th February 2018 that the claimant be transferred to Stirling/Maddiston; Linda Russell's handling of the claimant's grievance and her behaviour at the meetings on the 10th of April and the 16th of May 2018; the threat by Linda Russell to withdraw the claimant's firearms on the 16th May 2018 and the respondents' failure to treat the claimant's second grievance as a competent grievance.

205. In these circumstances the Tribunal proceeded to consider whether the '*just and equitable'* extension under s123 of the Equality Act should be allowed in respect of these claims. To this end, the Tribunal had regard to the words of Lord Justice Leggatt in the case of **Abertawe Bro Morgannwg University**

Local Health Board v Morgan and considered firstly the issues of the length of, and reasons for the delay and whether the delay has prejudiced the respondents.

206. In deciding this issue the Tribunal observed that the amendment including these claims was presented on 4th June 2019, which resulted in a delay in presenting the claims of some 12-18 months. The delay was caused by the claimant's change of solicitors which resulted in a considerable increase in the claims advanced by her. To this end the Tribunal had regard to the dicta in the case of **Chohan v Derby Law Centre** and did not visit the fault of the claimant's former legal adviser on the claimant herself. Insofar as the issue of prejudice to the respondents was concerned, the Tribunal noted that at the Hearing on Liability there were very few instances of witnesses being unable to recollect the events in question; and there were no apparent issues of prejudice to the respondents in their preparation and conduct of the Hearing.

207. The Tribunal then proceeded to consider the issue of the balance of prejudice. To this end, the Tribunal were of the view that the balance of prejudice overwhelmingly favoured the claimant in circumstances where the refusal to grant an extension of time would result in her being without a judicial determination of all her claims. The Tribunal considered the facts that notification of her claims were given on 4th June 2019; the respondents have been able to resist all the claimant's claims without apparent difficulties; and these arguments on time bar come at the conclusion of a 10 day hearing on liability, at which the respondents' witnesses were able to speak to all the live issues. In considering the balance of prejudice, the Tribunal also had regard to the fact that were an extension of time refused in respect of these claims then some, but not all of the claimant's claims extending over the relevant period of time would be apt for determination which would lead to an unsatisfactory and inconsistent conclusion.

208. The respondents are correct in stating that the exercise of the discretion should be the exception rather than the rule **(British Coal Corporation v Keeble)**. However, in all of these circumstances, the Tribunal are unanimous in determining that an extension of time should be granted under and in terms of

s123 of the Equality Act 2010 in respect of the claimant's claims of direct discrimination and victimisation that are prima facie time barred.

Conclusion

209. Accordingly, it is the decision of this Employment Tribunal that the Tribunal has jurisdiction to hear the claimant's claims. The claimant's claims of victimisation succeed in their entirety. The claimant's claim of direct discrimination is dismissed.

210. Date Listing letters will now be sent out to fix a Hearing on Remedy. There will be a Preliminary Hearing in advance of that Hearing to discuss preparation for the Hearing on Remedy.

Employment Judge: Jane Porter

Date of Judgment: 4 October 2021

Entered in register and copied to parties: 5 October 2021