EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109600/2014

Final Hearing
On 31 August, 1, 2, 3, 4, 7, 8, 9, 10, 21, 22, 23, 24, 28, 29, 30 September; and 1, 8, 19 and 20 October; and 16 and 17 November 2021 and Members' Meeting 20 December 2021.

Employment Judge M Robison
Tribunal Member I Ashraf
Tribunal Member W Muir

Mr R Brown	**Claimant** **In person**
The Chief Constable of the Police Service of Scotland	**Respondent** **Represented by** **Mr I Duguid QC** **Instructed by** **Ms Aileen Irvine** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The decision of the Employment Tribunal is that:

1. the claimant made six disclosures during 2011/2012 which were protected disclosure in terms of section 43B of the Employment Rights Act 1996;

2. the claimant did not suffer any detriment on the grounds of having made those protected disclosures;

3. the claim is therefore is not well-founded and is dismissed.

REASONS

1. The claimant lodged a claim in the Employment Tribunal on 19 October 2014 claiming detriment as a result of having made five protected disclosures.

2. This judgment follows 21 days of hearing during which we heard evidence about events which took place over almost 12 years and in respect of which the claimant made extensive and complex submissions.

3. The result is that this judgment is extensive although not intended to be unnecessarily so. Accordingly the judgment is divided into the following sections:

Part A: Background context and overview

Part B: Procedural history and background to the hearing

Part C: Findings and deliberations on protected disclosures

Part D: Findings in fact on detriments and causal connection

Part E: Tribunal deliberations on detriments and causal connection.

PART A: BACKGROUND CONTEXT AND OVERVIEW

4. This claim has its genesis in events which took place in 2006/2007 when the claimant, a police constable serving with Strathclyde Police, having joined the force in 1989, became involved in certain interactions with a police informant. As a result of concerns about his interactions, an investigation was undertaken by the Strathclyde Police Counter Corruption Unit (CCU). An allegation of corruption against the claimant was referred to the Procurator Fiscal (PF) in 2008 which did not result in any prosecution and in respect of which the sufficiency of the investigation by the CCU was heavily criticised by the Area Procurator Fiscal (APF). Following a subsequent referral back to Strathclyde Police Public Standards Department (PSD), which investigates allegations of police misconduct under the relevant misconduct regulations, the claimant

faced four misconduct allegations (2010), two of which the claimant admitted at a misconduct hearing and in respect of which he received a financial penalty.

5. The claimant however went on to report the police officers who had conducted the original corruption investigation against him (DI Kerr and DS Pagan), and alleged that they had attempted to pervert the course of justice. The claimant was subsequently interviewed in respect of that allegation by DI Dewar during 25 hours over seven days between January and April 2011.

6. The claimant alleges that during the course of that interview:
   - He made criminal allegations against DI Kerr and DS Pagan of an attempt to pervert the course of justice;
   - He made criminal allegations against five additional officers whom he alleged were involved in corruption and a cover up of crimes;
   - He made five protected disclosures in respect of these criminal allegations (one of which was subsequently conceded by the respondent).

7. The claimant's allegation that DI Kerr and DS Pagan had attempted to pervert the course of justice was referred to the Procurator Fiscal who decided not to prosecute. A decision was then taken by the respondent that the officers should be given "corrective advice", the most lenient form of sanction for misconduct.

8. During the course of the 2010 misconduct proceedings and the subsequent reporting of allegations against DI Kerr and DS Pagan (2010/2011), the claimant undertook research using Strathclyde Police computer systems.

9. This led to the claimant again being referred to the Procurator Fiscal (PF) in 2012 in regard to allegations of breaches of the Data Protection Act (DPA) for alleged access to the Police's Scottish Intelligence Database (SID) without a valid policing purpose. The Procurator Fiscal again decided that the claimant should not be prosecuted. After a subsequent referral to the Police's Professional Standards Department, misconduct proceedings were instituted. However, a recommendation was made that the claimant should receive a formal warning (under regulation 6(6) of the Police Misconduct Regulations) (2012 misconduct)

10. In November 2012, following the interview with DI Dewar in early 2011, the claimant made a complaint to Superintendent D Craig that DCI Dewar had illegally edited his statement. (This was also accepted by the respondent as a protected disclosure). In support of his allegation he produced a recording of the interview with DI Dewar which he had recorded covertly.

11. This allegation led to a pause in the claimant's 2012 misconduct proceedings, at the point at which he was asked to comment on the proposed formal warning. The complaint against DI Dewar was also referred subsequently to the Procurator Fiscal. That complaint was ultimately investigated by the Police Investigations and Review Commissioner (PIRC) on the instructions of the Procurator Fiscal, who did not uphold that allegation. Thereafter, the 6(6) warning was issued to the claimant (2016).

12. A subsequent further referral was made to the Procurator Fiscal concerning allegations against the claimant during the course of this claim in the Employment Tribunal. This related to concerns about documents in the claimant's possession which he intended to rely on in this hearing, allegedly in breach of the Data Protection Act. This again resulted in a decision by the Procurator Fiscal not to prosecute the claimant; and a decision was subsequently made by the respondent not to institute misconduct proceedings.

13. The claimant claims that he has suffered various detriments (listed below) as a result of having made six protected disclosures.

PART B: PROCEDURAL HISTORY AND BACKGROUND TO THE HEARING

Procedural history

14. This case has a very long and complex procedural history. That includes various sists and a rule 35 order dated 12 March 2018 which permitted the Lord Advocate to participate in proceedings in respect of documents in the claimant's possession which he had proposed to lodge and rely on at this hearing (and in respect of which a referral was made to the Procurator Fiscal, noted above). The Lord Advocate objected to a number of sensitive documents being lodged on the grounds of public interest immunity and lodged a public

interest immunity certificate on 17 April 2018 asserting an interest in certain documents.

Private hearing and the Lord Advocate's public interest

15. The Tribunal accepted that certain specified documents should not be lodged or referred to at any public hearing, but asked for views of parties in regard to their use at a private hearing (see Order of Employment Tribunal following hearing dated 30 January 2019). After further submissions from parties and those representing the Lord Advocate, it was subsequently argued, and accepted by the Tribunal, that the Lord Advocate's public interest concerns could only be protected if the whole hearing were to be in private and a restricted reporting order issued as well (see Orders of the Employment Tribunal following hearing dated 28 October 2019). A decision was also made that "any final judgment of the Tribunal disposing of this claim will be considered in draft by the Lord Advocate, who will have an opportunity to make submissions on its content to the extent that the public interest immunity certificate is engaged, and any related submission on the publication of any judgment in the Register". This decision was considered in draft by the Lord Advocate and adjustments have been made to prevent jigsaw identification of a CHIS. One particular adjustment involved the anonymisation of the vehicle registration number which featured frequently throughout this hearing. These adjustments did not impact on the ultimate findings or outcome.

Claimant's applications for orders

16. On 30 August 2020 the claimant made an application to amend his claim adding a sixth disclosure to which the respondent had no objection.

17. Final hearing dates had been listed on a number of occasions, which for various reasons required to be adjourned. A final hearing was again listed to take place over 20 non-consecutive days commencing 31 August 2021.

18. The claimant made further applications on 27 October 2020 and subsequently for witness orders and documents. It was decided (at a preliminary hearing in chambers on 23 December 2020) that a number of witness orders should be

issued. In regard to the claimant's request for documents (which came to be numbered 1 to 32) a decision was made (on 23 December 2020) to refuse to allow the majority of these documents.

19. In respect of a number of documents, the submissions made by both parties were insufficient to allow a decision to be made in chambers, and consequently as at 23 December 2020 a determination in regard to the claimant's application for documents numbered 21, 23, 24, 25, 29 and 32 remained outstanding. Following further submissions, and further consideration in chambers, parties were advised by letter dated 16 April 2021 that the claimant's application in respect of the outstanding documents (except document 32) was refused.

Claimant's application for "document 24"

20. Specifically, the parties were advised that the claimant's application for document 24 was refused. Document 24 was described by the claimant as "a copy of the Scottish Intelligence Database audit trail supplied to the claimant in order that he could examine it, having done so between March and May 2014, in relation to MC/00099/12, referred to in the Berry report dated 29/6/14, lodged within the respondent's evidence pile". The claimant requested a review of that decision.

21. In an email dated 28 May 2021 parties were advised that the application for reconsideration was refused, but also that "EJ Robison recognised that this is a complex case and it may well be that during the hearing of evidence it becomes apparent to the Tribunal or clear to the claimant at a particular juncture and in a particular context, that the document is after all relevant and necessary to allow the claimant to prove his claims. In such circumstances, the Tribunal will treat that as a change in circumstances and re-consider any renewed application which the claimant wishes to make".

22. The claimant however remained of the view that document 24 was necessary for him to prove his case and consequently he appealed that case management order. The EAT ordered a sift hearing before determining whether there should be a full hearing of the appeal. Although the respondent

asked for that hearing to be expedited in order to preserve the forthcoming hearing dates, the EAT advised that would not be possible. It was understood at that time that the case would be listed for a hearing at the EAT during September.

Hearing limited to certain issues

23. Although the claimant had understood from the EAT clerk that the final hearing could therefore not go ahead, that of course is a matter for this Tribunal. Consequently at a case management hearing which took place on 13 July 2021, parties agreed that the listed dates could be utilised to determine whether or not there were protected disclosures beyond those conceded by the respondent (see section 1 below under list of issues).

24. The respondent subsequently further argued, given their view that document 24 was not relevant to a number of the detriments to be proved, that issues 2(f) to (i) could be considered and determined without reference to document 24.

25. The claimant did not agree. However, and on further consideration of the claimant's submissions on the matter, the Tribunal decided that these issues could be determined without document 24 being lodged, and noted the respondent's understanding that the document could be referred to in evidence without reference to the physical document itself.

26. Consequently the hearing commenced on 31 August 2021 to consider issues set on in section 1 and section 2(f) to (i) listed below, with the expectation that a decision of the EAT may have been made before the second tranche of hearing dates in October and that it may have been possible to proceed to hear evidence on issues 2(a) to (e) thereafter.

27. The Tribunal therefore first heard evidence in regard to these issues in section 1 and 2(g) to 2(i), from the claimant on 31 August, 1, 2 and 3 September 2021. The Tribunal also heard from the respondent's witnesses ex- Detective Superintendent Kenneth Dewar on 3, 7, 8, and 9 September; ex Superintendent Carole Auld on 9 September (whose evidence in chief was set out in a witness statement, but who attended to be cross examined) and

Superintendent Andrew Murdoch on 10 September; and Inspector T Gallagher on 21 September 2021. A Ms C MacDuff (a civilian employee of the respondent) was called by the claimant and gave evidence on 21 September 2021.

Hearing on the remaining issues for determination

28. The Tribunal had intended to issue a decision on these issues alone following the evidence of those witnesses. However, during the course of hearing evidence about these identified issues, it became apparent that there was a misunderstanding about what was meant by "document 24". The claimant said that it was the entire contents of his "misconduct file" (which he had alleged had been edited) whereas the Tribunal (and the respondent) had understood it to be (only) a 600 page audit trail printed off from the Scottish Intelligence Database. Either way, it transpired that the claimant had made notes from this document when he had been permitted to view his misconduct file in 2014 under supervision. Following an exercise when the respondent cross referenced the claimant's notes (which were lodged at C1A/785 et seq) with the contents of the document, the respondent was able to agree that they were accurate, bar two small entries which the claimant accepted were inconsequential.

29. This was a significant development because it meant that the claimant was prepared to withdraw his appeal and the hearing was able to continue on the dates which had already been listed.

30. The Tribunal therefore again heard evidence in chief from the claimant on the remaining issues on 22 September. The Tribunal then heard from the following witnesses for the respondent: DI Stuart Lipsett (23 September), ex CI John Watt (24 September), Ex CI M Hepworth (24 and 28 September), Ex DCC R Nicolson and DCI L Skelton (both on 29 September); Ex DCC N Richardson (called by the claimant) and Mrs S Brennan (both on 30 September), Ex Inspector J Dunbar on 1 October and Ex Inspector I Wood (called by the claimant) on 8 October. On 19 October, the current Chief Constable, Mr I Livingstone, gave evidence, having been called by the claimant.

Evidence of DI XX

31. During the course of the hearing, the claimant made an application for a witness order for an ex detective inspector (whom we determined should be anonymised in this judgment) which the Tribunal initially granted on the grounds that his evidence was relevant. Following representations from the witness, that witness order was revoked, but an information order setting out agreed questions for DI XX was issued of consent. Although DI XX answered these questions in writing he expressed concern about ill health and in the circumstances the respondent elected not to draft any cross examination questions. The Tribunal has however accepted the written answers to the agreed questions and given them appropriate weight.

Documents

32. Parties lodged separate volumes of productions because joint bundles could not be agreed. The claimant lodged volume 1 of productions (in two physical files) which are referred to throughout the hearing and in this judgment as C1A and C1B. The claimant also lodged a second volume of productions C2. The respondent lodged two volumes of productions (in one physical file) referenced R1 and R2 as appropriate. The claimant also lodged a typed transcript of 25 hours of interview over seven days conducted in respect of his complaint which are in two physical files referred to as T1 (which covers days one to three) and T2 (which covers days four to seven). These documents are referred to in this decision by volume number and page number.

Submissions

33. Following the evidence of the final witness, as the claimant was not yet in a position to make submissions, it was agreed that the respondent would make submissions first on the protected disclosures (issues set out in section 1 below), which were made on 20 October 2021.

34. While the claimant was then due to make submissions, due to suspected covid, the last two days of hearing had to be postponed, and consequently the

Tribunal heard the remaining submissions on 16 and 17 November 2021. A members meeting took place on 9 December 2021.

Rule 50

35. As noted above, this decision was reviewed by the Lord Advocate prior to its publication in line with the terms of the Restricted Reporting Order issued (Annex A). The matter of the restriction of the names of players and witnesses in this case was raised with parties by the Tribunal following the close of submissions. While parties made no formal applications, and made suggestions about anonymisation, they were content for the Tribunal to make decisions in that regard. We therefore considered the requirements of Rule 50 and the relevant case law.

36. We came to the view that the names of the players in the background facts should be redacted, and they should be identified only by a letter. However, following deliberations, we decided that it was not necessary to anonymise the names of the police officers referenced and who gave evidence because they were simply conducting their duties. We saw no reason to protect their privacy in those circumstances. There was one exception to that, and that related to the former police officer who was reluctant to attend the Tribunal, whom we agreed, when revoking the witness order for the reasons explained to the Tribunal at the time, should be anonymised. This explains why he is referred to as Detective Inspector (DI) XX.

37. There is one other point to mention in regard to the naming of witnesses and police officers in this case. Many if not most of the police officers are retired. Many were promoted subsequent to their roles in the events in this case. We made a decision therefore to give them the rank (so far as we were aware of it) which they held at the time of their involvement in events.

Issues for determination

38. The final list of issues to be determined at a hearing on liability were agreed by parties as follows:

1. Public interest disclosures – section 43A of the Employment Rights Act 1996

Did the claimant make all or any of the protected disclosures in terms of section 43A of the Employment Rights Act 1996 that he claims to have made –

Disclosures 1-4, and 6 all made or allegedly made to Detective Chief Inspector Kenneth Dewar on various dates between January and April 2011…

Disclosure 5 was made to Superintendent David Craig on 19 November 2012.

Disclosure 1: That Detective Inspector James (Jim) Kerr, Detective Sergeant Joanne Grant / Pagan, and others, had, or were, attempting to pervert the course of justice, by concealing the status of a police informant, and the informant's handlers, specifically that the stated informant had been registered as a police informant, even although he was a suspected (sic), and being sought in respect, of drug dealing.

Disclosure 2: That there had been an unauthorised or illegal interference with a warrant for the above informant.

Disclosure 3: That a transfer and seizure of drugs was connected to a suicide and that this had been covered up by the said informant's handlers.

Disclosure 4:That several documents had been concealed regarding the return of monies that had been seized under the Proceeds of Crime Act 2002.

Disclosure 5: That DCI Dewar had illegally 'edited' a statement provided by the claimant.

Disclosure 6: That the domestic abduction of H into stolen motor-vehicle [vehicle registration number], bearing cloned plates, [in 2006], [in North Lanarkshire] was covered up by officers from the Proactive Unit of then

N Division, and possibly other police officers, of Strathclyde Police in early 2007, having failed to seize stolen motor-vehicle [vehicle registration number], or report their awareness of it, despite their awareness of its involvement in H's abduction, create or update crime reports, or carry out their statutory duties as police officers, to investigate crimes and bring the offender(s) to justice, amongst other crimes.

The respondent accepts that the claimant made disclosure 2 to DCI Dewar and disclosure 5 to Superintendent Craig and that they are protected disclosures in terms of section 43A.

The respondent denies that the claimant made any of the remaining disclosures to DCI Dewar, but accepts that if they were made they amount to protected disclosures in terms of section 43A.

2. Detriment – section 47B of the Employment Rights Act 1996

If the claimant made those protected disclosures, did the respondent subject him to any detriment on the ground that he had made them? Specifically -

(a) Did Detective Inspector Stuart Lipsett submit to the Crown Office and Procurator Fiscal Service, Complaints Against the Police Divisions ['COPFS CAAP-D'] a knowingly false criminal case against the claimant for multiple alleged offences under the Data Protection Act 1988 on the ground that he had made protected disclosures?

(b) Did Inspector Jim Dunbar conduct a knowingly false internal case for misconduct against the claimant on the ground that he had made protected disclosures?

(c) Did Deputy Chief Constable (Designate) Neil Richardson take steps to issue the claimant with a warning in terms of regulation 6(6) of

The Police (Conduct) (Scotland) Regulations 1996 on the ground that he had made protected disclosures?

(d) Did Deputy Chief Constable (Designate) Iain Livingstone (as he then was) take steps to issue the claimant with a warning in terms of regulation 6(6) of The Police (Conduct) (Scotland) Regulations 1996 on the ground that he had made protected disclosures?

(e) Did DCC (D) Richardson restrict the claimant's policing duties from around 13 May 2011 on the ground that he had made protected disclosures?

(f) Was the claimant's Long Service and Good Conduct medal withheld or delayed on the ground that he had made protected disclosures?

(g) Did Chief Superintendent Carole Auld and / or the respondent's Professional Standards Department fail to investigate the claimant's complaints about its treatment of him, on the ground that he had made protected disclosures?

(h) Did Inspector Tony Gallagher, on 5 April 2018, submit to COPFS CAAP-D a knowingly false report about the claimant's possession of documents on the ground that he had made protected disclosures?

(i) Did Inspector Tony Gallagher, between 23 March 2018 and 10 September 2018, submit to the respondent's Professional Standards Department a knowingly false report about the claimant's possession of documents on the ground that he had made protected disclosures?

39. It should be noted that it was agreed at the outset of the hearing that the detriment at 2(g) should relate to a "failure properly to investigate".

40. It had also been decided that this hearing should consider liability only and that remedies would be considered at a separate subsequent hearing, if required.

41. This list of issues was taken to include concessions in regard to protected disclosures, which are discussed at length in the next section.

Tribunal observations on the witnesses and evidence

42. The claimant gave evidence over five days in total and conducted proceedings himself. It must be said that he had a very detailed understanding of his case, which is perhaps inevitable having lived with it for so many years. It should also be said that he represented himself to a high standard (particularly during the hearing of evidence but also in oral submissions) and addressed all of the matters which he sought to rely on and bring to our attention in very detailed cross examination.

43. That said, we did find many of the claimant's arguments rather difficult to follow, but as discussed later in this judgment, that may relate to the claimant's understanding (or misunderstanding) of how the facts interplay with the legal principles.

44. We were aware, as Mr Duguid highlighted, that several of the questions the claimant asked were founded on propositions which the respondent did not accept but to which no objection was taken. We are grateful to him for refraining from making repeated objections which we were aware was a deliberate decision in order to allow proceedings to maintain continuity.

45. With regard to his own evidence however, we found that the claimant had difficulty answering a direct question, and it was apparent to us that he was concerned about being "tricked" into answering a question inaccurately that was designed to trip him up. As a result he had a tendency to focus on semantics and to query the meaning of the words used which often missed the point of the questions.

46. We did also note that the claimant had a tendency to rely only on evidence that supported his perception of what he believed had happened and the reasons for it. He had a tendency to ignore evidence that did not support his interpretation of events, as discussed further in this judgment. In general however the claimant would discount any other explanation for events,

including for example misunderstandings, misconceptions, mistakes or even negligence. A central feature explaining his misconceptions relates to his tendency to conclude that a crime had been committed when the circumstances and the evidence to support it did not necessarily point to that.

47. That said, as the Tribunal frequently emphasised, the Tribunal did not require to make any findings in fact or come to any conclusion about whether any crimes had in fact been committed (or concealed). The focus of course is only on answering the issues for determination, applying the necessary legal tests.

48. Further, there were a serious of unfortunate errors made by the respondent which featured throughout the evidence, not least the initial deficient investigation of the claimant for corruption. The irony of the evidence of DCC Richardson, about the importance of not charging a police officer with corruption without sufficient evidence, was not lost on the claimant. Other less fundamental errors however served to compound the claimant's beliefs, for example the mistakes made about the searches on the police database and surveillance operations; the fact that he was the only person in at least eight years in respect of which an invitation to a medal ceremony had been sent erroneously; and the e-mail sent to his personal e-mail by his line manager (not him).

49. Notwithstanding, we found that the police witnesses, generally speaking, were all credible and essentially reliable. As Mr Duguid pointed out, every witness who had completed service with either Strathclyde Police or Police Scotland had achieved high rank. We took account of the fact that that many of the events occurred many years ago, and some witnesses have long since retired and in many instances their recollections have been understandably incomplete.

50. There was one clear contradiction in the evidence relating to the medal ceremony, which we deal with later, as well as setting out our views of the evidence of each witness where relevant as we consider each issue.

51. In summary however, where there was any contradiction between the claimant and the police witnesses (the claimant's evidence in many instances being

based on his perception and speculation), we have preferred the evidence of the police witnesses.

52. Overall, notwithstanding the errors which were made, we were impressed by the lengths which the respondent went to to investigate the complaints of the claimant, following the initial deficient corruption investigation, which we accepted were all done in good faith.

53. In the end however, the claimant was never satisfied because the outcome of each and every investigation, including those by COPFS and PIRC, did not accord with the claimant's firmly held belief that there has been an extensive police cover up and that his exposure of that explains how he was treated.

PART C : FINDINGS AND DELIBERATIONS ON PROTECTED DISCLOSURES

Which protected disclosures were made by the claimant?

54. The Tribunal finds the following protected disclosures were made by the claimant:

1. That Detective Inspector James (Jim) Kerr, Detective Sergeant Joanne Grant / Pagan, and others, had, or were, attempting to pervert the course of justice, by concealing the status of a police informant, and the informant's handlers, specifically that the stated informant had been registered as a police informant, even although he was a suspected (sic), and being sought in respect, of drug dealing.

2. That there had been an unauthorised or illegal interference with a warrant for the above informant.

3. That a transfer and seizure of drugs was connected to a suicide and that this had been covered up by the said informant's handlers.

4. That several documents had been concealed regarding the return of monies that had been seized under the Proceeds of Crime Act 2002.

5. That DCI Dewar had illegally 'edited' a statement provided by the claimant.

6. That the domestic abduction of H into stolen motor-vehicle [vehicle registration number], bearing cloned plates, [in 2006], [in North Lanarkshire] was covered up by officers from the Proactive Unit of then N Division, and possibly other police officers, of Strathclyde Police in early 2007, having failed to seize stolen motor-vehicle [vehicle registration number], or report their awareness of it, despite their awareness of its involvement in H's abduction, create or update crime reports, or carry out their statutory duties as police officers, to investigate crimes and bring the offender(s) to justice, amongst other crimes.

Tribunal deliberations and reasoning

Relevant law

55. As noted above, two of these protected disclosures, namely 2 and 5, were conceded as protected disclosures meeting the requirements of the relevant statutory provisions prior to the commencement of the hearing. Mr Duguid confirmed that this concession had been made in his submissions. While he stressed that the respondent did not accept the contention of illegality, that of course is beside the point, the respondent having accepted that these disclosures were made and that they met the requirements of the relevant statutory provisions.

56. The relevant statutory provisions are set out in section 43A and 43B and 43C of the Employment Rights Act 1996, which states, under the heading "meaning of protected disclosure" at section 43A that a "protected disclosure" means a qualifying disclosure as defined by section 43B.

57. Section 43B, under the heading, "disclosures qualifying for protection", states (so far as relevant) that "a qualifying disclosure means any disclosure of information, which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show…(a) that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject….or (e) information tending to show any

matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed".

58. A qualifying disclosure will be a protected disclosure if it is made to an appropriate person. Section 43C(1) ERA states that "a qualifying disclosure is made….if the worker makes the disclosure a) to his employer". Section 43KA states that a person who holds the office of constable (other than under a contract of employment) shall be treated as an employee employed by the chief officer of police, with references to "employer" construed accordingly.

59. In submissions, we understood Mr Duguid to rely on section 43G. Section 43G however is headed "disclosure in other cases". This follows from the previous provisions, section 43C, "disclosure to employer or other responsible person", section 43D, "disclosure to minister of the crown", section 43F, "disclosure to a prescribed person". Section 43G relates to disclosures to other external bodies which do not all within the above provisions. This will cover disclosures to the police as a third party, but in this case the police are of course the equivalent of the claimant's employers.

60. While the provisions of section 43G mean that a claimant will also have to establish that certain additional conditions are met, including the fact that the information disclosed is substantially true, that the disclosure is not made for personal gain, and it was reasonable for the claimant to make the disclosure in the circumstances, these additional conditions do not apply in a case by a claimant in respect of disclosures to his employer.

61. Mr Duguid in subsequent submissions explained that his reference during submissions to "substantially true" was his own terminology, and, as we understood it, a paraphrase of the obligations on the claimant to show that he had a genuine and reasonable belief that the disclosures tended to show that a crime had been committed (or concealed).

62. Most recently in Martin v London Borough of Southwark UKEAT/000432/2020 the EAT re-iterated the 5-stage test for determining if there has been a protected disclosure (in cases involving employers):

    1. There must be a disclosure of information;

2. The worker must believe the disclosure is made in the public interest;
3. That belief must be reasonably held;
4. The worker must believe that the disclosure tends to show one of the matters in s43B(1)(a)-(f) Employment Rights Act 1996, e.g. a criminal offence has been committed;
5. That belief must be reasonably held.

63. With regard to the remaining disclosures, that is disclosures 1, 3, 4 and 6, Mr Duguid made detailed submissions by reference to relevant case law.

64. During submissions, a discussion arose regarding the status of further concessions which the respondent was understood to have made, as stated in the list of issues, namely "the respondent denies that the claimant made any of the remaining disclosures to DCI Dewar, but accepts that if they were made they amount to protected disclosures in terms of section 43A".

65. It was also understood by the Tribunal that disclosure 3 was conceded during the course of the hearing, to the extent at least of having been said, but it was also understood by the Tribunal throughout the hearing that if we were to have found that these disclosures "were made", and that relates to disclosures 1, 4 and 6, that they amounted to protected disclosures.

66. As we understood it, Mr Duguid did not go so far as to say that he was withdrawing that concession, otherwise we would have had to give careful consideration to the legitimacy, at this very late stage in proceedings, after all the evidence had been heard, of that application.

67. We did not require to consider that because as we understood the argument, Mr Duguid argued that the Respondent did not accept that "disclosures" "were made" because they did not fulfill the requirements of the legislation to amount to protected disclosures.

68. He also argued that notwithstanding any "concession" (for want of a better word) the Tribunal required in any event to satisfy itself that disclosures meeting the requirements of the legislation had in fact been made.

69. After further consideration, we do not accept that argument. This hearing has proceeded on the basis that if we were to find that the disputed disclosures were made, that they were protected disclosures in terms of the provisions. The claimant has prepared the case on the basis of those concessions. We as a Tribunal do not need to make any further enquiry into these questions because they are conceded or accepted.

70. It may well be that the respondent can argue that we have now heard evidence to the effect that the facts do not support the contention that these were protected disclosures; but that is nothing to the point. It is common practice for parties to agree evidence and to seek to limit the issues in dispute, and the Tribunal will only require to make a determination on those issues in dispute.

71. We did not therefore accept that we required to determine whether the claimant reasonably believed that the information was being disclosed in the public interest (that we took as conceded).

72. As it happens, it may well be that in hearing background evidence we heard evidence which might cast doubt on the wisdom of that concession. Nevertheless we proceed on the basis that there was a concession or acceptance that if we found that the disclosures were made, as in "said" during the interview with DCI Dewar, then they were accepted and conceded to be protected disclosures.

73. We therefore did not require to give further consideration to the submissions which Mr Duguid made in respect of the question of protected disclosures beyond the question whether they were said or not. It follows that we did not require to give any in depth consideration to the submissions made by the claimant in this regard, beyond his argument, explored extensively in evidence, that these disclosures were made.

74. We accepted that it may well be appropriate and relevant for Mr Duguid to argue that these were not disclosures at all. That would relate to the question whether the disclosures were "of information". Relying on *Cavendish Munro Professional Risk Management Ltd -v-Geduld [2010] IRLR 38;* and *Smith -v-London Metropolitan University [2011] IRLR 325*, Mr Duguid argued that, given

its ordinary meaning, a disclosure must convey facts. He argued that the making of "allegations" and particularly those unsupported by evidence will not be a protected disclosure. Nor, he argued, will the raising of personal grievances fall into that category. He submitted that the Tribunal has to consider whether in each of the remaining instances, the claimant was making no more than allegations or pursuing personal grievances. The particular personal grievance here is that pursued by the claimant against DI Kerr and DS Pagan and his refusal to be satisfied with the decision of the Procurator Fiscal that DI Kerr and DS Pagan should not be prosecuted for attempting to pervert the course of justice. He accepted that the difference between information and allegation can, on occasions, be finely balanced.

75. The claimant in submissions refuted the suggestion that he was pursuing a personal grievance by reference to the evidence heard.

76. On this matter, we were aware that the Court of Appeal has subsequently, in *Kilraine v London Borough of Wandsworth* 2018 ICR 1850, held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations; and 'information' and 'allegation' are not mutually exclusive categories of communication as might have wrongly been understood from *Geduld*, but rather they might be intertwined.

77. The Court of Appeal in *Kilraine* also emphasised that the word 'information' has to be read with the qualifying phrase 'tends to show' - here that the claimant reasonably believed that a criminal offence had been committed etc. That is, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show that a criminal offence had been committed.

78. The particular focus of our enquiry is on whether the claimant has been subjected to detriment, and whether that is "on the ground of" having made the protected disclosures, as is often the case in these type of cases. However, we first gave consideration to whether or not the clamant had made disclosures of information, and if they were found to have been made, that we took it to be accepted or conceded they were protected disclosures.

Disputed disclosures – disclosure 1

79. Disclosure 1 is described as, “That Detective Inspector James (Jim) Kerr, Detective Sergeant Joanne Grant / Pagan, and others, had, or were, attempting to pervert the course of justice, by concealing the status of a police informant, and the informant’s handlers, specifically that the stated informant had been registered as a police informant, even although he was [a] suspect[ed], and being sought in respect, of drug dealing”.

80. With regard to disclosure one, Mr Duguid argued that the key point is that named police officers were accused of concealing matters. However he went on to say that, “this statement in combination, is accepted by the respondent as having been made at various stages of the interview process conducted by DCI Dewar”. The respondent further accepted that the three statements made were factually correct with the contentious issue being whether they were concealed.

81. The respondent goes on to argue that the disclosure is not protected because it was not reasonable for the claimant to believe that his allegation was substantially true. The respondent argues that given the decision of the Procurator Fiscal to whom the allegation was referred not to prosecute, no crime of attempting to pervert the course of justice could be established; and nor, Mr Duguid argued, could it be characterised as concealment in the sense of being deliberate or intentional. He argues that there is no evidence to support any other view and that “the claimant is pursuing an unfounded personal grievance. The disclosure is therefore not a protected one”.

82. However, given the discussion above, and our conclusion that the respondent has conceded that if the disclosures were made that they were protected disclosures, we do not accept that submission and we have concluded that this disclosure was made, and that, given the concession, it is a protected disclosure.

83. In so far as the respondent might have legitimately argued that this is not a disclosure of “information”, we did not accept that. We were of the view that this disclosure clearly “conveyed facts” as required. These cannot be said to be general statements which are devoid of specific factual content. There can

be no doubt that what was stated was an allegation that "tended to show" that a criminal offence had been committed.

84. The fact that those "facts" might not be true is not relevant for the purposes of determining that particular question. The fact that it is an allegation which might not be proved does not mean that it is not a disclosure of information for the purposes of the relevant provisions.

85. That might be relevant if we were assessing whether the claimant's belief that it was made in the public interest and/or that it tends to show that a crime was committed was a reasonable belief. We have however concluded that we do not require to consider that because of the concession made by the respondent, as discussed above.

Disputed disclosure - disclosure 3

86. Disclosure 3 is stated to be "That a transfer and seizure of drugs was connected to a suicide and that this had been covered up by the said informant's handlers".

87. As noted above, the respondent during evidence conceded that this was said during the interview to DCI Dewar, confirming in submissions that, "undoubtedly the claimant attempted to explain his allegation to DCI Dewar [during] the statement recording process"; and that DCI Dewar investigated it as a "non-criminal" allegation but concluded that it was unsubstantiated.

88. The respondent however argued in submissions that "this is not a protected disclosure because there is no credible and reliable evidence to support the contention that the statement is substantially true or that the claimant could have a reasonable belief that it was substantially true".

89. The respondent's submissions then relate to the evidence to support the veracity of this disclosure; which it was submitted was entirely the claimant's interpretation of information which he claims to have obtained from other sources. While it was accepted as factually accurate that there was a seizure of a large quantity of drugs, Mr Duguid argued that there was no evidence to link that matter to the suicide. He argued that "the tribunal might reasonably

conclude that there is no substantial truth in this allegation. It does not meet the description of information and is conjecture and speculation".

90. However, as discussed above, while these matters may well have gone to the question whether the claimant's belief that this disclosure was in the public interest and tended to show that a criminal offence had been committed, we took that matter to have been conceded.

91. On the question whether this meets the description of "information" to fall within the category of a "disclosure of information", we accept this may not have been conceded. However, we again conclude that this cannot be said to be a general statement devoid of specific factual content, since there is sufficient factual content, namely "that the transfer and seizure of drugs was connected to a suicide" which it was alleged was "covered up" by police officers, thus tending to show that a crime had been committed.

92. We concluded that it having been accepted that this was said, that this was a disclosure of information, and on the basis of the respondent's concession that it was otherwise a protected disclosure, we found that it was a protected disclosure.

Disputed disclosures - Disclosure 4

93. Disclosure 4 is stated to be, "That several documents had been concealed regarding the return of monies that had been seized under the Proceeds of Crime Act 2002".

94. During the course of evidence the documents referred to were confirmed to be:
    1. The claimant's subject sheet/ initial seizure document in respect of detention of monies in relation to A dated 3 December 2006 (C1A/893);
    2. the Scott Wilson money deposit dated 8 December 2006 (C1A/905);
    3. claimant's further response to the enquiries of Martin Collins dated 29 January 2007 (C1A/891);
    4. Scott Wilson's precursor to the request for cheques dated 12 March 2007 (C1A/907); and
    5. The request for cheques dated 22 March 2007 (C1A/888).

95. Again, in submissions, the respondent states that "it is conceded…that this statement is factually proven and was made to DCI Dewar in the statement recording process".

96. The respondent argues however that it could not be said that it tended to show that a criminal offence had been committed (given the opposite conclusion was reached by the APF); nor could it be said to be a failure to comply with a legal obligation to which they were subject given the conclusion of the PF and DCI Dewar (the propriety of his investigation being confirmed by PIRC). The respondent argued that the Tribunal has no evidence before it to reach a different conclusion. The respondent goes on to argue that "the remaining issue…is whether this was a disclosure made in the public interest which the claimant reasonably believed was true. The respondent asserts that it was a statement which was motivated by self-interest".

97. Again we note that it is accepted that this statement was made. The submissions of the respondent go, in our view, only to the question of the reasonableness of the claimant's belief.

98. However, again we rely on the respondent's acceptance that if this statement disclosure was made, that it was a protected disclosure.

99. In so far as it might legitimately be argued that this is not a "disclosure of information", again we would not accept that submission. The allegation is of concealment of documents (by police officers). Although the specific documents are not referred to in terms during the interview, there is a reference to paperwork having been passed to DCI Dewar and there is a reference to documents having been known about but hidden by a police officer (specifically DI Kerr). We consider that this disclosure conveys sufficient facts to be an allegation which tends to show a crime has been committed.

100. Thus, the statement having been made, and it having been accepted that it was made, and in light of the respondent's concession, we find that it was a protected disclosure.

Disputed disclosure - Disclosure 6

101. The claimant alleges that he made the following disclosure: “That the domestic abduction of H into stolen motor-vehicle [vehicle registration number], bearing cloned plates, [in 2006], [in North Lanarkshire], was covered up by officers from the Proactive Unit of then N Division, and possibly other police officers, of Strathclyde Police in early 2007, having failed to seize stolen motor-vehicle [vehicle registration number], or report their awareness of it, despite their awareness of its involvement in H’s abduction, create or update crime reports, or carry out their statutory duties as police officers, to investigate crimes and bring the offender(s) to justice, amongst other crimes”.

102. With regard to disclosure six, again the respondent submitted that this statement does not quality as a protected disclosure because in the first instance it is not substantially true according to the evidence which had been heard by the Tribunal. No crime of abduction has been proven despite the claimant’s continuous assertions. It follows that there could not have been a cover-up of an unproven crime. Mr Duguid set out at length in submissions his contention that the evidence supports his assertion that the claimant had a personal interest in accessing the police database and requesting information in order to prove that he was not a corrupt police officer and that purpose was consistently stated or vouched for him from 2010 through to 2016. The contention that he was in fact reporting the coverup of serious crimes was unsupported by evidence, other than that of the claimant and his own conspiracy theories, a description used by witness T Gallacher.

103. While the respondent did not state, in terms, whether they accepted that this disclosure was made, we were taken by the claimant to passages of the transcript where he states that he said it. And although the claimant did not say this in the specific terms stated here to DCI Dewar during the interview, we were prepared to accept on a general reading of the transcript that this was essentially what the claimant told him. To that extent, we accept that it was said.

104. On the question whether this amounts to a disclosure of information, again we are of the clear view that this statement is an allegation which contains sufficient factual content to be categorised as “information”, and given

references to cover up by specific officers, that information tends to suggest that a crime has been committed.

105. Again, we take the view that the respondent has conceded that if this was said, and it was a disclosure of information, then it was a protected disclosure, and we so find.

Conclusions on protected disclosures

106. We have therefore found that the claimant made the protected disclosures which he alleges that he made.

107. We did however have another difficulty with the respondent's submissions on this matter. Given that it was clearly accepted that disclosures 2 and 5 were made and Mr Duguid confirmed there was no departure from that, it was not clear to us what the significance would have been had we not found, for the reasons relied on by Mr Duguid, that the claimant also made these other disclosures.

108. It seemed to us that the fact that the respondent conceded any protected disclosures at all, that meant that we were then required to give consideration to the question of detriment and the causal connection to the disclosure. While it might be in some cases that the more protected disclosures that were made, the more likely the claimant would be able to show a causal connection, we did not consider that this is one of them. This is not least because the respondent accepts that at least one disclosure was made during the interview to DCI Dewar; and the other concession relates to the disclosure to CS Craig.

109. For that reason, even if we are wrong about the conclusion we have reached above, we did not consider that would make any difference to the outcome or our ultimate decision.

110. We add that in any event the focus on reasonable belief that the information tends to show that a crime has been committed, is different from a reasonable belief that the information does show that a crime has been committed.

111. Mr Duguid referenced the need for the claimant to show that the information was substantially true. While that might be the case for disclosures to certain parties, in relation to the question of the claimant's reasonable belief, it is not necessary for the claimant to show that he reasonably believed in the truth of the allegation. Rather he needs to show that he reasonably believed that the information disclosed tended to show the relevant failure even if it is subsequently identified that no crime has in fact been committed. In any event, we did not consider further whether the belief in this case was "reasonable" because of the respondent's concession.

PART D: FINDINGS IN FACT – DETRIMENTS AND CAUSAL CONNECTION

Detriment 2(a): Did DI Stuart Lipsett submit to the COPFS CAAPD a knowingly false criminal case against the claimant for multiple alleged offences under the DPA on the ground he made protected disclosures? (criminal allegations 2011/ 2012)

112. On 20 February 2008, a report was sent to the Procurator Fiscal to consider whether there should be criminal proceedings in relation to the claimant's alleged misconduct between 1 December 2006 and 27 July 2007.

113. On 5 September 2008, the Procurator Fiscal confirmed to the respondent that there would be no criminal proceedings against the claimant and that the matter could therefore be investigated under the respondent's disciplinary procedures.

114. On 15 December 2008, the claimant was served with an investigation form in terms of the Police (Misconduct) (Scotland) Regulations 1996 (R/157).

115. At the conclusion of the misconduct investigation four charges were made against the claimant relating to his interactions with a Covert Human Intelligence Source (CHIS) (see R161-162). A misconduct hearing was fixed for 29 and 30 November 2010.

116. Solicitors for the Scottish Police Federation (SPF) acting in the name of the claimant made certain requests for documents to the Police's Professional

Standards Department (PSD) which was investigating the misconduct. In particular, by letter dated 1 October 2010 (R1/2/88-89), those solicitors made a request for the following documents:

1. All or any SID logs in relation to motor vehicle XXXX 9XX
2. Audit trail in relation to any of these logs
3. PNC audit or registration number XXXX 0XX
4. Details of all level 2 surveillance operations carried out by N Division Proactive Unit from December 2006 to July 2007 in reference to [redacted understood to be B]
5. Copies of CR numbers NE07300906, QB09520407 and QC00480707.

117. On 25 October 2010 CS John Pollock of PSD advised that having checked both registration numbers, that there was no trace of either in any systems requested to be checked (R1/90). That was an error because of a misunderstanding about the vehicle registration numbers.

118. CS Pollok also advised that there was no record of any level 2 surveillance operations in relation to the named individual. It was subsequently identified that this too was an error. He stated he was not prepared to disclose the requested crime reports “in the absence of any apparent relevance to the allegations served on Constable Brown”.

119. In advance of the misconduct hearing arranged for 29 November 2010, the first and fourth allegations were withdrawn. Subsequently, at the misconduct hearing, the claimant admitted the second and third charges. Specifically he admitted that on or around 24 July 2007 (i) he condoned a planned criminal act and (ii) he had made threats against an individual who was then registered as a CHIS. The claimant received a sanction of a reduction of two increments of pay for a period of one year on the grounds that both acts were considered likely to bring discredit to the police force.

120. Although the claimant’s position is that he was forced to admit the misconduct, the claimant intimated an appeal in respect of sanction only. The claimant was subsequently advised (on 15 September 2011) that his

misconduct appeal against sanction was refused by the Chief Constable (C2/612).

121. On 10 December 2010, the claimant made a formal subject access request (SAR) to the Force Disclosure Unit (FDU) making a request for information held by PSD under the Data Protection Act (DPA), specifically for a copy of DI Kerr's subject sheet to Area Procurator Fiscal (APF) dated 9 July 2008 (ie a document about the report to the Procurator Fiscal relating to allegations of corruption against the claimant) and a copy of CS Pollok's letter dated 25 October 2010 to his solicitor. He asserted that he had a right to this information because, as a serving police officer, any exemption relied on by the FDU would not apply because he intended to investigate matters himself.

122. After taking advice, Jeanette Findlay, Assistant Disclosure Manager of the Force Disclosure Unit (FDU), confirmed by letter dated 1 March 2011 (R/2/101) to the claimant that his requests for documents were refused because the information formed part of ongoing criminal allegations. She also pointed out that "exemptions are available only to those who have the responsibility for the investigation, it does not apply to individuals who have no authority to investigate the matters concerned".

123. On 4 March 2011, whilst off duty, the claimant attended the FDU to hand-deliver a letter (CIA/348-350). Such correspondence to the FDU would normally be delivered to Police Headquarters in Pitt Street, as members of the public are not permitted to hand deliver letters to FDU. Police officers are treated as members of the public in regard to SAR requests.

124. Although no members of the public are permitted entry to the FDU office, primarily because of the high level of sensitive information held there, after showing his warrant card the claimant was permitted entry by a member of staff, Mr N McGinley. He spoke initially to Mrs Findlay in her office and advised that he took issue with her conclusions about the application of the exemption. Mrs Brennan, head of information management, was alerted to his presence and attended the office. She was concerned about the way the claimant had gained entry to the office and about his overall attitude,

presence and behaviour which in her view was inappropriate and oppressive. The claimant left when requested.

125. Mrs Brennan was informed by Mrs Findlay and Mr McGinley of their concerns about the claimant's attendance at the office. She was aware that other staff were also upset by his attendance, because members of the public would not normally be permitted entry to their office.

126. She therefore took the unusual step of reporting the matter to her superiors. In particular, she immediately thereafter went to the Police Headquarters in Pitt Street and she informed CI S Livingstone of PSD of her concerns. He advised her that she should report the matter to the claimant's divisional commander, who was at that time CS Mawson. CI Livingstone immediately thereafter telephoned the claimant to advise that he should not attend the FDU in person.

127. On 15 March 2011, Mrs Brennan sent a memo to CS Mawson complaining about the demeanour of the claimant and the way he had obtained access to the FDU by displaying a warrant card (R2/102).

128. On 6 April 2011, the claimant was required to attend at London Road Police Station to meet with Superintendent Eddie Smith who was accompanied by Inspector Robert Coburn. SI Smith informed the claimant that he was to correspond with the FDU by letter only and not to visit or telephone.

129. The claimant covertly recorded the meeting with SI Smith (C1A/393). There SI Smith is recorded as saying "The reason I asked you to come down here Constable Brown was in relation to a subject report that I received from the Disclosure Unit at Headquarters and on the basis of the subject report…I had occasion to speak with Professional Standards…because…[it is] report[ed] that the Head of the Disclosure Unit spoke to Mr Livingstone because of your demeanour and the way that you conducted yourself when you presented yourself unannounced at the Disclosure Unit in March of this year. So basically having spoken to CI Livingstone, Professional Standards have got no interest in this, as far as this goes, they are happy to leave it but on the basis of the discussion I had with Chief Inspector Livingstone I need to

respond to the subject report, so my advice to you is in relation to any actions or any requests you may have to the Disclosure Unit for your on-going situation, you deal with that in correspondence, you don't turn up unannounced because my understanding is that's what Mr Livingstone's office said to you".

130. Superintendent Smith provided a note of that meeting (dated 11 May 2011 R2/104) responding to the memo to CS Mawson. In that note, SI Smith stated that, "I advised Constable Brown that under no circumstances should he visit the FDU in person or make contact via telephone and that as previously advised by CI Livingstone of the PSD, he should correspond with the Unit if required through letter. He was also advised not to use his position as a police officer to make contact with the FDU to gain information about his ongoing personal matter".

131. In or around late March/early April 2011, following the incident at the FDU, CI Livingstone made an informal verbal request of DI Watt, CCU intelligence division, to check the SID in particular to ascertain whether the claimant was using it to access documents which he had not been able to access through his solicitor and through requests to the FDU.

132. CI Watt checked against the claimant's names for general themes in respect of his searches, checking time and date log in, log off and what was submitted, what was searched and what was viewed.

133. Following an audit of the claimant's access to SID in particular, DI Watt identified that the claimant had made a large number of searches for a car registration number and for an individual named B for which there was no obvious policing purpose.

134. DI Watt therefore instructed that further investigations should take place and he produced a briefing referring the matter from the intelligence division to the operations division of the CCU to conduct further research (see R/3/112 undated CCU Brief to Ops).

135. The report states inter alia that, “Intelligence received by the CCU provides that Constable Brown has been accessing police systems for his own purposes to further his complaint and has physically attended the disclosure unit in an attempt to get information by Strathclyde Police [relative] to him”. He sets out the “aim” of the further investigation directed at operations which is to “research his systems [plural] access and establish if there is any cause for concern”.

136. On 7 April 2011, the brief to operations was updated by DI XX, as follows: “After liaison with PSD regarding the CAP file raised by PC Brown he requested the following police documents to assist his CAP and was refused. Information regarding [redacted but understood to be A]; Information regarding C; Information regarding B; Crime Report NE07300906; Crime Report QB09520407; Crime Report QC00480707; Crime Report QB04410208”.

137. This direction was passed to DI Lipsett from DI XX with the following instruction: “please prepare an interim report with the findings attached” (R1/114).

138. DI Lipsett was therefore required to investigate by auditing police database systems whether and why the claimant had accessed those systems for these named issues. He was assisted by DS Jackson. DI Lipsett spoke to CI Livingstone who advised that the documents requested had not been disclosed to the claimant or his solicitor because no reason had been given to show a policing purpose.

139. DI Lipsett thereafter searched the SID for the information about the named individuals, undertaking a targeted search on that basis. The crime reports were held on a different database.

140. DI Lipsett realised that the initial search for the vehicle registration numbers had revealed no entries because the two different numbers which had been identified were not valid registration numbers, the search having looked for a “9” and an “0” (zero) whereas it could only have been a letter “O” at that place in a number plate.

141. When searching the proper registration number, DI Lipsett found SID logs which referenced the car and the named individual and which had been accessed by the claimant.

142. On 13 May 2011, given no apparent policing purpose for accessing this information, DI Lipsett made a request to the claimant to attend Govan Police Station to carry out a criminal interview under caution. This interview was video recorded with DI XX watching “remotely” (C1B/1113).

143. The claimant was accompanied by a lawyer Euan Campbell who advised him to make no comment in regard to the questions which DI Lipsett asked from a prepared question plan. Mr Campbell had advised prior to the interview that the claimant would make no comment to the questions, as was his right under caution.

144. DI Lipsett therefore was left without any reasons or explanation why the claimant had sought to access the database. He was not aware of the claimant having made any criminal allegations about crimes or corruption to DI Dewar. He did not know why the claimant had accessed the database for this information, but he suspected it was to assist his misconduct appeal. It was not however clear why he was looking at those particular SID logs because he understood that the claimant’s misconduct allegations related to a police informant and he could not see any link between that police informant and that person or vehicle searched.

145. Because the claimant had not given any reason and DI Lipsett had no information to allow him to assess whether or not the claimant had a policing purpose, the matter had to be reported to the Procurator Fiscal.

146. He was obliged to refer the matter to the Procurator Fiscal in accordance with directions form Lesley Thompson, then APF for Glasgow. That direction was that in the absence of an identified policing purpose for accessing the SID by a police officer, the matter had to be referred and there was no discretion afforded to the police to do otherwise.

147. On 19 May 2011, DI Lipsett therefore completed an SPR2 (Sheriff Prosecution Report) to be sent to the Procurator Fiscal relating to these allegations (C2/19). On 7 June 2011, DI Lipsett produced a forensic audit report (R1/3/137 – 147) which contained background information to accompany the SPR to assist the Procurator Fiscal, which:

- confirmed that, as a police officer, the claimant was given a user name and personal password to access various Police Information Systems.
- set out the on screen message which appears prior to any officer logging onto Strathclyde Police Network, which included the following:
    - "I agree that I will abide by the terms of the Electronic Communications Policy and SOP [available to employees via the intranet] and acknowledge that if I make improper use of the systems and/or the data to which I will have access I may render myself liable to criminal and/or misconduct/disciplinary proceedings. Examples of offences, which may be considered in respect of the unauthorised disclosure of information and misuse of systems include Official Secrets Acts …Data Protection Act 1996 and Computer Misuse Act 1990. By selecting ok and actively logging on to the Strathclyde Police network you hereby agree to these terms and conditions".
- advised that access can thereafter be gained to various other systems including the Scottish Intelligence Database and Crime Management System, with a warning message prior to SID log in, which states as follows:
    - "You have reached the SID application authorised users only. Do not process unless you have completed the training module. Unauthorised use of this system is prohibited and an offence under the Computer Misuse Act 1990. Unlawful disclosure of information in whatever form is an offence under the Official Secrets Act and the Data Protection Act".
- Set out a post log on warning prior to search of the database:
    - "Unauthorised use of this system is an offence under the Computer Misuse Act unlawful disclosure of information….."

- summarised the accessed unauthorised SID use by the claimant in respect of charges libelled relating to alleged DPA breaches.
- Laid out 17 charges relating to the period between November 2010 and April 2011, all of which relate to the claimant's accesses to the SID to search for B and/or the vehicle registration number.
- Under assessment/conclusion, after a summary of the background facts, stated that "PC Brown has both personally and through his solicitor, attempted to acquire the data referred to in this audit to assist in his misconduct appeal and has been given reasons for the requests being denied. When interviewed regarding his access of SID for the above information he declined to comment and as such no further assessment for his access could be established. It is therefore assessed that PC Brown had no policing purpose for obtaining this data".

148. DI Lipsett printed out a very large number of pages from the SID audit trail which he had conducted some of which were forwarded to the Procurator Fiscal. The Procurator Fiscal only received the relevant extracts from the audit trail which supported the allegations identified.

149. On 28 August 2012 (R1/148) Lorna Revie, Principal Depute at CAP wrote to SI Jim Boyd at PSD to advise that:

> "this case was fully precognosced and reported for Crown Counsel's instructions. Crown Counsel have now instructed no proceedings in relation to the criminal allegations. They are of the view that the circumstances of the case are difficult and unusual. It was clear that during the various stages of the misconduct proceedings, information which Brown wished to use in his defence was initially sought through his solicitor.
>
> Unfortunately due to errors both by his solicitor and by Strathclyde Police, inaccurate information in relation to a motor vehicle and surveillance was provided. It was following the provision of that information that Brown accessed the system on a number of occasions but always in relation to the same person and vehicle. In view of the unusual circumstances in a case

where everything stemmed from misconduct proceedings, Crown Counsel take the view that the matter is best dealt with by the DCC".

150. On 14 December 2012, DCC Ruairidh Nicolson confirmed, in handwriting noted on the letter of 28 August, that an investigating officer should be appointed to review the circumstances. That is, that an investigation should then take place under the relevant misconduct regulations.

151. On 11 January 2013, the claimant was advised by Ms Revie of the decision that there should be no criminal proceedings against him in connection with this issue (R/149).

Detriment 2(b): Did Inspector Dunbar conduct a knowingly false internal case for misconduct against the claimant on the ground he made protected disclosures? (Misconduct allegations 2012 – 2016)

152. On 6 February 2013, DCC Nicolson appointed Inspector Jim Dunbar as investigating officer into this allegation of misconduct (R1/6/625).

153. On 7 February 2013, Inspector Dunbar interviewed the claimant at Easterhouse Police Station and served an investigation form under the Police Conduct Scotland Regulations 1996 (R1/6/626), informing the claimant about the allegations. This is a pro forma document which states as follows: "You are hereby informed that the following report, allegation of complaint has been made against you from which it may reasonably be inferred that your conduct constitutes misconduct".

154. The report continues at section 2, "Although you are not obliged to give any explanation at this stage, you may make an oral or written statement which may be used in evidence if misconduct proceedings are taken. You will be given a copy of any statement you may make. Although you are not obliged to do so at this stage, you may provide the names and addresses of any persons whom you may desire to give statements on your behalf. The Investigating Officer will take all reasonable steps to obtain statements from these witnesses".

155. The pro forma then sets out three questions. In answer to the question, “do you wish to make an oral statement” (R1/6/626), the claimant answered yes. It is further noted (R1/6/644), “he thereafter proceeded to state the following which Inspector Dunbar noted in his notebook and it was signed by all present at the conclusion: “the matters referred to apparently in charges (allegations) 1 to 19 formed part of a statement I provided to DCI Kenny Dewar over approximately 25 hours regarding matters I don’t wish to comment further regarding, at this time, and that statement has been the subject of massive alteration which I have previously reported”.

156. In answer to the second question, “do you wish to make a written statement”, the claimant said no. In answer to the third question “do you wish to provide the names and addresses of witnesses to give statements on your behalf”, the claimant stated “no we’ll be here all day I’ll do it later” (R1/6/626).

157. No names and addresses of witnesses were ever subsequently provided to Inspector Dunbar by the claimant.

158. The report then set out 20 allegations. These were based on the criminal allegations which had been made against the claimant, but had been reworded as thought appropriate by Inspector Dunbar and two had been split into two separate allegations for clarity. There were 19 allegations which related to the claimant accessing the SID to search for the vehicle registration and the named individual (R1/6/627).

159. A twentieth allegation related to the claimant’s attendance at the FDU on 4 March 2011, when he was alleged, whilst off duty, to have “behave[d] in an improper and oppressive manner and [his] conduct in so doing was such as was likely to bring discredit on the police force or service” (R1/6/630).

160. A caseworker, Colin Brown, appointed to assist Inspector Dunbar, took statements from a number of witnesses (listed at R1/6/644), including CI Livingston; DI Watt; DI Lipsett; DS Jackson; Mrs S Brennan; and Mrs J Findlay.

161. On 18 June 2013, Inspector Dunbar prepared a misconduct report which was referred to the conduct department of PSD for the case to be prepared for the briefing to the DCC, who is ultimately responsible for matters of police misconduct, in accordance with usual practice (R1/6/641).

162. The report set out background information which includes at para 5.4 (R1/6/646), "It would appear that upon being advised that no information was held regarding the individual or vehicle registration number Constable Brown embarked on a series of checks in the Scottish Intelligence Database with a view to confirming the information existed or obtaining information about the vehicle and the named individual. The checks numbering 19 in total spanned the period from 11 November 2010 until 20 April 2011".

163. That report summarised the witness evidence and attached the productions relied on, including the letters between the claimant's solicitors and the claimant himself and the respondent on the documents sought. A "copy audit trail report and view event log" was included in respect of each allegation.

164. Under conclusion, the report states that, (R1/6/652) "As a result of the enquiries carried out, the available evidence indicates that the allegations are substantiated. It should however be noted that, in the event of any proceedings being initiated, Constable Brown may well use mitigation as a factor for his actions. Due to the mix up in the initial stages of his legal representative's request for information regarding the vehicle registration number and name [redacted but understood to be C]. In addition his actions regarding the Force Disclosure Unit again appear to be in the belief that he has the right of access to all the information held about himself. That said, it does not, in any way, excuse any alleged inappropriate behaviour".

165. Then under remarks at para 11.2 it is stated that "The Investigating Officer has confirmed with the Professional Standards Department Unit that they are dealing with the matters referred to in Constable Brown's response and, as such, it does not form part of this enquiry". This relates to the comment which the claimant made when the misconduct investigation form was served on him (R1/6/644) regarding the statement made to DI Dewar.

166. This report, together with evidence and statements, was passed to Marvin Hepworth, former CI who on retirement was employed as a caseworker in the PSD, to check the investigation and to prepare a report (briefing paper) for the DCC in accordance with usual practice.

167. On 23 July 2013 Mr Hepworth produced a report (R1/6/725) setting out the allegations and the background including procurator fiscal involvement. Under the heading "evidence" that report states that (R1/6/728) "There is ample evidence to prove Allegations 1-20 albeit there are some mitigating factors. As regards Allegations 1-19, the Forensic Audit Report prepared by Detective Sergeant Lipsett and Detective Sergeant Jackson, confirms Constable Brown's access to the Scottish Intelligence Database on numerous occasions whilst working at Shettleston Police Office to search for both [redacted name] and [vehicle registration number]. Whilst Constable Brown and his solicitor were provided with false information in error by Strathclyde Police, there is no justification for him accessing the Scottish Intelligence Database System on nineteen occasions between 11 November 2010 and 20 April 2011 in respect of the aforementioned search factors.

Further evidence is provided by Sheena Brennan, Force Disclosure Manager, who confirms that access to the SID and other police computer systems must be for a policing purpose. She confirms that the circumstances detailed in allegations 1-19 were not for a policing purpose. The witness Brennan also speaks to the guidance in the Data Protection Standard Operating Procedure, the Strathclyde Police Force Information and Security Standard Operating Procedure and the Strathclyde Police IT Systems Log-On screen warning. The witness Linda Murray confirms that Constable Brown has signed the Electronic Communications Policy User Declaration. The witness Walker speaks to the training provided to Constable Brown relative to the SID. In relation to Allegation 20, the witnesses Brennan and Findlay who both work in the Force Disclosure Unit speak to Constable Brown's improper and oppressive manner on 4 March 2011…"

168. Under “Conclusion” (R1/6/729) it is stated “The allegations against Constable Brown can all be proven. As far as can be ascertained, he has not submitted any Intelligence Logs regarding [redacted name] or the vehicle registration number previously mentioned. It should be noted that when logging onto SID to view the registration number and named individual, Constable Brown no longer worked in Lanarkshire Division, so there was no policing purpose for him to access the above intelligence. Having said all this, Constable Brown has not used or passed on any of this information.

The other issue of concern is the potential embarrassment and reputational damage to the Police Service due to the errors made in supplying factually incorrect information to the Procurator Fiscal and Constable Brown and his lawyer.

Based on this and the fact that Constable Brown’s previous misconduct findings relate to different issues, it is the reporting officer’s submission that the DCC (Designate) deals with this matter by way of a Regulation 6(6) Warning in terms of the Police (Conduct)(Scotland) Regulations 1996”.

169. That proposal was considered and supported by Inspector Dunbar, who confirmed his support in handwriting on the report (R1/6/729).

Detriment 2(c) – Did DCC Neil Richardson take steps to issue the claimant with a warning in terms of regulation 6(6) on the ground that he had made a protected disclosure?

170. On 29 July 2013, this report was passed to the DCC at the time, namely Neil Richardson, who endorsed the report in handwriting, stating, “Please progress a 6(6) warning in this case” (R1/6/729).

171. A regulation 6(6) warning relates to the relevant regulation of the Police (Conduct) (Scotland) Regulations 1996 in force at the time which states that “where the assistant chief constable is satisfied that there is sufficient evidence of minor misconduct ….he may….instead of requiring the constable to appear before a misconduct hearing, decide to arrange for the constable

to be given an opportunity to comment upon that evidence….and thereafter be given a warning…."

172. On 12 August 2013, the claimant was therefore served with an "opportunity to comment on evidence" form signed by DCC Richardson (R1/6/732).

173. At that time the claimant was off work on certified sick leave. The claimant declined an offer to review the evidence prior to his return to work from sick leave because he said he would be unable to give the matter his full attention.

174. On 5 February 2014, his sick leave having ended, the claimant commenced annual leave.

175. On 18 March 2014, the claimant returned to work on rehabilitative duties, which presented difficulties in arranging suitable times for the claimant to meet with Inspector Scott Berry to view his misconduct file.

176. Between 20 March 2014 and 20 May 2014 the claimant viewed his misconduct file on six occasions, accompanied by a supervisory officer.

177. The claimant took detailed handwritten notes. These notes were subsequently typed up (C1A/785-809).

178. On 24 June 2014, the claimant handed a written response to Inspector Berry, that being his initial response to the "opportunity to comment" (R1/6/739-741). In this typed comment the claimant first references the reply which he provided to Inspector Dunbar on 7 February 2013, when he stated that allegations 1-19 relate to unauthorised edits to the statement provided to DI Dewar between 12 January and 5 April 2011, stating that "Inspector Dunbar has not included the detail of my reply in the evidence file, or his statement. It was noted in his notebook, as he states, and I signed the entry on 7/2/13".

179. He goes on to alleged that DI Dewar had removed multiple evidential strands from the statement "to conceal the actions of several officers, then DI James Kerr in particular, and an ex-registered Strathclyde Police CHIS….". He complained that multiple evidential lines of enquiry relating to his "record of work" had not been included, which addressed the inference by DI Kerr that

his work record as a police officer was the result of intelligence from the CHIS, and which he asserted proved serious criminality on the part of DI Kerr and others. He alleged this evidence was removed by DI Dewar, "by re-writing it, outwith my presence and without my permission, with a view to deceiving me, de-railing my justifiable and well-evidenced complaint, protecting officers subject of my complaint, and rendering me liable for allegations of breaching the Data Protection Act 1998 by removing my policing purpose from my statement, when at all times I was reporting criminality to him a recognised policing purpose.

I have reported the conduct I'm alleging DCI Dewar has undertaken several times, by e-mail and letter, including via the Scottish Police Federation, but not been interviewed about how I was arriving at, or evidencing, the very serious and highly criminal allegation I was making against him. I was not provided with a complaint number in respect of the allegation against then DCI Dewar.

He then references the information sent from Mr David Kennedy of SPF in an e-mail to CS McIntyre and CS Craig dated 27 June 2013 which informed them of the recording of the interview with DCI Dewar, but noting that he had not been contacted regarding access to that recording.

180. He continues (R1/6/740), "As the statement I provided to DCI Dewar between 12/1/11 and 5/4/11, before he illegally "edited" large portions of it to deceive me, contained highly detailed evidence of criminal acts, which although leveled at me by then DI Kerr in his case of 20/2/08, were committed by other officers I identified, I respectfully submit that at all times I had a verifiable policing purpose. I respectfully request that the foregoing explanation is considered, and should be considered a further report of the conduct I am alleging has taken place. As such I respectfully request that allegations 1-19 are reconsidered, as having a policing purpose at all times the product of which I fully reported in said statement, my conduct does not contain misconduct of any type".

181. The claimant went on to provide a response to allegation 20, that is that he was led to believe by SI Smith that the matter was concluded during the interview in April 2011, having stated that PSD had no interest in it. He goes on "As such I respectfully submit that I should not be facing this allegation, again, almost 2 years later when it was dealt with by SI Smith sometime in April 2011. As such I again respectfully submit that, the allegation having been dealt with, there is no misconduct to answer in respect of it. There is no statement from then SI Eddie Smith contained within the evidence file confirming the foregoing".

182. The claimant states that it is clear that the allegations which he makes against DI Dewar are criminal, and that CS McIntyre and others failed to act in respect of this complaint. He believed this evidenced an attempt to conceal the contents of the statement.

183. The claimant alleged that DI Dewar attempted "to pervert the course of justice, in order to defend officers guilty of attempting to pervert the course of justice, by having me blamed for matters I knew nothing of and was not involved in. The alteration, failure to seize and concealment of known exculpatory evidence are not acts of human error, and I would refute any suggestion that they could be. Despite Val McIntyre's letter of 11/4/13 stating that a lack of thoroughness and poor analysis of data were to blame for my situation, this is not correct. It is not possible to mis-analyse data which did not previously exist, and was fabricated to corroborate a statement which is now known to be false to begin with. As such any claim is a further, easily proven, falsehood, and further proof of the conduct which I have and am still facing.

It is clear from the statement that I know I provided to the then DCI Dewar that matters relating to [redacted but understood to be B] and motor vehicle [registration number] are not the only edits to it. It is obvious from allegations 1-19 that information relating to other edits in my statement, which also forms part of the evidence file, was not considered to be misconduct of any kind, including the other two registrations ….a stolen blue Mercedes E240 as this vehicle bore all three of those registrations at some time between 2005 and 2007, when I recovered it in Hamilton. All three have a bearing on this enquiry,

and the allegations surrounding me, as a result of then DCI Dewar's unauthorised editing of my statement".

184. On 16 July 2014, DCC Richardson sent a memo to the claimant (of which he acknowledged receipt on 24 July 2014) headed "Response to opportunity to comment", which confirmed (R1/6/745) that his initial response to Inspector Dunbar did form part of the evidence and was recorded in his official police notebook. He also requested the evidence which he said proved that the Dewar statement had been edited, given that it had been signed by him and he had the opportunity to make any amendments deemed appropriate but chose not to do so. He stated that unless he had fresh evidence to substantiate his allegations, he stood by the content of the letter dated 11 April 2013 from CS McIntyre.

185. On 28 July 2014, the claimant responded with a detailed 12 page letter (see memo R1/6/747) enclosing a 32 GB USB key which he said contained the recording of his statement to DI Dewar along with documentation numbered from 1 to 43 referred to in his letter of response. This was forwarded to PSD (R1/6/748-759).

186. On 28 August 2014, the claimant received a letter from PSD responding to his reply of 28 July 2014 (R1/6/774), in which it was noted that the pen drive supplied only contained 5 hours of recording, whereas the statement was taken over 25 hours. The claimant was therefore asked to provide a copy of any further recordings, indicating the relevant times when the statement was altered or edited.

187. The letter went on to state that although this complaint was addressed by CS McIntyre, it was acknowledged that he remained dissatisfied with the explanation provided. The claimant was therefore advised that in light of that and his perception that his statement had been deliberately edited or altered, an arrangement was made for Inspector Wood from PSD to take a statement from him and any other audio evidence. The claimant was advised that his

allegations had been formally recorded as a Complaint About the Police (CAP), which was given a reference number.

188. On 7 April 2015, following an investigation, Inspector Wood produced a briefing paper (R1/5/454) relating to the claimant's criminal complaint against DI Dewar. On 9 June 2015, the claimant was advised that the complaint was being dealt with as a criminal allegation. That had the effect of sisting the misconduct process (R1/5/457). On 17 July 2015 the claimant was advised the matter had been referred by the PF to PIRC (R/1/5/459). On 9 February 2016, the claimant was advised that no criminal charges would be made against DI Dewar (R1/5/460-461) [see more detailed findings in fact in regard to detriment 2(g)].

Detriment 2(d): Did DCC Iain Livingstone take steps to issue the claimant with a warning in terms of regulations 6(6) of the Police (Conduct) Regulations on the ground he made protected disclosures?

189. On 3 June 2016, Martin Hepworth, caseworker in PSD, prepared, in accordance with the usual practice, a briefing report relating to the claimant's outstanding misconduct warning for the then DCC (Designate) Iain Livingstone (R1/6/778 – 781). This consisted of a summary of the circumstances to date and an explanation for the delay and an update of the current position, including that the claimant had lodged a claim in the employment tribunal (which had also been sisted pending the outcome of the criminal investigation).

190. That report stated as follows (R1/6/780):

"The transcripts of the recordings by Constable Brown have been examined and Constable Brown himself has highlighted areas of the transcripts that relate to the subject of allegations 1-19. Analysis of these recordings and documentation do not provide any evidence to mitigate Constable Brown's conduct as detailed in the allegations despite protestations by him. It is clear that the nominal and vehicle in the allegations were connected to the Lanarkshire area where Constable Brown previously worked and that he had no policing purpose for continually searching the SID in respect of this whilst working in Greater Glasgow Division.

In relation to allegation 20, which Constable Brown contends was dealt with by way of corrective advice by the then Superintendent Edward Smith in the presence of Sergeant Robert Coburn, both these officers have been interviewed. They confirm that whilst Constable Brown was afforded advice not to attend at the Strathclyde Police Force Disclosure Unit to prevent any recurrence, Superintendent Smith did not address with him his alleged improper and oppressive behaviour….

Throughout the course of this misconduct process [the claimant] has been obstructive and has deliberately withheld evidence which he claims provides evidence of criminal activity by police officers and information to exonerate him in respect of the 20 allegations served on him. As previously mentioned, there is no evidence to mitigate the conduct described in allegations 1 to 20 and his criminal allegations against DCI Dewar and other officers were all referred to the Procurator Fiscal with no proceedings being taken".

191. Under conclusion, the report stated that, "in view of the foregoing and to prevent any further delay or stress to Constable Brown, it is recommended that arrangements are made for him to receive a warning in terms of Regulation 6(6) of the Police (Conduct)(Scotland) Regulations 1996 as soon as possible. It may be that the DCC (Designate) in fairness to Constable Brown, may wish to backdate this warning by 1 year due to the delays and unusual circumstances of this case".

192. On 7 June 2016 DCC Livingston sent a handwritten memo (R1/6/782) to Superintendent Thompson of PSD, as follows: "Please implement Mr Hepworth's recommendation; arrange for Reg 6(6) warning from Constable Brown's divisional commander. Given the procedural delays, some as a result of Constable Brown's action, backdate the warning by 12 months".

193. On 16 June 2016 Supt Thompson instructed Inspector B McNulty to issue the warning on behalf of the DCC (R 1/6/783). That warning (R1/6/784-789) set out the 20 allegations and communicated the concerns expressed in the briefing regarding withholding of evidence and the conclusion that there was

no evidence established to mitigate his conduct, as well as the reasons for the delay.

194. After rehearsing the circumstances, the warning concluded that allegations 1-19 were fully substantiated, noting by reference to the 19 checks of the SID for the named individual and car registration, “whilst I accept that the first occasion you searched for the above details may have been to satisfy yourself that the information supplied by the Counter Corruption Unit was incorrect, to thereafter search the system a further 17 times is unacceptable. These searches were clearly not for a policing purpose and I am aware that at the time you carried out these checks you were working out of Shettleston Police Office. The nominal named and vehicle concerned are connected to the Lanarkshire area of Strathclyde Police where you previously worked, so it is quite clear you had no legitimate reason for continuing to access these records. Furthermore, there is no trace of you having submitted any Intelligence Logs in relation to the checks carried out by you”.

195. With regard to allegation 20, the warning stated that, “I am aware that you attended [the FDU] whilst off duty and in plain clothes and spoke to a female member of staff regarding your dissatisfaction with the content of a response you had received to a Subject Access Request. The member of staff, who describes your demeanour as aggressive, confirms she informed you that both the written and verbal responses previously given to you detailing the exemptions that applied were appropriate. She also alludes to you not being satisfied with the explanation provided to her, resulting in her female supervisor entering the office. This other witness also describes your conduct as aggressive, inappropriate and oppressive, resulting in her requesting you to leave the building. I am also aware that you contend that this matter was dealt with by way of corrective advice from the then Superintendent Eddie Smith in the presence of Sergeant Robert Coburn at London Road Police Office. Both these officers have been interviewed and confirmed that Superintendent Smith did not you give corrective advice in relation to allegation 20, but merely advised you to refrain from attending in future at the Force Disclosure Unit. I therefore also find this allegation proven…having examined all the evidence, I consider it necessary to warn you in terms of

Regulation 6(6) of the Police (Conduct) (Scotland) Regulations 1996 that your conduct in these matters fell well short of that expected of a serving police officer".

196. This warning was read out to the claimant by Inspector McNulty on 31 August 2016 but the claimant refused to sign it (R1/6/789).

Detriment 2(e): Did DCC Richardson restrict the claimant's policing duties from around 13 May 2011 on the grounds of the protected disclosures?

197. On 16 May 2011, a briefing paper for DCC Richardson (R1/7/792) was prepared by DCI Louise Skelton, Head of Counter Corruption Unit.

198. The report set out the background, specifically referencing requests from the claimant's solicitor for information from policing systems including SID, crime management, PNC and details of level 2 surveillance operations, and stated that a temporary suspension of access to SID has been imposed on the claimant as a precautionary measure.

199. The report then recommended that a copy of that report was provided to CS McIntyre, Head of PSD; the claimant's divisional commander and human resources; and that the claimant's temporary suspension to SID was ratified.

200. On 13 May 2011, an e-mail was sent by DI XX to Sheila MacLeod, (R1/7/791) cc George Clelland, Louise Skelton and Stuart Lipsett, headed systems suspension, and marked restricted, in which he advised that they had that day reported the claimant for 17 offences under DPA to the APF. She was asked "As a temporary suspension measure" to confirm that his SID access was removed and that he would be applying to the DCC for ratification. He confirmed that he was recommending that access be withdrawn only from SID but that the DCC "may have other ideas" in which case DCI Skelton would contact them as soon as the DCC had been briefed. He advised that he had "offered PC Brown all necessary welfare support from our department including access to me 24/7 should he require same".

201. On 17 May 2011, a proforma relating to the allegations against the claimant under the DPA of 17 charges was prepared for completion by the DCC. It was

not recommended that he would be suspended, but rather that his duties would be restricted; limited to "operational with close supervision" and IT restrictions identified as "all SID authorisation suspended". This was signed by DCC Richardson.

202. On 17 May 2011, Douglas Cochrane (Head of Information Management) (R/7/790) replied to DI XX cc George Clelland, Louise Skelton and Stuart Lipsett advising that the claimant's access to the SID was suspended as of that afternoon.

Detriment 2(f) Was the claimant's long service and good conduct medal withheld or delayed on the grounds that the claimant had made protected disclosures?

203. By letter dated 12 November 2014, the claimant was invited to an awards ceremony by CS Andrew Morris due to take place on 16 December 2014 to receive a long service and good conduct medal (R1/795).

204. Inspector A Murdoch was responsible for the process of conducting the awards ceremonies at that time and he was assisted by staff member Ms C MacDuff. Long service and good conduct medals were given as appropriate to those with over 20 years' service. A potential recipient's record would be checked with PSD, CCU and HR to ensure there were no ongoing matters, and it would be signed off by Inspector Murdoch as appropriate. A check sheet listing each person eligible would be passed to Inspector Murdoch after vetting to check the record.

205. Inspector Murdoch checked the claimant's vetting sheet (R1/797). Despite the reference to "live" misconduct proceedings, which would indicate that the claimant was not entitled to receive the medal, Inspector Murdoch wrote "confirmed" on it, and a tick. This indicated that the claimant was entitled to receive a medal at that time.

206. Thereafter, Ms MacDuff sent the invite letter to the claimant. She noted on the vetting sheet "Invited to 16/12/14 ceremony 11/11/14".

207. When Mr Brown received the letter, he immediately contacted Ms MacDuff to advise that he was not entitled to receive the medal because of outstanding misconduct proceedings.

208. Ms MacDuff advised Inspector Murdoch of the error. Inspector Murdoch agreed that the claimant was not entitled to receive the medal at that time. He telephoned the claimant to advise him and apologised for the error.

209. He followed that up with a letter dated 17 November 2014 (R1/798) in which he asked the claimant to "please accept our sincere apologies for the error on our part in sending the letter, especially after PSD, CCU and HR checks have been carried out. As such, if it had not been due to your integrity in contacting us to point out the error we would not have picked up on this". He added a PS "as I indicated on the telephone on Thursday; please call me….if you wish to come in and discuss".

210. Ms MacDuff noted this on the misconduct sheet: "Officer now has a pending 6(6) warning (20 allegations) per Marvin Hepworth officer contacted on 13/11/14 Inspector Murdoch advised information not on the system thanked for his integrity in advising us of this CMacD 13/11/14".

211. The claimant received the misconduct medal in 2018 or 2019.

Detriment 2(g) Did CS Carole Auld and/or the respondent's PSD fail to investigate properly the claimant's complaints about its treatment of him on the grounds that he made protected disclosures?

212. On 19 December 2010 the claimant made a written "criminal complaint" of an attempt to pervert the course of justice against the officers DI Jim Kerr and DS Joanne Pagan, who had conducted the investigation which had resulted in the report to the PF making allegations of corruptions against the claimant on 25 February 2008. He set out the material which he relied on to support his complaint and show that it was not motivated by malice, including complaints about the following:

- that DI Kerr had failed to seize certain subject reports or report that they even existed, although he had seen them but failed to include them in the report to the PF which allowed charge 1 to appear to be justified on the basis of very flimsy evidence and without reference to the exculpatory evidence. He complained too about the failure to mention A being a registered Strathclyde Police CHIS or witness Martin Collins in regard to the allegation that he had corruptly returned money and questioned why there was no reference in the police report to cash being seized and Strathclyde Joint Branch Board cheques were issued by Finance to return the monies, not cash.
- the inclusion in the police report of an e-mail sent from the contact centre to the claimant on 10/7/07 requesting he contact a John Brown on a previously unknown mobile phone number, used to confirm A's account of his dealings with him, but not to include exculpatory e-mails sent to the claimant by the same method from A, all of which referred to A by his real name, evidence which discredited A's version of events.
- About the way his dealings with C had been reported, and the failure to note that the warrants system was down at the time the check was completed.
- The failure to include exculpatory evidence, seized as part of the enquiry, that contact was being made with A from Shettleston police office in late 2006, prior to the claimant having met him, and subsequently at times when he was on annual leave, which was evidence that he was being contacted by others and not the claimant or A's handlers or those acting on instructions to contact him.

213. He then referenced other similar matters which he alleged demonstrated a pattern of behaviour by the enquiry officers who failed to seize or report evidence which tended to refute allegations libelled, although they admitted seeing it, indicating that it could not be human error, and that they intentionally failed to seize or report the existence of a large amount of evidence pointing towards his innocence. He described the negative impact of these actions on his health and personal relationships.

214. By letter dated 5 January 2011 (C1A/118), DI Dewar informed the claimant that he had been instructed to undertake an investigation into his complaint, the remit of which was to assess whether DI Kerr or DS Pagan "wilfully or maliciously submitted evidence against him of a criminal nature in Police Report Reference Number QB04410208 in an attempt to pervert the course of justice".

215. Although DI Dewar was not at that time an officer serving in PSD or CCU, a decision was made to allocate an officer independent of these departments to report to PSD.

216. The essence of the claimant's allegation was that (1) these officers knew at the time of the submission of the report to the PF that exculpatory evidence existed that would have negated the charges contained in the report and (2) they deliberately ignored this evidence and failed to provide a balanced resume of the evidence available.

217. In the context of this investigation, the claimant was interviewed by DI Dewar on seven occasions on 12 January (day 1), 23 February (day 2), 3 March (day 3), 18 March (day 4), 25 March (day 5), 1 April (day 6) and 5 April 2021 (day 7). The claimant recorded these interviews without DI Dewar's knowledge or that of the respondent.

218. A transcript of these interviews has been produced which is lodged as follows: day 1 – T1, pages 1 – 256; day 2 – T1 pages 1-197; day 3 – T1, pages 1-299, day 4 – T2, pages 1-192, day 5, T2, pages 1-300; day 6 T2, pages 1-123 and day 7 – T2, pages 1-200.

219. DI Dewar took notes of these interviews and set out the claimant's position in the form of a witness statement. Such a police witness statement does not take the form of a verbatim report but rather a precis in the claimant's words in comprehensible format setting out the claimant's position. DI Dewar's handwritten statement is 23 pages long (R1/190 to R1/226). Because the claimant had difficulty reading DI Dewar's handwriting, DI Dewar read it out to him. It was signed by the claimant on every page during the course of the interview.

220. The claimant signed his statement at the bottom of each page of days 2, 3 and 4 on day 5; and the statement given on day 5 was signed on day 6; and the statement given on days 6 and 7 was signed on day 7. A typewritten version of the statement is lodged at R1/227-251.

221. During the course of that interview, the claimant made the following disclosures to DI Dewar:

- That there had been an unauthorised or illegal interference with a warrant for an informant (disclosure 2);
- That a transfer or seizure of drugs was connected to a suicide and that this had been covered up by the informant's handler (disclosure 3); and
- That several documents had been concealed regarding the return of monies that had been seized under the POCA 2002 (disclosure 4).

222. Those disclosures were however viewed by DI Dewar at the time to be of a non-criminal nature.

223. On 3 November 2011, DI Dewar produced his report in which he concluded that there was no evidence of any criminal conduct on the part of DI Kerr and DS Pagan and that the non-criminal allegations against the other named officers were also unfounded.

224. He did however find that there had been failings in the manner in which DI Kerr and DS Pagan had conducted the investigation in question, specifically that their investigation should have been more thorough and robust and he identified additional enquiries that he believed ought to have been made at the time. As a result, the report recommended that they be offered "corrective advice" in relation to their future conduct.

225. On 30 December 2011 a report was sent to the PF because of the nature of the allegations against DI Kerr and DS Pagan, to assess whether there should be any criminal proceedings (R348).

226. On 14 March 2012, the Area Procurator Fiscal wrote to the respondent advising that there would be no criminal proceedings against DI Kerr and DS Pagan (R356). The APF went on to state that:

"I must however express my serious concern about the short comings, uncovered by the Investigating Officer, in the investigation by DCI Kerr and DI Pagan. It goes without saying that an investigation into possible corruption by a police officer should be carried out meticulously and scrupulously. The apparently inadequate and negligent investigation resulted in failures to identify several pieces of evidence which were favourable to the complainer, and which undermined the inference that Constable Brown had corruptly influenced the return of money to [A] or protected him from prosecution. As you know, these included: 1. A failure to investigate entries on the Intelligence Database; 2. an incomplete investigation into telephony activity which resulted in misleading conclusions being draw; 3. A complete failure to investigate properly the process by which the decision was taken to return money to [A].

These failures resulted in a misleading and defective police report being submitted to me in relation to a sensitive and potentially high profile matter. You will not be surprised to learn that I take an extremely dim view of that situation. I note that the Investigating Officer considers that there was no risk that injustice might result since the police report was marked no proceedings by me. That decision was taken only after **I** [bold] had carried out investigation with the Civil Recovery Unit into the decision to return the money to [A].

However the crucial question is not whether any action was taken by the Procurator Fiscal on the inaccurate report, but whether the officers deliberately submitted false charges against Brown and had the intention that proceedings should be taken against him on what they knew to be false charges. While their investigation appears to have been at the very least careless and incomplete and gives the appearance of a disturbing lack of impartiality and a regrettable inclination to pre-judge issues without properly exploring the evidence, I consider that, as noted above, it would be impossible to prove the necessary mens rea against them. I therefore return the matter to you for investigation as a disciplinary one".

227. On 28 March 2012, the APF wrote to the claimant to advise him of her decision.

228. On 19 November 2012, the claimant wrote to CS David Craig of the PSD. In that e-mail he complained that the matters raised in his complaint (of November 2010) had not been dealt with and he had not been made aware of the outcome of DI Dewar's investigation. He complained that witnesses he expected had not been interviewed. He went on to state that "the typed personal statement which I have been supplied with purporting to be the statement I provided to DCI Dewar has been heavily edited and is not an accurate representation of the statement which I provided to him. Several matters which were discussed and explained at length which formed part of my statement either appear briefly, minus the full explanation of them which I provided, or in some cases not at all. I am not aware of any operational reason why my personal statement would be edited in this fashion. Are you able to state if there is such a reason?" (R360).

229. The claimant then specifically mentions one matter which he said formed part of his statement but he could find no reference to and that related to the alleged removal of 30 phone calls from a production relating to the corruption enquiry against him.

230. The claimant does however make it clear in that e-mail that he did not accept the outcome of the AFP not to prosecute DI Kerr and DS Pagan , stating "it is also clear that anyone making such an allegation having seen those reports was doing so maliciously, with the intention of causing a wrongful prosecution". He then went on to complain about the APF's involvement suggesting a conflict of interest and lack of impartiality and thoroughness on her part.

231. While the claimant does not make any reference to any other crimes he subsequently alleges had been committed or covered up by other police officers in this letter, he concludes by stating that, "the matters I have outlined are by no means all of the issues I have discovered". He asked for a meeting to discuss them (R361).

232. On 29 November 2012 the claimant's SPF rep wrote to DCC Nicolson (R362) requesting that the claimant's misconduct enquiry of 2010 be reopened on the grounds that a miscarriage of justice had taken place in regard to the

allegations to which he plead guilty. The letter stated that, “It is fully Constable Brown’s view that these issues [misconduct 2012] in relation in relation to data protection were as a sole result of him defending the allegations that you have been seen before”.

233. An undated briefing note which the claimant had passed to his SPF rep was also attached. In that note the claimant, inter alia, set out his concerns regarding the concealment of police intelligence logs to prevent the discovery of the cancellation of an apprehension warrant allowing a drug deal to take place which resulted in a female who had been stealing money from the bank where she worked to fund them committing suicide; and to conceal the involvement of officers in the commission of crimes by a male under surveillance involved in stealing a car and a domestic assault. He included reference to a number of other incidents to support his contention that information did not originate from the informant. He complained that he was forced to plead guilty to two of the 2010 misconduct charges because evidence had been manipulated and evidence necessary for his defence was not lodged. By reference to his allegation that the Dewar statement had been altered, he claimed that “blatantly criminal conduct on the part of police officers and a police informant is being concealed”. He claimed that this matter having been referred to the APF, “who was so negligent and incompetent that she missed all of the foregoing. She in turn marked the complaint no proceedings for fear of her negligence and incompetence being uncovered”. He went on, “there are multiple health and safety breaches, perversions of the course of justice, attempts to pervert the course of justice and misconducts in public office by police officers, Procurator Fiscal staff, staff within the Civil Recovery Unit in Edinburgh and a police informant, whilst he was registered as such and after he was de-registered” (R364 -366).

234. On 3 December 2012 DCC Nicolson advised that “the various issues detailed in your letter will be reviewed and I will respond to you in due course” (R367).

235. On 23 December 2012 (R368) and in subsequent e-mails to PSD (R369-371), the claimant provided further details about his concerns. In particular (R369) he was of the view that a number of witnesses (in particular A), whom he would

have expected to have been interviewed for the Dewar investigation but who were not, would be interviewed in the context of the review.

236. On 11 April 2013, following investigation by PSD, CS Val McIntyre wrote to the claimant (R1/4/388) informing him that having considered DI Dewar's report and related evidence she had concluded that DI Kerr and DS Pagan "could have conducted a more thorough investigation prior to submission of the police report to the PF and therefore both POs have been afforded corrective advice". However she rejected the claimant's additional allegations which she categorised as non-criminal. She also rejected the further allegation from the claimant in November/December 2012 that DI Dewar had deliberately edited his statement without his knowledge, having checked the written version against the typewritten version.

237. The claimant remained dissatisfied and made a further complaints to PSD, specifically (and apparently only) regarding his dissatisfaction with the statement taken by DI Dewar.

238. On 26 June 2013, the claimant's SPF rep advised CS McIntyre and CS Craig that he had a recording of the interview with DI Dewar (C1A/62).

239. On 28 July 2014, in response to a request from DCC Nicolson of 6 July 2014, the claimant provided a pen drive containing a recording of part of the statement taken lasting five hours which he said related to allegations 1 – 19.

240. On 28 August 2014 (R1/409), the claimant was advised that it was considered that the matter of the statement was dealt with in the letter to him dated 11 April 2013 from CS McIntyre, although it was recognised that the claimant remained dissatisfied with the outcome. The claimant was advised in that letter that Inspector Woods from PSD was therefore appointed to take a statement from him in respect of a further investigation by PSD into his complaints. She asked the claimant to provide a copy of any further recordings he had and the relevant times which prove that the statement was altered or edited.

241. On 18 September 2014 (R1/414-417), 23 October 2014 (R1/418) and 19 November 2014 (R1/422), Inspector Woods took statements from the claimant in connection with this investigation.

242. On 27 November 2014, Inspector Wood produced a report relating to his investigation (R1/427-435).

243. On 17 March 2015, a PSD management meeting took place relating to the investigation, following which a decision was made to refer the matter to PIRC (R1/5/437).

244. On 24 March 2015, an (unsigned) letter was sent from PSD to the claimant (R1/438) setting out what was understood to be his complaint to "establish absolute clarity around the parameters of our investigation". Nine heads of complaint were proposed, namely:

    1. That DI Dewar edited his statement by ignoring or failing to include important aspects of evidence which could or would have proved his innocence and highlighted the guilt or incompetence of others in an attempt to pervert the course of justice;
    2. That DI Kerr and DS Pagan did not conduct a thorough enough investigation and failed to uncover enquiries or seize evidence which would have pointed to his innocence and did thus attempt to pervert the course of justice;
    3. That officers from N Division including ex DS Andrew McCaig, DC Mark Cummings and DC Paul Brown were involved in the unauthorised surveillance of named persons;
    4. That DI Christine Fordyce altered and/or concealed intelligence logs and an intelligence package in relation to a named individual;
    5. That ex-DCI James King and ex-DS James Munro and any other officers with responsibility for deploying a named CHIS did so in an unauthorised participating capacity;
    6. That ex DCI James King offered advice and guidance to the Civil Recovery Unit in relation to the return of money seized under POCA to [redacted but understood to be A];

7. That both the claimant and members of his family were subject to unauthorised surveillance;
8. That the claimant's medical details were disclosed without his authorisation;
9. That the crime report pertaining to the case submitted against the claimant by DI Kerr has not been amended to reflect 'no crime' status.

245. The claimant was asked to sign a "heads of complaint" form and was asked also to set out any additional heads of complaint.

246. The letter also confirmed that a thorough investigation into the complaints would be made; that COPFS which had independent oversight of all investigations was aware of his allegations; that CAAPD had the right to direct further enquiry of PSD; that CAAPD is entirely independent of PSD and oversees investigations into all criminal investigations about the police; and that any further concerns could be raised with them once the report had been submitted; and reassured him that the report would include all supporting or exculpatory evidence that may exist.

247. On 30 March 2015, in an e-mail to Inspector Wood (R1/441 – 448) the claimant stated that he considered the nine headings to be too broad and not specific enough, and he set out 35 heads of complaint.

248. On 7 April 2015, Inspector Wood prepared a report summarising the background to the claimant's complaint (R1/250).

249. On 9 June 2015, the claimant was advised that the aspect of his complaint that was deemed to be a criminal allegation, namely his complaint that the statement taken by DI Dewar had been edited, had been referred by the PF to the Head of CAAPD, Mr Les Brown (R1/457).

250. On 17 July 2015 the claimant was advised that a reference had been made to PIRC to undertake enquiries into aspects of his complaint on the instruction of CAAPD (R1/459).

251. On 9 February 2016, Mr L Brown reported the outcome to the claimant (R460-461). That letter states inter alia as follows:

"it may be of assistance if I set out the approach that I have taken to your allegations that have been made over the course of a number of years and which have been the subject of consideration by both senior police officers and senior officials within the Crown Office and Procurator Fiscal Service (COPFS). The allegations that you made were the subject of a report to the then APF in Lanarkshire who examined the contents of that report and considered that there was no evidence of the commission of a criminal offence. It is also the case that your allegations have been examined by the Deputy Director of Serious Casework at Crown Office in 2013 who considered your allegations of criminality along with the original case papers. Following that exercise, the decision was taken that there was no evidence to support your allegation that there had been a conspiracy to attempt to pervert the course of justice.

I am however aware that you have remained dissatisfied with the decisions taken by both the police service and COPFS in relation to your complaints and that you have expressed concerns in relation to the impartiality of the processes involved.

It was against this background that I considered your serious allegation that the statement that you had provided to Kenneth Dewar in support of your wide ranging allegations and which formed the basis of the report which was considered by the then APF at Lanarkshire, had been deliberately altered so as to present a false and misleading account of your position, and that recordings that you had made clandestinely would support this. I therefore took the decision to refer the matter to the PIRC for investigation. I did so on the basis of ensuring that there was openness and transparency in the investigative process and so that the matter was considered by an organisation that is independent of both the police and the COPFS. As you are aware, my letter of referral to PIRC included specific reference to your belief that a statement provided by you had been edited in an attempt to pervert the course of justice…. Having regard to your serious allegation that the statement was deliberately altered to create a false and misleading picture that had an effect upon the investigations of allegations made by you a comparison between the contents of your statement and the transcripts of the recordings that you had

made clandestinely over a number of days would provide an objective basis for assessing the validity of your accusation.

Investigators at PIRC carried out a meticulous comparison between the contents of the statement submitted and the transcripts of the covert recordings made to you. In addition, they cross referred the document submitted by you containing your list of alleged edits with the typed statement taken by Kenneth Dewar. They further cross referred the transcripts of the recordings made by you with the report submitted to the former APF as well as a document you prepared containing a list of alleged edits. The thorough and detailed report received from PIRC has been carefully considered by the Crown and the evidence contained therein analysed.

There is no evidence to support your belief that Kenneth Dewar took away unsigned pages of your statement, rewrote them and returned them to you for signature. Having examined the recordings and having compared these with the statement taken from you and report submitted, no evidence has been found that your statement was unlawfully edited or that the report to the former APF misrepresented your accusation. On the contrary, the evidence suggests that Kenneth Dewar discussed the accuracy and signing of the statement with you on a number of occasions and actively involved you in the framing of the statement which as you are aware was subsequently signed by you as being accurate.

In short there is no evidence that either the statement submitted or the report submitted was altered deliberately with the intention of misleading the decision making process so that their contents deliberately and knowingly misrepresented your position. Furthermore, whereas in this case, a statement has been taken over a very lengthy period of time, in this case over a number of days, there is a need to balance submission of a verbatim account with the preparation and submission of a comprehensible statement. Having regard to all of the evidence in this case, I consider that that approach was taken in this particular instance.

As there is no evidence to support your accusation, there is no basis for considering that the decision reached by the former APF in respect of your allegations of criminality was either wrong or was made on the basis of false or misleading information. Additionally the report by PIRC raises no issue that suggests that the extensive review of your complaint carried out by the Deputy Director of Serious Casework at Crown Office proceeded on a false or misleading basis or that the conclusion drawn thereafter to the effect that the decision taken by the former APF was correct in all the circumstances should be revisited".

252. On 22 February 2016 a comprehensive briefing paper was prepared by Inspector Wood regarding the investigation (R1/463 – 491).

253. On 24 February 2016, the claimant was advised that the investigation by Mr L Brown having been concluded, PIRC having reported back to him, the respondent could now proceed to investigate the 34 remaining non-criminal allegations (R1/5/492).

254. On 26 August 2016, CS Carole Auld wrote to the claimant advising the outcome of these investigations (R1/526 to 558).

255. CS Auld referred initially to previous correspondence in which the claimant was advised of the outcome of police investigations, namely letters of 28 August 2014 and 30 January 2015 and 24 March 2015 from Supt McLeod; letter of 17 July 2015 from CS Mitchell and letter of 24 February 2016 from Supt John Laing. She stated that "despite the extensive work carried out by Inspector Wood in liaising with you and my department noting your concerns, it has been difficult to discern tangible new allegations which have not already been addressed".

256. Although nine head of complaint were proposed, the claimant proposed a further 26 complaints, not all of which were dealt with by CS Auld as meeting the criteria of a "Complaint about the Police", but she nonetheless responded to them all in the letter as appropriate.

257. First, CS Auld responded to the identified nine heads of complaint.

258. With regard to the first head of complaint, alleging that DI Dewar edited his statement, she noted that this allegation was subject of an investigation by PIRC, the outcome of which the claimant was advised about by Mr L Brown in the letter of 9 February 2016.

259. She also advises that the report by DI Dewar was referred to the APF and was considered by the Deputy Director of Serious Casework at Crown Office, who considered there was no evidence of the commission of a criminal offence. On that basis, she found that the allegation was not upheld.

260. With regard to head of complaint 2, which related to the allegation that DI Kerr and DS Pagan had attempted to pervert the course of justice or neglected their duty, she responded by noting that DI Dewar had highlighted a number of shortcomings in their investigation; that the lack of a thorough and robust enquiry was insufficient grounds to substantiate that these officers deliberately attempted to pervert the course of justice; that the requisite standard of proof had not been attained; that the matter would be best dealt with using internal police procedure; that both officers were given corrective advice; on referral the APF, although critical of the police investigation, concluded that no criminality was established. On review she concurred with these outcomes. She concluded, “While I do not uphold your allegation that the officers concerned attempted to pervert the course of justice, I apologise for the adverse impact upon you as a result of the investigative shortcomings”.

261. Head of complaint 3 related to his complaint about an unauthorised surveillance, which he had alleged on the basis of incorrect information from CS Pollock (the letter of 25 October 2020) but which he now accepts was authorised. CS Auld advised that “the incorrect information detailed by CS Pollock…appears to have been due to an administrative error….I apologise for this”.

262. Heads 4 and 5 related to the allegation that there was an alteration of the SID logs by DI Fordyce, which matter was investigated by DI Dewar who identified no evidence to support that allegation. Subsequently CS McIntyre investigated and ascertained that the use of intelligence was properly addressed and acted

upon and she was unable to uphold the allegation. CS Auld reviewed all of the evidence and concurred. Neither identified any evidence to support an inference that the identified police officers acted in any unauthorised participating capacity at any time. CS Auld concurred with these conclusions on review of all of the evidence.

263. Head of complaint 6 related to the claimant's complaint that advice and guidance were offered to the CRU in relation to the return of money seized under POCA. CS Auld stated that DI Dewar ascertained that the police officer identified had made entirely proper representations to CRU. DI Dewar's investigation was reviewed by CS McIntyre and again the complaint not upheld, noting that the matter had been investigated by COPFS and no wrongdoing was identified. CS Auld reviewed all the circumstances and concurred.

264. Head of complaint 7 related to the claimant's complaint that he and his family had been under surveillance. DI Dewar had ascertained from the officers identified that they had at no time performed directed surveillance on him; surveillance logs were also checked, as was the unit with oversight of all surveillance, but no record of him being any part of a surveillance operation could be found. This was reviewed by CS McIntyre and again by CS Auld who concurred with that conclusion.

265. Head of complaint 8 related to the claimant being referred to a consultant psychiatrist without consent, CS Auld concluding that his attendance and cooperation with the examination indicated an acceptance on his part of the process, and she found his allegation not upheld.

266. In relation to head of complaint 9, which related to the assertion that the crime report pertaining to the case submitted against the claimant by DI Kerr has not been amended to reflect 'no crime' status, she advised that crime reports would not be changed retrospectively without specific guidance from Crown Office.

267. CS Auld then went on in the letter to detail her responses to the other "issues of concern" which the claimant raised.

268. The claimant continues to be concerned about the outcome of his other complaints, namely head of complaint 18, 19, 22, 23 and 28 of the 35 heads of complaint which he identified and which were investigated by CS Auld. CS Auld refers to these additional matters as "issues of concern", as in her view all did not represent valid "complaints against the police" (R1/542).

269. With regard to the claimant's complaint 18 (issue of concern 9) (R/547) this related to "the delays in dealing with my current alleged misconduct….", which CS Auld attributed to the fact that, "despite you previously requesting the SPF transcribe these recordings, they were not fully disclosed and passed over in their entirety until September 2014".

270. In regard to the claimant's complaint 19 (headed issue of concern 10) about "the false report to the SPA by Eddie Smith regarding the alleged conversation which he states took place on 6/4/11", CS Auld replied (R/547) referencing the transcript of the meeting supplied, which she accepted was accurate, that she was unable to discern why he believed that the transcript was at odds with any evidence in SI Smith's e-mail report, and there was no evidence to indicate that the report was false, so the allegation was not upheld.

271. With regard to claimant's complaint 22 (issue of concern 13) this relates to "the conduct of Lipsett, Jackson, and XX during their investigation, from a prepared interview which blatantly mirrors Dewar's edits to my statement, starting no later than 48 hours after Dewar concluded taking my statement, clearly perverting the course of justice against me, and others, in relation to what I reported". CS Auld responded (R549) "I do not consider that this allegation contains a reasonable inference of criminality, as suggested by you, to be reported to the PF. In addition, it assumes as correct, your perception that edits to your statement were made by DI Dewar, which has been investigated and, as communicated elsewhere in this letter, shown to have no foundation. I cannot therefore record this as an additional head of complaint".

272. With regard to claimant's complaint 23, dealt with as issue of concern 14, the claimant asserted: "The officer or officers who edited the misconduct file in relation to the allegations I'm currently facing, the edits being particular to (now

deceased female) and other matters Dewar's edits relate to but edits which are exculpatory evidence in relation to the allegations which I'm still facing, despite the edits to the misconduct file also demonstrating what I reported to Dewar. Only 2 possibilities exist, the file was supplied to the COPFS, already edited, or the editing occurred after it was seized there, as per the documentary production sheet to the front of it". CS Auld responded referencing the fact that the claimant's allegation that DI Dewar had edited his statement had been considered by the PF and PIRC and found to be without foundation. She did not however make any reference to the claimant's allegation that his misconduct file had been edited (R1/5/549).

273. The claimant still complains about his complaint number 28 which stated: "All of the circumstances surrounding my attendance at [address] on 26/4/07 and the circumstances surrounding the failure to progress the fingerprint identification in respect of A between 31/10/06 and 25/6/07, clearly something, had it been progressed, which might have caused me not to find money at the address. This all appears to have happened because [house number] was under surveillance by the SCDEA".

274. CS Auld describes this as issue of concern 19 and replies that she cannot discern a tangible complaint from this, which she suggested described a coincidence of circumstances, but there was no evidence available to support or clarify the claimant's position (R/552).

275. With regard to the claimant's complaint 31 (issue of concern 22), CS Auld understood that to be an allegation that the police informant had provided false statements in the investigation by the CCU and that the police had failed to detect that they were false. CS Auld concluded that "there is simply an absence of any information which casts doubt on the veracity of A's statement and which supports your belief in this regard" (R/553).

276. CS Auld responded to all twenty six additional issues of concern identified by the claimant.

277. The claimant remained dissatisfied with the outcome. He made further complaints directly to the Chief Constable, to his MSP, to SPA and others (R/5/559 – 605). These matters were again passed to PSD.

278. CS Auld responded to these issues in an undated letter (R/5/592-593) in which she advised that she would only address the issues raised which had not previously been responded to. She referenced standard procedures in regard to criminal allegations and referrals to the PF and for dealing with misconduct. She referenced in particular the claimant's opportunity to view his misconduct file, and she concluded that she was unable to find any evidence that either the criminal file or the misconduct file had been edited.

Detriment 2(h) Did Inspector Tony Gallagher, on 5 April 2018, submit to COPFS CAAP-D a knowingly false report about the claimant's possession of documents on the ground that he had made protected disclosures? and

Detriment 2(i) Did Inspector Tony Gallagher, between 23 March 2018 and 10 September 2018, submit to the respondent's Professional Standards Department a knowingly false report about the claimant's possession of documents on the ground that he made protected disclosures?

279. The claimant lodged his claim in the Employment Tribunal on 19 October 2014.

280. In a note following a case management preliminary hearing which took place on 26 September 2017 in regard to preparations for a final hearing due to take place in January and February 2018, at paragraph 21, EJ Docherty stated that "it was agreed that a joint bundle of documents can be produced, and parties agreed to exchange documents by 22 November 2017. Mr King [at that time the solicitor representing the respondent] will make up the bundle and this will be produced by 6 October 2017 (sic)" [that latter date clearly an error].

281. On 20 November 2017 the respondent requested an extension of time to lodge the documents to 29 November, which was unopposed. The claimant subsequently made a request for unredacted documents to be lodged.

282. By e-mail dated 15 December 2017, EJ Docherty she confirmed that the Tribunal had not issued an order for these documents, rather a direction as to the exchange of documents. She further refused the claimant's application for unredacted documents to be lodged.

283. The claimant then forwarded a pen drive to the respondent with a view to the respondent producing a joint volume of productions to be relied on by the parties at the final hearing (as agreed and in accordance with standard practice). However, on receipt of the pen drive of documents from the claimant, Mr King raised concerns with the respondent's in-house solicitor, Ms Clelland, about the fact that the claimant had in his possession what were described as "confidential" documents in terms of the government protective marking scheme. He communicated these concerns to the Tribunal by e-mail dated 18 December 2018.

284. A rule 35 order subsequently was issued to permit the Lord Advocate to participate in proceedings, and to express a view on whether these documents should be permitted to be lodged as productions.

285. The final hearing dates were vacated due to the issues which this raised.

286. Ms Clelland shared Mr King's concerns about the fact that the claimant had restricted/confidential documents in his possession on a pen drive, and referred the matter to PSD.

287. An initial assessment of the issue was made by an assessing officer Inspector Foggin (R2/10/1) dated 6 February 2018, described as a "criminal case". The allegation summary was stated to be that the claimant had "between unknown dates ….unauthorised access to data held on computer".

288. An undated file note on the PSD computer system Centurion (R2/10/7) by reference to the claimant, states: "Criminal Allegation (1) Data Protection Act 1998 section 55, "did between 24 July 2006 and 30 November 2017 at a location meantime unknown, obtain and disclose personal data or information contained in personal data, for a non-policing purpose and without the consent of the Data Controller".

289. In an undated report (the status of which was unclear) prepared for CAAPD (C2/79 – 91) by Inspector Gallagher, he noted that Ms Clelland had "identified a large quantity of sensitive police reports containing third party personal data; forming the opinion that the subject officer Brown may be committing an offence having possession of same, and more importantly, that the information should not be in the public domain".

290. Under assessed conclusion (C2/84) the report states that "it is apparent that the subject Brown holds a considerable amount of legacy Strathclyde Police/Police Scotland documentation relating to previous misconduct/criminal proceedings taken against him and he has formed the opinion that having been provided with same, he has authority to retain and utilise them now in support of his Employment Tribunal. It is evidence that….it was procedurally incorrect to furnish him (legacy issue) with sensitive documentation not suitable for release into a public forum. Nevertheless, whilst it is accepted that this may have been the case, continued possession and use, may be considered by the reviewer PF as evidencing a 'non-policing purpose' and therefore a further breach of the DPA 1998. For the purposes of this report the submitting officer has identified documentation that the subject is suspected to have sourced himself, not having been provided with same by others or by other means. Given the volume of documentation and the relevant time period, further system audits….have not been actioned and therefore it is not known when he (or others on his behalf) accessed systems and obtained the material data. The reviewer may consider this necessary to identify additional parties involved in an alleged DP offences and this line will be pursued should CAAP-D so direct. Having assessed the circumstances COPFS/CAAPD referral is considered to be the most appropriate disposal route, as per the severity risk matrix (appendix A). Should CAAPD assess that the circumstances merit a higher level of reporting mechanism, the matter will be reported via CAAPD template report or SPR2 as per CAAPD instructions".

291. On 11 April 2018, the claimant was served with a notice in terms of Regulation 9 of the Police Service of Scotland (Conduct) Regulations 2014, informing him that enquiries into allegations relating to a "contravention of s55(1)(a) or (b) Data Protection Act 1998" had been made against him and a report submitted

to the PF. Misconduct proceedings were suspended in accordance with usual procedures (R2/10/4).

292. On 29 August 2018, Principal Procurator Fiscal Depute informed PSD that (R2/10/6) no criminal proceedings would be initiated because Crown Counsel "considered that there was insufficient evidence for prosecution and also that the Crown would be unable to exclude a defence of reasonable belief that there was entitlement to have access to the materials."

293. On 31 August 2018 (R2/10/16) Inspector Gallacher advised the claimant that the PF had confirmed that no criminal proceedings would be pursued, and therefore the case was passed to PSD to consider misconduct, in accordance with usual procedures.

294. Chief Inspector Andy Bell considered whether misconduct proceedings should follow and produced an undated report which stated as follows (R2/10/17):

"The Investigating Officer provides that the USB stick was found to contain 344 files, which files had clearly been accumulated over a number of years, predominantly from previous misconduct/criminal enquiries brought against the subject officer and through FOI requests. Following review of the amassed material, a number of documents were identified as potentially being sourced and held in contravention of DPA Act 1998 (and also contrary to relevant SOPS). These documents included: STORM incident reports; copy of crime reports; word docs containing SID information; copy of sudden death report; copy of witness statements; warrant documentation; copy of standard prosecution reports; copy of prisoner processing records; copy of iVPD Report".

295. Section 3 of the report, headed "conduct assessment" is largely redacted, but concludes, "When the relevant factors are considered along with the historic nature of the information under review, I am not of the view that it would be proportionate to request the appointment of an Investigation Officer under the 2013 Conduct Regulations in respect of the circumstances".

296. The report then makes reference to a further allegation that in December 2017 the claimant passed an operational enquiry from a police email account to his personal email account, relating to a speeding offence which he was investigating. The report concluded that "while inappropriate, …[it] was forwarded in furtherance of that enquiry. It is considered that this can and should be appropriately addressed through management intervention by the subject officer's line manager."

297. Under section 4, conclusion, the report states, "while concerning, I do not consider that there is prima facie evidence that the material held by the subject officer provides a clear indication that he has misconducted himself. It is however recommended that the Investigating Officer engages with the subject officer's line manager to have him address concerns around the forwarded e-mail from December 2017 and uses the opportunity to remind the subject officer about the requirement to ensure that any material he has gathered in respect of the Employment Tribunal must not be allowed to fall into the public domain".

298. Inspector Barry Spiers met the claimant in fulfilment of this recommendation on 10 September 2018, and confirmed the conversation in an email dated 14 September 2018 (R2/10/20). He confirmed that he had advised that there would be no misconduct proceedings and that the matter was now concluded. The claimant was "also reminded that the documentation retained for ongoing legal proceedings should be utilised exclusively for this purpose and not released into the public domain".

299. During that conversation, Inspector Spiers also confirmed that he had sent the e-mail to the claimant's personal account in error and apologised.

300. The claimant made a further complaint about this referral, which was also subsequently referred to PIRC (see C2/358). Following investigation, they decided that insufficient enquiries had been undertaken by the respondent to address the crux of the claimant's complaint, which was described as follows: "that Police Scotland were aware that the applicant was in possession of this information for a number of years, that the applicant was already investigated

in relation to the same allegation in 2011, and he was cleared of wrongdoing at that time. The respondent to the applicant [of the Police Scotland investigation] did not consider the investigation in 2011 and did not establish whether that investigation related to the same, or a similar allegation. The response did not consider the applicant's contention that the information on the USB stick was in his possession for a number of years and that Police Scotland were aware during that time that the applicant was in possession of this information. The applicant alleged that the investigation undertaken by [Inspector Gallagher] was malicious in so far as it was, in the applicant's view, a direct consequence of the applicant having raised an Employment Tribunal case against Police Scotland".

301. Following recommendation by PIRC to reassess their conclusions, a further assessment was made by the respondent, with CI Alan MacIntyre concluding in a letter dated 11 September 2020 to the claimant (C2/232) that "it is accepted that the 2011 professional standards investigation related to similar offences that were subsequently investigated in 2018; it is evident from the CAAPD report that Inspector Gallagher was indeed aware of those previous investigations; Inspector Gallagher's report acknowledged that you may have had this information for a considerable period of time and that it had not been possible to accurately ascertain the means by which you had obtained it, or how long you had had it".

302. That letter concludes, "On review of the available evidence I am satisfied that the concerns raised by a Police Scotland solicitor to Professional Standards in November 2018 merited an investigation and subsequent report to CAAPD as per the criteria and requirements detailed in the Complaints about the Police SOP. Furthermore, whilst the nature of the allegations in the 2018 report were very similar to those in 2011, Inspector Gallagher clearly highlighted this fact to the PF, with consideration being given to the apparent "continued possession and use" on your part. Indeed, the CAAPD report also included a significant amount of exculpatory evidence in your favour recognising that: you had previously had this material in your possession (and already had been investigated for possession of it), and; that it was evidence that some of the material may have been supplied by you (and not through improper use of

police systems); and that it was unclear when and by what means you had obtained some of the data. Ultimately I cannot conclude that this investigation was malicious in nature, nor a repeat of the 2011 enquiry. I am satisfied that the investigation and subsequent report by Inspector Gallacher was necessary, fair and consistent with the Complaints about the Police SOP. I therefore do not uphold your allegation".

Part E: Tribunal deliberations in regard to alleged detriments and causal connection

Relevant law

303. As discussed above, we have concluded that the claimant made protected disclosures as alleged. However, that is not sufficient for the claimant to succeed in his claim. The claimant requires further to show that he has suffered detriment and that any detriment was because he made the protected disclosures.

304. The relevant legal provision is section 47B ERA states that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground the worker has made a protected disclosure".

305. Bearing in mind dicta of the EAT in *London Borough of Harrow v Knight* 2003 IRLR 140, *Aspinall v MSI Mech Forge Ltd* EAT/0891/01 and *International Petroleum Ltd v Osipov* EAT/0058/17 (which was overturned on appeal but not in relation to the EAT's reasoning on the causation question) and the decision of the Court of Appeal in *Fecitt v NHS Manchester* 2012 ICR 372, this means that there has to be a causal connection between the claimant having made the protected disclosures and the respondent's decision to subject the claimant to detriment.

306. In *Fecitt*, Elias LJ held that "on the ground that" meant "materially influenced". He confirmed that s47B is infringed if "the protected disclosure materially (in the sense of more than trivially) influences" the employer's treatment of the whistleblower. In other words, it need not be the dominant reason, so long as

the protected disclosures played a more than trivial part. Elias LJ recognised that this test is different from the test for establishing dismissal for making a protected disclosure, where if the making of the protected disclosure is a subsidiary reason the test will not be made out, whereas that will be sufficient for claims under section 47B.

307. Section 48(2) states that it is for the employer to show the ground on which any act or deliberate failure to act was done. This means that once a claimant proves on the balance of probabilities that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment, the burden will shift to the respondent to prove that the claimant was not subjected to the detriment on the ground that he had made the protected disclosure.

308. Following *Kuzel v Roche Products Ltd* 2008 ICR 799 CA, the EAT in *Ibekwe v Sussex Partnership NHS Foundation Trust* UKEAT/0072/14, held that, as with the reason for dismissal, a tribunal might reject the reason advanced by a respondent for a detriment, but is not then bound to accept the reasons put forward by the claimant. Instead, the tribunal can conclude that the real reason was other than one put forward by either.

309. In the absence of direct evidence of the reason why a claimant was subjected to a detriment, a tribunal may be required to draw inferences from primary findings of facts about the real reason the respondent acted as they did. If the respondent cannot show why the detrimental treatment was done, then inferences may be drawn from the facts as found against the employer (see *London Borough of Harrow v Knight* 2003 IRLR 140 EAT and more recently the EAT guidance in *International Petroleum Ltd v Osipov UKEAT/0058/17*).

310. In summary, the matters here for determination by the Tribunal, applying the relevant legal principles, are whether the claimant was “subjected to” the detriments alleged, and if so whether the making of the protected disclosures “materially influenced” the treatment by the respondent (so that they need not be the main reason for the treatment). If the claimant can succeed to showing that he was “subjected to” the detriments alleged, then the burden of proof shifts to the respondent to prove on the balance of probabilities that the

claimant was not subjected to the detriments on the ground that he made protected disclosures.

311. The focus is thus on the respondent's reason (whether conscious or unconscious) for the conduct which amounts to a detriment. The protected disclosure must be causative in the legal sense of being the "causa causans", that is the real reason, the core reason, the motive for the treatment complained of. The respondent needs to show that the detrimental treatment was in no sense whatsoever on the ground of the protected disclosures; and a breach will be established if the protected disclosure materially in the sense of more than trivially influences the respondent's conduct.

312. It is not sufficient to show that the treatment was in some way related to or connected with the disclosures because while "related to" denotes some connection that is not necessarily a causative one. It does not answer the question of whether the protected disclosure formed part of the motivation (conscious or unconscious) of the respondent to subject the claimant to detriment.

313. We have come to realise that when the claimant submits that there is a "causal connection" between the protected disclosure and the detriment, what he suggests is simply a link or a relationship between them. It seems to us that he has failed to appreciate the significance of the need to show that it was the cause or the reason or the motive of the respondent for the detriments. It is not sufficient to show that detriments "arose out of" or had a "sufficient link to" the protected disclosures.

314. There was also a suggestion in parties' submissions that comparisons should be made with others in the same circumstances who had not made a protected disclosure; and while it may be that this can shed light on an employer's motive, we were well aware that there is no requirement to identify a comparator who was treated differently.

315. Further we bear in mind (by reference to *Croydon Health Services NHS Trust v Beattie* 2017 ICR 1240 CA) that there is no requirement that a malicious motive for the detriment is established, simply that it was the reason.

316. The focus however is on the evidence and we acknowledge that it is unlikely that a respondent will be up front about their motivation if it was because the disclosures; so that establishing the ground on which an act was done may require this Tribunal to draw inferences.

317. We considered in this case whether we could draw inferences from primary findings in fact which pointed to the respondent having been materially influenced by the claimant having made the protected disclosures, or whether the respondent had established facts upon which we could conclude that any detriments suffered were not for that reason.

318. Bearing that legal background in mind, we now consider in turn each of the detriments on the list of issues for determination.

Detriment 2(a) Report of claimant to Procurator Fiscal in regard to breaches of DPA (criminal allegations 2011/12)

319. The question for determination by the Tribunal is as follows: "Did Detective Inspector Stuart Lipsett submit to the Crown Office and Procurator Fiscal Service, Complaints Against the Police Divisions ['COPFS CAAP-D'] a knowingly false criminal case against the claimant for multiple alleged offences under the Data Protection Act 1988 on the ground that he had made protected disclosures?"

320. Considering whether the claimant was subjected to this detriment, we thought it self-evident that for a police officer to be referred to the Procurator Fiscal on any criminal allegations was a detriment, that the police officer had breached the Data Protection Act being just one example.

321. However, the claimant's allegation is that DI Lipsett's reference to the Procurator Fiscal was "knowingly false". This introduces a subjective element to the alleged detriment, and specifically we take this to assert that the report was referred to the Procurator Fiscal although DI Lipsett knew that it was based on a false premise.

322. The claimant's position, in summary, as we understood it, was that he was searching the database to investigate a crime or crimes; that he therefore had

a valid policing purpose; that the respondent knew that he did but chose to ignore it (which would make the referral "knowingly false"); this was in an effort to cover up any crimes which might have been committed by police officers in the CCU; and that the reason he was referred to the PF was because he had uncovered the concealment of crimes (and had made disclosures about them); the respondent seeking to ensure that potential corruption of a large number of police officers in the CCU was not exposed.

323. In his written submissions the claimant asserts that there is a causal connection between the disclosures to DI Dewar and the investigation of the criminal case by DI Lipsett because prior to making disclosures the claimant was not under any investigation. The investigation commenced within 48 hours of his interview with DI Dewar concluding. Each allegation contained within the criminal case submitted against him stems from information the claimant provided to DI Dewar during the interview between January and April 2011. The claimant relies on DI XX's evidence, who admitted being supplied with criteria to audit from PSD.

324. The claimant also submitted that since the Chief Constable "authorises" police officers to view intelligence in order to report crime, given he has proved that he was investigating crime by reference to the transcript of the interview, he could not have committed any crime or misconduct offence by doing so. No adverse inference should have been drawn from a no comment interview, which the claimant gave following legal advice, as DI XX and DI Lipsett should have known.

325. The respondent submitted that there was no evidence to support such a claim. DI Lipsett denied compiling a knowingly false report. His evidence was that he was operating on the instructions of a senior officer, namely DI Watt, whose briefing to him was completed on 5 April 2011 (according to DI Watt) which was the same date as the claimant's last meeting with DI Dewar.

326. The respondent submitted that there was no evidence to support the claimant's contention of a link between the Dewar interview and the criminal investigation; or that DI Dewar was reporting to PSD and briefing on the claimant's admitted

access to SID. Rather DI Watt said he became aware of the investigation by DI Dewar because he had "stumbled across it" on the system; otherwise he did not know the substance of the complaint; he had not spoken to DI Dewar about the claimant before 5 April 2011.

327. The brief by DI Watt was updated by DI XX whose position was that the origin of the CCU investigation was the claimant's attendance at the FDU. His update directed the investigators to eight specific matters. Rather than the information for searches coming from the Dewar interview, Mr Duguid explained the source of each of these matters, which had already been brought to the respondent's attention, primarily through the requests for information from the claimant's solicitor and the police report of DI Kerr and DS Pagan.

328. The respondent's position was that the information which was sought by the claimant was for personal purposes only; that is to challenge the propriety of one of the charges at the misconduct hearing which had been admitted by the claimant; he was seeking to have the misconduct charges withdrawn and at the same time establish that he was not a corrupt police officer. The respondent's submission is that the claimant's accesses to the database was not for the investigation of a crime reported to DI Dewar but an attempt to vouch evidence in support of his contention that he had been involved in legitimate police investigations, which were not founded upon intelligence from A. DI Lipsett said that he had no idea what DI Dewar was investigating except that it was a complaint against the police; he was unable to identify a link between the claimant's misconduct hearing and B or [vehicle registration number].

329. The respondent's position then is that there was no valid policing purpose for the database searches, so that the referral to the PF was legitimate and valid.

330. The parties detailed submissions considered a number of discrete matters, which are summarised in turn.

Catalyst for the investigation

331. A key area of dispute was the catalyst for the investigation. The claimant submitted that the evidence did not bear out the respondent's submission that

the genesis of the investigation was his visit to the FDU. In particular, the earliest date that the SID was searched, according to his notes at C1A/785, was 13 April 2011 which is some considerable time from 4 March 2011; whereas his interview with DI Dewar concluded on 5 April 2011. Nor was he seeking information from the FDU regarding B or [vehicle registration number] and this was confirmed by Mrs Brennan.

332. Rather, the evidence points to the genesis of the investigation being the Dewar interview. That interview concluded on 5 April 2011 and by 7 April 2011 he was under investigation. His position is that the investigation was commenced following the disclosures which he made to DI Dewar and it was Dewar's intelligence to PSD which allowed them to highlight those matters as audit criteria because he had raised these matters in his interview with him.

The information audited

333. We know from the operational briefing updated by DI XX that the search or audit criteria were as follows:

(i) Information regarding A
(ii) Information regarding C
(iii) Information regarding B
(iv) Crime report NE….0906
(v) Crime report QB….0407
(vi) Crime report QC….0707
(vii) Crime report QB….0208
(viii) PNC on XXXX 0XX or XXXX OXX.

334. The claimant focussed on how it was that officers came to search specifically for the entries relating to the named individual and the car registration number and how it was that the search criteria came to include A and C. The claimant argues that while A was an "audit criterion" in relation to the 2011 investigation of the claimant, he was never the subject of any application by the claimant for information; and he was never charged in relation to returning the seized money to him. This supports his argument that this information must have come from the Dewar interview. The same is suggested in regard to the references to C.

335. As we understood his argument, he suggested that the investigators alighted on these matters because he had raised these issues with DI Dewar during the interview with him; and because of the information he disclosed which came to be known as disclosure 6. He was of the view that some of the information could only have come from that interview. Further, the crime reports numbered were all in his statement to Dewar. His position was therefore that those matters must have been shared by DI Dewar with others in the CCU. The evidence is that DI Watt had spoken to DI Dewar so that there was direct contact between them; and DI XX's evidence was that he was being fed intelligence from PSD about the claimant's complaint against the police so that he could audit it. He argued that this was a clear breach of the investigation protocol and the "firewall" between departments.

336. The respondent on the other hand pointed to the sources of all of the information, or audit criteria, which was being searched, which they submitted were brought to the respondent's attention prior to the Dewar interview.

337. The respondent submitted that most related to information requested in the solicitor's letter of 1 October 2010, with the remaining three being referenced in the crime report ending 0208 which was the police report submitted by DI Kerr and DS Pagan to the Procurator Fiscal dated 20 February 2008.

338. This matter of the catalyst for the investigation into his database accesses is important because it casts light on the central question of whether the claimant had a valid policing purpose for accessing the database.

Reporting of crimes to DI Dewar

339. As we understood his argument, the claimant's position was that he had reported crimes to DI Dewar who had decided (a) not to record them and/or (b) not to recognise what he was told was an allegation of a crime; and/or (c) not to investigate them or refer them for investigation. This was apparently because he believed that DI Dewar wanted to avoid highlighting the fact that crimes of cover up may have been committed by other police officers in the CCU.

340. However given that DI Dewar did not report or investigate them, it was therefore incumbent on him (as a police officer having identified potential criminal offences) to investigate the crimes (and that not to do so would in turn be a neglect of duty and potentially a crime itself). He argued that the deliberate failure of DI Dewar to record his reporting of these crimes in the statement which he gave him meant that the respondent could be said to be attempting thereby to "deprive" him of a policing purpose.

Was a crime reported to DI Dewar at all?

341. The claimant's assertion that he had a policing purpose relates to his claim that police officers are entitled and indeed even obliged to investigate any crime of which they become aware. His assertion appeared to be that as a police officer, he was entitled to investigate any crime, for his own part, whatever that crime was, and wherever in Scotland that crime might have taken place, and in particular even if it had taken place outside the division in which he was a serving officer.

342. Mr Duguid sought to highlight in evidence that what the claimant alleged was a crime was not a crime at all. For example the abduction was not reported as such and the claimant was only speculating that the alleged victim had reported it some months later when the police were called to the domestic assault. Given that there was no crime, he argued, then there could be no cover up of crimes by police officers.

343. The claimant however took many witnesses to the productions which he submitted supported his contention that a crime or crimes had been committed, that police officers who were attached to CCU had knowledge of these events, and as these had not been reported or investigated as crimes, then there was a cover up (a particularly serious crime it if were committed by officers in CCU).

Rationale for searching databases/timing of searches

344. The claimant's position was that the evidence did not support the respondent's contention that he was seeking the information to challenge the propriety of one of the charges of misconduct. The claimant relied on the lack of clarity in

respect of the understanding of various witnesses about his rationale for searching the database at all. It was apparent that some witnesses understood that it was to assist him in his appeal/some with his misconduct hearing/some with his CAP (in relation to DI Kerr and DS Pagan). Without clarity about what his purpose was, he argued, it would be difficult to conclude that he had no policing purpose at all, that in order to reach the conclusion that he had no policing purpose, they ought to have known.

345. The claimant relied on the timing of the searches to refute the respondent's assertion regarding his purpose for searching the database. He pointed out that the requests from his solicitor for documents came after the first dates for the misconduct hearing in February, so could not relate to that; the solicitor's letter is dated 1 October 2010, but the decision was not taken until 29 November 2010; in regard to the information sought from the FDU on 4 March, he was seeking information personal to him so that the searches could not relate to that; that his appeal related to sanction only and the appeal did not take place until December, so the searches could not relate to that; that three of the entries were actually after the Dewar interview had been concluded. While Mr Duguid refers to the claimant seeking to overturn the decision, this is by reference to the Federation's letter of 29 November 2012, which is a long time after the event. Further, he relied on the fact that DI Lipsett could not make a relationship between his misconduct and his searches and as senior auditor that supported his contention that they were not linked.

Police procedure for investigating crimes

346. The claimant's position is that he had a valid policing purpose for his accesses to the database, and that was to view intelligence to report and investigate crimes, as authorised by the chief constable. This raises the matter of the procedure where a police officer identifies that a crime may have been committed, and specifically whether a police officer is entitled to investigate crimes which he has reported.

347. The claimant relied on the evidence of DI Lipsett in particular to support his contention that he did have a policing purpose for his searches.

348. While the claimant accepted that the evidence of DI Lipsett was that he knew nothing about the cover up of an abduction, when questioned he stated in evidence that if the matter related to the cover up of an abduction, then that would have been a policing purpose. He submitted that DI Lipsett's position was that had the reports been made by the claimant to DI Dewar then he confirmed that a policing purpose would have existed.

349. The respondent submitted that it was important to realise the context in which the answer was given; specifically, DI Lipsett was observing that had the claimant chosen to explain his motive for accessing the database and to answer the questions and rather than to answer "no comment" on the advice of his solicitor then parties "might not have been here today". The respondent understood this to refer to the erroneous answer provided by CS Pollock regarding surveillance and the erroneous reference to the car registration which had apparently motivated the claimant to check for information that he knew existed on the database.

350. The respondent also highlighted the fact that no other witness agreed with the proposition advanced by the claimant that there was a policing purpose. In particular, the respondent placed reliance on the evidence of the witness Sheena Brennan a data controller who has given expert evidence ("statements of opinion") previously to courts and tribunals regarding the interpretation of the Data Protection Act. Her evidence was that where, as the claimant contends, he made a report of a crime to Kenneth Dewar on the first day of their statement-recording exercise on 12 January 2011, a reporting officer should be appointed to investigate. It is not for the person reporting the crime to conduct the investigation single-handedly. As she explained, the claimant was not the reporting officer and accessing the database in connection therewith would not be a policing purpose. Chief Constable Livingstone as head of the force explained the same during his evidence. Similar evidence was adduced from Marvin Hepworth, a retired chief inspector, when asked as to whether accessing the database would have a legitimate policing purpose in the circumstances outlined to him. He stated that looking on the database once might be excusable but that doing so on nineteen occasions was definitely not and could not have had a legitimate policing purpose.

351. The claimant's position was that while Mrs Brennan suggested there was no policing purpose, she is not a police officer and she has no authority to overrule the decision of a police officer; she was not in possession of all of the facts and her evidence did not take account of all of the relevant legislation, and therefore it is incomplete and incorrect.

352. The claimant also queried whether the Chief Constable had sufficient operational experience for his evidence on that matter to have any weight.

353. The claimant's position was that DI Lipsett's evidence should be preferred above all others. He relied on the fact that he was a senior auditor and highly respected investigator, submitting that DI Lipsett "was the most reliable of any of the respondent's witnesses".

Did the respondent know of the claimant's policing purpose?

354. The claimant appears to accept in submissions however that DI Lipsett was not aware of the origin of the information on which the intelligence briefing was based; and that he had not liaised with DI Dewar so could not know about the crimes which he had alleged. In other words, DI Lipsett did not know that he had reported crimes, which would mean he was not aware of any policing purpose.

355. On the matter of him telling DI Lipsett his motive for accessing the database, the claimant appeared to suggest in evidence that given the subject matter of his allegations (ie accusations of corruption by police in the CCU) that it would not be appropriate to advise another police officer, having already given that sensitive information to DI Dewar, and perhaps especially not another police officer in the CCU given that they were colleagues.

356. The claimant thus apparently relies on an understanding that DI Dewar could (or perhaps should) have passed on information about his reports of crimes to those investigating the criminal case against him. Had they done so, then his policing purpose would be clear, he argues.

357. It should be noted however that his position on whether DI Dewar should have passed the information onto the CCU, so that they would have known he had reported the crime (and therefore have a policing purpose) was unclear, and apparently contradictory. On the one hand he submitted that for DI Dewar to tell them would be a breach of the "firewall" protocol, but on the other hand he appeared to rely on the fact that DI Dewar would have reported this to CCU as a crime (establishing a policing purpose).

358. However, ultimately, as we understood it, the claimant's position appeared to be that while DI Lipsett did not know, DI XX did know and should have or could have passed the information on. In any event his position was that the respondent knew that he had reported crimes, because he had told DI Dewar.

359. Further, the claimant argued that an illegitimate adverse inference had been drawn from his silence, ie that it has been assumed that there was no policing purpose, and his failure to mention this was held against him, and resulted in the referral to the PF.

Issue of the number of accesses and exculpatory evidence

360. In addition to the claimant's assertion that he did have a policing purpose, the claimant asks us to draw inferences from the facts to support his claim that the referral was "knowingly false".

361. The claimant queried the decision to focus on 17 accesses to the database, and queried suggestions by some witnesses that had he only accessed the database once that might have been condoned, given the errors made in furnishing the claimant with the wrong information about the entries on SID.

362. The claimant asks us to draw an inference from the evidence of DCI Skelton and Inspector Gallacher that there was no discretion in regard to referrals for DPA breaches and yet only 17 accesses were reported (and these all related to disclosure 6) whereas he had looked at over 100 different intelligence logs. In response to the respondent's suggestion that it would be too time consuming to research them all, he asserted that it was more time consuming to remove pages from the audit trail than leave them in and they should have reported

them all, given the evidence that there was no discretion in these matters. While DI XX referred to this being the "best evidence", all the other entries were "as good or as bad as B and [vehicle registration number]".

363. The claimant was of the view that the failure to research his many accesses to the databases which did not relate to these matters meant that there was a failure to identify exculpatory evidence against him. As we understood his argument, that specifically related to the fact that many of his other searches did not relate to crimes which had taken place in his own police division.

364. The claimant's position then would appear to be that more rather than less referrals should have been made to the Procurator Fiscal; and that to limit those to accesses relating to disclosure 6 was suspicious and that made the referral at least false.

365. With regard to the claim that exculpatory evidence had been overlooked or sifted out of the available documentation, the respondent's submission is that no exculpatory evidence has been established. In fact the evidence about other searches outwith the claimant's area of operation would be evidence of further breaches. The evidence was that the exercise of checking whether there was a policing purpose in each case would be a huge and time consuming task. The highlighting of, and the concentration of, the investigation on the accesses relating to B and the vehicle had its clear origins in the letter from the solicitor in October 2010. The reason for the report to the PF was the conduct of the claimant in accessing SID without an identifiable policing purpose.

Tribunal's conclusions on this detriment

366. Having considered these competing submissions, and considering the evidence that we heard, we have come to the conclusion that it cannot be said that the claimant was subjected to this detriment by DI Lipsett.

367. In particular, we have come to the view based on the evidence that we heard that the origin of the investigation was the visit to the FDU. We came to the view that the fact that the Dewar interview ended just two days before the investigation started is a coincidence of timing. Although the meeting with DI

Dewar concluded on 5 April 2011, and the investigation commenced on 7 April 2011, as Mr Duguid pointed out the claimant had revealed his concerns in general on the first day of the Dewar interview on 12 January. The claimant had visited the FDU on 4 March 2011; Mrs Brennan had immediately raised the issue with PSD; and the meeting with SI Smith, when the matter of the visit was addressed by senior officers, took place on 6 April 2011. A number of witnesses said in evidence that the origins of the investigation was that visit, including DCI Skelton and DI XX.

368. The claimant's view that the catalyst for the investigation was the Dewar interview was reinforced by his belief that all of the information searched for (as set out in the ops brief updated by DI XX) was information which he had disclosed to DI Dewar during the interview. While the claimant took us to the transcripts where the matters were mentioned, Mr Duguid took us to the documents which indicated that the respondent had already been furnished with that information by the claimant or his solicitor prior to the Dewar interview.

369. The claimant was concerned that the information which formed the basis of all of the 17 allegations related to B or [vehicle registration number]. This was not least because these issues relate only to disclosure 6 which was not linked to his original misconduct. However, he was particularly concerned about how the respondent came to include A and C as search criteria, when he had not made any request for information relating to them.

370. While this was a matter which did exercise us to an extent, it became clear that the investigation was centred around documents/information which the claimant had previously requested in connection with his misconduct hearing and subsequently. While we noted that the brief to operations by DI Watt was very general in its terms, when it was updated by DI XX the terms of reference became more specific.

371. It could not be said that the Dewar interview was the first time that any of these matters had been brought to the respondent's attention which might suggest that DI Dewar had been the source of the information for the specific searches.

372. We accepted the evidence of the witnesses that they had been tasked with a targeted search, based on information the claimant's solicitor had provided prior to the Dewar interview (or which was contained in reports he was seeking). These were matters of which PSD were aware from the previous 2010 misconduct investigation into the claimant.

373. We accepted that the CCU had alighted on B and [vehicle registration number] because these topics are those referenced in the solicitor's letter to PSD dated 1 October 2010 (the other references are for crime reports which are not held on SID). Specifically, the first four requests in the letter of 1 October 2010 relate to these matters. Further these are the topics which the claimant was (erroneously) advised were not included in the police databases.

374. The other matters listed were either crime reports relating to E, F and G, which his solicitor had asked for and which the claimant was asked about in the interview under caution, but which he did not make a SID search (although the claimant pointed out that he did do a search of F, but that is beside the point in our view).

375. The claimant was particularly concerned about the source of the requests for information on A and C, which he said could only have come from the Dewar interview. However as the respondent pointed out these individuals were referenced in the crime report into the claimant's alleged crimes in 2010 referred by DI Kerr and DS Pagan to the Procurator Fiscal, dated 20 February 2008 and therefore within the knowledge of PSD from prior to the Dewar interview.

376. Further, the fact that he was not seeking that specific information from FDU does not detract from our conclusion. Although he says that it was "personal information", he claimed he had a right to see it as a serving police officer investigating crimes, and it related to his investigations to disprove the allegations made by DI Kerr and DS Pagan. As we understood it, he requested a copy of DI Kerr's "subject sheet to the APF dated 9/7/08" which self-evidently related to the Kerr investigation, although we understood from the claimant that he has never had sight of this even now.

377. The claimant also reads a great deal into the answers of DI XX when he submits to quote the claimant that he was “fed intelligence” from PSD and which he appears to suggest was information passed by DI Dewar to PSD. Although DI XX said that he had liaised with PSD, we take it from his answers that it was PSD which supplied the specific information which formed the basis of the audit criteria based on information which they held. We understood from the evidence that CI Livingstone speculated that this is what the claimant would be searching for. DCI Skelton also confirmed that this was the view of PSD, that is that he would search for information which he had not been able to obtain.

378. Most importantly perhaps DI XX stated that he only became aware of the fact the claimant had reported the alleged cover up of crimes of a stolen vehicle/domestic abduction when he read the productions for this hearing. We thus accepted that he was not made aware of those details by DI Dewar; and we accepted the evidence of DI Dewar that he had not passed on the details.

379. We next gave consideration to the submission of the respondent, stressed throughout evidence and submissions, that what the claimant claimed to be a crime was not a crime at all, so there could be no coverup of any crime.

380. We accepted that was a legitimate argument. Indeed, it probably explains why DI Dewar did not initially recognise what he was being told was a crime (or even the cover up of a crime) (not least because it is clear from the transcript that the claimant had his own doubts about this at the time). We were however prepared to accept, for the purposes of our deliberations, that the claimant genuinely believed that a crime had been committed. This was not least because the respondent accepted that if we found that information had been disclosed to the effect submitted, even in relation to disclosure 6, then these were protected disclosures. The fortifies our conclusion that what the claimant told DI Dewar about was potentially, at least, allegations of crimes.

381. If we accept that what was reported was potentially a crime, this raises the matter of the procedure where a police officer identifies that a crime may have

been committed, and specifically whether a police officer ought to investigate crimes which he has reported.

382. We heard clear cut evidence from a variety of witnesses about the procedure when a crime was reported (not only Mrs Brennan, ex CI Hepworth, the Chief Constable but also ex-Inspector Dunbar). We were particularly taken with the evidence of Mrs Brennan on this matter. We noted her clear answer to the claimant's suggestion that there was a lack of clarity on the procedure and that if you asked three different people you would get three different answers. Her reply was unequivocal: if you asked three police officers you might get three different answers, but if you asked three members of her department you would get the same answer.

383. What is clear is that a police officer cannot unilaterally decide to investigate a crime; that it should be reported and if appropriate a police officer (which may be the reporting officer) will be allocated the task of investigating. Further the evidence that we heard was that given that the allegation was of corruption by police officers in the CCU, there was all the more imperative on the claimant to advise a superior or even report the matter to another police force. This would suggest then that the claimant did not have a valid policing purpose for the searches on the database, as he was not formally tasked with investigating those crimes.

384. While we accept that there may be some grey lines, as some witnesses have highlighted, where it may be necessary and appropriate for a police officer to investigate a crime in another policing division, this is not one of those circumstances. This was an allegation about a serious crime and there was no doubt that it was not appropriate for the claimant to investigate any crime or to assume that having reported it to DI Dewar, and believing that DI Dewar had not reported it, that he could investigate it himself.

385. Further, the claimant asserts that his submission that they were wrong to conclude that he did not have a policing purpose is supported by the fact that the witnesses all disagreed about the rationale for searching the database: how could they conclude that he did not have a policing purpose if they did not know

his purpose for accessing the database? He also argues that the timing of his searches does not support the respondent's ultimate submission that he was searching for this information to challenge the propriety of one of the original 2010 misconduct charges.

386. We have come to the view, as discussed further below, that the lack of clarity about the rationale does not support the claimant's argument that this means it was not appropriate to conclude that he did not have a policing purpose. Indeed the timing might bring us to conclude that it was for any one of the reasons suggested, but that would not rule in or out a valid policing purpose. The timing of the accesses themselves does not confirm that the claimant did in fact have a policing purpose.

387. We also gave consideration to the claimant's argument that the PF (at least) had not been referred to what he regarded was exculpatory evidence. As we understood it, that exculpatory evidence was the evidence that the claimant had made a large number of accesses to SID on other topics, which it was suggested the PF was not made aware of.

388. When asked to explain, the claimant advised that the evidence regarding accesses to information relating to N Division was exculpatory because it had to be explained. In particular, the claimant was only charged with accessing data in respect of 10% of the total accesses, and the other 90% was ignored. The claimant submits that the only explanation for that is that the subject matter of the 10% relates to the subject matter of the protected disclosures, whereas the 90% does not. However, the respondent removed information about 90% of his accesses in circumstances where they had no discretion but to refer such matters to the PF. There has to be an explanation for this and the claimant submits that the explanation is that disclosure 6 was the only one which was not related to the Kerr and Pagan inquiry.

389. That exculpatory evidence included evidence which the claimant asserted had been removed or "edited" from his misconduct file. The claimant referenced his misconduct file, and it was referred to during the hearing as "document 24". As discussed, there was a misunderstanding regarding which document the

claimant had sought recovery of, but it was either the whole misconduct file, or 600 pages of audit trail.

390. This matter featured quite highly in this hearing because the claimant's application for a document order to produce it had been refused. He was of the view that this was a significant document and that he needed it to prove his case and that explains why he decided to appeal the Tribunal's decision to refuse it.

391. The claimant's position was that the misconduct file had been "edited" at some point, by which he meant that pages had been removed. Although the witnesses were not able to confirm exactly when that was, witnesses accepted that pages had been removed but put forward a valid reason for this.

392. While we were not able to conclude, on the evidence which we heard, exactly who or when the audit trail was streamlined to focus only on the specific allegations being made against the claimant, we did come to the view, on the balance of probabilities, that the audit trail was streamlined before the report was sent to the PF. We however concluded that there was nothing sinister about this, not least because the paperwork made clear that the pages had been removed.

393. But in any event, we could not agree that the evidence which he pointed to, and which he was concerned had not been considered by the Procurator Fiscal, was in any way exculpatory, but rather that it may have highlighted that he had many more unauthorised accesses which would not have served to absolve him from the charges. Even the fact that he might have a valid policing purpose for other searches, would not absolve him of guilt in relation to these accesses which were referred.

394. We accepted that it would be entirely disproportionate to research all of his other searches on the SID. As a police officer, who had legitimate access to the system, it seemed to us to be inevitable that some of these accesses would be entirely legitimate. The focus only on a small sample (informed by their knowledge of the information the claimant was seeking) was in our view entirely appropriate and proportionate.

395. We came to the view that the fact that he had many other accesses also for subject matter relating to potential crimes outwith his division is beside the point. The focus was on the "best" evidence to use DI XX's phrase because this had been carefully researched. Further, we noted that more than one witness suggested that if he had accessed the database to research crimes not in his policing area, had more instances been referred to the Procurator Fiscal then he would have been facing more charges.

396. We did struggle to understand why it would be that the claimant might argue that he should have been "charged" with more alleged breaches and that he suffered detriment or disadvantage by the respondent referring less examples (beyond the fact that he might then expect a more serious sanction, discussed later). We could not say that any inference could be drawn from any failure to allege breaches in relation to many other accesses. We did not accept that there was anything sinister in the fact that they had not "reported" him for more accesses, since to have accessed even this amount would have had the potential for him to have been sanctioned for misconduct.

397. The claimant also drew our attention to the fact that it appeared that the report had been submitted twice to the PF, some thirteen months apart. The respondent's position was that there was no evidence before the Tribunal that it has been submitted twice (except that of the claimant). Although we could not get to the bottom of what had happened here, except that it might have been that a paper report then an electronic report was submitted, we were of the view that the answer to that question would not assist the claimant in his argument in any event.

398. In our view, the most important question when it comes to this alleged detriment, is the state of knowledge of DI Lipsett. It is self-evident that a person could not do something because another had made a protected disclosure if they did not know they had made one; and indeed nor can their decision be motivated or "materially influenced" by that fact.

399. The claimant made much of the fact that DI Lipsett agreed in evidence that, on the premise that he was investigating a crime by police officers, he did have a

policing purpose for the search. Whether that is right or not, and whatever DI Lipsett may say now and whatever weight we might put on his evidence compared with other witnesses, in response to the questions which were put to him, he made it clear that the claimant had failed to tell him about this at the time.

400. Even if the claimant could have been said to have a policing purpose for his searches, we conclude that DI Lipsett did not have any knowledge what that policing purpose was. We accepted his evidence that he did not know that the claimant had made allegations of crimes by police officers to DI Dewar. While he was aware (from the brief to operations) that there was an investigation being conducted by DI Dewar, he did not know the details of that. He did not know what the claimant had told DI Dewar; he did not know that he had reported any crimes to DI Dewar, he did not know specifically that the claimant was making accusations against colleagues in the CCU; he did not know that there was any accusation of a cover up. DI Lipsett had no information about what the policing purpose might be.

401. We did hear evidence about “firewalls” which we understood to be the requirement for separate investigations into separate matters to be undertaken by PSD while also ensuring that there was no overlap in the subject matter of investigations. DI Watt said this was why he had referenced the investigation being conducted by DI Dewar. In any event we understood that DI Dewar was deliberately selected because he was highly regarded and he was not assigned to PSD, which would serve to reinforce any “firewall”. We further accepted DI Dewar’s evidence that he had not passed on any details about the interview with the claimant.

402. DI Lipsett gave the claimant an opportunity to explain his policing purpose during the interview under caution, but the claimant had chosen, as was accepted as his right, to make no comment. The claimant argued that an illegitimate adverse inference had been drawn from his silence, ie that it had been assumed that there was no policing purpose, and his failure to mention this was held against him, and resulted in the referral.

403. However, DI Lipsett's position on this was not that an adverse inference had been drawn, but rather that he had no information to make a conclusion one way or another, that is that he had no information to assess whether he had a policing purpose or not.

404. We were interested to hear the evidence of DI Lipsett that this was standard practice of this solicitor at least, and while he accepted the claimant's right not to comment, he questioned the wisdom of that approach. He gave the example of circumstances where had a police officer given his explanation for his actions at that stage, then the matter would have gone no further.

405. We accepted that DI Lipsett was not aware of any allegations being made by the claimant about a crime being committed, that he was not aware of any rationale or reasoning being given by the claimant to explain these accesses, and that he had no information one way or another to access whether there was a policing purpose; that he could only speculate it was to do with his 2010 misconduct proceedings, and his conclusion that there was no valid policing purpose given was therefore genuine. There is therefore an entirely valid and legitimate reason for the referral to the PF. But crucially, DI Lipsett simply did not know that the claimant had made protected disclosures.

406. On the basis of these conclusions, we are of the view that the evidence favours the following interpretation of events.

407. The claimant was the subject of misconduct proceedings in 2010 in regard to his relations with a CHIS. These followed a reference to the Procurator Fiscal who highlighted that the investigation into the charges was deficient. In the course of preparing his defence for the misconduct hearing, the claimant, initially through his solicitor, sought certain documents. It would appear that these related to the claimant's attempts to clear his name and initially at least to show that he had a good policing record and "wasn't corrupt". His suspicions were raised when he was wrongly informed not only that there had been no search on the database for the vehicle but also that there was no authorised surveillance of the named individual. It is understood that he then took steps not only to establish for himself that there were such searches (to support his

assertions about the other police work he was undertaking which had no connection to the CHIS and to establish that he had been framed by other police officers); but probably and subsequently also to satisfy his growing (and apparently sincerely held) conviction that crimes had been committed but covered up by CCU, that in itself being a crime.

408. It is not apparent that he had these suspicions or at least that was not his focus of concern when he was interviewed by DI Dewar. This focusses on concerns about the Kerr investigation and in respect of which, as was stated in the typed version of his statement at least, “my intention is not to get these people the jail it’s just to demonstrate that I wasn’t corrupt”. His reference to other matters, and in particular other crimes that he had been involved in, was designed to show that he had solved crimes without intelligence from A, and which was at the time of the interview at least designed to clear his name. He was concerned to show that he was not inappropriately involved with A. This is illustrated by the fact that when the statement is read over, and the reporting of crimes by other police officers is not made as clear as the claimant now believes it was, the claimant signed the statement. It was not apparent to us when the claimant came to suggest that the reason for his searches was to research crimes committed by others and by police officers, but it appears to have been several years following his initial statement to DI Dewar.

409. The claimant, through his solicitor initially, and then by his attempts to obtain documents through FDU, brought himself and his research to the attention of the PSD. This was because Mrs Brennan was concerned about his attendance at FDU – whatever his conduct (and whatever documents he sought) there were concerns about him being in the building at all – and she took the unusual step of reporting him to PSD directly. As a result of this being brought to the attention of CI Livingstone, it is understood that he suspected that the claimant may have been making his own searches for the information that he had not obtained from FDU and that he had failed to obtain through requests by his solicitor. Although we did not hear evidence from CI Livingstone, we understood this from other witnesses and that CI Livingstone verbally instructed DI Watt (who worked across the corridor from him) to conduct an audit of the SID to assess its use by the claimant. Although there was some

lack of clarity about what exactly DI Watt was asked to do, he did suggest in evidence that he was searching for general themes, and he alighted on the repeated references to the car registration and the named individual. It is thus not clear whether he was given those details when first asked verbally by CI Livingstone or not (which we put down to a fading memory due to the passage of time). Notwithstanding, DI XX gave specific instructions regarding the scope of enquiry, which he said that he had obtained from PSD, and which meant that by the time the investigation was undertaken by DI Lipsett, it was a targeted investigation into certain named individuals and matters, all of which were brought to the respondent's attention prior to the Dewar interview.

410. The investigation of DI Lipsett revealed no obvious policing purpose. This was not least because these searches related to alleged crimes which might have been committed outwith the police division to which the claimant was assigned. DI Lipsett knew nothing of any allegations of crimes having been committed by other officers to DI Dewar.

411. The standard practice, in such circumstances then, was to interview a police officer to seek to ascertain what their policing purpose was. This was an interview "under caution". The claimant was not obliged to attend, and nor was he obliged to comment, and as the claimant stressed in evidence no adverse inference was to be drawn from any failure to comment. The claimant did attend the interview with his solicitor, and as is understood on the advice of his solicitor, he made no comment to the questions asked. The outcome however was that DI Lipsett could not, from the information which he had, identify a policing purpose for the claimant's access of the database.

412. On the crucial matter whether the referral to the PF was "knowingly false", we heard evidence from DCI Skelton to the effect that a diktat had been pronounced by the then APF for Glasgow Lesley Thompson that if no policing purpose could be identified, then the police had no discretion but to refer the matter to the Procurator Fiscal.

413. On the basis of that evidence alone, we accepted that DI Lipsett had no option but to refer the matter to the Procurator Fiscal. Given the failure of the claimant

to inform DI Lipsett about his rationale for searching these matters, and without any further information, procedures dictated a referral. It could not therefore be said that the referral was "knowingly false".

414. The claimant made the point in submissions that the respondent's reliance on that premise belies the fact that he was referred to the PF in regard to only 17 accesses when he had accessed the database more than 100 times for information relating to incidents outwith his division. If the respondent had no discretion but to refer such matters to the Procurator Fiscal, then all accesses should be referred. However, we accept that with regard to the content of the referrals, discretion does lie with the respondent. And with regard to DI XX's comment about the "best" evidence, that was the evidence which had been identified in respect of the two pieces of targeted information. No adverse inference can be drawn from this fact.

415. We conclude therefore on the basis of the evidence which we have heard that the claimant did not suffer a detriment of being "subjected to" a knowingly false criminal referral to the Procurator Fiscal by DI Lipsett.

416. While the focus of this issue for determination was on DI Lipsett, we noted in the claimant's pleadings and his submissions, that he alleged that the reference to the "knowingly false" case was "by the relevant DCC (Nicolson or Richardson) DI XX and DS Lipsett and DS Jackson and possibly others unknown to the claimant".

417. We take from this that the claimant suggests that even if DI Lipsett did not make the knowingly false referral, then others engaged by the respondent instructed it or engineered it, with the consequence that the respondent is liable for their actions.

418. To the extent that the claimant suggested that DI XX knew, it was clear from his written answers that while he had been passed information from PSD which allowed him to set out the specific parameters of the audit, he was very clear that he did not know anything about any allegations of crimes made by the claimant to DI Dewar until he read the productions for this hearing.

419. It was clear too, from the evidence which we heard that neither DCC Nicolson or DCC Richardson was aware at the time of any allegations of crimes having been made to DI Dewar.

420. In any event, the claimant appeared to rely on the fact that because DI Dewar knew, he did or ought to have passed on that information to PSD. He apparently then suggests that it can be taken that the respondent knew. As we understood his argument, he suggests therefore that the respondent is liable because the respondent knew about the protected disclosures, and it was the respondent in particular who was seeking to protect its reputation from allegations of extensive corruption in the CCU.

421. We were aware of the legal principles which confirm that where the decision maker does not know of the protected disclosures then that (self-evidently) cannot be the motivation for the detriment. Although we were not referred to it, we were aware too of a potential exception to that situation, illustrated by *Royal Mail Group Ltd v Jhuti* 2020 IRLR 129 SC.

422. That decision was an unfair dismissal claim where the decision to dismiss was made in good faith but the decision-maker had been misled. It may be argued that the same principles should apply to a detriment case. This exception might then pertain where someone above the claimant in the hierarchy of responsibility determines that a staff member should be subjected to a detriment for a reason but hides it behind an invented reason which the decision-maker adopts. The reason is the hidden reason rather than the invented one. Recent decisions stress the limited nature of the *Jhuti* exception eg *Kong v Gulf International Bank Ltd* UKEAT/0055/21, but in any event there was no evidence to support such a conclusion in this case.

423. We have found that neither DI XX, DCC Nicolson nor Richardson was aware at the time of any allegations of crimes having been made. There was no evidence whatsoever even to draw any inference that DI Lipsett had been authorised or instructed by anyone above him in the hierarchy to make the referral because of the protected disclosures, or even that he had been misled as to the background circumstances.

424. While DI Dewar was aware (in general) that the claimant had made criminal allegations against other police officers, we accepted his evidence that he did not divulge that information to PSD or any of the officers conducting this investigation. They were simply not aware at the time of these allegations. He was not in PSD and was not involved in the referral of the report to the PF in regard to the allegations of breaches of the DPA.

425. It was quite clear, as discussed above, from the evidence of DCI Skelton that the respondent was under an obligation to refer such complaints. We noted too that this practice was confirmed in evidence by Ex DCC Richardson who went so far as to suggest that the complete absence of any police discretion on the matter was disproportionate.

426. We have found no evidence to suggest any culpability on the part of DI XX or indeed the relevant DCC, or that anyone engaged by the respondent was responsible for the referral of a “knowingly false” report, and we conclude that standard procedures were followed.

427. We could not therefore conclude that the report which was made to the PF submitted by DI Lipsett was “knowingly false” (or indeed false at all) and we therefore do not find that the claimant has suffered the detriment which he has alleged. In such circumstances there is no requirement for us to consider whether the referral was because he had made a protected disclosure.

428. We went on however to consider, leaving aside the question whether it was knowingly false, the self-evident detriment of being referred to the PF at all and whether that could be said to have been because the claimant made protected disclosures.

429. The respondent relies on the reasons addressed by their witnesses to support the rationale for the referral to the PF. We accept that all the evidence points to that being the reason for the treatment, that is essentially that standard procedures were followed, and that the fact of the claimant having made protected disclosures is not supported by any evidence which we heard.

430. In our view the claimant's argument betrays an inherent contradiction and he cannot have it both ways: he cannot on the one hand rely on the failure of DI Dewar to report/investigate his crimes to thereby deprive him of his policing purpose; and on the other to rely on his assertion that DI Dewar had told others in the CCU that the claimant had uncovered corruption in the CCU which might result in DI Lipsett knowingly making a false reference to the Procurator Fiscal to punish him, or to detract from his allegations of a cover up.

431. It should be said that we were puzzled throughout this hearing and never enlightened on why it would be that if the respondent was seeking to conceal the coverup of crimes by many officers in the CCU, they would have referred the claimant to the PF, where it was at least possible that the PF would have identified any crimes which had potentially been committed. This is reinforced by the fact, as the claimant has highlighted, that the 10% of accesses which were referred actually related to the subject matter of the disclosures. There would have been other detriments the respondent could have subjected the claimant to (even keeping proceedings internal) that would have better served that purpose. This fortifies our view that any detriment was not because of the protected disclosures.

432. We have concluded that the decision makers were entirely unaware of the claimant having made a protected disclosure, that there was no interference of their decision making responsibilities by their superiors, and indeed that the respondent's approach to the investigation was entirely standard.

433. In summary then, we did not accept that the reference to the Procurator Fiscal was knowingly false, or false at all, but in any event while we did accept that a reference to the Procurator Fiscal was self-evidently a detriment, we did not accept that the reference was made on the ground that the claimant made a protected disclosure.

Detriment 2(b) misconduct relating to DPA breaches (2012 misconduct)

434. The next detriment which the Tribunal considered was whether Inspector Jim Dunbar conducted a knowingly false internal case for misconduct against the claimant on the ground that he had made protected disclosures.

435. We note again however that the claimant in his pleadings suggests that the investigation of the 2012 misconduct case was undertaken by Inspector Dunbar, but "under the oversight of the relevant DCC (Nicholson or Richardson) and possibly others not know to the claimant".

436. Again we have no difficulty in concluding that a misconduct investigation is in itself a detriment to the claimant, although again we were required to give consideration to whether this was "knowingly false".

437. Further and in any event we gave consideration to whether the misconduct investigation was "on the ground that" the claimant had made protected disclosures.

Respondent's submissions

438. The respondent summarised the background facts as follows. The outcome of the referral to the PF was to defer to the DCC to decide upon internal misconduct proceedings.

439. In February 2013, Inspector Dunbar, who had been appointed to undertake the internal investigation, served notice of twenty allegations on the claimant. In response, the claimant stated that the matters referred to in allegations one to nineteen formed part of a statement he had provided to DI Dewar over approximately 25 hours and that he did not wish to comment further as the statement had been the subject of "massive alteration" which he had previously reported.

440. Inspector Dunbar stated in evidence that he had no knowledge of DI Dewar's investigation and did not seek to enquire about it during the currency of his investigation. He and other officers were aware that it was important to have a "firewall" to prevent officers being "contaminated" by their knowledge of other investigations concerning the same complainer.

441. His involvement ended in June 2013 with a report to PSD at which point, it would be for a case preparer (Marvin Hepworth) to prepare a briefing for the DCC. Inspector Dunbar concluded in his report that each of the allegations was substantiated, notwithstanding certain mitigating factors. At the time of preparing the report which included allegation 20 (the claimant's behaviour at the FDU on 4 March 2011) Inspector Dunbar would have been unaware of the transcript of the meeting between the SI Smith and the claimant on 6 April 2011. The pen drive containing the recording of that meeting was produced by the claimant on 8 May 2016, almost three years after Inspector Dunbar's investigation concluded.

442. Inspector Dunbar refuted any suggestion that he had conducted a knowingly false investigation into an internal case for misconduct against the claimant. The claimant has failed to establish in what way the investigation was knowingly false. Inspector Dunbar was referred to his examination of the SID audit trail and event log. He accepted that he had examined an abbreviated version or a summary. When asked as to missing pages in the misconduct file which the claimant had examined, he pointed out that there was no secret that numbered pages were absent. One only had to look at the numerical order of the pages to discover that fact.

443. In the event that the allegation is now that there was missing documentation which would have been relevant to the misconduct case or that the missing documentation is exculpatory evidence which renders the investigation "knowingly false", the claimant has not specified how the documents which were not examined by the witness could have either been exculpatory or caused the investigation to be knowingly false. The claimant is inviting the Tribunal to speculate upon documents without any explanation of their relevance.

444. There is no proven connection between any disclosure made by the claimant and the investigation itself which followed consequentially from the decision of the Procurator Fiscal. The reason for the report was the conduct of the claimant. The claimant has not established by evidence that he was treated in

a different way from any other police officer, similarly reported for unauthorised access to the SID.

Claimant's submissions

445. In the claimant's written submissions, he suggests that there is a causal connection between the disclosure to DI Dewar and the detriment he was subjected to about 4 January 2013, which is that no misconduct investigation was initiated before the claimant made his disclosures to DI Dewar. This he asserts is because 95% of the misconduct allegations (that is 1 to 19) relate to the statement which the claimant alleges was edited by DI Dewar. Further, allegation 20 which relates to the claimant's alleged conduct on 4 March 2011 was dealt with on 6 April 2011, without sanction, almost two years before it became an alleged misconduct allegation on 7 February 2013, a recording of the interview having been supplied to the respondent .

446. He also argues that he suffered this detriment because of the disclosure he made to CS Craig on 19 November 2012, the causal connection being shown by the fact that prior to that he was not being investigated for misconduct, whereas within seven weeks of that e-mail, despite the criminal case not having proceeded, the misconduct investigation commenced.

447. His accesses to the database were authorised by the Chief Constable because they were viewed in order to report crime. Therefore, he could not have committed a misconduct offence by viewing them.

448. In response to the respondent's oral submissions, in regard to the matter of discretion, the respondent asserted they had no discretion, but exercised discretion only in relation to matters which were the subject of a disclosure. If the "firewall" was genuine; then there could not be any legitimate transfer of information between PSD and DI XX. Yet this was the evidence of DI XX, which he submitted was credible and accurate.

449. Although DCC Livingstone states that he was not aware of the recording of the interview with SI Smith, it was supplied on 8 May 2016; which predates the

Hepworth report by a month. So there is no reason why this is not in the briefing to DCC Livingstone; since it was available to be disclosed to him.

450. Although a decision had been made by the Fiscal, the evidence of DI Dewar confirms that there were many things that he did not tell the Fiscal, so their decision must be tempered with the fact that they were not made aware of matters as important as the abduction.

451. Further, he compares his treatment with how he was treated in 2018: while in 2011 the Fiscal decided not to prosecute him, still a misconduct enquiry ensued, whereas in 2018, the decision of the Fiscal was followed by an internal decision not to proceed even with the misconduct enquiry.

452. While DCC Livingstone and Richardson said that officers could be sacked for one allegation of misconduct; twenty allegations "put him in danger". The suggestion that there was too much paperwork to investigate the other accesses is incredible, given that other officers had been charged with many more data protection breaches than he had.

Tribunal deliberations: Background evidence on the first 19 allegations

453. We heard evidence that Inspector Dunbar was appointed by DCC Richardson. His starting position was to take the criminal allegations which had been made. He was aware of the report by DI Lipsett and DS Jackson and that the PF had decided not to prosecute. His evidence was that the first nineteen misconduct allegations were drawn directly from the criminal case and as explained by Inspector Dunbar that is standard practice at the outset of the internal misconduct investigation. However, he decided that it would be clearer if they were reworded and he decided to split two allegations again for ease of understanding. This explains why the number of allegations increased from 17 (in the criminal case) to 19 (in the misconduct case).

454. Although the claimant made a short statement on the date he was served with the misconduct papers, referencing the statement he had made to DI Dewar, he said at that point "I don't wish to comment further". Further, although he said that he did wish to provide the names and addresses of witnesses, he did not

provide Inspector Dunbar with any, then or subsequently (and gave no other statement to Inspector Dunbar).

455. Inspector Dunbar, in accordance with standard procedures, was obliged to let the claimant know, at the outset of the investigation, on the basis of those allegations, that he was being investigated for misconduct. The claimant's response was limited, and he did not elaborate subsequently.

456. The key point is that Inspector Dunbar was told by the claimant that he had provided a statement about the subject matter to which the allegations related to DI Dewar but also that he asserted then that the statement had been the subject of "massive alternation". Inspector Dunbar did not communicate with DI Dewar because he understood that this was the subject of a separate investigation which was unconnected with his. He was not therefore aware of the allegations which were made in that statement at the time he prepared his report. Again this appears to be in line with the "firewall" strategy.

457. Inspector Dunbar said in evidence that he has subsequently reflected whether he should have used the Dewar interview in the misconduct investigation. However he came to the view that he was in a no win situation: if he had used it the claimant would have complained because it was inaccurate (in respect of the alleged alterations) or he would have complained if he had not used it. He understood that the claimant had said that he was not going to give it to him anyway, referencing a letter dated 28 July 2014 where the claimant made a comment that he "would not have been disclosing [the evidence] at that juncture" ie when he was served with the papers. Clearly Inspector Dunbar did not see this at the time, but when reading the productions in preparation for giving evidence.

458. It is apparent however that the claimant seems to think that Inspector Dunbar should have made his own investigations into the allegations which he made to and about DI Dewar. While the claimant's SPF rep had advised of the recording of the Dewar interview to CI McIntyre and CS Craig on 26 June 2013, this was not passed to him, and was in any event after his report was concluded on 18 June 2013.

459. After his report was submitted in June 2013, he was not asked to do any further investigations although he could have been directed to do so by senior colleagues in PSD.

460. The claimant appears to suggest that inferences can be drawn about a suspect motive from the fact that his misconduct file had been "edited", as discussed above.

461. With regard to the claimant's concerns about his misconduct file, the evidence from Inspector Dunbar was that he would expect the misconduct file to contain the relevant pages of the audit trail, that is the intelligence relating to the allegations. Our note of his evidence suggests that he was not sure if had himself removed the pages, or whether they were removed when he got the file, and he suggested that he may have done, but also suggested that they may have been removed after he had worked on the file. He pointed out that there was no attempt to cover that up given that the pages are numbered and it is clear that there are pages missing. He suggested that it would be standard practice only to leave the relevant pages, because given the sensitivity of the material, they would not want that intelligence to be left on files or passed on if it was not necessary.

462. The claimant was concerned that the missing pages would reveal exculpatory evidence (that is show that he had looked at the database for a large number of other matters which were not the subject of any allegations). Inspector Dunbar did not know whether pages had been referred to the PF or not, but if they had not been, then the Procurator Fiscal could have asked for the missing pages if believed relevant. Clearly this was before Inspector Dunbar became involved but in any event the Procurator Fiscal had decided not to prosecute on the basis of whatever evidence they had, so that could not have impacted on their decision.

463. Inspector Dunbar stated in any event that he only focused on what was relevant for his investigation; and that would be intelligence which related to the searches which were the subject of the allegations. The focus was on these matters because the claimant's solicitor had specifically asked for them. He

said that he would not investigate every access to the database, but would need a "step for a hint" and the hint was given by the claimant's solicitor's letter.

464. Inspector Dunbar was adamant that there was no legitimate policing purpose of which he was aware. When taken during the hearing to what the claimant seeks to assure us is evidence of the police cover up, Inspector Dunbar pointed out that "you never showed me this when I did my enquiry". In any event, he advised that the Dewar interview became the subject of a criminal complaint and he could not have used it if it was the subject of a criminal complaint.

465. He was however clear that having identified what the claimant believed was police officers covering up an abduction and a stolen vehicle, that would that not in any event be a policing purpose. His evidence was that to have a legitimate policing purpose the access has to be in connection with that police officer's role. He explained the rationale for this and that there requires to be tight parameters for access to keep the integrity of the intelligence safe.

466. Along with other witnesses, Inspector Dunbar's position was that if the claimant had uncovered something as serious as he suggests, that he should have reported it to a superior. The claimant's position appeared to be that having reported it to DI Dewar, beyond that it was "not his place to disclose it to [Inspector Dunbar"]. This was because of the highly confidential and sensitive nature of the allegation against police officers in the CCU. The claimant appears to suggest that Inspector Dunbar should have investigated it for himself; or that he should have been told about it.

467. Although Inspector Dunbar had the benefit of witness statements and documentary evidence to prepare his report, upon which he based his conclusion, he had no further information directly from the claimant to explain his rationale about why he had accessed the database the nineteen times that were alleged.

Our conclusions

468. We concluded, focusing on the first nineteen allegations, that it could not be said that Inspector Dunbar made a "knowingly false" misconduct report

regarding the claimant's conduct. His evidence, which we accepted, was that Inspector Dunbar had "inherited" the information regarding the allegations from information gathered by DI Lipsett and considered by the Procurator Fiscal. He gave consideration to the allegations and thought they could be better worded. He brought these to the attention of the claimant at the outset of the investigation, in line with the requirement to alert a police officer to the fact that he is being investigated. It is also the opportunity for a police officer to put forward an explanation in defence and to put forward witnesses who might support that defence. In this case the claimant made a very cryptic reference to the statement that he had given to DI Dewar but, significantly, also mentioned his concerns about it having been altered. He did not otherwise bring any matters to Inspector Dunbar's attention.

469. Although Inspector Dunbar was aware of the statement to DI Dewar, we accepted his evidence that he did not consider it appropriate to look into that matter further, not least because the claimant had expressed concerns about the statement. We accepted Inspector Dunbar's evidence that there were opportunities for the claimant to bring his concerns to his attention, or to advise him of witnesses, but he did not do so. We accepted Inspector Dunbar's position that there was no policing purpose that he was aware of at the time for the accesses to the database. Notwithstanding, Inspector Dunbar did not accept, even after an explanation given in this Tribunal, that what the claimant described would have been a legitimate policing purpose.

470. What is quite clear is that Inspector Dunbar did not know of the criminal allegations made to DI Dewar. He did not know of any purported or otherwise policing purpose and we accept that it was not his place to find out but for the claimant to tell him. Crucially, Inspector Dunbar did not know that the claimant had made any protected disclosures.

471. Again, the claimant cannot have it both ways, he cannot complain that the "firewall" is breached, and complain that there was a failure of investigators to share information. It was for the claimant to bring the matter to Inspector Dunbar's attention, and then he could have assessed for himself at the time whether there was a valid policing purpose with all of the information. It was for

the claimant to seek to defend himself against misconduct charges by explaining that he did have a policing purpose if he was convinced that he did have one; notwithstanding how confidential or controversial it was; and even if he thinks DI Dewar should have told PSD about his allegations.

472. The claimant also apparently suggests that a suspect motive can be inferred from the fact that he suggested that one attempt, without a policing purpose, might be legitimate, whereas nineteen was not. However, Inspector Dunbar gave convincing evidence that he did not actually accept that even one access was acceptable. While in the claimant's case, given the fact that he was misinformed, he could understand why he might search once, he would not condone it.

473. We could therefore not conclude that the misconduct reference was "knowingly false" given the evidence which we accepted that Inspector Dunbar had no detailed awareness of the claimant's accusations of corruption against colleagues in the CCU, and he had no knowledge of the protected disclosures.

474. To the extent that the claimant seeks to suggest that the respondent subjected the claimant to this detriment, because Inspector Dunbar was operating under the oversight of DCC Nicolson or Richardson, or others "unknown to the claimant", there is no evidence to support such a contention.

475. As discussed elsewhere in this judgment, we accepted the evidence of DCC Nicolson that he had no knowledge of the Dewar interview or any allegations of criminality made by the claimant at the time. We also accepted the evidence of DCC Richardson that he was unaware at the time that the claimant had provided an extensive statement to DI Dewar and no awareness of the fact of any allegations. In short, there was no evidence that suggested that Inspector Dunbar's superiors were aware that he made protected disclosures beyond DI Dewar, and no evidence that DI Dewar had passed on knowledge of the allegations about crimes by police officers.

The twentieth allegation

476. A good deal of time was spent on evidence relating to the twentieth allegation, which related to the different matter of the claimant's attendance at the FDU on 4 March 2011. The claimant had a number of concerns about that allegation.

477. The claimant denied being aggressive or threatening. He said that he did not recall whether or not he offered his warrant card to gain entry. His recollection was that the meeting was very short and that he decided to leave before he was requested to do so.

478. We have preferred the evidence of Mrs Brennan to that of the claimant where there is any conflict. That is not least because there are contemporaneous written records of her reaction at the time, where she noted concerns about the claimant's "whole demeanour" which she found "inappropriate and oppressive". We accepted her evidence that the claimant gained entry through showing a warrant card. We accepted her evidence that it would be unusual for her to report such an event, thus confirming that it was a matter of particular concern to her.

479. The other concern expressed by the claimant was that he was left with the impression, following his meeting with SI Smith, that that was an end of the matter. He covertly recorded that interview as well and relies in this hearing on what he was told then. He interprets what is said as the matter having been dealt with by that informal verbal warning. He is therefore suspicious when, after being led to believe that the matter was concluded in 2011, he finds himself charged with misconduct in relation to this event two years later in misconduct allegations.

480. Notwithstanding, SI Smith confirmed to others that he did not consider the matter to have been dealt with.

481. Whatever our interpretation of what was said at that interview, the key point is that Inspector Dunbar relied on the subsequent assertion by SI Smith that he did not consider the matter to have been concluded, and had nothing to contradict that. Inspector Dunbar said that he was not aware of what was said at that interview; that he was not aware that a transcript existed; that he would have expected the claimant to have brought this to his attention but he did not.

He says also that if the transcript of the interview with SI Smith had been brought to his attention he would have included it in his report because it could have supported the claimant's position.

482. Inspector Dunbar said in evidence that he took no interest in what documents it was that the claimant was trying to retrieve when he contacted the FDU, and that his focus was on the claimant's conduct. Notwithstanding, he did include reference to the solicitor's letters in his report, but was not aware of, or paid no attention to, what was being requested of FDU so unaware of any link. He said in evidence if he had made a link he would have put it in his report. He said that when he did his enquiry he was not looking at motives.

483. It could certainly not be said that the report relating to this twentieth allegation was "knowingly false" given very clear evidence from Mrs Brennan supported by contemporaneous paperwork about what took place. Whether Mrs Findlay was right or wrong about her decision to refuse to give the claimant the paperwork he sought (and Mrs Brennan says she was right) is nothing to the point.

484. Equally, while we accept that, looking at the transcript of the interview with SI Smith, it could be read either way, our interpretation of what was said, or how the claimant understood it, is nothing to the point. Rather the point is that Inspector Dunbar had information to support his conclusion, and no information to the contrary. The claimant said that he had not supplied the transcript because the warning was put on hold. Further, as discussed later, DCC Richardson did not know about an alternative interpretation, and nor was the transcript brought to the attention of DCC Livingstone at the time he instructed the warning.

485. We do not accept that Inspector Dunbar produced a "knowingly false" report and we do not accept that the relevant DCCs (or anyone in the hierarchy) in any way interfered or engineered his decision, which was in accordance with normal practice. For the reasons set out, we do not accept the claimant was subjected to such a detriment.

486. But even if we were to accept that the claimant was subjected to a detriment by the conducting of an internal case of misconduct, we would not have accepted that this was on the grounds of, as in materially influenced by, the fact that he made protected disclosures.

487. Inspector Dunbar did not know what the claimant had said to DI Dewar and he was not made aware of any suggestion that SI Smith might have already dealt with the matter of the twentieth allegation. He was following standard procedures. He had legitimately concluded that the claimant did not have a policing purpose for his accesses, given none was identified to him. Those above him in the hierarchy did not know of the protected disclosures and there is no evidence to suggest that they inappropriately interfered with standard procedures.

488. Nor did Mrs Brennan know that the claimant had made protected disclosures. Although she said that it was unusual for her to report a police officer, she gave convincing evidence about the need to do so on that occasion.

489. Again, the claimant appears to have done himself a disservice here, if he did wish to seek to disprove that twentieth allegation, because he holds back evidence which might have helped. While he said he did not think he needed to while the warning was “on hold”, again if he wishes to avoid misconduct allegations being taken forward, he needed to bring any evidence he had to support his position to the attention of the investigators at the right time. We found it difficult to understand why the claimant did not produce the transcript far sooner than he did. It is almost as if he wanted to hear what the respondent had to say and then try to catch them out by producing proof that they were wrong. But that did not help him, and does not help him now to establish that this allegation was included because he made protected disclosures.

490. We conclude therefore that the claimant was not subjected to a detriment of having a “knowingly false” misconduct case pursued against him; that even if he were subjected to the detriment of having faced misconduct proceedings, the respondent had a valid and legitimate rationale for that, which had nothing to do with the fact that the claimant had made protected disclosures.

Detriment 2(c) Issue of warning by DCC Neil Richardson

491. The question for determination here is: Did Deputy Chief Constable (Designate) Neil Richardson take steps to issue the claimant with a warning in terms of regulation 6(6) of The Police (Conduct) (Scotland) Regulations 1996 on the ground that he had made protected disclosures?

Respondent's submissions

492. The respondent summarised the factual background, submitting that the original decision was made by DCC Nicolson, whose evidence was that this decision was in line with normal practice. He was not advised of any investigation having been undertaken by DI Dewar. His decision was founded upon the decision of the Procurator Fiscal, which was that the matter should be dealt with by the DCC and a briefing from PSD. He explained that he had no knowledge of the investigation of DI Lipsett and DS Jackson on behalf of CCU. He explained that it would not be recognised practice to enquire of the CCU regarding their investigations. DCC Nicolson explained that there was a low barrier to investigation of allegations against police officers in order that the trust of the public in serving officers was maintained.

493. DCC Nicolson was responsible for misconduct matters within Strathclyde Police from 2012 until April 2013 and the inception of Police Scotland. Responsibility then passed to DCC Richardson who accepted that by virtue of his office, he was involved in "taking steps to issue a warning in terms of Regulation 6(6)". He had little recollection of the facts of the claimant's case due to the high levels of his responsibilities within the force and the passage of time.

494. DCC Richardson's memo of 16 July 2014 acknowledged the accusations made by the claimant against DI Dewar of removing multiple strands of evidence from a statement taken from him in 2011, but in response wrote that the claimant had not provided any evidence to support his assertions. The pen drives containing the entire covert recordings of the Dewar interview were handed to Inspector Ian Wood on 18 September 2014. The Regulation 6(6) warning was

not given until 31 August 2016, by which time DCC Richardson had retired from Police Scotland.

495. There was nothing in his evidence which suggested he was doing anything other than following a procedure started by his predecessor in post, in addressing what was judged to be "minor misconduct" in terms of the regulations.

496. The claimant's proposition that DCC Richardson acted because the claimant made protected disclosures is unsupported by any evidence. It is indeed difficult to discern from the claimant's own evidence in what way there was a causal connection between protected disclosures and the actions of DCC Richardson. The assertion of the claimant is unfounded.

Claimant's submissions

497. The claimant in his written submissions, in regard to the causal connection, submits that the warning is the product of the 20 misconduct allegations. These relate either to what was stated in the original Dewar statement or what was edited out of it.

498. He submits that 19 of the 20 allegations stem from the criminal investigations initiated against the claimant within 48 hours of him making disclosures to DI Dewar; the criteria for the audit being supplied to DI XX by PSD, which was also overseeing the Dewar investigation.

499. The claimant pointed out that if the bar for referrals relating to data protection was so low, then he ought to have been reported for more accesses than he was. The referral only related to 10% of the evidence; it being an admitted fact that he had looked at 120 intelligence logs which were not related to the division in which he operated.

500. He relies on the fact that no misconduct investigation was initiated before he made the disclosures to CS Craig on 19 November 2012 but within 7 weeks of

doing so an investigation had been initiated, despite it being confirmed three months earlier that there would be no criminal proceedings. The dates of all 20 alleged misconduct offences pre-date the disclosures to CS Craig. Allegation 20 had been dealt with without sanction two years before it was a formal allegation.

Tribunal deliberations: Background evidence

501. The factual background to the issue of the warning was that, in accordance with standard procedures, Inspector Dunbar's report (the investigation having been undertaken with the assistance of a caseworker, Colin Brown) was passed to another caseworker, Martin Hepworth, to prepare the report and briefing with a recommendation to the DCC (in accordance with usual practice).

502. We heard evidence that Mr Hepworth recommended to the DCC that the matter should be dealt with by way of a Regulation 6(6) warning in terms of the Police (Conduct)(Scotland) Regulations 1996. It was thus categorised as "minor misconduct". This was stated to be for reasons relating to the reputational risk to the service given the mistakes which had been made, and the fact that the claimant's previous misconduct findings related to different issues. That proposal was considered and supported by Inspector Dunbar, who confirmed his support in handwriting on the report.

503. This matter required to be referred to the DCC who made the ultimate decision in accordance with police procedures and regulations. Initially the investigation was instructed by DCC Nicolson, but the decision was made by his successor in post, DCC Richardson, whose decision was to accept the recommendation of Mr Hepworth.

504. We heard evidence from DCC Richardson (who was called by the claimant) whom we found to be an impressive witness. Perhaps inevitably since he normally dealt with a very large number of misconduct cases at any one time given a staff at that time of around 7,000, he could not recall the details of this case. However we heard that around this time he was also dealing with setting up Police Scotland and receiving only high level briefings in relation to his other roles. We noted that during evidence he answered questions by reference to

his normal practice informed by force policies and procedures, some of which he himself had introduced to ensure transparency and consistency (eg the policy around limited suspension).

505. His evidence was that the volume of case files was such that he could not go into detail beyond a general awareness of each case, and that he relied on regular briefings which he received from the Head of PSD. He said that he would on occasion ask to see relevant papers but could not recall whether he had in this case. Importantly, he confirmed that he was not aware of the statement which the claimant had provided to DI Dewar. However having reminded himself by considering the paperwork for this hearing, he said that he recalled it being brought to his attention retrospectively by the claimant. He said that he had no recollection of the detail and he would not be routinely involved in detail.

506. He said that if allegations of corruption by police officers were made, this would usually be brought to his attention unless they were clearly without foundation. He said that he would expect such allegations to be looked into and if it was not then he would order an investigation. This case was not a matter which reached the necessary threshold to require him to be briefed. However, had it done so, he said that he would expect matters to be referred to PIRC which was up and running by that time.

507. He said that he took time and effort to ensure that he had a high level of confidence in the people who were running the departments which he oversaw which was especially important for CCU and PSD, and that he had confidence in the process because the players were hand selected by him.

Our conclusions

508. We clearly accept that to be issued with a warning, although the most lenient of sanctions for police misconduct, was a potential detriment. The focus of our deliberations was on whether the claimant was subjected to this detriment because he made protected disclosures; or whether the respondent was at least “materially influenced” by the fact he had made protected disclosures.

509. The claimant's assertion that there was a causal connection between the detriment and the disclosures appears only to support a conclusion that there was a connection in the sense that the subject matter of the warning was related to the subject matter of the disclosures and that the warning flowed from the information revealed by the claimant's research which he had then disclosed. As discussed above that however is not sufficient. A causal connection will only be established if the motive for the detriment is shown to be the making of the protected disclosures.

510. We noted DCC Nicolson to have stated in evidence that he had no awareness of the Dewar investigation (or indeed the circumstances of what was explained to him by the claimant in evidence relating to the alleged abduction, the car or the allegations of the SID logs having been altered). The claimant apparently accepted DCC Nicolson's evidence that he had no awareness of the Dewar investigation, or statement, and had no awareness of [vehicle registration number] or allegations of SID logs being altered.

511. Although the claimant may be surprised about that, we were not, because we would not have expected a DCC to have been briefed on that level of detail far less to remember it ten years on. It simply confirmed to us that no other police officers were briefed about what the claimant came to believe were crimes committed by CCU and there was no attempt to cover up his reporting of the crimes he alleged.

512. We have concluded further that DCC Richardson, and indeed the other police officers involved in making the decision to issue the warning, were simply implementing standard procedures. DCC Richardson was not aware of the detail of what the claimant had told DI Dewar; and he said that while he would expect to be briefed about allegations about corruption in the police if well-founded, this was not a matter which had been brought to his attention.

513. The claimant asks us to draw an inference from the fact that while he was accused of misconduct, and there was an awareness that he had accessed hundreds of SID logs, he was only disciplined for 19 accesses. He is suspicious of that fact, especially given the low threshold for referral to the PF (and indeed

misconduct proceedings). He is suspicious because otherwise he would face a more severe sanction which would in particular involve misconduct proceedings. The claimant came to believe that he was only charged with 19 breaches when he could have been charged with hundreds, so that the respondent could legitimately categorise his conduct as minor misconduct which would avoid his allegations being recorded in a public forum, as discussed further in this judgment.

514. There is however no evidence whatsoever to support the claimant's suspicions in this regard. The actors, which included the investigators, case workers and indeed two DCCs, were simply unaware of any details imparted by the claimant to DI Dewar, unaware even that the claimant had made allegations of crimes having been committed, unaware that the claimant had made protected disclosures. That being the case, it could not be said that the claimant was subjected to the detriment of a misconduct warning on the grounds that he made protected disclosures.

Detriment 2(d) issue of warning by DCC Iain Livingstone

515. The issue for consideration was: Did Deputy Chief Constable (Designate) Iain Livingstone (as he then was) take steps to issue the claimant with a warning in terms of regulation 6(6) of The Police (Conduct) (Scotland) Regulations 1996 on the ground that he had made protected disclosures?

516. Clearly the claimant was issued with a regulation 6(6) warning. To the extent that any disciplinary sanction would amount to a detriment, we accepted that the claimant was subjected to a detriment by DCC Iain Livingstone, because the warning was issued by him.

517. However that is entirely irrelevant to this case if the reason he was subjected to that detriment was a valid one in the circumstances. The key question for us was whether the claimant was subjected to that detriment on the grounds that he had made a protected disclosure. Was DCC Livingstone "materially influenced" by the protected disclosures which we have found that the claimant made when he decided to issue the warning?

Respondent's submissions

518. The respondent points out that Chief Constable Iain Livingstone assumed the duties of Deputy Chief Constable (Designate) with responsibility for conduct matters within Police Scotland, around the start of June 2016. He succeeded DCC Richardson who had resigned from the force and relinquished his duties around May 2016. Mr Livingstone remained in that position for approximately one year before his interim appointment as Chief Constable in the summer of 2017. At the time of assuming his responsibilities in 2016, he was aware of the decision of his predecessor in 2013 to begin proceedings for the issue of a warning under regulation 6(6) against the claimant. That decision in 2013 had been taken following a recommendation in the briefing note of Marvin Hepworth dated 23 July 2013, who compiled a further briefing paper for Mr Livingstone on 3 June 2016, which included the earlier briefing note and an explanation for the delay in proceedings. It did not refer to the covert recording or transcript of the meeting between the claimant and Eddie Smith on 6 April 2011, which had been delivered to PSD on 8 May 2016. Mr Livingstone was unaware of the transcript on 7 June 2016 when he issued his instruction that Mr Hepworth's recommendation be implemented.

519. Mr Livingstone stated that the giving of a regulation 6(6) warning was a "benevolent" sanction in the light of the more substantial allegations, namely nineteen unauthorised accesses to SID. He stated that the number of accesses was not determinative of the sanction and that the circumstances of each case required to be considered separately. He backdated the warning by a year in the light of the long delay and to allow the warning to be removed earlier from the claimant's disciplinary record. He stated that overall fairness to the claimant was important and he did not consider that a previous misconduct finding would necessarily aggravate the commission of another. The regulations did not specifically provide for such a consideration.

520. He strongly denied the claimant's assertion that the reason for the warning was to exclude the prospect of a hearing at which a recording of the proceedings would be made. The reason suggested was to deliberately prevent the claimant from repeating in an open recorded forum all of his long-standing

complaints against the police and presumably the revelation of corruption and cover-up. The assertion appeared to be that there was an agenda which Mr Livingstone was following, the motive for which was to silence the claimant. This proposition, in the respondent's submission, is indicative of the claimant's fanciful ideology.

521. The respondent submitted that the evidence does not support the allegation that DCC Livingstone took steps to issue the warning because the respondent had made protected disclosures. The evidence is to the contrary and supports the respondent's submission that it was because of his conduct in accessing the database without a policing purpose, and there is no other credible explanation for the course followed by Mr Livingstone.

The claimant's submissions

522. The claimant again submitted that there was a causal connection between this detriment and his protected disclosures, namely 19/20 allegations stemmed from the original criminal allegations, which were identified based on criteria passed to DI XX from PSD, which was overseeing the Dewar investigation as well. Further the twentieth allegation had been disposed of without sanction in 2011.

523. The claimant noted that Mr Hepworth's evidence was that the first time he was aware of the allegation of the abduction was when he accompanied Ian Wood to interview the claimant in October 2014. Although he knew about it, he failed to mention the allegation of a fairly serious crime in the subsequent briefing to DCC Livingstone in June 2016.

524. Further, although he may not have been furnished with the transcript of the interview with Eddie Smith, it was in the respondent's possession around a month before the briefing to the DCC. Although the claimant had not disclosed that recording before then, there was no reason to do so since the warning was on hold.

525. With regard to the evidence that a police officer could be sacked for one allegation, given that he got a written warning for 20, that one allegation would have to be very serious indeed if, relatively, that resulted in dismissal.

526. The claimant suggested that Mr Livingstone has had limited policing duties at the operational level having mainly held managerial positions and therefore his views on operational matters should be treated with caution.

527. He submitted that it was absurd to suggest that he had a personal interest in matters. Beyond having recovered the stolen vehicle, he was never charged by DI Kerr or DS Pagan in regard to the vehicle or B or H.

528. He submitted that, given the language of 6(6) is minor misconduct, if it was genuinely minor misconduct, it was surely odd for the written warning he got for that to be described as “benevolent”. This is to suggest that they were doing him a favour, by downgrading the sanction for misconduct which was not in fact minor. If it was minor misconduct, that was a contradiction, because such a sanction would be appropriate and no favours were being done. The claimant’s position was that this was a deliberate decision to avoid “the police discipline corridor”. He pointed out that misconduct hearings are recorded, that the respondent knew what his response would be, and the written warning prevented him airing his concerns about the cover-up by officers in the CCU in that forum.

Our conclusions

529. The claimant asserts that he was issued with this warning because he made protected disclosures. This is despite the fact that DCC Livingstone was not employed by Strathclyde Police at the time of the Dewar interview and followed the recommendation of the previous DCC and staff who had undertaken investigations.

530. The claimant apparently asks us to draw inferences from the fact that these allegations stem from the criminal allegations, which were in turn based on search criteria supplied by PSD to DI XX. Since PSD were also overseeing the Dewar investigation, the inference is that the respondent knew that he had

made allegations of crimes and a cover-up. He asserts that he is subjected to this detriment essentially because of his attempt to uncover corruption in the CCU.

531. The claimant asks us to draw an inference in particular from the fact that he was only subjected to misconduct proceedings in respect of 19 accesses. He had accessed hundreds more. Given the low threshold for referral to the PF the claimant suggests that he would expect to face a more severe sanction which would in particular involve a misconduct hearing. The claimant came to believe that he was only charged with 19 breaches when he could have been charged with hundreds, so that the respondent could legitimately categorise his conduct as minor misconduct which would avoid his allegations being recorded in a public forum.

532. We have heard no evidence to support such inferences. We have accepted the evidence of the Chief Constable who gave evidence in a clear, measured, straightforward and informed manner. We noted that the Chief Constable was however quite emphatic when it came to the claimant's suggestion that the sanction was deliberately lenient to avoid his allegations regarding corruption in the CCU being aired in a public forum. We got the clear impression that he was more than surprised to hear such a suggestion, and we found his evidence about the appropriateness of a "benevolent" sanction convincing. This had been explained by Mr Hepworth in his report, and related to the mistakes made by the respondent and the fact that this misconduct was not linked to the previous misconduct. The delay in issuing the warning, although largely caused by the claimant's own actions, explains why the warning was backdated.

533. We did not accept the claimant's assertion that the warning was issued on the grounds of him having made protected disclosures. In particular, we have found that DCC Livingstone was unaware of the background circumstances which, according to the claimant, might have prompted him to be involved in some kind of cover up by CCU police officers several years before. Indeed, it would be unlikely that he would have had knowledge or any recollection of the

Dewar interview because he was not, unlike the other police officers referenced in this case, even with Strathclyde Police at the time.

534. Even if it should have been brought to his attention, DCC Livingstone was not aware of the transcript of the recording of the meeting between the claimant and Eddie Smith. However, his evidence was that the written warning was an appropriate and justifiable sanction for the 19 access to the database alone so there could be no separate detriment to the claimant by the inclusion of that allegation.

535. For these reasons, although we have accepted that a warning of this sort would amount to a detriment, there was no evidence to support the claimant's contention that he was subjected to it on the ground of having made a protected disclosure. We accept the respondent's submission that it was issued in accordance with normal procedures, and that a "benevolent" sanction was explained and justified by background facts.

Detriment 2(e) issue of restriction from duties by DCC Richardson

536. The question for consideration here was whether DCC (D) Richardson restricted the claimant's policing duties from around 13 May 2011 on the ground that the claimant had made protected disclosures.

Submissions

537. The respondent submitted that DCC Richardson's decision to sign the pro forma document would have been in normal course given the allegations were breaches of the Data Protection Act and that the SID contained sensitive intelligence. DCC Richardson stated that the restriction was reasonable in the circumstances. He also considered it reasonable to place "on hold" the misconduct allegations while the conduct of DI Dewar was investigated by Crown Office and PIRC. Although he admitted that while he may have known about the Dewar investigation at the time, he had no recollection.

538. The claimant argued that there was no restriction on his duties prior to the Dewar interview, but after the end of the interview on 5 April 2011 and commencement of the misconduct investigation, his duties were restricted from

14 May 2011. Each allegation resulting in the claimant's duties being restricted related to a matter which had been disclosed in the Dewar interview.

539. The claimant submitted that he had been dealt with differently from other officers in this respect because he only faced allegations in relation to 10% of the evidence. He again submitted that this raises the question why there was no allegation in respect of the remaining 90%.

Our conclusions

540. We have made findings in fact about the circumstances leading to the restriction of the claimant's duties, specifically in relation to accessing the SID database. Indeed there was no dispute that the claimant's duties were restricted, and we accept that would be a potential detriment.

541. The focus then is whether the claimant suffered this detriment on the ground that he made protected disclosures. Given that the disclosure to CS Craig was not until 12 November 2011, that disclosure cannot be in consideration.

542. The focus therefore is on the disclosures made to DI Dewar. These were made between 5 January 2011 and 7 April 2011.

543. The claimant's duties were restricted on 13 May 2011. That of course was the date that of his "no comment" interview with DI Lipsett.

544. The claimant relies heavily on the time line here. However, as discussed elsewhere in this judgment, we find that the fact that his duties were restricted shortly after the Dewar interview is simply a coincidence of timing, and explained by other events.

545. We heard evidence from DCI Skelton regarding the reasons why the claimant's duties had been restricted. At that time in her role as head of the CCU it was DCI Skelton who made the recommendation that the claimant's duties be restricted.

546. She confirmed in evidence that the genesis of events and the catalyst for the investigation was the incident at the FDU on 4 March 2011, which came to the attention of the PSD on that date with the investigation commencing 7 April

2011. She confirmed that she became aware of the allegations relating to the claimant's attendance at FDU and believed it was a reasonable assumption that he may access the systems to get the documents he was looking for which he had been refused.

547. She gave evidence about the briefing paper which she had prepared for DCC Richardson relating to this matter, which was wrongly dated 16 May 2010 but should have been 2011. As we understood it this was a standard briefing and recommendation in line with standard practice.

548. Her evidence was that many of the cases which were investigated by CCU had a "flavour" of allegations against police officers about accessing the database; that any individual who was being investigated for potential breach of the DPA would have their access restricted in some way; that this was a protocol in place to prevent further breaches.

549. This would involve a subject report to the DCC recommending that a particular officer had access suspended. She would outline the circumstances of the breach and make a recommendation from a suite of options, depending on the nature of the allegation; it might be to restrict access to STORM or SID. The DCC would endorse or otherwise the recommendation then a memo would be sent to the relevant IT gatekeepers in accordance with the standard practice.

550. That process was followed in this case and DCI Skelton in her report of 16 May 2011 recommended the claimant's temporary suspension, already implemented by then, was ratified by the DCC. The decision to request temporary suspension followed the standard practice to manage risk, which was then implemented by operational officers and then ratified by the DCC.

551. We heard evidence from DCC Richardson that he had introduced the more nuanced suspension protocol because he had been concerned about the blanket suspension of officers accused of misconduct from their duties and concerned to ensure appropriate controls. It might not be thought necessary or appropriate to suspend a police officer but their duties could be restricted in a number of ways depending on the allegations, including operational duties under close supervision and IT restrictions as in the case of the claimant. The

decision requires to be made by the DCC because of his rank but it is made on the recommendation of other officers. DCC Richardson said that in around 25 percent of cases he would adjust the controls based on the briefing information.

552. A decision was made that there was no requirement to suspend the claimant, but rather that his duties should be restricted to close supervision with operational duties and in regard to IT restrictions that all SID authorisation would be suspended. This was ratified and signed by DCC Richardson. While IT restrictions could have been wider, a decision was made to limit the restrictions to the suspension of SID access authorisation.

553. We accepted that this was standard protocol, that is standard procedures that were implemented in respect of all police officers facing similar misconduct charges.

554. With regard to DCI Skelton's knowledge of the disclosures made to DI Dewar, she said that she knew about the misconduct investigation in 2010 but had no detailed knowledge of that. Further, she had no detailed knowledge of the documents or information which the claimant was searching for at the FDU. She said that she knew that an investigation was being undertaken by DI Dewar and that she knew of the claimant's complaint but "not the granular detail". She said that she thought that if DI Watt was conducting the investigation she would have learned about the Dewar investigation from him. She subsequently became aware of the details but was not at the time. Although the claimant put to her that she had been the "single point of contact" (SPOC) with DI Dewar for documents required in his investigation, she said that she did not recall that. She said that she dealt with hundreds of files on an annual basis.

555. We accepted that DCI Skelton may not remember detail from 10 years ago but in any event, we accepted her evidence that she was not aware of the details of the 2010 misconduct allegations against the claimant; we accepted that she was not aware of the detail of DI Dewar's investigation (even if she was the point of SPOC between CCU and Dewar, the Dewar investigation was

otherwise entirely separate); we accepted that she had no knowledge of the specifics of the allegations which the claimant had made in the Dewar interview; we accepted her evidence that she knew nothing of the details of any stolen cars or any abductions. While the claimant might assert that in a thorough investigation she or at least her department ought to have known about this, again he can't have it both ways, either she knew or the investigation was deficient because she did not know.

556. Thus we accepted that she therefore had no knowledge that he had disclosed information. As previously noted, it is self-evident that a person who does not know of another's protected disclosures cannot subject them to a detriment on the ground of that person having made the protected disclosures, nor indeed can that person be materially influenced by that fact, if they don't know about it.

557. The claimant asks us to draw an inference from the time frame. However we noted that the timing is explained by the fact that the intimation to information management staff to suspend the claimant's usage of the SID coincided with the date that DI Lipsett had interviewed him under caution, that is 13 May 2011. This is explained by a memo from DI XX on that date to the information management department to advise that the claimant had that day been reported to the Procurator Fiscal.

558. Again, counter intuitively, the claimant apparently relies on the Tribunal drawing inferences from the fact that it might be expected that he should have had his access restricted to more systems, given the initial allegations about his access to various systems. He apparently suggests that given he made hundreds of accesses that he might have expected to have greater restrictions on his duties beyond SID. As we understood it, his suggestion is then that there was something sinister about the decision to restrict his duties in this way, which it seems must cast doubt on the motive for doing so, which in turn must relate to the fact that he made protected disclosures.

559. We found no evidence to support that suggestion, namely that there was anything to be inferred from the fact that since there were apparently audits of

his access to other police computers beyond SID that his duties should be restricted further.

560. Despite the fact that DCI Skelton did not know about the protected disclosures, we considered whether DCC Richardson may have issued the instruction to suspend his duties on the grounds of the protected disclosures.

561. We accepted DCC Richardson's evidence that he was not aware at the time what the claimant had told DI Dewar and he had no recollection of being told about the allegations of corruption of police officers which formed the basis of the protected disclosures, as previously discussed.

562. We therefore concluded that the respondent has shown that the reason that the claimant was suspended from the use of certain IT systems was because he had been referred to the PF following a "no comment" interview under caution. This was simply an implementation of standard procedure and was not influenced in any way by the fact that claimant had made protected disclosures.

Detriment 2(f) – delay/withholding of long service medal

563. The issue for determination by the Tribunal is this: Was the claimant's long service and good conduct medal withheld or delayed on the ground that he had made protected disclosures?

564. The claimant has now received the long service/good conduct medal. Despite his acute memory for dates, he could not recall whether he received it in 2018 or 2019. He maintained his position however that it had been delayed or withheld because he made protected disclosures.

565. Again we accept that to withhold or even delay the award of a long service/good conduct medal would be a detriment. But was this a detriment which the claimant was subjected to by the respondent on the ground of having made protected disclosures?

Respondent's submissions

566. The respondent in submissions stated that there was no doubt that the claimant was not eligible to receive the medal at the time. The witnesses contended that the invitation to the ceremony was the result of an administrative misunderstanding. Neither Inspector Murdoch nor Ms MacDuff could recall a previous occurrence of an invitation being sent out in error.

567. The respondent lodged the computer printout relating to the disciplinary history of the claimant, who had been "taken off medal parade" consistently since 2 December 2011. That position was unaltered through to 10 October 2014. A printed entry on the document stated "No change @ 05/11/14". Chief Inspector Murdoch had handwritten on the printout, "Confirmed" with a tick and his signature. The respondent's position was that he had intended this to confirm that the situation with regard to the claimant was unchanged and that he remained ineligible for the ceremony.

568. Ms MacDuff interpreted the word "Confirmed" differently and extended the invitation to the claimant by letter. The respondent contended that each of the witnesses had interpreted the word, as they claimed, in good faith.

569. The claimant's evidence was that Inspector Murdoch had deliberately engineered the extending of an invitation to the claimant as a "Covert Integrity Test". This was explained by the claimant as a test of his integrity insofar as his acceptance of the medal to which he was not entitled could lead to his sacking as a police officer or his being forced to resign as a consequence. That is notwithstanding his entitlement to rely on the invitation mistakenly sent to him.

570. Inspector Murdoch denied ever having heard of a "Covert Integrity Test" in his years of service in the police force and had no comprehension of the claimant's assertion. The same was true of Ms MacDuff. The letter of apology commended the claimant's integrity.

571. The only witness to acknowledge an understanding of the wording "Covert Integrity Test" was DCC Richardson, but his consideration was that it might be engaged in much more serious investigations. The prospect of such a course of action with regard to a medal ceremony was beyond his comprehension and

he appeared bemused that consequences might follow for an officer in the circumstances of the claimant who would be able to rely on documented error by the organising department/office.

572. Such an award would be brought about after a fixed number of years following a misconduct charge. The regulation 6(6) warning, which was backdated by one year, required to be removed from his record before the medal could be awarded. There is nothing in the course of events which would suggest that the claimant was treated in any way different from another officer in a similar position.

573. The respondent submitted that the allegation of there having been a "Covert Integrity Test" is extraordinary and incredible. There is no evidence from which the Tribunal might conclude that the medal was delayed or withheld because of protected disclosures made by the claimant. There is only the speculative allegation of the claimant.

Claimant's submissions

574. The claimant submitted that there was a causal connection between the Dewar interview and this detriment, specifically that the warning issued on 31 August 2016 and the investigation that led to that, stemming from the Dewar interview, are the reasons put forward by the respondent for the non-issue of the medal. This is despite being invited to received it on 16 December 2014, when his record was "finding" free and he had considerably more service than was necessary to merit receiving it.

575. The claimant submitted that while Mr Murdoch was not asked what he meant by "confirmed", he laid the blame on Ms MacDuff, but her evidence should be preferred because she had worked in the department for over 10 years.

576. Ms MacDuff confirmed that prior to sending out the invite, standard checks with CCU, PSD and HR had all been undertaken which confirmed that the claimant could receive his medal; she advised that she was not aware of any instance before or after of the failure of checks.

577. In his case the investigation number was clearly noted on the computer print out, so this was not new information. The evidence of both was that it had never happened before, and therefore the evidence was that he had been treated differently.

578. The claimant submitted that Inspector Murdoch had caused Ms MacDuff to invite the claimant to receive the medal when he was fully aware that the claimant was not entitled to it, indicating that he was involved in a covert integrity test, and was fully aware that he was.

579. He submitted that it could be inferred from Inspector Murdoch's evidence that it was a covert integrity test because he said that he had never heard of it; so how could he know that it was not one. While he might have expected that Ms MacDuff had not heard of such a thing, he found it difficult to believe that Inspector Murdoch had not.

580. While the claimant accepted DCC Richardson's position that it was a questionable covert integrity test because he would have had a valid explanation for his conduct, DCC Richardson is not consulted on every covert integrity test; and just because his assessment was that it was a bad test, does not mean that it did not take place.

Our conclusions

581. We heard evidence on this matter from Inspector Murdoch and from Ms MacDuff, but their evidence was contradictory. While it was suggested that Inspector Murdoch was not actually asked what "confirmed" meant, we got the very clear impression from hearing his evidence that he had intended "confirmed" to mean that he was confirming that the claimant was not to get the medal due to outstanding misconduct.

582. In contrast, Ms MacDuff's evidence was that her clear understanding was that "confirmed" meant that he was to be invited to the ceremony. Her evidence was that there were only two outcomes: confirmed with a tick meaning the invite was to be sent out or a cross meaning they were not to be invited.

583. We preferred her evidence because she was unshaken in her conviction (even in cross examination by the respondent as it happens); she had worked in that department for 10 years; and we accept that she was very experienced and indeed respected in her role.

584. We do not accept the claimant's submission that the invite was sent out because the checks had been done and indicated that they were clear to invite him. This is because the detail of the computer printout shows that the checks were not in fact clear and that there were misconduct allegations outstanding. The words "no change" on the computer print-out meant that he should not have been invited to the medal award ceremony, because a police officer with outstanding misconduct proceedings yet to be finalised would not be eligible to receive it. In such circumstances, the standard procedure is to defer the award of any medal while misconduct proceedings are outstanding.

585. Given the evidence of both Inspector Murdoch and in particular Ms MacDuff who confirmed that in all her service in the department this was the only example she was aware of this having happened, this inevitably raised the claimant's suspicions.

586. The claimant asks us to draw an inference that the medal was withheld because of the protected disclosures, asserting that the invite to attend was a covert integrity test, to prompt misconduct which could not be said to be linked in any way to the allegations he had made or his previous misconduct allegations. In particular he argued had he attended the ceremony, he could have been sacked for accepting the award inappropriately.

587. He asked some witnesses about this who appeared unaware of the practice. Only DCC Richardson indicated that he was aware of this practice. His evidence in regard to the claimant's allegations about the withholding of the long service medal, and in particular the suggestion that it was covert integrity test, was enlightening. In particular he said that such tests were only very rarely undertaken and only in regard to allegations of involvement in serious crime or terrorism by police officers, and not for allegations of the sort which the claimant faced. Further, and in any event, his evidence was that this would not

be the kind of test that would be set since it would be ineffective, given that the claimant would have a valid response to any misconduct charge, that is that he was invited to the ceremony.

588. While the evidence of Ms MacDuff and Inspector Murdoch is apparently contradictory, we could not identify a motive for Mr Murdoch to obfuscate except perhaps to cover up his own mistake. But he had admitted at the time that the department had made the mistake and apologised for it. Thus notwithstanding the discrepancy, we accepted based on all other evidence that that this was simply an administrative error. The medal was withheld quite correctly at the time because the claimant was still subject to outstanding misconduct proceedings.

589. So while the claimant submits that he was subjected to a detriment by the long service medal being withheld or delayed, and he asks us to infer that this was because of the protected disclosures, in fact the reason it was withheld was because he was not entitled to it, in line with standard procedures that a police officer with outstanding misconduct proceedings

590. The claimant seeks to make a link between the fact that he was only subject to misconduct proceedings because he had researched information to support the making of the protected disclosures. Again the claimant appears to have misunderstood the requirement not just to show a link or a connection or a relationship between the detriment and the disclosures, but to show that the motivation for the detriment was to some extent at least the protected disclosures.

591. In so far as the claimant asks us to draw inferences from the facts, we do not accept that the invite amounted to a “covert integrity test”. We found DCC Richardson’s evidence entirely convincing, that is that a covert integrity test would only be deployed on rare occasions in relation to suspicions of serious crimes by police officers which was not the situation here. More importantly, we accept that this is simply not the kind of covert integrity test that would be set, given the claimant would have a perfectly valid reason for attending the medal ceremony.

592. Thus we concluded that the claimant's long service medal was delayed or upheld but for entirely valid reasons. The claimant should not have been invited to the ceremony because he had outstanding disciplinary proceedings. The invite was therefore sent in error. The reason it was withheld was not because he made a protected disclosure but because he was not entitled to it according to the rules. The withholding of the medal is not because he made protected disclosures but because he had live outstanding misconduct proceedings so entirely in line with procedure.

Detriment 2(g) - Failure to properly investigate the claimant's complaints

593. The question for determination by the Tribunal is: Did Chief Superintendent Carole Auld and / or the respondent's Professional Standards Department fail to investigate the claimant's complaints about its treatment of him, on the ground that he had made protected disclosures?

Respondent's submissions

594. In submissions the respondent set out the background facts as follows. CS Auld took over the investigation of the claimant's complaint from her predecessor Supt. Audrey McLeod, who had instructed Inspector Ian Wood to undertake an investigation, and who had identified nine heads of complaint. The claimant identified further heads of complaint, increasing the number from nine to thirty-five.

595. All of the documentation in connection with her enquiry was on the PSD database, named Centurion. She established that the allegations of complaints by the claimant had all been previously investigated over a number of years and accordingly her investigation became one where she required to be satisfied that the respondent had correctly followed its own procedures. She was not in a position to re-open investigations which had been advised upon or undertaken by the Procurator Fiscal, Crown Office or PIRC.

596. The procedure utilised in her investigation was a "Complaint against Police", normally available to members of the public. She considered that this type of

investigation was likely to be more thorough as she wished to provide the claimant with satisfactory answers.

597. Inspector Wood supplied a briefing note, following his investigation /consideration of all thirty five complaints. CS Auld relied upon the information contained therein to respond to the claimant by a thirty-two page letter.

598. The claimant's allegation of incomplete or deficient investigation was centred upon the absence of the entire content of the SID audit trail and view event log which had been available to Inspector Dunbar. Inspector Dunbar had indicated that he had the relevant documents but that it would be obvious from page numbering that others were absent. CS Auld stated in evidence that the claimant had the opportunity to address the incomplete nature of the documents but had originally declined or failed to do so at the appropriate juncture. She suggested that the absent or missing log entries need not necessarily be exculpatory. The respondent submits that the claimant has not explained in what way the missing pages of the log could exculpate him from nineteen allegations of viewing the SID without a policing purpose.

599. CS Auld explained the process by which the claimant could have pursued alleged wrongdoing by involving the Federation representative as a third party or by reporting a crime in the normal way, generating a police report to the Procurator Fiscal. Neither course had been followed by the claimant.

600. On the matter of the editing of his "misconduct file", she had further communicated with the claimant by undated letter sometime after 11 November 2016 on the subject of the editing of the file. She referred to the letter and the finding of DCC (Designate) Livingstone whose conclusion had followed the claimant having been given an opportunity to comment on the allegations and evidence and to provide a response. She insisted the correct procedure had been followed.

601. With regard to the twentieth allegation, the respondent submits that the author of the memo of 16 June 2016 states that both Superintendent Eddie Smith and Sergeant Robert Coburn upon interview confirmed that Superintendent Eddie

Smith did not give "corrective advice" in relation to the allegation but merely advised that the claimant should refrain from attending the FDU in future.

602. The claimant himself made the recording available on 8 May 2016 more than five years after the meeting itself, and one month before the decision on 7 June 2016 to implement Mr Hepworth's recommendation. The decision taken by DCC Livingstone in June 2016 was in ignorance of the existence of the transcript.

603. In his evidence, Mr Hepworth explained having spoken to Eddie Smith and Robert Coburn both of whom denied that the meeting with the claimant at London Road Police Station on 6 April 2011 was understood by them to be a conclusion of the matter from a disciplinary point of view. Mr Hepworth's conclusion therefore was made in the circumstances which he understood, without any knowledge of the covert recording of that meeting.

604. Carole Auld did not accept that the recording was at odds with the email between SPA and Eddie Smith or that the email represented a false report (complaint number 19 in her outcome letter).

605. She explained in evidence that her decision was taken in good faith as statements had been taken from the relevant witnesses including Supt. Smith. There had been no impropriety in her investigation of a matter which had been previously determined.

606. The respondent submits that there has been no failure to properly investigate the claimant's complaints. On the contrary, the previous investigations were thoroughly reviewed over a period of seventeen months and the complaint answered in every respect. The measure is not whether the claimant agrees with the findings but that he was treated no differently from any other officer in an equivalent position. There is no evidence before the Tribunal to suggest that another officer in the equivalent position would have been treated in any different manner.

Claimant's submissions

607. In his pleadings the claimant complained that his complaints between 19 December 2010 and the undated letter to the claimant of January or February 2017 have not been properly investigated by the respondent. He asserts that DCC Nicolson, Richardson and Livingstone are responsible for this detriment as they are responsible for the investigation of complaints, as well as multiple members of staff within the CCU and PSD, some of whom are known to the claimant and likely some of whom are not, whose investigations are sanctioned, controlled and overseen by the relevant DCC.

608. The claimant submits that the causal connection between his disclosures and this detriment is the editing of the claimant's statement, most notably omissions relating to D, Proceeds of Crime Act 2002 paperwork, the abduction in 2006 involving [vehicle registration number], the cannabis cultivation fingerprint relating to police reference number NE, the drug deal in 2007, as well as A and the warrant for his apprehension. The edits to the claimant's statement were clearly designed to conceal the conduct of DI Kerr, DS Pagan and possibly others, and conceal their awareness that the claimant could not have committed the crimes they were attributing to him. All of the edits to the claimant's statement conceal clear and unambiguous evidence which exculpated the claimant from the allegations he faced, and implicated DI Kerr, DS Pagan and others, in crimes identified by the claimant to DI Dewar. The respondent only investigated matters in the complainer's statement not those which have been edited from it. The information and conduct identified to DI Dewar was not acted upon.

609. The claimant submitted, during the course of the hearing, that his general concern about the failure to properly investigate, was a failure to recognise that he had made various allegations of a criminal nature against police officers, and CS Auld had not treated them as such, had not referred them as a criminal allegation ought to be, and therefore could not have been said to have conducted a proper investigation.

610. As we understood his argument, the claimant submitted that CS Auld had failed in particular to properly deal with his report of the following as crimes:

- The editing of the statement by DI Dewar;

- The allegation of the attempt to pervert the course of justice by DI Kerr and DS Pagan;
- The report of the abduction, and/or the cover up of that crime;
- The altering of intelligence logs by DI Fordyce;
- The editing of the misconduct file; and
- The false statements given by A.

611. Furthermore, although a decision was made by the Crown Office not to prosecute, that was based on the uncorrected transcript; which has since been corrected with that correct version having been in the possession of the respondent since March 2021 and no suggestion has been made that this corrected transcript is inaccurate.

612. While CS Auld suggests other ways that the claimant could have pursued matters, including involving the SPF or reporting the crime in the normal way, the claimant states that he did attempt to report matters but this was not a normal situation because the suspects were police officers.

613. The claimant also still complains about the twentieth allegation. The evidence of DCI Skelton that someone was “in tears” is not supported by other witnesses. He submitted that the events had been embellished to make his situation look worse. While the position with regard to SI Smith was a matter of interpretation, the respondent did have a copy of the transcript which he had not produced until that time because the warning was on hold.

614. It is factually incorrect to say that his complaint was answered in every respect, not least because there had never been a report of the abduction except by the claimant and there was no investigation into that crime.

Tribunal deliberations: Background facts

615. The background facts found here in summary are that the claimant made a complaint against DI Kerr and DS Pagan in writing on 19 December 2010, that is very shortly after the conclusion of the 2010 misconduct hearing. This was treated as a criminal complaint and dealt with very quickly; DI Dewar, an officer independent of CCU, being allocated to investigate the matter and the claimant

having been informed of that by 5 January 2011, the interview having commenced on 12 January 2011 and having been completed by 5 April 2011.

616. The investigation was then undertaken by DI Dewar into allegations of criminal conduct by DI Kerr and DS Pagan and non-criminal conduct by others. DI Dewar completed his report on 3 November 2011; and in accordance with the required practice, given the nature of the allegations against DI Kerr and DS Pagan, the matter was referred to the PF with the inevitable delay while it was investigated by them. On 14 March 2012, the APF advised no criminal proceedings would be pursued against DI Kerr and DS Pagan but expressed serious concern about the shortcomings of the investigation into the claimant's alleged criminal misconduct.

617. It was not however until 19 November 2012, some nine months later, that the claimant initiated a complaint that his statement to DI Dewar had been edited (specifically in the e-mail to CS Craig).

618. The claimant's complaint was that during the course of the Dewar interview he made criminal allegations not only against DI Kerr and DS Pagan, but also against a number of other police officers. He states that he reported a number of crimes during the interview (including the stolen vehicle and the domestic abduction) which he says were never recorded as crimes or investigated. His assertion is that these were deliberately omitted by DI Dewar, which is in itself a crime, because he wanted these crimes covered up (to protect the reputation of the force and to secure promotion, so the claimant argued).

619. It was clear that during this Dewar interview the claimant accused DI Kerr and DS Pagan of attempting to pervert the course of justice. What was less clear was that the claimant was making further criminal allegations against other officers or making a report of crimes. Indeed, it was evidently not clear to DI Dewar that the claimant was making such allegations during the course of that interview.

620. This was from our point of view not surprising; because it seems that everyone involved in this case including this Tribunal, has found the claimant's allegations that he was reporting crimes and the rationale for subsequent

events to be exceedingly convoluted. DI Dewar was attempting himself to understand and make sense of the allegations which the claimant was making.

621. Further, as Mr Duguid sought to highlight during the course of evidence, the references which the claimant made to other crimes during that interview were apparently raised with a view to the claimant seeking to clear his name and to show that his productive police record was not related to him having received intelligence from a CHIS. Whatever the claimant might say, that is certainly a reasonable reading of the interview based on the transcript which we saw, which was the corrected one.

622. It is only when reading the detail of the transcript of the interview that it can be gleaned from it that the claimant does make the other allegations that crimes had been committed. The respondent conceded some of the disclosures, but we have found on detailed analysis of what was said that these further disclosures were made (and as discussed above we find that the respondent conceded that if they were made then they were protected disclosures).

623. There is however certainly ambiguity over whether what the claimant was reporting might be crimes at all, based on a careful reading of what the claimant actually says (in the transcript which he himself relies on). This is evident for example, in the allegations made in regard to DI Fordyce.

624. Further, we were alert to the fact that the claimant had had the statement read over to him, and that he had signed each page and therefore was apparently content with its contents at the time. The claimant had an elaborate explanation about how it could be that the pages were taken away and re-written, so that he would have signed the pages and yet still DI Dewar could have deliberately edited his statement.

625. We heard evidence about the way that police statements were taken; they are not a verbatim account but a precis of what is being said in the words of the complainer; and there is a particular art to that when statements are being taken over several days as here.

626. Nonetheless the claimant went on to allege, almost two years after the Dewar interview, that the Dewar statement had been, to use his language, “edited” or altered and he alleged that this was with the specific purpose of concealing or covering up the crimes which he was alleging had been made.

627. Following the complaint to CS Craig in November 2012, the claimant continued to elaborate on his complaints, which were investigated by PSD and following investigation, the claimant was furnished with a report from PSD on 11 April 2013. The claimant remained dissatisfied and made further complaints to PSD, advising that he had a recording of the Dewar interview. PSD then initiated a further investigation (by Inspector Woods) with a report being produced in November 2014; and following further details of his complaints, another report in April 2015. His complaint that DI Dewar had “edited” his statement was referred to the PF in June 2015, and referred subsequently to PIRC, and the claimant advised of the outcome, not to prosecute, in February 2016. Thereafter PSD proceeded to investigate the remaining 34 complaints the claimant had identified, which the respondent categorised as non-criminal. CS Auld reported in August 2016; the claimant remained dissatisfied; yet further investigations took place, with CS Auld finally reporting in or around February 2017.

Our conclusions

628. Notwithstanding, the claimant complains that there was a failure to properly investigate his complaints; asserts that amounts to a detriment; and that was because he made protected disclosures.

629. He remains concerned about the Dewar interview. He submits that all of the edits or omissions he alleges were made relate to the disclosures. He suggests that this was a deliberate attempt to cover up crimes but also to cover up his reporting of crimes. While he may ask us to draw inferences from that, the fact is that the respondent now concedes that some or all of these disclosures were made, and that the Tribunal finding that they all were made, the respondent accepts that they were protected disclosures.

630. Our focus then is on whether the claimant suffered the detriment of an inadequate investigation and if so, was that because he made protected disclosures.

631. We therefore gave consideration to whether the claimant was "subjected to" this detriment, either by CS Auld or by other police officers in PSD, or indeed by the DCC with responsibility for the investigation of complaints. If we find that there is no failure to properly investigate, then it could not be said that the claimant was "subjected to" that detriment at all; so no need to consider whether that was "on the ground of" the disclosures.

632. At the outset of the hearing the list of issues was corrected, to make it clear that this detriment was a failure to undertake a full and proper investigation because there could be no dispute that most if not all of the claimant's complaints had been investigated to a certain extent at least.

633. When pressed during the hearing to be clear and specific about why he thought CS Auld's investigation was deficient, the claimant indicated that it was because he had reported crimes that had not been investigated and made what were clearly criminal allegations against a number of police officers but these were not treated as such. The claimant submits that "the respondent only [investigated] the matters in the complainer's statement not those which have been edited from it".

634. In particular, he argues that there is a clear reference to H being abducted in the transcript (disclosure 6), and that DI Dewar either decided not to note the abduction or he erased it from his statement, with the claimant contending the latter. He now suggests that allegation, and his allegations about the stolen vehicle, should have been investigated as crimes but were not.

635. Further, the claimant's asserts that his accusation that DI Kerr had "framed" him is also omitted. The claimant believes that A's informant handler had A plant a large amount of drugs at an address in North Lanarkshire in early 2007 which other police recovered the next day and which implicated the claimant in the cover up of the suicide of D, which was indirectly attributed to him (although it was never made clear to the Tribunal how that should be or why).

He believes that references to D have also been deliberately omitted from the statement and specifically, D does not appear before day 7 in his statement and there is no code for D on the list of code numbers which was attached. The claimant had however, as is now clear from the transcript, referred to her on numerous occasions before. The only reason the reference on day 7 is not erased, he alleges, is because that is the only day when he signed his statement on the same day, so this prevented DI Dewar from altering it. The claimant now suggests there should have been further investigation into the circumstances of D, and in particular statements should have been taken by others who worked with her in the bank.

636. The claimant came to this belief having researched matters, and in particular having identified two police intelligence logs in late 2010 which related to entries dated 8 March and 17 May 2007, which he alleges were altered.

637. We thought that the claimant has apparently conflated two matters; whether the crimes which he reported to DI Dewar in 2011 were investigated as crimes and whether his complaint or complaints in 2012, 2013 and 2015 had been properly investigated.

638. Nevertheless the focus of our deliberations was on whether an adequate investigation had been conducted into his complaints, that being the issue for determination.

639. We noted that the procedure used to investigate the claimant's complaint was the "Complaints Against the Police" procedure normally used to deal with complaints by members of the public. This procedure was used because CS Auld thought an investigation under those procedures would be more thorough.

640. Following the claimant's complaints to PSD in 2015, initially nine heads of complaint were identified; but following further correspondence with the claimant this was expanded to include an additional 26 matters, some described as "issues of concern" because they would not qualify to be formally categorised as "complaints against the police".

641. We heard evidence that CS Auld had spent some 17 months on the investigation. She set out her conclusions in a 32 page letter addressing each of the 35 issues of concern. With regard to the issues which the claimant continues to argue were not appropriately investigated, we set out our conclusions below.

642. We took account however of the evidence of CS Auld that she was initially intending to investigate all of his complaints but found that they had already been investigated and some by external agencies including PIRC and COPFS which she had no power to change. She said that she was only looking into new matters raised by the claimant. We were aware of the claimant's position that a number of the matters he raised were "new", in the sense that they had not been investigated, and in particular the report of the abduction.

643. Nevertheless we noted that she reviewed the investigations which had been undertaken. We noted then that her focus was on the sufficiency of the investigation and in particular whether the correct procedures had been followed.

644. On the matter of the claimant's assertion that crimes which he claims he reported were not investigated as crimes, in general in coming to our conclusions we took account of the fact that a mere allegation that a crime has been committed is not sufficient to require it to be investigated as a crime; as witnesses said there needs to be evidence to support it. The allegations were investigated by police officers and all the indications were that the evidence points to the conclusion that it was not appropriate or necessary for CS Auld to investigate all the allegations as crimes.

645. While it was apparent to us that what the claimant asserts to be incontrovertible evidence of criminality is not such at all, what is more important are the views those with experience and expertise on these matters, not only other police officers, but also the PF, Crown Counsel and indeed officers at PIRC.

646. We have come to the following views on the sufficiency of investigation in relation to the issues which the claimant relies on in support of his submission.

The editing of the statement by Dewar

647. The claimant complains that CS Auld had considered the allegation of editing the statement as an "irregularity of procedure", whereas in his submission the editing of a statement is a criminal matter but it was not dealt with as such. He suggests that any competent investigation of the claimant's allegations would have concluded that the Dewar statement was edited. Dewar was not treated as a criminal suspect but he should have been and he should have been interviewed under caution because the editing of a statement was a criminal offence.

648. CS Auld noted in the outcome letter that the report by DI Dewar was referred to the APF and was considered by the Deputy Director of Serious Casework at Crown Office, who considered there was no evidence of the commission of a criminal offence. Further, this allegation was the subject of an investigation by PIRC. On that basis, she found that the allegation was not upheld.

649. Most importantly then, the allegation that DI Dewar had edited his statement was referred to the CAAPD of the COPFS. COPFS referred it to PIRC, an agency independent of the Police. COPFS concluded they had produced a "thorough and detailed report" and that there was no evidence to support a prosecution.

650. Given not least a referral to PIRC and the "meticulous comparison" which was made between the record of the statement and the transcript, we accept that a conclusion was made by independent outside agencies that no criminal offence was committed by DI Dewar in the recording of the statement. We accept that the respondent is not only entitled but requires to accept the decision of COPFS. We accept therefore that CS Auld's reliance on that was appropriate and the claimant's complaint was adequately and sufficiently investigated by the respondent.

651. We were made aware of the claimant's concerns that the transcript which was seen by the PF and PIRC was the "uncorrected" transcript, but we could not see what difference it would have made to the claimant or the outcome of this

case if the "corrected" transcript had been considered. That is not least because he was asked to supply a list of alleged edits.

The allegation of attempt to pervert the course of justice

652. The claimant complained that there was a failure to properly investigate his initial complaint which was the allegation against DI Kerr and DS Pagan of an attempt to pervert the course of justice. As we understood it, this related to the claimant's accusation that he had been "framed" by them. This was the primary subject of the claimant's initial complaint in December 2010 which was investigated by DI Dewar over the course of the next 11 months.

653. In the outcome letter, CS Auld noted that DI Dewar had highlighted a number of shortcomings in their investigation; but noted that the lack of a thorough and robust enquiry was insufficient grounds to substantiate that these officers deliberately attempted to pervert the course of justice; that the requisite standard of proof had not been attained; that the matter would be best dealt with using internal police procedure; that both officers were given corrective advice.

654. CS Auld pointed out that on referral the APF, although critical of the police investigation, concluded that no criminality was established. On review she concurred with these outcomes. She recognised that there were investigative shortcomings, and apologised to the claimant for the adverse impact that resulted.

655. The claimant argued that it was inconceivable that DI Dewar would not conclude that DI Kerr had committed a criminal act and should have been investigated as such. It was his position that the police report compiled by DI Kerr alleging that he was guilty of corruption was "knowingly false from start to finish"; that "every fact" that was relied on was false, with all the evidence available at the time to DI Kerr to show that. The claimant says "attempting to frame a police officer for a death is not a shortcoming, it is a crime". The claimant's position was that DI Kerr and DS Pagan should have been arrested and interviewed under caution. On that basis, the police investigation must be

flawed because otherwise DI Kerr and DS Pagan would not only have been charged with this offence but also convicted of it.

656. During the course of this hearing, we heard a good deal about the evidence which the claimant relied on to show the deficiencies of this Kerr and Pagan investigation, which we accept were stark as did the respondent and the Procurator Fiscal. Obvious deficiencies were the failure to take account of evidence supporting his position that he returned money to A in the form of a cheque on the instructions of a senior officer; and the failure to properly scrutinise the phone records.

657. There was however no requirement for this Tribunal to take any view on whether DI Kerr and DS Pagan should have been charged with a crime or even should have had greater sanctions beyond “corrective advice”, which we understood to be the most lenient form of discipline available.

658. It was apparent from the evidence of some of the police witnesses that they personally agreed that the claimant was ill done to in this regard. The claimant however has not accepted these acknowledgements or the apology from the respondent. It became clear to us that the claimant’s quest to clear his name has turned into something of an obsession. This is illustrated by his determination to search for a reason to explain why DI Kerr and DS Pagan were dealt with so leniently in his view and to justify why he was charged with subsequent misconduct for researching what he alleges were crimes. This in turn led him to become convinced that other crimes were committed and covered up to explain police conduct.

659. The fact that the claimant was did not agree with the outcome does not equate to a conclusion that there was a failure to adequately investigate his complaint. Again, this complaint was investigated by the APF who concluded there should be no criminal prosecution. We accept that the respondent was entitled to rely on that. Whether the conclusion of the APF that there should be no criminal prosecution was right and whether the subsequent penalty against DI Kerr and DS Pagan was too lenient is beside the point. The matter was determined by an independent outside agency and then the respondent subsequently

undertook a further review of the claimant's complaints. It could not therefore be said that there was a failure to adequately investigate this complaint.

The report about the abduction

660. The claimant asserts that there was a failure to investigate his allegation about the abduction (and subsequent cover up). He says that since this had never been investigated, and was not addressed in the Dewar report, it was therefore a "new" allegation. CS Auld could therefore not rely on the fact that it had already been investigated. Although she said that she did not have authority to re-open investigations, she did have authority to investigate new allegations. The claimant claimed that this was the second senior police officer to ignore the reporting of a crime; although the claimant pointed out Ian Wood had said in evidence that further investigation was required.

661. While this allegation (addressed as "head of complaint 3" by CS Auld) apparently relates to the claimant's allegation of an unauthorised surveillance which he now accepts was in fact authorised, the claimant references in this head of complaint the fact that the abduction incident and the stolen vehicle "appear to have been the subject of some sort of concealment".

662. CS Auld in the outcome letter advised that "the incorrect information detailed by CS Pollock…appears to have been due to an administrative error….I apologise for this". She states that all of the named officers were interviewed and deny any wrongdoing on their part and concludes that "there is no evidence available to support your allegation that false information appeared in SID logs and subject reports". She did not uphold the allegation, although she did apologise for the admin error of the claimant being told by CS Pollock that the surveillance was unauthorised.

663. The claimant submitted that although CS Auld accepted in evidence that head of complaint 3 related to the abduction, she did not address this matter in her response, thus mirroring Dewar's conduct. While the respondent suggests that the abduction is not a crime, the claimant relied on the evidence of Mr Hepworth a senior operations officer who indicated that this should have been recorded as a crime. The claimant also relies on other information which was

available to CS Auld, in particular the related police intelligence logs which indicate that although H made no complaint in August, she must have reported the abduction the next February; as well as the statement taken by Inspector Wood. This is all ignored by CS Auld, he argues, but there is no proof that a crime did not take place and he submits that the evidence infers the contrary and that H was failed by the attempt by the police to cover up this crime. Further, he asserts that the PF was never alerted to this allegation because of the omissions of DI Dewar.

664. With regard to the claimant's argument that this allegation of a crime was not investigated and addressed in the outcome letter, despite it having been raised by CS Auld, our attention was not drawn during the course of evidence to any documentation or evidence to suggest that the claimant raised this as a concern at the time (although he did raise concerns about other matters relating to what he saw as deficiencies in the outcome letter).

665. The respondent submits that the matter was dealt with as appropriate at the time in 2006 and that there is no evidence (other than that of the taxi driver, whose report was investigated at the time) that any abduction was reported, beyond the speculation of the claimant who makes the assumption that it was reported in the following February. He did not however take us to any evidence to confirm that it was reported by the victim as an abduction.

666. We heard a good deal of evidence about this, and Mr Duguid argued that given the facts it was not appropriate to categorise it as a crime at all. Further DI Dewar did not, at the time, recognise it as a report of a crime.

667. We have come to the view that this matter was dealt with appropriately at the time; that it was not recognised as a potential crime at the time and it was not recognised by DI Dewar as a potential crime. The claimant did not make it clear (at least to this Tribunal) that he had expected that to be investigated as a crime at the time.

668. It is apparent that the specific failure to investigate the crime of abduction was not made clear as a separate head of complaint at all and it is not clear therefore that the claimant made a complaint to CS Auld either about the failure

to investigate the abduction. The claimant's concern has been articulated in his disclosures as the coverup of a crime of abduction specifically by police officers operating in the proactive unit of N division. Leaving aside whether a crime was committed or not, CS Auld confirms that those police officers were interviewed and denied any wrongdoing. Further CS Auld concluded that there was no evidence to support his allegation that false information appeared in the SID logs or the subject reports.

669. Thus we accepted that the complaint of a cover up of crimes was in fact investigated by CS Auld. The fact that the claimant did not agree with the outcome does not support an assertion that there was a failure to properly investigate the matter. In any event, we could not see how a failure to investigate this particular matter could be said to have any consequential detriment to the claimant, far less that there was a failure to investigate it because he had made protected disclosures. Indeed, it is now accepted by the respondent as a protected disclosure which the claimant made.

670. Nor could we understand what difference it would make to the claimant or the outcome of this Tribunal if the PF had been made aware of the allegation of the abduction (given the decision not to prosecute).

The complaint about DI Fordyce

671. The claimant complains that there was a failure properly to investigate his complaint about DI Fordyce, which, in submissions, he suggests was also a criminal offence (if we understood him correctly).

672. In the letter this is head of complaint 4, which is dealt with as an "irregularity in procedure" which the claimant (at the time of making his complaint) apparently accepted. He says "I do not know if she altered the logs for content or merely placed them where no-one could see them". He suggests the latter because in his view the "altered" logs were apparently intended to "cut links between [D], the drugs, A and the police and [vehicle registration number] and the police possibly due to the domestic [in 2007] and the failure to seize the vehicle".

673. CS Auld responded that, “DCI Dewar reported that his investigation revealed that DI Fordyce was interviewed in relation to the matter and refuted any suggestion of altering or concealing intelligence logs with a view to suppressing evidence or intelligence”.

674. The claimant’s position was this was insufficient: all that happened was that she was asked and denied it, and that they “couldn’t do less”. His position is that it was insufficient for DI Dewar only to have asked her if she did and accept her answer. His position is that she should have been interviewed under caution.

675. CS Auld noted in her outcome letter that this matter was investigated by DI Dewar who found no evidence to support this allegation. Notwithstanding, further investigation into this was undertaken, the claimant being advised of that by CS McIntyre in a letter dated 11 April 2013 that there was no evidence to support his allegations. CS Auld subsequently reviewed all the evidence available and concurred with her finding.

676. We conclude therefore that this is a matter which was adequately investigated. The claimant was not himself clear that any criminal offence had been committed during his interview with DI Dewar, and even by the time of his complaint in 2015. His assertion that there was a motive was pure speculation, indeed even that logs had been altered at all. Only the claimant suggests that logs were altered which was to support his theory that crimes had been committed. Based on the evidence we heard there are many reasons why SID logs might change; we heard for example about sanitisation and weeding. In any event we heard no evidence to suggest that there was any intention to alter SID logs for any nefarious purpose; but it is not for us to make any conclusions about that anyway. Rather, our focus is on whether there was adequate investigation of the claimant’s complaint and we conclude that the investigations by DI Dewar, CS McIntyre and CS Auld were reasonable in the circumstances.

The misconduct file was edited

677. The claimant also alleged that his "misconduct file" was edited. The claimant alleges that CS Auld did not address the issue at all in her investigation/review.

678. This was identified in the outcome letter as claimant's complaint 23, which was dealt with by CS Auld as issue of concern 14. The claimant had complained that: "The officer or officers who edited the misconduct file in relation to the allegations I'm currently facing, the edits being particular to (now deceased female) and other matters Dewar's edits relate to but edits which are exculpatory evidence in relation to the allegations which I'm still facing, despite the edits to the misconduct file also demonstrating what I reported to Dewar. Only 2 possibilities exist, the file was supplied to the COPFS, already edited, or the editing occurred after it was seized there, as per the documentary production sheet to the front of it".

679. CS Auld responded referencing the fact that the claimant's allegation that DI Dewar had edited his statement had been considered by the PF and PIRC and found to be without foundation. She did not however make any reference to the claimant's allegation that his misconduct file had been edited.

680. The claimant's position at the hearing was that she had not addressed the issue at all because this is not a response to his complaint about editing of the misconduct file, by DI Lipsett and DS Jackson in particular. The claimant asserted that CS Auld has intentionally misunderstood the complaint.

681. Although we accept that CS Auld did not address this specific point in her letter, we noted that this was a concern which the claimant raised subsequent to the receipt of the letter in correspondence with PSD. We noted that she provided a further undated response, in which she suggests that she has looked into this matter further and that the claimant had an opportunity to view the file and that she found no evidence that the misconduct file (or the criminal file) had been edited.

682. The claimant submitted, with regard to his concerns about the misconduct file, that CS Auld had not identified the correct document, and that she had referred to the Centurian record, and not the physical document which he had seen. He submitted that it was impossible for her to rely on her assertion that the matter

had been investigated when she had not even identified the correct source material. The claimant asserts that it should have been put to DI Lipsett and DS Jackson that they had edited the misconduct file; and that any others who worked with the file should also have been asked.

683. The claimant argued that it is ridiculous for CS Auld to suggest that he could have raised his concerns about the editing of the misconduct file subsequently given that she says that it did not happen. In particular, in the second undated outcome letter she is adamant that it was not edited. CS Auld says that the evidence is not missing, so she cannot say that it was not exculpatory.

684. The matter of the "editing" of the misconduct file took up a good deal of time during the hearing. This was not least because, as discussed elsewhere in this judgment, the claimant had appealed a decision to refuse to order recovery of that document, but also because it became apparent during the course of the hearing that there was a misunderstanding about which exact document was being referred to. Either it was a 600 page audit trail of the claimant's SID accesses; or it was the whole of the claimant's misconduct file, which the claimant gestured while giving evidence to suggest that it was very large indeed, as much as 12 inches high.

685. Although we did not see the actual document, the respondent had agreed that the notes which the claimant took from the file were accurate. On these notes the pages numbers are noted; for example at page C1A/785 the pages of logs printed are noted, with a note "all pages present"; on page C1A/786 it is stated "pages 99-305 missing".

686. The claimant has thus noted that pages from the audit trail are missing. This is what he means by edited. But as pointed out by Inspector Dunbar, given that it is clearly recorded that the pages were missing, there can be no suggestion of a cover up or an attempt to "hide" evidence.

687. The focus of the claimant's concerns however were clear to us. In particular he was concerned that pages had been removed which would have shown the other accesses which he made to the SID and which would show that he made accesses to many entries unrelated to events taking place in his own policing

division. He suggests this this is exculpatory evidence and he was particularly concerned that the PF did not have access to this as discussed above. Although we were not able to conclude from the evidence that we heard who had removed the pages, and while we have concluded that they were removed before being sent to the PF, as Inspector Barr pointed out the PF could have asked for them since they were noted as missing. Further Inspector Dunbar explained that it would be necessary and appropriate to remove pages because this is sensitive intelligence which should be limited to what is necessary.

688. Whether any additional evidence is exculpatory or otherwise, discussed elsewhere, is beside the point when we are dealing with the question whether this complaint was adequately investigated. We have however come to the conclusion that it could not be said that the "misconduct file" or even the audit trail was "edited" for any nefarious reasons at all. There is simply no issue to investigate here. It was quite clear that pages were removed, that there was no attempt to hide that, and that there was a perfectly plausible reason why they would have been removed.

The false statements given by A

689. The claimant also raised in submissions concerns about a failure to investigate criminality by A, specifically in relation to what he had said in statements at the time of the original events. He suggests this was "knowingly false" so that the police officers who investigated the allegations at the time should themselves be charged. He suggests that he is less favourably treated than others: when A makes a complaint about him, he is immediately interviewed; but when he makes complaints about other police officers this is not investigated.

690. This was dealt with by CS Auld in the outcome letter, referred to as issue of concern 22, which the claimant has described at head of complaint 31. CS Auld understood that to be an allegation that the police informant had provided false statements in the investigation by the CCU and that the police had failed to detect that they were false. CS Auld concluded that "there is simply an absence

of any information which casts doubt on the veracity of A's statement and which supports your belief in this regard".

691. The circumstances of the claimant's misconduct allegations were investigated by DI Dewar in the first instance, then by CS McIntyre and then reviewed by CS Auld. We could not conclude that a failure to re-open the role of A in the allegations dating back to 2007 meant that there was a failure to adequately investigate the claimant's complaint.

Conclusion

692. We conclude therefore that the investigation by the respondent could not be said to be lacking or not properly or adequately undertaken. Indeed we were impressed at the lengths the respondent has gone to investigate the claimant's complaints. There is no doubt that the investigation by PSD was thorough and in fact it is apparent that his complaints were taken very seriously. We noted for example that the Dewar investigation was responded to very quickly indeed; we heard about a PSD management meeting regarding the claimant's complaint on Tuesday 17 March 2015; and that each subsequent complaint was investigated and responded to. Although there were some delays, these all had a valid explanation, and while we noted that CS Auld took 17 months to complete her review, we considered that this was a factor which demonstrated its thoroughness.

693. The fact that the claimant continues to complain is simply because he does not agree with, does not accept, the outcome of each and every one of the investigations because they do not concur with his belief.

694. The claimant has convinced himself that various crimes have been committed and gone undetected. We heard extensive evidence about the evidence which he believes supports that, but as we explained frequently to Mr Brown both during case management and at the hearing, it is not for this Tribunal to make conclusions about whether crimes were committed or not.

695. Indeed, in regard to the protected disclosures, we proceeded on the basis that the respondent had conceded, those disclosures having been made, that what

was said "tended to show" in the claimant's reasonable belief that crimes, or the concealment of crimes had been committed.

696. The key question however is whether the claimant suffered detriment because he made those protected disclosures. We do not even need to consider that question here, because we do not accept that the claimant has established that he was "subjected to" a detriment at all by the respondent through any failure to properly investigate his complaint.

697. Further and in any event there was no evidence from which we could draw any inference that the way that the investigations were conducted was "on the ground of" the protected disclosures.

Detriment 2(h) and 2(i) Submission of a knowingly false report by Tony Gallagher to COPFS CAAPD and subsequently to PSD about the claimant's possession of documents

698. These two detriments are closely linked and we have considered them together. They are noted in the list of issues as:

- Did Inspector Tony Gallagher, on 5 April 2018, submit to COPFS CAAPD a knowingly false report about the claimant's possession of documents on the ground that he had made protected disclosures?

- Did Inspector Tony Gallagher, between 23 March 2018 and 10 September 2018, submit to the respondent's Professional Standards Department a knowingly false report about the claimant's possession of documents on the ground that he had made protected disclosures?

The respondent's submissions

699. The respondent's submissions in summary were as follows. Inspector Gallagher joined PSD in 2018, and shortly thereafter he was assigned this investigation, following concern having been raised by the external solicitor acting for the respondent about the documents on the pen drive handed in by the claimant. He had no recollection of having ever encountered the claimant before.

700. The number of documents on the pen drive was voluminous. Inspector Gallagher separated documents which may have been obtained by the claimant legitimately, including removing the “shade of grey” category, with the remaining identified as those which a police officer could not have obtained for a policing purpose.

701. Inspector Gallagher explained that he had met the claimant at London Road Police Office out of courtesy to him to advise him that he was being investigated. He refuted the suggestion that it was conducted in bad faith or that it was knowingly false. He was following the instruction of a senior officer in carrying out the investigation.

702. He compiled a report (approved by Chief Inspector Samantha Ainsley) for CAAPD as he was required to do in matters of alleged Data Protection breaches. That report contained an allegation but it was not a prosecuting report. It was not a standard police report, and none was called for by the Procurator Fiscal in this instance, but it was specifically for advice to consider whether it was in the public interest to pursue a prosecution.

703. The report related to documents which might have been obtained between 24 July 2006 and 30 November 2017, these dates being selected as the start and end dates of the earliest and latest documents on the pen drive. He said that it was “probable” that documents from the 2011 data protection enquiry had been part of his 2018 report. He explained that the claimant’s continued use and possession of the documents was something that the Procurator Fiscal should look at.

704. The Procurator Fiscal advised there should be no prosecution, on the basis of insufficient evidence and an inability to exclude a defence of reasonable belief. The claimant was advised of this decision and that the matter would be referred for consideration of misconduct proceedings. That reference occurred as a matter of course, where criminal proceedings were declined by the Procurator Fiscal. No further investigation was undertaken.

705. The decision not to pursue misconduct proceedings was communicated to the claimant by Chief Inspector Andy Bell of PSD. The reasons given in that letter

were that: “When the relevant factors are considered along with the historic nature of the information under review, I am not of the view that it would be proportionate to request the appointment of an investigating officer under the 2013 Conduct Regulations in respect of the circumstances”.

706. The claimant’s contention that Inspector Gallagher submitted a knowingly false report is not supported by any evidence other than that of the claimant. His claim is unfounded in fact. Inspector Gallagher in answer to the claimant’s question stated that paperwork uncovered in the enquiry “revealed various conspiracy theories which you held”. The respondent’s submission is that this is another such theory.

707. The contention that Inspector Gallagher deliberately and criminally compiled a false report because the claimant had made protected disclosures has no foundation in the evidence heard by the Tribunal. If the claim is that the claimant is being victimised by repeated investigations, the respondent submits that each investigation undertaken has had an entirely tenable explanation and that the treatment of the claimant is no different to that which would be afforded to any other officer in the same position in the police service.

708. Inspector Gallagher could not have submitted a “knowingly false report” where no report was submitted to PSD, separate from the CAAPD Report.

709. If this detriment is intended to relate to a separate allegation regarding the transference of an image from a police email account to the claimant’s personal email account in connection with a road traffic matter and the matter to be addressed by “management intervention” of the claimant’s line manager, the conclusion of Chief Inspector Bell was that he did not consider there to be prima facie evidence that the claimant had misconducted himself.

710. Inspector Gallagher answered the claimant’s questions by explaining that he had not conducted an investigation of this matter and had not raised it as a complaint. He had come across the email. He concluded that the claimant had obtained it for policing purposes. His obtaining of it was not criminal and therefore could be dealt with by advice. It had been mentioned in his report for transparency purposes only.

711. If it is the claim of the claimant that the inclusion of this information in any report is knowingly false, it was Inspector Gallagher's contention that his investigation and conclusions were carried out in good faith. If the claim is that it was an error in identifying the source of the email as the claimant's own police account, that claim may on the claimant's own evidence be well founded. It is not accepted by the respondent that the error was a deliberate one, or that it was because the claimant had made protected disclosures.

The claimant's submissions

712. The claimant submits that there is a causal connection between this detriment and the protected disclosures because the documents forming misconduct allegations against the claimant are documents which the claimant legitimately had in his possession for performing his statutory duty to investigate criminality and bring offenders to justice. The allegations did not even substantiate misconduct to a civil balance of proof, far less a criminal standard, making any attempt to have the claimant sanctioned for them internally clearly malicious.

713. The claimant argues that there is a link between this detriment and the disclosures because the documents included evidence which allowed the claimant to make disclosure 6 in particular. This shows that some of the documents were obtained for the purposes of reporting criminality by police officers and non-police officers including the abduction. The Crown decisions of 2011 and 2018 show that they were legally possessed since no criminal proceedings or misconduct proceedings ensued.

714. While Inspector Gallagher alleged an offence of possession of such documents, no such offence exists, the language of section 55 DPA being "obtain and disclose" and not "possession and use". It is clear (given the disclosures) that the documents were for the purposes of reporting criminality and therefore legally processed. Further, the documents referred to included those which had already been the subject of misconduct proceedings when it was found that he had not committed an offence.

715. The claimant's position was that he was given many of the documents legitimately, which is different from him having obtained them. It does not follow

that you have unlawful possession of them. This was accepted in evidence by Inspector Gallagher and that there was no suggestion that he took them or obtained them. However Inspector Gallagher makes allegations of a breach of s55 DPA spanning 11.5 years from 26 July 2006 to 30 November 2017 by reference to a crime that does not exist. The charge was clearly malicious because of the excessive time frame and the lack of reference to a location; and without any specific reference to the personal data which was being referred to.

716. While the claimant accepts that he did disclose them, this was on the instruction of an Employment Judge.

717. It was not appropriate for Inspector Gallagher to make a report to the PF for advice "along the lines of 'what do you think of this'". Here, there is no crime reference number, just an internal reference, so that suggests that Inspector Gallagher did not think that he had committed a crime. The claimant pointed out that the referring of a non-standard police report to the PF was a practice which apparently only applied to PSD.

718. The claimant queried why only 30 documents were referred to if there was no discretion but to report DPA breaches to the PF. Since the claimant was not interviewed and in the absence of any explanation by him, how could it be that only 30 documents would be referred if there was no discretion.

719. The claimant, relying on Inspector Gallagher's evidence that he was unlikely to have removed documents relating to 2011, argued that he was being charged twice in relation to the same documents, which raised the issue of double jeopardy.

720. With regard to the decision of the PF not to prosecute and the decision of the respondent not to pursue misconduct proceedings, his treatment in 2018 should be contrasted with his treatment in 2011. In 2018, there was one allegation with an 11 year span but no criminal or even misconduct proceedings, whereas in 2011 he was subjected to misconduct proceedings, the difference being that in 2018 he was not making live protected disclosures.

721. In the Bell report, it was stated that misconduct proceedings would be disproportionate. Yet in 2018, Inspector Foggin and Inspector Gallagher conducted an investigation and identified what he had done was a potential crime and referred the matter to the PF in respect of a crime that did not exist, during which time the Tribunal was sisted for six months.

722. Given that this was the difference between criminality or nothing, the conclusion could not be lack of supervision (of Inspector Gallagher) but rather that it was malicious. That conclusion is supported by the fact that the investigation started no later than 6 February but was still being discussed on 6 June; and during that 8 week period no-one in PSD had managed to differentiate between something that was not even misconduct let alone a crime.

723. Further Inspector Gallagher indicates that he did not carry out any investigation in relation to the allegation relating to the e-mail which suggests that the allegation was not made in good faith. The claimant's position was that the document was sent to his personal e-mail by his boss Sgt Barry Spiers; that the matter was raised at the time; and it was acknowledged as an error. However, in contrast to the claimant, Barry Speirs was not disciplined despite the breach of the DPA.

724. While the claimant accepted that Inspector Gallagher "on the face of it" would not have made the decision, he suggested that he was told to do it by someone above his rank. He points out that Mr King, acting on instructions of the Chief Constable, also had possession of documents which he disclosed to him, but unlike the claimant he was not approached and informed that he was a criminal suspect. The claimant's position was that it was only when the claimant asked if Mr King and the Chief Constable were also being charged that the respondent realised they had "overstepped plausibility" and it was decided that the matter was too complex and messy and steps had to be taken to put an end to it. The claimant accepted that Mr Gallacher could not make decisions like that.

Our conclusions

725. We considered first whether the claimant had been "subjected to" this detriment at all. The claimant submits that the report was "knowingly false" and suggests that we should draw an inference to that effect from the following:

- The paperwork he had was all paperwork he would have routinely worked with;
- The paperwork related to his legitimate duty of investigating crime;
- The respondent was already aware that he was in possession of the documents;
- There is no such "charge" of "possession and use" under DPA section 55;
- Inspector Gallagher did not submit a police report in the usual way but sought advice from the PF;
- He did not categorise it as a crime;
- The "charge" or allegation was lacking specifics about the documents, the location or the time frame, going back even further than his first meeting with A;
- The fact that the time span includes a period in respect of which allegations have already been considered and no criminal proceedings and no misconduct proceedings ensued (two other officers having investigated matters);
- The fact that he was not charged with a criminal offence by the PF;
- The fact that he was not even subject to any misconduct proceedings;
- The fact that no-one in PSD even after an eight week investigation recognised that this was clearly not a criminal offence;
- The fact that Inspector Gallagher did not undertake an investigation into the e-mail but did include it in the charge, even though if he had investigated he would have found that it was sent by his line manager;
- Those who had investigated it before did not conclude that he had committed a crime.

726. The claimant submits that all this suggests that the referral was made in bad faith, was malicious and was therefore knowingly false.

727. Again the focus of the claim and issue for determination is on Inspector Gallagher. However, based on the evidence we heard we could not draw any

inference that Inspector Gallagher had submitted a "knowingly false" report to CAAPD because:

- He did not know the claimant or even the background to the allegation (apart from what he read in the papers he was considering);
- He was only recently appointed to PSD;
- He was acting on the orders of a superior;
- His report was checked/authorised by a superior;
- The time frame selected relates to the first and last dates of the documents on the pen drive;
- Inspector Gallagher believed that there was an inference of criminality from his initial assessment of the type of documents held and how they were obtained;
- He did not personally make any referral/report to PSD.

728. With regard to the alleged detriment relating to the misconduct proceedings, we noted that Inspector Gallagher did not make any separate report referring the matter back to PSD. Indeed, the claimant apparently accepted that Inspector Gallagher could not have himself made the decision not to proceed with the misconduct proceedings, but that this would have been a decision made by his superiors. Although this is not articulated in the list of issues, we do note that in the pleadings, the claimant suggests this detriment was perpetrated not only by Inspector Gallagher but also others unknown to the claimant, including the Chief Constable, acting on behalf of the respondent, and therefore he suggests that the respondent is responsible for the referral of the report through actors engaged by them.

729. We shared the claimant's concerns about the way this matter was dealt with, and noted that the claimant was intending to openly lodge such documents in the employment tribunal clearly indicating that he believed he was entitled to be in possession of them (supporting the PF's conclusions). However, there was otherwise no evidence, beyond speculation and assumptions made on the part of the claimant, that the report to the PF was knowingly false.

730. We note that when the matter was considered by Inspector Bell it was considered that to pursue misconduct proceedings would be disproportionate.

It is rather unfortunate that such a decision could not have been made earlier by superiors and the matter nipped in the bud at that point.

731. However, the evidence we heard was that standard procedures were followed (without it seemed to us reflecting on the bigger picture of this case). We noted that there were strict protocols regarding referrals about police officers breaching DPA through their access to police computers; we noted DCC Nicolson's evidence that the low barrier was designed to ensure the maintenance of the public's trust in police officers; although we also noted DCC Richardson's evidence that in his view the pendulum had swung too far and that police discretion was too limited.

732. The genesis of this particular referral was in fact an external solicitor acting for the respondent; who was concerned enough about the particular types of documents in the claimant's possession to refer the matter to an in-house solicitor, who shared similar concerns and made a decision to refer the matter to PSD. Given the strict protocol in place, an investigation ensured. Inspector Gallagher was appointed by Chief Inspector Foggin and reported to Chief Inspector Ainslie.

733. It would appear that it was thought appropriate to allocate an officer who had only just commenced work in PSD (and so had limited knowledge of the background circumstances) and who was entirely unknown to the claimant. Inspector Gallagher's position was that there was a question mark over why the claimant should have certain documents in his possession (and for which in his view it was apparent that there was no policing purpose) so that the matter had to be referred in respect of those documents of concern. The PF then chose not to prosecute because it could not be ruled out that the claimant had a reasonable belief defence that he was entitled to have access to the documents. All this evidence supports the conclusion that the report was made in good faith, and was not "knowingly false".

734. Accepting that a referral to the PF is in principle a detriment, aside from whether these reports were "knowingly false", we went on in any event to give

consideration to the question whether this investigation and subsequent referral was because the claimant made protected disclosures.

735. As we understood his main argument, the claimant suggests that the causal connection is that the documents which formed the basis of the criminal allegations (in 2012) resulted in no criminal proceedings; they were therefore legally held (and related to crime reports referenced); and given that it was determined not even to proceed with misconduct proceedings this makes them clearly malicious. The claimant however asks us to thereby conclude that if they were malicious, there must be a motive for that and the motive must be that he made protected disclosures.

736. He also suggests that there is a link between this detriment and the disclosures because the documents included evidence which allowed the claimant to make disclosure 6 in particular, which shows that some of the documents were obtained for the purposes of reporting criminality by police officers and non-police officers including the abduction. The Crown decisions of 2011 and 2018 shows that they were legally possessed since no criminal proceedings or misconduct proceedings ensued.

737. The fact that he had been investigated before without being prosecuted is of course not sufficient to show a causal connection; or that the reason why the respondent referred the matter was because of the protected disclosure. We have already concluded that the Gallagher report was not knowingly false, but we also accepted the evidence of Inspector Gallagher that he had little knowledge of the Dewar investigation or indeed the employment tribunal proceedings, beyond what he then became aware of during the course of his investigations. He said in evidence that he had no knowledge of the claimant's allegations against DI Dewar; he had no knowledge of what the claimant told DI Dewar; and the only knowledge he had of that was as a consequence of seeing the paperwork on the pen drive; and he was not aware that the paperwork related to matters which had been reported to Dewar. He said in the evidence that he considered the claimant's allegations to be conspiracy theories. He said he had no prior knowledge of the claimant and no preconception of him.

738. The claimant suggests that there is a “link” between the alleged detriment and the disclosures, because the subject matter of the documents considered relates to the subject matter of his disclosures; he advises that it was because of these documents that he was able to establish his belief that a crime or crimes had been committed, for example that there was an allegation of an abduction which was not investigated (disclosure 6).

739. But as discussed above the simple fact of a “link” or “connection” between the subject matter of the disclosures and the subject matter of the detriments is not sufficient to show any “causal connection”. Rather there has to be evidence to support the conclusion that the reason why or the motivation for the detriment was the making of protected disclosures. There was however no evidence from which to draw such an inference. In any event, the claimant would have been subjected to such a detriment in plain sight of the Tribunal.

740. In any event it is for the respondent to prove that the detriment had nothing to do with the disclosures; and we accept here that the reason for the referral was the implementation of standard procedures as discussed above.

741. We were also made aware that the claimant’s complaint about this was referred to PIRC. Following investigation, they decided that insufficient enquiries had not been undertaken by the respondent to address the crux of the claimant’s complaint. A further investigation followed the recommendation by PIRC to reassess their investigations.

742. CI Alan MacIntyre reported that they accepted that 2011 professional standards investigation related to similar offences that were subsequently investigated in 2018; Inspector Gallagher became aware of them and acknowledged that the claimant had the information for a considerable period of time, and that it was not possible to accurately ascertain the means by which he had obtained them. However, they were satisfied that the concerns raised by their solicitor to PSD did merit an investigation and report to CAAPD “as per the criteria and requirements detailed in the Complaints about the Police SOP”.

743. It was also accepted that the nature of the allegations in the 2018 report were very similar to those in 2011, but that was highlighted by Inspector Gallagher

to the PF, with consideration being given to the apparent "continued possession and use". It was noted that the CAAPD report included a significant amount of exculpatory evidence in his favour recognising that he had previously had the materials in his possession and had been investigated for that; that some of the material may have been supplied by him (and not through improper use of police systems) and it was unclear when and by what means he had obtained some of the data.

744. The respondent concluded that the investigation was necessary, fair and consistent with the Complaints about the Police SOP and was not malicious in nature nor a repeat of the 2011 enquiry.

745. We agreed with the conclusion that the referral and investigation was consistent with police procedures and could not be said to be malicious. The claimant was referred to CAAPD by Inspector Gallagher who had no knowledge of the background circumstances. A decision was made not to prosecute. A further decision was made not to proceed with misconduct proceedings at all. Any detriment to the claimant was thus limited, and there was no evidence to support his contention that it was for malicious reasons, for less because he had made protected disclosures. Rather again it was explained by what might even be categorised as slavish adherence to standard procedures, whereas a departure from procedures might actually have been warranted in these circumstances.

Overall conclusions

746. In summary, by reference to the list of issues for determination by this Tribunal, we have concluded that the claimant did make the six disclosures as alleged. While we do not accept that the claimant has established that he was subjected to the nine detriments as alleged, we do accept that he was subjected to certain detriments.

747. However, we conclude that it cannot be said that the detriments to which the claimant was subjected were on the grounds of, that is they were not materially influenced by the fact that, the claimant having made the protected disclosures.

748. In particular, the claimant has failed to identify any prima facie *causal* link between the protected disclosures and the detriments found; he has failed to establish any facts from which we could draw that inference. We came to understand that the claimant did not actually appreciate what is meant by a causal connection. To paraphrase the legal principles, it is not sufficient for the claimant to simply establish a "link", rather it must be established that the *reason why* he was subjected to the detriments was because he had made the disclosures.

749. For example the claimant suggests that the 2012 misconduct allegations relating to DPA breaches are "causally connected" to the Dewar interview (and thus the protected disclosures) because every single one of the data protection allegations related to either [vehicle registration number] and/or B and these were matters which he raised during that interview. He suggests too that the 2018 misconduct allegations were "causally connected" to the Dewar interview because the paperwork all relates to his research to establish that the crimes, which he disclosed, were committed.

750. While clearly there was a "link" or a relationship or a connection between the protected disclosures and the detriments, the fact that they were linked because they were related to the same subject matter, or because one event postdated another, is not sufficient to establish a causal connection.

751. Rather what we have here is a coincidence of timing, a coincidence of subject matter, but a coincidence is something which happens without a causal connection. A causal connection is not proved by the mere fact of a coincidence of timing or subject matter.

752. As discussed above, the making of protected disclosures must be the real or effective cause, that is the direct or decisive cause of the detriment, the reason or motive for the treatment. It need not be the sole cause, but it must be shown that the respondent was "materially influenced" by the fact that the claimant

made the protected disclosures. We have found no evidence to support such a conclusion, and indeed the facts support the respondent's argument that there were other reasons which explain the detriments to which the claimant was subjected.

753. We should add that, perhaps because of this apparent lack of understanding, we have not found the claimant's arguments easy to follow and we struggled with the logic of many of his arguments. Our impression was, to put it colloquially, that he was "fishing in a river with no fish". We were however prepared to accept that his opinions are sincerely held and that he has convinced himself of connections between events which cannot be established and he has convinced himself that there must be nefarious motives to explain events which have unfortunately impacted negatively on him. We have resisted putting his arguments down to conspiracy theories; but if the claimant were right about those motives, then there are a very large number of individuals both within and outwith the police service who would require to be party to the treatment of the claimant. While this is exactly the claimant's concern, it is just not credible that so many individuals, especially those outwith the police force, would have gone to these lengths to punish the claimant when there is no obvious motive for that.

754. Further, we thought that there was a fundamental contradiction in the claimant's overall position: why would the respondent refer matters which highlighted possible crimes by police officers to an outside agency (the procurator fiscal specifically) if they were concerned that crimes they were seeking to cover up might thereby potentially be uncovered. The respondent could simply have accepted that there was a policing purpose for his searches, as he argued, and not sent him down the "disciplinary corridor" at all.

755. We do have sympathy with the claimant; and we sensed that too from a number of witnesses (initially at least); because he has been at the receiving end of a large number of mistakes made on the part of the police service, not least the catalyst for all this which was the investigation into his conduct by DI Kerr and DS Pagan in respect of which the APF recognised that there were "significant shortcomings". The irony of the evidence of ex DCC Richardson about the

importance of careful and comprehensive inquiry before a police officer would be charged with corruption did not escape us either.

756. However there is simply no evidence to support the claimant's contention that these were anything other than administrative failings, some which we recognise are very serious indeed, to which the claimant unfortunately fell victim.

757. We were also of the view that the claimant's position has shifted over the years and the level of his conviction only strengthened over time. Mr Duguid pointed out throughout the hearing that the claimant was not originally focussed on disclosing the cover up of crime at all. Originally, he was focussed on "clearing his name" and on highlighting the injustice (it is accepted that) he suffered at the hands of DI Kerr and DS Pagan. We thought it was significant that he did not complain that DI Dewar had edited his statement until almost two years after it had been given, during which time the claimant appears to have had a growing conviction that he suffered further injustices which have not been borne out, that matter having been considered by outside agencies and now this Tribunal.

758. There is no evidence to suggest any detriments which he was subjected to were on the ground of him having protected disclosures. Rather we find that the respondent has established alternative reasons for those detriments, and that they had nothing whatsoever to do with the fact that he had made the protected disclosures.

759. For these reasons this claim must be dismissed.

760. We would however finally wish to add that we are indebted to both Mr Duguid QC and Mr Brown for their professional, courteous and respectful dealings in the Tribunal which almost certainly ensured that this hearing could be concluded within the time frame in which it was eventually listed.

Employment Judge: **M Robison**
Date of Judgment: **17 February 2022**
Entered in register: **01 March 2022**
and copied to parties

ANNEX A BELOW

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number **4109600/2014**

Claimant: **Mr R J Brown**

Respondent **The Chief Constable, The Police Service of Scotland**

RESTRICTED REPORTING ORDER

Pursuant to Rule50(3)(d) of the Employment Tribunals Rules of Procedure 2013, and in relation to the above proceedings, this Order prohibits the publishing or broadcasting in Great Britain in any newspaper, magazine, computer network, internet website, social media website or app, sound or television broadcast, or cable, satellite or live-streaming service, in any form whatsoever, whether orally or in writing, any details of the relevant matters identified below. This prohibition applies whether or not such details are already known to any person independently of these proceedings.

The relevant matters are:

1. The subject matter and content of the alleged public interest disclosures said to have been made by the claimant, with which these proceedings are concerned;
2. The existence and content of any documents produced to the Tribunal or referred to in evidence or submissions at the preliminary and/or final hearings;
3. The evidence given by any witness, including in the form of witness statements, and any questions put to witnesses by or on behalf of any party;
4. The submissions made, whether orally or in writing, by or on behalf of any party, including the Lord Advocate, at the preliminary and/or final hearings; and
5. The reasons or grounds for the making of this order

if and to the extent that such publication is likely, whether directly or indirectly, to lead, correctly or incorrectly, to (i) the identification of any person as a Covert Human Intelligence Source (CHIS) or police informer, or (ii) the disclosure of any police operational procedures relating to the handling of CHISs or police informers.

Subject to any other order of the Tribunal, or any order of a court of competent jurisdiction, this order shall have permanent effect with effect from 6 November 2019.

If any identifying matter is published or broadcast in contravention of the Order, any person guilty of such an offence shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Any party or other person with a legitimate interest who has not had a reasonable opportunity to make representations before this Order was made may apply in writing for it to be revoked or discharged either on the basis of written representations or, if requested, at a hearing.

Employment Judge: Muriel Robison

Date Order Made: 6 November 2019