EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Otti

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool **On:** 1 and 2 August 2022

Before: Employment Judge Aspinall
Ms Heath
Mr R Cunningham

Representation
Claimant: In person, supported by his wife
Respondent: Mr Alexander Jones, Counsel

JUDGMENT having been given orally on 10 August 2022 and sent to the parties on 10 August 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant was a police officer who was dismissed on 7 December 2005 after five years' service, for gross misconduct. He had been convicted of obtaining a pecuniary advantage by deception in that he had failed to disclose criminal offences of burglary, theft and criminal damage when being appointed as an officer and convicted of obtaining personal data in breach of the Data Protection Act in relation to his use of the Police National Computer.

2. He brought a complaint of race discrimination in 2006 arising out of that dismissal but his claim could not proceed as it was brought out of time. He appealed the decision that his claim could not proceed. The Employment Appeal Tribunal upheld the Tribunal decision.

3. In 2012 the claimant sought to overturn his criminal convictions and approached a former colleague PC Devanna for support. He understood that she might offer him

a statement in terms that might assist him in seeking to have one of his two convictions overturned. The convictions in question related to the respondent's state of knowledge and the claimant's disclosures about his conviction history at the time of the decision made by Officer F in 2000 to put the claimant forward for appointment. PC Devanna did not provide a statement. The claimant went to the Court of Appeal but his convictions were not overturned.

4. In 2020 the claimant asked the respondent for a statement from PC Devanna as he wanted the Criminal Cases Review Commission to look at his convictions. He alleged that the opinion she had expressed in the 2012 telephone call showed that she had known that Officer F had known about the convictions prior to the claimant's criminal trial that she had failed to act on, in reporting the matter (Officer F) within the police, for investigation. He also argued that action ought to have been taken in relation to Officer F. PC Devanna did not give a statement. The respondent did not formally investigate her and did not take action in relation to Officer F.

5. By a claim form dated 22 March 2021 the claimant brought complaints of direct discrimination and victimisation on the ground of ace. At a preliminary hearing on 7 July 2021 EJ Skehan ordered the claimant to pay deposits in order to continue with his complaints. The claimant chose to proceed with only the following three allegations of victimisation which retained their original numbering:

> Allegation 6
>
> The respondent compelled Constable Devanna on around 30 December 2020 to change her mind about providing the witness statement to support the claimant's application to the Criminal Case Review Commission.
>
> Allegation 7
>
> The respondent refused to record and refer conduct matters against Constable Devanna on around 28 January 2021 to the Independent Office for Police Conduct which they are obliged to from being aware of serious operational corruption from the material they had given them. The claimant alleged that the decisions were made by Chief Inspector Sumner and Superintendent Hassall.
>
> Allegation 8
>
> The respondent refused to conduct a criminal investigation into ex-Inspector Formby in misleading the jury about his knowledge of criminal convictions. In particular the claimant alleged that Chief Inspector Sumner and Superintendent Hassall had made that decision.

The List of issues

6. The parties agreed a list of issues, at the request of the Employment Judge, at the outset of the hearing.

> Agreed List of Issues

1. Did Dawn Devanna agree to provide the Claimant with a statement in February 2012 ? The Respondent accepts she did.

2. Did Dawn Devanna change her mind about providing the Claimant with a statement in December 2020? The respondent accepts she did.

3. Why did Dawn Devanna change her mind?

4. Did anyone put any pressure or undue influence on Dawn Devenna when making that decision? In particular DS Wilkinson, DCI Sumner or SPT Hassall ?

5. Did DCI Sumner refuse to record/refer Dawn Devanna to the IOPC? The respondent accepts he did.

6. If so why?

7. Did Superintendent Hassall play any role in the decision-making process?

8. Did anyone, including Superintendent Hassall, put any pressure or undue influence on DCI Sumner when making that decision?

9. Did DCI Sumner refuse to record/refer Inspector Formby to the IOPC? The respondent accepts he did.

10. If so why?

11. Did Superintendent Hassall play any role in the decision-making process?

12. Did anyone, including Superintendent Hassall, put any pressure or undue influence on DCI Sumner when making that decision?

7. It was agreed that these were issues for factual findings and that the Tribunal would of course apply the law in section 27 so that it would also be concerned with the state of knowledge of the alleged discriminators as to the claimant's protected act, the definition of detriments and the reason why each of the alleged acts took place.

Support for litigants in person

8. The Equal Treatment Bench Book (ETBB) provides guidance for the judiciary and non legal members in supporting litigants in person. It explains that litigants in person may ;

- Be unfamiliar with the language and specialist vocabulary of legal proceedings.
- Have little knowledge of the procedures involved, and find it difficult to apply the rules even when they do read them up.
- Be ill-informed about ways of presenting evidence.

- Be unskilled in advocacy, and so unable to undertake cross-examination or test the evidence of an opponent.
- Be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.
- Be unable to understand the concept of a cause of action.
- Lack objectivity and emotional distance from their case.

9. The ETBB suggests ways in which a Tribunal can support the litigant in person, for example, by ensuring:

- The process is (or has been) explained to them in a manner that they can understand.
- They have access to appropriate information (eg the rules, practice directions and guidelines – whether from publications or websites).
- They are informed about what is expected of them in ample time for them to prepare and comply.
- Wherever possible, they are given sufficient time for their particular needs.

10. The process was explained to the parties and a timetable for the hearing was agreed at the outset. There was also discussion about the scope of the hearing. The Tribunal explained that it would be focusing on the list of issues and would not, for example, be making findings as to whether or not Officer F knew the claimant had convictions before recruiting him, or PC Devanna knew that Officer F had known that. There were clearly deeply distressing background circumstances to this complaint, in that the claimant believed he had been wrongly convicted and wrongly imprisoned. The Tribunal would not be revisiting the content of the criminal proceedings. The claimant understood that and acknowledged that that Tribunal had clarified the position so as to manage his expectation as to relevant content.

11. The claimant did not require any breaks or other provision by way of reasonable adjustment but the Tribunal decided that there should be breaks for the claimant between his being a witness and then cross-examining the respondent's witnesses. Breaks were also provided between each of the respondent's witnesses and the Tribunal checked with the claimant that he was ready to proceed at each stage. He appeared well prepared and had a set of typed notes in table format of his cross examination questions for each witness. He was readily able to navigate through those notes and choose which question to go to next in reaction to a witness' response. He was supported in note taking, at the suggestion of the Tribunal, by his wife. The Tribunal assisted the claimant to stay focused on the List of Issues in his questioning and at the end of each of his cross-examinations the Tribunal assisted him by going back to the witness statement and the claim form and list of issues to check that he had put his case to the respondent's witness. Sometimes, this resulted in a further spate of questioning. The respondent's Counsel made no objection and was himself supportive of the claimant in assisting him to find pages in the bundle that were relevant to his questions.

12. In this case the claimant was advancing some complicated scenarios by which he said the respondent had acquired knowledge of his protected act and had coerced or compelled PC Devanna to refrain from providing a statement to him. The Tribunal assisted the claimant to put these points across by labelling them using the following

phrases *the database cascade, the HR file conspiracy* and *the drop hands deal.* The claimant acknowledged that support and readily adopted that phraseology as a short hand way of putting the scenario to the respondent's witnesses. The claimant was further supported in his closing submission by the Tribunal.

The Hearing

Documents

13. We had an agreed bundle of 551 pages together with a supplementary bundle from the claimant of a further 39 pages.

14. Counsel for the respondent had prepared and shared an opening note. We went through this briefly together so that the claimant was aware prior to any evidence being heard of the relevant tests in law particularly in relation to knowledge and the "reason why" the detriment was done. The note included references to Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425, Warburton v Chief Constable of Northamptonshire Police [2022] EAT 42 and Scott v London Borough of Hillingdon [2001] EWCA Civ 2005. There was also opening discussion and clarification of key points arising from Shamoon, Nagarajan and Jhuti in the Supreme Court, on the issue of a manipulator.

15. A further document was admitted by consent on the second day. It was a Policy document stating that police personnel files should be kept until the officer was 100 years old or the file was 85 years old.

16. Following closing submissions DCI Sumner was recalled and swore to the veracity of a chain of emails that showed what had happened to the claimant's personnel/HR file. They were added to the bundle by consent as pages 552 -556.

Oral evidence

17. We heard oral evidence from the claimant. He returned to issues in relation to his convictions, his dismissal in 2005 and decisions around his appointment in 2000. We found he shifted position frequently for example he said that PC Devanna had decided not to give a statement and had told the respondent this *before* it then communicated its decision not to investigate her. When the documentation showed that the day book recorded the call in which she was told she would not be investigated as 15 December 2020 and then the email trail showed her telling the respondent she would not assist the claimant on 22 December 2020, he changed his position to argue that this was still evidence of pressure. The Employment Judge assisted him to describe his contention as a "drop hands deal", to articulate that what he was alleging was that 1) she was only told she wasn't being investigated after she had told the respondent she wouldn't provide a statement and then, in the alternative 2) the events were linked, that there was an oral "drops hands deal" done, whichever went first, so that pressure had been applied to PC Devanna to prevent her from assisting him and 3) that whatever the dates there was a "proximity" of events which was suspicious.

18. PC Devanna gave her evidence in a straightforward way and could not have been more direct in refuting the suggestion that anyone had put any pressure on her to change her mind about giving a statement to the claimant. She was, notably, calm

and measured under cross examination by the claimant despite the fact that he had recorded her covertly and written to her employer calling for action to be taken against her.

19. DS Steven Anthony Wilkinson gave his evidence in a helpful way explaining to us how he carried out the "scoping" exercise in the claimant's complaints on behalf of ACU, the chronology of events in relation to him telling PC Devanna that she was not going to be investigated formally, on 15 December 2020, and in explaining the process by which DCI Sumner told him that decision first verbally and later entered the decision on the respondent's electronic case file. He also explained to us the database used by professional standards, now ACU.

20. DCI Craig Sumner gave his evidence in a straightforward way and was clear about the decision making in relation to not "serving" (this was the word used to mean not proceeding to formal investigation) PC Devanna, or Inspector F and his reasons for those decisions. He was compelling in his evidence about how seriously he took the role of Appropriate Authority. He was frank about the process for retaining and destroying officer's HR files and he admitted that the HR file for the claimant ought to have been retained but had been destroyed in error.

21. Following conclusion of the submissions the Tribunal withdrew to begin deliberation. A message came from the clerk that the respondent's Counsel had asked to be heard before the Tribunal in the presence of the claimant on a matter that had arisen. The Tribunal reconvened in open court. Mr Jones explained that DCI Sumner had a serious of emails from Ms KM who ran the archive for the HR Files and that the position in relation his evidence about the claimant's HR files had changed. Mr Jones felt it is his duty to the Tribunal to appraise it of this position. The claimant was shown the emails and it was agreed that they could be admitted in evidence. DCI Sumner was recalled and swore to the veracity of the emails. The claimant had no cross examination. There were no further submissions and the Tribunal withdrew to resume deliberation.

Applications

22. At the start of the hearing the claimant indicated an intention to have the respondent's response struck out. The basis for this application was his contention that the DayBook of PC Devanna, which was relevant as to the dates and chronology of the decision not to proceed against her and her decision not to give the claimant a statement, had been tampered with. He contended that it had been falsified to make it look as though PC Devanna knew she was not to be investigated *before* she decided not to give the statement. He said that the reality was the other way round, that only when she had refused to support him, did the respondent tell her it would not investigate her.

23. The Employment Judge explained the grounds for strike out to the claimant. The claimant understood that a strike out in a fact sensitive case would be rare and that a party's case would be taken at its highest on a strike out application. The Employment Judge explained the practicalities that a strike out application might take up the morning of the first of the two days listed and put the rest of the hearing at risk. The Employment Judge suggested that one way to proceed might be to hear his evidence on the DayBook and to consider it. The Employment Judge asked was the

original DayBook available for inspection. It was. The claimant said he would put the falsification of the DayBook entries to the respondent's witnesses. The Tribunal would examine the DayBook for itself. The claimant withdrew his request for a strike out application to be heard.

The falsification of the DayBook allegation

24. During the course of Ms Devanna's cross examination the unredacted entries that had been provided in the claimant's bundle were examined in the original, at the bench with the claimant and respondent's counsel standing present and within sight of Ms Devanna.

25. The claimant's position was that the front of the DayBook had been falsified; that the book really only ran to June 2020 but had been changed to make it look as though it ran to June 2021, so as to cover the period of October to December 2020 relevant to this case. Further the claimant said that an entry in the DayBook had been added later to make it look as though the claimant had been told there would be no investigation of her on 14 October 2020. In support of this contention he said that an entry in the date margin read 14.10.2020 and appeared in between entries for 13 December 2020 and 15 December 2020.

26. On examination of the original DayBook the Tribunal found that there was no evidence of tampering with the front page, the date had simply been scored through the paper heavily. On the issue of the 14 October 2020 entry the panel unanimously agreed that it said 14.12.2020. On the photocopy the 12 appeared to look ambiguous so that it could have been a 12 or a 10. In the original the mark could be seen, it was clearly a 12. It had a heavy underscoring on the base of the two consistent with the heavy underscoring on the base of the 1 on the front of the Daybook. The 14.12.20 date appeared chronologically in the dates in the margin, after the 13 December entry and before, on the next page the word "cont" meaning continued and the entry date of 15 December 2020.

27. The Tribunal found no issue of suspicion, no grounds for suspecting falsification, on examination of the Daybook.

28. The claimant was given guidance that to make an allegation that an officer either of her own accord or on instruction from someone had falsified an entry in a DayBook was a serious matter. The claimant did not withdraw the allegation but shifted ground when the panel examined the DayBook so that his allegation became that even the 15 December 2020 entry was a falsification; that the claimant had only been told that there would be no investigation of her *after* she had decided not to support him. He sought to argue concurrence of her decision not to support him and the communication of DCI Sumner's decision not to proceed against her *whenever* it was, whether the 14 October, 15 December or later. It was at this point that the Employment Judge helped him to formulate his argument that there had been a "drops hands deal" done and to clarify his "proximity" argument.

The Facts

29. On 20 February 2012 at 15.31 the claimant covertly recorded a telephone conversation with PC Devanna. In that conversation she expressed an opinion that

he thought might help him to overturn his criminal conviction in 2005.

30. On 27 July 2020 the claimant wrote to the respondent informing it of the recorded call and requesting a statement from PC Devanna. On 18 July 2020 he was asked by the respondent to provide more detail of his request including the intended purpose of the requested statement. He replied to say that he wanted the statement to support an application to the Criminal Cases Review Commission. He then chased up his request on two occasions before, on 17 September 2020, he wrote to the respondent's force solicitors saying:

> *You will be aware that I have made repeated requests to you for a statement from Constable Devanna to assist with an application to the CRCC. This officer has provided evidence that Inspector F of the Recruitment Department may have perjured himself during a criminal trial in October 2005, which subsequently led to my dismissal from the force and imprisonment.*
>
> *Please provide the name of the officer with delegated power from the Chief Constable who has decided <u>not to provide me with a response</u> to my request for Constable Devanna to provide a statement.*
>
> *I must advise you that if you fail or refuse to provide the name of the officer with delegated power within the next 7 days, I will make the complaint to the PCC as a direction and control complaint against the Chief Constable.*

31. The force solicitors communicated this position internally that same day saying to the recipients of an internal email;

> *…this is a particularly serious allegation involving the referred inspector……also potentially serious for the constable as suggests she was aware of this serious offence but has not progressed this in any way internally….. in the light of the email received today, I advise that it is appropriate to respond to Mr Otti as soon as possible and for PSD to consider the way forwards. Whilst there is no property in a witness, and Constable Devanna is entitled to give a witness statement, it appears that she may need some support if she is to be spoken to by Mr Otti. Likewise, on the face of it there are potential issues for consideration by PSD.*

32. The claimant's HR file was requested from the HR Shared Service archive.

33. A response was sent to the claimant informing him the matter had been referred to PSD and asking him for a transcript of the telephone call with PC Devanna. The referral was made to PSD. DCI Sumner was routinely copied in to the 24 hour log for 18 September 2020 which showed the referral to PSD. Research was undertaken by the PSD and a report produced which drew from the PSD database, detailing the claimant's history including his conviction following trial at Liverpool Crown Court from 3-12 October 2005 and his dismissal. It did not reveal his 2006 race discrimination proceedings. DS Wilkinson from PSD wrote to the claimant on 22 September 2020 saying;

> *You've requested a statement be obtained from Constable Dawn Devanna which you believe implicates Inspector F in an offence of perjury. I am from the*

PSD and intend to listen to the recording you provide or read the transcript or both and with supervision we will establish whether there is any misconduct or criminal offences apparent. It is unclear at this stage whether Constable Devanna is a witness in this case or in fact implicated by your recording and may require legal advice before she provides any account to us or you.

34. The claimant sent the recording and the transcript to the PSD and requested that all communication be carried out in writing. Superintendent Hassall was supervising the scoping of the complaint(s) by DS Wilkinson within the PSD. DS Wilkinson sent a report email to Spt Hassall on 23 September 2020. The claimant chased the respondent on 25 September 2020 saying that he was planning to instruct his legal representative to take a statement from PC Devanna. On 29 September DS Wilkinson told the claimant he hoped to be able to get back to him within a few days.

35. On 7 October 2020 an entry on the PSD log labelled "awaiting decision from Constable Devanna" from DS Wilkinson said

I've reviewed the relevant material and discussed the case with Spt Hassall and with Legal Servies and both are happy for me to refer Constable Devanna to the material and the request to allow her to consider agreeing to meet with Mark Otti's solicitor. …….she will consider the request….may take advice from the Federation….will come back to me with a response.

36. DS Wilkinson told the claimant PC Devanna was considering the request. The request for the claimant's full HR file was cancelled. On 7 October the claimant asked

Can you please confirm whether you have recorded any conduct matters under the Police Reform Act 2002 and if so whether you have referred the matter to the IOPC ?

37. DS Wilkinson replied that no conduct matters had been recorded and no referral made to IOPC. The claimant came back to ask why. They agreed to have a recorded telephone conversation in which DS Wilkinson set out why. The claimant sent a further email on 7 October 2020. He made an allegation that PC Devanna had clearly known in 2004-2005 the material he said she disclosed to him in 2012 and failed to *bring this substantive evidence to the attention of the PSU investigation team.* DS Wilkinson replied to the claimant to say that *this does change the situation and it is not appropriate for me to allow her to believe that she is simply a witness for your CCRC application. I will therefore advise her your position is that you are raising a potential conduct matter.*

38. DS Wilkinson wrote to PC Devanna on 8 October 2020 *I no longer feel it is appropriate for you to make yourself available for his solicitor to take a statement from you.*

39. On 13 October DS Wilkinson wrote to the claimant to reassure him that no decision had yet been made about a conduct matter due to lack of information and to make arrangements for the recorded telephone conversation to take place. They spoke on 20 October 2020. The call was recorded, a transcript made and notes sent to the claimant. During the call the claimant said that he was not confident that the respondent would wish to investigate his concerns fully as the outcome would damage

the reputation of the force. The claimant said that PC Devanna had breached standards of honesty and integrity and that Inspector F committed criminal offences of perjury when he mislead the court and perverted the course of justice by removing PNC records from the claimant's application forms in 2000. On 4 November 2020, in response to the call and DS Wilkinson's notes the claimant sent a long written submission to DS Wilkinson. It made no mention of the 2006 claim for race discrimination. DS Wilkinson suggested a further recorded call and agreed to present the claimant's submissions to the Appropriate Authority, that would be the person making the decision as to whether to proceed in misconduct proceedings and or criminal offences against PC Devanna and Officer F.

40. A further recorded call took place, again no mention was made of the 2006 complaint, and there was a long email from DS Wilkinson on 17 November 2020 setting out his thinking on the case and his plans for presentation of all the information to the Appropriate Authority for a decision. The claimant was consulted as to whether any further information needed to go to the Appropriate Authority. The claimant wanted extracts from the evidence of an officer DS Roache, given during the claimant's criminal trial in 2005, to be included. He provided them to DS Wilkinson who agreed to include them. DS Wilkinson submitted the full report for an assessment to the Appropriate Authority and informed the claimant this had been done on 27 November 2020. The report and ancillary paperwork did not refer to the 2006 complaint. The claimant then chased up a response on numerous occasions.

41. On 15 December 2020 DCI Sumner, the Appropriate Authority, told DS Wilkinson that he had considered the report and would not be proceeding with conduct or criminal proceedings against either PC Devanna or Inspector F as there was insufficient evidence on which to proceed. DS Wilkinson rang PC Devanna. She was working from home that day. He told her there would be no formal investigation against her. He told her it was entirely up to her if she wished to assist the claimant or not. She agreed to think about it and let him know her decision. She made an entry in her daybook as follows:

> *16.09 call from D/Sgt Wilkinson PSD about Mark Ottey..cont..He apologised for length of time since last spoken to me explained new DCI in dept – he confirmed that DCI has said that there is no case to answer against me – I am not being investigated however the question remains as to whether I want to assist and provide a statement to Mark Ottey's Solicitor – I said I would take some advice from Fed and get back to them 16.14 call ended*

42. On 21 December 2020 DCI Sumner wrote up his decision on the PSD case management system. He reported

> *I have considered the evidence…and there is currently insufficient evidence to investigate the matter further……Con Devanna is not under suspicion but is a serving officer……it is right and proper to update her in respect of Mr Otti's expectations…..the officer may wish to volunteer information that could assist Mr Otti ….any information provided by the officer will be of her own volition and under the guidance of the police federation representative…should the officer volunteer anything then that may mean that a reassessment is required*

43. On 22 Decemebr 2020 PC Devanna emailed DS Wilkinson to say *in response*

to the request from Mr Otti my answer is No.

44. DS Wilkinson saw the entry made by DCI Sumner on 23 December 2020. On 30 December he wrote to Mr Otti to inform him of the outcomes as follows:

> *Following your request for a statement to be obtained from Constable Dawn Devanna, the officer has responded to say that she does not wish to provide the statement and can't be compelled to do so..*
>
> *You have also suggested that the officer should face disciplinary proceedings and that a retired officer, Officer F, should face criminal proceedings. It has been determined that these are not appropriate courses of action.*

45. The claimant made subsequent enquiries about complaints to the IOPC and DS Wilkinson confirmed on 28 January 2021 that none had been made.

46. On 8 February 2021 the claimant sent a Race Discrimination Questionnaire to the respondent. It contained 44 questions. The respondent did not respond.

47. On 22 March 2021 the claimant brought his tribunal complaint.

48. On 2 August 2022 DCI Sumner had an email exchange with MS KM who was in charge of the archive of personnel and HR files for the respondent. KM was responding to enquires as to the whereabouts of the claimant's personnel / HR file. Ms KM explained that the policy is to not destroy files for 100 years. There were multiple HR files for the claimant. Each time a file was requested a separate carriage fee was incurred so all HR files were collected together in one box on 25 March 2014, to only incur one carriage fee.

49. In 2018 the respondent had undertaken a storage review and destroyed 90 boxes of files according to their retention schedule. The claimant's box of files was destroyed at that time. KM cannot say how that came about, it was in error, and the most likely explanation was that the wrong box number was keyed in and it was wrongly entered on a list for destruction. The box file did not contain all of the claimant's records. A solicitor's office file re employment / race discrimination still exists as do files for a PSU now ACU investigation and an OH medical records file.

Relevant Law

<u>Victimisation – section 27</u>

50. The definition of victimisation appears in section 27 Equality Act 2010:

> **"A person A victimises another person B if A subjects B to a detriment because:**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**

51. A protected act includes:

> **(a) bringing proceedings under this Act;**

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that another person has contravened the Act

52. The Equality Act 2010 does not define detriment. In Derbyshire v St Helens 2007 HL Nueberger LJ cited Brightman J from a 1980 case Ministry of Justice v Jeremiah [1980] ICR 13 in which it was said that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. So, if a reasonable worker takes the view that the treatment is to his detriment and the claimant genuinely believes it to be to his detriment then that is enough to amount to a detriment. The test is not therefore wholly subjective. Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73. In Edinburgh Mela Limited v Purnell 2021 EAT, a whistleblowing complaint, Choudhury P applied the broad construction of detriment used in the Court of Appeal in Jesudason.

53. However, an unjustified sense of grievance will not amount to a detriment, Shamoon v Royal Ulster Constabulary 2003 HL,

54. Detriment can occur post termination of employment Woodward v Abbey National plc [2006] ICR 1436. **There is no time limit on the length of time between the protected act and detriment though the longer it is the harder it will be for a claimant to show a connection between the protected act and the detriment.**

55. Section 27 requires the detriment to be *because* of the protected act. That cannot be the case where there is no evidence that the person who inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail. *Essex County Council v Jarrett EAT 0045/15.* This was confirmed by the Court of Appeal in *Scott v London Borough of Hillingdon 2001 EWCA Civ 2005,* when it upheld the EAT's decision that an unsuccessful job applicant had not been victimised for bringing a race discrimination complaint against a former employer. The Court ruled that knowledge of a protected act is a precondition of a finding of victimisation and that, as there was no positive evidence that the respondent knew of the claimant's previous complaint, there had been no proper basis for the tribunal to infer that the claimant had been victimised.

56. The detriment must be because of the protected act and this is usually formulated to look at the *reason* why the putative discriminator acted. Further, as per CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439 the Employment Tribunal must determine the "reason why" each alleged purported discriminator acted and if a sole decision-maker focus solely on their mental processes.

57. Reason why extends to include not just the sole reason but a reason that has a significant influence, that is to say that it is more than minor or trivial. The need for conscious motivation as a prerequisite for a finding of victimisation was rejected by the House of Lords in *Nagarajan v London Regional Transport 1999 ICR 877, HL.* Victimisation may be 'by reason of' an earlier protected act if the

discriminator *subconsciously* permitted that act to determine or influence his or her treatment of the complainant.

Burden of proof

58. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

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

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

60. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

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

Submissions

62. The Tribunal assisted the claimant to put his submissions specifically on the knowledge and "reason why" points. The respondent made no objection to the support offered to the claimant.

63. The state of knowledge submission was as follows:

a. *the database cascade:* DS Wilkinson did the research / and or Colleague P or Colleague R did the research and informed DS Wilkinson so that DS Wilkinson included in his report to DCI Sumner or reported verbally to DCI Sumner information as to the protected act which DS Wilkinson found out about either directly or from Collegue P or Colleague R's enquiries on the database used by ACU which included, the claimant assumed by way of merger or appropriation, a previous database used by PSU, which previous database he assumed contained an entry relating to his 2006 race discrimination complaint, which he assumed had been put on that database about him after he had left employment in 2005 but when he brought his tribunal claim in or after 2006 and/or

b. *the personnel / HR file conspiracy*: the file which had been requested was delivered and looked at covertly either by DS Wilkinson and or colleague P and or Spt Hassall and the file included information about the 2006 proceedings even though the claimant had left in 2005 and that DS Wilkinson having seen the file or been told its contents by a colleague then shared knowledge of the protected act with his colleagues including Spt Hassall and either DS Wilkinson or Spt Hassall informed DCI Sumner of the protected act. The submission included the claimant's position that the email generated to call off the request for the file was sent to cover up the fact that it had been received and had contained information which the respondent knew would prejudice its position so it contrived to have the officer who had requested it now cancel that request so as to make it look as though it had not seen the file.

64. The claimant submitted that an adverse inference should be drawn from the respondent's failure to respond to his Equality Act Questionnaire and that this failure corroborated his argument that the respondent had known about his protected act and taken steps to thwart him in his efforts to overturn his conviction.

65. On the "reason why" point the claimant's argument evolved during the hearing so that he said that his protected act was not, or might not have been, the reason why PC Devanna declined to help him but she was or might have been coerced or compelled not to help him (by the threat of proceedings against herself) by someone who did know about his protected act and for whom the protected act was the reason why they coerced or compelled PC Devanna.

66. The Employment Judge clarified the position with the claimant so that his submission on this point was formulated as follows:

> What if DCI Sumner or Spt Hassall knew of the protected act and exerted pressure on PC Devanna not to provide the claimant with a statement (for example by threatening to proceed against her in professional standards investigation or criminal proceedings) to the claimant's detriment because he had sued them in 2006. The claimant confirmed that if the tribunal found that PC Devanna had not known about his protected act then that was his submission.

67. The claimant made a number of alternate submissions as to the chronology of events and how he says the coercion or compulsion was evidenced. 1) He submitted that PC Devanna's Daybook had been falsified, that PC Devanna had gone back and inserted an entry into her day book after the event to make it look as though she had been told she would not be proceeded against before she told the respondent she would not provide the claimant with a statement. Whether that false entry was 14.10.20 or 14.12.20 did not matter to his submission. He submitted that the reality is a chronology in which Ms Devanna finds out she is not to face PSD investigation on the day after she declines to support Mr Otti, and this chronology supports his case on coercion. He pointed to the entry on the PSD case management system of 23rd December to suggest that the decision not to proceed against her was recorded *after* her decision communicated by email on 22 December 2020 not to provide him with a statement. Alternately 2) he submitted that whatever the chronology showed his

argument was one of *proximity* and the close proximity of her being told she wasn't to be proceeded against (whenever that was) and her telling the respondent she wouldn't give the claimant a statement were evidence of coercion and a "drop hands deal" having been done.

68. Counsel for the respondent had prepared an opening note. He dealt with the coercion point at closing submission. He submitted that this was not a manipulator type case, the decision makers; PC Devanna and DCI Sumner, were clear in their evidence that they were not influenced by anyone else in making their decisions. Further, counsel submitted that neither DCI Sumner nor Spt Hassall had knowledge of the claimant's protected act and could not therefore have manipulated PC Devanna because of it.

Applying the law to the facts

69. Turning first to the list of issues and the reasoning on the factual findings, allegation 6 was:

The respondent compelled Constable Devanna on around 30 December 2020 to change her mind about providing the witness statement to support the claimant's application to the criminal Case review commission.

This was broken down into the following questions on the List of Issues;

Did Constable Devanna agree to provide a witness statement in support of the claimant's application to the CCRC?

70. PC Devanna spoke to the claimant on a number of occasions in October 2012. He covertly recorded the calls. PC Devanna agreed to provide a statement that might help him to overturn his convictions.

Did Constable Devanna know on or around 30 December 2020 that the claimant had done a protected act?

71. PC Devanna did not know about the protected act prior to commencement of these proceedings. The claimant did not tell her about it during their calls in October 2012. She did not hear about it from DS Wilkinson, DCI Sumner nor Superintendent Hassall whom she had never spoken to. She did not know about it from any document or anyone else at the respondent.

Did Constable Devanna change her mind about providing a statement?

72. PC Devanna began thinking about whether or not to provide a statement in early October 2020 but she was told by PSD that it was not appropriate for her to talk to the claimant's lawyers at that time so she held off making a decision. The Tribunal accepts her oral evidence that she did not give it any thought from 8 October until 15 December 2020.

73. After 15 December when she was told by DSI Wilkinson that there was to be no conduct or criminal proceedings against her and PSD confirmed she was free to make her decision, she was then able to resume thinking about whether or not to provide a statement. Between 15 and 22 December 2020 she decided not to provide a statement to the claimant. She told the respondent on 22 December 2020 and it conveyed the information to the claimant. She had changed her mind from 2012, in 2020.

Did someone motivated by the protected act compel Constable Devanna to change her mind about providing a witness statement?

74. PC Devanna made her own mind up. She was not compelled or coerced by anyone else not to help the claimant. The communication she had from DS Wilkinson was to tell her on 15 December that it was up to her what she did. The Tribunal accepted her oral evidence on this point. It was corroborated by DS Wilkinson's oral evidence and corroborated by the notes DCI Sumner had entered on the PDS case management system. DCI Sumner had written on 21 December 2020 before the claimant communicated her decision:

the officer may wish to volunteer information that could assist Mr Otti ….any information provided by the officer will be of her own volition and under the guidance of the police federation representative…should the officer volunteer anything then that may mean that a reassessment is required

That showed the Tribunal that the respondent, after it had decided not to proceed against her and had told her that, was contemplating a situation in which PC Devanna may choose to support the complainant.

75. The claimant would have the Tribunal believe that the notes were entered not on 21st but on 23rd so as to cover up the "drop hands deal" that had been done. This would require the Tribunal to believe that DCI Sumner had colluded with DS Wilkinson to put those notes on the system *after* PC Devanna had told DS Wilkinson she was not going to provide a statement so as to make it look as though they did not know that she wasn't going to help the claimant when in fact they did. There was no basis in evidence for the Tribunal accepting the claimant's submissions on the coercion point on any version of the chronology of events. The Tribunal accepted the oral evidence of DCI Sumner as to the chronology: he decided on 15th, DS Wilkinson told PC Devanna on the 15th, DCI Sumner made the entries on 21st, PC Devanna decided not to provide the statement between 15th and 22nd and told DS Wilkinson on 22nd, DS Wilkinson read DCI Sumner's policy decision on 23rd.

76. The Tribunal found DS Wilkinson's evidence on the chronology reliable because i) he was able to tell the Tribunal why he had told PC Devanna about the decision straight away on 15th, because he was concerned to alleviate the stress she must have been under and because he recounted ii) that he was at a meeting on 22nd December and came out of that meeting to see her email saying she wasn't going to help the claimant and remembered not looking on the PSD to see DCI Sumner's report until the next day. DS Wilkinson's recollection of the chronology of events was good, it was corroborated by emails at the time and his evidence as to the date of the decision on 15th was also corroborated by the entry in the daybook. PC Devanna recorded the call as having taken place on 15 December 2020.

77. On the claimant's version of events the Tribunal would have to accept that DS Wilkinson in the professional standards department now the ACU had instructed a PC to falsify an entry in a daybook and that she had accepted that instruction then and that she and her senior officers were lying about it to the Tribunal now. Having heard oral evidence from DS Wilkinson and PC Devanna, the Tribunal found no evidence whatsoever of any such instruction nor of any collusion or dishonesty. The Tribunal found the claimant's position wholly incredible.

78. Further, even if PC Devanna had been compelled or coerced, as was alleged by DS Wilkinson or DCI Sumner or Spt Hassall (to whom she had never spoken) none of them had knowledge of the protected act. The respondent's submission on the state of knowledge of DS Wilkinson, DCI Sumner and Spt Hassall, that they did not know of the protected act at the time of the alleged acts of victimisation is accepted.

<u>If Constable Devanna knew about the protected act and had agreed to give a statement then what was the reason why she did not give a statement</u>?

79. PC Devanna did not know about the protected act. The Tribunal accepted her oral evidence that she did not give a statement because the claimant had covertly recorded her and his convictions were more numerous and more serious than he had told her. These two things destroyed her trust in him. PC Devanna told the claimant in response to a question in cross-examination "*Mr Otti you have not said one word of truth to me since the day I met you…you recorded me without telling me and I found that to be a complete violation… I did not know the full facts when I agreed to provide you with a statement in 2012.* The Tribunal found her evidence on this point compelling.

<u>Was the 2006 claim for race discrimination the reason why Constable Devanna did not give a statement in support of the claimant?</u>

80. PC Devanna was not aware of the 2006 race discrimination complaint. She was not manipulated nor coerced by anyone who was. It was not the reason why she did not give a statement. It played no part whatsoever in her reason why she did not give a statement which is set out above.

81. Allegation 7 was:

<u>The respondent refused to record and refer conduct matters against Constable Devanna on around 28 January 2021 to the independent office for police conduct which they are obliged to from being aware of serious operational corruption from the material they had given them</u>.

82. This was DCI Sumner's decision. The Tribunal heard oral evidence from DCI Sumner. He did not know about the 2006 protected act. He was not put under any pressure from Superintendent Hassall or anyone else to reach his decision. The reason why he made his decision was because there was insufficient evidence on which to proceed against her. The Tribunal found his evidence credible as it was corroborated by the entry he made on the case management system on 21 December 2020. He was a convincing witness when he spoke about his role as Appropriate Authority and how he prides himself on acting with independence and integrity in that role. When he acts as Appropriate Authority in professional standards issues his direct

report line is to the Deputy Chief Constable so if for example, as the claimant submitted, Spt Hassall had made it known through DS Wilkinson or directly that he did not want action taken, the rank of Superintendent alone would not act as a persuasive factor on DCI Sumner. He made his decision on the case report before him from DS Wilkinson and no other factors nor people influenced him. There was insufficient evidence to bring conduct or criminal proceedings against PC Devanna, that was his decision and he told Ds Wilkinson about it on 15 December 2020. His evidence was corroborated by DS Wilkinson.

83. Allegation 8 was:

The respondent refused to conduct a criminal investigation into ex-Inspector Formby in misleading the jury about his knowledge of criminal convictions.

84. This was DCI Sumner's decision. The Tribunal heard oral evidence from DCI Sumner. He did not know about the 2006 protected act. He was not put under any pressure from Superintendent Hassall or anyone else to reach his decision. The reason why he made his decision was because there was insufficient evidence on which to proceed against Officer F. DCI Sumner had been made aware of the criminal trial in 2005 by DS Wilkinson's report and had seen, amongst the documents attached to the report which had been agreed with the claimant, the statement of the evidence of Officer F at the criminal trial.

85. The Tribunal found his evidence credible as it was corroborated by the entry he made on the case management system on 21 December 2020. He was a convincing witness when he spoke about his role as Appropriate Authority and how he prides himself on acting with independence and integrity in that role. When he acts as Appropriate Authority in professional standards issues his direct report line is to the Deputy Chief Constable so if for example, as the claimant submitted, Spt Hassall had made it known through DS Wilkinson or directly that he did not want action taken, the rank of Superintendent alone would not act as a persuasive factor on DCI Sumner. He made his decision on the case report before him from DS Wilkinson and no other factors nor people influenced him. There was insufficient evidence to bring conduct or criminal proceedings against Officer F, that was his decision. He entered it in the report on 21 December 2020.

86. Turning now to deal with the legal requirements for a section 27 victimisation complaint that have not been explicitly covered by the list of issues:

There must be a protected act

87. The respondent did not dispute that the claimant bringing race discrimination proceedings in 2006 amounted to a protected act for the purposes of section 27.

88. The act was a long time, 14 years, before the acts of detriment complained of. That meant that there would need to be good evidence to establish a connection or nexus between the protected act and detriments. The protected act was post termination of employment as were the detriments.

Knowledge of the 2006 protected act

89. The claimant was insistent that the respondent knew, firstly because of the "database cascade" argument and secondly because of the personnel / HR file conspiracy, that he had done his protected act.

90. The *database cascade argument*, if the Tribunal was to believe it, required us to accept a number of assumptions 1) that the persons who maintained the PSU database in 2005 /2006 knew that the claimant had brought proceedings 2) that an entry was made on that database to record the proceedings in relation to a *former* employee 3) that the PSU database had been merged into the new ACU database at some time after that date and that the merger had copied across historic entries for former officers 4) that an entry on the database had come to the attention of DS Wilkinson who had chosen not to include it in his report to DCI Sumner, that the entry had been removed from the database after that point and 5) that DS Wilkinson and DCI Sumner had known about his protected act and were lying to the Tribunal.

91. The Tribunal saw the scoping report and entry inventory from the database that it, through DS Wilkinson, had relied on. The claimant argued that he had been denied specific disclosure at an application determined by EJ Benson earlier in this case, of each of the entries on inventory and thereby denied the ability to prove knowledge. The claimant had been granted 24 specific disclosure requests by EJ Benson but had been denied this one. The respondent volunteered at the hearing to provide access to the content of each of the inventory item that is to say to allow us to look at the list of entries and click on each one to see what it said. The Tribunal decided not to do that because it would only reveal what is on the database now and not what was on there in 2020, and would not, in any event preclude the claimant from continuing to argue that entries had been seen and deleted. What mattered was not what the Tribunal might see now, but what had been seen by decision makers at the relevant times. The inventory was in the bundle and the claimant could (and did) cross examine the respondent's witnesses as to what they had seen on the database.

92. The Tribunal weighed in the balance the oral evidence of DS Wilkinson and DCI Sumner and the emails at the time with the oral evidence of the claimant together with his database cascade argument. His argument, that entries on there showed his 2006 complaint, had been seen, deleted and no reference made to them so as to keep DS Wilkinson and DCI Sumner knowledge free was fanciful, not least because the officers who would have had to collude to do that were numerous and could not have known that detriments would occur and a victimisation complaint ensue in which knowledge might be important. The Tribunal preferred the direct oral evidence of the respondent's witnesses on this point to the claimant's submissions.

93. The Tribunal accepted the oral evidence of DS Wilkinson that he had not seen an entry relating to the 2006 complaint, that he had never seen a tribunal complaint logged on the database ever, in all of his research and enquiry in his role in professional standards and that in his view, a tribunal complaint would not be on that database but would be recorded separately somewhere.

94. In relation to the *personnel / HR file conspiracy* the claimant's argument was rejected. DS Wilkinson gave clear and credible evidence corroborated by the contemporaneous emails that the file had been requested, the scoping undertaken, the file no longer needed and the request cancelled. Further, DCI Sumner, in his efforts to explain the destruction, in error, of the claimant's file to this Tribunal produced

emails which showed that a separate legal file existed for the race discrimination complaint. This leant credibility to the respondent's position that a) personnel/ HR file had been destroyed and b) it had not seen the personnel/ HR file and led the tribunal to think that even if it had there may have been no mention of the race discrimination complaint on either the database or the personnel / HR file because, as DS Wilkinson had speculated, a separate file had in fact, existed. By analogy the Tribunal noted that there was also a separate file for Occupational Health reports. That added to the Tribunal's view that the files were kept separately by topic.

95. The arguments above in relation to the database cascade and the personnel HR File conspiracy made serious allegations of dishonesty by senior and long serving officers. The Tribunal found the allegations wholly lacking any credible base in evidence. The Tribunal accepts the respondent's submission that DS Wilkinson, DCI Sumner and PC Devanna did not know of the claimant's 2006 proceedings at the time and that there was no "puppet master" or manipulator controlling events to thwart the claimant by coercing or compelling PC Devanna not to help him.

96. The Tribunal drew no adverse inference from the respondent's decision not to respond to the Equality Act Questionnaire. Having looked at the number and scope of the questions on that Questionnaire, the Tribunal accepts the respondent's position at paragraph 26 of the ET3 Response Form that it was a resource based decision not to respond.

97. The claimant did not meet his burden of proof. He had no evidence that could show that PC Devanna, DS Wilkinson or DCI Sumner, knew of his protected act when PC Devanna decided between 15 and 22 December not to provide the statement and when around 15 December 2020 DCI Sumner decided there was insufficient evidence to proceed against PC Devanna or Officer F.

98. The complaints must fail as the claimant cannot establish knowledge. If knowledge had been established the Tribunal would have gone on to consider detriments. The Tribunal sets out its reasoning on these points so that the claimant can see that even if the respondent had known about his protected act his complaints would have failed for other reasons.

Detriments

99. There was no submission at Tribunal as to whether or not allegations 6,7 and 8 amounted to detriments. Arguably, allegation 6 could be said to be seen by the claimant as something that would make him worse off. A reasonable man trying to overturn a conviction would believe that not getting a statement from someone whose evidence he believed would help him get that conviction overturned would be a detriment. In short, he would be worse off without the statement from PC Devanna. A broad definition of detriment is applied and, if it had been necessary to do so, the Tribunal would have found that allegation 6 amounted to a detriment to the claimant.

100. The tribunal did not need to consider did Allegations 7 and 8, the respondent not proceeding in misconduct and or criminal proceedings against PC Devanna and Officer F, amount to detriments. The Tribunal, if it had had to decide this point, would have decided that they did not. The Tribunal had regard to the Shamoon decision and decided that the claimant's sense of grievance at the internal decision of the

Appropriate Authority not to refer complaints which it had investigated and found unsubstantiated to the IOPC, would have amounted to an unjustified sense of grievance. The decisions were internal matters for the ACU. Even if the Tribunal is wrong about that, the complaints at allegations 6, 7 and 8 would fail on the "reason why" point.

Because of / the reason why

101. Section 27 says there is victimisation where the respondent subjects the claimant to a detriment *because* the claimant did the protected act. Even if the claimant had succeeded on the points above in relation to knowledge and detriment, his complaints would have failed at this point. Mr Jones had prepared an opening note which had been given to the claimant. In opening and closing submission, in order to be clear and helpful to the claimant litigant in person, to his credit, Mr Jones explained the test as set out by the EAT, applying earlier Court of Appeal decisions, in Warburton v Chief Constable of Northamptonshire Police. This is a 2022 case and sets out clearly that the tribunal must ask itself what was the "reason why" and if not one sole reason then did the protected act have a "significant influence" on the outcome. The claimant was aware that this was the test before evidence began and was reminded of it on numerous occasions during his cross examination of the respondent's witnesses.

102. The reason for PC Devanna's decision was that the claimant had covertly recorded her and his convictions were more numerous and more serious than he had told her. These two things destroyed her trust in him. The protected act played no part in the reason why and had no influence on the decision. That complaint must fail. The reason for allegations 7 and 8 were determined above to be that there was insufficient evidence in DCI Sumner's assessment to proceed to either conduct or criminal investigations. The protected act played no part in the reason why and had no influence on the decisions at allegation 7 nor 8.

103. It is notable that during the case the claimant posited alternate reasons for the outcomes at allegations 6,7 and 8. He said that the respondent was motivated to thwart him in his attempts to overturn his conviction and alternately, motivated to protect itself from reputational damage. Although this was put to him in cross examination, and its significance explained in terms of the "reason why" burden of proof, the claimant persisted in saying that respondent must have known of his 2006 protected act, by reason of either the database cascade or the personnel/HR file conspiracy and that it was motivated to thwart him and protect itself. This argument was that it was motivated, not by his race, or his having brought race discrimination proceedings, but generally motivated against him. The claimant did not root this argument in his protected characteristic of race / his previous proceedings protected act. The Tribunal assisted him as a litigant in person in putting that position for him and in considering it as if he had put it himself. For the reasons set out above, it is an argument that could not succeed.

104. The decision of the Tribunal is a unanimous one. The non legal members have asked that these written reasons records that they have never before seen so much patient assistance given by at Tribunal to a litigant in person.

105. The claimant's complaints of victimisation fail.

106. The respondent has indicated an intention to make a costs application. It should do so in writing in accordance with Rule 77, the time will run from the date on which the short form written version of the oral judgment is promulgated.

Employment Judge Aspinall
Date:14 September 2022

WRITTEN REASONS SENT TO THE PARTIES ON

27 September 2022

FOR EMPLOYMENT TRIBUNALS