



EMPLOYMENT TRIBUNALS

Claimant: Mr K Benson

Respondent: Chief Constable of Wiltshire Police

Heard at: Bristol **On:** 6, 7, 8 and 9 February 2023

Before: Employment Judge Christensen

Representation

Claimant: Mr Rogers of Gorvins Solicitors

Respondent: Mr Peacock of Weightmans Solicitors

RESERVED JUDGMENT

The claim for constructive unfair dismissal (Ss95(1)(c) & 98(4)) succeeds. A hearing is listed to determine remedy on 7 June 2023.

The claim for automatic unfair dismissal (S103A) does not succeed and is dismissed.

The claim for detriment (S47B) does not succeed and is dismissed.

The claim for automatic unfair dismissal (S100) does not succeed and is dismissed.

The claim for detriment (S44) does not succeed and is dismissed.

REASONS

The claims, issues and the law

1. The claims (and the statutory provisions under which they are pursued) and issues arising are set out in the Case Management Orders dated 17 March 2022 (EJ Roper) and 17 October 2022 (EJ Self). The claimant made an application to amend his claim and that application was successful to a limited extent as set out in the CMO of 17 October. The issues set out in those two orders have been brought together in one list of issues, relating to liability and which are numbered from 1 to 7.

Preliminary matters

2. The Case Management Order dated 17 October 2022 indicates that this hearing will be conducted before a judge and two lay members. This is

understood to relate to the jurisdictions being extended on 17 October 2022, to include PID detriment as set out in paragraph 4 of that Order. This matter was listed to me without any members. Having discussed this matter with the Regional Employment Judge, I raised this with the parties at beginning of day 1 and asked whether the parties had any objection to me continuing to conduct the case sitting alone. Both parties confirmed they were content for me to do so.

3. During the hearing, the respondent conceded all of the issues as set out Issue 2 regarding the making of one or more qualifying disclosures. I therefore do not determine those issues. The respondent conceded that the claimant made disclosures qualifying for protection in his letter of 16 September 2020 [414] and in the Issue Resolution raised by him on 19 September 2020 [417].
4. I heard evidence from the claimant. For the respondent I heard evidence from Ms Miller who was the claimant's team leader at the relevant time, Mr Owen HR Advisor, Ms Somers Head of Health and Safety for Wiltshire Police and Mr Draper Regional Forensic Co-Ordinator. A bundle was prepared running to 608 pages and one page was added to that during the hearing, namely a sketch of the CSI Suite in Swindon (Gablecross Police Station).

The witnesses

5. In closing submissions Mr Rogers submitted that where conflicts arise between the witnesses that I should prefer the evidence of the claimant. He submitted that the respondent's witnesses obfuscated and were variously evasive and highly selective in memory recall.
6. As an example he highlighted the oral evidence of Ms Somers in which she stated that at the Personal Risk Assessment meeting on 11 September she acknowledged to the claimant that there was an error in the CSI Risk Assessment regarding the placing of floor tape. Such a possibility is not referred to in her witness statement and is not referred to in the minutes of that meeting prepared by the respondent and the claimant. One of the main features of the claimant's case is that the errors in the CSI Risk Assessment, and the respondent's failure to acknowledge them, were relevant to his loss of trust and confidence in the respondent. If such an acknowledgment of an error had been given to the claimant at the time that would be relevant.
7. Ms Somers conceded under cross examination that she was mistaken in saying that such an acknowledgement had been given. She accepted that one had not been given and that the CSI Risk Assessment was inaccurate to state that there were 2m floor markings in the CSI suite.
8. When questioned about other inaccuracies in the CSI Risk Assessment Ms Somers did not accept any further inaccuracies until she had been cross examined with the aid of photographs that the claimant had taken of the CSI suite in August and September 2020. That cross examination resulted in Ms Somers accepting that there were further errors in the CSI Risk Assessment in relation to the use of screens and clear desk policy.

9. In his evidence, Mr Owen accepted in cross examination that parts of the CSI Covid Risk Assessment were demonstrably false. His evidence was that he knew that the claimant had raised concerns about the accuracy of the CSI Risk Assessment and also that he took no steps to investigate those concerns and instead put the concerns through to Health and Safety to address. His oral evidence under cross examination was also that he accepted that by reference to the questions that the claimant had sent in prior to the Case Conference on 9 September, that his response on 8 September by and large did not answer the questions posed by the claimant.
10. Mr Draper gave his evidence last and accepted after observing the other witnesses being cross examined that there were errors in the CSI Risk Assessment that he had completed.
11. From this I am satisfied that the respondent's witnesses were to a degree evasive in their evidence; my notes record lengthy and at times robust cross examination by Mr Rogers and initial resistance from these witnesses prior to their acceptance that errors existed in the CSI Risk Assessment and that the claimant had not received responses to his queries.

Findings of fact

Background

12. The claimant joined Wiltshire Police on 17 March 2008 as a Crime Scene Investigator (CSI). Prior to that he had completed 28 years of service as a Police Officer with Gloucestershire Police.
13. The relevant events took place between March 2020 (first covid lockdown) and 19 March 2021 when the claimant resigned. During that period the claimant was 64 and turned 65 in October 2020. He had the medical conditions of diabetes and hypertension.
14. The claimant's job description as a CSI is at [106]. This sets out that the job purpose is to attend all crime scenes to conduct scientific examinations to identify, record and recover physical and digital forensic evidence and intelligence information. It also sets out that there is additional post scene activity to ensure processing of evidence and intelligence. CSIs are required to participate in an on-call roster, out of hours working and recall to duty to meet operational demand. The claimant was a fractional worker and worked a 50% shift pattern.
15. Part of the claimant's case is that, because he worked at 50%, it was arguably easier to continue to let him work from home after July 2020.
16. The respondent had a CSI suite at Gablecross Police Station in Swindon. It also had a CSI office in Melksham. When the claimant needed to work in an office he worked at the CSI suite in Melksham. CSIs would return to the CSI Suite to process all evidence gathered at a crime scene. The CSI Suite at Gablecross Police station was accessible directly from a car park

rather than through the front entrance of Gablecross Police Station. CSIs also conducted forensic examinations of vehicles at assigned garages.

Policies and procedures

Whistleblowing

17. I was referred to a number of whistleblowing policies in the bundle. These are
18. Wiltshire Police Force Reporting Wrongdoing [311] August 2013. This sets out that the respondent will support staff in raising any concerns about safety in the workplace and will respond to and investigate the concerns.
19. Wiltshire Police Force Reporting Wrongdoing [197]. March 2021 This sets out that the respondent will respond and support staff in raising concerns about any concerns about safety in the workplace and will investigate the concerns raised.
20. Police and Crime Commissioner whistleblowing policy July 2019 [328] This sets out that any matter raised under that procedure will be investigated thoroughly and promptly and the progress of investigation will be reported back to the individual who raises the concern.
21. These procedures are relevant as the claimant made a disclosure qualifying for protection on 16 & 19 September 2020 [414]. His case is that no investigation was carried out and no report was made to him of the outcome of such an investigation.

Issue Resolution

22. The respondent operates a procedure to resolve internal disputes that is referred to as Issue Resolution and Dignity at Work Procedure [114]. It is a grievance procedure.
23. This procedure is relevant as the claimant raised a grievance under it on 19 September 2020 [417]. The outcome of that grievance is contained in a report dated 17 December 2020 [519] and sent to the claimant by HR on 1 February 2022 [544]
24. The procedure sets out [132] that it does not apply where there is a protected disclosure and that the respondent's wrong doing procedures should instead be used.
25. The respondent's case is that the disclosure qualifying for protection that he made on 16 September 2020, was responded to in the outcome report of the claimant's issue resolution.

Performance and Capability Procedure

26. The respondent operates a Performance and Capability Procedure [166]. This procedure is relevant because claimant was written to on 22 October 2020 to call him to a first stage capability meeting under that procedure [465].
27. The capability procedure sets out the distinction between matters which may be properly classified as misconduct and those matters which relate to capability and gives the respondent a wide discretion regarding matters which can be properly classified as capability. At paragraph 9.13 it sets

out some features which may assist in determining whether the issue is properly one of capability. Paragraph 9.2 sets out that matters of capability may be outside the staff member's control.

28. That process sets out that Capability Proceedings will not automatically be suspended in the event of allegations against their supervisors. [173].
29. Under the capability procedure there are 3 stages set out. At the conclusion of the 3rd stage it is stated that the possible outcomes can include; written warning extension, final written warning, dismissal (with or without notice) and gross incapability.
30. The ACAS Code on Disciplinary and Grievance Procedures sets out some principles which are relevant. The claimant referred to these briefly in closing submissions. At paragraph 1 it states that if an employer has a separate capability procedure, performance issues may be addressed under that procedure. It confirms however that the basic principles of fairness set out in the code should still be followed under such a procedure. Paragraph 46 makes reference to overlapping grievance and discipline procedures. This is also relevant on the facts of this case. Although the Capability Procedure used by the respondent is not a discipline procedure in name, it is argued by the claimant that is akin to one and can result in dismissal. It assists therefore to recognise what the Code says in this regard. It sets out at paragraph 46 that where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. In fact, in this case, the grievance (Issue Resolution Procedure) was commenced before the Capability Process, however it nonetheless assists to recognise that under the ACAS Code an employer may suspend one process to deal with the other. It gives managers a discretion.

Classification of vulnerability

31. The parties have agreed that, in line with the government guidance issued, the claimant properly fell within the category of 'clinically vulnerable' but not within the category of 'clinically extremely vulnerable 'CEV'. This latter category was limited to individuals who had been issued with shielding letters. The claimant did not have such a letter but by reference to his medical conditions of diabetes and hypertension was properly classified as clinically vulnerable 'CV'. The relevant government guidance on these categories in terms of working from home or going to a place of work is at [370] The parties agree that this guidance applied to clinically vulnerable people in July 2020 which is when the respondent started to take steps to bring its workforce back into the workplace.

The first lockdown

32. When the first lock down was announced by the government in March 2020, all CSIs were required to work from home. CSIs who were not CV or CEV were deployable from home. CSI vehicles were deployed across the force area and CSIs were required to collect a vehicle and attend crime scenes with suitable PPE. They could then attend the CSI suite in Swindon to process evidence collected at a crime scene but would otherwise not attend the office.

33. For those CSIs who were CV or CEV alternative arrangements were made. The claimant came into this category. They were not deployable from home and were instead given administrative tasks to undertake at home to support the operational needs of CSI.
34. I find that during this period the claimant was not able to carry out his core job function of attending crime scenes and instead undertook various administrative tasks given to him.

Return to work proposals July 2020

35. It is agreed that the government guidance relating to people who are CV and appearing at [370] was applicable at July 2020. This states
36. *If I can work from home: you should work from home. Your employer should help you work from home by discussing home working arrangements, ensuring you have the right equipment, including you in all necessary communications and looking after your physical and mental wellbeing.*
37. *If I cannot work from home: you can go back to work. If you are clinically vulnerable get your employer to make arrangements for you to work safely.*
38. *Clinically vulnerable people are at higher risk of severe illness. Therefore you should take extra care in observing social distancing. Your employer should help you work from home, either in your current role or in alternative role.*
39. *If you are clinically vulnerable (but not extremely clinically vulnerable) and cannot work from home, your employer should offer you the option of the safest available on-site roles, enabling you to stay 2 metres away from others. If you have to spend time within 2 metres of others, employers should carefully assess whether this involves an acceptable level or risk.*
40. In or around July/August 2020 government guidance changed so that CEV workers could be brought back into the work place, provided appropriate health and safety measures were in place. The respondent thereafter started a process of addressing the situation of all of its CV and CEV workers.

Occupational Health Referral and Referral to Force Medical Advisor

41. The claimant was written to by his 1st line Manager, Heidi Miller on 7 July [378]. Ms Miller had started in her first role as a Team Leader in February 2020. This was self-evidently a challenging time for Ms Miller to take on this new role given that it coincided with the start of the covid pandemic.
42. At this stage the claimant had been working from home for about 4 months. She stated "*Wiltshire are in the process of starting to get staff back to operational roles albeit still deploying from home until at least the end of August*". She makes no reference to what measures are to be

taken to get the claimant back safely to operational duties. Mr Benson therefore raised the issue himself in his response and asked about what risk assessment on social distancing etc will take place for those that are CV. At this stage no one had been vaccinated and the claimant had genuine and understandable concerns about returning to the workplace social distancing and exposure to covid, given his status as CV.

43. Ms Miller's initial approach is, in my judgment, relevant as it gives no reassurance to the claimant that she has any understanding of her responsibilities to the claimant as someone who is CV. She says nothing about this at all, notwithstanding the evidence of the Head of Health & Safety in relation to the responsibilities of line managers in getting CV staff back to work.
44. It is the start of conduct by the respondent by reference to which the claimant's ability to have trust and confidence in the respondent's management of his return to the workplace started to be undermined.
45. Her approach is friendly but also casual and does not address the claimant's reasonable concerns and the key issue of ensuring that the claimant as someone who was CV, understood how their vulnerabilities would be safely managed on return. The Head of Health and Safety's evidence (Ms Somers) was that OHU assessments were to be done for all CV staff to approve fit to return to work and that individual risk assessments were also to be completed by line management on CV staff on a one to one basis to support their safe return to work. Notwithstanding this Ms Miller makes no mention of any risk assessments. It is the claimant, rather than his line manager who took the initiative in raising the issue of what risk assessments would be undertaken.
46. Ms Miller's response continues in a casual vein. She states "*we can do an OH referral if you feel that would be a good idea*". Again I consider this relevant in the sense that she does give the claimant any reassurance that she understands her responsibility as his manager, to have taken this initiative herself and says instead that an OH might only be done if the claimant thinks it is a good idea. This conduct continues to undermine the ability of the claimant to have trust in the respondent's return to work plans for him. The Government Guidance at this time is set out above and this placed responsibilities on the respondent, through Ms Miller, to have conducted itself in such a way that gave the claimant confidence that the respondent understood it's responsibilities under that guidance
47. On 9 July [346] Ms Miller completed an OH referral. The proposal at this stage was to return the claimant to full operational duty including the attendance at crime scenes – a core part of the role of CSI. "*We would now like to bring Keith back onto the operational side of his role, this will mean remaining on call from home but with a change to allow him to attend crime scenes. He would be required to deploy from home, collect a vehicle (single crewed) and attend scenes. There may be a limited requirement to work at the CSI office in Swindon at times which has been risk assessed for covid*"

48. That form is sent to HR who confirm that a Personal Risk Assessment will also be undertaken for the claimant.
49. At this stage (July 2020) it was clear to anyone reading that form, including the claimant, that the respondent's plan was to return him to CSI operational duties attending crime scenes. The respondent has presented its case on the basis that the plan had always been a phased return to duties but I reject that possibility as the evidence does not support it. In July 2020 the clear understanding of the claimant and intention of the respondent was that he would be required to return to full operational duties – that is consistent with Ms Miller's request for an OHU to cover that.
50. The OHU referral was also sent to the claimant. He annotated his copy with a number of his concerns including that a Personal Risk Assessment has not been carried out before this referral. He sent these the OH nurse. These included:
- a. How many staff will be allowed in the CSI suite and difficulties with social distancing
 - b. There has been no personal risk assessment
 - c. That the process of return to work has had little or no discussion regarding his welfare, and that it is characterised by get on with it and stop moaning and is being handled unprofessionally and consistent with the ways of the police service in the 1980s and that the claimant's risks are not being taken seriously.
 - d. That the process has considerably reduced the claimant's feelings of wellbeing
51. Pausing here I reflect that in my judgment nothing raised by the claimant is in any sense unreasonable or difficult to address. It is therefore relevant that, even accepting the challenges presented by the pandemic, no one in respondent's origination engaged meaningfully with the claimant and his concerns as CV at this early stage. Had they done perhaps things would have progressed differently but in fact they did not. That they didn't, simply made the claimant more concerned, less confident in his employer and more determined to continue to pursue his concerns.
52. The concerns raised were not addressed by the OH Nurse on 21 July. The consultation did not progress well because of the claimant's dissatisfaction with the OH Nurse's failure to address his concerns. The claimant was told that all of his concerns would instead be provided to and addressed by the Force Medical Advisor.
53. The OH report confirmed that [364] "*Keith is advised that he is able to continue to work from home and be deployed to scenes utilising a single crewed vehicle*". It records that the claimant should wear PPE and follow best practice guidance.
54. The claimant wrote to the OH Nurse on 21 July [355] confirming his concern that the assessment did not address his circumstances and the fact that he was CV and appeared instead to be generic. He asked why actual workplace assessments are not carried out for those that are CV to

comply with Government Guidance, rather than just referring to an environment being covid safe. He asks that these concerns around his personal circumstances be referred to the FMA.

55. The claimant was then referred to the Force Medical Advisor (FMA) for a telephone consultation on 30 July. In that conversation the FMA told the claimant that he was not aware of any concerns or questions that he had raised.
56. The FMA produced a report on 30 July [366] which confirmed "*Keith will be at increased risk of developing severe complications should he contract coronavirus infection. He does not need to shield but is in a risk category where social distancing and hygiene precautions will need to be very strictly observed. He could, therefore return to an office or even a more public environment provided these precautions could be observed*".
57. By the end of July a picture was forming of the claimant starting to lose confidence in the way in which the respondent operated its procedures to return him to work. The process was poorly managed in the first instance by Ms Miller. This caused legitimate concerns and issues to be raised by the claimant which were not addressed. Trust and confidence is further eroded by being told that they would be addressed by the FMA but in fact were not. At this time the anxiety levels around contracting covid were very high. It was the early days of the pandemic, death rates were rising and a vaccination had yet to be developed. In my judgment there was nothing unreasonable in the safety concerns being raised by the claimant
58. At this stage the claimant understood that it was being proposed that he be returned to full operational duty.

Could the claimant work from home?

59. A theme arising in the claimant's case is that because he had *in fact* been working at home from March 2020 that in accordance with government guidance he 'could work from home' and he should continue working from home. Government guidance categorised individuals into those who have jobs that will let them 'work from home' and those that do not. He also argues that because he was fractional it would be easier for the respondent to enable him to continue to work from home.
60. The claimant emailed Mr Owen on 31 July [369] and asked him if he can work from home to enable him to complete an online government questionnaire. Mr Owen responded and confirmed that his full role cannot be done from home. He confirmed he could be deployed from home and could perform admin tasks from home but that the role of a CSI cannot be done from home.
61. Part of the claimant's case is that because he worked a 50% contract it would be easier for him, as a CSI, to continue to work from home understanding only the administrative roles that he had been doing since March.
62. The claimant's witness statement [para 9] sets out that "*it was*

demonstrably the case that I was able to work from home given that I had been doing so for the past 4 months". His witness statement also sets out that the advice received from the results of the questionnaire he completed was ignored. I am satisfied that this is an example of a query from the claimant that was not ignored and was clearly answered by the respondent. That the claimant did not wish to accept the respondent's position in this regard [369] is evidenced in his email to Mr Owen on 31 July [368] in which he ignores Mr Owen's answer and states instead "so effectively I can work from home doing admin tasks".

63. The respondent's position on this is confirmed in the bundle in Mr Owen's response to the claimant at the time and in the evidence of Mr Draper who confirmed that it was possible to accommodate a CSI officer doing a small portion of their work portfolio from home in the circumstances of the early days of the pandemic but that this arrangements was not sustainable in the long term. The key operational part of the role – attending crime scenes – self evidently cannot be carried out if a CSI is working at home and is not deployable to crime scenes.
64. I see no force at all in the claimant's position and accept instead the respondent's position that it was not sustainable or reasonable for the claimant to continue to work from home as a CSI in the long term. It is not consistent with government guidance as I am satisfied that the claimant could not 'work from home'. That he did perform a portion of the normal duties of a CSI, namely administrative tasks only for 4 months, was a proper initial emergency response to the pandemic given his status as CV. That however does not satisfy me that he could 'work from home' in the full sense of his job function. Issues arise on the management by the respondent of his return to an operational role from July onwards but I entirely reject any notion that the headline of what the respondent was seeking to achieve – returning all operational staff to operational duties – was in any sense unreasonable or improper under government guidance or otherwise. Instead I am satisfied that the claimant's pursuit of the possibility that he should continue to work from home in the long term as a CSI tends to indicate an intransigence to accepting the reality of the world of work post-covid.
65. I regard the claimant's position regarding his fractional status and how that could make it easier for him to continue to work from home to also be misguided. It is a matter for management by any employer to determine how to utilise any fractional workers recognising their job description and contractual duties. The respondent's position in this regard is that all CSIs, whether full time or fractional, were required to be deployable to the core task of attending crime scenes and forensic examination thereafter. None of this could be undertaken by a CSI who was working only at home.

Covid Risk assessments – force wide and CSI specific

66. Ms Somers completed a generic risk assessment for the respondent in May 2020 [204]. This sets out control measures that are in place to address hazards for CV and CEV staff. This largely mirrors the Government Guidance in place and already referred to.

67. Mr Draper, Regional Forensic Co-Ordinator and the claimant's second line manager completed a Covid risk assessment for the CSI office in Swindon [242]. Mr Draper was not deployable and was at that time working only from home. He therefore did not attend the CSI offices to complete this assessment and instead completed it from home. He therefore had a limited evidential basis to know that the detail he provided in the Risk Assessment was correct. Mr Draper gave no explanation for this unusual and seemingly casual method of completing a covid risk assessment. It was completed on 4 July 2020.
68. The CSI RA was counter signed by Ms Somers as Head of Health and Safety. Her evidence to me which I accept was that she counter signed it to indicate that she knew it had been done but not to indicate that she was confirming its correctness as she could not check the details of each of the departmental risk assessments. However, that reality would not have been clear to the claimant when he was given a copy of the CSI RA.
69. Even accepting the considerable pressure that will have existed at the time on the police force generally, and on CSI managers specifically, I regard Mr Draper's evidence in relation to the reality of how he completed the CSI Risk Assessment as indicating a degree of complacency regarding the importance of assessing risk in the workplace relating to covid – most particularly for staff who were CV and CEV. I am satisfied that this tends to suggest that his prime focus was very much on getting his CSIs back to work.
70. Considerable damage was done to the claimant's ability to have trust and confidence in his employer and their wish for him to return to operational duties when he became aware of the inaccuracies in the CSI RA.
71. The CSI RA refers to '*minimal number of staff*' working on the premises but does not set a maximum number of staff. The respondent's witnesses have referred to a requirement that no more than two members of staff should be present in the CSI Suite at Swindon. The claimant was unaware of any such measure; he had asked to be told how many members of staff could be present in the CSI Suite. He received no answer to this question. I find that there was no visual covid measure in place (such as a poster on the entry doors in the CSI Suite) for the CSI suite in Swindon that ensured that it was understood that only a maximum of 2 people would be present. Instead the approach of the respondent, confirmed by Ms Somers, was for each member of staff to take personal responsibility to ensure social distancing when in the office. To a degree this is understandable given the challenges of running a police service; however it would not deal with the reasonable concerns of staff who are CV in relation to the government guidance "*if you are clinically vulnerable and cannot work from home, your employer should offer you the option of the safest available on-site roles, enabling you to stay 2m away from others*". Nor indeed does it deal with the significance of the advice of the FMA that the claimant "*is in a risk category where social distancing and hygiene precautions will need to be very strictly observed*".
72. This increased his anxiety regarding the CSI Suite as from his experience

he believed that 7 or 8 people might need to be present there at the same time if there was a major incident. The offices are not large and he had concerns about how he would be able to maintain social distancing.

73. The CSI Risk Assessment was sent to the claimant by Mr Owen on 13 August [372]. It indicated that
- a. Layouts and processes have been reviewed to allow people to work further apart from each other or in a different location.
 - b. Floor tape had been used to help keep staff 2m distant
 - c. That screens have been used to separate people from each other where it was not possible to separate people from each other.
 - d. Workspaces were cleared at the end of each shift.

Claimant attends the CSI Suite in August

74. The claimant visited the CSI Suite on 15 August 2020 to replace some batteries and took photographs. He took further photographs on two further visits to the CSI suite in September 2020 and February 2021. It is these photographs that the respondent's witnesses were taken to in cross examination and by reference to which the witnesses acknowledged the errors in the CSI Risk Assessment.

75. The claimant's existing concerns were now enhanced as it was evident to him that the CSI Risk Assessment he had been sent was inaccurate. There was no tape on the floor, there were no screens between desks and adjacent desks appeared to be operational and in use with personal items on them and jackets hanging on the back of chairs. It appeared that desks were not being cleared down at the end of shifts. This caused further damage to his ability to trust his employer to safely manage him back to work.

Questions raised in correspondence

76. Through July and August the claimant continued to raise his concerns. On 12 August [372] the claimant emailed Mr Owen – *"I will await the replies to my many queries/questions that I have asked since this process has begun"*. Mr Owen responded but did not engage with this concern in his response [372] and instead confirmed that a case conference had been scheduled. In that response he also confirmed that a Personal Risk Assessment would be carried out on return to operational duties and that would look at any adjustments needed for the claimant. It did not however engage with the claimant's particular concern that a Personal Risk Assessment would need to be carried out *before* his return to work. On 13 August [376] in an email to Ms Miller, the claimant confirmed that *"I informed you that I still had not had any proper replies to my queries or questions that I had asked for since the beginning of this process. I had been informed that OH would answer them, they would not and stated that the FMA would, he stated that was not his place it was the organisation's responsibility. I have effectively been going round in circles"*. Ms Miller responded to say everything will be discussed at the case conference.

77. By this stage there had been no indication given to the claimant of any intention to return him to anything other than operational duties attending

crime scenes.

78. On 14 August the claimant sent his union representative, Mr Fuller, a list of questions for replies prior to the case conference. Mr Fuller forwarded those to Mr Owen. [385]. Mr Owen responded to the claimant on 8 September. He accepted in cross examination that by and large his response did not provide answers to the claimant's questions.

Case Conference 9 September

79. Mr Draper, Ms Miller, Ms Somers, Mr Owen were present. The claimant attended with his union representative Mr Fuller. The claimant confirmed his view that the risk assessments that had been carried out were based on an office environment rather than a crime scene. At this stage there had been no indication given to the claimant that a return to operational duty would not involve attendance at a crime scene. It was confirmed to him that individual needs would be considered in the Personal Risk Assessment (PRA). That was scheduled to take place on 11 September. The claimant confirmed his concerns that his needs as CV had been overlooked and the respondent had been ignoring his request for a PRA to be done before his return to operational duties. This concern had been raised by the claimant in early July upon his response to the initial OH assessment [359] but had not been addressed.

Personal Risk Assessment 11 September

80. The PRA was carried out by the claimant's line manager Ms Miller with Ms Somers present to assist.
81. For the first time it was confirmed to the claimant that the plan was a phased return, initially, to limited operational duties that did not include attendance at crime scenes [402]. Those duties would be the examination of mobile phones at the CSI suite in Swindon using the ACESO machine and vehicle examinations at a garage in which very little face to face contact is required. Both the phones and vehicles having been left for 72 hours prior to examination in line with covid regulations. It was confirmed that staff could wear face coverings if they wish and all were provided with a level 1 PPE kit (eye protection, IIR2 masks, apron, hand sanitizer, hazard bag and disinfectant bottle).
82. During this meeting there was an exchange between the claimant and Ms Miller which is recorded in the minutes prepared by the claimant of the meeting. [461] This exchange is consistent with Ms Miller seeming to continue to fail to understand the claimant's concerns, as someone who was CV, regarding covid. She asked the claimant why he thinks he would be highly likely to be exposed to covid if he returned to work. To which the claimant responded that the issue was not that but instead, that *if* exposed the FMA had confirmed that he would be highly likely to become ill. (The FMA report [366] in fact refers to the claimant being at risk of developing severe complications should he contract coronavirus infection and emphasised the importance of adherence to social distancing on return to work) The seeming failure by Ms Miller to understand this fundamental distinction continued to erode the claimant's ability to have trust and confidence in his employer.

83. It was also confirmed that if the initial phase for return was agreed, then further meetings would be needed to discuss and assess the next phase of the return to crime scenes.
84. I am satisfied that by this stage the claimant had raised levels of stress and anxiety and was stressed during this meeting.
85. The claimant considered this PRA to be fundamentally flawed in that it did not comply with HSE guidance to (a) identify what work activity might cause transmission of the virus (b) think about who could be at risk (c) decide how likely it is that someone might be exposed and (d) act to remove the activity or if not possible to remove the risk. He dismissed it as a legitimate PRA. In submissions it was argued that it was generic and based on the views of two people without any proper assessment of risk. I do not accept that that is a correct characterization of the PRA. Ms Miller was the claimant's line manager and had a good understanding of what the work activity of a CSI was and Ms Somers was head of Health & Safety. The minutes of the meeting confirm that they were focused on specific work activities and that there would be no attendance at crime scenes in the initial phase. The PRA focused specifically upon the activities of use of ACESO machine and vehicle examination.
86. The meeting broke down when the subject of eventual return to volume crime and attendance at crime scenes was discussed. The claimant left the meeting to speak with his union representative.
87. It is apparent that by this stage the claimant and respondent were struggling to find a way forward. The claimant had heightened anxiety levels, did not trust the risk measures that the respondent had said it had put in place, and was proposing to put in place to address covid generally and him specifically as CV, would prefer to continue to work from home and was frustrated by the respondent's failures to engage with the questions that he wished to have answered.
88. The respondent was becoming frustrated with the claimant's approach, did not wish to engage with his questions and wished instead to move to a situation in which he returned to his operational role. Mr Draper had suggested to the claimant in the Case Conference that any concerns about failure to adhere to due process or to force policies should be raised by the claimant as a grievance through the Issue Resolution Procedure. A stalemate was developing.

Whatsapp message 16 September

89. The claimant was part of a CSI WhatsApp group called Swindonians. The claimant's concerns about the respondent's approach to covid safety were further heightened on 16 September upon receipt of a message on that group from a colleague. It showed the door to the photo studio in the CSI suite on which there is a poster stating '*keep to max of 1 in this room*'.
90. The colleague sent a photo of the poster on the door with the message

'just for our amusement'. The claimant's line manager Ms Miller responded with two laughing face emoticons. It was considered to be funny because self evidently the photo studio needed two people to enter – one to take the photograph and one to be photographed.

91. This claimant saw no humour in this message and it instead further damaged the trust that he had in the respondent and what he considered to be a disregard of the concerns he had raised regarding social distancing and lack of care by his line manager to covid safety issues for CV people.

92. Proposal for return to work 16 September

93. On the same day as sending the WhatsApp message, Ms Miller wrote to the claimant [413] and sent him a copy of the PRA form confirming the intention for the claimant to have a recuperative return to the CSI suite in Swindon to utilise the ACESO machine on 18 September. She confirmed in her letter that the claimant could utilise her office to undertake this work if that would make him more comfortable.

Claimant makes disclosure qualifying for protection 16 September

94. The claimant responded on the same day [414] asserting that the PRA did not relate to him as an individual and that he perceives he is being rushed back to work in an unprofessional way. He refers to the detrimental impact on his health and that this has not been referred to. He stated his belief that government advice for those who are CV has been ignored and that the office is not covid safe for those who are CV. He sets out that the CSI RA has been completed in error as it refers to there being floor tape on the floor and no screens notwithstanding that desks are less than 2m apart.

95. He set out that covid is a serious and imminent threat to public health and that key areas relating to health and safety have not been completed correctly. He stated *"I reasonably believe that this 'threat' to my health, safety and welfare to be serious and imminent. This has obviously affected the trust, confidence and credibility I have of Wiltshire police and SW forensics management towards health and safety and specifically mine"*. He refers to S44(1)(d) and S100(1)(d) Employment Rights Act.

96. Notwithstanding the concession given that this is a disclosure qualifying for protection under S43(B) and the fact that the respondent's procedures for handling whistleblowing complaints all confirm that they will be investigated and responded to, in fact the respondent did not investigate this complaint and did not provide the claimant with a response to it. The respondent's case is that this was dealt with by Inspector Huggins in his investigation into the claimant's grievance. This is notwithstanding that the Issue Resolution procedure [132] confirms that it should not be used to address whistleblowing complaints. The facts establish that in any event the Issue Resolution procedure does not address the whistleblowing complaint.

97. There is no explanation provided by the respondent for this failure; it caused further damage to the trust and confidence of the claimant in his

employer.

98. In a letter headed 'Return to Work', dated 25 September [447], Mr Owen acknowledged receipt of the letter of 16 September, stated the respondent's position that it had taken proper steps to safeguard the claimant's health and safety, had listened to his concerns and sets out the proposals for his return to operational work with 11 measures in place to reassure him in relation to his safety. That is proposed for 22 October.

99. The claimant responded in a letter of 26 September [450] and confirmed his position that coronavirus was a serious and imminent threat that cannot be fully mitigated and that given the areas of concern raised by him, the claimant held a reasonable belief of an imminent threat of danger as he is CV. The stalemate continued.

Request for Issue Resolution (Grievance) 22 September

100. The claimant submitted an Issue Resolution on 22 September [417+] in which he raised all the concerns that he had regarding his safety on return to operational work and how his concerns about this had been handled by the respondent. This was acknowledged by Ms Woodman in HR on 30 September and the claimant told that the grievance had been allocated to Inspector Huggins.

Capability Process 22 October

101. Having been unsuccessful in achieving its aim of getting the claimant back to operational duties or to attend a case conference and having sent two letters referring to a return to work to the claimant (413 Ms Miller 16 September and 447 Mr Owen 25 September), the respondent decided to utilise the formal capability procedure as a way of breaking the impasse. On 22 October Mr Owen wrote to the claimant [465] *"I am writing to inform you that following your failure to return to the recuperative role at Gablecross Police Station as required for the discharge of your duty we are now required to undertake a formal capability meeting to discuss the support measures proposed to allow you to return to your role"*.

102. The claimant was invited to a Formal Capability Meeting on 2 November. He was told its aim was to identify all reasonable adjustments that the respondent could make to support the claimant in returning to duty in a recuperative manner, and an opportunity for the claimant to raise additional concerns which may be contributing to this matter.

103. In his letter of 27 October [471] the claimant challenged that he has failed to return to a recuperative role; instead he sets out that his failure to return to work are because of breaches of health and safety provisions and he refers again to Ss44 & 100 ERA. He also confirms that he has made a protected disclosure under S43A. He challenged why the respondent is undertaking a formal capability process and how the current situation fitted into 'capability'. He put to Mr Owen that he is fact commencing a disciplinary process. He asserted he was being bullied into returning to his role and that he felt under immense stress and duress and that he was suffering detrimental treatment.

104. Mr Owen responded on 28 October [471] and confirmed that the claimant has declined to attend a second case conference to discuss recuperative return and that the respondent's position is that they have acted reasonably and sought clinical and H&S guidance. He confirmed that the respondent had offered the claimant a return to work in a non-public facing role with a host of further adjustments to put the claimant's well being at the centre of matters. He confirmed again, that the claimant's role as a CSI could not be done from home. He explained that as all efforts to resolve the situation informally had failed the respondent had little option but to commence a formal process under the Managing Capability and Performance Policy.
105. Further correspondence passes between the claimant and Mr Owen. On 30 October [467] Mr Owen wrote to the claimant to confirm that nothing would be gained by further 'toing and froing' of email and that instead the meeting on 2 November was the right place for the claimant and the respondent to set out their respective positions. Mr Owen acknowledged the claimant's comments regarding whistleblowing protection and asserted that the respondent's decision to move to a formal process had nothing to do with the fact that the claimant has raised concerns.
106. Part of the claimant's cases is that the capability process was a punitive process and that it should not have been run alongside the Issue Resolution Process.

Stage 1 Capability Hearing 10 November

107. The meeting took place remotely on the 10th rather than the 2nd November as the claimant reported sick 15 minutes before the first meeting. The claimant was accompanied by his union representative.
108. The claimant sent the respondent a comprehensive list of outstanding issues to the respondent on the morning of the hearing [491]. He confirmed in that email that he believed the capability process to be an unfounded disciplinary process because he has raised H&S concerns. He set out that the process had profoundly impacted his health and well-being and that he was now suffering from stress and anxiety. A second lockdown had commenced on 5 November.
109. During the meeting the claimant confirmed that he had attended the CSI Suite to change batteries and had noted that some of the measures set out in the CSI RA had not been carried out. He asked if he could move to another role that could be done from home and was told that there was no reason for him not to return to work (this is one of the possibilities referred to in the recommendations in the Higgins report). The outcome of the meeting was that the claimant would be issued with a formal support plan similar to the measures previously offered but that he would not be required to attend external garages; only the CSI Suite to undertake ACESO mobile phone examinations.
110. The claimant was written to on 12 November [497] to confirm that he would be issued with a formal support plan for 12 weeks together with

fortnightly meetings to help provide necessary support. He was told that at the end of the 12 week period a review meeting would be held to discuss next steps.

111. The claimant felt unable to return to work, he was suffering from stress and anxiety and saw his GP on 17 November.

Sickness absence starts and second referral to OH

112. The claimant's stress levels caused the respondent to make a referral to OH on 13 November and in which Mr Draper confirmed "*Keith has been working from home since mid-March....since July we have been encouraging a return to his role....Keith has consistently challenged the Risk Assessment for Gablecross... Keith is reporting high levels of stress and anxiety in relation to the impact that the case is having on him, and has reported sick today (13 November), please can we request that an appointment is made to discuss his concerns and any support that can be provided*".

113. The claimant's stress levels resulted in him seeing his GP who issued him with a Statement of Fitness to Work on 17 November. This confirmed the claimant was suffering from stress at work and was thereafter issued with a series of fit notes to cover the period to 31 March 2021 referring to stress at work.

114. The FMA's report [503] dated 17 December following the OH referral confirmed that the claimant's covid age was 78 (63 years + 4 for hypertension +11 for diabetes) and that he is therefore in a 'high' risk category for developing significant complications should he contract coronavirus infection. It confirmed that the claimant can attend a covid secure work environment – or work from home if suitable duties were available.

115. It stated "*I understand that he has been absent from work since the end of November due to stress. He relates this to his perception of how he has been treated by management and by the organization. As you know he is not satisfied that the office environment is sufficiently covid secure. He describes anger about the situation and reduced tolerance, also anxiety when he thinks about the issue. He is not depressed...he is not taking medications for psychological reasons; in my opinion they are not indicated*".

116. The report confirmed that the claimant can return to a covid secure work environment or work from home if suitable duties were available. It confirmed "*he states that he no longer has trust and confidence in the organization and is therefore undecided about whether he would return to work even if he was satisfied with workplace precautions taken to minimise coronavirus transmission*".

Claimant's report to Health & Safety Executive

117. The claimant made a complaint to the Health and Safety Executive (HSE) in November relating to the CSI RA. This caused the HSE to email Ms Miller on 10 November to notify her of the complaint [485] and to

request an explanation of the control measures in place for Covid including “*how you have organised your workplace to ensure workers are either time-sequence or spatially segregated (please include photographs)*”.

118. The letter to Ms Miller referred to a complaint regarding the site of Gablecross Police Station. Ms Miller forwarded the letter to Mr Draper, Mr Owen and Ms Somers. She commented “*Just received this, I’m assuming it has come from Mr Benson*”. There are several departments within Gablecross Police Station, each one having completed its own departmental assessment of risk for covid.
119. By now the respondent had a clear understanding that part of the claimant’s concern and complaint about its CSI RA (and his safety within those premises as someone who is CV) was that it was inaccurate in a number of regards, including that that there were no screens between desks and no tape on the floor and no clear desk policy although the RA states these measures are in place.
120. Part of the claimant’s case is that the response provided by Ms Somers to the HSE was disingenuous in that Ms Somers chose to send the HSE in response, photographs of a number of areas of Gablecross Police Station (including where tape markings had been placed at entry points), but that none are provided of the CSI Suite.
121. Ms Somers’s position on this is that she was simply responding to what the HSE had asked her to respond to – namely measures in place at the site of Gablecross Police Station and that she did not assume that the complaint related to the CSI Suite or that it had come from the claimant. Her position is that she sent photos of the entrance to Gablecross Police Station showing tape markings and various posters indicating 2m distancing and limits on numbers that could enter. Ms Somers position is that she had further correspondence with the HSE regarding this complaint but that correspondence has not been disclosed and is not in the bundle.
122. It is relevant in my judgement, in addressing the claimant’s position regarding the potential disingenuous nature of Ms Somer’s response to the HSE, to note that when responding to the HSE Ms Somers sent them *photographs* of general public areas of Gablecross Police Station but also specifically the RA for the CSI Suite but for no other departments at Gablecross Police Station. I do not accept Ms Somer’s reasoning in this regard as the fact that she sent the CSI RA but no other for Gablecross Police Station and yet no photos of the CSI suite is unexplained. It is also relevant in my judgment that the CSI Suite is not accessed through the public entrance to Gablecross Police Station and instead directly from the car park. It tends to indicate that Ms Somers may not have given the HSE a complete picture of the complaint that she understood them to be dealing with. However, without sight of the various exchanges between her and the HSE in relation to this matter I can reach no conclusion on this issue.

123. In terms of damage to trust and confidence for the claimant the significance is that the HSE sent him copies of the photos that Ms Somers had sent to them. On the basis that this appears to be part of the HSE procedures from the emails in the bundle to the claimant from HSE [507 + 512] I regard it as proper to conclude that the Head of Health and Safety for the respondent would have known that this could happen. The receipt of those photographs caused further damage to the claimant's trust and confidence in the respondent. He was now concerned that the respondent was not being straightforward with the HSE in relation to his concerns.
124. The claimant was written to by HSE on 7 January and told that they were satisfied with the response of the respondent to the complaint and the covid safety measures in place.

Outcome of Issue Resolution

125. Inspector Huggins completed his report on 17 December [519]. After chasing HR for a copy of the report on 17 January 2021, the claimant was sent a copy on 1 February by HR and told that this closed this stage of the Issue Resolution. The claimant wrote on 5 February to ask what the next stage in the process was. Inspector Huggins replied, keeping Ms Woodman on the cc line indicating that he anticipated that HR would be able to assist him with his query. The claimant received no further response from HR to assist with his query.
126. Inspector Huggins's report is fulsome. It set out the respective positions of the claimant and the respondent. It stated "*In high level summary it is my overarching consideration that I cannot progress or resolve this issue resolution. In my view this appears to be a case where both parties are holding firm in their respective corporate and individually held views. Namely: 1. Wiltshire Police retain the firm view that they have instigated all relevant covid secure steps and that Keith should return to his role with mitigation support in place 2. Keith retains the firm view that Wiltshire Police have failed to ensure his safety, and that he is invoking his rights as an employee to refuse to return to an unsafe working environment*".
127. Inspector Huggins's report stated "*I have however considered Keith's questions as above and I do believe that a small number of recommendations should be considered as outlined in the below section of this report. I also share Keith's concern around the completion of an Office Covid secure risk assessment. I do accept that it was completed at a time of great unknown, however if a risk assessment indicates that something has been done (such as tape) – it is important to ensure that this is the case and is correct*".
128. He sets out 5 recommended next steps.
- a. Further OHU/FME review to establish if Keith is suitable for medical redeployment. He sets out that since the last review there has been a material change in circumstances as Keith is now signed off sick with a mental health condition. He states this needs further consideration. "*This should lead to a detailed finding as to whether*

Keith should be considered for medical redeployment into a 'working from home' role or indeed whether he is fit to continue his role as a frontline CSI".

- b. A further and in-depth risk assessment should be considered for the office working – independent of the one already completed by Mr Draper.
- c. Consideration should be given to mediation to explore possibilities for a longer term working relationship and reconcile any differences
- d. A full Personal Risk Assessment should be conducted with Keith considering every task the respondent wishes him to complete
- e. Keith should be encouraged to fully engage with the personal risk assessment.

129. The contents of the report encouraged the claimant to believe that his concerns were being taken seriously and that something would finally be done to address them, it restored a degree of trust in the respondent. He expected action to be taken by reference to the recommendations contained within it. He expected to hear from HR as advised by Inspector Huggins [542]. However he heard nothing further from the respondent – whether from HR or his line management - regarding the report generally or the recommendations within it specifically. The respondent in fact took no steps to explore the recommendations made by Inspector Huggins either internally or with the claimant. Instead they were seemingly ignored. The respondent's only explanation for this is that the claimant was on sick leave. However in cross examination both Mr Draper and Mr Owen accepted that this did not create a bar to exploring those possibilities with the claimant.

130. The claimant heard nothing further from the respondent until a letter of 16 March from Mr Cooper who had taken over from Mr Draper in January 2021. Mr Cooper wrote to introduce himself given the claimant's impending to return to work. He stated "*moving forward I would like to see your positive return to work place as soon as possible and note that you are due to return in April...please let me reassure you that I am completely open to any conversation about your return to work and if there is anything you feel I could address do not hesitate to make contact*".

131. Mr Cooper makes no reference to the existence of, the contents of or the recommendations in Inspector Huggins's report.

132. It is the failure by the respondent to have communicated anything to the claimant in relation to Inspector Huggins's report in terms of their response to his recommendations that was the final straw for the claimant. This added something to the already damaged duty of trust and confidence and was in fact fatal to its continuance. Once it was clear to the claimant that the recommendations would not be discussed to return him to work, the fine thread of trust that had continued to exist broke.

Final Straw

133. The claimant considered this letter from Mr Cooper as the final straw and he resigned on 19 March. He concluded from the letter from Mr Cooper that the respondent had no intention of ever dealing with his

concerns in a serious and professional manner, that there was to be no response to the recommendations in Inspector Huggins's report and that his ability to have trust and confidence in his employer was completely destroyed.

134. The claimant had been told by Mr Owen in his letter of 25 September that he wanted to ensure barriers to the claimant's return to work were removed. The claimant had been told by Mr Owen in his letter of 22 October that the respondent wished to explore measures to allow the claimant to return to work and adjustments to support the claimant back to work and to let the claimant raise his concerns. The claimant was told by Mr Cooper on 16 March that he is open to any conversation about your return to work and anything that he (Mr Cooper) can address to get the claimant back to work. By the time Mr Cooper wrote his letter the Huggins report had been issued acknowledging legitimacy in some of the claimant's concern on the CSI RA and containing recommendations to be considered by the respondent, all focused on a return to work. Notwithstanding these assurances of being open to any possibility of getting the claimant back to work, Mr Cooper says nothing at all about the Huggins recommendations.

135. Until receipt of Mr Cooper's letter, the claimant continued to hope that the focus of the respondent was, as stated by Mr Owen to remove barriers and support him back to work and that the Huggins recommendations may be a way of achieving that aim.

Resignation letter 19 March 2021 [549]

136. The resignation letter runs to 4 ½ pages and sets out the detail of the conduct of the respondent that caused him to resign. It is a fulsome letter of resignation. I do not recite the detail here having addressed the various incidents referred to in my findings of fact.

137. The letter concluded

138. *"My support during this whole process has been virtually non-existent. The FMA referrals were not for my welfare but for the return to work drive.....My medical conditions, vulnerabilities and mental health have not been a consideration in this process by any of the parties concerned, apart from, as stated, Inspector Huggins who carried out the Issue Resolution process.....I feel I have been badly let down by the organisation, especially after a life time of service".*

139. *"I now consider that my position as a CSI within the Wiltshire Police to be untenable and the detriments and breaches of contract have affected and eroded any mutual trust, confidence and credibility I have of the Wiltshire Police, the Crime Scene Investigation Department and SW Forensics. As stated above I consider myself to have been constructively dismissed".*

Submissions and The Law

140. The relevant statutory provisions are set out in the CMOs of EJ

Roper and EJ Self. By reference to the issues arising under each head of claim the statutory provisions are identified from the Employment Rights Act

- a. 95(1)(c) & S98(4) ordinary constructive unfair dismissal
- b. S103A automatic unfair dismissal
- c. S47B detriment
- d. Ss 44 and 100
- e. S100 dismissal
- f. S44 detriment

141. The **respondent** has provided some written submissions setting out what it argues are the salient facts in relation to the issues to be determined. I was able to read these and then they were augmented briefly orally. I do not refer to them in any detail here but instead do so where they are relevant in my determination of the issues.

142. The respondent provided a print out of a number of decided cases that engaged the statutory provisions in the context of the covid pandemic. All but one of the cases referred to in the print out are first instance Employment Tribunal cases. They all of course turn on their particular facts and I do not regard them as of any particular assistance in my determination of the issues before me. I determine these on the basis of the facts of this case.

143. As an example I refer to the case of *Bryan-v-Landmarc Support Services ET/2502158/20* which both parties referred me to. The claimant in that case was also CV but not CEV; she was required by her employer to return to work one week out of seven even though a risk assessment had yet to be carried out. Most of her tasks could be carried out from home. The claimant raised a grievance and did not attend work – a disciplinary process then followed. Her grievance hearing, grievance appeal and two disciplinary hearings were resolved against her. She was then signed off with stress and anxiety and resigned. Her claims for constructive unfair dismissal, automatic unfair dismissal (S100) and S44 detriment succeeded. I do not derive any assistance from how the ET decided this case because it turns on its particular facts. There are some similarities to the instant case – but also some dissimilarities.

144. I was also referred to a Court of Appeal authority *Rogers-v-Leeds Laser Cutting [2022] EWCA Civ 1659*. The claimant had messaged his manager to state that he would be staying away from work until the lockdown eased because he was worried about infecting his vulnerable children (a baby and a child with sickle-cell anaemia) with Covid. A month later he was dismissed. He brought claims under S100(1)(d) and (e). He did not have sufficient service to claim ordinary unfair dismissal. The S100(1)(e) claim fell away at the EAT.

145. The tribunal held that the claimant had not established a reasonable belief in a serious and imminent workplace danger. The EAT and Court of Appeal upheld that determination on the facts. The Court of Appeal held the tribunal had been entitled to find that the claimant did not

believe that there were circumstances of imminent danger in his workplace and that any such belief would not have been reasonable. It set out a 5 step approach to determining claims brought under S100(1)(d)

- i. Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so
- ii. Was that belief reasonable? If so
- iii. Could they reasonably have averted that danger? If not
- iv. Did they leave or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so
- v. Was that the reason (or principal reason) for the dismissal?

146. An issue was raised orally in relation to S100(1)(c). The respondent submitted that the claimant was at a workplace that did have representative of employee's safety or a safety committee and yet did not bring his concerns to the attention of such a person or committee. The claimant has submitted on this point that Sarah Somers was such a person.

147. The respondent submitted orally that there is a higher threshold for S100(1)(d) (serious and imminent danger) than for S100(1)(c) (harmful or potentially harmful to health or safety)

148. The respondent's headline submissions relating to the claims are set out between paragraphs 103 and 125 of its written submissions.

149. The **claimant** made oral submissions of which I have taken a note. I do not recite them here but instead refer to them where they are relevant in determining the issues.

Determination of issues

Constructive Unfair Dismissal (S95(1)(c) and 98(4))

150. In my judgment the findings establish that the respondent's conduct was such that that it was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent and the respondent had no reasonable and proper cause for doing so. S95(1)(c)

151. Although I recognise the difficult circumstances of the pandemic and the challenges of operating a police service and CSI operation in that environment this does not explain the catalogue of conduct by the employer through Ms Miller, Mr Owen, Mr Draper, Ms Somers and Mr Cooper that from July 2020 to March 2021.

152. There is continuum of a theme of failing to engage with the claimant's concerns and issues regarding social distancing given his status as CV and his safety upon return to work such that he was able to have trust and confidence in his employer. I am satisfied that his concerns were genuine and that he was entitled to hold those concerns given his status as CV but also recognising that the pandemic caused many

different reactions in different people and that for some, their sense of fear was more heightened than others. The respondent seemed to block its ears to his concerns even though it is apparent that the claimant was right from the outset to argue that there were errors in the CSI RA. This caused the impasse that is recognised in the report of Inspector Huggins. It is impossible to know and speculation does not assist as it is not relevant to the issues in this case; but it is possible to imagine that a simple acknowledgment of that error early on may have assisted. Ms Somers initially told me in her evidence that she had acknowledged that error in the CSI RA but then retreated from that position under cross examination and accepted so such acknowledgement had been given. Mr Draper made it crystal clear to the claimant that if the he wished to continue to pursue his concerns he needed to do so through an Issue Resolution – his focus was to get the claimant back to some sort of operational function. Even when that process of Issue Resolution came up with some seemingly sensible and reasonable recommendations to get the claimant back to work they also were ignored. The respondent has provided no good reason for not engaging with these recommendations.

153. Even accepting, as I do, that there was no proper basis to support the claimant's position regarding being able to 'work from home' or that as a fractional worker it was easier for him to work from home as a CSI or that the PRA conducted on 11 September was wholly illegitimate; that does not detract in any sense from the incremental damage to trust and confidence that was brought about by the conduct of the respondent as set out in my findings.

154. It started with Ms Miller's casual and seemingly uninformed approach to risk assessment upon her initial approach to get him back to work. It continued with the OH nurse deflecting his questions to the FMA and then not being addressed by the FMA. It continued with the claimant's visit to the CSI offices in August and realising there were errors in the CSI RA that were relevant to social distancing in the office. It continued with the respondent not acknowledging those errors and Mr Owen's failure to fully answer his questions through August and into September. It continued with the receipt of the WhatsApp message and receipt of the photos that had been sent to the HSE. It continued with there being no investigation into nor response to his disclosure qualifying for protection. It continued through to there being no response in any sense to the recommendations made by Inspector Huggins.

155. I turn now to consider the particular matters cited in the list of issues which refers to the items in pages 12 & 13 of the case details in the ET1. I determine those issues in the following way.

1.1.1

156. The respondent failed to complete a suitable and sufficient risk of the CSI complex. Mr Draper completed this CSI RA from home and did not attend the CSI complex to check the detail he had included in the RA. This failure to take care with the assessment of risk is unexplained. As submitted by the claimant, it was inaccurate in relation to floor tape, screens and clean desk policy. Once the claimant became aware of the

errors this caused significant damage to the claimant's ability to trust his employer, by reference to the measures in place to safely return him to work. It tended to indicate a degree of complacency as even when faced with the reality that parts of that assessment were wrong during the process of endeavouring to return the claimant to the workplace, and Mr Draper knowing that he had completed it from home without attending the premises, no acknowledgment was given to the claimant of any error. The respondent's witnesses also struggled to acknowledge the errors during evidence in this tribunal and did so only after fairly lengthy and robust cross examination by the claimant's representative. Although this conduct at the tribunal does not impact on the claimant's ability to have had trust and confidence in the respondent at the time, I record it as it is consistent with the respondent's attitude to this whilst the claimant was employed by them.

157. The respondent has submitted that screens were not considered necessary for the CSI department but that misses the point, being that the CSI RA said that screens *had* been fitted. With the floor tape the respondent submitted that Ms Somers would have put floor tape down in advance of the claimant's return to work. That too however misses the point regarding the significance of the inaccuracy on the face of the RA and the impact of that inaccuracy and the respondent's failure to acknowledge it to the claimant.

158. The respondent has also submitted that it was proposed that the claimant undertake a two phase return. Although that became latterly correct, that does not reflect the original intention of the respondent and again misses the significance of the impact on the claimant in understanding (from July to September) that the respondent was intending to return him operational duties including attendance at crime scenes.

159. The respondent has submitted that it was the intention that there would never be more than 2 members of staff in the CSI suite at any one time. My findings do not support this being in any sense clear to the claimant and it also inconsistent with the CSI RA which does not state this; instead and in response to the question "*is there a plan in place for the minimum number of people needed on site to operate safely and effectively?*", the RA refers only to 'minimal' number of staff working on the premises.

1.1.2

160. Neither Mr Draper nor Ms Somers checked that the details that had been included in the CSI RA completed by Mr Draper were correct. Mr Draper completed the CSI RA whilst at home and the details were not checked by Ms Somers. As the claimant submits, it was demonstrably inaccurate by reference to floor markings, screens between desks and clear desk policy. When the claimant became aware of these inaccuracies it caused significant damage to his ability to trust his employer for the same reasons as set out above.

161. The respondent has submitted and I accept that the pandemic brought many difficult challenges for employers. I also consider it relevant

that the pandemic brought significant and real fears for many individuals regarding their safety at work. The respondent has submitted that given the context of such an unprecedented situation, if mistakes were made care should be taken before taking an overly critical view. My approach is not to seek to take a critical view of either party regarding the relevant events but instead to make findings on what happened and then in relation to the conduct of the employer, to gauge whether it has behaved in a way that was likely to damage trust and confidence and whether the employer had reasonable and just cause for doing so.

1.1.3

162. My findings establish a consistent pattern of the respondent not fully responding to, acknowledging or recognising legitimacy in the concerns and complaints raised by the claimant and instead ignoring some of them or diverting them elsewhere. In his report Inspector Huggins reports an impasse in terms of getting the claimant back to work but he also acknowledges that there is some legitimacy in the claimant's concerns regarding the accuracy of the risk assessment. Even when faced with the contents of this report the respondent did nothing to acknowledge to the claimant that there was any legitimacy in his original concerns on the CSI RA, nor indeed did it take any steps to explore or respond to the recommendations within it. It is instead seemingly ignored.

163. The respondent submits and I accept that the respondent put in place a formal support plan on 12 November with a comprehensive list of measures in place for a return to work. This support plan did not however address the particular concerns already raised by the claimant that were instead being addressed as part of the Issue Resolution process. By this stage the respondent's wish to return the claimant to operational duties, and the claimant's stated concerns about health and safety were running down different tracks.

1.1.4

164. The respondent accepts that the claimant made protected disclosures in September 2020. Its procedures for handling whistleblowing allegations all require the respondent to investigate and respond. There was a complete failure by the respondent in this regard. Although it argued that Inspector Huggins report addressed these I find that it did not. Even had it, that would be inconsistent with the respondent's own procedures that set out the Issue Resolution should not address whistleblowing allegations.

1.1.5

165. I am not satisfied that there was a failure to comply with Government guidance in relation to clinically vulnerable staff on the initial return to work. I reject the claimant's submission that because the claimant had in fact worked at home for 4 months that it was common sense that this established that he could work from home. I also reject the claimant's submission that because the claimant was on 50% contract that it was common sense that he could be more gainfully employed at home than a full time CSI.

166. The claimant did not come within the definition of someone who could work from home as he could not undertake his core function as a CSI from home. Instead he was someone who could not work from home but was CV. The Government guidance indicated that for someone in that category the employer should offer the safest on-site role ensuring 2m distancing from others. There are criticisms to made of the respondent in terms of the arrangements made to ensure 2m distancing for the claimant but in my judgment this is not correctly characterised as a failure to follow Government guidance.

167. I also reject the claimant's submission that the respondent failed to follow its own Generic RA [206]. This largely mirrored the Government guidance and changed over time as circumstances relating to the pandemic and guidance evolved. Any changes to that policy were not seen by the claimant and therefore could not have impacted on his ability to have trust and confidence in his employer at the time.

1.1.6

168. I reject the submission from the claimant that the decision to commence the capability process was causally connected with the claimant having made disclosures qualifying for protection. Although chronologically one followed the other the findings of fact do not support such a possibility.

169. In my judgement and based upon my findings, by the time capability proceedings were commenced, the respondent had already closed its ears to the various safety concerns raised by the claimant. That the claimant chose to label those in his letter of 16 September as assertions of a statutory right and disclosures qualifying for protection did not, on the basis of my findings, have any impact on the respondent. They continued to fail to engage with those concerns and focus instead on measures to get the claimant back to work. Mr Draper suggested that the claimant address those concerns through Issue Resolution. Even after the production of the report and recommendations of the Issue Resolution investigator, the respondent continued to ignore the matters raised by Inspector Huggins. In this sense their approach of ignoring the problems raised is consistent through the continuum of the relevant events and are not influenced by the fact of the claimant asserting that he was making a disclosure qualifying for protection or seeking statutory protection.

170. In my judgment it is wrong to characterise the capability proceedings, as the claimant does, as being punitive in nature. They clearly are not punitive in nature according to the policy and are aimed at being supportive whilst recognising that they can cover many different situations. Nor were they operated in fact as a punitive measure but instead as a management response to the respondent's inability to find a way of getting the claimant back to operational work. That the policy might result in the sanction of dismissal does not in my judgment mean that they are punitive in nature. Instead that is a measure available to an employer to enable them to manage the process to a certain outcome, that could include dismissal if all other options fail.

171. The respondent went some way in the process to offering the

claimant adjustments and supportive measures to return to work. However due to its failure to engage with the claimant and to have recognised or addressed the claimant's underlying anxiety in the early stages or beyond, about the safety of the workplace and his concern about being able to socially distance in the office or at a crime scene the claimant's ability to trust his employer in this regard was damaged. This is recognised in the FMA report in December 2020 which records the claimant's psychological distress and his difficulties in trusting the respondent regarding precautions to protect him at work. He became stressed and anxious and was signed off work shortly after the capability hearing. This is also recognised in Inspector Huggins report which suggests a number of measures to restore trust.

172. My judgment is that the conduct of the respondent in commencing capability proceedings was not in itself conduct that was likely to damage trust and confidence. The respondent was, in my judgment reasonably entitled to utilise such a process to manage the impasse. However its conduct in then operating the process, so that it entirely separated it from the process that was considering his concerns did cause damage to trust and confidence. This is because the Issue Resolution Process found legitimacy in some of the claimant's concerns and made sensible recommendations that were aimed at restoring trust and confidence such that the claimant could be returned to work. It only became apparent to the claimant that the process of returning him to operational duties had paid no heed to anything in the Issue Resolution report when Mr Cooper wrote to him in March regarding a return to work.

1.1.7

173. The significance of this issue is by reference to the impact on trust and confidence upon the claimant and whether the respondent had proper cause for its conduct. The impact on the claimant was learning that the respondent had sent the HSE photographs that did not relate to the CSI Suite.

174. By reference to the issue before me I do not reach a conclusion that there was dishonesty in what the respondent did or that they provided false images. I am however satisfied, as my findings indicate, that the actions of Ms Somers were not straightforward and are not fully explained by her. Her evidence was that she did not know who the complaint was from but I am also satisfied that she strongly suspected that it was from the claimant. That is consistent with her decision to send the HSE the CSI RA. Her evidence was that she had further correspondence with the HSE regarding this matter and in relation to the CSI suite. That correspondence has not however been disclosed.

175. Ms Somers has endeavoured to argue that she was responding to a complaint about Gablecross Police Station. On the face of the email from HSE that is correct. She argued that on that basis, she provided photographs of the public entrance to Gablecross Police. However that does not explain why she chose to send the CSI RA to the HSE – rather than any of the other departments at Gablecross Police Station. Without more, the information sent to the HSE would tend to indicate that the

photographs related to the area for which she had sent the CSI RA.

176. The claimant submits that it is inexplicable why Ms Somers sent the HSE a RA of one area and photos of an unrelated area. There is force in this submission as Ms Somers was not able to assist me with the reasons that she took this course of action.

177. It is proper to conclude that Ms Somers would have understood that the photos she sent of the general areas of Gablecross Police Station, may be provided to the claimant by the HSE to resolve his complaint, if he was the originator of the complaint to HSE. I am satisfied that this is conduct which was likely to damage the trust and confidence of the claimant in the respondent. It lay at the very heart of the claimant's concerns regarding his safety at work.

1.1.8

178. The submissions of the respondent in relation to this issue focus on failure by the claimant to take any action in relation to the recommendations. See paragraphs 98 and 101. I do not accept that the responsibility for progressing matters in this regard lay in any sense with the claimant. It was for the respondent to manage their response to this report and it is significant that although the claimant asked HR what the next step was when he was sent a copy, he never received any response even to that query.

179. I repeat here, what I set out in my findings. Upon receipt of the report the claimant was encouraged to believe that his concerns were being taken seriously and that something would finally be done to address them, it restored a degree of trust in the respondent. He expected the recommendations to be actioned. He expected to hear from HR as advised by Inspector Huggins [542]. However he heard nothing further from the respondent – whether from HR or his line management - regarding the report generally or the recommendations within it specifically. The respondent in fact took no steps to explore the recommendations made by Inspector Huggins either internally or with the claimant. Instead they were seemingly ignored. The respondent's only explanation for this is that the claimant was on sick leave. However in cross examination both Mr Draper and Mr Owen accepted that this did not create a bar to exploring those possibilities with the claimant.

180. The claimant submits that the failure to act on the recommendations in Inspector Huggins's report is inexcusable. There is force in this submission and I also consider it relevant that it is unexplained.

1.2.1 Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent?

181. By reference to my findings and the determination of the 8 issues above I am satisfied that the respondent behaved in a way that was likely

to destroy or seriously damage the trust and confidence between the claimant and the respondent. My judgment is that the conduct of the respondent was not calculated to do so; however looked at in the entirety of my findings, my judgment is that it was likely to do so and in fact did do so.

182. There was a thin thread of trust that continued to exist after the claimant went on sick leave, once the capability process had commenced. That thread hung on the respondent's response to the Issue Resolution.

1.2.2 Whether the respondent had reasonable and proper cause for doing so.

183. Even accepting, as I do, the challenges created by the pandemic, my judgment is that the respondent did not have proper cause for its conduct. That the claimant was persistent and determined in his pursuit of his health and safety concerns, that the claimant had a degree of unreasonable expectations of being able to continue to work from home as a CSI are issues to be managed by the respondent and do not in my judgment provide reasonable or proper cause for the approach adopted by the respondent in relation to the legitimate concerns raised by the claimant. The Huggins report seeks to address these issues with focused and sensible recommendations but is seemingly ignored by the respondent. There is no proper cause advanced for this failure.

1.3 Did the claimant resign because of the breach? The tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract at an end.

184. On the facts the claimant resigned when he realised that the respondent was seeking to bring him back to work after a period of sickness absence, without any consideration or acknowledgment of the recommendations made in the Huggins report. This was, as the claimant argues the final straw. The detailed reasoning behind his decision to resign at that point is set out in his resignation letter.

185. I do not accept the submission made by the respondent that the claimant was not prepared to contemplate any form of return to operational work irrespective of the support measure put in place. The claimant was a long standing public servant with a strong ethos or right and wrong, whose ability to trust his employer to return him to a place of work that was safe for him as CV during the pandemic, was damaged by the respondent's response to the claimant's concerns and failure to acknowledge the errors in the CSI RA performed by Mr Draper.

186. The claimant remained hopeful that the Issue Resolution report would finally address and resolve his concerns such that his trust could be restored. His evidence was, and I accept it that upon receipt of that report *"I was for the first time in the entire process encouraged to believe that my concerns were being taken seriously and that something would finally be done to address them"*. His resignation letter states *"there were many recommendations made by Insp Huggins within the Issue Resolution report to be considered and actioned by the Wiltshire Police. I had expected a reply to the report but to date I have not received any*

communication from my management of HR in regard to any of these areas....the lack of any reply to date or any progress with regard to the identified recommendations on the Issue Resolution report prior to any return to work adds to the breakdown of mutual trust and confidence I have of the organisation. I deem this to be a final straw, this being in combination with the other repudiatory breaches of contract I have illustrated”.

187. My judgement is that the claimant resigned because of this final straw which finally destroyed the claimant’s ability to have trust in his employer such that he could remain employed. The final straw added something to the erosion of trust and confidence that had already taken place.

1.4 Did the claimant delay before resigning and therefore affirm the contract.

188. The facts establish a period of about 4 months during which the claimant was unfit to work because of stress at work from November 2020 to March 2021. Matters are effectively suspended during this period and pending the outcome of the Issue Resolution report from Inspector Huggins. There was no delay by the claimant in determining that he would resign. He had hoped that his return to work would be done in a way that reflected the recommendations in the Huggins report. He acted promptly following receipt of his letter from Mr Cooper as from that he properly understood that the respondent intended to pay no heed to the recommendations in the Huggins report.

189. I do not accept the submission of the respondent that the claimant had waived earlier breaches. The facts do not support such a possibility.

1.5 Was the dismissal otherwise fair within the meaning of S98(4)

190. I have not been satisfied that it was otherwise fair as submitted by the claimant.

191. The claim for constructive unfair dismissal succeeds.

3. Dismissal (S103A)

192. The parties agree that under this head of claim I should consider the reasons for the conduct of the employer. Was the employer’s repudiatory breach of contract because the claimant had made disclosures qualifying for protection?

193. The respondent submits the conduct of the respondent is not explained by the fact that the claimant made the disclosures. Instead, on the claimant’s own case there were a series of repudiatory breaches of which the majority took place prior to or were unconnected with the protected disclosures.

194. The claimant submits that the key decision maker Mr Draper regarded the CSI RA as a box ticking exercise to get people back to work. He did not attend the premises to complete the detail on the CSI RA and

had no real interest in safety concerns at work generally nor specifically in the ones raised by the claimant. This, submits the claimant, is supported by Mr Draper's telling the claimant that if he wished to continue to advance his safety worries he should do so through Issue Resolution and that Mr Draper instead pressed on to a Capability Process. The claimant submits that this was disciplinary in nature and was commenced and continued in the face of the claimant having made disclosures qualifying for protection.

195. The facts do not support a conclusion that the conduct of the respondent is explained by the claimant having made disclosures qualifying for protection. Instead they indicate that the respondent closed its mind in the early stages (from July) to the possibility that there was legitimacy in the claimant's concerns and certainly well before the claimant made disclosures qualifying for protection in September. Their focus was returning the claimant to operational work. That attitude continued once the claimant made the disclosures qualifying for protection and is the reason why the Capability Procedure was used by Mr Draper. The respondent had already closed its mind to the concerns raised by the claimant. That attitude continued once they received Inspector Huggins report. There seems no proper reason to conclude that the fact that the claimant made disclosures qualifying for protection had any impact at all on the respondent and this is supported by the fact that it failed to address them through their whistleblowing procedures or at all.

196. I therefore prefer the position argued for by the respondent. This part of the claim does not succeed.

4. Detriment S47B

4.1 Did the respondent subject the claimant to an unwarranted capability process and continue the same from 22 October 2020?

197. The claimant submits that this process was punitive and disciplinary and was materially influenced by disclosures qualifying for protection made in September 2020.

198. The facts do not support that the decision to commence the Capability Process was in any sense influenced by the fact of the making of the protected disclosures. The facts instead support that the decision was a the continuation of an ongoing approach by the respondent of not giving legitimacy to the claimant's ongoing safety concerns to achieve their objective of returning him to operational duties.

199. The process was not punitive or disciplinary, it was instead a procedure properly available to the respondent to move things forward. It created a plan to return the claimant to work with a number of supportive measures in place. These were never implemented as the claimant then started a period of sick leave caused by stress at work as he continued to be concerned that his underlying concerns had not been addressed. However on its face, it was not an unwarranted procedure. The ACAS Code recognises that grievance and capability procedures may overlap and it gives managers a wide discretion to consider how to manage that overlap. That the respondent determined to address the issues of endeavouring to get the claimant back to work by hiving his grievance off

to another procedure is not, on its face, unreasonable. However it was the conduct of the respondent in moving to get the claimant back to work in March without paying any heed to the outcome of the grievance procedure that ultimately caused irreparable damage to trust and confidence.

4.2 & 4.3 By doing so did it subject the claimant to detriment/was it done on the ground that he had made the protected disclosure?

200. My judgment is that it did not for the reasons set out above.

201. This part of the claim does not succeed.

5. Health and Safety (S44(1)(c) &(d) and S100(1)(c) &(d))

S44(1)(c) & S100(1)(c)

202. Was the claimant an employer at a place of work where (i) there was no representative or safety committee or (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means? He brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

203. The respondent argues that these provisions are not engaged because the claimant was an employee at a place of work where there was a representative and safety committee for these purposes and did not raise his concerns through either route. The claimant argues that they are engaged as the claimant raised his concerns with the Head of Health & Safety on 9 and 11 September.

204. I have not been referred to any case law that might guide me in addressing these opposing submissions.

205. I prefer the position argued for by the claimant as it would seem counter-intuitive to deny an employee protection under this section once they had reasonably brought their concerns to their employer's Head of Health and Safety during the early days of a pandemic.

206. On that basis I am satisfied that the preconditions to protection from detriment and dismissal are engaged.

S44(1)(d) & S100(1)(d)

207. In circumstances of danger which an employee reasonably believed to be serious and imminent and which he could not reasonably be expected to avert, he refused to return to his place of work or any dangerous part of his place of work.

208. The parties have referred me to the Court of Appeal case of *Rodgers-v-Leeds Laser Cutting [2022] EWCA Civ 1659*. This sets out a 5 stage test to determine whether any belief regarding serious and imminent danger was reasonable.

209. Did the employee believe that there were circumstances of serious and imminent danger at the workplace? By reference to a return to work in the CSI suite, my primary position on this is that I find that the claimant did

not hold such a belief. My determination of this issue is influenced by the fact that the claimant voluntarily chose, under no instruction from the respondent, to attend the CSI suite on 3 occasions – August, September 2020 and February 2021. The first two of these was before any vaccination was available. His reason for doing this was to collect batteries. If the claimant had really believed that there was a serious and imminent danger present at the CSI suite I am satisfied that he would not have done this. He could not have known how many other people might have been present in the CSI suite and as his primary concern was to ensure social distancing his decision to attend the suite is incompatible with a belief in serious in imminent danger. There are many other ways that he could have equipped himself with batteries and this action is simply inconsistent with holding that particular belief.

210. Was the belief reasonable? If I am wrong in my primary position and the correct analysis is that the claimant really did hold that belief I would determine that such a belief was not reasonable because it is inconsistent with his actions.

211. Could they reasonably have averted the danger? To the extent that needs addressing on the facts of this case it is relevant that his decision to attend the CSI suite was a voluntary one and not one done on instruction by his employer.

212. Did they refuse to return to work because of the perceived serious and imminent danger? Although I am satisfied that the claimant refused to return to work because of concerns regarding health and safety at work I am not satisfied that those concerns meet the threshold to satisfy the particular language in the statute for the reasons set out.

213. Was that the reason for dismissal? I return to consider this in issue 6.

214. On this basis I am satisfied that the precondition to protection from detriment and dismissal are not engaged.

6. Dismissal S100

215. My approach to this part of the claim relies upon similar reasoning to that adopted in relation to the claim under S103A. On the basis of my determination of issue 5, the claimant is protected from dismissal under S100.

216. The claimant properly submits that he repeatedly raised health and safety concerns about returning to work. The facts support this. However the facts also support that the conduct of the respondent is not explained by the fact of raising those concerns. Instead the facts support that the respondent closed its ears to there being legitimacy in his concerns and the fact of raising them does not therefore appear to influence or explain the respondent's conduct. The respondent's conduct is instead explained by its desire to restore its full operational function as a police service during the pandemic.

217. This part of the claim does not succeed.

7. Detriment

Did the respondent subject the claimant to an unwarranted capability

process and continue the same from 22 October?

218. On the basis of my determination of issue 5 the claimant is protected from detriment under S44.

219. For the same reasons set out above, my judgment is that the capability process was not unwarranted. The respondent was reasonably entitled to use this process to address the situation that existed. For the same reasons as set out above I am satisfied that the use of this process did not subject the claimant to a detriment and that in any event, the decision to use that process was not done on the ground that the claimant had raised health and safety concerns.

Employment Judge Christensen
Date: 27 February 2023

Judgment & reasons sent to the Parties on 10 March 2023

For the Tribunal Office