



# EMPLOYMENT TRIBUNALS

**Heard at:** Croydon (by video) **On:** 20 to 23 May 2024

**Claimant:** Mr Robert Turner

**Respondent:** National Crime Agency

**Before:** Employment Judge E Fowell

**Representation:**

**Claimant** In person

**Respondent** Mr Robert Moretto of counsel

## JUDGMENT

The complaint of constructive dismissal is dismissed.

## REASONS

### Introduction

1. These written reasons are provided at the request of Mr Turner following oral reasons given at the hearing. The request for written reasons was made on 29 May but due to an oversight was only forwarded to me on 9 July 2024.
2. By way of background, Mr Turner resigned on 14 May 2021, bringing to an end his career as a Financial Investigator. His last few years of service were marred by a decision of the Proceeds of Crime Centre, his regulatory body, to revoke his licence. They seem to have made an example of him for failing to keep his training records up to date. All attempts to overturn this decision, in which his managers played an active part, were unsuccessful. He had a period of several months off sick with stress in the summer of 2019, then raised a grievance. That was not resolved until January 2021, largely because of Covid. Ultimately, various supportive recommendations were made but it was felt that a decision of this sort could not simply be overturned by his managers in the National Crime Agency (NCA) even

though the Proceeds of Crime Centre is part of that Agency. Mr Turner appealed that decision and was off sick again for several months. When the appeal outcome came, on 12 May 2021, the position was unchanged and two days later he resigned.

3. In those two days there was a further development. After years of insistence that Mr Turner's accreditation was permanently revoked, the Proceeds of Crime Centre decided that those in his position could reapply for accreditation, subject to any further training that might be required. Oddly perhaps, this belated recognition that there should be some avenue of redress was identified as a final straw in his resignation letter.
4. There is no doubt that Mr Turner was highly regarded: a few months after he left he was awarded a formal commendation from the Director General, described as a fantastic achievement, for his work on one particular operation, Operation Telefoto, to be presented to him at a national awards ceremony.
5. He brings a single claim, that he was constructively dismissed. Constructive dismissal is not a term used in the Employment Rights Act 1996, but section 95(1) gives the legal definition of a dismissal, and it includes where:
  - (c) ... the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
6. So there have to be circumstances justifying the employee in downing tools and walking out. In legal terms, there has to be a fundamental breach of contract by the employer. In cases of constructive dismissal that usually means a breach of what is known as the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 that happens where an employer conducts itself:

"... without reasonable and proper cause, conducts itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence".
7. Or as Wilkinson J. put it in **Woods v WM Car S(P) Ltd** [1981] ICR 666, whether

"... the employer's conduct as a whole ... is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

### **Procedure and evidence**

8. In addressing that question I heard evidence from Mr Turner, and on behalf of the National Crime Agency from:
  - (a) Mr John Rushton, now retired, the Regulator who first took the decision to suspend Mr Turner's accreditation;

- (b) Mr Thomas Barford, Operations Manager, and now a Grade 2 Senior Officer, who was Mr Turner's line manager from December 2018;
  - (c) Mr Mark Kerr, Senior Investigating Officer, who investigated an allegation that Mr Turner was carrying out regulated activities after his suspension;
  - (d) Mr Gary Cathcart, Head of Financial Investigation, who was in overall charge of the Complex Financial Crime Team (CFCT), to which Mr Turner's substantive post was assigned;
  - (e) Mr Dominic Muga, Operations Manager at the CFCT, now a Regional Financial Investigations Manager, who was Mr Turner's nominal line manager at the CFCT from December 2019;
  - (f) Mr Gerry McLean, Regional Head of Investigations (Scotland and Northern Ireland), who handled with Mr Turner's grievance about the loss of his accreditation;
  - (g) Mrs Laura Gill MBE, Head of UKFIU Operations, who dealt with Mr Turner's appeal; and
  - (h) Mr Vincent O'Brien, who was in overall charge of the Proceeds of Crime Centre at the time (now in a more senior role) and who took the eventual decision to allow applications for re-accreditation.
9. There was relatively little disagreement over the facts of the case. Indeed there was a good deal of sympathy and mutual respect shown during the hearing between Mr Turner and the respondent's witnesses. Questions to those witnesses were completed on the second day of the hearing, Mr Turner's evidence having concluded on day one.
10. There was also a bundle of 940 pages. Having considered this evidence and the submissions on each side, I make the following findings of fact.

### **Findings of Fact**

11. Mr Turner began his career in financial investigation in October 2000 having previously worked in banking, so unlike many of his colleagues he did not have a police background. In that time the role changed considerably. The earliest contract we have for him is from 2006, issued by the Serious and Organised Crime Agency, and it contains no mention of any regulatory requirements. When the National Crime Agency was formed in October 2013 he transferred to them. A letter at that time explains that he was now a civil servant, with corresponding terms and conditions, and was subject the Civil Service Code and to other policies and procedures to be found on the intranet from time to time.

12. This was a Grade 4 or G4 role, roughly the equivalent of a police sergeant. Above that are G3, G2 and then G1 roles, followed by Deputy Director level.
13. Financial investigation became an increasingly complex and regulated activity over those years, and an explanation of those changing structures in place is to be found in an independent review of the Proceeds of Crime Centre, commissioned by the Home Office in 2019 and carried out by Liverpool John Moore's University. The National Crime Agency did not agree with all aspects of the report but the introductory section and the recommendations have been published and the opening sections are as follows:

#### **"INTRODUCTION**

It is important to recognise from the outset that financial investigation is overseen in a way that is different to any other aspect of criminal investigation. Section 3 of the Proceeds of Crime Act 2002 (POCA) (as amended, 7/10/2013), requires the Director General of the National Crime National Crime Agency (NCA) to provide a system for the accreditation of financial investigators (FIs), which includes provisions for monitoring their performance and for withdrawing accreditation from any FI who contravenes or fails to comply with any condition of their accreditation. Furthermore, the National Crime Agency is required to make provision for training in financial investigation and the operation of POCA (Section 3(7)). They are fulfilled on the NCA's behalf by its Proceeds of Crime Centre (PoCC).

This fundamental requirement has been established in POCA since its inception, with the function transferring to different organisations as part of organisational change and wider system structure reforms. Initially, identified as the Centre of Excellence of the Asset Recovery National Crime Agency (ARA) (which once bore the same statutory responsibilities held by the NCA today); PoCC moved to the National Policing Improvement National Crime Agency (NPIA), which assumed those responsibilities in 2008 until 2013 when (as a by-product of that National Crime Agency's metamorphosis into the College of Policing) it relinquished it to the NCA. PoCC has remained within the NCA since then, and in that time was housed in four different directorates until, on 1st April 2020, PoCC moved to the newly formed National Economic Crime Centre (NECC).

When PoCC was created, it was recognised as representing a core UK law enforcement capability in terms of financial investigation. The Centre received significant 'pump-priming' investment from the Home Office. ...

In that context, PoCC is a success story but it is one which requires qualification. Though its international reputation remains high (anecdotally, the UK's centralised systems of financial investigation and asset recovery are envied by nations that lack the institutional understanding of demand and capability they can bring), overall funding has reduced, the challenge of resourcing has increased and concerns about its current ability to effectively deliver its training and accreditation functions has come under increasing scrutiny. In this evaluation, we collected data from stakeholders and practitioners. We heard lots of support for PoCC's staff but rather

less for the institution and its services. We believe that both require significant change and have outlined a pathway to reform in this report.

### **PoCC'S PURPOSE AND STATUTORY RESPONSIBILITIES**

PoCC's statutory responsibilities are clear but its purpose, its mission, is rather more opaque. Ostensibly, the Centre has an extraordinary degree of independence and control; fulfilling a statutory duty under the Proceeds of Crime Act 2002 (POCA) to provide FI training and accreditation systems. We say ostensibly because, as we noted earlier, the statute makes it clear that the NCA, and not PoCC, bears statutory responsibility for those functions. For all practical purposes, PoCC controls the training and accreditation systems that allow the NCA to meet its legal obligations. For its part, there is evidence that the NCA has extended an exceptional degree of latitude to PoCC to shape those systems as it sees fit. The NCA iteration of PoCC has determined course content, modes of delivery and also decided upon the standards that financial investigation professionals must achieve and maintain to merit the 'accredited' label that essentially confers their licence to practice.

... Arguably, the PoCC's national role, remit and independence are not always universally understood by the wider NCA. Both boundaries and lines of responsibility between the two, are blurred. We believe that PoCC is struggling to serve three masters; the Home Office (by virtue of its perceived mandate under POCA), the FI community, and the NCA as employer, paymaster and holder of the statutory duty enshrined in POCA. Hitherto, neither the NCA nor the Home Office seems to have been able to settle on what it wants from the Centre or how increasing criticism of it and its services from the FI community should best be met. Hence the Home Office's commissioning of this evaluation, which in our view is timely.

In modern times, vision and mission statements are common currency. They describe, respectively, where an organisation wants to get to and what it needs to do to get there. They can be valuable organisational statements, serving as a guide for the creation of objectives and goals in the organisation, providing a roadmap for its staff and a useful source of information for its customers and other interested 'outsiders'. As we can find no record of the PoCC having a clear vision or mission statement we have assessed its purpose against the statutory commitment to provide systems of training and accreditation for FIs as set out in Section 3 of POCA.

Notably, POCA does not describe the form such activities should take nor make any reference to regulation. However, PoCC staff employed in the provision of training and/or in carrying out the accreditation role now bear the title 'regulator'. We believe that the use of that term seems to claim a level of authority for the work that the legislators never intended. We believe that redesignation of PoCC regulators as 'trainers', 'accreditors', 'performance managers' or even as 'compliance officers' would more accurately reflect their responsibilities under POCA and go some way to ameliorating concerns about the directive nature of their relationship with FIs.

14. This was of course a report on the position of the Proceeds of Crime Centre at the time (2020) and many of the recommendations have since been taken on board.

However, it is useful in explaining the role of the Centre, its statutory basis and the internal tension that exists between it as an independent regulator and the rest of the National Crime Agency. It also explains the tension between its role as a regulator and as a training provider, i.e. of the balance between carrot and stick in ensuring appropriate standards. And finally, the report indicates that there was some dissatisfaction with its work and approach among Financial Investigators.

15. A key issue in this case is over the significance of accreditation, or the loss of accreditation. What is clear is that the practical impact of withdrawal is less significant than its personal or emotional significance, and for the holder's status within the organisation. Accredited FI status allows the holder to carry out work under the Proceeds of Crime Act, i.e. tracing and confiscating assets following a conviction. Much of the work of the National Crime Agency, however, is involved in investigating economic crimes in order to secure a conviction, so is pre-trial work.
16. Financial Investigators do not just work for the National Crime Agency however. The regulatory framework applies to a host of organisations including other police forces and regulatory bodies like HMRC, Financial Conduct Authority, even the Environment Agency.
17. POCA allows a Financial Investigator at any of these organisations, among other things, to make applications to banks to get information about the accounts of persons of interest, using what is known as a production order. This is made to the court but staff at the bank in question also have access to the Financial Investigation Support System – FISS – and can check if the person making the request is authorised to do so.
18. The National Crime Agency has a policy on the requirements for accreditation, entitled *Registration, Accreditation and Monitoring* [153]. According to this, the Proceeds of Crime Centre requires evidence to be uploaded onto the FISS system every year to show that a Financial Investigator has carried out this and other POCA tasks. FISS also gives access to training modules, which can include things like a monthly quiz. For someone regularly working on POCA work, the requirements are not at all difficult. They simply need to upload evidence periodically to show that they are doing the required tasks, such as applying for production orders, and that any other training requirements are in date. Mr Turner referred to them repeatedly as tick boxes.
19. From 2015 onwards Mr Turner was seconded to one particular operation, Operation Kanji. This was a complex hedge fund fraud which resulted in the convictions of several foreign nationals in 2021. Work is still continuing on the proceeds of those crimes, but it is agreed that Mr Turner did not need his accreditation from the Proceeds of Crime Centre for his work on that case. Nor was there any need for any production orders, because he was investigating crimes rather than tracing the proceeds, and in any event the focus of the operation was international rather than

domestic. In fact, he did not need to use any particular POCA powers. That made it more difficult to keep his accreditation up to date since he would have to go out of his way to carry out the required tasks. But it was still worth doing and it was expected that he should do so: he might of course need these powers in future – it would be surprising if he would go through the rest of his career without doing so – and it was also valuable for other reasons. It afforded him membership or full membership of the FI community; it indicated that he was able to carry out the full range of tasks he might be called on to perform; and his job title, at all times, was Financial Investigator.

### *The loss of accreditation*

20. On 16 February 2018 Mr Turner had an e-mail reminder that his re-accreditation was due soon [181]. It came from one of the regulators, Mr Rushton, one of the witnesses. However, he overlooked it, and on 23 March Mr Rushton emailed again to inform him that his FISS account was suspended forthwith [184]. He stated:

“If you wish to have your account reinstated you can appeal to Dave Craze, the accreditation manager who is copied in. This must be in writing supported by your line manager.”

21. (I should mention that Mr Craze, who was employed at Grade 3, one level above Mr Turner, passed away in 2021.) Mr Turner wrote back to Mr Rushton on 27 March [185] to apologise, explaining that he had been working from home due to health issues and that the case he was working on (Operation Kanji) was at a very busy stage, but said he was happy to agree an action plan if necessary to sort things out.
22. From Mr Rushton’s point of view he had made his decision and it was final, subject to any appeal to Mr Craze, supported by his line manager, a Mr John Entwisle. So, he made no response, not even to say that this would not do.
23. Mr Turner set about providing the necessary evidence. He found a colleague who needed to raise a production order and she let him do it so that he could use it for his accreditation. But he could not get onto FISS to show what he had done. So he wrote to Mr Rushton to ask how he should record it [191]. Mr Rushton’s reply was to repeat that reinstatement of the account required the support of his line manager and must be sent to Mr Craze for consideration.
24. It was not clear to Mr Turner whether he has simply lost access to FISS or whether he had lost his accreditation, and if so whether this was a temporary hitch or something more serious. However, on 9 April, Mr Entwisle wrote to Mr Craze [194] to request that he be reinstated. It was a relatively informal email, as might be expected for two members of staff at the same level, and in it he too stressed how busy Mr Turner had been on his current case. He said that Mr Turner he had not been required to do any POCA work on this long-running case but retained all his

skills and abilities and had been using production orders and some other POCA on Mr Entwisle's behalf for work outside that case. He ended:

"Please can you consider reinstatement of his accreditation. It is difficult to get FIs to work on dedicated frauds even though the NCA requires them to work on such. Some flexibility around this issue would be appreciated."

25. Mr Craze replied directly to Mr Turner rather than to Mr Entwisle. He did so on 5 June, nearly two months later, and in more formal terms, noting that Mr Turner could have applied to suspend his accreditation while he was working on this fraud case and that this was not the first time he had been in such difficulty. He had in the past been subject to a suspension, had needed a workplace assessment and had had to be reminded to submit evidence to keep himself up to date. Further, he noted that Mr Turner had gone ahead and made a production order after the date on which his accreditation had been terminated. Consequently, he wrote:

"These circumstances speak for themselves and as such I am not allowing your appeal with your accreditation now permanently withdrawn."

26. That, as far as Mr Craze was concerned, was the end of the process. A decision had been made, the right of appeal had been exercised and the decision was final. However it took some time for that position to sink in. Mr Entwistle wrote back on 5 June [198] to say:

"I understand your decision and the rationale. Pragmatically the NCA still needs Rob to work as a Financial Investigator. What do I need to do in order to get Rob's accreditation status back. If you let me know what is required we will progress it."

27. Mr Craze responded:

"I cannot add anything further to my statement below. Rob has had his accreditation withdrawn permanently as he over a period of years contravened or failed to comply with conditions subject to which he was accredited."

28. This did at least make the position clear. Mr Entwisle replied on 7 June [210] to say:

"It cannot be the case that his accreditation is removed and cannot ever be reinstated. The NCA needs him to be an AFI. In order for him to become an AFI again he must recommence the AFI process. ...

There must be some compromise here that gives PoCC what they need to fulfil their duties and doesn't cost the NCA unnecessary expense [in retraining]."

29. Mr Turner's emails to Mr Entwisle at about this time showed that he was shocked and upset at this turn of events, and anxious for a resolution. On 11 June [214] Mr Entwisle escalated it to his line manager, Ms Kim Kitney (G2), referring to it as a sledgehammer approach. She asked him to prepare a business case for reinstatement [227] presumably with the intention that this would be passed up the



management chain for a decision. No one seemed to know what to do for the best and so things dragged on during July and into August 2018, when Ms Tracy Gupwell took over as Mr Turner's line manager. She also took up the cudgels on his behalf, and spoke to Mr Craze about the situation on 28th. Afterwards she wrote to him [238] thanking him for his candour and letting him know that she intended to flag it to her G1, Mr Alsop, stating:

"I feel that decisions now have to be made around, what I see as an untenable position, regarding Rob continuing to work as a financial investigator within the NCA."

30. But Mr Craze reiterated his position the next day [241] emphasising how little time was needed to upload the required evidence and what he saw as historic leniency with Mr Turner.
31. Ms Kitney did escalate the matter to Mr Hislop on 30 August setting out two options: either to write to PoCC seeking a final extension given Mr Turner's health issues at the time of the decision, or to displace him from his current role. This reflected her view that:

"The role occupied by Rob, requires FI accreditation, this would not be optional, but a managed move."

32. Mr Hislop's view, based in part on the chronology provided by Mr Craze, was that option 2 was preferable, i.e. to move Mr Turner to another role [260]. It does not seem to have been considered feasible for him to remain on Operation Kanji as things stood.

### *Disciplinary proceedings*

33. At about the same time, a concern arose about the fact that Mr Turner had applied for the production order in early April, at a time when his accreditation had been withdrawn. Did that therefore mean that the production order had been obtained illegally? It is not quite clear from the correspondence whether the concern arose with Ms Gupwell or Mr Craze but she contacted the NCA's Professional Standards Unit for advice on 13 September [272]. A severity assessment was then carried out, and it was considered that Mr Turner might have perjured himself whilst making the application. Consequently, and to compound his difficulties, Mr Turner was told on 19 September that he was to be investigated for gross misconduct, with Mr Mark Kerr as the appointed investigator [274].
34. It is unnecessary to go into the details of that investigation since it forms no part of the agreed list of issues, save to say that Mr Kerr concluded that there was no case to answer; the original communication from Mr Rushton did not make clear that Mr Turner's accreditation was being withdrawn rather than his access to FISS. That outcome was made known to Mr Turner in December 2018 [366].

35. By then Mr Turner had had another change of line manager, this time to Mr Thomas Barford, another of the respondent's witnesses. They seem to have a good working relationship or friendship and Mr Barford was supportive throughout.
36. Throughout this time Mr Turner had been working from a branch office in Calder, West Yorkshire. The prospect of losing his accreditation had been stressful for him. After four weeks working from home in the summer of 2018 he was signed off by his GP until 13 August [232]. He was then off again for almost all of October with work-related stress [322], no doubt because of the disciplinary proceedings. When those proceedings came to an end he carried on as before, working on Operation Kanji. No steps were taken to move him to a different role, as previously proposed by Mr Hislop.
37. In November 2018 the Home Office published its own review of the role of the Financial Investigator role [340] and under the heading Accreditation [337] it recorded:
- “About half of the FIs reported concerns around maintaining their accreditation. These concerns seemed to be exacerbated by uncertainty around the processes by which their accreditation is maintained.”
38. Further:
- “An FI could therefore be at risk of losing their accreditation if they undertake investigations that do not require them to make investigative orders under POCA. One of the FIs reported that different FIs in their organisation were linked to different investigative teams and predominantly supported the criminal investigations that the team is responsible for. Where these are investigations of non-economic crime, the FIs might not make investigative orders using POCA. .... It will be important to assess the likelihood of this specialisation resulting in FIs losing their accreditation and, if so, take steps to mitigate it.
39. Hence, loss of accreditation was clearly seen as a concern and the report recommended new guidance on how to avoid it.
40. Also during 2018 there was a reorganisation of the Economic Crime Command (ECC), which is where Mr Turner's substantive post belonged. His work on Operation Kanji, which had been going on since 2015, was a secondment. The new arrangements included the establishment of the Complex Financial Crimes Team (CFCT), a more centralised unit than the existing branch structure. A preference exercise was carried out to see whether individuals wanted to remain in their current branch or to join this new team, which was to be headed up by Mr Gary Cathcart, one of the witnesses. Notably, having lost his accreditation, Mr Turner was not included in this preference exercise.

41. At some point it was concluded by management that his substantive post fitted better into this new and larger team, perhaps because he would have accredited Financial Investigators around him to carry out any POCA work, but no final decision was made as to whether he would return to his old branch or join this new team.

2019

42. In January 2019 Mr Barford (Mr Turner's line manager) raised the issue of reaccreditation again with Ms Kitney. She in turn contacted Mr Craze, and that led to a phone call on 14 January. This time the discussion included a Mr Paul Smith, Regional Regulator, but his view was the same as that of Mr Craze: Mr Turner had had an action plan in the past and had still failed to comply with his CPD requirements, so there was no way back.
43. Efforts to wear down their resistance did not stop there. A formal looking action plan for his reaccreditation [423] was prepared for Ms Kitney in May 2019 and sent to the Proceeds of Crime Centre, only to be met with repeated statements from Mr Craze that the decision was permanent and it was too late now to be considering an action plan.
44. Over a year had passed since the withdrawal of his accreditation and Mr Turner's managers now had to turn their attention to his future place in the organisation rather than simply making efforts to change that decision. I was not given a detailed breakdown of the stages of Operation Kanji but the trial was in 2021 and the time from being charged with an offence to trial is often very considerable, so during 2019 the need for further investigative work was drawing to a close. Mr Barford felt that Mr Turner would be better moving to the new CFCT. That would not necessarily have involved a change of location although the main office for that unit was in Warrington. Mr Turner was concerned that if he did that it would involve the end of any efforts to overturn the withdrawal of his accreditation and so he was reluctant. Perhaps as a result of that dilemma he was signed off sick again on 24 June and was then off work for the next three months. He returned on 1 October 2019.
45. Mr Cathcart, the head of CFCT, also wanted him to join that team, although he too was concerned about the loss of accreditation. He contacted Mr Smith at PoCC in November to see if anything could be done about it [478] and had the same answer [474]

"The view of PoCC and supported by myself is as follows:

Rob Turner will not be re accredited under the PoCA"

46. Mr Cathcart then had a meeting with Mr Turner on 20 October and explained his understanding that the decision could not be changed. Consequently, he could not offer him a role as a Financial Investigator but he could offer him a role as a "grade 4 investigator". However he did not press him for a decision. Mr Turner continued

to be managed by Mr Barford although he was allocated a nominal line manager within the CFCT structure, Mr Dominic Mugan, another of the respondent's witnesses. Mr Mugan met Mr Turner a couple of times in December and January to discuss the work of CFCT, and in particular a role as "Actions Manager" which involved assigning work to others in the team.

### *The grievance*

47. Any such move was put on hold from 17 January 2020 when Mr Turner submitted a grievance about his loss of accreditation [484]. It was a grievance expressed to be against the Proceeds of Crime Centre, the accreditation policy, Mr Craze, Mr Rushton and Deputy Director Horne, who oversaw the Centre. By then, Mr Turner had obtained support from his trade union, particularly from Mr Kevin Tweedale, and the grievance put forward some new points. Firstly, it argued that Mr Rushton and Mr Craze had not demonstrated Civil Service values. Secondly, he said that they had not followed the required procedure in the policy. According to this policy [165] there are Senior Appropriate Officers (SAOs) who are trained and accredited by the National Crime Agency to authorise Accredited Financial Investigators (AFIs) within their organisations to exercise their powers under POCA. It also states [163]:

"In order to be re-instated contact must be made with the regional regulator and / or the Accreditation team in writing ... Within 12 calendar weeks from the date of suspension via their SAO stating the reasons for noncompletion of CPD."

48. The regional regulator was Mr Smith and so the appeal ought to have been submitted to him by the SAO, Ms Kitney (G2). (There was some confusion over this person but it was confirmed by Mr O'Brien, who was later in charge of the Proceeds of Crime Centre.) Hence, the proper procedure had not been followed.
49. However valid this point, it did not get around the central difficulty which was that the POCA required the NCA to provide a system for accreditation, which includes, at section 3,

"provision for –

(a) the monitoring of the performance of accredited financial investigators, and

(b) the withdrawal of accreditation from any person who contravenes or fails to comply with any condition subject to which he was accredited."

50. In short, it did not address the independence point. However, Mr Gerry McLean, a Regional Head of Investigations, was appointed to investigate the grievance and I asked him whether it would not have been better to have told Mr Turner at the outset that his grievance was hopeless since (as far as he was aware) he did not have the power to overturn the decision in question. He said that he had had the same conversation with HR at the time and it was considered better to deal with the

grievance. There are perhaps arguments on both sides. Since the outcome of the grievance process was a series of recommendations, it may have been felt, despite the long history of unsuccessful attempts to overturn the decision, that these would be something which the Proceeds of Crime Centre would consider and therefore provide a route back to accreditation.

51. One consequence of treating this as a grievance was that it took a long time to resolve and in the meantime Mr Turner was reluctant to give up his existing post and join the Complex Financial Crimes Team. Much of the delay was due to Covid, which could not have been foreseen. The first meeting between Mr Turner and Mr McLean was on 2 March 2020, three weeks before the first national lockdown. They did not speak again until mid-June when the first lockdown period had come to an end. Mr Turner was also in discussion with Mr Barford about the way ahead and they had a heated call at sometime in June. Mr Barford felt that Mr Turner was increasingly disrespectful and was venting his frustrations on him, and at the same time refusing to discuss what he wanted to do next. In those circumstances I accept that he probably did say to Mr Turner that it was a waste of time trying to overturn the decision and that he should take the job with the CFCT. But at no stage was Mr Turner given any ultimatum about such a move despite the passage of months and ultimately of over a year.
52. A grievance meeting was arranged for 28 July, then rearranged for 6 August, by which time Covid restrictions had relaxed. Afterwards, Mr Turner asked Mr McLean to interview Ms Kitney, something which was not completed until October. In the meantime Mr Turner had made a subject access request, and when that information was received, in December, he asked Mr McLean to consider it. By then the second period of lockdown was underway. Consequently it was not until 13 January 2021 that Mr McLean was in position to set out his conclusions [655]. The main finding was as follows:

“The Proceeds of Crime Centre is an independent legislated regulator responsible for the occupational standards and accreditation of Financial Investigators. Having considered the PoCC policy & process for non-voluntary suspension, withdrawal of accreditation, as well as the appeals process, I am led to conclude that PoCC has followed its stated policy. The PoCC believe the appeals process has been exhausted, leaving no reasonable basis either to challenge previous decision-making or to seek suitable resolution between the parties. I will make some recommendations in respect of how the policy is applied but in light of the foregoing circumstances and having considered all available material, I determine your grievance cannot be upheld.”

53. Those recommendations involved:
  - (a) a standard template with the appropriate guidance to support the appeals process,

- (b) that the NCA “may wish to review” the policy on the withdrawal of accreditation generally,
- (c) that it might be appropriate to make an unreserved apology to Mr Turner for the way these matters were handled and communicated to him – on the basis that his expectations had not been managed by his line managers at the time,
- (d) that a career development review take place for Mr Turner and,
- (e) that the NCA should consider a communication strategy to increase awareness of the revised policy at the appropriate levels.

54. All this went as far as could well have been expected short of overturning the decision itself but Mr Turner was nevertheless disappointed with the outcome. He indicated that he was still unwilling to take the CFCT role pending an appeal and then on 29 January 2021 he was signed off sick again with stress, remaining off work for the rest of his employment.

#### *The Liverpool John Moores Report*

55. By the time this grievance outcome had been issued, Mr Vincent O’Brien had taken over the management of the PoCC and the Liverpool John Moore’s report (already quoted) had been prepared. Mr Turner was aware that it was in progress and had been urging Mr McLean to look into it. According to Mr O’Brien’s evidence, a draft report was produced in September 2020, which was discussed with the Home Office and the recommendations were circulated outside the Home Office and National Crime Agency in November, but the report itself was never published. Both the Home Office and the National Crime Agency were unhappy with the quality of the report, and in particular they were concerned that statements taken from contributors were easily attributable to the individuals concerned. However, it was felt that the recommendations, particularly on the withdrawal of accreditation, should be adopted. An action plan was drawn up in November and the recommendations and draft plan for implementing them were made available at a senior level - to the Strategic Asset Recovery Group - in December 2020. It follows that Mr McLean was not aware of these recommendations when he announced his outcome.
56. Another development at around the time of the grievance outcome was that Mr Turner’s union representative, Mr Tweedale, contacted Mr O’Brien directly to see if anything could be done. They then spoke on 1 February, and it was as a result that conversation that Mr Tweedale (and Mr Turner) became aware that the Liverpool John Moore’s report was due shortly.

#### *Grievance Appeal*

57. Mr Turner submitted his grievance appeal on 8 March 2021 [643]. It was dealt with by an even more senior member of staff, Mrs Laura Gill MBE, Head of the UK FIU

Operations. As such she had senior leadership responsibility for areas including Money Laundering and Terrorist Finance.

58. It is not necessary to say a great deal about the process followed. Suffice to say that she came to very similar conclusions to those of Mr McLean. The appeal procedure did not require a rehearing of the original grievance, and was conducted as a review, to ensure that the outcome was one which was open to Mr McLean. The grounds of appeal, or at least those pursued, were that there had been a failure to follow policy and procedure, as already explained, and that additional information from the Liverpool John Moore's report was not taken into account.
59. The appeal hearing itself took place on 28 April 2021, and involved a panel of three people. Mr McLean attended to deal with any questions although Mr Turner had no questions for him. At the end of the hearing the panel deliberated, then called Mr Turner and explained the outcome and their rationale. This was that while they could not uphold the appeal, they were making further recommendations, as set out below. (That evidence of Mrs Gill was not challenged.)
60. The reasons were set out in a letter sent to him on 12 May 2021 [690]. It is relatively short, listing the grounds of appeal and setting out a brief conclusion that there had been no breach of policy or procedure and that the additional information he provided (about the University review) did not change the outcome.
61. The whole grievance process ought to be documented in a single document known as the grievance booklet. That sets out the basis of the grievance, completed by the individual making the complaint, then sections completed by the investigator recording the steps taken, the outcome (including the recommendations) – completed by Mr McLean - and the same details for the appeal stage. It recorded that the appeal panel fully supported the recommendations made by Mr McLean and indeed felt that they should be bolstered and tracked. There was an overarching need, they said, for greater transparency and publication of the accreditation process, and in particular:
  - (a) that the need for a standard template was a “must” rather than a “may”,
  - (b) they “strongly advised” that a review of the process was needed
  - (c) they reinforced the view that the apology be provided, since it had not been given
  - (d) they strongly recommended the career development review take place and
  - (e) the communication strategy.
62. However, the grievance booklet was never included with the outcome letter, which did not therefore reflect what Mr Turner had been told on 28 April. He therefore

viewed the outcome as a further disappointment. He was still off sick and, since the middle of April, was reduced to half pay. With the help of his union he had made a request for an extension to full pay which had already been refused. He had also made an application under the Civil Service Injury Benefit Scheme (CSIBS) for further support on the basis that his absence was due to a service-related injury. That too was unsuccessful. Finally he had just submitted an application for ill-health retirement, something which required medical evidence that he was unfit for work in any capacity for the foreseeable future. He had been referred to occupational health - an outside company (Optima) - who had advised him that this was extremely unlikely to be successful. All of this was therefore very discouraging. His only remaining internal option was now to return or attempt to return to work in the CFCT or in branch and to put his attempts at reaccreditation behind him.

63. At this point however, on 13 May 2021, Mr O'Brien sent his momentous email to Mr Tweedale [696]. In it, he explained that in future:

- PoCC will consider any applications for accreditation including from officers who have previously had accreditation withdrawn;
- re-accreditation may require retraining depending on lapses in training/practice or issues identified;
- line manager support for re-accreditation may be required.

64. Accordingly, the way was open for Mr Turner to recover his accreditation. However, Mr Turner did not see it in a positive light. In fact, he resigned the following day, 14 May 2021. In his resignation letter [698] he said:

“The final straw was this week I received the written outcome of my grievance from the appeals panel which finalised the position but omitted all of the recommendations of the original investigator, Gerry McLean. Despite Gerry’s best efforts the whole thing has been a travesty and a whitewash.

Furthermore the offer of Vince O'Brien, which I have no doubt was well-intentioned, merely adds insult in injury. He suggests, without any reference to the whole debacle I have suffered, that I can now simply apply for re-accreditation and that there may be the simple matter of re-training. It is too little too late and I know exactly who is in need of retraining and I can assure you it is not me.”

65. He resigned on notice and so his contract came to an end on 16 June 2021. One curious feature of the case is that Mr O'Brien never received the recommendations from the appeal hearing either, which rather undermines the point of that exercise. Mrs Gill's understanding was the grievance booklet was left with HR - the complex HR team - to disseminate for organisational learning but this does not seem to have taken place, or at least not at the time. It seems most likely therefore that the impetus for the change of policy was the Liverpool John Moore's report and not the appeal outcome or any lobbying by Mr Tweedale.



66. We now have the National Crime Agency's Action Plan dated May 2021 [818] prepared in response to the recommendations in the Liverpool John Moore's report. This must have been produced shortly after Mr Turner's resignation, and it sets out the recommendations which had been implemented so far and which were to be done. The first two, which had been implemented, involved an assessment of Proceeds of Crime Centre governance and the establishment of a new governance framework. Under the heading Accreditation and Monitoring it states that a new accreditation scheme should be agreed with stakeholders, with "a scaled response of interventions to maximise effectiveness and reduce conflict." Further, the Home Office should "consider replacing the current requirement for FIs to evidence the use of their POCA powers with an enhanced system of CPD linked to local supervision and management." In other words, a more proportionate response to shortcomings, with more carrot (training) and less stick. Finally, it was recommended that there be a transparent process of escalation between PoCC and local management up to an independent adjudicator. All this could have been drafted with Mr Turner in mind, and certainly these measures, if implemented, would have made a considerable difference in his case.

### **Applicable Law and Conclusions**

67. Turning to the applicable law and having set out the essential test for constructive dismissal at the outset, the first most and important question to address is whether the decision to revoke Mr Turner's accreditation, or at least the way in which that decision was reached, amounted to a breach of the implied duty of trust and confidence. That simple question has been elaborated in the list of issues to involve a host of smaller and subsequent matters, not all of which are particularly relevant. This list was finalised at the second preliminary hearing but unusually was not referred to by either side in their closing submissions. It does not therefore seem to be a document on which either side places much reliance.

68. Nevertheless, the various aspects of this alleged breach, as set out in that list of issues, do at least need to be recorded. I will do so with some simplification and removing from the list the many argumentative elements. They are (essentially) as follows, and unless otherwise stated are against the respondent (NCA):

- (a) not being sympathetic to Mr Turner's mental health condition;
- (b) the PoCC suspending his access to FISS in March 2018 on the grounds that he had failed to complete his CPD requirements;
- (c) the PoCC accepting an appeal from Mr Turner's line manager in April 2018 in breach of policy;
- (d) the PoCC permanently removing Mr Turner's accreditation in June 2018 including

- preventing him from gaining access to the support and reference materials on FISS and
  - refusing to undertake a workplace assessment in relation to his accreditation
- (e) the PoCC asserting there was no appeal or recourse with respect to the removal of accreditation;
- (f) Ms Gupwell referring Mr Turner to the professional standards department alleging gross misconduct in September 2018;
- (g) the PoCC refusing to overturn the withdrawal decision despite representations from the respondent between January and November 2019;
- (h) the PoCC overstating their position in respect of section 3 of POCA and the respondent's legal department agreeing with that position;
- (i) failing to pursue an informal resolution with the PoCC timeously;
- (j) in October 2019, expecting him to review evidence 'because he was a Financial Investigator'.
- (k) failing to deal with Mr Turner's grievance timeously;
- (l) Mr Barford attempting to force Mr Turner to take an alternative position (with CFCT) then becoming irate, raising his voice and stating that [attempts to overturn the decision] were a waste of time;
- (m) not publishing the 2020 Home Office Report despite its pledge of transparency;
- (n) the appeal being a review rather than a re-hearing;
- (o) the PoCC withholding the findings of the Home Office Report from Mr McLean;
- (p) failing to make a copy of the report available to Mr McLean;
- (q) Mr Barford suggesting the alternative (CFCT) position should be taken up before the outcome of the grievance;
- (r) the appeal panel failing to consider the relevance of the Home Office Report;
- (s) reducing Mr Turner to half pay as a result of his absence;
- (t) not upholding Mr Turner's grievance;

- (u) not providing Mr Turner with a fully completed copy of the grievance booklet with endorsements;
- (v) not providing the promised apology;
- (w) Occupational Health stating that ill health retirement was difficult to achieve particularly in cases of mental ill health;
- (x) Mr O'Brien's email on 13 May 2021, confirming that the PoCC would consider applications for accreditation;
- (y) having biased views of Mr Turner based on historical issues, namely an issue in 2010 and his inter-action with Mr Paul Smith.

69. There are therefore 25 criticisms of the respondent or the PoCC or named members of staff. Many of them were not put to the witnesses or mentioned at all in evidence, or can be put to one side given my findings of fact. Briefly therefore:

- (a) There is nothing to suggest that the respondent was unsympathetic to Mr Turner's mental health. Indeed the respondent showed considerable patience and sympathy towards him over a long period.
- (b) Ms Gupwell did not "refer him" to the professional standards in the way suggested, she simply raised a query, which appears a reasonable step in the circumstances.
- (c) Nor does it seem unreasonable to expect him to carry on working as a financial investigator given that he was not working on POCA activities.
- (d) There was a considerable delay in resolving the grievance, but that was largely because of Covid, then Mr Turner's request that Ms Kitney be interviewed, then that his SAR material be considered. Overall the grievance was handled in a thorough and sympathetic manner, something which Mr Turner thanked Mr McLean for when he gave evidence.
- (e) It is understandable that Mr Barford would attempt to persuade Mr Turner to take the position with Complex Financial Crimes Team, and equally that he may have become irate at his refusal. He may also have said that attempts to overturn the decision were a waste of time. But again, Mr Turner thanked Mr Barford for his support as manager so I conclude that there was nothing untoward in any exchanges they had. It was a frustrating situation for both of them, and understandably Mr Barford eventually came to the conclusion that Mr Turner was better putting it behind him. The same conclusion applies to the timing of his advice, given before the end of the long-running grievance process, issue (q).

- (f) The fact that the appeal was a review rather than a re-hearing was in accordance with the respondent's policy, and hence cannot amount to or contribute towards a breach of contract.
- (g) Similarly, Mr Turner had exhausted his sick pay entitlement and the NCA followed its own policies in reducing it, and then considering whether to extend his period on full pay. (And although not mentioned in this list, the same applies to the refusal of his CSIBS claim.)
- (h) It is also understandable, and entirely correct, that it would have been very difficult for Mr Turner to qualify for Ill Health Retirement, so any statement to that effect is also unobjectionable, and in any event that option lapsed with his resignation.

70. The role of the Liverpool John Moore's report calls for more detailed consideration. It is not clear why the Home Office and National Crime Agency took issue with some of the contents but I accept the reasons given for the decision not to publish it in full, which was largely about confidentiality. The fact that the recommendations were adopted or largely adopted and then published shows that the end result was agreed, even if there were differences over the methodology. That does not show any real lack of transparency. It was not a report commissioned with Mr Turner in mind or which was held back from scrutiny because of any mention of his case. So that decision is not in my view a legitimate cause for complaint.

71. It follows too, given the timings, that it was not available to Mr McLean, and it would also have been premature to share it or the internal action plan with the appeal panel. Their task was historic, not forward looking. The main role was to decide whether Mr McLean's decision was appropriate in the circumstances. It is understandable that Mr Turner wanted it to be made known: the fact that reform was called for, and was underway, underlined his own claim to have been unfairly treated. But it was simply not available in time, and there was no unfairness in the grievance and appeal proceeding on the basis of the information which was properly available to them at the time. It follows that I make no criticism of the respondent in respect of those aspects relating to the 2020 Report – (m), (o), (p) and (r) in the original list of issues.

72. Of the remaining 13 issues, five relate to the actual decision or decisions by PoCC – (b), (c), (d), (e) and (g) – the last one being their refusal to overturn the decision. I will return to those shortly. The final issue (y) should in fact also be added to this group - the fact that the decision was based on historic issues.

73. The remaining issues are procedural, essentially,

- (a) the legal department agreeing with the PoCC position on their independence;
- (b) management failing to pursue an informal resolution with the PoCC timeously;

- (c) not upholding the grievance;
- (d) not sending him the completed grievance booklet;
- (e) not giving him the promised apology.

74. The appeal outcome itself is missing from the list, but these are all criticisms of steps made by Mr Turner's own line management to address the situation. I am satisfied that those criticisms are misplaced. Once again, it is clear that there was a great deal of sympathy and support for him. The recommendations made by Mr McLean show that he went to significant lengths to influence a change in approach on behalf of Mr Craze and Mr Smith, in circumstances where he felt that he had no direct authority to impose that change. In practice, had he attempted to assert some authority over the Proceeds of Crime Centre and simply rescind the decision, Mr O'Brien would have been in a position to refuse and would have been right to do so. It is clear from his account, supported by the other witnesses for the National Crime Agency, that it was a cardinal principal that the Proceeds of Crime Centre was an independent regulator. That means independent from influence by National Crime Agency. Although it was housed within the National Crime Agency, in the sense that its members of staff were employed by the National Crime Agency, its role was to regulate Financial Investigators in many other government departments and there would be a risk of double standards if a more lenient view was taken of their staff because of the effect on operational effectiveness of a suspension. Indeed, s.3(3) POCA requires that decisions taken:

“under that system which concern—

- (i) the grant or withdrawal of accreditations, or
- (ii) the monitoring of the performance of accredited financial investigators,

are taken without regard to their effect on operations by the National Crime National Crime Agency or any other person.

75. That section alone is enough to dispose of the argument that the Proceeds of Crime Centre exaggerated their powers or that the respondent's legal department was wrong to agree with them. It also shows that the outcome of the grievance was not itself a breach of contract or calculated or likely to undermine to any extent the relationship of trust and confidence. Mr McLean did the best he could in that exercise for Mr Turner and it has to be remembered that there were valid reasons for the initial decision by Mr Rushton.

76. It is unclear why it was ever suggested that management took too long to pursue an informal resolution with the Proceeds of Crime Centre. There was never any prospect of an informal resolution, at least not until there was a much broader reassessment of the accreditation process, but on several occasions Mr Turner's

managers took the initiative on his behalf. Mr Entwisle wrote repeatedly from the outset, as did his successor Ms Gupwell. She escalated it to her manager, Ms Kitson, who escalated it in turn to Mr Hislop. When Mr Barford took over as line manager in January 2019 he also contacted Mr Craze directly about his decision. Mr Cathcart also raised it on his own initiative. All this was done before Mr Turner raised his own grievance, which he could have done at the outset. There was no need for him to wait until these efforts were shown to be unsuccessful.

77. The final aspects of the grievance process were disappointing in that Mr Turner was not given the full grievance booklet and so was not even informed of the recommendations made by the panel at the appeal stage. Nor does it seem that those recommendations were passed to Mr O'Brien at the Proceeds of Crime Centre. No doubt that lack of circulation explains the fact that no apology was ever forthcoming, although it was never suggested that the apology should come from Mr Craze or anyone at the Proceeds of Crime Centre; it was supposed be due from his own Deputy Director on the basis that it should have been made clear to him that it was unlikely that Proceeds of Crime Centre would overturn its decision and could not be forced to do so. These points are however very secondary to the main complaint, which is over the decision(s) of the Proceeds of Crime Centre itself.
78. That involves the remaining issues from the above list, i.e. suspending his access to FISS (b), permanently withdrawing his accreditation (d), asserting that there was no appeal (e) and refusing to overturn the decision (g). There is also the point about the procedure followed, i.e. accepting an appeal from his line manager (rather than the SAO) (c) and also the fact that the decision was based on historical events (y).

*Was the decision a fundamental breach?*

79. Although the case for the respondent is that the withdrawal of accreditation had little effect on Mr Turner's role or responsibilities, it was not seen in that light by any of his managers at the time. Their unprompted and sustained efforts to rectify the situation show that they regarded it as a serious issue. To recap, Mr Entwistle considered it incompatible with his existing role, as did Ms Kitney, who described his position as untenable. That was then endorsed by Mr Hislop, who concluded that he would need to be moved to another role.
80. The decision also indicated a loss of trust in Mr Turner. POCA duties involved include making applications to a court as a fit and proper person. Hence, the withdrawal of accreditation meant that he was no longer seen in that light. It must have been little comfort for Mr Turner to be told that there was plenty of other work he could do, particularly once it was clear that the decision was permanent. After that he would never again be regarded as sufficiently expert and trustworthy to make these inquiries, inquiries which he knew to be very much less difficult than those which he was routinely undertaking. The view that there must be a route back for him to regain the necessary degree of trust seems to have been widespread

amongst all his managers and that is the aspect which seems to have particularly baffled and infuriated them, as well as Mr Turner.

81. However, it does not follow that the decision itself was a breach of contract. It was not disputed that the accreditation policy applied to Mr Turner. His 2013 contract did incorporate such policies as introduced from time to time. That policy did impose a clear requirement to maintain his accreditation, setting out the steps needed, and allowed for a decision that it be permanently withdrawn if he failed to do so. On that basis I have to conclude that issues (b), (d), (e) and (g) are not breaches of contract either.
82. On further consideration of the policy itself, it does not refer in terms to loss of accreditation being permanent but that is the implication. The fact that the decision is based on a failure to maintain a satisfactory level of evidence means that there is nothing surprising in previous failures being taken into account, so on that basis too I conclude that issue (y) has to be decided against Mr Turner
83. That leaves issue (c), which is essentially that the way in which the decision was reached was not in accordance with the policy. Against such a long list it may seem minor, but it is a point of importance. The right of appeal was to be made by Ms Kitson or someone at her level to Mr Smith or someone at his level and given the consequences that is an important safeguard which was overlooked. It is in fact striking how informally the whole matter was dealt with. The original decision by Mr Rushton appears to be a virtually automatic response to a failure to provide the necessary evidence on FISS by the due date. No doubt those were his instructions. But he could have made clear to Mr Turner that this was a serious situation, not something that could just be corrected without due consideration. He could have reminded him of the accreditation policy and the need for an appeal to come from Ms Kitson or equivalent, to Mr Smith. Mr Craze could have done the same thing. Mr Craze then went ahead and dealt with the appeal himself, which was quite wrong. In doing so, he also seems that he relied on factors which Mr Turner was not aware were going to be taken into account, such as what had happened on previous occasions. There had been three previous incidents when Mr Turner had had to be reminded of the requirements, or where some action plan had been put in place, but Mr Turner had no opportunity to give any explanation or mitigation forward on those points. That itself is a breach of natural justice, and will have compounded the sense of unfairness. Even if the procedure had been followed in full it would still have been a very basic one. It did not even involve a meeting, where Mr Turner could have addressed any unexpected concerns.
84. Overall therefore I am satisfied that the way in which this decision was taken was something which struck at the root of his employment as a Financial Investigator. It is noteworthy that the ultimate position adopted by the National Crime Agency required a much more extensive and transparent process before accreditation is removed.

85. However, was this something for which the National Crime Agency is responsible as Mr Turner's employer? That is essentially the first question in the list of issues, the question as to whether the National Crime Agency controls the Proceeds of Crime Centre. Did *the National Crime Agency* strike at the root of the contract, or can they escape liability because it was done by the Proceeds of Crime Centre?
86. It is instructive to consider the position if Mr Turner had been a Financial Investigator working for HMRC or the Metropolitan Police or any number of other responsible agencies. If his accreditation had been withdrawn in the same circumstances – permanently, relatively informally, and without the proper process - could he have resigned from HMRC, say, claiming constructive dismissal? I am forced to the conclusion that the answer must be no. HMRC would not be in breach of his contract or any policy, even if they had the same accreditation policy in place or some similar partnership agreement with the Proceeds of Crime Centre setting out the standards of fairness to be expected. They could lobby, much as the National Crime Agency did here, they could make also recommendations, but they would not be in a position to insist and no one, even someone in Mr Turner's shoes, would reasonably have regarded them as being in breach of contract.
87. What this illustrates is that the actions of Proceeds of Crime Centre are not those of the employer and cannot be regarded as such. Although the statutory duty to ensure a system of regulation is placed on the National Crime Agency, they discharge that duty by establishing the Proceeds of Crime Centre and are duty bound to ensure its independence. The principle is also enshrined in s.3 of POCA that they must not, in their decision-making, make any special allowance for the work of the National Crime Agency. That principle would also be undermined if their own staff were better protected than those elsewhere, in that they had some further redress against their own employer.
88. That principle was well-understood by staff. All of the managers concerned lobbied the Proceeds of Crime Centre but no one suggested for a moment that it could simply be overturned. Accordingly I conclude that an individual member of staff, like Mr Turner, cannot complain to the National Crime Agency that a regulatory decision of this sort involved a breach by the National Crime Agency of their obligation of trust and confidence towards him.
89. I remind myself of the form of words used in the case of **Woods**, quoted at the outset, which involves a consideration of "the employer's conduct as a whole ... judged reasonably and sensibly". This is a case where the employers conduct as a whole has to be looked at and looked at in the context of a regulatory framework which for very good reason they had to avoid interfering with, even where that decision was made in this way.



*Affirmation*

90. If I am wrong about that conclusion then it follows that Mr Turner would have been entitled to resign shortly after the decision in March 2018 and to have brought a claim of constructive dismissal. Even then, it does not follow that he was still entitled to do so three years later, having carried on working and receiving pay in the meantime.

91. The starting point in considering that question as to whether he has affirmed any such breach of contract is the well-known words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 CA:

“The employee must make up his mind soon after the conduct of which he complains: or if he continues for any length of time without leaving, he will lose his right to be treated himself as discharged.”

92. It is well established that he may carry on under protest for a while, without necessarily being taken to have affirmed the contract, but there comes a point when delay will be taken to indicate affirmation. The relevant principles were reviewed recently in **Brooks v Leisure Employment Services Ltd** [2023] EAT 137. The Employment Appeal Tribunal (HHJ Taylor) held that engaging in a contractual grievance or appeal procedure is not likely to unequivocally affirm the employment contract. In that case, Ms Brooks continued in employment for three months. It was held that this was no more than continuing to work and draw pay for a limited period of time while giving the employer an opportunity to put matters right.

93. But a delay of three years is very different to a delay of three months. And although Mr Turner made clear that he did not want to make a decision about his future role until the outcome of the grievance process, he did not say that he was working on under protest or that he would resign unless it was resolved to his satisfaction. A case can be made that at various times it was reasonable for him to await events but there are several periods during those years when little or nothing was going on. For example, it was clear that the decision to revoke his accreditation was a permanent one from early June 2018 but the immediate efforts to rectify that situation ran out of steam shortly afterwards and little or nothing was being done in July or August. Disciplinary proceedings then intervened and it would no doubt have appeared to be an admission of guilt had he resigned at that point, but the grievance was not filed until the 17th of January 2020, over a year after the conclusion of those proceedings so, for example in October November or December 2019, it is difficult to see anything being said or done to challenge the situation. On that basis I have to conclude that even if I am wrong about the fundamental breach being attributable to the National Crime Agency, Mr Turner affirmed the breach by his relative inactivity over that lengthy period.

94. It is possible to revive an earlier breach if there is some 'final straw' as that phrase is understood in law. The list of issues contains four possibilities, including the reduction to half pay and the remark by the OH practitioner, but these were not mentioned in his resignation letter and do not in any way revive the hurt felt by the withdrawal of accreditation.
95. The two points mentioned in the resignation letter are the change of approach by Mr O'Brien on 13 May and the decision not to uphold his grievance on 28 April 2021. (That is the date of the actual appeal hearing, when Mr Turner was told the outcome, about two weeks before the outcome letter was sent.) Both these points are mentioned in the resignation letter, or at least the failure of the appeal panel to endorse the earlier recommendations, but neither seems to me capable of amounting to a final straw as that term is understood legally. As Mr Moretto reminded me, it was established in **London Borough of Waltham Forest v Omijlalu** [2004] EWCA Civ 1493 that

"[19] ... Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant."

...

"[21] If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. [Emphasis supplied.]"

96. In short, a final straw has to contribute something to the breach or breakdown in the duty of trust and confidence rather than being something innocuous.
97. I accept that Mr Turner may have had mixed feelings about the change of heart from Mr O'Brien and may have been exasperated at the delay. He also seems to have taken exception to the requirement of retraining, although that requirement seems to me perfectly understandable in the circumstances. It would in my view be illogical to construe this statement by Mr O'Brien as a final straw or something which in any way contributed to the breakdown in the relationship of trust and confidence. It did not add insult to injury. It was in fact the opposite and it is very unfortunate that Mr

Turner, who had been off sick with stress for some time by this point, reacted to it in the way that he did.

98. As to the appeal outcome, this was explained in person on 28 April 2021, over two weeks before Mr Turner's resignation, so I conclude that it was in fact the email from Mr O'Brien which prompted the resignation, not this earlier disappointment. In any event, there is still the distinction between the decision itself and the way it was made. As already explained, I conclude that the decision itself was not in breach of contract. Hence, the fact that it was not overturned on appeal cannot revive it. The lack of a proper process was an issue in the grievance process, but Mr Turner did not resign in response to the decision on that discrete point, nor did it contribute to that decision to any real extent. Rather, he was still hoping that the decision itself be overturned, which was not in my view open to the panel.
99. Accordingly, and for all the above reasons, the claim must be dismissed.

Employment Judge Fowell  
Date **30 May 2024**

JUDGMENT & REASONS SENT TO THE PARTIES ON  
**22 July 2024**

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