

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100924/16

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Held in Glasgow on 18, 19 & 20 April 2017 and 10 & 11 August 2017

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Employment Judge: J D Young
Members: Mrs P McColl
Mr J O'Donnell

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Mr Alan Cotton

Claimant
In Person

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Chief Constable Of The Police
Service Of Scotland

Respondents
Represented by:
Mr A Gibson -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that:-

(1) that the claimant was not subjected to any detriment by any act, or by any deliberate failure to act by the respondent in terms of Section 47B of the Employment Rights Act 1996;

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(2) the claimant was not unfairly (constructively) dismissed in terms of Section 98 of the Employment Rights Act 1996.

REASONS

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Introduction

E.T. Z4 (WR)

1. The claimant presented a claim to the Employment Tribunal on 10 April 2016 complaining that he had been subjected to detriment on the ground that he had made protected disclosures. The claim was based on Section 47B of the Employment Rights Act 1996 (ERA).

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2. In the course of time the claimant made application to amend his claim to include that he had been unfairly (constructively) dismissed by the respondent with effect from 21 October 2016 which amendment was allowed.

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3. The respondent in their grounds of resistance denied that the claimant had been subjected to any detriment by any act, or any deliberate failure to act, done on the ground that the claimant had made protected disclosures. The respondent also maintained that the claimant had resigned and that the respondent's conduct did not entitle the claimant to terminate the contract under which he was employed such that it would amount to a dismissal.

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Preliminary Hearing

20 4. At a preliminary hearing consideration had been given to the issue of whether or not the claimant had made protected disclosures as that is defined at Part IVA of ERA and by Judgment promulgated on 21 December 2016 the Tribunal found that the claimant had made protected disclosures on:-

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(1) 17 November 2011 in terms of an email sent to the Deputy Chief Constable of Strathclyde Police, Mr Neil Richardson.

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(2) 19 December 2011 in terms of a formal grievance made by the claimant which reiterated his concerns in the email of 17 November 2011.

- (3) 5 March 2012 in terms of a further formal grievance lodged by the claimant on the basis that his first grievance had been mislaid and that there had been a systematic failure of the grievance process.
- 5 (4) 12 September 2012 in terms of an email to DCC Corrigan seeking a meeting in light of Data Protection charges being withdrawn against him and concerns regarding the conduct of the respondent's Counter Corruption Unit (CCU)
- 10 (5) 5 November 2012 in terms of a formal statement made by the claimant to Chief Inspector James Trotter in respect of his concerns.

Issues for the Tribunal

- 15 5. The issues for the Tribunal at the final hearing were:-
- (1) Had the claimant been subjected to any detriment by any act, or any deliberate failure to act, by the respondent done on the ground that he had made protected disclosures.
- 20 (2) If so, what was the remedy.
- (3) Was the resignation of the claimant as (in terms of his claim) "*a direct result of the ongoing detriment by the respondent and that his position was made untenable by that*".
- 25 (4) If the claimant was unfairly (constructively) dismissed by the respondent would the claimant have been dismissed in any event in respect of his actings.
- 30 (5) Should any compensation to be awarded if the claimant was found to be unfairly dismissed be reduced, because he would have been dismissed anyway or on grounds of his own contributory conduct.

Documentation

6. At the final hearing there was produced 2 folders of documents being:-

5 (1) A Joint Inventory of documents numbered 1 – 54 and paginated 1 – 352. At the hearing there was submitted and allowed to be lodged further documents number 55 – 59 inclusive and paginated 353 – 400. Reference to these documents in this judgment is to the paginated numbers (JB 1 – 400).

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(2) A separate folder of documents submitted by the claimant being documents numbered 1 – 26 and paginated 1 – 222. There was also submitted and allowed to be lodged in the course of the hearing two further documents numbered 27/28 and paginated 223/225. Reference to these documents is again by the paginated number (C1 – 225).

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7. It was also agreed that there should be allowed a document bringing together the grounds of resistance to the claim made by the respondent and comments on those grounds of resistance by the claimant.

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The final hearing

8. At the hearing evidence was given by the claimant along with:-

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John Sallens, who had formerly been employed by the respondent as a Detective Sergeant and who had retired in 2013. He had 30 years experience with Police forces in London and then Strathclyde. In the decade prior to retirement had been engaged in the Serious Crime Squad in Strathclyde Police. He now worked for a law practice;

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Andrew Reid, who had commenced employment as a Police Officer in January 2000 and was now engaged at the Detective Training Centre at Jackton and Tulliallan;

5 Diane Greenaway, a former Precognition Officer within the Procurator Fiscal Service. She had commenced employment with the Fiscal Service in 1986 and retired from the Service in 2012;

10 Amanda Daly who had been a Police Officer with the respondent for 16 years;

Shona Bassano, a Detective Sergeant with the respondent and a Police Officer for 21 years. Between July 2007 and 2012 she had been engaged in CCU and since then with Border Policing Command at Glasgow Airport;

15 David Mitchell, a Detective Constable with the respondent who had spent 15 years in Castlemilk; 1 year in Pitt Street and 5 years in the Digital Forensic Unit which he had left for another post in May 2015;

20 James Trotter, a Chief Inspector with the respondent in the Criminal Justice Services Division. He had been a Police Officer for 28 years and in the period 2012/2013 had been with the Professional Standards Department as a Chief Inspector;

25 Peter Blair, Head of Resource Management for Police Scotland but employed by the Scottish Police Authority. He had been a Police Officer for 30 years prior to his retiral. He made a return to the position of Head of Resource Management in August 2014;

30 Brian Gibson, Chief Inspector of G Division with the respondent having been 26 years in the Police Force;

Niall West, a Police Inspector with the respondent who had 29 years, 7 months service with the respondent at the date of the Hearing. He had worked in the Professional Standards Department for 10 years.

- 5 9. From the relevant evidence led, admissions made, and documents produced the Tribunal were able to make findings in fact on the issues.

Findings in Fact

- 10 10. The respondent leads the service known as Police Scotland which was formally established on 1 April 2013. That service comprises police officers, police staff and special constables. The respondent is responsible for policing across Scotland.

- 15 11. The claimant commenced employment with the respondent on 31 July 1995 as a Probationary Constable. He became a Police Constable after 2 years and spent time with the Plain Clothes Crime Team at Irvine. He joined the CID in Irvine in 2004 and 2006/2007 was "*moved to Jackton training*" for Detective Training. To that point the appraisals of the claimant had been
20 positive. Appraisals in respect of years 24 April 2006; 28 August 2007 and 4 June 2008 (C1-12) all marked the claimant at a high level and made positive statements as to his abilities. In 2009 he joined the Forensic Science Gateway at Pitt Street which involved forensic services for both the Police and the Procurator Fiscal Service. He dealt with requests for analysis
25 "*from a Policing and forensic science point of view*". In that department he reached the position of Detective Constable.

- 30 12. The claimant was in that position when the chain of events commenced which resulted in the present Tribunal Hearing. The claimant received a phonecall from an individual in the Saltcoats area who advised that he had witnessed an attempted murder in Saltcoats. The individual wished to know if the claimant thought he should approach the police about this matter as he was reluctant to do so.

13. The claimant advised that he was aware of this individual having a “*loose connection*” with him in that he had coached his son at football and had known him for some years. He considered that he was of “*good character*” but had had a “*chequered past*” in that he had a criminal record. The victim of this attempted murder was the individual’s brother in law. The claimant’s advice to the individual was that he should go to the Police on the matter and not be tempted to “*take the law into his own hands*”. The individual appeared to have had some contact with the local police but was disappointed at their response.
14. At that time the claimant contacted Detective Inspector John Hogg at Saltcoats who was in charge of the enquiry which had been given the operational name “*Operation Amp*”. Apparently Detective Inspector John Hogg advised the claimant that the investigation into the attempted murder was progressing “*slowly*” as a result of “*witnesses not speaking up*”.
15. The claimant advised that he was unable to submit an “SID log” (Scottish Intelligence Database Log) in respect of any information as his password for entry to that system had expired. The claimant’s position was that Detective Inspector John Hogg advised the claimant to counsel the individual to give a statement. The statement of DI Hogg (C63/64) was to the effect that the claimant had not identified any particular contact but offered to speak to the family to “*talk some sense into them*”
16. After a period of time the clamant received a further call from the prospective witness who advised that he had made a statement to the team in charge of the enquiry and as a result he had been “*threatened with violence*”. The claimant thought that was credible. The individual’s son had been arrested in respect of threats that he had made. He advised that he “*looked at the Police report from that case i.e. the son’s case*”. He also contacted Diane Greenaway who the claimant considered was the Precognition Agent within the Procurator Fiscal Service to advise her that

the prospective witness was “*scared and upset*”. At that time Diane Greenaway discussed with the claimant her concern as to lack of progress in Operation Amp and the claimant advised that he had encouraged the witness to make a statement and he was now being threatened. Diane Greenaway explained that she had issues with Detective Inspector Hogg as to the lack of progress in the case and the conversation concluded.

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17. On or around 19 November 2010 the claimant was asked to go to the respondent’s CCU. He spoke to Detective Inspector Skelton who asked the claimant to accompany him to Govan to be interviewed. The claimant was unaware of the reason but attended an interview under caution. The interview was attended on behalf of the respondent by Police Officers Skelton; Bassano and McLuckie. The transcript of the interview with the claimant by Detective Sergeant Bassano in the presence of Detective Sergeant McLuckie was produced at C34/52. That interview would confirm that the claimant approached Diane Greenaway of the Procurator Fiscal’s Office without contact to his superiors or any officer in the charge of Operation Amp.

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20 18. As a consequence of that interview (and unknown to the claimant) a briefing paper was prepared by Detective Superintendent Jim Boyd, then Head of CCU for the attention of the respondent’s Deputy Chief Constable. That briefing paper was prepared on 21 November 2010 (JB55/56). The briefing paper advised that the Area Procurator Fiscal for Kilmarnock, Tom Dysart had made a referral to the respondent’s Head of Professional Standards Department (PSD) inferring possible criminal association and inappropriate conduct of the claimant. The view of the Area Procurator Fiscal was that the approach made by the claimant to the Precognition Officer regarding the prospective witness was wholly inappropriate. The briefing paper advised that the claimant had accessed a Standard Police Report of the son of the individual who had contacted him, which report concerned breach of bail conditions “*by threatening violence towards associates of the accused in the attempted murder*”. The briefing paper considered that the actions of the

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5 claimant were inappropriate and that he would be reported to the Area
Procurator Fiscal at Glasgow for a breach of the Data Protection Act 1998.
The report advised that the investigation had "*highlighted DC Cotton`s
inappropriate and unprofessional relationship with APF in Kilmarnock which
is detrimental to the partnership working*". Given that the claimant in his
position at Forensic Science Gateway required him to have full access to
policing systems it was considered that immediate consideration be given to
his "*redeployment to avoid any reoccurrence of the above or damage to
partnership working which is an integral part of FSG duties.*" The briefing
10 paper recommended a posting of the claimant to "*Operational uniform
duties outwith the Ayrshire PF area*".

19. Subsequent to the recommendation being made to the Deputy Chief
Constable the claimant was advised on 29 November 2010 that he would
15 be transferred to a uniform position with G Division. He was to be stationed
at the Gorbals office.

20. The claimant subsequently was absent from work through illness namely
stress. He advised that he was at a "*very low ebb*" as a result of this transfer
20 as he had "*no idea how this had happened*".

21. The claimant made a return to work and took up the post at Gorbals in
February 2011. He had made a house move to the Glasgow area from
Ayrshire to be nearer to his place of duty as he was on a "*rotational shift
25 basis*".

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First Protected Disclosure

22. On 17 November 2011 the claimant sent an email to the Deputy Chief Constable of Strathclyde Police, Mr Neil Richardson which stated as follows:-

5 *“Dear Sir, it is with much regret and despair that I have found it necessary to contact you, however, after 14 months of extreme stress, pressure and anxiety I feel I am left without recourse to any other office.*

10 *Circa September 2010 I was subject to a discipline inquiry as a result of an alleged Data protection offence, one which I strongly refute and co-operated fully with enquiry officers over. I was never arrested or charged with any offence. As of that day I was re-deployed to uniform duties at Gorbals community police office where I remain currently.*
15 *This resulted in a substantial financial penalty being incurred by me due to increased travel costs.*

20 *Despite several attempts by me, my line manager and my Chief Inspector to try and ascertain whether I was permitted to apply for any lateral or promoted posts, I have yet to receive any meaningful response to date.*

25 *In lieu of any information to the contrary I successfully applied for the new promotion to sergeant process only to be told I failed the sift at the HR stage due to the foregoing matter. This was communicated to me by my Chief Inspector via email. Approximately a week alter I then received a contradictory email from force training informing me that I had been successful in passing the HR sift and that I would be put forward for interview. My Chief Inspector is now investigating the veracity of that second email.*
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In addition, in the interim I had also applied for a lateral development post within the DCU at G divisional headquarters. Today, I was

interviewed for that post and later informed I`d been successful in my application but that as per HR, any re-deployment would be on hold, again pending the result of the foregoing inquiry.

5 *In summation, after 14 months of punitive treatment without any information or transparency of the process I feel totally undervalued, disillusioned and abandoned. Despite being totally innocent of any allegations made I find myself punished without any explanation of why and for how long. My last hope of some closure or at least clarity*
10 *of the situation is to respectfully request your due consideration of the foregoing. I realise that in doing so, I`m jeopardising my future career but I`m sure you`ll appreciate that at the moment any hope I had of a successful career is already a forlorn hope”*

15 **Second Protected Disclosure**

23. This was followed on 19 December 2011 by a grievance lodged by the claimant (JB57/64 and at C26).

20 24. This grievance referred to the events leading up to the email of 17 November 2011 to the Deputy Chief Constable which he stated was sent in an effort to “*bring some clarity and a resolution to my situation*”. He states in the grievance that as a result of that email he was “*afforded a meeting with Mr Bailey, Superintendent at HR on Friday 9 December 2011*”. At this
25 time he stated that there was an apology made for the breakdown in communication over his promotion process application and that the application was purely a matter for the G Divisional Commander. The claimant made further enquiry and was then told that “*after consultation .. I will remain on the SNV list for this post until after a determination is made regarding me by PSU. This despite there being current vacant posts.*” His
30 grievance was that despite there being no finding of guilt against him in relation to the events leading to demotion; there being no charge against him; and that he had co-operated with the enquiry, he found himself having

5 “suffered enormous disadvantage and unfair detriment”. He stated that he had suffered stress and financial penalty as a result and his moral was low. He stated that the approach by the Professional Standards Unit had been “punitive” and there was no clarity about his future career. The solution he sought (JB63) was to be allowed to continue with his career “to some degree of normality at least until COPFS have come to some form of determination over my case. That normality shall include a transparent assessment on my case in order that a realistic career path is available to me.” He also wished a review of the processes which had taken place in his case so that matters might be resolved for the future.

15 25. In respect of his grievance a meeting took place between the claimant and Brian Reid who was a Divisional Commander. The grievance is noted (JB65) as unresolved at that time. In terms of the grievance procedure (JB353/375) in force at the time (paragraph 6.1.10) if a grievance is not concluded at Stage 1 (and being the position reached by the claimant in his discussion with Mr Reid) then the grievance and “any associated papers are to be forwarded to the Human Resources Manager, Equality & Diversity Unit, Force Headquarters”. In the event that did not happen and the grievance papers became “lost”.

Third Protected Disclosure

25 26. On 5 March 2012 the claimant raised a further grievance (JB65/68) which essentially complained that his previous grievance should have been referred to Stage 2 but had not. This grievance details the steps that should have been taken to progress matters but were not taken and which led to a “total systematic failure of the grievance processes”

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Detriment on First, Second & Third Disclosures

Submission of Police Report

27. The claimant became aware that a Police Report had been submitted to the Procurator Fiscal naming him as the accused person. The papers relating to this report (C28-52) indicated the nature of the complaint involving the claimant and that he had been interviewed on 19 November 2010 by Police Officers DS Bassano and McLuckie. The interview accompanied the papers. There was also reference made to statements from Police witnesses DI John Hogg and DS Bert Greyston whose position was that they had not been told of contact from the witness (T McLelland Snr) by the claimant (C61/64). Those statements were taken on 23 November 2010.

28. This report resulted in a complaint against the claimant being made by the Procurator Fiscal (C31) namely:-

“On 17 April 2009 at Strathclyde Police Headquarters, 173 Pitt Street, Glasgow or elsewhere in Glasgow you ALAN COTTON did knowingly or recklessly and without the consent of the Data Controller as defined within the after-mentioned act, namely the Chief Constable of Strathclyde Police in that you did access the Strathclyde Police Intranet Case Recording System and did view and obtain personal data for non policing purposes; contrary to the Data Protection Act 1998, Section 55(1)(a).”

29. This complaint related to access by the claimant of details concerning Thomas McLelland (Jnr) which had been referred to within the Police Report.

30. There was much controversy over when it was that this report was sent to the Procurator Fiscal. The claimant’s position was that this report was submitted to the Fiscal in March 2012 and it was inaccurate and misleading. His position was that it was deliberately so, consequent upon the First, Second and Third disclosures that he had made. His position in evidence in

was that CCU “*saw fit to present a falsely positioned police report against me. I say that report (document number 8 – C28/52) was made as a result of the protected disclosures*” of 17 November 2011, 19 November 2011 and 5 March 2012. The timing of events against the allegation of detriment as a result of these protected disclosures is discussed later in this Judgment.

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31. Additionally, the claimant around 28 March 2012 was informed that there were internal disciplinary matters being considered against him in respect of the contact with Diane Greenaway of the Procurator Fiscal’s Office and also in respect of the alleged breach of Data Protection. His position was that these misconduct proceedings were as a result of the First Second and Third disclosures that he made.

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32. In respect of the charge against the claimant he attended a preliminary diet in July 2012 with a trial date being fixed for 12 September 2012. However, on 7 September 2012 after a meeting between the claimant’s solicitor and the Fiscal service the complaint against him had been deserted as it was accepted that he had a “*valid policing purpose in accessing the crime report*”. However, the misconduct proceedings were not dropped and were to continue. The claimant maintained that these proceedings were taken as a result of the First, Second and Third Disclosures and were to his detriment.

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33. Consequent upon the complaint against the claimant being deserted an article appeared in a publication under the name of the “*Digger*” (C95) which advised that the claimant had been due to appear in Glasgow Sheriff Court but the case had not called and the prosecution “*may have been dropped*”. It referred to the claimant having been demoted “*from Detective to ordinary bent Copper*” and that he was “*disciplined for dipping into Police records on a known criminal*”. It was also stated that “*a Depute Procurator Fiscal at Saltcoats was sacked because of her support for Cotton*”. Given that these reports from the “*Digger*” circulated amongst the underworld the claimant considered it was safer for him and his family to move address and he did

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so. The claimant considered this further detriment on account of the disclosures.

Fourth and Fifth Protected Disclosures

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34. On 12 September 2012 the claimant made a Fourth protected disclosure by email to Detective Chief Constable Corrigan seeking a meeting with him in light of the Data Protection charge being withdrawn and the serious concerns he had regarding the conduct of CCU and their enquiry. In response to this email the respondent arranged for the claimant to make a formal statement in respect of his concerns which he did on 5 November 2012. This statement (JB74/81) formed the Fifth protected disclosure.

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35. The statement made by the claimant made complaints against police officers, Detective Chief Inspector Louise Skelton; Detective Inspector James William Dillett, both of CCU; Detective Inspector Laura Jane McLuckie, Crime Management Q Division; Detective Sergeant Shona Cameron Bassano formerly CCU and then H Division. The complaints made by the claimant were of oppressive conduct as he was conveyed to Helen Street Police Office for the interview on 19 November 2010; a neglect of duty on or around 19 November 2010 by failing to adequately investigate the circumstances of his involvement in the case of attempted murder and failure to interview material witnesses; that a police officer bearing malice towards him was allowed to involve himself in the enquiry and caused interrogating officers to ask inappropriate questions regarding the claimant's relationship with Diane Greenaway; and that there was a neglect of duty in that the standard prosecution report which was submitted to COPFS included innuendo but failed to provide evidence to substantiate the charge against him. He also complained of his transfer to uniform duties without any finding of guilt and that the CCU failed to consider his welfare needs throughout their enquiry.

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36. These matters were investigated by Chief Inspector James Trotter. He did not uphold any of the complaints made after due investigation (JB74/99).

This was followed by a letter to the claimant dated 30 January 2013 reporting on the enquiry and giving reasons why the complaints had not been upheld (JB101/103).

5 **Misconduct proceedings against the Claimant**

37. On 14 February 2013 the claimant was advised that the internal investigation against him would commence (C92/93). In terms of those documents an Investigating Officer was appointed to make enquiry into the allegations set out at C93 being (1) that the claimant had accessed the respondent Intranet Case Recording System and obtained personal data for a non policing purpose; (2) verbal representation was made on behalf of Thomas McLelland Snr to a Precognition Agent in connection with a trial unconnected with the claimant's duties and in the knowledge that Thomas McLelland Snr was involved in criminality; and (3) having obtained intelligence provided by Thomas McLelland Snr the claimant failed to submit that intelligence onto the Scottish Intelligence Database.

38. Detective Inspector Clark as investigating Officer made enquiry and produced a report dated 31 May 2013. That report (JB104/122) advised (JB120) that the Investigating Officer *"has found no evidence to suggest that Constable Cotton has acted with any criminal intent or malice, however, he has failed to adhere to proper protocol and procedure. By operating in such a manner Constable Cotton has found himself subject to investigation and potentially left the organisation open to criticism from external parties."* His conclusion (JB119) was that there was no policing purpose to have the claimant accessing the Standard Prosecution Report on the respondent's Intranet system; there was communication with the Precognition Agent Diane Greenaway who the claimant contacted on behalf of Thomas McLelland; and that intelligence had not been submitted *"via SID"*. The claimant's position in respect of the findings of Detective Inspector Clark was that the conclusion that there was nothing to suggest criminal intent or

malice supported his view that the CCU had falsely presented a skewed police report to the Procurator Fiscal.

5 39. The outcome of the enquiry by Detective Inspector Clark was intimated to the claimant in terms of a notice of 17 July 2013 (C94) wherein he was advised by Niall Robertson (Deputy Chief Constable, Designate) that having considered the term of the report he had decided "*that you should not be required to appear before a misconduct hearing or be the subject of a warning in terms of Regulation 6(6). I would, however, draw your attention*
10 *to the attached minute which will be read over to you by the Senior Officer serving those documents on you.*" In that respect the claimant attended a meeting with Superintendent Newbigging and Chief Inspector O'Donnell who were responsible for disciplinary issues in the Glasgow division. He advised that they told him "*the situation is closed – but counselled not to act*
15 *in that manner again but proceed without impunity.*" He states that Mr O'Donnell "*did fire a salvo across my bow – he said it was unusual to find that certain matters were upheld by Detective Inspector Clark but no proceedings*".

20 **Application for promotion by Claimant**

40. Subsequent to the conclusion of the misconduct enquiry and the outcome to "*counsel*" the claimant on the matters contained within the report, the claimant made application for promotion. He passed the appropriate vetting
25 procedure which would approve him for a promoted post and in September 2014 he was placed at Partick Police Office as Acting Sergeant.

41. Then on 26 January 2015 he made application for a Detective Sergeants post within the Digital Forensic Unit in Helen Street, Glasgow which came
30 under the umbrella of the CID Operation. He advised that the person in post was due to retire and after making enquiry about the role, made application (JB127/131).

42. In terms of an email dated 11 February 2015 (JB135/136) the claimant was advised by Inspector Andrew Bain of the Recruiting Department that:-

5 *“Unfortunately during the vetting process it has come to light that because of the sensitive nature of the role you have been deemed at this time as not suitable for this post. As a result I am unable to progress your application any further”.*

43. The claimant considered that this was a detriment occasioned by the protected disclosures he had made up to that point. Having completed the vetting procedure to acknowledge that he was in line for promotion his view was that had been denied this promotion because of the disclosures made. In particular his belief was that the CCU had prejudiced his position.

15 44. His enquiry with Human Resources (Chief Inspector Murdoch) disclosed that CCU had been spoken to as regards a role within CID to the effect that it was not the case that the claimant would never have a position within CID but *“just not now”*.

20 45. In respect of deployment issues Peter Blair Head of Resource Management for the respondent gave evidence on the procedures involved in vetting applications for employment within the service. He advised that as a matter of routine an application such as was made by the claimant for a post within CID would be referred to the PSD and CCU of the respondent *“to see if there was any impediment”* and if there was a response from either of those departments to assess *“if the individual should go forward as a suitable candidate”*. The reason for checking with PSD and CCU was that the Human Resource Department would not always *“be aware of any ongoing issues which may impact or be a risk to Police (Scotland) e.g ongoing discipline; finding of misconduct; recent behaviours which might affect the reputation of Police (Scotland) or otherwise”*. Both PSD and CCU would be presented with a list of applicants and then two Inspectors within Mr Blair’s team would consider any responses from those units and decide whether

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the individual could go forward with his/her application or not. It would not be a valid reason to discontinue an application because the individual had made a complaint about another Police Officer. The valid reasons would relate to the individual's conduct. He refuted that because the claimant may have made a complaint against Police Officers that his application was not to proceed.

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46. JB132 contained a list of four applications made for appointment including that made by the claimant. These were all referred both to PSD and CCU. In the case of the application by the claimant no comment was made by PSD. However, CCU stated "*CCU will liaise with CI Murdoch HR*". Chief Inspector Murdoch was one of the two Inspectors who had been given responsibility for considering any issues raised by either PDS or CCU. In that discussion it was decided that the claimant was unsuitable for the position for which he had applied and that was conveyed to the claimant in terms of the email at JB135.

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47. No information was available as to what had passed between CCU and Chief Inspector Murdoch. Mr Blair advised that "*within the last year or so*" a written report was now prepared as to any discussion between PSD or CCU and HR so that there would be a record of information provided by CCU which may affect an application.

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48. Amanda Daly in her evidence referred to the list of complaints against Police Officers interviewed in the investigation into alleged misconduct by the claimant (JB95/98) and advised that to her knowledge none of the Officers Skelton; Dillet; McLuckie; or Bassano had been suspended from their roles or had been prevented from obtaining promoted positions despite the complaints made.

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49. In evidence David Mitchell advised that he had been involved in misconduct proceedings and accepted a penalty imposed. He had not been demoted within Digital Forensic Unit. His misconduct did not involve Data Protection issues.

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50. The claimant considered that the failure to be appointed to the post in the Digital Forensic Unit was a detriment on the grounds of him making protected disclosures. In March 2015 the claimant did accept a promoted post at Pollok as a Sergeant within the Community Policing section. He was pleased to be promoted but considered that the promotion was on the limit of travel in that it was a 76 mile round trip from his home (at that time) in West Kilbride to Pollok and only 4 miles short of the cut off point to be afforded a "*welfare move*" which would allow him assistance in being able to move his home closer to his post.

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51. In any event he enjoyed his time at Pollok and saw it as one of the "*best periods of his career*".

Applications for external business interest and flexible working

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52. On 7 January 2016 the claimant submitted "*an application for permission for a business interest*" in terms of the respondent's process for such applications. The application (JB138/147) indicated that he wished to be involved in an estate agent business named County Homes Ayrshire operated by his brother. He indicated that the role would involve "*assisting my brother on an ad hoc basis, acting as an agent for his company. The activity would include attending potential client's homes in order to carry out a visual survey of the property and thereafter compiling a written report of the same.*" It was anticipated that the role could be carried out with a "*few hours per week*" and not impose on his duties as a Police Officer as it was likely the main activity would be performed on rest days. He stated that this was:-

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5 *“A relatively new business venture for my brother and as such he has enlisted my aide as and when I`m available. He has lived with Ulcerative Colitis for the past 31 years and more recently he has endured some health complications. As he has a young family it is incumbent upon me to assist where possible.”*

10 53. At the same time on 23 January 2016 the claimant made an application for flexible working. By email of 23 and 24 January 2016 he submitted a plan of flexible working for consideration and indicated that, if approved, the plan would start as of Monday 21 March 2016.(JB142/147)

Application for business interest

15 54. The application for external business interest was reviewed by Andrew Small (JB140) who did not perceive there to be a difficulty in relation to the application made. The application also carried the approval of the claimant`s superior at Pollok, Area Commander Brian Gibson.

20 55. The process in respect of such application called for it to be submitted to the Divisional Commander who at the time was Andrew Bates. In a telephone call between Mr Bates and Mr Gibson concern was expressed by Mr Bates about the nature of the business interest. His concerns appeared to revolve around the possibility of the claimant being involved in renting; leasing; vetting of clients; and collection of rent and whether that might carry some risk for the claimant in his role as a police officer. Mr Gibson required to acknowledge that he had not considered those aspects when he had been looking at the application. Mr Bates passed the application to Mr Anthony O`Donnell for consideration and investigation as appropriate. Mr Gibson explained that it was an error on his part that the application was not sent to Mr O`Donnell in the first instance as part of the process.

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56. In any event on 5 February 2016 Anthony O`Donnell indicated by email (JB150) that his *“spidey sense”* was *“telling me there is something amiss”*.

5 He noted there was no mention of County Homes Ayrshire on the internet; there was nothing in Companies House to indicate a company had been registered; and that the address given appeared to be *“an old Bank which a number of different firm have used over the years”*. He was suspicious that the claimant was not being truthful and that the application set along with the application for part time working was to *“enable him to try and build up a business while at the same time retaining his current job just in case it doesn’t work out”*. He also stated that there was a view the claimant seemed to have *“plenty of cash about him and that there may be other reasons for this application”*. He stated he wanted to carry out a little more research. The application was then remitted to CCU for their view. They responded through Mr Derek Whiteford (JB164) who advised that there was nothing that they would wish to add to the information already obtained. Their position was that the matter lay with G Division to deny or grant the application.

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57. Then on 15 February 2016 (JB167) Antony O`Donnell advised Brian Gibson that after enquiry CCU had *“nothing on record”* in relation to the claimant or his brother but suggested an enquiry with *“U div intell in relation to Derek Cotton and the business address”* and that the claimant be interviewed on questions around when the company commenced business; why it did not appear to be registered or be on the internet; had he already commenced assisting his brother; what his role was to be and *“just see where the interview takes you”*. Mr O`Donnell concluded by saying *“I think it`s safe to say we won`t even be considering any part time application from him until this is all sorted out!!”*

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Application for flexible working

30 58. The application for flexible working ran in parallel with the application for business interest. In terms of the application lodged there would be 50% reduction in hours worked by the claimant. Brian Gibson considered that a reduction of that sort would be difficult in terms of the claimant`s

responsibilities in community policing and impact on resources. The reason for the application made by the claimant was stated by him to be as a result of *“deteriorating health of both my parents and brother. I now find myself primary provider of care for both my parents and a secondary source for my brother. As a result this has placed a greater demand on my time and in particular in the evenings and weekends when the availability of professional carers is at a premium. My current post is 38 mile each way commute from my home address and a similar distance from my brother and parents who all stay relatively close to me.”* Accordingly he wished to engage in flexible hours.

59. In the first instance and in terms of proper process the matter was considered by the *“Resource Manager”* namely Carol Thomson. She considered the application against the respondent’s scoring system and indicated that the *“proposed pattern does not pass”* and indicated that to Andrew Small (JB173/175). On that occasion and at meeting with the claimant towards the end of February 2016 a revised form was submitted by the claimant. The amended document (JB180/190) was considered by Mr Gibson and the Resource Manager as well as Kenna Spence an HR Adviser. The application was then further considered and *“tweaked”* between Mr Gibson and Mr Small.

Outcome of application for business interest and flexible working

60. A meeting between Mr Gibson and the claimant took place on 4 March 2016 when the flexible working plan was discussed. The position of Mr Gibson was he thought that the revised plan as *“tweaked”* between him and Mr Small was acceptable to the claimant.. However, the claimant wished time to consider matters with his family and the following week he became absent from work through ill health.

61. Prior to the meeting of 4 March 2016 an interview had taken place between Mr Gibson and the claimant regarding his application for a business interest.

5 Its purpose was to ask the questions raised by Anthony O'Donnell. The report on that meeting was contained within an email from Mr Gibson to Anthony O'Donnell of 1 March 2016 (JB197) and the response from Mr O'Donnell was that his present stance "*would be that there is no need to approve the application at this stage as clearly the business is not yet up and running and so I am not going to authorise a secondary interest in a business that only exists on paper and in his brother's head. Can you advise that he should resubmit his application at a time when the company is actually registered and in operation. It will then be given due consideration.*" This information was conveyed to the claimant at the meeting of 4 March 2016 with Mr Gibson.

62. The claimant's position in respect of these applications was that this was further detriment occasioned by him making the protected disclosures. He referred to Mr Anthony O'Donnell being part of CCU in the past albeit he was not in that unit as these applications were being considered. However, he considered that this was further interference, essentially at the hands of CCU as Mr O'Donnell would be predisposed to refuse the application because of his links with CCU. Thus he considered that he was continuing to be subject to a detriment as a consequence of "*CCU being allowed to proceed with impunity and without supervision*".

Reports on Counter Corruption Unit

25 63. In support of his view of the general approach taken by CCU the claimant produced the "Police Scotland – Counter Corruption Unit Assurance Review" prepared by HM Inspectorate of Constabulary in Scotland (C96-178). This lengthy review considered particular issues affecting CCU surrounding the alleged disclosure of sensitive information to a journalist and also general matters affecting CCU. In terms of "*the executive summary*" it was noted by the HM Inspector that:-

5 *“The experiences for many of the Police Officers related to legacies of Strathclyde Police CCU investigations, although there was a shared view that the culture from this unit was carried forward into the Police Scotland CCU in 2013. A common theme was the legality, proportionality and apparent lack of procedural fairness carried out by the CCU when dealing with Police Officer and members of Police staff. The primary concern was over a general lack of transparency and accountability within the CCU and frustration by Police Officers that when they raised complaints against CCU Officers, these were not taken seriously or independently investigated.”* (C106).
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64. These concerns were reiterated as part of the “key findings” of the Assurance Review into CCU (C112).

15 65. Reference was also made to the paper provided to the “Justice Subcommittee on Policing - Evidence Session on Police Complaints Handling of 14 January 2016” (JB193/222). In particular reference was made to the submission from the Scottish Police Federation (C201/202) and to the:-

20 *“emerging experience of our members .. that the oppressive and adversarial approach that was a feature in the former force is common place with PIRC investigations and that our members are often on the receiving end of treatment that would be considered unthinkable for non-Police suspects and witnesses. In evidence in 2014 the SPF member reference to the approach adopted with the Data Protection Act allegations and the impact this has on officers and indeed the wider service. I very much regret that it appears to us that since then little has changed.”*
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30 66. Additionally the note of the meeting of 15 February 2015 (being part of the papers before the subcommittee) contained reference by the representative of the Scottish Police Federation to normal enquiry by police officers being:-

5 “potentially considered to be falling foul of data protection legislation. The whole approach is just wrong. It should be about the misuse of data rather than accessing of data. There is no indication of wholesale abuse in that regard “ and that on “opportunities for Police Officers to be nosy. There is nothing wrong with being nosy. There is nothing wrong with looking at the activities of individuals for whom we might have had responsibility. Genuine criminal misuse of the information that has been passed around is when xx records have got nothing at all to do with policing activities are used, but many members fall foul of looking at incidents that they are told they should not be looking at because they are nothing to do with their beat or area, and that is the wrong test.” (C218/219).

15 67. The position of the claimant was that these were tactics which CCU used with him and demonstrated how they would approach those who had “*the audacity to complain*”. The belief of the claimant was that the CCU had prejudiced him by implementing a false and skewed police report; that had led to the misconduct proceedings; and although he had been cleared of wrongdoing continued to prejudice him in his role as a Police Officer with respect to his applications for a business interest and flexible working.

Events before and after resignation of the Claimant

25 68. The claimant remained off work from 8 March 2016 as a consequence of ill health. A meeting was arranged with him on 8 April 2016 to discuss the absence. At that time the report indicated that the claimant “*advises that at this time he is currently unable to achieve a work life balance between his work and personal family commitments, also a previous internal police investigation involving him has produced excessive pressure on him which has caused him stress and to be unfit for work*”. The note indicates that the claimant stated he was “*not in a position to return to work at this time and due to his current circumstances believed his position with Police Scotland*

5 *was untenable and was unsure if he would ever return to work in future.*” At that point it was noted that the claimant advised that he was *“preparing to take Police Scotland to an Employment Tribunal as he had raised a case of being unfairly treated”*. The note of the meeting contains the concerns that the claimant had about his employment. He considered that he had been *“unfairly treated and subjected to a higher degree of scrutiny than other officers”* and that a previous investigation and enquiry into his conduct was the cause of this scrutiny. It was maintained by the claimant that the thought of attending and *“the thought of future ASM’s was placing added stress on him and requested an alternative arrangement be considered.”* (JB206/209).
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69. A further *“attendance support meeting (ASM)”* was held with the claimant on 23 May 2016 at Pollok Police Office. The tenor of that meeting was similar to the meeting of 8 April 2016 (JB203/204).
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70. By letter of 6 June 2016 the respondent advised the claimant of his entitlement to sick pay. It was noted that he would be placed on *“half pay with effect from 7 September 2016 and then nil pay with effect from 8 March 2017”*. He had the right to make representations for *“special circumstances”* to be considered and the claimant was reminded of the assistance which was available to employees who were absent through ill health (JB 216). This advice was repeated by letter of 5 August 2016 (JB217/218).
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71. A further ASM had been set to further discuss matters with the claimant on 21 September 2016. This was to be with Inspector Kevin Lammie who had taken over line management responsibilities for the claimant. Prior to that meeting an enquiry was undertaken by the respondent and an *“open source Google search”* noted that the claimant appeared *“as the company name under County Homes with an address of Royal Bank Building, 1 Manse Road, West Kilbride, Ayrshire KA23 9ET, 0129 4823184; enquiries at www.countyhomesayrshire.com. The services provided are residential property sales and Alan Cotton is the employee and a member of the National Association of Estate Agents (MNAEA). County Homes Ayrshire`s*
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website states that it its industry recognised qualification ensures that its professionals are member of the National Association of Estate Agents (NAEA). It was also noted on the “give something back” page that there was a photograph of the claimant playing football and mention was made of a summer fayre in June 2016 when County Homes Ayrshire sponsored the Beat the Goalie competition with “their staff on hand to give some tips and directions to the competitors”.

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72. This limited enquiry led to the respondent considering whether the claimant was carrying out business activities whilst on sick leave. A briefing paper (JB399) was prepared giving the foregoing information and requesting that Professional Standards make further enquiry.

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73. Further papers were then prepared by Professional Standards being a preliminary assessment (JB380/383) and briefing paper (JB384/386). The conclusion was a request that “Deputy Chief Constable Rose Fitzpatrick gives consideration to the appointment of an Investigating Officer in terms of the Police Service of Scotland (Conduct) Regulations 2014”.

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74. That request was granted and it was intended that a meeting be held with the claimant and Detective Cliff Neil to investigate these matters. The concern of the respondent was that there was a contradiction between the claimant advising at the time of his request for business interest that he did not intend being involved in the running or management of County Homes but appeared to have done so and secondly that he was doing so while absent through ill health.

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75. The claimant had no knowledge and had been given no intimation that he was subject to enquiry. The briefing papers and preliminary assessment were kept wholly within the respondent’s domain and were not released to the claimant. He had instituted his Tribunal claim on 10 April 2016. At the hearing he questioned whether the enquiry into business activities was made as a result of the Tribunal claim being lodged but this was refuted by

Mr West who gave evidence on the terms of the enquiry which had been made. The claimant's position was that the briefing paper and assessment were "full of innuendo and mischief " and that he was not guilty of misconduct.

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76. In any event none of these particular matters were put to the claimant whilst in employment. His position was that he received a call seeking that he attend an interview. It was confirmed by Mr West that in that call the claimant had been advised that the interview was about a "misconduct matter" but no elaboration was given. Initially the claimant had agreed to meet with Inspector Neil on 21 October 2016 but on the evening of 20 October 2016 he decided to resign. He decided that his position was untenable and that he would commence working with the Estate Agency business from that time.

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77. By letter of 21 October 2016 the claimant tendered his resignation from the respondent (JB222). He stated that the resignation was with immediate effect and:-

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"the ongoing war of attrition with Professional Standards Department and the organisation as a whole has become intolerable. My father's terminal illness together with that of other family members health conditions are of paramount importance to me and my only focus. I will of course return the uniform, epaulettes and appointments."

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Submission of Police report to Crown Office Procurator Fiscal Service (COPFS)

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78. A critical issue arose in the evidence as to the submission of a police report prepared by a Detective Sergeant Shona Bassano. The position of the claimant was that this report was prejudiced against him as a consequence of him making in particular the First and Second protected disclosures and "possibly" the Third protected disclosure. His position was that this report to

the Procurator Fiscal had been prepared in February/March 2012. It was the position of Detective Sergeant Bassano that the report had been hand delivered by her to COPFS in January 2011.

- 5 79. A briefing paper for the attention and information of Neil Richardson, Deputy Chief Constable on the referral to the Head of Professional Standards Department by the Area Procurator Fiscal for Kilmarnock inferring "*possible criminal association and inappropriate (sic) conduct*" of the claimant was dated 21 November 2010 (JB54/56). There was no dispute on the date of that briefing note which indicated that the CCU had made enquiry including an investigation and system audit. Neither was there dispute that in relation to this matter the claimant had been interviewed by officers of CCU on 19 November 2010 in relation to allegations of "*criminal association and unauthorised access of Internet Case Reporting System (ICRS)*". There was no dispute that the claimant was transferred to "G" Division with effect from 29 November 2010 from his duties within Forensic Science Gateway.
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- 20 80. Evidence from Diane Greenaway was to the effect that standard police reports (SPRs) are put onto the Internet Case Reporting System (ICRS) and that the case numbers given to those reports are followed through into the Procurator Fiscal's office. Thus it was maintained that the case number GA12004089 on the complaint raised by the Procurator Fiscal against the claimant (C31) meant (a) that it was a report in the year 2012 and (b) the number "4089" meant it was "*well into 2012*" when the police report was made as these reports were given a number in the order in which reported. She could not see the possibility of a case being hand delivered from the respondent to the Procurator Fiscal's Office.
- 25
- 30 81. Reference was also made to the "*Notice of Previous Convictions*" applying to the claimant (C32) carrying at the bottom left of that document the date 14/03/2012; the time 12:44:26; and the words "*Court print for Law Fiona PC*". Diane Greenaway considered that would represent the date of submission of the report to the Procurator Fiscal.

82. The evidence from Amanda Daly was to the effect that the number which appeared in the witness statements (C53/64) in respect of the complaint against the claimant being “PSPAC 02981110” translated as :-

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“PSP - Police Scotland

AC – Patrick/City Centre

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0298 – Report numbered 0298 in the year given by the computer

1110 – Month and year. This may represent when the crime was committed.”

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83. The evidence of Andrew Reid was to the effect that the reference to “*Law Fiona PC*” on the Notice of Previous Convictions would be to the “*case marker*” who would ensure that matters were all in order for the report to go to the Crown Office and that would be done on 14 March 2012 in accordance with the date at the bottom left of C32. Thus the report would be submitted March 2012 which would conform to the reference at the top of the complaint against the claimant (C31) being GA12004089 being a reference to:-

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“G – Glasgow

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A – City Centre (Pitt Street

12 – year

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004089 – Police report number for those in that area.”

He would not know why a police report would be hand delivered. His experience was that reports would be communicated electronically.

- 5 84. John Sallens gave similar evidence and under reference to the number on the complaint of “GA12004089” and considered that it would be “*impossible*” for the report to have been presented to the Procurator Fiscal in January 2011.
- 10 85. The evidence from Detective Sergeant Bassano was to the effect that she was the individual within CCU who had been asked to deal with the complaint which had been made by the Procurator Fiscal for Kilmarnock about the claimant’s contact with Diane Greenaway following his conversation with Thomas McLelland. She was briefed by her line manger on the matter. She was to take a statement from Diane Greenaway and carry out an audit check of the systems to ascertain if there had been inappropriate access by the claimant. She took those steps. She prepared a briefing note and recommended that an interview be conducted with the claimant. She was instructed to interview the claimant on a voluntary basis and that was done on 19 November 2010. As a result of that interview statements were taken from Detective Inspector Hogg on 23 November 2010 (C63/64) and from Detective Sergeant Albert Grayston on 23 November 2010 (C61/62). The previous statement by Diane Greenaway was taken on 10 November 2010 (C53/54).
- 15 20
- 25 86. She then prepared the police case report for the Procurator Fiscal and hand delivered that report to Ms Revie at the COPFS office on 19 January 2011.
- 30 87. She had also prepared the briefing note of 21 November 2010 (JB54/56) which was revised by Neil Richardson, Deputy Chief Constable as he was the individual who required to make decisions about the claimant and whether or not he should retain his position within Forensic Gateway. For the purpose of preparing that case report for the Procurator Fiscal and identifying the statements she used an “*agency number*” being the crime reference number “AC1110” which pertained to the month and the year it was created on the case management system.

88. Detective Sergeant Bassano explained that at that time any criminal allegation against a Police Officer in an SPR was hand delivered to the “CAP Unit in Glasgow by hard copy” and was “not put on any other system at that point”. She advised that this was the “standard process in the Professional Standards Department and Counter Corruption Unit.” There was no case number put on the ICRS unless instructed to do so by the Procurator Fiscal.
89. She advised that this report regarding the claimant was “one of many which went to the Fiscal by hard copy” at that time. She had checked the records to reconfirm the position. The reason that the number was not put on ICRS was so that if there were no proceedings against the Police Officer then there would be no record within the criminal history system (CHS). Some cases would be returned by the Fiscal marked “no proceedings” and in those circumstances it may proceed to a misconduct case. If a case was to proceed to prosecution it would then be given a number within ICRS.
90. She advised that in this case the Procurator Fiscal had instructed that it be given an ICRS number in March 2012 when it was decided they would proceed to a prosecution. By that stage additional witnesses and statements had been added to the documents delivered to the Fiscal. In that respect she referred to paragraph 9.5 (JB88) of the report into the complaint made by the complainant against Police Officers which stated:-
- “On 25 October 2011 Lorna Revie sent communication that statements be obtained from two Officers who could speak to PC Cotton’s role at the Forensic Gateway. Ms Revie detailed another two points for clarification. She did not request for a statement to be obtained from Thomas McLelland (Snr) nor did she make any adverse comments on the quality of the SPR.”

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91. Detective Sergeant Bassano explained that by that time Lorna Revie of the Procurator Fiscal's Office had possession of the SPR and consideration of the report was the reason why she had asked for additional statements and some clarification.
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92. Detective Sergeant Bassano advised that she had prepared the report in the period between November 2010 and when it was delivered to the Fiscal in January 2011 and denied that it contained false or misleading information. The essence of the matter in relation to the contact by the claimant with Diane Greenaway was that a Police Officer should not represent a criminal to a Precognition Agent without reporting the matter to the officer in charge of the investigation. That did not appear to have happened. That was not appropriate behaviour. In addition there was
15 evidence from the audit systems check that the claimant had accessed systems in respect of a report for Thomas McLelland (Jnr) in 2009. In his role in Forensic Gateway there was no reason for that access.
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93. So far as the date of 14/03/2012 appearing on C32 was concerned she did not know the person named (Fiona Law) but considered that it did corroborate that was the date the Fiscal had instructed to put the case onto the ICRS being the reason it bore the number GA12004089.
- 25
94. Questions were raised with Detective Sergeant Bassano as to the witnesses who were subsequently added beyond the point at which she stated she had delivered the SPR to the Procurator Fiscal. She advised that the evidence of Sheena Brennan in connection with Data Protection had been added subsequent to delivery of the report. Her evidence related to the breach of Data Protection and she gave generic evidence in a
30 number of such cases.
95. The Tribunal concluded and find from the evidence given that the police report prepared by Detective Sergeant Bassano had been hand delivered

by her to Lorna Revie of the Procurator Fiscal's Service in Glasgow on 19 January 2011. They found Ms Bassano to be credible in this matter. The evidence from other officers was of course genuinely given but none of them had worked within CCU and none knew the process of dealing with complaints against Police Officers which was in place at that time. Detective Sergeant Bassano explained that hand delivery of these reports was essentially a protective measure for Police Officers in that if there was no report created on ICRS and the Fiscal decided not to proceed with the matter then there was no record for a serving Police Officer of suggested criminal activity. If the matter was to proceed to prosecution then the case would be entered in the ICRS as was done in this case in March 2012.

96. This was an exception to the normal course of events which the Tribunal considered was not within the knowledge of the Police Officers who spoke to the normal course of events regarding the creation of SPRs and transmission to the Procurator Fiscal.

97. Diane Greenaway again gave genuine evidence but she had not been privy to the particular operation regarding complaints against Police officers and how they were dealt with by COPFS.

98. The timeline was also consistent with the report being delivered in January 2011 rather than March 2012 and that carried weight with the Tribunal in assessing the evidence. The briefing note which was prepared following the complaint from the Procurator Fiscal for Kilmarnock was undoubtedly prepared 21 November 2010. The systems audit had taken place by then. The claimant had been interviewed under caution on 19 November 2010. The claimant was moved from his position at Forensic Gateway at that time. Statements were taken from two other officers on 23 November 2010. The guidelines indicated that police reports in respect of complaints against Police should be prepared within 14 days of the suspected offence. There seemed no sensible reason why there should be delay until March 2012 of presentation of the police report to the Fiscal given that the briefing note on

the matter was prepared 21 November 2010 and investigation and enquiry had taken place at that time into the circumstances. There was also evidence to find that the Fiscal in October 2011 had sought further information and clarification. That was only likely if the police report was by that date already in the hands of the Procurator Fiscal rather than being presented in March 2012.

Events subsequent to termination of employment

10 99. The claimant now is the principal of the estate agency business known as County Homes Ayrshire. He stated that his mother had *“bankrolled the business and continues to do so”*. He is a sole trader and *“yet to draw a wage”*. He expected that the business may become profitable approximately September 2018. He had earned £40,000 per annum with the respondent at date of termination of his employment. Given the commitments he would require to have to his family by way of care arrangements he considered that reasonable earnings with the respondent on flexible working until retirement at age 60 would have been £25,000/£30,000 per annum on reduced hours.

20 100. He sought financial compensation for the loss of potential promotion earnings. He had prepared a paper (JB393) giving three options of loss related to assumptions regarding promotion. Within that paper it was stated that *“estate agents average salary of £25,000 projected to be achieved by 2020 to pensionable age at 2030”*.

30 101. In support of that statement of loss there was produced (JB395/398) a report on pension loss. The claimant had left the pension scheme of the respondent on 31 March 2016 by which time he had completed 18 years 235 days service and had a final pensionable salary of £39, 662 per annum.

102. The calculation assumed that the claimant would have continued to serve until age 60 and then retire as a Constable. It also assumed that he would continue to be a member of the pension scheme. Pension loss is then
5 calculated (reduced for taxation) to £264,020 (JB397).

103. A counter schedule of loss was produced by the respondent (C225) which included no pension loss given that the claimant was not part of the pension scheme at date of dismissal.

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Submissions

Submissions for the Claimant

15 104. The claimant submitted that he had been in a job which he had loved for over 20 years but the treatment that he had received from the respondent was unfair and lacked the hallmarks of an organisation which should stand for justice and fairness.

20 105. He had been brave enough to take a stand as “*a war had been waged*” on him.

106. He submitted that his evidence should be preferred and that the respondent had followed unfair procedures in the way in which they had dealt with him.

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107. His contention was that in the initiating incident he had done nothing wrong and that the worst thing that could possibly be done was to be accused of corruption. He believed that he had incurred the wrath of the respondent`s CCU/PSD Unit as a result of challenging their workings. Since his first
30 protected disclosure of 17 November 2011 he had been prejudiced. The three witnesses who had spoken on his behalf namely John Sallens, Amanda Daly and Andrew Reid had also spoken of the treatment that was meted out by the CCU and the detriment that caused. Those witnesses all

indicated that officers from the CCU subjected whistleblowers to detrimental treatment.

5 108. It was the contention of the claimant that the officers working within that department worked outwith the law; outwith guidelines and without fear of reprisal. That was confirmed by the evidence given to the Justice Committee and the findings in the HMICS report.

10 109. He maintained that the police report was a consequence of his disclosure and that it had been deliberately skewed by Detective Sergeant Bassano. He maintained that the motive for Detective Sergeant Bassano to say that the police report had been delivered in January 2011 was to prevent her being prosecuted.

15 110. It was maintained that the police report was false and there was no reason for it to be false. The witnesses Reid/Daly/Sallens all advised that it was a common tactic for breach of Data Protection to be used when the CCU wished to discredit an officer.

20 111. Evidence from Diane Greenaway was to the effect that the report would have been received in March 2012 which can be confirmed by the reference number on the complaint against him.

25 112. It was also the case that he had been denied promotion. Evidence had been given that others in the force had been able to be promoted albeit they had outstanding complaints against them. It was significant that Mr O'Donnell was imposed as a liaison between G Division and CCU/PSD. He had been party to the "*corrective advice*" given to the claimant. He was the one who had been instrumental in preventing the external business interest application being granted and also indicating that the flexible hours application should be refused.

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113. He maintained that he had suffered and continued to suffer as a result of the disclosures which had been made and in the end he had been left with no option but to resign.
- 5 114. The respondent as Chief Constable was “*vicariously responsible*” for the actings of the force and its officers and in those circumstances the claim was well made.
- 10 115. As far as remedy was concerned compensation should be awarded. It was notable that in the three appraisals prior to CCU involvement the claimant had been given a high rating. He had been denied promotion. Without the involvement of CCU it was likely that he would have been promoted in 2008. It was in any event no quantum leap to suggest that the rank of Inspector and Chief Inspector might have been his within the years
15 2016/2030. Neither was it unreasonable to suggest that he could have attained the rank of Detective Superintendent.
116. In this respect the Tribunal was encourage to consider he options 1, 2 and 3 as set out in the paper accompanying the pension loss statement.
- 20 117. While the respondent would say that he had left the pension scheme voluntarily that was a “*naïve*” understanding of the position. The claimant had experienced the “*fury of the CCU over the preceding 7 years*” and knew full well the implication of his impending ET1 Application. The withdrawal
25 from the pension scheme was a direct result of his experience of dealing with the CCU and how that would without doubt end his career. Continued membership was therefore futile.
- 30 118. His position was that as a direct result of the CCU contact and his subsequent resignation he was then able to explore the offer made to him by his brother to take over the day to day running of the estate agency business. However, he did not “*grow up wishing to be an estate agent*”. He wanted to be a Police Officer and that had been taken away from him.

119. The opening ceremony of the Estate Agency business under his management took place on 26 November 2016 which was some weeks after his resignation. There was “no way” that he would have taken up the business prior to that resignation given the scrutiny that he was under.

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120. He had given years of loyal service to the Police. He had attended to his work at the expense of his family life in earlier years. There was a feeling of betrayal given the treatment that he had experienced.

10 **Submissions for the Respondent**

121. The Tribunal were reminded of the statutory test for constructive dismissal within Section 95(1)(c) of the Employment Rights Act 1996 (ERA). It was submitted that there was little specification of the claimant’s constructive dismissal claim. The extent of the claimant’s averment was that resignation was a direct result of the ongoing “*detriment by the respondent and that his position was made untenable by them*”.

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122. It was the respondent’s position that the claimant could rely on no more than the acts of detriment which he contended were a consequence of protected disclosures in coming to a view he should resign.

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123. In particular it could not be the case that because he had received a phonecall asking him to attend a meeting that caused him to resign. The phonecall request for a meeting was not a matter which the claimant had relied upon as a detriment in making a protected disclosure. The respondent’s position was that the claimant “*would know full well*” there were likely to be misconduct issues arising out of the allegation that he had worked as an estate agent during a period when he claimed to be too sick to work but that was not his case.

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124. It was maintained that the claimant's position was that a breach of the implied duty of trust and confidence arose from the respondent subjecting him to detriment on the grounds of making a protected disclosure. However even taking the claimant's case at its highest he did not resign in response to a breach of Section 47B of ERA. That was apparent from the fact that the claimant was informed that his secondary employment application was not being approved on 4 March 2016 (the last act he averred caused him to suffer detriment) but did not resign until over 7 months later on 21 October 2016.

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125. It was submitted the claimant's claim for constructive dismissal failed even if his case under Section 47B of ERA was to be upheld in full or part; and it most certainly failed if his case under Section 47B of ERA was dismissed. In his claim he stated that the "*resignation was a direct result of the ongoing detriment by the respondent*" and given the time lapse between the last act which the claimant said caused him detriment and resignation no claim could lie.

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126. It was maintained for the respondent that there had been no actings on their part on the ground that the claimant had made a protected disclosure. Everything that the respondent had done in relation to the claimant was because he was under suspicion of a crime, inappropriate conduct, or it was simply not considered operationally possible to accommodate his requirements at the particular time.

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127. In particular it was submitted that from the evidence a finding should not be made that the police report was as a consequence of the protected disclosure made on 17 November 2011. The evidence was that given the date of the briefing note and the evidence of Shona Bassano this report could not have been prompted by a disclosure on 17 November 2011 as it had been delivered to the Procurator Fiscal Service by 19 January 2011. The originating complaint was made by the Area Procurator Fiscal for Kilmarnock and not by the respondent. The terms of the briefing note of 21

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November 2010 and the police report were similar. The claimant could not say that the actions of the Area Procurator Fiscal on 25 October 2010 was an act done on the grounds of him making a protected disclosure. The Area Procurator Fiscal felt that the claimant's behaviour was "*wholly inappropriate*" and required to be reported. An investigation was inevitable. Essentially the claimant was aggrieved and annoyed that a complaint had been made about him at all rather than that action was taken against him because he had made a protected disclosure.

10 128. The interview which took place as a consequence and his transfer to a uniformed position could not have been acts done on the grounds of protected disclosure. These all took place prior to the first disclosure being made.

15 129. The complaint against Ms Bassano was made on 6 November 2012 some 7 months after the claimant says she submitted a false report. Ms Bassano did not have knowledge of the protected disclosure of 17 November 2011 which the claimant says resulted in him being subject to a false report.

20 130. The post that the claimant applied for in 2015 was made some 3 years after he made his final protected disclosure. He made that application on 26 January 2015. His final disclosure was a statement made to James Trotter where he complained about 4 officers. That complaint was investigated and not upheld. The claimant applied for a post in January 2015 some 3 years after the complaint had been investigated and not upheld. Two months later he was promoted to a separate position.

30 131. The evidence from Peter Blair explained the involvement of PSD/CCU. Nothing out of the ordinary took place in relation to the application made by the claimant. Mr Blair nor anyone in his department had a connection with CCU. The fact that the claimant had made a complaint about officers had nothing to do with his protected disclosures. There was no reason or motive for that to be the case.

132. The claimant maintained that as a result of making protected disclosures officers failed to investigate two internal grievances raised by him on 19 December 2011 and 5 March 2012.

5 133. It was submitted that these complaints had been investigated. The second grievance raised essentially indicated that the first grievance had not been dealt with. These matters were considered within the report headed "*Complaint about the Police*" dated 7 December 2012.

10 134. There was no evidence to back up the claim that in some way grievances had not been followed through as a result of protected disclosures.

135. So far as the application for flexible working was concerned this was a decision Brian Gibson required to take. He had no knowledge of the protected disclosures. That decision on the flexible working application was made 4 years after the making of the last protected disclosure. Mr Gibson was clear in stating his distaste at the insinuation that he would not be "*his own man*" in the decision taken. The evidence of Mr Gibson was that he felt he had reached a compromise solution with the claimant on this application and if the claimant had accepted that compromise then he could have had a flexible working arrangement.

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136. A similar position existed in relation to the application for secondary employment. Again the decision was taken almost 4 years after the making of the last disclosure.

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137. Mr Gibson in his evidence indicated that after discussion he agreed with the view taken by Mr O`Donnell that the application was premature and that it should be resubmitted once the claimant`s brother had set up the estate agents business and it was in operation. So there was no outright refusal of that application.

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138. It was submitted that the burdon of proof in respect of the “whistleblowing” claims and constructive dismissal was on the claimant and that there had been a failure to present credible evidence that acts were done on the basis that the claimant had made a protected disclosure. The Police Officers concerned who had made decisions in the preparation and submission of the police report, and in dealing with grievance, application for flexible working and application for outside business had simply been performing their roles and dealing with these matters in good faith.
139. If the Tribunal were not to dismiss the claim in its entirety then a separate schedule of loss had been submitted by the respondent to counter that submitted by the claimant.
140. There was no evidence of accounts from the estate agency business and nothing to say what actually had been earned by the claimant since he took over management. In the absence of any accounts it was submitted that comparable earnings should be assessed.
141. In any event the schedule of loss was inaccurate. It could not be the case that the claimant could have been promoted to Sergeant in October 2011 when he had only made his first disclosure in November 2011.
142. It was also submitted that it was inconceivable that any loss should include the amounts that the claimant considers he would have received in promoted posts over a period of 13 years or so.
143. The pension loss was inaccurate as the report was based on the claimant leaving service on 31 March 2016 whereas that had happened in October 2016. The true position was that the claimant had voluntarily left the pension scheme in March 2016. The respondent had no influence in that one way or another. He was not in the scheme at the date he resigned. He is a deferred member. It does not matter why he left the scheme. The fact is that in October 2016 when he left the service of the respondent he was not in the

scheme. It was not argued by the claimant that but for constructive dismissal he would have gone back into the scheme. The loss needs to arise on account of the dismissal and if the claimant was not in the scheme at that point then no loss arose.

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144 In any event there should be a 100% deduction under the principle of **Polkey** as the claimant would have been dismissed in any event given the allegations of him working when on sick leave.

10 145. In any event any compensation should be reduced by 100% due to the contributory conduct of the claimant. If he had not contacted the Precognition Agent to speak to her about Operation Amp and witnesses no action would have been pursued.

15 **Conclusions**

The Legal framework

146. A principal right within Section 47B of ERA is a right not to be subject to a detriment because of a protected disclosure. Section 47B(1) of ERA provides:-

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“A worker has a right not to be subject to any detriment by any, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

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147. The interrelationship between detriment and dismissal was considered by the Court of Appeal in **Melia –v- Magna Kansei [2006] IRLR 117** which confirmed that the relevant provisions as to detriment and dismissal must be construed as part of the overriding statutory scheme. Accordingly an employee who makes a complaint of unfair constructive dismissal is entitled to rely upon the statutory protection relating to detriment right up until the effective date of termination when the dismissal in question became

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effective. It was only after this moment in time that the provisions relating to dismissal came into play. Thus the employee in question was entitled to remedies relating to detriment throughout the whole period of his employment and he was not prevented from claiming remedies for detriment which he suffered from the time when the repudiatory conduct of the employee started up until the effective date of termination of his employment.

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148. If a protected disclosure has been made it becomes necessary to consider whether or not the worker has been subjected to an unlawful detriment as a result. That can arise from an act or deliberate failure to act by the employer.

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149. “*Detriment*” is not defined but it is considered that a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them has in all the circumstances been to their detriment. It is not necessary to show that there was some physical or economic consequence flowing from the matters complained of (***Shamoon –v- Chief Constable of The Royal Ulster Constabulary (Northern Ireland) [2003] IRLR 285***).

150. Section 48(2) of ERA applies to all detriment claims. It states that:-

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“on such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done”.

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151. That does not mean that once a claimant asserts that he or she has been subject to a detriment, the respondent must disprove the claim. Rather it means that once all the other necessary elements of the claim have been proved on the balance of probabilities by the claimant - i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment – the burden will shift to the respondent to

prove that the worker was not subjected to a detriment on the ground that he or she had made the protected disclosure.

5 152. Where a complaint is upheld then the employee would be entitled to a declaration to that effect and “*monetary compensation in respect of the act or failure to act to which the complaint relates*”. (Section 49(1) of ERA). There is no limit to the compensation that can be awarded. The standard rules for detriment cases covering the award on the “*just and equitable basis*” are set out at Section 49(2) – (5) of ERA. Awards of compensation for injury to feelings in whistleblowing detriment cases are available and in that respect awards with respect to aggravated and exemplary damages are potentially available. If it appears to a Tribunal that the protected disclosure was not made in good faith it may (depending on the circumstances) reduce any award by no more than 25%.

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153. In a detriment case the test as to whether there has been a detriment is “*on the ground that the worker has made a protected disclosure*” which has been interpreted as meaning that the disclosure must have been “*a material factor*” (***Feckitt –v- NHS Manchester [2012] IRLR 64***).

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Constructive Dismissal

154. Section 95(1)(c) of ERA states that there is a dismissal when an employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer’s conduct.

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155. ***Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221*** makes it clear that the employer’s conduct must be a repudiatory breach of contract: “*a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the terms of the contract.*” It is clear that it is not sufficient that the

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employer's conduct is merely unreasonable. It must amount to a material breach of contract.

5 156. The employee must then satisfy the Tribunal that it was this breach that led to the decision to resign and not other factors.

157. Also the employee should not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

10 158. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual terms may have the cumulative effect of undermining the trust and confidence inherent in every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim
15 constructive dismissal following a "*last straw*" incident even though the last straw by itself does not amount to a breach of contract – **Lewis -v- Motorworld Garages Ltd [1986] ICR 157**. However, the last straw must contribute however slightly to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot
20 be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. While it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual
25 case where conduct which is perfectly reasonable and justifiable satisfies the last straw test.

30 159. If a subsequent event takes place that adds to the previous breach or breaches this may effectively "*resuscitate*" the past. It may be that if an employee remained in employment and did not resign in response to a particular incident, he/she may not have affirmed the contract in the event of a subsequent incident. In those circumstances the Tribunal would need to have regard to everything that has happened in order to assess whether (a)

there is or has been a repudiatory breach which the employee is now entitled to accept; and (b) the employee has resigned at least partly in response to such breach. .

- 5 160. The term of the contract that the claimant relies on in this case is that commonly called “trust and confidence”. This was defined in ***Malik –v- Bank of Credit & Commerce International SA (In Liquidation) [1997] IRLR 462*** where Lord Steyn said that an employer shall not:-

10 *“without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”*

Conclusions on protected disclosures

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161. The finding in fact that the police report was at the Procurator Fiscal’s Service by 19 January 2011 is very damaging to the claimant’s case that he was subject to a detriment on the ground of making protected disclosures. Comment has been made on the reasons why that finding was made.

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162. The first protected disclosure made by the claimant was on 17 November 2011 being the email addressed to Mr Neil Richardson, Deputy Chief Constable of Strathclyde Police. This was well after various events which form the subject of complaint by the claimant had taken place.

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163. By that time a complaint had been made about the claimant’s contact with Diane Greenaway from the Procurator Fiscal for Kilmarnock; a systems audit check had been conducted which disclosed the claimant had accessed the system; he had been interviewed under caution; other officers had been interviewed; a police report had been prepared; and delivered to COPFS; and he had been redeployed to uniformed duties at Gorbals Community Police Office. None of these matters could have been occasioned by protected disclosures commencing 17 November 2011.
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164. That means that there was put in train prior to any protected disclosure being made the steps which would result in the claimant being served with a complaint in May 2012 and the subsequent trial date being set for September 2012. There was no evidence that anyone from the respondent
5 encouraged or had any part to play in the decision by the Procurator Fiscal to proceed on the police report by raising a complaint in March 2012 and having a trial date set. That the respondent would have no part to play in the Fiscal's decision would be the expectation and part of the respondent's procedures (JB335). That was a matter entirely in the hands of the
10 Procurator Fiscal at that stage. In any event it was not the case for the claimant that the respondent had encouraged the Fiscal to pursue that complaint because of protected disclosures made but that the initiating police report was false and skewed as a result of the disclosure of 17 November 2011; 19 December 2011 and 5 March 2012. Thus it could not be
15 said that the raising of the complaint and the setting of a trial date and the subsequent abandonment of the case against the claimant was in any way inspired by disclosures that were made.

165. This was effectively at the heart of the claimant's case. His view is that
20 having made a complaint the respondent's CCU made it their business to prejudice him by means of a false and skewed police report which resulted in the prosecution. His case is that flowing from that there were subsequent measures taken against him in misconduct proceedings; to prevent promotion; disadvantage him in interfering with his application for flexible
25 working and application for outside business interest. Taking away the assertion that the police report was false and skewed as a result of the protected disclosure and led to prosecution and misconduct proceedings removes a fundamental pillar in that case.

30 166. It also means that it could not be said that the "*Digger*" article was inspired by the protected disclosure. The events outlined within the article relate to the fact that he was prosecuted and that information was made public about his address in each diet prior to trial. Given that the conduct of the

proceedings at that point were in the hands of the Procurator Fiscal and that those proceedings had not been inspired by protected disclosures then the article , while certainly unfortunate could not be said to be part of actings at the hands of the CCU.

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Misconduct proceedings

167. The contact with Diane Greenaway and the concern raised by the Procurator Fiscal for Kilmarnock not only activated the investigation and the police report but also triggered the misconduct proceedings against the claimant which of course was separate to any criminal proceedings. The misconduct proceedings commenced subsequent to the criminal complaint against the claimant being deserted. While misconduct proceedings could proceed in tandem with criminal proceedings the respondent's procedure allows for such proceedings to be stayed pending the outcome of any criminal proceedings (JB338). The commencement of the misconduct proceedings subsequent to the complaint being deserted was in line with that procedure. The matter was investigated by Inspector Andrew Clark as Investigating Officer who found no evidence to suggest that the claimant had acted with any criminal intent or malice but had failed to adhere to proper protocol or procedure. That resulted in the meeting between the claimant and Superintendent Newbigging and Chief Inspector O'Donnell on 26 July 2013 when the claimant was counselled on his future behaviour.

168. The Tribunal considered that those proceedings were part and parcel of the initiating complaint made by the Procurator Fiscal at Kilmarnock and which had activated the investigation resulting in the complaint being raised by the Procurator Fiscal. That also triggered misconduct proceedings. These matters were not prompted by disclosures commencing 17 November 2011.

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Grievance raised by the claimant

169. The second protected disclosure made by the claimant on 19 December 2011 was by means of a formal grievance against the respondent in respect of the issues raised in his email of 17 November 2011. That grievance was taken to the conclusion of the “first stage” but there did appear to be confusion over progress from that point. The position of the claimant was that the matter should have proceeded to a “second stage” as he was not content with the discussions at the first stage. In addition it was stated that the papers had been “lost”. That meant there was no evidence that the grievance made by the claimant was followed up at that time by the respondent. As a distinct process it would not appear that it was brought to a conclusion.

170. At the same time a further disclosure was made by the claimant on 12 September 2012 which was emailed sent to the Deputy Chief Constable, Mr Campbell Corrigan the terms of which were:-

“Boss, as you know I was recently subject of police report ref AC02981110, PF ref GA 12004089. I appeared for ID on 29/08/12 at GSC and was scheduled to appear again today for trial.

On Friday 7 September I was contacted by my lawyer, engaged at my own expense, to the effect that after mutual disclosure and a meeting with Mr John Dunn of COPFS where a Chief Superintendent was present, the crown now accept that I had a valid policing purpose in accessing the crime report that I did. A position I’ve maintained since the start. I’m sure I hardly need to explain the sense of justice and relief I felt as a result of that call.

Having been informed by yourself previously, at the receipt of my copy complaint, that you were not considering any internal discipline matters, I assumed that Friday would have been the end of my living

5 *nightmare these past two years. Yesterday I was informed by my area commander that after consulting with complaints and discipline, whilst they are aware of the COPFS decision, the matter is certainly not resolved. I've now had to communicate that to my family last night and explain to them that despite Fridays developments the nightmare continues unabated.*

10 *Whilst I understand that I'm unable to raise a grievance in relation to this as per the SOP, it appears that I should direct any issues I have regarding this to yourself. I would respectfully request that I be granted a meeting with you to discuss the many serious concerns I have regarding the impact on me and my family as a result of the conduct of the counter corruption unit inquiry into my case in particular and their operations in general. It is my firm belief that it is only a matter of time before a tragedy befalls a colleague and Strathclyde Police as a direct result of the actions of this department.*

15 *I hope and trust that this matter is of such gravity that it will require your personal attention and I look forward to meeting with you soon in this regard."*

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171. The claimant subsequently clarified what he had said in the email regarding the internal misconduct proceedings. In his statement of 5 November 2012 to James Trotter (JB74/81) he states that in the email of 12 September 2012 *"I mentioned that at receipt of my copy complaint I was informed that there were no internal discipline matters being considered. I have been shown a copy of the form served on me and I realised now that I misread the form"* (JB81).

30 172. The email of 12 September 2012 did not complain that the claimant's grievance had not been resolved. That email was met with an invitation that the claimant meet with Chief Inspector James Trotter who took a statement on 5 November 2012 from the claimant on the matters which concerned

5 him. The email of 12 September 2012 and the statement of 5 November 2012 were the fourth and fifth protected disclosures made by the claimant. In the statement made by the claimant (JB74/81) it does appear that the same grounds of complaint as were raised in the grievance by the claimant are laid out within that witness statement. There is a difference in that there are particular allegations against particular officers within the statement of 5 November 2012 but the general thrust was the effect that the investigation had on the claimant; that the move to uniformed position was decision based on "*a personal grudge*" and "*punitive*"; and he had been offered no support. He felt that the actions taken by "*CCU and HR have proved to be*
10 *entirely punitive and totally Draconian*"; and that he felt undervalued and mistreated and that there was a direct link "*on how I am perceived and treated now to the initial decision taken*". The statement appears to be an elaboration on the grievance which was lodged on 19 December 2011 and repeated on 5 March 2012.

173. There then followed a full investigation into the matters raised by the claimant in terms of the "*Complaint about Police – Alan Cotton*" report (JB82/100) and which investigation concluded that the complaints were not
20 upheld. That decision and the reasons for it were conveyed to the claimant by letter of 30 January 2013 (JB101/103).

174. Given the timing of the grievances which were raised (19 December 2011 and then 5 March 2012) it is possible, in terms of timing, that the grievance of 19 December 2011 did not proceed to the second stage and the papers were "*lost*" due to the claimant making a protected disclosure on 17
25 November 2011. However, there was no evidence that there was any interference or connection between the CCU and the grievance procedure. In the view of the Tribunal that grievance should have been processed into the second stage. At the same time it does appear that there were on 12
30 September 2012 and 5 November 2012 matters raised by the claimant which were essentially the same issues as covered by the grievance in December 2011 and repeated in March 2012. Those matters were

investigated fully by Chief Inspector Trotter. He dealt with the issues raised. He came to a considered view and the Tribunal were not able to say that the failure to investigate the grievances was on the ground of the protected disclosure made by the claimant on 17 November 2011. By that time he had not made any complaints against specific Police Officers. His complaint was generic in nature. He felt he had been unfairly treated. His complaint of 12 September 2012 amplified and made more particular by the statement of 5 November 2012 did indicate that there were actions by individual Police Officers which were in his view unfair and untoward. Those accusations were relayed to the officers concerned in November 2012 (JB83) and well after the grievance procedure broke down in December 2011/March 2012. No specific allegation against particular officers had been made by the claimant to that point. They had no knowledge or indication of a complaint being made against them by the claimant until that point. The complaint was made against serving officers in CCU. They could have had no knowledge of any complaint being directed against them when the grievance was raised in December 2011/March 2012. The Tribunal did not consider that the failure of the grievance process was on the grounds of the protected disclosures made on 17 November 2011 or the terms of the grievance made in December 2012 or 5 March 2012.

Applications for posts within Cyber Crime Unit

175. The claimant made application for a Detective Sergeant post in the Digital Forensic Unit on 4 February 2015. The role came within the umbrella of the CID operation of the respondent. The outcome of that application was that because of the "*sensitive nature of the role*" the claimant had been deemed as not suitable "*at this time*". That information was given after a process of vetting of the application had been followed which process appeared to the Tribunal to follow a normal course. In that process the view of both PSD and CCU would be taken. It would appear from the evidence that a discussion took place between officers within Resource Management and

Detective Inspector Murdoch of CCU and as a result of that discussion it was not offered to the claimant.

5 176. Mr Blair stressed that the officers in his department would be dealing with the matter independently. There was no written report or evidence which would convey what had passed between his officers and DI Murdoch.

10 177. This application came some time after the last disclosure (5 November 2012) when specific complaints had been made by the claimant against 4 officers. By that stage the complaint had not been upheld. There was no evidence that the officers in question were aware of the application which had been made.

15 178. Essentially to find that this move had been blocked on the grounds of the protected disclosures made would be to accept that because complaints had been made about officers within CCU that department held a grudge and would take steps to ensure that the claimant was disadvantaged.

20 179. The timescale of approximately 2.5 years between the events makes that difficult to accept. Additionally it was the case that shortly after this application was refused the claimant did receive promotion to a position at Pollok Police Station. It did appear to the Tribunal that the CID role that was being applied for could be fairly described as being "*sensitive*" in nature. The claimant had been involved in a matter which did concern the
25 Procurator Fiscal at Kilmarnock as being inappropriate. There was no evidence to suggest that there was a continuing grudge against the claimant as a result of him making complaints about Police Officers in November 2012 such that the CCU would ensure he was disadvantaged in respect of any promotion application. The view of the Tribunal was that there was no
30 evidence to suggest that the claimant was being disadvantaged in this application and subject to a detriment on the grounds of the protected disclosures made.

Application for business interest and application for flexible working

180. These applications were made in January 2016. Again in terms of the timescale there is some distance between the last protected disclosure of 5 November 2012 and these applications.

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181. From the evidence of Chief Inspector Brian Gibson the Tribunal were satisfied that these applications had been considered conscientiously and objectively.

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182. It is the case that Mr Gibson was initially in favour of the application. Discussion with Mr O`Donnell altered his view. Mr O`Donnell`s role seemed to the Tribunal to be part of the process in such applications. He did seem suspicious about the application made. At the same time it did appear that when the application was being considered the estate agency business had not been set up and there was no specific information about the role that the claimant would play. The application was not refused outright. It was indicated to the claimant that he could reapply once the business was established and there was more information available,

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183. Mr O`Donnell appeared to be the individual who had "*counselled*" the claimant on the outcome of the misconduct proceedings. He had not been named as an officer who had any part to play in the initial investigation against the claimant and there was no evidence to suggest that he was party to any protected disclosure made by the claimant. He had not been involved in the investigation or the misconduct proceedings (other than to advise of the outcome). It appeared part of the process that he was involved in this application and he had not sought to intervene irregularly. He had certainly put a "*dampener*" on the initial enthusiasm shown by Mr Gibson but from the evidence given by Mr Gibson we accepted that he had modified his view as there were matters raised by Mr O`Donnell which he had not initially considered.

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184. In the circumstances we could not find that there was a connection between the protected disclosures made and the outcome of this application.

5 185. A similar position relates to the application for flexible working. Again the Tribunal accepted that Mr Gibson had given conscientious consideration to this request. It seemed that he had tried to do his best to accommodate the claimant. The request was made on the basis that the claimant had particular care arrangements that he wanted to organise as a result of ill health in the family. We accepted the evidence from Mr Gibson that he
10 thought he had reached a compromise solution with the claimant on 4 March 2016. However, subsequent to that meeting the claimant had indicated that he required to be absent through ill health.

15 186. We also accepted Mr Gibson`s evidence that he would have made the decision on the matter. Whatever Mr O`Donnell`s view might have been on this application he was not the one who would have made the final decision. The evidence suggested that operationally the initial request of effectively 50% reduction in working hours would not work for Mr Gibson. The Tribunal cannot disagree with that position. It did seem a substantial reduction and
20 the Tribunal could see that there would operational concerns in that respect. As indicated there were discussions to see whether some other arrangement could be made which would relieve the pressures on the claimant but ill health ensued to interrupt resolution of the matter.

25 187. Again given the timescale between disclosure and application; given the conscientious consideration which the Tribunal believe was made to the application; given that Mr Gibson believed he had reached a compromise and there was no evidence to suggest that the entirety of the application was being thwarted from CCU or elsewhere; then the Tribunal could not say
30 that the claimant was subject to a detriment in respect of this application on the ground of protected disclosures made ending 5 November 2012.

188. Accordingly the Tribunal could not make a determination that the claimant was subject to a detriment on the ground of making protected disclosures and that claim fails.

5 **Conclusions on constructive dismissal**

189. The foregoing finding badly affects the claim of unfair (constructive) dismissal made by the claimant. It is his averment for the constructive dismissal claim that his *“resignation was a direct result of the ongoing detriment by the respondent and that his position was made untenable by them.”*

190. Given that the Tribunal has not been able to make a finding that there was detriment on the grounds of the claimant making protected disclosures then that ground for a claim of constructive dismissal disappears.

191. However, the question would still remain as to whether or not the actings of the respondent were such as to destroy the implied term of mutual trust and confidence which exists between employer and employee.

192. In that respect the Tribunal had to bear in mind that the initiating complaint was from the Area Procurator Fiscal for Kilmarnock and not from the respondent and in particular from CCU.

193. The matter had been investigated by officers within CCU. It was the case that enquiry had uncovered unauthorised system access by the claimant. These allegations were not fabricated in any way. The claimant accepted that a complaint made by the Area Procurator Fiscal for Kilmarnock had to be investigated and as a routine part of any investigation a system check would be conducted.

194. It was the claimant's case that the CCU were "*out of control*" and they would simply use Data Protection as an excuse to "*get at*" an officer. That would presuppose they had some reason to do that. As indicated there was no protected disclosure made prior to the investigation in November 2011 which would suggest that the CCU were upset by the claimant or that 5 allegations had been made by him which would mean they would seek retribution. By the time the police report was prepared and lodged the claimant had made no assertion that any officer of CCU was acting irregularly or was to be the subject of any complaint.

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195. Thus the motive for CCU to, as alleged, falsify a police report and to submit a prejudicial report on a Police Officer was lacking. Neither could the Tribunal come to the view that without any motive CCU was so "*out of control*" that they would be prejudiced against any police officer who was 15 subject to a complaint such that they would ensure false allegation.

196. The particular concerns of the claimant about the police report were outlined by him in his disclosures of September 2012/November 2012 and investigated. That investigation appeared to be even handed and resulted in 20 a finding that the initiating police report was not skewed or deliberately made prejudicial.

197. In any event the resignation of the claimant came about in October 2016. That was some 4.5 years after a complaint had been raised against him by the Procurator Fiscal. It was 4 years after he had been cleared of that 25 charge. If the claimant believed that the implied term of trust and confidence had been breached by CCU's actings in relation to the report and complaint by the Procurator Fiscal then resignation should have occurred much earlier.

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198. As indicated also the misconduct proceedings were part and parcel of the initial investigation and report to the Procurator Fiscal. That was the position stated to the claimant when he became aware of the complaint being

5 raised. Misconduct proceedings were delayed until such time as the court proceedings had concluded which was in line with the respondent's procedures. Again the Tribunal could not consider that there was a breach of the implied term in the taking of those misconduct proceedings particularly when the misconduct proceedings cleared the claimant of wrongdoing.

10 199. Again the issue of denial of the role within Cyber Crimes CCTV has been discussed. The Tribunal could not consider that the CCU had a part to play in ensuring the claimant was disadvantaged. Any role in CID must be considered to be "*sensitive in nature*". The claimant had been the subject of investigation and complaint and in those circumstances the Tribunal could not consider that there had been unreasonable treatment of the claimant in the denial of that promotion. The Tribunal did not consider that denial of
15 promotion was a matter which would breach the implied term.

20 200. The procedures and processes which took place as regards the application for business interest and flexible working appear to be processes which were conducted in accordance with the respondent's internal procedures. There did not appear to be at play actings by the CCU to ensure that the claimant was disadvantaged in those applications.

25 201. Even if the claimant's case was one of "*last straw*" then it is difficult to see what was of concern to the claimant in October 2016. The claimant's position was that he received a phonecall asking if a meeting could be arranged. It appears that the claimant was advised that in general terms the matter was "*of misconduct*" but no specification was given. Initially the claimant agreed to the meeting and then decided to resign. It is difficult to know what it was that the respondent did that was wrong or unreasonable at
30 that time. The Tribunal accepted that there had been enquiry made by the respondent at that time into whether or not the claimant was working while on sick leave. That was a matter that would obviously concern any employer. The position had reached the stage where an Investigating

Officer had been appointed and would wish to consider with the claimant whether there had been any misconduct or not. That was unknown to the claimant who indicated he had no knowledge of why he was being called but that the phonecall "*brought back*" all the previous treatment and he could take no more.

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202. For the last straw doctrine to assist the claimant it would be necessary to show that there had been an incident where the employer had acted unreasonably to trigger the "*last straw*" and result in a resignation. That was not the case here. There appeared to be legitimate concerns by the respondent and a reason why they would wish to meet the claimant. The Tribunal could not consider that the claimant without knowing what it was that the respondent wished to speak to him about could take it that their actions were unreasonable at that point such that this was the "*last straw*" and he was entitled to resign in respect of previous incidents.

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203. The Tribunal were not convinced that the real reason for the claimant's resignation was his treatment from the respondent. By this stage it would appear that he had made up his mind for various good family reasons to be involved in the estate agency business. He had come out of the pension scheme at an earlier date. The Tribunal considered he had by that stage decided on an alternative career.

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204. In all the circumstances therefor the Tribunal was unable to conclude that the claimant was unfairly (constructively) dismissed and that claim fails.

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Employment Judge: J D Young
Date of Judgment: 14 September 2017
Entered in register: 14 September 2017
and copied to parties

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