



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Numbers: 4109987/2015 and 4123241/2018

Hearing held in Glasgow on 2 December 2019 (pre-reading), 3, 4, 5, 6, 18, 19,
20 December 2019 (evidence), 13 January 2020 (adjourned due to ill health
of a member of the Tribunal), 10 February 2020 (evidence), 12 February
10 2020 (submissions) and 13 February 2020 (deliberation in chambers).

Employment Judge M Whitcombe
Mr I C MacFarlane
Mr W Muir

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Ms K Harper

Claimant
Represented by:
Mr D Hay
(Advocate)

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The Chief Constable, Police Service of Scotland

Respondent
Represented by:
Mr G Mitchell
(Solicitor)

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JUDGMENT

The unanimous judgment of the Tribunal is as follows.

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- (1) The allegation that the claimant was victimised contrary to section 27 of the Equality Act 2010 and regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 succeeds in one respect only: the allegation concerning information supplied by
40 Sergeant Doug Bell to Chief Inspector Hollis on or about 30 April 2015.

(2) All other allegations of victimisation under the same legislation fail and are dismissed.

(3) The allegations that the claimant was subjected to detriments contrary to section 47B of the Employment Rights Act 1996 because she had made certain protected disclosures all fail and are dismissed.

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REASONS

Introduction

10 1. This litigation has a long history, the first claim form (ET1) having been submitted in July 2015. In very brief summary, the various claims arise from events during the claimant's service as a police officer. The claimant was the subject of an investigation by the force. The claims with which this Tribunal is concerned all derive either from that investigation, or else from the respondent's handling of the claimant's subsequent complaints about that investigation.

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2. The claimant alleges that she has done various protected acts for the purposes of the Equality Act 2010 and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and also that she has made protected disclosures for the purposes of the "whistleblowing" provisions of the Employment Rights Act 1996. She alleges that she has been victimised and subjected to detriments because of those protected acts and protected disclosures. The claimant is no longer a serving police officer, but the circumstances in which her service came to an end are not the subject of any claims.

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3. This hearing was originally listed for 20 days, with a concern in some quarters that 20 days might not be enough. As a result of a previous case management order this hearing dealt with liability only, essentially to enable a more focussed approach to expert evidence in relation to remedy once the Tribunal's findings on liability were known. At the joint suggestion of the

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parties, evidence in chief was given by way of written witness statements. The parties prepared an extremely helpful agreed chronology and an agreed list of issues in accordance with a case management direction. As is often the case, the list of issues was discussed, revisited and revised during the hearing. The hearing itself was timetabled. As a result, we were able to reach our decision on liability after one day of pre-reading, 8 days of evidence (not all of them full days), one day of submissions and one day of deliberations. That was due in no small part to the skill, diligence and focus of the representatives. They deserve to be thanked publicly for their efforts, which were a model of the cooperation required by rule 2 of the ET Rules of Procedure in order to further the overriding objective.

Issues

4. As stated above, the parties agreed a written list of issues. It evolved in some respects during the hearing. We will set it out in the form it effectively took by the time of closing submissions, taking account of the concessions made by the respondent and the points withdrawn, narrowed or merged by the claimant. We will also omit remedy points since they are not for determination at this hearing.
5. The issues are in bold. Some explanatory comments appear in italics. References to pages in the agreed joint file of documents for the hearing appear in square brackets.

Victimisation

1. **Was the claimant's grievance of 5 March 2015 a relevant protected act in terms of section 27(2)(d) of the Equality Act 2010?** *Other protected acts had been identified and conceded, but were not ultimately relied upon in closing submissions (see paragraph 36 of the claimant's written submissions). The respondent does not raise any issue of bad faith relevant to section 27(3) of the Act.*

2. If so, was the claimant subjected to detriment because of that protected act?

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2.1 Was the commencement, on or around 20 April 2015 (*in fact the claimant's submissions focused on 19 March 2015*), of an enquiry/investigation into the claimant's off duty contact:

2.1.1 because of the alleged protected act above?

2.1.2 a detriment?

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2.2 Was the report on or around 30 April 2015 by Sgt Doug Bell to CI Hollis of 4 instances of alleged conduct by the claimant made:

2.2.1 because of the alleged protected act above?

2.2.2 a detriment?

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2.3 Was the report by CI Hollis on 8 May 2015 to SI Steven Lowther of the said alleged conduct:

2.3.1 because of the alleged protective act above?

2.3.2 a detriment?

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2.4 Was there a decision made on or around 11 May 2015 to escalate/broaden the scope of the respondent's enquiry/investigation into the claimant's conduct (see para 15-17 of the statement of claim dated 3 March 2016), and, if so, was it:

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2.4.1 because of the alleged protective act above?

2.4.2 a detriment?

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2.5 Was the attendance of police officers of the respondent at the addresses of 9 named neighbours of the claimant on various dates between 3 and 21 May 2015:

2.5.1 because of the alleged protected act above?

2.5.2 a detriment?

The neighbours concerned were identified by name both in the list of

issues and also during the hearing but it is not necessary to name them in order for the parties to be able to understand our reasons.

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2.6 Was the attendance of a Detective Inspector from Professional Standards and an Inspector from Dumfries PO at the home of Bruce Harper, the claimant's ex-husband, on 22 May 2015:

2.6.1 because of the alleged protected act above?

2.6.2 a detriment?

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2.7 Was the respondent's conduct of the investigation compliant with the Police Service of Scotland (Conduct) Regulations 2014 (and associated SOP)? If not, was that:

2.7.1 because of the alleged protected act above?

2.7.2 a detriment?

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2.8 Was the respondent's decision not to inform the claimant of the investigation until July 2015:

2.8.1 because of the alleged protected act above?

2.8.2 a detriment?

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Additional allegations of detriment identified in the list of issues were abandoned by the time of closing submissions.

Breach of regulation 7, Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

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3. It is agreed, for the purposes of regulation 7(3) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, that the claimant's grievance of 5 March 2015 was a protected act.

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4. Were any or all of the 8 alleged detriments in paragraphs 2.1 to 2.8 above because of that protected act?

Protected disclosures

5 **5. It is agreed that the following contained protected disclosures in terms of section 43B(1) of the Employment Rights Act 1996:**

5.1. The claimant's letter to the Chief Constable dated 26 May 2016 [843] and her solicitor's email to the respondent's Professional Standards Department dated 13 July 2016 [862].

10 **5.2. The information conveyed in the meetings and correspondence listed at para 1 of the claimant's amendment to the ET1 dated 21 November 2018 in claim number 4123241/2018 [555-556].**

15 **6. In respect of the protected disclosure at paragraph 5.1 above, was the claimant subjected to detriment as specified in para 13 of the claimant's amendment to her ET1 dated 25 November 2016 [536]?**

20 **7. In respect of the protected disclosure at 5.2, was the claimant subjected to detriment as specified in para 7 of the claimant's amendment of her ET1 dated 21 November 2018 and claim number 4123241/2018 [557].**

Evidence

25 *Witnesses*

6. The claimant called the following witnesses:

- 30 (a) the claimant herself, Ms Karen Harper;
 (b) Mr Bruce Harper, the claimant's ex-husband, who retired from the force in 2006 when holding the rank of Sergeant.

7. The respondent called the following witnesses in the following order:

- 35 (a) Mr William Sturgeon, now retired, but formerly a Chief Inspector posted

in the Complaints and Professional Standards Unit of Dumfries and Galloway Constabulary until the creation of Police Scotland in April 2013, and after that a point of contact between V Division (Dumfries and Galloway) and the newly created Police Scotland Professional Standards Department (“PSD”);

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(b) Mr Mark Hollis, currently a Superintendent based in Dumfries with responsibility for operations within V Division (Dumfries and Galloway) but at the relevant times a Detective Chief Inspector in Dumfries and Galloway from July 2013 to 3 April 2015, in which capacity he was appointed to investigate the claimant’s grievance against Sergeant Doug Bell and Inspector Stuart Davidson, before becoming Area Commander for Galloway with effect from 4 April 2015;

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(c) Mr Irvine Watson, now retired, but at the relevant time a Chief Inspector and Area Commander for Galloway based at Stranraer, in which capacity he dealt with the claimant’s flexible working request;

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(d) Mr Stuart Davidson, now a Temporary Superintendent based at Dumfries but at the relevant times an Inspector stationed at Castle Douglas within the Galloway Area Command, reporting to Chief Inspector Irvine Watson;

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(e) Ms Anne-Marie Smith, an Inspector within PSD based at Dumfries;

(f) Stephen Foggin, formerly an Inspector within PSD and the point of contact for areas including V Division;

(g) Mr Steven Lowther, at the relevant times a Chief Inspector and Area Commander for Dumfriesshire Area Command (the east part of V Division), before becoming Temporary Superintendent and Operational Commander for the same area on 5 April 2015;

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(h) Mr Jim Trotter, now retired but at the relevant time a Chief Inspector within PSD based in Dalmarnock, Glasgow;

(i) Mr Paul Cameron, a Chief Inspector currently based in K Division (Renfrewshire and Inverclyde) but at the relevant time a Chief Inspector with PSD;

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(j) Mr Doug Bell, now retired, but at the relevant time a Sergeant based at Castle Douglas reporting to Inspector Stuart Davidson;

(k) Mr Paul Main, now retired, but at the relevant time a Chief Superintendent assigned to investigate and respond to the claimant's complaint about the investigation into her off-duty conduct;

(l) Ms Claire Walker, an Inspector based in Dumfries with responsibility for dealing with anti-social behaviour, neighbour disputes and community events within certain defined geographical areas.

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8. With the exception of Mr Main, all of the witnesses named above gave all or most of their evidence in chief by way of written witness statements. All witnesses were cross-examined.

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9. We have little to say by way of general observations on the manner in which the witnesses gave their evidence. In general, we formed the impression that the witnesses were doing their honest best to help and to give their account of events as they remembered it. We make allowances for the fact that many of the relevant events occurred 5 or more years ago with inevitable consequences for memory. We also make allowances for the stressful atmosphere of formal legal proceedings, even in the Employment Tribunal. Witnesses on both sides have found the process leading to this hearing gruelling and stressful. It is therefore understandable if at times some of them became defensive or even a little difficult. It appeared to us that the claimant was not always as open as she might have been, and that Mr Main strived to improve upon his written evidence by attempting to anticipate the point of Mr Hay's questions rather than answering them in a straightforward manner. However, we did not think it was appropriate to draw adverse inferences about credibility in either respect. They are relatively minor matters and, as is so often the case, we found contemporaneous documents to be of much greater evidential value than the impression witnesses made in a hearing room anything up to 5 years later.

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10. The parties had prepared a joint file of documents for the hearing which ran to page 1140 but with many insertions such that it filled two lever arch files with double sided printing. Where appropriate we will refer to pages in those

files in square brackets.

Findings of Fact

- 5 11. We made the following relevant findings of fact. Many were admitted or at least undisputed. Where there was a dispute we reached a conclusion on the balance of probabilities, noting the burden of proof where necessary (see below for legal principles in relation to the burden of proof). It is certainly not our intention to recite or to make findings on every piece of evidence we
- 10 heard, since that would include facts which were ultimately irrelevant to our conclusions. Rule 62(5) of the ET Rules of Procedure 2013 requires only that we should state our findings of fact in relation to the issues identified in this judgment. That should also be sufficient for these reasons to be “**Meek-compliant**”.
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12. The claimant commenced service in the police with the Strathclyde force on 9 October 1995. Having commenced a career break in October 2003, she gave birth to her first child in February 2005 and returned to work in February 2008.
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13. On 4 September 2014 the claimant’s neighbour, who we will anonymise as Mrs X, made a complaint about the claimant’s off duty conduct. A statement was taken from Mrs X at Dumfries police station by Constable Audrey Johnstone. Briefly summarised, the complaint was that there had been a
- 25 number of issues between the X family and the claimant from August 2013 onwards. The complaint included an allegation that the claimant “storms about the estate in her police uniform, she goes out of my sight but looks like she is on a mission to do something”. Mrs X suggested that when the claimant behaved like that Mrs X asked her own son to come home. Mrs X described an incident in August 2013 on the claimant’s doorstep in which the claimant
- 30 was allegedly aggressive towards Mrs X, shouting and swearing at her for 20 minutes. It was also alleged that the claimant had been to the park “niggling at my son and other children” and “shouting at other kids in the street for various things”. Allegedly, the incidents would always be connected to the

claimant's son in some way. It was alleged that the claimant had also argued with other neighbours. Finally, Mrs X described a particular incident "a few weeks ago" when she had come home to hear the claimant shouting at some children. Having seen her own son there Mrs X asked him to come over, causing the claimant to shout aggressively at one boy in particular. The claimant then walked over to Mrs X aggressively. Mrs X was not aware of the reason why the claimant allegedly treated her like that and said that she did not take it personally because of the way the claimant treated other neighbours. The claimant's actions were described as "very intimidating".

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14. Notably, Mrs X said that "I don't want to make an official complaint to police", but said that she wished to seek advice. Mrs X said that she knew of at least six neighbours who had seen the claimant act in an aggressive manner but would need to speak to them first before details could be supplied. On 20 October 2014 Avril Dickie provided the respondent with the names of additional potential witnesses to the claimant's conduct.

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15. On 4 November 2014 the claimant transferred to "V division" based at Kirkcudbright police station, Dumfries and Galloway. On 12 November 2014 the claimant made a flexible working request. It is not relevant for present purposes to summarise the precise details of that request.

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16. On 16 November 2014 divisional officers submitted a report to PSD that no further investigation would take place in response to Mrs X's complaint.

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17. On 20 November 2014 the respondent approved the claimant's flexible working request.

18. The period from November 2014 to February 2015 is one in which the claimant alleges that she was bullied and harassed by Sgt Doug Bell. We will summarise the allegations below when dealing with the claimant's grievance.

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19. On 10 February 2015 the claimant was diagnosed with work-related stress and commenced a long period of sick leave from which she did not ultimately

return.

20. Also on 10 February 2015, Sgt Bell emailed Inspector Stuart Davidson stating that a number of issues had been brought to his attention by various officers over recent days [358I]. The penultimate line of the email stated simply, “all
5 submitted for your information.” We have taken careful account of the precise words used in that email but the allegations can be summarised as follows.

20.1. That about one year earlier Sgt Paul Dodds had been off duty
10 and walking with his young child in a certain area of Dumfries when he observed the claimant shouting aggressively towards a man known to Sgt Dodds to be the claimant’s ex-husband. According to Sgt Bell, Sgt Dodds had suggested to him that the conduct of the claimant, who was also off duty, constituted a breach of the peace.

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20.2. Another sergeant at Dumfries told Sgt Bell that the claimant had made a complaint to a PC Kirk prior to her transfer to the division. The complaint had not been upheld. The claimant allegedly refused to accept that outcome, stating that she was a police officer too, and
20 arguing that her complaint should be upheld.

20.3. An incident in which the claimant asked another officer to locate
25 her radio in the Castle Douglas building because she had left it there, asking that other officer to meet her halfway between Kirkcudbright and Castle Douglas so that she could recover the radio. The other officer refused to take time out of his working day to do that at which
point the claimant slammed the phone down.

20.4. It was alleged by a PC Patterson that the claimant regularly
30 drove marked police vehicles in built-up areas at excessive speed, possibly up to 50 mph. A dangerous overtaking manoeuvre was also described. None of the incidents were emergency calls. PC Patterson acknowledged that he should have stopped the claimant from driving in that manner but was scared to approach her due to her

temperament.

21. On 5 March 2015 the claimant submitted a formal grievance against Sgt Doug Bell and Inspector Davidson. The standard form completed by the claimant is at [365-369]. Briefly summarised, the claimant alleged that Sgt Bell only spoke to her in a condescending and overbearing manner although he would be careful to speak normally when other people were present. The claimant felt that he was deliberately trying to intimidate her and to find fault in her work. Examples were given which it is not necessary to set out in detail for present purposes. The claimant felt harassed and intimidated. On one occasion she felt humiliated and began to cry. In the same grievance form the claimant criticised Inspector Stuart Davidson who she understood to have spoken to Sgt Bell on 2 February 2015 before speaking to the claimant on 4 February 2015 in the following terms: "I've been asking around and Doug Bell has not bullied anybody". The claimant therefore decided to raise a formal grievance, sensing that Inspector Davidson was irritated by the suggestion of bullying on the part of Sgt Bell. The claimant also complained about a locker search which took place on 10 February 2015. In short, Sergeants Bell and Moffat had carried out an allegedly routine check of lockers and had found that the claimant had failed to return the radio she had been using prior to transferring to the division. The claimant complained that her locker had been opened by the subject of an ongoing bullying investigation and also that it was unacceptable that a female officer's locker had been opened by any male officer.

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22. Overall, the claimant stated that she felt a formal grievance was the only avenue left open to her, having been subjected to a determined effort by Sgt Bell to bully and harass her in a way she described as "systematic and ruthless". Relevantly, the claimant also said this: "I have no idea why Sgt Bell has treated me in this way however I am not the only person to be bullied by him. One theory is he was resentful of my part time status. I understand he informed another part-timer her shift plan was no longer acceptable, causing great upheaval in her family life."

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23. On 16 March 2015 a new and separate complaint was made about the claimant's off duty conduct by Mr X, the husband of Mrs X referred to above. It is recorded on an ISR report at [373-374] and a written but unsigned statement taken at Mr X's home address by PC Burke in the presence of PC Urwin. In summary, Mr X alleged that on that day at about 1630 his son had come home upset after an interaction with the claimant's son. The claimant had shouted at Mr X's son in the park, Mr X's son then said to the claimant "why do you always follow us at the park you freak", after which the claimant allegedly followed Mr X's son for about 20 metres, shouting at him. In Mr X's view that had upset his son more and was part of an ongoing situation. He referred to Mrs X's previous complaint. Mr X indicated that he would normally have dealt with it himself but knew from his wife and other neighbours that the claimant would "just give me a mouthful". Mr X said that he was not concerned about the incident between the children but rather with the adults' behaviour.

24. On 19 March 2015 the respondent took the decision to reopen the investigation into the claimant's off duty conduct.

25. On 25 March 2015 CI Mark Hollis was appointed to hear the claimant's grievance. He met with her to discuss it on 10 April 2015.

26. On 30 April 2015, in the course of a meeting with CI Hollis about the claimant's grievance, Sgt Doug Bell reported certain issues concerning the claimant's conduct. Those matters concerned conduct both on and off duty. The notes are at [452A-452F] and the relevant passage appears on the final page. While there is some degree of overlap with the matters communicated to Inspector Davidson on 10 February 2015 there are also some differences. On this occasion CI Hollis summarised them as five bullet points. Once again, we have paid careful attention to the precise words used by him to summarise Sgt Bell's comments but we will summarise them as follows.

26.1. The claimant had misrepresented to an ambulance driver that

a member of the public had overdosed whereas in fact they were intoxicated (the implication being that the ambulance crew had a greater obligation to deal with the case if someone had overdosed).

5 26.2. The claimant had carried out an overtaking manoeuvre at 50 miles an hour in a built-up area without any need to do so. PC Patterson had been “too scared to approach Karen about it at the time due to her temperament”.

26.3. Sgt Paul Dodds “may have witnessed an off-duty breach of the peace committed by Karen toward her ex-partner”.

10 26.4. The claimant would not accept an explanation from PC Kirk that a matter she had reported to the police was a civil matter and had subsequently become abusive towards PC Kirk.

26.5. The claimant had misplaced her radio at another office and had asked that PC Hawker drive it to her and meet her halfway.

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27. On 8 May 2015 CI Hollis passed the information received from Sgt Bell to Inspector Walker, who was carrying out an investigation into the claimant’s off duty conduct [415]. CI Hollis stated in that email, “I noted the details but haven’t explored them in any greater detail as they have no bearing on the grievance, but they clearly relate to her conduct and may need to be
20 addressed.” CI Hollis then summarised matters in four bullet points using his own phraseology. He then said, “as I said, these are potential misconduct issues. I’m not sure what the parameters of your investigation are, or indeed if you are already aware of them and investigating them. Could you let me
25 know whether or not these are issues you will pick up, if not I’ll get somebody to do an assessment to see if there is any substance to them.” He concluded the email by explaining that he was due to meet with the claimant in the following week in order to finish the grievance. He felt that “reading between the lines” the claimant was “angling for a transfer to Dumfries”. He did not
30 regard that as an option given that there were ongoing issues with the claimant’s neighbours and others in Dumfries.

28. On 11 May 2015 a decision was taken to escalate or broaden the scope of

the enquiry into the claimant's conduct in the light of the additional information provided by CI Hollis.

29. Over the period between 3 May 2015 and 21 May 2015 Inspector Walker and Inspector Smith attended the home addresses of nine neighbours of the claimant in the course of their investigation. Statements were obtained. It is not necessary for present purposes to summarise the evidence given, or the criticisms now made of its coherence on behalf of the claimant.
30. On 22 May 2015 those same inspectors attended at the home of Bruce Harper, the claimant's ex-husband. While there is agreement that the duration of the meeting was around 45 to 50 minutes, and that Mr Harper provided background on his relationship with the claimant and details of her recent behaviour which he regarded as bizarre and overprotective, there is a dispute regarding the way in which that conversation developed.

30.1. Mr Harper perceived that the purpose of the visit was to ask whether he would like to make a complaint about the claimant's conduct towards him. However, the officers made no reference to any specific conduct and did not tell him that they were investigating any allegations made by any other parties against the claimant. Mr Harper's evidence was that there was no reference at all to the alleged incident between him and the claimant in the street. Further, he denies that any such incident has ever happened. Mr Harper referred to the fact that he was an experienced (former) police officer and stated that he regarded the distinction between being asked to make a complaint and being asked to give a statement as a purely semantic one. The point, so far as he was concerned, was that there was no suggestion that there was a live enquiry in relation to the claimant's conduct towards anyone else, therefore he would be the complainant if he made a statement. He was clear that the respondent's officers were trying to solicit a complaint from him. Mr Harper says that he made it clear at the outset that he would not be making a formal complaint or giving a statement to the officers. However, he was prepared to

discuss with them on an informal basis the difficulties he had been having with the claimant and he did so. Mr Harper prepared a note of the same date in order to advise the claimant of what had happened and passed it on to her through his cousin as an intermediary. Although he was not on speaking terms with the claimant at the time he was sufficiently concerned about the visit that he felt he had to warn the claimant of its potential implications for her continued service with the force.

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30.2. Inspector Walker's evidence was that she visited Mr Harper accompanied by Inspector Smith because they believed that he might be able to provide background information in relation to the claimant and they wished to know whether he had any concerns in relation to her conduct towards him or others. He was the father of the claimant's child and they believed that he might have relevant information in relation to the general concerns the neighbours had raised. One of them had alleged that Mr Harper was a potential witness to certain matters. Inspector Walker categorically denied that Mr Harper was ever invited to make a complaint against the claimant or that that was the purpose of the visit.

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30.3. Our conclusion on the balance of probabilities is that Mr Harper's perception is likely to be reliable. Whether or not Inspectors Walker and Smith *intended* to solicit a complaint from Mr Harper we accept that they gave an experienced former officer that firm impression. We also accept Mr Harper's analysis that there would be little practical difference between making a statement and making a complaint in circumstances where he was unaware of a complaint by anyone else. In that sense, the officers were inviting Mr Harper to make a complaint in the form of a statement. It is equally clear that Mr Harper did not accept that invitation but preferred to discuss matters informally. We find that the informal discussions did not include any specific reference to allegations made by neighbours or to the alleged

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argument between the claimant and Mr Harper in the street, and were more in the nature of general background to the relationship between Mr Harper and the claimant. However, we accept that the overall purpose of the visit was as described by Inspectors Walker and Smith.

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31. On 30 May 2015 Inspector Walker produced a report (in the form of a memorandum addressed to CI Watson) following her investigation into the claimant's off duty conduct [444-452]. It summarised some of the evidence gathered in the course of that investigation. It concluded, "it would appear that the incidents reported to police are mostly of a trivial nature however are obviously causing neighbours concern and some degree of stress and upset. The incidents appear to be centred around the actions of Karen's son Bruce Harper who would appear to do no wrong in his mother's eyes. There does not appear to be any crimes committed however it is respectfully requested that consideration be given in relation to misconduct of an off duty Police Officer [sic]". The memorandum concluded by saying that it was submitted for CI Watson's information and consideration for further action.

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32. On 5 June 2015 CI Hollis reached a decision rejecting the claimant's grievance. The covering email and the attached outcome form are at [453-471].

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32.1. The allegation of bullying against Sgt Bell was not upheld. The reasoning was that, other than the claimant's own account, there was no other evidence to support her claim and an abundance of evidence which suggested that the opposite was the reality. The conclusion was that the claimant had legitimately and justifiably been challenged about a number of performance and procedural issues by Sgt Bell as her line manager. The claimant had been defensive regarding her shortcomings and had not been a victim of bullying.

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32.2. The allegation that Inspector Davidson had been reluctant to deal with complaints about Sgt Bell was also not upheld. The reasoning was that the information gathered made it clear that

5 Inspector Davidson had taken adequate steps to meet with both parties and to understand their respective points of view. He had also sought to pursue a proportionate resolution by way of a mediation meeting between them. Overall, there was not felt to be any evidence that Inspector Davidson's approach to the issues had been other than reasonable and proportionate and entirely in keeping with the informal procedure outlined in the Police Scotland Grievance SOP.

10 32.3. A third allegation that there was an underlying passive aggressive tone in emails sent by Inspector Davidson to the claimant was also not upheld having reviewed the relevant documents.

15 32.4. The fourth allegation regarding the locker search was not upheld. Having reviewed the circumstances there was not felt to have been any irregular practice regarding the locker search.

20 33. The broader conclusion was that the claimant had used the grievance as a mechanism to respond to performance concerns legitimately raised with her by line managers. She had displayed a hostility towards Sgt Bell from day one which escalated from their initial meeting. There was no evidence whatsoever to support her assertion that she was a victim of bullying and victimisation.

25 34. A resolution package was proposed under which the claimant would remain stationed within her existing policing area but reporting to a new line manager, structured independent mediation would take place between the claimant and Sgt Bell, the claimant would receive a training or mentoring package in order to become fully aware of procedural variations between divisions and the claimant should be asked to consent to an occupational health referral. CI
30 Hollis was not willing to transfer the claimant from her current area. He understood that the manner in which he had resolved the grievance would not be acceptable to the claimant and referred to her right of appeal.

35. The claimant commenced the first of two ET claims against the respondent on 20 July 2015. On the next day, 21 July 2015, she submitted a grievance appeal form.

5 36. On 24 July 2015 CI Hollis informed the claimant by telephone of the existence and outcome of the investigation carried out by Inspector Walker. Although the agreed chronology gives a date of 23 July 2015 both the claimant and CI Hollis stated that it was the next day. The claimant had no previous knowledge of the investigation. She was invited to attend a meeting to discuss
10 her neighbour's complaints about her off duty conduct and related improvement action.

37. Some of the relevant context appears in an email sent by CI Sturgeon to CI Hollis, Inspector Walker and others the previous day, 23 July 2015. PSD had
15 assessed the report submitted by Inspector Walker and had reached the conclusion that although the claimant's actions represented "discreditable conduct" a response of "improvement action" was both proportionate and appropriate in order to safeguard her own reputation and, by association, that of the respondent. There was also a suggestion that the conduct might be
20 linked to the claimant's then current medical condition. Although the claimant was signed off sick it was not considered inappropriate to take action before her return to work. According to the email, the purpose of the intervention was not designed to be punitive but rather to make the claimant aware of the perceptions others have in relation to her conduct so that she could take steps
25 to ensure that she did not come into further conflict with neighbours. It was felt that a failure to intervene at that point could later come to be regarded as a missed opportunity to prevent future incidents. The intervention was said not to be about apportioning blame, but rather to be about raising awareness of what was expected regarding the claimant's off duty behaviour.

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38. On 26 May 2016 Margaret Gribbon, the solicitor then acting for the claimant, made a complaint on behalf of the claimant to the Chief Constable alleging misconduct by other police officers. The respondent now accepts that the letter of complaint contained protected disclosures [843]. That avoids the

5 need for us to analyse the complaint in very much detail. That will greatly
reduce the length of these reasons because the complaint was ultimately
presented in a rather long and convoluted form. While the covering letter was
limited to 6 pages and 34 paragraphs it enclosed an inventory of productions
and four separate schedules. When the respondent very sensibly attempted
in correspondence to summarise and agree the heads of complaint Ms
Gribbon expressed her client's dissatisfaction with the suggested summary
but did not offer any alternative. Ms Gribbon's letter concluded by saying, "it
is kindly requested that the PSD now take steps to carefully read our
10 aforementioned letter in greater detail with a view to redrafting the allegations
for our client's approval". The CI Cameron's evidence was that he found that
to be an unhelpful approach, especially given the volume of documentation
submitted with the complaint. We have considerable sympathy with CI
Cameron's view, but it is unnecessary for us to make any findings on that.
15 The point, for present purposes, is that opportunities to clarify, condense and
simplify the complaint were missed. It therefore proceeded in a long and
convoluted form.

39. On 1 September 2016 Ms Gribbon complained about the handling of the
20 complaint. Several of her criticisms were upheld. We accept the respondent's
evidence that there were great difficulties and delays in agreeing with Ms
Gribbon the heads of complaint to be investigated. Since there is no complaint
before this Tribunal in relation to that delay we do not make any findings as
to the parties' respective culpability, if any, for that delay. On 28 August 2017,
25 15 months after the original complaint, Ms Gribbon submitted a document
setting out 57 separate heads of complaint. Eventually, CS Main proceeded
on the basis of 59 separate aspects to the complaint, although it seems to us
that there was a great deal of overlap and repetition in those separate points.

30 40. The claimant retired from the force on grounds of ill health on 17 October
2017.

41. On 27 August 2018 CS Main produced his long and detailed report in
response to the 59 identified heads of complaint [1027-1074]. None of the

allegations were upheld.

Submissions

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42. The representatives made most of their submissions in writing. They were supplemented by concise oral submissions. Since we do not believe that engagement with submissions is demonstrated simply by repeating or summarising them we will not do so, especially since they are available in their full written form. Instead, we will seek to deal with the key arguments in the course of our reasoning, set out below. All we would add at this point is that most of the respondent's submissions on the agreed issues were to the effect that (a) there was no evidence or insufficient evidence of the necessary causative link between the protected act and the alleged detriment (b) in any event there was no detriment.

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Legal principles – victimisation under s.27 of the Equality Act 2010

Fundamentals

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43. The relevant parts of the statutory definition of victimisation in section 27(1) of the Equality Act 2010 are as follows. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act.

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44. As for protected acts, the relevant part of the definition in section 27(2) appears in section 27(2)(d): making an allegation (whether or not express) that A or another person has contravened this Act.

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45. As already noted above in the "issues" section of these reasons, the respondent does not raise any issues of bad faith relevant to section 27(3).

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46. As is well known, section 42 of the Equality Act 2010 provides that for the purposes of Part 5 of the Act ("Work") holding the office of constable is to be treated as employment by the chief officer in respect of any act done by the chief officer in relation to a constable.

47. We will not set out the vicarious liability provisions in section 109 of the Act since no issue is taken in relation to them in this case. The respondent accepts that it is liable for any discriminatory acts done by officers in the name of the chief constable.
48. Section 39(4)(d) of the Act, read in conjunction with section 42 (above), effectively provides that a chief officer must not victimise a constable in their force by (so far as relevant) subjecting them to any detriment other than those listed in (a) to (c).
49. We take the definition of “detriment” for the purposes of sections 27 and 39 from **Shamoon v Chief Constable of the RUC** [2003] ICR 337 and **MOD v Jeremiah** [1980] ICR 13. It is an objective test focused on the perception of a reasonable worker in all the circumstances. Detriment for these purposes is treatment which a reasonable worker *would or might* regard as being to their disadvantage in all the circumstances. It is not necessary for a claimant to demonstrate some physical or economic consequence.
50. A key issue is “causation”. The statutory test requires that the employer (or in this case the Chief Constable through those for whose acts he is vicariously liable) must have subjected the claimant to a detriment *because* she has done, or is believed to have done, or may do, a protected act. It is very well established that a Tribunal must not simply apply a “but for” test of causation (i.e. “but for the protected act, would the detriment have happened”), but rather should seek to identify the real reason for the treatment in the sense of the conscious or subconscious motivation of the relevant decision maker. See for example **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 and **Nagarajan v London Regional Transport Ltd** [1999] ICR 877.
51. It is also well established that the protected act need not be the sole cause or even the principal cause of the detrimental treatment. Where there is more than one cause all that is necessary is that the protected act should be a significant, substantial or effective cause of the detrimental treatment (see

once again **Nagarajan** at page 886E-F).

5 *Tainted information cases*

52. There is a growing body of law on “tainted information” cases, where a decision maker or other actor acts without any unlawful motivation on their own part but does so on the basis of information supplied to them by another for unlawful reasons. We raised this with the parties and by the time of closing submissions the legal position was agreed, so far as relevant to this case.

53. The binding authority for our purposes is **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010, CA. The focus must be on the conscious or sub-conscious motivation of the actual decision maker, which in this case means the person subjecting the claimant to a detriment. Where a decision maker acts innocently on the basis of tainted information (in the sense of information supplied to them because the claimant had done a protected act) then there is no claim in respect of the acts of the decision maker, though there might be in respect of the acts of the person who supplied the tainted information. In unfair dismissal cases the law is rather different (see **Jhuti v Royal Mail Group** [2019] UKSC 55 and even more recently **Uddin v London Borough of Ealing** (UKEAT/0165/19/RN)) but since there is no claim of any sort in relation to the termination of the claimant’s service as a constable we need not consider those cases any further. While it is entirely possible that the law might develop further, Mr Hay agreed that **Reynolds** was binding on us.

Burden of proof

54. The burden of proof in proceedings relating to a contravention of the Equality Act 2010 is governed by section 136 of that Act. The correct approach is set out in section 136(2) and (3). References to “the court” are defined so as to include an employment tribunal.

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

5 (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

55. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for the
10 statutory language.

56. We have taken into account the well-known guidance given by the Court of Appeal in ***Igen Ltd v Wong*** [2005] ICR 931 (sometimes referred to as “the revised ***Barton*** guidance”), which although concerned with predecessor
15 legislation remains good law. It was approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054. ***Ayodele v Citylink Ltd*** [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in ***Igen Ltd v Wong***.

20 57. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a “*prima facie*” or, in plainer English, a “first appearances” case of discrimination which needs to be answered. If the inference of discrimination *could* be drawn at the first
25 stage of the enquiry then it *must* be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed *unless* the respondent can discharge the burden of proof at the second stage.

30 58. However, if the claimant fails to prove a “*prima facie*” or “first appearances” case in the first place then there is nothing for the respondent to address and nothing for the tribunal to assess. See ***Ayodele*** at paragraphs 92-93 and ***Hewage*** at paragraph 25.

59. The following principles can be derived from ***Igen Ltd v Wong*** (above), ***Laing v Manchester City Council*** [2006] ICR 1519 EAT, ***Madarassy v Nomura International plc*** [2007] ICR 867, CA and ***Ayodele v Citylink Ltd*** (above),
5 which reviewed and analysed many other authorities.

59.1. At the first stage a tribunal should consider all the evidence, from
whatever source it has come. It is not confined to the evidence
adduced by the claimant and it may also properly take into account
10 evidence adduced by the respondent when deciding whether the
claimant has established a *prima facie* case of discrimination. A
respondent may, for example, adduce evidence that the allegedly
discriminatory acts did not occur at all, or that they did not amount to
less favourable treatment, in which case the tribunal is entitled to have
15 regard to that evidence.

59.2. There is a vital distinction between “facts” or evidence and the
respondent’s “explanation”. While there is a relationship between
facts and explanation, they are not to be confused. It is only the
20 respondent’s *explanation* which cannot be considered at the first
stage of the analysis. The respondent’s *explanation* becomes relevant
if and when the burden of proof passes to the respondent.

59.3. It is insufficient to pass the burden of proof to the respondent for the
25 claimant to prove no more than the relevant protected characteristic
(or in this case a protected act) and a difference in treatment. That
would only indicate the *possibility* of discrimination and a mere
possibility is not enough. Something more is required. See
paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy***.

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60. However, it is not always necessary to adopt a rigid two stage approach. It is
not necessarily an error of law for a tribunal to move straight to the second
stage of its task under section 136 of the Equality Act 2010 (see for example
Pnaiser v NHS England [2016] IRLR 170 EAT at paragraph 38) but it must

then proceed on the assumption that the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which then fails to discharge a burden which ought not to have been on it in the first place (see *Laing v Manchester City Council* [2006] ICR 1519 EAT at paragraphs 71 to 77, approved by the Court of Appeal in *Madarassy*). Tribunals must remember that if and when they decide to proceed straight to the second stage.

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- 10 61. In a similar vein, the Supreme Court in *Hewage* (above) observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination but they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or
- 15 the other.

Legal principles – victimisation under reg. 7 of the PTWR 2000

- 20 62. Much of what appears above is relevant in this context too. We have been concerned with regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 which contains the equivalent victimisation provisions.

- 25 63. While those regulations use the phrase “on a ground specified...” rather than “because”, it is widely accepted that the use of “because” in the Equality Act 2010 was not intended to change the pre-existing law in that respect. We therefore see no relevant difference, and we did not understand the representatives to make any contrary submission.

- 30 64. Regulation 7(3)(a)(v) includes within the definition of prohibited grounds “alleged that the employer had infringed these Regulations”.

65. Regulation 16 applies those provisions to the police and regulation 11 contains vicarious liability provisions.

Reasoning and conclusions – claims under the EqA 2010 and PTWR 2000

5 66. We will deal with each of the agreed issues in turn.

Was the claimant's grievance of 5 March 2015 a relevant protected act in terms of section 27(2)(d) of the Equality Act 2010?

10 67. Despite describing it in submissions as “an afterthought”, the respondent admits that the same act was protected so far as PTWR 2000 are concerned, no doubt because of the express reference in the final paragraphs of the grievance complaint form to the possibility that part-time status was the reason for detrimental treatment.

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68. Our finding is that the grievance also amounted to a protected act for the purposes of the Equality Act 2010 because, on a fair reading, it contained allegations of sex discrimination. Earlier in the grievance form, at [368], the claimant complains that a female officer's locker should not have been
20 searched by two male officers. We interpret that as an allegation of less favourable treatment because of sex, or of harassment related to sex, either of which would be a breach of the Equality Act 2010. Additionally, we think that in the particular circumstances of the claimant's grievance her suggestion that her part-time status might have caused resentment on the part of Sgt Bell also amounts to an allegation of direct or indirect sex discrimination. It is
25 instructive to consider how that allegation might have been regarded if PTWR 2000 had never been enacted. It is well-established that judicial notice can be taken of the disproportionate assumption by female workers of caring responsibilities outside work, such that restricted working patterns or discouragement from working part-time can cause group and individual
30 disadvantage (consider for example **London Underground Ltd v Edwards (No.2)** [1998] IRLR 364, CA). We note that the claimant's example was of another *female* part-time worker who had suffered disadvantage, but the point would stand even if she had not made that point. If PTWR 2000 did not exist,

the claimant's grievance alleging hostility towards part-timers could also be articulated as a complaint of (possibly) direct or (probably more strongly) indirect sex discrimination. The issues would not be the same as the ones that arise under PTWR 2000, but that is not the point. It is sufficient for the grievance to amount to a protected act for the purposes of s.27 of the Equality Act 2010 too. The wording of the section makes it abundantly clear that a relevant allegation need not be express.

69. Having found on that basis that the claimant's grievance was a protected act for the purposes of the Equality Act 2010 as well as for the purposes of PTWR 2000 it is convenient to consider the allegations of victimisation under each piece of legislation together.

Was the commencement, on or around 20 April 2015 (in fact the claimant's submissions focused on 19 March 2015), of an enquiry/investigation into the claimant's off duty contact:

- (a) because of the alleged protected act above?*
- (b) a detriment?*

70. We find that the commencement of an enquiry or investigation into the claimant's off duty conduct amounted to a detriment. A reasonable person in the claimant's position could very reasonably regard the commencement of such a process as being to their disadvantage. The reasons are obvious: the result could be very serious in professional terms and might even result in criminal proceedings, depending on the conclusions of the investigation. Even if the matter had been limited from the outset to the possibility of a finding of discreditable conduct as an officer (and there was no such limitation) that outcome would not be one that any officer would welcome or accept with indifference. The reasonable constable would regard it as a disadvantage and the risk of such a finding following investigation was equally a disadvantage and a detriment.

71. As for the reason for treatment, we do not consider it necessary to embark on a tortuous journey through the burden of proof provisions because this is a case in which we think the evidence allows us to make clear findings in the respondent's favour regarding the reason for the detrimental treatment considered above.

72. First, in our assessment there is cogent evidence of a lawful reason for the treatment, unconnected in any sense whatsoever to the protected act. It is important to remember the historical context. On 4 September 2014 one of the claimant's neighbours had already made an allegation (although not in formal terms a complaint) of inappropriate conduct on the part of the claimant while off duty. On 16 March 2015 the respondent received further allegations of a very similar nature. This time, there was no request from the complainant that it should not be treated as a formal complaint. Given the similarity of the allegations and the fact that two similar allegations had been made within a relatively short period it is easy to see why on 19 March 2015 the respondent decided to investigate further. A failure to do so might well have undermined public confidence in the police or looked like a closing of ranks or indifference to the concerns of the public regarding an officer's off duty conduct. We are therefore quite satisfied on the balance of probabilities that the respondent's sole reason for commencing the investigation was the receipt and content of a complaint about the claimant's off duty conduct. It was an obvious and cogent reason to investigate further.

73. We find that the protected act formed no part at all of the respondent's reason for commencing that investigation. It is purely coincidental that the claimant had submitted her grievance earlier the same month on 5 March 2015. The complaint from the neighbour was received on 16 March 2015, and the respondent decided to investigate a few days later on 19 March 2015. Significantly, the subject matter of the grievance did not concern any of the officers involved in the decision to commence an investigation and there is no direct evidence that any of them were influenced by it. Indeed, they all denied knowledge of the grievance until later that month.

74. On behalf of the claimant Mr Hay has attempted to demonstrate a likelihood that one or more of the officers involved in the decision to commence the investigation were *aware* of the claimant's grievance. We are careful to distinguish *awareness* from conscious or sub-conscious motivation. While a lack of awareness would be a defence, mere awareness of a protected act certainly does not, without more, equate to motivation.
75. In any event, we accept the evidence of the relevant witnesses that they were genuinely unaware of the claimant's grievance at the relevant time (19 March 2015). That was the evidence of SI Sturgeon and SI Lowther and we decline Mr Hay's invitation to infer that they are incorrect about that. We do not think that there is a proper basis for such an inference, in the face of firm denials in cross-examination and a lack of any direct evidence to the contrary. We do not think the mere fact that there was a relatively small senior management team who met regularly is a sufficient basis for such an inference. We do not think that the lack of notes of the meeting of 19 March 2015 is especially suspicious, even if it is surprising. There was an obvious and evidence-based reason for the respondent to decide to investigate further. It also seems plausible to us that for the first few days after receipt of the grievance it rested with HR and had not yet come to the attention of any of the relevant decision makers in relation to the investigation. Mr Hay's submission is creative and attractively presented, but we do not accept it.
76. The only thing we need to add in relation to the allegation brought under regulation 7 of the PTWR 2000 is that there is even less evidence to support an inference that a complaint about part-time working was the reason for the treatment. There is no evidence to suggest that any of the relevant decision makers on 19 March 2010 would be concerned about that one way or the other. Otherwise, we repeat the reasoning already set out above in relation to the claim under section 27 of the Equality Act 2010.
77. In summary, this allegation of victimisation under section 27 of the Equality Act 2010 and/or regulation 7 of PTWR 2000 fails on causation.

Was the report on or around 30 April 2015 by Sgt Doug Bell to CI Hollis of 4 instances of alleged conduct by the claimant made:

- 5 (a) *because of the alleged protected act above?*
 (b) *a detriment?*

78. We find that this was an obvious detriment. The information passed on by Sgt
10 Bell to CI Hollis amounted to allegations of wrongdoing on the claimant's part
both on and off duty. It was liable to lead to an investigation of some sort, and
even if it had not done so it was likely to diminish the claimant's personal and
professional reputation. A reasonable person would regard that as a
disadvantage, and we find that it was a detriment for the purposes of the
15 Equality Act 2010 and the PTWR 2000.

79. On causation, we consider the timing and context to be significant. Sergeant
Bell disclosed these matters at the end of a meeting with CI Hollis on 30 April
2015 to discuss allegations made against Sgt Bell within the claimant's
20 grievance. The purpose of the meeting was not to discuss the claimant's own
conduct. The information volunteered by Sgt Bell did not relate directly to the
subject matter of the grievance. For example, if the claimant had complained
about the way she had been spoken to upon forgetting body armour, it might
have been relevant to refer to other occasions on which the claimant had
25 been taken to task for the same error. However, this was a rather different
situation. It is striking that Sgt Bell raised quite unconnected matters. Further,
Sgt Bell had already raised pretty much the same points with another officer,
Inspector Davidson, on 10 February 2015. There was no good reason for him
to do so again. His decision to do so again, in the course of a meeting about
30 a grievance against him, suggests strongly to us that he did so in response
to the allegations made against him in the grievance and which had been
discussed at length earlier in the same meeting. Put simply, it was retaliation.

80. For those reasons we are quite satisfied on the balance of probabilities that

Sgt Bell raised those matters because of the protected act. Once again, we consider that we are in a position to make clear findings on the evidence, and it is not necessary for us to proceed laboriously through the burden of proof provisions. Had we done so, in truncated form, we would have found that the circumstances in which Sgt Bell raised the relevant matters were such that we *could* conclude that the reason was the claimant's protected act, and that the respondent's evidence was insufficient to discharge the burden of proving a different, lawful reason for the treatment. We do not accept the explanation put forward in submissions that Sgt Bell was merely passing on information received, or as Sgt Bell put it himself, passing on information to give CI Hollis the full picture of his knowledge of the claimant. He was not *merely* doing that, he was doing that in direct response to the allegations made against him by the claimant and in order to retaliate.

15 81. This allegation is therefore upheld.

Was the report by CI Hollis on 8 May 2015 to SI Steven Lowther of the said alleged conduct:

- 20 (a) *because of the alleged protective act above?*
(b) *a detriment?*

82. We find that this was a detriment for reasons already expressed in more detail above. In short, the report was likely to diminish the claimant's personal or professional reputation and might have resulted in serious consequences for her career.

83. As for the reason for treatment, we are in a position to make a firm finding in favour of the respondent without proceeding through all the steps of a burden of proof analysis. We are quite satisfied that the report made by CI Hollis was appropriate and unconnected to the protected acts.

84. It is clear from the terms of the email dated 8 May 2015 from CI Hollis to Insp Walker, copied to Insp Smith and TS Steven Lowther [418], that CI Hollis was

attempting to establish the parameters of the existing investigation, with which he was not involved. He rightly regarded the matters reported to him by Sgt Bell as potential misconduct issues but was unclear whether they were already known to those already investigating the claimant's conduct. He was similarly unaware whether those matters already formed part of that investigation. Logically and reasonably, CI Hollis asked whether the new information supplied by Sgt Bell covered matters which would be picked up by Inspector Walker's investigation, or not. If not, then CI Hollis said that he would, "get somebody to do an assessment to see if there is any substance to them". While it is true that he also referred to his own involvement in the grievance process there is nothing sinister in that. That is how he had come to receive the information from Sgt Bell. We are satisfied that CI Hollis wrote the email in those terms in an effort to ensure that the matters raised by Sgt Bell were appropriately investigated. They were certainly the sorts of matters which properly merited an investigation, for reasons already set out above. We find that the claimant's grievance formed no part at all of CI Hollis' conscious or subconscious motivation for bringing those matters to the attention of other officers.

85. We have already set out the legal principles regarding "tainted information" applicable in a case of this sort. They leave no room for an argument that the claimant's successful allegation that Sgt Bell victimised her means that the allegation against CI Hollis must also succeed because it is based on Sgt Bell's "tainted information".

86. Whether framed under the Equality Act 2010 or the PTWR 2000, this allegation of victimisation fails because the detriment was not done because of, or on grounds of, the protected act.

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Was there a decision made on or around 11 May 2015 to escalate/broaden the scope of the respondent's enquiry/investigation into the claimant's conduct (see para 15-17 of the statement of claim dated 3 March 2016), and,

if so, was it:

- (a) *because of the alleged protective act above?*
- (b) *a detriment?*

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87. By the end of the case there was no dispute that such a decision was taken. SI Lowther's email of 11 May 2015 [417] records the agreement of various matters, one of which was that Insp Smith would assist Insp Walker in an investigation of the claimant's off duty conduct. It is clear from other parts of the email that the investigation would include the matters raised by Sgt Bell through CI Hollis: "e.g. driving incident etc". This was largely a response to CI Hollis' email of 8 May 2015 [418] asking whether the matters raised by Sgt Bell with him were already known to the investigators, and if so whether they would form part of the scope of their investigation. We regard the email of 11 May 2015 as confirmation that they would.

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88. As for the reason for that decision, we are satisfied that it had nothing at all to do with the protected act. The decision to broaden the investigation was a logical consequence of having additional matters of potential misconduct drawn to the attention of those conducting and supervising the existing investigation into the neighbour dispute. We see no evidence at all that TS Lowther or anyone else involved in that decision were consciously or sub-consciously motivated by the content of the claimant's grievance. On the contrary, we find that they were simply motivated by the need to investigate the matters raised with them by CI Hollis.

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89. Mr Hay invites us to draw adverse inferences from the fact that by 11 May 2015 TS Lowther was aware of the claimant's grievance. As already explained in more detail above, we would not be prepared to infer hostile motivation from mere *awareness* of the grievance. A more important factor in our assessment is that we see no evidence that TS Lowther reacted adversely to the claimant's grievance upon learning of it, or subsequently, or that he had any reason to.

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90. Mr Hay also points out a procedural irregularity in that PSD should have been notified of the investigation by this stage in accordance with the applicable Complaints about the Police Standard Operating Procedure [700]. We agree that the respondent failed to comply with procedure in that respect. Paragraph 5.2 of the SOP required PSD to be notified “at the earliest opportunity” using a particular form, and that was not done. However, we are not prepared to draw any adverse inference about the respondent’s motivation for broadening the investigation from that procedural failing. PSD would have to be notified at some point, as indeed they eventually were. There is no evidence of a deliberate attempt to prevent PSD from finding out about the investigation and we conclude that it was an oversight. Further, Inspector Smith was involved in the investigation and she was a PSD officer. While that does not constitute formal notification to PSD on the prescribed form “at the earliest opportunity”, it represents a degree of early PSD involvement. For those reasons we would not adopt Mr Hay’s characterisation of the process as a “covert sift for prejudicial material”, and we are not prepared to draw any adverse inferences from the procedural failings.

91. We will also deal with one additional point raised by Mr Hay in submissions. He highlights TS Lowther’s sentence, “it may be that during this, issues come to light which can be considered, e.g. driving incident etc”. Mr Hay submits that TS Lowther was therefore open to the possibility that the investigation might go further than the matters raised by Sgt Bell through CI Hollis if other issues were discovered. We suspect that Mr Hay is right about that, but since it makes no difference to our conclusion it is unnecessary to make a finding. To the extent that TS Lowther was prepared for the investigation to cover other matters in addition to the neighbour dispute and those raised by Sgt Bell, that was a legitimate position to take given the growing list of concerns about the claimant’s on and off duty conduct. We see no basis for an inference that TS Lowther’s stance was consciously or sub-consciously motivated by the claimant’s grievance.

Was the attendance of police officers of the respondent at the addresses of 9 named neighbours of the claimant on various dates between 3 and 21 May 2015:

(a) *because of the alleged protected act above?*

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(b) *a detriment?*

92. We find that this was an obvious detriment. It had the potential to cause embarrassment and difficulty for the claimant in her home neighbourhood. A reasonable person in the claimant's position would regard the visit as placing them at a disadvantage.

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93. However, we are quite satisfied that the claimant's grievance played no part whatsoever in the decision to visit those neighbours. It was necessary for the respondent to visit them in order to gather evidence relevant to the original complaint made by Mr X on 16 March 2015 and the wider neighbour dispute. We have already found that Mr X's complaint called for an investigation and that the claimant's grievance formed no part of the respondent's motivation for investigating. The complaint could hardly have been investigated properly without visiting those 9 neighbours. All of them had the potential to offer relevant evidence, and it was in the nature of the dispute that many neighbours might have a perspective on its root cause and the conduct of all involved.

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94. Mr Hay's submissions anticipated that our finding on this allegation would probably be the same as our finding on the decision to commence the investigation in the first place. It is, and this allegation fails too for similar reasons.

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Was the attendance of a Detective Inspector from Professional Standards and an Inspector from Dumfries PO at the home of Bruce Harper, the claimant's ex-husband, on 22 May 2015:

(a) *because of the alleged protected act above?*

(b) a detriment?

5 95. We find that this was a detriment. A visit to any potential witness to investigate a complaint about an individual is something which that individual could reasonably regard as placing them at a disadvantage. It is an uncomfortable and embarrassing business, made all the more uncomfortable in this instance by the complex emotional background given the acrimonious nature of the separation.

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96. However, we are entirely satisfied that the reason for visiting Bruce Harper had nothing whatsoever to do with the claimant's grievance. Like many others considered in this case, it was another step fully justified by the nature of the allegations under investigation. An apparently credible report had been received that the claimant had been involved in an unbecoming incident with Bruce Harper in the street. The ultimate source of that report was not Sgt Bell, against whom the grievance had been brought, but Sgt Dodds. Bruce Harper was also a potential witness to aspects of the wider neighbour dispute. The attendance of officers at Bruce Harper's home address should be unsurprising in those circumstances, since it was the most practicable method of gathering any relevant information he was able to give.

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97. Mr Hay's submissions noted that the need for the visit was "clearly connected" with the allegations made by Sergeant Bell, but we have been careful to avoid applying a "but for" test of causation. Mr Hay's submission seems to come close to that. The question for us is whether the grievance formed part of the conscious or subconscious motivation of those who decided to visit Bruce Harper. We have concluded that the grievance formed no part of that motivation, which was based instead on the need to investigate certain allegations.

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98. Whether framed under section 27 of the Equality Act 2010 or under regulation 7 of the PTWR 2000 this allegation of victimisation fails on causation.

Was the respondent's conduct of the investigation compliant with the Police Service of Scotland (Conduct) Regulations 2014 (and associated SOP)? If not, was that:

- 5 (a) *because of the alleged protected act above?*
 (b) *a detriment?*

and

10 *Was the respondent's decision not to inform the claimant of the investigation until July 2015:*

- (a) *because of the alleged protected act above?*
 (b) *a detriment?*

15 99. We will deal with these issues together because by the time of closing submissions Mr Hay presented them as being two sides of the same coin.

20 100. Both are essentially concerned with a natural justice point, namely the claimant's right to be made aware of the allegations against her before the respondent reached any adverse conclusion. This is a fundamental principle of fairness in criminal, disciplinary and regulatory investigations. It is also a fundamental principle of public law. It is enshrined in the Police Service of Scotland (Conduct) Regulations 2014 in certain defined situations but it is a much older principle of much wider application. Mr Hay cited the well-known authority of **Ridge v Baldwin** [1964] AC 40 on natural justice in administrative decision making. In some situations it would also be an aspect of the rights guaranteed by Article 6 ECHR, where engaged. All we need say for present purposes is that in our judgment basic principles of fairness required that the claimant should be afforded proper notice of the allegations made against her
25 and a right of reply before the respondent made any decision as to whether "improvement action" or any other penalty would be imposed. A decision to require improvement action is neither a neutral act nor an entirely supportive act, though it may have a supportive element. It represents a blemish on the
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officer's record and a criticism of her conduct.

101. The respondent reached the conclusion that "improvement action" was required before the claimant had been given any opportunity at all to respond to the allegations against her. She was denied any prior notice of the charges against her, still less any opportunity to dispute them, before the respondent reached its decision. While some of the respondent's witnesses suggested that the claimant could have disputed the charges at the improvement meeting, at which point the investigation might possibly have been re-opened, we find that suggestion to be wholly unconvincing. By then the decision had been made. The respondent could not give any examples of a situation in which an investigation had been re-opened in that manner. The supposed possibility that the investigation might have been reopened after PSD had reached and announced their decision is not reflected in any written procedure.

102. A reasonable person would regard that denial of basic fairness as a failure which placed them at a disadvantage. It was a detriment for the purposes of the equality legislation with which we are concerned in this case.

103. As for the reason for that detrimental treatment, the claimant's submissions are based on inference and rely on the lack of a good explanation, coupled with the cumulative weight of the other allegations. However, we have only upheld one of those other allegations: the allegation in relation to Sgt Bell's actions. All of the others have failed. We did not find the decision to commence the investigation to be an act of victimisation, nor did we find certain decisions taken during the course of that investigation to be acts of victimisation. While we regard the failure to notify the claimant of the allegations against her until after the respondent had made its decision as a serious procedural failure, we do not think it would be appropriate to draw an inference that the failure was motivated, whether consciously or sub-consciously, by the claimant's grievance. The respondent conducted the investigation in a manner which was unfair to the claimant, but it was not motivated to do so by the claimant's grievance.

Legal principles – protected disclosures

5 104. Under section 47B of the Employment Rights Act 1996 a worker (which includes a police officer) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by another worker of the same employer in the course of their employment.

10 105. Since it is agreed that the relevant disclosures in this case were protected, there is no need to set out the legal principles which determine whether a disclosure attracts protected status.

15 106. By virtue of section 48(2) of the Employment Rights Act 1996 it is for the respondent to demonstrate the ground on which any act, or deliberate failure to act, was done. *Ibekwe v Sussex Partnership NHS Foundation Trust* (UKEAT/0072/14/MC) shows that a failure by the respondent to show the reason why certain action was taken does not necessarily mean that the claimant wins by default, and that can be contrasted with the position under the burden of proof provisions in section 136 of the Equality Act 2010. A Tribunal is entitled to consider the whole of the evidence before making a finding on the balance of probabilities. Mr Hay helpfully accepted this in paragraph 22 of his submissions.

25 107. Once again, the key issue for us is causation. The protected disclosure need not be the sole or even the principal cause of the detriment, but it must materially influence the treatment of the whistleblower, in the sense of being a more than trivial cause (*Fecitt v NHS Manchester Trust* [2012] ICR 372).

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Reasoning and conclusions – protected disclosures

108. The claimant's case in submissions was considerably more focussed than in the list of issues, or in the amendments to the claims incorporated by reference. The protected disclosures, and the fact that they were protected,

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are agreed. They were the letters of complaint to the Chief Constable dated 26 May 2016 [843], an email to PSD dated 13 July 2016 [862] and various meetings and correspondence listed at [555-556].

5 109. Essentially, the claimant is asking us to find that when investigating complaints which included protected disclosures, the respondent reached deficient conclusions *and did so on ground of the protected disclosures*.

10 110. The alleged detriments all derive from the outcome of the complaint, embodied in CS Main's report dated 27 August 2018 [1027-1074]. It dealt with 59 separate heads of complaint, many of which were subdivided into several parts. Mr Hay's submissions restricted the claimant's case to criticisms of the conclusions reached by CS Main in respect of Heads of Complaint 9(i), 24, 32 and 47, as well as 49-54 "to some tangential effect".

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111. In relation to the alleged detriments highlighted in Mr Hay's submissions, we find as follows.

20 111.1. The restriction of CS Main's enquiry under head of complaint 9(i) to two meetings was not a detriment. By focussing on those two meetings CS Main dealt with the vast majority of the complaint. Mr Hay highlights the hint in SI Lowther's email [417] that other matters might be added to the scope of the enquiry too, but in practice they were not. We find that a reasonable person in the claimant's position
25 would feel that almost all of the substance of her complaint had been addressed, and certainly the main allegations. This minor failing was not a detriment.

30 111.2. Allegedly the answers to heads of complaint 24 and 32 focussed on the decision to *visit* Bruce Harper rather than the alleged *invitation* for him to make a statement. We disagree. We think this was addressed in head of complaint 24. It was not omitted. There was no detriment. There was no broader allegation about the style of questioning, and we see nothing wrong in CS Main reaching a

conclusion without interviewing Bruce Harper.

5 111.3. In relation to head of complaint 47, the allegation is that CS Main missed some of the point, in that he failed to focus on the description of the event as “borderline criminal”. We think that is a fair criticism, although we can certainly understand how that aspect of the point was missed in such a vast complaint. However, since this was properly an aspect of the concerns raised by the claimant we find that the failure to address it could reasonably be regarded as placing her at a disadvantage. It was a detriment.

10 111.4. In our assessment the failure to offer to interview the claimant as part of the investigations is not a matter which placed her at a disadvantage. There had already been two meetings on 20 July 2016 and 24 August 2016. She had already made a lengthy statement in support of her complaint [895-911] and it had been articulated at length through an experienced solicitor. Taken as a whole, that was sufficient to comply with section 9.2 of the respondent’s own Whistleblowing Guidance [684]. That section requires only that a meeting should be offered. There were two, supplemented by a statement. This was not a detriment.

20 112. For those reasons, we have upheld only one of the allegations of whistleblowing detriment still pursued in submissions. However, we can say that even if we had found that all of those matters were detriments, the result would have been the same. We see no basis at all for a finding that the claimant was subjected to any detriment by CS Main because of the relevant protected disclosures.

25 113. First, we note that CS Main was undertaking a vast task, and was probably not assisted by the repetitive nature of several of the heads of complaint or the significant delay in formulating them. We also note that no criticism is made of the vast majority of his findings or reasoning in relation to the other heads of complaint. The criticisms are really limited to 4 of the 59 heads of complaint plus a general point about interviewing the claimant. The

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overwhelming majority of his work is not criticised. We regard this as a situation in which minor errors of approach, scope or reasoning crept into a very substantial piece of work. No reason has been put forward why this senior officer, who was then based within PSD and whose role was to investigate complaints against other officers, should on this occasion seek to subject the claimant to detrimental treatment because of the very protected disclosures that shaped the complaint.

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114. Mr Hay has put forward only the following material from which to infer that protected disclosures were the grounds for detrimental treatment.

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114.1. **CS Main's performance when giving oral evidence.** We have set out our comments on the performance of witnesses earlier in this judgment, including comments on the evidence of CS Main. While in some respects CS Main might have been trying a little too hard to impress us, or to outmanoeuvre Mr Hay, that should not detract from the diligent and careful way in which he generally went about his work when preparing the report. We do not draw adverse inferences.

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114.2. **The lack of record keeping in relation to his own investigations.** We do not think this is a powerful point, the report is the record. There was no obligation to keep additional records, and no inference should be drawn from a failure to do so.

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115. We bear in mind that it is rare to find *direct* evidence that someone has been subjected to a detriment because they are a whistleblower, and it is a rare case in which there is an obvious "smoking gun" to be discovered somewhere within the evidence. Claimants will frequently have to rely on the inferences which might properly be drawn from the evidence. We do not criticise Mr Hay's ingenious attempts to construct a basis for inferring unlawful treatment in this case, but we regard that material as insufficient for us to draw the inference he seeks.

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116. The allegations of breach of section 47B of the Employment Rights Act 1996

fail because we are satisfied that the alleged detriments were not done on the ground that the claimant had made protected disclosures. We have upheld only one of those allegations of detriment, but even if we had upheld them all, we are satisfied that they resulted from straightforward human error when undertaking a substantial and difficult piece of work.

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Overall conclusion

10 117. For those reasons the claimant's case succeeds on one point only: the allegation of victimisation in relation to Sgt Bell's actions. All of the other allegations fail and those other claims are dismissed.

118. Separate directions will be given for the determination of remedy.

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Employment Judge : M Whitcombe

Date of Judgment : 24 February 2020

Date sent to parties : 26 February 2020