THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Ms S Campbell
Miss B Brown

BETWEEN:

Mr F Ojo **Claimant**

AND

The Commissioner of the Metropolitan Police **Respondent**

ON: **19-23 March 2018 and 4 May 2018 in Chambers**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms G Hicks, Counsel**

JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claim that he was subject to detriments for making protected disclosures fails and is dismissed.

Reasons

1. By a claim form presented on 23 December 2016 following an ACAS early conciliation process initiated on 12 October 2016 and completed on 26 November 2016, the Claimant brought to the Tribunal a claim that he had been subjected to various detriments because he had made protected disclosures. The Respondent resisted the claims.

2. The Claimant represented himself at the hearing, having had legal representation when he presented his claim and for some time thereafter. He had no other witnesses. The Respondent called seven witnesses, Sergeant Steven Johnson, Police Constable David Wilcock, Inspector David Blundell, Sergeant Philip Smith, Chief Inspector Andrew Johnstone, Inspector David Monk and Chief Inspector Colin Carswell. All the witnesses had prepared witness statements, which the Tribunal read, along with the documents referred to in them, before hearing the oral evidence.

3. There was an agreed bundle of documents of 488 pages to which a small number of additions were made during the course of the hearing. References to page numbers in this judgment are references to page numbers in that bundle.

The law

4. The law on protected disclosures is set out in Part IVA ERA. S43A defines a "protected disclosure" as a "qualifying disclosure" (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. s 43B defines a qualifying disclosure as:

> **"any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following—**
>
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
>
> **(e) that the environment has been, is being or is likely to be damaged, or**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**

5. Under s43C a "qualifying disclosure is made in accordance with this section if the worker makes the disclosure (a) to his employer…". If disclosed in that way, ie to the employer, it becomes a protected disclosure.

6. Under Section 47B ERA a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. The test of whether a detriment was caused by, ie done on the ground of a protected disclosure, was set out in *Fecitt v NHS Manchester [2012] IRLR 64*.

7. We were referred by the Respondent to a number of additional authorities to which we refer as necessary in this judgment.

The issues

8. The parties had agreed a list of issues in advance of the hearing as follows:

Limitation

9. Has the Claimant presented his complaints before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them (Section 48(3)(a) Employment Rights Act ('ERA') 1996)?

10. If not, has the Claimant shown that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (Section 48(3)(b) ERA 1996)?

11. If so, has the Claimant presented his complaints within such further period as the Tribunal considers reasonable (Section 48(3)(b) ERA 1996)?

Whistleblowing

12. Did the Claimant disclose information, which in his reasonable belief, tended to show that the Respondent had failed, was failing or was likely to fail to comply with any legal obligations to which it is subject, within the meaning of Section 43B ERA 1996?

13. The Claimant relies on the following alleged disclosure: that the Claimant reported his concerns about PS Johnson's driving to Police Inspector David Blundell on 21 January 2015.

14. Was this a disclosure of information?

15. If so, what failure (within the meaning of Section 43B(1)(a)-(f) of the ERA 1996) did the information disclosed tend to show? The Claimant claims that it tended to show that the health or safety of any individual has been, is being, or is likely to be endangered (Section 43B(1)(d) ERA 1996).

16. Did the Claimant reasonably believe there have been such a failure?

17. Was the disclosure made in the public interests?

18. Was the disclosure made in good faith (Section 49(6A)(b) ERA 1996)?

19. If the Claimant is found to have made a qualifying protected disclosure, did he suffer any detriment(s) as a result? The Claimant relies on the following alleged detriments:

a. on 29 January 2015, the Claimant was told by PS Johnson (i) not to stir things up behind his back and (ii) that he was to be his scribe at the scene of fatal accidents;
b. in April 2015, the Claimant was, without warning, marked as a '4' in his personal development report;
c. on 4 June 2015, PS Johnson gave the Claimant a Personal Development Plan ('PDP') requiring the Claimant to increase the amount of 'stop and search' done by the Claimant. As part of the PDP, the Claimant was moved from his driving role at Catford Traffic Garage to a Safer Transport Team at Southwark Police Station;
d. on 23 August 2015, PS Johnson sent the Claimant an e-mail threatening the Claimant with a disciplinary procedure 'Unsatisfactory Personal Performance stage 1' 'should his performance in relation to S&S [stop and search], 'crimints' and arrests' not improve;
e. in a meeting on 9 September 2015, the Claimant was questioned and criticised by PS Smith. In particular PS Smith did not restrict himself to taking a note of the meeting (and indeed took no note of the meeting at all) but became directly involved in the meeting by asking questions which were not directly relevant to the matter at hand and accused PC Ojo of 'smirking or smiling';
f. on 16 September 2015, the Claimant's request to transfer to A relief to enable him to remain working on Traffic but not under PS Johnson was denied by Acting Chief Inspector Monk and Inspector Blundell;
g. on 5 October 2015, the Claimant was sent a Management Action letter describing his attitude and conduct on 8 September as 'unprofessional, rude and discourteous'; and
h. on 21 August 2016, the Claimant's request for other officers including PS Johnson to be removed from Traffic was refused by Chief Inspector Carswell.

Remedy

20. To what remedy if any, is the Claimant entitled? The Claimant is still employed and seeks compensation.

21. If the disclosure was not made in good faith would it be just and equitable to reduce any award (by up to 25%) accordingly (Section 49(6A)(b) ERA)?

22. The Tribunal was slightly perplexed by aspects of the formulation of the issues which in paragraph 12 above suggests that the Claimant was relying only on subsection 43B(1)(b) ERA (breach of a legal obligation), but then in paragraph 15 referred to subsection 43B(1)(d) (health and safety). As the Claimant had made it clear in his ET1 that he was relying on both subsections and Respondent dealt with both subsections in the presentation of its case and in its submissions, we have addressed them both as far as is necessary in our findings of fact and conclusions.

Findings of fact

23. The Claimant began his service as a police officer in July 1987 and remained

at the rank of constable throughout his career. By the time of the hearing he had retired from the police force, but at the time of the incidents giving rise to these proceedings he was working as a member of Roads and Transport Policing Command ("RTPC") as a police driver and police driving assessor with Traffic Division at Catford Traffic Garage. Traffic Divisions deal with criminals using the road network, the enforcement of road traffic offences and serious accidents.

24. In December 2014 RTPC merged with Transport for London Police to form the Road Transport Policing Unit. We heard evidence that the merger was not entirely harmonious and resulted in something of a "them and us" culture that may have contributed to the dispute in this case. Whether or not that was the case, the Claimant began from December 2014 to be managed by Sergeant Johnson, who had previously been assigned to a Safer Transport Team ("STT"). STTs deal largely with crime on the bus networks, ranging from theft to violence against the person. Sergeant Johnson requested to be moved to Traffic after the merger and he became Sergeant to a B relief team of four officers, including the Claimant. He reported to Inspector Blundell.

25. On 21 December 2014 Sergeant Johnson sent an email to his team setting out his expectations as follows:

> **"Guys, please see attached work return records that I would like sent to me on the last working day of each month. As far as I am aware there is no way at this time of measuring individual officer's performance. From what I have seen with the officers I have worked with there should be no problem having something in each box. Please don't leave a box blank, if it is zero then just put a zero in it.**
> **You will note that there is a box for stop and search, this is not a mistake. I will be expecting officers to conduct stop and search where the grounds exist, ensure full grounds are documented and I will have the relevant ammunition to fight back should it be a negative result.**
> **As you have probably seen, I like to be out and about as much as I can and will make a point in the New Year of going out with officers on a daily basis where possible. From what I have seen, we have the makings of a great team and I am looking forward to working with you all.**
> **A bit about me just to give you the heads up.**
> **1. I am not one to e-mail so please come and speak to me first if possible.**
> **2. I don't like to see officers sat around the station, quick cuppa and then out please.**
> **3. I know a lot of officers don't like wearing a tie but ties please in long or short sleeve order.**
> **4. Don't want to teach you to suck eggs but I don't like to see officers sat in a car whilst colleagues are dealing with drivers. Officer safety is paramount and you need to be at your colleague's side ready to go into battle if need be.**
> **5. It is our job to keep the roads safe and deny scumbags the use of our roads so think crime.**
> **I know when you read this you will think f***g h**ll he is one of them. I'm not but I strive to have the best working team and the pride that comes with it."**

The Tribunal found this to be indicative of Sergeant Johnson's approach to the management of his officers from the start of his appointment as the Claimant's line manager. He was new in his role and intended to stamp his authority on his team. He also clearly expected his officers to take a proactive

approach to their work.

26. The Metropolitan Police recognised seven levels of qualification for police drivers. Details of the various driver classifications were set out in the People Standard Operating Procedure (SOP) of which the 2014 and 2016 versions were set out at pages 50 – 86 and 87 – 116 respectively. The SOP supported the Police Driver and Vehicle Policy (page 46-49) the purposes of which was expressed at page 48 to be the establishment of "safe operating and driving practices to reduce the risk of collisions involving police vehicles".

27. The Claimant described himself as a "Level 1" driver, whilst the Respondent referred to him as an "Advanced" driver. Despite the different nomenclature it was common ground that the Claimant's Advanced driving level was one below the highest (Tactical Pursuit and Containment). It was also common ground that Sergeant Johnson, the Claimant's line manager was a "Response" driver, two levels below that of the Claimant. The level applicable to police driver determines various aspects of the manner in which the driver is entitled to drive. At page 75 the 2014 version of the SOP described a Response driver (also known as a Level 3 driver) as one:

> **"who has completed a response driving course and can undertake initial phase pursuit. Drivers are authorised to driver vehicles both liveried and covert, with or without warning equipment. (With effect from 1 June 2012, Level 3 drivers in unmarked cars, including those fitted with warning equipment are prohibited from taking part in any stage of a pursuit)".**

The effect of this restriction is that in relation to certain driving activities, including the driving of certain high performance vehicles, Level 3 drivers are entitled to drive only to the same capacity as Level 1 or Basic drivers. Basic drivers are entitled to drive any car regardless of engine capacity but subject to certain restrictions:

> **They are not entitled to make use of any of the legal exemptions in respect of speed, red lights, keep left signs or any other exemption normally available to police drivers. They may not audible warning equipment. They may use blue lights to assist conspicuity at the scene of an incident whilst the MPS vehicle is stationary. Police officers may also use the blue light to assist in stopping a vehicle. PCSOs employed within the Road and Transport Policing Command and are attached to a Roads Policing Team (RPT) may use blue lights in order to facilitate the regulation of traffic, for example the removal of broken down vehicles. PCSOs attached to RPTs may also use blue lights when employing a rolling road.**
> **A basic driver must not become involved in any stage of a pursuit and if a vehicle that has indicated to stop fails to do so, they must not continue following it**

(Paragraph 2.6 of the 2016 SOP page 95)

The Tribunal notes that the underlined words were not included in the 2014 version of the policy, applicable at the time of the matters giving rise to the Claimant's claims (page 60), which suggests that the Respondent recognised need for clarification of this aspect of the restrictions on Basic drivers.

28. The Claimant's case was that he was subjected to a series of detriments in the wake of having made disclosures about Sergeant Johnson's driving in January 2015. It was his case that he had a conversation with Inspector Blundell shortly after an incident that occurred on 21 January 2015. The Respondent did not deny that an incident had occurred but disagreed with the Claimant's account of the facts and characterisation of them. The Claimant described the incident in his ET1 as follows:

> **"On 21 January 2015 the Claimant accompanied PS Johnson when PS Johnson drove a Level 1 vehicle. PS Johnson drove on a fast road, exceeded the speed limit and responded to a call. The Claimant was concerned about this because it breached police driving regulations and posed a risk to his own and the public's safety, namely, the risk that PS Johnson might cause an accident by driving a vehicle which he was not qualified to drive."**

29. In its ET3 the Respondent described the incident as follows:

> **"It is accepted that on 21 January 2015 the Claimant accompanied PS Johnson in the course of duty, during which they were checking for overweight vehicles. PS Johnson was driving a BMW, which he was permitted to do.**
>
> **Having completed the checks, PS Johnson was driving back when a call came through notifying them that a car bumper had come loose and was lying in the road posing a danger to road users. Responding to the incident, a "rolling road" was set up, whereby one car from the Traffic Unit went ahead to retrieve the car bumper, whilst PS Johnson used his blue light to slow down the traffic until his colleague was able to remove the item from the road. It is denied that PS Johnson acted in breach of the driving SOP or that there was anything improper or unsafe about his actions. In particular, it is denied that he drove too fast, exceeded the speed limit or responded to a call whilst driving. PS Johnson drove with due care and attention, within the speed limit, and in accordance with the driving SOP. He was lawfully responding to an incident."**

30. There was therefore a dispute of fact as to the nature of the incident on 21 January 2015. In is oral evidence the Claimant amplified his concerns by explaining that what PS Johnson had done was to use his two tones (audible warning equipment) and his blue lights (together referred to as "blues and twos") to respond to the call prior to joining the rolling road. If that had been the case it would appear to the Tribunal that Sergeant Johnson had indeed breached the guidelines at page 60. The 2014 policy was not explicit on whether or not a Level 3 driver was entitled to participate in a rolling road (that clarification came in the later version of the policy) but it was explicit that a Level 3 driver should not use audible warning equipment.

31. The Respondent's case was that the Claimant was mistaken about a number of aspects of the incident. In cross examination Sergeant Johnson denied using the two tones, although he accepted that he had used the blue lights. He also denied driving at speed. Sergeant Wilcox, who gave evidence by Skype, was unable to verify whether or not Sergeant Johnson had driven at speed or used his two tones – he had not been present in the car. However both he and Sergeant Johnson agreed that the Claimant had been mistaken in his recollection of the location of the incident. The Claimant was adamant

that it had occurred near the O2 Arena on the A2 in Greenwich. Both Sergeant Johnson and Sergeant Wilcox agreed that it had occurred on the A12 on a stretch between Bow roundabout and the Blackwall Tunnel. There was no other evidence to assist us and we accept that the location of the incident is more likely to have been as remembered by Sergeants Johnson and Wilcox. At its highest the Claimant's case is that Sergeant Johnson drove outside the speed limit and used two-tone equipment in breach of the limitations set out in the SOP. Whilst it is not in dispute that Sergeant Johnson was driving a BMW (which was not itself a breach of the SOP) and that he participated in the rolling road using his blue lights to slow the traffic (which we find was also not a breach of the SOP at the time, although this point was made more explicit in the later version), there is a direct conflict of evidence as to the use of two tones and driving at speed. On a balance of probabilities we consider that the Claimant did witness this behaviour by Sergeant Johnson. It seems improbable that he would have fabricated the incident, despite the fact that his recollection of its location was inaccurate. We are therefore prepared to accept that the Claimant did witness a breach of the SOP by Sergeant Johnson on 21 January 2015.

32. However we find no evidence that he made a written or oral disclosure to that effect to Inspector Blundell. When asked to provide details of the disclosure (whilst he still had the benefit of legal advice), he provided the details at page 365 which state as follows:

> **'The Claimant verbally reported his concerns about PS Johnson's driving in confidence to a superior officer, Police Inspector David Blundell. The Claimant asked Inspector Blundell to speak to PS Johnson and remind him to stop driving Level 1 vehicles until he had passed the course qualifying him to drive them.'**

33. Inspector Blundell, however, whom we found to be a credible witness, had no recollection of this conversation. In cross examination he said that his first recollection of any issue concerning Sergeant Johnson's driving was when he received the Form 728 at page 163 to which we return in the next paragraph. He elaborated on this by saying that had the Claimant come to him on 21 January as the Claimant had alleged and raised a concern that there was some impropriety in Sergeant Johnson's driving, he would have asked the Claimant to meet with him to explain what he felt about it, what he wanted Inspector Blundell to do about it and whether he wanted the Claimant to raise the matter with Sergeant Johnson. He would have kept a written record of the discussion to make sure that his understanding was correct so that there would be something to fall back on if Sergeant Johnson complained about being spoken to. He would have given a copy of the record of the discussion to the Claimant and would have invited the Claimant to look at the "Cleartone" footage, which makes a record of the manner in which a police vehicle is being driven, as evidence to support his concerns.

34. Inspector Blundell provided several examples of occasions on which he had followed up a meeting with a written record (pages 263, 270 and 287). We found this persuasive evidence and formed the view that the Claimant's

recollection of having spoken to Inspector Blundell on 21 January was incorrect, despite the fact that paragraphs 13 and 14 of the Respondent's Grounds of Resistance appear to suggest that the Respondent was conceding that the Claimant had spoken to Inspector Blundell and that Inspector Blundell then spoke to Sergeant Johnson. In broad terms this was in fact correct, for reasons that we go on to consider – in due course Inspector Blundell did speak to Sergeant Johnson about his driving, but we accepted Inspector Blundell's evidence, given in response to a direct question from the Claimant, that despite the impression given by the Grounds of Resistance, he did not speak to Sergeant Johnson on or around 21 January 2015.

35. On or around 29 or 30 January Sergeant Johnson called the Claimant into the Sergeant's office to discuss his concern that the Claimant was talking about him and his driving pejoratively to colleagues. We find as a fact that Sergeant Johnson learned that from his colleagues and not from Inspector Blundell. After hearing Inspector Blundell's evidence we asked that Sergeant Johnson be recalled to clarify his own evidence on this point. In answer to questions from the Tribunal he said that he had become aware of the Claimant's comments when his colleagues, the "PCs in general" were talking about it. He did not recall a specific date and said that as far as he could remember someone had come to tell him that all the PCs were talking about that fact that the Claimant was stirring things up about him driving an unmarked car.

36. There was an undated document at page 164 prepared by Sergeant Johnson and described as a "Running Log of incidents involving PC Ojo". The first incident described is a conversation alleged to have taken place between Sergeant Johnson and the Claimant on 30 January (although the Claimant said that it had taken place a day earlier, on 29 January). The conversation concerned the incident on 21 January and records the Claimant raising the issue of the size of car Sergeant Johnson was driving, the fact that he, as a more advanced driver, should have been driving the vehicle instead, the fact of Sergeant Johnson having used the blue lights and the possibility of his having exceeded the speed limit.

37. Following that conversation the Claimant submitted to Inspector Blundell a Form 728 (page 163) dated 30 January 2015. The form contained the following extracts:

> **"On Thursday 29 January … PS Johnson approached me and asked to speak to me in the garage sergeant's office. He explained that he wanted to have a chat with me because he felt that I was under the impression that he did not like me, and he wanted to correct this.**
> **He then suggested that I had been stirring things up behind his back about driving the fully marked traffic cars, and that if there was a problem I should have approached him in person and discussed the matter and not gone behind his back. I explained that he had been seen on various occasions driving the 'performance' vehicles even though he is a Level 3 driver. My understanding was that he is only allowed to ferry these vehicles and not use these for routine patrols.**
> **I have made various enquiries with other supervisors to confirm that Level 3 drivers can only ferry these vehicles, and on 21 January 2015 I was present as his operator in a fully marked traffic BMW, which he drove for several hours**

> **around the Greenwich area and he even participated in a 'rolling road' on the Rochester Way. … He indicated that he was not aware of the Level 3 driving limits.**
> **The conversation then switched to the team and what was expected of us. PS Johnson made it quite clear to me and in no uncertain terms that at the scene of a serious or fatal accident I would be 'his scribe and that I would have to stay by his side and write everything down and that's how it's going to be'.**
> **I would like to object to being described as a 'scribe'. I find this term offensive, insulting and degrading … I feel that I am the victim of a particularly insulting remark from a supervisor who should know better and should set a better example to me and other officers. I would like this matter brought to the attention of PS Johnson."**

38. Although the Claimant advanced his case solely on the basis that he had made an oral disclosure to Inspector Blundell on 21 January which we have found as a fact he did not actually make, we have also considered, as the Claimant was without the benefit of representation at the hearing, whether the Form 728 contained any qualifying disclosures. This was not self-evident. The gist of the Claimant's complaint was that Sergeant Johnson had driven a vehicle in a manner that breached the Respondent's policy and in a manner that potentially involved a danger to health and safety. Potentially therefore both subsection 43B(1)(b) and (d) ERA were engaged. The document at page 163 did in our view contain a disclosure of information. Looking at the actual text of the documents the information disclosed was that Sergeant Johnson (a) had been seen driving "performance" vehicles even though he was only a Level 3 driver and was therefore only entitled to "ferry" the vehicles and not use them for routine patrols; b) drove round Greenwich for several hours; and c) participated in a rolling road on Rochester Way. (We find as a fact that the Claimant was wrong as regards the location of the rolling road nevertheless he was factually correct to say that Sergeant Johnson was driving a performance vehicle and had participated in a rolling road.) In principle therefore there was a disclosure of information that tended to show that there may have been a breach of the driving policy. We return to this in paragraph 27.

39. Page 163 did not however in our judgment contain any information that tended to show the health and safety of an individual had been, was being or was likely to be endangered. There is no reference to Sergeant Johnson having exceeded the speed limit, used his two tones, or in any way driven in a manner that could be described as dangerous. Hence even though we found as a fact that the Claimant did witness this driving behaviour on the part of Sergeant Johnson, there is no evidence of his having made any disclosure to that effect. We therefore find as a fact that the Claimant did not make a disclosure of information under s43B(1)(d) ERA.

40. Returning to s43B(1)(b) we then went on to consider whether the Claimant held a reasonable belief that (a) that the driving policy had legal force and (b) that Sergeant Johnson had been driving in breach of it by driving in the manner he described at page 163. We considered on balance that it was reasonable for this particular Claimant to hold the view that the driving SOP had legal force. He referred to the "Driving Regulations", implying that he did in fact believe that there was a set of legal restrictions on what traffic officers

are entitled to do when driving. On balance we accepted that he might genuinely have believed this to be the case, despite his many years of experience as a police officer and that element of his belief was therefore in our view reasonably held. We had regard to the case of *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4* in reaching that conclusion.

41. We find however that the belief that Sergeant Johnson was not entitled to drive a performance vehicle was not reasonably held given the Claimant's role and years of experience as a police driver and driving assessor. It is clear from the policy that officers are not restricted in the type of vehicle they drive and there is no reference to "ferrying" vehicles as distinct from driving them during the course of duty. Whether the Claimant reasonably believed that Sergeant Johnson had breached the SOP by participating in a "rolling road" caused us more difficulty as there is no explicit reference to rolling roads at page 60, which contains the relevant section of the policy applicable in 2015 (this was added to the later version of the policy). On balance we did not think it was reasonable for the Claimant to assert that Sergeant was in breach of a policy when there was no reference in that policy to the specific activity he was complaining about. As he had been an Advanced police driver for some considerable time he either should have known the rules or should have checked the policy before making the complaint at page 163. As the position about rolling roads was unclear he should have explained why he thought that it amounted to a breach of the policy. In our view his belief that there had been a breach of the SOP was not reasonably held for someone in his position.

42. The Tribunal therefore reached the conclusion that the document at page 163 was either not the disclosure of information that the Claimant was relying on, in which case there is no evidence of any potentially qualifying disclosure being made at all, or, if it was the disclosure relied upon, it did not amount to a qualifying disclosure. We therefore find as a fact that there was no qualifying disclosure in the manner alleged by the Claimant (and therefore no protected disclosure) and his claim therefore fails at the first hurdle. However in case we are wrong about this initial conclusion we will go on to deal with the remaining facts of the case, our conclusions as to whether the Claimant was subjected to any detriments and our conclusions as to whether there was any causal link between the way in which the Claimant was managed by Sergeant Johnson and the fact that the Claimant had raised a complaint about Sergeant Johnson's driving, (even though we find as a fact that no complaint was made that amounted to a protected disclosure). We would add for completeness that had it been necessary to consider whether the Claimant had made disclosures that he reasonably believed to be in the public interest we would have found that the public interest is engaged in the matter of whether or not a police vehicle is being driven lawfully and in accordance with internal policy and guidelines.

43. Inspector Blundell did not regard the Form 728 as a whistleblowing complaint. To him the form read like a personal complaint about Police Sergeant Johnson and in particular his use of the word "scribe". We consider that that

was a reasonable view for him to take given the overall content of the Form 728. At page 167 is his response to the Claimant:

> **"Thank you for your report below.**
> **It is clear that you have a difficult relationship with Sergeant Johnson, which has encouraged you to write to me. That is a shame as I do hold you in high regard, and I want you to be happy at work.**
> **My advice here would be that you have the appropriate conversations with him. Pick your arguments, and maintain diplomacy.**
> **In respect of the use of the word 'scribe', it is difficult to see how this may be taken as a derogatory term. My understanding is that it is a term used for an individual who creates records and is a term in common usage within the police family for an individual who is nominated to maintain logs or take minutes.**
> **I (along with every other officer I know), do feel that it is best practise for supervising officers to elect a 'scribe' in managing scenes of incidents, and I do expect nominated officers to perform this role to the best of their ability."**

The Claimant wrote in response:

> **"Thank you for your email below.**
> **The difficulty with Sergeant Johnson is that I made enquiries into his driving the fully marked and unmarked traffic cars in response mode when he should not have been. As a traffic sergeant with the ability to suspend officers for doing this I was shocked and surprised that he claims it was an oversight.**
> **I am always diplomatic, arguing with supervisors is not really my thing and is fruitless as they make things uncomfortable, but I had to bring this to your attention as I felt I had compromised myself and the garage. … I too want to pursue a good working relationship with PS Johnson".**

44. On 12 and 31 March the Claimant and various other officers were reminded to produce their work returns, (pages 169(a) and 169) following Sergeant Johnson's email in December (set out at paragraph 12 above).

45. On 18 May the Claimant signed a Performance Development Review ("PDR") for the period to 30 April 2015. This rated him a 4 overall based on his work record in the period. That meant that he was "at the required standard in some areas but that development was required in several areas" (page 125). Sergeant Johnson proceeded immediately to create a development plan by way of management action which was a required response to that rating. What Sergeant Johnson omitted to do, which he later admitted to, was to warn the Claimant before the rating was allocated and give him an opportunity to improve. Inspector Blundell gave evidence that ordinarily there would be a prior warning before a performance management process was instigated. We were also shown a document addressed to police officers entitled "Unsatisfactory Attendance and performance – what you need to know – Police Officer" (page 489) which set out the following guidelines (which appear not to have been followed on this occasion):

> **"If there are concerns about your attendance or performance, your manager should try to address these with you informally in the first instance. This may involve something simple, like providing instruction on how to perform a task, or something more structured with set targets and a review period to measure how you have improved.**

> **It is important to speak to your manager early on…**
> **If this process does not result in enough of an improvement or if you don't engage fully with the support that is provided to you it is at this stage that your manager may consider entering into the UPP process".**

46. The Claimant was reminded again on 19 May to complete his work return in the correct format (page 170).

47. On 1 June Sergeant Johnson signed the PDR (page 172). Details of the actual plan, described as "Management Action", were at pages 173- 4 and would involve moving the Claimant to Southwark Safer Transport Team for one month from 24 July to 24 August 2015. The detailed proposals were set out in the notification letter at page 175-6 and in the document at page 177b - c. The Claimant was informed that the reason for the transfer was his failure to generate any intelligence reports since 2007 and the fact that the number of fixed penalty notices and accidents he was reporting were falling below expectation. Various numerical targets were set although the Respondent's witnesses denied that these amounted to formal targets. It appeared from Chief Inspector Johnstone's evidence that the plan for the Claimant was devised after a discussion between him and Sergeant Johnson.

48. On 4 June a conversation took place between the Claimant and Sergeant Johnson. There is no contemporaneous note of that conversation but the Claimant raised a complaint about it on a second Form 728 on 7 June (page 179). He complains about the imposition of what he regarded as targets and in particular his view that requiring police officers to meet specific targets was a breach of Home Office policy. He sought an investigation into PS Johnson for bullying and failing to obey a lawful order.

49. On 17 June the Claimant appealed against his PDR and the associated management action (page 180). He directed the appeal to PS Johnson and copied it to Inspector Blundell. He made seven points, the last of which read:

> **"It seems very coincidental that after bringing it to the attention of a senior line manager about yourself driving police cars you are not authorised to drive (using blues and twos) I receive fours for my PDR and a month posting to the Southwark Safer Transport Team and management action".**

50. That engendered an exchange between Inspector Blundell and PS Johnson at pages 183 and 184 on 13 and 15 July (Inspector Blundell was absent from the office on sick leave between 10 June and 10 July). Inspector Blundell queried whether PS Johnson had gone about matters in the right way and PS Johnson gave an explanation based on what he regarded as weak management of the Claimant in the past:

> **"Steve, Frank Ojo wants to appeal his PDR and so it will be my role to do this. He is also upset that he's being sent to Southwark STT, which he sees as unfair.**
> **I realise that you are on night duty at the moment, so communication is going to be difficult, but please can you advise me of why this has been arranged.**

> **Most importantly, if it is because of a performance issue, had the issue been brought to his attention previously? ie has he been given notice to rectify any problems?"**
>
> **"Sir,**
>
> **Unfortunately I think Frank has been let down by a lack of supervision by his previous line managers. I have not been on the team since January and the first I became aware of the lack of performance and lack of ability was whilst reviewing crimint, stop and search and the old DDT for his PDR as he failed to provide any evidence. …I could not believe that the last time he put a crimint on was in 2007. …The reason I have sent Frank to Southwark for a month is I feel it will assist him in regaining the skills required to be a competent officer. It would give him more of an opportunity to deal with members of the public, investigate crime, conduct stop and search and make regular use of the crimint system.**
>
> **…I feel he is stuck in his ways and has become complacent. With an officer of Frank's service I would expect a lot more."**

51. It is apparent from the email that Sergeant Johnson was sidestepping the question of whether the alleged performance issues had previously been brought to the Claimant's attention, which was in our judgment both a requirement of Respondent's own guidelines as referred to above at paragraph 32 and an approach that a competent manager would ordinarily adopt in order to secure an improvement in performance. In particular an employee ought to be given the chance to improve before specific development measures are implemented.

52. Inspector Blundell's perception was that a move to Southwark would in any event have been ineffective to bring about an improvement in performance. He raised the matter with Dave Fuller at Southwark who then expressed reservations directly with Sergeant Johnson (page 189). However Inspector Fuller's intervention was then overridden by Chief Inspector Johnstone whose position on the issue was set out in an email at 192 -193 which read as follows:

> **"Lads,**
>
> **When I was on south area I spent a considerable amount of time sorting out PCs with suitable 'development' needs - these might be a new career on a BOCU or an STT or an attachment elsewhere to raise their game and make them appreciate what they are working for in their current roles.**
> **Frank Ojo is one such officer. I have seen his PDR and his attempts at justifying why he doesn't arrest anyone, doesn't search anyone or even know how to log on to the crimint and I'm less than impressed with him. A couple of months ago I added my support to the proposed action plan he was to be given to try and answer some of his shortcomings. Part of that plan was that he was to be posted to a busy inner city STT for a minimum of four weeks to force him into situations to arrest and deal with intel that he could not avoid ie I wanted him out of his nice safe traffic car and walking and patrolling South London streets and buses.**
>
> **I directed PS Steve Johnson to make this happen and get him on to an attachment with MD STT for these reasons. My only caveat was that it was to**

> **be a minimum of a month and if he didn't improve he would stay longer until he completed his development plan to Steve's satisfaction. It wasn't a suggestion it was an instruction.**
>
> **I hear through the grapevine that Frank is no longer going on this attachment to MD STT.**
> **I know I've left but my instruction for this officer still stands.**
>
> **We owe it to the hard working officers to see us challenging and bringing the less busy officers up to a basic standard.**
>
> **Please don't let me hear someone has changed what I decided - unless it is of course the Commissioner!"**

53. Chief Inspector Johnstone was at this point about to take up another position as Chief Inspector at Palestra in Central London. Given his imminent departure the Tribunal was struck by the specific interest that he took in the Claimant's development. In his witness statement he said that he had known the Claimant since 1994 when he and the Claimant worked together as PCs at Catford Traffic Garage. He added "The Claimant could be quite a "difficult character" and was known then as an officer who would question a Sergeant's instruction as "he knew best"." The Claimant disputed the accuracy of this recollection and maintained that he had never worked with Chief Inspector Johnstone. He requested that the Respondent produce a copy of his work history, which the Respondent duly did. This showed that there were indeed inaccuracies in Chief Inspector Johnstone's rather specific recollections as the Claimant had not worked as a traffic officer in Catford in 1994 and had not undertaken any traffic duties at all until September 1999 when he worked for 15 months as a member of the Millennium Traffic Team. It appeared to the Tribunal that Chief Inspector Johnstone was not telling the tribunal the truth about his knowledge of, and history with, the Claimant and we found his evidence on this point to be highly unsatisfactory.

54. Chief Inspector Johnstone denied that he knew that the Claimant was alleging that his transfer to Southwark was motivated by his having "blown the whistle" about Sergeant Johnson's driving until he became involved in preparation for the case. Despite our findings in the previous paragraph about the credibility of some of Chief Inspector Johnstone's evidence, we found no evidence that he was aware of the Claimant's allegations about Sergeant Johnson's driving in the summer of 2015 and hence no evidence that his intervention in the way that Claimant was managed was influenced by those allegations. He did give evidence of a general tightening up of the management of Catford Traffic Garage after he took over as its Chief Inspector in January 2014, at which point there had been no substantive Chief Inspector in post for about 18 months. As a result of this he considered that performance management in general had suffered.

55. As a result of Chief Inspector Johnstone's intervention the Claimant's transfer to Southwark for one month did take place between 24 July and 24 August 2015. During this period there were various communications between Sergeant Johnson and the Claimant including a number of requests for the Claimant's work returns. The Claimant's evidence was that he had been put to

work patrolling on buses. He was not in a vehicle and his ability to apprehend potential criminals in vehicles was therefore somewhat limited. There seemed to have been a mismatch between the objectives he had been set and the tasks he was allocated. Consequently when he came to meet with Sergeant Johnson on 20 August the meeting did not go particularly well. Sergeant Johnson's follow up email dated 23 August was at page 211. This expressed disappointment that the Claimant had not met the targets set for him and had only put one "crimint" onto the system. The targets in question were set out in the development plan at page 210b-c and included two arrests per month, three intelligence reports per week and three process reports per day. Sergeant Johnson then arranged for the Claimant to be assigned to the "Tasking Team" at Catford and to this purpose sent a copy of the development plan to Lee Rogers under cover of the email at page 210a, which described Sergeant Johnson's expectations of the assignment. The email contained the following passage:

> **"I have therefore arranged for you to spend some time with the TDP Tasking team. They are a very pro-active team of hard working officers who gain lots of S&S, crimints and arrests. I have spoken with Sgt Roger and he will assist you as best he can. Should your performance in this area not improve I will have no option but to start the UPP Stage 1 process".**

56. It was the Claimant's evidence that the instigation of a UPP was widely understood within the police force as the start of a process by means of which an officer would be "managed out" of the force. This was to some extent confirmed by Inspector Blundell's evidence in cross examination. He explained that the UPP is governed by regulations and confirmed that it is a process that could lead to dismissal. He acknowledged that for an individual nearing retirement such as the Claimant the process could be particularly difficult and that in his view the instigation of it would be likely in and of itself to impair performance.

57. The Claimant's concerns and reservations were expressed the day after the meeting in an email to Inspector Blundell (page 210) dated 21 August in which he alleged that Sergeant Johnson was bullying him and that he wished to be transferred from "B relief" onto "A relief". On 23 August he also wrote a detailed response to Sergeant Johnson (page 212) which he copied to Chief Inspector Monk, who had by then taken over from Chief Inspector Johnstone. In this email Claimant complains that:
    a. The setting of targets was contrary to Home Office guidelines at the time;
    b. He had been sent on a placement that in effect made it impossible for him to meet the targets that had been set;
    c. He was still unclear as to whose figures his stop and search figures were being compared to;
    d. In his view the real reason he had been placed on a development plan was that he had complained about Sergeant Johnson's driving on 21 January 2015;
    e. Sergeant Johnson was continuing to drive vehicles that he was not authorised to drive and had driven a BMW X5 into Kent sometime during the period 13 July 2015 to 19 July 2015.

Chief Inspector Monk replied at page 214 asking him to raise the matter with Inspector Blundell.

58. The Claimant and Inspector Blundell met on 1 September and a record of the discussion was at page 223. It acknowledged the Claimant's appeal against his PDR (which he had commenced in June) was ongoing and stated that that "any evidence of Sergeant Johnson breaching MPS driving policy would be considered". Inspector Blundell agreed to investigate the possibility of the Claimant changing teams.

59. In fact the question of Sergeant Johnson's driving had already been looked into – it was not clear to the Tribunal exactly what had triggered this investigation as none of the witnesses addressed it directly. At page 266 – 267 was an email from Mike Rabstein of RTPC to Inspector Blundell dated 2 September which attached a report prepared by PC Mark Lawson. The report stated that "Information was passed to the RTPC PSU regarding PS Steven Johnson… in that the officer was using a marked police vehicle for which he was not trained or authorised to use (sic)". It was clear from the report itself that the matter had been raised with PCSU on 10 August (page 267) but the report does not state the name of the complainant.

60. The report was unable to reach any conclusions about the incident on 21 January 2015 as the Cleartone footage for that date had been overwritten, but Mr Lawson had considered another 20 randomly selected time periods in which Sergeant Johnson was driving high performance vehicles and found no evidence that he had used emergency warning equipment or used the legal exemptions policy, which would have been a breach of policy. As a level 3 driver he was entitled to drive high performance vehicles, contrary to the Claimant's assertions, as already noted in this judgment. The report did however suggest that it was not good practice for Sergeant Johnson to be driving vehicles beyond his trained driving level as a matter of routine as this would inhibit his ability to respond to incidents. He was entitled to drive a Mitsubishi Shogun in response mode and the report suggested that Sergeant Johnson's supervisor should speak to him and give directions as to the most suitable vehicle for him to drive routinely. Inspector Blundell then had a conversation with Sergeant Johnson about the vehicles he was taking out on patrol.

61. On 8 September an incident occurred during an operation ("Cubo") in which Sergeant Johnson and the Claimant were involved in the seizure of uninsured vehicles. Sergeant Johnson gave the Claimant an instruction and the Claimant was in doubt as to whether he had grounds for complying with it and he therefore queried it. The conversation became heated, Sergeant Johnson raised his voice and the Claimant walked away. It is not clear whether his walking away was a response to being shouted at and we do not need to determine that for the purposes of this case. However Sergeant Johnson was sufficiently concerned to seek Inspector Blundell's guidance as to how to respond to what he perceived to be discourtesy on the Claimant's part. Inspector Blundell recommended "management action" which means an intervention short of formal disciplinary action. He considered it to be a "low

level matter". He advised Sergeant Johnson to meet with the Claimant and have someone with him to act as a witness and take notes.

62. The same day the Claimant repeated his request to Inspector Blundell to be transferred to A team (page 252). Inspector Blundell replied saying that this would be a matter for Chief Inspector Monk. There was then a meeting on 9 September between the Claimant, Sergeant Johnson and Sergeant Philip Smith who had been invited to the meeting act to as witness and note taker. There was transcript of the meeting at pages 226 to 251. It is apparent from the transcript that Sergeant Smith did not confine himself to witnessing the interaction between the other two parties and taking notes. He made a number of comments about the Claimant's conduct from an early stage and towards the end of the meeting at page 249 the Claimant was moved to say "Sarge you're just trying to pile everything on". In response to that Sergeant Smith said that he was "just trying to give you an observation" and suggested that the Claimant had a habit of smiling and smirking. In cross examination he gave responses that suggested that he was confused as to the nature of his role. Nevertheless following the meeting the Claimant raised a complaint under the police Fairness at Work Policy (page 224 - undated) and on 11 September further restated his wish to be transferred to another team (page 252). His complaint (page 224) was that the meeting had been oppressive and that he had felt bullied.

63. A meeting took place between the Claimant and Inspector Monk on 15 September. They discussed the history of the Claimant's management by Sergeant Johnson and the Claimant's conviction that he was being managed heavy-handedly because he had raised a concern that Sergeant Johnson had been driving a vehicle that he was not authorised to drive. The meeting culminated in the Claimant agreeing that the situation could be improved by a change of line managers. That would mean that he would remain on B relief rather than moving to A relief as he had originally requested. It was agreed that he would move to Sergeant Benneworth's team with effect from 2 October and this was confirmed in an email from Inspector Monk at page 254 which said:

> **"You raised an issue with PS Johnson's unauthorised driving of vehicles with Inspector Blundell that has been dealt with…I asked how we could move forward with this issue and agreed that you would move to PC Benneworth's team from 2nd October".**

64. However the next day the Claimant sent an email saying that he had an issue with two of the officers on Sergeant Benneworth's team and therefore wished to revert to his original request to move to A relief (page 256). Inspector Monk replied indicating that he was reluctant to accede to the Claimant's request saying:

> **"I am a little concerned that you do not wish to go on this leave party because of issues with staff.**
>
> **All MPS staff are expected to be professional treating each other with courtesy and respect. We sometimes have to work with officers that we may not get on**

with.

As stated in my previous email I would really like you to remain with Inspector Blundell as he is aware of the issues that you have raised, able to monitor the situation and offer support where appropriate."

65. Inspector Blundell emailed the Claimant to tell him that he would meet with him on his return from leave (page 265). The meeting took place on 2 October and Inspector Blundell wrote to the Claimant the same day giving him three options: to stay where he was, to move to Sergeant Benneworth's team or to move to Sergeant Smith's team. They also discussed Inspector Monk's reasons, cited above, for not wanting the Claimant to move to A relief.

66. On 3 October the Claimant emailed Inspector Blundell to tell him that there was a vacancy on the Lewisham Safer Transport Team (page 270). Inspector Blundell replied on 5 October (page 274) and confirmed that the move could take place. It was agreed that the Claimant would start in the new role on 12 October and Inspector Blundell waived the normal requirements for 28 days' notice to facilitate this start date.

67. On the same day the Claimant received an email from Sergeant Johnson (page 275) entitled "Management Action" referring to the Claimant's conduct on 8 September and describing it as "unprofessional, rude and discourteous" and falling short of the standards of behaviour set out in the Police Conduct Regulations. The email concludes:

"I feel your behaviour as set out above is in breach of this and I therefore would like to inform you that this incident will be shown on your HR file and (sic) having received management action for falling below the standards expected."

68. Following this the Claimant raised two further Fairness at Work complaints. The handling of these was not identified as a detriment by the Claimant and none of the identified issues refers to them specifically. However we set out our findings in relation to them briefly below before returning to the last detriment of which the Claimant complains, namely Chief Inspector Carswell's refusal to remove various officers from B relief in August 2016.

69. The Claimant raised a further Fairness at Work complaint some weeks after the management action letter of 8 September (page 296) - the document was undated but according to the response to the complaint at page 321 it was submitted in November 2015. The complaint was as follows:

"This is regarding a development plan regarding stop and search targets. The supervisor concerned is PS S Johnson 1402T based in B relief at Catford Traffic Garage TDP. Without the process of an "action plan" a "development plan" was given to me to do more stop and searches (sic). I was moved for a period of one month from TDP to Southwark Safer Transport Team to increase the number of stop and searchs and crimint entries. I was sent an email advising me that UPP stage 1 would be considered if there was no increase in stop and searchs. At the end of this development plan I was then posted for 2 weeks at the Pro active Team at TDP.
When this was completed I went back to the same leave party with the same

> **supervisor. No officer has ever been disciplined/developed for not doing enough stop and search for the years I have been at TDP. Shortly after these development plans I had to approach senior line managers to request a move to another relief. They were unable to assist, so I moved to a Safer Transport Team at Lewisham where I am now based. The resolution I am seeking is for the supervisor to be interviewed about the allegation of bullying".**

70. Both Fairness at Work complaints were dealt with by Inspector Jaspal Sandhu who interviewed Inspector Fuller, Inspector Blundell, Sergeant Johnson, Chief Inspector Johnstone and Chief Inspector Monk himself. He then wrote to Chief Inspector Monk on 19 February 2016 (page 321-2) raising his concerns that there may have been misconduct on the part of Sergeant Johnson, that the Claimant felt that the performance plan had been put in place to punish him for reporting that misconduct and that there were problems with the way the performance management had been carried out. Specifically he said:

> **"I was tasked with looking at local resolution on 15th December 2015….**
> **PC Ojo did not want the matter resolved locally and reiterated that he felt what had taken place was bullying and punishment for reporting wrongdoing…As the allegation made appears to be misconduct I submitted an MM1 on 18th February with the details of what PC Ojo had alleged….**
>
> **I am concerned that the organisation may be vulnerable to legal actions that might be taken by the originator of the FAW… This is because I have reviewed the PDR and the Development plan. The PDR has not been carried out correctly and the Development Plan is poor. PS Johnson did not provide any average performance figures for the team to PC Ojo to evidence his poor performance. PC Ojo is the only officer in the department who has been put on an attachment as part of a development plan. The development plan states that performance in stop and search falls far below [what] PS Johnson expects and although PS Johnson does not set targets for stop and search the inference taken by PC Ojo and PC Anderson [the Claimant's Police Federation representative] was that this was effectively telling PC Ojo to do more stop and search."**

71. Inspector Sandhu sent the MM1 to RTPC on 18 February (page 323). The issues he raised were bullying on the part of Sergeant Johnson and his having exceeded his driving entitlements. He received a response from Mike Rabstein on 23 February 2016 (page 323) informing him that the potential misconduct issue had already been looked into and no evidence of misconduct had been found. He also expressed the view that a development plan was justified in the Claimant's case. He said:

> **"I would contend that a development plan of some sort was very justified. I would ask what previous line managers were doing about the poor performance of PC Ojo.**
>
> **I would suggest you discuss with PS Johnson's line manager issues around UPP if you feel the need to. This is not suitable for the PSU to be involved around misconduct issues as there isn't (sic) any..I also note that CI Johnstone has supported/instructed that his move and dev plan happen.**
>
> **Allegations are:**
>
> **1. PS Johnson bullied PC Ojo by giving him a poor PDR, putting him on a development/action place and moving him on attachment to Southwark STT and TDP tasking team. Failing to achieve professional standards in relation**

> **to Authority, Respect and Diversity. PC Ojo had a right of appeal through PDR process at the time. Dev plan supported by CI Johnstone. No misconduct issue.**
> 2. **PS Johnson drove an advanced vehicle on 21 January 2015 outside of his entitlement as a level 3 trained driver…. Dealt with. No case to answer for PS Johnson. No misconduct issue.**

72. On 1 March 2016 Rob Anderson queried the decision that here had been no misconduct in relation to the bullying allegation (page 328). Inspector Sandhu expressed the view that the situation was either one in which there was a poorly performing officer who needs developing or a sergeant who is using his position to punish/bully an officer (5 March page 328). On 7 March Rob Anderson sought a view from RTPC (page 327) and received the following response from Mike Rabstein the same day:

> **"The reporter (sic) of wrongdoing with regards to driving issues was looked into and has been dealt with. The other matter was referred back to line managers to deal with around PDR and dev plan issues. Considerations can be given to UPP but it is for PS Johnson's line managers to determine. I am aware that CI Monk is aware of the situation and that steps have been taken to address these matters and the PC Ojo has been informed."**

73. The outcome of the Fairness At Work process was that the Claimant's PDR score of 4 was quashed by Chief Inspector Monk and he was regraded a 3. However the Claimant had in the meantime raised a further Fairness at Work report (page 310-11) dated 8 February 2016 raising a complaint that he had been bullied by both Sergeant Johnson and Sergeant Smith. Inspector Monk discussed this with him (pages 335 a-c) following which Steve Hodder was appointed to deal with both outstanding complaints.

74. For reasons that were not completely clear to the Tribunal, the final report did not emerge until 25 August 2016, more than six months later (there were two copies in the bundle, one marked, at pages 348-361 and 362-375). However the Claimant did not make any complaint about the delay in these proceedings. The report's conclusions were set out at section 4 of the report. We do not propose to set them out in their entirety but we note that Mr Hodder

    a. took the view that the Claimant had been underperforming in areas other than Traffic, but that this underperformance was not well managed by Sergeant Johnson. He attributed this to Sergeant Johnson being a "new broom" who was himself on a learning curve;
    b. did not think that Sergeant Johnson's management style amounted to bullying;
    c. noted that the breakdown in the relationship between the two officers was underpinned by the merger of Traffic and STC and the difficulties that arose from the different sets of expectations prevailing in the two sides of the service and the different backgrounds of the two officers;
    d. considered that Sergeant Johnson would benefit from some guidance or coaching on performance management;
    e. accepted that "it is possible that PS Johnson was influenced consciously or otherwise, by PC Ojo having previously reported him for alleged breaches of driving regulations, although PS Johnson is certain

that this was not the case";

f. considered that the meeting of 9 September 2015 had not been well handled by Sergeant Johnson and that having two managers acting in tandem "could be construed as behaviour akin to bullying" even though he did not believe that that was the intent of either officer and was more reflection of Sergeant Johnson's inexperience.

He recommended that if the Claimant wished to return to traffic he should enter into a mediation process with Sergeant Johnson.

75. The next and final matter on which the Claimant relied as a detriment was the refusal by Chief Inspector Carswell in August 2016 to remove from Traffic certain officers, including Sergeant Johnson. The Claimant asked for this to happen in an email dated 11 August 2016 (page 342) to Lee Rogers. He expressed the wish to return to Traffic from the Lewisham Safer Transport Team to enable him to continue to exercise his skills. The request was forwarded to Inspector Knowles who discussed it with Chief Inspector Carswell. He gave the Claimant a response on 21 August (page 345) which stated "I have discussed this with Mr Carswell. He is happy to accommodate PC Ojo back on RPT but this will not be on the basis of other officers being moved from the RPT".

76. Chief Inspector Carswell's evidence was that he was unaware of the background to the Claimant's request. We find this surprising. Even if he had had no actual knowledge prior to the request being made, the unusual nature of it as he himself characterises it in his witness statement, makes it in our view somewhat remarkable that he did not make any enquiries into the background. Had he done so he would have learned that there was a live Fairness at Work complaint in respect of which the outcome was published just four days later on 25 August. His assertion therefore that the decision was made on the basis that there was no evidence of any wrongdoing would seem to have been hastily made without any real enquiry or prematurely made when there was a live complaint raised by the officer concerned of which the outcome was not yet known.

Conclusions

77. We have already determined that the Claimant's claim cannot succeed because he did not persuade the Tribunal that he had made a protected disclosure in the manner that he alleged. Had he done so, we would have gone on to consider whether he had been subjected to the detriments referred to in paragraphs 11(a) to (h) of the List of Issues and whether any of the treatment of which he complained had been materially influenced by his having complained about Sergeant Johnson's driving.

78. The bare facts of paragraphs 11 (a) to (h) were not in dispute. What the Respondent disputed was whether the matters of which the Claimant complained amounted to detriments and whether the actions complained of were materially influenced by the Claimant having complained about Sergeant

Johnson's driving (the applicable test of causation being that set out in *Fecitt v NHS Manchester [2012] IRLR 64*). We will set out our hypothetical conclusions in brief, by reference to each detriment alleged.

a. We consider that it was not inherently detrimental to the Claimant for Sergeant Johnson to have asked the Claimant not to stir things up behind his back. This was a reasonable request from a manager to a subordinate and although there may have been something about the manner in which the Claimant was spoken to that was potentially detrimental, the Claimant did not put his case that way or mention that in the written complaint at page 163. Nor was it detrimental to refer to the Claimant as a "scribe" – we accepted the Respondent's evidence that this was a term in wide use within the police force across all ranks.

b. Despite the clear evidence that the Claimant was not performing highly in his role, it was indisputably detrimental to the Claimant to have been marked a 4 in his PDR. This was effectively acknowledged by the Respondent as the rating was eventually quashed by Inspector Monk. Sergeant Johnson departed from normal performance management procedures by failing to warn the Claimant that a rating of 4 was a possibility and failing to give him time to improve. We do not think Sergeant Johnson's intentions in that regards are relevant – for the purposes of establishing whether or not there was a detriment what matters is the Claimant's perceptions and whether these are reasonable in the circumstances. Furthermore the Respondent failed to persuade the Tribunal that any other officer was treated in this way or to show that the Claimant's performance was so poor that he warranted the exceptional treatment that he received. We acknowledge that the Claimant contributed to his predicament by, of example, failing to produce timely work returns, but we were not persuaded that the way in which he was managed was proportionate.

c. It was also detrimental to the Claimant to be moved to a Safer Transport Team. Inspector Blundell did not support the move or consider that it would be beneficial to the Claimant. It removed the Claimant from the roles he was trained to perform into an unfamiliar environment in which his skills were not used. It seemed to the Tribunal that the Claimant could almost be described as having been set up to fail by the move – he was required to increase the number of times he conducted "Stop and Search" but it seemed to the Tribunal that he was not given the wherewithal to achieve the target set.

d. We had regard to the Respondent's submissions concerning the threat by Sergeant Johnson that an Unsatisfactory Personal Performance procedure might ensue if his statistics did not improve. Although we accepted that there were objective reasons for the Claimant to be given rigorous targets in light of his continued failure to meet Sergeant Johnson's' expectations, we also took the view that the Claimant would reasonably have perceived Sergeant Johnson as having targeted him for particularly close management. Inspector Blundell supported the

Claimant's assertion that the instigation of a UPP was widely perceived as the first step in a process of managing someone out and we took into consideration the fact that the Claimant was by this stage in the run up to his retirement. The Claimant plainly perceived this step as detrimental as it prompted him to complain of being bullied. Regardless of Sergeant Johnson's motivation, in our judgment his management style and choice of language created a perception on the part of the Claimant that he was being managed in an overbearing fashion. The Claimant reasonably perceived that as detrimental.

e. The Claimant also reasonably perceived himself to having been bullied by the conduct of the meeting on 8 September 2015. Again we acknowledge that the Claimant contributed to his own predicament by having acted discourteously and arguably in an insubordinate fashion towards Sergeant Johnson during Operation Cubo, but the decision by Sergeant Smith to depart from his allotted role and participate in questioning the Claimant and commenting on his conduct and demeanour was viewed by the Claimant as overbearing. The conduct of that meeting was unorthodox and in our judgment the Claimant reasonably perceived it as detrimental.

f. We did not think it was reasonable of the Claimant to regard the decision not to transfer him to A relief in September 2015 as detrimental. We have set out our findings of fact in relation to this element of his complaint at paragraphs 50 and 51. Inspector Monk's predominant reason for refusing the Claimant's request was to leave him under the line management of Inspector Blundell who knew him well and was familiar with the recent history. That outcome was not reasonably regarded as detrimental by the Claimant – it was plainly arrived at with his interests in mind. Inspector Monk was also entitled to refuse to accede to the Claimant's request not to work with particular officers on the team to which Inspector Monk had offered to transfer him and the Claimant did not in our judgment have a valid reason to perceive that management decision as detrimental to him.

g. Similarly we regard the letter of 5 October that followed the Operation Cubo incident as reasonable in the circumstances. The Claimant had conducted himself in a manner that was discourteous and rude albeit that Sergeant Johnson had handled the management action meeting badly. It is likely that the Claimant read the letter through the lens of his unhappiness at the way that meeting had been conducted and to that extent his unhappiness with the outcome was justified. However it was not reasonable for him to regard a reprimand as detrimental given his own conduct on the occasion in question.

h. We deal in more detail below with the final detriment relied upon – Inspector Carswell's decision in August 2016 not to remove certain officers, including Sergeant Johnson, from Traffic to facilitate the Claimant's return as that alleged detriment is linked to the question of jurisdiction.

79. It follows from our conclusions in the preceding paragraph that we found some of the decisions taken by Sergeant Johnson and on occasion the manner in which he communicated those decisions, to have been reasonably regarded by the Claimant as detrimental to him. The remaining question is whether, had we found that the Claimant had made a protected disclosure, the Respondent would have discharged the burden of showing that there was no causal link between his having complained about Sergeant Johnson's driving in January 2015 and the detrimental treatment to which Sergeant Johnson subjected him.

80. It seemed to the Tribunal that there were a number of influences on the manner in which Sergeant Johnson conducted his management of the Claimant including his inexperience as a manager, his desire to impress his superiors with his enthusiasm for raising performance standards, the support he received from Chief Inspector Johnstone, the awkward relationships that ensued after the merger of the Traffic and Safer Transport divisions and what would appear to have been a personality clash between Sergeant Johnson and the Claimant. In the Tribunal's judgment however the Respondent did not discharge the burden of showing that the Claimant having complained about Sergeant Johnson's driving had no material influence on the manner in which Sergeant Johnson managed him thereafter. As the Fairness at Work report concluded, the possibility that he had consciously or unconsciously been motivated by the Claimant's complaints cannot be discounted. The treatment of the Claimant was singular and the first act of heavy hand management – the rating him a 4 without prior warning, followed reasonably quickly after the Claimant had raised his complaint. It would not be surprising if Sergeant Johnson had developed conscious or unconscious feelings of hostility, although he denied that that was the case. The particular focus on the Claimant remained not wholly satisfactorily explained and leaves open the possibility that the complaint was a material influence on it. But the Claimant did not make a protected disclosure there is no remedy available to him for that state of affairs.

81. The question of whether the Tribunal had jurisdiction to hear the Claimant's claim would also have arisen in this case. Again we consider this point purely on a hypothetical basis given our initial conclusion that there was no protected disclosure.

82. The Claimant put forward no explanation at all as to why he did not submit his claim earlier than he did and the fact that he was legally represented when he submitted his claim would have been a relevant consideration. In the absence of any such explanation the Tribunal would not have been in a position make a determination that it would not have been reasonably practicable for the Claimant to submit a claim within the relevant time limits and he would therefore have been reliant on establishing that one of the acts he relied upon was in time.

83. The Claimant commenced early conciliation on 12 October 2016, meaning that only Inspector Carswell's refusal to remove other officers from RPT was

on the face of it potentially in time as the Claimant did not advance his claim on the basis that there was a continuing act. We therefore considered whether the last act relied upon could be considered to be part of a series of similar acts or failures, bearing in mind the decision in *Jhuti v Royal Mail Group UKEAT/0020/16* that the last incident relied upon needs to be both within the statutory time limit and itself actionable. Inspector Carswell's act was within the time limit, but was it an actionable detriment? There would have been two elements to our enquiry – was it detrimental to the Claimant to be working in a Safer Transport Team and was the decision to leave him there materially influenced by his having raised questions about Sergeant Johnson's driving?

84. We do not need to determine this point definitively but on the question of whether it was detrimental to the Claimant to be working in a Safer Transport Team, we were satisfied that it was. The point was eloquently made in the Claimant's ET1: "The Claimant believes this is to his detriment as he is a highly qualified Traffic Officer who would have preferred to continue working in Traffic as a police driver rather than at Safer Transport, where his role largely consists of riding on buses". It was reasonable for the Claimant to regard the move as detrimental and he showed that he was unhappy with it by requesting a transfer back to Traffic. The Respondent submitted that the move to STT was not detrimental to the Claimant's career, but that was not how he perceived it and his perception was in our judgment reasonable in the circumstances.

85. We were however somewhat troubled by the findings we made in paragraph 63 in relation to Inspector Carswell's decision. The burden is on the Respondent to show that a protected disclosure did not materially influence its treatment of a whistleblower and we were simply not convinced by Inspector Carswell's assertion that he knew nothing about the background to the Claimant's request – we consider that on a balance of probabilities he would have known something about it and about the outstanding Fairness at Work Report. The possibility that Inspector Carswell's decision could conceivably have been influenced by the nature of the Claimant's complaints about Sergeant Johnson cannot in our view be discounted entirely, despite Inspector Carswell's denial. We recognise that there is a material difference between the Claimant asking to be returned to Traffic – a request that Inspector Carswell was happy to accede to – and a request that other officers (including Sergeant Johnson) be moved elsewhere. Inspector Carswell's account of the matter was that his reason for not giving consideration to moving the other officers was that he needed to act fairly towards them, particularly where there was no evidence of wrongdoing.

86. As we have already observed, he arrived at that conclusion without apparently looking into the background to the request or awaiting the outcome of the Fairness at Work enquiry. Had he done so he would have been aware of the difficult working relationship between Sergeant Johnson and the Claimant. That said, the findings of the Fairness at Work report were that Sergeant Johnson needed coaching on how to manage his reports, but that he had not actually bullied the Claimant. The report therefore arrived at the conclusion that there had been poor management but no actual wrongdoing. That being

the case, even if Inspector Carswell had reached his decision in full knowledge of the Fairness at Work report, in our judgment he would on a balance of probabilities reached the same decision as the report would have supported his view that there had been no actual wrongdoing by the officers concerned. His reason for acting as he did would therefore have been the need to be fair to the officers concerned in the absence of wrongdoing – a decision that would have been unrelated to the Claimant's alleged protected disclosure. There was also force in the Respondent's submission that given the lapse of time since the alleged disclosure and the last detriment relied upon, coupled with Inspector Carswell's lack of direct involvement in the earlier events, the Respondent would in any event have discharged the burden of showing that there was no causal link between the alleged disclosure and Inspector Carswell's refusal to move the other officers from their roles.

87. It follows from these hypothetical conclusions, that even if the Claimant had made a protected disclosure, on the facts Inspector Carswell's actions would not have been materially influenced by it and there would therefore have been no actionable detriment within the statutory time limit. Had the issue of jurisdiction actually arisen for determination would therefore have concluded that we did not have jurisdiction to determine the claim.

88. For all the above reasons, although we find that there were grounds for criticism of the way in which the Claimant was managed, the Claimant did not make a protected disclosure and his claim therefore fails and must be dismissed. In the alternative it was brought out of time and we did not have jurisdiction to determine the claim.

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Employment Judge Morton

Date: 31 May 2018