EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101669/17 and 4100208/18
Held in Glasgow on 15, 16, 19, 26, 27and 28 March and 4, 5, 11, 13,14 and 15 June 2018 with deliberations in chambers on 19 June 2018.

Employment Judge: Susan Walker
Members: Hugh Boyd
Peter Kelman

Ms Amy McDonald — **Claimant**
Represented by:
Mr Hay, of counsel

The Scottish Police Authority — **Respondent**
Represented by:
Mr Miller, solicitor-advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:

1 Claim 4101669/17 is dismissed.

2 In respect of claim 4100208/18, the claimant was subjected to a detriment on the ground that she had made a protected disclosure (in respect of one matter); and the respondent is ordered to pay to her the sum of SEVEN THOUSAND FOUR HUNDRED AND FORTY POUNDS (£7440) (which sum includes interest) as compensation for injury to feelings.

REASONS

1. These claims are made under section 48 of the Employment Rights Act 1996 (the "ERA"). The claimant alleges that she has been subjected to a number of detriments because she made protected disclosures (commonly called

"whistleblowing"). The claimant is still employed by the respondent and does not allege she has suffered any financial loss but she seeks compensation for injury to feelings.

2. Claim 4101669/17 ("claim 1") was presented on 2 June 2017 and was amended by email received by the Tribunal on 21 June 2017. Claim 4100208/18 ("claim 2) relates to some later events and was presented on 5 January 2018.

3. The respondent accepts that the claimant made a number of protected disclosures that attract the protection of the legislation. However, they dispute that some of the disclosures relied on are "protected" in terms of section 43A of the ERA. While the respondent also accepts that most of the events complained of by the claimant occurred (although they say that not all can be considered "detriments"), they dispute that they occurred because the claimant had made protected disclosures.

4. Evidence was led from the claimant and from Louise Haggerty and Lesley McCabe on her behalf. Evidence was led for the respondent from DCC Fitzpatrick, Kathy Logan, James Gray, Nicola Marchant, Elaine Wilkinson, David Hume, Andrew Flanagan, John Foley, Grant Macrae, Caroline Stuart, Gary Devlin and Grace Scanlon.

5. When the hearing resumed on 4 June 2018, it was converted, by agreement, to a case management preliminary hearing in private. This was to consider an application that had been made by the claimant in the intervening period for the Tribunal to order that certain documents be produced. That application was refused by the Tribunal with reasons given orally at the time and the hearing of the evidence resumed on 5 June 2018.

6. Two joint bundles of productions were provided and the parties' representatives made submissions orally, each speaking to a written note, and provided copies of relevant authorities. The Tribunal is grateful to the representatives for the courteous manner in which they co-operated with each other. This was of considerable assistance to the Tribunal.

7. In advance of the hearing an order was made by the Employment Judge that certain individuals who would be referred to in the proceedings (but were not parties to it) should be referred to during the hearing by initials – AB, CD, EF,

GH, JJ and KL. KL referred to DCC Fitzpatrick and that part of the order was subsequently revoked.

8. The following are alleged to be protected disclosures in relation to claim 1.
   - 8 June and 15 July 2015 – emails from the claimant to John Foley in relation to expenses claimed by AB, a former Board member (Disclosure 1).
   - 11 July 2016 – claimant's grievance sent to Robin Johnston containing information about a severance payment made to CD (Disclosure 2).
   - 11 July 2016 – claimant's grievance sent to Robin Johnston containing information about a severance payment made to EF (Disclosure 3).
   - 11 July 2016 – claimant's grievance sent to Robin Johnston containing information about a severance payment made to GH (Disclosure 4).
   - 18 December 2016 - email from claimant to John Foley relating to a payment about to be made to JJ and email of 19 December 2016 about the same matter to Andrew Flanagan (Disclosure 5).
   - 27 January 2017 - email from claimant to John McCroskie relating to relocation payments about to be made to DCC Fitzpatrick (Disclosure 6).
   - 5 May 2017 - email from claimant to Andrew Flanagan referring to Disclosures 1 - 6 above. (Disclosure 7).
9. The respondent accepts for the purpose of these proceedings that Disclosures 1, 5, 6 and 7 are protected disclosures.

The alleged detriments (claim 1)

10. The alleged detriments set out in claim 1 are:
    - exclusion from taking part in internal and external audit meetings from around July 2016. (Detriment 1)
    - exclusion from internal finance meetings from around July 2016. (Detriment 2)
    - exclusion from Scottish government and other police Scotland meetings from around July 2016. (Detriment 3)
    - exclusion from a Finance Committee Workshop that took place on 10 May 2017. (Detriment 4)
    - cessation of one-to-one meetings and dialogue with John Foley (the claimant's then line manager) from around July 2016. (Detriment 5)

- exclusion from receiving finance, external and internal audit communications from around July 2016. (Detriment 6)
- inability to fulfil job functions/erosion of duties/allocation of duties (this includes removal of delegated authorities without consultation and preventing her being a resource for Police Scotland) from around August 2016. (Detriment 7)
- refusal to appoint an independent third party to hear her grievance appeal. (Detriment 8)
- proposal to second Lesley McCabe (then assisting the claimant) to Police Scotland and the failure to consult claimant and to follow the relevant Standard Operating Procedure. (Detriment 9)
- providing details of the claimant's allegations contained in the ET1 to DCC Fitzpatrick (which created embarrassment and distress). (Detriment 10)

The alleged protected disclosures (claim 2)

11. The claimant relies on the same disclosures as in claim 1 with the following additional disclosures:
    - 17 May 2017 - email from the claimant to the Cabinet Secretary for Justice, the Auditor General for Scotland and Audit Scotland including Disclosures 1 - 7. (Disclosure 8)
    - 1 June 2017 - statement by the claimant on the Certificate of Assurance for the 2016/17 accounts provided to John Foley or around 1 June 2017. This combines disclosures marked (ix) and (x) in the ET1 which it is agreed comprised one disclosure (Disclosure 9).
    - 25 November 2016 – claimant's appeal of the outcome of her grievance. This is included in claim 2 but is not relied on in claim 1 (Disclosure 10).
12. The respondent accepted that Disclosure 10 is a protected disclosure.

The alleged detriments (claim 2)

13. The alleged detriments set out in claim 2 are:
    - Failure to promptly and fully investigate the protected disclosures (Detriment 11)

- Failure to promptly afford the claimant the opportunity of meeting with the respondent or someone on their behalf to enable her to provide information and evidence about the protected disclosures. (Detriment 12)
- Failure prior to 21 June 2017 to ensure the disclosures were investigated in accordance with good practice and/or the respondent's draft/approved whistleblowing policy and guidance. (Detriment 13)
- Failure, post June 2017/appointment of Scott Moncrieff, to ensure that the protected disclosures were investigated in accordance with good practice and/or their published whistleblowing policy and guidance. (Detriment 14)
- Making comments about the claimant in the grievance outcome appeal inferring inappropriate conduct by her. (Detriment 15)
- Failure by John Foley and/or Andrew Flanagan to acknowledge to reply to emails – specifically claimant's emails of 18 and 19 December 2016, 27 January 2017 and 5 May 2017. (Detriment 16)
- John Foley did not acknowledge or discuss the issues that gave rise to the qualified Certificate of Assurance in June 2017. (Detriment 17).

Issues to be determined

14. The following issues require to be determined by the tribunal: -

(1) Were Disclosures 2, 3, 4, 8 or 9 "protected disclosures" for the purpose of section 43A?

(2) Was the claimant subjected to any or all of the detriments as she alleges?

(3) If the claimant was subjected to any of the alleged detriments, was that was on the ground that she had made a protected disclosure?

(4) Is the tribunal prevented from considering any part of claim 2 because it has been presented out of time?

(5) If either claim succeeds, how much should be awarded by way of injury to feelings, taking into account the updated *Vento* bands?

Findings in fact

15. The following facts are found to be established:

a) The claimant is a qualified Chartered Accountant. She is a member of the Institute of Chartered Accountants of Scotland.

b) She was appointed as Director of Financial Accountability of the respondent in May 2014.

c) The respondent was established in April 2013 and is the governance body which holds Police Scotland and the Chief Constable to account and acts as a bridge between Police Scotland and the Scottish Government and is also responsible for the provision of Forensic Services. The accounts of the respondent have to be laid before Parliament each year.

d) The claimant was one of four Directors of the respondent and a member of the Senior Management Group. She reported to John Foley, the Chief Executive who reported to the Board. The Chair of the Board at the time of her appointment was Vic Emory who was replaced by Andrew Flanagan around October 2015.

e) The Chief Executive of the respondent has a statutory responsibility to the Scottish Parliament as the Accountable Officer for the management of the budget of the respondent (including the majority of the budget which is allocated to Police Scotland). The Accountable Officer has to sign off the Annual Accounts each year to say that he has complied with his statutory responsibilities.

f) The role of the Director of Financial Accountability was to support the Accountable Officer and to assure him of the completeness and accuracy of the accounts. The claimant interacted with the internal auditors and the external auditors (Audit Scotland) in the preparation of monthly and quarterly management accounts as well as the year end accounts. She provided support to the Finance and Investment Committee and the Audit Committee which included liaising with the Chairs of those committees, attending the committee meetings and often presenting papers. The claimant had weekly meetings with the finance team of Police Scotland and she had meetings with the Scottish Government throughout the year about the budget. All Directors were asked to provide an annual Certificate of Assurance in relation to their

area of responsibility for the Accountable Officer to allow him to sign the Governance Statement in the Annual Accounts.

g) Initially there were four internal auditors and a finance assistant that reported to the claimant. The internal audit function was outsourced to Scott Moncrieff over a period of about 12-18 months starting in 2015.

h) The claimant then had one direct report, Lesley McCabe. The claimant reported to John Foley and worked closely with him at the start of her employment They were based in a small office and had almost daily contact as well as weekly 1-2-1s. Mr Foley carried out the claimant's annual appraisal.

i) The claimant would have regular email contact as well as face-to-face meetings with her various points of contact.

Disclosure 1

j) In June 2015, John Foley asked the claimant to investigate an expenses claim made by AB, a former board member. The claimant did investigate. The claimant confirmed that the there was no problem with the matter that Mr Foley had raised but she raised a different issue with him about AB's expenses. Mr Foley did not reply to her emails of 8 June 2015 or 15 July 2015. The content of these emails did not affect the way that the claimant was subsequently treated by Mr Foley or anyone else.

The restructure

k) A meeting was scheduled for the respondent's Audit Committee in October 2015. Shortly before that meeting, the Audit Director from Audit Scotland (Gillian Woolman) contacted John Foley and said there was a problem with the accounts as the balance sheet did not reconcile in respect of the fixed assets. John Foley contacted David Hume, the chair of the audit committee and they agreed that the meeting of the Audit Committee should go ahead to hear the auditor's concerns. At the meeting, when it came to considering the accounts, everyone (including the claimant) was asked to leave apart from the Board members who were on the committee, Mr Foley and the Auditors. Following discussion, it was agreed that the respondent would be allowed a period to reconcile the balance sheet. This was to be overseen by John Foley

personally. Mr Foley advised the claimant and her counterpart at Police Scotland that this was to happen.

l) This was not the first time there had been issues with the annual accounts. John Foley concluded that there were problems in the accounting structure and that structural change was required. In particular, he considered that having two finance leads, the claimant for the respondent and her counterpart at Police Scotland led to confusion as to roles and responsibilities and that this had contributed to the problem with the most recent accounts. He was also concerned that there was no reporting line from the Police Scotland Finance lead to him, as Accountable Officer.

m) In December 2015, John Foley told the claimant that he had had a conversation with the Chair of the Board, Andrew Flanaghan, and they intended to appoint an interim Chief Financial Officer.

n) Mr Foley discussed the restructure with John Gillies (of HR) and asked him to prepare a paper with a proposed new structure.

o) Karen Kelly was appointed to the role of Interim Chief Financial Officer in February 2016. Mr Foley told the claimant that Ms Kelly would now be her line manager. In fact, there was no formal management of the claimant by Ms Kelly but the 1-2-1s with Mr Foley stopped. Those that had been in the diary for January, February and March 2016 were cancelled.

p) Over the next few months, Ms Kelly became the respondent's point of contact with the internal auditors and with Audit Scotland. She started to attend meetings that the claimant would previously have attended – with audit teams, with Audit Scotland, with Police Scotland and with Scottish government. Ms Kelly was also the person that John Foley spoke to about finance matters affecting the respondent rather than the claimant.

q) On 2 March 2016, the claimant was told informally by Jeanette Macrae, of HR, that it was likely that her role would be made redundant. This was confirmed by John Foley at a meeting with the claimant on 28 April 2016. This meeting was in the diary for the claimant's annual appraisal. However, Mr Foley was aware that the paper prepared by John Gillies was going before the HR committee for approval the following day and that this recommended

that the claimant's post would be removed from the new structure. He wanted to warn the claimant before that happened.

r) The following day, 29 April 2016, John Gillies presented his paper to the HR committee. This paper recommended the removal of the claimant's role and the equivalent role at Police Scotland and the introduction of a Chief Financial Officer who would have a dotted reporting line to the Chief Executive of the respondent. This proposal was approved by the HR committee.

s) On 3 June 2016, the claimant had a further meeting with John Foley and Alastair Muir from HR. Lesley McCabe accompanied the claimant. Alastair Muir explained the redundancy process. John Foley said that there were no other suitable roles for the claimant and he expected the claimant would be leaving. The claimant was unhappy as she considered that her skillset had not been properly considered for other roles. Mr Muir said that when the permanent post for Chief Financial Officer was advertised, the claimant would be informed and she could apply if she wished to. Mr Foley said that the claimant qualified for the Voluntary Severance Scheme (VRS) and with 3 months' notice pay, she would receive about £50000. Lesley McCabe reminded Mr Foley that the respondent had a policy of no compulsory redundancies so the role might be redundant but the claimant was not. The claimant said that she was "not happy" and she handed over her lawyer's business card.

t) There had been an enhanced redundancy scheme in operation for directors ("the DERS"). The claimant had expected that any redundancy payment offered to her would have been calculated under the DERS. She was told that the DERS had been closed for some time. She was aware of some other payments that had been made more recently and she did some investigation into the circumstances of those payments and concluded that they had not been made under the VRS. The claimant did not, at that time, consider that the payments (which were made to CD, EF and GH) to have been made improperly.

u) In May 2016, James Gray met with John Foley to discuss a possible secondment of Mr Gray from PWC accountants (his then employers) to act as Interim Chief Financial Officer of Police Scotland. Mr Foley had explained

that the intention was to merge the finance function of the respondent and Police Scotland and to remove the posts of Director of Financial Accountability of the respondent and Director of Financial Management of Police Scotland and replace these with a Chief Financial Officer who would have a reporting line to the Chief Constable and a dotted reporting line to the Chief Executive of the respondent as the Accountable Officer.

v) James Gray agreed and started work at the end of May 2016. He initially worked in the interim role for 3 days a week becoming full time from the end of July 2016. The secondment was extended with the permanent post being advertised towards the end of January 2017. Mr Gray applied for the post. The claimant did not. Mr Gray was successful and took up the permanent post of Chief Financial Officer at the beginning of July 2017.

w) By August 2016, the claimant's role had significantly diminished with most of her previous responsibilities being undertaken by Karen Kelly or James Gray. The claimant found her time was not fully utilized. She continued to attend Committee meetings but was no longer presenting papers or taking the lead in relation to finance. She opted to sit at the outside of the room rather than at the main table as she was no longer the finance lead.

x) Tom McMahon was the Director of Strategy and Performance for the respondent. He was working mainly on the Policing 2026 Strategy. In August 2016, he moved so that he was based in the Police Scotland headquarters. The claimant understood he had been seconded to Police Scotland but in fact he had not been.

y) Around October 2016, the claimant discussed with James Gray whether she could provide some assistance to Police Scotland, as she was aware that they were short of finance staff. This was not progressed but the recruitment of additional finance staff for Police Scotland was approved later that year. James Gray was not aware of the contents of the claimant's grievance until summer of 2017.

The claimant's grievance (including Disclosures 2, 3 and 4)

z) On 11 July 2016, the claimant's solicitor submitted a grievance on her behalf to Robin Johnston (Head of Legal for the respondent) for forwarding to a Board member. The covering email said, *"Leaving aside our client's contention that the redundancy consultation process has been a sham, it is nevertheless requested that all so called consultation meetings are now sisted pending conclusion of the attached grievance".*

aa) The grievance consisted of a form and an appendix. Where the form asked *"what resolution are you seeking from this grievance",* the claimant gave the answer *"Full and impartial investigation of all complaints raised in the grievance and consistency of treatment compared to other Directors with respect to severance terms".*

bb) The Appendix runs to 6 pages. The grounds of the grievance are set out in paragraph 3 as follows:

The employee submits that the SPA has acted unfairly and inconsistently in their handling of the redundancy for her post of Director of Financial Accountability. In particular, the employee alleges that the SPA has breached the terms of the Organizational Change Redundancy SOP ("OCR SOP") by failing to:

- *Be fair and consistent in its approach to redundancies;*
- *Avoid compulsory redundancies were possible, actioning voluntary rather than enforced redundancies where appropriate;*
- *Be as open as possible with lines of communication; and*
- *Provide opportunities to assist Authority/Police staff in their search for employment.*

cc) The claimant then set out the detail of her grievance under a number of subheadings as follows:

- <u>Failure to advise of redundancy at the earliest opportunity</u>
- <u>Failure to offer suitable alternative employment ("SAE")</u>
- <u>Deliberate failure to exclude the employee from the recruitment process for the post of IFO</u>
- <u>Breach of organizational Change Supernumerary SOP ("OCS SOP")</u>
- <u>No Compulsory Redundancy Policy</u>

- Inconsistency of treatment regarding Directors' severance/exit packages.

dd) Under the last heading, the claimant stated:

(22) The SPA has advised the employee that in the event of her post being made redundant she will receive a package that will only compromise of a £10000 enhancement. The employee contends that the proposed exit package is considerably less favourable than the exit packages paid to other SPA Directors and so there has been inconsistency of treatment. The employee contends that the SPA has exercised considerable discretion towards Directors' exit packages in recent years in relation to both the decision to award an exit package and in the amount of the same.

(23) Firstly the employee contends that she has seen no evidence to support the SPA's position that the Directors' Enhanced Redundancy Scheme ("DERS") was closed in its entirety with effect from the 30th September 2013. The employee calls upon SPA to disclose same well in advance of her grievance hearing.

(24) If the DERS was closed in its entirety from 30th September 2013 (which is denied) then the employee contends that the SPA has nevertheless offered enhanced exit terms to a number of Directors after September 2013 and cites the following examples:-

ee) The claimant then set out the circumstances and the payments made to CD, EF and GH.

ff) In relation to CD she said that under the VRS, CD's entitlement was £38000. "*However the employee contends that SPA records will show that CD received a severance package of £83000, twelve weeks PILON and payment in lieu of accrued holidays".*

gg) In relation to EF, she said that EF was not entitled to a payment under the VRS or the Voluntary Early Retirement Scheme. *"However the employee contends that SPA records will show that EF received a severance package of £47000 and had four years' service added to her pension".*

hh) In relation to GH, she said *"The employee contends that GH left the SPA in May 2016 when she had a pending prosecution for domestic abuse. The employee contends that despite the fact that the SPA was in possession of*

information which, prima facie, provided sufficient grounds for dismissal, GH was permitted to leave the SPA under the VRS at a cost to the tax payer of £165000 gross."

ii) The claimant's intention in including details of payments to CD, EF and GH in her grievance was to show that, even if the DERS was closed, the respondent could use discretion to make severance payments that were above the entitlement under the VRS and to argue that similar discretion should be applied in the claimant's case.

jj) The claimant was advised that Nicola Marchant, the Deputy Chair of the Board, would hear her grievance on 2 November 2016.

kk) The claimant met with Dr Marchant on 2 November 2016 to discuss the grievance. She was accompanied by Lesley McCabe. Susan Beaton from HR was in attendance and there was a notetaker. The claimant talked through the issues in the appendix. In relation to *"Inconsistency of treatment"* she said that the sum she had been offered was much less than other directors had been offered. She believed that the respondent had applied discretion to allow other directors to leave on a better package than the one she was offered. She said that she did not believe that the DERS was closed because three other people were offered enhanced terms after the date when it is said to have been closed. The three people she was referring to were CD, EF and GH. The claimant said that if the DERS had been closed then it had been deviated from. Dr Marchant said she would investigate each of the cases and review the paperwork.

ll) When asked what resolution she was seeking, the claimant said if she could not remain in an equivalent role, then she was looking for her case to be treated consistently (not favourably) with the other Directors and staff who left the organization with an enhanced redundancy package. She also wanted her legal fees to be paid.

mm) Dr Marchant carried out an investigation over the next 9 days which included requesting the paperwork in relation to the payments to CD, EF and GH from HR Governance who requested it from John Foley.

nn) Dr Marchant issued her Report (the Grievance Outcome) on 14 November 2016. She concluded that the grievance principally covered 3 areas:

- A failure in the consultation process
- A failure to run an open and transparent recruitment process for the position of Interim CFO
- Inconsistency of treatment regarding Directors severance packages.

oo) She concluded that there were failures in the consultation process and this part of the grievance was upheld. She did not conclude that there were any failures in the recruitment process for the Interim CFO. She concluded that the DERS had closed on 31 March 2014. She said that terms offered to the individuals named in the claimant's grievance were compromise agreements and therefore confidential. However, they were not made under the DERS. She did not uphold that part of the claimant's grievance. She concluded that it appeared as though there had been a breakdown in the relationship between employee and employer and therefore proposed that discussions were intimated to determine whether a mutually agreeable settlement could be reached.

Appeal against the Grievance Outcome (including disclosure 10)

pp) Claimant appealed the Grievance Outcome on 25 November 2016. The appeal was sent to Dr Marchant and Susan Beaton of HR.

qq) The claimant requested that the appeal was heard by an independent third party as she said that the Chief Executive and the Chair were both conflicted.

rr) She said that contrary to the Grievance Outcome, her grievance fell into 6 (and not 3) areas. She made a number of criticisms of Dr Marchant's investigation, including a failure to investigate some allegations and reaching perverse conclusions in others. In respect of the heading "Inconsistency of Treatment regarding Director's severance/exit packages" she said that the Grievance Outcome *"fundamentally failed to understand this aspect"* of her grievance. She said that even if it was accepted (which it was not) that the DERS had closed, Dr Marchant had failed to address the separate complaint of alleged inconsistency of treatment. It was submitted that the alleged inconsistency of treatment was not contingent on the DERS being active at the material time.

ss) She then continued that it was immaterial in determining the matter of alleged inconsistency of treatment whether or not the individuals signed compromise

agreements. *"The SPA is a public body funded by the taxpayer. As well as alleging inconsistency of treatment, the Employee's grievance in this respect also alleges gross misuse of public resources."* She contended that it was incumbent on the SPA or independent third party to *"fully and thoroughly investigate this aspect of her complaint and to desist from attempting to obfuscate matters by unhelpfully suggesting that information within her knowledge is confidential when it is clearly not."* She said that in her senior position she was aware of the amounts paid to the former employees in question. She complained that there was no challenge in the Grievance Outcome to the payment to GH which she says was *"an elaborate misuse of taxpayers' money and the matter is worthy of investigation by Audit Scotland".* The appeal included a claim that the grievance outcome had subjected her to a detriment and victimised her in breach of the Grievance Policy.

tt) The claimant concluded by saying that she consented to her appeal (and any subsequent grievances) being sisted (frozen) pending the outcome of any settlement discussions. However, she said that if the settlement discussions were contingent on the claimant withdrawing her grievance then she reserved the right to lodge a further grievance.

uu) Dr Marchant reviewed the appeal and accepted the claimant's contention that the Chair (Mr Flanagan) and the Chief Executive (Mr Foley) would not be appropriate people to hear the appeal. However she was concerned about an external person having access to the confidential material contained in the claimant's grievance. She discussed with Susan Beaton and Robin Johnston who might hear the appeal. They suggested another board member, Graham Houston. However, the claimant objected that that person was not sufficiently independent as he sat on the People Committee. Dr Marchant then approached Police Scotland to ask for an alternative senior person to hear the appeal but that was not considered by Police Scotland to be appropriate. Dr Marchant considered a Board member from a partner organisation such a Fire and Rescue but again was concerned about confidentiality. Mr Johnston suggested that the appeal be heard by 2 newly appointed board members who had not been party to the issues in the grievance.

vv) On 30 March 2017, Dr Marchant put these two alternatives to Mr Flanagn, as Chair of the Board, recommending the latter as a solution. He agreed. John Foley contacted the two board members, Grant Macrae and Gillian Stewart in April 2017 to ask them to undertake the appeal and they agreed.

ww) On 26 July 2017, the claimant attended a hearing of her grievance appeal with Grant Macrae and Gillian Stewart. She was accompanied by Lesley McCabe. It was explained to the claimant that the outcome of the appeal would be delayed because Grant Macrae was about to have surgery.

xx) On 29 September 2017, the Grievance Appeal Outcome was issued. The claimant's appeal was not upheld. Mr Macrae and Ms Stewart did not consider the "whistleblowing" part of the appeal as they understood that an investigation into those matters was being carried out by Scott Moncrieff (see below) but made the following observations:

"Compromise agreements are designed to keep the identities of those involved, the contents of the agreement and their personal details private. The parties whose names and details that have been written into these grievance documents by Amy would have a case themselves for breach of privacy if these became public documents. At the time of these agreements and subsequent payments (which Amy had privileged knowledge of) Amy had a senior financial role in the SPA and was a key member of the SMT and thus had a duty of care to act in the best interests of the SPA at all times. Her position also meant that she had privileged access to the payments being made to these individuals. It is however very likely that Amy wasn't aware of or was not part of the full discussions, the HR process or contractual agreements or circumstances in which these payments were agreed with the people named."

yy) The claimant was upset by these comments as she felt it was being suggested that she had behaved improperly and unprofessionally in raising these matters.

Payment to JJ – Disclosure 5

zz) On 18 December 2016 (which was a Sunday) the claimant emailed John Foley (copied to Robin Johnston, Andrew Flanagan, Judith McKinnon (HR) and

Lesley McCabe) with concerns about a proposed severance payment for *[JJ]*. The payment was scheduled for 22 December 2016. The claimant said *"I am not sure if you know that [JJ] had already resigned from her post at the beginning of October 2016. David Page announced this as such at the F & IC held on the 6 October. I understand [JJ] has secured a new job in Inverness and will leave the organisation on the 31 December 2016 and is marked as such in Scope. I am raising this to you as there looks to be a requirement to investigate this matter further as [JJ]'s post has not been made redundant with the changes currently being made within the Finance structure being temporary in nature until a permanent CFO is in place. I am not aware of any approval by HRRC to this redundancy or there being a paper presented to the JNCC. Rather there is recruitment ongoing of senior finance resource of around [JJ]' s grade at the present time. It would appear that in making this redundancy payment there has been a failure of governance at many levels in addition to what may be construed as inappropriate behaviour by [JJ]. There is a one off opportunity on Monday to recall the current payment which is pending to [JJ] on a temporary basis until you have had the opportunity to review this."*

aaa) The next day, 19 December 2016, the claimant emailed Andrew Flanagan (copied to John Foley and Judith McKinnon). Her email said *"Further to my email Judith has confirmed the process which has been followed which applied a test to the redundancy payment which I highlighted. Going forward Judith has highlighted a procedure to ensure that there is a process to be followed for redundancy payments made out with wider scale organisational change".*

bbb) With that cover email on 19 December, the claimant forwarded an email from Judith McKinnon which set out an email exchange between Ms McKinnon and James Gray about the background to the payment to JJ. Ms McKinnon told the claimant said that the payment had been approved although she was unaware of the statement made at the F & IC. She said the redundancy did not have to come to HRRC and that had been delegated for 81 posts to HR Governance. She said that she had refused to support the initial business case and that James Gray had provided a stronger and more robust case.

ccc) Mr Foley became aware of the email sent on 18 December first thing on Monday 19th. He went to find the claimant to speak to her about it. The claimant indicated that she was still concerned about the payment. Mr Foley then spoke to Judith McKinnon and James Gray and concluded that the payment could properly be made. He had by then also received the claimant's second email of 19 December and understood from that that the matter was resolved and that she no longer thought there was an issue with the payment. He did not respond to that email as he considered the matter resolved and he believed the claimant was no longer concerned about it.

ddd) On 20 December 2016, Andrew Flanagan read both of the claimant's emails of 18 and 19 December at the same time. He understood the claimant to be saying in the second email that the matter she had raised in the first had been resolved. He did not reply to either email as he did not think a reply was required. He considered the claimant was simply doing her job by raising a concern and then advising him the concern had been addressed.

Scheme of delegation

eee) In December 2016 a new scheme of delegation was approved which placed all delegated financial authority in the Chief Executive Officer instead of the heads of service (including the claimant) who previously had some delegated authority.

fff) This was an error and meant that John Foley had to authorise all payments. When the claimant pointed this out to him, he asked her to put measures in place to reinstate delegated authorities.

Disclosure 6

ggg) On 27 January 2017, the claimant emailed John McCroskie with her concerns about a relocation payment that was to be made to DCC Fitzpatrick. She said that she did not consider there were exceptional circumstances that would support this as a valid payment. John Foley was on holiday at the time and Mr McCroskie was standing in. On his return to the office, Mr Foley was made aware of this email. He did not consider any investigation was required as he knew about the circumstances of the payment and had agreed them himself. He did not respond to the claimant's email and nor did John McCroskie.

Lesley McCabe

hhh) Between January 2017 and March 2017, new finance personnel were recruited for Police Scotland. These were temporary appointments to assist with new structure proposed by John Gillies. In advance of these recruitments, there was an opportunity for existing finance staff to apply for 5 posts. This was advertised by internal email. Lesley McCabe was not sent that email and heard about it from colleagues in Police Scotland. She queried this with Sarah Jane Hannah (who was a senior member of staff in finance in Police Scotland.) Ms Hannah apologised for the oversight and invited her to an interview for one of the posts. Ms McCabe was not offered that post. She then applied for a further 3 roles in Police Scotland but was unsuccessful.

iii) On 14 March 2017, John Foley had a regular weekly meeting with James Gray. After the meeting he spoke to Sarah Jane Hannah and Alison Dougall, both accountants with Police Scotland. They asked whether they could have Lesley McCabe to work with Police Scotland. Mr Foley said he had no objection but that they would have to contact HR and go through the proper procedure. Mr Foley had no further involvement in this proposal.

jjj) Sarah Jane Hannah then contacted Judith McKinnon who explained that this would need to be done as a secondment. There was some further discussion between Ms Hannah and HR. On 20 March 2017, Kathy Logan from HR contacted the claimant, as Lesley McCabe's line manager, to ask her to discuss the proposal with Lesley McCabe. There was some further discussion. Ms McCabe was concerned about the impact on her substantive post. When Ms Logan realised that Lesley McCabe did not wish to be seconded, the proposal was not progressed.

Email of 5 May 2017 to Andrew Flanagan (Disclosure 7)

kkk) On 5 May, the claimant emailed Mr Flanagan. She said *"For your information please find attached the emails from my solicitor sent to Robin Johnston. The case is now being prepared for litigation".* Attached were a number of emails from the claimant's solicitor to Robin Johnston setting out the claimant's position on a number of matters.

lll) Mr Flanagan was not sure whether a reply was required. He noted the email was for information only. He also wondered whether the claimant was wanting him to intervene to arrange a settlement. He contacted John Foley and Nicola

Marchant saying he had received the email but was not sure if he was supposed to do anything with it.

mmm) Mr Foley said that Dr Marchant was dealing with it. Mr Flanagan did not reply to the claimant's email but arranged to meet with Dr Marchant and Robin Johnston to discuss. They met on 11 May. It was agreed that, although they were aware of the transactions and believed that John Foley had reviewed them, they should get some independent assurance if the case was going to litigation.

Appointment of Scott Moncrieff to carry out investigation

nnn) On 11 May 2017, Dr Marchant contacted David Hume, as Chair of the Audit Committee and asked him to arrange for an investigation into the claimant's allegation about potential inappropriate use of funds. Robin Johnston sent an email to David Hume on 18 May 2017 setting out the details of the alleged improper payments. Mr Hume contacted Gary Devlin of Scott Moncrieff who was the Head of Internal Audit and they met on 23 May 2017. Following discussion, Mr Hume commissioned him to carry out an investigation. He asked Robin Johnston to provide Mr Devlin with background information which he did on 25 May 2017.

ooo) The respondent had been working for some time on a whistleblowing policy. It was approved by the Board on 25 May 2017 but was not published (and therefore did not come into force) until 21 June 2017.

ppp) Scott Moncrieff provided a draft methodology for the investigation in early June. This was reviewed by David Hume and by Robin Johnston. Mr Johnston commented that the investigation was an integral part of the respondent's whistleblowing policy and guidance (although that was not yet in force) and that he expected Scott Moncrieff to satisfy these requirements. He gave as an example the need to provide information and feedback to the whistleblower. Mr Johnston also stressed the need for objectivity.

qqq) The final version of the methodology was agreed about 20 June 2017. The brief was to carry out an independent assessment of the 6 allegations the claimant had made (as set out in the Disclosures 1 - 6) and to prepare a report to provide evidence based recommendations and conclusions to support the respondent in responding effectively to the concerns raised.

rrr) On 11 August 2017, the claimant was interviewed by Gary Devlin and Grace Scanlon as part of their investigation.

sss) The investigation took much longer than anticipated. Scott Moncrieff did not provide feedback to the claimant.

ttt) In October 2017, Mr Hume asked for a further report to be prepared that would not include the personal details of the individuals concerned that could be put in the public domain. Both reports went before the respondent's audit committee at their meeting in January 2018. The committee considered that further work was required on the management responses.

Disclosure 8

uuu) On 17 May 2017, the claimant's solicitor sent an email on her behalf to The Auditor General for Scotland, Audit Scotland and the Cabinet Secretary for Justice. The email said that the purpose of the email was to disclose information which the claimant contended *"demonstrates a gross misuse of public resources"* and to *"highlight staff behaviours within the respondent"* which *"poses a significant risk to its effectiveness and efficiency".* The claimant said that she had no confidence in the respondent to investigate the matters raised. She then set out Disclosures 1 – 7. She said that the respondent had failed to follow its own draft whistleblowing policy and guidance and that the claimant had been subjected to victimsation which would shortly become the subject of legal proceedings. She concluded by saying that she would be unable to make an unqualified sign off of the required Certificate of Assurance to support the Governance Statement within the 2016/17 Annual Report and Accounts.

DCC Fitzpatrick – concern that her address was in ET1

vvv) Dr Marchant was concerned that if the claimant made a claim to the employment tribunal, that the claim might include details of DCC Fitzpatrick's address in relation to the payment of relocation expenses. She raised this concern with Louise Haggerty, of HR, in early June, who said she would contact the respondent's solicitor and ensure that steps were taken to prevent this. The respondent's solicitor said that he could not discuss the matter with her as Police Scotland was not his client (Ms Haggerty worked for Police

Scotland although they provide HR support to the respondent) but that matters were in hand.

www) DCC Fitzpatrick was told by either Louise Haggerty or her boss, David Page, that details of her private address had been made public in a claim to the employment tribunal. DCC Fitzpatrick did not know who had made the claim but she was concerned about a security breach. She wrote to John Foley that day to express her concerns that *"details of her home address had been put in the public domain in connection with an employment tribunal matter concerning staff at the SPA".* She said she was extremely concerned about the breach of personal data, privacy and security and the privacy of members of her family. She asked to receive as a matter of urgency an explanation of how this had occurred, confirmation that the details had been removed and what steps had been taken to address the impact on her personal security.

xxx) This letter from DCC Fitzpatrick led to Robin Johnston telephoning the claimant's solicitor and asking for the ET1 to be amended to remove the reference to DCC Fitzpatrick's address. The claimant's solicitor pointed out that the ET1 was not yet in the public domain and that the reference in the ET1 was only to the town where DCC Fitzpatrick had previously lived, not her current address. She said she did not think it was unreasonable to remove the reference but she would take instructions. There was then correspondence between solicitors in which the claimant's solicitor questioned how DCC Fitzpatrick had become aware of the ET1 and set out her client's suspicion that John Foley had done this in an effort to discredit the claimant. This was denied by Robin Johnston. It was ultimately agreed that the reference to the town was replaced with "South east of England". This was confirmed to DCC Fitzpatrick by Dr Marchant in person and in writing.

Finance workshop

yyy) Elaine Wilkinson convened an ad hoc Finance Workshop for 10 May 2017. The Committee Co-Ordinator asked Ms Wilkinson whether the claimant was needed for the Workshop. Ms Wilkinson took from that the claimant would prefer not to attend and she said "not absolutely necessary". There was no

intention to exclude the claimant and Elaine Wilkinson was not aware of the claimant's disclosures.

Certificate of Assurance (Disclosure 9)

zzz) The claimant provided her Certificate of Assurance to Mr Foley's PA around the 1 June 2017. In it she said that her *"protected disclosures"* (referring to communications of 11 July 2018, 18 and 19 December 2016, 27 January 2017 and 5 May 2017 onwards) should be considered in the preparation of the Governance Statement in the Annual Accounts. She said that she could not confirm that all controls in her area were working well and she could not confirm that there were no other significant matters arising which would require to be raised specifically as she did not have full oversight over all financial matters. Mr Foley did not read this Statement and it was simply passed with the Certificates of Assurance from other directors to James Gray.

Current position

aaaa) The claimant presented an ET1 for claim 1 on 2 June 2017.

bbbb) Around July 2017, the claimant was doing some project work for Forensic Services and she spoke to John Foley about a possible role there. Mr Foley said that the claimant's skill set was a good match and that there were other suitable roles in the organization. The claimant's role was confirmed as redundant in August 2017 and the claimant moved to a role in Forensic Services in which she is happy.

cccc) Claim 1 was set down for a hearing in December 2017. The claimant sought to amend her claim shortly before that hearing. That application was refused. The first day of the hearing was spent considering the claimant's application for reconsideration of that refusal. That application was subsequently refused but the hearing dates had by then been lost.

dddd) The claimant presented an ET1 for claim 2 on 5 January 2018 and the claims were combined for hearing.

Observations on the evidence

16. The Tribunal considered that, in the main, all the witnesses gave their evidence to the best of their recollection. There was little dispute about what had happened to the claimant. The question was why these things had happened.

17. The Tribunal considered that Mr Foley's evidence was unsatisfactory in some respects. In particular, there was confusion around whether he was aware of the contents of the claimant's grievance or the grievance appeal and when. He said it had been emailed to him but he had not read it because it was about him and that was not appropriate. However, he was unable to explain how he knew it was about him if he hadn't read it. The Tribunal considers it is more likely than not that he was aware that the claimant had raised issues about the payments to CD, EF and GH in November 2016 when he was asked for details of the payment between 2 and 11 November 2016 and that he was aware of the appeal shortly after it was lodged on 25 November 2016 and that the claimant was suggesting the payments were improper.

18. There was one significant dispute of fact in relation to a conversation between the claimant and Mr Foley on the morning of the 19 December 2016. It is agreed that they had a conversation in which Mr Foley asked the claimant if it was "OK" to make the payment to JJ. The claimant says that she responded "no, it's not". Mr Foley said that the claimant said she "had got the wrong end of the stick" which he took to mean he could make the payment. The tribunal considers it more likely that the claimant's version is correct. Had she said everything was fine, the Tribunal did not think that Mr Foley would then have contacted Judith McKinnon and James Gray to get their views. The claimant's second email about this matter was sent at 10.25am on 19 December. The claimant says this was before she had the conversation with Mr Foley. Mr Foley says it was after. The Tribunal considered that he had received the second email after he had spoken to the claimant. He described going looking for her first thing in the morning after receiving the first email and catching up with her outside the tea room. The Tribunal accepted that he understood from the claimant's second email that everything was in order. That was a reasonable understanding from the cover email and was similarly understood by Mr Flanagan. He described "pages of explanation" supporting the decision to make the payment to JJ. The Tribunal considered he had not read it in detail but was satisfied after speaking to Ms McKinnon and Mr Gray that everything was in order.

19. This was a recurring theme in Mr Foley's evidence. He said he had not read things or investigated things because he was the Chief Executive and someone

else was dealing with the matter. Another example of this was the Certificate of Assurance which the claimant had qualified in a significant way. She had expected some response from Mr Foley as he was the addressee and she had handed the certificate into his office. However, the Tribunal accepted Mr Foley's evidence that although he collected these certificates, he didn't read them and simply passed them to Police Scotland, expecting that if there was anything he needed to know, he would be told. While this may appear unsatisfactory, it was consistent with Mr Foley's evidence as a whole and the tribunal accepted that was what had happened.

20. Similarly the Tribunal accepted his evidence that he did not reply to some of the claimant's emails because he knew the facts about that particular matter and/or he didn't feel he needed to reply. This is apparent as early as Disclosure 1 where the claimant flagged an issue and Mr Foley simply did not reply. It is not suggested that this was because it was a protected disclosure. Again, this may be unsatisfactory but that is not what this Tribunal is concerned with. It is for the respondent to give a reason why something happened. It does not have to be a "good" reason provided it is not influenced by the making of a protected dsclosure.

21. In one matter the Tribunal did not accept the claimant's evidence. This was in respect of what was in her mind when she included reference in her grievance to the payments to CD, EF and GH. The Tribunal does not accept that the claimant at that time believed that the payments were improper. This is not suggest that the claimant was being untruthful when she said that she had intended to convey that the payments were improper. Rather, the Tribunal considers that the claimant was incorrectly applying her later state of mind (when the Tribunal accepts that she did consider the payments to be improper) to her motivation as at 11 July 2016. Had the claimant genuinely believed these payments were improper, the Tribunal considers it extremely unlikely that she would have simply included them in a grievance under a heading of "Inconsistency of treatment". It is much more likely that she would have queried them with John Foley or with the Board (in the way that she queried later payments). That would have been consistent with her position as Director of Financial Accountability. At the least, she would have stated in clear terms that

she considered that the payments were improper rather than as examples of the Board exercising discretion to make payments outside the VRS.

22. The Tribunal also considered it significant that when giving evidence about the 11 July disclosure, the claimant said for example *"In my head it was quite clear I was making a disclosure. I'm asking for these to be investigated."* However, that is not stated in the grievance. Conversely, it is clearly stated in the appeal that was presented on 25 November 2016. The Tribunal accepts that by the end of November 2016, the claimant had come to the view that there was something wrong about the payments. However, it considers her evidence was unreliable in relation to her state of mind in July. The claimant said in evidence that at the grievance hearing that that she "*accused John Foley of wrongdoing in respect of the 3 cases".* However, there is no suggestion of such a specific accusation in the note of that meeting. Dr Marchant's recollection was that she agreed to investigate the payments but that was in the context of inconsistency of treatment with the claimant and whether these payments showed that the DERS was still open. Had the claimant specifically said that Mr Foley was guilty of some wrongdoing, the Tribunal considers that Dr Marchant would have remembered that. The Tribunal considered this was another example of the claimant attributing her later (strong) beliefs about the alleged impropriety to an earlier time when she had not yet formed that belief.

23. There was an unsatisfactory exchange in cross-examination of the claimant when she suggested that the reference to payments to 3 directors during the grievance meeting referred to other people. The Tribunal considered it was quite clear that the claimant had been talking about CD, EF and GH. This affected their view of the claimant's credibility in respect of this matter.

24. Mr Miller produced a copy of a judgment of an employment tribunal in a previous case brought by the claimant against a previous employer. He asked the tribunal to consider the comments made in that case about the claimant's evidence when considering the reliability of the claimant's evidence in this case. The Tribunal did not consider that was appropriate and, for the avoidance of doubt, has not taken that into account.

Relevant Law

25. The relevant law was set out in Mr Hay's submissions and is not in dispute.

Meaning of protected disclosure

26. Section 43A of the ERA provides that a "protected disclosure" is a qualifying disclosure made by a worker in accordance with section 43C to 43H. Section 43 B provides that a qualifying disclosure is 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 certain things. These include *"that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject".*(section 43B(1)(b))
27. For a qualifying disclosure to be "protected", it must be made in one of the ways set out in sections 43C – H. These include disclosure to his employer, a Minister of the Crown (in certain circumstances) or, a person prescribed by order of the Secretary of State for certain matters. That is not an exhaustive list.
28. The requirement for a reasonable belief requires to be considered on an objective basis by the Tribunal (*Phoenix House Limited v Stockman 2017 ICR 84)*
29. In respect of legal obligations, certain categories of concern contain legal implications that are obvious without the need to give chapter and verse (*Bolton School v Evans 2006 IRLR 500*)
30. There are no absolute rules when determining if a disclosure is made in the public interest. It has to serve a wider interest that the personal or private interest of the employee. Relevant factors include the number in the affected group, the nature of the interest affected, the extent to which these interests are affected, the nature of the wrong doing and the identity of the wrongdoer *(Chesterton Global v Nurohamed 2018 ICR 731)*

The right not to be subjected to a detriment

31. Section 47B provides that a worker has the right not to be subjected to a 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. Section 47B extends this protection to being subjected to a detriment by any act or deliberate

failure to act by another worker of the employer in the course of that other worker's employment.

32. A detriment exists if a reasonable worker would or might take the view that the treatment accorded to her had been to her detriment. *(Shamoon v Royal Ulster Constabulary 2003 ICR 337)*

Burden of proof and causation

33. Section 48(2) provides it is for the employer to show the ground on which the act, or deliberate failure to act was done.

34. In *Kuzel v Roche Products Ltd 2008 ICR 799*, Mummery LJ (dealing with a case of unfair dismissal under section 103A) set out the approach to causation in such cases where it is alleged that the reason for dismissal was the making of a protected disclosure. He said that the burden is not on a claimant to establish the connection between a disclosure and dismissal but rather to challenge the evidence produced by the employer and to produce some evidence of a different reason. Identification of the reason arises from the direct evidence and permissible inferences from it. Unlike cases of discrimination, the Tribunal is not compelled to draw inference where they can be made and must be satisfied that it can do so.

35. In *Fecitt v NHS Manchester Trust 2012 ICR 372*, Lord Mummery explains that there will be an infringement of section 47B if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

36. In the most recent formulation of the test, the Employment Appeal Tribunal said in *Phoenix House Limited v Stockman 2017 ICR 84*, all that the respondent's witness had to establish was that her action *"was not in any way affected by or related to the making of the protected disclosure".*

Enforcement

37. Section 48 provides that a worker may present a complaint to the employment tribunal that he has been subjected to a detriment in contravention of section 47 B. If the Tribunal finds the complaint to be well founded it shall make a declaration to that effect and may make an award of compensation. The claimant in this case

seeks compensation only for injury to feelings. Since the case of *Vento v Chief Constable of West Yorkshire Police (no 2) [2003] IRLR 102,* such compensation has been placed into three broad 'bands' of compensation for injury to feelings awards (as distinct from psychiatric or personal injury). The lower based band (between £500 to £5000) applied for less serious cases, the middle band (between £5000 and £15000) for serious cases that did not merit an award in the upper band, the upper band (between £15000 and £25000) applied in the most serious cases. Only in exceptional cases would an award be made above £25000. The bands have been uprated by Presidential Guidance issued on 5 September 2017 which sets out a formula for claims presented before 11 September 2017. For claims presented on or after 11 September 2017, the lower band is £800 to £8400, the middle band is £8400 to £25200 and the upper band is £25000 to £42000.

Time bar

38. Section 48(3) provides that a tribunal shall not consider a complaint under section 48 unless it is presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates or where that act or failure to act is part of a series of similar acts or failures the last of them. There is the possibility of an extension of time if the tribunal is satisfied it was not reasonably practicable for the complaint to be presented in time. Section 48(4) provides that where an act extends over a period, the "date of the act" means the last day of that period and a deliberate failure to act shall be treated as done when it was decided on. In the absence of any evidence to the contrary an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably be expected to do the failed act if it was to be done.

Claimant's submissions

39. For the claimant, Mr Hay made oral submissions based on a written speaking note. In summary he submitted as follows:

Were disclosures 2,3 and 4 "protected"?

40. Mr Hay submitted that the claimant was steadfast under cross-examination that she drew a distinction between those directors who had received payment under the DERS and CD, EF and GH. She set out in her grievance at paragraph 24, not only the amounts that these individuals received but the amounts they would have received under the VRS said to be in force at the time. It would be unnecessary for the claimant to indicate what was properly payable if she was simply seeking to convey that she wanted what others got. The claimant considered that she had indicated that these matters should have been investigated when discussing them at her grievance hearing.
41. He submitted that the information in paragraph 24 did, in the reasonable belief of the claimant, amount to information tending to show a breach of the legal obligations of Mr Foley as Accountable Officer in Section 16(3) of the Public Finance and Accountability (Scotland) Act 2000.
42. Further while the information was contained in a grievance which in other respects related to the claimant's own employment, that does not mean that the information was not in the public interest. With reference to the factors in *Nurmohamed*, the claimant in particular relies on the nature of the wrongdoing and the identity of the wrongdoer as relevant. The nature of the wrongdoing is the improper payment of public money in unnecessary circumstances. The finances of public institutions have been the subject of particular public concern for many years in the current economic climate. It is significant that the identity of the wrongdoer is the Scottish Police Authority. Of all public institutions, those connected with policing must command the highest public confidence.
43. The Tribunal was invited to accept the claimant's evidence on this matter which demonstrated a strong sense of ethics.

Detriments

44. It is submitted that the 10 detriments identified by the claimant in claim 1 readily satisfy the definition of detriment. In particular, Mr Foley accepted that the claimant's duties did reduce in the way the claimant alleged. The refusal to appoint an independent chair of the grievance appeal was in apparent inconsistency with such a course of action taken in a grievance by CD. The proposal to second Ms McCabe would have had the effect of further isolating the claimant in her work environment.

Were the detriments done on the ground that the claimant has made a protected disclosure?

45. Mr Hay advised that the claimant now accepts that Elaine Wilkinson did not deliberately exclude her from the Finance Workshop and that this incident was unrelated to protected disclosures. The claimant also accepts that the removal of her delegated powers was an error and was not related to protected disclosures.

46. The detriments fall into 4 broad groups (i) erosion of duties/isolation in the workplace (ii) the hearers of the stage 2 grievance (iii) secondment of Lesley McCabe and (iv) revealing the allegations to DCC Fitzpatrick and subsequent suggestion that there was a security breach.

47. It is for the respondent to show the reason for the detriments and that the disclosures had no material influence on the motive for such treatment. John Foley said he had no knowledge of the contents of the grievance of 11 July 2016 and was unaware of the contents until around 5 May 2017. The tribunal will require to determine whether Mr Foley was telling the truth. It is submitted that his evidence on this was rather confused. He appeared to confuse years and also his evidence about when he saw the grievance was unclear. His position came to be that he had not read the claimant's grievance at the time it was submitted and that while Dr Marchant asked him questions as to the consultation process, there was no discussion about payments to CD, EF and GH. This was contradicted by Dr Marchant's evidence that she had raised queries about these individuals in November 2016. Mr Flanagan also said he had discussed the circumstances of the payments with Mr Foley. Mr Foley says "it's was a small office" but maintains his position that he knew nothing of the allegations for almost 12 months after the grievance was raised. The Tribunal is invited to question the reliability and credibility of his testimony in this regard.

48. While there was a restructuring, that had been the case since March 2016. The claimant gave evidence of a noticeable alteration in her duties in July 2016 and not being as well sighted on financial matters as she had been in the past. It is submitted that the disclosure need not be the sole cause of the detriment – the question is whether it had a material influence.

49. The first time the claimant as aware of the comments alleged to be made by the external auditor (Ms Woolman) in October 2015 was when Mr Foley gave evidence about it. It had not been foreshadowed in any averments and Mr Foley accepted he had not told the claimant about it at the time. It was submitted that this should be taken into account in attaching weight to the evidence. Mr Foley had a hand in either approving or taking action to promote the approval of the payments to CD, EF and GH. There was pressure on the organization in respect of reconciling the balance sheet and political pressure. The Tribunal is asked to assess the evidence carefully in light of that and whether the knowledge of the disclosures on the part of Mr Foley played a part on the erosion of the claimant's job.

50. In respect of the proposed secondment of Lesley McCabe around 20 March 2017, the tribunal is asked to consider carefully the testimony of Mr Gray and Mr Foley. The claimant would highlight that this was not the normal process by which a secondment would come about. Kathy Logan explained that a secondment process would start with a need for a post before turning to the question of who would perform that work. Ms McCabe denied in her evidence that she wanted to move to Police Scotland. The source appeared to be Sarah Jane Hannah but the rationale is unclear. This is suggested to be an example of marginalisation and because the claimant had made protected disclosures.

51. As for the issues around DCC Fitzpatrick, it is submitted that Dr Marchant saw the claimant as "trouble" although she denied that.

Claim 2

52. Mr Hay submitted that again the detriments can be marshalled into groups: (i) the grievance appeal outcome (ii) delays in the investigation of the claimant's whistleblowing concerns (iii) inadequacies in the investigation of these concerns (iv) failure to reply to the claimant's emails.

53. The Grievance Appeal Outcome makes reference to the claimant being in potential breach of her duty of care "*to act in the best interests of the SPA at all times".* It is submitted that the reasonable recipient of that outcome would construe it as suggesting that they were potentially in breach of that duty, ultimately Mr Macrae accepted that was precisely what they sought to convey.

Such comments would reasonably be considered to be to the claimant's detriment.

54. The question of delay in investigation is one of degree and will depend on the extent of the delay. Steps only appear to have been taken to commence investigation of the claimant's grievance presented in July 2016, sometime after May 2017, almost 10 months after the submission of the stage 1 grievance. It was 4 months after Disclosure 5, 3 months after disclosure 6. Not only was there delay but none of the disclosures were acknowledged as being a disclosure. If the claimant is asked to identify a trigger point by which the investigation should have occurred, it is submitted that the respondent should have sought to begin investigation of whistleblowing within a reasonable time with a reasonable period submitted as being not more than 4 weeks after receipt of the grievance. Delay in investigation is a detriment.

55. Adequacy of investigation is also important. The claimant considers there were serious shortcomings in the investigation by Scott Moncrieff. However, Mr Hay confirmed that the claimant now accepts that these were not linked to the fact that she had made protected disclosures.

56. As for the failure to reply to emails, this was a detriment as the whistleblower was not listened to.

<u>Were the detriments done on the ground that the claimant has made a protected disclosure?</u>

57. The Grievance Appeal Outcome comments were materially influenced by the protected disclosures. They related to the fact that reference had been made to individuals CD, EF and GH. It is submitted that it is not possible to disentangle them from the protected disclosures. It was not simply the identities that was mentioned but also *"details that had been written into these grievance documents by Amy"*. The expectation is that a whistleblower provides details. How else is an employer to investigate? It is submitted that these disclosures materially influenced the detriment.

58. The delay in investigation was also materially influenced by Disclosures 2, 3 and 4 because of the technical way they were presented. The respondent's position appeared to be that because they were contained in a grievance they would not be considered as part of that process. The claimant submits that the

vehicle through which the disclosure is made cannot readily be severed form the disclosure itself.

59. The failure to reply to emails, it is submitted, was because the claimant was seen by Mr Foley as a troublemaker.

Remedy

60. The only compensation sought is injury to feelings. It is submitted that this should be in the middle of the middle band of *Vento* due to the failure by the respondent to engage with the claimant's concerns and her increasingly isolated position whilst Director of Financial Accountability.

Respondent's submissions

61. Mr Miller pointed out that the onus is on the claimant to establish that each disclosure is protected in terms of the statutory provisions.

62. He noted that the claimant accepted in cross-examination that she could not claim to have suffered any detriment on account of having made (and repeated) the first disclosure.

63. The respondent disputes that Disclosures 2, 3 and 4 qualify for protection as they were not made in the public interest but rather formed the foundation of an attempt by the claimant to secure for herself a higher termination payment by way of an internal grievance. This is contrasted with the claimant in *Chesterton* who had expressly said that the subject of his disclosure affected others and the tribunal found that he had been motivated by the implication for others in making his disclosure. The claimant made no similar suggestion. It is necessary for the Tribunal to examine the motivation of the whistleblower. In her grievance the claimant said the resolution she was seeking was *"full and impartial investigation of all complaints raised in the grievance and consistency of treatment with other directors with respect to severance terms".* Conscious of the implications, the claimant was constrained to argue in evidence that the reference to "*other directors*" was not a reference to the 3 individuals named in paragraph 24 of her grievance. That is demonstrably false. The names given in that paragraph follow this introduction: *"the employee contends that the [respondent] has nevertheless offered enhanced exit terms to a number of directors after September 2013 and cites the following three examples:"*

64. It is submitted that this was a legally drafted document asking for consistency and citing examples – she wants to be treated the same. By the time the claimant submitted her grievance appeal on 25 November 2016 she had inserted the words "gross misuse of public resources." However there is no such public element in the grievance itself. Indeed there could not be. The claimant was seeing equivalence of treatment. She also accepted in cross-examination that she had accessed the payment made in 2014 to CD only when it mattered to her personally. It is doubted that the Director of Financial Accountability would have sought for herself settlement terms that were in any respect "improper".

65. When she was asked in the grievance hearing what her resolution would be, the claimant said she was "*looking for her case to be treated consistently, not favourably with that of other staff/directors who left the organization with and enhanced redundancy package*". The minute also records her contention that the DERS was not closed in September 2013 as she *"understands 3 other people were offered enhanced terms after this date"*. Ultimately, her position was that the "*other directors*" referred to in the hearing were CD, EF and GH. Dr Marchant was left with the matter to investigate. However, the claimant denied on at least 6 occasions that she was seeking equivalence of treatment with the three individuals she named in her grievance. She was deliberately trying to convince the Tribunal that her grievance was made in the public interest when it was not. This illustrates the extent to which the claimant was prepared to manipulate her own evidence to suit her needs.

66. If the Tribunal accepts the respondent's position, then the claimant cannot show that any detrimental act occurring before 18 December 2016 (in claim 1) happened on the ground that she had made protected disclosures.

<u>Detriments</u>

67. Detriments 1 – 7 happened before 18 December 2016. The claimant says there was a failure to investigate but what this means is there was a failure to do what she wanted. Dr Marchant did investigate whether DERS was still in force as the claimant alleged, pointing to the 3 cases.

68. The onus is on the claimant to establish that these acts and omissions took place. It is accepted that most did take place to some extent. However it is

disputed that meetings with John Foley "ceased". It is disputed that some could reasonably be considered a detriment. It is submitted that a reasonable worker who had sent a message to her Chair for his information could realistically complain of a detriment if they did not receive an acknowledgment. In relation to DCC Fitzpatrick's address. Dr Marchant thought the ET1 had the address in it. She was at the end of a line of 3 people. It clearly wasn't in the ET1. It was not reasonable for the claimant to see that as a detriment. It is submitted that this was an unjustified sense of grievance.

Causation

69. The Tribunal has to approach a case like this by examining every detriment in turn (see *Blackbay Ventures Ltd v Gahir 2014 IRLR 416*). On the assumption that the claimant has established some protected disclosures and some detrimental treatment, the onus shifts to the respondent to disprove the connection. The respondent must provide on the balance of probabilities that the act complained of was not on the ground that the claimant made the protected disclosures. In the claim, the claimant makes no attempt to suggest any connection other than to narrate that the detrimental act follows a disclosure. It is submitted that the respondent has been able to present logical and credible explanations for what the claimant sees as detrimental acts and has been able to convincingly exclude any possibility that the explanation was influenced to any extent by the making of the protected disclosures.

70. A feature of these claims has been the number of witness for the respondent who are neither employees nor serving board members with a diverse range of professional backgrounds. For the claimant to succeed she would have to show that all these individuals have independently chosen to subject her to detriments for making protected disclosures or there has been a hidden hand orchestration on a grand scale. It is submitted that it is difficult to say which is more improbable.

71. It is submitted that innocent explanations proliferate. Lesley McCabe had been applying for positions in Police Scotland. Sarah Jane Hannah thought that meant she wanted to work in Police Scotland. Kathy Logan believed it was a genuine secondment and when she realized Lesley McCabe did not want it, it was not taken further. Andrew Flanagan thought the claimant had retracted her

concern that she had made the preceding Sunday. All directors were dropped from the scheme of delegation. Gary Devlin and Grace Scanlon had lost sight of the terms of the whistleblowing policy and Caroline Stuart and Grant Macrae respected the claimant's right to disclose matters of concern but for good reason emphasized that disclosure should respect the privacy rights of others.

72. It is submitted that these explanations are dwarfed by the implications of the financial restructure approved by the respondent's HR and remuneration committee on 29 April 2016 The majority of the alleged detriments in claim 1 follow the decision to make her post (not her) redundant. That decision in not impugned as being a detriment but it is the answer to all the other detriments.
73. That the situation dragged on as long as it did was entirely a consequence of the grievance being pursued by the claimant. She was artificially sustained in a post with no real function. She successfully relied on the respondent's decision to apply a moratorium on the redundancy consultation process during the passage of her grievance and appeal. Her own approach did not lend itself to discussion.
74. It is submitted that the claimant faces another obstacle. It was part of her job to draw attention to financial irregularities. That does not deprive her of protection. It does, however, call for great care in analyzing her complaints of detriment as observed in *Blackbay*. The Tribunal is invited to consider the comments of the EAT.
75. Some of the claims defy logical analysis. Does the claimant really say that her whistleblowing complaint was not investigated because it was a whistleblowing compliant? Mr Miller invited the tribunal to consider the comments of the then President Langstaff in *Basildon & Thurrock NHS Trust v Weerasinghe 2016 UCR 305.* This was a discrimination case but pointed out the danger of "*failing to distinguish between context on the one hand and cause or consequence on the other"*
76. Mr Miller suggested that the claimant was a poor witness who tended to the dramatic and at points in cross-examination were not credible.
77. Mr Miller also presented the judgment issued in a previous whistleblowing case brought unsuccessfully by the claimant and invited the tribunal to consider the comments made in that judgment about the claimant's evidence in that case.

78. Mr Miller concluded by saying that is there was found to be any breach of section 47B it was likely to be in respect of only one or two minor matters and that any compensation for injury to feelings should be in the lowest band of Vento.

Timebar

79. Mr Miller invited the Tribunal also to consider issues of time bar in the second claim. Following Mr Hay's intervention, Mr Miller accepted that the complaint about the Grievance Appeal Outcome was in time. However he maintained a timebar point in respect of the earlier part of the claim. Mr Hay suggested these were all similar acts and so in time.

Discussion and decision

80. The Tribunal has considered the evidence and the parties submissions and reached a conclusion on the issues as follows:

Were Disclosures 2, 3 or 4 protected disclosures?

81. This question is relevant for both claim 1 and claim 2. To be a protected disclosure, the Tribunal would have to be satisfied, firstly, that the claimant had a genuine and reasonable belief that this information tended to show that John Foley was in breach of a legal obligation and that she had a genuine and reasonable belief that the disclosure was made in the public interest.

82. The legal obligation relied on by the claimant is contained in section 16(3) of the Public Finance and Accountability (Scotland) Act 2000 which places an obligation on Mr Foley as the Accountable Officer to ensure *"the propriety and regularity of the finances of the corporation"* and *"that the resources of the corporation are used economically, efficiently and effectively".* The Tribunal accepts that there is no need for the disclosure to identify the legal obligation in detail nor to identify the statutory basis of the obligation. It is irrelevant whether the claimant is correct in her belief provided it is genuine and reasonable. It is important to stress again that this Tribunal is not considering whether there was any impropriety in making the various payments.

83. The Tribunal is not satisfied that as at 11 July 2016 the claimant had a genuine belief that the information she included about the severance payments tended to show that John Foley was in breach of this obligation. It accepts that this became her belief at a later date and that that belief was reasonable. At its highest, the Tribunal considers that the claimant is suggesting in the grievance that some severance payments have been made that there was no legal requirement to make. That is not of itself a breach of a legal obligation, particularly in the context of a compromise agreement. It is not unusual in the context of negotiating the exit of employees to offer payments above what is thought to be legally due to ensure a smooth exit. The claimant would have been aware of this. The Tribunal considers that the claimant was offering details of the payments to CD, EF and GH as examples of where the Board had exercised discretion to make payments. This was to support her position that, if the DERS was in fact closed, the Board should exercise its discretion to make a payment to her that was in excess of the standard VRS. The Tribunal accepts that the claimant was not seeking "the same" treatment as these individuals (as the circumstances of each of these payments was different to hers) but that she was seeking "consistency of treatment" in the sense that, if the DERS was closed, she wanted the Board to exercise its discretion to pay her more than the VRS entitlement.

84. Although not strictly necessary to do so (as they are not satisfied that the claimant had the necessary belief) the Tribunal also considered whether the disclosure of this information was made by the claimant in the public interest. The Tribunal accepts that it is possible to make a protected disclosure in the context of a grievance. They also accept that the person making the disclosure may have "mixed motives". It does not prevent a disclosure being made in the public interest if the person making it also seeks personal advantage from the disclosure. The question for the Tribunal is not whether the disclosure might be relevant to others but whether the claimant genuinely and reasonably had that in mind as part of her motivation at the time.

85. The Tribunal considers that it has not been established that the claimant had <u>any</u> element of public interest in mind when making Disclosures 2, 3 and 4 in her grievance on 11 July 2016. That is not a criticism of the claimant as the

Tribunal has also found that she did not have a genuine belief at that time that there was any impropriety in the making of these payments. Again, it is important to consider the context in which the alleged disclosure was made. The claimant was complaining about the redundancy consultation process and about "inconsistency with other directors" in respect of the payment offered. She had expected to be offered a higher redundancy payment. When she was told that the DERS was closed, she did not accept that and did some investigation as she was aware of other people receiving payments. Her position was that she did not accept that the DERS was closed but if it was, then the Board had exercised discretion in making enhanced payments to others (specifically, CD, EF and GH).

86. The Tribunal considered it was relevant both in considering the claimant's belief and whether the disclosure was made in the public interest, that the claimant had legal advice when she drafted the grievance, that she was the Director of Financial Accountability and that she had previously brought a claim relating to whistleblowing. They considered that had the claimant been seeking to make a disclosure of a breach of a legal obligation by Mr Foley and particularly if she believed she was making that disclosure in the public interest, she would have framed it in very clear terms (as indeed she did later).

87. The Tribunal therefore finds that Disclosures 2, 3 and 4 are not protected disclosures.

88. There are still a number of disclosures accepted as protected so the tribunal then turned to consider the complaints made.

Claim 1

89. The tribunal first considered the complaints made in claim 1. It is important to keep the claims separate as not only are the alleged detriments separate but there are additional disclosures in claim 2.

Was the claimant subjected to the alleged detriments?

90. The Tribunal accepts that all of the events set out in Detriments 1- 7 did occur to a greater or lesser extent. The Tribunal heard evidence that the claimant still attended a number of meetings although she took a much lower profile role than

before. The term "exclusion" suggests a rather more deliberate action than in fact took place and in some matters (such as where she sat at the meeting) the change was made by the claimant herself. However, the Tribunal accepts that the claimant played less of a role than she had before. She was no longer the main finance contact, she attended fewer meetings and played less of a role in the meetings she did attend.

91. In respect of Detriment 5, the respondent suggested that meetings with John Foley did not "cease". However, the Tribunal considers that the claimant ceased to have any formal meetings with Mr Foley in the course of her work after April 2016 (such as 1-2-1s or appraisals) and this can reasonably be understood as the detriment that is relied on.

92. The Tribunal needs to be satisfied, not just that the events occurred but that the claimant was "subjected to a detriment" in each case meaning "*a reasonable worker would or might take the view that the treatment accorded to her had been to her detriment."* The Tribunal considered that it was reasonable for the claimant to consider all the alleged detriments as detriments (to the extent we have found them to have occurred). The Tribunal accepts Mr Miller's point that it may not always be reasonable to allege a detriment simply because an email sent "for information" is not acknowledged. However, the Tribunal considers that where an employee has sent a number of emails about similar matters over a period of time and there is no reply to any of them, it is reasonable for the employee to consider that the concerns are being ignored and to consider that a detriment.

Causation

93. The main question for the Tribunal was why each detriment occurred. Did the fact that the claimant had made a protected disclosure (individually or collectively) have a material influence on why she was subjected to any of the detriments? The Tribunal was conscious that it has to consider each detriment individually and not collectively. It is also self-evident that a detriment cannot be caused by a disclosure that happens later.

94. It was accepted by the claimant that Disclosure 1 was not a causal factor for any of the detriments. In light of our earlier finding about Disclosures 2,3 and 4,

the first relevant protected disclosure in claim 1 is made on 18 December 2016 and the earliest date that can be considered a relevant detriment in claim 1 is therefore 18 December 2016.

95. The onus is on the respondent to satisfy the Tribunal that the protected disclosure was not a material influence on the treatment of the claimant. The Tribunal therefore examined the respondent's evidence carefully to see whether that burden was discharged and whether it accepted the respondent's witnesses' explanations for why the detriments occurred on the balance of probabilities.

Detriments 1 – 7

96. The Tribunal noted that the claimant no longer insisted on Detriment 4. In respect of Detriment 7, she no longer insists on the change to the Scheme of Delegation. The other issue in Detriment 7 relates to the claimant being a resource for Police Scotland. The Tribunal heard from Mr Gray that this was discussed in general terms at one point and he could not remember why it had not progressed. There was no evidence that Mr Foley was aware of that discussion. However, in any event, this occurred around October 2016 at a point when no protected disclosure had been made and the Tribunal accepted that Mr Gray did not become aware of the contents of the claimant's grievance until the middle of 2017. In these circumstances, the detriment cannot have been influenced by the making of a protected disclosure.

97. The Tribunal heard evidence from a number of witnesses including the claimant herself about the restructure of the finance function that was started in 2015. The Tribunal considered that the evidence was clear that there were issues in the finance function long before the claimant made the first protected disclosure on 18 December 2016. Discussions had started about the restructure that would make the claimant's post redundant in December 2015. That culminated in a paper to the board on 29 April 2016. Karen Kelly was appointed as an interim Chief Financial Officer of SPA in February 2016 and James Gray as Interim Chief Financial Officer of Police Scotland in May 2016. Thereafter, John Foley liaised with these individuals rather than the claimant leading to the cessation of formal meetings with the claimant. He told the claimant that Karen

Kelly was her line manager in February 2016 although it is unclear whether Ms Kelly knew that was expected of her).

98. Karen Kelly and then James Gray took over many of the roles and responsibilities that had previously been the claimant's as Director of Financial Accountability.

99. Without doubt, this was upsetting and frustrating for the claimant. However, the Tribunal was satisfied that detriments 1, 2, 3, 5 and 6 arose entirely as a result of the restructure and not because of any protected disclosure made by the claimant. It is not clear if Detriment 7 extends beyond the complaints about the scheme of delegation and the claimant being a resource for Police Scotland but if so, the Tribunal would find that these were as a result of the restructure and not because of a protected disclosure.

100. Even if the Tribunal had found the disclosures on 11 July 2016 to be protected, they would have found that these played no part in the diminution in the claimant's post. It was clear from the evidence that this was caused by the restructure and the redundancy of the claimant's post. The situation was complicated by the respondent's policy of no compulsory redundancies and the sisting of the redundancy consultation process while the claimant's grievance was ongoing. During that period the claimant continued to be employed on full pay while her post effectively disappeared round about her. Efforts to restart the consultation process that may have found other posts were resisted.

<u>Detriment 8 - Refusal to appoint an independent chair for the appeal.</u>

101. The claimant intimated her appeal against the grievance outcome on 25 November 2016. In that appeal she asked for an independent third party to hear the appeal. It is not clear when the respondent decided to refuse that request. The Tribunal considers on the balance of probabilities it was after 18 December 2016 when the first protected disclosure was made. The decision was ultimately taken by Mr Flanagan who was aware of the protected disclosures on 18 and 19 December 2016. However, Dr Marchant was also involved in providing options to Mr Flangan. There was no evidence that Dr Marchant was aware of the disclosures on 18 and 19 December 2016 (Disclosure 5) nor the next

disclosure on 27 January 2017 (Disclosure 6). (She was clearly aware of the grievance appeal but that is not alleged to be a protected disclosure in claim 1.)

102. The Tribunal considered Dr Marchant to be a straightforward witness and accepted her explanation that she was concerned that the nature of the investigation would require accessing personal data from systems and she was not sure what vetting would be required for a third party. She was also concerned that there would be a further delay and the claimant was already complaining about delay. Dr Marchant accepted the claimant's point that it would not be appropriate for Mr Flanagan to chair the appeal (as per the policy) and took steps to consider alternatives. The Tribunal accepted that Dr Marchant's suggestion as to an appropriate person to hear the appeal was not affected by the claimant having made a protected disclosure as she was unaware of the relevant emails.

103. The Tribunal heard that Mr Flanagan discussed the matter with Dr Marchant and Robin Johnston and accepted the suggestion that choosing two very recently appointed directors was sufficiently independent from the process. Again, the Tribunal accepted that this decision was not affected by the fact that the claimant had made protected disclosures but was seen as a reasonable solution to the claimant's legitimate concern about independence.

<u>Detriment 9 - The proposal to second Lesley McCabe in March 2017 and lack of consultation</u>

104. The Tribunal considered that the evidence showed clearly that Lesley McCabe had been applying for alternative positions at Police Scotland. The suggestion that she be seconded to Police Scotland came from Sarah Jane Hannah. The Tribunal considered it was more likely than not that Ms Hannah made that suggestion in the belief that Ms McCabe was seeking a move to Police Scotland. There was no evidence that Ms Hannah had any knowledge of any protected disclosures by the claimant. John Foley was aware of the protected disclosures relating to JJ and DCC Fitzpatrick (Disclosures 5 and 6). However, the Tribunal accepted his evidence that his only involvement was to say that he had no objection to the idea but it would need to go through the correct procedure. Kathy Logan then contacted the claimant. It may be that she

did not "consult" the claimant and rather told her that this was what was proposed. However Ms Logan had no knowledge of any protected disclosure made by the claimant. When it became clear that Ms McCabe did not wish to be seconded, the proposal was simply dropped. The Tribunal were satisfied that there was a full explanation of this event and that it was unrelated to the claimant having made protected disclosures.

Detriment 10 - The conduct around DCC Fitzpatrick's address 7 June 2017

105. Again the Tribunal considered that Dr Marchant was a straightforward witness as was DCC Fitzpatrick. There appeared to be a concern that DCC Fitzpatrick's address would appear in the claim. In fact, there was only a reference to the town in which she had lived. There was also a confusion in Dr Marchant's mind about the public nature of the claim form which she conveyed to DCC Fitzpatrick.

106. The Tribunal accepted that there was genuine and understandable anxiety about the address of a senior officer being made public. That may have misplaced in the circumstances but the Tribunal was satisfied that that was the reason for the communication that took place. It was unclear to the Tribunal why this matter became so emotive with the claimant saying that she believed she was being accused of being a terrorist. The contact was made from one solicitor to another. While the claimant's solicitor did not accept the respondent's assessment of the risk, the issue was, in the end, quite simply addressed by removing the reference to the town from the claim form. The Tribunal were satisfied that this communication was not influenced by the claimant making protected disclosures but solely because of understandable, if misplaced, security concerns.

107. In conclusion, therefore, claim 1 is dismissed.

Claim 2

108. The Tribunal then considered claim 2.

The alleged protected disclosures

109. The claimant relies on the same disclosures as in claim 1 with three additional disclosures. The respondent accepted in submissions that for the purposes of these proceedings, these additional Disclosures (8, 9 and 10) were qualifying disclosures although they disputed that Disclosure 8 was made to the respondent. The Tribunal was satisfied that Disclosure 8 (insofar as it was made to Audit Scotland) was made to a prescribed person under the Public Interest Disclosure (Prescribed Persons) Order 2014 and was therefore a protected disclosure and insofar as it was made to a member of the Scottish Executive was made under section 43E of the ERA and was therefore a protected disclosure.

Alleged detriments (claim 2)

110. Mr Hay helpfully suggested that, again, these can be marshalled into groups (i) the grievance appeal outcome (ii) delays in the investigation of the claimant's whistleblowing concerns (iii) inadequacies in the investigation of these concerns and (iv) failure to reply to emails. Mr Hay confirmed that although the claimant still had concerns about the investigation carried out by Scott Moncrieff, she accepted that these were not influenced by the protected disclosures. Detriment 14 is not insisted on. The Tribunal addresses the detriments accordingly (although in a slightly different order).

Detriment 15 - Comments in the Grievance Appeal Outcome

111. The Tribunal considered that this could reasonably be considered a significant detriment. The claimant's person and professional standards were being criticized by two members of the Board. Although the Tribunal accepted that the directors had genuine concerns about anonymity, the Tribunal considered that the criticism of the claimant went further than that and suggested that the claimant had acted improperly and in breach of her duty to the respondent. There was reference to the claimant having privileged access to information about the payments but that she had not had full knowledge of the circumstances. The Tribunal considered that there was a clear suggestion that by drawing attention to the payments the claimant had acted improperly and unprofessionally and had misused her position. The Tribunal considered it was impossible to separate this detriment from the protected disclosure that was set

out in the grievance appeal. They did not consider that the comments in the GAO were influenced by other protected disclosures made by the claimant. The Tribunal therefore concludes that Detriment 11 was on the ground that the claimant had made a protected disclosure (Disclosure 10).

Detriment 16 - John Foley's failure to reply to email of 18 December 2016

112. The Tribunal considered it more likely than not that Mr Foley was aware of the allegations being made in the grievance appeal by this point. As noted above he was aware that the claimant had raised questions about the payments to CD, EF and GH in the original grievance. Mr Foley's evidence that he had been emailed a copy of the appeal but had not read it was unconvincing.

113. Tribunal accepted that the claimant considered she had been subjected to a detriment because she did not get a reply to her email of 18 December. It accepted that the claimant still had concerns about the payment which was to be made to JJ. However the Tribunal also accepted the evidence of Mr Foley that he understood her second email to mean that the issue had been resolved. Further, he had investigated the matter and considered it didn't need a response. The tribunal does not consider that the failure to reply was because the claimant had made a protected disclosure (either Disclosure 10 or Disclosure 5).

Detriment 16 - Andrew Flanagan's failure to reply to email of 19 December 2016.

114. There was no evidence that Mr Flanagan was aware of the protected disclosure contained in the claimant's grievance appeal (Disclosure 10) when he received the emails of 19 December 2016. The Tribunal considered that in light of his evidence about his work pattern and how infrequently he was in the office at that time, there was no basis for an inference that he did know about the grievance appeal at that time. He did clearly know about the disclosure contained in the email of the 18 December (Disclosure 5) as he was copied into that email. The Tribunal accepted that the claimant had expected a response to the email of 19 December from Mr Flanagan and didn't receive one and that this was a detriment. However, it also accepted Mr Flanagan's account that, like Mr Foley, he understood from the email of the 19 December that the matter had been resolved and no response was necessary. He simply thought the claimant was

doing her job and that she had sent him the email on the 19 December because he had been copied into the one on the 18 December and she wanted him to know it had been resolved. The Tribunal were satisfied that Mr Flanagan's failure to respond to that email was not influenced by the making of a protected disclosure either in the grievance appeal (Disclosure 10) or by the emails of 18 and December 2016 (Disclosure 5).

Detriment 16 - John McCroskie/John Foley's failure to reply to email of 27 January 2017 (or to take any action).

115. Mr Foley was on holiday and Mr McCroskie briefed him on his return. Mr Foley considered there was no need to investigate as suggested by the claimant. Although it was outside the normal policy, he was aware of the circumstances and had personally agreed to the payment. Mr Foley did not respond to the email because he didn't think there was an issue and he was busy, having just returned from holiday. Again, this is not particularly satisfactory but, as noted earlier, the Tribunal considered it was consistent with Mr Foley's evidence in other respects and was not influenced by the claimant having made protected disclosures.

Detriment 16 - Failure by Andrew Flanagan to reply to email of 5 May 2017

116. This email states it is "for information". Mr Miller suggests that not receiving a reply to such an email cannot reasonably be considered a detriment. The Tribunal would agree with that if this was the only example of an email not being replied to. However, when it is the latest in a number of emails where the claimant sets out her concerns and receives no reply, the Tribunal considers it is reasonable for her to consider this a detriment.

117. The Tribunal has to consider, therefore, whether Mr Flanagan's failure was influenced by the fact that the claimant had made protected disclosures. The Tribunal accepted Mr Flanagan's account that he was not sure whether he should reply (as the email was "for information") and had been told by Mr Foley that Dr Marchant was dealing with it. The Tribunal accepted that Mr Flanagan did not reply because he didn't think it needed a reply. He thought someone else was dealing with the matter and he was also concerned that the claimant wanted

him to intervene to arrange a settlement. His failure to reply was not because she was making, and had previously made, protected disclosures.

Detriment 17 – Failure by John Foley to reply to the comments on the Certificate of Assurance

118. Was that a detriment? The Tribunal considers that it was. It was reasonable for the claimant to expect some response to her comments which significantly qualified her certificate and to feel that her concerns were being ignored or not taken seriously. However, the Tribunal accepted Mr Foley's evidence that he simply hadn't read it. His attitude appeared to be that he would collect the certificates (or his PA would) and they would then be sent on to the Chief Financial Officer. If there were any issues he needed to be aware of, the CFO or the auditors would let him know. This is not a particularly good reason but the Tribunal accepted it as true. It was of a piece with much of Mr Foley's evidence which was that he was the CEO and that he didn't do any of the day to day work of the SPA.

Detriments 11, 12 and 13 – failure to investigate the allegations

119. Detriments 12 and 13 relate to how the claimant says an investigation should have taken place but essentially the complaint is set out in Detriment 11 and is an alleged failure to promptly and fully investigate the claimant's allegations. There was no whistleblowing policy in place when the claimant made her allegations so the Tribunal does not consider that to be a relevant detriment in itself. The claimant accepts that once Scott Moncrieff were commissioned that any inadequacies are unrelated to protected disclosures.

120. The Tribunal accepts that Mr Foley did investigate the payment to JJ and was satisfied it was in order. He had authorized the payment to DCC Fitzpatrick himself and considered it to be in order. Similarly, the Tribunal does not consider there was any failure by Mr Flanagan to investigate the matters in the emails of 19 December 2016 and 5 May 2017 for the reasons set out above.

121. However, the Tribunal considers there was a significant delay in investigating the claimant's allegations about the payments to CD, EF and GH. The Tribunal accepted that the grievance itself did not raise issues of impropriety. However, it

was clear from the grievance appeal that the claimant was making allegations of improper use of public funds. The Tribunal accepted that a reasonable person would have considered the failure to investigate these fully and promptly to be a detriment as she felt her concerns were not being taken seriously.

122. The respondent has not given any real explanation for the failure to take any steps to investigate these allegations which failure continued until 23 May 2017, when David Hume commissioned Scot Moncrieff. The grievance appeal was sisted for some time and there were issues around who was to hear it. However, those are only partial explanations and none of the respondent's witnesses gave any real explanation for the length of the delay. Once it was clear that litigation was pending, the respondent immediately saw the need to investigate. It is for the respondent to provide the reason for the detriment and in this case, the delay. The respondent has not done so and the tribunal would have found that the claim succeeded in respect of Detriments 11, 12 and 13.

Timebar

123. However, the Tribunal also has to consider issues of time bar. As Detriments 11, 12 and 13 relate to a failure to do something, time starts to run from when it could reasonably have been expected that the thing would be done. Mr Hay suggests 4 weeks is a reasonable period for an investigation to commence. In light of the fact that the appeal (which first makes it clear that there is an allegation of wrongdoing) was made on 25 November 2016 and that this was leading into the holiday period, the Tribunal considers that a longer 2-month period would be a reasonable period to expect the respondent to commence and investigation. This would make 25 January 2017 the date on which the three-month period for presentation would start to run. A claim would therefore have had to be been presented by 24 April 2017 (subject to any adjustment for ACAS early conciliation). Instead it was presented on 5 January 2018.

124. The Tribunal does not consider that the failure to investigate can be considered a similar act with Detriment 15 (the comments made in the Grievance Appeal Outcome) in order to be bring those Detriments in time. The Tribunal considers these detriments are quite separate in character. Not only is making comments in the Grievance Appeal Outcome a positive act but also it is unrelated

to delay. There clearly were delays in dealing with the claimant's appeal but that is not, itself, alleged to be a detriment.

125. It has not been suggested by the claimant that it was not reasonably practicable to present the complaint in relation to the failure to investigate fully and promptly in time and that time should be extended. Detriments 11, 12 and 13 are therefore out of time and the tribunal does not have jurisdiction to consider them.

Remedy

126. The claimant seeks compensation for injury to feelings. The Tribunal is satisfied that he claimant did suffer injury to feelings as a result of the comments in the Grievance Appeal Outcome (Detriment 15). This was one incident but the Tribunal considered it a reasonably serious incident. It is important that whistleblowers are supported when they make allegations. However, instead, it was suggested that the claimant had acted improperly and unprofessionally in making the disclosures. The claimant was upset by this although she did not demonstrate the same level of distress that she did about other incidents she complained about.

127. The Tribunal considers that this places it towards the top end of the lowest band of ***Vento*** and considers that £7000 is an appropriate sum. To this, the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provide that interest should be added at 8% on a daily basis from the date of the detriment (29 September 2017) to the date of this judgment (13 July 2018). That is a period of 41 weeks (287 days) £7000 x 8%x 287/365 giving an amount of interest of £440.

Employment Judge: Susan Walker
Date of Judgment: 13 July 2018
Entered in register: 16 July 2018
and copied to parties