THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms S Lansley**
Mr S Goodden

BETWEEN:

Rebekah Gregory

Claimant

And

The Commissioner of Police of the Metropolis

Respondent

ON: **14th to 18th September 2020**

Appearances:

For the Claimant: Mr S Feeny, Counsel
For the Respondent: Mrs H Winstone, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that protected disclosure detriment claims pursuant to section 47B of the Employment Rights Act 1996 fail and are dismissed.

REASONS

1. By a claim form presented on 15 August 2018, the claimant complained of protected disclosure detriments contrary to section 47B of the Employment Rights Act 1996. The claims were resisted by the respondent.

2. The hearing was a hybrid one whereby the claimant attended throughout by CVP video conference (she was in quarantine for reasons related to the Covid-19 pandemic) and all other participants, including the panel and representatives, were physically present in the Tribunal building.

3. The claimant gave evidence and we also heard from Police Sergeant Stephen Grant, Federation Representative on her behalf. The respondent gave evidence through Chief Inspector Paul O'Herlihy; Detective Constable Simon Guy; and Detective Constable Keith Handley. The parties provided a joint bundle and references in the judgment in square brackets are to pages within the bundle.

The Issues

4. The agreed List of Issues are at pages 68-73 of the bundle and are referred to more specifically in our conclusions.

The Law

5. Section 43A ERA, define a "protected disclosure" as: "[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

6. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters listed in sub-sections (a)-(f).

7. Section 47B provides that a worker has a right not to be subjected to any detriment by his employer on the ground that the worker has made a protected disclosure.

Findings of Fact

8. The claimant joined the police force on 16 April 2013 under the MPS Graduate Entry Scheme as a police constable, based at the Wandsworth Borough. On 2 January 2018, she was promoted to Police Sergeant and joined the Emergency Response Team, at Kensington & Chelsea station, where she had line management responsibility for 8-10 officers.

9. In the early hours of 11 July 2017, the claimant was rung by a colleague and informed that another colleague, her housemate, PC Tom Lennon (TL) had been arrested for headbutting a probationary colleague, PC Arora-Taylor (AT) after a team night out.

10. The following day, the claimant overheard officers talking about the incident in the staff canteen. On 20 December 2017, at the request of TL's solicitor, the claimant provided an MG11 statement (a witness statement in criminal proceedings). In it, she states that she overhead officers discussing TL's case in the canteen. Although she does not state what specifically she heard, she says that the tone of the conversation was supportive of AT. [137]. That statement was provided to the case officer in TL's criminal trial.

11. As a result, on 27 February 2018, the claimant was informed that she was a warned witness in TL's case, which was due to be heard on 2 March 2018.

12. On the day of the trial, the claimant was required to wait in the witness room with other warned witnesses in the trial. These included AT and other probationary officers unknown to the claimant, who were witnesses for the prosecution. The claimant overheard the group discussing the case, which they were not supposed to do, but she did not intervene. While there, she sent text messages to TL, relaying to him what was happening and in some instances, making derogatory remarks about the officers. [145-146] Much of what occurred in this room was the catalyst for subsequent events.

13. Before the trial started, the claimant was de-warned and so was not required to give evidence. On leaving the witness care room, the claimant approached DC Rebecca Smithson (RS), of the department of professional standards (DPS) and PS Sonja Morris (SM), TL's welfare officer, both of whom were present in the court. The claimant told them that the officers in the witness care room had been reading their statements aloud and discussing the events of the night in question. The claimant relies on this report as her first protected disclosure. The claimant asked if she could remain in the public gallery as she wanted to provide support to TL. After making a phone call, RS advised the claimant to make a note of what she had heard in the witness care room and to note down any differences between that and the evidence of the witnesses in court.

14. During the lunchbreak, the claimant gave her notes to RS and told her that she was concerned that the evidence given by the witnesses under oath was different from what had been said in the witness care room. RS raised this with the CPS, the defence and the trial judge and as a result, the trial was adjourned, part-heard, until 11 April 2018 so that an investigation could take place into the conduct of the witnesses concerned.

15. Later that day, the claimant prepared a witness statement detailing the conversations in the witness care room and referring to the differences between what was said then and the subsequent evidence given by the officers. [138-140]. There are 2 versions of the statement, one dated 2 March 2018 and one dated 3 March 2018. They are exactly the same except that in the later version, an officer's name has been redacted [179-181] The claimant relies on the statement as her second protected disclosure.

16. The statement had a number of exhibits, including screenshots of the text messages between the claimant and TL while she was in the witness care room [145-146].

17. On 6 March 2018, RS took a further statement from the claimant as the first one was felt to be lacking in detail. In this statement, the claimant sets out the bits of evidence given by the officers that she deemed contradicted their conversation in the witness care room. She relies on this statement as her third protected disclosure [193-202].

18. DC Keith Handley (KH) and DC Simon Guy (SG) were appointed to investigate the allegations made by the claimant. On 5 March 2018, Regulation 15 Notices of

investigation into breaches of standards of professional behaviour and perverting the course of justice were issued to the officers named in the claimant's statement. The allegations were said to be potential gross misconduct [188-189 & 190-192].

19. The respondent's Code of Ethics document of July 2014 sets out the standards of professional behaviour for the police profession of England and Wales. It is a statutory code made under section 39A of the Police Act 1996 (as amended by section 124 of the Anti-Social Behaviour, Crime and Policing Act 2014) [549]. The standards of professional behaviour are set out at clause 3.1 of the code and the disciplinary proceedings against the officers (and later the claimant) were based on breaches of the Code. [550].

20. Upon reviewing the claimant's statement of 6 March 2018, the investigators decided that the officers had not committed criminal conduct but there was possibly gross misconduct. As a result, new Regulation 15 notices were issued, omitting the reference to perverting the course of justice.

21. On 20 March 2018, 5 of the 6 officers involved were interviewed by KH and SG [242-355] and on 4 April 2018, KH and SG produced their investigation report [358-373]. They concluded that there was no evidence to support the allegation that the officers had attempted to pervert the course of justice. However, it was accepted that their behaviour in the witness care room was unprofessional and foolhardy, due to poor judgment and inexperience. It was felt that a finding of misconduct was not justified and that it was more appropriate for the issues to be addressed under the performance regulations. In addition, it was recommended that the conduct of the claimant in the witness care room on the 2 March 2018 should be investigated as there were concerns about her motives in making the allegations against the officer in view of her relationship with TL. That recommendation was approved by Chief Inspector Daniel O'Connor (DOC) [377-379]

22. Accordingly, on 11 April 2018, the claimant was served with a Regulation 15 Notice of an investigation into an allegation of breach of the standards of professional behaviour. This related to 3 matters: i) failure to challenge the behaviour of the officers she witnessed behaving inappropriately; ii) sending text messages to TL whilst still a prosecution witness; and iii) attempting to discredit prosecution witnesses by making unfounded allegations against them [386-390]. These matters were said to be gross misconduct. The claimant relies on the service of this Notice as Detriment 1.

23. On 12 April, a risk assessment was undertaken to assess whether the claimant should be placed on restricted duties as there was a concern that the criminal investigation/trial of TL could potentially be undermined [401-402]. The risk assessment was undertaken by Detective Inspector Franklin-Lester (FL). FL concluded that given the seriousness of the allegations and the need to safeguard the reputation of the MET, some restrictions should be applied. These were: removal from the chain of evidence; no face to face contact with the public and confinement to a police building. [410-412] The restrictions were authorised by Chief Inspector Paul O'Herlihy (POH). The claimant relies on this as detriment 2 though during cross examination, she conceded that it was reasonable and proportionate to place restrictions on her in the circumstances.

24. The claimant relies on the instigation of the gross misconduct investigation on 12 April 2018 as Detriment 3.

25. The investigation was put on hold until the conclusion of TL's trial, which had been re-scheduled for 25 May 2018, as the claimant had been warned to attend as a witness for the defence.

26. On 29 May 2018, KH sent the claimant an invitation to attend an investigatory interview on 4 July 2018 [427].

27. On 24 June 2018, the claimant provided a written statement in response to the allegations against her. She relies on this statement as her fourth protected disclosure [455-460]

28. The interview took place on the re-scheduled date of 6 July 2018 and was conducted by SG and KH. The claimant's Federation representative, Police Sergeant Stephen Grant (SG) was also present [580-627]. The claimant relies on the conduct of the interview as Detriment 4.

29. The claimant's approach to the interview was to submit her pre-prepared written statement, confirm her name and rank and thereafter to respond to all questions with: "*I have nothing further to say*". This, she says, was based on advice. The claimant contends that the interview was oppressive, intimidating and hostile. She said that she was asked inappropriate questions about her relationship with TL and was asked other questions over and over again when she felt she had already answered them. Her perception was that this was done in order to break her. She also complain that she was sworn at by SG. The transcript of the meeting records SG saying to the claimant: "*The comment there, trying to absolve all fucking responsibility to, you know your role*". SG accepts that he said this. These matters are addressed later in our conclusions.

30. On 11 September 2018, SG and KH submitted their investigation report to DOC. They concluded that there was a case to answer in respect of the first 2 allegations but not in relation to the third. They also recommended that the claimant receives advice or gain some experience around court related matters [464-479]

31. On 1 October DOC determined that the matter should be referred to a misconduct meeting on the first two allegations. Whilst he was satisfied that the claimant's alleged conduct did not warrant dismissal, he nevertheless felt that it was more than a minor breach of the minimum standards and could not be considered as a performance issue. [500-503]

32. On 4 October 2018, FL requested that the restrictions imposed on the claimant be lifted [506-507]. This was approved by the Deputy Assistant Commissioner, Richard Martin the following day [509-511]

33. On 29 November 2018, the claimant attended a misconduct hearing, conducted by Inspector Jason Brockhurst (JB) [566-567]

34. On 30 November 2018, JB issued his outcome report, in which he concluded that the 2 allegations were not proven. [562-563]

Submissions

35. Both parties presented written submissions, which they spoke to. We have taken these into account.

Conclusions

36. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:

Protected Disclosures

Discloure 1 – Verbal disclosure to RS and SM on 2.3.18

37. This relates to the matters at paragraph 13 above. The claimant relies on section 43B(1) ERA; (a) (*criminal offence*) and; (b) (*legal obligation*) in respect of all her disclosures.

38. We should say at this point that the respondent only challenges the alleged disclosures on the basis of reasonable belief and public interest. There is no issue as to whether the matters disclosed amount to information for the purposes of section 43B(1).

Reasonable belief

39. There are 4 stages to reasonable belief –

i) the claimant's subjective belief – did the claimant believe that the disclosure tended to show a relevant failure.

ii) The objective belief – was that belief reasonable. In considering the objective test, those with professional or insider knowledge will be held to a different standard than laypersons in respect of what it is reasonable for them to believe Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4 EAT

ii) did the claimant believe that the disclosure was in the public interest

iv) If so, was such a belief reasonable.

40. Details of the claimant's verbal disclosure was subsequently set out in her MG11 statement of 2.3.18. The account makes no reference to perjury. The claimant states in the document that she asked to speak to RS and SM as she was annoyed and angry at the behaviour of the officers she had overheard. It seems to us that she was annoyed and angry on behalf of TL rather than because of any notion of justice being perverted; that is why she sent him the text messages. The officers had not been called to give evidence at this stage so we consider it unlikely that the claimant had a subjective belief that her disclosure tended to show that they had or indeed were likely to commit perjury. Even if we are wrong about that, we find in any event that she could not have reasonably believed that her disclosure tended to show this to be the case. This is not a qualifying disclosure pursuant to 43B(1)(a).

41. The claimant relies on a breach of the Standards of Professional Behaviour as set out in Schedule 2 of the Police (Conduct) Regulations 2012 (the 2012 Regs) and in particular,

the duty to act honestly and with integrity. Although the claimant does not refer specifically to the 2012 Regs in her MG11 statement, she does refer to the code of ethics being breached by the officers discussing their evidence. As stated at paragraph 19 above, the code of ethics is a statutory code which applies to the police force in England and Wales. The Code applies the same standards of professional behaviour contained in Schedule 2 of the 2012 Regs, which are likely to impose legal obligations on the higher echelons of the police service, at least. In our view, it is likely that legal obligations arise from the application of the code to officers generally. However, if we are wrong, it is clear from the case: Babula v Waltham Forest College 2007 ICR 1026, CA, that there can still be a qualifying disclosure, even if the worker is mistaken about the existence of the legal obligation relied upon.

42. It was submitted by Ms Winstone, for the respondent, that the claimant did not have a reasonable belief because she acted in bad faith. If she had thought the officers were doing wrong, she would have challenged their behaviour and not waited for 30 minutes before reporting it. The claimant said in evidence that she did not challenge them as she felt intimidated. We accept her evidence. Our view of the claimant was that although she was emotional and a bit over-sensitive when giving her evidence, overall, she was credible. During the course of her evidence she made a number of concessions that were potentially damaging to her case. For example, she accepted that it was reasonable and proportionate to place restrictions on her even though this is one of the detriments she relied upon. That to us is the mark of someone who is being straightforward and honest.

43. In her MG11 statement of 2 March 2018, the claimant refers to a comment from the officers to the court usher that: "*she isn't with us*" making her feel uncomfortable. She also refers to not wanting to draw attention to herself in an already awkward situation (the awkwardness presumably being her support of TL). That account is entirely consistent with the claimant being reluctant to challenge the officers. Although much was made by Ms Winstone of the fact that the claimant was a sergeant and therefore senior to the officers concerned, who were all probationers; she was an inexperienced one, only having been appointed to the role 2 months beforehand. The claimant told us that she did not know how to challenge appropriately as she had not been trained and she did not know how that would affect her position as a witness. We accept that evidence. In any event, one of the outcomes of her disciplinary hearing was that she acted appropriately in reporting the matter up [563].

44. It was also submitted by Ms Winstone that if the claimant was concerned about the officers' discussion and felt unable to challenge them, she would have got up straight away and reported it. The claimant's evidence was that she was waiting to hear from the court clerk whether she was needed as a witness. We accept her evidence as it seems to correspond with the sequence of events. Once the claimant was told she was no longer a warned witness she promptly left the room.

45. We therefore disagree with Ms Winstone that the claimant acted in bad faith.

46. We are satisfied that the claimant reasonably believed that her disclosure tended to show a breach of a legal obligation, namely breach of the professional standards set out the code. This is supported by the evidence of SG who conceded in cross examination that by discussing their witness statements as they did, the officers had committed such a breach.

47. We are satisfied that the claimant reasonably believed that her disclosure was in the public interest. The honesty and integrity of the police force is clearly a matter of public interest as is any behaviour that has the potential to undermine public confidence in the police. That is supported by the Code which at clause 1.3.2 states: *The expectation of the public….is that every person working in policing will adopt the Code of Ethics".* [549]

48. In all the circumstances, in relation to disclosure 1, we find that there was a qualifying disclosure pursuant to section 43B(1)(b) only.

Disclosure 2 – The claimant's statement to the DPS of 2/3 March 2018 [179-181]

49. This is referred to at paragraph 15 above. Again the claimant relies on 43B(1)(a) (Criminal offence – *Perjury/perverting the course of justice*) and (b) (legal obligation – *2012 Regs*).

50. Although perjury is not specifically mentioned in the document, it is strongly hinted at in the statement "*I noticed during cross examination of the witnesses there was a lot being said that was different to their account upstairs* [181]

51. The claimant may well have believed that the officers were committing perjury. However, for that belief to be a reasonable one, there should be some objective basis for it. The claimant relies on the difference between what she says she overheard in the witness room and what was said in the witness stand. We did not hear from the officers in question so the only direct account we have is that of the claimant. However, we are cognisant of the fact that she was sat apart from them, with her head down and only overheard snippets of conversations, while there were other conversation taking place as well. The claimant's evidence of the alleged perjury is covered at paragraphs 48 - 51 of her witness statement. There was no official transcript of those proceedings and the best record we have of the evidence in court is the contemporaneous note of RS [167-172]. From those notes we observe that the claimant's perception of the evidence is not entirely accurate. For example, she alleged that PC Tobias Hussey had specifically said to the court that no one was drunk, contrary to what had been discussed in the witness room [201]. However, according to the RS's notes, the question was never asked of him or an answer in the terms alleged given. The claimant also claimed that PC Natalie Commordore's evidence that TL was the aggressor contradicted comments made in the witness rooms about AT being "pissed off" with TL and wanting to knock him out all night [142] However, we see no conflict between those two statements.

52. It was submitted by Ms Winstone that the claimant's actions were a calculated attempt to discredit the officers. We disagree, we think it more likely that her judgment was clouded by her friendship with TL and most probably, she had, without question, accepted his account of events. Hence, when what she heard in the witness room did not accord with her uncritical view of events, she automatically assumed that the officers were lying and thereafter judged everything through that lens. That approach lacked any objectivity and we find that there was no reasonable basis for the claimant to believe that her disclosure tended to show that perjury had or indeed was about to take place. We find that there was no qualifying disclosure under 43B(1)(a).

53. We find that the statement is a qualifying disclosure pursuant to 43B(1)(b) for the reasons already stated in relation to Disclosure 1.

Disclosure 3 – claimant's statement to DPS of 6 March 2018 [193-202]

54. This is referred to at paragraph 17 above and covers the same matters as disclosure 2 but in slightly more details. For the same reasons as Disclosure 2, we find that there was a qualifying disclosure pursuant to s.43B(1)(b) only.

Disclosure 4 – claimant's statement of 24 June 2018 [455-460]

55. This was the statement prepared for the claimant's disciplinary hearing and is referred to at paragraph 27 above. The statement covers the same ground as the earlier statements and for the same reasons as above, we find that it amounts to a qualifying disclosure for the purposes of s.43B(1)(b) only.

Detriments

Detriment 1 - Issuing the claimant with a Regulation15 notice

56. This a reference to the matters at paragraph 22 above. The persons that the claimant accuses of subjecting her to the detriment are SG and KH. The claimant's case is that SG and KH were annoyed at having their time wasted by having to investigate the officers she had reported and had retaliated by investigating her. That argument might have had some merit if the allegations in the Regulation 15 notice were based on contrived facts. They were not as there was a factual basis for them. In relation to the first allegation, it is factually correct that the claimant did not challenge the officers. In relation to the second allegation, it is factually correct that she sent text messages to TL and in relation to the third allegation, the allegations she made were potentially discrediting of the officers and were determined to be unfounded. The Regulation 15 notice states that the allegations may constitute a breach of the standard of professional behaviour for police officers and on our reading of the code, that must be right.

57. The claimant points to the delay in issuing the notice as something we should draw an adverse inference from. The respondent was aware of the facts upon which the misconduct allegations were based by 6 March 2018, at the latest, but did not issue the notice until 11 April, over a month later. We are being invited to infer that the timing – after the conclusion of the officers' investigation – points to it being a retaliatory act. SG told the tribunal that the delay was because the investigation of the 5 officers had to take priority as it needed to be concluded before the trial of TL resumed, which it was due to do on 11 April. We accept that evidence.

58. Mr Feeny made much about the manner of the interview of the 5 officers. He suggested that the investigating officers too readily accepted the officer's account of what they said and were clearly looking at ammunition to use against the claimant. We have seen the transcripts of the interviews and disagree with that interpretation. We are satisfied that the officers were interviewed thoroughly and appropriately.

59. We are satisfied that there is no causual link between the protected disclosures and the issuing of the Regulation 15 notice. We find that the notice was issued because of genuine concerns that the claimant's conduct, as described in the notice, had breached professional standards of conduct.

Detriment 2 - restricting the claimant's duties

60. This is a reference to the matters at paragraph 23 above. Even though the claimant conceded in cross examination the restrictions were reasonable and proportionate in the circumstances, Mr Feeney sought to row back from this by submitting that whilst POH was not influenced by the disclosure in authorising the restrictions, the detriment was nevertheless caused by the disclosure. However, we are satisfied that the restrictions were imposed for the reasons set out in FL's risk assessment and were not connected to the claimant's disclosures.

Detriment 3 - Initiating the gross misconduct proceedings

61. This was a natural consequence of and flowed from the issuing of the Regulation 15 Notice, which we have found was not a detriment. It is exactly the same process that followed the issuing of Regulation 15 Notices to the 5 officers. It was not connected to the claimant's protected disclosures.

Detriment 4 - the fact and manner of the misconduct interview

62. The claimant no longer relies on the fact of the interview as a detriment, only the manner of it. At para 100 of her witness statement, the claimant refers to the attitude of SG and KH at the hearing as oppressive, patronising, and hostile. We were invited by both parties to watch the recording of the misconduct interview so that we could get a flavour of how it was conducted. We declined to do so firstly because of its length but secondly and more importantly, there was there was a full transcript of the interview in the bundle and we considered that this, plus the evidence of the witnesses concerned was sufficient and proportionate to allow the parties to put their case.

63. The claimant accepts that the officers did not shout or raise their voices. Her complaint is about the way they questioned her. She felt the questions were overly repetitive; being asked over and over again after she had given her answer. The answer she refers to is her pre-prepared statement for the interview and her stock response: "*I have nothing further to say.*" It is said that the claimant was asked 10 times why she felt intimidated by the officers in the witness room. KH and SG felt that this was important to explore as it went to the heart of the claimant's defence to the allegation that she had failed to intervene and stop the officers' inappropriate behaviour. KH told us that he needed to know why the claimant felt intimidated and her pre-prepared statement did not address this, hence the continuous probing. We accept that evidence.

64. Having been taken to relevant extracts from the interview transcript, we find that the questions asked were relevant and appropriate . Although we accept that the claimant perceived the approach to be oppressive, patronising and hostile, that perception was not reasonable. The style of questioning was not to our mind out of keeping with what we would expect from police officers, whose stock in trade is asking questions. As a police officer herself, this should not have come as a surprise to the claimant. The claimant was emotional even before the interview started and broke down in tears early on simply in response to bits of her statement being read out. Being on the wrong side of an interview was clearly stressful for the claimant and it is possible that in her heightened emotional state, everything was magnified in her mind.

65. One aspect of the interview that was clearly inappropriate was SG swearing. He acknowledged that it was unprofessional and apologised to the claimant at the time. We accept that he was not swearing at the claimant, rather, he was using the swear word as part of his general vocabulary. Whilst we agree that it was unprofessional, we find no causal link between this and the claimant's protected disclosures.

66. Our overall conclusion is that none of the detriments were because of the claimant's protected disclosures.

Judgment

67. The unanimous judgment of the Tribunal is that the protected disclosure detriment claim fails and is dismissed.

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Employment Judge Balogun
Date: 10 December 2020