EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4102866/2019 (V)

Held remotely on 19, 20, 21 and 22 January 2021

Employment Judge: W A Meiklejohn

Mr Jeffrey Hughes	**Claimant**
Civil Nuclear Police Authority	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the reason for the claimant's dismissal was not that he made a protected disclosure and his claim of automatically unfair dismissal in terms of section 103A of the Employment Rights Act 1996 does not succeed and is dismissed.

REASONS

1. This case came before me for a final hearing on both liability and remedy, conducted remotely by means of the Cloud Video Platform ("CVP"). The claimant appeared in person and Mr Stilitz QC, instructed by Ms A Rathbone, Solicitor, appeared for the respondent.

Nature of claim

2. The claimant brought a complaint of automatically unfair dismissal under section 103A (**Protected disclosure**) of the Employment Rights Act 1996 ("ERA"). In the respondent's Grounds of Resistance, the reason or principal reason for the claimant's dismissal was said to be his capability and attitude, and not his protected disclosures.

Background

3. The claimant had brought a previous claim against the respondent (Case no 4101277/2014 – the "Detriment Claim") alleging that he had been subjected to detriments in contravention of section 47B ERA (**Protected disclosures**). Following a final hearing which took place in Glasgow on various dates between 12 December 2016 and 29 November 2017, the Employment Tribunal (Employment Judge Gall, Mr I Macfarlane and Ms M Perrett) found against the claimant in his Detriment Claim (the "Detriment Judgment").

4. The claimant submitted an appeal against the Detriment Judgment but was informed in terms of Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (the "EAT Rules") that no further action was to be taken on the appeal. It appears that the claimant intended to seek a hearing under Rule 3(10) of the EAT Rules but sent his application to the wrong address and was unable to pursue the matter.

Procedural history

5. The claimant's ET1 claim form was presented to the Tribunal on 10 March 2019. The respondent submitted an ET3 response form resisting the claim. There had been a series of preliminary hearings. The Notes issued following these hearings have recorded the procedural history of the case in some detail and so I will be brief here.

6. The first preliminary hearing took place on 10 May 2019 (before EJ Eccles). In the Note issued following that hearing, the issues were recorded as follows –

> "*(1) What was the reason for the claimant's dismissal?*
>
> *(2) If the sole or principal reason for the claimant's dismissal is because he made a protected disclosure or disclosures should the Tribunal make an order for reinstatement?"*

7. On 14 May 2019, before EJ Eccles' Note had been sent to the parties, the claimant sought to amend his claim to add a complaint of disability discrimination.

8. The second preliminary hearing took place on 1 November 2019 (before EJ O'Donnell). In the Note issued following that hearing, it was recorded that it was

agreed by the parties that the dates upon which the claimant had made protected disclosures were February 2011, 22 November 2012, 2 May 2013 and January 2015. The first three dates were as found by the Tribunal in the Detriment Claim and the fourth date was accepted by the respondent.

9. The outcome of the second preliminary hearing was that the claimant was directed to provide information about his disability and his proposed disability discrimination complaint and, once the claimant had done so, the respondent was permitted to object to the application to amend.

10. The third preliminary hearing took place on 4 May 2020 (before EJ R McPherson). The claimant had not complied with EJ O'Donnell's directions. The outcome was that the claimant was given a further opportunity to provide his proposed written amendment (with which he complied) and a further preliminary hearing was fixed.

11. The fourth preliminary hearing took place on 8 June 2020 (before EJ Hoey). The outcome was that the claimant's application to amend to introduce a complaint of disability discrimination was refused.

12. The case was then listed for a final hearing to be conducted by CVP on 19-22 January 2021. The issues to be determined were as set out in paragraph 6 above (the second of which would arise only if I found that the reason or principal reason for the claimant's dismissal was that he had made a protected disclosure).

Evidence

13. For the respondent I heard evidence form Chief Inspector A Brotherston, Chief Superintendent D Worsell and Superintendent A Cole. I also heard evidence from the claimant. Evidence in chief was given by way of written witness statements which were taken as read in accordance with Rule 43 of the Tribunal Rules. I had a joint bundle of documents to which I refer by page number.

14. It is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. I have focussed on those areas where

the evidence had what I considered to be the closest bearing on the issue I had to decide – what was the reason for the claimant's dismissal?

15. It was a matter of agreement between the parties that the claimant, as a police officer, was precluded from bringing an "*ordinary"* unfair dismissal claim by virtue of section 200 ERA. Accordingly, evidence as to whether the respondent had acted reasonably or unreasonably, or whether dismissal fell within the band of reasonable responses, was not relevant in this case.

16. It was also not the function of this Tribunal to rehear the Detriment Claim. Save only where necessary to set the scene for this case, I have not revisited matters already decided in the Detriment Judgment.

Findings in fact

17. The Civil Nuclear Constabulary ("CNC") is an armed police force created pursuant to section 52 of the Energy Act 2004. The primary duty of the CNC is the protection of licensed civil nuclear sites. The respondent is the authority responsible for securing and maintaining the effective functioning of the CNC.

18. To perform its functions, the CNC requires officers at the ranks of constable and sergeant to carry firearms. Every officer carrying firearms must qualify as an Authorised Firearms Officer ("AFO") and must maintain that status. AFO status can be (and frequently is) temporarily suspended. It can also be permanently withdrawn.

19. The claimant commenced employment with the CNC in May 2007 as a police constable. He worked at Torness until 2011 when he transferred to Hunterston. At Hunterston the claimant was unhappy with the way that patrols of the site were carried out. This led to his protected disclosures.

20. Details of the claimant's protected disclosures in 2011, 2012 and 2013 are recorded in the Detriment Judgment (at paragraphs 25-28). In January 2015 the claimant contacted his MP, Dr P Whitford raising concerns about public safety at a nuclear site. This was agreed to be a further protected disclosure.

Mr Brotherston assumes management responsibility for claimant

21. Following a handover period, Mr Brotherston assumed management responsibility for the claimant in July 2016. At this time the claimant was not attending at work, although he believed he had been fit to do so since January 2015 (following a period of medically certified absence relating to his mental health). The claimant had an issue with the way his absence was described (referring to gardening leave, non deployable at home and deployable at home) and also with the requirement to book in and book off each day. These matters were clearly a source of irritation to the claimant but were not relevant to the issue I had to decide.

22. When he took over management responsibility for the claimant, Mr Brotherston identified that the claimant did not have National Security Vetting ("NSV") clearance in place. This prevented him from returning to his contracted role as an AFO. The timescale for obtaining NSV clearance was not a matter over which the respondent had control. The claimant's position was that it took 20 months and he believed the respondent had been responsible for delay. I had no evidence bearing directly on this and it was in any event not relevant to the issue I had to decide.

23. There was a meeting between Mr Brotherston and the claimant at the claimant's home on 12 November 2016 in the course of which Mr Brotherston told the claimant about Inspector A Mander taking over from Inspector A MacRae at Hunterston. The claimant suggested that the need for Inspector Mander to settle in had been stated by Mr Brotherston as the reason for delaying his return to work, rather than his ongoing Employment Tribunal. However I accepted Mr Brotherston's evidence that *"the reason for the claimant staying out was the effect the Employment Tribunal was having on him".*

Claimant's AFO status temporarily suspended

24. The Tribunal hearing on the Detriment Claim began in December 2016. The claimant became distressed while giving his evidence. The Tribunal did not mention this directly in the Detriment Judgment – they said that there was *"a real degree of passion about the manner in which he gave his evidence"* (at paragraph 197) – but it was not disputed by the claimant.

25. Mr Brotherston became aware of this and took the decision in December 2016 to withdraw the claimant's AFO status pending an Occupational Health ("OH") assessment of his mental fitness to carry firearms. This was confirmed by the OH referral form dated 20 December 2016 (183-185). The OH referral was made by Inspector MacRae but the terms in which the referral was made were drafted by Mr Brotherston.

Claimant assessed by Occupational Health

26. The claimant was assessed by Ms C MacGregor, Occupational Health Adviser, on four occasions between January and April 2017. She provided OH reports dated 25 January 2017 (186-187), 23 February 2017 (189C-189D), 23 March 2017 (190-191) and 27 April 2017 (198-199). She recorded in the last of these reports that there did *"not appear to be any current Occupational Health need"* and that she had *"discharged"* the claimant.

27. In her January 2017 report, Ms MacGregor recommended that the claimant should undergo a psychological assessment and indicated a preference for Prof C White to whom the claimant was already known. In her February 2017 report Ms MacGregor noted that Prof White no longer carried out private consultations and that the claimant had agreed to being referred to an alternative psychologist. In her March 2017 report Ms MacGregor recorded that this referral had been made, noted that funding for the assessment was "*not forthcoming at this time"* and recommended that the assessment should take place as soon as possible. In her April 2017 report Ms MacGregor recorded that funding for the psychological assessment had been "*put on hold"* due to the claimant "*having been given leave of absence until after the conclusion of his ET".*

28. This was confirmed in an email dated 6 April 2017 (196-197) from Ms H Franks, HR Coordinator, Occupational Health, Fitness and Wellbeing, to various recipients –

"*A message has come through from the ACC….to say can Occupational Health NOT put forward Jeffrey Hughes for any psychological assessment at the moment. He is currently going through an employment tribunal and any*

assessment should not take place until at least after the employment tribunal is over…."

Return to work discussions

29. On 15 June 2017 Mr Brotherston met with the claimant at the claimant's home. Mr Brotherston was accompanied by Ms H Jordan of HR. The claimant was accompanied by Sargeant M Clark. Mr Clark was the claimant's Welfare Liaison Officer and also his Police Federation representative. In the course of this meeting there was discussion about two possible roles for the claimant. Mr Brotherston was unable to recall what these roles were. There was disagreement as to how the claimant had reacted.

30. In his email to the claimant of 29 June 2017 (213-214) Mr Brotherston stated that the claimant had *"immediately rejected"* these and that he had asked the claimant to take 24 hours to consider the proposed roles more fully before making his decision. Mr Clark sent an email to the claimant on 29 June 2017 (211-212) in which he said that he could "*categorically beyond reasonable doubt confirm"* that the claimant did not reject the two possible roles. On 4 July 2017 Mr Clark emailed Mr Brotherston (216) stating that he "*never heard* [the claimant] *accept nor decline the two proposals".*

31. The disagreement about what was said at the meeting on 15 June 2017 was not of itself material. It did however confirm that the respondent was taking some action to find an alternative role for the claimant while his Detriment Claim was ongoing.

Claimant is referred again to Occupational Health

32. In September 2017 the claimant requested to be referred again to OH. This was confirmed by his email of 18 September 2017 to Mr Brotherston (232-233) in which he asked to be re-referred to Ms MacGregor rather than another clinician. Mr Brotherston replied on the same date (232) advising the claimant that OH were confident that his needs would best be met *"via a face to face meeting at Bisley with the senior occupational health adviser Lorraine Holloway".* This meeting took place on 2 October 2017. Mr Brotherston was unable to recall receiving a response following this OH referral.

33. The background to the referral was described by Mr Brotherston in terms of the respondent trying to facilitate a return to work for the claimant at Summergrove in Cumbria. Mr Brotherston said that the claimant had some "*angst"* about this. This was further confirmation of action by the respondent with a view to the claimant returning to work.

34. On 30 November 2017 the claimant emailed Ms Jordan (360) to advise that he had an appointment with Prof White on 5 December 2017. He asked if the CNC would like a report from Prof White and whether there were any questions the CNC would like Prof White to answer. Ms Jordan replied to the claimant on 30 November 2017 (362-363) indicating that she needed to speak to Mr M Fernandez, the Chief Medical Officer ("CMO").

35. The claimant emailed Ms Jordan again on 5 December 2017 (362) confirming that he had met with Prof White and indicating that Prof White was happy to provide a report. Ms Jordan responded on the same date (361-362) informing the claimant that the CMO had advised that the CNC would not be *"pursuing any report from Professor White at this point in time".* She told the claimant that the CNC had retained the services of an independent psychologist (Dr Vincentti) to whom the claimant would be referred.

Claimant goes to Summergrove

36. Mr Brotherston arranged to meet the claimant at Summergrove on 14 November 2017. This was with a view to integrating the claimant back into the workplace. It was originally intended that the claimant would spend two days there. In advance of this meeting Mr Worsell prepared a Return to Work strategy for the claimant (500) and provided this to Mr Brotherston.

37. While at Summergrove and during a meeting with Ms Jordan, the claimant showed signs of distress. Ms Jordan decided he should return home. As a result of this there was no meeting between the claimant and Mr Brotherston.

38. The claimant went to Summergrove again on 17 December 2017. He met with Ms Jordan. There was discussion about a three phase return to work plan. The claimant understood that the first stage of this was to be assessed by Dr

Vincentti. These visits to Summergrove were further evidence of steps being taken to facilitate the claimant's return to work.

Detriment Judgment issued

39. The Tribunal's Judgment in the Detriment Claim was sent to parties on 9 January 2018. It contained some adverse comments about the claimant (at paragraphs 21-23, 198-212 and 218-219). The claimant "*was not viewed by the Tribunal as being particularly credible or reliable"* (paragraph 198). He thought that various people "*had it in for him"* due to his protected disclosures (paragraph 202). He was "*prone to exaggeration"* (paragraph 203). He was alleged to have said "*I am paranoid, my doctor says I am paranoid"* (paragraph 206).

40. In relation to the claimant's AFO status, Mr Worsell expressed his view of the Detriment Judgment in these terms –

> "*….it was very clear to me that the Claimant's original suspension from….AFO duties could not be rescinded and would become permanent, and I had doubts as to his fitness to be a Police Officer, albeit this required further consideration."*

41. Mr Worsell took the decision that the claimant's AFO status should be permanently withdrawn. The evidence did not disclose the date upon which Mr Worsell made that decision but it was between receipt of the Detriment Judgment (ie after 9 January 2018) and the meeting between Mr Brotherston and the claimant on 24 January 2018. Mr Worsell did not immediately document his decision nor communicate it to the claimant.

Meeting on 24 January 2018

42. Mr Brotherston met with the claimant at Summergrove on 24 January 2018. This was intended by the respondent to be the start of reintegrating the claimant into the workplace. Mr Worsell had provided Mr Brotherston with an updated version of the Return to Work strategy (371-372).

43. Unfortunately, the meeting between Mr Brotherston and the claimant did not go well. According to Mr Brotherston the claimant was *"uncooperative from the outset"* and "*focussed his engagement upon why he had not been referred for*

a psychological referral". Mr Brotherston said that when he asked the claimant if he felt fit to return to work, the claimant "*became evasive and confrontational and refused to confirm whether or not he felt fit instead asserting that he would only return to work after he had been referred for a psychological assessment".*

44. It was apparent from his subsequent email to Mr Brotherston on 29 January 2018 (378-379) that the claimant's understanding of the purpose of the meeting on 24 January 2018 differed from Mr Brotherston's. The claimant understood that it was to discuss his return to work after the three phase return to work plan he had discussed with Ms Jordan on 17 December 2017.

45. Mr Brotherston sent a memo to Mr Worsell after the meeting on 24 January 2018 (375-376). This supported the description of the meeting which Mr Brotherston gave in evidence. In his memo Mr Brotherston quoted a number of statements made by the claimant when asked if he felt fit to return to duty –

"*I could say I am not but I could be lying or say I am and I could be lying also."*

"It's not for me to say whether I am fit to return to work it's for a professional."

"There is a final barrier to go through we have to tick the box before I can return to work."

46. Mr Brotherston's memo also referred to the claimant stating that Prof White had diagnosed him as suffering from "*severe mistrust of my employers to the point where I don't trust anyone".* Mr Brotherston referred to the claimant stating that he was "*uneasy about working at Summergrove".* Mr Brotherston advised Mr Worsell that he had requested that the claimant *"visits his GP and submits a fit note and regards himself as on sickness absence".* Mr Brotherston expressed "*serious concerns"* about supporting the claimant's reintroduction to the workplace.

Further correspondence

47. Mr Brotherston sent an email to the claimant on 26 January 2018 (380-381) stressing the need to establish the claimant's fitness to return to work and requiring him to liaise with his GP and submit a fit note. Mr Brotherston sent a further email to the claimant on 29 January 2018 (379-380) in which he referred to the claimant having advised Ms Jordan that he had visited his GP and could not receive a fit note because he was not sick. Mr Brotherston told the claimant that he was *"confused by this"* and stressed the need for confirmation of the claimant's fitness to return to work. He told the claimant that when his fitness to return was confirmed he could "*resume your duties at Summergrove, unless you would prefer to work from Culham as discussed".*

48. The claimant responded to Mr Brotherston on 29 January 2018 (378-379). He said that his concern was in relation to working in the proximity of people who he had accused of bullying him. He said that he would have no issues working elsewhere, including Culham.

49. Mr Brotherston responded on 30 January 2018 (378), telling the claimant that he would support *"your desire to explore an alternative option to work out of Culham".* Arrangements were then put in place for the claimant to go to Culham on 12 February 2018.

50. However on 9 February 2018, in response to an email from the claimant asking about various matters including car hire and hotel reservation (377-378), Mr Brotherston told the claimant (377) that he would not now be travelling to Culham. Mr Brotherston referred to "*a number of issues that have become apparent during my efforts to secure you a place at CLD Culham".*

51. In evidence Mr Brotherston referred to logistical issues such as availability of office space and computer equipment at Culham. The claimant was highly sceptical about this in view of the size of the respondent's premises at Culham and the fact that over 100 staff were based there. It seemed to me that the probable reason for the claimant not going to Culham was cost, as described in a paragraph in Mr Brotherston email to the claimant of 9 February 2018 (377) –

"*I will have to provide documented justification for the additional costs through a submitted business case to explain the disparity in costs involved between supporting your return to work at Summergrove and Culham.*"

Claimant's AFO status permanently rescinded

52. On 15 February 2018 Mr Worsell implemented his decision to rescind permanently the claimant's AFO status. He documented this in a Policy Note dated 15 February 2018 (396-397).

53. Within the Rationale section of this Note, Mr Worsell stated as follows –

"*I have considered the breakdown in trust of PC Hughes to undertake AFO duties in a proportionate and reasonable manner, to carry firearms and to exercise judgment on the deployment and use of lethal force.*

I have sought to balance this against the personal, professional and possible employment implications for PC Hughes.

I have considered the site workers, police colleagues and wider general public who may in whatever way or circumstances be affected by the manner in which PC Hughes would likely exercise his duties and responsibilities as a Police Officer."

54. Mr Worsell then recorded that he had considered various findings in the Detriment Judgment, which he described in nine numbered paragraphs. These were, at least in part, Mr Worsell's own interpretation of the Tribunal's findings, but I did not believe that he had misunderstood or misinterpreted those findings.

55. In a further Policy Note dated 22 February 2018 (414-416) Mr Worsell set out in more detail his views on the Detriment Judgment. This included the following paragraphs –

"*3. Paragraph 23 of the Judgment makes it clear that PC Hughes (JH) exhibits questionable decision making and motivation.*

4. Paragraph 198 makes it clear JH's lack of credibility and reliability as a witness, either in respect of his recollection or his interpretation of CNC decisions.

5. Paragraph 199 provides for the unjustified adversorial position which JH took against the CNC.

6. Paragraph 200 provides for doubt in the reliability of JH's decision making, and his inflexibility when confronted with a suggestion that his view might be wrong.

7. Paragraph 201 is critical of JH's reasoning and decision making insomuch as it provided [proved] *"fateful" for his claim against the CNPA.*

8. Paragraph 202 describes circumstances and behaviour which can be viewed as paranoia on the part of JH.

9. Paragraph 203 refers to JH being prone to exaggeration, stating that this did not assist his credibility or reliability. Whilst the judgment falls just short of indicating dishonesty, such a lack of integrity is implied. This paragraph also provides evidence of JH own misconception in terms of his own misconduct, which also verges on dishonesty.

10. Paragraphs 206 & 207 provide reference to JH himself stating "I am paranoid, my doctor says I am paranoid", and whilst JH did contest having made this statement, the judgment found that in all likelihood these comments had been made by JH.

11. Paragraph 219 essentially describes a lack of reasoning or objectivity, all of which taken together describes paranoid behaviour exhibited by JH."

56. Again, I did not believe that Mr Worsell had misunderstood or misinterpreted the findings in the Detriment Judgment.

57. After further reference to the terms of the Detriment Judgment, the Policy Note recorded Mr Worsell's decision in these terms –

"*All of the above taken together provide for PC Hughes being unsuitable for redeployment to another role with the Civil Nuclear Constabulary."*

58. Mr Worsell's decision to rescind permanently the claimant's AFO status was subsequently affirmed by Assistant Chief Constable Armit on 26 February 2018 (512-513).

Meeting on 19 February 2018

59. On 17 February 2018 Mr Brotherston emailed the claimant (408) about attending a meeting on 19 February 2018 with himself and Mr Worsell. Mr Brotherston did not disclose to the claimant why Mr Worsell wanted to meet with him. The venue for the meeting was a hotel (Strathclyde Hilton).

60. Mr Brotherston's evidence was that he understood this was to be a return to work meeting until Mr Worsell told him in the hotel carpark, immediately before the meeting, that he intended to tell the claimant about the permanent rescinding of his AFO status. Mr Worsell's recollection was that he had already told Mr Brotherston about his decision, and this was confirmed by the revised Return to Work strategy document dated 19 January 2018 (371-372) which Mr Worsell had provided to Mr Brotherston.

61. At the meeting on 19 February 2018 Mr Worsell advised the claimant of the permanent rescinding of his AFO status. In an email from Mr Worsell sent to Mr R Findlay on 19 February 2018 (409) shortly after his meeting with the claimant (which was also attended by Mr Brotherston and Mr Clark), Mr Worsell described the meeting in these terms –

"*I opened the meeting by stating that I would be sharing my decision to permanently restrict the officer from AFO duties. I advised PC Hughes that this was a command decision and was not related to any assumed or reported medical condition. I stated that my decision was based on observations made by the presiding judge, recorded in the judgment document, who had chaired the recent ET. I offered to go into the detail of my rationale, but the officer did not require that at this stage. I further advised the officer that the Constabulary now needed to consider the next steps in his case, and that this would be done quickly and that we would meet again next week, by telephone, at which point I would share the decision(s) of the Constabulary as regards his future deployment."*

Telephone call on 27 February 2018

62. A telephone conference call took place on 27 February 2018. The participants were the claimant, accompanied by Mr Clark, and Mr Worsell along with Mr Cole for "*admin support".* A note of the discussion was prepared (419-422).

63. The following extracts from that note describe the outcome in terms of what was to happen next following permanent rescinding of the claimant's AFP status, as explained to the claimant by Mr Worsell –

"*You now have a clear path you have been permanently restricted you will be going to the next available redeployment panel which is next Tuesday 06th March which will consider redeploying you to a non AFO role. I don't know the exact vacancy availability until the day as this can change. Typically, the vacancies if any are in PCR SEL or DRY. I am in the RDP meeting and the panel may be able to consider a preference. If you were redeployed to either of those two sites what would be your preference?"*

"To continue with the way forward. If the RDP could not redeploy you to a suitable vacancy then progression through the capability procedure would follow."

"To recap you have been permanently restricted from AFO duties, you will be going to the RDP, you will be either redeployed to a post or you will be entering capability."

Redeployment panel

64. This duly convened on 6 March 2018. The meeting was minuted (424-433). The minutes were redacted except insofar as relating to the claimant. The outcome in the claimant's case was recorded in these terms (KT is Ms K Timms, the panel chair and the respondent's Head of HR, and APM is Armed Police Model) –

"***<u>PC 861 Hughes – Hunterston</u>***

KT asked DW to provide a short overview of the case. PC Hughes had been out of the workplace for a considerable period. DW had made the decision to

permanently restrict PC Hughes from AFO duties, which had been supported by the ACC Operations. It was confirmed that the reason for the permanent restriction was not for medical reasons. The restriction was taken due to poor performance, behaviour and conduct. KT referred to the terms of reference which state:

Only cases that have been processed by the relevant Risk Assessment Panels and approved for permanent medical restrictions will be eligible for review.

The case was discussed and it was agreed that this case did not meet the criteria of an APM role.

Decision: APM role not offered. The panel agreed that the case should now be managed outside of the redeployment panel by operational management with HR support."

65. Mr Worsell sought in evidence to dissociate himself from the use of the words "*poor performance".* He indicated that this was not what he had said. He said that he had never alluded to the claimant's performance being below standard.

66. Mr Worsell said that he had been talking about the claimant's behaviour and conduct "*in the round".* He referred the claimant's inability to accept decisions, to follow direction and command and his constant challenges to the organisation. These brought the claimant's judgment into question.

67. Mr Worsell accepted that the redeployment panel terms of reference (as quoted in paragraph 64 above) meant that the claimant would not have been eligible for an APM role as he had not been approved for permanent medical restrictions. He accepted that this had been a *"false dawn"* for the claimant and apologised for that.

Capability procedure

68. The respondent has a Capability Management Policy and Procedure (477-483). This sets out examples of when the policy could be used. These include -

- A suitable role and/or duties are not available

69. The policy provides for three stages (with a right of appeal at the formal stages) –

    (a) Informal stage – this appears to apply only in cases of sickness absence.

    (b) Stage one – First formal meeting – this is described as a "*first capability management meeting".* The policy states that "*the chair will confirm why the individual has been invited to attend and explain that the purpose of the meeting is to discuss each option in regards to their particular case".* The outcome is an action plan.

    (c) Second stage – Final capability meeting – the circumstances in which this will be called are described thus –*"If there is no satisfactory and sustained improvement in line with the requirements of the action plan issued at the first capability meeting, a final capability meeting will be called".*

70. During the telephone conference call on 27 February 2018 Mr Worsell made reference (according to the note) to *"request moving directly to a stage 2 meeting – its detailed in the procedure".* Mr Cole's evidence was that "*As stated in the procedure at that time a direct to stage 2 final capability meeting can be held with the agreement of all parties".* I could find nothing in the policy itself which allowed for going straight to a final capability meeting (although I did not have the appendices). However, I accepted the evidence of Mr Worsell and Mr Cole that this could be done by agreement, and I noted that Mr Cole gave a couple of examples of cases where this had happened.

Stage 2 capability meeting

71. Emails sent by Mr Cole to the claimant on 28 March 2018 and by Mr Craig to Mr Cole/Mr Worsell on 2 April 2018 (436) were headed "*Capability stage 2 meeting".* Mr Cole's letter to the claimant of 17 April 2018 was headed "*Invitation to Final Capability Meeting".* In an email exchange between the claimant/Mr Craig and Mr Cole on 13-18 April 2018 (516-518) the heading was "*Stage 2 Capability Meeting".*

72. No issue was taken by the claimant or his representative about the appropriateness of going straight to a final capability meeting (ie stage 2) in

advance of the capability meeting which was scheduled for 2 May 2018. The meeting went ahead on 2 May 2018. A minute was prepared (442-444).

73. The minute records that there was some discussion at the start of the meeting about the need for all parties to agree to go straight to stage 2. Mr Cole explained the rationale for this, indicating that if this was not agreed, the meeting could go ahead at stage 1 but the matter would move to stage 2 as quickly as possible. The minute records that Mr Cole asked the claimant if he was *"happy to proceed with the Stage 2 Capability meeting"* and the claimant confirmed that he was. The meeting proceeded and the availability of suitable alternative roles was discussed. No such role was identified.

74. The minute records Mr Cole stating, after a brief adjournment, as follows –

> "*….considering JHs permanent restriction from AFO duties his contracted role as an AFO, the outcome of the redeployment panel where no post was offered, and that there did not appear to be any other suitable vacancy in the CNC at that time that this is a straightforward case and he will be recommending termination of employment to the Head of HR".*

75. Mr Cole sent an email to Ms Timms on 2 May 2018 (519) recommending that the claimant's employment be terminated.

Claimant appeals

76. The claimant submitted an appeal against the stage 2 capability meeting outcome on 18 May 2018 (445-446). The basis of his appeal was that it had been *"inappropriate and unlawful"* to dismiss him for asserting his statutory right to seek redress from the Employment Tribunal.

77. An appeal hearing chaired by Deputy Chief Constable S Chesterman took place on 21 June 2018. Minutes were prepared (454-457). There were also handwritten notes (457A-457P). The outcome was that Mr Chesterman upheld the decision to recommend termination of employment. Ms Jordan wrote to the claimant on 26 June 2018 to confirm this (460).

Termination of employment

78. Mr N Couzens, HR Business Partner, wrote to the claimant on 30 July 2018 to confirm his "*exit details".* These were that the claimant would receive a capability payment of £32882.88 (gross) on termination of employment and accrued holiday pay, and would be on garden leave during his three months' notice period expiring on 31 October 2018. The claimant signed an acknowledgement of these terms on 6 August 2018 (470).

79. The claimant referred to a document recording the return to him on 26 October 2018 of the contents of his locker (473). This showed three items marked "*returned to stores"* with the signatures of two officers dated 2 May 2017. The claimant said that this indicated a decision to terminate his employment had been taken at that time. Mr Cole said that there was limited locker space available at Hunterston and that the probable explanation was that the claimant's locker had been cleared for use by someone else.

80. I considered that Mr Cole's explanation was plausible. The evidence of steps taken by the respondent to reintegrate the claimant including his attendance at Summergrove, the preparation of a return to work strategy and the discussion about possible alternative roles was inconsistent with a decision having been taken in May 2017 to dismiss him.

Comments on evidence

81. The respondent's witnesses gave their evidence in a straightforward manner. It was to their credit that where their actions were open to criticism – for example when Mr Worsell was dealing with the terms of reference of the redeployment panel – they were willing to accept that criticism. Any discrepancies in their evidence – such as when Mr Brotherston had been told about the permanent withdrawal of the claimant's AFO status – were not material. I found them to be credible and reliable witnesses.

82. The claimant told me that he had been receiving treatment which he had found helpful, and that his mental health was much improved. He used the word "*shocking"* to describe his own behaviour as recorded in the Detriment

Judgment. I found him a much more credible witness than the Tribunal which heard the Detriment Claim had done.

83. The claimant clearly felt he had been treated unfairly by the respondent. His questioning of the respondent's witnesses was focussed on his perception of that unfair treatment. Matters such as the respondent's unwillingness to receive a report from Prof White and their failure to send him for psychological assessment fuelled his sense of injustice. He was unhappy that the decision to rescind his AFO status permanently, which led to his dismissal, had been taken on the basis of the comments about him contained in the Detriment Judgment.

Submissions for respondent

84. Mr Stilitz provided written submissions which he supplemented orally at the hearing. His written submissions are available in the case file and so I will not rehearse them here, other than to record his arguments based on the case of ***Royal Mail Group Ltd v Jhuti [2019] UKSC 55***.

85. In his oral submissions, Mr Stilitz stressed that there was only one issue to be decided and that was the reason for the claimant's dismissal. Matters such as fairness, process and the range of reasonable responses did not arise. There was also no issue of disability discrimination.

86. Mr Stilitz reminded me of the nature of the respondent. They were a police force performing an important security role. Their constables and sergeants carried firearms. They needed to be extremely disciplined. They were not a "*run of the mill"* employer.

87. In dealing with the Detriment Claim, the Tribunal had conducted a detailed examination of the claimant's employment and had made findings about his conduct and character from 2011 until 2016/17. Those findings were binding on me.

88. That those findings were adverse to the claimant came as no surprise to the respondent. They regarded him as a difficult and challenging employee. When the Detriment Judgment entered the public domain, the respondent had to decide on a suitable response. That response was Mr Worsell's decision to

rescind the claimant's AFO status. The respondent no longer had the requisite degree of trust in the claimant as an AFO for the reasons set out in Mr Worsell's rationale.

89. The scope of the respondent's capability procedure extended beyond the usual definition of "*capability".* The respondent could have gone down a conduct route, but the capability route entailed a substantial termination payment for the claimant.

90. Mr Stilitz quoted from the judgment of Lord Wilson JSC in ***Royal Mail v Jhuti*** at paragraph 44 –

"*The context of the present case is a search for the reason for a company's dismissal of an employee. In* ***Abernethy v Mott, Hay and Anderson [1974] ICR 323****,* 330*, Cairns LJ offered the classic definition: "A reason for the dismissal of an employee is a set of facts known to the employer, or may be of beliefs held by him, which cause him to dismiss the employee"."*

- and at paragraph 60 –

"In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision maker."

91. Lord Wilson also referred (at paragraph 45) to the observation in the judgment of Lord Bridge of Harwich in ***West Midlands Co-operative Society Ltd v Tipton [1996] ICR 192*** at 200-201 that "*the reason for the dismissal to which the* [statutory] *provisions* [for claims for unfair dismissal] *referred might aptly be termed the "real" reason for it".*

92. Mr Stilitz submitted that, following ***Royal Mail v Jhuti*** –

(a) The reason for dismissal was the set of facts and/or beliefs held by the employer which caused him to dismiss the employee;

(b) The "real" reason for dismissal should be identified, in accordance with industrial realities and common sense; and

(c) If a manager procures the dismissal of an employee for an impermissible reason, in particular the making of a protected disclosure, that reason is to be attributed to the employer even if the final decision-maker adopts another, spurious reason in ignorance of the true reason for dismissal.

93. Mr Stilitz argued that the real reason for the claimant's dismissal had nothing to do with his protected disclosures. The decision taken by Mr Worsell to rescind the claimant's AFO status was on the basis of risk. It was hard to see how the respondent could have done anything else. Given that there was an 83 page judgment in the public domain, their position would have been indefensible if there had been a tragic accident.

94. When matters proceeded to the capability procedure, it was unsurprising that Mr Cole recommended dismissal when no alternative role for the claimant had been found. If I found Mr Worsell and Mr Cole to be credible witnesses, that should be the end of the matter.

Submissions by claimant

95. The claimant submitted that there had been no reasonable excuse for the respondent's failure to return him to work since his whistleblowing in January 2015. At various times since then he had been passed as fit. The evidence showed that he had been managed by Mr Brotherston and Mr Worsell. This was unlike his colleagues who were managed by a Sergeant and an Inspector.

96. The claimant questioned the credibility of Mr Brotherston's evidence about how he (the claimant) had reacted to the discussion of two possible roles at the meeting of 15 June 2017. Mr Brotherston said that he "*remembered it well*" when referring to the claimant having refused immediately to consider these, yet he was unable to recall what these roles were.

97. The claimant was critical of the respondent's failure to follow OH advice by obtaining a psychological assessment. He was also critical of the direction given by the Assistant Chief Constable, the third most senior person within the respondent's organisation, that he (the claimant) was not to be put forward for psychological assessment. The email of 6 April 2017 (196-197) communicating this direction had been addressed to the CMO and a number of clinicians. The

need for a psychological assessment was not a matter where clinicians should be directed by senior management.

98. The claimant said that he had complied with every instruction given to him while he remained absent from work. He had shown his willingness to return to work over a number of years. He had attended an OH assessment in London despite having previously been seen at Hunterston which was only 15 minutes from where he (then) lived. He had complied with the requirement to book in and out of work each day despite his contention that this could have been done by a duty planning officer by the click of a mouse. He had agreed to go to Culham despite the lengthy travel to/from Abingdon and time away from home only for this to be withdrawn at the last minute on what he saw as spurious grounds.

99. The claimant described the document relating to the contents of his locker (473) as "*undeniable"* proof of the respondent's intention to terminate his employment as at May 2017. He argued that the only reasons for a locker is emptied were termination of employment or death. He believed that he had not been meant to see this document – it was a "*smoking gun".*

100. Although not advanced by the claimant himself in his submissions, I suggested that he might embrace the argument that –

(a) he had been dismissed because he had been dealt with under the respondent's capability procedure and no alternative job was available;

(b) he had been dealt with under the capability procedure because of the outcome of the redeployment panel;

(c) he had been referred to the redeployment panel because his AFO status had been permanently withdrawn;

(d) his AFO status had been permanently withdrawn because of what was said about him in the Detriment Judgment dealing with his Detriment Claim;

(e) he had pursued his Detriment Claim because he perceived that he had suffered detriments; and

(f) He perceived those detriments because he had made protected disclosures.

101. Mr Stilitz responded to this by arguing that this articulation of an alleged chain of causation was not consistent with what the Supreme Court said in ***Royal Mail v Jhuti***.

Applicable law

102. Section 103A ERA (**Protected disclosure**) provides as follows –

"*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

Discussion

103. I deal first with the point made by Mr Stilitz about following a chain of causation and whether this is proscribed by ***Royal Mail v Jhuti***. The reason for dismissal will in most cases be the reason stated by the employer. It will be the set of facts known to the employer or the set of beliefs held by the employer. However, sometimes the waters can become muddied, as they did in ***Royal Mail v Jhuti***.

104. In reaching his conclusion (at paragraph 62) Lord Wilson said this –

"*….if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."*

105. I understand that to mean that an Employment Tribunal can look behind the stated reason for dismissal so as to find the real reason. In my view, this mandates rather than prohibits following a chain of causation where that is necessary to find the real reason for dismissal.

106. In the present case, the stated reason for dismissal is *"capability and attitude".* In the sense that the word is used in this case "*capability"* is not restricted to the meaning assigned to it in section 98(3)(a) ERA –

""*capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality…."*

107. It has a wider meaning, as referenced at paragraph 68 above. It includes the situation where a suitable role and/or suitable duties are not available. That begs the question of what "*suitable*" means. It seems to me that the answer must depend on the particular circumstances, including, in the present case, the reason why the claimant found himself at a capability meeting.

108. Given Mr Worsell's acceptance that the claimant's case did not fit the criteria for consideration by the redeployment panel, it was the decision by Mr Worsell to permanently suspend the claimant's AFO status which led to the application of the capability procedure. The rationale for that decision is found in Mr Worsell's Policy Note dated 15 February 2018 (396-397) and is expanded on in his Policy Note dated 22 February 2018 (414-416).

109. Mr Worsell's view was clearly stated in his second Policy Note. He considered the claimant "*unsuitable for redeployment to another role with the Civil Nuclear Constabulary".* He formed that view based on what was said about the claimant in the Detriment Judgment. That led me to speculate on what might have happened if, at the time of the stage 2 capability meeting, a suitable role and/or suitable duties had been identified. There would have been a tension between an even-handed application of the capability procedure by Mr Cole and the view expressed by Mr Worsell.

110. That however did not arise and I had to deal with what actually happened and not what might have happened. The position at the capability meeting on 2 May 2018 was that (a) the claimant's AFO status had been permanently restricted, (b) there was no suitable vacancy and (c) Mr Cole decided to recommend termination of employment. There was no evidence that the respondent had concealed or otherwise withheld from the claimant some alternative role which would have been suitable. I considered that it was appropriate, in seeking to determine the reason for dismissal, to look at the reason for the claimant's AFO status being permanently rescinded.

111. That required me to look at the rationale for Mr Worsell's decision. This was set out in his two Policy Notes. It was clear from these that the key element was what was said about the claimant in the Detriment Judgment. I did not believe that Mr Worsell misunderstood or misinterpreted the Detriment Judgment. He identified the various criticisms of the claimant made in the Detriment Judgment. His decision to rescind the claimant's AFO status was based on those criticisms.

112. In my view, the criticisms of the claimant in the Detriment Judgment were not made because he had made protected disclosures. They were made because of the view of the claimant formed by the Tribunal in hearing the Detriment Claim. They found him not to be particularly credible or reliable. They found him prone to exaggeration. They found the evidence of one of the respondent's witnesses who stated that the claimant had acknowledged that he was paranoid to be credible. They found that some of the claimant's evidence "*simply did not ring true".*

113. It was good to hear the claimant describe his mental health as "*much improved"* and his reference to his own behaviour as "*shocking"* demonstrated a degree of insight as to how his mental health had impacted him. However the Tribunal dealing with Detriment Claim described the claimant in terms which reflected what was before them.

114. If there was a chain of causation here, it stopped at the Detriment Judgment. That judgment was not critical of the claimant because he had made protected disclosures but for the reasons set out in the judgment (see paragraph 39 above). The permanent rescinding of the claimant's AFO status was not linked to his protected disclosures but to the terms of the Detriment Judgment.

115. The reasons for the claimant's dismissal by the respondent were (a) that it was not appropriate that he should continue to be an AFO and (b) the absence of a suitable alternative role. The former was Mr Worsell's reason for permanently rescinding the claimant's AFO status and the latter was Mr Cole's reason for recommending termination of employment. The reason for dismissal was not that the claimant had made a protected disclosure or disclosures.

Decision

116. Having found that the reason for the claimant's dismissal was not that he made protected disclosures, it followed that his claim brought under section 103A ERA did not succeed and required to be dismissed.

W A Meiklejohn

Employment Judge

27 January 2021

Date of Judgment

Date sent to parties **30 January 2021**