EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4111346/2021

Hearing held in Glasgow on 14 to 21 March 2022

Deliberations 22 – 24 March 2022

Employment Judge D Hoey
Tribunal Member J Lindsay
Tribunal Member A McFarlane

Mr P McCue	**Claimant** **Represented by:** **Mr Maxwell - Solicitor**
Civil Nuclear Police Authority	**Respondent** **Represented by:** **Mr Stilitz QC - Counsel [Instructed by Respondent]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous judgment of the Tribunal is that the claimant's claim that he had been subject to unlawful religious harassment in respect of incidents that occurred on 1 June 2020 and 17 August 2020 (in terms of section 26 of the Equality Act 2010) is ill founded, as while the claims had been made in time and were acts for which the respondent was liable, the respondent had satisfied the Tribunal that all reasonable steps had been taken such as to entitle it to a defence in terms of section 109(4) of the Equality Act 2010.

2. The unanimous judgment of the Tribunal is that the claimant's claim that he had been subject to unlawful religious harassment (in terms of section 26 of the Equality Act 2010) for which the respondent is liable, in relation to the incident that occurred on 30 June 2021 is well founded (the respondent not

having satisfied the Tribunal that all reasonable steps were taken pursuant to section 109(4) of the Equality Act 2010).

3. A separate remedy hearing will be fixed to determine what, if any remedy, should be awarded in respect of the foregoing unlawful act.

REASONS

1. By ET1 accepted on 9 September 2021 the claimant claimed that he had been subject to unlawful harassment for which the respondent was liable. Early conciliation had commenced on 21 July 2021 with the ACAS Certificate issued on 13 August 2021.

2. The hearing was conducted in person with the claimant's agent and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. Due to the impact of the pandemic, some of the witnesses attended the hearing remotely and there were no issues arising.

Case management

3. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. Both documents were refined as the case progressed.

4. A timetable for the hearing of evidence had been agreed and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The hearing had been set down for 10 days but robust case management ensured the hearing was concluded within 6 days. Each witness had provided a written witness statement with the evidence being appropriately challenged.

5. It was agreed that remedy would be reserved, with a separate hearing to be fixed if necessary.

Issues to be determined

6. It is accepted that the following incidents occurred

    a. On 1 June 2020 the claimant found a document with "UDA no surrender" written on it in his pigeon hole;

    b. On 17 August 2020 the claimant's wife found a piece of paper inside his work jacket which had the words "UDA no surrender" written on it; and

    c. On 30 June 2021 the claimant found the graffiti "FTP" on his coffee mug in the police kitchen area at Hunterston, which was understood to stand for "Fuck the Pope".

7. It was accepted that the incidents set out had the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (such that they amounted to unlawful religious harassment).

8. The issues to be determined are as follows (which is based on the agreed list which was has been updated to reflect the issues in dispute).

Who perpetrated the relevant acts?

9. Were the 3 incidents perpetrated by an employee or agent of the respondent?

10. If so, were such acts done in the course of the relevant employee's employment or within the relevant agent's authority, such that the respondent is vicariously liable for their acts?

Time limits

11. Given the first 2 incidents occurred outwith the limitation period for raising a claim, do the acts of discrimination relied upon by the claimant amount to an act continuing over a period?

12. If not, should the limitation period be extended on the basis that it would be just and equitable to do so?

Reasonable steps

13. If the relevant acts are acts for which the respondent may be liable, did the respondent take all reasonable steps within the meaning of Section 109(4) of the Equality Act 2010 to prevent employees from committing such acts, or committing acts of that description so that the respondent has a defence to the claims of harassment?

Evidence

14. The parties had agreed productions running to 478 pages with additional documents being inserted in the course of the hearing. The Tribunal heard from the claimant, his wife, Mr Thomas (a former officer of the respondent), Mr McGarvie (a former officer of the respondent), Inspector Gilmartin (who was commander of the unit in question and the claimant's line manager), Sergeant Wilson (who stood in for Inspector Gilmartin when he was absent), Mr Mehmood (initially engaged as Diversity Manager who became the Equality, Disability and Inclusion Manager), Detective Inspector Allan (who managed the professional standards inquiry), Chief Inspector Brotherston (who had responsibility for the unit), Superintendent Jones (who was the divisional superintendent), Superintendent Robinson (whose command included the unit for a period), Temporary Assistant Chief Constable Vance (divisional commander) and Ms Ferguson (HR manager).

Facts

15. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The chronology which the parties produced, which was finalised after the hearing has assisted the Tribunal in making relevant findings.

Background

15. The respondent is a non-departmental public body created under section 51 of the Energy Act 2004 responsible for securing and maintaining the effective functioning of the civil nuclear constabulary, the statutory armed police force created under section 52, which has its primary function the protection of civil nuclear sites and safeguarding of nuclear material in Great Britain.

16. The claimant joined the respondent in 17 May 2007 and was engaged as Police Sergeant (from 2018). The claimant is a Roman Catholic and was based at the operational policing unit at Hunterston B nuclear power station, which is operated by a commercial entity.

Policy documents

17. There are a number of policy documents that are relevant to this case. Policy documents are found on the respondent's intranet and when issued are issued electronically (with links to the intranet page). Briefings are also issued when the documents are produced with some being placed on the noticeboard. Staff are expected to read all policies. There is no record kept as to who had read each policy or when but as a disciplined organisation staff are expected to read such documents.

18. On 1 June 2014 the respondent adopted a **Dignity at Work Policy** which stated that the respondent did not condone nor tolerate unacceptable behaviour. All staff had a duty to follow the policy and comply with it. Staff had a personal responsibility to ensure the principles were followed. Complaints could be dealt with informally or formally and malicious complaints could lead to disciplinary action. This was updated on a number of occasions.

19. The respondent also had an **Equality Diversity and Inclusion Policy** and Procedure (introduced in December 2019 and updated in March 2021).

20. The respondent had unit based diversity champions (based at each unit) and a Diversity Manager (engaged to cover the respondent's organisation).

21. Where an incident arises in connection with a protected characteristic, these may be characterised as a Prejudice Related Incident (with any grievance containing such issues to be considered prejudice related grievances) which would require consideration as to how to deal with the issue. The Diversity Manager would be involved in such discussions to determine what diversity related input is needed. The Diversity Manager was available to discuss any diversity related matters with staff and on occasion would conduct briefings on diversity related matters.

22. The respondent also had an **Equalities Consultative and Support Network** which is an arm's length partly independent body to support equality issues via consultation and engagement. Members are volunteers from the respondent's staff. The respondent had **Equality Support Groups** which provided moral and cultural support to employees with particular characteristics, with one such group being the Multi Faith Network which formed part of an external inter faith network. There are documents setting out the approach taken to diversity champions the Equalities Consultative and Support Network and Equality Support Groups on the respondent's intranet. Staff can join these groups voluntarily.

23. The respondent also had a **Police Officer Misconduct Policy** and Procedure which states that the respondent is committed to ensuring officers adhere to the **Standards of Professional Behaviour** (as found in Schedule 2 to the Police (Conduct) Regulations 2012 and the College of Policing Police **Code of Ethics**. Standards of behaviour include authority respect and courtesy, equality and diversity and challenging and reporting improper conduct.

24. The Misconduct Policy set out the policy to be followed in respect of potential breaches of the policy which includes the completion of a form to inform local management of such behaviour and ultimately the Professional Standards Department (which would formally investigate any breach of the rules). The standard of proof applied internally is on the balance of probabilities (which contrasts with the higher standard applied in Police Scotland investigations).

25. The respondent had many policies in place and would communicate policies by email or issuing a bulletin on the intranet or by oral communication. Relevant policies were also placed on a notice board. Managers, including Sergeants, were responsible for ensuring direct reports read them.

Training

26. Upon induction officers would undergo a period of intense training. Initial equality diversity and inclusion training takes place during induction which includes training on Code of Ethics, An introduction to the Equality Act, Equality Diversity and Inclusion Awareness, and Dignity at Work. Refreshers take place thereafter on an online platform which requires candidates to read slides and take a multiple choice test. Refresher sessions include sessions on equality, diversity and inclusion. Continuing professional development took place with some sessions being mandatory, most of which were done online. When the online questions were answered correctly, the candidate would pass the module. Managers, including Sergeants, were responsible for ensuring those staff for whom they were responsible completed the mandatory training. Records were kept in respect of the online sessions.

27. Training modules included an introduction to the Equality Act, 4 different equality diversity and inclusion awareness videos and dignity at work training. Some of the compulsory modules included diversity and equality. The time spent on the online modules varied depending upon how knowledgeable the officer is and can be completed within half an hour in some cases. Staff were notified quarterly of the mandatory training modules, with managers chasing their direct reports to ensure the mandatory training was completed. Managers had a responsibility to carry out the training and lead by example.

28. The refresher training considered each aspect of the Equality Act, in terms of the protected characteristics and unlawful discrimination. That included racism, homophobia and religious discrimination (including harassment). For those who retained knowledge of the key principles, the training could be completed within half an hour (if the principles and concepts were known). Sessions covered included religious prejudice and cultural issues and the

differences within cultures and tensions. The generic courses did not focus on sectarianism *per se* but did cover religious discrimination and harassment.

29. Inspector Gilmartin for the period of 1 January 2019 to February 2022 completed 2 courses on autism and a module on the Equality Act 2010 (which took 21 minutes and 47 seconds) and watched an Equality Diversity and Inclusion Awareness Video.

30. Sergeant Wilson for the period 1 January 2019 to February 2022 completed a module on the Equality Act 2010 (which took 11 minutes 1 second), a module on an introduction to the Equality Act 2010 (which took 16 minutes 20 seconds) and watched an Equality Diversity and Inclusion Awareness Video.

31. Other offers would carry out similar refresher training (in addition to face to face training and diversity inputs).

Persons involved

32. As a Sergeant, the claimant was responsible for managing a team of officers. He reported to Inspector Gilmartin, the Operational Unit Commander of the site in question. When he was absent, Inspector Wilson covered his duties. His duties included managing the officers and staff at the unit and ensuring operational requirements are met together with engaging with stakeholders. Inspector Gilmartin undertook welfare support in relation to the claimant working with him in relation to his welfare, sickness and career development.

Critical incidents

33. A critical incident can be declared where the effectiveness of the police response is likely to have a significant impact on the confidence of the victim, their family or the community. Where this is declared certain actions follow and the matter is reviewed with meetings taking place and actions agreed.

Background incidents

34. The claimant first had an issue with one of his fellow Sergeants, Sergeant Craig, in 2011 (4 years after the claimant joined the respondent). This occurred at a night out in a pub when those present had imbibed alcohol.

Sergeant Craig had seemed angry and said to the claimant that he had heard the claimant did not like him because of his religion (which was believed by the claimant to be protestant). The claimant denied it and walked away.

35. In 2014/15 there was a disagreement between officers at a social event with a possible sectarian element.

36. In 2016/17 an issue arose as to a group of officers being allocated shifts by Mr Thomas with a possible sectarian element.

Network launched

37. On 6 April 2017, the respondent launched an Equalities Consultative and Support Network, an arm's length semi independent organisation with its own constitution, established to support the consultative engagement and human rights and equality impact assessment functions of the respondent. It was to support and promote ethics, diversity and inclusion.

2018 prejudice related incident

38. On 18 November 2018 a Prejudice Related Incident was reported. This incident arose from the belief from 3 officers based at Hunterston believed that they had been racially discriminated against in that they had been prevented from working together because they had come from Northern Ireland. They considered this to be unlawful racial discrimination. The report had been received from the then Federation Chair, Sergeant Craig.

39. The operational unit commander and divisional superintendent with the diversity manager decided that a comprehensive equality diversity and inclusion briefing should take place for all of the Hunterston workforces.

Claimant's grievance against colleague

40. On 28 December 2018, the claimant advised (then temporary) Inspector Gilmartin that he wished to pursue a formal grievance against Sergeant Craig. This related to an incident that had occurred on 22 December 2018. The claimant had initially wished to pursue matters informally but the claimant had considered matters and wished the matter to be dealt with formally. The

claimant had an issue with how Sergeant Craig had dealt with an officer that the claimant had managed and what had been said. The claimant believed Sergeant Craig had alleged the claimant had lied to the other officer, bullied him and breached the Code of Ethics. The claimant sought a formal resolution of the dispute. The claimant felt Sergeant Craig had an issue with him in how he acted towards him.

41. Around this time the claimant had notified (then) Chief Superintendent Vance as to the issues he was encountering and that he believed he had been targetted due to his religion. The claimant had been advised to include relevant evidence in his grievance.

Equality Act training with reference to religious bias

42. On 5 and 6 February 2019, Mr Mehmood, Diversity Manager, visited Hunterston and delivered Equality, Diversity and Inclusion sessions, dealing specifically with religious bias following the prejudice related incident that occurred in November. The diversity manager and divisional superintendent met with staff at the unit. The diversity manager spent 2 days at the site delivering equality diversity and inclusion sessions outlining dignity at work, the respondent's expectations and the impact of religious bias on individuals, citing his own experiences in the context of the incident that occurred. This was a proactive session focussing on religious discrimination.

Meeting to discuss prejudice related incident

43. On 6 February 2019 a meeting was held at Hunterston to resolve the Prejudice Related Incident, attended by Mr Mehmood. The meeting noted that there was a belief officers had been kept apart because of their Northern Irish background. This had happened following an out of work dispute in the past and it was agreed that the practice would cease. Those involved were reminded of the equality, diversity and inclusions requirements.

Officers reminded of importance of respect and tolerance

44. On 6 March 2019 Temporary Superintendent Cole informed officers at Hunterston that sectarian behaviour would not be tolerated, that it would be

dealt with robustly and that all officers were expected to challenge and report such behaviour.

Claimant's grievance heard

45. On 12 March 2019 the claimant's grievance against Sergeant Craig was heard. The claimant explained that there had been previous unfounded allegations made against him and he had not had a good working relationship with Sergeant Craig. He said he believed Sergeant Craig had mispresented the position and that Sergeant Craig was "personally coming after him".

Second prejudice related incident

46. In March 2019 a prejudice related incident was raised by Mr McGarvie. He stated that having been on site for over 2 years it was recently brought to his attention that Sergeant Craig had been carrying out what Mr McGarvie believed to be a "personal vendetta" against him and his partner by making unfounded allegations and undermining him and his partner. He set out that he believed the conduct had been malicious and due to religion, Mr McGarvie and his partner being catholic. He said it had become a huge concern for him and wished it investigated as his position had become untenable and he had resigned from the respondent.

Inspector Gilmartin meets Sergeant Craig

47. In June 2019 Inspector Gilmartin met with Sergeant Craig. The purpose of the meeting was to look for a resolution of the issues between Sergeant Craig and the claimant. Sergeant Craig had read out a pre-prepared statement at the meeting setting out historic details between the two sergeants going back a number of years. Mediation was offered (something the claimant had indicated he would consider) but Sergeant Craig did not see the point of this.

Claimant's comments on grievance issues

48. On 3 August 2019 the claimant sent additional comments in relation to the unfounded allegations of sectarianism raised against him on his grievance. The claimant noted that after the formal meeting Sergeant Craig had made

another unfounded allegation about the claimant having said an Irish phrase (which some may regard as being linked to Catholicism). The claimant believed the allegation was made shortly after Sergeant Craig had attended his grievance meeting.

Discussions with claimant and Sergeant Craig

49. Temporary Assistant Chief Constable Vance met with the claimant and Sergeant Craig separately in the course of August 2019 and had a "closed door meeting" during which it was noted that there were issues between those individuals and that professionalism was required. It was understood that there were personality conflicts in existence and senior staff were tasked with ensuring the officers remained aware of the professional standard requirements. Senior staff were aware of the personality conflicts and sought to ensure the issue was dealt with informally.

Federation reminds officers of need for respect

50. On 9 August 2019, an email was sent by the Chief Executive of the Police Federation, advising all officers that he was committed to the eradication of any religious, political, racial, disability or age discrimination. He said: "It is then with increasing concern and disappointment that it has been brought to my attention once again by the Chief Officer team yesterday of reports of acts of sectarianism and bigotry that have been reported as occurring between Police Officers at the Hunterston unit. To be absolutely clear this practice has to stop forthwith. Failure to heed my advice will undoubtedly lead to the potential termination of employment or redeployment through the Police (Conduct) Regulations or redeployment. For the avoidance of doubt such acts of hatred and intolerance have no place in this or any other Police Service."

Outcome of claimant's grievance

51. By letter dated 21 August 2019 Inspector Gilmartin informed the claimant that his grievances of bullying, abuse of position and oppressive behaviour were thoroughly investigated and that no evidence had been found to substantiate the allegations that had been made against the claimant, the outcome the

claimant sought from his grievance. No action was taken against Sergeant Craig in respect of the unfounded allegation as the allegation had been raised by him pursuant to his role as Federation Representative with the matter having been reported to him. The respondent did not consider the allegation to have been malicious. There was no evidence to suggest malice.

New Dignity at Work Policy and Equality Policy

52. In September 2019, the respondent adopted a new Dignity at Work Policy and Procedure, which was made accessible on the intranet.

53. On 4 December 2019 the respondent adopted an Equality, Diversity and Inclusion Policy and Procedure, which was a new policy and was accessible on the intranet. This noted that equality and diversity was "more than a legal obligation, it is fundamental to our operational effectiveness". The policy required all staff to respect each other. It stated that "Equality, inclusivity and fairness is at the heart of everything we do".

54. The procedure stated that there would be a range of activities led by senior managers but with all employees being responsible and accountable for their actions. The policy dealt with the Equality Act 2010, required behaviours, promoting equality and diversity, terms and conditions, cultural or religious requirements, work life balance, raising a grievance, and Governance. Reference was made to the dedicated Diversity Manager and ECS Network.

Critical incident declared

55. On 12 February 2020 Chief Superintendent Vance declared a Critical Incident at Hunterston. This related to a complaint that a sectarian message had been left in an officer's pigeon hole. While there had been no allegation of sectarianism *per se*, there had been "previous sectarian undertones" and as this had the potential to impact upon staffing, a critical incident was declared. It was noted that allegations of sectarianism were taken very seriously and any behaviour found to have fallen below the standards of expected behaviour would be subject to robust professional standards process. The diversity manager had been involved. A plan was put in place to deal with each of the

concerns operationally. There were no issues to be raised with professional standards at that stage which would be kept under review.

56. These meetings were followed up with meetings on 14 February 2020 (noting that if any further sectarian issues arise the respondent should be ready to respond) and on 25 February 2020 when it was decided that there would be increased chief inspector cover for a sustained period to increase visibility and provide further support.

57. A further Critical Incident Meeting was held on 6 March 2020. It was noted that a health and safety investigation was being carried our and operational issues had been dealt with. Any sectarian undertones would be dealt with though professional standards.

First incident – 1 June 2020 – Envelope in claimant's pigeon hole

58. On 1 June 2020, the claimant found an envelope with "UDA No Surrender" written on it in his pigeonhole. The envelope was addressed to "PC 859 McCue" (and included a letter the claimant had been sent in 2018 with the message written on top of the letter). The writing that had "PC McCue" looked different to the writing with the message (which was in capital letters). By June 2020 the claimant was Sergeant McCue. This was recorded as a Prejudice Related Incident on 2 June 2020. It was noted that it had been some time since he had cleared his pigeon hole and he could not put a time frame on when the envelope could have been placed there. The claimant believed the envelope was from a letter over 2 years old which could have been when the message was written on it. It was possible the message was written before the recent interventions had taken place (and could have been written when the February 2020 incident had occurred).

59. The unit where the claimant was based is secure. A key code is needed to access the building and only authorised personnel can access. Staff who have access include officers and staff of the respondent (which accounts for 90% of those with access), with the remainder being personnel engaged by or reporting to the commercial entity that owns the facility. Cleaners have access and would spend around an hour or two carrying out their duties. There was

some interaction between staff engaged by the respondent and those engaged by the owner of the facility which was mostly limited to pleasantries. There was no evidence of such individuals knowing of the claimant's religion (which his colleagues knew).

60. The claimant's pigeon hole was in the meeting room with the others, which was a room used as a briefing room with a large meeting table and chairs. Each pigeon hole was marked with the officer's warrant number and was occasionally checked by the officer and was located in a place where those engaged by the respondent would meet.

61. The claimant reported the incident to another Sergeant who placed the note into an evidence bag. The claimant continued working. The matter was referred to Inspector Gilmartin who informed the Force Incident Manager (an operational manager with tactical responsibility for incidents who maintain an operational log and record incidents). He spoke with the claimant later that day who advised he could not say when he had last checked his pigeon hole.

62. On 2 June 2020 Inspector Gilmartin telephoned the claimant for a welfare check and the claimant was advised as to the involvement of the Diversity Manager and that a Prejudice Related Incident form would be considered. The claimant advised Inspector Gilmartin that he believe he was being "targetted by Sergeant Craig and his cronies" (around 3 known colleagues of Sergeant Craig). He stated that Sergeant Craig does not speak to him at work and that in the claimant's view Sergeant Craig had "not been punished" and he was considering another grievance. Inspector Gilmartin telephoned the claimant later that day to confirm a prejudice related incident would be lodged.

63. On 3 June 2020 Inspector Gilmartin telephoned the claimant to discuss the incident further. The claimant stated that he did not wish to involve Police Scotland at that stage. He advised Inspector Gilmartin that he had been considering raising another grievance against Sergeant Craig but had decided not to do so and instead seek the advice of his Federation. It was noted that identifying who had left the message may be difficult given the

different individuals who had access and the lack of CCTV or other means to identify those responsible.

64. On 5 June 2020 the Diversity manager spoke with Superintendent Jones, Detective Chief Inspector Pemberton and Inspector Gilmartin to discuss the incident and brief them about the Dignity at Work Policy and possible Equality Diversity and inclusion points to be included in briefings for the unit.

65. On 8 June 2020 Inspector Gilmartin spoke with the claimant for a welfare check. Inspector Gilmartin understood that the claimant did not wish to raise a grievance about this incident as the message could have been written some time ago. Mr Mehmood spoke to Ms Jones to support her visit and provide examples of unacceptable behaviour relating to religion and belief.

66. On 16 June 2020 the claimant submitted a "letter of concern" to Inspector Gilmartin regarding the incident that occurred on 1 June 2020. He stated that he believed it had been motivated by his religion. He acknowledged that during the discussion with Inspector Gilmartin it would be unlikely that the author of the comment would be identified. He indicated that the context of the incident was such that this was not isolated and there had been other malicious actions that created prejudice towards the claimant. He referred to the unfounded allegation made against him in 2019 (which he believed had been fabricated on the basis of his religion and could bolster sectarian prejudices against him). He said: "I now feel that a failure to tackle sectarian issues or take preventative action to avoid future incidents has left employees who harbour these prejudices undeterred". He concluded that the days of treating such behaviour as minor to be tolerated should end. He stated that he had "not yet considered reporting this incident to Police Scotland" and hoped that this was the last time the issue needs to be raised.

67. On 16 June 2020 Superintendent Jones visited Hunterston and spoke to the claimant about the incident. Superintendent Jones understood that the claimant did not wish the matter referred to Police Scotland but advised him that if there were subsequent incidents that may be a decision the respondent took irrespective of the claimant's position. The claimant also advised that he

did not wish senior managers to address the unit with regard to the incident. The claimant was offered occupational health support.

68. Inspector Gilmartin had informally asked officers within the unit if they had any information relating to the incident but no one came forward. The management team had spoken to officers to seek information and to remind staff of the Code of Ethics/standards of professional behaviour. Steps were taken to remind staff of the seriousness of the conduct that led to the first incident and of the importance of equality and respect.

Second incident – 17 August 2020 – Paper in claimant's work jacket

69. On 17 August 2020 the claimant's wife found a piece of paper with "UDA No Surrender" written on it in his work jacket which was in an inside pocket the claimant did not use.

70. The claimant only wore that jacket for work and had returned from leave on 26 July 2020 and had undertaken 3 sets of 2 day and 2 night shifts, wearing the jacket in question to and from work. When at work the claimant had hung his jacket on the outside of his locker in the male changing room, in open view of those present. The changing room was accessible by officers, staff and employees and contractors of the commercial entity that owns the building. The room is beyond the meeting room and kitchen. The claimant would access the locker room at the start and end of his shift to take items from his locker. Some locked their lockers and others did not. The locker had the officer's name and warrant number on the front. The claimant believed the jacket had last been washed prior to 26 July 2020. Immediately following this the claimant telephoned the unit and spoke with a Sergeant

71. On 18 August 2020, Inspector Gilmartin had been briefed as to what had occurred and he spoke with the claimant to confirm the position. He then submitted a specific form reporting the incidents of 1 June 2020 and 17 August 2020 as misconduct to Professional Standards (in the event those responsible were identified). Inspector Gilmartin recorded the incident as a Prejudice Related Incident. The report noted that "there have been previous

interventions within the past 18-24 months in relation to matters of a similar nature which this graffiti may have been an intended part of".

Claimant on sick leave

72. On 19 August 2020 the claimant commenced a period of sick leave (returning to work on 9 October 2020). The claimant advised Inspector Gilmartin that his mental health "was not great" and Inspector Gilmartin helped calm the claimant down and offered support.

73. The claimant chose not to raise an Employment Tribunal application with regard to the first and second incidents. He was aware of the time limits but wished to focus upon returning to work. The claimant's mental health was adversely affected as a result of the harassment he suffered. His mental health deteriorated when he had to relive the acts of harassment suffered. The claimant wished to focus upon his return to work in the hope the issues would be resolved.

Critical incident declared

74. On 19 August 2020 the incident of 17 August 2020 was recorded as a Critical Incident. This was to address deployability concerns "against the backdrop of potential sectarian undertones". The report noted that thee had been "a history of concerns about sectarianism which had been subject to management intervention and review". By March 2020 the respondent was satisfied the issued had been addressed by way of professional standards review and local management activities, including senior officer presence and engagement. While the previous critical incident had been closed, a further one was created as there was the "potential for sectarian undertones to re-emerge". Operational issues were addressed. Senior officer visibility was instructed with code of ethics messaging. The matter was to be referred to Police Scotland for investigation (which was progressed by Inspector Gilmartin). The Diversity Manager was to create an outline plan to address local diversity concerns which would have included bespoke training.

75. Between 21 and 23 August 2020, Chief Inspector Brotherston and other senior officers visited Hunterston to engage with officers and ensure there was high visibility of senior officers within the unit. Briefings took place with regard to Code of Ethics and management expectations. At the briefings all staff were advised as to their responsibilities as to equality and diversity in line with the Code of Ethics and of the need to treat people with respect. The sessions emphasised the importance of respect for religion and of the existence of the Equality Policy.

76. Between the 25 and 26 August 2020, Chief Superintendent Vance visited and spoke to officers on both day and night shift to maintain visibility of senior officers. He found those with whom he spoke to be friendly and welcoming and the demeanour within the unit to be cordial, friendly and welcoming.

77. On 26 August 2020, the claimant commenced therapy under the Employee Assistance Programme provided by the respondent.

78. On 28 August 2020 a further Critical Incident meeting was held with a review being undertaken as to steps taken and actions achieved. Support was to be maintained with the claimant and his family with regular welfare meetings to continue. The Diversity Manager was to create an outline plan to address local diversity concerns. Liaison with Police Scotland was to continue to seek the perpetrator. Senior officers continued to be visible and ensure officers were aware of the requirement to adhere to standards of professional behaviour.

79. On 4 September 2020 Chief Superintendent Vance declared the incident closed, but to be kept under review in light of the Police Scotland investigation and Professional Standards Department investigation.

Claimant's welfare considered

80. On 4 September 2020 Inspector Gilmartin contacted the claimant to check on his welfare. During the discussion a potential transfer to another unit was discussed. The claimant had indicated he would consider the position and the form for completion was sent to him. Specific details of such a move were not

explored. Subsequently the claimant indicated that he did not wish to progress consideration of a transfer and the matter did not progress.

81. On 8 September 2020 a Case Management Discussion was held to discuss the claimant's return to work. Discussion took place as to seeking to manage the claimant's health.

82. On 10 October 2020 the claimant returned from sickness absence. The claimant felt the work atmosphere had improved and he believed there would be no further incidents.

Police Scotland investigation closed

83. On 16 February 2021 Detective Inspector Allan of the Professional Standards Department of the respondent advised the Depute Chief Constable of the respondent that Police Scotland had contacted the claimant to advise that no fingerprints had been found on the document. Detective Inspector Allan sought the Depute Chief Constable's approval to close the investigation as he concluded that there were "no further viable lines of enquiry" reserving the right to reopen the enquiry if new information came to light. He could have commenced an internal investigation (by speaking to potential witnesses) but chose not to do so. The respondent was aware that there were 4 officers who had differences with the claimant, whom the claimant considered were adverse to him on the grounds of his religion.

New Equality Policy launched

84. On 5 March 2021 an updated Equality, Diversity and Inclusion Policy and Procedure was adopted (the original policy having been issued on December 2019). This emphasised the need for respect and value. It stated that the "commitment to equality and diversity is more than a legal obligation, it is fundamental to our operational effectiveness". The Policy set out the position within the Equality Act 2010, required behaviours, promoting equality and diversity, religious requirements, grievances and governance. The policy made it clear that complaints of discrimination would be taken very seriously. Under the heading "Training" the policy stated that the respondent undertook

to provide equal access to training and ensure all employees undertake equality and diversity training with managers being equipped with key equality diversity and inclusion skills with a comprehensive training programme delivered by the corporate leaning department. An intensive ongoing training programme was to be in place.

85. The Policy referred to equality support groups that had been established under the Equalities Consultative and Support Network to provide specific support for employees with protected characteristic. A link was provided for further information on the intranet. Support mechanisms were also set out.

Third incident – 30 June 2021 – Claimant's cup has sectarian message

86. On 30 June 2021 the claimant found the letters "FTP" having recently been written on the underside of his mug in the kitchen area having been away from the unit the previous week. He reported the incident to Police Scotland. "FTP" was shorthand for "fuck the pope". The mug the claimant used referred to Celtic Football Club. The ink had not fully dried which suggested it had been written relatively recently. The mug had been stored in the kitchen cupboard which was unlocked. The mug was not in its usual location in the cupboard and had been moved to his section's cupboard where it was located. The kitchen area was accessible by officers and staff and those engaged by the site owner. There was no CCTV in the vicinity (and as the building was not owned by the respondent they did not consider it practicable to extend CCTV).

87. The kitchen was adjacent to the meeting room. Access to the kitchen was via the meeting room or the corridor. Cups were found in a cupboard. There were cupboards marked for each of the sections and a general cupboard. The claimant usually stored his mug (which was personal to him) in the general cupboard. It would be clear for the claimant's mug and its design that it belonged to a Celtic supporter (which in the west of Scotland could be associated with Catholicism). Cleaners would not wash officers' mugs and were unlikely to know which officer had which mug whereas some officers knew which mug belonged to which officer.

88. The claimant reported the incident to a fellow Sergeant who was nearby. The claimant was upset and had to go home. Later that day Acting Inspector Wilson contacted the claimant and discussed the incident. He offered him access to the Employment Assistance Programme, which the claimant accepted. The claimant was unable to continue working that day and commenced a period of sick leave with work-related stress. The claimant received a call from the acting Inspector in Inspector Gilmartin's absence who confirmed matters would progress. The claimant stated he would inform Police Scotland as a hate crime.

89. The professional standards team were formally advised of the incident and that it could potentially amount to gross misconduct.

90. On 1 July 2021, the incident of 30 June 2021 was recorded as a Critical Incident and weekly meetings were instituted. This was because while the previous critical incident had been closed, "there was the potential for sectarian undertones to remerge". Actions were agreed to maintain operational effectiveness and deal with issues arising. That included updating the claimant and his family and completing a health and safety investigation. It was noted that if the professional standards investigation and health and safety investigation result in no further action, a local management plan would be needed to deal with the issues. Assistance was to be given to Police Scotland to assist with their enquires.

91. On 5 July 2021 a Health and Safety incident report was submitted on behalf of the claimant and a referral made to Occupational Health given the impact the incident had upon the claimant's health and his unfitness for work.

Prejudice related incident created

92. On 7 July 2021 the incident of 30 June 2021 was recorded as a Prejudice Related Incident and referred to the Diversity and Inclusion Manager. Later that day a Critical Incident meeting was held and it was agreed to conduct an investigation via professional standards. The investigation would proceed following the Police Scotland investigation. Welfare meetings with the claimant were to continue and senior officers were to maintain high visibility

within the unit. Mr Mehmood noted that the outcome of the investigation would determine what steps were needed.

93. On 7 July 2021 the claimant advised Inspector Wilson by telephone that he had decided to report the incident to Police Scotland.

94. On 7 July 2021 Chief Inspector Brotherston visited the unit to maintain visibility of senior officers. On 9 July 2021 Inspector Wilson visited the unit and submitted an Occupational Health referral for the claimant.

95. On 13 July 2021 a further Critical Incident meeting was held noting the police investigation was proceeding with regular updates given to the claimant and his family. Senior officer visibility was to continue to provide key code of ethics messaging. It was also noted that an extension to the claimant's pay was being explored.

96. Contact details for the professional standards department were sent to Police Scotland that day, with the internal investigation held in abeyance pending the outcome of the criminal investigation.

97. On 15 July 2021 Inspector Wilson emailed all staff in an email headed "Message regarding recent incident". He stated: "I am sure you are as upset as I am about the recent incidence of sectarianism which has occurred at our unit. This matter is now being investigated by Police Scotland/Professional Standards and full support is being given to the individual and their family… [The incidents] are deeply distasteful and go against our values and what we stand for. Sectarianism is also, quite rightly, a criminal offence. It will never be condoned, tolerated or brushed under the carpet by me and if it does occur I expect it to be challenged by everyone who works at Hunterston. You will have my full support in doing so. If anyone has been affected by the recent incident please feel free to come and talk to me."

98. On 17 July 2021 Ms Wilson, Unit-Based Diversity Champion, and Mr Mehmood, Equality Disability and Inclusion Manager, emailed all at the unit. The email stated: "For your information, at present there has been a critical incident declared due to another alleged sectarian issue occurring at the unit.

As the Unit Based Diversity Champion I would like to assure everybody that if any officer at all believes or witnesses any inappropriate matter or behaviour they should have the full confidence to report the matter to myself, their line manage or Mr Mehmood the Equality disability and inclusion manager directly. The matter will be taken seriously." Staff were encouraged to report inappropriate behaviour in confidence.

99. On 20 July 2021 a further Critical Incident meeting was held. The Police Scotland investigation was continuing (with the internal investigation to follow once that investigation was concluded). Welfare support was to continue and senior officer visibility would continue also.

100. On 26 July 2021 all staff were notified that Equality, Diversity and Inclusion training would be carried out at the unit. Staff were told the session was mandatory and those absent would attend the course when it was rerun at a later date.

101. On 27 July 2021 a further Critical Incident meeting was held. The Police Scotland investigation was ongoing and a health and safety investigation would take place. Acting Inspector Wilson was tasked with arranging a programme of Equality, Diversity and Inclusion training at Hunterston, to be delivered by the Corporate Learning and Development Department. A number of staff (including those with whom the claimant had an issue) believed that the training resulted in their being considered bigots and they did not wish to attend. Those individuals were advised that the training sessions were for everyone and were mandatory. All staff attended,

102. On 4 August 2021 a further Critical Incident meeting was held confirming the Police Scotland investigation was progressing. The claimant's wife had made a complaint but had not engaged further to allow the respondent to seek further information. Training was to commence the following day with senior staff to attend to show support.

Face to face training takes place

103. Between 5 August 2021 and 6 October 2021 face to face Equality, Diversity and Inclusion training was undertaken. This was focused and specific training with regard to the impact of sectarianism with discussion and interaction.

104. This training was planned following a meeting of the senior team in August 2020 where the Diversity Manager was to consider local issues. The Diversity Manager considered the training had to be face to face to be more effective.

105. The training was similar to pre-existing training in terms of underlining the importance of respect and of the need to avoid discrimination but focused on religious discrimination specifically and with greater interaction.

Further meetings

106. On 10 August 2021 a further Critical Incident meeting was held noting that the investigation was proceeding.

107. On 17 August 2021 a further Critical Incident meeting was held confirming the investigation was ongoing as was welfare support. The Diversity Manager undertook to review feedback following the training that was ongoing.

108. On 31 August 2021 Acting Inspector Wilson emailed all personnel requesting that anyone with information about the incident of 30 June 2021 should contact Police Scotland with details of the investigating officer being provided.

109. On 1 September 2021 another Critical Incident meeting was held. No further contact had been established with the claimant's wife despite repeated attempts given her complaint and the issue would be considered without her input. The internal investigations were ongoing. The feedback from the training had been positive and was being considered.

Further meetings

110. On 14 September 2021 a further Critical Incident meeting was held. Continued welfare meetings were taking place but the claimant had indicated

that his stress and anxiety had increased and he was engaging with occupational health and would progress with cognitive behavioural therapy.

Health and safety report

111. On 23 September 2021 a Health and Safety Incident Investigation Report was completed. This stated that the author believed the incident was work related given it dealt with relationships at work. With regard to the "underlying root cause" the report stated that: "Given that this is the third such incident the claimant has been victim of, it would be reasonable to suppose that there is an individual/individuals at the site who have a dislike for the claimant based around his religion and are using bigoted/sectarian phrases or acronyms to target him knowing it will cause him distress/mental health."

112. Under the heading "likelihood of a recurrence and potential consequences" it stated: "This is the third incident the claimant has reported with a low likelihood of finding the perpetrator(s) because of the nature of the evidence left behind and lack of witnesses to the incidents. Due to this, when the claimant return to the workplace, reoccurrence is likely."

113. Under "safe environment when interviewing staff" the report noted that all staff who were consulted ort interviewed regarding the incident were given a private room or phone to do so. With regard to previous reports, it was stated that the previous incidents were similar in that they used sectarian (in this case anti catholic) language which is often prevalent in the west of Scotland. No other sectarian incidents were identified.

114. Under the heading "Engage with HR to ascertain any instances of sectarianism" the report noted that other officers were spoken to and there had been anecdotal stories regarding accusations of sectarianism potentially made by officers who were leaving but there seemed to be no evidence to support that.

115. Under "risk control measures" it was noted that welfare meetings with the claimant were continuing, employee assistance programme was engaged, critical incidents were being dealt with, Police Scotland continued to

investigate it as was professional standards, senior officers were visiting, funding was extended for cognitive behaviour therapy for the claimant and specific sectarian training was being rolled out.

116. Under "recommendations" the report stated that "further training for line managers to support them in identifying and dealing with sectarian behaviour" was recommended. CCTV was to be considered in relevant areas but it was noted that may be difficult given the nature of the operation.

Meetings and investigation continue

117. On 28 September 2021 a further Critical Incident meeting was held noting the police Scotland report was awaited. The claimant had contacted the respondent as part of welfare support to state that he did not wish to engage with the organisation. The employee assistance programme was continuing. Support measures were to be put in place via a capability meeting.

118. On 2 October 2021 Police Scotland contacted Inspector Wilson advising that all lines of enquiry had been exhausted and they were closing the investigation. They indicated that no officer or staff member had come forward following the request. Police Scotland decided it was not proportionate to undertake any further enquiries.

Post training report

119. The sectarian focused training concluded on 6 October 2021 and a "Report into the delivery of the Training" was delivered. This noted that the first session involved attendees exploring their values and how they saw the world which led to a discussion about prejudice discrimination and values. The unit commander and senior officers had been present and commented that the "pitch and tone of the session was spot on". The report noted that "the overall feeling and comments from the majority of officers attending were that it was worthwhile, timely and necessary".

120. The report noted that a "needs, concerns and expectations exercise" was conducted at the start of each session to gauge the group, their attitude and willingness to engage. Examples of "anecdotes and theories that arose during

the week" included: "This is normal banter, someone is just not seeing at as such, these incidents are self inflicted, historically these incidents haven't been dealt with, a concern that the site is perceived as a sectarian hotbed, this is a smokescreen to cover up bullying, we're all being labelled the same".

121. The report stated that the points were addressed. It stated: "We have the impression that these feelings can run deep and therefore the communication of any investigation and any outcomes are vital to re-establish trust."

122. The report concluded: "Our impression of the unit and the officers based there is that it is not beset with sectarian issues. Rather there have been a few incidents, apparently from both sides, that could be considered isolated and not a reflection of the unit as a whole. Across the unit there are representatives of both communities as well as those that are not indigenous to the region. Most have stated that any references to either side were light hearted, good natured and received as such".

123. Those who had not received the training were to receive a training session by the end of the year (and the claimant's training could be dealt with upon his return to work).

Further meetings

124. On 12 October 2021 a further Critical Incident meeting was held noting that in the absence of any evidence Police Scotland had closed their investigation and professional standards would review the position "expecting also to close out the investigation". As the claimant's wife had not engaged further, that complaint would not proceed. A capability meeting would proceed.

125. On 19 October 2021 a further Critical Incident meeting was held when it was noted the internal investigation was likely to be closed in the absence of any evidence. The health and safety investigation was also closed. Welfare meetings were to continue. Training would continue.

126. On 19 October 2021 Police Scotland formally informed the claimant that their enquiry had been concluded.

127. On 26 October 2021 a further Critical Incident meeting was held noting that the investigations had been concluded. Occupational health input was being progressed and the instructing letter was with the claimant's GP.

128. On 1 November 2021 a Stage 1 capability meeting was held with the claimant to discuss ways in which a return to work can be arranged. Cognitive behavioural therapy sessions were being progressed to assist the claimant. The claimant did not feel he would be able to return to the unit.

129. On 2 November 2021 a further Critical Incident meeting was held noting the investigations had completed. The final meeting took place on 9 November 2021 at which the incident was closed by Superintendent Robinson, with each of the investigations having concluded.

Observations on the evidence

130. This was not a case in which there were large numbers of material factual disputes for the purposes of the issues in this case with the majority of the factual matters not being in material dispute.

131. We were satisfied that each of the witnesses sought to provide evidence to the best of their recollection.

132. With regard to the issues where disputes arose, the first issue related to whether or not the claimant had told Inspector Gilmartin (and later Superintendent Jones) that he did not wish Police Scotland to be involved. The Tribunal concluded from the evidence that Inspector Gilmartin and Superintendent Jones both genuinely believed the claimant did not wish to involve the authorities at that stage. The claimant may have been undecided but we concluded that Inspector Gilmartin's and Superintendent Jones' genuine belief was that the claimant had decided against an intervention at that stage. The Tribunal did not consider Inspector Gilmartin or Superintendent Jones to have misrepresented the position.

133. The Tribunal considered the assertion (made by the claimant's agent in submissions) that the respondent had been seeking to avoid dealing with matters (or "gas light" the claimant in the sense of not fully supporting the

claimant and taking matters seriously). The Tribunal did not consider that to be a fair summary of the respondent's approach in its attempt to support the claimant during relevant meetings, both formal and informal. The claimant was clearly under significant stress having been subject to harassment which caused him real offence. The respondent provided the claimant with support and sought to assist him in progressing with the issues in a manner that was acceptable to the claimant. The respondent was sympathetic and compassionate and took the allegations extremely seriously.

134. A dispute arose as to what had been discussed with regard to a potential transfer to another location. The Tribunal preferred the evidence of Inspector Gilmartin who believed the claimant had not wished to explore the issue of a transfer. Had the claimant wished to progress that matter, support would have been given. There was no evidence to suggest that such support would have been denied of the claimant. The respondent wished to be careful in not seeking to persuade the claimant to leave his base given the context.

135. A further and significant dispute that arose was whether or not there was a "sectarian problem" at Hunterston. Both parties addressed the Tribunal on this issue and it is necessary to make a number of observations about this issue. It is relevant since it sets the context of this case and in particular the factual matrix against which the reasonable steps defence is considered.

136. The respondent's agent noted that prior to the three incidents which are the subject of the present proceedings, there were no proven incidents of sectarian discrimination at Hunterston. It was stated that such issues as had arisen fell into two categories: allegations of unfair treatment which were attributed by the alleged victim as being motivated by sectarian bias and allegations that others harboured sectarian prejudices.

137. It was also noted that in considering the extent of sectarian issues at Hunterston, it is critical to bear in mind that the case considers a large policing unit over a period of 15 years. In that time, the evidence indicates the claimant himself, having joined Hunterston in 2007 he did not experience any incidents until an isolated remark in the pub in 2011, where a colleague suggested the

claimant had an issue with his religion (which the claimant denied). The claimant did not experience any noteworthy incidents for a further seven years until his grievance in December 2018. That grievance initially related to a complaint by the claimant that a colleague had exaggerated the concerns of another officer about the claimant's allocation of overtime. The claimant accepted there was nothing explicitly sectarian about this.

138. During the grievance process, the claimant asked for a further matter to be investigated, namely an allegation that had been passed to his colleague in his capacity as Federation Representative that the clamant had used a nationalist Irish phrase. This was a hearsay allegation falling, an allegation against the claimant which was found to be unfounded.

139. The respondent's agent argued that there was only evidence of three potentially sectarian incidents. Firstly in 2014 or 2015 there would appear to have been unspecified words exchanged at a social function outside of work. This was investigated and expectations in regard to behaviour at the unit were reinforced by the Divisional Superintendent and the Unit Commander. There would not appear to have been any repetition.

140. Secondly on 18 November 2018 Mr McGarvie raised a Prejudice Related Incident. This related to an allegation that Mr McGarvie's partner had been displaying favouritism in the allocation of duties. There was nothing explicitly sectarian about this. However, Mr McGarvie sought to put a sectarian slant on this on the basis of a photograph of colleague on an Orange walk and a Facebook post in which a colleague was critical of the controversial policy of positive discrimination introduced in Northern Ireland. The suggestions appeared to be based on prejudicial thinking.

141. Finally it was submitted that Mr Thomas made similarly unfair assumptions on the basis of the Facebook material. There was no finding of sectarian discrimination and Mr Thomas left the Respondent in 2019.

142. Taken in the context of the size of Hunterston, the large number of officers working there, and the time period of 15 years, it was submitted that these isolated, low level and inconclusive incidents could not justify a finding of

widespread problems of sectarianism. There were clearly some personal animosities and occasional allegations and counter-allegations, but no more.

143. It was argued that the imbalance between the lack of hard evidence of sectarian prejudice and the level of suspicion of the claimant (and Mr Thomas and Mr McGarvie) was striking. There appeared to be a readiness to see sectarianism behind ordinary tensions between colleagues, and an unfortunate readiness to attribute bigotry to others, sometimes without any justification.

144. In short it was submitted that taking into account the time-frame and small number of individuals involved, the evidence shows no general problem of widespread sectarianism at Hunterston. At most, it showed a small number of incidents involving a small number of individuals, which may or may not have had sectarian undertones. That was a view shared by the respondent's witnesses and the trainers at the most recent training event.

145. The claimant's agent argued that sectarianism can be covert or overt and the fact there had been unfounded or false complaints could have been motivated by sectarianism. The fact there was no overt sectarianism did not result in there being no sectarianism. The fact there were repeated unfounded complaints were made could be as a result of religion.

146. The Tribunal considered that there had been religious tensions in place amongst certain colleagues. It was clear, as the author of the health and safety report noted, that there was at least one person (or persons) who had a dislike of the claimant because of his religion. There had been previous disagreements that arose as a result of religion.

147. The trainers of the most recent training did not consider the respondent to be "beset" with sectarianism and did not consider the relatively few incidents (on both sides) to be reflective of the unit. The Tribunal has no doubt that this is correct bearing in mind the period of time involved and number of incidents.

148. Nevertheless, for the purposes of this case the discussion as to whether or not there was a "sectarian problem" or issue regarding religion was a semantic

matter. There were a number of issues that had arisen as a result of religion. The claimant had been subject to 3 separate acts of religious harassment (and the acts were accepted by the respondent to amount to unlawful harassment). There were important equality issues that required to be dealt with (irrespective as to whether or not there was considered to be a "sectarian issue" or not) with personality conflicts which the respondent had to resolve. At least one member of staff wished to offend the claimant (and used his religion to do so). These were serious issues.

Law

Time limits

149. The time limit for Equality Act claims appears in section 123 as follows:

> *"(1) Proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of three months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the Employment Tribunal thinks just and equitable …*
>
> *(2) …*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it".*

150. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** 2003 IRLR 96 which deals with circumstances in which there will be an act extending over a period. In dealing with a case of

alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52: “The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.”

151. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

152. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

153. The Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548 confirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks**. Thus tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

154. In **South Western Ambulance Service NHS Foundation Trust v King** EAT 0056/19**,** the Employment Appeal Tribunal observed that when a claimant wishes to show that there has been ‘conduct extending over a period’ if any of the acts relied upon are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

Extending the time limit

155. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

156. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should "have regard to" the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- The Tribunal should have regard to the prejudice to each party.
- The Tribunal should have regard to all the circumstances of the case which would include:
    - Length and reason for any delay
    - The extent to which cogency of evidence is likely to be affected
    - The cooperation of the respondent in the provision of information requested
    - The promptness with which the claimant acted once he knew of facts giving rise to the cause of action
    - Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

157. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay;

the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

158. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. This is a matter which is in the Tribunal's discretion. The Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

159. In **Rathakrishnan v Pizza Express (Restaurants) Ltd** 2016 ICR 283 the Employment Appeal Tribunal held that in that case the balance of prejudice and potential merits of the reasonable adjustments claim were both relevant considerations and it was wrong of the Tribunal not to weigh those factors in the balance before reaching its conclusion on whether to extend time.

160. The Tribunal considered and applied the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed and in particular assess the respective prejudice.

161. The Tribunal also applied the principles set out by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5. The Court emphasised that it would be wrong to rigidly apply the "Keeble factors" since that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The correct approach in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

Reasonable steps defence

162. Section 109(1) of the Equality Act 2010 states that: 'Anything done by a person (A) in the course of A's employment must be treated as also done by

the employer'. The employer's knowledge or approval of the act in question is not relevant (section 109(3)). The employer has a defence under section 109(4) which states: "In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A… (a) from doing that thing, or (b) from doing anything of that description.' it can show that it took all reasonable steps to prevent A from doing that thing or from doing anything of that description."

163. Thus, for an employer to be liable for the discriminatory conduct of one of its employees, three things must be established: that there is, or was at the relevant time, a relevant employment relationship between the employer and the alleged discriminator, that the conduct occurred 'in the course' of employment (as widely defined) that the employer failed to take all reasonable steps to prevent the conduct in question.

164. In **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010, Underhill LJ said at paragraph 36: "it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination". The onus is on the claimant to establish this.

165. In **Forbes v LHR Airport Ltd** [2019] ICR 1558, Choudhury J surveyed the authorities which have considered the issue of whether an employee's conduct is "in the course of employment". He concluded at paragraph 25: "From these authorities, it can be seen that the main principle to be gleaned is that the question of whether conduct is or is not in the course of employment within the meaning of section 109 of the Equality Act 2010 is very much one of fact to be determined by the tribunal having regard to all the relevant circumstances. It can also be said that the words 'in the course of employment' are to be construed in the sense in which the lay person would understand them and that there is no clear dividing line between conduct that is in the course of employment and that which is not. Each case will depend on its own particular facts." That wide interpretation of "course of employment"

is supported by the Equality and Human Rights Commission Code of practice (at paragraph 10.46).

166. The Equality and Human Rights Commission Employment Code provides the following example at paragraph 10.50: 'An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act'.

167. The onus rests firmly on the employer to establish the defence. An employer can do so by showing either that it attempted to prevent the particular act of discrimination or that it attempted to prevent that kind of act in general.

168. What amounts to 'all reasonable steps' will depend on the circumstances but examples might include providing supervision or training and/or implementing an equal opportunities policy. The Equality and Human Rights Commission Employment Code (at paragraph 10.52) suggests the following: implementing an equality policy, ensuring workers are aware of the policy, providing equal opportunities training, reviewing the policy as appropriate, and dealing effectively with employee complaints.

169. The Employment Appeal Tribunal issued guidance as to the approach tribunals should adopt when determining whether an employer has satisfied the 'reasonable steps' defence in **Canniffe v East Riding of Yorkshire Council** 2000 IRLR 555*,* when it held that the proper test of whether the employer has established the defence is to identify first, whether there were any preventative steps taken by the employer, and secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable. The question as to whether such steps would in

fact have been successful in preventing the act of discrimination in question was not determinative. The steps taken by the employer do not need to be successful in order for the defence to be made out. As Burton J said at paragraph 14: "The employer, if he takes steps which are reasonably practicable, will not be inculpated if those steps are not successful, indeed, the matter would not be before the court if the steps had been successful, and so the whole availability of the defence suggests the necessity that someone will have committed the act of discrimination, notwithstanding the taking of reasonable steps".

170. The context is important, such as whether or not the employer knows of particular risks. Steps which require time, trouble and expense may not be reasonable steps if, on assessment, they are likely to achieve nothing (**Croft v Royal Mail Group plc** 2003 ICR 1425).

171. Equal opportunities training that is delivered long before the act of discrimination, and not followed up, is unlikely to meet the 'reasonable steps' defence. In **Allay (UK) Ltd v Gehlen** 2021 ICR 645, the Tribunal accepted that employees had received training that covered harassment but noted that the training had been delivered two years prior to the harassment and was 'clearly stale'. A reasonable step would have been to provide refresher training. The Employment Appeal Tribunal found that the less effective the training is, the more quickly it becomes stale and that is necessary to consider not only when any training took place but how thorough and forceful it was (see paragraphs 35 and 37). The Tribunal concluded that the training had become stale not merely because one individual had made racist comments but because other colleagues and managers knew harassment was taking place but took no action in response to it (paragraphs 48 and 50).

172. The Employment Appeal Tribunal emphasised that in considering the defence, a Tribunal should identify the steps taken by the employer, consider whether they were reasonable and consider whether any other steps should reasonably have been taken. It is not generally sufficient to determine whether there has been training as the nature of the training should be considered and the extent to which it may be effective with a consideration as to what

happened in practice. Rather than simply say the training was satisfactory (or unsatisfactory) findings should be made as to the policies and training that existed, and if the Tribunal considers it should be refreshed, when would it be reasonable to do so. The burden is firmly on the employer to establish the defence and the legislation encourages employers to take significant and effective action to combat discrimination in the workplace.

173. Generally speaking the defence is limited to steps taken before the discriminatory act occurred given the statutory wording (see **Mahood v Irish Centre Housing Ltd** EAT 0228/10) and it is not sufficient for an employer to show that the discrimination was promptly remedied (see, for example, **Fox v Ocean City Recruitment Ltd** EAT 0035/11*)*. In **Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical and Environmental Services)** EAT 0158/00 the Employment Appeal Tribunal held that the aim of the statutory provision is to *prevent* discrimination from occurring and so when considering whether an employer has made out the defence, the Tribunal must look at events that took place before the discriminatory incident. Subsequent events are relevant to the question whether the defence has been made out only in so far as they shed light on what occurred before the act complained of (such as by demonstrating that a policy that exists on paper was not in fact operated in practice).

174. In **Allay (UK) Ltd v Gehlen** (above) the Employment Appeal Tribunal considered that the Tribunal was entitled to conclude that the training employees had received was stale, not only because racist comments had been made but also because a colleague who heard the racist comment did not report it, and two managers who had been informed about the racist remarks did not take any action either. Thus actions following the unlawful act can be taken into account to a limited extent.

Submissions

175. Both parties had prepared written submissions and were given the chance to comment upon each other's submissions in addition to making oral submissions. The Tribunal is grateful to both parties for taking the time to do

so. The parties' submissions were fully taken into account and the relevant submissions are set out below as appropriate when considering each issue.

Discussion and decision

176. The Tribunal considered the parties' submissions in detail together with the evidence that was provided to the Tribunal orally and in writing. The Tribunal was able to reach a unanimous decision in relation to each issue. We shall approach each issue in turn.

First issue - who perpetrated the relevant acts?

177. The first issue is to determine whether or not the 3 acts (taken individually) were perpetrated by an employee or agent of the respondent. In this regard the Tribunal required to consider whether it was more likely than not (ie based on the balance of probabilities) that the person who was responsible for the conduct was someone for whose acts the respondent was liable (an employee (as widely defined) or agent.

178. The Tribunal did not consider it necessary the claimant prove the specific person responsible on the balance of probabilities. The Tribunal considered that it was sufficient if there was a greater than 50% chance the person responsible was someone for whose acts the respondent was responsible, since otherwise anonymous acts of harassment carried out by employees could never be established as unlawful. It was necessary for the Tribunal to be satisfied on the evidence that the persons responsible for each of the acts in question were more likely than not to be someone for whom the respondent is liable (rather than a particular person).

First incident

179. The first incident is that on 1 June 2020 when the claimant was clearing out his pigeon hole he found an envelope addressed to "PC 850 McCue" on which someone had written "UDA no surrender".

180. The claimant's agent noted the perpetrator is unidentified and nobody is able to identify the person responsible. It was submitted that it is not necessary for

the claimant to identify the specific individual responsible for this act of harassment. Rather it is for the claimant on the balance of probabilities to prove the person responsible was an employee or agent of the respondent. It was argued that if it was necessary to identify the specific individual responsible for the act of harassment this would mean an employer could never be responsible for an anonymous acts of an employee's harassment which would severely limit the effectiveness of the law.

181. The claimant's agent argued that around 90% of those with access to the unit were employees (or officers) of the respondent. The police station is an armed police station on a secure nuclear site. It is difficult to envisage a workplace with a higher level of security or limitation of access. Further, the respondent's own witnesses conceded in evidence that the likelihood was that it was a member of police staff who perpetrated this act and it was just the precise identity of the individual responsible that was unknown.

182. It was submitted that the numbers alone should allow the Tribunal to make a finding that on balance of probabilities an employee or employees of the respondent were responsible. In addition to the numbers, there were a number of other factors which point to the fact that it was an employee of the respondent who was responsible. There was undisputed evidence that officers had very little interaction with cleaners. The claimant did not communicate extensively with non respondent individuals with access to the site. It was unlikely they would have known his religion and so it was unlikely they would have targeted him with a sectarian note. Further whilst they may have known his name, it is unlikely they would have known his warrant number and so they would not know which pigeon hole belonged to him. It was also unlikely a cleaner would have known the claimant's rank.

183. It was also known that there had been ongoing disputes between officers on religious grounds with groups making allegations and counter allegations against one another. The claimant also had a personal disagreement with Sergeant Craig who had previously made allegations against the claimant, which resulted in the claimant raising a grievance against Sergeant Craig. This would explain possible motivation as to who left the note.

184. The respondent's agent argued the claimant was unable to establish any of the incidents were perpetrated by an employee of the respondent. Despite the investigations undertaken internally and by Police Scotland, it had been impossible to identify the individual responsible and the claimant had accepted that he did not know, and was likely never to know.

185. The areas in which the incidents took place were accessible to individuals who are not the employees or agents of the respondent and non-respondent staff interacted with the respondent's officer on a day to day basis.

186. It was submitted that the mere fact a majority of those with access to the relevant areas would have been police officers does not establish that the perpetrator was an officer. It was argued that there was simply no evidential basis for asserting any particular individual was responsible in circumstances where a large number of individuals might have been responsible and the identification of a perpetrator is inevitably a speculative exercise.

Decision on first incident

187. The Tribunal considered the evidence led before it. The act in question occurred within the unit with the note being placed within his pigeon hole which had his warrant number (and not name) attached. There was a greater than 50% chance that the person who placed the note there was an employee or agent of the respondent. The Tribunal reached this conclusion for the following reasons.

188. Firstly around 90% of those with day to day access to the locus were those for whom the respondent was liable. There was no evidence before the Tribunal that suggested the 10% of those with access spent a greater time at the area in question. The evidence was that officers rarely checked their pigeon holes but the pigeon holes were located in the meeting room where the officers would meet. It was more likely than not that officers more than those not engaged by the respondent would spend more time there.

189. There was no evidence suggesting those who accessed the area who were not engaged by the respondent knew the claimant's warrant number or his pigeon hole whereas each officer would be more likely to be so aware.

190. There had already been issues with religious overtones with other persons engaged by the respondent in connection with religion. This incident was of a similar nature to previous incidents which had been carried out by those for whom the respondent was liable. There was no evidence suggesting there were similar concerns or issues by the 10% staff.

191. The Tribunal accepted the claimant's agent's submissions in relation to this issue. The fact the respondent's own witnesses concluded it was likely to have been someone for whom the respondent was responsible supported the Tribunal's conclusion.

192. There was a greater than 50% chance that the person responsible for the first incident was employed or engaged by the respondent, for whose actions the respondent is liable.

Second incident

193. Both agents made similar submissions in relation to the second incident which was the note found in the jacket the claimant wore to and from work.

194. The claimant's agent submitted that as the jacket was left hanging on a peg within the male changing room, a cleaner would not likely to know what jacket belonged to the claimant and given the proximity to the first incident and the fact the note contained the same sectarian content, it was highly likely the same person was responsible. The respondent's agent argued that it was not possible to identify who was responsible.

Decision on second incident

195. The Tribunal considered the evidence and concluded that it was more likely than not that the person responsible for the second incident was the same person who had been responsible for the first incident. It was possible the incidents had occurred at the same time, with the claimant only discovering

the material on different dates. The message was the same and the perpetrator wished to cause the claimant offence (given the religious overtone). It was more likely than not that the note was placed in the claimant's pocket when his jacket was in the locker room. Those who accessed the room were more likely to be those for whom the respondent was liable. There had been a history of disagreements with staff for whom the respondent was liable (with no evidence of such disagreements having arisen with those not engaged by the respondent who had access to the jacket). The fact the respondent's witnesses believed the incident to have been caused by someone for whom the respondent was liable supported this conclusion.

Third incident

196. Both agents made similar submissions with regard to the third incident relating to the graffiti under the claimant's mug. The claimant's agent noted that the mug was left in the kitchen cupboard under the sink before he went on leave. When he returned from leave it was within the section cupboard. There were a number of sections and so it would be unlikely a cleaner would place the claimant's mug back in the correct section cupboard. The individual responsible for the graffiti is more likely to have known which section the claimant was. Cleaners did not clean the kitchenware and so cleaners would not have been handling the mugs in the first place. The respondent's agent argued there was no evidence to identify the perpetrator.

Decision on third issue

197. This was not an easy matter to determine. The previous incidents had been directed at the claimant (and his name had been used). This occasion related to a cup clearly used by a Celtic supporter (which in the west of Scotland can be considered by some to be related to Catholicism). It was not obvious that the focus of the perpetrator had been the claimant, rather than the mug, and it was possible that the person responsible wished to offend the mug owner (and could have had no background knowledge as to the claimant).

198. Having assessed the evidence, the Tribunal concluded, that there was a greater than 50% chance that the person responsible had been engaged by

the respondent for whose acts they are responsible. The incident occurred within an area more likely to be frequented by officers. It was where officers would take their breaks. There was no evidence that suggested those not engaged by the respondent who were present in the unit frequented the kitchen for any length of time whereas officers obviously did. The person responsible is more likely than not to have known whose mug it was given it was returned to the correct section. The claimant's agent's submissions are meritorious on this issue. There was no evidence suggesting any of those not engaged by the respondent had any reason to leave such graffiti (or had any history of doing so) unlike the position with regard to the respondent's staff who had a history of matters with a sectarian overtone.

199. The Tribunal considered the fact that not every officer knew what their colleagues mugs were. Some officers knew what other officer's mugs were. There was no evidence that those not engaged by the respondent (or for whose acts the respondent would be liable) knew which mug belonged to whom given the cleaners did not ordinarily clean the mugs. It was more likely than not that it was a colleague of the claimant who had applied the graffiti to his mug.

200. The Tribunal concluded that the claimant had shown, on the balance of probabilities, that the person responsible for each of the three incidents relied upon was someone for whom the respondent was liable.

Second issue – Act done in course of employment or authority

201. Even if it was more likely than not that the act had been carried out by someone for whose acts the respondent was liable, the claimant requires to establish that it was more likely than not that each of the acts was done in the course of the relevant employee's employment or within the relevant agent's authority, such that the respondent is vicariously liable for their acts.

202. The respondent's agent argued that the lack of evidence about when and how each of the incidents occurred meant that even if they were perpetrated by an employee of the respondent, it was not possible to undertake the fact-sensitive analysis required to determine whether such a person was acting in

the course of their employment when perpetrating the relevant acts. For example, it is unknowable whether the individual was on duty at the relevant time or perpetrated in the workplace.

203. The claimant's agent argued that if that was correct then an employer could never be responsible for an anonymous act of harassment perpetrated by an employee which would limit the protection by the Equality Act.

204. The Tribunal concluded that the claimant requires to show that those responsible were acting in the course of their employment (or authorised to act). It is sufficient the claimant establish this on the balance of probabilities. The Tribunal must be satisfied that it is more likely than not that the person responsible for each incident was acting in the course of their employment/authorised act at the relevant time. It may be possible to achieve this without proving precisely who was responsible or precisely when it occurred, but there requires to be evidence showing that there was more than a 50% chance it was done at a time by a relevant person when the respondent would be liable.

205. The claimant's agent argued that there were sufficient – and agreed – facts available to determine whether the acts were in the course of employment, which is given a wide meaning, including acts in the workplace, construed in the sense in which a lay person would understand them.

206. With regard to the first incident the envelope with the graffiti was an old envelope – it contained a letter from 2018 inside it. It was more likely than not that this was within the workplace with the perpetrator writing on the envelope inside the workplace during working time. It was also submitted that the respondent's witnesses considered this was an act which occurred within the workplace. It was submitted that the lay person would consider an act which takes place within the workplace and during working time as one which would have been carried out within the course of employment.

First incident

207. The Tribunal considered the evidence in relation to this issue. The issue is not whether the incident occurred at the workplace but rather whether the incident happened at a time when the person who was responsible for it (being someone for whom the respondent was liable) was acting in the course of their employment or otherwise during a time for which the respondent would be liable for their actions.

208. The first incident is more likely than not to have occurred at the pigeon hole. The act is more likely than not to have taken place within the unit. It is more likely than not that the perpetrator (whom the Tribunal found was more likely than not to be someone for whom the respondent was liable) carried out the act at a time when they were acting in the course of employment or otherwise at a time when the respondent would be vicariously liable. Even if the person did the act outwith their working hours, it was more likely than not to have been at a time when the respondent was liable, given the connection to the workplace and the fact the incident took place within the workplace. Having carefully assessed the evidence, the Tribunal concluded the first incident occurred at a time when the respondent would be liable.

209. The incident happened at the pigeon hole area which was an area frequented by those for whom the respondent was liable, who are more likely to be present in that area only when working (or when otherwise carrying out acts related to their employment).

Second incident

210. The claimant's agent submitted that the note was found within the claimant's work jacket in the inside pocket, which was a jacket worn only to and from work. As the note was found within the inside pocket it would be impossible for the note to have been placed into the pocket whilst the claimant was wearing it. The claimant left the jacket unattended whilst at work within the male changing room hanging on a peg. This would be the only opportunity for anyone to place anything within the inside pocket in the workplace. On the balance of probabilities the note must have been place within the jacket pocket whilst in the workplace during working time, likely when the claimant

was out of the police building on patrol. Further the respondent's witnesses also considered that this was an act which occurred within the workplace.

211. The Tribunal considered the evidence. The incident occurred within the locker room. It was more than 50% likely that the act occurred at a time when the person was acting in the course of their employment or when the respondent would otherwise be liable for their actions. It occurred within the workplace. Even although it was possible staff would be at the locus before or after their shift, it was likely to have occurred at a time when the respondent would be vicariously liable for their actions given the context and circumstances.

Third incident

212. The claimant's agent noted that the graffiti was found on the bottom of the claimant's mug following a period of leave. The claimant left the mug in the cupboard under the sink prior to going off on leave and found it within the section cupboard upon his return. The mug was unlikely to have left the workplace. The perpetrator is more likely than not to have taken the mug and written graffiti on it within the workplace, during working time. The respondent's witnesses also considered that this was an act which occurred within the workplace.

213. The Tribunal prefers the claimant's submissions in this regard and upholds them. The incident occurred within the kitchen. It was more likely than not to have been carried out a time when the respondent would be liable in law for the actions of the unknown perpetrator. This is due to the context and circumstances. The incident took place in the kitchen by someone who knew in which unit the claimant was based (and where his mug went). It is more than 50% likely the act was done at a time when the respondent would be liable in law for the perpetrator's actions since there is unlikely to be a reason for the person to be present at the locus when not working.

Third issue: Time limits

214. Given the Tribunal has found that the claimant has established that the actions were carried out by individuals for whom the respondent was liable,

at a time when the respondent was liable, next issue is whether given the first 2 incidents occurred outwith the limitation period for raising a claim, the acts of discrimination relied upon by the claimant amount to an act continuing over a period.

215. The claimant's agent accepted that the claims for the first incident (1 June 2020) and second incident (17 August 2020) were brought outwith the ordinary time limits. The time limit for bringing claims was therefore 31 August 2020 and 16 November 2020. The claimant contacted ACAS on 21 July 2021 lodging his claim on 9 September 2021.

216. The claimant's position was that the three acts were a continuing act of discrimination and therefore that the ordinary time limit should be taken from the final incident, on 30 July 2021 (and no issue of time bar arises).

217. The question was whether the incidents were an act extending over a period, as distinct from a succession of unconnected or isolated specific acts, looking at whether or not the acts are part of a series and whether they are acts which are similar to one another. A relevant factor is whether the same individuals or different individuals were involved in the incidents. Although the precise identity of the perpetrators is unknown it was believed that the same group of officers were responsible for.

218. It was submitted by the claimant that the incidents formed part of a series of acts specifically targeting the claimant because of his religious beliefs. The acts are very similar, the first two in particular both featured the same delivery method (a note) and contained the same phrase. The third incident is similar with graffiti left on an object belonging to the claimant. This was not an isolated incident that is raised out of time; nor two incidents separated out over a long period of time. Instead there are three linked and related incidents happening over 12 months. It was submitted that the acts were perpetrated by the same person or a limited group of employees within 13 months of each other that are agreed to satisfy the definition of religious harassment. Accordingly, these are not stand-alone events. It was a continuing act.

219. The respondent' agent argued that there was no evidence to suggest that the three incidents amounted to "conduct extending over a period". It was argued that three isolated acts over a period of a minimum of 13 months cannot be characterised as a policy, practice, "ongoing situation" or "continuing state of affairs", particularly where there is no evidence to establish any relevant link or coordination. Given the first message was written on an envelope addressed to "PC 850 McCue", it is likely that the true overall timescale was significantly longer, and possibly as long as three years. The evidence of any wider issue of sectarianism was inconclusive and does not justify any finding of a concerted campaign against the claimant.

220. Finally, it was submitted that the third incident was different to the first two, and might well have been perpetrated by a different person and for a different motive, bearing in mind that the claimant's mug celebrated a famous Celtic victory. It was just as possible that it was an offensive comment related to Celtic's traditional association with Catholicism as directed against the claimant, particularly given that not everyone in the Unit would know which cup every officer had.

Decision on act extending over a period

221. The Tribunal had no hesitation in concluding that the first two incidents were closely connected. They were not stand alone or isolated incidents but part of a series of acts, likely to have been carried out by the same person. The Tribunal considered the respondent's submissions carefully with regard to the third incident and concluded that on balance it was likely that the third incident was part of a series of acts, an act extending over a period.

222. While it was possible that the third act was unconnected to the first two, the Tribunal considered it was more likely than not that the third act was connected to the first two. The mug had been placed back into the correct section, suggesting the person responsible had not simply been wishing to place the comment upon a mug, but rather place it upon the claimant's mug and thereby cause the claimant offence (as had been done in relation to the previous 2 incidents). There was no evidence that any other person had been

affected by reason of religion and the evidence suggested the focus was in relation to the claimant (and his religion).

223. The Tribunal also considered the time between the second and third act. The second act took place on 17 August 2020 and the third act on 30 July 2021. The claimant was absent from work from 18 August 2020 until 10 October 2020. While the time between the second and third incident was significant, the Tribunal considered that it was likely that the same person or persons were behind the incidents which amounted to a continuing act of religious harassment. The Tribunal looked at the substance of each of the acts (which are each accepted to be acts of unlawful harassment) and concluded that they did not amount to isolated and separate incidents but rather, on balance, amounted to part of one continuing act of harassment. On that basis the claims were lodged in time.

Just and equitable

224. If the Tribunal was wrong in its conclusion that the three incidents amounted to an act extending over a period, the Tribunal considered whether the limitation period should be extended on the basis that it would be just and equitable to do so.

225. The claimant's agent emphasised the wide discretion the Tribunal has and that if the Tribunal found the claim to be time barred and did not exercise discretion in the claimant's favour, he would be denied a finding of discrimination whereby he was harassed on two previous occasions. He submitted that despite the passage of time there had been no obvious or apparent impact upon the preparation or conduct of the and nor upon the cogency of the evidence as the respondent was able to present a full defence of the claims and the events of the first two events would have formed part of the evidence in any event.

226. The key issue with regards to any failure to lodge the claim in time was the claimant's mental health. While the claimant returned to work within the ordinary time limit, however it would, it was submitted, be an error to interpret his fitness for duty as evidence that his mental health had fully recovered.

227. The claimant's agent argued that the claimant's significant ill health was relevant and there would be a far greater prejudice to the claimant as opposed to the respondent if his claim could not proceed since the claimant would lose a good claim on its merits while the respondent suffered no prejudice in conducting its defence to the claim.

228. The respondent's agent noted that the claimant accepted in evidence that he could have brought a claim after the first two incidents, but that he chose not to. It was submitted that, in those circumstances, it would not be just and equitable to extend time. The respondent's agent noted that the onus is on the claimant to show why claims should be permitted to proceed out of time: and given the claimant took a conscious choice not to bring a claim, it would be unfair to the respondent and prejudicial to require it to meet stale claims, relating to events which took place almost two years ago.

229. The Tribunal considered the evidence led carefully and the recent Court of Appeal guidance in reaching a decision in this area. The key issue in determining whether or not it is just and equitable to allow the claims to proceed is the prejudice caused to both parties. The Tribunal concluded that, had it been necessary to do so, the Tribunal would have found that it would have been just and equitable for the claims to be allowed to proceed. Even if the final act was a standalone or isolated incident, the first two acts were clearly connected. While the claimant chose not to pursue the claims at that time, his mental health was adversely affected by the treatment he had received and the events that had happened, during his employment. His principal focus was to secure a return to work.

230. The Tribunal considered the prejudice to the respondent. While it was suggested that the cogency of evidence was affected as a result of the delay, the respondent was fully able to present its defence and there was no suggestion a fair hearing was not possible. While there were some disputes, these were not disputes that arose due to the passage of time but disputes that arose as a result of the perception as to what had been said or agreed. The same disputes were likely to arise had the hearing taken place sooner.

The Tribunal did take into account the prejudice of having to defend a claim which was on its face out of time.

231. The Tribunal also took into account the fact the claimant was able to return to his role as a firearms officer (and did so without raising a claim). His mental health had an impact upon his health but equally he was able to carry out his role and return to work. That was an important factor the Tribunal placed in the balance. The Tribunal also took into account that the acts are accepted to amount to harassment *per se*.

232. The Tribunal balanced the length and reason for the delay in this case. The claimant had explained why he did not raise a claim when he did, with his mental health having been affected. The Tribunal balanced that against the fact the cogency of evidence was unaffected. A fair hearing was self evidently still possible and the respondent was in no way hampered by the passage of time (and there was no suggestion from any witness that the passage of time affected their ability to recall matters).

233. The claimant decided following the third incident to raise a claim given the impact of the third act of harassment upon him following upon the effect of the previous two incidents.

234. On balance the Tribunal considered the prejudice to the claimant in the circumstances of this case to be far greater in not being allowed to proceed with the claims, given his mental health and the context in which the issues arose balanced with the impact upon and prejudice to the respondent.

235. The Tribunal considered the evidence led and was satisfied that the claimant had persuaded the Tribunal that it was just and equitable to allow the claims to proceed, had this been required.

Final issue: Reasonable steps defence

236. The final issue the Tribunal required to consider is whether the relevant acts are acts for which the respondent may be liable, the respondent took all reasonable steps within the meaning of Section 109(4) of the Equality Act 2010 to prevent employees from committing such acts, or committing acts of

that description so that the respondent has a defence to the claims of harassment. In reaching its decision as to the defence in respect of the 3 incidents, the Tribunal carefully considered the principles set out in **Allay**, recognising that the purpose of the legalisation is to encourage employers to take significant and effective action to combat discrimination in the workplace and that the defence can only be sustained where the Tribunal is satisfied all reasonable steps have been shown to have been taken to prevent discrimination generally or the act in particular. The Tribunal carefully and in detail assessed the steps that were taken from the evidence led and their reasonableness and considered the context in which the incidents occurred.

237. The Tribunal requires to consider each incident individually and the steps that were taken and whether all reasonable steps were taken.

First incident

238. Both parties began their submissions with some general comments as to the policies and training position. The respondent's agent submitted that the relevant policies were "living documents". They were regularly updated and improved and reflected values and practices the respondent espoused. This was not a "tick box" approach.

239. It was submitted that making it mandatory for every officer to read every policy and for a register to be kept to ensure that every officer had done so would be wholly disproportionate. It was submitted that the respondent did at least as much as required in relation to policies by: regularly circulating updated policies, by email, communications and on the internet; having physical copies available on the notice board; updating and re-circulating policies annually, and consulting on them if appropriate; having a strong expectation that officers would keep themselves familiar with the policies; and ensuring engagement with the policies by having regular online testing on them.

240. The respondent's commitment to equality was demonstrated by its setting up of the ECSN, the Equality Support Groups and the appointment of Unit-based Diversity Champions (including Ms Wilson at Hunterston) to apply these values across the organisation. Moreover, Mr Mehmood, the EDI Manager,

had a high profile within the organisation and makes an effort to get out into the units and speak to officers.

241. Training was taken similarly seriously: It formed a significant element of induction training. It was regularly refreshed online, with a requirement to complete a test to ensure that it had been understood. It was supplemented by more informal briefings and reinforcement of the underlying values.

242. The respondent's agent argued that the Tribunal should apply the general principles in this area. The question of reasonable steps must not be assessed with hindsight. The question is what would have been reasonable at the relevant time, not in the light of subsequent events. This is particularly important, where there is a series of events, which can only be seen as such in retrospect. For example, the first Incident could legitimately have been seen at the time as an isolated and historic incident directed to the claimant.

243. The requirement to take reasonable steps is not a counsel of perfection. The defence may be made out even if the Tribunal itself would have done things differently or perhaps better than (in its view) the employer has.

244. The evidence heard presented a very selective view of conditions at Hunterston. The claimant has been at the unit for 15 years, mostly without incident. In that time, there were a small number of relatively minor incidents.

245. It was suggested that just as an employer may do too little to prevent discrimination, they can do too much. An overly aggressive or disproportionate response to the events in the present case would have been likely to strain relations. It is notable that there was an element of "backlash" to the steps that were taken. The claimant himself took objection to the Federation's public anti-discrimination stance on 9 August 2019, and two officers objected to the additional training on the basis that they felt accused of sectarian bigotry.

246. Finally, the impact of the pandemic needs to be taken into account in considering the reasonableness of the respondent's actions. The first Incident occurred shortly after the epidemic hit (in March 2020), in conditions of near

total lockdown. The Tribunal was reminded that it is easy to forget how distracting and difficult conditions were initially, simply in terms of remaining operational. For much of the period with which the case is concerned, heavy restrictions remained in place and it often felt like normal life had come to a standstill. The speed of the respondent's response must be judged in the light of the unprecedented conditions in which it was operating as an organisation at the relevant time. The resource constraints that apply to public sector bodies would have impacted even more acutely during the pandemic.

247. The respondent's agent set out the 14 steps that had been taken prior to the 1 June 2020 incident which comprised adopting and updating a Dignity at Work Policy; adopting the fourth version of its Equality, Diversity and Inclusion Policy); launching the Equality Consultative and Support Network; setting up the Equality Support Groups, including a Multi Faith Network; Unit-based Diversity Champions volunteered and were selected. Version 6 of the Respondent's Police Officer Misconduct Policy dated December 2019 (specifically specifying discrimination to be misconduct) was in place and the policies were circulated by email, available on the intranet; in some cases displayed prominently in hard copy on the notice board and the subject of discussion and training.

248. Equality, diversity and inclusion training formed a significant part of initial face to face training for all officers, comprising three modules and additional, compulsory refresher online training was undertaken regularly by all officers, requiring that an online test be completed to show full understanding.

249. On 5 and 6 February 2019, Mr Mehmood visited Hunterston and delivered EDI sessions focussing specifically on the impact of religious bias, and citing his own experiences and on 6 February 2019, a meeting was held at the unit to seek to resolve tensions arising from Mr Thomas' misuse of the duty rota. On 6 March 2019, Temporary Superintendent Cole informed all officers that sectarian behaviour would not be tolerated, that it would be dealt with robustly and that all officers were expected to challenge and report such behaviour.

250. On 21 August 2019, the claimant's grievance against Sergeant Craig was dealt with sensitively in accordance with his wishes as to the desired outcome by clearing him of all allegations;

251. On 12 February 2020, Chief Superintendent Vance declared a Critical Incident to address deployability concerns, with particular focus on identifying whether these had arisen from sectarian issues. Critical Incident meetings were held on 12 February 2020, 25 February 202 and 6 March 2020.

252. It was submitted that these steps should be considered in the round and show a proactive and sensitive approach by management to diversity, appropriate attention to the possibility of sectarian issues, and a culture which sought to address head on rather than brush under the carpet issues as they arose.

253. It was submitted that the respondent's investigation was reasonable. There was no evidence as to who the perpetrators might have been. Each of the incidents occurred in circumstances where many individuals could have carried it out over a relatively prolonged period of time and with no witnesses.

254. Whilst Superintendent Allan gave consideration to installing covert CCTV cameras in the building, this was not realistic, nor a viable or practical option.

255. Inspector Gilmartin spoke widely with officers within the unit to see if anyone had any information as to who it might have been. No one did.

256. It was argued that it would have been wrong to have singled out officers to speak to. There was no evidence whatsoever to link any individual to any of the relevant incidents. The claimant himself never identified anyone as a potential suspect, either to the respondent or in his statements to Police Scotland. Any officer would have insisted on being interviewed under caution, with some justification, if they considered themselves to be under any suspicion at all. Given the adverse response to some being instructed merely to undertake EDI training, on the basis that some considered that to unfairly label them as a sectarian bigot, it is inevitable that such individuals would have reacted extremely adversely to any suggestion that he might have had been responsible for Incidents, particularly in the absence of any evidence against

them. To have targeted him in this way, on the basis of no evidence whatsoever, would merely have raised the temperature and increased tension, for no conceivable benefit.

257. With regard to the argument training should have happened earlier, it would have been particularly difficult to roll out training earlier than it was in the light of the commencement of Covid lockdown in March 2020. As Mr Mehmood explained, additional video training would not have been viable at the outset and was in any event less impactful. The additional training given in August to October 2021 was not vastly different to training previously given. The basic principles and approach were the same, albeit there is always some benefit in reinforcement. Previous training and briefings specifically on sectarianism had been given.

258. It was submitted that the question of training must be looked at in the round. The following factors were said to be significant: all officers undertake face to face EDI training as a significant part of their induction training; all officers undertake regular face to face training; the respondent consistently messaged positively on EDI through circulating updated policies and procedures and having relevant institutional arrangements; there had been additional training and briefings on EDI in Hunterston, some of it focussing specifically on religious discrimination, before the first Incident occurred. Against that background, it would be counsel of perfection to suggest that section 109(4) required the Respondent to have rolled out the additional training programme earlier than it did, in the early stages of the Covid lockdown period.

259. The respondent had encouraged the claimant at an early stage to raise any concerns with the diversity manager being visible. The respondent's policies sent a strong message about unacceptable behaviour and the respondent sought proactively to deal with any sectarian concerns head on, being helpful and supportive. The incidents were treated as extremely serious in nature with a comprehensive and robust response.

260. The claimant's agent argued that the steps that were taken were ineffective in preventing the incidents. The employer must establish that they have taken

all reasonable steps: a high threshold. It was the claimant's position that the respondent had failed to take effective and significant action to combat discrimination and fell well short of the high threshold. The respondent is a large employer with significant resources.

261. The claimant's agent argued that the respondent did not evidence that the policies relied upon were mandatory for staff to read and familiarise themselves with. There was a 'general expectation' staff would read these but it was not a requirement for them to read the policies. There were no records of which officers read the various policies or when they read the policies. It was submitted that it must be a reasonable step for an employer to require employees to read the policies and maintain a record of this.

262. No training material had been lodged in evidence and training records indicated annual training lasted a maximum of twenty minutes. Given the number of characteristics and types of discrimination that would need to be covered, the training could not have been very detailed. Training was on the Equality Act generally. Basic training which can be completed by clicking through slides and answering a few basic questions is ineffective.

263. The claimant's agent also argued that the fact the incidents occurred showed the training was stale and ineffective. This is contrasted with the more recent training which was bespoke.

264. It was argued that steps taken after the incident cannot be relied upon in support of the defence to that incident. Subsequent events are relevant only so far as they shed light on what occurred before the act complained of.

265. In any event the claimant's agent argued the respondent failed to treat allegations seriously.

Tribunal's decision as to defence regarding the first incident

266. The Tribunal considered the steps the respondent took prior to the first incident as set out above. The Tribunal also considered (and applied) each of the guiding principles and applicable law when considering this.

267. Applying the guidance from the Equality and Human Rights Commission Employment Code, the Tribunal considered that the policies the respondent had in this area were genuine and that a tick box approach was avoided. The respondent approached dignity at work seriously with a desire to avoid discrimination at work. The annual training that took place supplemented the initial training. Although there was a lack of precise detail included within the training packages, the Tribunal was satisfied that the approach taken to inform staff as to the guiding principles was reasonable. The policies were clear. While it would have been perfection for a system to be in place requiring all staff to consider each policy and for a record to be taken, it would not have been reasonable to do so in the context of this case. The fact it could have been done did not mean it was reasonable to do so.

268. Not only did the respondent devise a policy but it was implemented and workers were reminded of the existence of the policy and trained in relation to it. The training covered the policies and tested staff as appropriate. The policy was also reviewed and the respondent had in place a number of other initiatives to ensure diversity and equality was not academic but very much at the heart of what the respondent did. The policies were updated and reviewed as appropriate. Staff were aware of and reminded about the Policy in this area and refresher training took place that focused on the principles within the legislation. The Diversity Manager, local champions and groups and senior staff reminded staff as to the position. Briefings had also taken place.

269. The Tribunal considered the issue of training generally and in particular the claimant's submission that there was a lack of evidence with regard to the specific training that had been given. The respondent's agent argued while the respondent had not provided detailed notes of the training sessions or modules there was sufficient evidence given as to the content of the training sessions. The respondent's agent submitted that a number of witnesses gave evidence about the nature of the training. Evidence was given as to the 3 modules covering the Equality Act (an introduction), Dignity at work and 4 Equality Diversity and Inclusion Awareness videos. The policy documents,

which had been lodged, were covered in the training sessions (with the policy documents themselves referring to training).

270. With regard to the refresher training, the evidence showed that candidates read slides and answered a multiple choice test at the end. The training was run by a specific department supported by an HR team and diversity manager. Evidence was given as to how this covered the principles within the Equality Act, building upon the induction training, with staff having to answer questions correctly in order to pass. This was not a tick box approach but rather a genuine attempt to remind staff of the overarching principles of the Equality Act supported by clear and developing policies and a clear culture.

271. There was also further training provided on an informal basis in 2019 by Mr Mahmood who gave evidence about the matters covered, saying it included the impact of discrimination and his own experience with focus on sectarian issues. Finally details of the bespoke training that took place in 2021 can be gleaned from the report provided by the trainers.

272. In short, although the underlying materials with syllabus was not provided in evidence, the policies covered in the training were and the evidence of Mr Mehmood and other witnesses gave sufficient evidence of the nature of the sessions which were substantive sessions. The policies and training provided by the respondent underlined the respondent's approach to an inclusive and diverse workforce, It had sought to be proactive in combatting discrimination in the workplace. The claimant accepted in cross examination that the respondent's message to staff had been clear that religious discrimination was considered unacceptable. The respondent's approach to discrimination in the workplace was not perfect but it was reasonable and robust. Staff were made fully aware of the seriousness of breach of the Equality Act and of the need for respect. The fact the respondent was a disciplined organisation with officers required to comply with the Code of Ethics and standards of professional behaviour underlined this approach.

273. The Tribunal considered the claimant's submissions carefully together with the respondent's response and the evidence led. The Tribunal was satisfied

from the oral evidence heard as to the basis of the training and the topics covered that the training up to the first incident was suitable and reasonable. The respondent's approach demonstrated a genuine engagement with diversity issues and an attempt to ensure all staff followed the policies. The training and support given to staff prior to the first incident was significant.

274. The Tribunal did not consider that the fact further acts of discrimination occurred showed there to be a need for further training. The respondent's approach to the rules in this area were clear. There could be no doubt as to the respondent's view of a breach of the Equality Act (the principles of which were understood by staff). It was clear that certain individuals disliked the claimant and used his religion as a way to offend him. The author of these acts would have been in no doubt as to the unlawful and unacceptable nature of their actions as a result of the respondent's approach to equality and diversity in the workplace.

275. The Tribunal did not consider it would have been a reasonable step to require employees to read the policies and maintain a record of this. While that would have been perfection, the Tribunal considered the respondent's approach went as far as was required, and was reasonable. The respondent was a disciplined force and the respondent communicated the position as to the respondent's policies in these areas very widely and maintained a consistent and clear approach. There were no further steps that were reasonable.

276. The Tribunal did not consider it would have been reasonable to have introduced more detailed or more nuanced training at this stage (prior to the first incident). While a number of sectarian issues had been raised, there was no suggestion that there were specific issues or matters that required additional training. The respondent made their approach to such matters abundantly clear (that such behaviour was not tolerated). The briefings following the earlier incident had underlined this. This further incident by itself did not show that the previous briefings had become stale given it was possible the first incident had occurred at the same time as the incident that gave rise to the briefings. The Tribunal did not consider the training that had been provided to have become stale in any event.

277. The respondent was aware of personality differences within the unit and had sought to deal with these matters informally. The Tribunal did not consider the claimant's agent's submissions that the respondent had failed to take reasonable steps in relation to the first incident to be meritorious. It was not reasonable to have offered additional training to all employees prior to the first incident. The Tribunal was satisfied there were no other reasonable steps that should have been taken in relation to the first incident.

278. Managers were responsible for ensuring their direct reports carried out the online training. As a disciplined organisation, staff were required to follow instructions, which included completing the mandatory training and keeping up to date with relevant policies and procedures. The respondent's approach in this regard was reasonable. The Tribunal did not uphold the claimant's agent's submissions that there were further reasonable steps in that regard.

279. The Tribunal was satisfied that complaints were dealt with effectively given the approach that had been taken up to the first incident within context. The Tribunal did not consider it to have been reasonable to have embarked on an investigation given the facts and context (and that it could have been an isolated event against the claimant with no likely evidence as to the perpetrator being available). The Tribunal did not consider that the steps relied upon by the claimant's agent were reasonable on the facts.

280. The Tribunal upholds the respondent's submissions with regard to its defence of the first incident. The respondent has discharged the onus and shown the respondent had taken all reasonable steps to prevent the act of harassment occurring or to prevent harassment occurring more generally.

Second incident

281. The respondent's agent set out the additional steps that had been taken prior to the 17 August 2020 incident. From 1 June 2020 Inspector Gilmartin was in regular contact with the claimant in support of him and his welfare. On 2 June 2020 the 17 August 2020 incident was recorded as a Prejudice Related Incident. On 5 June 2020 Mr Mehmood spoke with Superintendent Jones and others to discuss the incident and brief them about the Dignity at Work Policy

and the content of briefings at the unit, including underlining harassment on grounds of religious belief. Mr Mehmood spoke to Ms Jones again on 8 June 2020 to support her visit to Hunterston and provide examples of unacceptable behaviour relating to religion and belief. Inspector Gilmartin informally asked around among officers in relation to any information on the incident and on 16 June 2020 Superintendent Jones visited the unit to speak to the claimant.

282. The respondent's agent submitted that the respondent adopted a proportionate approach in that it respected the claimant's wish that the matter should not be reported to Police Scotland, respected his wish that the Divisional Commander should not address the entire unit and made it clear that any further incidents would be treated robustly and that the decision as to how to proceed would be taken out of the claimant's hands.

283. The claimant's agent argued that the respondent's response to the first incident was negligible. It was reported as a prejudice related incident but nothing further was done. That was nothing more than a reporting mechanism that records when an incident has occurred. It was disputed that the claimant did not want anything done further. The respondent should have taken the issue out of the claimant's hand and investigated the matter and reported it to Police Scotland. Support offered to the claimant was minimal. The claimant's agent argued the claimant "was gas lit" by Inspector Gilmartin who tried to blame a cleaner, rather than taking charge and instilling confidence in the claimant that the respondent would do everything they could.

284. It was argued that the respondent did the bare minimum in response to incident 1. The claimant argued training should have been provided between Incident 1 and 2 and fully investigated it.

Tribunal's decision in relation to defence to the second incident

285. The Tribunal considered the evidence that had been led and the parties' submissions. The second incident occurred around 10 weeks following the first incident. The Tribunal noted that both incidents were very similar and it was entirely possible that the second incident had in fact occurred at a similar time to the first incident, and was not discovered by the claimant until later on

(when his wife checked his jacket). There was a strong likelihood that both incidents had been carried out by the same person (who had a dislike of the claimant) around the same time, given the incidents were similar.

286. The respondent's submissions have merit and are upheld. It was reasonable for the respondent to have considered the first incident to be an isolated act directed to the claimant. At that time there were no witnesses and it was highly unlikely that the perpetrator could be identified. The claimant's wishes were respected in managing that issue and he was given support. Regular meetings took place with him. The steps the respondent took were reasonable and proportionate and there were no other reasonable steps at this time.

287. Applying the guidance from the Equality and Human Rights Commission Employment Code, as found in relation to the first incident, the Tribunal was satisfied the policy introduced and training that was in place was suitable and sufficient. The Tribunal was satisfied that the initial training that had been provided and policies in place demonstrated a meaningful and regular engagement with equality and diversity issues and showed a desire to eradicate unlawful discrimination in the workplace. The steps the respondent had taken were reasonable. It would not have been reasonable to have done any more than was done in this case prior to the second incident.

288. The Tribunal did not consider it would have been reasonable to have ignored the claimant's desire not to take matters forward formally. The respondent supported the claimant. The steps the respondent took were not negligible but were proportionate and considered. The claimant's submissions with regard to the defence in respect of the second incident are not upheld.

289. The Tribunal considered whether a reasonable step would have been to have introduced specific training in the period following the first incident. Taking account of all the facts and the circumstances of this case the Tribunal was satisfied that it would not have been reasonable to have done so. While it would have been a perfect response, the test is one of reasonableness. The training that had been provided was reasonable and the clear and consistent approach taken to diversity within the respondent showed how serious such

issues were taken by the respondent. It was not a reasonable step to have carried out further training in the period between both incidents not least given the short period of time, context and background in which it occurred. The training that had been delivered had not become 'stale'.

290. The Tribunal did not consider it fair to suggest the respondent had "gas lit" the claimant. The respondent supported the claimant and met with him. His decision not to involve Police Scotland had been respected and he was supported. There was no suggestion there were any requests the claimant had made which were not met. The Tribunal did not consider it would have been reasonable to have pursued a transfer for the claimant given it was not something he had wished to explore. If the claimant had wished to explore the transfer, assistance would have been given to him with regard to the administrative process but the claimant did not seek such assistance.

291. The Tribunal considered the failure to fully investigate the first incident. At that time there was no suggestion there was likely to be any repetition and steps had been taken to ask officers if anyone had any information to provide it. The absence of any evidence and the facts suggested that a full scale investigation was likely to be fruitless and the claimant had been supported in not informing Police Scotland and regular welfare meetings took place. While embarking upon an investigation as to the first incident would have been a perfect response, the Tribunal was satisfied it would not have been reasonable to do so and there were no reasonable steps that should have been taken leading up to the second incident. It was possible that the incident was isolated and an investigation would have limited effects.

292. The Tribunal takes account of its industrial expertise in reaching this conclusion and concluded that there were no further reasonable steps the respondent should have taken with regard to the second incident. The steps the respondent took in the lead up to the second incident were reasonable and there were no other steps that would have been reasonable on the facts. The respondent had discharged the onus and shown it had taken all steps as were reasonable to prevent the act occurring or harassment generally from occurring. The defence is successful in respect of the second incident.

Incident 3

293. The respondent's agent set out the steps taken prior to the 30 June 2021 incident. On 18 August 2020 a form was submitted reporting the first two incidents as gross misconduct. On 19 August 2020 Inspector Gilmartin reported the 17 August 2020 incident to Police Scotland for investigation and the 17 August 2020 incident was recorded as a Critical Incident and an extensive action plan put in place. Critical Incident meetings were held on 28 August 2020 and 4 September 2020. On 21 to 23 August 2020 Chief Inspector Brotherston visited to engage with officers and on 25 and 26 August 2020 Chief Superintendent Vance visited to speak to officers and on 4 September 2020 Inspector Gilmartin checked on the claimant's welfare.

294. In March 2021 the Dignity at Work Policy was updated. On 5 March 2021, an updated version of the Equality, Diversity and Inclusion Policy was adopted which refers employees to the ECSN and ESGs, providing a link to the relevant material.

295. Taken cumulatively, it was argued that these steps showed a proactive, serious and appropriate response to the 17 August 2020 incident. No further incidents occurred in the nine months following the 17 August 2020 incident.

296. The respondent's agent submitted that steps taken after the relevant acts of harassment are capable of being relevant to at least the second limb of section 109(4) of the 2010 Act, the question of whether the employer took reasonable steps to prevent employees from "committing acts of that description".

297. The following additional steps were taken after the 30 June 2021 incident: On 1 July 2021 the 30 June 2021 incident was reported as a Critical Incident and an extensive action plan put in place. Critical Incident meetings took place weekly thereafter for several months and a form was submitted, with assessing the severity as gross misconduct. On 5 July 2021 a Health and Safety report was submitted on behalf of the claimant and on 7 July 2021 the 30 June 2021 Incident was recorded as a Prejudice Related Incident and

referred to Mr Mehmood. On 7 July 2021 Chief Inspector Brotherston visited to speak to officers.

298. On 13 July 2021 contact details for the professional standards department were sent to Police Scotland and on 15 July 2021 Sergeant Wilson emailed all staff expressing solidarity with the victim, concern that a sectarian incident had taken place, inviting all officers to challenge such behaviour and asking anyone who has been affected by the incident to feel free to speak to him.

299. On 17 July 2021, the Unit Based Diversity Champion at Hunterston emailed all officers encouraging them to come forward in full confidence if they witnessed any inappropriate matters. Mr Mehmood endorsed and reinforced her message.

300. On 26 July 2021 all staff were notified that EDI training would be carried out. The training was delivered in August and October 2021. Sergeant Wilson spoke to individuals who did not wish to attend the training, who felt they had been labelled as bigots by being asked to undertake training, to reassure then and ensure that they undertook the training. All staff except the claimant completed the training.

301. On 31 August 2021 Sergeant Wilson emailed staff requesting that anyone with information about the incident of 30 June 2021 should contact Police Scotland.

302. It is submitted that these steps were an appropriate response to the 30 June 2021 and reflected a calibrated approach, whereby the response was escalated with each subsequent incident in a proportionate way. Ultimately, even the most diligent and committed employer cannot always eliminate all discriminatory conduct by its employees, particularly where the conduct is clandestine in nature and gives rise no relevant forensic evidence.

303. Overall, it was submitted that the steps taken demonstrated a genuine commitment to eliminating unlawful discrimination. The policies, training, procedures and institutions which had been established, developed and regularly updated reflected a serious and sustained effort to uphold its

obligations under the 2010 Act. The defence is established provided that "reasonable steps" have been taken; not every conceivable step.

304. The claimant's agent argued that the fact the respondent was explaining exactly what they have now done after the third incident to prevent harassment happening again fatally undermined their position that they have taken reasonable steps. There was nothing to prevent the respondent from having taken such steps sooner. A critical incident group was established, which was a command structure in order to co-ordinate the response. The fact it was established does not indicate action was taken; it is merely the vehicle which determines which action is taken and by whom.

305. It was submitted that the respondent again submitted a prejudice related incident to record the incident, and referred the matter to professional standards and Police Scotland but the respondent left the investigation to Police Scotland who were unable to investigate further once forensic results provided no information and no witnesses came forward voluntarily. The respondent closed their own investigation down immediately following the closure of the police Scotland investigation was complete. The respondent hid behind the Police Scotland investigation and Police Conduct Regulations as an excuse for their own inaction. The standard of proof for both investigations is different. Police Scotland require a higher standard of proof. A lack of evidence for Police Scotland does not automatically mean an internal investigation would not be able to proceed or yield a result. The claimant's agent argued that the respondent could have spoken to individuals to obtain information. Instead they chose not to do so.

306. The issues of the claimant transferring was briefly discussed in response to incident 2. This was not taken forward because the claimant did not fill in the required paperwork which was due to his mental health.

307. The claimant's agent argued that further training should have been provided and it should have been done sooner. The pandemic was said to be "a poor excuse" for not providing training before incident 3. It could and should have been done online.

Tribunal's decision as to defence of third incident

308. The Tribunal carefully considered the evidence led together with the parties' submissions (and applied the principles set out by the respondent's agent and applicable law) with regard to the third incident.

309. Applying the steps from the Equality and Human Rights Commission Employment Code, the Tribunal was satisfied, as set out above, that the respondent genuinely and meaningfully engaged with equality and diversity issues and it had a living equality policy which was implemented and updated. Workers were aware of the policy and the respondent made clear their robust approach to these issues. The policy was appropriately reviewed, communicated, applied and updated.

310. The Tribunal considered the position in relation to training in relation to the defence as to the third incident. The Tribunal considered the claimant's agent's submission that it would have been a reasonable step to have carried out the bespoke training session sooner (or online) to have merit. The respondent's agent argued that the lockdown and associated issues were important factors as to why the training was delayed for the period it was delayed. That is taken into account but the onus was on the respondent to show why it was not reasonable to have carried out the training sooner. It was possible to have carried out the training sooner and the Diversity Manager confirmed in evidence that the session could have been arranged sooner. No specific explanation was given as to the specific impediments of having the training sooner, other than the existence of the pandemic.

311. The Tribunal took into account the delay that had occurred together with the reasons. The fact the training could have been introduced earlier did not necessarily mean it would have been reasonable to have done so given the context and unique circumstances the pandemic created. The Tribunal must avoid a counsel of perfection and consider the position from the evidence.

312. The Tribunal considered that following the second incident the respondent was essentially on notice that a person or persons wished to offend the claimant with particular reference to his religion. While it would not have been

a reasonable step, in the Tribunal's judgment, to have undertaken further training between the first and second incident, following the second incident, the Tribunal considered that a reasonable step would have been to implement the decision that was taken to deliver the bespoke sectarian training within around 6 months of the second incident. The time between deciding to embark upon the training and delivering it was about a year. While it is not disputed the pandemic would have resulted in some delays, the nature of the respondent's organisation as such that officers required to attend the unit. It would have been reasonable to have accommodated the session within 6 months of discovery of the second incident.

313. There was no evidence showing why the pandemic prevented progressing the training within this reasonable timescale. Following the incident in November 2018 face to face sessions took place within 3 months. The Policy introduced in March 2021 also stated intensive training would take place. Mr Mehmood accepted the session could have been carried out sooner.

314. The pandemic and its impact is an important factor to be taken into account and a period of time would have been needed to adjust operations in light of the restrictions but absent any specific clear evidence supporting why a delay of 12 months was reasonable, the Tribunal concluded that the training should have been introduced sooner. It would have been reasonable to have done so within around 6 months within the context at the time.

315. It would have been preferential to have delivered the training face to face and that could have been done within around 6 months of the second session. The session could have been delivered online had there been specific issues or restrictions that would have prevented the sessions being delivered face to face. The fact it was accepted that the face to face training could have been delivered sooner was a significant concession by the Diversity Manager in evidence. It would have been reasonable to have done so.

316. The Tribunal also takes into account the fact that there was no evidence of any further sectarian incidents following the bespoke training. That suggests the bespoke training was effective. There is a good chance that had the

session taken place within around 6 months of the second incident, the third incident could have been avoided. In so deciding, the Tribunal takes into account that there could be no doubt as to the message the respondent had issued to all its staff and its clear approach to emphasising that such conduct is not acceptable. The claimant accepted that the respondent had been clear in advising all staff that such conduct was totally unacceptable. That supported the respondent's decision in not introducing the training prior to the second incident given the respondent's approach to equality, diversity and inclusion but it would have been reasonable to have expedited the training and carried it out within around 6 months of the second incident.

317. The Tribunal applied its industrial expertise and concluded that on balance and in light of the context of the respondent's actions, its approach to equality issues, the steps taken with regard to proactively setting out the position together with the pandemic (and the evidence before the Tribunal) it would have been a reasonable step to have carried out the training within around 6 months of discovery of the second incident.

318. The Tribunal also took into account the fact that there were a number of staff who resented further training, believing that suggested people were being identified as bigots. That supported the fact that such additional training was necessary to underline the approach to religious tolerance. Training is essential to ensure the issues are understood and the bespoke nature of the session was successful (given the absence of any further incidents).

Failure to investigate

319. The Tribunal notes that one of the key steps required by the Equality and Human Rights Commission Code in considering the defence is dealing effectively with employee complaints. Dealing with complaints is important not least in providing a deterrent effect to show those who discriminate that complaints will be investigated internally, increasing the prospect of detection. That differs from police investigations (where the standard of proof is higher). Dealing with equality related complaints effectively can be an important step to prevent unlawful discrimination from occurring.

320. The Tribunal considered that a reasonable step would have been to have undertaken a proper *internal* investigation with regard to the first and second incident following the discovery of the second incident (as opposed to relying solely upon the Police Scotland investigation). By the time the second incident had occurred, it ought to have been clear that the incident in question was not an isolated or one off event and that someone wished to cause the claimant offence by reference to his religion in more than a one off or isolated way.

321. This is particularly so given the clear position set out by the claimant in his letter of concern where he advised the respondent that he believed this religion was the source of the conduct to which he had been subjected. While the first incident could have been a one off, by the time the second incident had occurred, it was clear that the claimant was correct in his assertions and action was needed which required formal discussion with relevant individuals who worked at the unit. While it would not have been reasonable to have investigated matters after the first incident, by the discovery of the second incident, a reasonable step would have been to have commenced an investigation shortly following the second incident.

322. The respondent referred matters to Police Scotland. The Professional Standards Department was tasked with investigating matters but they relied upon the Police Investigation. What was missing from the consideration was the benefit an internal investigation can have with regard to deterrence. Even if an employer does not consider an internal investigation is likely to yield further evidence, that is not something that is known until the investigation is carried out. The perpetrator might think twice about repetition if it is known that an internal investigation would take place (and reliance is not simply going to be placed upon the absence of evidence satisfying Police Scotland). It was significant that Inspector Allan accepted that such an investigation could have been undertaken but was not as reliance had been placed upon Police Scotland (which unsurprisingly found no forensic evidence).

323. The Tribunal took account of the various steps that were taken by the respondent, including asking staff to cooperate with the police and come forward if they had any information. That was an informal investigation and

voluntary request. A reasonable step would have been to have gone further and launched a formal internal investigation. This would not be an "under caution" interview, in the sense of believing in officers' guilt, but rather a standard approach to speaking to those who may be able to provide information, since when spoken to, persons may recall things that otherwise would have been missed. It would have been based on a lower standard of proof. It could also have yielded a better response, as opposed to relying upon individuals coming forward voluntarily. This shows that such a step could have prevented the harassment occurring or harassment generally from occurring.

324. The Tribunal took into account the potential deterrent effect of formally involving Police Scotland, which itself underlined the seriousness. The fact such an investigation relied upon the requirement for forensic evidence (with a higher standard of proof) was a key distinction. There was no evidence that a more thorough internal inquiry could not have been undertaken.

325. The Tribunal took into account the respondent's agent's submissions as to why it was considered such a step was not reasonable. The Tribunal did not uphold those submissions. The Tribunal did not consider that commencing a formal investigation was "singling officers out". It would have ben an attempt fairly and reasonably identify what evidence there was given the absence of any forensic evidence. It was possible someone saw somebody placing something in the claimant's jacket pocket or placing a note in the claimant's pigeonhole (but did not want to come forward voluntarily). It is also entirely possible that someone heard discussion about such actions (or the potential for future actions) and again did not want to volunteer such information.

326. It was not correct to say that at no stage had the claimant identified potential authors of the action. He had told Inspector Gilmartin on 2 June 2020 that he believed he was being targetted by Sergeant Craig "and his cronies" (which was understood to mean known four known colleagues). The respondent knew the claimant believed he was being targetted because of his religion and it was affecting him. It would have been reasonable to have spoken to those four persons known by the respondent as potentially having relevant

information given it was the individuals the claimant believed had targetted the claimant. That approach may have identified others to speak to.

327. Given the previous incidents that had arisen, a reasonable step, following the discovery of the second incident, would have been to have identified those who may be able to provide information and speak to those persons which included those with whom the claimant had an issue with regard to his religion. While it was not known when the incidents occurred, there were a small number of people whom the claimant believed could have been responsible, a fact known by the respondent. There were 4 individuals (including Sergeant Craig) whom the respondent knew had clashed with the claimant before. The fact that any officer being spoken to could consider themselves to be a potential suspect did not provide a reason not to reasonably investigate. The whole point of an investigation is to try and identify the responsible party. The fact some individuals might not wish the respondent to investigate the matter does not provide a good reason not to investigate. Just as such individuals did not wish to attend the training and were told they had to attend, it would have been reasonable to have undertaken a formal investigation into the first and second incidents. This was not targeting staff (or labelling or treating people as bigots) but rather would have amounted to a fair and reasonable attempt to understand what had happened and whether anyone could assist in identifying the culprit or provide further relevant information.

328. While the temperature in the unit may have been increased, that was likely to be because the culprits may have realised the respondent was taking these issues seriously and was not relying upon the existence of forensic evidence or a police investigation nor relying upon people coming forward voluntarily. The conceivable benefit to such an investigation was the potential deterrent effect in respect of repetition of such action but also the potential to identify information that could assist in identifying the responsible person or persons. That is what made the taking of this step, in addition to involving Police Scotland, reasonable. It was not solely relying upon forensic evidence.

329. The Tribunal took into account that the actions of the Unit Commander and senior staff (and the diversity manager) was significant. There was a clear

signal sent as to how serious the issue was. The Tribunal also took account of the requests by senior staff for anyone with information to provide that voluntarily of their own accord, including during informal discussions. The step which was missing, which was a step the Tribunal considered reasonable following the discovery of the second incident, was the commencing of a formal investigation to ascertain what colleagues knew or what information they could provide. That was not interviews under caution but a proper investigation given the seriousness of the incidents which were accepted to be unlawful harassment (and treated as such).

330. The Tribunal did not consider such an approach would be ”inflammatory and counter productive” as was submitted. There was no evidence to suggest who was responsible *per se* but no formal discussions had taken place with staff who could potentially assist. The deterrent effect of such an investigation would be significant and given two incidents had occurred, it would have been reasonable to have progressed this following the second incident.

331. It would not have been necessary to have interviewed everyone within the unit but a proportionate investigation could be undertaken with those who could potentially assist, such as those with whom the claimant had previous issues (which he considered potentially to be related to his religion). That could potentially have included speaking to those not engaged by the respondent who had access to the relevant areas particularly if the respondent believed such individuals may have potentially useful information. It would not have been difficult to have identified a relatively small number of individuals who could have information that could assist.

332. While it was submitted such an investigation could have led to people believing they were being wrongly accused (as it did in relation to the mandatory training), such staff should have been comforted by the knowledge the purpose of the investigation was to ensure everyone understood the seriousness of the issues and that it was in everyone’s interest to identify the culprit and deal with them in accordance with the respondent’s policies. No one was being accused and the temperature was not being raised and instead a full and formal internal investigation was being carried out given the

seriousness placed upon the issues. The absence of any evidence was not a reason by itself not to commence a formal investigation to ascertain what evidence there could be. Inspector Allan accepted such an investigation could have been carried out rather than relying upon Police Scotland.

333. It had been accepted by the respondent that such an investigation could have been initiated (and there was no evidence suggesting that it would not have been possible to have done). There was no evidence, for example, that such an investigation could not have been carried out during the Police Scotland investigation (or even shortly following its conclusion). While the prospect of an internal investigation yielding new material might have been considered low, that was not in itself a reason for not embarking upon such a move.

334. The Tribunal considered that a reasonable step would have been to formally have investigated the first and second incidents once the second incident occurred, which would have been an example of "taking complaints seriously" as set out in the Equality and Human Rights Commission's Code. While it would not have been a reasonable step to have done so after the first incident, once the second incident came to the respondent's attention, a formal internal investigation ought to have been expedited. It would only have been a reasonable step in respect of the third act of harassment. The Tribunal takes into account the fact that there was an ongoing police investigation and professional standards were considering matters from a formal perspective but that relied upon an entirely different issue – whether a crime had been committed rather than whether or not the respondent's policies had been breached with regard to dignity at work.

335. The delegation of the internal investigation to Police Scotland and failure to formally speak with staff who could assist amounted to a failure to take a reasonable step of speaking to such individuals, whose identity was known to the respondent, to assess what such persons had seen or could say with regard to both incidents. That was likely to have a deterrent effect and the author of the first two incidents was significantly less likely to repeat their actions since he or she would have been aware of the respondent's zero tolerance approach to such matters and of the fact an internal investigation,

in addition to the Police Scotland investigation, would increase the prospect of detection. While the involvement of Police Scotland would have a deterrent effect, meeting with staff internally as part of a formal investigation (which is subject to a lesser burden of proof) would have had additional impact.

336. The Tribunal did not consider that the respondent had dealt effectively with the claimant's complaints and that such a step would have been reasonable, avoiding a counsel of perfection, in respect of the third incident.

No other steps would have been reasonable

337. The Tribunal did not consider pursuing a transfer with the claimant between the second and third incident to have been a reasonable step. The Tribunal was satisfied that at the time the issue was raised the claimant had decided not to pursue a transfer. Had he wished to have done so, he could have asked for assistance with regard to the paperwork. There was no evidence that suggested such support would not have been given. It was reasonable to assume that the claimant, a victim of harassment in the unit, did not want to move some distance away. The Tribunal did not consider the other steps argued by the claimant's agent to have been reasonable on the facts.

338. The Tribunal applied the guidance from the Equality and Human Rights Commission Code, the principles set out by the respondent's agent and the authorities in this area. The Tribunal was not satisfied that in relation to the third incident the respondent had discharge the burden of showing that it had taken all such steps as were reasonable to have prevented the harassment occurring or to have prevented harassment occurring generally. In reaching that conclusion the Tribunal carefully and fully took account of the steps the respondent had taken and the submissions of the respondent's agent.

339. The Tribunal took a step back to consider whether the respondent had discharged the onus of showing that it took all reasonable steps to prevent the third incident from occurring (or harassment generally from occurring). It considered that the respondent had not done so as there were two steps which would have been reasonable for the respondent to have taken to have prevented the harassment occurring (or to have prevented harassment

generally), taking into account what the respondent had done and the context, including the steps following the incident, as relevant. Firstly it would have been a reasonable step to have carried out the bespoke training within around 6 months of discovery of the second incident. Secondly it would have been a reasonable step to have commenced a formal internal investigation shortly following discovery of the second incident by meeting with individuals who could potentially provide information as to the perpetrator of the first two incidents (comprising speaking to the claimant, Sergeant Craig, the known individuals employed by the respondent with whom he socialised and others thought relevant to assist in identifying the perpetrator). The remainder of the claimant's agent's submissions were not upheld.

Defence in relation to third incident not upheld

340. For those reasons the respondent's defence in relation to the third incident is not upheld and the claimant's claim that he had been subject to unlawful harassment for which the respondent is liable, is upheld in relation to the incident that occurred on 30 June 2021. A remedy hearing will be fixed to determine what remedy, if any, should be awarded.

Observations

343. The Tribunal reiterate its thanks to both agents who assisted the Tribunal to comply with the overriding objective and for their professionalism.

Employment Judge: David Hoey
Date of Judgment: 12 April 2022
Entered in register: 13 April 2022
and copied to parties