



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 9

A63/15

OPINION OF LORD BRAILSFORD

In the cause

MRS K

Pursuer

against

SIR STEPHEN HOUSE, CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND

Defender

Pursuer: McBrearty QC, Campbell; BTO Solicitors

Defender: Shand QC, Smart; Clyde & Co

31 January 2019

[1] This was an action of damages instituted by a former police officer against the Chief Constable for The Police Service of Scotland in which it was alleged that there was a failure to take reasonable care by Police Scotland in duties owed to their employees. The case for the pursuer as pled on record set forth a list of duties said to be incumbent upon the defender but as developed and presented at proof was ultimately limited to the following averments of duty:

“It was the defender’s predecessor’s duty to take reasonable care for the safety of its employees, including the pursuer, and to avoid exposing them unnecessarily to the risk of injury.” (closed record 18B)

“It was their duty to afford her fair treatment in carrying out an investigation into her conduct and performance and to support her in her move to another department. It was their duty not to take disciplinary action against her or to move her permanently from her post without affording her fair treatment. The duties to afford the pursuer fair treatment as aforesaid required the defenders, amongst other things;... (ii) not to move her from her post, in particular, not to do so on the basis of preliminary findings which had not been the subject of proper investigations which she had not been made aware of and not had the opportunity to respond to; (iii) to advise her that her post had been re-advertised and provide her with an explanation therefor...”(closed record 18C-E)

[2] Proof was restricted to liability and causation. The pursuer gave evidence on her own behalf and adduced the evidence of nine further witnesses. The defenders did not lead evidence.

Pursuer’s evidence

[3] The pursuer joined the then Grampian Police Force (“Grampian”) in 1990 as a probationary police officer serving in that rank until February 1992, at which time she was awarded the Baton of Honour as the most outstanding officer on basic probationer training. She then commenced uniform duties in Aberdeen serving in that capacity until October 1994 when she was moved to CID duties within the same city. Between March 1995 and November 1998 her service was with the Drug Squad in the city, during which period she was awarded a prize for the best student in detective training. In 1997 she undertook a test purchasing course, completion of which permitted her to undertake work making test purchases of illegal drugs in a covert capacity. In October 1998 she completed the appropriate training and became a qualified undercover officer. She was promoted to detective sergeant in 2000. Between 1998 and 2003 she was employed either within the Grampian Police Force Intelligence Section or as an undercover police officer working both within the UK and abroad. The pursuer’s evidence was that she spent the majority of her

working time on undercover duties. In July 2003, whilst deployed as an undercover officer, the pursuer became seriously ill, required hospital admission and operative treatment. As a result she was absent from work until November 2005. On her return to work she was assigned to Grampian Police Force Special Branch where she worked until September 2007 when she was seconded to the Special Operations Unit ("SOU") of the Scottish Drug Enforcement Agency ("SCDEA"). Her unchallenged evidence was that all police officers working in SCDEA were seconded from other police forces and during their time in SCDEA remained formally officers of the parent force.

[4] The pursuer gave evidence in relation to her health in the period from her joining the police until her secondment to the SCDEA in 2007. Following the death of her mother in 1997 she suffered a period of depression which continued till April 1999 and required the prescription of medication. This matter was discussed with Grampian Police Occupational Health Department in October 1997 and a note was made of contributing factors associated with the death of her mother and work related stresses.¹

[5] As already recorded the pursuer developed a serious illness in 2003. As a consequence of this illness she suffered from symptoms of anxiety and again developed depression of sufficient severity to require medical intervention and the prescription of appropriate drugs.

[6] The pursuer attended regular sessions at least once annually with a clinical psychologist, Mary Keenan Ross, from 1998 until 2013. These sessions were facilitated and paid for by her employer.

¹ PDF371. All productions were provided in PDF format on disc. Each page of text being given a page number. These were reproduced in hard copy for the proof in five lever arch folders, each page having a number corresponding to the PDF numbering. For convenience the PDF numbering will be adopted herein.

[7] In September 2007 the pursuer was seconded to the SOU of SCDEA. The personal records of SCDEA relative to the pursuer, although a little difficult to follow, describe her position for dates between 2009-2011 as a “permanent posting”.²

[8] The pursuer’s role in SOU within SCDEA was initially of a Test Purchase Coordinator. This involved the coordination and supporting of test purchase operations throughout Scotland. It further involved the organisation of training for test purchasers and her involvement as an active member of the National Undercover Working Group. In the course of her work with SCDEA the pursuer worked with another police officer within the SOU, Detective Sergeant G (“DSG”) a secondee to the unit from Strathclyde Police Force. DSG had been employed in SOU as the Regional Operational Support Sergeant since about 2003, as such he was responsible for the majority of banking arrangements and financial reconciliation within the unit. SOU made use of covert premises, vehicles, bank accounts, mail boxes and companies in order to facilitate covert operations. Banking arrangements were required in order to facilitate and fund such operations.

[9] When the pursuer commenced employment with SOU in 2007 it was based in Osprey House in Paisley. At this time the pursuer owned a residential property in Aberdeen. Her evidence was that prior to commencing work with SCDEA management within the agency offered her accommodation to use when she was working in Paisley within a covert flat in the Strathclyde region rented by SCDEA. The offer was accepted. At a later stage again with the knowledge and cooperation of SCDEA management she moved into another covert flat rented by SCDEA. Her position was that during her time in SCDEA she resided either in her own property in Aberdeen, covert flats rented by SCDEA in

² PDF1223

Glasgow or in a property owned by members of her family in Glasgow. She also indicated that her work within SCDEA involved travel throughout the UK, and indeed abroad. In 2009 the office occupied by the pursuer and DSG in Osprey House was relocated to another location. After this the pursuer indicated that both herself and DSG would regularly work at an offsite covert premise ostensibly maintained as business premises. Occasionally she would "hot desk" at Osprey House. This working arrangement was known to the pursuer's managers who regularly attended at the covert premises she was working from.

[10] In relation to the period between 2007-10 the pursuer stated that she both enjoyed her work with SCDEA and performed at a high level. She maintained that this was reflected in appraisals by superior officers made in connection with an application for a competency based salary payment in 2008³ and a staff appraisal in February 2010.⁴

[11] In or about April 2010 Detective Inspector Danny Rae ("DI Rae") was seconded to SOU and assumed responsibility as the pursuer's supervisor. Confirmation of the pursuer's recollection of the date when DI Rae assumed responsibility as her supervisor is to be found in an SCDEA note for a special operations enquiry briefing dated 6 July 2011.⁵ DI Rae instituted a number of changes in the operation of SOU. One change involved the exchange of roles between the pursuer and DSG. The change required a transfer of information relating to banking arrangements and financial details pertaining to the funding of covert operations between the pursuer and DSG. The tenor of the pursuer's evidence was that DSG was somewhat obstructive in cooperating with the exchange of roles with her. She did,

³ PDF pages 1120-25

⁴ PDF1237/1240

⁵ PDF1845

however, consider at the time that she had been informed by DSG of the full details of bank accounts and financial arrangements used to facilitate covert operations operated by SOU.

[12] In August 2010 a covert flat often used as a residence by the pursuer was broken into. On being informed by uniformed police of the break in the pursuer reported that property owned by both her and SCDEA had been stolen. Approximately two weeks later the pursuer recalled that she had stored personal jewellery in the covert flat, it was missing and she thought it had been stolen in the break in. She made a further report of that theft. She placed a value on the jewellery stolen in excess of £5,000. She prepared a memo for SCDEA about the incident. After submission of this memo SCDEA made a proposal to reimburse her for lost property, primarily the jewellery, in the sum of £2,500. Shortly after receiving this offer the pursuer discovered the jewellery she thought had been stolen from the covert premises in her flat in Aberdeen. This was again reported to SCDEA with an apology on the part of the pursuer. She said she was embarrassed by her mistake. She received no payment from SCDEA in respect of the jewellery. There has never been any suggestion of any wrongdoing on the pursuer's part in respect of this incident made by SCDEA or, for that matter, any other police unit.

[13] After having assumed responsibility for supervising the pursuer DI Rae formed the view that her residing, when working in Paisley, in covert premises was unfair to her. He considered that requiring her to maintain a covert identity whilst outwith work constituted an unfair burden. He therefore recommended that she relocate from Aberdeen to Glasgow. That recommendation was approved by superior officers and subsequently the pursuer sold her house in Aberdeen and relocated to Glasgow in December 2010. She received financial assistance from SCDEA in respect of the relocation.

[14] DSG's secondment with SCDEA was due to expire in or around April 2011. He was due to go on annual leave on 5 April 2011. Prior to that date he received notice that his secondment would come to an end immediately upon his return to duties following leave. DSG sought to extend the period of his secondment and made submissions to his superiors DI Rae and Superintendent Ian Thomas on this matter. As a result of these representations his secondment was extended by three months. On 6 April 2011 DSG went on annual leave. On that date the pursuer, in the routine exercise of her duties, attended at a covert mail box hitherto operated and supervised by DSG. She collected a bundle of unopened mail from the mailbox. When she opened the mail she found bank statements and mobile phone bills in names which were unknown to her. She also found two debt collectors' letters. She immediately attempted to speak with DI Rae on the phone but could not contact him. She accordingly attended at Osprey House and told DI Rae what she had discovered. She then attended the offsite premises that she had been using as an office with DSG. She indicated that the offsite premises gave the appearance of having been "ransacked". She found boxes and bags of unopened documents and mail. She found evidence that some documents had been shredded. Material present included documents relating to pseudonyms unknown to the pursuer such as bank cards, mobile phone bills, letters from debt collectors and passports. Amounts of cash were also found in the premises. It was the pursuer's position that none of these items had been present when she had last been in the offsite premises. The pursuer was unaware of any operational reason which would explain the existence of the items concerned. The pursuer's evidence was that she was very concerned about what she had found. The pursuer again attended at the covert premises on 7 April, this time accompanied by DI Rae. The pursuer's views on what she had discovered in the premises were echoed by DI Rae. He gave evidence of what he discovered at the premises as

constituting “a total disaster”. The pursuer was concerned that the operations of SOU and SCDEA were compromised with potential safety implications for officers employed within the units, a view which DI Rae shared. DI Rae contacted his superiors, Superintendent Ian Thomas (“Supt Thomas”) and Chief Inspector James Reid (“Ch Insp Reid”) who attended the covert premises on the same day (7 April). The pursuer’s evidence was that during the visit Supt Thomas became angry. He kicked a chair in the direction of the pursuer and asserted that she “must have known about this”. The pursuer stated to the Superintendent that she had no knowledge. Her understanding at the time was that Supt Thomas had accepted her explanation. There was no doubt in the mind of the pursuer that all senior management within SCDEA, including the head of the intelligence department, Chief Superintendent Stephen Whitelock (“Ch Supt Whitelock”), regarded the situation which had been uncovered as extremely serious and to constitute a significant risk of comprising the work of the units.

[15] Senior management of SCDEA tasked DI Rae and the pursuer to immediately assess the full extent of the situation and to attempt to rectify problems, including the paying off of debts which had been incurred either for or ostensibly for covert operations. Fulfilling this task involved the pursuer in the following 8-10 weeks working very long hours exclusively on this task.

[16] On or about 14 April 2011 DSG returned from annual leave and had a meeting with senior officers in relation to the findings in the covert office. It was the pursuer’s understanding that he accepted responsibility for the failings which had been discovered. It was also the pursuer’s understanding that DSG, in addition to accepting his responsibility, had indicated to DI Rae that the pursuer had neither been involved nor had any knowledge of any of the matters which had been uncovered. I record at this point that the pursuer’s

understanding as regards DSG was never challenged, nor was it rebutted in any other evidence led at proof. Following the meeting between DSG and his superiors on 14 April the pursuer was tasked to support him and in particular drive him from Osprey House where the meeting had taken place to Central Station in Glasgow. It was the pursuer's view that in the course of the journey DSG appeared unstable and distressed. He was admitted to a psychiatric unit on or around 15 April 2011. At this point the pursuer was delegated as his welfare contact and required to visit him in hospital as well as liaising with his family. She was not pleased at having been given this task which she considered inappropriate in circumstances where she was the officer who had uncovered wrongdoing on the part of DSG. DSG never returned to work for the police and was subsequently granted ill health retirement.

[17] An internal investigation within SCDEA was instituted to be conducted by the Professional Standards Unit ("PSU") within the authority. The officer leading the investigation was Detective Inspector Alastair Thomson ("DI Thomson"). On 19 April 2011 the pursuer was required to attend an interview with the investigation. Prior to this interview the pursuer was informed by DI Rae that Supt Thomas had told him that she [the pursuer] "should remember what side her bread was buttered on". She maintained that Supt Thomas repeated this statement directly to her. The pursuer's position was that while she did not understand why this comment was made she construed it as a threat. The interview was conducted by two Detective Sergeants of the PSU in Kirkintilloch Police Station. It lasted for a period of approximately two and a half days. It was conducted in a room ordinarily used for interviewing suspects in criminal investigations. There were few breaks in the interview. The pursuer stated that she felt "degraded" by the nature of the interview and the circumstances in which it was undertaken. Her interviewers told her that

the purpose was to obtain a background to the SOU and details of how the events involving DSG had developed. She was not informed that her conduct formed part of the investigation. She was not informed of the outcome of the investigation, save that DSG had been reported to the Procurator Fiscal.

[18] On 27 April 2011 the pursuer attended her GP complaining of a stressful situation at work. The relevant record recorded that in the assessment of the treating doctor she was “coping well” and had “good insight at this stage.” She declined medication and certified time off work was not deemed necessary at this time.⁶

[19] During this period the pursuer continued to be engaged solely in addressing matters arising out of the result of the discoveries in the covert office in April. In June 2011 a Detective Constable Scott McLeod was assigned to the SOU to assist her with the process. By about the end of July the pursuer’s evidence was that she felt the problem was contained and under control because no new discoveries were being made and those which had been made were being properly and adequately addressed.

[20] On 27 July 2011 the pursuer was instructed by DI Rae to immediately attend at Osprey House. She met with Detective Chief Inspector John Thomson (“DCI Thomson”) and Detective Superintendent Laurie Morrison (“DSI Morrison”), both of PSU. She was informed that Strathclyde Police as DSG’s parent force had demanded an investigation into the SCDEA investigation. She was further told that Grampian had agreed with this. She was then told that for transparency reasons she was being suspended from her role as an undercover operative within SOU to allow the Strathclyde investigation to proceed. She was told that the investigation would take about 6 weeks “give or take,” which she

⁶ PDF 704 and 823

understood would be her period of suspension from SOU. She was not informed of the remit of the investigation. She was not advised that the remit included investigating the appropriateness of her conduct in the circumstances of the April discoveries. She was not told where she was being transferred. During the course of this interview she was informed by DCI Thomson that Grampian had requested she be returned during the period of suspension but that SCDEA supported her retention within their authority. In relation to the conduct of this interview and her reaction the pursuer stated that she was extremely distressed. She was crying during the interview, that she felt sick and that she was having difficulty breathing. She made representation to the interviewing officers that she could not understand why this was happening, that she was the innocent party and the officer who had discovered the problem being investigated. She further stated that her distress was a reaction to being informed by police colleagues that she was part of a process in which SCDEA were effectively using her as a scapegoat and that the outcome of the investigation would be the termination of her career. She stated that her recollection was that the interview lasted an hour. She was so distressed at the end that DCI Thomson requested DSI Morrison to remove her from Osprey House to avoid other persons seeing her in that state. DSI Morrison did so and took her to a café at Dobbie's Garden Centre at Braehead. She remained with DSI Morrison in the café for about one hour, she was distressed throughout, using her words in evidence which went unchallenged, "sobbing my heart out". She stated that DSI Morrison was "dismissive" and told her "it's only a job". When DSI Morrison left she said that she was completely distraught, felt abandoned, betrayed and used. She left the café and called a Grampian police officer, Detective Inspector Thom ("DI Thom") whom she had worked with in the past and whom she regarded as a friend. She described herself as being extremely distressed during the course of the conversation

with DI Thom. I interject to note that DI Thom gave unchallenged evidence supporting, insofar as he could on the basis of a telephone call, the pursuer's characterisation of her state during the call. The pursuer conveyed the gravamen of her interview earlier that day with PSU. Her recollection was that DI Thom undertook to immediately speak to a senior officer in Grampian. She was subsequently informed that an arrangement had been made for her to speak with Chief Inspector Richard Craig ("Ch Insp Craig") of Grampian during the course of that evening. Following the telephone conversation with DI Thom the pursuer called another police officer and made arrangements for that person to collect her and take her home, which was complied with. She subsequently spoke to Ch Insp Craig on the telephone that evening. She said she was upset and crying during the course of that telephone conversation, again something which Ch Insp Craig supported in giving evidence. On 29 July 2011 the pursuer drove to Aberdeen and met with Ch Insp Craig.

[21] On either 28 or 29 July 2011 the pursuer was informed that she would be temporarily moved to the Witness Protection Department of SCDEA.⁷ She was upset at this posting, did not want to go and wished to remain in the SOU. She spoke to DI Rae about this who submitted a report requesting that she remain in SOU in a non-operational role. DI Rae's request was supported by Supt Thomas but rejected by Ch Supt Whitelock.

[22] The pursuer recalled attending at Osprey House to commence her role in witness protection on 1 August 2011. DI Rae accompanied her to the offices of witness protection. On arrival the officer in charge was unaware that the pursuer was to be moved to his department. She spoke with DCI Thomson who, essentially, informed her that the officer responsible for arranging her move had failed to do so and was on holiday. She was also

⁷ PDF 1223, the pursuer's SCDEA personal record, records a start date in witness protection on 4 August 2011.

informed that arrangements had been made for another Detective Sergeant to move into SOU and assume the responsibilities formally discharged by herself. Given that she was unable to commence work in witness protection at that time she left Osprey House. She recalls feeling sick.

[23] On 2 August 2011 the pursuer again attended her general practitioner. The relevant GP notes record the practitioner's view that she was experiencing "ongoing extreme stress at work".⁸ In a subsequent referral note to a psychiatrist the general practitioner recorded his view that at this stage "she was clearly suffering from anxiety and depression".⁹ The GP prescribed appropriate medication for depression and anxiety. The pursuer indicated that she has been prescribed medication for anxiety and depression continuously since August 2011.

[24] The pursuer commenced work in witness protection on the basis of her recollection approximately one week after seeing the doctor on 2 August. The relevant personal record indicates commencement in witness protection on 4 August 2011, albeit that may be her formal date of assignment to that unit rather than the date when she commenced work. She worked in that unit for a relatively short period of time before going on leave. During the few days she worked in witness protection she was assisted by the detective sergeant who replaced her in SOU for some assistance in relation to matters about the job which were outwith that person's knowledge. She willingly provided assistance as requested. She was due to return from leave on 29 August 2011. On that date she attended her GP. On this occasion the GP noted "ongoing stress at work".¹⁰ She also complained of exacerbation of a

⁸ PDF703

⁹ PDF823

¹⁰ PDF703

pre-existing physical condition. She was certified as unfit for work. In evidence she explained that due to the stigma she said existed in the police associated with being off work due to stress she was anxious that the medical certificate reflected the exacerbation of her pre-existing physical condition rather than anxiety and depression.

[25] The pursuer was at pains, both in examination-in-chief and cross-examination, to stress that she was informed prior to her move to witness protection that the move was of a temporary nature. Further, she stated she was never informed that the move was other than temporary. She pointed out that her personal record supported this assertion.¹¹ It should also be stated that DI Rae gave evidence that he, at least initially, thought the move was temporary.

[26] The pursuer returned to work on 3 October 2011. On 5 October she was told by the officer who had replaced her in SOU that “no one wants to tell you this, but your job was advertised”. The officer also informed her that she intended to apply for the pursuer’s former job on a permanent basis. She said that she had informed the pursuer of this because she did not wish to do anything behind her back. The pursuer’s position was that this was the first occasion that she became aware that she would not and could not return to her former role. She said that she was distraught on receiving this information. She spoke by telephone with Ch Insp Craig of Grampian Police and arranged to meet him the following day at the police college at Tulliallan. She said that the meeting went ahead and during the course thereof the Chief Inspector told her that he thought there must have been a mistake and that her role would not have been advertised without her being told of this. She also said that she spoke at that time to DI Rae about this matter. He informed her that the officer

¹¹ PDF1223

in her role should not have spoken to her about the job advertisement. She took that statement from DI Rae as confirmation that the job had been advertised and that DI Rae knew of that fact. On 7 October 2011 the pursuer returned to Osprey House and spoke to the head of HR at SCDEA. That person confirmed that the pursuer's role in SOU of the SCDEA had been advertised. She also said that the head of HR informed her that the Deputy Director General of SCDEA, Johnny Gwynne had told her that Grampian had decided that the pursuer was never to be an undercover police officer again or to work in SOU. Again the pursuer's evidence was that she was distraught about this information and was finding it difficult to breathe. She recalls the meeting with the head of HR lasting about an hour. At the end of the meeting the pursuer left the premises and work. She was in distress. She has not worked since 7 October 2011.

[27] After leaving Osprey House on 7 October 2011 the pursuer had a further meeting with the head of HR at the SCDEA, on this occasion in a café in Byres Road, Glasgow. The head of HR told her again that her understanding was that Grampian Police had requested that the pursuer did not return to SOU or operate as an undercover police officer. It was further the evidence of the pursuer that she had been told by the head of HR that that person had telephoned Ch Insp Craig of Grampian and had been informed that he was unaware of any request made by Grampian to the effect that the pursuer should not return to work in SOU.

[28] On 11 October 2011 she attended on Mrs Ross for a session of psychological support. She continued to have regular sessions with Mrs Ross until March 2015. All this treatment was paid for by SCDEA.

[29] On or around 14 September 2011 an Initial Assessment Report prepared by Detective Inspector James Dunbar ("DI Dunbar") on behalf of the Deputy Chief Constables of

Strathclyde and Grampian Police had been made available to those authorities.¹² The purpose of the report had been, in part, to “establish what stewardship responsibilities have been given to DSG and [the pursuer]” and to “Highlight possible misconduct by either officer” and “Highlight possible work performance findings by either officer”. The report contained five potential allegations of misconduct on the part of the pursuer and in addition identified some potential work performance findings on her part. On 19 October 2011 the Deputy Chief Constable of Grampian and Chief Superintendent Euan Stewart (“Ch Supt Stewart”) of that force met and decided that on the basis of DI Dunbar’s report the pursuer should be provided with management advice, that representing the lowest level of available sanction available. As a consequence of that decision an arrangement was made that Ch Supt Stewart should meet with the pursuer at a neutral venue in Aberdeen on 8 November 2011. The pursuer attended that meeting on that date accompanied by Ch Insp Craig of Grampian. Ch Supt Stewart commenced giving management advice based on the potential allegations of misconduct and failings in work performance contained within DI Dunbar’s report. The first piece of management advice proceeded on the assertion that the pursuer had known about the activities of DSG and had failed to inform her line manager of these matters. At this stage the pursuer stated in evidence that she intervened and informed the Chief Superintendent that that proposition was factually incorrect. There was a discussion about the factual basis of the report following which Ch Supt Stewart determined that it was inappropriate to proceed to give management advice and closed the meeting.

¹² PDF1833-1840

[30] On 21 December 2011 the pursuer was contacted by telephone by the head of HR at SCDEA. She said that the head of HR advised her to accept the management advice based upon the report because to do otherwise would “open a can of worms”. The head of HR said that she had been asked by “management” to tell her this. On the same day the pursuer met with DCI Thomson of SCDEA at a Costa café in the Braehead shopping centre. The pursuer said that at the meeting DCI Thomson advised her that she “needed to accept this management advice and we need to draw a line under it”. He gave the pursuer a summary of the conclusions of the report by DI Dunbar, including the five areas of potential misconduct. He did not show the pursuer the report. The first time the pursuer had seen the report was during the course of the present litigation. On being told of the five allegations of potential misconduct by DCI Thomson at the meeting in the Costa café the pursuer rejected them. She said that she told DCI Thomson that the report was totally incorrect and that the conclusions, based on inaccuracy were professionally and personally damaging to her. An account of the meeting with DCI Thomson on 21 December 2011 was given by the pursuer to the psychologist Mrs Ross at a meeting on 17 January 2012.

[31] On 16 February 2012 the pursuer again met with Ch Supt Stewart. She was again accompanied at that meeting by Ch Insp Craig and on this occasion by a representative from the Scottish Police Federation. At this meeting Ch Supt Stewart delivered two pieces of management advice to the pursuer. That advice was in the following terms:

“Given that you are in a supervisory rank you: should have acted sooner in voicing your concerns; must be willing to challenge colleagues in relation to inappropriate behaviour.”¹³

¹³ PDF1868

[32] In 2013 the pursuer applied for ill health retirement. She stated that the reasons she applied for retirement was that she continued to suffer from stress, anxiety, depression and “not being able to bounce back to my former self”. She was granted ill health retirement in March 2013.

Other evidence adduced by pursuer

[33] Police Inspector Nicholas Thom (“Insp Thom”) of Police Scotland had known the pursuer since around 1991 when he commenced employment with Grampian Police. He had sporadic contact with the pursuer during the 1990’s when they both served in Aberdeen. His opinion at that time was that she was a very capable police officer. In 2008 he was a Detective Inspector in intelligence based in Aberdeen. In early 2011 he was the district coordinator for Grampian in relation to test purchasing and in that capacity had contact with the pursuer who was then the national coordinator for test purchasing. He was asked about contact with the pursuer in July 2011. He recalled being contacted by her, by telephone, one afternoon when he was at home. He did not remember the precise date. He quickly appreciated that the pursuer was crying and distressed. He found it difficult to understand what she was saying. He had never heard the pursuer in that state before. He tried to establish what was concerning the pursuer, telling her repeatedly to calm down. He eventually ascertained that she was calling from a car park in Glasgow having just left a meeting with officers of PSU. He also ascertained that she had been a “whistle-blower” and that she now felt that she was being accused of wrongdoing. He also thought that she mentioned that she was being moved to witness protection on a temporary basis. The phone call lasted approximately ten minutes. At the end of the call he was concerned as to her welfare. He accordingly contacted Ch Insp Craig and made an arrangement for that

person to telephone the pursuer that evening. He spoke to the pursuer again, later the same evening after she had spoken with Ch Insp Craig.

[34] Richard Craig was a Chief Inspector in Grampian Police during the period in 2011-12 when he had involvement with the matters with which this case is concerned. At that time he was deputy head of HR for Grampian Police based in Aberdeen. Prior to his involvement in the events about which he gave evidence he was aware of the pursuer and of her operational role but did not know her as an individual.

[35] His recollection was that in July 2011 he was contacted by a senior CID officer who asked him to make contact with the pursuer in the exercise of his welfare function towards police officers. The officer who contacted him gave him no knowledge of the background reasons giving rise to the need for the pursuer to receive welfare assistance. He was given a mobile telephone number where he could contact the pursuer. He telephoned the pursuer and arranged to meet with her in Aberdeen at a neutral venue away from police offices. His recollection of the pursuer's presentation during the telephone call was that she was "tearful, emotional, very anxious, seeking clarity into procedures and support that I could offer her". He was of the view that she was "deeply upset".

[36] The arranged meeting in Aberdeen took place. His recollection and understanding of the meeting was that the pursuer informed him that she was being moved from her current role in SOU to another part of SCDEA. She told him that the move was of a temporary nature. She indicated that she had received no welfare support from anyone within SCDEA. He indicated further that following this meeting he had a further two or three telephone calls with the pursuer. During these calls the issue of the pursuer's move within SCDEA was discussed and whether that move was to be temporary or permanent. There was also discussion about the rationale behind the move. Ch Insp Craig was able to

explain to the pursuer as deputy head of HR in Grampian that the pursuer was seconded by Grampian to SCDEA and any move within that authority was outwith the competence of Grampian. He told her with what he characterised as the “utmost certainty” that Grampian Police could make no offer of a move in employed role within SCDEA. He further explained that Grampian had no input or control over any change in the pursuer’s role whilst seconded to SCDEA. As a result of the meeting and telephone conversations, Superintendent Craig telephoned the head of HR at SCDEA. He explained that he was the Grampian Police point of welfare contact for the pursuer. His recollection was that this conversation, and therefore SCDEA’s knowledge of his involvement and role dated from late July 2011. The purpose of the call was to attempt to ascertain whether the move of the pursuer from SOU to witness protection was permanent or temporary. He was clear that he was not asked during the course of conversation whether Grampian Police had any view on the proposed move to witness protection.

[37] Ch Insp Craig had no recollection of meeting the pursuer at the police college at Tulliallan at or about this time. He did not deny that such a meeting may have taken place, his position was simply lack of memory of any meeting.

[38] Ch Insp Craig stated that he and Ch Supt Stewart of Grampian Police met with the pursuer in Aberdeen during November 2011. The purpose of the meeting was to enable the Chief Superintendent to give management advice to the pursuer arising from an independent investigation carried out on behalf of Strathclyde and Grampian Police. His recollection was that when the Chief Superintendent began the meeting and sought to deliver the first piece of management advice based on the report the pursuer made it clear that she did not agree with the factual basis upon which the advice was premised. This matter was discussed between the pursuer and the Chief Superintendent. On consideration

of the pursuer's position and explanation the Chief Superintendent agreed to stop the meeting in order to allow him to make further enquiries in relation to the factual basis upon which the report proceeded. He took no part in any enquiries undertaken by Ch Supt Stewart following this meeting. He was asked to attend a further meeting with the pursuer and Ch Supt Stewart on 16 February 2012. By that time Ch Supt Stewart had obtained further factual information and on the basis thereof gave two pieces of management advice to the pursuer at the meeting. Ch Insp Craig stated that the pursuer accepted the advice but in response stated her position was that she could have done nothing else in the circumstances she discovered in July 2011.

[39] DSM is a Detective Sergeant employed in undercover police operations. As a result of his role the court granted him anonymity. His home force is Northumbria Police. He responded to an advert placed in an edition of the "Police Review" dated 29 July 2011 by SCDEA for "Specialists required to tackle serious organised crime in Scotland". After he had submitted his application and before a subsequent interview in connection with his application for the post, which took place in either October or November 2011, he visited SOU at SCDEA in Paisley. During the course of his interview he was informed that the pursuer was the previous holder of the job he had applied for and that she had been seconded elsewhere in SCDEA. He was the successful candidate and commenced his role in March 2011.

[40] Fiona Riddoch was a former police officer, having retired in the rank of Detective Inspector in 2015. Her home force was Strathclyde Police. In 2011 she was serving as a Detective Sergeant in the confidential unit of SCDEA. At that time she knew the pursuer and was aware that she was employed in SOU at SCDEA. DS Riddoch's recollection was that at that time she had worked with the pursuer on about two or three occasions. She had

no issues with the pursuer but equally was not socially friendly. She regarded her as no more than a work colleague. In about July 2011 she was asked if she would undertake a temporary secondment in SOU. She agreed. She was aware that the temporary role she was undertaking was normally carried out by the pursuer. Her evidence was that she was aware that there was "something going on" within SCDEA but did not know what that was. When she began work in SOU she did not know if the pursuer was working elsewhere or was offsite for some reason. After she commenced work in SOU she had some contact with the pursuer. She talked to the pursuer about the duties she was expected to undertake and asked her about day to day running of the office. She remembers that she received a request from a procurator fiscal about a matter and consulted with the pursuer about how to deal with this. Essentially she recalled her contact at this time with the pursuer as involving matters of "general housekeeping" within SOU for which she was now responsible. She stated that the pursuer was "very generous with her knowledge and assistance" when asked questions about these matters. Her temporary secondment to SOU terminated on 13 October 2011 for matters which are unrelated to the issues in the present case.

[41] DS Riddoch was clear that during her period in SOU she was performing the tasks which the pursuer had previously undertaken. Her view was that SOU continued to organise covert operations at this time. She purchased new assets for use in covert operations for SOU at this time. She was aware that a permanent position of the sort she was filling temporarily had been advertised within SCDEA. She was qualified to apply for that role. Her understanding, which may have been obtained from DI Rae, was that the job advertised was the role formerly filled by the pursuer. She in fact spoke to the pursuer about the advertisement. The pursuer confirmed that the job advertised was the role she had filled until late July 2011. One reason why she had spoken to the pursuer about this

matter was because she felt it would have been dishonest to apply for the role without discussing it with the pursuer. After she had spoken to the pursuer she applied for the job but was not supported in that application by her line manager. Her application did not proceed.

[42] Daniel Rae is a former police officer, having retired in the rank of Detective Inspector in 2013. In 2010/11 he was working at SCDEA. In about September 2010 he assumed day to day responsibility for SOU. In that capacity he was the direct superior and line manager of both the pursuer and DSG. In turn his superior and manager was Chief Inspector James Reid who in turn reported to Superintendent Ian Thomas. Supt Thomas' superior was Chief Superintendent Whitelock.

[43] On taking over responsibility for operations in SOU DI Rae instituted a review of work in that department. He ultimately submitted a paper which formed the basis of changes in the operation of the unit. One change was an exchange of roles between the pursuer and DSG. Part of this change involved the pursuer becoming responsible for financial arrangements and accounting for covert assets. DI Rae became aware that despite the formal change in roles he had instructed there had been a lack of progress in actual transference of duties. He considered that this was primarily caused by obstructions created by DSG. When pressed he was clear that the majority of the difficulty in transference of accounting roles to the pursuer was created by the attitude to the move of DSG. In essence DSG was reluctant to exchange roles with the pursuer.

[44] DI Rae also stated that on his assuming responsibility for SOU he became aware of the pursuer's living arrangements, in particular that she spent substantial periods of time residing in covert flats operated by SCDEA in the Glasgow area. He considered that was

unfair to her and was responsible for instituting a process which culminated in her changing her residential arrangements in Glasgow.

[45] In relation to the events of April 2011 his recollection was that his first involvement was when the pursuer telephoned him informing him of that she had discovered unaccounted for material in covert office premises operated by SCDEA. He attended at the premises with the pursuer on the day she initially telephoned him. He discovered bags that were full of mail which had not been opened in what he described as “years”. He found details of covert identities which were unknown to him. He discovered cash, apparently unaccounted for, “stuffed in a drawer”. His general description of what he discovered was that it constituted a “total disaster”. He telephoned his immediate superior Ch Insp Reid and informed him that he required to see him immediately. He could not remember the exact date this occurred but considered it was either 6 or 7 April 2011. He met with Ch Insp Reid and Supt Thomas. All three were concerned about the potential for compromise to SCDEA’s covert operations. They were concerned about the presence of unaccounted for cash in the office. They were concerned about the existence of covert identities which were unknown to senior management. They were concerned about the potential for disclosure of the true identities of persons operating under pseudonyms. Beyond that there were concerns in relation to letters found emanating from debt recovery agencies, apparently unpaid bills and the possibility of cash purchases which were not accounted for.

[46] DI Rae was aware that at the date of discovery, DSG was absent on holiday. His recollection was that the process of discovering the extent of the problem that had been uncovered started during the period when DSG was absent on holiday. He considered that

SCDEA became aware of the full extent of the problem on DSG's return from holiday having returned and cooperating with the authority.

[47] His evidence was that on Ch Insp Reid and Supt Thomas visiting the premises and becoming aware of the nature and extent of the problem he and the pursuer were tasked to work at the covert premises full-time in order to get to the bottom of the problem. He stated that they were both advised by senior managers that all operational activity was to be suspended at that time. The work they undertook in the following weeks was to close down assets, reconcile and close bank accounts, sell vehicles and dispose of or terminate lets of covert premises. His estimate was that the total clean-up operation took something in the order of six to eight months to complete. DI Rae became aware that PSU were involved. Operatives from PSU attended at the covert premises and took possession of all documents discovered by DI Rae and the pursuer. He liaised with PSU and received instructions from them. His understanding and belief was that the pursuer also liaised and cooperated with PSU. He was aware that the pursuer was interviewed by personnel from PSU at Kirkintilloch Police office in April 2011. He was also interviewed by persons from that unit. His interview extended over a period of about one day.

[48] In relation to the operation of SOU between April and October 2011 his evidence was that DS Riddoch came to work in the unit because they "needed numbers". He remembered being spoken to by the pursuer and informed that it was proposed to transfer her to witness protection. He discussed that issue with her and agreed to put in a report to his superiors asking if she could remain in SOU in a non-operational role to "assist me re-build the unit". That request was refused. He stated that his understanding at first was that the pursuer's move to witness protection was "sort of temporary", he did not remember who told him of the move but did recall being told, probably by Supt Thomas, that the decision to move the

pursuer had been made by Supt Whitelock. He was shown the pursuer's employment record ¹⁴, but had never seen this before. He confirmed that the document stated that the move of the pursuer to witness protection was a "Temporary Posting".¹⁵ He did not know the reasons behind the temporary move. He confirmed that when the pursuer told him about the move she appeared to be "quite upset". He dated his knowledge of the pursuer's move to witness protection as being about the end of July 2011.

[49] In 2010/11 Detective Inspector James Dunbar was an investigator for PSU. His role included investigations into alleged misconduct. During the course of 2011 he was tasked with reviewing operations within SOU of SCDEA. He confirmed that he conducted an inquiry and thereafter produced a report entitled "Special Operations Initial Assessment Enquiry".¹⁶ The report was undated but the witness thought that it was completed and circularised "about 14 September 2011". He described the circumstances in which he prepared the report as being that he was "basically given paperwork" and conducted a desktop review of that material. He himself conducted no interviews of any person involved with the matters under report. The conclusions of the report were stated on the final page ¹⁷ and were his, based upon the documentation provided to him.

[50] DI Dunbar was asked if he recalled meeting with Ch Supt Stewart of Grampian Police in December 2011. He recalled a meeting with a senior police officer from that force at that time, albeit he could not remember the officer's name. His memory was that he was instructed to attend the meeting which took place at Pitt Street, Glasgow. He was shown

¹⁴ PDF1222

¹⁵ PDF1223

¹⁶ PDF1833-1840

¹⁷ PDF1840, p8 of the internal numbering of the document.

Ch Supt Stewart's file note of the meeting.¹⁸ Whilst he could not remember the "specifics of the meeting" he agreed with a proposition put by the court that the contents of the file note were not inconsistent with the evidence he had previously given.

[51] Steven Whitelock was a former police officer having retired holding the rank of Assistant Chief Constable and Deputy Director General of SCDEA. He joined SCDEA in 2008 initially as interim Director General and from March 2009 Deputy Director General of that agency.

[52] Ch Supt Whitelock stated that he became aware of a problem within SCDEA on or about 6 April 2011. The initial information conveyed to him was that documents and materials had been found in offsite premises which gave rise to concerns of mismanagement and misconduct. His initial information was that the problem concerned documentation and invoices. The initial report came to him from Supt Thomas. His position was that he was never aware of the full circumstances that gave rise to this problem and that he did not recall details of the matter. He did however consider the matter serious having regard to the nature of the job undertaken by SCDEA and he was concerned that it might give rise to issues relating to compromise of operatives or officers within the unit.

[53] He was aware of a PSU investigation into this matter, his understanding being that that was conducted by Detective Inspector Allister Thompson ("DI Thompson").

[54] Ch Supt Whitelock was unable to give details of the work conducted in SOU after discovery of the problem in April 2011. Ch Insp Reid and DI Rae conducted that work, which he characterised as "general housekeeping" to repair damage occasioned. He was aware that assets were closed down and premises were disposed of and, further, that there

¹⁸ PDF1868

were certain purchase of new assets for use in SOU. He did not dispute a suggestion, based on the evidence of DI Rae, that it took about 6 months to rectify problems occasioned by the issues discovered in April 2011. He was unable to say if any undercover operations were undertaken by SOU in the period of 6 months following April 2011. He did however say that he would "be surprised if any" took place. He did not think that the two sergeants working in SOU would be supporting any outside operations in the period of 6 months following the discovery. His overall view was that in the 6 months following the discovery the unit was not functioning as it should have done. He considered that because of the mismanagement discovered the unit was compromised. He accepted that the unit was not formally closed down but that it did not in that period provide the support that was expected of it. He stated that "other people" were brought into the unit but that there was a hiatus in operations for about 6 months. He confirmed that DS Riddoch and DSM were brought into the unit in that period.

[55] When questioned in relation to the position of the pursuer he agreed with a proposition that DI Rae was told by Supt Thomas that the pursuer was not to return to special operations. He agreed with the proposition that that decision was made by senior managers in SCDEA. He freely accepted that he made the decision that the pursuer should no longer be employed in SOU. When asked the reasons for that decision he stated: "I no longer had confidence in her professional judgement". He elaborated by saying that at the time he reached that decision he was still establishing the damage done in the unit and, further, was looking for "freshness in the unit". When asked what caused him to have lost confidence in the pursuer he stated that working in the unit required a high degree of integrity from a police officer. In the case of the pursuer there were a number of events which had reached him to conclude that he could no longer have confidence in her. First, he

said that he had discovered that the pursuer had, albeit prior to April 2011, been residing on a residential basis in covert premises operated by SCDEA. He characterised this as a poor management decision and lack of judgement by her. He stated that when he found out about this situation he had taken steps to correct it. He said that in late 2010/early 2011 SCDEA provided financial assistance to assist the pursuer's relocation. Second, he cited the break in which had occurred in covert premises occupied by the pursuer and the reported loss of £5,000 worth of jewellery belonging to her. He considered that this event had the potential to compromise the operations of the unit. He had required to order an investigation of the break in by regular police. The subsequent discovery by the pursuer of her jewellery in her premises in Aberdeen rendered that investigation redundant. He did not consider that the incident reflected well on the pursuer. His third concern related to the mismanagement of covert finances. Whilst he was aware that principal responsibility for that lay with DSG, his view was that the pursuer "must have been aware" of this matter. He based that view on the fact that the two officers worked together within a small office, had worked together for many years, that each had to understand the nature of the other's work and, beyond that, it should have been obvious to the pursuer that there were issues about DSG's management. Overall he was "surprised that she had not seen anything". When he put together these three factors his judgement was that she was no longer suitable to work in the role that she was filling.

[56] Ch Supt Whitelock accepted that he had never spoken to the pursuer about any of these matters either individually or cumulatively.

[57] When asked when his decision that the pursuer was not to be employed in SOU had been taken he stated: "It would be in April 2011. When the investigation into the discovery commenced. I decided that I was not going to allow either officer back into the unit." When

it was suggested to him that the pursuer only found out that she was not to return to SOU on 5 October 2011 Ch Supt Whitelock said that he could not comment on that. When asked about the pursuer's move out of SOU on 27 July 2011 and whether she was told that that was a temporary or permanent move Ch Supt Whitelock agreed that he was aware that she was relocated to witness protection at that time. He was not aware that she was told it was a temporary move. His position was that that was an HR matter and that he did not know about it. He said he was unaware that DI Rae had submitted a paper requesting that the pursuer be retained in special operations on a non-operational basis. He simply reiterated that by that time he had made his decision that she was not to return to special operations. His view was that normally moves within SCDEA would be on a temporary basis pending the outcome of a decision in relation to role. He accepted that the pursuer's personnel record seemed to show that the relocation to witness protection was a "Temporary Posting".¹⁹ He was not surprised at that. He thought the move would be described as temporary until the investigation was completed.

[58] Euan Stewart is a former police officer having retired with the rank of Chief Superintendent in 2013. Between 2009-12 he was a Chief Superintendent and head of professional standards in Grampian Police. During the course of his police career he had extensive experience of misconduct proceedings within Grampian Police. His evidence in this regard was that in misconduct, or potential misconduct, situations a decision maker had to consider all issues, consider organisational values, the law and to act proportionally.

[59] In relation to the events of 2011 with which this action is concerned Ch Supt Stewart indicated that he knew the pursuer prior to July 2011. He could not remember ever working

¹⁹ PDF1223

with her and he had never been her line manager. He did however see her during the 1990's in Aberdeen. He was also aware that in 2011, and indeed for some time prior thereto, she had been seconded to SCDEA. In July 2011 he was telephoned by Deputy Chief Constable McNab of Grampian Police and told that there was a sensitive issue which the Deputy Chief Constable wished him to deal with. The extent of the information given to him was that there was "something wrong with SCDEA", he was not to discuss any sensitivities around the issue causing the problem, he thinks he was told that the pursuer was involved in the problem and he was to investigate the matter. He produced extracts from his handwritten day book which contained entries in relation to his involvement in the matter.²⁰ He gave evidence about two video conferences he held involving himself, Deputy Chief Constable Richardson of Strathclyde Police, Johnny Gwynne of SCDEA, DI Thompson of SCDEA and Superintendent Macintyre of Strathclyde Police. The outcome of these meetings was that the report conducted by DI Dunbar was instigated and the report of the Detective Inspector received. Following receipt of this report he confirmed that he arranged a meeting with the pursuer to take place on 8 November 2011 at which it was intended to give her management advice based upon DI Dunbar's report. Ch Supt Richard Craig also attended that meeting. His evidence of the meeting was that he started to give advice but immediately the pursuer sought to rebut the factual basis of the material he was basing the advice upon. On this happening the witness stated "my brain said something was not right". He decided that he should not give the advice and terminated the interview. He considered that before he could give advice in circumstances where the factual basis upon which he was proceeding was being challenged he required to find out more about what

²⁰ PDF1849/1866

had happened. He determined that he would do so. He considered that it was necessary for him to take this step as a matter of fairness. This was based upon his experience and practice within Grampian Police. He said that he had been particularly concerned when he heard that the only source of evidence used by DI Dunbar emanating from the pursuer was an interview which had spanned three days. He had serious concerns, again based on his experience, as to the fairness of an interview of that nature.

[60] After the meeting Ch Supt Stewart arranged to meet with the author of the report, DI Dunbar, at Pitt Street in Glasgow. That meeting took place on 12 December 2011. Ch Supt Stewart's file note of that meeting was produced. It showed that the meeting consisted of Ch Supt Stewart, Superintendent Macintyre and DI Dunbar. It records that the potential allegations contained in DI Dunbar's report were based upon the Inspector's reading of statements held by SCDEA and speaking with members of staff at that unit. It records that DI Dunbar stated at the meeting that "much more enquiry would be necessary" before the points highlighted in respect of [the pursuer] could be used in relation to "giving her advice". Ch Supt Stewart's conclusion, as stated in evidence, was that "something was really not right around the process applied" in preparation of the report. He was concerned, again based on his experience, that the conclusions reached were wrong. His view was that something required to be done to redress the situation. He formed the view that the advice given to the pursuer should be along the lines of "given that you are in a supervisory rank you should have acted sooner in voicing your concerns, must be willing to challenge colleagues in relation to inappropriate behaviour".

[61] Thereafter he arranged a further meeting to be attended by the pursuer and Ch Insp Craig on 16 February 2012. At that meeting he gave the advice he stated as appropriate in his meeting in Glasgow on 12 December 2011. The advice was accepted by the pursuer.

[62] Mary Keenan Ross (Mrs Ross) is a clinical psychologist with 34 years experience in practice. For many years she has been retained by the police to provide psychological services to undercover police officers. She was initially retained in this capacity by Strathclyde Police but since 1996 has provided services of this nature to police officers engaged in undercover work with SCDEA. She explained the scope and function of her work with undercover police officers as trying to ensure that they are supported and can recognise and cope with stresses associated with working in an undercover role. The objective is to ensure that they receive appropriate counselling before a psychological issue arises. Undercover police officers should be seen every six months by Mrs Ross. There is scope within her agreement with the police force to provide more frequent counselling if that is required by an officer. Undercover police officers can also request to see Mrs Ross.

[63] In the foregoing capacity Mrs Ross has seen the pursuer over an extended period of time. She first saw her in 1998 when the pursuer was suffering depressive symptoms following the death of a parent. She again saw the pursuer in 2003 and for a period thereafter in relation to a recurrence of depressive symptoms following a serious illness. In her capacity as clinical psychologist providing services for SCDEA she began to see the pursuer again in 2007. She was consulted by the pursuer at the time of the events with which this action is concerned in 2011. She continued to treat the pursuer thereafter and last saw her in about February 2013. At the request of the police Mrs Ross prepared a psychological report in relation to the pursuer dated 24 August 2012.²¹ She spoke to the terms of this report in her evidence. In addition there were produced Mrs Ross's manuscript

²¹ PDF812

notes of meetings with the pursuer between the period 25 March 2005 – 11 October 2011.²²

She spoke to the contents of these notes when giving evidence.

[64] At a consultation on 11 October 2011 the pursuer provided Mrs Ross with her version of the events in her work since April of that year.²³ She told Mrs Ross that following her discovery and reporting of the management problems in SOU in April she felt “compromised”. She had had to work exceptionally long hours clearing up the consequences of the mismanagement. She had initially thought that her work and life would return to “normal” when the investigation and clear up was completed. What in fact occurred was that she was removed from SOU and sent to another branch of SCDEA on what she was told was a temporary basis. She was given no explanation for this move. When she arrived at the temporary posting no one expected her and there was no work for her to do. She felt abandoned. She subsequently discovered that her job had been advertised and that she would not return to it. Again none of this was communicated to her in a formal sense. In giving her evidence about the state of the pursuer at this time Mrs Ross said: “She was broken – suffering considerable anxiety and depression. She was traumatised by her treatment by the police. She was not able to cope.”

[65] It was Mrs Ross’s assessment that the events between April 2011 and her removal from SOU in late July 2011 were psychologically damaging to the pursuer. Mrs Ross was however of the opinion that the most significant damage occurred because of the pursuer’s inability to ever return to SOU. She considered that “not returning to Special Operations was a major stress. It was the loss of a role and the leaving of the role and the perception of

²² PDF351 - 364

²³ PDF816 - 817

what that meant” which caused the pursuer the most prolonged psychological damage. She considered the problem to be compounded by the lack of clear communication from the pursuer’s employers to her. Senior counsel for the pursuer asked Mrs Ross for her view on what the situation would have been if the pursuer had been able to return to SOU after a temporary move. Mrs Ross’s opinion was that she would have expected a “full recovery, to her previous psychological level of functioning, prior to the discovery of what [DSG] had done”. Mrs Ross’s opinion was that a return to SOU would have amounted to permanent closure for the pursuer and also sent a message to her work colleagues that she had not been implicated in the mismanagement at SOU. She considered that management’s treatment of the pursuer kept open the issues in relation to this mismanagement and thereby occasioned psychological damage to the pursuer.

Pursuer’s submissions

Liability of the defender

[66] The defender is the Chief Constable of the Police Service of Scotland. The acts and omissions the pursuer relied upon were breaches of duty by constables from legacy forces, namely Strathclyde and Grampian, to the Police Service of Scotland. The Police Service of Scotland came into force on 1 April 2013 as a result of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). Prior to the coming into force of the 2012 Act the vicarious liability of Chief Constables was governed by section 39 of the Police (Scotland) Act 1967 which provided, *inter alia*;

“39. - Liability for wrongful acts of constables

- (1) The chief constable of a police force shall be liable [for any unlawful conduct] on the part of any constable [or police custody and security officer] under his general direction in the performance or purported performance of his

functions in like manner as a master is so liable [for any unlawful conduct] on the part of his servant in the course of the servant's employment."

Schedule 5 of the 2012 Act deals with the transfer of, *inter alios*, liabilities from legacy forces to the Police Service of Scotland. Paragraph 20 of schedule 5 provides:

"Transfer of liabilities of chief constables etc

20. By virtue of this paragraph, any liabilities of a chief constable of a police force under section 39 of the 1967 Act and of the Director General of the SCDEA under section 22 of the 2006 Act are, on and after the appointed day, to be treated as liabilities of the chief constable of the Police Service under section 24 of this Act."

Section 24 of the 2012 Act provides, *inter alios*:

"24. - Liability for unlawful conduct

- (1) The chief constable is liable in respect of any unlawful conduct on the part of any person falling within subsection (2) in the carrying out (or purported carrying out) of that person's functions in the same manner as an employer is liable in respect of any unlawful conduct on the part of an employee in the course of employment."

[67] The submission was that had the present proceedings been raised prior to the effective date on 1 April 2013 in terms of section 39 of the Police (Scotland) Act 1967 the appropriate defenders would have been the chief constables of the relevant legacy forces. Since the action was raised after the relevant date the effect of the 2012 Act is that the defender sued in the present action is vicariously liable for the unlawful acts of constables in the legacy forces. In the present case each relevant officer was seconded to SCDEA from a legacy force and, accordingly, the correct defender is sued.

Duty of care

[68] A number of duties are pled against the defender in article 6 of the Closed Record at page 18. The pursuer did not found upon all duties pled but confined her case to duties pled at pages 18 B-C and 18 D-E, as narrated in paragraph [1] of this opinion.

[69] It was observed by counsel that whilst persons, such as the pursuer, holding the office of constable are not strictly employees it is well recognised that the general duty of an employer to take reasonable care for the safety of its employees applies to police officers and to the defender. It was submitted there was no reason in principle or policy for an alternative view.²⁴

[70] More generally it was submitted that the duty to take reasonable care for employees includes taking reasonable steps to prevent psychiatric injury. The duty only arises if psychiatric injury is foreseeable, unless physical injury is also foreseeable. It was not contended that there was a foreseeable risk of physical injury in the present case. This was developed by submitting there was a duty to take reasonable steps to avoid psychiatric injury which encompassed a duty of fair treatment. It followed that if unfair treatment would foreseeably cause psychiatric injury then there would be a duty to treat fairly providing that fair treatment is a reasonable step.

[71] The foregoing submissions were founded upon and supported by three English cases: *Gogay v Herefordshire County Council*;²⁵*Croft v Broadstairs & St Peter's Town Council*;²⁶*Yapp v Foreign & Commonwealth Office*.²⁷

²⁴ *W v Commissioner of Police of the Metropolis* [2000] 1 WLR 1607 per Lord Slynn of Hadley 1610 c-g.

²⁵ [2000] IRLR 703

²⁶ [2003] EWCA Civ 676

²⁷ [2013] EWHC 1098 (QB)

[72] In *Gogay (supra)* the issue was whether the defendant local authority had acted reasonably in suspending the claimant from a post in a residential home while she investigated circumstances surrounding a child living in the home. The investigation concluded that there was no case to answer but that the claimant had suffered psychiatric illness and loss of earnings as a result of suspension from employment. The claim was based on a breach of an implied term of the claimant's contract to the effect that the defendants would not without reasonable cause conduct themselves in the manner likely to destroy or seriously damage the relationship of confidence and trust between themselves and the claimant. It was submitted that a duty of the nature desiderated in that case was frequently referred to as a Malik duty being derived from a case of that name.²⁸ It was said for the purposes of stress at work claims there was no practical difference for an employer between the content of the Malik duty and a common law duty to take reasonable care for the safety of employees.²⁹ In *Gogay (supra)* Hale LJ (as she then was) held that there had been a breach of the Malik duty in circumstances where the claimant had been accused of sexual abuse of a child and suspended without sufficient investigation. Her stated view was that the claimant was entitled to "something better than the knee jerk reaction which occurred in this case".³⁰

[73] *Croft (supra)* involved an employee's claim for damages for psychiatric injury caused by negligence or breach of contract by her employers, a town council. The claimant had received a warning letter whilst off sick from work. The defenders made no attempt to obtain the claimant's version of events before administering a form of disciplinary warning

²⁸ *Malik v Bank of Credit and Commerce International* [1998] AC 20

²⁹ *Deadman v Bristol City Council* [2007] EWCA Civ 822

³⁰ At paragraphs 55 – 59.

and had not previously intimated any complaint received to the claimant. The absence of an opportunity to respond to the complaint was described at first instance as “failing to observe what I regard in this court as a basic rule of justice and fairness”.³¹ The claimant was successful at first instance, albeit that in a successful appeal it was held that the psychiatric harm was not reasonably foreseeable. The judge at first instance’s classification of the treatment of the claimant and of the existence of an obligation to treat her fairly was not however demurred from by the Court of Appeal.

[74] *Yapp (supra)* was a further case where at first instance it was held there had been a breach of the obligation to give fair treatment to an employee. The case was submitted to have some factual similarities to the present case. At first instance the ratio of the opinion of Cranston J³² was as follows:

“In my view these submissions fall down because they overlook the claimant’s right to fair treatment. That was an expressed term of his contract, although the duty of fair treatment can also be derived from the implied term of trust and confidence in the employer – employee relationship... Fair treatment in this case obliged the FCO to conduct some preliminary investigation of the allegations which Mr Courtney had levelled against the claimant before taking the decision to withdraw. In addition, fair treatment obliged the FCO to inform the claimant of the allegations and to take into account his critique of them.”

It was submitted that the implied term referred to by Cranston J is the Malik duty and therefore comparable with the common law duty to take reasonable care for an employee’s safety.

[75] My attention was drawn to a further passage in the opinion of Cranston J dealing with the learned judge’s view of allegations made against the plaintiff at the same meeting in which he was withdrawn from his post. In relation to that position Cranston J stated:

³¹ At paragraph 25

³² At paragraph 117

“But whatever the claimant was told on 13 June was to no avail in meeting the obligation of fair treatment since, crucially in my judgment, the decision to withdraw had already been made... In no way could the 13 June interview with the claimant meet the FCO’s contractual obligation of fair treatment. Fair treatment in the way I have described was a mandatory requirement before the decision was made.”

[76] *Yapp (supra)* was another case where the decision at first instance was overturned on appeal. Again, as with the case of *Croft (supra)* the Court of Appeal took no issue with the existence of a duty of fair treatment at common law.

[77] The last point the pursuer’s counsel made in relation to *Yapp (supra)* was that the Court of Appeal concluded that a case could usually be equally framed by reference to an employer’s duty of care and that there was no practical difference between the two.³³

[78] The pursuer’s submission was that on the basis the three cases of *Gogay*, *Croft* and *Yapp* it was clear that there was a common law duty of fair treatment in circumstances such as those arising in the present, providing psychiatric harm is reasonable foreseeable and that the duty equates to the Malik implied contractual term.

[79] In relation to the content of the duty of fair treatment in the context of the present case reference was made to *Barber v Somerset County Council*.³⁴ In that case Lord Walker of Gestingthorpe stated³⁵;

“Every case will depend on its own facts on the well known statement of Swanwick J in *Stokes v Guest Keen and Nettlefold (Bolts and Nuts) Limited* remains the best statement of general principle: ‘...the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know... He must weigh up the risk in terms of likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is

³³ *Yapp (supra)* at paragraph 12

³⁴ [2004] 1 WLR 1089

³⁵ At paragraph 65

found to have fallen below the standard properly expected of a reasonable and prudent employer in this respect, he is negligent.”

In the context of that decision it was submitted that the content of the duty of fair treatment will include such factors as the importance of the decision and the consequences of it. It was submitted that in circumstances where a decision has an adverse effect on an individual a reasonable and prudent employer who had a concern for the employee’s welfare would have in mind issues of proportionality, fairness, organisational values and transparency. In the context of that decision it was submitted that the content of the duty of fair treatment will include such factors as the importance of the decision and the consequences of it. It was submitted that in circumstances where a decision has an adverse effect on an individual a reasonable and prudent employer who had a concern for the employee’s welfare would have in mind issues of proportionality, fairness, organisational values and transparency. In each of *Yapp (supra)*, *Gogay (supra)* and *Croft (supra)* the duty required that an allegation or complaint made against the employee be put to that person before any action was taken. That was framed as a basic premise of fairness and, further, to allow a person subject to an adverse decision to be given the opportunity to answer allegations. It was submitted that it was particularly important in a case such as the present where the decision to move the pursuer was a loss of confidence in her, raised significant issues regarding her integrity, involved her ability to undertake her role and, finally, potentially questioned her professional and personal reputation. These observations were said to be particularly pointed having regard to the consideration that in explaining his loss of confidence in the pursuer and his reasons for deciding to move her Ch Supt Whitelock expressed suspicion of potential criminal conduct on the part of the pursuer. It also followed from this that the duty of fair treatment required the allegation to be put to the pursuer in order that she was

afforded the opportunity to respond and potentially rebut the same. The duty was submitted to extend to a requirement to carry out a sufficient level of investigation before taking a serious and adverse decision in relation to the pursuer. It was not open to Ch Supt Whitelock to make what was characterised as a “knee jerk” reaction in the absence of proper and sufficient investigation.

[80] Finally on this chapter the submission was that the duties could all be said to arise as a matter of common sense. They are reasonable steps that can easily be taken by the reasonable and prudent employer. There was however in the factual matrix of the present case a cross check to be found in the evidence of Ch Supt Stewart and his description of the approach taken by PSU at Grampian. That force proceeded on the basis, according to Ch Supt Stewart’s evidence, of recognition of a need for a decision maker to consider all issues, think about organisational values, any applicable law and to understand what the officer who was the subject of the complaints position was and to take a proportionate approach.

Breach of duty of fair treatment

[81] On Ch Supt Whitelock’s own evidence the decision to remove the pursuer from her post in SOU was taken in mid-April 2011. Ch Supt Whitelock’s approach was characterised by counsel as “remarkable” and on no view according with the duty of fair treatment owed to the pursuer. Again on Ch Supt Whitelock’s own evidence the basis of his decision was a loss of confidence as a result of three events, the use of a covert flat, the allegedly illegitimate claim regarding jewellery and the events following the discoveries of 6 April. As at the date of Ch Supt Whitelock’s decision there had been no investigation in relation to the covert flat or the jewellery. No investigations were in fact ever conducted into those matters. So far as

the events of 6 April were concerned at the time of Ch Supt Whitelock's decision no investigation had taken place. He was in fact on his own evidence unaware of the full information which had been discovered as at the date of his decision. Furthermore at no time were any of these concerns put either by Ch Supt Whitelock or by any other officer to the pursuer for her response.

[82] The effect of Ch Supt Whitelock's approach was that a serious and adverse decision effecting the pursuer was taken in circumstances where there was no objective evidence available in order to evaluate any concerns held by any person against her. There was no proper procedure prior to a decision being reached by Ch Supt Whitelock. Senior counsel for the pursuer went so far to describe the situation as a good example of why a duty of fair treatment exists and should exist.

[83] In the submission of the pursuer this failure was compounded by subsequent events where she was given no support by SCDEA in the period after April 2011. She was misinformed as to the reason and nature of her transfer from SOU in July 2011. She was at no time given any opportunity to respond to any criticisms made against her.

Reasonable foreseeability

[84] It was accepted that the duty to take reasonable steps to prevent psychiatric injury only arises if such injury is reasonably foreseeable. In relation to the issue of reasonable foreseeability I was referred to *Attia v British Gas Plc*³⁶; *Fraser v State Hospitals Board for*

³⁶ [1988] QB 304

*Scotland*³⁷; *Hatton v Sutherland*³⁸; *Barber (supra)*; *Heartman v South Essex Mental Health and Community Care NHS Trust*³⁹ and *Yapp (supra)*.

[85] On the basis of the foregoing cases it was submitted that there are two categories of case in which psychiatric harm is reasonably foreseeable. These are, first, those in which the action taken by the employer is sufficient by itself to result in it being reasonably foreseeable that psychiatric injury can occur. The second category was, it was submitted, where there are specific indications relating to an individual employee which result in psychiatric harm becoming foreseeable to the employer. Applying those propositions to the present case the submission was that psychiatric injury was foreseeable having regard only to the circumstances surrounding the manner in which the pursuer was treated and absent any specific indication that she was vulnerable to developing a psychiatric reaction. Whilst that was in itself said to be sufficient to establish foreseeability it was argued separately that there were in any event indicators which those responsible knew or ought to have known of which indicated the pursuer's propensity to psychiatric harm. These indicators were said to be present in her case by at least no later than the end of July 2011.

[86] That submission was put in the context of the facts of the present case. In that regard the situation was said to be that by mid-April 2011 the defender knew or ought to have known that the pursuer had considerable training, experience and specialism in the area of undercover policing; that she was highly committed to her job, had performed to a high standard and was respected by her peers; that she had suffered from stress at work in 1997/1998; that she had suffered from depression and anxiety between 2003 and 2005; that

³⁷ [2001] SLT 1051 per Lord Carloway at paras 129/132

³⁸ [2002] EWCA Civ 76

³⁹ [2005] ICR 782

the events of 6 and 7 April 2011 and their aftermath were of themselves of a stressful nature. Having regard to that factual background the employers assumed guilt in relation to the matters connected to DSG without any evidence of that. They placed reliance on a baseless suspicion that the pursuer had committed fraud against SCDEA. They placed reliance upon the pursuer accepting the offer of SCDEA accommodation made by SCDEA management in 2007. They relied upon the accumulation of those matters and decided without investigation into any of them or giving the pursuer the opportunity to respond on a permanent move from her post at SOU. Notwithstanding this they did not inform the pursuer of the decision and retained her in post for a period of months. They then informed her that she was being moved temporarily, which was incorrect. They further informed her that her home force, Grampian, had requested her return but that they (SCDEA) had sought to keep her. This was untrue. They advertised her post without informing her of this. They did not inform the pursuer that she was never to return to undercover work. They never informed her of the reason why she was permanently moved from SOU and prevented from operating as an undercover officer.

[87] All these actings were said to show “a total lack of respect and dignity” for the pursuer and had “no regard for the impact on [her] reputation and wellbeing”. The submission was that these circumstances were “sufficiently egregious to render it reasonably foreseeable that [the pursuer] would suffer from psychiatric injury”.

Causation

[88] It was accepted in order for there to be liability and damages for breach of duty the court must be satisfied on the balance of probabilities that the pursuer would not have

suffered psychiatric injury, or that her injury would have been less severe, had the duty been complied with.

[89] It was submitted that the pursuer herself had stated that she been permitted to return to SOU after her temporary move in July 2011 she would have managed to cope with that and would have continued to work. She said she would have interpreted her return to the SOU as a message that she had been exonerated from any wrong doing in relation to the matters connected DSG. She considered that her colleagues would have taken a similar understanding from her return to work. She would have had faith and trust in management if that had occurred.

[90] The generality of that view was broadly corroborated by the evidence of Mrs Ross. She considered that had the pursuer been permitted to return to her work after the temporary move in July she would have experienced a full recovery from her symptoms and been able to retain employment with the police.

[91] Taking these factors into account the submission was that there was clear evidence that on the balance of probabilities had the pursuer been afforded fair treatment she would not have been moved from her post and injury would have been prevented.

Defender's submissions

[92] Senior counsel for the defender initially made submissions upon the basis of which the defender is sued. My attention was drawn to averments in statement 2 averring that the defender, that is the person holding the office for the time being of Chief Constable of the Police Force of Scotland, is sued as the statutory successor to SCDEA. That averment is subject to a qualified admission that the defender "has succeeded to certain rights and liabilities all is provided by the Police and Fire Reform etc (Scotland) Act 2012". In

submission reference was then made to section 20 of the 2012 Act, which I have already quoted.⁴⁰ It was observed that section 39 of the 1967 Act and section 22 of the 2006 Act in that statutory provision are the source of liabilities of Chief Constables of the police service transferred by the provision. Section 39 of the 1967 Act has already been referred to in this opinion.⁴¹ Section 22 of the 2006 Act is in the following terms:

“Liability for Wrongful Acts of Police Members of the Agency

- (1) The Director General of the Agency is liable in reparation in respect of any wrongful act or omission on the part of any police member in the performance or purported performance of the member’s function in the same manner as an employee is liable in respect of a wrongful act or omission on the part of the employer’s employee in the course of the employee’s employment...
- (5) Any reference in this section to a police member is a reference to a person appointed as a police member of the Agency in accordance with paragraph 7 of schedule 2.”

Reference was then made as an example of a case where a Chief Constable was held vicariously liable in terms of section 39 of the 1967 Act to *Wilson v Chief Constable of Lothian and Borders*.⁴² It was submitted that having regard to the foregoing statutory background and to principles said to be explained in *Wilson (supra)* that in order to establish liability in the present case the pursuer required to establish that a police officer of the former Grampian Police came under one or other of two specific alleged duties desired by the pursuer and that he or she was in breach of that duty and that the breach caused the psychiatric illness in respect of which the pursuer sues. Alternatively a police member of the SCDEA required to come under one or other of the said two specific alleged duties

⁴⁰ Paragraph [66] hereof.

⁴¹ Paragraph [66] hereof.

⁴² 1989 SLT 97.

desiderated by the pursuer and that he or she was in breach of that duty and that breach caused the psychiatric illness in respect of which the pursuer sues.

[93] The argument was developed by submitting that the pursuer's case was that Ch Supt Whitelock of SCDEA was in breach of the defender's predecessor's duty "not to move her from her post, in particular, not to do so on the basis of preliminary findings which had not been the subject of proper investigations which she had not been made aware of and not had the opportunity to respond to."⁴³ The submission for the defender was that even if Ch Supt Whitelock was under the duty desiderated, which was denied, the pursuer had not established that at the material time he was a police member of SCDEA within the meaning of section 22(5) of the 2006 Act. It was submitted that his evidence was that he was an officer of Strathclyde Police. He had then been appointed Interim Director General of SCDEA. From 1 April 2010 to January 2013 he had the role of head of intelligence in SCDEA. His rank was that of Detective Chief Superintendent.

[94] Senior counsel for the defender submitted that so far as what she identified as the second specific duty, that is the duty "to advise [the pursuer] that her post had been re-advertised and provide her with an explanation therefor"⁴⁴ was breached by an officer, the identity of whom is unknown to the pursuer. The submission was that in these circumstances the defender did not know which police force the pursuer contended the officer was with.

[95] The defender's submission then set forth certain propositions derived from case law which were said to be relevant to what the pursuer required to prove in order to establish

⁴³ Closed record page 18D/E

⁴⁴ Closed record page 18D/E

that each of the specific duties stated to be incumbent on a police officer of Grampian Police or a police member of the SCDEA were.

[96] The first proposition was that foreseeability of psychiatric illness was a prerequisite to the recovery of damages for psychiatric injury in cases based on breach of duty.

Reference was made to: *Hatton v Sutherland (Barber v Somerset County Council)* ⁴⁵, *Rorrison v West Lothian Council* ⁴⁶, *Fraser v State Hospitals Board for Scotland* ⁴⁷, *Green v Argyll and Bute Council* ⁴⁸, *Taplin v Fife Council*⁴⁹, *Robertson v Scottish Ministers* ⁵⁰, *Pratt v Scottish Ministers* ⁵¹ and *Yapp v Foreign and Commonwealth Office (supra)*.

[97] The second proposition advanced drew attention to the legal effects of the differences between physical and psychiatric injury. This element of the submission was founded upon propositions identified in *Hatton (supra)*. It was noted that the dividing line between a normal but unpleasant state of mind or emotion and a recognised psychiatric illness or disorder is not easy to draw. The causes of psychiatric illness can be complex and depend upon the interaction between the patient's personality and a number of factors. It is not easy to predict who will suffer from psychiatric illness or how, why and when that may occur. An employer should be aware of what is going on within a work place under his control but is less aware of what is going on in an employee's mind or with their lives outside work. An employee may deliberately minimise or conceal true state of affairs. An

⁴⁵ [2002] ICR 613

⁴⁶ 1999 Rep LR 102 at paragraphs 16.19 to 16.22

⁴⁷ 2001 SLT 1051 at 1057H

⁴⁸ Unreported Lord Bonhamy 28 February 2002

⁴⁹ 2003 SLT 653 at 657H-I

⁵⁰ [2007] CSOH 186 at paragraph 7

⁵¹ [2011] CSOH 86 at paragraph [44]

employer has less control over how employees choose to do their work and balance the demands of work and life than they have over the work place. It follows that there must be plain indications that the pursuer's mental health is at risk before foreseeability is established.

[98] The third proposition was that it is impermissible to reason that because a defender has behaved unreasonably the risk of psychiatric injury should have been foreseen. In support of this proposition reference was made to *Barber (supra)*, *Croft (supra)*, and *Yapp (supra)* and *Attia v British Gas Plc (supra)*. In the context of the present case, where no evidence of bullying was adduced by the pursuer. It was submitted that it is not usually foreseeable that even "disciplinary action which is quite seriously unfair" will result in psychiatric injury unless there are signs of pre-existing vulnerability.⁵²

[99] The fourth proposition was that managers often have to take decisions which will, and will be anticipated as having, an adverse effect on employees in emotional terms but that does not mean that a person's manager knows or ought to anticipate that his decisions will cause the employee to suffer psychiatric illness. In support of that proposition reference was made to *Fraser v State Hospital Board for Scotland (supra)* and *Yapp (supra)*.

[100] The fifth proposition was that even if an employer can foresee that a decision will cause an employee to suffer psychiatric illness that does not mean that on that ground alone he or she comes under a duty not to implement that decision. The foreseeability of psychiatric illness does not alone give rise to a duty of care. The duty is only to take reasonable care. It was said that in *Croft (supra)* the judge correctly identified that in order to succeed the claimant had to show that it was foreseeable that unless they acted with

⁵² Rorrison (*supra*) at p248F, 248B-E

reasonable care the claimant was likely to suffer a breakdown, and that her employers caused her breakdown either by doing something no reasonable employer knowing her vulnerability should or would have done or by failing to do something any reasonable employer should and would have done.

[101] Against the background of those five propositions, senior counsel for the defender then examined the case against Ch Supt Whitelock. On consideration of the evidence the proposition was that the pursuer failed to establish that Ch Supt Whitelock made any decision based on the Dunbar report. It was further submitted that there was no reason for Ch Supt Whitelock to have foreseen that the pursuer being moved into witness protection in July 2011 would cause her to suffer psychiatric illness. It was yet further submitted that even if, which was denied, Ch Supt Whitelock could have foreseen the pursuer would become psychiatrically unwell because she was moved in July 2011 to witness protection that is insufficient to impose upon him the duty intended for by the pursuer.

[102] The defender's last argument was that the duties ultimately relied upon by the pursuer constituted a new case which it was not open to the pursuer to make. This was said to be "not least" because it was never put to Ch Supt Whitelock that he was at fault in regard of the matters which formed the basis, or context, of the duties relied upon.

[103] Having regard to the foregoing, the submission was that the defender was entitled to absolvitor.

Critical examination of evidence and submissions

Liability of the defender

[104] The pursuer put in issue the responsibility of the defender for the acts and omissions complained of in this case. The acts and omissions relied upon as constituting breach of

duty are to be found in statement 6 of the closed record and have already been narrated in paragraph [1] of this opinion. On the evidence it is, in my view, clear that those acts or omissions were all of police officers of legacy forces, namely Strathclyde or Grampian, of the Police Service of Scotland. The date at which the acts or omissions occurred was 2011/12 at which time, in terms of section 39 of the 1967 Act, the Chief Constable of those police forces was responsible for unlawful conduct on the part of any constable. Those liabilities were transferred to the defender in terms of section 20 of the 2012 Act. Section 24 of the said Act creates liability on the part of the defender in these circumstances.

[105] Having regard to the foregoing I am satisfied that the present defender is responsible for any act or omission giving rise to a breach of duty which the pursuer may establish as a matter of fact.

Duty of care

[106] The duty founded upon was to afford the pursuer fair treatment in carrying out an investigation into her conduct and performance and support her in a move to another department. I am satisfied that on the authority of *Gogay (supra)*, *Croft (supra)* and *Yapp (supra)* it is now clear that the law recognises a common law duty of fair treatment in circumstances where the complaint is that psychiatric harm occurred to an employee. The resultant psychiatric harm must be reasonably foreseeable. It is, further, in my view clear that the content of the duty of care in any case will depend upon the facts and circumstances of a given case. The approach taken by Swanwick J in *Barber (supra)* is accepted as an authoritative statement of the law⁵³.

⁵³ *Barber (supra)* per Lord Walker of Gestingthorpe at paragraph 65

[107] In determining whether the test adumbrated in *Barber (supra)* just referred to is met the first factual issue to be determined is whether in the circumstances of the evidence in the present case it can be said that the duty of care was breached by the defender. In considering that issue I am of the opinion that the evidence was relatively clear. On 6 April 2011 the pursuer discovered quantities of material suggestive of either mismanagement or wrongdoing on the part of her colleague DSG. On the same day she reported these discoveries to her superiors. On 7 April consideration of the material by superior officers confirmed the concerns of the pursuer. The pursuer was charged by superior officers to assist, along with her immediate superior, in the identification of all matters of concern and to take steps to ensure that no further damage was occasioned to SCDEA. She undertook that task in the period between 7 April and 27 July 2011.

[108] During the course of April 2011, at an early stage in the investigation and rectification process, Ch Supt Whitelock formed the view that the pursuer should no longer be involved in covert operations within SCDEA. He formed the view on the basis of three matters, those being the pursuer's occupation of covert premises as a residential base in the period up to, broadly, the end of 2010. Second, the pursuer's erroneous report of the theft of her personal property from the covert premises she was occupying and subsequent retraction of that claim on discovery of the property. Third, the pursuer's discovery of DSG's mismanagement on 6 April 2011. At the stage when Ch Supt Whitelock reached his conclusion none of the three factors he relied upon had been investigated and reported upon. At that stage there had been no adverse finding in relation to any of those matters which had been determined by a body charged with investigation of them. No concerns about any of those matters had been conveyed by either Ch Supt Whitelock or any other member of SCDEA to the pursuer.

[109] In the period between 6 April 2011 and 27 July 2011 in addition to conducting the task she had been charged with in rectifying damage occasioned by DSG's mismanagement or misconduct the pursuer cooperated with an investigation carried out by the PSU of Strathclyde Police. She was never informed of the conclusions of that investigation. No complaint as to her conduct ever arose out of that investigation.

[110] On 27 July 2011 the pursuer was informed that she was being moved to a different unit, witness protection, within SCDEA. The pursuer said that she was told that this was a temporary posting. Support for this evidence came from the witness DI Rae who said that he initially thought that it was a temporary posting. More conclusively the pursuer's personnel file kept by SCDEA recorded the move as a temporary posting. A number of other witnesses were informed contemporaneously by the pursuer that she had been temporarily moved from SOU. Ch Supt Whitelock's position in relation to the matter was that he did not know about it but that he would have expected it to have been a temporary posting. I am satisfied on the evidence that the pursuer is to be believed in her evidence that she was informed the posting was temporary. I am further satisfied on the evidence that notwithstanding what the pursuer was told the pursuer was following the decision of Ch Supt Whitelock being moved permanently from covert operations in SOU of the SCDEA. The principal source of this evidence is Ch Supt Whitelock's clear and candid statement of the decision he made in April 2011 to which I have already adverted.

[111] Beyond these factors I am also satisfied that SOU continued, albeit on a reduced capacity, to conduct operations after April 2007. The defender's position on record was that a decision was taken to close SOU following the discoveries of April 2007. It was further averred that "[A]s the unit had closed it stopped taking new work and no longer had

capability to deploy undercover officers.”⁵⁴ The defender’s adduced no evidence to support this proposition. It was effectively rebutted by the evidence of the pursuer and of DS Riddoch and DSM. Ch Supt Whitelock did not state categorically that no work was carried out by SOU after April 2011. His evidence was limited to saying that it was not functioning properly and that he would be “surprised” if it undertook much work.

[112] My conclusion on the basis of the foregoing is that a decision was taken by Ch Supt Whitelock that the pursuer should not, after discovery of the events in relation to DSG’s mismanagement, ever work in SOU again. That decision was taken apparently without consultation with any other person. It was taken on the basis of concerns, no doubt legitimately held by Ch Supt Whitelock, but which had not been subject to objective evaluation or scrutiny. Moreover those concerns had not been presented to the pursuer in order to afford her an opportunity to comment thereon or, for that matter, to seek to rebut. These considerations would, of themselves, in my view constitute a lack of fair treatment in the context of an employee employer relationship. The matter does not however rest with the conclusion of Ch Supt Whitelock.

[113] After Ch Supt Whitelock had reached his decision the pursuer was wrongfully, and in my view deliberately, told that her move from SOU was temporary. She was not told that she would not return to that posting. I am bound to conclude that she was deliberately misled in relation to this matter. Again I am of the view that that factor constitutes a lack of fair treatment. It follows that I consider that the pursuer has established a breach of duty in the circumstances of this case.

⁵⁴ Closed record answer 4 page 12B

Foreseeability

[114] There was a measure of agreement in relation to the appropriate authorities in relation to the question of foreseeability. The formulation set forth by Dillon LJ in *Attia* (*supra*) is accepted as authoritative:

“Whether it was reasonably foreseeable to the reasonable man – whether a reasonable onlooker, or, in the context of the present case, a reasonable gas fitter employed by the defendant to work on the plaintiff’s house – is to be decided, not on the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect in a person of normal disposition or customary phlegm, but by the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, treating himself as the reasonable man, and forming his own view from the primary facts as to whether the chain of cause and effect was reasonably foreseeable.”

[115] Adopting that approach I again consider that the evidence as established is relatively clear. The pursuer was an experienced and successful police officer. By April 2011 she had considerable experience in undercover policing. She had a previous incident of stress associated with, at least in part, work pressure in 1997. This was known to the employing police force who had been responsible for referring her for psychological assistance to Mrs Ross at that time. She had a further period of depressive illness between 2003-5 following the recurrence of a serious organic illness, again this being known to the relevant police authority.

[116] So far as the events following April 2011 were concerned I am satisfied that the initial discovery and investigation in which the pursuer participated were stressful. In that regard I particularly note her unchallenged evidence that at least one of the senior officers who attended at the covert premises with her on 7 April initially accused her of having knowledge of the mismanagement/misconduct. Moreover, albeit it may be a small factor, there was unchallenged evidence that this senior officer was angry and kicked a chair at or about the time he suggested the pursuer had knowledge of these matters. It appears to me

that behaviour of this sort, no matter that it may well be understandable from a person himself being confronted with a very difficult position, would be likely to occasion stress in a person in the position of the pursuer as the officer responsible for the discovery.

[117] I further accept the pursuer's evidence, again unchallenged, that she was during the course of April 2011 interviewed by two officers from PSU. The circumstances of the interview were that it was carried out in a police office away from her work base. It extended over a very prolonged period, one which later caused an experienced police officer of Grampian Police to express in evidence reservation as to its fairness. The conduct of the interview caused the pursuer to believe, whether rightly or wrongly is in my view immaterial, that she was being considered a suspect in the investigation.

[118] The third, and probably most significant stressor, was the transfer from SOU to witness protection. The transfer was itself a surprise and not the subject of discussion with the pursuer before it was effective. She was then, on the evidence I have held as proven, misinformed as to the nature of the posting being advised it was temporary when in fact it was permanent. She then discovered, not by official communication but by effectively being informally told by colleagues, that her former position in SOU had been advertised. I am of the opinion that these factors are either individually or cumulatively sufficient to satisfy the test set down by Dillon LJ in *Attia (supra)*.

[119] The effect of these factors on the pursuer was in my view within the knowledge of members of SCDEA. In that regard the pursuer contacted a colleague in Grampian Police on 27 July 2011 in a state of great distress. That person arranged that steps should be taken which culminated in a senior officer in that police force being appointed to protect or assist the pursuer's welfare. These persons all had knowledge in relation to the stress the process was having on the pursuer. There is clear authority for the proposition that knowledge on

the part of some employees in cases of stress at work is sufficient. An employer cannot rely upon the ignorance of an individual who was the decision maker to avoid the threshold of reasonable foreseeability.⁵⁵

Causation

[120] Clear evidence was obtained from the psychologist Mrs Ross, who had provided psychological counselling to the pursuer for a significant number of years prior to the events of 2011. Her unchallenged evidence was that when she saw the pursuer in 2011, broadly contemporaneously to these events, she was both distressed and suffering from significant depressive illness. Moreover, and importantly, in response to direct and pointed questioning she expressed the view that the most significantly harmful element psychologically was the failure by the defender to permit the pursuer to return to employment in SOU in the absence of any explanation why this course was being undertaken. Mrs Ross gave, again unchallenged, evidence to the effect that had this been permitted then the pursuer would have achieved closure. Her psychologically damaging concerns that her professional reputation was damaged would have been obviated by such a course. It was Mrs Ross's opinion that had the pursuer been allowed to return to SOU she would have made a full recovery.

[121] Having regard to that evidence and these considerations I am satisfied that there is a causal link between the breach complained of and the injury of a psychological or psychiatric nature sustained by the pursuer.

⁵⁵ Taylor v Rover [1966] 1 WLR 1491

[122] Having regard to the foregoing conclusions I am satisfied that the pursuer has established the case set forth on record against the defender. The questions of causation and liability have been answered to my satisfaction in favour of the pursuer. I will therefore uphold the pursuer's second plea-in-law and repel the defender's fourth plea-in-law. As noted at the outset of this opinion proof was restricted to the issue of liability and causation. The case will be put out by order at a date to be intimated to discuss future procedure.