Black and Asian Police Association

Greater Manchester

Newsletter: Special Edition December 2015.

"The Judgment"

GMP Lose Racism Appeal

Appeal No. UKEAT/0166/15/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal

On 20 & 21 October 2015

Judgment handed down on 3 December 2015

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

CHIEF CONSTABLE OF GREATER MANCHESTER POLICE APPELLANT

MR P BAILEY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON GORTON QC and MR PETER SIGEE (of Counsel) Instructed by: Chief Constable of Greater Manchester Police Openshaw Complex Lawton Street Openshaw Manchester M11 2NS

For the Respondent	MISS ASSUNTA DEL PRIORE (of Counsel) Messrs Slater & Gordon (UK) LLP Solicitors Landore Court 51 Charles Street Cardiff CF10 2GD

SUMMARY

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Indirect

RACE DISCRIMINATION - Inferring discrimination

RACE DISCRIMINATION - Burden of proof

PRACTICE AND PROCEDURE - Questionnaires

VICTIMISATION DISCRIMINATION - Other forms of discrimination

This appeal was a challenge to the conclusions and reasoning of the Employment Tribunal in a claim for direct and indirect discrimination on grounds of race. The appeal was dismissed.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a Reserved Judgment of the Employment Tribunal ("ET") sitting at Manchester, and sent to the parties on 10 February 2015. I will refer to the parties as they were below. The ET made three relevant decisions.

    i. Some of the Claimant's claims of victimisation (those alleged at (c), (d), (e) and (f) on the ET's list of issues: see paragraph 36, below) succeeded.

    ii. Those claims did not succeed as claims of direct discrimination.

    iii. The treatment by the Respondent of the complaint which the Claimant made on 26 November 2012 amounted both to victimisation and to direct discrimination.

2. The Respondent makes three principal criticisms of the ET's reasons for holding that the first group of complaints amounted to victimisation.

    i. The success of the victimisation claims is inconsistent with the failure of the direct discrimination claims arising from the same facts. As a result, submits the Respondent, the decision that the victimisation claims succeeded was an irrational decision.

    ii. The ET applied the wrong test (in effect, a "but for" test) in holding that the detriment which, it was agreed, the Claimant suffered, was "because of" his protected act.

    iii. The ET erred in law in holding that burden of proof moved to the Respondent.

3. The President, Langstaff J, gave permission to appeal on the papers. He said that the critical part of the ET's reasoning was at paragraph 31. In paragraph 31 the ET dealt with the cause of the Claimant's being in the temporary post, but not with the reason why he left it. The President added that the logic of that and of what followed was "very questionable". It was arguable that this approach to causation infected all the reasoning, and made grounds (2), (3) and (4) arguable. Grounds (1) and (5) were arguable as they stood. Ground (6) was in his view less arguable, but should be heard. He refused an application for the notes of evidence.

4. The Claimant was represented by Miss Del Priore, and the Respondent by Mr Gorton QC and Mr Sigee. Mr Sigee represented the Respondent at the ET hearing. I am very grateful to all counsel for their very useful skeleton arguments, and to Mr Gorton and Miss Del Priore for their lucid and concise oral submissions. They distilled the issues in a way that I have found very helpful.

The Facts

5. I take the facts from the Judgment of the ET. The Claimant is a police officer, a detective constable. The ET said that "he is of black British/Caribbean ethnicity". He was, at the material time, the chair of the Black and Asian Police Association for Greater Manchester Police ("GMP"). He brought proceedings against the Respondent in 2007 and 2008, claiming that he had been discriminated against on the ground of his race. Those claims were settled by a compromise agreement in 2009. One of the terms was that the Respondent would second the Claimant to the regional crime unit ("RCU") at the earliest opportunity and in the meantime would post the Claimant to a role in the Serious Crime Division ("SCD").

6. The RCU was part of an inter-force entity which has undergone various changes over time. It was agreed at the hearing that it was easier to refer to it by its current title, "TITAN", even though, for the earlier periods in the history, that label is anachronistic. TITAN is a distinct entity from the Respondent's force. Five or six different forces were members of it. They contributed their officers to its activities by secondment. TITAN had several different units. The RCU was one. The others included the Regional Intelligence Unit ("RIU"), and the Regional Asset Recovery Team ("RART").

7. ACC Shewan knew about the terms of the compromise agreement as did Helen Phillips, a lawyer who helped draft it. Although there was a confidentiality clause in the compromise agreement, members of the Respondent's Senior Command Team were permitted to know its terms.

8. The Claimant needed to pass a surveillance course and an advanced driving course before he could be seconded to the RCU. In the meantime, after a discussion between Claimant and DCS Leach it was agreed that the Claimant could be seconded to RIU until a GMP officer left the RCU. In due course it was agreed that the secondment would last 2 years, from 1 October 2009.

9. The terms of the secondment as agreed by the Respondent were set out in an email dated 28 August 2009 from Helen Phillips to DCS Leach. These terms were communicated to the Claimant's solicitors by a letter dated 4 September 2009. They included the requirements to pass the two courses and to be vetted. Those had not been terms of the compromise agreement. This was pointed out by the Claimant's solicitor in a letter dated 3

November 2009. A role in the RIU was only acceptable in the short term. The Claimant reserved the right to refer back to the terms of the agreement if necessary.

10. The Claimant took but failed the driving course. On 3 December 2009 DCS Leach was told that 3 GMP officers were due to return to the force from the RCU. He was asked to confirm that one of the vacancies would be suitable for the Claimant. He said, in effect, that he could not, as the Claimant had failed the driving test, and needed to pass the surveillance test. The Claimant could be put on the next driving course and was expected to pass. He was happy to explain the position to the Claimant in person. The Claimant stayed in the RIU and did not press for a move to the RCU. In 2010 he took but did not complete the surveillance course.

11. There was an issue about the secondment to TITAN of a DCI with whom the Claimant was not happy to work. The Claimant raised this issue, and the fact that the secondment had not developed as he had expected, in an email. He said that he thought this was more ill treatment of the kind he had suffered in the past. On 30 September 2010 there was a meeting between the Claimant, ACC Shewan and Helen Phillips. The Claimant referred to the DCI. He said he was happy working in the RIU, although he referred to the fact that the compromise agreement did not require him to pass any courses. He did not complain that he had not moved to the RCU. The Claimant's role in the RIU did not require him to pass the surveillance course.

12. ACC Shewan sent an email to ACO Julia Rogers after that meeting. This said that the Claimant wished to see out the 2-year secondment even though he accepted that failing the surveillance course meant that he could not serve in the RCU. He was doing a good job in

the RIU. The Respondent seemed content to pay for the secondment to continue with the Claimant working in the RIU for a further year. There was nothing in the compromise agreement which tied the secondment to passing the surveillance course. "Paul knows this very well indeed." As far as the agreement and the Claimant were concerned, there was to be a further year in the RIU. ACC Shewan asked whether ACO Rogers could "recall any reason" why he should not confirm that the secondment would continue for a further year.

13. ACC Shewan offered on behalf of the Respondent to pay for the Claimant to stay in the RIU on 5 October 2010. DCS Leach agreed, on condition that the Claimant would return to the GMP when the 2-year secondment was completed. The agreement was confirmed in a letter dated 17 November 2010.

14. On 15 November 2010 the Claimant raised, with the Respondent personally, a complaint of victimisation in connection with the compromise agreement. He raised some issues which were not raised in the Employment Tribunal claim. He said nothing, however, about his failure to move into the RCU. ACC Shewan replied, denying those claims, in a letter dated 1 December 2010. There was then further correspondence. The Respondent personally replied on 14 January 2011.

15. The Claimant stayed in the RIU for the rest of 2011. October 2011 "which was to have been the end of his secondment came and went", in the words of the ET. The ET said that it seemed that the head of TITAN considered the Claimant's position at about that time. He let the Claimant stay in the RIU beyond the second anniversary of the secondment, probably because the general issue of secondment was being discussed, and it was convenient to do so. The Respondent continued to pay for the secondment. There were no documents

dealing with this. At the time of the Claimant's initial secondment, the Respondent's policy (the Tenure Policy 2002) was that secondments should last two years. A revision of that policy was proposed in March 2009, to take effect from 30 November 2009. Under that policy, the minimum period of secondment to most units including the SCD (TITAN was not mentioned) was two years. Whether as a result of that policy or not, the Claimant's period of secondment was expressly agreed to be two years. In 2011, TITAN wanted the period for which officers were seconded to it to be increased. In 2013, it issued a draft tenure policy. This recognised that an officer seconded to it was seconded under the terms of his or her own force's policy. The draft provided for a maximum secondment period of 5 years for the RCU and RIU and 7 years for the RART. Though unadopted, this policy was under discussion and the Claimant knew about it.

16. A senior officer in TITAN, DS Lyons, wanted to find out about the Claimant's position in the RIU in November 2011. So he sent an email to Ms Henderson of the GMP. He said that the Claimant was happy to stay in the RIU, but would like to know how long he was likely to be there for. He wanted to know if he should be sending the Claimant on any courses. The ET accepted (there was no documented reply to his email) that DS Lyons was told that the Claimant was on a 2-year secondment, was due to return in October or November 2011 and there was a note on his file to say the secondment should not be extended. DS Lyons considered the issue further in March and April 2012. In April 2012, there was a discussion between DCS Shenton, from the Respondent's SCD, and DS Lyons. The upshot was that the Claimant was to be placed by DCS Shenton in Operation Holly. Operation Holly was a GMP investigation but it had recently been agreed that it would be jointly conducted with TITAN. It was based at Nexus House in Ashton-under-Lyne. This

was some distance from Warrington (TITAN's headquarters), where the Claimant had been working in the RIU.

17. The ET said (Judgment, paragraph 4.33) that an email dated 3 April 2012 was significant about this. This was sent by DCS Shenton to ACC Heywood, an ACC in GMP, and copied to Helen Phillips, Kirsty Henderson, and Caroline Ball. DCS Shenton said that the period of the Claimant's secondment had come to an end but he was still at the RIU. He had discussed this with DS Lyons and explained that it was not intended to keep the Claimant in post "over establishment" and that if the Region wanted to keep him, he would need to be part of their establishment. He had not passed the surveillance course, and so was posted to the RART, where he had been productive. There had been no discussion with the Claimant about reintegrating him into GMP. Where he would return to was not dealt with in the compromise agreement. The Claimant did understand that he would be returning to GMP. GMP had just agreed with TITAN about a joint operation. TITAN intended to appoint the Claimant disclosure officer, a role in which he was considered to be "extremely proficient". DCS Shenton suggested that the Claimant return to GMP, and be posted to the SCD, as part of DCS Shenton's establishment. DCS Shenton would then post him to the operation and when that finished, ensure that he was appropriately posted and managed in the SCD. He knew about the Claimant's history and the skills he had developed on his secondment. The Claimant would be told that he had returned to GMP.

18. TITAN was happy with this. It agreed that the Claimant could have a police car to use to travel to his new work place.

19. If ACC Heywood replied to DCS Shenton's email, the reply was not in the bundle for the ET hearing, as the ET noted (paragraph 4.35). Caroline Ball did reply on 3 April 2012. She copied in ACC Heywood. She said she did not know about the agreements, nor should she. Her only issue was why the Claimant was being slotted into a post rather than recruited to it. "If there clearly is something that will compromise the force and this is the right thing to do for all then so be it." She emailed ACC Heywood on 14 May 2012. She said that her team wanted to contact the Claimant about his re-entry to GMP. She asked if there was any information that would prevent a conversation with the Claimant. She knew he was on Operation Holly and the intention was to contact him about his preferences once he had finished that job. There was no reply to that email from ACC Heywood before the ET.

20. The ET noted that neither DCS Shenton, nor ACC Heywood made witness statements or were called to give evidence.

21. The ET recorded that there was a conversation between the Claimant and DI Dean, who was in charge of Operation Holly, when the Claimant was posted to that operation. The Claimant's tenure at the TITAN was raised. DI Dean discussed this with DS Lyons. His view was that this was a GMP issue. What happened next in the GMP was not clear to the ET. At some stage in the summer a letter was prepared to be sent to the Claimant but it was not sent. No-one in the GMP or in the TITAN spoke to the Claimant about his re-entry to the GMP. He continued to work on Operation Holly at Nexus House with the use of a police car.

22. On 1 October 2012, DCS Horrigan was seconded to TITAN as its Head. He made inquiries about the Claimant's status, having noted that he had been posted there as a supernumerary. DS Lyons spoke to him about his own inquiries and discussions. DCS

Horrigan contacted DCS Shenton to ask about what the position was about the Claimant's return to the GMP. DCS Shenton emailed Emma Bilsbury to ask if the Claimant had been written to. He had not been written to or spoken to. Nothing had been done since his recall to GMP was first considered in April 2012. So a letter dated 20 November 2012 was prepared to tell him that his secondment had ended and he was to be transferred back to GMP.

23. Senior officers in TITAN including DI Dean knew that a letter was on its way to the Claimant before the Claimant did. DI Dean's view was that such a letter should not come out of the blue, and asked DS Julie Barnes to speak to the Claimant about it. She did so and the Claimant was annoyed. He asked why he was being treated differently when others were given 5 years' tenure. She could not answer his questions.

24. On 22 November 2012, DI Dean and DS Barnes met the Claimant. He repeated his view that he should be subject to "tenure" and not sent back to GMP. DI Dean's view was the Claimant had never been officially posted to the RIU but that his secondment was temporary. The Claimant said he did not know that. DI Dean used the word "attachment" to describe the posting to the RIU. The Claimant said he was to have a meeting with ACC Copley of HR. He said that as of the following Wednesday he would report to Leigh, his home station. He would take the matter further as he felt there had been a breach of the rules and of diversity. He was given a copy of a letter sent by Caroline Ball at the end of the last meeting. It had not yet reached him. He was told he would no longer be able to use the police car, and would not be paid travel expenses, but that attending at Leigh might have disciplinary consequences, as he was still posted to Nexus House.

25. The letter from Caroline Ball "confirmed" that the Claimant's secondment had ended and that he had been substantively transferred back to GMP. It went on to say that his work on Operation Holly was expected to last about 18 months, although that would depend on the progress of that investigation. He would then be posted to another suitable DC role in GMP and that Emma Bilsbury would be working to arrange the next posting.

26. The Claimant's reaction was noted. It led to a flurry of emails. DS Lyons made an offer to meet the Claimant. He did not know about the background but said that the loss of the car would have a financial impact on the Claimant and could be seen as unfair. He spoke to Caroline Ball on 22 November 2012 and she emailed DCS Shenton. She said that DS Lyons would be asking for the Claimant to stay in his current role as disclosure officer for another 6 months, subject to approval. There was no reply to this from DCS Shenton before the ET. The ET could only find that that suggestion went no further. No formal request for an extension was made by DS Lyons; and none was granted.

27. On 22 November 2012 the Claimant emailed DCS Horrigan. He wanted to meet him to discuss Caroline Ball's letter. The Claimant prepared an undated "Chronology" which he handed to ACO Potts on 26 November 2012. This set out meetings he had had over the past year. He asked the number of BME members of the TITAN to be noted, the process of transfer for white personnel and the process for BME personnel. He said that what had happened was against four policies, the GMP Posting Policy, Diversity and Equality in Employment 20 July 2012, the **Equality Act 2010**, and "Standards of Professional Behaviour for Police Officers". I will refer to the **Equality Act 2010** as "the 2010 Act".

28. On 26 November 2012, the Claimant told ACO Potts that he was not complaining about DS Barnes or DS Dean, but was making a professional standards complaint. The complaint was forwarded by ACO Potts to ACC Sheard of the GMP's professional standards branch. She emailed the Claimant on 27 November 2012 and said that she was "unpicking" the background. She understood that it was very unsettling for the Claimant. She would get back to him quickly.

29. The next day the Claimant met DCS Horrigan. DCS Horrigan used the term "attached" rather than "seconded". ACC Sheard was not able to finish her inquiries within the time she had promised the Claimant. She told the Claimant there would be a short delay. On 28 November 2012 she asked DCS Horrigan if the Claimant's secondment could be extended as he was working on Operation Holly. He considered the request and agreed that the Claimant could carry on using the car while he considered it. On 30 November 2012, having spoken to DCS Shenton, DCS Horrigan replied to ACO Sheard. He could not extend the secondment because while it would resolve the "tricky situation" with the car, it would make an "already unsatisfactory situation regarding the selection procedures for TITAN" worse. Another officer was due to leave the unit because he had failed a course and had not been permitted to move to another unit in TITAN. He and DCS Shenton agreed that the best course was for the Claimant to return to GMP and for the force to resolve the transport issue.

30. ACC Sheard wrote to the Claimant on 4 December 2012. She explained why the secondment could not be extended and why he would not be entitled to any travel expenses when he came back. She referred to the Claimant's belief that the ending of his secondment was unfair, and not what had been agreed, and that his return to GMP and posting to Nexus

House, without travel expenses, was also unfair. She did not refer to race, or to professional standards.

31. She repeated DCS Shenton's reasoning from the regional point of view. GMP had honoured the commitment to a 2-year secondment and there were no grounds of extending it. His return to GMP would have to take immediate effect. On the travel expenses point, she said that the position under the relevant policy was clear. On return from secondment, an officer could be posted anywhere and without recourse to travel claims. She said that the inquiries she had made did not support the Claimant's assertions that GMP had acted outside the agreement made in 2009 or that GMP's policies had been applied inconsistently or unfairly to him. She said that if she had left out anything important, the Claimant should feel free to raise it. She did not action the Claimant's complaints as professional standards complaints.

32. The Claimant was unhappy with this and said so to senior officers. ACC Sheard heard about that and emailed him on 5 December 2012. She said that she was disappointed that he had not contacted her again if he was unhappy. She was more than happy to review matters. The Claimant continued to work at Nexus House. He was not entitled to use the car and was not paid any travel expenses.

33. The Claimant served a statutory questionnaire. The Claimant relied on two named white comparators and on a hypothetical comparator. The Claimant's two comparitors (Darren Bailey and Leslie Drummond) were both seconded by GMP to Titan in 2009 by a written agreement, for an initial period of two years but "subject to review". Both secondments were extended beyond two years. In question 27, he asked GMP to confirm that

his complaint was not investigated by the professional standards branch. GMP's reply was that ACC Sheard, the then head of that branch, had investigated it. "It was not considered a complaint under the Police Reform Act 2002."

34. The Claimant relied on three reports in support of an argument that GMP was "institutionally racist". One, a report by the IPCC, post-dated the events in question.

The ET's Judgment

35. The ET set out the facts which I have summarised above. It referred to the parties' written submissions and listed the cases they relied on. It set out the relevant statutory provisions in an Annexe to the Judgment.

36. The agreed issues (so far as relevant) were whether the Respondent treated the Claimant less favourably on the grounds of his race, among other things, in (a) failing to second him to the RCU in breach of the compromise agreement, (b) treating him as "attached" to TITAN rather than as "seconded"; (c) terminating the secondment summarily and/or without consultation; (d) failing to allow the Claimant to complete 5 years in his seconded post, in breach of the TITAN's 2011 policy; (e) withdrawing his use of a RIU car or doing so summarily and/or without consultation; withdrawing his right to claim travel expenses summarily and/or without consultation; and (g) failing to investigate the Claimant's complaints about these things properly.

37. The ET noted in paragraph 9 of the Judgment that the Claimant relied on the same particulars in support of both claims. The particulars might support both, or one, or neither of the claims. For reasons which would become clear, the ET decided to consider the victimisation claims first. These were really facets of "the same major complaint" (Judgment, paragraph 23). That complaint was "recalling the claimant to the GMP, at the time when and in the manner in which the respondent did so".

38. The ET said that once a complainant had established that he done a protected act, the next question was whether he had suffered any detriment. There is no longer any need for a comparator. Ending the Claimant's secondment and removing his car amounted to a detriment. The remaining issue to be addressed was the burden of proof, as once those two elements were established, the burden of proof shifted to the employer to show that a reason for the treatment (and it need not be the sole reason) was that he had done a protected act.

39. The question was "what were the reasons that the respondent ended the claimant's secondment when, and in the manner, that he did?". The burden of proving non-victimising reasons was on the Respondent. The difficulty for the ET was that it had heard no evidence from the people who apparently took the relevant decisions. The responsibility for the decisions lay with the Respondent rather than with TITAN. This was DCS Horrigan's view and the ET agreed with it (Judgment, paragraph 27).

40. Who decided to recall the Claimant at the time he was recalled? None of the Respondent's witnesses was able to say (ibid). They did not make the decision and did not know who had made it (Judgment, paragraph 29). Caroline Ball carried out the decision, but the ET did not consider she made the decision. On the evidence, the only conclusion the ET

could reach was that it was either, DCS Shenton, or, more probably, ACC Heywood (Judgment, paragraph 27). The ET noted in this regard the email Caroline Ball sent on 22 November 2012 to DCS Shenton. Not one single email from ACC Heywood had been disclosed. In the absence of any evidence from him the ET could not begin to assess the reasons for his treatment of the Claimant. The ET recorded a submission from the Respondent that the Claimant could have called these two officers as witnesses. That submission missed the point that it was for the Respondent to discharge the burden of proof.

41. At paragraph 30 the ET noted that DCS Shenton had mistakenly thought that the secondment was for two years from October 2010. That might have explained the timing of the decision to recall the Claimant, although he had gone on to say that the period of the secondment had finished. The email of 3 April 2012 suggested that DCS Shenton knew why the Claimant had been seconded as he referred to not needing to go into "issues within the GMP". He had later said he was aware of the Claimant's history with MIT (which is where the issues giving rise to his earlier claims arose). The ET was therefore satisfied that DCS Shenton was aware that the Claimant had done a protected act (Judgment, paragraph 30).

42. The ET said (Judgment, paragraph 31) that the reason why the Claimant found himself in the position he did was because of the unique way he had arrived at TITAN. He was there because of the compromise agreement and that agreement was "inextricably linked to and [arose] out of' his protected act". Hence, there is no escaping the fact that his treatment was "because of" his having done a protected act. The ET was "therefore quite satisfied that the claimant suffered the detriments set out in claims (c), (e) and (f) because he had done a protected act". Those victimisation claims therefore succeeded. The ET found that DCS Shenton and ACC Heywood "were highly likely to have been aware, at the very

least, that the Claimant had previously brought tribunal proceedings" and that those were about his race. That was a very strong inference from the email of 3 April 2012.

43. Claim (d) (that the Claimant's secondment was not extended or considered for extension) also succeeded. That, too, flowed from the compromise agreement and, hence, from his protected act. In any event, the ET had not heard from DCS Shenton or ACC Heywood, and so could not know why they had "disregarded what had become an increasingly exercised option".

44. The ET then considered direct discrimination.

45. Unlike a victimisation claim, a claim of direct discrimination cannot succeed without a comparator, that is, a person, real or hypothetical, whose relevant circumstances are not materially different from those of the claimant (Judgment, paragraph 33). The most relevant circumstance was the Claimant's position under the compromise agreement. None of the actual comparators relied on by the Claimant were in that position, so he had to rely on a hypothetical comparator. Would a white officer in the same situation have been treated in the same way? Was the Claimant's race the reason why he was treated as he was?

46. The ET held that the answer to the first question was "probably 'yes'" and to the second, "no". It was a somewhat paradoxical consequence of the success of his victimisation claim that his race claim was undermined by that finding. "The reason why he was treated as he was was overwhelmingly that he was only in [TITAN] because he had made a special agreement with the respondent, and hence the reason why he had to leave it, and the manner in which the respondent went about it, was that reason as well." (Judgment, paragraph 35).

47. The ET went on to say (ibid), "To the extent that the manner in which the respondent went about it in terms of lack of consultation and warning could be considered discriminatory in itself, we are satisfied that the more likely explanation is ineptitude rather than the claimant's race. Clearly, the contemplation of the claimant returning to his own force had been going on from April 2012, and Caroline Ball has in May 2012 envisaged her team being in contact with the claimant to discuss his return. Sadly that did not occur, and it is difficult to avoid the conclusion that Caroline Ball, or possibly those senior to her, simply "sat on" this matter until it was noticed in November 2012, in something of a panic, that nothing had been done. There then ensued the hasty and ill considered letter which deprived the claimant of any chance of consultation."

48. In paragraph 36, they said that there might have been a reluctance to grasp the nettle. But it was completely irrelevant that the protected acts were race claims. The ET were quite satisfied that a gay or female officer who had compromised claims in respect of those protected characteristics with the same resultant period of secondment would have been treated in the same way. The claims of direct discrimination failed under heads (c) - (f).

49. The ET then considered complaint (g) (the failure to treat the Claimant's complaints as professional standards complaints). The ET held in paragraph 38 that the Claimant's complaint in November 2012 of a breach of the **2010 Act** was a fresh protected act. The failure to deal with the complaint as a professional standards complaint was a detriment. The burden then shifted to the respondent to explain the treatment.

50. The ET heard from ACC Sheard about the professional standards complaint. Her explanation for the way she dealt with it was that it was not considered to be a complaint under the **Police Reform Act 2002**. The ET said that that explanation was hard to accept. If

it was genuinely her view, it was hard to see how she could reasonably hold it, because of the clear terms in which the complaint was expressed. It was forwarded to her as a professional standards complaint (which meant that ACO Potts appeared to have understood it as such) but she made no effort to deal with it as such.

51. The ET concluded that a hypothetical white comparator would not have been treated in that way. Anyone else would have had their complaint dealt with appropriately as professional standards complaint, or would have been told why it was not being dealt with as such. Yet ACC Sheard did not even explain to the Claimant that she was not prepared to deal with his complaint as such a complaint, let alone why. Moreover, the Claimant was clearly making a complaint about race, an issue ACC Sheard did not refer to at all in her response.

52. What was the reason why the Claimant was treated in this way? The inference to be drawn from her evidence, the documents, the replies to the questionnaire, and "though to a lesser degree, the reports and previous findings of racism within the Respondent's force, is that she treated him this [way] because the very matters he was raising were connected to his race. There was clearly an embarrassment and sensitivity felt by the respondent about the claimant, and how his situation had been handled. The obvious inference is that ACC Sheard, consciously or subconsciously, did not want to respond to the claimant's complaints as race complaints by referring the matter to Professional Standards as this would potentially escalate the issue". Once her understandable efforts to resolve matters informally had failed, "… she clearly then, as she probably now realises, ought to have passed the matter on to Professional Standards. That she did not do so, in our view, was because the claimant had raised complaints of race discrimination, and, either as victimisation, or as direct discrimination, the … claim succeeds".

Discussion

53. I have not found this an easy case. Miss Del Priore accepted that, in places, the ET Judgment is badly expressed. The essential question for me is whether the Judgment is just badly worded or whether it is so deficient as to disclose material errors of law. I have set out Mr Gorton's essential case in paragraph 2, above.

54. Before I consider the grounds of appeal, I make three points. The first point is that the ground on which the President gave permission to appeal was, in short, that the logic of the reasoning in the second part of paragraph 31 of the ET's Judgment is questionable. It is not so much questionable, as, of and by itself, an insufficient basis for a finding of victimisation. I think that Miss Del Priore accepted this. The ET apparently adopt a similar approach in paragraph 35 of their Judgment (albeit in a different analytical context). It was not open to the ET to conclude that just because there was a historical link between a protected act, the compromise agreement which flowed from it, and the Claimant's secondment, the secondment was brought to an end, when, and in the way that it was, because of the protected act. As the President observed, that is to equate the reason why the secondment ended with the reason why it started. There is, of course, a causal link between the secondment and its end, because it was always a temporary secondment. But that is not, in my judgment, the only reason for the ET's decision on this issue: see the first sentence of paragraph 31 and "In any event" which introduces the reasoning in the rest of that paragraph.

55. The second point is that there is no necessary logical contradiction, in my judgment, between the findings that the victimisation complaint succeeded and that the direct discrimination claim failed. I think that Mr Gorton accepted this. There are three main

reasons why. First, they are different causes of action. As the ET pointed out, in order to succeed in a direct discrimination claim, a claimant has to identify a comparator (and show less favourable treatment than would be given to that comparator); whereas no comparison is inherent in the definition of victimisation. Second, in the case of each claim, a claimant has to show a causal link between the treatment he suffers and two different things: in one case, his race, and in the other, a protected act. Third, that link does not require that the claimant's race or, as the case may be, his protected act, must be the sole cause of that treatment, as is common ground. It is thus logically possible for a claimant to fail to show in relation to the same act or acts that he received less favourable treatment "because of" his race, but to succeed in showing that he was subjected to a detriment "because of" a protected act.

56. The third point is that the Claimant's complaint was not that the secondment ended, as such, but that it ended in the way, and at the time when it did, and that the Respondent had not explained why the Claimant was not considered for an extended secondment, in line with TITAN's draft policy, and in line with the two white officers whose secondments were extended. True it may be that their secondments were, from the outset, subject to extension (see further, the next paragraph), but a decision must have been made to extend those secondments beyond the two-year initial period. It is clear from the ET's findings that the question of the Claimant's secondment must have been under discussion for some time. Two leading figures in that discussion were not called to give evidence. In paragraph 18 of the Notice of Appeal, the Respondent suggests that the decision to end the secondment was made by ACC Sheard. But she did not make the decision. Rather, she dealt with the Claimant's complaint about the ending of the secondment. He described that complaint as a professional standards complaint. That complaint was a consequence of a decision to bring the secondment to an end. But when ACC Sheard dealt with that complaint, her decision on the

complaint was a consequence of the ending of the secondment; it was not the decision to end it.

57. It is convenient here to say more about two potential evidential comparators, DC (or DS) Bailey (a different Bailey from the Claimant) and DC Drummond. These were white officers who had been seconded by the Respondent and whose secondments were extended. They gave evidence at the ET hearing. I asked in the course of argument why these two officers were not referred to in the ET's reasoning, other than in passing. Mr Gorton told me that their cases were significantly different from the Claimant's case because, unlike his secondment, their secondments were, from the outset, subject to an express provision that they could be extended.

58. The first ground of appeal relates to the ET's findings on paragraphs (c)-(f) and (g). Mr Gorton's point is that there is a missing step in the ET's reasoning in paragraphs 24 and 39-40 of the Judgment. Under all these heads, the ET's approach was that it was not in dispute that there was a protected act and a detriment. They then said that the consequence of that was that the burden of proof shifted to the Respondent to disprove victimisation. I accept Mr Gorton's submission. The ET did not explain in paragraph 24 or 39 what evidence there was that the two were causally linked ("because of"). As a matter of analysis, the ET identified two facts from which the ET, absent an explanation, could have inferred a possibility of victimisation, but by themselves, they were not enough to lead to an inference of victimisation, because the ET left out the required causal link between the protected act and the detriment (see **Igen v Wong** [2005] IRLR 258, and **Madarassy v Nomura International Plc** [2007] IRLR 246 at paragraphs 56 and 57).

59. However, I accept Miss Del Priore's submission that, in the context of this case, this was not a material error of law, at least as regards paragraphs (c)-(f). I deal with ground (g) further, below. There are two points about the context for this submission. The first is the common sense position that there will rarely be direct evidence of victimisation or of direct discrimination. A respondent will hardly ever say, "Oh, yes, now you come to mention it, I did victimise C" or, "I did discriminate against C on the grounds of his race". Once an ET has found the primary facts (i.e. what happened) it has to decide why what happened happened. To do that it will often have to draw inferences, taking into account any explanation by the respondent (see, for example, paragraphs (1) to (6) of what have been called the **Igen v Wong** guidelines, from the Annexe to the judgment of Peter Gibson LJ in that case). Those guidelines refer more than once to the absence of an adequate explanation, or to an explanation. This leads me to the second contextual point, which is that, as the ET knew, there was no explanation from the Respondent about the main complaint. It is entirely understandable, but not commendable, that in this case, where the Respondent had provided no explanation of the manner and timing of the decision to recall the Claimant to the GMP, and the ET knew that, the ET jumped this step. In other words, they knew that there was no explanation, so knew that burden of proof must shift. That explains, but does not, of course, excuse, the wrong way in which they described what they had to do in paragraph 24 of their Judgment.

60. What was the significance of the lack of evidence from the decision maker or decision makers? It was that the Respondent had not provided any explanation from those whose decision it was to end the secondment when and in the way in which it was ended. I reject the submission (which is the basis of he second ground of appeal) that the secondment ended because the terms of the compromise agreement always envisaged that it would be temporary

and that that was a non-discriminatory explanation for the Claimant's treatment. The point here is that the second anniversary of the secondment came and went, and it did not end then, and there was evidence both that when and how the secondment would end was a topic of discussion among the Respondent's managers, and officers in TITAN, over a significant period, and that two other officers' secondments (admittedly secondments which were, in terms, expressly subject to extension) had been extended. Further, when the secondment did formally end, the Claimant was still to work in the same place and in the same role as he had been while the secondment was still in force (but without a car to get to that work place and with no entitlement to claim travel expenses).

61. In my judgment, if the ET had engaged with the missing step in their reasoning (i.e., was there material in this case from which an inference of victimisation could be drawn?) they must have said, "yes". It was not material from which such an inference had to be drawn, of course. Whether it was right to draw such an inference from that material was pre-eminently a question of fact of the ET's assessment.

62. Mr Gorton also submitted that the ET fundamentally misunderstood the function of the burden of proof and this led them to fail (in relation to claims (c) - (f)) to take into account in the victimisation claim material which they did take into account when they considered the direct discrimination claim, and which, if they had taken it into account when they considered the victimisation claim would or might have made a difference to their conclusion. He submitted that the ET had "a complete non-discriminatory explanation", which they deployed when considering the direct discrimination claim, but to which, because of their error about the burden of proof, they shut their eyes when considering the

victimisation claim. This explanation, referred to in paragraph 35 of the Judgment, is, in short, "ineptitude".

63. But it is not quite as straightforward as that, in my judgment. The context for the consideration of the direct discrimination claim in paragraphs 33-35 is that the ET had already found the victimisation claim proved (and if my analysis is right, were entitled to do so), because the Respondent gave no evidence to explain why and when the secondment ended as it did. In the light of that, the ET then considered whether the Claimant had shown that his direct discrimination claim had succeeded.

64. I have described the ET's reasoning on this part of the case at paragraphs 45-48, above, and do not repeat that there. The effect of this, in other words, was that, in the ET's judgment, the treatment had nothing to do with the Claimant's race, and more to do with the fact that he had done a protected act.

65. In sum, in paragraphs 33-36, the ET were not saying anything which was logically inconsistent with their conclusion on victimisation. Ineptitude was not a complete explanation for what had happened, but it was part of the reason why the ET decided that the direct discrimination claim failed. But that claim did not fail just because of the ineptitude of the Respondent in ending the secondment. It failed mainly because a white officer who had done a protected act would have been treated in the same way. The type of protected act was not relevant, but the fact of the protected act was.

66. Mr Gorton's cogent submissions have not persuaded me that the ET materially erred in law in on these points in relation to complaints (c)-(f). There are four strands in the thread of the ET's reasoning, when the Judgment is read as a whole.

i. They understood that there were three elements in the victimisation claim.

ii. They gave appropriate weight to the lack of any explanation from the respondent of the decision to end the secondment when, and in the way in which, it ended.

iii. The "ineptitude" explanation they refer to in the context of the direct discrimination claim was not a complete answer to the victimisation claim.

iv. They explained adequately their conclusions that the victimisation claim succeeded and the direct discrimination claim failed.

67. I also bear in mind that they were referred to the relevant cases (listed in paragraph 6 of the Judgment) and that, quite apart from the Annexe to the Judgment in which they set out the text of the relevant statutory provisions, there are several passages elsewhere in the Judgment which suggest that the ET appreciated that the victimisation claim would fail if the reasons why the secondment ended when, and how, it did, were what the ET described as "non-victimising reasons", or to put it another way, the detriment was not "because of" the protected act.

68. In paragraph 5 the ET said, "… the focus has been upon an examination of the reasons given by the respondents' witnesses for their treatment of the claimant and whether these were by reason either of his race or his having done any protected act". In the list of issues, paragraph 7, the ET used the phrase "because of" under the direct discrimination heading; and under the heading "Victimisation …". In paragraph 24, the ET described the

burden of proof as the burden of showing "that the reason for the treatment (and it need not be the sole reason - it is sufficient that the doing of the protected act was part of the reason for the treatment) was not the protected act". In paragraph 25 the ET said, "So the question that arises in this case is what were the reasons that the respondent ended the claimant's secondment when, and in the manner, that he did? The burden of proving non-victimising reasons lies upon the respondent." The ET also said in paragraph 28: "In the absence of any evidence from him [sc Steve Heywood] the tribunal has no basis on which to begin to assess what the reasons for his treatment of the claimant were", and in paragraph 31, "… quite apart from the absence of any evidence from the respondent as to the reasons why he treated the claimant as he did when he did …" and "… he suffered the detriments … because he had done a protected act". In paragraph 32, they said, "… the tribunal cannot know why they disregarded what had become an increasingly exercised option". In paragraph 33, the ET went on to say that they had also considered whether the claims should succeed as claims of direct discrimination "on the basis that not only was the claimant treated as he was because he had done a protected act but because of his race". In paragraphs 34 and 45, they said, "That brings us on to the next consideration, the "reason why" test". In paragraph 37, dealing with complaint (g), the ET said that the question was, "… was such a failure (if such it be) because of the claimant having done a protected act so as to amount to victimisation, or was the reason why there were not so dealt with the claimant's race?".

69. The next issue is whether the ET erred in finding that the Claimant's case on victimisation and direct discrimination based on ACC Sheard's response to his professional standards complaint. The Respondent's anxieties about this aspect of the ET's decision are explained in paragraphs 68-71 of the Respondent's skeleton argument. They are, in essence, that the Respondent feels that the effect of the ET's decision was to dictate to it how it should

deal with a complaint which it would rather treat as a grievance than as a professional standards complaint, essentially, it seems, for reasons to do with resources.

70. I reject that as a concern, because, having read the relevant legislative material, I consider that it does not require every professional standards complaint to be the subject of a full-blown investigation. The minimum requirement imposed by the legislative scheme, if such a complaint is made, is (if the Respondent does not consider that it merits investigation as such a complaint) to write to a complainant to say so; see Regulation 12(1) and (6) of the **Police (Conduct) Regulations 2012** (2012 SI No 2632) ("the 2012 Regulations"). The **2012 Regulations** are made, not under the **Police Reform Act 2002** ("the 2002 Act") but under the **Police Act 1996**. But the legislative scheme does require that at least. Whether a complaint is such a professional standards complaint, and falls within the legislative scheme, is a mixed question of law and fact, ultimately for a court. It is not a question of discretion for the Respondent, although it is, of course, the Respondent's job to make an assessment of that mixed question when a complaint described as a professional standards complaint is made to it.

71. Mr Gorton made a number of criticisms of the ET's findings on this aspect of the case. They were based on a misapplication of the burden of proof (see paragraphs 39 and 40). The ET did not find as a fact that ACC Sheard was not telling the truth when she said that she did not regard the Claimant's complaint as professional standards complaint. The fact that she acted unreasonably was not, on its own, enough to give rise to an inference of discrimination or victimisation. The ET erred in its description of a hypothetical comparator. The ET's finding at paragraph 45 that the Claimant's treatment was "connected to his race" was insufficient to found liability. The ET erred in its approach by equating liability for

victimisation with liability for direct discrimination. The ET took into account irrelevant matters in reaching their conclusions.

72. I reject the submission that the ET erred in its description of the hypothetical comparator. It is true that the description in paragraph 43 of the Judgment is not as full as it might be. But I am satisfied by the direction in the last sentence of paragraph 33 "a comparator has to be a person, real or hypothetical, whose relevant circumstances are not materially different from those of the claimant", by the reasoning in paragraph 34, as well as by what the ET said in paragraph 43, that the ET well understood its task on this part of the case.

73. I reject the submission that the ET applied too loose a causal requirement to the claim by using the phrase "connected to his race". It is clear from this part of the Judgment, read as a whole, that the ET appreciated that they needed to consider the reason why the treatment occurred, or, to put it another way, whether it happened "because of" a protected act or "because of" the claimant's race.

74. I accept that there is a missing link in the ET's reasoning between paragraphs 39 and 40 of the Judgment. But I do not consider that it is a material error, both for the reasons given in the previous paragraph, and because there was evidence about the explanation for this aspect of the Claimant's treatment, which the ET analysed with great care.

75. I was initially attracted by the submission that the ET should have made a finding whether ACC Sheard's explanation was an honest explanation or not. In the event, I am satisfied that it was not necessary for the ET to make a finding on that point. This is because

the ET did not rely solely on what they, I think, saw as ACC Sheard's unreasonable response to the professional standards complaint to found their inference that the Claimant was both victimised and the subject of direct discrimination. They relied on a number of other matters, including the way in which she gave her evidence, the embarrassment and sensitivity they detected which the Respondent felt about the Claimant, and the documents (I accept Miss Del Priore's submission that by that they meant all the documents in the bundle).

76. Mr Gorton submitted that the ET erred in relying on matters which were irrelevant. The first is the reply to question 27 in the questionnaire served by the Claimant. Section 138(4)(b) of the **2010 Act** permits an ET to draw an inference from an evasive or equivocal answer to a question in such a questionnaire. Were the ET entitled to find that that the answer to question 27 was evasive or equivocal? In my judgment they were, because the answer does no more than to assert that that complaint was not considered to be a complaint under the **2002 Act** without explaining on what grounds it was considered not to be such a complaint; that was precisely what was in dispute. More fundamentally, whether or not the **2002 Act** applies to a "conduct matter" as defined in section 12(2) of the **2002 Act** does not affect the duties imposed by the **2012 Regulations**. Those were the relevant duties here and they were not complied with.

77. The second is the reports and previous findings of racism in the Respondent's force. I accept Mr Gorton's submission that there is no doctrine of transferred malice which enables an ET to say that just because one employee has acted with a discriminatory motive towards a person, that employee's motive can be attributed to a second employee who does not share that motive, or know about it, but makes a decision based on what the first employee has told him. However, the ET did not fall into that trap. What they did was to give limited weight to

background information about other problems connected with race in the Respondent's force which were the subject of two reports which were in the bundle (one undated, one dating from 2005), and one postdating the events of this case. It is perhaps unfortunate that the ET used the pejorative phrase "institutional racism". But I do not consider that they erred in relying on this material to the limited extent that they did. I do not consider that it is irrelevant as a matter of law.

78. The last question on this complaint is whether the ET equated liability for victimisation with liability for direct discrimination as Mr Gorton submitted, and, if so, whether they erred in doing so. I do not consider that they equated liability for the two statutory torts. I am satisfied that they appreciated both that the torts are different and what the requirements of each are. What the ET held was that, on these facts, the Respondent had committed both victimisation and direct discrimination. The question is whether the material on which they relied entitled them to find that both torts had been committed. I consider that it did. As a matter of logic, the ET were entitled to find that the Claimant's race, and his protected act, played a sufficient causal role in, or were sufficient reasons for, ACC Sheard's response to his professional standards complaint.

Conclusion

79. For these reasons I dismiss the appeal.