



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Howard

**Respondent:** Metropolitan Police Service

**Heard at:** London Central

**On:** 31 March to 4 April 2014  
7 to 9 April 2014  
24 & 25 April (in Chambers)

**Employment Judge:** Ms H Grewal

**Members:** Mr D Carter  
Lady A Sedley

## Representation

**Claimant:** Ms S Jolly, Counsel

**Respondent:** Ms R White, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1 Between 31 January and 29 October 2012 the Respondent directly discriminated against the Claimant on the grounds of sex and race by Acting Inspector Kelly (as he then was) subjecting her to a course of conduct which was detrimental to her;
- 2 The complaints of discrimination on the grounds of marital status are not well-founded;
- 3 The complaints of victimisation are well-founded in respect of:
  - (a) Acting Inspector Kelly's conduct on 6 November 2012;
  - (b) Chief Inspector Hardman's findings in his report of 14 March 2013; and
  - (c) The Respondent directing DS Hepworth to remove all references to and findings of discrimination and harassment from her final report.

# REASONS

1 This was a combined hearing of two claims, 2200184/2013 and 2202916/2013, presented to the Tribunal respectively on 8 January 2013 and 7 July 2013, in which the Claimant complained of race and sex discrimination.

## The Issues

2 It was agreed at the start of the hearing that the issues that we had to determine were as follows.

2.1 Whether the Respondent directly discriminated against the Claimant because of race and/or sex by doing any of the following:

- (a) Local police attending her home after one day's sickness absence on 31 January 2012;
- (b) Conducting her return to work interview by 7 March 2012 in an intimidating way;
- (c) Inspector Kelly arranging for private shoot sessions with her in April 2012;
- (d) Monitoring her Facebook page and doubting her sickness absence on 8 and 9 June 2012;
- (e) The manner in which the Respondent reacted in August 2012 in respect of the Claimant's car going missing;
- (f) Inspector Kelly not supporting the Claimant's flexible working application made in July 2012 without having any discussion with her;
- (g) Inspector Kelly not supporting the Claimant's SO6 ARV application and indeed blocking it without any discussions with her;
- (h) Inspector Kelly not supporting the Claimant's CO19 ARV application, attempting to persuade PS Gil not to support it and ultimately blocking or sabotaging it without any discussion with her;
- (i) Inspector Kelly accusing the Claimant in August 2012 of fraudulently having tampered with her sickness absence;
- (j) Inspector Kelly withdrawing the Claimant's authority to carry firearms on 12 August 2012;
- (k) Chief Superintendent Tarrant refusing on 29 October 2012 to shorten her tenure;

- (l) Hostile treatment by Inspector Kelly's conduct towards the Claimant in respect of Inspector Rose and on 6 November following the lodging of the Fairness at Work complaint;
  - (m) Making the findings that it did on 14 March 2013 in respect of the Claimant's Fairness at Work complaint
  - (n) Failing to take any action against Inspector Kelly;
- 2 If any of the matters set out at paragraph 1 (a), (c) and (l) occurred, whether they were harassment relating to race and/or sex.
- 3 Whether the matters at paragraph 1(g) and (j) were direct discrimination on the grounds of marital status.
- 4 Whether the Claimant's complaints to Chief Superintendent Tarrant in October 2012 and to Inspector Kelly on 28 November 2012 amounted to protected acts under section 27 of the Equality Act 2010. It was admitted that the Claimant's fairness at work complaint on 5 November 2012 and the Claimant's ET1 on 8 January 2013 did amount to protected acts.
- 5 If so, whether the Claimant was subjected to the following detriments because she had done the protected acts:
- (a) The failure by Tarrant to release the Claimant from her tenure;
  - (b) A hostile and aggressive attack by Inspector Kelly on 6 November 2012 when he pinned the Claimant in a corner, pointed his fingers at her in a fierce and threatening manner and intimidated her;
  - (c) Watching the Claimant on CCTV;
  - (d) The 14 March 2013 local resolution report findings into the Fairness at Work complaint;
  - (e) The failure to consider whether those findings amounted to race and/or sex discrimination on the grounds of marital status;
  - (f) The Respondent directing DS Hepworth to halt her investigation into the Fairness at Work and to remove all references and findings of discrimination and harassment from the final report, with the result that no appropriate or adequate disciplinary action was taken against Acting Inspector Kelly.
- 6 Whether the claims are in time/constitute a continuing course of conduct within the meaning of section 123(3)(a) Equality Act 2010, and/or whether it is just and equitable to extend time to permit any claims which are out of time.
- 7 This last complaint of victimisation (paragraph 5(f) above) was added as a result of amendment permitted on the second day of the hearing. The application to amend was made as a result of documentation that was disclosed on the first day of the hearing although it had been requested prior to that date. The

Respondent did not oppose the application on the basis that the Claimant would be entitled to make a fresh application to the Tribunal in respect of those matters. It seemed sensible to all involved that that complaint should be consolidated with the present complaints and heard at the same time as them.

### The Law

8 Race, sex and marriage are protected characteristics in respect of which discrimination is prohibited under the Equality Act 2010 (section 4). All references to sections below are to the Equality Act 2010 unless stated otherwise.

9 Section 13 provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. On a comparison of cases for the purposes of this section, there must be no material difference between the circumstances relating to each case (section 23). Section 14, which deals with discrimination because of a combination of two relevant protected characteristics, has not yet come into force.

10 Section 26 provides that a person (A) harasses another (B) if A either engages in unwanted conduct related to a relevant protected characteristic or engages in unwanted conduct of a sexual nature and, in either case, that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Race and sex are relevant protected characteristics.

11 Section 27 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. "A protected act" includes making an allegation that (whether or not express) that A or another person has contravened the Equality Act 2010.

12 If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision (section 136). Proceedings on a complaint under the Equality Act 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable (section 123(1)). Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)).

13 In recent years the higher courts have emphasised that in cases where there is no actual comparator, or where there is a dispute about whether a comparator is an appropriate comparator, tribunals should focus on why the claimant was treated in the way that he or she was treated. Was it because of a protected characteristic? The point has been made, among others, by Lord Nicholls in Shamoon v Chief Constable of the RUC [2003] IRLR 285 (at paragraph 11), Mummery LJ in Aylott v Stockton on Tees BC [2010] IRLR 94 (at paragraph 41 – "*There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?*") and Underhill J in Cordell v FCO [2012] ICR 280 (at paragraph 18).

14 It has long been recognised that it is extremely rare for there to be overt evidence of direct discrimination and the issue in each case will be whether such discrimination can be inferred from the primary facts found by the tribunal. In determining whether there are facts from which the tribunal can infer race or sex discrimination, the tribunal must have regard to all the material facts and is not limited to considering only the evidence adduced by the claimant – **Laing v Manchester City Council [2006] IRLR 745**. Where there is a finding of less favourable treatment, a tribunal may infer that discrimination was on the proscribed grounds if there is no explanation for the treatment or if the explanation proffered is rejected - **King v Great Britain-China Centre [1991] IRLR 513**.

15 The burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination – **Madarassy v Nomura International PLC [2007] IRLR 247**.

16 A tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated an employee unreasonably and that the employee in question was a woman or from an ethnic minority – **Glasgow City Council v Zafar [1998] IRLR 36**. However, racial or sex discrimination may be inferred if there is no explanation for the unfavourable treatment. That is not an inference from the unreasonable treatment itself but from the absence of any explanation for it – **Bahl v The Law Society [2004] IRLR 810**, per Gibson LJ at paragraph 101.

17 If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, that is sufficient to establish direct discrimination. It need not be the sole or even principal reason for the conduct; it is enough that it is a contributing cause in the sense of a “significant influence” – Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR 572**, at 576.

### **The Evidence**

18 The Claimant gave evidence in support of her case. The following witnesses gave evidence on behalf of the Respondent - PC Gary Flaherty, Inspector Simon Fox, DS Carlos Gil, CI Mark Hardman, DS Fiona Hepworth, PS David Kelly, PS Colin Marsh, PS Andrew McNally, Inspector Stuart Rose, Inspector John Stone, PS Phillip Stubbs, Chief Superintendent Andrew Tarrant, and David Jones. We also had before us three lever-arch files of documents. Having considered all the oral and documentary evidence the Tribunal’s findings of fact are as follows.

**Findings of Fact**

19 The Claimant is a black woman. She joined the Respondent as a police officer on 12 July 2004. She was 25 years old at the time.

20 The Claimant qualified as an Authorised Firearms Officer on 16 September 2010 and was issued with a blue card. The blue card confirms that the officer is authorised to carry and deploy weapons. An officer's entitlement to hold a blue card is reviewed annually, and the officer is required to undergo hearing, eyesight and physical fitness tests annually. In addition, officers have to maintain their shooting skills by regular practice and assessments. If an officer fails a test shoot the officer's blue card is marked with a red "R" which denotes that the officer must redo the test. If an officer has three red Rs in a 15 month period he loses his authority to carry weapons, and will have to be reassessed and reclassified.

21 At the time that the Claimant got her blue card she was working in the Child Abuse Investigation Team ("CAIT", also known as SCD5). She continued working there until August 2011. She got her first red R in February 2011.

22 In August 2011 the Claimant was posted to the Diplomatic Protection Group ("DPG") in Special Operations Directorate number 6 ("SO6"), although she did not start working in the unit until 6 October 2011. DPG is primarily responsible for providing protection to diplomatic and government buildings and communities in London. Much of the protection is provided by armed officers and in order to join DPG an officer has to be an authorised firearms officer.

23 Prior to joining DPG there had been no disciplinary proceedings against the Claimant and there was no evidence before us of there being any specific concerns about her performance or attendance. Furthermore, there was no evidence that she had had any difficulties or complaints in respect of her colleagues or that she had raised any grievances against them.

24 DPG has approximately 700 officers. Women are significantly under-represented in DPG and at the relevant time there were only 12 female officers in DPG (1.71%). 2 of the female officers, one of whom was the Claimant, were black. There was no statistical evidence of the ethnic origin of officer in DPG. Chief Supt. Tarrant's evidence was that about 12% of the officers were "non-white".

25 DPG was divided into five core teams which operated out of four bases. These were at Apex House in Charing Cross (A1), Lillie Road in Hammersmith/Earls Court (B1), Kensington (B2) and the Palace of Westminster. The teams generally worked two shifts of 12 hours. The early shift started at around 6 or 7am and the late shift at 6 or 7pm.

26 When the Claimant joined DPG she was in team 2 and was based at Kensington. The various teams were spread out amongst the bases and altogether team 2 had about 8 Sergeants and 105 constables. There were about 34 team 2 officers at Kensington (B2) and the supervision of them was shared between Sergeants Gil and Marsh, each of them being responsible for the line management of 16 constables. The Claimant was in Sergeants Gil's group. The

Claimant was the only woman in team 2 based at Kensington. Until 2 January 2012 the sergeants in team 2 reported to Inspector Rose. Inspector Rose's contact with the Claimant was minimal and was limited to chance encounters whilst visiting the posts on which she might have been deployed.

27 On 7 October 2011, the day after the Claimant started working at DPG, she got her second red R.

28 On 2 January 2012 Inspector Rose was seconded to work on the Olympics. Sergeant David Kelly, who was in team 3 and had previously acted up as Inspector in that team, volunteered for the role of Acting Inspector for team 2. Sergeant Kelly was based at B1. He was appointed to the role and became the Claimant's second line manager.

29 Soon after taking over responsibility for the team Acting Inspector Kelly introduced himself to the Claimant one night when she was on duty at the American Embassy. They had a brief conversation about their children.

30 On 30 January 2012 the Claimant was due to work the 7am to 7pm shift. She awoke in the middle of the preceding night and felt very unwell. She vomited several times and shortly after midnight she telephoned the Respondent's HR desk service and reported that she was sick with vomiting and did not know when she would return to work. The next shift the Claimant was due to work after that was at 7pm on 31 January. Having made the telephone call, the Claimant turned her mobile phone off so that she could sleep undisturbed.

31 The Respondent's Attendance Management procedure provides the following - the officer must report sick to the HR service no later than the start time of the tour of duty/working day, giving details of the nature of the illness and the anticipated date of return; the officer must expect to receive a call from the line manager establishing contact and he/she must co-operate fully with maintaining contact; the HR service must ensure that the relevant line manager and unit are notified of the sickness absence; the line manager must contact the individual as soon as possible to establish contact; staff who report sick should expect to receive a phone call from their immediate line manager within 24 hours of reporting sick; if the line manager is unavailable the deputy should make the call.

32 The procedure does not say that in the event of the Respondent being unable to make contact for 24 hours after an officer has reported in sick, a "please allow" i.e. instructing police officers from the individual's local area to visit his or her address, will or must be instigated. The Respondent has not produced any written policy or instruction to this effect for either the Metropolitan Police as a whole or DPG in particular. We do not accept that there was an unwritten policy or Senior Leadership Team instruction to this effect in DPG. We do, accept, however, that where there are welfare concerns about an officer, the officer's line managers can, and do, instruct local police officers to visit the officer at home.

33 On 30 January at 4pm the sergeant on duty tried to call the Claimant. He recorded that there was no reply to repeat ringing and no facility to leave a message.

34 On the following morning (31 January) at 11.27 Acting Inspector Kelly gave the sergeant an instruction to initiate "please allow". The reason recorded for the "please allow" was to check on the Claimant's welfare as they had been unable to make contact with her since she had reported in sick the previous day. The Sergeant tried calling the Claimant again at 11.33 and there was no reply.

35 At 11.45 a message was passed to Surrey police to discreetly attend the Claimant's home address and to instruct her to contact the Sergeant as a matter of urgency. At 1pm the Surrey police attended and reported later that there was "*no response at the door, no cars in the drive. Nothing appeared untoward.*" The Surrey police did not drop a card or a note through the letter box asking the Claimant to make contact with them.

36 At 8pm that evening the Claimant sent Sergeant Gil a text. She said that she had been to the doctor that day and had been diagnosed with a stomach bug, She said that she would keep him informed as and when she felt better to return to work.

37 The Claimant gave evidence that when other officers had been off sick a "please allow" had not been instigated. The Respondent's witnesses gave evidence that it had been done on other occasions. However, in neither case, was there evidence that the material circumstances were the same as in the Claimant's case. In the examples the Claimant gave, we did not know whether it had not been possible to contact the police officers in question for over 24 hours after they reported in sick. In the examples, the Respondent gave we did not know whether the officer in question had reported his/her sickness prior to the start of duty and/or whether there was any particular basis for any welfare concerns.

38 On 24 February 2012 the Claimant received her third red "R". As a result her firearm authorisation was withdrawn until she could attend a reassessment. It was not unusual for officers to get red Rs and to have to redo the test shoots. Although it was quite unusual for officers to get three red Rs within a 15 month period and to lose their firearms authority, it was not necessarily indicative of serious shortcomings in the officer's shooting ability and quite often the officer was able recover the blue card within a relatively short time frame.

39 The Claimant went home early on 24 February and she was absent sick from work from 25 to 27 February. She spoke to Sergeant Gil on 25 February and said that she had left early the previous day because she had been feeling unwell and that she had been to see her doctor that morning and that she had tonsillitis and a chest infection. This was her third sickness absence in that 12 month period. She had been absent sick for two days in May 2011 and for 2 days at the end of January 2012.

40 Acting Inspector Kelly's evidence to the Tribunal was that from about February he had doubts about the Claimant's honesty and formed the view that she did not meet the standards required for DPG. He provided no explanation of what had led him to doubt her honesty. He did not know her from before. He did not give any evidence about information about her that had been conveyed to him by someone else. There was, on the face of it, no basis for him having those



doubts. Equally, there appeared to be no basis for concluding that she did not meet the standards required for DPG.

41 Whilst at the Child Abuse Investigation Team the Claimant had been involved in the investigation of a serious rape and sexual assault case which was due to come for trial in April 2012. Initially Acting Inspector Kelly had authorised her to spend some time working on the case. On 5 March 2012 the Inspector at CAIT asked whether the Claimant could be released on 20 and 21 March to complete her work on the case. Acting Inspector Kelly responded on 7 March that unless there was a strong business reason for the Claimant to be released, i.e. there was no one else who was able to undertake the work, he would be unable to release her for any further periods other than for the trial itself. The reasons he gave for being unable to release her were DPG operational needs and the Claimant's training commitments. The Claimant was to be the Officer in Charge at the trial, as the officer in charge of the case was going to be on paternity leave at the time. DPG released the Claimant for the two weeks from 16 April to attend at the trial.

42 Following her sickness absence at the end of February 2012, a return to work meeting was held with the Claimant on 7 March 2012. Such a meeting is required in all cases when an officer returns to work after a sickness absence.

43 The Respondent's Attendance Management procedure provides that it is the responsibility of the first line manager to conduct the return to work interview and that the interview should take place in private to preserve confidentiality. The purpose of the interview is to confirm the reason for the absence, ensure that the person is fit to return to work, demonstrate concern for the health of the individual, provide an opportunity to identify any health, domestic welfare or work related problems and to update the individual on any work place events during her absence. Paragraph 6.7 of the procedure provides that the second line manager will review the case of any individual who has reached four periods of absence in 12 months.

44 At Kensington there were no private rooms for confidential meetings and all such meetings were normally conducted in the "base room" i.e. the room where the sergeants worked. Sometimes the door would be closed and a sign would be put on the door, but this did not always prevent people from walking in as they had to go through the base to access their lockers.

45 The Claimant's return to work meeting should have been conducted by DS Gil, her line manager. Instead Acting Inspector Kelly attended and took over the conduct of the meeting. AI Kelly believed that the Claimant had not been genuinely ill but had pretended to be ill so that she could work on the case in which she had been involved in the Child Abuse and Investigation Team. There was no basis for Acting Inspector Kelly believing that the Claimant had lied about her sickness absence. The meeting that took place did not address any of the matters that should be addressed at a return to work meeting. AI Kelly asked the Claimant whether she was committed to DPG and wanted to be on the Group; he told her that he had concerns about the amount time of time she spent on work for the CAIT and felt that this impacted upon her work for DPG. He also said that he had concerns about the levels of the Claimant's sickness absence while at CAIT. The evidence before us was that the last period of sickness absence prior

to the 2 days' sickness absence in May 2011, had been in April 2010. The meeting was conducted in the base room. Sergeant Gil was present as the Claimant's line manager. Sergeant Marsh was also present in the base room working at his desk. He did not directly participate in the meeting, but the base room is a small room and he was in a position to hear and observe the meeting.

46 The manner in which this meeting was conducted was wholly inappropriate and contrary to the Respondent's Attendance Management procedure. Instead of a supportive return to meeting, which is what the Claimant was expecting, she had to face her inspector, in the presence of two Sergeants, challenging and questioning her commitment to and suitability for DPG and castigating her for work demands placed on her by her former unit. She had not been given any advance notice that Al Kelly had concerns or that he wanted to discuss them with her.

47 Shortly after this Al Kelly ordered Sergeants Gill and Marsh to ask the Claimant whether she was "having sex with PC Flaherty" because the two of them often arrived at work together. The simple reason for that was that they travelled to work together. There was no evidence whatsoever to indicate that they were in any kind of relationship. Sergeants Gil and Marsh were shocked and made it clear to Al Kelly that they were not prepared to ask the Claimant that question because they considered it wholly inappropriate. Al Kelly got angry with them and shouted at them but they maintained their position. Al Kelly's evidence to us was that it was important to know if officers were in a relationship because that could have some impact upon them working together, However, he was not able to offer any explanation as to why, if that was the reason for asking the question, he had not instructed Sergeants Gil and Marsh to ask PC Flaherty the same question. The failure to raise the issue with PC Flaherty and absence of any basis for suspecting a relationship between them suggests to us that the query was not prompted by a legitimate concern about officers in a relationship working together but was an attempt by Al Kelly to find some wrongdoing on the part of the Claimant, some excuse to challenge and undermine her.

48 DPG has a local instruction for flexible working that applies to all officers who wish to work a flexible working pattern. It provides that any request should be made on a prescribed form to the applicant's line manager. It must set out the date of the proposed change, full details of the change, consider the impact of the change on the unit and include a 12 month roster. On receipt of the application the line manager must within 28 days conduct a formal interview with the applicant and, having considered various matters, should make a recommendation as to whether the application should be approved or rejected. The request should then be forwarded to the Chief Inspector of Professional Standards and the strategic HR advisor who, in the interests of consistency and fairness, will be responsible deciding whether the application should be approved or rejected. The local instruction does not provide for any involvement on the part of the inspector in an application for flexible working.

49 On 24 March 2012 the Claimant made an application for flexible working. She wanted to work shifts from 11am to 11pm (no night shifts) from 16 April. The reason for the application was childcare; there had been a change in her circumstances since she had been posted to DPG, in that she now had sole responsibility for her two daughters. Sergeant Gil spoke to her and asked her to

contact the Duties' Sergeant, who was responsible for rosters, and to get a work rota produced to see if her request could be accommodated. Al Kelly was made aware of the request.

50 On 1 April the Claimant contacted John Green, the Duties' Sergeant, and asked him to confirm whether her proposed shift pattern would work. His initial view was that it would not work and he suggested certain other options. However, none of these fitted with the Claimant's needs. He then reviewed it and said that it might be possible but it would almost certainly mean a move to B1 as the other two bases worked a different shift system. Although the Claimant believed that this had somehow been orchestrated by Al Kelly, there was no evidence before us to indicate that that was the case. The Claimant did not challenge or question the Duties' Sergeant's assertion that the rota could not be accommodated at her base. As she did not want to move to B1, she did not submit a rota. Sergeant Gil was thereafter reminded in May and June to either reject or approve the application and he confirmed on 11 June that the Claimant had cancelled the request.

51 On 14 February of that year PC Atkins (white male) had made an application for flexible working because of childcare needs. He wanted to continue working the same number of day and night shifts in a fortnight period but wanted to vary the pattern of his shifts. He attached a 12 month rota to his application. Sergeant Marsh supported his application on 15 February and passed it to Al Kelly for his final decision, although according to the local instruction it should have been passed to someone else. Al Kelly approved it on the same day as the application had been discussed with the Duties' Sergeant and was going to have minimal impact on working needs.

52 The Claimant's firearms authorisation was restored on 29 March 2012.

53 Al Kelly had suggested to the Claimant that she should book in for optional shooting practice but she had not done so. On 2 April 2012 he sent an email to Rob Guyatt-Jones, the instructor at the shooting range. He told him that the Claimant had reclassified after having lost her blue card with three red Rs but he wanted to prevent a recurrence and inquired about what practice and support was available. Normally it is the responsibility of individual officers to make sure that they get the practice they need. If there are any concerns about an officer not getting sufficient practice, the appropriate person to raise it would be the officer's line manager. Sergeant Gil did not raise any such concerns with either the Claimant or Al Kelly. There was no credible explanation of why Al Kelly got involved in this matter in the way that he did.

54 Mr Guyatt-Jones responded that Saturday shoots were the only thing that he could offer, and if the Claimant was given the morning away from work they could enter her for two slots rather than one the new officers were normally given. His view was that the fact that the Claimant had only red Rs as opposed to straight fails probably meant that she had no massive issues.

55 Al Kelly asked Mr Guyatt-Jones to provisionally book the Claimant in for two slots on the following Saturday although he was not sure whether the Claimant would be working that Saturday. He then approached the Claimant while she was working the night shift and told her that he had booked her in for

Saturday shooting. He did not say that he had booked her to go on the Saturday shoot with him. The Claimant questioned why he felt the need to book her in and she told him that she was on annual leave on that Saturday Al Kelly was annoyed and said that in that case she would have to cancel it.

56 We heard limited evidence about PC Dave Haslet, a white male officer, in the Claimant's team, who had been involved in a firearms incident. The incident in question took place before Kelly became the Acting Inspector for the Claimant's team. PC Haslet was guarding the Israeli embassy and accidentally discharged his loaded rifle. As this was a serious matter, it was investigated outside DPG at a higher level. The investigation found that PC Haslet had been "jigging about" and had been trying to adjust his body armour under his coat and the safety catch had unlocked and the trigger had been pulled. PC Haslet was exonerated. Some time after the incident Kelly became Acting Inspector. He gave PC Haslett the opportunity to act up as Sergeant on a few occasions. He thought that he did that after PC Haslet was exonerated but he was not sure. He also said that PC Haslett would have been taken through the post-incident procedure which would have involved one-to-one shooting sessions at a specialist centre.

57 Sometime between April and June 2012 the Evening Standard approached the Respondent as it wanted to do a photo feature about the role of London's police officers in the Olympics. Chief Superintendent Tarrant, who was commanding officer at DPG, selected the Claimant to represent DPG in the feature. When Al Kelly found out that the Claimant had been selected, he told Sergeants Gil and Marsh that he was going to speak to Chief Supt Tarrant to express his displeasure. He approached Chief Supt Tarrant and told him that he wished he had been consulted because he did not think that the Claimant was a "good advert" for DPG. When he was subsequently questioned about this in the course of the investigation into the Claimant's grievance, he said that the reason that he had objected to the selection of the Claimant was that she was undergoing various disciplinary matters and had problems with her performance and her attendance. The Claimant was not at that stage undergoing any disciplinary matters and no performance issues had been raised with her. She had lost her blue card but it had been recovered a month later and, according to the shooting instructor, it was not indicative of serious issues with her shooting. There were no attendance issues other than the fact that the Claimant had had two short periods of sickness absence earlier in the year. Al Kelly accepted in cross-examination that there were no attendance or disciplinary issues and said that what he had said in the investigation had been a "mistake" because the interview had been "rushed" and DS Hepworth (who conducted the interview) had been overbearing and unpleasant.

58 The Claimant took one day's annual leave on 8 June as it was her daughter's fifth birthday. She posted a birthday message to her daughter on Facebook with a link to some photographs. Shortly after 7pm she reported to the HR service desk that she had injured her foot and would be unable to attend work the following day. She had dropped a dumbbell on her foot and had seriously hurt it. Some of the Claimant's colleagues, who had seen the Facebook message, insinuated that she was "pulling a sickie". Al Kelly, instead of ignoring these remarks or dissuading his subordinates from engaging in rumour mongering, told Sergeant Gil to get officers, who were the Claimant's friends on Facebook, to look closely at what she had posted and to make inquiries into

whether the Claimant had previously requested annual leave for the following day which had been refused. This was yet another example of Al Kelly believing, without any sound basis, that the Claimant was lying and being dishonest about her sickness absence and of him trying to find some evidence of wrongdoing on her part. Sergeant Gil was unhappy about doing this but did as he was asked. The Claimant was informed by PC Flaherty that Al Kelly was looking into her Facebook account and that comments had been made that she was "taking the mickey". When the Claimant returned to work on 12 June, she took into work her hospital notes and pictures of her bruised and swollen foot.

59 On 31 July 2012 the Claimant applied again for a flexible working pattern to work eight hour day shifts from 11am to 7pm Monday to Friday starting from 10 September. The application was accompanied by a 12 month rota showing the Claimant working that pattern. Sergeant Gil supported the application on 28 August 2012 and put it forward to Al Kelly to approve or reject. On 30 August Al Kelly said that he would confirm with the Duties' Sergeant whether what the Claimant proposed was a viable pattern which sufficiently met business needs. Sergeant Green's response on 3 September 2012 was there was no problem with the Claimant not working nights or weekends, but that working from 11am to 7pm did not fit into any of their core business. He suggested a number of alternatives. On the basis of the advice from Sergeant Green, Al Kelly rejected the Claimant's application. Sergeant Green's response was posted on the HR Service and the Claimant could have followed up the other options that he had suggested, but she did not do so.

60 On 24 July 2012 PC Atkins applied to change his pattern to make it fit more closely with the normal team roster. The change involved was minimal. Sergeant Marsh approved it on 25 July. It appears that it was not forwarded to anybody else for approval thereafter.

61 On 9 August 2012 the Claimant applied for an Armoured Response Vehicle ("ARV") role in DPG, SO6.

62 On the same day when the Claimant went home at the end of a day shift, she discovered that her car, which she normally parked in Purley (on Friends Rd) was missing. She believed that it had been stolen. At about 7.51 she telephoned the police and she was put through to the Central Office (Computer Aided Despatch "CAD") where all calls made to and from the police are logged. She informed them that her car was missing and that she believed it was stolen. She had contacted the local authority hotline number and it had been confirmed that her car had not been impounded by the local authority.

63 The CAD operator checked the system and found an entry from earlier in the day logging a call from a bailiff, who had left a contact number, saying that he had removed the Claimant's car from Friends Rd. The CAD operator called the Claimant back five minutes later to inform her of that entry and gave her the bailiff's contact number. She was told that in those circumstances the police could not circulate her car as stolen.

64 The Claimant called the number that she had been given and she was told by the man that she spoke to that he was a bailiff and that she owed over £900 in respect of a parking ticket which had been sent to her a year ago at her old

address. The Claimant did not recall ever having received any parking ticket. The man said that she could have her car back if she made the payment over the telephone. The Claimant was, understandably, reluctant to part with that sum of money over the telephone without having seen any documents relating to the parking ticket and without some sort of verification that the man in question was indeed a bailiff as he claimed to be.

65 The CAD operator called her back after she had spoken to the man claiming to be the bailiff and he noted at 8.25 "*caller has spoken to the bailiffs and they are returning car now*".

66 At around 9.30 that evening the Claimant spoke to Inspector Fox, who was on duty that night. She was distressed and upset and said that she had returned home from work to find that her car had been stolen and that her house keys and other possessions were in the car. She said that she needed emergency annual leave the following day to change her locks and to sort out other things.

67 Before the end of the night shift Inspector Fox sent an email to Al Kelly and to Chief Inspector Des Connors (who was the Professional Standards champion at DPG). He informed them of the call from the Claimant and said that one of his sergeants had said that she had a habit of manufacturing a crisis when she needed a day off and it had been refused. There was no evidence before us to justify or provide a basis for the remark that the Sergeant made. Nevertheless, Inspector Fox acted on it; he said that he had done a "*bit of digging*" and this had revealed a CAD entry which showed that the car had not been stolen but had been repossessed by bailiffs. He highlighted two issues that might need further enquiries: firstly, whether the Claimant needed annual leave if she had been reunited with her car and, secondly, whether there were issues in respect of financial problems and debts.

68 Al Kelly, who had believed for a long time that the Claimant lied about her sickness absence and had been trying to find some wrongdoing on her part, was not slow to act on the information from Inspector Fox. At 8 am the following morning he told Sergeants Gil, Marsh and Farmer that the Claimant had requested annual leave the night before on the grounds that her car had been stolen when in fact the CAD reports showed that it had been lifted by bailiffs and had been returned to her. If the Respondent wanted to investigate the matter further by speaking to the Claimant, the normal and fair way of doing it would have been to tell her that they were investigating a potential misconduct matter and were making notes of the interview before asking her any questions. Instead Al Kelly instructed DS Gil to telephone her, in his capacity as her line manager, and to ask her what had happened the night before. He asked him to do this on the speakerphone so that DS Marsh could make a note of what was said. The result was that unbeknown to the Claimant whatever she said would be recorded and would be used as part of a disciplinary investigation. He also told DS Gil to start a MM1 form and to send it to him to complete it. The MM1 is a form that is used to report potential misconduct to the Directorate of Professional Standards ("DPS"). Even before any investigation had taken place Al Kelly had decided to refer the matter to DPS.

69 Inspector Connors sent Al Kelly an email at 8.55 am and told him that Inspector Fox's email raised issues of potential misconduct, and he asked him to investigate them and to compile a report.

70 At about 8.56 DS Gil phoned the Claimant, using the speakerphone in the base room. He did not tell the Claimant that he was investigating potential misconduct, or that there were concerns that she had not been honest the night before when she had requested annual leave. Nor did he tell her that the conversation was being conducted on the speakerphone and that DS Marsh was making a note of it. He simply asked her what had happened the night before. The Claimant said that when she had got to Purley her car had not been where she had left it, she had contacted Croydon police station to report the car stolen, she was waiting for her insurance broker to open to start the ball rolling and that she was going back to Croydon police station with her log book so that details of the car could be circulated.. Sergeant Gil asked her to phone him once her car had been circulated and to give him the crime report number. She was asked if she had her car back and she said that she did not.

71 Parts of the account given by the Claimant were true and parts were not. It was true that her car had gone missing and that she still did not have it and had not had it the previous night when she had requested annual leave. However, she was not entirely honest about the circumstances in which her car had gone missing. She knew that police had a report saying that her car had been lifted by a bailiff and that in those circumstances they could not circulate it as stolen. Although the Claimant had been given that information she was sceptical about it because she had never received a parking ticket and had at this stage not met with the bailiff or seen any documentation to support what was being alleged. We think it likely that she did not tell Sergeant Gil the true position partly because she was still uncertain in her own mind about it and partly because she was embarrassed about the involvement of the bailiff. She was also concerned that if she revealed the involvement of the bailiff, it would become common knowledge at the base and would generate rumours about her being in financial difficulties. In light of the rumours already circulating about her lack of honesty in relation to her absences, her fears were not entirely misplaced.

72 After the Claimant spoke to Sergeant Gil she spoke again to the man claiming to be the bailiff. He told her that unless she recovered the car within 24 hours there would be further charges and the car would be sold at an auction. He offered to meet with her and show her all the relevant paperwork. He also told her that the parking ticket had been issued because she was partially parked on a disabled bay. The ticket had been for £60 but the fine had increased as it had not been paid for a year.

73 At about 9.44 the Claimant called Sergeant Gil on his mobile. She said that she had just received a call from Croydon control telling her that her car had not been stolen but towed away and that it would cost her £300 to get her car back. The Claimant then started to get upset and became emotional. She understated the amount that it would take to recover the car because she was too embarrassed to state the true amount.

74 The Claimant subsequently met the bailiff with her ex-partner and, having seen the relevant paperwork, her ex-partner made the payment to the bailiff and the Claimant recovered her car.

75 Later that day Chief Inspector Connors, Chief Superintendent Tarrant and Al Kelly discussed the matter, and Sergeant Gil was asked to conduct a fact finding interview with the Claimant when she was next at work.

76 When the Claimant attended at work the next day at 7pm she was interviewed by Sergeants Gil and Stubbs. At this interview the Claimant repeated that she had found out on the morning of 10 August that her car had not been stolen but taken by a bailiff; she said that it was over a £60 ticket from a year ago and that she had not received the paperwork for the ticket because she had moved to a different address soon after. Sergeant Gil showed the Claimant the two CAD messages that showed that the Claimant knew on the night of 9 August that her car had not been stolen. The Claimant said that she was embarrassed because she was experiencing financial difficulties and did not have the funds to pay the bailiff; hence, when she spoke to Sergeant Gil the following morning she had stuck to the original story that her vehicle had been stolen. She maintained, however, that she had not recovered the car until later on 10 August. Sergeant Gil advised her to keep all the paperwork to prove that. When the Claimant was given the opportunity to add further comments she said that she was sorry and she should not have lied. Sergeant Gil advised the Claimant to hand in her blue card as she was under investigation. The Claimant was initially reluctant to do so but she did.

77 Sergeant Gil completed the MM1 form. He set out the circumstances that were the basis of the referral to DPS. It was no longer being suggested that the Claimant had lied about not having her car when she requested annual leave. The basis for referring the matter to the DPS was that the Claimant had lied when she said that her car had been stolen when she in fact knew that it had been removed by the bailiff. The Claimant's response to the allegation was recorded as,

*"Im [sic] so sorry I lied but I was embarrassed to tell the truth ...I could hear people in the background and I know what this job is like and how rumours start and also how it would react if I had debt problems as when you join you are told not have these problems. I was very embarrassed I didn't have the money to pay the fine ..."*

The form was then given to Al Kelly who added the sections of the Guidance on Standards of Professional Behaviour which it was said that the Claimant had breached. He identified it as a matter that came under "Honesty and Integrity" and asserted that the Claimant's conduct had potentially breached, inter alia, the following two sections – section 1.12 which provides "*Police Officers are honest, act with integrity and do not compromise or abuse their position*" and section 1.13 which provides, "*Police officers act with integrity and are open and truthful in their dealings with the public and their colleagues, so that confidence in the police service is secured and maintained.*".

78 Prior to the form being submitted to DPS, a severity assessment has to be carried out by the professional standards champion in the unit. The severity



assessment assesses whether the conduct concerned would, if proved, amount to misconduct or gross misconduct. The purpose of the assessment is to allow the officer to have an early indication of the possible outcome (dismissal if it is a case of gross misconduct but not otherwise) and to decide how and by whom the matter should be handled. In this case the severity assessment was done by Chief Inspector Barrett because it was recognised that if the matter was sent back to the unit for local investigation Chief Inspector Connors would be the investigating officer. Chief Inspector Barrett also identified it as being in breach of the honesty and integrity provisions and assessed it as being a gross misconduct matter.

79 When the form is submitted to DPS, a further severity assessment is carried out by someone in DPS. It was carried out by DI Anne Bewley on 17 August 2012. She assessed it as being a misconduct matter that that could be addressed adequately at local level. In giving her reasons she said that she appreciated that the Claimant had been given a day's leave on the basis that her car had been stolen rather than repossessed, but she did not think that there was a distinct difference between the two when it came to making arrangements when the Claimant found herself without a vehicle.

80 The matter was then passed back to Chief inspector Connors to investigate as a misconduct issue.

81 On 11 August Sergeant Gil filled in the reporting officer's section on the Claimant's ARV application. He said that he was unable to recommend her for the role due to welfare issues that had arisen and the fact that the Claimant had lost her blue card. The reporting officer also had to tick yes/no boxes to indicate whether he agrees with certain declarations set out in the form. It is stated on the form that if any of the "no" boxes are selected, the applicant must be informed that her application could not proceed. Sergeant Gil selected "no" for two statements – these were to confirm that the Claimant had the potential to perform the role applied for and that she was free of any bar to selection through discipline findings, performance or integrity issues. He informed the Claimant that her application was not being progressed at this stage.

82 On 12 August the Claimant sent Al Kelly an email which was copied to the Black Police Association. She requested the return of her blue card; she said that she had not been served with any official notice of an investigation into misconduct and was not aware of any official requirement to surrender her blue card. She also sought clarification of why her ARV application was not being progressed.

83 Al Kelly responded that if she was not prepared to voluntarily surrender her blue card he would withdraw it. He gave two reasons for doing so: firstly, he said that her ongoing divorce and apparent financial difficulties seemed to be affecting her judgment and, secondly, that the circumstances of the alleged misconduct showed a lack of judgment and integrity. There was no evidence that the Claimant was going through a difficult or acrimonious divorce or that it was having any impact on her judgement. The only financial difficulties to which the Claimant had referred related to her inability to pay the £900 which she needed to pay to recover her car. He stated that Sergeant Gil had not supported her ARV application and that he would not be doing so either. His reasons were that she

was not operational as a firearms officer at the time (due to not having her blue card) and he considered her judgment to be in question. He indicated that he would submit her application unsupported but would request an independent member of the SMT to review his rationale for not supporting it.

84 On 13 August Al Kelly made a formal request for the Claimant to be relieved from firearms duties and for her firearms authorisation to be withdrawn. He gave two reasons for making the request. The first was that the Claimant was undergoing a divorce at that time and that she was undergoing some financial difficulty resulting from that. There was no evidence to support, or any basis for making, this assertion. The second was that she was under consideration for disciplinary procedures around allegations related to honesty and integrity. He said it was his opinion that should there be a case to answer she should be relieved of armed duties. However, at the time this request was made, no decision had been made whether the matter should proceed under the disciplinary procedure.

85 On the same day Chief Superintendent Tarrant supported the request for the Claimant to be relieved from duties. The officer who is relieved from firearms duties must be invited to record their comments on the form and must be informed of the date when their re-authorisation might be considered. It appears that this did not happen in the Claimant's case.

86 Having withdrawn the Claimant's firearms authorisation on 13 August, Al Kelly then completed the second reporting officer's section of the Claimant's application form for the SO6 ARV role. He gave three reasons for not supporting her application – (i) she was not operational because her firearms authorisation had been withdrawn; (ii) she was subject to a report alleging misconduct around honesty and integrity; and (iii) the sickness record submitted by the Claimant in support of her application was not accurate because it did not show three periods of a total of 9 days' sickness absence in 2012.

87 When the Claimant handed in her blue card to Sergeant Gil on 11 August he noticed that it did not have any red Rs in it. He asked her if she had another card and she replied that she did and handed it in. She said that when she had gone to Milton to be reclassified she had been given a new card.

88 On 14 August Chief Inspector Connors asked Al Kelly to conduct a fact finding exercise in respect of the Claimant having two blue cards.

89 On 18 August Al Kelly asked Sergeant Gil to do a fact finding investigation in respect of the two blue cards and the discrepancy between the sickness record submitted by the Claimant and what was shown on the HR system. In respect of the latter, he said that either there was a fault on the system or the Claimant had somehow altered the system. This is indicative yet again of Al Kelly not trusting the Claimant and always assuming the worst about her. Sergeant Gil was unhappy about investigating these matters but said that if he had to do it, he would give the Claimant notice of what he was investigating and afford her the opportunity to discuss with it an adviser first.

90 Later that day Sergeant Gil sent Al Kelly an email. He said that he had told the Claimant what he wanted to speak to her about and gave her the opportunity

to consult someone. She, however, had said that she had nothing to hide and was happy to speak to him about both matters. She said that when she had gone to Milton to be reclassified she had been given the new blue card by Andy Hopton; he had not asked for the old one to be returned and whenever she went out shooting or training she took both cards with her and showed them. In respect of the sickness records, the Claimant had opened the HR pages in front of him and they had looked at the last three years' sickness report. What appeared was exactly the same as that which the Claimant had attached to her application. Sergeant Gil suggested that there was a fault on the Claimant's HR page. As the Claimant had openly answered all questions satisfactorily, he did not see the need to do a fact finding investigation.

91 Al Kelly, instead of accepting this, proceeded to contact Andy Hopton. Andy Hopton confirmed the account given by the Claimant. On 19 August Al Kelly informed Connors and Tarrant that he had conducted a fact finding exercise in respect of the two blue cards but had found no evidence of misconduct.

92 On 5 September the Claimant was informed that her application for the ARV role had not been supported by her line management. This could not have come as a surprise to the Claimant because both Sergeant Gil and Al Kelly had informed her that they would not be supporting her application.

93 On 18 August 2012 Zak Tatou (a male officer of Moroccan origin), who was in team 2 and based at Lillie Road also applied for the ARV role. His line manager, Sergeant Farmer, confirmed that he was free of any bar to selection through discipline findings, performance or integrity issues. Al Kelly was the second reporting officer and he supported his application. He stated that Mr Tatou had been subject to management action within the previous 12 months but that it had been related to one incident which had been out of character.

94 There was some confusion before us as to the precise nature of Zak Tatou's previous disciplinary findings. When Sergeants Gil and Marsh had been interviewed by DS Hepworth in late 2013 as part of the investigation into the Claimant's grievance, they had said that they believed that he had three disciplinary findings against him. When Sergeant Marsh gave evidence before us he said he had looked at Mr Tatou's records the previous day and found that he had in fact been wrong. He said that Mr Tatou had had one management action in the previous 12 months, but that he had had two previous disciplinary sanctions in January and April 2011 (one for disobeying a lawful order and the other for impoliteness and intolerance. Towards the end of the hearing a document, which purported to be Zac Tatou's disciplinary record, was disclosed. It is not entirely easy from the face of the document to understand what it is that it shows; it certainly does not appear to be the document that Sergeant Marsh had checked a day or two before because it did not contain the two previous disciplinary sanctions in January and April 2011. It showed that that Zak Tatou had been the subject of management advice for misconduct some time after 5 March 2012. Management advice is a disciplinary sanction that is imposed after the end of a misconduct hearing; it is different from management action which is imposed informally without there being any disciplinary action.

95 Sergeant Marsh offered to be the welfare officer for the Claimant while she was being investigated. The role of a welfare officer is distinct from the role of a

Federation representative. The role of a welfare officer is not to advise or represent on any disciplinary issues but simply to discuss welfare issues with the officer. Sergeant Marsh first spoke to the Claimant on 12 August and informed her that he would be acting as her welfare officer. A week later he sought clarification from Al Kelly as to whether he was still her welfare officer because Al Kelly had said certain things which indicated he might not be. Al Kelly replied that pending the outcome of the decision on the MM1 he was but that he wanted the role to go to a female officer from another team.

96 On 21 August 2012 Chief Inspector Connors invited the Claimant to a meeting on 28 August to serve her with the relevant paperwork for the investigation into the allegation of misconduct. The Claimant was given some time off on 21 August to prepare for a meeting with her Police Federation representative the following day. When Al Kelly was informed of this his response was "*as long as she does not go home*".

97 Al Kelly was informed on 22 August that DPS had decided that it was not gross misconduct and was to be investigated in the unit as misconduct.

98 On 28 August Al Kelly told Sergeant Marsh that Graham Powell, who was the Claimant's Federation representative, had talked to him about any possible complaint being made against him by the Claimant. He said that Powell had told him that he had nothing to worry about as the Claimant "*didn't have a leg to stand on*". Sergeant Marsh was surprised that the Claimant's Federation representative was discussing what she had raised with him in his capacity as her representative with others.

99 On 7 September 2012 Al Kelly told Sergeant Marsh that he was not to be the Claimant's Welfare Officer any more. When Sergeant Marsh asked him why he replied, "*she doesn't need one, I'm dealing with something else now*". Sergeant Marsh informed the Claimant of this. She was shocked and said that it had gotten totally personal and she felt that Kelly was out to get her. Sergeant Marsh shared her view. On the same day Al Kelly told the Claimant that he was withdrawing Sergeant Marsh as her Welfare Officer. He said that when the MMI had first been submitted it had been felt that there might have been underlying welfare issues and it had not been clear at which level any ensuing investigation would take place. As the investigation was now going to be conducted at a local level, he felt that it would be disproportionate for Sergeant Marsh to undertake that role.

100 On 13 September the Claimant asked Chief Supt Tarrant if she could meet with him to discuss a problem she was having with her supervisors. He responded that it would be inappropriate to do so prior to the conclusion of the disciplinary process that had been initiated against her by her superiors. We do not quite understand that. We can understand him not wanting to discuss with her the disciplinary investigation and any matter related to that. If, however, there were other concerns or problems that the Claimant wished to discuss, there appears to be no reason why he could not have discussed them with her.

101 On 8 October 2012 Chief Inspector Connors informed the Claimant that he had concluded his investigation and that he had found there was a case to answer with regard to discreditable conduct. The Guidance on Standards of

professional behaviour provides that police officers must behave in a manner which does not discredit the police service or undermine public confidence, whether on or off duty. The section on discreditable conduct states that police officers must report any action taken against them for a criminal offence, conditions imposed by a court or the receipt of any penalty notice.

102 On 10 October the Claimant had a meeting with Chief Supt Tarrant to discuss her concerns. She said that she felt that Al Kelly was treating her differently from others. Although the Claimant did not explicitly say that he was treating her differently on the grounds of her race and sex, it is clear to us that Chief Supt Tarrant understood that that was what she was saying. It was in that context that he discussed the "*particular cultural issues on firearms commands*" and referred to her as being a role model for BME employees. It is also clear that he understood the complaints to be of discrimination on the grounds of sex and race, because shortly after the meeting he sent her an email in which he said one of the options open to her was to go to an employment tribunal. We did not find his evidence that he did not know that police officers could not bring claims of unfair dismissal to the tribunal credible. The reference to going to an employment tribunal was clearly a reference to bringing claims of discrimination in the tribunal.

103 The Claimant said that she was thinking of leaving and Chief Supt Tarrant sought to dissuade her from that by saying that she was good role model for BME employees and that a new inspector was going to start in the substantive role in January 2013. There was also discussion about an ARV role in another command, CO19, and Chief Supt Tarrant indicated that he would be prepared to release her from her tenure if she chose to apply for that. Normally officers are expected to work for at least two years if they are posted to a particular command. There was a dispute between the parties as to whether Chief Supt Tarrant had given such an indication. It appeared to us from subsequent communication that he did do so.

104 On 17 October 2012 Chief Inspector Connors informed Al Kelly that following a discussion among senior officers in the Command, it had been decided that although the Claimant's disciplinary hearing was not due to take place until 25 October she would be allowed to submit an application for the ARV role in CO19. He asked him to inform the Claimant of this and also to make her aware that if there was an issue about the return of her blue card, then the matter would have to be reviewed.

105 Having been informed of that on 19 October the Claimant wrote to Chief Supt Tarrant that she had made her decision and wanted to be released from her tenure to look for another role. Chief Supt Tarrant responded on 23 October that he was sorry that she wanted to go and asked for admin purposes how long she had been there. The Claimant responded on 25 October that she had been in DPG for one year.

106 On 25 October the Claimant also spoke to Sergeant Gil and Al Kelly about applying for the ARV role in CO19. Sergeant Gil suggested to the Claimant she should try and see if her former inspector, Inspector Rose, would support her application because he did not think that Al Kelly would. The Claimant called Inspector Rose in Sergeant Gil's presence. Inspector Rose told her that he did

not think it would be appropriate for him to comment on her application as he had not been her second line manager for some time and that it would be more appropriate for it to be done by her current second line manager.

107 The Claimant's misconduct hearing took place on 25 October 2012. The charge was one of discreditable conduct, the particulars of which were that on 9 August she had misled Inspector Fox by saying that she required emergency annual leave because her vehicle had been stolen when she knew that it had not been and on 10 August she had misled Sergeant Gil by reiterating that her vehicle had been stolen when she knew that it had not been. The Claimant admitted the allegation and put forward strong mitigation. She was given a written warning. Inspector Stone, who was the disciplining officer, accepted that at the time of speaking to Inspector Fox the Claimant had been in an emotional state which could explain why she had failed to tell the truth. However, he found the telling of the deliberate untruth to Sergeant Gil the following morning to be a serious breach verging on an 'honesty and integrity' matter. In deciding the appropriate sanction he said that he took into account her previous good character, the fact that she was a current firearms officer, her honesty and integrity which had been demonstrated by fully co-operating with the investigation throughout and apologising to all involved and the fact that the misconduct had had minimal non-lasting impact and had been an apparent one-off mistake.

108 On the following day, 26 October, the Claimant sent her ARV CO19 application to Sergeant Gil. He ticked all the boxes "yes" including confirming that she was free of any bar to selection through disciplinary findings, performance or integrity issues. He stated that he was fully supporting the Claimant's application for the role and set out his reasons for doing so. He then sent it to Al Kelly on 27 October at 10.26pm for Kelly to fill in the section to be completed by the second reporting officer.

109 Al Kelly told Sergeant Gil that he was wrong to support the Claimant's application because she had a live written warning. Sergeant Gil did not accept that that precluded him from supporting the Claimant's application. Sergeant Gil told the Claimant what Al Kelly had said. He said that he could not see why Al Kelly could support Zak Tatou's application when he had a live disciplinary action recorded against him but not that of the Claimant. He said that he could see only two things that were different between her case and that of Tatou - she was black and she was a woman.

110 Al Kelly endorsed the Claimant's application on 28 October and sent it to HR at 2.46am on 29 October. He copied his email to the Claimant and Sergeant Gil. He said that he did not support her application and disagreed with Sergeant Gil's declaration. His reasons for not supporting the application were (i) The Claimant had on 25 October received a written warning for discreditable conduct which was live for 12 months and that the Claimant had shown lack of judgment and integrity in the matter; (ii) she had shown disregard for procedure by approaching another Inspector to complete the application and (iii) she was not undertaking AFO duties at that time because her blue card had been withdrawn.

111 Although Zak Tatou also had live disciplinary action that had not stopped Al Kelly from supporting his application. The explanation proffered by Al Kelly for that difference in treatment was that Tatou's disciplinary sanction had been

imposed nearly a year ago and had therefore nearly expired. That was not supported by the document that was produced towards the end of the hearing. That showed that Tatou's sanction was imposed sometime after March 2012, which means that it was imposed less than 5 months before the date when Al Kelly supported his application. Another important difference was that in Tatou's application Al Kelly referred to his misconduct as being one off and out of character. There is a question mark if that indeed was the case if Sergeant Marsh's evidence was correct. However, although Inspector Stone had specifically referred to the Claimant's misconduct in similar terms, Al Kelly did not put that on her application. Inspector Rose's evidence to us that was that he would be surprised if the Claimant approaching him were to be used as a reason for not supporting the Claimant's application. It must also have been apparent to Al Kelly that as a result of the outcome of the misconduct hearing the Claimant's blue card would very shortly be restored to her.

112 At 11.32 on 29 October the Claimant's blue card was restored to her and Kelly was informed of the fact shortly thereafter (at 11.57). Al Kelly never got in touch with CO19 or HR to inform them that the Claimant's blue card had been restored and that he was no longer relying on that as a reason for not supporting her application.

113 On 29 October, around about the same time as he submitted the application, Al Kelly spoke to the Claimant in the base room in the presence of Sergeant Gil. He told her that he was not supporting her application and started to explain his reasons for not doing so. The Claimant became upset and said that she knew that that would be the case. She said that that was the second time he had submitted her application without giving her an opportunity to see his comments before it was submitted. Al Kelly also said that he had telephoned CO19 and told them that she had a written warning. The Claimant said to Al Kelly that she felt he had a personal problem with her and that she had brought this to Tarrant's attention. Al Kelly replied angry that he did not know where she had got that idea from.

114 On 29 October at 10.51 am Chief Supt Tarrant told the Claimant that as she had been in DPG for a minimum of two years he could not release her from tenure. At 11.26 he told Al Kelly that he taken advice from somebody in HR who had recommended that the Claimant application should not be submitted on the basis that she did not have two years' tenure, and he suggested to Al Kelly that that should be the reason for rejecting her application. Chief Supt Tarrant had a change of heart about releasing the Claimant from her tenure because he saw that as being a more acceptable or justifiable way of blocking her application than the reasons put forward by Al Kelly.

115 On 5 November 2012 the Claimant submitted a formal Fairness at Work complaint, which is the Respondent's terminology for a grievance. When she submitted it she was asked whether she had tried local resolution. The Claimant responded that she had brought the matter to the attention of both her Sergeants and the OCU Superintendent (Tarrant) as well as a Federation rep and the Black Police Association. She said her complaint related to an Acting Inspector and that she felt it had gone beyond the stage whereby she was able to approach him to resolve it. In the Fairness at Work the Claimant alleged that she had been subjected to unfair treatment over a period of time by Acting Inspector Kelly on

the basis of her race and/or gender. The specific matters of which she complained were broadly the same as those that are the subject-matter of the claim before us. She did not indicate in the form the resolution that she was seeking.

116 On 6 November in the evening Al Kelly called Sergeant Gil at the base and told him that the Claimant's CO19 ARV application was not being progressed because of her tenure and he wanted to tell her that personally. Sergeant Gil contacted the Claimant to tell her this and she said that she had been advised not to speak to him about her application as that formed a part of her Fairness at Work complaint against him. Shortly after that Al Kelly attended the base. As he was working at the time he was armed. Sergeant Gil told him that the Claimant did not want to speak to him and Al Kelly replied that she had to speak to him as he was her manager. Sergeant McNally was also present. Sergeant Gil tried to persuade Kelly to let him speak to her. However, Al Kelly kept a lookout for the Claimant and every time he heard somebody arrive he checked on the CCTV to see if it was her. As soon as he saw the Claimant arrive, he approached her as she was entering the base room and told her that he wanted to speak to her. He told her that her application was not being put forward as she was still on tenure to SO6. The Claimant told him that she had been advised not to speak to him about it. Al Kelly asked her who had advised her not to speak to him and the Claimant responded that it was the Federation. Al Kelly said that he was her second line manager and she had to speak to him. He was shouting at her and waving his hands. Sergeant Gil could see that the Claimant was getting upset and he told Al Kelly to stop it. The Claimant left in tears. After the Claimant left Sergeant Gil told him that he should not have behaved the way he did. Al Kelly responded, "*I'm not frightened of her*". His evidence was that he was not frightened of her making complaints of race and sex discrimination against him.

117 Al Kelly's evidence to us was that at the time this happened he probably knew that the Claimant had put in a Fairness at Work complaint. We find that he did know and that that was the reason that he had gone to speak to her. There was no reason why Sergeant Gil could not have communicated the message that her application was not being progressed because of tenure.

118 In his role as Acting Inspector, Kelly's management style was overbearing, intrusive and unreasonable. He was unpopular with some of the Sergeants and officers who saw him as a bully. However, he treated the Claimant particularly badly and far worse than he treated any other officer and she was often reduced to tears as a result of his behaviour. Sergeants Gil and Marsh and PC Flaherty all gave evidence to the above effect and we accept their evidence. There was no evidence before us of any other officer being subjected to the same treatment as the Claimant. Sergeant Marsh's evidence was that he was concerned that the Claimant was being targeted by Al Kelly. His view was that Al Kelly felt that no one dealt with the Claimant because they were all too frightened of her. Sergeants Gil and Marsh had on occasions spoken to their superiors (Chief Inspectors Hardman, Barrett and Connors and Inspector Rose) in general terms about their unhappiness about Al Kelly's management style and had queried when an appointment would be made to the substantive role. They had not complained specifically about the treatment of the Claimant, although they had informed Chief Inspector Connors in August 2012 that the Claimant might make a complaint about Al Kelly's treatment of her.



119 The Respondent's Fairness at Work Procedure is said to be compliant with the Equality Act 2010 and to support the Metropolitan Police Service's Equality Policy. It states at paragraph 1.2 that it enables MPS personnel who are dissatisfied with the way that they have been treated at work to raise the matter without fear of recrimination and to explore ways to find an acceptable solution. Paragraph 1.3 provides that the procedure is not intended to apportion blame and that it cannot result in anyone being punished; however, where the facts and circumstances of the case require investigation through an alternative procedure, the FAW will be suspended and the appropriate alternative procedure will be used. Paragraph 9.1 provides that if misconduct issues come to light during an FAW review, they will be progressed through a disciplinary or misconduct investigation. Separate issues could continue to be progressed through an FAW review. If, however, all matters are accepted for disciplinary or misconduct investigation, the FAW procedure will be treated as concluded. The FAW procedure is the only procedure within the Respondent that can be used to raise grievances of race and sex discrimination, and has regularly and routinely been used for that purpose.

120 Paragraphs 2.2 and 2.3 of the FAW procedure emphasise that there is a requirement for line managers and originators (complainants) to attempt to resolve the matter of concern informally before submitting a formal FAW. This should be done in the first instance through the use of day-to-day management action or, where appropriate, through the use of the mediation service. Informal resolution should be achieved within 5 working days of the matter being raised. If the complainant and the line management have not already explored options for informal resolution and mediation, the procedure will be placed on hold until this has been completed. When the subject of the concern is someone in the line management chain, informal resolution should be sought from an appropriate independent manager or a trade union representative. If informal resolution fails to resolve the matter to satisfaction of the complainant, he or she may opt for a formal FAW review.

121 Stephen Padwick (Practice Manager, Conflict Management & Resolution team) considered the Claimant's FAW submission and decided to refer it back to Chief Superintendent Tarrant for attempts to be made at informal resolution. In light of what the Claimant had said when she submitted the Fairness at Work about having attempted to resolve the matter locally by bringing it to the attention of her sergeants as well as Chief Supt Tarrant and the nature of her complaints, it is bizarre that Mr Padwick thought it appropriate to send it back to the unit to be dealt with by way of informal resolution.

122 Chief Supt Tarrant asked Chief Inspector Hardman to undertake the informal resolution and on 15 November CI Hardman wrote to the Claimant and informed her of this.

123 On 19 November the Claimant wrote to Chief Supt Tarrant that she was disappointed that he had detracted his previous offer releasing her from tenure, as a result of which she had withdrawn her application to CO19. She also said that she was deeply upset by Al Kelly's comments on her application which confirmed her view that he had a personal problem with her. She concluded that she had submitted an FAW because she had for some time been bullied,

harassed and victimised by Kelly and that he believed that it was on the grounds of her sex and race.

124 It is clear from the opening section of Chief Hardman's report that he understood the Claimant to be saying that the specific matters of which she complained showed that she had been subjected to unfair treatment over a period of time by Al Kelly on the basis of her race and/or gender.

125 Chief Inspector Hardman's role was to attempt an informal resolution of the Claimant's complaint. In our experience that should have involved ascertaining from the Claimant what she would regard as a satisfactory resolution and then having discussions with management as to whether that could be facilitated. However, Chief Inspector Hardman did not ask the Claimant what she would regard as a satisfactory resolution. He met with the Claimant and Lorraine Francis, her Federation representative, on 20 December 2012. CI Hardman went through the seven specific incidents about which the Claimant complained and, in respect of each of them, provided what he called the "Senior Leader Team Perspective". At this stage he had not spoken to anyone about these incidents or looked at any of the documents. The "SLT perspective" was in effect an explanation and justification for Al Kelly's conduct. CI Hardman said that he thought that he should provide the perspective as there might have been misunderstandings on the part of the Claimant. The Claimant did not at any stage say that she accepted or agreed with his perspective, or that she had misunderstood the position. In respect of three matters (the "please allow" in January 2012, the return to work meeting on 7 March and the organising of the Saturday shoots) Hardman said that he "would look at the proportionate nature" of these incidents and why they had occurred.

126 On 8 January 2013 the Claimant presented a claim to the Employment Tribunal complaining of race and sex discrimination in relation to the conduct of Al Kelly between January and 6 November 2012.

127 On 16 January 2013 CI Hardman met with the Claimant. At this meeting he agreed that he would speak to Al Kelly and certain other individuals about some of the matters.

128 On 29 January 2013 CI Hardman interviewed Al Kelly and Sergeant Marsh. On 4 February 2013 he had a telephone conversation with Sergeant Gil..

129 In a holding response submitted on 5 February 2013 the Respondent sought a 12 weeks' stay of the proceedings on the grounds that matters might be resolved through the Fairness at Work and that it would be premature for the Respondent to admit or deny conclusions before the conclusion of the internal procedures. As the Claimant consented to that, the case was stayed until 31 July 2013.

130 On 5 February 2013 CI Hardman met with the Claimant and Ms Francis and went through a report that he had prepared of his findings on the seven specific incidents. CI Hardman subsequently recorded in his report that the Claimant had agreed that certain matters were complete. The Claimant agreed that they were "complete" to the extent that CI Hardman indicated that he could

not take them any further. She did not accept or agree with the rationale or explanation that he gave for Al Kelly's conduct or his conclusions about Al Kelly's conduct. At the meeting on 5 February, the Claimant also raised Al Kelly's behaviour on 6 November, and CI Hardman agreed to look into that. He subsequently spoke to Sergeants Gil and McInally about it.

131 On 8 February Chief Inspector Hardman had a brief telephone conversation with the Claimant. He told her that he had spoken to Sergeant Gil about the incident on 6 November and that Sergeant Gil had confirmed what she had stated. Chief Inspector Hardman told her that he was contemplating taking some kind of formal management action against Al Kelly which could resolve the complaint if she was in agreement. The Claimant's Federation representative told CI Hardman that they would like to see his report before they made any decision about informal resolution. It was agreed that CI Hardman would meet the Claimant and her trade union representative before he took any action against Al Kelly.

132 CI Hardman did not make any attempt to arrange that meeting before 8 March 2013. As a result of his limited availability, the first date on which they could all meet was 8 April and it was agreed that a meeting would take place on that date.

133 Contrary to what CI Hardman had agreed with the Claimant and her trade union representative, he met with Al Kelly on 14 March 2013 and outlined to him certain areas of learning. These were that greater consideration needed to be given to the location of return to work interviews and any discussions about training needs, both of which should take place where there were appropriate facilities to have private uninterrupted conversations. In respect of the former, he also said that greater consideration should be given to who was present and the roles of those present should be explained. He also advised that a more composed approach should be taken when speaking to staff about performance matters. This advice constituted informal management action. Management action is not a disciplinary outcome that is imposed after a misconduct hearing. It is considered to be part of the normal managerial responsibility of managers.

134 On the same day CI Hardman sent the Claimant and her Federation representative his final report on her grievance. It was headed Local Resolution Fact Finding Report. The role of CI Hardman, as we understood it, was to attempt to resolve the matter informally, not to conduct an investigation of the Claimant's Fairness at Work complaint. In respect of each of the seven specific incidents CI Hardman set out Al Kelly's response and in relation to some matters what Sergeants Gil, Marsh and McInally had said. He concluded,

*"I have reviewed all the areas identified by Carol in her submission on an individual basis in order to understand the details as to what occurred and why. The result of this review is that I have not been able to establish any evidence of direct discrimination in relation to Carol on the basis of her ethnicity or gender. There appears to be a rationale in place which would justify the action taken by A/Insp Kelly in all the incidents i.e. a supervisor enforcing systems and processes such as the Attendance Management Policy or an element of misunderstanding/confusion i.e. how to complete the template form*

*That being said it is accepted that it is the application of the policy and how A/Insp Kelly ensured that policy and SLT expectations were adhered to has raised some concern as it appears to have led Carol to being the subject of specific attention by A/Insp Kelly and could be construed as too robust and bullish. This would continue to be the view of Carol and has been indirectly supported by two Sergeants on the team”.*

We find it difficult to see how Chief Inspector Hardman could have reached any conclusions on the issue of race and sex discrimination without having conducted a full and proper investigation into the issue. Having concluded that the Claimant had been “the subject of specific attention” by AI Kelly and that his conduct toward her had been “too robust and bullish”, he had not further investigated or addressed the issue of why this was the case. He had not sought to ascertain from anyone whether in this respect the Claimant had been treated differently from others.

135 CI Hardman also said in his email of 14 March that he had already taken action against AI Kelly. Ms Francis responded that it was extremely disappointing that he had done so contrary to what he had agreed with them.

136 The meeting that had been arranged for 8 April 2013 did not take place as the Claimant was absent sick. Ms Francis was not prepared to meet with CI Hardman in the Claimant’s absence. She also made it clear to him that that the Claimant felt badly let down by him as he had broken his promise to speak to them before he spoke to AI Kelly. Chief Inspector Hardman felt that he had done all that he could to resolve the matter locally, and he referred it back to Practice Support for them to take the next step. Practice Support sought confirmation from Ms Francis as to whether the matter had been resolved and when she indicated that it had not, a Fairness at Work Advisor was appointed to review the matter. The Claimant objected to the FAW Advisor who was originally appointed. This took place in May and Practice Support agreed to appoint another FAW Advisor.

137 On 12 June 2013 the Claimant presented a second claim of race and sex discrimination to the Employment Tribunal.

138 On 14 June 2013 Detective Sergeant Fiona Hepworth was appointed the FAW Advisor to deal with the Claimant’s FAW. The FAW procedure provides that FAW Advisors are appointed on the basis that they have demonstrated the necessary experience, skills and knowledge to carry out a review of the concerns raised. DS Hepworth was a very experienced police officer who had a lot of experience of conducting serious criminal investigations but was relatively new to carrying out FAW reviews.

139 DS Hepworth first met the Claimant and Ms Francis, her Federation representative, on 17 July 2013. She spent 6 hours with them going through the Claimant’s concerns. Thereafter, she requested and received from the Claimant and Ms Francis a large number of emails and attachments that were relevant to the issues being investigated.

140 On 29 July 2013 the Claimant submitted a second Fairness at Work complaint in which she complained about matters that had occurred between

February and June 2013. DS Hepworth was tasked to investigate this FAW as well. DS Hepworth was off sick from 13 to 23 August 2013 and met with the Claimant late August/early September to discuss her second FAW.

141 Following that interview DS Hepworth sent emails to certain witnesses asking them questions and also interviewed Al Kelly and Sergeants Gil and Marsh.

142 Sergeant Marsh told DS Hepworth about Al Kelly removing him as the Claimant's Welfare Officer, that Al Kelly had supported Zak Tatou in his ARV application although he had three disciplines against him, and that Al Kelly had asked him and Sergeant Gil to ask the Claimant if she was having sex with a male PC because they arrived at work together. He said that they had refused and that Al Kelly had not been happy and had shouted at them.

143 Sergeant Gil told DS Hepworth that he had been asked to investigate the Claimant's two blue cards and why her sickness record on the HR system was not accurate, they had been asked to look at the Claimant's Facebook account and he had been asked to find out whether the Claimant's illness following her daughter's birthday had been genuine, Zak Tatou had three disciplines but his application for an ARV role had been supported by Al Kelly, he had on numerous occasions warned Al Kelly not to speak to the Claimant, on one occasion when he had warned Al Kelly about his conduct after he had belittled her for no reason and she had left upset, Al Kelly had said that he was not frightened of her, when the Claimant had been asked to be the face of the Olympics Al Kelly had tried to stop this for no reason, on 6 November when the Claimant had refused to speak to Al Kelly about something that was part of her FAW he had started to shout at her, waving his hands in her face and using the palm of his hand to gesticulate at her in very angry voice and that this had happened while he was armed.

144 The FAW procedure provides that at the completion of a review of the concerns raised, the FAW Advisor should prepare a report highlighting his/her findings and recommendations. According to the procedure the report should then be sent to the appropriate Practice Support Team for a quality assurance review before it is released to any other party.

145 Guidance notes are provided to Fairness at Work Advisors on the completion of their reports. These are set out on a pro forma form. Part 3 deal with the results of the interviews conducted and part 4 is headed "FAW Advisor's assessment". The guidance notes for this part state,

*"Your assessment of the issue(s). Have you found the evidence to substantiate all or some of the issues in regard to fairness? Look for documentary evidence or evidence supported by witness corroboration.*

*Take good care not to make any assessment regarding discrimination – this is not an advisor's role."*

146 The Respondent's explanation for this guidance, as we understand it, is that Fairness at Work is about learning and resolution and not about punishing misconduct, and that as discrimination is potential misconduct, if the FAW Advisor finds any evidence of discrimination, the FAW should be halted and the

matter referred to the Directorate of Professional Standards to pursue it as a misconduct matter. There are two difficulties with that explanation. It is correct that paragraph 9 of the Fairness at Work procedure does say that if misconduct issues come to light during an FAW review they should be progressed through a disciplinary or misconduct investigation. However, paragraph 9 refers to all misconduct issues, not just discrimination. However, the guidance in paragraph 4 relates purely to discrimination and not to any other kind of misconduct. The second difficulty is that a FAW Advisor cannot decide whether the matter does need to be referred to DPS unless he or she has made some assessment of the evidence and decided whether or not it indicates discrimination. The evidence of David Jones, the Head of the Fairness at Work team, was that the policy of the Metropolitan Police was that a FAW Advisor was not permitted to make a finding of discrimination in his or her report. The only explanation that we can think of for having this guidance and policy for discrimination but not other forms of misconduct is that police officers can bring tribunal proceedings in respect of discrimination but not for other kinds of misconduct.

147 In early October 2013 DS Hepworth spoke to Geri Brownrigg in Practice Support and indicated that she had concerns about Al Kelly's behaviour and considered that it amounted to misconduct. She was asked to send them a draft copy of her report and a list of issues that she considered amounted to misconduct.

148 On 17 October DS Hepworth sent Geri Brownrigg a draft of her report and asked her to look through it. Ms Brownrigg forwarded the draft report to Mr Jones. In her draft report Ds Hepworth had set out the "nature of concerns" as being, inter alia, "*discriminated against on the grounds of my race and/or sex*" and "*harassment and victimisation since my submission of an ET in January 2013 on the grounds of my race and gender*". In part 4 which dealt with the FAW Advisor's assessment Ds Hepworth had concluded by saying, "*I have read through all the material in this case and firmly believe that CH has been discriminated against by DK and not been given the time, support and space that she as a police officer is [sic] required. I feel that DK has harassed her by constantly getting at her, treating her differently to her colleagues, who are all male. In my opinion he feels threatened by her and keeps stating "I AM NOT FRIGHTENED OF HER", this to me is making a deal of her race and that she is a female and if I was a colleague that DK was saying this to I would feel very uncomfortable and would need to challenge this.*"

149 On 18 October 2013 DS Hepworth sent Mr Jones a list of possible misconduct issues against Al Kelly. These included issues relating to unlawful discrimination, harassment, bullying and victimisation. On 24 October Mr Jones told DS Hepworth that he had forwarded her draft report and list of misconduct issues to DPS to review the information and to decide whether the matters uncovered by her amounted to misconduct. He also asked her not tell the Claimant at that stage that the matter had been referred to DPS.

150 We had no evidence (oral or documentary) in relation to the review carried out by DPS. On 4 November Mr Jones wrote to DS Hepworth that the assessment of DPS was that none of the matters should be assessed as misconduct. They had stated that the only issue that might need further fact finding at the local level was the allegation of bullying although that was more

likely to be the officer's management style as opposed to bullying or oppressive behaviour. He then said,

*"I have made a few suggested changes to your report, which are shown in red as tracked changes. In making these changes I am mindful that Carol has a 'live' ET and your report will be disclosable should the matter go to a full hearing"*

The passages which he had suggested deleting included those quoted at paragraph 148 (above). He had referred to the passage in her assessment as "opinion" and had said that unless she could justify her conclusion it should be removed because she might be asked to provide evidence as to how she had come to that conclusion. Although it is referred to as a "suggestion" rather than an "instruction", bearing in mind their respective positions (Head of FAW and a relatively new FAW Advisor) and Mr Jones' evidence about the Respondent's policy about findings of discrimination in FAW reports, we do not consider that DS Hepworth really felt that she really had any choice in the matter. In cross examination DS Hepworth said that her assessment that there had been race and sex discrimination and harassment had been based on her evaluation of the evidence before her and that her opinion was valid on the facts and the evidence. She had believed that her role was to find whether there had been discrimination or not but was told that that was not her role. She also accepted in cross examination that she had removed that conclusion because it had been suggested to her that having a reference to discrimination would compromise the Respondent's position at the Tribunal.

151 On 14 January 2014 DS Hepworth sent the Claimant her amended Fairness at Work report with the passages in the assessment section that referred to discrimination having been removed. She recommended, as had been suggested by Mr Jones, that a local fact finding exercise be undertaken into issues relating to Al Kelly which had not already been dealt with by Chief Insp Hardman.

152 Mr Jones also adduced evidence about two other cases in which he had suggested that references to discrimination be removed from the FAW reports. In one case the FAW Advisor had said that he was unable to comment on whether or not an alleged ageist remark had been made at a meeting, but that if it had been made, he would consider it to be discriminatory. Mr Jones' comment was,

*"The use of the word discriminatory may cause problems if there are failings in this case which warrant the ET being settled. I suggest that you ask CC about this comment and, if he denies making the comment, perhaps state that you are unable to prove the remark was made."*

In the second case the FAW Advisor had written that a certain action could have amounted to indirect discrimination. Mr Jones' comment was,

*"As discussed can you please amend the section I have highlighted in blue on your report. Any reference to discrimination can cause problems for the MPS at a later date if this case evolves into an ET. I suggest that you re-write this section and conclude ..."*

These two incidents reinforce our view that that the Respondent's guidance and policy about FAW Advisors not making any findings of discrimination is related to the difficulties that that might cause to the MPS when defending allegations of discrimination in the employment tribunals.

## **Conclusions**

### **Complaints about the conduct of Al Kelly between January and 6 November 2012 (paragraphs 2.1(a)-(l) and 5(b) and (c) above)**

153 We considered first each of the incidents individually and the explanations given by Al Kelly for his actions and then stood back and looked at his conduct as a whole during that period.

154 Our conclusions in respect of the individual complaints are as follows:

(a) There was no procedure or policy that provided that if the Respondent could not make contact with an officer in the first 24 hours of absence police officer would be sent to the officer's home. There is a discretion to do so which would be exercised where there were welfare concerns. There was nothing to indicate that there were any welfare concerns about the Claimant on 31 January 2012. Al Kelly's explanation had been there was such policy in DPG. We did not find that there was any such policy.

(b) On 7 March 2012 when the Claimant attended what she expected to be a routine return to work meeting with her Sergeant she found herself at a meeting in which her Inspector, in the presence of two Sergeants, suggested that she lacked commitment to DPG. He did so because he thought that she had been dishonest about her absence and that she did not meet the standards required for DPG. He has not put forward any credible basis for reaching those very negative conclusions about the Claimant.

(c) There was no reason for Al Kelly to have booked shooting sessions for the Claimant. The responsibility for getting appropriate practice lay with the individual officer. Any concerns about the officer getting appropriate practice should be dealt with by the officer's line manager. Although getting 3 red Rs was not common it did not indicate that the Claimant had significant issues with her shooting.

(d) The Claimant made two flexible working applications (24 March and 31 July) and in both cases she claimed that she had been treated less favourably than PC Atkins. We found that PC Atkins' application had been approved because the changes he had sought were minimal and the rotas submitted by him had been agreed by the Duties' Sergeant. The Claimant's applications were not approved because the Duties' Sergeant took the view that the hours that she wanted to work could not be accommodated. In respect of the first application, having reconsidered the matter, he indicated that they could be accommodated at B1 but the Claimant did not want to move there. We did not find that Al Kelly had in any way influenced the Duties' Sergeant to reach the conclusions that he did. We were satisfied that the difference in treatment between the Claimant and PC Atkins had nothing to do with either race or gender.



(e) There was no good reason for Al Kelly to instruct Sergeant Gil to make inquiries about the Claimant's sickness absence on 8 June. The mere fact that there might have been conjecture or speculation on the part of the Claimant's colleagues about whether her illness was genuine is not a reason for the Inspector to start an investigation into the matter.

(f) The 9 August incident only came to light because another Inspector again acted on negative comments made by one of the Claimant's colleagues and did a bit of digging about. The manner in which Al Kelly investigated the incident the following day was unfair and contrary to normal procedures. The normal and fair way of investigating it would have been to tell the Claimant that it was being investigated and then to ask her about it. The manner in which Al Kelly instructed Sergeant Gil to deal with it was designed to get some evidence to be used against the Claimant. Once the MM1 was submitted to DPS, the matter was dealt with fairly and properly. It was recognised as being a misconduct rather than a gross misconduct matter and Inspector Stone took into account mitigating factors and imposed a sanction that was fair. He was entitled to come to the conclusions that he did and the Claimant's race and/or gender played no part in that.

(g) Al Kelly gave two reasons for withdrawing the Claimant's firearms authorisation, one of which was not factually accurate or true. He was not able to explain from where he had got information that the Claimant was undergoing a divorce which had resulted in financial difficulties.

(h) Both Al Kelly and Sergeant Gil did not support the Claimant's ARV application in August 2009. The reasons that they gave for not doing so were that the Claimant's firearms authorisation had been withdrawn and that she had been reported for misconduct matters relating to honesty and integrity. Those are valid reasons for not supporting her application and there can be no criticism of them for not doing so. The claimant's race and/or gender played no part in that.

(i) Al Kelly had no grounds for suspecting the Claimant of having fraudulently altered the HR record of her sickness absence. His suspicion arose from the view that he had formed long before the 9 August incident that she was dishonest.

(j) We found that by not supporting the Claimant's CO19 ARV application Al Kelly treated her less favourably than Zak Tatou. Both the Claimant and Tatou had a disciplinary sanction. Al Kelly's explanation for supporting Tatou but not the Claimant was that Tatou's disciplinary sanction had been imposed almost a year before he had applied and the Claimant's sanction had just been imposed. That was not true because Tatou's sanction had been imposed less than 5 months before. Furthermore, Al Kelly referred to Tatou's disciplinary matter being out of character but did not make the same observation about the Claimant. The fact that Al Kelly was determined to do everything to stop the Claimant's application being progressed is also clear from his using her approach to Inspector Stone and the withdrawal of her blue card as a reason for not supporting her application. The former was clearly not a matter that should have had any bearing on the issue and he knew that the blue card was about to be restored to the Claimant. Al Kelly has not provided any credible explanation for treating the Claimant differently from the way he treated Zak Tatou and his conduct in this matter demonstrates a personal antipathy towards the Claimant.

(k) We found that Chief Supt Tarrant's refusal to release the Claimant from tenure was connected to Al Kelly's decision not to support her application. Chief Supt Tarrant supported Al Kelly's position by providing him with a more watertight reason for the application not to be progressed. At the hearing Chief Supt Tarrant was not prepared to concede any shortcoming on the part of Al Kelly, although he had sat through the hearing and heard the evidence of PC Flaherty and Sergeants Gil and Marsh about Al Kelly's conduct.

(l) In addition to the matters about which complaint was made we found that there were other respects in which Al Kelly had treated her badly. There was no basis for asking the Sergeants to ask the Claimant whether she was having sex with PC Flaherty. In singling her out to be asked the question he had treated her less favourably than PC Flaherty. There was no explanation for that difference in treatment. There had been no basis for his objecting to the Claimant being selected for the photo feature in the Evening Standard. There was no good reason for suddenly withdrawing Sergeant Marsh as the Claimant's welfare officer. Those two matters are indicative of a personal hostility or antipathy on the part of Al Kelly toward the Claimant.

155 The picture that emerges when one puts all the above incidents together is that within a few weeks of becoming the Claimant's line manager Al Kelly formed the view, without any sound basis for doing so, that the Claimant was dishonest and not up to the standard required for DPG. Linked to that was another view, equally without any foundation, that his colleagues were frightened to deal with these issues because the Claimant was black and female and might complain of discrimination. Thereafter he engaged on a course of conduct that was designed to, and which in fact did, undermine, discredit and belittle her – every absence was assumed not to be genuine and was probed and investigated, shooting sessions were booked for her, her commitment was challenged in front of two sergeants, her Sergeants were instructed to investigate conduct issues on spurious grounds, her ARV CO19 application was not supported.

156 The Respondent accepted that Al Kelly's behaviour in respect of some of the matters set out above had been unreasonable, but its case was that that was attributable to his lack of managerial experience and his robust and overzealous management style. We accept that his management style was overbearing, intrusive and unreasonable. However, we found that the Claimant was singled out and targeted by Al Kelly, and that she was treated particularly badly and far worse than any other officer. There was a personal antipathy towards her. The Respondent has not put forward any explanation for that.

157 DPG was at the relevant time, and probably still is, an almost exclusively male and predominantly white unit. The Claimant stood out in the unit because she was different from almost everyone else in it because she was black and she was female. There was no evidence that the negative perception that Al Kelly had of the Claimant was based on any knowledge that he had of her from other sources. One is, therefore, driven to the conclusion that the negative perception must have been based on what he saw – a black woman. His view about his colleagues' failure to deal with her was certainly based on her sex and race. There was no evidence that he had a similar negative perception of any male or

white officer. In respect of many of the incidents, Al Kelly has not provided a credible explanation of why he did what he did. It is not a case of saying that the explanation given by him is not reasonable or objectively justified. There is just no credible explanation. In respect of incidents where there are named comparators (who are of a different gender and race) Al Kelly has not provided a credible explanation for the difference in treatment.

158 The Claimant was the only black woman in the unit managed by Al Kelly. She was singled out and targeted by him for almost a whole year.. On his own admission he had formed a negative view of her from very early on. He doubted her honesty and her ability. He has not put forward any credible basis for forming such a view. He has not provided a credible explanation many of the actions he took in respect of her. He has not provided any credible explanation for treating the Claimant less favourably than named comparators of different gender and race. The Respondent has not provided any explanation of why he treated her far worse than others. We infer from all of the above that the Claimant's race and gender both contributed to and significantly influenced Al Kelly's treatment of her, and that she was treated the way that she was because she was black and because she was a woman. We have focused on why the Claimant was treated the way that she was. However, even if we had followed the two stage process, the result would have been the same. The matters set out in paragraphs 155-157 (other than the last line of paragraph 156) and first seven lines of this paragraph are, in our view, sufficient to shift the burden to the Respondent. The Respondent has not satisfied us that race and sex played no part in Al Kelly's treatment of the Claimant.

159 We found that Al Kelly went to see the Claimant on 6 November 2012 and acted in a hostile and aggressive manner because she had made a complaint of race and sex discrimination against him the previous day. We have not found that he was specifically watching the Claimant on the CCTV. He was looking at the CCTV so that he would know when she arrived.

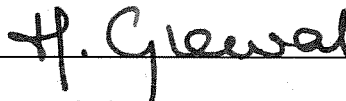
The complaints in relation to the Fairness at Work process (2.1 (m) and (n) and 5 (d), (e) and (f))

160 We found that the process conducted by Chief Inspector Hardman was neither a proper attempt at informal resolution nor a proper investigation. Chief Inspector Hartman began the process by explaining to the Claimant what he called the "SLT perspective" in order to justify Al Kelly's actions and ended by concluding that there had been a rationale in place to justify his actions. He concluded that there was no evidence of race or sex discrimination without having conducted a proper investigation into the matter. He found that the Claimant had been the "subject of specific attention" by Al Kelly, but strangely, in a case where there was an allegation of sex and race discrimination, made no inquiries into why she had been the subject of specific attention. He concluded that there was no evidence of misconduct on the part of Al Kelly and, therefore, the matter was not referred to DPS. The whole process took three months. We found that the way in which CI Hardman conducted the informal resolution process and the conclusions that he reached in his report were very unsatisfactory and, in the absence of any credible explanation for him conducting it in that way, concluded that it was because this was a complaint of race and sex

discrimination and because in the course of it the Claimant had brought a Tribunal claim of race and sex discrimination.

161 Under the Fairness at Work procedure if misconduct issues come to light in the course of an FAW review, they have to be progressed through a disciplinary or misconduct investigation. In the present case DS Hepworth expressed concerns about Al Kelly's conduct which she believed amounted to misconduct. Her view, as expressed in her draft report, was that he had treated her differently from her male colleagues and had made an issue of her sex and race. She believed that he had discriminated against her. In those circumstances the Claimant's complaints about the conduct of Al Kelly should have been progressed through a misconduct investigation. However, no misconduct investigation took place and it appears that someone at DPS took the view that nothing disclosed in DS Hepworth's report could amount to discrimination or misconduct. In light of the fact that DS Hepworth had concluded in respect of certain incidents that Al Kelly had treated the Claimant less favourably than male and/or white colleagues, it is surprising that DPS came to the view that there was no basis for investigating whether or not there had been any discrimination. The matter was referred to DPS because the Respondent's procedures require that in respect of any potential misconduct. It was not referred because the Claimant had complained of or brought Tribunal proceedings for sex and race discrimination.

162 We found that DS Hepworth was asked to delete all references to discrimination and harassment related to sex and/or race from her report, not because they were not supported by evidence in the report, but because the Claimant had brought a complaint of race and sex discrimination in the Tribunal. We think that is the clear import of Mr Jones' email of 4 November 2013 to DS Hepworth. The impression conveyed by the report that was ultimately provided to the Claimant was that DS Hepworth had not accepted that the Claimant had been subjected to any sex or race discrimination. That is what the Claimant believed and that is what the Tribunal would have believed if the Claimant had not insisted on the disclosure of the draft report. The Tribunal is very concerned that the Respondent's policy of not allowing Fairness at Work advisors to make assessments of discrimination and of instructing to delete them when they do so might mislead complainants and tribunals into believing that the FAW Advisor has not found any discrimination when in fact he or she has done so.

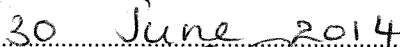


Employment Judge



Date

JUDGMENT & REASONS SENT TO THE PARTIES ON



FOR THE TRIBUNAL OFFICE