Appeal No. UKEAT/0232/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19, 20 & 21 March 2013
Judgment handed down on 14 May 2013

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

MR D BLEIMAN

MR D SMITH

COMMISSIONER OF POLICE OF THE METROPOLIS APPELLANT

K MAXWELL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PHILIP MEAD (of Counsel) Instructed by: Metropolitan Police Legal Services New Scotland Yard 8-10 Broadway London SW1H 0BG
For the Respondent	MR KWEKU AGGREY-ORLEANS Instructed by: McCue & Partners LLP 2nd Floor 14 Grosvenor Crescent London SW1X 7EE

SUMMARY

RACE DISCRIMINATION – Direct

SEXUAL ORIENTATION DISCRIMINATION/TRANSEXUALISM

VICTIMISATION DISCRIMINATION

HARASSMENT

The ET held that the Appellant was liable in respect of unlawful discrimination by way of direct discrimination, harassment and victimisation on grounds of race and sexual orientation in respect of a large number of complaints raised by the Claimant in two claims that were heard together.

The Appellant appealed a number of findings on 17 grounds. The common threads of appeal were whether the ET erred in three respects: first, by failing to set out the primary facts with clarity so that the validity of the inference can be examined (in accordance with the judgment of the CA in **Chapman v Simon** [1994] IRLR 124); second by wrongly causing or permitting the burden of proof to transfer; and third, by failing to establish a prima facie case that treatment was on grounds of a prescribed characteristic, before permitting the burden of proof to transfer (in accordance with the judgment of the CA in **Madarassy v Nomura International plc** [2007] ICR 867). In addition there were limitation appeals.

The EAT concluded that the ET considered all the evidence in relation to each and every allegation with considerable care. The criticism of the ET that it failed to set out the primary facts with clarity is without merit. Further, in respect of the complaints of direct discrimination the ET had the two-stage process set out in **Igen v Wong** [2005] ICR 931 well in mind. There was no obligation on the tribunal to refer to the two-stage process in relation to each and every complaint or indeed to adopt the two-stage process in relation to each and every complaint if the tribunal considered that it was not appropriate to do so, having regard to all the circumstances of the case.

The EAT dismissed the appeal in relation to both claims save in relation to one finding of direct discrimination. Further the EAT held that the ET had no jurisdiction to consider two complaints, which it had failed to address, on grounds of limitation.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. The Commissioner of Police of the Metropolis ("the Appellant") appeals from the judgment of an Employment Tribunal sitting at Reading ("the tribunal"), chaired by Employment Judge Byrne, and sent to the parties on 15 February 2012 which held that the Appellant was liable in respect of unlawful discrimination found to have been committed against Mr Kevin Maxwell (who we shall refer to as "the Claimant") (by way of direct discrimination, harassment and victimisation on grounds of race and sexual orientation) in relation to certain complaints raised by the Claimant.

2. At all material times the Claimant was employed by the Appellant as a Detective Constable within Specialist Operations (SO15) Counter Terrorism Command Special Branch of the Metropolitan Police Service (MPS). He is of mixed race and is gay. He identifies himself as "black". He reported sick due to stress on 25 July 2009. At the time of the hearing before the Employment Tribunal the Claimant had not returned to work.

3. The Claimant claims that the Appellant has subjected him to:

(1) Direct racial discrimination under sections 1(1)(a) and 4(2) of the **Race Relations Act 1976** ("the 1976 Act");

(2) Direct sexual orientation discrimination under Regulations 3(1)(a) and 6(1) of the **Employment Equality (Sexual Orientation) Regulations 2003** ("the 2003 Regulations");

(3) Harassment on racial grounds under section 3A of the 1976 Act;

(4) Harassment on grounds of sexual orientation under Regulations 5 of the 2003 Regulations; and

(5) Victimisation under section 2 of the 1976 Act and Regulation 4 of the 2003 Regulations.

4. The Claimant brought two claims, both heard together. In the first claim the Claimant raised complaint in relation to over 120 allegations of direct discrimination and/or harassment and/or victimisation on grounds of race and/or sexual orientation. In the second claim the Claimant made complaint that he had been victimised on grounds of race and sexual orientation in relation to one further matter. The second claim concerned a leak to a Sun journalist of information which the journalist proposed to use to write a story critical of the Claimant's claim.

5. Mr Philip Mead appears for the Appellant and Mr Kweku Aggrey-Orleans appears for the Claimant. Mr Mead and Mr Aggrey-Orleans both appeared before the tribunal.

6. There were approximately 2,300 documents before the tribunal. The tribunal had four reading days before the hearing commenced. The hearing lasted 12 days. The tribunal then held meetings over 12 days before the reserved judgment was delivered, which runs to 113 pages.

Legal framework

General principles

Discrimination

7. In **Chapman v Simon** [1994] IRLR 124 Peter Gibson LJ said at para 41:

> **"Complaints of racial discrimination are by their nature serious. The complainant who can establish unlawful discrimination against him or her on racial grounds has suffered a serious**

wrong, for which Parliament by the Race Relations Act 1976 has provided remedies. … It is therefore appropriate that in such a case as the present, Industrial Tribunals should perform their duties with meticulous care."

The judge continued (at para 42):

"… It is the act of which complaint is made and no other that the Tribunal must consider and rule upon…"

At paragraph 43 the judge said:

"Racial discrimination may be established as a matter of direct primary fact. … More often racial discrimination will have to be established, if at all, as a matter of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the Tribunal in its fact-finding role, so that the validity of the inference can be examined. …"

At paragraph 46 the judge said:

"I also agree with the Employment Appeal Tribunal in accepting the following submission of Mrs Chapman and the Council, viz 'that having found 'Mrs Chapmans conscious attitude to race was impeccable', there were no primary facts found from which it is possible to infer 'subconscious' or 'unconscious' racial prejudice'…".

8. In **Igen v Wong** [2005] ICR 931 Peter Gibson LJ stated at paragraph 17:

"The statutory amendments clearly require the Employment Tribunal to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not upheld."

Peter Gibson LJ said at paragraph 29:

"The relevant act is, in a race discrimination case such as *Webster*, that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All of those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities."

9. In **Laing v Manchester City Council** [2006] ICR 1519 Elias J (President) said (at para 71):

> **"There still seems to be much confusion created by the decision in *Igen* [2005] ICR 931. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race."**

Elias J continued:

> **"76. Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in *Igen*, it is not necessarily an error of law to fail to do so. There is no purpose in compelling tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set up hurdles designed to trip them up. The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee, if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer. But where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.**
>
> **77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the tribunal to reach a finding of discrimination even if the prima facie case had not been established. The tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance."**

10. In **Madarassy v Nomura International plc** [2007] ICR 867 Mummery LJ said:

> **"69. The Employment Appeal Tribunal (Elias J (President) presiding) in *Laing* rightly rejected the complainant's submission. It accepted the respondent's submission that, at the first stage, the tribunal should have regard to all the evidence, whether it was given on behalf of the complainant or on behalf of the respondent, in order to see what inferences 'could' properly be drawn from the evidence. The treatment (or mistreatment) of others by the alleged discriminator was plainly a highly material fact. All the evidence has to be considered in deciding whether 'a prima facie case exists sufficient to require an explanation': para 59. The only factor which section 63A(2) stipulates shall not form part of the material from which inferences may be drawn at the first stage is 'the absence of an adequate explanation' from the respondent.**

> **79. … It seems to me that the approach of Elias J is sound in principle and workable in practice. This court should approve it. No alteration to the guidelines in *Igen Ltd v Wong* is necessary."**

At paragraph 83 Mummery LJ cited with approval the statement of Lord Nicholls in **Shammoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337:

> **"The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."**

In the recent case of **Warby v Wunda Group plc** (Appeal No. UKEAT/0434/11/CEA) Langstaff J (President) referred to the judgment of Elias LJ in **Grant v HM Land Registry and Anor** [2011] EWCA Civ 769 where the importance of the particular circumstances were emphasised: "for example, it will generally be relevant to note to whom a remark is made, in what terms, and to what purpose". Langstaff J added:

> **"We therefore accept the Respondent's submission that context is everything. It is for a Tribunal who hears the witnesses, whose job it is to determine the facts, and who considers the submissions made to it in the light of having heard these witnesses and determined those facts, to decide what the context is and to contextualise what has taken place."**

Harassment

11. Section 3A of the 1976 Act, which is headed "Harassment" states:

> **"(1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in s.1(1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of—**
>
> **(a) violating that other person's dignity, or**
>
> **(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.**
>
> **(2) Conduct shall be regarded as having the effect specified in para (a) or (b) of sub-section (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect."**

12. The proviso in sub-section (2) creates an objective standard as Underhill J (President) observed in **Richmond Pharmacology Ltd v Dhaliwal** [2009] IRLR 336 at para 15:

> **"Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."**

See also Regulation 5 of the **Employment Equality (Sexual Orientation) Regulations 2003**.

Victimisation

13. The reverse burden of proof under section 54A(2) of the **Race Relations Act 1976** does not apply to cases of victimisation.

14. In **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 Lord Nicholls at paragraph 16 stated:

> **"The primary object of the victimisation provisions in section 2 is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so. The structure of section 2 is similar to the structure of section 1(1)(a), but with an important difference. Racial discrimination, in section 1(1)(a), is discrimination on the grounds of race. Discrimination by victimisation, in section 2, is discrimination on one of the grounds, colloquially known as the protected acts, described in section 2."**

15. Section 2(1) defines discrimination by way of victimisation as follows:

> **"A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—(a) brought proceedings against the discriminator or any other person under this Act; or (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or (c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or (d) alleged that the**

> **discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act, or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them."**

Section 2(1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith. (See also Regulation 4 of the **Employment Equality (Sexual Orientation) Regulations 2003**).

Limitation

16. The material part of section 68 of the 1976 Act as to the period within which proceedings are to be brought states:

> **"(1) An [employment tribunal] shall not consider a complaint under section 54 unless it is presented to the tribunal before the end of—**
>
> **(a) the period of three months beginning when the act complained of was done;**
>
> **(6) A court or tribunal may nevertheless consider any such [complaint or claim] which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.**
>
> **(7) For the purposes of this section—**
>
> **(b) any act extending over a period shall be treated as done at the end of that period;…"**

This provision in similar terms appears in other discrimination legislation (see Regulation 34 of the **Employment Equality (Sexual Orientation) Regulations 2003**).

17. In **Aziz v FDA** [2010] EWCA Civ 304 Jackson LJ said at paragraph 33:

> **"In considering whether separate incidents form part of 'an act extending over a period' within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA and UKEAT/0804/02/DA) at paragraph 208."**

Vicarious liability

18. Liability of the employer under the 1976 Act and the 2003 Regulations is regulated by section 32(1) of the 1976 Act, and by Regulation 22(1) of the 2003 Regulations. The material words are identical. Section 32 of the 1976 Act headed "Liability of employers and principals" provides, so far as is material:

> **"(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act (except as regards offences thereunder) as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."**

19. Section 76A of the 1976 Act headed "Police forces" provides, in so far as is material:

> **"(1) In this section, 'relevant police office' means—**
>
> **(a) the office of constable held—**
>
> **(i) as a member of a police force;**
>
> **(2) For the purposes of Part II, the holding of a relevant police office shall be treated as employment—**
>
> **(a) by the chief officer of police as respects any act done by him in relation to that office or a holder of it;**
>
> **(3) For the purposes of section 32—**
>
> **(a) the holding of a relevant police office shall be treated as employment by the chief officer of police (and as not being employment by any other person); and**
>
> **(b) anything done by a person holding such an office in the performance, or purported performance, of his functions shall be treated as done in the course of that employment."**

Regulation 11 of the **Employment Equality (Sexual Orientation) Regulations 2003** performs an identical function in relation to the operation of the 2003 Regulations.

The Parties' Submissions and Discussion

The First Claim

General

20. Most if not all, of the criticisms of the tribunal relate to the first stage of the process. Mr Mead identifies certain common threads of appeal. He submits that the tribunal erred in three particular respects: first, by failing to set out the primary facts with clarity so that the validity of the inference can be examined (in accordance with the judgment of the Court of Appeal in **Chapman v Simon**); second, by wrongly causing or permitting the burden of proof to transfer, by showing that conduct is unreasonable or unfair (see **Bahl v Law Society** [2003] IRLR 640 (EAT) approved in **Bahl v Law Society** [2004] IRLR 799); and third, by failing to establish a prima facie case that treatment was on grounds of a prescribed characteristic, before permitting the burden of proof to transfer (in accordance with the judgment in **Madarassy v Nomura International**).

Ground 17: lack of reliability of the Claimant's uncorroborated evidence

21. In his skeleton argument Mr Mead raised this head of appeal at the outset on the basis that if this tribunal finds there is merit in the Appellant's arguments, then such conclusions would impact both on the ground of appeal on limitation and the grounds of appeal on discrimination and in particular victimisation. However, perhaps recognising the weakness of this ground in his oral submissions, Mr Mead dealt with it near the close of his submissions.

22. Mr Mead refers to numerous findings made by the tribunal that the Claimant had failed to prove a primary case in relation to significant parts of the evidence. He identifies 15 allegations where the Claimant's memory was found to be deficient in the sense of the Claimant not accurately establishing primary facts in which any asserted discrimination could be established and where, in particular, the Claimant failed in relation to the establishment of basic facts, for

example as to who was at a meeting, who did what, or who said what, as well as whether such conduct had a discriminatory dimension. On the basis that the Claimant was "an unreliable historian", he submits, that no reasonable tribunal would have made further findings that the Claimant had proven a prima facie case on the basis solely of the Claimant's recollection in other identified respects. The tribunal failed, Mr Mead submits, to have regard to the totality of the evidence including the medical evidence of Dr Oxlade, a consultant psychiatrist, who concluded that the Claimant was "a sensitive man with high standards". Dr Oxlade "believed [the Claimant's] perspective on things seemed to be exaggerated" and he "took the view that the Claimant had trouble understanding other people's points of view" (para 164).

23. We reject this submission. The tribunal had proper regard to the evidence of Dr Oxlade. There is nothing perverse about rejecting the Claimant's evidence in relation to some allegations on the basis that the tribunal was not satisfied that he had an accurate recollection of certain events but accepting his evidence in respect of other allegations in relation to other specific matters. The tribunal did not make a finding that it could not accept any evidence from the Claimant which was not corroborated. The submission on this ground of appeal made by Mr Mead is in effect that they should have done so. In our view there is no foundation for this submission.

Grounds 1-9: findings of direct discrimination on grounds of race and/or sexual orientation.

General

24. It is the Appellant's case that there was a generic failure by the tribunal to establish a prima facie case of discrimination. Mr Mead criticises the tribunal for appearing to have adopted a **Laing** approach by scrutinising the Appellant's evidence to assess whether the Appellant has satisfied it that there was no discriminatory reason for the treatment complained

about. He submits that in those cases where the Appellant was able to satisfy the tribunal, there is and can be no criticism. However, where for differing reasons the tribunal was not so convinced, there is a potential prejudice to the Appellant, should the tribunal have failed on the evidence to have met the requirements at stage 1. In particular, he submits, there is an absence in the tribunal's reasoning as to how a hypothetical comparator would have been treated, and why the alleged treatment was established, on a prima facie basis, to be discriminatory on the prescribed grounds.

Ground 2: the finding at paragraph 263: "that on occasions [the Claimant] was required to stop black and Asian people for white officers and then to hand them over to white officers".

25. The pleaded allegation is set out at paragraph 32 of the judgment in the following terms: "DC Inman, DC Marriott and DC Parker asked the Claimant on several occasions to act as a 'buffer barrier' by stopping black and Asian people for them first and then to hand the person over to them because 'blacks don't complain about blacks'". The finding made by the tribunal at paragraph 263 refers to "white officers" unspecified. There were no adverse findings made against DCs Parker, Inman and Marriott at all. Mr Mead submits that the only basis for concluding that the allegation was made out was that another person, DC Delaviz, who worked on a separate team had been asked to stop passengers of an Iranian background given that DC Delaviz was himself of Iranian background. Accordingly, Mr Mead submits, there is no prima facie case established on the evidence to support a contention that either DCs Inman, Parker or Marriott had treated the Claimant less favourably or to indicate that the treatment of the Claimant was on grounds of race.

26. Mr Aggrey-Orleans refers to the evidence accepted by the tribunal that the Claimant and DC Delaviz who are black and Asian respectively were asked to stop black and Asian passengers, their white colleagues were not asked to act as "buffers" and the denial of the

practice by the Appellant. These facts, he submits, set up a prima facie case of race discrimination and harassment for which the Appellant had not offered an explanation, having denied that the practice existed.

27. In our judgment the evidence established a prima facie case from which the tribunal could conclude that the Appellant had discriminated against the Claimant. Further the tribunal in our view was entitled to take into account the denial of the practice and the absence of an operational explanation as to why the practice was followed in assessing the adequacy of the explanation put forward by the Appellant.

Ground 3: Paragraph 273 and the comment of DS Osborne: "read with a large malt in hand!" made in an e-mail in reference to the sickness management contact log.

28. The allegation at paragraph 47 is couched in terms of the MPS not taking "the Claimant's complaints" seriously. However the tribunal characterises the allegation at paragraph 273 as that "his situation and health were treated dismissively in an e-mail". Mr Mead submits that is not the same: one referred to complaints of the Claimant, the other refers to the prevailing circumstances of the Claimant.

29. At paragraph 99 the tribunal record the cross-examination of DS Osborne and his explanation of the comment "read with a large malt in hand!" as a comment meant in a light-hearted way and that "DI Quantrell does like malt". The tribunal rejected that explanation as "an explanation that 'does not ring true'". The words used by DS Osborne "can only be inferred as indicating a disparaging approach to the Claimant by DS Osborne". Mr Mead observes that the mere fact of disparagement does not meet the prima facie case. He submits that the tribunal does not determine that the Claimant has been less favourably treated than a hypothetical comparator nor does the tribunal make any finding that there was a prima facie

case that the criticism of the Claimant was made on prescribed grounds of either race or sexual orientation. Accordingly there is no prima facie case satisfying stage 1 of the two-stage test.

30. Mr Aggrey-Orleans submits that the tribunal was entitled on the evidence to find direct discrimination and harassment on the grounds of race and sexual orientation where the Claimant's evidence that DS Osborne was aware of the allegations of discrimination had been accepted, DS Osborne's denial of knowledge of complaints had been rejected, and disparaging comments were being made at a time when the Claimant had complained about discrimination. The tribunal, he submits, had the evidence before it which entitled it to conclude that the Claimant had been subjected to less favourable treatment than a hypothetical comparator on the grounds of his protected characteristics at stage 1 and then to go on to stage 2 at which point DS Osborne's explanation failed to show that the disparaging remark was in no sense whatsoever on the grounds of the Claimant's protected characteristics. That was because his explanation was not believed by the tribunal. We agree. It was implicit in the tribunal's conclusion that DS Osborne would not have acted in the way he did if the complaint had not been a complaint about discrimination. It is clear that the tribunal understood the legal test. There was no need for the tribunal to spell out the position of a hypothetical comparator.

Ground 4: paragraph 274: comment of DI Quantrell: "that's life".

31. Mr Mead accepts that it is not disputed that DI Quantrell may well have used those words. The key issue is the context within which the comment was made. Mr Mead submits that the tribunal failed to construct a hypothetical comparator, failed to construct a finding of less favourable treatment and failed to identify on what basis the comment was said to be on grounds of either race or sexual orientation. He submits that the Claimant was an unreliable witness and that the prima facie case is not made out in relation to whether the comment was made in the context in which it is alleged by the Claimant that it was said to be made. The

comment in itself "that's life" is neutral. There must be, he submits, some evidence to support a determination that the comment was made on the prescribed ground. There is no such finding.

32. We do not accept Mr Mead's submission. The context of the findings of fact indicates this is a time when the Claimant had been complaining of discrimination to his senior line managers and the Appellant had knowledge of such complaints. The tribunal's findings of fact, as Mr Aggrey-Orleans submits, show that the tribunal rejected DI Quantrell's evidence that the comment was made on another occasion; the tribunal believed the Claimant's version of events; and this was a time when the Claimant was complaining about discrimination and the Appellant was aware of it. The allegation of discrimination was plainly an allegation of wrongdoing. The tribunal refers to its findings of fact at paragraphs 104-106. In our view the tribunal was entitled to conclude that the Appellant did not wish to deal with the Claimant's complaints.

Ground 5: paragraph 278: comment by DI Quantrell: "asked my opinion whether the staff were wary because he was black or gay, I categorically stated no, but to be realistic, I said staff would be wary if they thought he would get them into trouble with the organisation" i.e. by this I meant he had a personal agenda to progress his career or sue the organisation based solely on his race or sexuality".

33. The findings of fact at paragraphs 125-126 record the content of the telephone attendance note of DI Quantrell. Mr Mead submits that DI Quantrell was asked his opinion whether staff were wary because the Claimant was black or gay and in response DI Quantrell is recorded as "categorically" stating "no". On that basis the pleaded allegation is not made out. DI Quantrell then goes on to state his thinking if the circumstances were considered to be different. He refers to people using their personal agenda to progress their career, wrongly or wrongfully, within the organisation by making allegations based on race or sexuality. What DI Quantrell

was referring to was people using their race or sexual orientation as a means of advancement within the organisation. Whether that is an acceptable comment or not is irrelevant. It is, Mr Mead submits, a non-discriminatory comment.

34. We reject this submission. We agree with Mr Aggrey-Orleans that the claims of direct discrimination, harassment and victimisation on the grounds of race and sexual orientation are evident on the facts and stage one is made out on the facts. The tribunal rejected DI Quantrell's evidence as to the comment. The tribunal took into account the context in which the comment was made, namely at a time when the Claimant was enquiring as to whether his race and sexual orientation was affecting his relationships at work. The tribunal found at paragraph 278 that "the Claimant's individuality is inextricably linked with his race and sexual orientation. To suggest to him that if he pursued his complaints people would be wary of him, was inevitably linking that to his race and sexual orientation". DI Quantrell's comments appeared to discourage the Claimant from raising his concerns of how he perceived that he had been treated. The tribunal was entitled, in our view, to draw inferences from DI Quantrell's threat to the Claimant of less favourable treatment compared to a hypothetical comparator on the grounds of the Claimant's protected characteristics.

Ground 6: paragraph 280: careless identification of homophobic comments the Claimant was complaining about by DI Quantrell.

35. The tribunal accepted DI Quantrell's evidence that he had used the wrong terminology when identifying the precise derogatory words about which the Claimant was complaining. The tribunal found that DI Quantrell had been careless. Mere carelessness, Mr Mead submits, cannot without more lead to a finding of less favourable treatment on grounds of sexual orientation. Further it is not accepted that the Claimant suffered a detriment in terms of the terminology wrongly used. The Claimant corrected the erroneous terminology at the meeting.

36. The allegation was that DI Quantrell had falsely asserted in a case conference on 14 October 2009 that the Claimant had alleged that he had been called a "queer" and "faggot". Mr Aggrey-Orleans points to the tribunal's findings of fact and conclusion that "the lack of detail is important because it does show a lack of care in dealing with the Claimant's concerns and allegations. It illustrates a perhaps subconscious assumption on the part of DI Quantrell that given that the Claimant was gay, then those were the words that he would have taken offence at". This, he submits, amounted to direct discrimination and harassment on the grounds of the Claimant's sexual orientation.

37. In our view the tribunal was entitled in the context of the totality of the evidence concerning DI Quantrell and the findings that the tribunal made in relation to him (see Grounds 3-5, 7 and 9) to conclude that similar carelessness would not have occurred in a hypothetical comparator circumstance. Plainly there was some, albeit perhaps short term, detriment to the Claimant.

Ground 7: paragraph 284: excessive contact by DI Quantrell during October 2009

38. Mr Mead submits that it appears that the tribunal has sought to turn a complaint of victimisation into a basis for finding direct discrimination. The tribunal state that the existence of the Claimant's complaints "relying on those characteristics that caused the [Appellant] to press the Claimant to try and get closure of the problem quickly" amounted to direct discrimination. Mr Mead asks on what basis the tribunal has found direct discrimination against the Appellant on grounds of race and sexual orientation.

39. Mr Aggrey-Orleans submits that the Claimant's allegations must be viewed in the context of the totality of the evidence as to how the Claimant was treated. The oppressive nature of the

calls were viewed against the Appellant's own procedure that indicated a call once a week for the first 27 days of sickness and once per fortnight thereafter. The tribunal accepted the Claimant's account as to the oppressive and excessive contact, rejected DI Quantrell's evidence and that the same was done because the Claimant was black and gay and had complained about discrimination which situation the Appellant was keen to control given potential damage to the Appellant. Further the Appellant was not able to demonstrate that the frequency of calls was in no sense whatsoever on the grounds of race and sexual orientation.

40. In our view the tribunal was entitled to conclude that

> **"The Respondent has not been able to prove on the balance of probabilities that the frequency of contact with the Claimant in October 2009 was in no sense whatsoever on the grounds of his race or sexual orientation. On the contrary, the Tribunal draws the inevitable conclusion that it was precisely because of the nature of the complaints that the Respondent was keen to try and resolve the matters sooner rather than later. The Tribunal finds that the excessive contacting of the Claimant in October 2009 by CI Quantrell did amount to direct discrimination on the grounds of his race and sexual orientation, as it was the existence of his complaints relying on those characteristics that caused the Respondent to press the Claimant to try and get closure of the problem quickly." (Para 284).**

Ground 8: paragraph 285: comment of CI D'Orsi that the Claimant was not suitable for SO15.

41. Mr Mead submits that again it appears that the tribunal has sought to turn a complaint of victimisation into a basis for finding direct discrimination. The pleaded case as set out at paragraph 58 is: "The DCI said he thought the Claimant would be suited to a Borough when or if he returned as there are more officers of his age and more diversity. He said the Claimant was not able to do the job he wanted to do within SO15 Special Branch because of racism and homophobia. Both the DCI and DI Quantrell said SO15 has an older age group, which meant they were more set in their views". Mr Mead submits that the evidence as to what was said and found by the tribunal (see paragraph 285) does not reflect the pleaded case. The allegation refers to what DCI D'Orsi said. It does not refer to what he meant, or what the Claimant

understood (see paragraph 149). The comment was not made on the grounds of race and sexual orientation.

42. In our judgment the Claimant having reported discrimination in his role was being told to move from that role to a role where he was less likely to be exposed to racism and homophobia. At paragraph 149 the tribunal said: "On balance the tribunal accept that in the context of discussing options, DCI D'Orsi did say to the Claimant that if he moved to another policing role away from SO15, he would not face the issues he had at Special Branch". At paragraph 285 the tribunal found as a fact that the comment was clearly made to the Claimant because of his sexual orientation and race. We accept Mr Aggrey-Orleans' submission that the tribunal's conclusion comes from an assessment of the evidence and the clear context of the discussion that the Claimant was not suited to SO15 because of the level of discrimination within it, and would be better suited elsewhere where there was likely to be less discrimination. The tribunal found the context of the conversation to be important. The tribunal felt that DCI D'Orsi was conceding that there were issues within SO15. That is a permissible conclusion for the tribunal to form of the evidence, as was the tribunal's impression that DCI D'Orsi was telling him that he was not suited to SO15.

Ground 9: paragraph 286: finding that DI Quantrell was aggressive in tone to the Claimant because he was angry and upset at what he saw as criticism of himself in the Claimant's regulation letter.

43. Mr Mead submits that the first stage test has not been made out and that again there appears to be confusion of the test for direct discrimination and that for victimisation. The tribunal found that

> **"DI Quantrell was aggressive in tone to the Claimant because he was angry and upset at what he saw as criticism of himself in the Claimant's regulation 28 letter. His treatment of the**

> **Claimant was as a result of the Claimant having raised his concerns of race and sexual orientation discrimination and amounted to direct discrimination, harassment and victimisation. Given all the circumstances, including in particular the perception of the Claimant, it is reasonable to consider that it had the effect of creating an intimidating hostile degrading humiliating or offensive environment for the Claimant." (Para 286).**

Thus the tribunal find that the Claimant was treated in the way that he was as a result of the criticisms of DI Quantrell in the Claimant's letter. Mr Mead submits this is a non-discriminatory explanation. The tribunal, he submits, failed to make findings of less favourable treatment, or that such treatment was done on a prescribed ground.

44. Mr Aggrey-Orleans submits the tribunal made a finding that DI Quantrell reacted negatively to the Claimant's complaint of discrimination, that DI Quantrell's aggression was because the Claimant was black and gay and was complaining about him together with raising concerns of race and sexual orientation discrimination. The evidence also includes DI Quantrell's evidence that the Claimant was "damaging our good name" by raising his concerns of discrimination.

45. We have no doubt that the tribunal was entitled to find that this amounted to harassment and victimisation (see below), however we do not consider that in the light of the specific findings made in paragraph 286 that this amounted to direct discrimination.

Ground 1: finding that criticism of the Claimant in front of others over the submission of a leave form constituted direct discrimination on grounds of race, on the basis that the Claimant was the only mixed-race officer on the team.

46. The Appellant appeals this finding even though the tribunal found it was not just and equitable to extend time, and therefore the complaint was dismissed as being out of time. However the finding is a matter of public record, and stands as a determination in respect of the record of the officer concerned.

47. This particular complaint was said to involve the submission of a leave form where the Claimant was criticised by DS George in front of DC Jenkins and DS Stafford who both laughed at the Claimant, as a consequence of which the Claimant felt humiliated. The tribunal made a finding of discrimination on grounds of race (paragraphs 243 and 244). Mr Mead refers to the finding at paragraph 19 that the evidence of the other officers was that DS George did nothing to humiliate the Claimant in front of others, which evidence the tribunal accepted. This finding, he submits, is therefore in direct contradiction with the Claimant's pleaded case (paragraph 15). Mr Mead further submits that the tribunal failed to construct a prima facie case as to how a hypothetical comparator would have been treated or identifying on what basis such treatment is said to be on grounds of race.

48. Mr Aggrey-Orleans contends that the correct test was applied in paragraph 244 where the tribunal finds less favourable treatment of the Claimant compared to his white colleagues on the grounds of race and draws an inference from the fact that the Claimant was the only mixed race officer treated this way that it was on the grounds of his race. We agree with Mr Aggrey-Orleans that this, combined with DS George's denial that the incident occurred, contrary to the tribunal's finding, further entitled the tribunal to draw the inference that the treatment was on the grounds of race.

Ground 10: findings of harassment

49. The allegations found by the tribunal to constitute harassing conduct include the following: comment by DS Osborne: "being one of those people" (para 268); comment by DS Osborne: "read with a large malt in hand!" (para 273); comment by DI Quantrell: "that's life" (para 279); DI Quantrell failing to approach the Claimant's allegations with an open mind (para 279); careless identification of homophobic comments by DI Quantrell (para 280); excessive

contact by DI Quantrell during October 2009 (para 284); comment by DCI D'Orsi that the Claimant was not suitable for SO15 (para 285); and finding DI Quantrell was aggressive in tone because he was angry and upset at criticism of him (para 286). The findings against DC Howarth and DS Addis in respect of harassment are not challenged.

50. Mr Mead submits that given the tribunal's findings as to the sensitivity of the Claimant (paras 164, 167 and 289), it is necessary in each instance of potential harassment for there to be some evidence and reasoning to support the basis upon which the tribunal found that it was reasonable to consider that the index behaviour would reasonably be considered to be harassing behaviour, not merely that the Claimant perceived that he was subject to harassment. In none of the instances of a finding of harassment, Mr Mead submits, is there such a reasoned basis. Further in relation to the findings at paragraphs 274, 278-280 and 284-286 the tribunal either made no distinction between the tests for discrimination and harassment, or addressed the issue only from the point of view of the Claimant's perception. The Appellant's case is that none of the incidents meet the threshold of severity or seriousness to justify a finding of harassment.

51. Mr Aggrey-Orleans submits that the tribunal had in mind the relevant statutory provisions relating to harassment and it is accepted that it applied the correct test in relation to the comments by DC Howarth and DS Addis. That being so it is submitted that it is illogical and unlikely that the tribunal did not apply the test consistently to all allegations of harassment made. Mr Aggrey-Orleans submits that in reaching its conclusion on each allegation of harassment the tribunal took into consideration its assessment of the Claimant's evidence on that allegation. Where the tribunal thought that the Claimant was being unreasonably sensitive it stated so. For example at paragraph 256 the tribunal state:

> **"If the comment had arisen as a result of the race or ethnic or national origin of DC Delaviz, could it amount to harassment of the Claimant applying the provisions of section 3A(1)RRA?**

> **In the Tribunal's view, no. It should not have reasonably been considered as having that effect, taking into account the over-sensitive perception of the Claimant. It amounted to the Claimant taking offence by proxy on behalf of DC Delaviz, who himself was not offended; and could not have amounted to harassment in all the circumstances and on all the facts found in this case."**

Similar examples of the tribunal adopting the proper assessment of the Claimant's evidence appear in paragraphs 265 and 275 of the decision.

52. As for paragraph 268 (the comment made by DS Osborne: "being one of those people", Mr Aggrey-Orleans does not accept that the tribunal found an act of harassment based on words DS Osborne was not alleged to have said. The tribunal recorded the allegation made by the Claimant at paragraph 36. This statement was denied by DS Osborne and the Claimant's evidence was accepted. The Claimant's evidence was that DS Osborne intended to suggest that the Claimant was also "one of those people". This evidence was accepted. Mr Aggrey-Orleans submits that the tribunal's finding of fact is a reference to the allegation that was made by the Claimant. The words "being one of those" amounted to no more than the tribunal paraphrasing the allegation and the Claimant's sentiment about DS Osborne's statement.

53. The tribunal was aware of the test in relation to harassment which is set out in its conclusions at paragraph 267 of the judgment and in our view the tribunal was entitled to make all the findings of harassment that it did, having given careful consideration to the evidence that it had heard.

Grounds 11-15: findings of victimisation on grounds of race and/or sexual orientation

54. Findings made by the tribunal of victimisation are at paragraphs 278-279 and 284-286. We considered the findings in these paragraphs in respect of direct discrimination when considering grounds 5, 7, 8 and 9 at paragraphs 33-34 and 38-45 above.

Ground 11: Burden of proof

55. Mr Mead observes that the tribunal correctly recorded that there is no reversal of the burden of proof in relation to victimisation in race cases (para 236), however he submits that the tribunal thereafter made no distinction between the respective victimisation causes of action when applying its legal analysis at paragraphs 278 and following. The tribunal failed, he submits, to apply the two stage **Igen** test to the victimisation claims on the ground of sexual orientation. There is, he submits, no separation of the differing legal considerations in respect of direct discrimination, harassment and victimisation, which appear to be rolled into one.

56. Mr Aggrey-Orleans contends that the tribunal knew and applied the correct test (see paras 227, 230 and 236) and it is unrealistic to suggest that the tribunal was applying the same test for direct discrimination, harassment and victimisation, having itself set out the different tests.

57. In our view there is no merit in this criticism of the tribunal.

Ground 12: paragraph 278: comment by DI Quantrell: "asked my opinion when staff were wary because he was black or gay, I categorically stated no, but to be realistic, I said staff would be wary if they thought he would 'get them into trouble with the organisation' i.e. by this I meant if he had a personal agenda to progress his career or sue the organisation based solely on his race or sexuality".

58. Mr Mead submits that the tribunal mis-characterises what DI Quantrell said, as found at paragraph 125, and fails to analyse the reason why DI Quantrell said what he did. That reason why is a non-discriminatory reason, referring as it did to an agenda of advancement, whereby certain categories of person might receive preferential treatment should they make complaint. Applying the reason why test, Mr Mead submits, no victimisation is made out.

59. At paragraph 278 the tribunal made the following material findings:

> **"(1) The question posed by the Claimant was whether staff were wary of him because he was black or gay.**
>
> **(2) The response from CI Quantrell 'was to categorically state no', but he then went on to say that staff 'would be wary if they thought he would get them into trouble with the organisation'.**
>
> **(3) In all the circumstances CI Quantrell's comment appears to discourage the Claimant from raising his concerns at how he perceived he had been treated.**
>
> **(4) CI Quantrell stated 'It was not about race or sexuality but (the Claimant) as an individual'.**
>
> **(5) 'The Claimant's individuality is inextricably linked with his race and sexual orientation. To suggest to him that if he pursues his complaints people would be wary of him, was inevitably linking that to his race and sexual orientation."**

60. In our view it is necessary to consider CI Quantrell's response as a whole. The tribunal was entitled to find that CI Quantrell was discouraging the Claimant from pursing or raising his complaints. This amounted to victimisation.

Ground 13: paragraph 279: CI Quantrell failed to approach the Claimant's allegations with an open mind

61. Mr Mead contends that the tribunal make no finding as to whether CI Quantrell said what the Claimant alleged. On this basis alone, the particular complaint set out at paragraph 52 must fail. Further Mr Mead submits that the race and/or sexual orientation of the Claimant are not relevant components of any test for victimisation, and accordingly the tribunal has applied an incorrect test. Also it is said that it is unclear what the detriment is that the Claimant has suffered.

62. CI Quantrell had researched the Claimant to establish if he was "Ok" or a "troublemaker". (Para 129). In our view the tribunal was entitled to draw from the evidence the inference that the Claimant's race and sexual orientation were the reasons why CI Quantrell

doubted whether the Claimant was a "genuine case" or not and that amounted to victimisation of the Claimant (para 279); and that the Claimant had suffered a detriment.

Ground 14: paragraph 284: excessive contact by CI Quantrell during October 2009

63. Mr Mead submits that it is not understood how an employer striving to get an employee back to work when that employee is disengaging with the employer can be said to be less favourable treatment. Analysing the reason why, demonstrates a non-discriminatory reason: namely resolution of the issues by getting the Claimant back to work. Mr Mead submits that given the lack of differentiation between discrimination, victimisation and harassment, it is wholly uncertain how the tribunal addressed its mind to the different causes of action.

64. The tribunal found that the treatment of the Claimant as set out in paragraph 284 of the decision "did amount to victimisation both on grounds of race and sexual orientation, arising directly as it did from him having raised those very complaints". In our view this was a conclusion the tribunal was entitled to reach on the evidence.

Ground 15: paragraph 285: comment of DCI D'Orsi that the Claimant was not suitable for SO15.

65. Mr Mead submits that given the tribunal's findings as to the rationale for the conversation and the intent of the Appellant to seek to return the Claimant to work, the "reason why" found is a non-discriminatory reason, and that the words were not spoken "on the ground that" the Claimant was making complaints of discrimination. Offering a move by stating that officers are more the Claimant's age and more diverse and that the Claimant would not face the issues the Claimant had faced at Special Branch constitutes, he submits, a reasonable approach in the circumstances of the difficulty both the Appellant faced and the Claimant faced.

66. The Claimant was told by DCI D'Orsi that he was not suitable for SO15. At paragraph 285 of the decision the tribunal found that this was an act of, inter alia, victimisation "because the Claimant had alleged that race and sexual orientation discrimination had occurred. DCI D'Orsi was conceding in that conversation with the Claimant that there were issues at SO15 arising from racism and homophobia". The tribunal was entitled, in our view, so to find.

Paragraph 286: CI Quantrell was aggressive in his tone to the Claimant

67. In his oral submissions Mr Mead challenged the finding made in paragraph 286 that CI Quantrell's aggressive tone amounted to victimisation. We considered this behaviour in relation to the finding of direct discrimination which is the subject of challenge in Ground 9 (see paras 43-45 above).

68. The tribunal found that CI Quantrell was aggressive in his tone to the Claimant and "His treatment of the Claimant was as a result of the Claimant having raised his concerns of race and sexual orientation discrimination" (para 286). In our view the tribunal was entitled to conclude that given all the circumstances it was reasonable to consider that "it had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant". The tribunal was aware of the statutory provisions relating to victimisation (see paras 227 and 230 of the Decision). This was a conclusion which, in our view, the tribunal was entitled to find amounted to victimisation.

Ground 16: limitation

69. In respect of time issues there are three grounds of challenge to the tribunal decision: first, that the tribunal failed to address the complaints against DC Howarth (March 2009) and DS Addis (June 2009); second, the tribunal erred in its determination of a "continuing act"; and third, the tribunal wrongly exercised its discretion in extending time.

Complaints against DC Howarth (March 2009) and DS Addis (June 2009)

70. The tribunal decided that the claim against DS George, which was some 15 months out of time, was "on the facts found not part of an ongoing situation or continuing state of affairs, arising as it does from a isolated act at another Terminal involving another team" (para 293). Accordingly the tribunal did not consider it appropriate in all the circumstances to extend time in respect of the claim against DS George. Mr Aggrey-Orleans accepts that the same reasoning should apply to the claim against DC Howarth, and therefore the tribunal had no jurisdiction to consider that claim.

71. Mr Mead submits that time should not be extended in respect of the claim against DS Addis for the same reason. This was also a stand-alone claim involving offensive comments made during a presentation at Paddington Police Station (para 269). DS Addis had no connection to Heathrow, and was not therefore connected to the line management at Heathrow, or T5, or the day-to-day work environment of the Claimant. In our judgment the tribunal's reasoning in the case of DS George applies equally to the case of DS Addis, and therefore the tribunal had no jurisdiction to consider that claim also.

Determination of a continuing act

72. The "act" which is continuing, for the purposes of the legislation, is the act about which complaint is made. Mr Mead submits that in the present case the Claimant did not make complaint that the Reporting Wrongdoing Policy was being applied in a discriminatory way. The tribunal was therefore wrong to take into account the failure on the part of the Appellant "to address, comply with and implement its reporting wrongdoing policy in dealing with the Claimant's complaints" (para 292), as acts which persisted for the duration of the Claimant's period off sick from July 2009.

73. In our judgment it is clear from the tribunal's detailed examination of the individual complaints that whilst it expressed itself when summarising continuing act by reference to the wrongdoing policy it had proper regard to all the evidence when reaching the conclusion that there was a "continuing act".

Exercise of discretion in extending time

74. Mr Mead submits by reference to the documentation before the tribunal that the tribunal was wrong to find that "the Claimant did not receive any advice or assistance in progressing the Employment Tribunal claim until he met with legal advisers in January 2010" and that "it was not until 5 May 2010… that the Claimant was able to instruct a solicitor in respect of the first Employment Tribunal claim…" (para 295). We do not accept these submissions. The Claimant set out in his witness statement at paragraphs 677-704 the material facts as to when he sought and obtained legal advice and his health and state of mind at the time. We understand that the Claimant was not cross-examined on these matters. Mr Aggrey-Orleans accepts that it may have been better if the tribunal had said that it was not until 5 May 2010 that the Claimant was able *sufficiently* to instruct a solicitor in respect of the first claim. However in our view the tribunal made findings of fact that it was entitled to do on the evidence before it.

Second claim: the leak to *The Sun* newspaper

Ground 18: findings of victimisation on ground of race and/or sexual orientation

75. The relevant findings of fact made by the tribunal are set out at paragraphs 211 and following in the Judgment. On the afternoon of Friday 23 July 2010 Mr Fedorcio, Press Officer at the Appellant, received a telephone call from Anthony France, a journalist from The Sun Newspaper. Mr France said he was aware that the Claimant had submitted an employment tribunal claim for race discrimination and that he intended to run a story about the claim, either

on Monday or Tuesday the following week. He told Mr Fedorcio that he intended to write that the Claimant's claims were without foundation. Mr France referred to a specific allegation that on a visit to a mosque the Claimant's white colleagues refused to eat the food offered by the hosts and that this behaviour was evidence of racism. Mr France said that in fact the colleague in question had been lactose intolerant and had politely declined the food offered. It appeared to Mr Fedorcio that Mr France had a very high level of knowledge of the claim. He said "Given what seemed to be the very precise nature of the incident he related (the mosque/food) it appeared to me that Mr France may have received the information from one of DC Maxwell's colleagues who was there" (para 211).

76. On 27 July the Claimant's solicitor, Ms Arpita Dutt, returned a call made to her by Mr France. Her evidence, which was not challenged, was:

> **"Mr France identified himself as a journalist and informed me that an article would be published later that week in the Sun Newspaper… He informed me that the Sun had been informed about the Claimant's claim… He referred to one claim of a group visit to a mosque and during that visit to the mosque, an Officer had refused to eat curry. He said that the non-curry eater was on a low cholesterol diet because of an illness and that was why he had refused to eat. … I advised Mr France that he only had a snapshot of the claim, that the defence had not even been filed at the Employment Tribunal and that the claim was not in the public domain as yet and that he knew more about the defence than we did. In particular I noted that Mr France had been informed of aspects of the Respondent's potential defence in relation to why an Officer had refused to eat curry at the Mosque and the potential denial of the homophobic comments alleged to be made based on an Officer who had alleged to have met him previously having worked in a gay area in city centre Manchester. These were issues that could not have been known to me, or the Claimant, as the Grounds of Resistance had not yet been filed by the Respondent…" (Para 215).**

77. The conclusions of the tribunal in respect of the threatened Sun story are set out at paragraphs 296 and 297 of the Judgment.

> **"296. The Tribunal refers to its findings of fact at paragraphs [211 and following]. The information about the claim was clearly not disclosed by the Claimant to Mr France, the Sun reporter. The Tribunal is entirely satisfied on the evidence heard that on the balance of probabilities the information about the Claimant's case acquired by the Sun came from an officer working for the Respondent. What is particularly significant is Mr France's account, as given to the Claimant's solicitor, that an officer attending the mosque had a low cholesterol diet. That information could not have come from the Claimant or anyone connected with the Claimant's claim, because it was not until the cross-examination of Mr Jenkins that the**

Claimant learned that he had a low cholesterol diet. Indeed Mr Fedorcio, who spoke to Mr France, thought that the story had come from one of the Claimant's colleagues such was the level of detail that Mr France had.

297. Further the response had not been completed and presented on behalf of the Respondent at that stage. The Respondent is vicariously liable for the actions of its Police officers. For the Respondent, Mr Mead argued that it is necessary to identify the individual who is liable under section 32 of the Race Relations Act, that is whether it is an employee in the course of employment or an agent otherwise stage one of the burden of proof test is not met. He argues that if the Tribunal find that the Claimant has proved primary facts from which the Tribunal could conclude in the absence of an adequate explanation from the Respondent that the information leaked to Mr France came from the Respondent, then the Respondent is not in a position to prove on the balance of probabilities that the release of the information was in no sense whatsoever on the grounds of the Claimant's race or sexual orientation. The Tribunal do not accept that argument. To do so would make it virtually impossible for a Claimant, in similar circumstances where information is leaked that can, on the facts found, only have come from within a Respondent organisation, to pursue a claim unless they are able to identify who actually leaked the information. That is not in this Tribunal's view a purposive interpretation of Section 32 on facts such as these, and the Tribunal rejects that argument."

78. In **Lister and others v Hesley Hall Ltd** [2001] UKHL 22 the House of Lords held that the determining factor concerning liability was whether the employee's torts were so closely connected with his employment that it would be fair and just to hold his employer vicariously liable.

79. In **Chief Constable of the Lincolnshire Police v Stubbs** [1999] IRLR 81 the applicant, a member of the Lincolnshire Constabulary, complained that during the time she was seconded to the North East branch of the Regional Crime Squad she was subjected to two incidents of inappropriate sexual behaviour from DS Derek Walker, who was also a member of the Lincolnshire Constabulary seconded to the North East branch of the Regional Crime Squad. The employment tribunal upheld her complaint. On one occasion the incident took place in a public house after her term of duty where she met other police officers, including DS Walker. The second occasion was at a leaving party attended by the applicant and DS Walker and others. The tribunal said that: "these incidents were connected to work and the work place. They would not have happened but for the applicant's work. Work related social functions are an extension of employment and we can see no reason to restrict the course of employment to

purely what goes on in the workplace". The Employment Appeal Tribunal dismissed the appeal. Morrison J (President) said at paragraph 44:

> **"… We concur with the findings for the industrial tribunal, that the two incidents referred to, although 'social events' away from the police station, were extensions of the workplace. Both incidents were social gatherings involving officers from work either immediately after work or for an organised leaving party. They come within the definition of course of employment, as recently interpreted by the Court of Appeal in *Jones v Tower Boot Co. Ltd* [1997] IRLR 168 and the case of *Waters v The Commission of Police of the Metropolis* [1997] IRLR 589. It would have been different as it seems to us had the discriminatory acts occurred during a chance meeting between Mr Walker and the applicant at a supermarket, for example, but when there is a social gathering of work colleagues such as there was in this case, it is entirely appropriate for the tribunal to consider whether or not the circumstances show that what was occurring was an extension of their employment. It seems to us that each case will depend upon its own facts. The borderline may be difficult to find. It is a question of good exercise of judgment by an industrial jury: whether a person is or is not on duty, and whether or not the conduct occurred on the employer's premises, are but two of the factors which will need to be considered. …"**

80. Mr Mead submits that the tribunal failed to have regard to the obligation on the Claimant to prove at stage 1 of the two-stage test in **Igen** the primary facts, in particular that the leaker was acting in the course of his employment. He submits that unless the Claimant is able to prove primary facts as to the identity of the tortfeasor, there is no basis upon which a secondary liability can be imposed on the employer under section 32.

81. We reject this submission, as did the tribunal. The tribunal was entirely satisfied on the evidence heard that on the balance of probabilities "the information about the Claimant's case acquired by the Sun came from an officer working for the Claimant" (para 296). Mr Aggrey-Orleans observes that the Appellant did not offer any alternative explanation of how else the Sun acquired the story from the Appellant, other than Mr Fedorcio thinking that the source of the leak may be one of the Claimant's colleagues due to the precise details of information of the mosque claim (para 211).

82. The purpose of the leak, Mr Aggrey-Orleans submits, was to protect the reputation of the Metropolitan Police Service in circumstances where the Claimant had made allegations of

discrimination against fellow police officers. Put broadly, Mr Aggrey-Orleans submits, the subject matter of the leak by an officer working for the Appellant was plainly closely connected with his employment.

83. In our view the tribunal was entitled to find that the leak had come from an individual for whose actions the Appellant was vicariously liable, given the detailed knowledge that Mr France had of the claim and aspects of the Appellant's potential defence and Mr Fedorcio's belief that Mr France had received the detailed knowledge of the mosque/food incident from one of the Claimant's colleagues who was there.

Conclusion

84. It is clear that the tribunal considered all the evidence in relation to each and every allegation with considerable care. The Judgment of the tribunal runs to 113 pages. At the outset in paragraph 3 the tribunal "considered how best to approach the identification of issues". Paragraph 3 continued:

> **"…The starting point must be the amended details of claim dated 14 May 2010. The Tribunal set out below, using the same paragraph numbering as that contained in the amended statement of claim, the relevant paragraphs on which the Claimant relies in support of the various claims made. Whilst that clearly results in a substantial amount of the pleading being incorporated into this Judgment, in the Tribunal's view that is an appropriate way to approach setting out the issues as it ensures that the pleaded case is directly addressed in the conclusions that follow after the Tribunal's finding of fact."**

At pages 39-53 the tribunal set out the factual issues and legal claims for determination.

85. At paragraph 6 the tribunal provided a summary of their overall impression of each witness which further indicates the care they have taken in assessing the factual evidence. Very detailed findings of fact are set out at pages 59-129. The statement at the outset of the tribunal's conclusions (which are set out at pages 134-150) that "The conclusions … are cross-

referenced to the factual issues identified in the amended statement of claim incorporated in this Judgment" (para 238) again indicates the methodical approach taken by the tribunal.

86. In our view the criticism of the tribunal that it failed to set out the primary facts with clarity is without merit. Further, in respect of the complaints of direct discrimination, the tribunal cannot be criticised for not going through the two-stage process in relation to each complaint. We are satisfied that the tribunal properly tackled the issues arising in this case in the most convenient and appropriate way, having regard to all the circumstances of the case. It is clear that the tribunal had the two stage process set out in **Igen v Wong** well in mind. When dealing with the first allegation in its Conclusions the tribunal stated at para 240:

> **"Having applied the two-stage process set out in Igen v Wong, the Tribunal do not find from their findings of fact (paragraphs 8-14 above) that the Claimant has proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed unlawful acts of discrimination as alleged."**

87. There was no obligation on the tribunal to refer to the two-stage process again in relation to each and every complaint or indeed to adopt the two-stage process in relation to each and every complaint if the tribunal considered it was not appropriate to do so. Mr Mead did not in his final written submissions to the tribunal (B442-447) suggest that it should.

88. Mr Mead disavowed a reasons challenge. However the reality in our view, as Mr Aggrey-Orleans contends, is that this appeal is largely an attack on the tribunal's findings of fact and adequacy of reasons. The only perversity challenge expressly put forward is in Ground 17 (see paras 21 to 23 above) which encapsulates the Appellant's real complaint, namely that all the complaints made by the Claimant are made up. After a painstaking analysis of the factual evidence the tribunal rejected this suggestion and there is no basis in our view for this

tribunal to interfere with the findings of fact made and the conclusions reached by the tribunal, save to the limited extent we have indicated.

89. For the reasons we have given we dismiss this appeal in relation to both claims save in the following respects: in relation to the first claim we allow the appeal against the finding of direct discrimination challenged in Ground 9 (see paras 43-45 above), and in relation to Ground 16 we find that the tribunal had no jurisdiction to consider the complaints against DC Howarth and DS Addis (see paras 70-71 above).