EMPLOYMENT TRIBUNALS

Claimant: Mr P Bailey

Respondents: 1. Chief Constable of Greater Manchester Police
2. Dermott Horrigan
3. The Chief Constable of Lancashire Police

HELD AT: Manchester **ON:** 4 - 8 September 2017
11 September 2017
12 September 2017
(In Chambers)

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Carlo Breen, Counsel
Respondents: Simon Gorton, QC, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claim of victimisation under the Equality Act 2010 fails and is dismissed.

REASONS

1. The claimant by a claim form dated 9 October 2015 regarding the termination of his role as Disclosure Officer in Operation Holly and his return to Greater Manchester Police claimed victimisation and detriments due to making a protected disclosure. On the first day of the Tribunal he withdrew the whistle blowing detriment claim and they were accordingly dismissed. The Tribunal therefore proceeded to hear his victimisation claims only.

Claimant's Submissions

2. In summary the claimant submitted that he was removed as Disclosure Officer on Operation Holly as a result of three protected acts. Even if the Regulation 16

matter was taken into account the protected acts were still a significant influence on the decision accordingly he had been victimised as a result of bringing proceedings or activities in relation to race discrimination. Further GMP were joint or sole decision makers and as such were liable, if the decision maker was Dermott Horrigan alone the claimant submitted Dermott Horrigan's employer Lancashire Police (i.e. the third respondent) were vicariously liable for his actions.

Respondent's Submissions

3. The respondent submitted that the reason for the claimant's removal was solely the Regulation 16 matter and the Employment Tribunals were not a factor in the decision maker's mind, they contended the decision maker was Dermott Horrigan alone. They further contended that Dermott Horrigan's employer Lancashire Police could not be responsible or vicariously liable for an act taken in respect of the claimant an employee of another Police Force, nor could GMP be liable for an action taken by an officer of a different Force.

Issues before the Tribunal

4. Were the acts relied on protected acts?

5. Who was the Decision Maker in this case? Was it GMP; GMP and Dermott Horrigan: Dermot Horrigan alone?

6. What was in the Decision Maker's mind when they decided to terminate the claimant's role on Operation Holly, in particular was it a reason related to the protected acts?.

7. Was that reason materially influenced by the fact that the claimant had done a protected act?.

8. If the decision was so materially influenced are any of the respondents in law responsible for that act?.

9. The claimant relied on three protected acts:

(i) the fact that he was Chair of the Black and Asian Police Officer's Association and his associated activities in that role;

(ii) his consolidated proceedings in 2009 and

(iii) the bringing of the 2012 proceedings.

Witnesses

10. The Tribunal heard from the claimant himself, a Detective Constable with Greater Manchester Police (on Tuesday 6 September) and for the respondents Dermott Horrigan now retired who was Head of TITAN, previously Detective Chief Superintendent with Lancashire Police, John Webster a Detective Chief Inspector with Merseyside Police, Deputy Head of Operations for TITAN, Tim Dean retired

previously a temporary Detective Inspector (with Cheshire Constabulary), Head of the Economic Crime Unit within TITAN, Elizabeth Jenkins at the time Deputy Head of the Specialist Fraud Division within the Crown Prosecution Service, Gary Shewan Assistant Chief Constable with Greater Manchester Police and Russ Jackson Acting Assistant Chief Constable with Greater Manchester Police and at the time Head of Crime in Greater Manchester Police liaising between GMP and TITAN.

Cast List

11. These are people referred to within the proceedings who were not witnesses:

Peter Jackson Detective Superintendant in GMP Major Incident Team

Nicholas Bailey Chief Superintendent Cheshire Police Head of Professional Standards,

Carl Price, Crown Prosecution Service Solicitor,

Elizabeth Bailey Crown Prosecution Service Solicitor,

Dawn Copley Assistant Chief Constable GMP,

Ian Hopkins, Deputy Chief Constable GMP (at the time),

Ian Rushton Crown Prosecution Service Deputy Chief Crown Prosecutor for CPS North West,

Peter Fahy, Chief Constable for Greater Manchester Police,

Michael Ryan, Detective Inspector West Yorkshire Police,

Paul Rumney Detective Chief Superintendent GMP Professional Standards,

David Holt Chief Superintendent GMP Professional Standards,

Julian Flindle Deputy Chief Inspector GMP Professional Standards,

Celine Boyd TITAN Admin Staff,

Laura Orton GMP Admin Staff.

Bundle

12. There was an agreed bundle in three volumes.

Redactions

13. It is important for this issue to be set out in our judgment. The bundles were subjected to considerable redaction by the Crown Prosecution Service on the basis of legal privilege, this had not been challenged by the claimant's solicitor prior to the Tribunal and although it was alluded to on the first day of the Tribunal and in final submissions it was not challenged by the claimant's representatives on the first day of the hearing or thereafter. It is of course always possible to arrange a "voir dire" whereby a Judge not involved in the case would consider whether the redactions were genuine, clearly this would have involved calling a witness from Crown Prosecution Service at the very least, this could have been arranged but obviously would have led to this Tribunal being at best postponed for around two days or in its entirety. This decision therefore will refer to those redactions which placed the Tribunal in a difficult position in making findings of fact.

Woodmay

14. It should also be noted that the claimant has separate proceedings to be heard in December regarding the "Woodmay" issue which refers to the operation undertaken by West Yorkshire Police investigating the alleged leak to the Manchester Evening News which led to the Regulation 16 notice referred to below.

15. The Tribunal's findings of fact are as follows.

16. The claimant joined Greater Manchester Police in January 1990 and has been Chair of BAPA, Black and Asian Police Officers Association since June 1999.

17. Between April 2007 and February 2009 he issued three sets of Tribunal proceedings against Greater Manchester Police claiming race discrimination and victimisation. In July 2009 a Compromise Agreement was arrived at which inter alia provided for the claimant's secondment to the Regional Crime Unit (RCU) part of the North West Regional Taskforce (NWROC) which later became TITAN. Within TITAN there was an operation called Goldfinch which had originally been undertaken by Greater Manchester Police but then moved to TITAN in March 2012. At some point the name of the operation changed to Operation Holly.

18. TITAN was under the overall control of D.C.S. Horrigan, TITAN was responsible for a number of other investigations. D.C.I. Webster was deputy in charge of operations on TITAN and Mr Tim Dean was the senior investigating officer on Holly.

19. In February 2013 the claimant issued Tribunal proceedings in respect of his secondment to NNWROC/TITAN. This was heard at the Tribunal by Judge Holmes on the following dates 8, 9, 10, 11 and 12 September and 24 November 2014. The 13 January 2015 being devoted to submissions only. The Judgment from that Tribunal was issued on 10 February 2015 and we will return to that later.

20. This Tribunal has been referred to as the "Holmes Tribunal" and we will adopt that for the sake of clarity and consistency. Mr Dean, Mr Horrigan and Mr Shewan were all witnesses in that Tribunal however we are unaware on what dates they appeared to give evidence but it certainly would have been in 2014.

21. The claimant was seconded to Operation Holly in March 2012. This was at that stage within TITAN and therefore the claimant was working under a secondment arrangement, unfortunately there appears to be no specific contract documenting this arrangement involving the claimant although we were shown specimen ones.

22. Operation Holly was a very complex fraud and money laundering investigation which had been ongoing for a number of years when the claimant joined. The claimant was given the pivotal position of Disclosure Officer, it was recognised he held the skills to carry out this role.

23. The role of the Disclosure Officer is set out in legislation under the Criminal Procedure and Investigations Act 1996 Part 2 Section 23 Code of Practice refers to guidance being given regarding "information falling within paragraph B and material falling within paragraph D is revealed to a person who is involved in the prosecution of criminal proceedings arising out of or relating to the investigation and who is identified in accordance with the prescribed provisions.

> B is information which is obtained in the course of criminal investigation and may be relevant to the investigation is recorded.
>
> D is any other material which is obtained in the course of a criminal investigation and may be relevant to the investigation is retained.
>
> Section F states that were such a person referred to in E inspects information or other information in pursuance of a requirement that it be revealed to him and he requests that it be disclosed to the accused, the accused is allowed to inspect it or is given a copy of it.
>
> Section G where such a person is given a document indicating the nature of information or other material in pursuance of the requirement that it be revealed to him and he request that it be disclosed to the accused the accused is allowed to inspect it or is given a copy of it.
>
> H, that the person who is to allow the accused to inspect information or other material or to give him a copy of it shall decide which of those (inspecting or giving a copy) is appropriate.
>
> I, that where the accused is allowed to inspect material as mentioned in paragraph F or G and he requests a copy and is given one unless the person allowing the inspection is of the opinion that it is not practicable or not desirable to give him one.
>
> J, that a person mentioned in paragraph E is given a written statement that prescribed activities which a code requires have been carried out.
>
> The person who carries out the duty of considering material in a criminal investigation under these provisions is called a Disclosure Officer.

24. In the CPS manual the duties of a Disclosure Officer are set out in more detail. The Disclosure Officer is described as the person responsible for examining material retained by the Police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it and certifying that he has done this and disclosing material to the accused at the request of the prosecutor. It defines material which may be relevant to an investigation as material which appears to an investigator or to the officer in charge of an investigation or to the Disclosure Officer that it has some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances of the case unless it is incapable of having any impact on the case. The Disclosure Officer can also not disclose material which is sensitive which may prejudice an important public interest but otherwise they are deciding what material is potentially irrelevant and what material is relevant and at the end of the process they have to certify that they have done that work in good faith etc.

25. There were no complaints about the claimant's performance in this role. At the same time obviously the claimant was pursuing matters relating to his role in BAPA, there was no evidence that any issue regarding these activities arose and indeed none of the respondents' witnesses were cross examined in relation to their involvement in or knowledge of any BAPA matter save that their own Counsel asked them about this and their answers were negative. As referred to above in the course of the Holmes Tribunal Mr Dean, Mr Horrigan and Mr Shewan gave evidence, possibly as early as the beginning of September possibly as late as 24 November.

26. In cross examination both Mr Dean and Mr Horrigan resiled from the proposition put to them that they gave evidence "against" the claimant at the Holmes Tribunal. They said they were providing evidence regarding the narrative of what had happened and the nature of the organisation. Mr Dean said he felt he was quite supportive of the claimant in the evidence he gave and that he stated he felt the claimant had been badly managed. Mr Horrigan felt he was just there for background information, Mr Shewan was not asked about his evidence but it was asked that he was part of the team involved in the settlement of the claimant's earlier case and he agreed with this.

27. In or around December 2013 Operation Holly was considering sending all the information they had gathered to CPS for a charging decision. This would have involved obtaining leading Counsel's opinion. There were three Counsel who were engaged on this matter on behalf of CPS, Leading Counsel, Junior Counsel and Disclosure Counsel. Leading Counsel was Mr Ian Unsworth QC.

28. A completely separate matter then arose. Two other GMP Police Officers X1 and X2 were involved in disciplinary hearings for what reason we are not aware and did not need to know. On 26 January 2014 X1 complained to the Chief Constable of GMP regarding a Manchester Evening News ("MEN") article and on 2 February X2 complained to the Chief Constable regarding the same MEN article. Both complained that their roles whilst with the Police had been identified in this article information which had never been in the public domain. When X2 complained on 2 February he stated that he believed the leakers of the information to the Manchester Evening News to be Tom Elliott (a Police Federation Representative) and DC Paul Bailey. Both X1 and X2 had left the respondents employment by this stage.

29. On 6 February 2014 X1 made an MG11 statement. These are formal statements. On 14 February 2014 X2 made an MG11 statement.

30. The regulations relating to this matter i.e. an external complaint, are set out in the Police Reform Act 2002 Schedule 3.

31. 2A says "the appropriate authority must handle the complaint in such reasonable and proportionate manner as the authority determines", 2C says "the appropriate authority must comply with its duty under sub section 2A by making arrangements for the complaint to be investigated by the authority on its own behalf if at any time it appears to the authority from the complaint or from the authorities handling of the complaint at that point that there is not an indication that

> (a) a person serving with the Police may have committed a criminal offence or behaved in a manner that would justify the bringing of disciplinary proceedings …"

32. Paragraph 19(b) states that:

> "(1) If during the course of an investigation of a complaint it appears to the persons investigating that there is an indication that a person to whose conduct the investigation relates may have
>
> (a) committed a criminal offence or
>
> (b) behaved in a manner which would justify the bringing of disciplinary proceedings, the person investigating must certify the investigation is one subject to special requirements.
>
> (2) If the person investigating the complaints certifies the investigation is one subject to special requirements the person must as soon as is reasonably practicable after doing so make a severity assessment in relation to the conduct of the person concerned to whom the investigation relates.
>
> (5) An assessment under this paragraph may only be made after consultation with the appropriate authority.
>
> It then goes on to describe that the person must be given a notification which is essentially a warning that they are being investigated and may be required to be interviewed, further that restrictions must be placed or can be placed on the Police Officer under that notice.

33. The written notice is set out in Section 16 of the Police (Complaints) and Misconduct (Regulations) 2012 and Section 16 says:-

> (1) For the purposes of paragraph 19(b)(7) of Schedule 3 to the 2002 Act notification given by the investigator to the person concerned must be in writing and state ….

34. In respect of where a complaint is made by a fellow officer rather than a member of the public (X1 and X2 were members of the public by the date of their complaints) Regulation 15 notice will be given.

35. ACC Dawn Copley was the appropriate authority within the legislation referred to above on which the basis the investigation proceeded. She undertook as required by the legislation an initial severity assessment. She referred to information received from four Police Federation Officers which indicated that another Police Federation Officer provided a copy of the operation Atticus file to the claimant in this case. The assessment considered what information was in the public domain, considered that there was no evidence of misconduct in public office or criminal offence and that much of the information disclosed was already publicly available. It was said that the Police Federation colleagues had given information that their colleague had provided the report to the claimant. There was no information as came available later that when the information had been provided to the claimant the Police Federation representative responsible for that action had done so with a view or believing that it would be leaked to the Press by the claimant.

36. In terms of the assessment at this time therefore ACC Copley decided that the Police Federation representative's behaviour could constitute a breach of confidentiality to the extent that it could cross the gross misconduct threshold and he may have a case to answer. Accordingly he was served with a Regulation 16 notice as is required, in February 2014. No action was indicated against the claimant. An investigation into X1 and X2's complaints was then referred to West Yorkshire Police as such an investigation has to be undertaken by an independent police authority (called Operation Woodmay).

37. On 7 October 2014 West Yorkshire Police reviewed GMP's initial severity assessment. By this time it was recorded that one of the original four Police Federation Representatives had given information that the fifth rep who had passed the information allegedly to the claimant had done so knowing it would be "leaked". It was recorded that GMP had earlier decided that the information they had suggested that no disciplinary proceedings would be brought against the claimant and therefore no Section 16 notice was required. However West Yorkshire went on to say that they considered "that the public complaints if proven is one of special requirement namely that there is indication that X and the complainant may have:

(i) committed a criminal offence or

(ii) behaved in a manner which would justify the bringing of disciplinary proceedings".

38. They went on to say they were seeking to consult with the appropriate authority with a view to completing a further severity assessment and ensuring the officers concerned were provided with written notice unless that might prejudice this investigation or another investigation.

39. On 12 October Paul Rumney emailed ACC Copley saying "find attached a request from West Yorkshire Police to serve a Regulation 15 notice on D C Paul Bailey following their investigations thus far" (the reference to Regulation 15 is a

mistake it should be Regulation 16). Mr Rumney was Detective Chief Superintendant in the Professional Standards Branch of GMP.

40. ACC Dawn Copley replied on 20 November. In this email ACC Copley agreed that the claimant now needed to be served with a Section 16 notice but asked that they did not serve the notice until this could be co-ordinated with other discussions that needed to be had with the claimant. Further she asked them to consider whether if DC Bailey was involved could he be considered to have been acting as a whistle blower. ACC Copley was concerned with ongoing matters which have not concerned us in this Tribunal but related to the claimant's role in BAPA and providing information to HMIC, Her Majesty's Inspector of Constabulary. We understand her to be suggesting that the activity of leaking to the Manchester Evening News might be legitimate if it was done for whistle blowing purposes and hence would not necessarily require a Section 16 notice if this was its motivation.

41. There was some correspondence between David Hull and Julian Flindle on 1 December regarding restrictions on duty for the claimant and a reference to Russell Jackson providing a care and support plan for the claimant, ACC Copley also confirmed that none of the officers involved in West Yorkshire Police's current investigation had been involved in a previous investigation against the claimant which had led to the 2007/2009 Tribunal claims.

42. On 15 December 2015 Michael Ryan (WYP) provided an updated severity assessment considering points which had been made to him including those from ACC Copley. WYP had also considered the situation regarding potential data protection infringements and confidential reporting, and they confirmed in this email (which was to Paul Rumney and Julian Flindle) that they wished to serve a Regulation 16 notice.

43. A Regulation 16 notice can be served with specific restrictions attached and a discussion regarding this then ensued. Russ Jackson (who was liaising on behalf of GMP with TITAN and in particular the claimant) corresponded with them and stating that it appeared that restrictions were not necessary. He stated "if restrictions are necessary then of course so be it it is your call I can house him elsewhere in SCD however the impact is pretty huge operationally and this is not withstanding other matters for example he is pretty crucial to the BME representation work we are doing" so asked them not to take any action before Christmas for obvious reasons. We find the reference to "huge operationally" was a reference to what would happen if the claimant was removed from Operation Holly.

44. On 5 January 2015 Dawn Copley again as the appropriate authority said she was content that notices had to be served but she was less convinced there was an immediate need for restrictions, she said this could be reviewed but she felt he should be advised to stay within legal boundaries when making press comments. She set out her policy decision below this email. She was clearly alive at this stage to the possibility that the claimant may regard the serving of notices as victimisation as she states "it is therefore possible DC Bailey will believe and/or allege that this investigation is deliberately targeted towards him as some form of retribution".

45. In respect of restrictions she said "restrictions should always be considered on a case by case basis and care should be taken in drawing comparisons as no two cases are alike. That said, the normal course of events would generally see officers under investigation for information leaks being subject to restrictions". She said there were a number of unique factors including his role as BAPA Chair, it was important for him to be able to continue to pursue activities in relation to that, and she highlighted that care should be exercised in the application for restrictions "partly due to the impact being wide ranging as the result of the role he was performing for BAPA". She stated that restrictions were not necessary but he should be reminded of the advice she had previously referred to. Ultimately there were restrictions on the claimant's Regulation 16 notice but they were only in relation to not contacting the Police Federation Representatives referred to and the complainants.

46. As the claimant complained generally about the way in which he was treated in relation to the serving of this notice even though strictly it refers to the Woodmay investigation we feel it was appropriate to touch on this issue, whilst being mindful that it is subject to separate proceedings in December.

47. The claimant was told by Tim Dean that he was required to attend Nexus House, the claimant asked him why, he said he did not know why. Mr Dean was asked in cross examination why he did not tell the claimant it was about the Section 16 notice as he did know this was the reason for the meeting. The claimant had viewed this as a lie and potential Police misconduct. Mr Dean said it was because he had been instructed not to and that it can be the case in some investigations that the individual is not given any prior warning as it could be damaging to the investigation to give the individual prior warning of the regulation 16. He did not know whether that was the case or not but that is why he proceeded as he did.

48. The claimant was therefore served with the Regulation 16 note on the 19 January but he did not sign it.

49. No restrictions were placed in respect of his role on Operation Holly.

50. However on that same day DCI John Webster contacted Julian Flindle with concerns regarding the claimant continuing on Operation Holly which is recorded in an email from Julian Flindle of 20 January to ACC Copley. This says that "I received a call last night from DCI John Webster who is the SIO for Operation Holly, he was raising concerns he had about DC Bailey continuing to be employed as the Disclosure Officer on the investigation. I appraised him of the policy decision around the restrictions but his concern is that if the defence becomes aware they could call Paul as a witness and infer that the fact he is being investigated undermines the disclosure process. He has asked for a meeting with myself to discuss the matter ….it is worthy of note that DCI Webster did not appear to be being in any way obstructive he just seemed to want to discuss the issue whatever the final decision arrived at". He recorded that Mr Webster had also said that in Merseyside a GM (gross misconduct) investigation would "see your SC vetting being suspended" which would preclude the claimant from continuing in the role. ACC Copley confirmed that GMP would not ordinarily suspend somebody's vetting at this stage but Merseyside obviously took a different view. Merseyside were in charge of TITAN and therefore she said this may require her to reconsider her opposition but the intention was that

Julian Flindle and Russ Jackson were going to meet with DCI Webster to discuss the situation.

51. On 26 January Tim Dean recorded that he had a meeting with Carl Price and Ian Unsworth QC to Operation Holly. What the meeting was about specifically was redacted. In evidence Mr Dean said he believed the meeting was because DS Barnes who was the claimant's line manager (she had given evidence for the claimant in the Holmes Tribunal) had informed Carl Price of the CPS of the situation regarding the Regulation 16 notice and that Carl Price spoke to Ian Unsworth QC about it. As a result a meeting was set up. Mr Dean said at that stage CPS and Ian Unsworth expressed the view that the claimant should be removed as Disclosure Officer, and the QC felt that the damage was done and the outcome of the investigation did not matter. Mr Dean said that he asked CPS if they could get an opinion from a different QC but this did not seem to be a solution. However this identifies that Mr Unsworth QC had formed a view prior to any information about the claimant's Employment Tribunal case. We accepted Mr Dean's evidence, we found him a credible witness.

52. Nothing then happened as there were discussions between TITAN and Greater Manchester Police. There was a discussion between ACC Copley and Russ Jackson which implied that TITAN wanted to send back some GMP officers to GMP and this appeared to be the result of a status report DI Dean had completed on 30 January. Again the whole of this was redacted. ACC Copley was anxious to make sure TITAN did not act independently without discussing this further with GMP. On 2 February Russ Jackson emailed ACC Copley and said that he had outlined the problems to them but he had taken the view that it was their decision. He recorded saying "it is not acceptable to return the officers simply on the grounds of his apparent unchallenged behaviour, if you are saying your overall team dynamics are such that the team is dysfunctional and you can manage this case within TITAN then it is your call but you should be very clear and transparent on this and it should be recorded".

53. He went on to say that "if we take the view that they need to consider the factors we have internal to GMP I will suggest a meeting including yourself as I probably have only part of the information myself. This email flagged up what became a issue about whether TITAN was seeking to divest themselves of the claimant because he was difficult to manage or because of the Regulation 16 matter and if it was the former what was the basis of them finding him difficult to manage. We find in the reference to "factors we have internal to GMP" that this was a reference to the situation in relation to the claimant's Tribunal proceedings**.**

54. On 12 February Russ Jackson said that Mr Horrigan had asked for a meeting in any event and they were looking a returning 'the DC's'. Mr Dean said this was because he had completed a status report on Holly and as it was winding down (being ready for prosecution) they would not require the same no of officers going forward. He stated it was inaccurate of GMP to say that the issue was really that TITAN had management issues with the claimant . We accepted his evidence that that was his motivation at the time as it is clear the investigation was at a late stage as that was the reason for seeking counsel's opinion on charging.

55. On 10 February the judgment in the claimant's Tribunal case was promulgated, in respect of which he won part of his case.

56. On 18 February a Manchester Evening News article appeared in relation to the claimant's Tribunal case with the first respondent indicating that the first respondent were intending to accept the judgment.

57. On 20 February in relation to the management issue ACC Copley recorded that she shared a concern with Russ Jackson that TITAN were looking at the WYP investigation as an opportunity to return staff to GMP and thereby "avoid dealing with staffing issues they clearly have and are concerned by but so far appear to have done nothing about. This is troubling as something we will not agree to". She went on to say "if you get an indication that they are trying to simply avoid this by some questionable route please do let me know and I am happy to become involved in a meeting".

58. On 17 February, the day before the MEN report, Ian Unsworth QC had sent an email to Mr Dean, copied to Carl Price regarding the claimant, it was redacted and therefore we are unable to say to what it referred from its content but for the reasons given below it appears this is when the Employment tribunal proceedings are first raised.

59. The first mention of the QC and the ET proceedings was ACC Copley on 22 February stating to Russ Jackson "thanks for this (a redacted email), I have not been involved in ET or the circumstances that led to it so it would probably need another person to assist that aspect although I think we need to understand exactly what issues the QC thinks are relevant". She did not believe it had any relevance to the investigation under Woodmay and was not aware of any connection between the two or how "an internal staffing issue resolved through the ET would affect the decision to charge and other criminal matters". Accordingly we find that the 17 February email must have raised the claimant's Employment Tribunal issues.

60. Horrigan and Dean were asked how Ian Unsworth QC knew about the claimant's Tribunal proceedings. They both stated that they believed he had done his own Google search and denied that they had directly informed him of these matters. We accept their evidence - it's a fairly usual activity these days and it would be a prudent one to undertake as no doubt the defence would undertake a similar internet search.

61. ACC Copley also recorded that "we are at the position where TITAN have disclosed to you that they had difficulty managing Paul per se and have not taken any steps to address the behaviour which they say causes them and his line managers concern. We must guard against the WYP investigation being used unfairly to deal with the matters that TITAN have not addressed whilst protecting the operational aspects of Holly". There was discussion about the fact that the Holmes Tribunal was currently under settlement discussion.

62. There was a meeting on 23 February with Ian Unsworth and DI Dean, again all redacted and therefore we have no information regarding what that was about.

63. On 3 March Russ Jackson wrote to Dermott Horrigan following a meeting on 2nd March. This email had seven points, the second of which was redacted. It referred to a consensus that Operation Holly must not fail, that the claimant has indicated to TITAN Manager he views his position as untenable and blames GMP for his position however (ultimately there was no evidence that the claimant had personally said his position was untenable), it was recorded that the claimant had not signed the disclosure documents although he had prepared them, Mr Jackson believed they could be signed by others, (he was wrong on this). It was noted that disclosure was considered likely to be the main thrust of attack by the defence. It was said that management and relationship issues were separate to and should not be confused with the professional standards matters (i.e. Regulation 16).

64. On 11 March there was a video conference with the QC Russell Jackson, Laura Shuttleworth GMP's lawyer, John Webster, Tim Dean, Carl Price and ACC Copley. The notes of which were redacted in totality.

65. Following this there were criticisms of the QC by Russ Jackson and ACC Copley. By this stage it is clear from other information that the QC was refusing to make a decision on charging whilst the claimant was still on the Holly team, it was clear Mr Dean wanted to take action as he recorded that on 16 March, he said it was making Holly impossible to manage, the headings for the redacted emails between him and John Webster were headed "role of Disclosure Officer". Mr Webster in evidence told us he thought the decision to remove the claimant because of the Regulation 16 matter could have been actioned by an operational Police Officer within TITAN at much less senior level than those involved and did not understand the need to involve the first respondent.

66. On 15 March Mr Horrigan advised that the QC had advised in an email to Carl Price that the claimant should be removed from Operation Holly as a result of the Regulation 16 matter. We accept his evidence on this.

67. On 19 March ACC Copley requested Mr Jackson to speak to the claimant about what was going on, particularly as he had been reported as saying he thought his position was untenable as Disclosure Officer and she was hoping he would share his views.

68. On 25 March Mr Bailey sent an email to colleagues in his capacity as BAPA Chair recording that GMP had now decided to lodge an appeal in his case after initially indicating that they would accept the decision of the Holmes Tribunal.

69. ACC Copley then took steps to obtain advice from CPS regarding the situation. On 26 March ACC Copley recorded that she had spoken to Ian Rushton (from CPS) who had advised that it had to be dealt with by somebody else in CPS and she notes that "in the interim I am conscious that PB remains in situ and is saying to colleagues his position in Holly is untenable meanwhile the QC is not willing to advance a charging advice whilst the current situation remains we have an impasse".

70. DCS Jackson then spoke with the claimant on 27 March. He reported to ACC Copley about the meeting saying that the claimant made a "dignified and compelling

argument" as to why he should stay on the investigation. Part of this was the enormous job he had already done as Disclosure Officer on Operation Holly, he also referred to if he was called (as a witness) this could result in character challenges being made against him but his view was that questions would be generic which he would be happy to field, e.g. "D C Bailey have you made allegations against GMP for corruption, yes I have and so that makes me a very objective Disclosure Officer". He accepted that if he was formally charged (a reference to Regulation 16) this was a different story. Again part of this was redacted.

71. DCC Ian Hopkins was recorded after considering that email that "he (i.e the claimant) had made a compelling case for remaining and I think we should continue to support him". He said "would it be helpful if I spoke to Andy Ward (from Merseyside) whilst we are awaiting CPS's response and at least make sure TITAN don't do anything and to check if Andy is even aware". ACC Copley then recorded that she needed to push for the meeting with CPS as soon as possible as this seemed to have fallen into abeyance.

72. On 31 March the claimant sent to Russ Jackson his version of the meeting, this recorded that Mr Jackson had stated "PB was a brilliant Detective". He recorded that Mr Jackson said he did not agree with Ian Unsworth QC and was more compelled by PB's views, that he had made it clear that he was the Disclosure Officer for Operation Holly, that GMP would need to go through due process to remove him, that Mr Jackson had confirmed he would remain the Disclosure Officer for Operation Holly and that Russell Jackson had questioned what would happen if PB was exonerated but had been removed from Operation Holly, where would that leave Operation Holly?. The claimant's own notes therefore reflect GMP supporting his position and his arguments.

73. On 31 March Mr Webster sent an email to Dermott Horrigan which addressed the issue previously referred to about the claimant being difficult to manage, it was a rather garbled email and in evidence Mr Webster stated that the intention of it was to acknowledge that there were difficulties managing the claimant but that this was nothing to do with the reason why there was an ongoing discussion about him being removed from Operation Holly.

74. Mr Webster stated in that email that the issue here "is not the management of Paul Bailey or indeed Julie Barnes it is everything to do with the ongoing situation regarding Paul and the "never ending" Employment Tribunals and the incessant dispute between Paul and GMP". At one point he said it will only be resolved with the removal of Paul from the enquiry as per the instructions from ….. this was redacted. He stated that although there were management issues it was nonsense that that was why he was seeking to remove the claimant. He said if by way of example Paul had not been served with discipline papers and the Employment Tribunal had been resolved "it was anticipated that Paul's all encompassing obsession would have diminished and progress would have been made with a much more pleasant working environment, this had not happened due to recent events". The recent event in relation to Employment Tribunal was the fact that the GMP had appealed the decision.

75. Dermott Horrigan replied saying "hope you feel better having got that off your chest", he went on to discuss support for Julie Barnes and said that they could not change the situation concerning DC Bailey and his fall out with GMP and he was seeking some clarity from Russ Jackson on GMP's position. ACC Copley then chased up Ian Rushton about the advice from CPS on 5 April.

76. On 6 April ACC Copley set out her summary of the situation, part of which was redacted, she stated "I decided Paul could remain in situ at the outset, TITAN were unhappy - you met with them and the decision remained, then the QC was unhappy … redaction … ERGO completely frustrating what he had asked for. Sadly I think this is an ungracious and unedifying attempt to get his own way without having to put down his objections in writing and therefore be subject to challenge and scrutiny in due course". The "impasse" was referred to and she said that could not remain as Operational Holly had to progress. She said "so now it sits with the CPS to review what the QC has said so far and whether his position is credible and tenable, I am trying hard to divorce what I see as his unprofessional approach to this and the argument he makes which has *some* merit. She said until CPS had a chance to review they were at stalemate and she was hoping that WYP would progress and resolve their investigations", a reference to the Regulation 16 matter. It was recorded that Dermott Horrigan had been chasing up Mr Jackson who had explained they were waiting for CPS's opinion. Mr Jackson also noted that the CPS delay whilst not of their making might actually be helpful if the time afforded "de-clutters the WYP matter". It was again recorded that the claimant wanted to stay and they supported him in that. He was clearly expressing a hope that if the investigation into the leak came to a swift conclusion, the claimant would be able to stay on Operation Holly.

77. On 17 April it was flagged up by Dermott Horrigan that a conference with Counsel on Operation Holly was required and that ACC Copley, DS Jackson and Elizabeth Bailey from CPS should attend at GMP's request (it later proved to be Elizabeth Jenkins) from CPS, that Laura Shuttleworth from the Legal Department should also be included. Carl Price contacted Dermott Horrigan directly on 1 May regarding the fact that the 8 June had been proposed as a date for a conference and he felt this was too late as the charging decision was being delayed because of the failure to resolve the situation. It was ultimately arranged for 15 May.

78. On 1 May Mr Horrigan emailed Elizabeth Jenkins and Carl Price copying in John Webster and Tim Dean stating "I am quite clear in my view that Holly must not be endangered in any avoidable way and I am supportive of the proposed action going forward however I am sure you will agree with me when I say that GMP find themselves in a very invidious position in relation to this matter, whilst they concur with the overarching view that Holly cannot be undermined there are distinct difficulties for GMP wrapped up in this decision making that will only come into play at some point in the future - hence their desire to ensure that all decisions are fully considered. " We find this was a reference to anticipated potential legal action the claimant might take following a decision to remove the claimant from Operation Holly.

79. On 5 May ACC Copley stepped down from responsibility for Woodmay and associated issues passing them on to ACC Gary Shewan.

80. On 6 May ACC Copley sent a long email to Gary Shewan as a handover on Operation Woodmay. She stated in this that she referred to a discussion with TITAN and said "we have challenged the CPS/TITAN's position and supported Paul remaining in situ, they remain unconvinced and negotiations have been difficult to say the least, we cannot allow Operation Holly to be undermined by the impasse and it needs resolving … as it stands the QC is refusing to have any dealings with Paul and as such this affects his willingness to give charging advice. The case is at a crucial stage and I have referred his comments, conduct and approach to CPS for their review and consideration. I have been most unimpressed with the QC and his approach to the whole issue, we have challenged his stance robustly but we remain in deadlock and the meeting on Monday is necessary to move this on. Paul's role must be resolved whether he is allowed to remain whilst under investigation or he is moved". We note that ACC Copley does not refer to the claimant's Employment Tribunal proceedings in this email, and nothing is redacted, solely to this Section 16 notice.

81. From ACC Shewan's policy book and day book he records that there was an urgent need to reach agreement on whether PB can remain in his role as Disclosure Officer on Operation Holly, then there was some redactions and he said he asked his PA to arrange a phone call with Dermot Horrigan. On 8 May he stated "TITAN CPS and Counsel to seek discussion and agreement on the question of whether Paul should be removed, I explained I was out of the country until 15 May and so we agreed to hold the conference on that day, Dermott Horrigan was insistent that there was no other option than to remove Paul from the role".

82. In respect of the meeting on 15 May Counsel's opinion was received on 14 May but this was completely redacted.

83. Regarding the actual conference, part of the notes were again redacted. ACC Shewan stated that he wished to explore the rationale for removing PB from Operation Holly post and to allay any concerns that he may have on behalf of GMP. There was then considerable redaction. He noted "other points made by myself were to challenge the TITAN team as to whether their intention to remove PB was fair". In particular he said he had stated:

> "(i) were they applying similar decisions to other officers;
>
> (ii) as the damage had been done would they have to disclose PB's involvement which would involve some legal challenges, they envisage push back but we are required to act, the action is reasonable.

84. He continued to question whether it was possible for someone to do four years worth in a matter of weeks,(this is a reference to some understanding that the claimant's disclosure role could be "covered by somebody else in a fairly short period of time as referred to by Russell Jackson earlier, here Mr Shewan was raising question marks about this from which we surmise that somebody again was suggesting that the disclosure could be checked or authorised by somebody else in a matter of weeks)" and ACC Shewan was clearly dubious about this.

85. The claimant would refer to this as re-branding, i.e. a proposal that his work could be signed off by somebody else in a short period. We know as it turned out that in fact the disclosure was undertaken by two people over a considerable period of time subsequently.

86. It was Elizabeth Jenkins' evidence to the Tribunal that she advised a removal of the claimant from Operation Holly on the basis of the Section 16 notice but not on the basis of the ET proceedings as she felt these could be managed by prosecuting counsel. The claimant submitted that Elizabeth Jenkins was an unsatisfactory witness as she was unable to answer a significant question of questions under cross examination, the respondent stated that she was an eloquent witness when speaking of matters within her knowledge and memory. We do accept her evidence on the reasons for her view that the claimant should be removed as this was supported by Mr Shewan's email which we will refer to below.

87. ACC Shewan then went on to say "following a discussion I asked DH and PB for a short period of time to consider the discussions and ask clearly what they were asking me to decide, DH made it clear that the decision had been made and that it was his decision alone to make, as a result of this I asked for three things:

(i) to consider fairness;

(ii) to reflect the views of Elizabeth Bailey (this was a reference to Elizabeth Jenkins) and a policy decision that the decision to remove PB from the post was on the grounds of the investigation alone and

(iii) that GMP is present when TITAN informed PB of their decision.

At the end of the meeting I agreed with RJ (Russell Jackson) that he and Danny Inglis would be present when PB was informed by TITAN.

88. At 8.25 on 15 May Mr Horrigan emailed Mr Shewan stating "as per your request to me to share my rationale with you concerning my decision to remove DC Bailey from the role of Disclosure Officer on Operation Holly please see the following "I have read the advice from Ian Unsworth QC and Steven MacNally Prosecuting Counsel on Operation Holly relating to the role of Disclosure Officer, my position has until now been undertaken by DC Paul Bailey, the advice was relatively brief in relation to the ongoing situation, specifically addresses the appropriateness of D C Bailey continuing in the role of Disclosure Officer for this case as it progresses towards prosecution and quite clearly states that a new Disclosure Officer be appointed".

89. He goes on to say "quite rightly Mr Unsworth states he makes no judgment upon the merits of any litigation between D C Bailey and GMP, past or present, nor the current investigation being undertaken by West Yorkshire Police, I too adopt the same position. Looking at this advice from an independent position it would not only be foolhardy to continue with D C Bailey as Disclosure Officer in the face of this advice but, from my understanding, it would likely result in the prosecution not progressing due to the issues articulated by Counsel. As such I see no alternative to a new Disclosure Officer being appointed by the SIO and D C Bailey taking no

further part in this investigation or prosecution. I have relied upon the contents of the advice as I believe it continues to remain relevant and germane and do not believe it requires any additional narrative".

90. On the 18 May Mr Dean advised the claimant of his removal .He advised him this was because of the Regulation 16 notice and this is corroborated by the claimant's own record of this meeting.

91. On 20 May Mr Shewan replied to Mr Horrigan saying he wished to reiterate the matters that he had raised with him at the conference on Friday. "My understanding of the advice provided by Liz Jenkins during the conference call was that the concern from the prosecution was that DC Bailey has been served with a notice under Regulation 15 of the Police (Conduct) Regulations 2012 notifying him that his conduct is being investigated and may amount to gross misconduct. Further, that the investigation is in connection with a leak of information outside of Greater Manchester Police. I understood Liz's advice to be very clear - that whilst the defence in the criminal prosecution resulting from Operation Holly may seek to conduct their own open source research on D C Bailey and ask him questions about what they find relating to his Employment Tribunal claims this could be managed by the prosecution and D S Bailey would not need to be removed from his role however I am persuaded by Liz's advice that D C Bailey cannot remain the role of Disclosure Officer in the light of the Regulation 15 notice. (Again this is a reference to Regulation 16).

92. Mr Horrigan replied on 12 June and he stated that "the reason I didn't go into such detail was due to the fact that Counsel's advice specifically referred to the basis of its advice being "*whether the DO could properly fulfil his obligations when he is subject of allegations that he has leaked sensitive material to third parties".* This plainly makes it clear that the QC predicates his advice on the misconduct allegations and not other issues. I acknowledge that the advice contained references to the ET matters as potentially presenting some prosecutorial difficulties but I considered these to be background commentary, as such I maintain my position that the decision to remove D C Bailey from the role of DO is based on the advice clearly outlined by Mr Unsworth, that he cannot fulfil his Disclosure Officer obligations due to the misconduct allegations made against him".

93. Mr Horrigan in evidence confirmed that the Regulation 16 matter was the reason in his mind for the claimant's removal, we found Mr Horrigan a compelling witness and we note that the claimant had a high opinion of him. However clearly he was quoting directly from the advice in his email of 12th June and we accept that is an accurate reflection of his thinking, we have borne in mind that he did not refer to CPS's advice but we do not think this is fatal to the conclusion regarding the Regulation 16 matter as the email describes the situation in relation to Regulation 16 matter in any event. Further the quote establishes that the reason for the Q.C's opinion was not just the fact the claimant had been served with a regulation 16 notice but the reason for it, as the reason was highly relevant to the credibility of the role he had on Holly.

94. Meanwhile the claimant had been informed of his removal as Disclosure Officer on 18 May. The claimant's record of this stated that "D I Dean stated that as

a result of Counsel's advice he D I Dean had made the decision that D C Bailey's position as Disclosure Officer on OP Holly was untenable. The advice related to the gross misconduct investigation into D C Bailey, D I Dean said that D C Bailey was removed from Operation Holly with immediate effect". It is recorded that the claimant asked to seek Counsel's advice but this was refused but then D I Dean said he would seek clarification whether he could do that. DCS Jackson stated that GMP were not persuaded by the CPS argument that D C Bailey's position in relation to Police corruption and his view on ethics within the GMP would be harmful to any trial. GMP were persuaded by the advice with regard to D C Bailey's misconduct investigation being fatal to his continued role as Disclosure Officer within OP Holly".

95. DCS Jackson stated that even if D C Bailey was exonerated in the gross misconduct investigation he still would not be able to act as Disclosure Officer within OP Holly as the same issues raised in the advice would still apply. There was then a discussion about whether a further notification of restriction of duties was required which stated he could not work on Operation Hollly. The claimant recorded that he had said that he was finished in GMP as he could not be involved in any type of investigation. DCS Jackson disagreed and stated there were levels to D C Bailey's restriction, on a high profile case such as Operation Holly D C Bailey could not be involved but in lower level cases the reason of the DC's removal from Op Holly would not apply. D C Bailey disagreed and stated he needed to see the advice and the notification of restricted duties. It was later confirmed that the claimant could see the advice but not keep a copy of it.

96. The claimant was allowed to see this advice on 22 May, he stated that the advice was based on two main premises, "the first being that I had taken my employer GMP to an Employment Tribunal and had won and as such I would make a poor witness for the prosecution as I would speak truthfully about my trust in GMP and as such that it was not felt that I would speak favourably about GMP under cross examination, and the second being that I would not be able to carry out my duties as Disclosure Officer because I would be forced to explore my own gross misconduct investigation (which is itself the subject of a separate Tribunal claim). In short there was an implicit suggestion I would be incapable of discharging my duties as a Disclosure Officer fairly or within the law". We accept the claimant's evidence that the QC's advice at this later stage referred to both matters.

97. The claimant refused to engage in any discussions about him taking up another position within GMP. An email from Julian Flindle of 27 May to the claimant's Police Federation rep stated that the grounds for the restriction being imposed were "this is based upon the decision by TITAN and not GMP the decision caused consultation between TITAN, CPS and Counsel. GMP have engaged in a joint discussion with these parties and made its view known however the decision remains theirs. We are therefore issuing a new notice based upon their decision and the impact this has had in Paul's deployment and the validity of the restrictions initially imposed". It was also recorded that "CPS have taken the view that on the fact Paul is under investigation for gross misconduct and consider this has made his role as Disclosure Officer untenable".

98. On 28 May Tim Dean sought the permission of Dermott Horrigan to order the claimant to report to Nexus House and to remain there pending his new posting, and

to exclude his access to Urmston Police Station where Operation Holly was based. Russ Jackson communicated with the claimant on 29 May to try and discuss a placement with him but again he declined and in the end Russ Jackson made a decision that he should move to Major Incident Team, Syndicate 3.

99. The claimant then brought this Tribunal claim. Initially there were other respondents but ultimately there are now just the three, GMP, Mr Horrigan and Lancashire Police as Mr Horrigan is one of their officers.

100. Following this the claimant issued his own MG11 making various complaints about Tim Dean. In it he also said that Ian Unsworth QC had committed a crime of perverting the course of justice by saying that the claimant should not be a witness. The claimant believed that this was intimidation of a witness.

101. As a result of the allegations the claimant made against Tim Dean, Tim Dean was served with a Regulation 15 notice at which as referred to earlier is what occurs when an officer makes a complaint about another officer. He was not removed from Operation Holly. These allegations were investigated by North Wales Police and he was exonerated in respect of all the allegations.

102. It is relevant to note as well that as part of a later striking out/deposit order application by the first respondents they sent a letter of 12th December 2016 to the Tribunal which the claimant would later rely on, in particular the following parts. The section on the Holly claim and facts states that: "The facts are relatively straightforward and are in fact largely recounted in the ET1:

> (i) the claimant was assigned by GMP to work on a TITAN operation namely Holly, the claimant's senior reporting officer was D I Tim Dean, both TITAN and D I Dean were formerly respondents in this claim and the claim against both had been withdrawn and dismissed on withdrawal.
>
> (ii) DSC Horrigan was the operative Head of TITAN.
>
> (iii) Upon the service of the Regulation 16 notice GMP had expressly decided (as Appropriate Authority) required no restrictions on the claimant's role in Holly as Disclosure Officer.
>
> (iv) Subject to any issues of legal and professional privilege which of course reside in the Crown Prosecution Service (CPS) and therefore what is stated here in no sense represents a waiver of that privilege that is and remains a matter for the CPS to waive (if so advised) on 17 February 2015 Leading Counsel (Ian Unsworth QC) instructed by CPS expressed his view that the service of the Regulation 16 notice was incompatible with the claimant's continued role as Disclosure Officer in Holly. That as advice was repeated by Leading Counsel in March and then the subject of a formal written advice dated 14 May 2015 again expressing the view that the claimant's role in Holly should terminate, the advice involved two considerations:

(a) that the claimant's previous bringing of proceedings against GMP would undermine potentially his role as Disclosure Officer and

(b) that being under investigation for gross misconduct compromised the claimant's role as Disclosure Officer

(v) GMP in fact resisted and objected to any such suggestion made by leading Counsel through ACC Copley and to its rationale they had imposed no such restrictions on the claimant's role when the notice was requested by WYP (West Yorkshire Police). Eventually GMP requested that any decision should be reviewed and taken by the CPS who instructed Counsel.

(vi) the claimant remained in his role pending a decision by CPS.

(vii) at the meeting on 15 May 2015 with a senior CPS lawyer Ms Jenkins represented GMP including ACC Shewan and TITAN including DCS Horrigan, Ms Jenkins rejected Counsel's ground (a) rationale above for removing the claimant, Ms Jenkins however formed the view that rationale (b) was compelling and that the claimant's role as Disclosure Officer could not continue in the light of the service of the notice.

(viii) As a result of the CPS's view concurring with Counsel, TITAN agreed with and followed the advice of Counsel and the CPS and formed the same view that the claimant's role as Disclosure Officer could not continue. DCS Horrigan explained the rationale but was ultimately TITAN's decision in an email to ACC Shewan on 15 May 2015 expressing the view that it would be unwise not to follow the advice of counsel when if that course was followed the prosecution would be likely not to progress.

(ix) The decision was conveyed to the claimant by D I Dean on 18 May and on 22 May D I Dean permitted the claimant to read Counsel's advice.

(x) The claimant was subsequently transferred out of TITAN and into GMP's Major Incident Team."

103. The letter later states under the heading "Points Applicable to all Respondents":

"The decision to remove the claimant from Holly was taken by TITAN and D S Horrigan based on the advice from Counsel and CPS. GMP were therefore compelled to remove the claimant and in turn assign him to other duties. Neither the CPS (nor Counsel instructed) were the servants or agents of either respondent and no such case is advanced by the claimant. In the circumstances the claim or allegation that GMP was responsible for the claimant's removal from post is mis-conceived …."

104. ACC Shewan was questioned about this in Tribunal and appeared to confirm that both A and B had been taken into account however the questioning of ACC Shewan was unfair at this stage as his attention was only drawn to the letter up to paragraph 5 and not the subsequent paragraphs which set out a sequence of events which resulted in only B being the operative issue. Accordingly we are satisfied that

as recorded in ACC Shewan's day book and his emails that the only issue which GMP believed the claimant could be transferred out of Holly on was the Regulation 16 matter.

Disclosure CPS Manual

105. The claimant also relied on CPS guidance on the Disclosure Officer which he said suggested that removing him as Disclosure Officer was a complete over reaction and unjustified. He relied on the guidelines in respect of when an officer himself should report himself to CPS. The manual states that in the introduction "details of disciplinary and criminal proceedings against police officers who are witnesses might be disclosable under the act, in addition there may be exceptional occasions when the interests of justice require that other information is revealed to the prosecutor and disclosure considered". It further states that at paragraph 6, disciplinary procedures which have not been completed should be revealed by the officer to the prosecutor which was the situation the claimant was in in respect of the West Yorkshire investigation, although paragraph 19 muddies the waters by saying "when an officer has been notified under Regulation 9 of the Police Conduct Regulations of allegations made against him he or she is not required to reveal to the CPS details of the allegations, if disciplinary proceedings are commenced Police Officers making statements should inform the prosecutor of details of all matters with which they have been charged but where the proceedings have not yet been completed.

106. There was also a flow chart which did not refer to un-completed disciplinary proceedings and therefore suggested that these did not have to be reported to CPS however the situation here is that it was reported to the QC involved by someone, whether it was CPS or TITAN is not 100% clear.

107. However it was correct to report the matter in accordance with the explanatory notes; the explanatory notes stated that "where an officer has been notified of allegations made against him but he is not suspended from duties he is not required to reveal to the CPS the details of the allegations however the Head of Professional Standards Department should consider in liaising with CPS Unit Head whether the interests of justice require the revelation of that information and provide the prosecutor with the information if required". It ends with duties to reveal and disclose must be observed scrupulously, failure to do so may result in wrongful conviction, undeserved acquittal or misconduct proceedings against the prosecutor or Police Officers.

The Law

<u>Victimisation</u>

108. Section 27 of the Equality Act 2010 sets out the definition of victimisation. It is as follows:-

> (i) a person (A) victimises another person (B) if A subjects B to a detriment because

(a) B does a protected act or

(b) A believes that B has done or may do a protected act.

(ii) each of the following is a protected act:

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act and

(d) making an allegation whether or not express that A or another person has contravened this act and must not do so in prohibitive circumstances which under Section 39(4) provides that an employer (A) must not victimise an employee of A's (B) as to the terms of B's employment or in the way A affords B access or by not affording B access to opportunities for promotion, transfer or training or for any other benefit, facility or service or by dismissing B or by subjecting B to any other detriment.

109. No argument was made in this case regarding detriment and therefore we do not describe the law in relation to detriments.

Causation

110. It is clear the detriment must be because of the protected act, in the Chief Constable of West Yorkshire Police -v- Khan 2001 House of Lords the Chief Constable maintained he refused to give a reference to a Police Force to which K had applied for a post because he did not want to prejudice his position in a case of race discrimination against West Yorkshire Police. The Court of Appeal held that the refusal was by reason of the fact that K had brought proceedings in the sense that if K had not brought proceedings he would have been provided with a reference. However the House of Lords rejected this "but for" approach to victimisation. While it was true that the records that were held by reason that K had brought the race discrimination claim in a strictly causative sense the language used in Section 21 of the RRA was not the language of strict causation, rather it required the Tribunal to identify the real reason for the treatment complained of. The Court concluded the real reason for the refusal to provide the reference was that the provision of a reference might compromise the Chief Constable's handling of case being brought about West Yorkshire Police which was a legitimate reason for refusing to accede to the request.

111. In Derbyshire -v- St Helens MBC 2007 the House of Lords looked at the interpretation of the phase by reason that in Section 41 of the Sex Discrimination Act (these cases predate the Equality Act) which concerned allegations of victimisation in the context of ongoing legal proceedings where the Council had sent a letter to all

the claimants setting out the dire consequences of their equal pay claims to the Council's budget.

112. The House of Lords said that while the test adopted by the Court in Khan of whether the employers conduct was honest and reasonable could be a convenient way of determining whether the statutory test is satisfied, it was no substitute for statutory tests, then contained in Section 4(1). In the Derbyshire case the claimant's claims of victimisation was successful. The decision was based on the fact that the Council had gone further than was reasonable to protect its interests in the litigation. In St Helens the bringing and continuance of the equal pay proceedings was unarguably the motive for the Council's letters, in Khan the employer refused to do something for fear or prejudicing its position in litigation. If they had done that in order to persuade the claimant to give up his claim the results were likely to have been different.

113. In Martin -v- Devonshire Solicitors 2011, in that case the claimant made allegations that one of the firm's partners had said that she was after the partner's money and another had called her a prostitute, she brought a grievance which was dismissed, the respondent then took disciplinary proceedings against her for making false allegations but withdrew these when a Consultant Psychiatrist said she had a depressive illness with psychotic episodes during which she experienced paranoid delusions but dismissed her later on the basis of the breakdown in the relationship of trust and confidence.

114. The EAT considered what was the reason for M's treatment was it the fact that she brought Tribunal proceedings in respect of the original accusations (she brought a sex discrimination claim). The EAT took the view that there could in principle be cases where an employer has dismissed an employee or subjected him to some other detriment in response to the doing of the protected act but where the employer could say that the reason for the dismissal was not the complaint as such but some feature of it which could possibly be treated as separable, the EAT recognised that such a line of argument was capable of abuse but this did not mean it was wrong in principle.

115. We recount this case law as it was referred to by the claimant's representative however the respondent never relied on a Khan - type argument that the reason for the respondent's actions were motivated only by protecting Operation Holly from operational failure and were based on the advice of Counsel/CPS by the respondent i.e. that the respondents were protecting Operation Holly from operational failure and that any proceedings brought by any officer in similar circumstances would have resulted in the same reaction of the claimant's Employment Tribunal proceedings should be seen in a context unrelated to the fact that the proceedings concerned race discrimination.

116. The protected act need not be the sole reason for the treatment but it must have a significant influence on it, Nagarajan -v- London Regional Transport 1999 House of Lords. It was defined in Igen -v- Wong Court of Appeal 2005 as an influence which is more than trivial.

117. The claimant also referred to the case of Pasab Limited -v- Woods 2012 which stated that the reason why a person acts as she did was a question of fact, it is not open to a Tribunal to accept the subjective reason put forward by the alleged discriminator as a matter of fact and then impute some different reason to her based on the Tribunal's objective assessment of a remark or its meaning.

118. Neither is there any need in a victimisation case for conscious targeting.

Burden of Proof

119. Under Section 136 of the Equality Act 2010 says that

> (i) this section applies to any proceedings relating to a contravention of this act,
>
> (ii) where there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold the contravention occurred.
>
> (iii) Subsection (2) does not apply, they show that A did not contravene the position.

120. The case law in respect of the burden of proof has been set out in cases of Barton -v- Investec Henderson EAT (2003), Court of Appeal in Igen Limited -v- Wong (2005), finally in Madarassey -v- Nomura International plc HL (2007). The Barton/Igen guidelines stated that "it is for the claimant to prove on the balance of probabilities facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination, if the claimant did not prove such facts the claim will fail.

121. There were a number of other guidelines in those cases including of course the Tribunal should consider drawing inferences from matters not related to the factual matrix in the case before them, but indirectly related, for example that a respondent had failed to follow their normal procedure in respect of dismissal.

122. However recently in a case of Efobi -v- Royal Mail Group Limited EAT 2017 Mrs Justice Laing stated that relying on burden of proof as described above in Igen and Burton was erroneous where it led to imposing an additional burden of proof on the claimant. She said Section 136 required the Tribunal to consider all the evidence from all sources and at the end of all the evidence decide whether or not there were facts on which the Tribunal could conclude the respondent had committed an act of discrimination.

123. If they can do so ignoring the explanation from the respondent then matters moved to the considering the respondent's explanation and whether that was free of any discrimination.

124. In other cases such as Laing -v- Manchester City Council 2006 EAT it was said that if the Tribunal is satisfied with the reason given by the employer as being genuine and did not disclose either conscious or unconscious racial discrimination

that is the end of the matter i.e. there was no need to consider whether the burden of proof shifted.

Police officers as employees and Agency

125. The engagement of a Police Officer in UK law is not employment, it is the holding of an office and therefore a Chief Officer of a Force is not the employer. However, in order to ensure that individuals can bring discrimination claims it is deemed to be an employment relationship for the purposes of the Equality Act. This is set out in Sections 42 and 43 of the Equality Act which say that

> 42 Identity of the employer:
>
> (i) for the purposes of this part holding the office of Constable is to be treated as employment -
>
> (a) by the Chief Officer in respect of any act done by the Chief Officer in relation to a Constable or appointment to the office of Constable and
>
> (b) by the responsible authority in respect of any act done by the authority in relation to a Constable or appointment to the office of Constable…
>
> 43 - Interpretation
>
> (i) this section applies for the purposes of Section 42(2) Chief Officer means
>
> (a) in relation to an appointment under a relevant act the Chief Officer of Police for the police force to which the appointment relates
>
> (b) in relation to any other appointment the person under whose direction and control the body of Constables or other persons to which the appointment relates is
>
> (c) in relation to a Constable or other person under the direction and control of a Chief Officer of the Police that Police Officer of Police;
>
> (d) in relation to any other Constable or any person the person under whose direction and control the Constable or other person is;

126. The respondent contends this means that where a Chief Officer does an act or omission which is a breach of the Equality Act to an officer deemed to be his or her employee under Section 42 and that act or omission is done in respect of an officer who is under the Chief Officer direction or control, the Equality Act will apply.

127. The respondent contended that if GMP had not committed any acts i.e. if they were not the decision maker they were not liable under Section 42. Further, if Mr Horrigan had made the decision to dismiss the claimant as he was employed by

Lancashire Police, (third respondent) but the claimant was employed by respondent 1 there was no liability on respondent 3 for acts done to an employee of respondent 1 under Sections 42 and Section 43.

128. The claimant submitted that under Section 109 the Chief Constable of Lancashire Police was liable as the employer of Mr Horrigan if the Tribunal found Mr Horrigan had made the decision to dismiss, or that he was acting as agent of the Chief Constable of the third respondent under the scope of their authority for the purposes of 109 and that Mr Horrigan was liable under Section 110 as an employee or agent. The claimant was employed by the first respondent and therefore there is no liability on the third respondent for acts done to an employee of the first respondent under Sections 42 and 43.

129. Section 109 says the liability of employers and principals:

(i) anything done by a person (A) in the course of A's employment must be treated as also done by the employer;

(ii) anything done by an agent for the principal with the authority of the principle must be treated as also done by the principal.

(iii) it does not matter whether that thing is done with the employer or the principal's knowledge or approval.

(iv) in proceeding against A's employer B in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A from doing that thing or B from doing anything of that description.

110

(i) a person A contravenes this section if

(a) A is an employee or agent

(b) A does something which by virtue of Section 109(1) or 109(2) is treated as having been done by A's employer or principal and

(c) the doing of that thing by A amounts to a contravention of this act by the employer or principle.

(ii) it does not matter whether in any proceedings the employer is found not to have contravened this act by virtue of Section 109(4).

130. The claimant also relied on the decision of the Commission for Metropolitan Police -v- Weeks EAT 2011 where the EAT upheld a Tribunal's decision in the situation where a Police Constable was under the immediate direction of the City of London Police but was employed by the Commissioner for Metropolitan Police, it was concluded that the City of London Police were acting as the employer for the Commissioner of Metropolitan Police Authority when making decisions regarding

employment matters and therefore that the Commissioner was liable for the acts of discrimination committed by the City of London Police.

131. In Weeks it was said to be authority for the proposition that "an agency can exist between the Chief Officer of the Police and someone else, even though that someone else is an officer and even though that officer is an officer under the direction and control of another Chief Officer and it was said that the test should be whether the alleged "agent" had the express or the implied consent of the claimant's Chief Officer to make the decision that he did in respect of the claimant's employment. The decision had to be in relation to something of a nature of employment and in this case it concerned a refusal of a flexible working request however it was recognised that if that refusal was an operational decision i.e. if it was because of short staffing on particular occasions it might fall outside of the employment relationship. Weeks referred to the case of the Chief Constable of Cumbria -v- McGlennon EAT 2002 however McGlennon does not specifically address this point rather it is concerned with establishing that the Chief Constable has responsibility for the actions of one of his or her employees acting in a line management capacity in relation to another employee.

132. The claimant submitted that an agency could exist between Lancashire Police and the claimant even though he was under the control of another Chief Officer namely Greater Manchester Police.

133. However that was not the situation in Weeks, the situation in Weeks was that Commissioner for Metropolitan Police (CMP) was still liable for the actions taken by the City of London Police (CLP) as CLP were acting as an agent for CMP who were the claimant's employer. Weeks could be authority for the first respondent being liable for the second respondent's actions even though he was not their employee.

<u>European Law</u>

134. The claimant also submitted that under European Law (specifically the equal treatment directive which is concerned with employment and working conditions) the claimant should be given a remedy where the domestic legislation failed to provide one i.e. if the above agency argument was rejected.

135. The claimant relied on Jessemey -v- Rowstock Limited 2014 Court of Appeal, this case considered the situation regarding post employment victimisation following the Equality Act 2010. It had been raised with the Government prior to this case by various bodies that the 2010 Act had failed to reflect the settled position at law that post employment victimisation was unlawful. This was as a result of two cases, Coote -v- Granada Hospitality EAT and ECR 1998 and Rhys Harper -v- Relaxion Group House of Lords 2003. However for some reason the way in which Equality Act 2010 was drafted it excluded this provision. The Court of Appeal in the Jessemy case took the view that this was a drafting error as post termination discrimination and harassment was included and it was clear that the settled position at law was that it was a matter which was actionable. The Court referred to the explanatory notes which included post termination for victimisation and the fact there was no indication there was any intention to exclude it. The decision was based on it being a drafting error and that the correction of the drafting error was allowed by the case

of Inco Europe -v- First Choice Distribution 2000 House of Lords. Accordingly we did not find this case particularly helpful and we were not referred to any other case law.

136. It was stated that in the claimant's submission that the directive requires a remedy against the third party who was not a person's employer but who was responsible for the discrimination. The Tribunal must give effect to the principles of the European Court of Justice and the directive, the claimant must be given an effective remedy for discriminatory treatment.

137. It is relevant to note in McGlennon it was said at paragraph 48 that judgment, "nor in our judgment can it be argued that the difficulties in the way of a Police Constable bringing such a claim can be overcome by saying they are a barrier within the domestic legislation that can be disregarded and dis-applied as being incompatible with directly affected community rights which is the exception acknowledged by Mummery J in the Court of Appeal to that basic position (in Biggs -v- Somerset County Council 1995 Court of Appeal). The reason that a Police Officer whose claim is outside the limited scope of Section 17 was unable to bring discrimination proceedings against the Chief Constable under the act is nothing to do with any procedural or qualifying barrier of the kind referred to by Mummery J inhibiting the exercise of a right act otherwise provides. It is much more fundamental one that under the general law of England and Wales a Police Officer is not an employee at all and so is outside the protection of the provisions about discrimination employment all together and the absence of express positive provision to extend "employment to him or her artificially", the direct effect of a community instrument confers no separate jurisdiction on the Employment Tribunal to alter a Police Officer's status in law or create new positive rights or remedy for discrimination outside those legislation provides. If there is an infringement of the directive that is a matter for Parliament or possibly for a Court having inherent jurisdiction but not something for the Employment Tribunal. The principal state was summed up in that case as the major issue of principal of his, i.e. the Chief Constable's potential liability under the Sex Discrimination Act 1975 for management decisions taken by his subordinate officers on such matters as recruitment and posting".

Parties' Submissions

138. The parties' submissions were mainly given in writing with some oral additions the more significant had been recorded above in the legal section, where relevant the parties' more detailed submissions will be referred to in our conclusion. It was agreed throughout that the issues we had to decide were:

(i) who took the decision to remove the claimant from Operation Holly;

(ii) what was the reason in the Decision Maker's mind for this decision and

(iii) if the decision was materially influenced by a prescribed motive i.e. that the claimant had done a protected act were any of the respondents responsible for that act in law.

Conclusions

Protected Acts

139. In respect of the protected act the respondents submitted that only the proceedings in 2009 and the proceedings in 2012 could be considered protected acts, the first protected act that the claimant was a member and chair of BAPA could not be a protected act.

140. We find that the BAPA activities were not a protected act for the purposes of this claim. No reference at all was made to them particularly to any activities which may have influenced any potential decision maker amongst the witnesses. It was not put to them in cross examination that the claimant's activities with BAPA had any influence on their decision making. It was put to them in chief by their own Counsel and they denied it. No detail was provided. Accordingly we discount that as a protected act, the other two matters clearly stand as protected acts.

141. If we are wrong on this, it is plain that none of the potential decision makers were influenced by this matter.

Who was the Decision Maker?

142. We consider the claimant's submissions which were discursive rather than analytical and we sought to ascertain from those submissions what were the findings of facts the claimant stated we should make in respect of this issue and why and any matters from which we should draw inferences generally or in relation to the findings of fact.

143. The claimant says that we should find that this was a decision of Greater Manchester Police on the basis that; - the events showed a pattern of TITAN waiting for GMP to agree with their position before implementing any decision, the fact that there had to be a meeting with GMP before the decision was actually implemented i.e. the 15 May decision, that GMP must be involved because he was not removed on TITAN's say so alone, John Webster's evidence he would have done it immediately and felt it should be done at a lower level, that on 1 May Dermott Horrigan says to Elizabeth Jenkins and Carl Price "I am sure you will agree with me when I say that GMP find themselves in a very invidious position in relation to this matter, whilst they concur with the overarching view that Holly cannot be undermined there are distinct difficulties for GMP wrapped up in this decision making that will only come into play at some point in their future, hence their desire to ensure that all decisions are fully considered."

144. The claimant says that had it just been TITAN's decision to remove and they would have done so on service of the Regulation 16 notice the clear frustration of Horrigan, Webster and Dean was apparent, they wanted the claimant out but ACC Copley stood in their way, therefore the Tribunal should find that the decision to remove the claimant was in reality a joint decision, the 15th May meeting was convened for all parties to discuss the way forward and the strategy book of Shewan refers to the urgent need to reach agreement. The claimant submits Mr Shewan was the ultimate Decision Maker, he refers to Mr Horrigan's evidence that although GMP initially had reservations about the decision taken to remove D C Bailey

predicated upon earlier ET's or disputes all parties including GMP ultimately concurred that Counsel's advice removed D C Bailey to preserve the integrity of the prosecution.

145. The respondents submitted that Mr Shewan's day book and policy book showed that on 15 May Mr Horrigan told Mr Shewan he was not required to make any decisions as he, Mr Horrigan, was going to make the decision and he had made it that the claimant would be removed. The respondents state that TITAN was seeking agreement as a professional courtesy and further that the Shewan and Horrigan's email exchange took following 15 May show that the decision was Horrigan's.

146. The claimant says that this is all a sham and devised so that GMP would not have any liability for any further discrimination or victimisation complaints, however we do not accept the claimant's proposition in this regard.

147. In our view the evidence shows that the parties were seeking to reach an agreement but that ultimately it was an operational decision made by TITAN. We find this on the basis that Mr Webster first floated the issue in January 2015 i.e. that the service of the Regulation 16 notice might cause prosecution problems and in raising that he was acting directly as a member of the TITAN senior management team. Further, we do not accept that Mr Shewan has recorded matters erroneously in his day and policy book. This was good evidence that at the time Mr Horrigan did say it was his decision and made the decision. However ACC Shewan states in his email of "*I am persuaded by Liz's advice that DC Bailey cannot remain in the role of Disclosure Officer in the light of the Regulation 15 notice" .. he also says "I would have preferred for you to have deferred your decision …. but I understand as far as you were concerned the decision had been made*". That this is corroborated by the later emails. In fact is better evidence than the email exchange (which the claimant attacks as being artificial in order to establish no connection between GMP and the decision) as it is in a document filled in consecutively day by day therefore not open to amendment.

148. In addition GMP would have to be involved to some extent as they would have to take the claimant back and it would have been extraordinary if TITAN had simply made the decision and reported it back to GMP giving them no notice and leaving their officer in limbo.

149. If we are wrong on this and GMP were involved in the decision we would find that the reason why GMP made that decision was entirely because of the Regulation 16 point and not because of the Employment Tribunal proceedings, we discuss that further below as it is absolutely clear from ACC Shewan's email of 16 May.

<u>What was the reason for the decision to remove the claimant from his role as Disclosure Officer?</u>

150. The claimant stated that we should consider that the fact he brought Employment Tribunal proceedings for race discrimination had a significant influence on the decision maker's mind because first of all it was disproportionate to consider that the Regulation 16 matter should cause his removal as Disclosure Officer, and

this was clear from the fact that the GMP had not considered this was necessary at the first instance, that the CPS guidelines in respect of this show that this did not need to be reported to the prosecutor, that Dermott Horrigan's first email following 15 May clearly referred to the Employment Tribunal proceedings and to Counsel's advice rather than CPS's advice. Further Counsel's advice it can reasonably be concluded referred to both matters whereas it suggested that CPS's just refers to the Regulation 16 matter. In any event the claimant submitted the Tribunal should discount Elizabeth Jenkins' wholly unreliable evidence that this was her view and that she was not concerned about the Employment Tribunal proceedings. In addition Dermott Horrigan's second letter still did not refer to CPS's advice, further that there was a flurry of activity after the outcome of this case which suggests that his Employment Tribunal proceedings had an influence on the decision making process from that date onwards, that it would be absurd to suggest that Ian Unsworth based his decision purely on material he had elicited from a Google search, that Webster's email complaining about the claimant being difficult to manage was indicative of the Employment Tribunal proceeding causing TITAN a problem and Regulation 16 was a convenient way of getting rid of that problem.

151. Finally the fact that Tim Dean was not removed when served with a Regulation 15 notice strongly suggested that the claimant's ET proceedings were an influence on the decision rather than it being entirely based on the Regulation 16 matter as the service of a similar notice had not caused another officer involved with the investigation to be moved.

152. Further, that in relation to the respondent's letter to the Tribunal seeking Deposit Orders ACC Shewan had agreed that the reason for the decision to move the claimant was Counsel's advice regarding both issues. However, we have recorded above that the question was unfair and that we are satisfied that the contemporaneous documentary evidence from Mr Shewan demonstrates that the issue for GMP was the Regulation 16 notice.

153. The respondents rely on the fact that Mr Horrigan and Mr Dean knew about the claimant's proceedings since 2013/2014 and did not see the Employment Tribunal proceedings as an issue at all and the email trail clearly shows that the Regulation 16 is what "kicked off" TITAN seeking Counsel's advice, Counsel threw into that mix the ET proceedings but this was not what TITAN was concerned with and the Tribunal should accept Mr Horrigan's evidence that the reason for his decision was the Regulation 16 matter. This was reflected in his email of 12 June to Gary Shewan that Mr Shewan's email reflects the rationale in the meeting of 15 May and further, that Mr Bailey's own email recording what happened on 19 May recalls that the reason given was entirely to do with Regulation 16 and there was an express rejection of any connection with the Employment Tribunal matters. In addition it was submitted that the respondents were happy with the claimant's work as a Disclosure Officer and that by removing him they were undoing some years of work that had been put in to that role. Therefore this is not something they wished to do or did lightly and from the evidence of the senior Operational Officers attending the Tribunal it is clear that they did not think the disclosure could be signed off simply by somebody else. Further, the Regulation 15 notice did not require Tim Dean's removal as it did not go to the root of his role which it did in the claimant's case as

the actual allegation concerned the leaking of information when he was in charge of assessing which information should be disclosed.

154. We find on the balance of probabilities that the Regulation 16 matter was the reason for Mr Horrigan's decision based on his final email of 12 June and his oral evidence - we have noted we found him a compelling witness. We rely also on the fact that the reason conveyed by Mr Dean on 18th May to the claimant for his removal related to Regulation 16 only. We accept that counsel's advice referred to the tribunal proceedings but not that that was the reason for Mr Horrigan's decision. Regarding Mr Horrigan's failure to refer to C.P.S's advice we do not consider that determinative as to what was in his mind as we have said in our findings of fact.

155. Further, our finding is based upon the clear thrust of the emails we have seen starting with Mr Webster's in January when the Regulation 16 notice was first served . The email trail shows that the Regulation 16 matter was the thing that started the ball rolling for TITAN and not the claimant's Employment Tribunal proceedings. It cannot have been the Employment Tribunal proceedings as Mr Horrigan and Mr Dean had known about the proceedings for a considerable time as they were witnesses in those proceedings. Clearly those proceedings did not concern them at all during the whole of this time from the beginning of the claimant's Tribunal until the issue arose in 2015 regarding the Regulation 16 matter. In addition when Mr Webster does raise the claimant's Tribunal proceedings to Horrigan, Horrigan's response shows him unconcerned about the effect on Operation Holly of the claimant's Employment Tribunal proceedings.

156. In addition we have accepted the evidence that a view was expressed by the Q.C. that the claimant could not stay as disclosure officer as early as 26th January entirely on the basis of the Regulation 16 matter.

157. Further, regarding Tim Dean's Regulation 15 notice we accept there were differences of material significance between his situation and the claimant's. Neither do we accept the claimant's submissions that removing him was wholly disproportionate as the Regulation 16 matter was really quite trivial, particularly as GMP did not see the need to serve a notice. Having seen West Yorkshire Police's report it can be seen that there was in fact quite a serious matter involved in his particular Regulation 16 – again it was not just the Regulation 16 notice but the reason for it which was the issue. The Claimant also relies on the fact the C.P.S manual did not require the notice to be referred to at all, however we do not accept this as it requires professional standards to consider and report it.

158. We have possibly strayed into Woodmay territory here but as the claimant relied on these matters in submissions in relation to fact finding and inferences we have fully considered them and explained why we have not accepted them or find they are balanced by other factors.

159. Further, whilst there was some suspicion in the first respondent's mind that TITAN wanted to "return the claimant because he was difficult to manage" we are satisfied this was not a matter concerning Dermot Horrigan as exemplified in his response to John Webster's email of 31 March.

160. Accordingly given our finding that the Employment Tribunal Proceedings were not a significant influence on the decision maker's – Mr Horrigan's - mind the claimant's claim of victimisation fails and is dismissed.

161. If we are wrong on this and he made the decision based on both issues then it would be true to say that the Employment Tribunal proceedings were a significant influence on the decision.

162. In respect of ACC Shewan if we were wrong that GMP had nothing to do with the decision it is absolutely clear from his email of 20 May that his "decision" was entirely based on Elizabeth Jenkins's advice and he relied solely on the matter of the Section 16 notice therefore it was not because of any protected act. Therefore the claimant's claim would fail on this basis as well as against the first respondent.

Who was legally responsible for Mr Horrigan's acts?

163. If we are wrong on the above and Mr Horrigan was significantly influenced by the Employment Tribunal proceedings for race discrimination in making his decision to remove the claimant from Operation Holly then an issue arises as to who is liable for that victimisation?

(1) Could GMP be responsible for Mr Horrigan's actions (as far as we can ascertain the claimant's submissions do not refer to this however we consider it prudent to consider it). We have considered this as this seemed more in all fours with the Weeks case however we would distinguish it from Weeks on the following basis. Firstly that in Weeks the matters which referred to were an issue arising out of the normal employment relationship. Here this was a clearly operational matter and we believe this would take it outside of Weeks. Further there would be an issue regarding consent in this case as insofar as TITAN sought GMP's consent to remove the claimant it was only given (and we do not accept it was given or sought on the 15 May) on the basis of the Section 16 Notice and not on any other basis and accordingly if Mr Horrigan considered the Employment Tribunal matters he was acting outside any authority.

(2) Lancashire Police. The cases cited by the claimant of Weeks and McGlennon appear to us not to be on all fours with this situation, as we have referred to above in McGlennon the Chief Constable at issue was the same Chief Constable as employed the line manager and the claimant. In Weeks it was an issue of a third party acting as agent for the actual employer of the claimant. This is not the situation here. Mr Horrigan was an employee of Lancashire Police but the claimant was not and accordingly does not fall into the factual scenarios in those two cases. In accordance with Sections 42 and 43 the third respondent cannot be liable in respect of the claimant as he is not their employee by virtue of those sections as those sections require the complainant to be an employee of the Chief Constable respondent. Mr Horrigan cannot be personally liable under Section 110 as his employer, the third respondent, is not liable under Section 109 as the claimant is not an employee of the third respondent. Mr Horrigan was acting for TITAN when he made an operational decision in relation to the claimant. TITAN are not a

respondent nor is its managing police force Merseyside Police, nor did either of those entities employ the claimant

European Law

164. We have indicated above that we found Jessemey again not on all fours with this situation here but would refer to the paragraph quoted from McGlennon suggesting that the reality is that liability for acts of discrimination has been carved out of domestic law which would otherwise limit liability because a Police Constable is not an employee and that European law says nothing about when an individual should be an employee or not and no case law at all was cited to us in relation to this. Accordingly there appears to be no remedy in European Law for a claim arising out of the definition of the employment relationship in UK domestic law.

165. It is plainly unfair to the claimant or anyone else in his position that no respondent is liable where there are proven discriminatory acts against him/them in this situation. The problem possibly could be resolved by a formal agreement being entered into in future between all the relevant Police Authorities where an operation such as TITAN is set up that ensures there is a liable employer at the end of the day.

Conclusion

166. Accordingly the claimant's claim of victimisation fails and is dismissed.

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Employment Judge Feeney

Date: 6th October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
12 October 2017

FOR THE TRIBUNAL OFFICE

[JE]