EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr Zaheer Ahmed	**AND**	**The Chief Constable of North Yorkshire Police**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **Middlesbrough** **On:29 March, 3, 4, 5, 6, 9, 10, 11 and 12 April 2018**

Deliberations: In chambers **On :13 and 19 April 2018**

Before: **Employment Judge Shepherd**

Members: **Ms Wiles**
Mr Wykes

Appearances

For the Claimant: **Mr Ross**
For the Respondent: **Mr Davies**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The claim of race discrimination is well-founded and succeeds.

A further hearing to consider the remedy to be awarded is to be listed for a one-day hearing and the parties should inform the Tribunal within 7 days of this judgment being sent to them as to whether the case is now ready for listing or whether further directions should be made.

REASONS

1. The claimant was represented by Mr Ross and the respondent was represented by Mr Davies.

2. The Tribunal heard evidence from:

Zaheer Ahmed, the claimant;
Habad Khan, Deployment Manager;
John Kendall, Traffic Constable;
Christian Poole, Response Sergeant;
Manzoor Mohammed, Detective Constable and Chair of the North Yorkshire Black Police Association;
Kerry West, Talent Partner;
Jonathan Reardon, Talent Advisor;
Roland Burnett, Civilian Investigator;
Phillip Cain, Temporary Assistant Chief Constable;
Patricia Hope, Inspector;
Ellie Stephen; Detective Sergeant;
Charlotte Bloxham, Chief Inspector;
Lindsey Robson, Superintendent;
Alisdair Dey, Superintendent;
Lee Partridge, Inspector;
Adam Thomson, Superintendent;
Stephen Thomas, Detective Superintendent.
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The Tribunal also had sight of a statement in the name of Robert Thorpe, former Inspector, in the form of an unsigned email. Mr Thorpe did not attend to provide oral evidence before the Tribunal and, as a result, his evidence was accorded less weight than that given to the evidence of witnesses who appeared at the hearing, and whose evidence could be challenged and its credibility assessed.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 1037. The Tribunal considered the documents to which it was referred by the parties.

4. The issues that the Tribunal had to determine had been identified in an agreed list of issues which was confirmed at the outset of this hearing as follows:

Section 13 of the Equality Act 2010

1. Did the Respondent treat the Claimant less favourably because he is Pakistani by:

   (a) The Respondent (T/I Hope) failing to support him in undertaking Critical Incident Inspector cover between 2013 and 2014 (as alleged in paragraph 7 of the 'Particulars of Claim' [*para 2.1 of C's List of Issues*]);

   (b) His line managers failing to follow up his requests for an attachment to the Professional Standards Department between 2013 and 2014 (as alleged to paragraph 7 of the 'Particulars of Claim' [*para 2.1 of C's List of Issues*]);

   (c) The Respondent failing to consider him for a Temporary Inspector role in the Criminal Justice Department in Athena House York in 2014 in favour of Sergeant Hunter and not giving him the opportunity to apply for the role (as alleged in paragraph 8 of the 'Particulars of Claim' [*para 2.2 of C's List of Issues*]);

(d) The Senior Management Team for the York area chaired by ACC Cain not considering him for an Acting Neighbourhood Delivery Inspector role in 2014 in favour of Sergeant Andrew Godfrey to the City and East Neighbourhood and not giving him the opportunity to apply for the role (as alleged in paragraph 9 of the 'Particulars of Claim' [*para 2.3 of C's List of Issues*]);

(e) Roland Burnett and DS Ellie Stephen failing to investigate properly a race hate incident which occurred in April 2014 in which the Claimant was called a nigger (as alleged at paragraphs 12-14 of the 'Particulars of Claim' [*para 2.4 of C's List of Issues*]);

(f) The Senior Management Team for the York and Selby area chaired by ACC Cain failing to consider the Claimant for the Acting Neighbourhood Delivery Inspector role that was given to Sgt Metcalfe in 2015 and not giving him the opportunity to apply as alleged in paragraph 15 of the 'Particulars of Claim'[*para 2.5 of C's List of Issues*];

(g) The Senior Management Team for the York and Selby area chaired by ACC Cain failing to consider the Claimant, or giving him the opportunity to apply for the Acting Neighbourhood Delivery Inspector roles in favour of Sergeant Hunter and Sergeant Richardson (as alleged in paragraphs 15 and 16 of the 'Particulars of Claim' [*para 2.6 of C's List of Issues*]);

(h) The Senior Management Team for the York and Selby area chaired by ACC Cain moving the Claimant with effect from 27 April 2015 from York to Malton (as alleged in paragraph 18 of the 'Particulars of Claim' [*para 2.7 of C's List of Issues*]);

(i) The Senior Management Team for the Scarborough and Ryedale area chaired by Supt Lindsey Robson failing to consider the Claimant for acting up into an Inspector role in favour of Sergeant Millington and not giving him the opportunity to apply (as alleged in paragraph 19 of the 'Particulars of Claim' [*para 2.8 of C's List of Issues*]);

(j) CI Wilkinson and CI Charlotte Bloxham rejecting the Claimant's application in January 2016 for temporary inspector posts in York and Supt Robson failing to support him for the temporary inspector post in Harrogate (as alleged in paragraph 20 of the 'Particulars of Claim' [*para 2.9 of C's List of Issues*]);

(k) The Validation Panel for the Scarborough and Ryedale 'Sergeant to Inspector' promotion process, chaired by Superintendent Alisdair Dey rejecting/failing to support the Claimant's application of 1 June 2016 for promotion to Inspector (as alleged in paragraph 21 of the 'Particulars of Claim' [*para 2.10 of C's List of Issues*]);

(l) T/Inspector Lee Partridge wrongly stating on his application for promotion that he was not competent in the role of Sgt (as alleged in paragraph 32 of the 'Particulars of Claim');

(m) T/Inspector Lee Partridge refusing to support the Claimant's application to Inspector in 2017 (as alleged in paragraph 32 of the 'Particulars of Claim' [*para 2.11 of C's List of Issues*]);

(n) The Validation Panel for York and Selby area chaired by Superintendent Adam Thomson rejecting the Claimant's application for promotion to Inspector in 2017 (as alleged in paragraph 32 of the 'Particulars of Claim' [*para 2.12 of C's List of Issues*]);

(o) Supt Stephen Thomas rejecting the Claimant's appeal (as alleged in paragraph 42-48 of the 'Particulars of Claim' [*para 2.13 of C's List of Issues*]);

(p) Inspector Partridge not confirming the fact of the Claimant's competency until April 2017 and thereby preventing his career progression until that date (as alleged at Paragraph 51-51 off the 'Particulars of Claim'[*para 2.14 of C's List of Issues*])

The Claimant relies on Sgt Hunter, Sgt Richardson, Sgt Godfrey and Sgt Metcalfe as comparators. If these comparators are deemed to be unsuitable then the Claimant relies on a hypothetical comparator.

Victimisation

2. The Respondent accepts that the Claimant's Grounds of Appeal dated 7 March 2017 constitute a protected act. Did the Respondent subject the Claimant to a detriment by:

(a) Supt Stephen Thomas rejecting the Claimant's appeal [*para 2.13 and 3.2 of C's List of Issues*];

(b) Inspector Partridge not confirming the fact of the Claimant's competency until April 2017 [*para 2.14 and 3.2 of C's List of Issues*].

Jurisdiction

3 Has the Claimant brought his claims within the period (as extended by the ACAS Conciliation rules as appropriate) of 3 months starting with the date of the act to which the complaint relates in accordance with Section 123 of the Equality Act 2010?

(a) If no then:

(i) Do any of the alleged acts constitute a course of conduct extending over the relevant period?

If not, would it be just and equitable to extend time?

Financial Losses

3. What would the Claimant have earned had any discrimination the Employment Tribunal finds to have occurred not occurred?

4. What has the Claimant actually earned since the date of any act of discrimination the Employment Tribunal finds to have occurred in mitigation of his losses?

5. Has the Claimant failed to take reasonable steps to mitigate his loss over and above what he has actually earned?

6. If not, what steps would the reasonable person in his position have taken?

7. Should any damages awarded to the Claimant be reduced to reflect the fact that he would not have progressed to the rank of Inspector absent any discriminatory conduct (see Chagger v Abbey National plc [2010] ICR 397)?

8. Should any award be reduced to reflect accelerated receipt?

9. What interest should be awarded in respect of the Claimant's pecuniary losses?

Non-pecuniary losses

10. Has the Claimant suffered injury to feelings as a result of the Respondent's breaches of the Equality Act 2010?

11. What interest is due on the Claimants' general damages?

12. To what extent should the Claimant's damages be grossed up to reflect the actual incidence of taxation?

ACAS uplift

13. Does it appear to the Employment Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies?

14. If so, has the Respondent failed to comply with that Code in relation to that matter?

15. If so, was that failure unreasonable?

16. Is it just and equitable in all the circumstances to increase any award it makes to the employee by no more than 25%?

Declaration

17. Is the Claimant entitled to a declaration?

The Tribunal was not provided with evidence in respect of remedy and it will be necessary for a further hearing to be listed in this regard.

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

5.1. The claimant was born in Wales on 26 February 1964. His parents were of Pakistani origin and his first language was Punjabi. He did not learn English until he started school. He spent approximately nine years in the Army.

5.2. The claimant began working for the respondent as a police officer on 6 June 1994. He became a Sergeant in 2006.

5.3. On or around January 2013, the claimant worked as a Custody Sergeant in York.

5.4. On 5 June 2013 the claimant passed the second of a two-part national examination to become an Inspector. He passed this exam at the first attempt. This alone does not guarantee appointment as an Inspector. The procedure is then that there is a requirement to obtain the support of a Validation Panel of senior officers before being able to move to an interview before a Board for promotion to the rank of Inspector.

5.5. In 2013 there was a promotion exercise and the deadline for applications was a day before the results of the claimant's examinations came out. The claimant, and others, applied for the Promotion Board. They were all told that they were too late to be considered. The respondent has since adjusted its procedure to take account of when the examination results are published. The Tribunal heard no evidence of any other Sergeant to Inspector Promotion Board process taking place before June 2016.

5.6. Trish Hope became the claimant's line manager in December 2013.

5.7. The claimant sent an email to Trish Hope on 25 December 2013 requesting her assistance to develop into the role of Inspector for a future Board. He asked to be considered for Critical Incident Inspector opportunities.

5.8. The role of Custody Sergeant is normally expected to be a two-year posting and, due to the logistical difficulties, opportunities to be released to perform "acting up" or Temporary Inspector posts are limited during a period working as a Custody Sergeant. The Tribunal was informed by a number of witnesses that the role of Custody Sergeant is not a popular post, it requires four weeks' specific training and there are usually staffing problems.

5.9**.** On 2 January 2014, Trish Hope sent an email to the claimant which stated:

> "Zac – hopefully if any Temp jobs come up you can apply for them for which I would support you. Hopefully we can sit down and come up with some ideas for you, to develop your portfolio on top of everything you are already doing.
> Obviously with only a year in you won't be considered for a move just yet but hopefully some temp jobs may come up in April."

5.10. The claimant was offered the possibility of acting up as Critical Incident Inspector cover on three individual days in early 2014.

5.11. On 7 April 2014, the claimant was on duty in the Selby Custody Suite. A detainee suspected of theft was racially abusive to the claimant. The claimant was called a "nigger".

5.12. Ellie Stephen, Case Progression Manager, allocated the investigation to Roland Burnett, Civilian Investigator. Mr Burnett further arrested the detainee for the additional racially aggravated offence.

5.13. The Occurrence Enquiry Log (OEL) report for 8 April 2014 has an entry by Ellie Stephen which included:

> "When interviewed about his comments towards Sgt Ahmed he states that he could not remember what he said. This is a racially aggravated incident which will require CPS charging authority. The full code test cannot be met today in order to seek the requisite authority. Outstanding actions which will be necessary are; Seizure of CCTV from Selby custody. CJA from Sgt Ahmed. Bail for these actions to be completed.

5.14. On 13 April 2014 there is an entry which states:

> "Related crime to be kept under investigation while bail for above racial offence is being investigated and if charged additional crime will be required."

5.15. On 30 May 2014 there is a further entry under the name of Ellie Stephen which states:

> "Review of the investigation. The allegation is one of a racially motivated offence, where a police officer was verbally abused by the suspect and the word used was in relation to the officer's ethnicity. Statements have been obtained, however with regards to proving the offence they fall short and one statement undermines the allegation. The threshold test has not been met as there is insufficient evidence of an offence, combined with the suspect's inability to recall the circumstances when interviewed. NFA."

5.16 The Tribunal had sight of the claimant's police pocket book which gave details of the incident, the racial abuse and three PCs referred to as being present. The Tribunal also had sight of a witness statement by the claimant dated 11 April 2014.

5.17. The Tribunal was not provided with the statements that were stated to have been obtained in the OEL. During the course of his evidence to the Tribunal, when he was asked about the statement that was said to undermine the allegation, Roland Burnett produced a statement by PC Elizabeth Hartley which had not previously been disclosed in the Tribunal proceedings. This statement referred to the suspect having been handed to the Custody Sergeant and made no mention of any events after that.

5.18. A written file was said to have been destroyed one year after the incident. However, Roland Burnett said that he could remember the details. He said that he had never received the witness statement from the claimant. He had not viewed the CCTV footage and had not seen the claimant's police

pocket book. He said that he did not think it necessary to see the CCTV footage.

5.19. Roland Burnett told the Tribunal that the CPS would not prosecute without a statement from the victim.

5.20. On 14 August 2014, the claimant sent an email to Ellie Stephen referring to the relevant detainee and stating:

> "I understand the above was not charged with the racial offence upon myself and not recorded as a crime.
> Just after an update as to the circumstances."

Ellie Stephen replied:

> "Please accept my apologies I thought that you had been updated. I will speak to Inv Roly Burnett who completed the investigation to get the specific details, if it is not crimed then that will be rectified as it should have been."

5.21 There was no further information given to the claimant in relation to this incident.

5.23. On 28 July 2014 it was decided that the claimant would move from Custody to York. At the same time it was decided that Sergeant Dave Hunter would also move from his Custody role. However, Sergeant Hunter had not actually been working in Custody for a number of weeks as he had been working on secondment as a Sergeant in the Criminal Justice Department.

5.24. On 20 October 2014 the claimant was posted as a Safer Neighbourhood Patrol Sergeant based in York.

5.25. On 31 October 2014 the claimant was placed on the list of those qualified for acting up opportunities as "would be considered". The claimant's

Professional Development Review shows objectives achieved and Trish Hope, his Line Manager, stated that he:

> "Used his Inspector qualifications to good effect in the Custody environment."

5.26. On 27 April 2015, the claimant, along with another Sergeant, was posted to Malton as a patrol Sergeant as part of the Scarborough and Ryedale Command. The decision to move both Sergeants was reached on the basis of geographic home location and determined by information provided by HR.

5.27. On 7 August 2015, the claimant requested a transfer to York and raised health and welfare issues in respect of his travelling to Malton.

5.28. On 21 December 2015, following a York and Selby resourcing meeting chaired by Superintendent Cain, the claimant's request for a transfer was added to the transfer request list and the reason provided stated "reduced travel time".

5.29. On 1 July 2016 the claimant was posted to York as a Safer Neighbourhood Patrol Sergeant.

5.30. The claimant applied for a number of temporary inspector posts within Response at both Harrogate and York district. On 4 January 2016 Lindsey Stamp (now Robson) asked the claimant which role he was seeking to apply for. In that email she stated:

> "I would obviously be supportive of the York posts, but may struggle to support an expression of interest for Harrogate given the welfare issues you have already highlighted in respect of travel to Malton."

The claimant replied that he would wish for the York role.

5.31. Charlotte Bloxham and John Wilkinson carried out a paper sift of the applicants for the Temporary Inspector posts. There were 24 applicants and 8 failed, including the claimant.

5.32. The reason the claimant's application was refused was stated to be:

> "It did not match up to what we required for the rank of inspector"

5.33. Charlotte Bloxham provided evidence to the Tribunal of the claimant's application. She also provided evidence of another application which had been scored low and a comparatively strong application. This evidence was clear and credible. The Tribunal is satisfied that the reason for the rejection was the quality of the claimant's application.

5.34. On 19 May 2016 the claimant sent an email to Lindsey Stamp stating:

> "Would you support my future application for Inspector promotion, the advert I note will appear on 20th May but requires line manager support. Inspector Millington is currently on annual leave."

5.35. Lindsey Stamp replied:

> "Thank you for your email, I think we need to meet to discuss your application. When we last met I stated there was a lot of work that needed to be undertaken in preparation for the process and I would be keen to see the progress that you have been making."

5.36. On 1 June 2016 the claimant applied for the Inspector Promotion Board and Lindsey Stamp supported his application. She was not his first line manager who was also an applicant for the same promotion Board. She was therefore the claimant's second line manager. On the application form she stated:

> "Zac has worked hard over recent months to prepare himself for this process. He has received honest feedback from his line management about his strengths and weaknesses, and has strived to address these areas of developmental need by working more closely with the Neighbourhood Policing Team for example. He has also paid close attention to his leadership style, something that he is now beginning to understand, and has put himself forward for opportunities outside of the organisation in order to further his development (Leadership course at York College). He has also sought opportunities for mentorship both internally and externally to North Yorkshire Police.
> I support Zac in progressing to the next stage of this process and wish him the best of luck."

5.37. On 6 June 2016 there was a validation panel meeting chaired by Alisdair Dey. On the panel were Superintendent Dey, four inspectors, including Lindsey Stamp (Robson), a representative from the Police Federation and Kerry West from Human Resources who took the notes and attended by telephone. Her notes in respect of the consideration of the claimant were as follows:

> "Recent example of failure to manage incident.
> LS – meeting 2 months ago – examples were really bad.
> Last week – evident huge amount of work in last 6 weeks – partnership working
> LS really unsure about him
> Developmental needs
> Investigation }
> Management of resource } Both issues
>
> Issues raised neither feel he is competent in current rank
> Not comfortable supporting ZA
> Development plan
> Qs over competence in rank
> -Not supported"

5.38. The claimant was not supported following the Validation Panel. The other six candidates were supported. The decision was made by Alisdair Dey and recorded as:

> "Recent incident where Zac failed to recognise a threat. Female tasered but returned home to where threat was made to her mother in first place.
> As Sgt has previously failed to manage incident effectively and appeared to leave responsibility to on coming supervision.
> Two months ago he was told that he had significant work to do. Has since done a tremendous amount of work to develop himself.
> Threat issue – no arrests made. Offences became statute barred.
> No investigation management.
> Still has development needs in a number of areas in investigative management of incidents.
> Had to be given basic advice by hub supervisors.
> Zac clearly has a number of areas for development to proceed to the next rank.
> Additionally he does not appear to be competent in his current rank which is a requirement to be supported.
> Evidence has been produced at this meeting to that effect."

5.39. Alisdair Dey asked Lindsey Robson to gather the details of the examples people have given in relation to the claimant's performance and speak to the claimant to give him feedback.

5.40. The Tribunal had sight of a number of emails dated 8 June 2016, providing Lindsey Robson with information with regard to historical issues that had been raised in respect of the claimant. These contained copies of emails that had been sent to the claimant at the time of the incidents.

5.41. Lindsey Robson met with the claimant on 28 June 2016. She said that she had talked through each incident with the claimant. She said that there

appeared to be two key issues, poor management of incidents and poor OEL updates.

5.42 The claimant prepared a list of the events that he had discussed with Lindsey Robson. There were six incidents within that document. Lindsey Robson agreed that those were the list of issues discussed with the claimant on 28 June 2016.

5.43. The emails produced in respect of these incidents were from a number of other officers on or shortly after the date of the validation panel. A number of these appeared to be relatively friendly emails from some time before with little that would indicate to the claimant that there were serious criticisms. One was an email from Ellie Stephen to Lindsey Robson which stated:

> "Sorry found this too which highlights what is required for primary investigation."

The email to Lindsey Robson from Ellie Stephen was dated 8 June 2016. The enclosed email from Ellie Stephen to the claimant was dated 5 May 2015 and indicated that further work was necessary to complete a primary investigation but there was little or no indication to the claimant that there was any criticism of his performance.

5.44. Another email from Paul Healy dated 8 June 2016 enclosed an email from the claimant to another officer and the comment in Mr Healy's email was "failure to supervise?"

5.45. When giving evidence to the Tribunal, Lindsey Robson said that she could not say that all the six issues had been raised at the validation panel and she agreed that she thought the issue referred to at paragraph 5.43 above had come in later. She said that taking the single issues they appeared trivial but, collectively they were not trivial.

5.46. The Tribunal finds that these emails provided to Lindsey Robson after the Validation Panel were redolent of an attempt to justify the decision made at the panel and the evidence in respect of actual issues raised at the panel was vague. Kerry West, who took the notes, could not remember the issues raised apart from the Taser incident. Lindsey Robson acknowledged that she did not recall whether all six issues had been raised and could not recall if the incident in one email from Ellie Stephen had been raised.

5.47. On 28 June 2016 Lindsey Robson sent an email to Kerry West and Temporary Inspector Martin Metcalfe who was the claimant's new line manager. She set out the incidents which had been discussed with the claimant. She stated:

> "I met with Zac this morning and went through his feedback with him. Essentially there were a number of incidents raised at our validation session from a number of inspectors which, collectively, caused us concern.
>
> I have talked Zac through each one of these this morning and highlighted where I feel he has fallen short of that required of a Sergeant.
>
> There appears to be to common themes; lack of management grip of incidents (from initial response through to investigation), and poor quality updates from Zac on the occurrences (for example all crime reviews read 'Awaiting update from OIC' or 'Enquiries in hand' which is clearly substandard and I will address this separately with his previous line manager). Both themes were evidenced in detail and Zac has taken the occurrence numbers away in order to reflect and improve. I have advised him that I would be sending this email to his current supervisor in order to help him draft a personal development plan and Zac already has some thoughts regarding what this might encompass with the most obvious being an attachment to the Investigation Hub."

5.48. Martin Metcalfe replied to the email as follows:

> " Thanks very much for the update and I will look after and help Zac whilst I am here"

No such development plan was put in place for the claimant.

5.49. On 1 September 2016 Lee Partridge became the claimant's line manager. He replaced Martin Metcalfe. There had been a handover but he said that Martin Metcalfe did not refer to any issues with the claimant's performance.

5.50. In a monthly performance review on 16 October 2016 Lee Partridge has included an entry as follows:

> "6. Zac would like to pass the next promotion board. For development he would like a T/Ins in PSD and CII course. I will raise this with C/Insp Bloxham. I am aware that Zac has a period of A/Insp over the Christmas period.
> 7. I have asked Zac to send me his feedback from the previous validation and any evidence that addresses the feedback issues. This is so I can fully support Zac going forward."

5.51. On 16 October 2016 the claimant sent an email to Lee Partridge which stated:

> "Please find attached the word document of the brief issues that CI Stamp mentioned in our debrief which I made after the meeting. This was only a verbal feedback and no written documents were given to me on that occasion."

5.52. On 13 February 2017 Lee Partridge sent an email to the claimant stating:

> "in relation to this document, it is not clear what the issues are. Please can you briefly (a sentence or two) highlight what the issues were with each and explain how you have since addressed these issues."

5.53. Lee Partridge told the Tribunal that the contents of the document setting out the six incidents were ambiguous and inconclusive. He said that they did not define the issues and just described the incidents so that it was meaningless to him.

5.54. The procedure in respect of the Sergeant to Inspector promotion process had changed by the time of the 2017 exercise. The application was in the form of a performance and development review and Lee Partridge assisted the claimant with regard to his preparation of this PDR. Lee Partridge advised the claimant to send this form to Liz Edwards in HR to check. At one stage Lee Partridge mentioned to Liz Edwards that the general English/grammar was poor. In his notes Lee Partridge has indicated that he discussed this with Liz Edwards and it is stated that:

> "Apparently this is sometimes indicative of BME candidates and this should be taken into account. Liz is also trained in unconscious bias etc"

5.55. In entry dated 11February 2017 Lee Partridge has included within his notes:

> "Yesterday, I also told Zac not to worry about the English/grammar."

5.56. Lee Partridge completed the Sergeant to Inspector Promotion – Line Manager Assessment Form for the claimant. It is indicated on the form that it should be used to record the line manager's assessment as to whether an officer is competent in the current rank. It was indicated that it should be ensured that the line manager use the appropriate assessment box for the officer's current rank although, if the officer had been acting or temporary as an inspector for six consecutive months or longer they would typically have an Inspector PDR.

5.57 The form was completed using scoring of the claimant as a Sergeant and in the overall assessment the claimant was marked as not yet competent and

the application for the promotion to the rank of Inspector was marked as unsupported. In the general overview Lee Partridge stated:

> "Zac's ambition is to attain the rank of Inspector. He was unsuccessful at the previous validation process where a number of development areas were raised but it has been difficult to pinpoint the exact issues as no formal notes were taken and a bespoke development plan was not created. I believe that the general areas of concern were; initial scene attendance/management, overview of investigations and CPM decision-making. Zac has made a conscious effort to improve these skill areas by holding a training event for his team to raise the quality of Investigation Hub handovers, scrutinising paperwork, conducting regular performance management meetings and managing scenes. I have not been made aware of any investigation or CPM issues since I began managing Zac in September 2016 and I have no concerns regarding his scene management. To conclude, based on my experiences and available evidence, Zac has sufficiently developed in these areas.
>
> I have managed Zac since 1 September 2016 and during this time he has been very dependable and keen to assist the greater good. For example, he agreed to work a short notice shift (5x3) on 24 December 2016 and in doing so rescued an acute resourcing issue.
>
> This also represented a significant personal sacrifice. Zac always starts work early so he can organise and prepare his workload. I have been present during his team briefings which are thorough and detailed. On a day-to-day basis I consider Zac to be reliable and will get the job done.
>
> I was disappointed with the breadth and depth of some of his PDR evidence and as such, there are a number of competency areas that are not evidenced/satisfied and which I cannot enhance with my own personal observations. Therefore, Zac has some development needs and is not ready for promotion to substantive Inspector."

5.58. Lee Partridge said that there were issues but also said the primary reason why he deemed the claimant not to be fully competent as a Sergeant

was due to a support plan which the claimant had managed in respect of one of the officers for whom the claimant was responsible which Lee Partridge felt was inadequate and carried major risk issues.

5.59. Superintendent Adam Thomson chaired the validation panel. He made the decision that the claimant should be included for consideration at the Validation Panel. He said that he did not think the claimant would have sold himself well in his PDR with only one example for each competency and he was aware of the positive action efforts of the Force and, as there was capacity, he wanted to give the claimant as much opportunity as he could.

5.60. The Validation Panel took place on 2 March 2017. Adam Thomson was the Chair and the other members of the panel were Inspectors Ellis and Pointon. Also present were Terry West and Nicola Smith from HR.

5.61 The notes of the Validation Panel in respect of the claimant stated that he had been scored as a Sergeant. There was reference to him being "dependable operationally" and a "safe pair of hands"

5.62. At the end of the handwritten notes it was stated:

> "Competent, consistent Sgt
> – didn't demonstrate personal responsibility to obtain feedback.
> Unsupported".

5.63. Adam Thomson's evidence to the Tribunal was that the Validation Panel's decision whether to support the claimant or not was based on the assessment of the claimant's ability or potential to operate at the next rank.

5.64. The validation form completed after the Panel referred to the claimant being described as a 'safe pair of hands' and that there were ' competent but routine examples' in the PDR. It was stated:

> "No other evidence which would enhance that in the PDR, to further progress prospects.
> No evidence of significant effort to develop since last panel, i.e. feedback sought or planning implemented."

5.65. On 7 March 2017 the claimant submitted an appeal in respect of the Sergeant to Inspector process. He stated that his grounds of appeal were on the basis that the process was unfair. He referred to:

> "In 2016 I was supported by my second-line supervision to be given a board however at the intervention of the SMT this was blocked, having applied in 2017 I have not been supported by my immediate supervisor.
>
> The process is flawed due to the fact that it has not taken in consideration of my PDR which is satisfactory and states that I am competent in my rank there have been no development issues or disciplinary matters identified I therefore conclude that I have been the victim of unconscious bias.
>
> I do not believe that assessors are qualified with the most recent changes this will also impact on me as an individual the marking process is prescriptive and not independent which is what good practice advises I believe that my fate was sealed in 2016 by the SMT and that has filtered into the process in my case for 2017.
>
> By virtue of the fact that I had been successful initially in 2016 and not in 2017 when I have in fact developed myself further shows that the process is at fault it factors opinion and is subjective which is not an accepted way for anyone from a BME to succeed, I request that the process is made independent so that it is fair and transparent I would seek to see the decision of the SMT in 2016.
>
> I would therefore request independent scrutiny of my application for 2016 and 2017."

5.66 Stephen Thomas, Detective Supt, was appointed to consider the claimant's appeal.

5.67. On 21 March 2017 Kerry West emailed Stephen Thomas providing extracts from the appeal process which included:

> "An appeal may be resolved in one of the following ways:
>
> - The appeal is not founded – this will include whether there is insufficient support information to substantiate the grounds for the appeal.
> - An acknowledgement that alternative processes might have been more suitable, but that the outcome is not likely to have been substantially affected.
>
> - An acknowledgement that alternative processes might have been more suitable and as the selection process has not been finished the applicant will now be included in the process.
> - Where the recruitment selection process has concluded the applicant must re-apply at the next process.
> - The selection process will be cancelled and re-run.
> - Any other action deemed appropriate in the circumstances."

5.68. On 3 April 2017 Stephen Thomas sent an email to Kerry West indicating that he had met with the claimant and was now in a position to report back. He stated:

> In summary I haven't found any grounds to uphold his appeal however between his failure last year and this year there should have been formal development plans in place for under-represented groups.
>
> I will propose a formal mentor structure for such candidates which will mean we need enough mentors for those officers and staff who need the chance to develop, can we pay for or arrange 360 feedback etc…?"

5.69. On 5 April 2017 Adam Thomson sent an email to Lee Pointon and Lee Partridge with a copy to David Ellis which stated:

> "Please can you find out what is on Zac's development plan and then consult with HR. He was deemed unsuitable for support but is qualified for the role. I am also mindful that he had said that he was putting in a grievance/appeal and have not heard any result from that? We need to be fully appraised of the facts before we make a decision."

5.70. On 5 April 2017 Lee Partridge sent an email to Adam Thomson, Lee Pointon and David Ellis stating:

> "In the Sgt-Insp Line Manager Assessment, Zac scored 1 (meets some expectations) for 'leading people' and 'managing performance' This was primarily due to his management of a recent support plan that was substandard. I discovered this performance issue during his monthly review on 6th January.
>
> With some assistance, Zac constructed a new support plan which was activated on 13th Jan and ran for two months. Unfortunately, all this occurred around the time of the Sgt-Insp assessment process and I felt that Zac had development needs in these areas, hence why I scored him 1s. Managing support plan is a basic function for a Sgt, let alone an Insp.
>
> The support plan was successfully completed on 26 March. Zac managed this plan correctly and has in my opinion has developed sufficiently in the areas of concern. I would not have an issue with offering Zac an A/Insp position.
>
> Regarding the appeal – D/Supt Thomas informed on Monday that he was not upholding the appeal. I understand that Zac is aware of his

decision this but he has yet to be notified formally by way of a written report."

5.71 On 5 April 2018, Stephen Thomas sent the claimant his report providing the outcome of the appeal. In this it is stated:

"Having read through and discussed with Zac his PDR for this year it is clear that the evidence presented is at a basic level, there was little evidence or examples of leadership or decision-making at the level of a potential Inspector. A number of the examples repeat themselves to allow a number of competency areas to be evidenced however they are at the standard expected of a Sergeant operating at an expected level.

The quality of presentation in the PDR, the appeal letter and his application is poor. There are a number of spelling mistakes, grammatical and language errors. This was discussed during our meeting and examples highlighted. Zac was surprised to see the errors and disappointed in himself.

Having discussed the appeal with his line manager Inspector Partridge I was aware that Zac had been given the opportunity to have his documents reviewed by his supervisors. This review had resulted in errors being identified and support provided through HR who also reviewed his work and pointed out errors. Despite this extra assistance the presented written documents are well below the standard I would expect from a potential Inspector.

I'm also aware that in determining the outcome of the line manager assessment the issue of 'Unconscious Bias' was recognised. Insp Partridge utilised a trained HR 'unconscious bias advisor to support them.

In my discussion with Zac it was clear that after last year's process he was able to enter into a mentor relationship with a senior officer and

that areas for development were identified. Despite this there seems to be a lack of formal development plans and actions through the intervening 12 months leading up to his most recent disappointment.

Given this evidence I am unable to support his appeal as I found no evidence that he had been unfairly treated.

In our discussion it was clear that as an organisation there were additional support frameworks that could be implemented that would assist Zac and future candidates from BME or under-represented backgrounds. There needs to be a formal identification of individual officers and staff members from BME and under-represented community groups. An approach can then be made to each one expressing the importance and value in developing their talents and offering a formal mentor to those willing to take part. The mentors would make themselves available for monthly meetings, assist in facilitating 360 feedback and arrange for development opportunities, evidence collection, form writing and interview preparation.

Zac agreed that this would be a big step forward and that it would not only assist him it would also build the confidence of those following him through the organisation.

I offered Zac my services as a mentor for him over the next 12 months and outlined what he could expect in support, he agreed to consider the offer and respond having reflected on our meeting."

5.73. On 3 August 2017 the claimant presented a claim of race discrimination to the Employment Tribunal.

5.74 The claimant was appointed to act up as an Inspector from 7 August to 28 August 2017.

5.75. The claimant retired from his role with the respondent and his last day of service was 20 September 2017. The claimant said that he had no option but to retire. The Tribunal saw no documentary evidence with regard to the claimant's retirement. The claimant was not clear about when he made the decision.

6 The law

Direct discrimination

7 Section 13 of the Equality Act 2010 provides;

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 4 of the Act defines the protected characteristics, one of which is race.

8 In **Islington Borough Council v Ladele** [2009] ICR 387 Mr Justice Elias explained the essence of direct discrimination as follows:

"The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

9 In **Glasgow City Council v Zafar** [1998] ICR Lord Browne-Wilkinson stated

"Those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them"

10 It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the prohibited characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome, see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLA 572 in paragraph 17:

> " I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(*a*). The employer treated the complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination. Balcombe L.J. averred to an instance of this in *West Midlands Passenger Transport Executive v. Singh* [1988] I.R.L.R. 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that 'the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions' about members of the group."

11 Where an actual comparator is relied upon by the claimant to show that the claimant has suffered less favourable treatment it is necessary to compare like with like. Section 23(1) of the Act provides: "there must be no material difference between

the circumstances in relation to each case." That does not mean to say that the comparison must be exactly the same, there can be a comparison where there are differences. The evidential value of the comparator is weakened the greater the differences, see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and **Carter v Ashan** [2008] ICR 1054. The Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054 confirmed that a Tribunal had not erred in relying on non-exact comparators in a finding of discrimination.

12 Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong** [2005] ICR 931 and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

> "The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved fact from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer… then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination."

13 To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy v Namora International PLC [2007] ICR 867** the Court of Appeal made it clear that

the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: “They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

14 A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar** [1998] ICR 120. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

15 In the case of **Qureshi v Victoria University of Manchester and another** [2001] ICR 863 Mummery J said:

> “There is a tendency, however, where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or items as if they were themselves the subject of a complaint. In the present case it was necessary for the Tribunal to find the primary facts about those allegations. It was not, however, necessary for the Tribunal to ask itself, in relation to each such incident or item, whether it was itself explicable on "racial grounds" or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the Tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds. The process of inference is itself a matter of applying common sense and judgment to the facts, and assessing the probabilities on the issue whether racial grounds were an effective cause of the acts complained of or

> were not. The assessment of the parties and their witnesses when they give evidence also form an important part of the process of inference. The Tribunal may find that the force of the primary facts is insufficient to justify an inference of racial grounds. It may find that any inference that it might have made is negated by a satisfactory explanation from the respondent of non-racial grounds of action or decision."

16 Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] IRLR 285 the tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, **Ladele, Amnesty International v Ahmed** [2009] IRLR 884, **Aylott v Stockton on Tees Borough Council** [2010] IRLR 994, **Martin v Devonshires Solicitors** [2011] ICR 352**, JP Morgan Europe Limited v Cheeidan** [2011] EWCA Civ 648, and **Cordell v Foreign and Commonwealth Office** [2012] ICR 280.

17 For a finding of direct discrimination it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nagarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

18 Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established.

19 In the case of **Qureshi v Victoria University of Manchester** Mummery J said, with regard to race discrimination:

> "As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. The Applicant faces special difficulties in a case of alleged institutional discrimination which, if it exists, may be inadvertent and unintentional. The Tribunal …. must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits?"

20 The Tribunal has considered the case of London Borough of **Ealing v Rihal [2004] EWCA Civ 623** in which Lord Justice Keane in the Court of Appeal stated at paragraph 38:

> "The Tribunal's reference to Mr Foxall being an "honest and honourable man" (paragraph 48) is not inconsistent with him being unwittingly influenced by racial considerations. As Neill LJ said in *King –v- Great Britain China Centre* at page 528:
>
> > "Few employers will be prepared to admit such discrimination *even to themselves.* In some cases discrimination will not be ill-intentional but merely based on an assumption that "he or she would not have fitted in"." (my emphasis)
>
> Nor is Ealing assisted by the fact that the Tribunal accepted as genuine and true Mr Foxall's explanation of what he was seeking to do in the scoring. That was simply the Tribunal accepting that Mr Foxall was honestly describing what

he was trying to do in that exercise. As it said a little later, he gave this evidence with great conviction *on his own part*. That in no way leads to a conclusion that he was not influenced by racial considerations, albeit without appreciating it. “

Victimisation

21. Section 27 of the Equality Act provides as follows:-

(1) 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.

(2) 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;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

22 In a victimisation claim there is no need for a comparator. The Act requires the tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan** [2001] IRLR 830:-

> "The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so".

The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

23 To get protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says "Detriment does not ... include conduct which amounts to harassment". The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 is applicable.

24 The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see **South London Healthcare NHS Trust v Al-Rubeyi** EAT0269/09. Once the tribunal has been able to identify the existence of the protected act and the detriment the tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572, **Chief Constable of West Yorkshire Police v Khan**

[2001] IRLR 830, and **St Helen's Metropolitan Borough Council v Derbyshire** [2007] IRLR 540. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others** [2010] IRLR 136. In **Martin v Devonshires Solicitors** EAT0086/10 the EAT said that:

> "There would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable."

25 In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan**. In **Owen and Briggs v James** [1982] IRLR 502 Knox J said:-

> "Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

26 In **O' Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615 the Court of Appeal said that, if there was more than one motive, it is sufficient that there is a motive that there is a discriminatory reason, as long as this has sufficient weight.

Burden of Proof

27 Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If 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 that the contravention occurred.
>
> (3) But sub-section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
> (a) an Employment Tribunal."

28 Guidance has been given to Tribunals in a number of cases. **In Igen v Wong [2005] IRLR 258** (a sex discrimination case decided under the old law but which will apply to the Equality Act) and approved again in **Madarassy v Normura International plc [2007] EWCA 33.**

29 To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This

> will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: “They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

30 In the case of **Pnaiser v NHS England** [2016] IRLR 170**,** EAT, Simler P said that whilst Tribunals might find it helpful to go through the two stages suggested in **Igen v Wong** , it is not necessarily an error of law not to do so and in many cases moving to the second stage is sensible. She warned against falling into the trap of substituting 'motive' for causation in deciding whether the burden of proof has shifted. In that case the Tribunal had erred in effectively requiring the claimant to show that the only inference which could be drawn from the primary facts was a discriminatory one. This was too high a hurdle and in fact a claimant is only required to demonstrate a prima facie case that the putative discriminator has consciously or unconsciously taken into account, in that case, something arising from disability, in order for the burden to shift.

31 In **Griffiths-Henry v Network Rail Infrastructure Ltd** [2006] IRLR 865, EAT It was said that in order for the burden of proof to shift, the claimant is not required to provide any positive evidence that the difference in treatment was based on race.

32 In Harvey on Industrial Relations and Employment law it is stated

> “ If unreasonable conduct therefore occurs alongside other indications (such as under-representation of women in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a Tribunal may find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. Similarly – once the burden of proof has shifted, as Girvan LJ explained in **Rice v McEvoy** [2011] NICA 9*,* [2011] EqLR 771 – while the test is not to ask what a reasonable employer would

have done, action which is wholly unreasonable may assist in drawing inferences that the employer's purported explanation for his/her actions was not the true explanation.

HHJ Peter Clark in The **Home Office (UK Visas & Immigration) v Kuranchie** UKEAT/0202/16 (19 January 2017, unreported) confirmed that 'statistical' evidence that may tend to show a discernible pattern of treatment by the employer to the claimant's racial group could lead a Tribunal to infer unlawful discrimination. He gave an example of a race discrimination case in which racial statistics were held to be a relevant consideration, that of **Rihal v London Borough of Ealing** *[2004] EWCA Civ 623, [2004] IRLR 642*. The presence of such evidence can amount to the 'something more' than the difference in protected characteristic and treatment as Mummery LJ described was needed in **Madarassy v Nomura** so as to shift the burden of proof."

33 **Time limits**

Section 123 of the Equality Act 2010 states:

(1) ...Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
...

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) a failure to do something is to be treated as occurring when the person in question decided on it.

> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

34 The Court of Appeal made it clear in ***Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686*****,** that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an “ongoing situation or continuing state of affairs” as oppose to “a succession of unconnected or isolated specific acts”. It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

35 The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the tribunal that it should do so, and *'the exercise of discretion is the exception rather than the rule*' (***Robertson v Bexley Community Centre*** **[2003] EWCA Civ 576** per Auld LJ at para 25).

36 The Tribunal’s discretion to extend time under the ‘just and equitable’ formula is similar to that given to the civil courts by section 33 of the Limitation Act 1980 for extending time in personal injury cases (***British Coal Corpn v Keeble,*** **[1997] IRLR 336**). Under section 33, a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

1. The length of and reasons for the delay;

2. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time; the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant;

3. The duration of any disability of the claimant arising after the date of the accrual of the cause of action;

4. The extent to which the claimant acted promptly and reasonably once he knew of his potential cause of action. Using internal proceedings is not in itself an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor.

5. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

37 The Tribunal had the benefit of written submissions together with further oral submissions provided by the representatives. These were helpful. They are not set out in detail in these reasons but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

38. The Tribunal heard evidence in relation to background issues in respect of the respondent organisation's history and criticisms of its lack of proportionate representation of BME officers when considered in relation to the population of area it covers. These figures were stark and have led to comments in a number of fora including Parliamentary committees. In the House of Commons Home Affairs Committee Police Diversity Report 2016 it was said that North Yorkshire was one of four police forces not to employ any black or black/British officers and there is not a single police force that has BME officers proportionate to the population that they are policing. The statistics show that North Yorkshire is one of the least proportionate forces having, as of January 2017, 1.2% representation of BME officers in the force compared with a 3.4% BME local population. A Positive Action Group has been set up to focus on diversity and the recruitment and selection process. The Tribunal understands that this Positive Action has been put into place in April 2017.

39. Mr Davies, in his submissions on behalf of the respondent stated:

> "Institutional racism does not exist as a legal concept. An organisation cannot be guilty of it or liable for it. In this case, the Respondent can only be liable if the Employment Tribunal is satisfied that one or more of the Respondent's employees or officers has acted in the way he or she has because of the Claimant's race. In a mental processes case that means being motivated by the Claimant's race."

40. The Tribunal agrees with this submission and it has approached its deliberations and conclusions on the basis that it has considered the motivation of a number of the respondent's employees. This is a case in which it is necessary to consider inferences. Direct discrimination is rarely blatant. As Lord Browne – Wilkinson observed in Glasgow City Council v Zafar those who discriminate "do not in general advertise their prejudices: indeed they may not even be aware of them".

41. The Tribunal heard that the claimant's opportunities to act up or to be offered Temporary Inspector roles was limited. He said that he had only amassed 24 days acting up whereas his named comparators had figures of 433 days in respect of Sergeant Hunter and 501 days for Sergeant Metcalfe. The respondent provided

figures of 52 days for the claimant, 534 for Sergeant Hunter and 622 for Sgt Metcalfe. Whichever figures are considered, it is clear that there was a substantial disparity and that the claimant had not had the opportunity of substantial periods of acting up as an Inspector when compared with these two comparators.

42. The Tribunal took account of Assistant Chief Constable Cain's evidence that acting up or obtaining Temporary Inspectors posts was not a mandatory requirement for promotion and there were operational rationales in respect of each of the specific examples that were considered. However, one of the issues for the claimant was his inability to evidence his competence at Inspector level. The sizeable disparity between him and these two comparators in respect of the number of days may have put the claimant at a disadvantage. Whilst in each case it appeared justified on its own merits on non-racial grounds, when taken as a whole this gave cause for concern and is relevant background information in respect of inferences and the burden of proof.

43. Mr Davies submitted that:

> "Discrimination cannot be treated as the default explanation for lack of success. Certain factors clearly frustrated the Claimant's attempts for promotion (being on a de-facto two year posting in custody when he passed his exams; the lack of line management continuity; the failure of Sergeant Metcalfe to put the Claimant on a support plan as instructed or to communicate the fact of it or the results of it to Inspector Lee Partridge; the failure of the constable's support plan coming to light just before the 2017 promotion round). None of those factors arose due to discrimination. At the same time, the Claimant was not as focused in how he wanted to achieve his ambitions as some other candidates. His approach was rather passive. A pushier candidate may have overcome these problems."

44. The Tribunal agrees with most of this submission. However, some of the relevant factors may be indicative of some element of unconscious or subconscious discrimination.

45. A further submission on behalf of the respondent was that:

> "There was much discussion during the hearing of the Respondent's procedures. There was much criticism of the failure to put Sergeant Ahmed on a formal support plan and record his performance in relation to it. Such criticism plainly has justification and it is understandable it attracted the interest of the Employment Tribunal with its natural concern to see that proper HR processes are followed. However, the fact that so much attention fell on such issues was due also to the fact that it was filling the gaping void in the Claimant's case: the complete lack of any evidence of discriminatory motivation. There wasn't any evidence of that nature to examine. No evidence at all."

46. The Tribunal does not agree that there was a gaping void in the claimant's case. The concern was to understand why the instructions to provide the claimant with a support plan was not put in place. The claimant was not supported by his line manager because of his ongoing failure to put in place an adequate support plan for one of the police constables under his supervision. However, no similar criticisms had been levelled at Sergeant Metcalfe when it should have been apparent to the respondent that he had not followed those instructions to impliment a development support plan for the claimant.

47. Mr Davies went on to say:

> "Leaving aside associative and perceptive discrimination, direct discrimination claims fall into two categories: (1) criterion type claims and (2) mental processes type claims. This claim is a 'mental processes' type claim. Acts which are not of themselves discriminatory - such as the failure to promote - are alleged to be discriminatory because of the motivation of those who have done them. In such cases the mental processes of the decision maker must be examined: Where witnesses give their reasons for rejecting a candidate in a selection process, the Employment Tribunal need not be satisfied that it was the 'right' or 'correct' decision but only that the explanation given is genuinely held. The decision does not have to be justified further than that. "

48. The Tribunal may accept that the explanation as to what the witness was trying to do was genuine. However, the matter does not end there as the genuineness of the intention is not inconsistent with subconscious or unconscious racial motivation.

49. A further general submission from Mr Davies was that:

> "The Claimant also shied away from accusing his former friends and colleagues of racism himself. He fell back on positive action and unconscious bias to legitimise the allegations he was making. In other words, he accepts he doesn't have any evidence of discriminatory motive. The Claimant applied for jobs with the Respondent after suffering what he claims to be discrimination which prevented him from continuing in his role. That casts into doubt whether he genuinely believes he has suffered discrimination. "

50. The Tribunal considers it understandable for the claimant to shy away from criticising former friends and senior colleagues with whom he had a long working history in a disciplined service.

51. The Tribunal does not accept that this prejudices his case. The Tribunal accepts that the claimant resigned partly as a result of the repeated placing of obstacles in the way of his career progression. He did apply for civilian posts with the respondent. The Tribunal does not agree that this places severe doubt on the genuineness of his assertions. He was looking for employment near to his home in a role where there was unlikely to be any promotion or barriers to promotion in civilian posts.

52. In respect of the specific list of issues identified, the tribunal has considered each of these as follows:

53. Section 13 of the Equality Act 2010

1. Did the Respondent treat the Claimant less favourably because he is Pakistani by:

(a) The Respondent (T/I Hope) failing to support him in undertaking Critical Incident Inspector cover between 2013 and 2014 (as alleged in paragraph 7 of the 'Particulars of Claim' [*para 2.1 of C's List of Issues*])

54. The Tribunal accepts that Trish Hope's rationale was the need for operational cover in the custody suite and that this was not on grounds of the claimant's race.

(b) his line managers failing to follow up his requests for an attachment to the Professional Standards Department between 2013 and 2014 (as alleged to paragraph 7 of the 'Particulars of Claim' [*para 2.1 of C's List of Issues*])

55. The Tribunal accepts that Trish Hope did not have the power to place the claimant in the Professional Standards Department. There was no difference in treatment as there was no evidence Trish Hope provided this opportunity to any other officer.

(c) The Respondent failing to consider him for a Temporary Inspector role in the Criminal Justice Department in Athena House York in 2014 in favour of Sergeant Hunter and not giving him the opportunity to apply for the role (as alleged in paragraph 8 of the 'Particulars of Claim' [*para 2.2 of C's List of Issues*]).

56. The Tribunal is satisfied that this was not a Temporary Inspector role. It was an attachment at the existing rank. The Tribunal is satisfied that Allan Wescott made the decision to appoint Sergeant Hunter to this short-term attachment as a result of his relevant operational experience.

(d) The Senior Management Team for the York area chaired by ACC Cain not considering him for an Acting Neighbourhood Delivery Inspector role in 2014 in favour of Sergeant Andrew Godfrey to the City and East Neighbourhood and not giving him

the opportunity to apply for the role (as alleged in paragraph 9 of the 'Particulars of Claim' [*para 2.3 of C's List of Issues*]).

57. The Tribunal is satisfied that ACC Cain did not consider the claimant for this Acting Inspector role as he was not part of his command at that time. The Tribunal is also satisfied that Sergeant Godfrey provided critical continuity in relation to policing of the relevant neighbourhood, local community and night-time economy.

(e) Roland Burnett and DS Ellie Stephen failing to investigate properly a race hate incident which occurred in April 2014 in which the Claimant was called a nigger (as alleged at paragraphs 12-14 of the 'Particulars of Claim' [*para 2.4 of C's List of Issues*]).

58. The Tribunal finds that there was an abject failure to investigate this incident or to deal with the claimant's later request for information. This was a race specific issue. The racial abuse in question could not have been made to a white officer. In the overall factual matrix, this is relevant to the approach to the matter of race. It is significantly out of time. It was a discrete incident and not part of a continuing act.

59. The relevant investigation papers have been destroyed and the respondent has suffered prejudice as a result of the delay in presenting this claim. The Tribunal does not find it just and equitable to extend time in the circumstances. It has no jurisdiction to deal with this complaint.

(f) The Senior Management Team for the York and Selby area chaired by ACC Cain failing to consider the Claimant for the Acting Neighbourhood Delivery Inspector role that was given to Sgt Metcalfe in 2015 and not giving him the opportunity to apply as alleged in paragraph 15 of the 'Particulars of Claim'[*para 2.5 of C's List of Issues*].

60. The Tribunal is satisfied that this decision was made by ACC Cain on clear operational grounds of minimal disruption to shift patterns.

(g) The Senior Management Team for the York and Selby area chaired by ACC Cain failing to consider the Claimant, or giving him the opportunity to apply for the Acting Neighbourhood Delivery Inspector roles in favour of Sergeant Hunter and Sergeant Richardson (as alleged in paragraphs 15 and 16 of the 'Particulars of Claim' [*para 2.6 of C's List of Issues*]).

61. The Tribunal is satisfied that the claimant was not, at the time, in the York and Selby command and the claimant was not in the pool of candidates from which he could be considered for selection.

(h) The Senior Management Team for the York and Selby area chaired by ACC Cain moving the Claimant with effect from 27 April 2015 from York to Malton (as alleged in paragraph 18 of the 'Particulars of Claim' [*para 2.7 of C's List of Issues*])

62. The Tribunal is satisfied that this decision was based on evidence provided by HR and that ACC Cain chose the claimant and another Sergeant purely on what he believed to be the correct postal address.

(i) The Senior Management Team for the Scarborough and Ryedale area chaired by Supt Lindsey Robson failing to consider the Claimant for acting up into an Inspector role in favour of Sergeant Millington and not giving him the opportunity to apply (as alleged in paragraph 19 of the 'Particulars of Claim' [*para 2.8 of C's List of Issues*]).

63. The Tribunal is satisfied that Lindsey Robson (then Stamp) did not consider the claimant because he had already raised issues in respect of travelling and welfare and this posting would have incurred further travel. Further discussions could have taken place with the claimant but the Tribunal accepts that there was no evidence of a discriminatory motive.

(j) CI Wilkinson and CI Charlotte Bloxham rejecting the Claimant's application in January 2016 for temporary inspector posts in York and Supt Robson failing to support him for the temporary inspector post in Harrogate (as alleged in paragraph 20 of the 'Particulars of Claim' [*para 2.9 of C's List of Issues*]).

64. The Tribunal is satisfied that Charlotte Bloxham provided a clear rationale in respect of these applications. She gave clear and cogent evidence in respect of the claimant's poor application when considered against a number of other applications and there was no discriminatory motive on grounds of the claimant's race.

(k) The Validation Panel for the Scarborough and Ryedale Sergeant to Inspector promotion process chaired by Superintendent Alisdair Dey rejecting/failing to support the Claimant's application of 1 June 2016 for promotion to Inspector (as alleged in paragraph 21 of the 'Particulars of Claim' [*para 2.10 of C's List of Issues*]).

65. The Tribunal has given a great deal of consideration to this central issue. It finds that the decision not to provide support to the claimant was the result of anecdotal opinions provided in the validation meeting and there was a post-decision search for further justification. The issues used in the feedback given to the claimant were not all identified in the validation meeting and they were not sufficiently investigated prior to the decision being taken. The reasons for not supporting the claimant were not apparent from the documentation in respect of the meeting and the Tribunal is satisfied that it is likely that the reasons were based on information that was sought after the decision had been made. This, together with other findings set out below, provided the Tribunal with considerable concern and it is satisfied, on balance, that there was unconscious race discrimination.

(l) T/Inspector Lee Partridge wrongly stating on his application for promotion that he was not competent in the role of Sgt (as alleged in paragraph 32 of the 'Particulars of Claim').

66. Lee Partridge said that the claimant had improved and the issues following the 2016 Validation Panel were no longer a concern. The assessment that the claimant was not competent was solely with regard to a support plan provided by the claimant for a PC which Lee Partridge believed to be inadequate. The relevant support plan was then put in place and the claimant was deemed to be competent to act up in an Inspector role in a matter of weeks and before the appeal decision had been taken. The Tribunal finds that assessment of the claimant as not yet competent in the circumstances was incorrect and inappropriate. This was a single matter that was resolved very quickly and the Tribunal finds, on balance, that this, together with the other findings, provided evidence of unconscious discrimination.

> (m) T/Inspector Lee Partridge refusing to support the Claimant's application to Inspector in 2017 (as alleged in paragraph 32 of the 'Particulars of Claim' [*para 2.11 of C's List of Issues*])

67. This is essentially the same issue as (l) above. There were seven categories and the claimant was only deemed as 'meeting an expectation' in two of those. Lee Partridge said that it was difficult to pinpoint the exact issues arising from the 2016 validation exercise. When giving evidence to the Tribunal, Lee Partridge made it clear that the issues from the 2016 process were no longer matters of concern and that the claimant was not yet competent solely due to the inadequate support plan that he had put in place for one of the police constables he was supervising . That issue was dealt with swiftly and the claimant was then deemed competent to act up as an Inspector on 26 March 2017, a matter of weeks after the Validation Panel and before the outcome of his appeal. The Tribunal is satisfied that the refusal to support the claimant's application in 2017 was not made on any other ground and that ground alone was not sufficient to reach the conclusion that the claimant was not competent. The Tribunal finds that this fact, together with other findings, is sufficient evidence of unconscious discrimination to establish a prima facie case of unconscious or subconscious discrimination.

> (n) The Validation Panel for York and Selby area chaired by Superintendent Adam Thomson rejecting the Claimant's application for

promotion to Inspector in 2017 (as alleged in paragraph 32 of the 'Particulars of Claim' [*para 2.12 of C's List of Issues*]).

68. The evidence of Superintendent Thomson was contrary to the documentary evidence. He indicated that the decision was made on the basis of the claimant's capacity to move to the rank of Inspector. The decision was documented as being on the basis of there being 'no evidence of significant effort to develop since the last panel'. However, there was clear evidence of that improvement provided to the panel by Lee Partridge. Even if the Tribunal had found that the issues from 2016 had not been adequately addressed by the claimant, it would have expected some consideration of why there had been no development plan put in place for the claimant in respect of those issues as had been proposed.

69. The Tribunal found that the evidence of Adam Thomson in respect of the decision by the Validation Panel did not accord with the documentary evidence. It was apparent that there were 27 candidates who went before Validation Panels across the force. There was only one BME candidate, the claimant, and he was the only one not supported. The Tribunal appreciates that not all the 27 candidates were before the Validation Panel chaired by Superintendent Thomson and that three other candidates had not been supported by their line manager and so had not been placed before the Panel. However, having considered all the evidence and, on the balance of probabilities, the Tribunal is satisfied that the claimant has established facts from which it could conclude that the claimant had been subject to direct race discrimination when compared with the actual comparators identified or a hypothetical comparator with no significant differences from the claimant. The claimant was the only candidate before the 2017 validation panels who was not supported and the reason for that lack of support was not clearly explained and what explanation was provided was inconsistent. The respondent has not shown a non-discriminatory reason to the satisfaction of the Tribunal.

(o) Supt Stephen Thomas rejecting the Claimant's appeal (as alleged in paragraph 42-48 of the 'Particulars of Claim' [*para 2.13 of C's List of Issues*])

70. The appeal outcome was rejected partly on grounds of spelling and grammar even though Lee Partridge had spoken to HR earlier and had been told not to pursue the issue because the claimant was a BME candidate and he had informed the claimant not to worry about his English/grammar in the application. The Tribunal considers that Stephen Thomas did want to help the claimant but it is satisfied that this is evidence of unconscious discrimination with regard to the spelling and grammar part of the appeal outcome. This, together with the other findings of fact in respect of evidence of unconscious discrimination are sufficient to reverse the burden of proof and the respondent has failed to show a non-discriminatory reason.

71. ACC Cain, when asked about the importance of spelling and grammar to the role of Inspector, said that there would need to be serious concerns particularly once BME issues were taken into consideration.

72. When it was put to Superintendent Thomas that Lee Partridge had been advised by HR that English and grammar was not important, he said that he did not entirely agree with that and that it was indicative of someone who had not taken the effort. Also, his view of what decision he could make with regard to the outcome of the appeal did not accord with the advice that he had been given by HR. That advice had provided six possible outcomes whereas Superintendent Thomas was of the view that he could only uphold the appeal or not uphold it.

73. Once again, this, together with the other findings of fact reached by the Tribunal are sufficient to show a prima facie case of discrimination. Facts from which a Tribunal could conclude that there was discrimination in the absence of a non-discriminatory explanation. The fact that the conclusion reached by Superintendent Thomas was significantly influenced by his consideration of the claimant's failings in respect of English and grammar when this had already been said to be something that the claimant should not worry about is one of the facts from which the Tribunal concludes that the claimant has shown a prima facie case of less favourable treatment. The Tribunal is satisfied that there was no credible evidence of a non-discriminatory reason.

(p) Inspector Partridge not confirming the fact of the Claimant's competency until April 2017 and thereby preventing his career progression until that date (as alleged at Paragraph 51-51 off the 'Particulars of Claim'[*para 2.14 of C's List of Issues*])

74. The claimant was found to be competent to act as an Inspector in a matter of weeks and before the appeal decision. The issue of the adequate support plan for the PC was resolved on 26 March 2017 and Lee Partridge indicated that the claimant had sufficiently developed in the areas of concern and he did not have a concern with offering the claimant an Acting Inspector role. This was a critical short period of time. The new support plan was activated on 13 January 2017 and ran for two months. The Tribunal is satisfied that the claimant could have been provided with assistance to establish his competency before the Validation Panel and, as the claimant's competency had been reassessed before the appeal outcome, the Tribunal is satisfied that the failure to confirm the claimant's competency before April 2017 is a fact, together with the other facts found, from which the Tribunal could conclude that there was direct discrimination.

75. The issue of unconscious or subconscious discrimination is a difficult concept and is largely dependent on the drawing of inferences from facts. The Tribunal is clear that there are facts which establish a prima facie case. The Tribunal has to consider the totality of the position drawn from the established facts. It is not necessary for a Tribunal to make a specific finding as to whether any of the matters found would, of itself, amount in law to a discrete act of discrimination. The Tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the respondent has treated the complainant less favourably on the grounds of his protected status.

76. There is no jurisdiction to reach a conclusion on the basis of institutional racism and the Tribunal has taken great care not to decide this case on that basis. The underrepresentation of BME officers in the respondent police force was raised on a number of occasions and the claimant did shy away from identifying individual officers as discriminatory when giving oral evidence.

77. The statistics and information with regard to the underrepresentation of BME officers within the respondent police force, together with the racist incident in the custody suite and failure to investigate are relevant with regard to the background and drawing of inferences. Those inferences are drawn from the facts found by the Tribunal in respect of the obstacles the claimant faced in relation to his applications, the failure to provide the claimant with adequate support plans, the categorisation of the claimant as not yet competent, the conduct and conclusions of the Validation Panels and the appeal as set out within these reasons.

78. The evidence provided in respect of the identified actual comparators was not sufficient for the Tribunal to consider them in respect of the majority of the issues and, in those circumstances, the Tribunal had to consider the issues on the basis of a hypothetical comparator. That is, a white police sergeant in the respondent force in the same, or not materially different, circumstances as those of the claimant.

In the case of **Shamoon** Lord Nicholls said that:

> "Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application?"

79. In **London Borough of Islington v Ladele** Elias J (the then President of the EAT) said that often, in practice, a Tribunal will be unlikely to be able to identify who the correct comparator is, without first asking and answering the question why the claimant was treated as he was. Until that question is answered, he said, the appropriate attributes of the comparator will not be known. His conclusion was that, whilst comparators may have evidential value, often they cast no light on the 'reason why question'.

80. In this case, where the consideration of the Tribunal is in respect of unconscious discrimination as a result of drawing inferences from the totality of facts found from the evidence before it, the identification of a hypothetical comparator would be tortuous and sterile in respect of each finding of fact further than as follows. The Tribunal has concluded that a white police sergeant who passed his or her inspectors'

exams and was seeking promotion would not have been treated in the way the claimant was to the extent that the various obstacles would not have been placed in that officer's way. Also, taking into account all the inferences drawn from the facts, the Tribunal is satisfied that the reason why the claimant was treated that way was as a result of unconscious race discrimination because of the claimant's protected characteristic of his Pakistani ethnic origin. The respondent has not established a non-discriminatory reason for the difference in treatment.

Victimisation

2. The Respondent accepts that the Claimant's Grounds of Appeal dated 7 March 2017 constitute a protected act. Did the Respondent subject the Claimant to a detriment by:

   (a) Supt Stephen Thomas rejecting the Claimant's appeal [*para 2.13 and 3.2 of C's List of Issues*];

   (b) Inspector Partridge not confirming the fact of the Claimant's competency until April 2017 [*para 2.14 and 3.2 of C's List of Issues*].

81. Mr Davies submitted that:

> "The case of victimisation was not put to the Respondent's witnesses. It must therefore fail. These allegations are not therefore dealt with any further in these submissions. "

82. The Tribunal agrees with this submission and, in any event, it is satisfied that neither of these issues were acts of victimisation. The appeal was not rejected because of the grounds of appeal and the assessment of the claimant as not being confirmed as competent until April 2017 was not because he had submitted the appeal.

Jurisdiction

3. Has the Claimant brought his claims within the period (as extended by the ACAS Conciliation rules as appropriate) of 3 months starting with the date of the act to which the complaint relates in accordance with Section 123 of the Equality Act 2010?

    (a) If no then:

        (i) Do any of the alleged acts constitute a course of conduct extending over the relevant period?

            (a) If not, would it be just and equitable to extend time?

83. As set out above, the Tribunal is satisfied that issue (e) was a discrete act and not part of a course of conduct and it would not be just and equitable to extend time. With regard to the other issues from which the Tribunal has concluded that the claimant has shown a prima facie case, the Tribunal is satisfied that this was a continuing course of conduct. The issues in respect of the two Validation Panels are inextricably linked and the Tribunal is satisfied that these complaints are bought within time. The Tribunal is not satisfied that the respondent that the respondent has shown a non-discriminatory reason for the difference in treatment.

84. The Tribunal was unable to give consideration to the question of whether the claimant would have been promoted to the rank of Inspector had he been supported in his applications. The Tribunal will need to hear further evidence in respect of remedy and whether the outcome will be in respect of the loss of a chance. The case of Abbey National v Chagger may be relevant.

Employment Judge Shepherd
4 May 2018