Appeal No. UKEAT/0200/18/LA
UKEAT/0205/18/LA
UKEAT/0271/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 April 2019
Judgment handed down on 22 May 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR D QUARM — APPELLANT

COMMISSIONER OF POLICE OF THE METROPOLIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR TRISTAN JONES (of counsel) Instructed by: Advocate The National Pro Bono Centre 48 Chancery Lane London WC2A 1JF.
For the Respondent	MR NIRAN DE SILVA (of counsel) Instructed by: Directorate of Legal Services Metropolitan Polices Services Holborn Police Station 8th Floor 10 Lamb's Conduit Street London WC1N 3NR

SUMMARY

VICTIMISATION DISCRIMINATION

PRACTICE AND PROCEDURE – Striking-out/dismissal

These were appeals from three decisions.

In 2015 the Appellant made a complaint to the IPCC alleging misconduct on the part of fellow officers. This was referred to the Respondent's Directorate of Professional Standards (DPS) who decided to take no action in relation to it. He presented an ET claim that this was an act of direct race discrimination, victimisation (for having made previous ET claims under the **Equality Act**) and whistleblowing detriment. He ticked the box on the claim form requesting that a copy be sent to the regulator. The claim form was then sent to the IPCC, which in turn sent it to the Respondent's DPS. They decided to take no action upon it pending the outcome of that ET claim. The Appellant then presented a fresh ET claim in relation to that decision. The ET held that it did not amount to an act of victimisation because, applying **Derbyshire v St Helens MBC** [2007] ICR 841 (HL) there was no detriment. That decision was upheld. The ET erred in finding that there was in any event no detriment because the outcome would have been no different. **Deer v University of Oxford** [2015] ICR 1213 applied. But the ET's decision was not dependent on that finding, which was made in the alternative. The failure to take further action after the first ET claim had concluded was said to amount to a further act of victimisation. That claim also failed. That decision was also upheld. The ET had found that the complaint had genuinely slipped off the radar of the case handler. The inaction was not because of the protected act. The first appeal was therefore dismissed.

The second appeal was against the refusal of a reconsideration application by the same Tribunal. That appeal was also dismissed, as the Tribunal had been entitled to take the view that what the Appellant considered to be significant new evidence did not undermine the basis of their original decision.

In 2017 the Appellant sent a dossier to the IPCC containing various allegations of police misconduct. This was referred to the Respondent's DPS who decided not to record or action it. The Appellant presented a claim to the ET that this was an act of direct race discrimination, victimisation, and whistleblowing detriment. At a Preliminary Hearing the ET struck those claims out as having no reasonable prospect of success. In the third appeal, the Appellant appealed that decision.

Held: the ET erred in its understanding of the underlying statutory regime concerning complaints of police misconduct, in finding that the case handler had no knowledge of the Appellant's race or prior complaints, and in its approach to the legal tests to be applied in respect of the underlying claims. This appeal was allowed.

HIS HONOUR JUDGE AUERBACH

Introduction

1. These are appeals from three decisions of two Employment Tribunals arising from two separate claims. They involve the same parties and have a common background. I shall refer to the parties as they were (in both cases) in the Employment Tribunal ("ET"), as Claimant and Respondent. The Claimant is a serving Detective Constable, who has over twenty years' service with the Metropolitan Police Service. The proper respondent to work-related claims brought by him in the ET is the Respondent.

2. The first appeal is from the decision of a Tribunal sitting at London Central (Employment Judge Tayler, Mr J Carroll and Mr M Simon) arising from a Full Merits Hearing on 4 – 7 September 2017, promulgated on 7 September 2017. The second is from the decision of the same full Tribunal, on a reconsideration application, given at a hearing on 15 June 2018 and promulgated in writing on 25 June 2018. The first decision dismissed a claim of victimisation. The reconsideration decision declined to vary or revoke the first decision.

3. There was also a further application in that case, for reconsideration of that reconsideration decision. That was refused, by a decision of the Employment Judge, because that application was out of time, and he in any event found that it had no reasonable prospect of success. That decision is not the subject of appeal.

4. On initial consideration on paper, HHJ Martyn Barklem considered the Notice of Appeal pertaining to the first decision of the Tayler Tribunal not to be arguable. The Claimant then requested a hearing under Rule 3(10) of the **EAT's Rules of Procedure**. HHJ Stacey

considered the appeal against the reconsideration decision on paper, and thought it desirable, in those circumstances, that it too be considered at that same hearing. At that hearing HHJ Eady QC accepted that amended grounds of appeal put forward by the Claimant's counsel were arguable, and should proceed to a Full Hearing.

5. The second appeal is from the decision of a Tribunal sitting at London East (Employment Judge Jones, sitting alone) following a Preliminary Hearing on 12 January 2018, striking out complaints of race discrimination, victimisation and being subjected to detriment on the grounds of protected disclosures. That was promulgated on 27 February 2018. There was an unsuccessful application for reconsideration, but no appeal from that decision.

6. HHJ Eady QC, who considered the appeal on paper, thought it unarguable. However, the Claimant sought a hearing under Rule 3(10). At that hearing Mrs Justice Elisabeth Laing DBE accepted that all of the points identified in draft amended grounds of appeal tabled by counsel were arguable, and directed that they proceed to a Full Hearing.

7. At all of the hearings in the ET the Claimant, who was a litigant in person, represented himself. The Respondent was represented by Mr Niran De Silva of counsel. The Claimant pursues his appeals as a litigant in person, but has had the advantage of representation pro bono at EAT hearings by Mr Tristan Jones of counsel. Mr De Silva has again appeared in the EAT for the Respondent. I had the benefit of detailed written and oral arguments from them both.

The Legal Framework

8. It is helpful at the very outset to set out the relevant substantive statutory framework and some established principles which emerge from the authorities.

9. Section 39 **Equality Act 2010** prohibits (among other things) direct discrimination by an employer against its employee, and provides that an employer must not victimise its employee, in certain ways, including, in both cases, by subjecting the employee to a detriment.

10. Section 42 makes provision that, for these purposes, a police constable is to be treated as employed by the relevant chief officer in respect of any act done by the chief officer in relation to him. Other provisions have the effect, read with section 42, that acts done by the chief officer's agents, in that capacity, or employees in the course of their employment, are her acts. Accordingly, any conduct of the staff or officers of the Metropolitan Police Service which amounted to victimisation of the Claimant by subjecting him to a detriment would be unlawful conduct for which the Respondent is liable.

11. It is convenient, therefore, taking my cue from the nomenclature of the statute, and common usage, to refer to the Claimant's working relationship with the Metropolitan Police Service ("MPS") as his employment, and to the MPS as his employer. I will also use "the Respondent" to refer to the MPS itself as well as the Respondent herself, as suits the context.

12. The definition of direct discrimination is found in section 13 of the **2010 Act**. I do not need to set it out in full. The core is in sub-section (1), which provides: "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." For these purposes, protected characteristics include race.

13. The definition of victimisation is found in section 27 of the **2010 Act**.

(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.

14. It will be observed that the requirement that the complainant have been subjected to a detriment appears both in the cause of action in section 39 and in the definition of victimisation in section 27. Predecessor provisions defining victimisation referred to "less favourable treatment"; but in section 27 that was replaced by the reference to detriment. That history, together with the fact that less favourable treatment is also still a feature of the definition of direct discrimination, is why some authorities refer to a need to find "less favourable treatment". But this change has not made any material difference.

15. In a case which relies on section 27(1)(a), for liability to be established the Tribunal must therefore find that the employee did a protected act, that the impugned conduct (whether by act or omission) amounted to subjecting him to a detriment (I will call that detrimental treatment) and that the conduct occurred because the employee did the protected act.

16. It is well-established that, if it is not inherently obvious from the nature of the conduct, the question of whether conduct was "because" of a protected act must be determined by the

Tribunal making a finding about the mental processes of the individual concerned, and, in particular what has been called their motivation. The protected act need not provide the sole or principal motivation, so long as it was a material contributing influence on the conduct.

17. It is also well established that conduct will amount to a detriment if the complainant reasonably perceives it to be such, and that to pass this test it does not have to be the case that the conduct had some identifiable adverse hard financial impact, or can be traced through to some other concrete adverse outcome for the complainant. However, as Lord Hope of Craighead observed in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 (at paragraph 35): "An unjustified sense of grievance cannot amount to "detriment"".

18. Where the impugned conduct is found to have been because of ongoing litigation, the authorities provide more particular guidance as to the approach to be taken to whether such conduct is reasonably to be regarded as a detriment. This emerged from the decisions of the House of Lords in **Chief Constable of West Yorkshire v Khan** [2001] ICR 1065 and **St Helens Borough Council v Derbyshire** [2007] ICR 841 (HL).

19. As the Tayler Tribunal correctly noted, the overall effect of the authorities was captured by the EAT in **Pothecary Witham Weld v Bullimore** [2010] ICR 1008. There is, rightly, no challenge to its self-direction in law, and I do not need to reproduce its detailed analysis of the earlier authorities. However, it is helpful to set out the following passage from **Bullimore**:

> **18. *Overview*. We have felt it necessary to set out the reasoning in Khan and Derbyshire in some detail because the Tribunal in this case clearly regarded those decisions as affording the principal source of guidance on the issues which it had to resolve. But we are bound to say that we regard them as something of a red herring. As Ms. Monaghan persuasively submitted, it is crucial to appreciate that both are cases of a very particular type, namely cases where the employer has taken action in order to protect his position in current litigation; and that the particular problems discussed in them are peculiar to that type of situation. We accept Ms Monaghan's submission that in most cases the familiar approach of (a) deciding whether the Claimant has suffered "less favourable treatment" (which in practice answers also whether he or she has suffered a detriment) and (b) asking whether the protected act was, or was part of, the reason why he suffered that**

detriment, following the guidance in Nagarajan, will suffice; and the complexities addressed in Khan and Derbyshire simply do not arise. The present case is not of the Khan/Derbyshire type. There was no litigation between the Claimant and the Appellants at the time that Mr. Hawthorne gave the reference complained of or conducted the grievance meeting. (For the avoidance of doubt, however, we should make clear that we are not to be taken as saying that the often-quoted observations in para. 29 of Lord Nicholls' speech in Khan are no longer relevant on the general question of the correct approach to the "reason why" question.)

19. In these circumstances we need not attempt any elaborate analysis of how the law stands post-Derbyshire in the kinds of case with which it is concerned. Since, however, we heard some useful submissions on the question it may be helpful in other cases if we briefly summarise the position as we understand it, while repeating that in most cases this analysis is unnecessary:

(1) It remains necessary formally to ask all three questions which arise from the statutory wording – namely (a) whether the claimant has suffered "less favourable treatment"; (b) whether, if so, that is "by reason that" he or she did the protected act; and (c) whether he or she has suffered a detriment (although, as noted above, questions (a) and (c) substantially overlap). That follows inevitably from the statutory language but it is in any event made clear by Lady Hale: see para. 36 of her speech in Derbyshire (p. 854 D-F).

(2) In the case of an act done by an employer to protect himself in litigation involving a discrimination claim, the act should be treated straightforwardly as done by reason of the protected act, i.e. the bringing/continuance of the claim; and the subtle distinctions advanced in Khan as to the different capacities of employer and party to litigation should be eschewed.

(3) In considering whether the act complained of constituted a detriment the starting-point is how it would have been perceived by a reasonable litigant; but such a litigant could not properly regard as a detriment conduct by the employer which constituted no more than reasonable conduct in defence of his position in the litigation.

(4) There is no "honest and reasonable" defence as such; but the exercise required under (3) will in all or most cases lead to the same result as if there were.

20. Also, pertinent to these appeals is **Deer v University of Oxford** [2015] ICR 1213 (CA). In that case a former student and employee of the University was refused a reference by her former doctoral supervisor. Her case was that this had happened because she had brought a previous discrimination claim against the University, which had settled. She pursued a grievance, a grievance appeal, and multiple ET claims. The first two ET claims complained about the refusal of the reference, the third and fourth about the conduct of the grievance and grievance appeal processes. The fifth concerned the University's refusal to comply with a Data Protection request while ET claims were ongoing. All the complaints were of victimisation, relying on the previous settled claim, and/or earlier claims in this cycle, as protected acts.

21. The first ET claim was dismissed on its merits. The others were dismissed at a Pre-Hearing Review, the third and fourth claims on the basis that there was no detriment. The ET reasoned that the grievance had repeated the claim in claim 1, which had been found to have no merit. So, it must be assumed that, however the grievance and appeal processes had been conducted, they would have failed. The fifth claim was also struck out on the basis that there was no detriment. Appeals to the EAT in respect of the dismissal of the third, fourth and fifth claims having failed, they came, with permission from Underhill LJ, before the full Court of Appeal. As the earlier claims dated from a time when less favourable treatment was a feature of the definition of victimisation, there was some discussion in the Court's decision of that concept, as well as of detriment. However, the discussion of the former illuminates that of the latter in a way that continues to hold good.

22. Elias LJ (Floyd and Sullivan LJJ concurring), said, at paragraphs 25 to 28:

> **25. The concept of detriment is determined from the point of view of the claimant: a detriment exists if a reasonable person would or might take the view that the employer's conduct had in all the circumstances been to her detriment; but an unjustified sense of grievance cannot amount to a detriment: see *Derbyshire* v *St Helens MBC* [2007] UKHL 16; [2007] ICR 841, para. 37 per Baroness Hale reciting earlier authorities.**
>
> **26. In fact it seems to me - as it did to Underhill LJ as he said when granting permission to appeal - that although the concepts of less favourable treatment and detriment are distinct, there will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences. That is perhaps more starkly the position in cases of discrimination on race or sex grounds where it can be readily seen that the act of discrimination of itself causes injury to feelings. But similar reasoning applies to victimisation discrimination. This is also an important protection for an employee or ex-employee, and a real and burning sense of injustice or unfairness may be experienced by someone who is discriminated against on this ground. It is perhaps possible that there may be evidence showing that in fact in a particular case the claimant did not suffer any sense of grievance or injustice notwithstanding less favourable treatment, but the normal inference would surely be that he or she did.**
>
> **27. Claim 5 falls under the Equality Act. So far as is relevant, section 27(1) provides that:**
>
> > **"A person (A) victimises another person (B) if A subjects B to a detriment because -**
> >
> > **(a) B does a protected act..."**
>
> **28. A protected act includes bringing proceedings under the Act: section 27(2). There is no concept of less favourable treatment as such in this formulation of the wrong. However, if a tribunal finds that the reason for particular conduct adverse to an employee is victimisation,**

there is implicit in that conclusion a finding that but for having taken the protected act, the employee would have been treated more favourably.

23. That analysis led ultimately to this conclusion in relation to the appeals in respect of claims 4 and 5, at paragraphs 47 and 48 of the speech of Elias LJ

> **47. Ms McCafferty [for the University] accepted that there will be cases where procedural failings may give rise to a detriment even although it is plain that they had no effect on the substantive outcome of the investigation, but she submits that this is not such a case.**
>
> **48. In principle I do not see why not: if the appellant were able to establish that she had been treated less favourably in the way in which the procedures were applied, and the reason was that she was being victimised for having lodged a sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound in damages. The fact that the outcome of the procedure would not have changed will be relevant to any assessment of any compensation, but it does not of itself defeat the substantive victimisation discrimination claim. It seems to me that Ms McCafferty's case must depend on a consideration of the merits which, for reasons I have given, I do not think is justified in this appeal. I would uphold the appeal in relation to these two matters.**

24. As for claim 5, the Court noted that the University's case was that it had refused the Data Protection request, in the belief, on advice, that it was not obliged to furnish documents which were relevant to outstanding litigation. The Employment Tribunal concluded that, whether that was right or not, the University's actions had been those of a reasonable litigant, and, applying **Bullimore**, there was, in any event, no detriment.

25. The EAT upheld that analysis. Elias LJ accepted that a delay in responding to such a request could, as such, be a detriment. But he continued:

> **52. However, the Tribunal has also found that the appellant would not be able to establish a detriment for a quite distinct reason, namely that the university was acting on legal advice and had acted reasonably in furtherance of its interests in the litigation. There is plenty of authority for the proposition that no reasonable employee could treat as a detriment ordinary and reasonable steps taken by the employer in the course of litigation: see the detailed discussion of the relevant authorities by Underhill P (as he then was) giving the judgment of the EAT in *Pothecary Witham Weld v Bullimore* [2010] ICR 1008. Mr Segal suggested that it was far from self-evident that it was reasonable to withhold personal data which would eventually have to be disclosed. But the finding below was that it was reasonable, and the appellant adduced no evidence to suggest that it was not an ordinary step in the course of litigation.**
>
> **53. In my judgment, therefore, it is fanciful to believe that this particular claim could succeed. The university was acting on the advice of lawyers. As the employment judge recognised, whether the advice was right or wrong, there was no basis for believing that the university had done anything other than rely upon the advice. Short of a submission that the lawyers were in some kind of dishonest collusion with the university - and that argument has properly not**

been advanced - the only proper inference is that the university was acting in what it perceived to be its best interests in the litigation.

26. The provisions of Part IVA **Employment Rights Act 1996** define the concept of a protected disclosure. It is unnecessary, in the context of this appeal, to mine the details. It suffices to note that the gist is that the employee has disclosed information which he reasonably believes tends to point to past, present or future wrongdoing of one or more prescribed kinds, including criminal offences, and which he reasonably believes to be in the public interest.

27. Section 47B then makes it unlawful for an employer to subject an employee to a detriment, by any act or deliberate failure to act, done on the grounds that the employee has made a protected disclosure. These provisions extend to police officers, who are to be treated, for the purposes of them, as employed by the relevant chief officer.

The Factual Background to The Tayler-Tribunal Appeals

28. The salient aspects of the factual chronology of events leading up to the matter that came before the Tayler Tribunal, which I draw from its first decision, are as follows.

29. The claim before that Tribunal was the eleventh ET claim that the Claimant had presented against the Respondent. As the Tayler Tribunal described (paragraph 1): "The initial claims focused on complaints of race discrimination. Later claims focused on victimisation and detriment done on the grounds of having made protected disclosures." Claims 6 – 9 were heard by a Tribunal chaired by Employment Judge Baron between February and March 2015. Those claims were dismissed in a decision promulgated on 1 July 2015.

30. On 19 October 2015, the Claimant presented a complaint to the body then known as the Independent Police Complaints Commission ("IPCC"). As the Tayler Tribunal put it (paragraph 3): "He raised a number of historical complaints and also complained about the actions of various officers when giving evidence at the Baron tribunal; alleging that they had been guilty of criminal conduct, principally that they had perjured themselves."

31. I will refer to that complaint as "IPCC complaint 1".

32. In accordance with the procedure which it is required to follow, the IPCC in the first instance referred complaint 1 to the Respondent's Directorate of Professional Standards – Complaints Support Team ("DPS-CST"). Their task is to decide whether an allegation, which comes to them, should be formally recorded as an allegation of misconduct and then referred elsewhere within the Respondent to be fully investigated, or, if the allegation is of sufficiently serious misconduct, referred (or referred back) to the IPCC for it to investigate. The carrying out of that assessment process was referred to in the Tribunal proceedings as a severity assessment, although, as the Tayler Tribunal noted in their decision, where the referral originates from a fellow officer that may not be strictly the correct term for it.

33. Ms Geri Brownrigg and Inspector Damian O'Connell of that team decided that complaint 1 raised a large number of matters that had been considered by the Baron Tribunal, and that the additional matters raised by it did not meet the threshold for an investigation. They took no further action in relation to it, and they did not conduct a severity assessment.

34. I will refer to that decision of the DPS-CST as "employer decision 1".

35. On 9 March 2016, the Claimant presented a claim form to the ET. I will call that "ET claim 10". It complained that employer decision 1 amounted to an act of direct racial discrimination, victimisation and detrimental treatment on the grounds of protected disclosures. The protected disclosures relied upon were set out in a document to which the claim form referred, but which the Claimant did not successfully upload to the Tribunal Service portal. However, a footnote in the Tayler Tribunal's decision tells us that the list "included complaints about events prior to the Baron tribunal and conduct at the Baron tribunal that were similar to the IPCC complaint of 19 October 2015."

36. Accordingly, I observe, the protected disclosures which featured in ET claim 10 concerned the matters of alleged conduct on the part of the employer raised in IPCC complaint 1; and the conduct of the employer impugned by claim 10, as amounting to unlawful detrimental treatment, was employer decision 1 – the failure to conduct a severity assessment.

37. Where a claim presented to the ET contains a complaint that the employee has been subjected to a detriment because he made a protected disclosure (or of unfair dismissal for that sole or principal reason) he may, if he chooses, tick a box on the claim form indicating that he wishes a copy to be sent to any relevant prescribed regulator. This is catered for in rule 14 of the **ET Rules of Procedure 2013**. If (but only if) the box has been ticked, the Tribunal administration *may* do that, but, strictly, are not bound to do so. But, assuming that they can identify a pertinent prescribed regulator, ordinarily they will.

38. In the claim form for ET claim 10 the Claimant ticked that box, and so the Tribunal administration sent a copy of the claim form to the IPCC. However, that did not have with it a

A copy of the list of protected disclosures to which the claim referred, because that had not been uploaded with the claim form.

B 39. On 6 June 2016, Mr Jonathan Atherton of the IPCC emailed the DPS-CST that it had received correspondence from HMCTS relating to an ET claim by the Claimant. At paragraph 27 of its substantive decision the Tribunal quotes from that email, including the following:

> **"…. Within this correspondence Mr Qualm [*sic*] raises allegations against a number of officers of the DPS. The allegations Case Number: 2207623/2016 appear to relate to a decision taken by the DPS not to record previous conduct allegations arising from the employment tribunal.**
>
> **I was wondering whether you have had sight of this correspondence and whether you are intending to make a referral to the IPCC in relation to that correspondence?" …**

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D 40. Although a copy of the claim form was not enclosed, it was clear to Ms Brownrigg, who saw that email, that it related to ET claim 10. She replied, on 7 June 2016:

> **"We have not had sight of this correspondence, please could you forward to our mailbox for assessment. The Employment Tribunal in relation to this matter is not taking place until November 2016.**
>
> **At this time we will not be referring it to the IPCC."**

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41. The IPCC replied suggesting that she check whether the Respondent's lawyers had received the claim. She forwarded the correspondence to the Respondent's ET Client Unit, which also forms part of its Directorate of Professional Standards, and to its external solicitors. Mr Longhurst, a Senior Case Manager with the ET Client Unit, replied that he had not seen the correspondence, and would not normally see material linked to an ET claim, as claimants in such cases were required to correspond through the external solicitors. He also commented:

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> **"If Mr Quarm has submitted something to the IPCC that links into the current litigation then we should ideally have access to this so we are aware of his concerns.**
>
> **If this new correspondence is in relation to matters that post-date the current claim (March 2016 onwards), then it should be processed as per normal by the IPCC / DPS or any other appropriate area of the Service."**

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42. The solicitors reported that they had not received anything, but surmised that it might well be a copy of the claim form in ET claim 10 if indeed the Claimant had ticked the box causing it to be sent to the IPCC.

43. Ms Brownrigg shared those replies with the IPCC, who then, on 20 June 2016, sent her a copy of the claim form. They asked if, once it had been reviewed, she could "…please let me know if you intend to record any conduct in relation to the allegations raised by Mr Quarm?"

44. Ms Brownrigg then, on 5 July 2016, forwarded the claim form to the external solicitors and the ET Client Unit and, at the same time informed the IPCC that she had sent it to them both "…for their observations."

45. On 27 August 2016, the external solicitors informed Ms Brownrigg that ET claim 10 had been struck out, as a deposit order had been made, and the Claimant had failed to pay the deposit by the appointed deadline.

46. As a matter of fact, Ms Brownrigg thereafter took no further action in relation to the IPCC referral in relation to ET claim 10.

The Tayler Tribunal's First Decision

47. The complaint adjudicated by the Tayler Tribunal arose from the eleventh claim form to be presented by the Claimant against the Respondent: ET claim 11. That was presented on 25 August 2016. As originally framed, the conduct about which it complained was the failure to carry out a severity assessment in relation to the conduct raised by ET claim 10, after it was first referred by the IPCC to the DPS, in a time window in June 2016. By the time of the start

of the hearing before the Tayler Tribunal, the sole live complaint was of victimisation, the protected acts relied upon being various allegations of discrimination made in previous ET claims (including ET claim 10).

48. However, after closing submissions, the Claimant applied to amend his claim, to extend the time window, so as, in substance, to embrace the failure to take any step after the DPS had been notified that ET claim 10 had been struck out. That application was opposed, but allowed.

49. Thus, the Tribunal had ultimately to decide whether there was victimisation by the DPS failing to take any steps to investigate the conduct referred by the IPCC: (a) upon initial referral in June 2016, at which time ET claim 10 was ongoing; and/or (b) after the DPS had learned, in August 2016, that ET claim 10 had been struck out.

50. After tracing briefly, the background of the claim before it, the Tribunal discussed how the amendment came about. The Claimant had indicated that he had not appreciated, until Ms Brownrigg gave live evidence at the hearing itself, that "the Respondent was contending that it had not been appropriate to assess his claim pending the conclusion of the Employment Tribunal proceedings." The Tribunal agreed that that specific case had not been identified in the Grounds of Resistance or at previous Preliminary Hearings.

51. As to Ms Brownrigg's written and oral evidence the Tribunal said:

> **13. The Claimant states that it was not dealt with in the witness statement of Miss Brownrigg. He referred to paragraph 21 in which Miss Brownrigg stated about having referred the matter to the Respondent's ET unit:**
>
> > **"What I had in mind when writing to them was clarifying whether the document which had been sent to the IPCC was the same as the Claim Form. Had they come back to me and told me that it was (which is what I have now been told), then I would not have recorded it as a separate Conduct matter. I would have told Mr Atherton that it duplicated the Tribunal Claim and that we were not recording anything at that time. It is my understanding that the organisation considers court or Tribunal**

> **Judgments and if there were a finding of Misconduct, this would be referred to the DPS at that stage through the DPS mailbox."**
>
> **14. In her statement, Miss Brownrigg focused on the fact that the matter slipped off her radar but did make it clear that her understanding was that any assessment of matters duplicating the ET1 would await the outcome of Employment Tribunal proceedings. That is consistent with her email of 7 June 2016 when she referred to her understanding that correspondence the IPCC was referring to related to Employment Tribunal proceedings and that "At this time we will not be referring It to the IPCC."**
>
> **15. However, we accept that it was not until the Employment Tribunal hearing that Miss Brownrigg's position was made explicit in that she was not expecting any further action as there were ongoing Employment Tribunal proceedings."**

52. Applying **Selkent Bus Co Ltd v Moore** [1996] ICR 836 principles the Tribunal considered that the balance of justice and injustice to each side favoured allowing the amendment. The position could have been avoided, had the Respondent been clear about its case from the outset; and Ms Brownrigg had, in fact, given evidence about the reasons for her inaction after 27 August 2016, and been questioned about it before them.

53. In the course of setting out its basic findings of fact, the Tribunal also recorded some evaluative conclusions. Of Ms Brownrigg's email of 7 June 2016, it said (paragraph 29):

> **"29. We accept that in this email Miss Brownrigg was stating that the issues raised in Claim 10 would not be referred to the IPCC at that time. That was because there was an ongoing Employment Tribunal complaint about the matter and her understanding was that consideration would not be given to any potential misconduct issues until the Employment Tribunal proceedings were completed."**

54. Of Mr Longhurst's email of 9 June 2016 it said (paragraph 34):

> **"34. This response was consistent with Miss Brownrigg understanding that the matter would not be assessed for possible misconduct issues in relation to matters that were before the Employment Tribunal. However, if there were matters other than those before the Employment Tribunal they would be assessed in the usual way. Strictly speaking such assessment would not be a severity assessment, which is a process used where complaints are made by members of the public. However, where a complaint was made by a serving Police Officer it could be assessed to determine whether it raised any allegations of misconduct etc."**

55. After referring Ms Brownrigg's actions on 5 July 2016, the Tribunal observed (paragraph 38):

> **"38. There was no reason for her to expect any further action at the time as it was now clear that the document was the ET1 from Claim 10 consideration of which would await the outcome of the Employment Tribunal proceedings in the normal way."**

56. After referring to the email of 27 August 2016 informing Ms Brownrigg that ET claim 10 had been struck out, the Tribunal continued (paragraphs 41 and 42):

> **"41. Miss Brownrigg stated that she did not think any further of the matter and that the fact that there had been previous correspondence from the IPCC enclosing the ET1 "slipped off her radar". She stated that she was having a difficult time because of the death of her father and that there was a particularly heavy caseload because of the summer holiday period. She was dealing with more than a hundred cases at that time. She had not set herself any electronic reminders.**
>
> **42. Miss Brownrigg was asked why no assessment had been made of the Claimant's allegations once claim 10 had been struck out. She stated that if she had thought about it, which she did not as the matter had slipped off her radar, while it would not have been appropriate for her to carry out an assessment as she was one of the people against whom the Claimant was complaining, she would have passed the matter to a colleague for consideration. As this matter was not previously pleaded Miss Brownrigg had to deal with the matter on the hoof and had very limited opportunity to consider her position. The questioning was put on the assumption that the strike out had brought proceedings completely to end. However, as Mr De Silva pointed out in resisting the application to amend, that was erroneous. The Claimant subsequently appealed the making of the deposit order and the strike out to the Employment Appeal Tribunal."**

57. In the next section, the Tribunal set out the law, referring to the relevant provisions of the **2010 Act**, and various authorities, including extensive citation from **Derbyshire**, **Khan** and **Bullimore**. Neither counsel before me suggested there was anything wrong with the Tayler Tribunal's summary of the law. Indeed, there was not.

58. The concluding paragraphs of the Tribunal's decision were then as follows.

> **"57. The first question is that of why the Claim Form in Claim 10 was not assessed by the Respondent to determine whether it might raise issues of misconduct when it was sent to them by the IPCC in June 2016. We consider that the evidence is clear; even though Miss Brownrigg did not give a great deal of thought to the matter at the time. The Respondent's approach in a case of this nature was to await the outcome of the Employment Tribunal proceedings before considering whether a potential case of misconduct on the part of staff or officers had been made out. We do not see anything surprising in that. It was the Claimant who had chosen to bring a complaint before the Employment Tribunal that his allegations of 19 October 2015 had not been subject to a severity assessment. He had chosen the Employment Tribunal as the venue in which he wished to have that allegation tested. When he ticked the box to state that he wished the matter to be referred to a regulator he introduced a level of circularity in that the Claim Form was sent back to the Department about which he was complaining. His logic is that Miss Brownrigg should have undertaken a severity assessment of the allegation that she had failed to conduct a severity assessment of the original complaint of 19 October 2015.**

58. We consider that the analysis in St Helens is helpful. An assessment of the Claim Form was not undertaken as there was a claim, which included allegations of victimisation, before the Employment Tribunal. In that sense, a causal connection is made between Claim 10 and the decision not to assess it when it was referred by the IPCC. This was because of the ongoing Employment Tribunal proceedings. We consider the real issue is whether that can reasonably be seen to be detrimental. We do not consider it can. It was the Claimant's choice to bring the matter to the Employment Tribunal for judicial consideration and we do not see how he can reasonably have felt at a disadvantage by the Respondent's approach that any consideration of whether any member of staff or officer was guilty of misconduct should await the judicial determination of the Employment Tribunal.

59. In respect of the period after the Claim 10 had been struck out we are fully persuaded by Miss Brownrigg's evidence that the matter had slipped off her radar and she did not think about it any further. We accept that while she had been unhappy to be subject of Employment Tribunal proceedings once she had been informed that they had been struck out she did not think about the correspondence with the IPCC further. As the Complaints Support Team does not deal with ET claims she did not record it on Tribune, the Respondent's computer system that could have been used to set reminders. Miss Brownrigg had never previously dealt with an ET Claim where the Claimant had ticked the box requesting that the Tribunal Service send the Claim to the IPCC. Miss Brownrigg was going through what she described in evidence as "an emotional time". Her father had passed away on 14 June 2016. Miss Brownrigg had a very busy caseload, dealing with on average 100 matters at one time. Summer was a particularly busy time. Miss Brownrigg was not chased by the IPCC after reverting to them on 5 July 2016. It is not surprising that seeing that the claim had been struck out by the Employment Tribunal she assumed the matter was at an end.

60. In any event, questioning to Miss Brownrigg on this matter was based on a misconception that the strike out meant that the proceedings were at end, whereas the Claimant subsequently appealed the making of the deposit order and the strike out decision the basis that had paid the deposit late. There is no reason to believe that the Respondent would not have continued with the same approach, that any consideration of misconduct proceedings should await conclusion of the tribunal proceedings, so that consideration of the matter would await the passing of the time limit of an appeal and, once the appeal had been instituted, the conclusion of the appeal. Miss Brownrigg failing to consider the matter further on hearing of the strike out has not subjected the Claimant to any detriment as even if she had thought about it and referred to claim to someone else for consideration there is no reason to believe any further steps would have been taken pending any possible appeal and, once one was instituted, its determination. Further, there is no reason to believe any consideration would have resulted in any further action in circumstances in which the Employment Tribunal made a deposit order on the basis that the claim had little reasonable prospect of success and the Claimant had failed to pay the deposit order on time resulting in it being struck out."

The Tayler Tribunal's Reconsideration Decision

59. By a letter of 21 September 2017, the Claimant sought a reconsideration of the Tayler Tribunal's first decision. He sought to rely on a letter to him from another member of the DPS-CST team, DS Murphy, of 14 September 2017, as new evidence meeting **Ladd v Marshall** [1954] WLR 1489 criteria. It related to a fresh document which he had tabled to the IPCC, containing serious allegations of criminal and other misconduct, and which the IPCC had in turn referred to the DPS-CST.

60. I will return to DS Murphy's letter in more detail later, as it was the subject of the claim which led to the appeal from the decision of the Jones Tribunal. At this point it suffices to note that the letter declined to record the document as a complaint, or take any further action in relation to it. The Claimant relied, in his reconsideration application, on the fact that the letter made no mention of any policy of postponing assessment of a complaint while the same matter was the subject of outstanding ET proceedings, and informed the Claimant that he had the right to appeal the decision which it conveyed. He submitted that the contents of this letter therefore undermined the case, that he said had been accepted in the original decision, that there was a *policy* of not investigating complaints which were the subject of overlapping ET proceedings, until those proceedings were over.

61. The Tribunal accepted that the fact that DS Murphy's letter did not refer to a policy "could be relevant." However, it declined to reopen its previous decision. The heart of its reasoning is at paragraphs 13 and 14:

> **"13. We consider, irrespective of the arguments that should have been raised at the hearing, the key point is that the Claimant has adopted a literalist approach to our Judgment. In the application for review he refers to the "No Severity Assessment Policy" as if the tribunal was suggesting that there was an inflexible policy, that should be reduced to writing somewhere, in accordance with which the Respondent at always did not assess complaints while there were outstanding tribunal proceedings. That oversimplifies our Judgment. We referred to this being the understanding of Miss Brownrigg. We referred to it being the approach of the Respondent in a case of this nature. The key factual finding is that, despite it being raised late in the day, we were fully satisfied that Miss Brownrigg did not take further action on the referral back because it was a copy of the Claim Form that was already before the Employment Tribunal. We do not consider there is any reason for a reconsideration of that core factual finding. It matters relatively little whether that decision was made as part of some broader approach or on an individual basis. The real question was why she acted as she did. Even if she misunderstood the general approach we were entirely persuaded that her genuine understanding was that the matter would not be progresse[d] while the Tribunal claim was outstanding was the reason she took no action.**
>
> **14. It is important to note that the circumstances were very unusual. The Claimant ticked the box in the claim form in Claim 10 asking that the matter to be referred to a regulatory body with the consequence that it was referred back to the very organisation that was the subject of the Employment Tribunal complaint. There was nothing of substance to be gained by the Respondent taking any further steps until the tribunal had made its decision. As set out in the Liability Judgment we do not consider the Claimant was subject to a detriment. A genuine decision was taken that the matter should not be pursued in light of the tribunal proceedings. In all the circumstances we do not consider that the interests of justice require reconsideration. The new evidence, and further analysis of evidence available at the time of hearing, does not support a proper basis for finding that the Claimant was subject to**

victimisation by the Respondent. The application for review is refused in that the Liability Judgment is confirmed."

The Tayler Tribunal's Decisions – The Grounds of Appeal

62. The Grounds of Appeal in relation to the Tayler Tribunal's decisions distinguish between the periods before and after 27 August 2016. They thus distinguish between the Tribunal's evaluation of the DPS-CST's initial handling of the IPCC referral, in circumstances when it was known that ET claim 10 was live and ongoing, and its evaluation of the failure to take any further action, after Ms Brownrigg had learned that that claim had come to an end.

63. The Grounds of Appeal can be summarized are as follows.

64. First, that the Tribunal erred, in respect of its decision that the Claimant did not suffer a detriment in the *first* period: (a) by failing, in its liability decision, to consider whether it was reasonable to view the Respondent's (claimed) approach, of staying consideration of a referral until the conclusion of related ET proceedings, as detrimental, given that the two processes served different purposes, and that the ET outcome would not be binding on the Respondent; and (b) in its reconsideration decision, by not properly engaging with the impact which the absence of a *general* policy or practice of taking that approach, might have on whether the failure to progress the Claimant's allegations was reasonably viewed as a detriment.

65. Secondly, that the Tribunal erred in deciding that the Claimant did not suffer a detriment in the *second* period: (a) by failing to address in the liability decision whether the ongoing failure to progress his allegations was a detriment because of a protected act; and (b) by holding, in the reconsideration decision, that the absence of evidence that the eventual outcome would have been any different meant that there was no detriment.

66. Thirdly, given how the litigation, and Ms Brownrigg's evidence, unfolded, that the Tribunal failed to adequately explain or support why it accepted in its Liability Judgment that she had acted on a practice or policy (of staying any action pending the outcome of a related ET claim) in her handling of the matter in the first period.

67. Fourthly, in its Reconsideration Judgment the Tribunal failed to consider whether the new evidence undermined the credibility of the Respondent's case that Ms Brownrigg had believed there was such a general policy or practice.

Tayler Tribunal Appeals - The Arguments, Discussion and Conclusions

68. It is convenient to consider first Grounds 3 and 4, since they attack the Tribunal's foundational factual findings as to why Ms Brownrigg acted as she did.

Ground 3

69. Mr Jones submitted that the Tribunal, in its liability decision, failed to explain sufficiently its reasoning, as to why it accepted that Ms Brownrigg had acted on the Respondent's approach to cases of this sort being to await the outcome of the ET proceedings. This was, he suggested, despite the fact that this approach had no obvious rationale, and that this had not been the Respondent's case, or Ms Brownrigg's evidence, prior to the hearing itself. In relation to this crucial issue the Tribunal needed to explain *why* it accepted this evidence. The decision was, in this respect, not **Meek** compliant (referring to the guidance in **Meek v The City of Birmingham District Council** [1987] IRLR 250 (CA)).

70. Mr De Silva submitted that it was not right that the Tribunal had found that Ms Brownrigg had shifted position, only that her position had been made more "explicit" at the

hearing. What she said in evidence at the hearing was consistent with what was in her witness statement. Further, the Tribunal's remarks about the lack of clarity or explicit stating of the Respondent's position prior to the hearing, were made in the context of the amendment application. There was no suggestion that the Tribunal had concerns about Ms Brownrigg's credibility as a witness. The Tribunal's reasoning was also sufficiently clear.

71. My conclusions on this ground are as follows.

72. I had in my bundle a copy of Ms Brownrigg's witness statement that was before the Tayler Tribunal. In it she explained the work of the CST, and that this did not include dealing with ET claims, and stated that she was not aware, before dealing with this matter, that the IPCC might receive ET claims. She also stated that she was aware at the time that the Claimant had made previous ET claims.

73. She said, of her email of 5 July 2016 to Mr Longhurst and the solicitors

> **"26. What I had in mind when writing to them was clarifying whether the document which had been sent to the IPCC was the same as the Claim Form. Had they come back to me and told me that it was (which is what I have now been told), then I would not have recorded it as a separate conduct matter. I would have told Mr Atherton that it duplicated the Tribunal claim and that we were not recording anything at that time. It is my understanding that the organisation considers court or tribunal judgments and if there were a finding of misconduct, this would be referred to the DPS at that stage through the DPS Mailbox.**
>
> **27. In any event, I did not hear back from them and I did not follow this up. The matter then slipped off my radar and I did not update Mr Atherton following this (and he did not follow it up with me). Summer is a busy time for staff working over the holidays as there are a number of abstractions due to annual leave and I recall it being very busy at this time.**
>
> **28. On 27 August 2016, I received an email from Weightmans confirming that the claim had been struck out (p88).**
>
> …."

74. As I have recorded the Tribunal observed (paragraph 14) that Ms Brownrigg's statement "did make it clear that her understanding was that any assessment of matters duplicating the

ET1 would await the outcome of Employment Tribunal proceedings. That is consistent with her email of 7 June 2016" in which, as the Tribunal noted, she stated: "[a]t this time we will not be referring it to the IPCC."

75. That, it seems to me, was an entirely fair observation about that evidence. It is right that the Grounds of Resistance (which I have seen) did not properly set out the Respondent's case on this point; but, contrary to Mr Jones' submission, *Ms Brownrigg's* position did not change between her written and oral evidence, as described by the Tribunal. She was consistent in saying that this was her understanding. The Tribunal was also entitled to rely on her initial email (including the phrase "at this time") as supportive of its conclusion.

76. The Tribunal repeated the foregoing finding about the understanding which informed Ms Brownrigg's 7 June 2016 email at paragraph 29, and it also accepted her evidence, that, had the stage been reached of an assessment being required, because she herself was one of those accused in the previous matter, she would not herself have carried that out.

77. The Tribunal also fairly observed that Mr Longhurst's 9 June 2016 email was consistent with what Ms Brownrigg said was her understanding. Mr Jones fairly submitted to me that it did not positively support it – he did not say that if there was duplication, the IPCC/DPS processes should *not* be followed pending the ET outcome, and it would not have been his role to do so. But, the Tribunal did not find any more than that it was consistent: effectively, that it did not give her any cause to think that her understanding might be wrong.

78. The Tribunal went on to make the findings that it did in paragraph 57, which I have already set out. It seems to me that, on a fair reading of this paragraph, the Tribunal is

conveying a number of conclusions. First, in saying that "the evidence is clear; even though Ms Brownrigg did not give a great deal of thought to the matter at the time" it is saying (again) that it accepted her clear evidence about her understanding as true. In referring to the Respondent's approach and saying that it does not "see anything surprising in that", the Tribunal is further explaining why it found it entirely credible that this was Ms Brownrigg's evidence – because it would not be surprising if this was indeed the approach. The remainder of the paragraph then seeks to make that observation good, in particular in the Tribunal's reference to what it describes as the element of circularity, a feature to which I will return.

79. Mr Jones argued that there was insufficient foundation for the Tribunal's findings, having regard to the lack of prior pleading of the Respondent's case to this effect; and the way the full picture had only emerged in Ms Brownrigg's evidence at the hearing, and the lack of evidence from her about where she got her understanding from. However, in light of its discussion of the amendment application, the Tribunal was plainly very alive to the fact that this case had not been articulated in the original Grounds of Resistance. But, it being the case that this *was* Ms Brownrigg's evidence, its task was to assess and make findings of fact, on the evidence. As I have said, I do not think the Tribunal should have found that her evidence materially *changed* from written statement to live evidence. In saying that it became more explicit, the Tribunal may have been erring on the side of generosity to the Claimant in the context of his amendment application.[1] But, in any event, the Tribunal read, and importantly, heard, Ms Brownrigg's evidence, it considered how it fitted, or not, with the evidence of the email trails, and it evaluated its inherent plausibility. It made firm findings of fact, which it was

[1] While Mr De Silva argued that, because this explanation had not been originally pleaded, it should have been viewed with much greater scepticism by the Tribunal, it was not any part of his case that, for that reason, it should not have been considered at all. The Tribunal plainly considered that the Respondent was at fault in not having pleaded its case properly, but also that it was fair to both sides, and manageable, both to consider Ms Brownrigg's explanation and to allow the Claimant's amendment, which was seen as being consequential upon it.

entitled to make on the evidential material before it, and explained them. Its findings were proper, and **Meek** compliant, and there is no basis for me to interfere. Ground 3 therefore fails.

Ground 4

80. Mr Jones submitted that the evidence of DS Murphy's letter did arguably undermine the case that the Respondent had a general approach, where there were overlapping ET proceedings, of postponing the conduct of a severity assessment until those proceedings were over. It was not a sufficient answer to say that the key question was why Ms Brownrigg acted as she did, even if she misunderstood the general approach. If there was no general approach, that had implications for her credibility. The Tribunal had a duty to engage with this. See: **SQR Security Solutions Limited v Badu**, UKEAT/0329/15/DA.

81. Mr De Silva submitted that the Tribunal had properly and fully considered, in paragraph 13, the potential probity of the DS Murphy letter, and reached a proper reasoned conclusion about it. There was no basis for the EAT to interfere.

82. My conclusions on this ground are as follows.

83. First, Mr De Silva is right that the Tribunal did not consider that there had, at the Liability Hearing, been a shift between what Ms Brownrigg said in her written and her oral evidence, which put a question mark over her credibility. But Mr Jones is plainly right that there was a *general* issue as to her credibility, as the Tribunal plainly had to decide whether it accepted her account of why she acted as she did, as true, or not.

84. It is also right to say that the understanding which the Tribunal, in its liability decision, accepted that Ms Brownrigg had, was about the general approach that was taken in cases of this nature. But in its reconsideration decision it specifically engaged with the possibility that the DS Murphy letter could be argued to be evidence that there was no such general approach. It correctly observed that it had not found previously that there was an inflexible or written policy. It also did specifically engage with whether this affected what it described as its core factual finding. It did, in my view, therefore, engage with the potential implications of the letter for Ms Brownrigg's credibility; and it stated, in terms that, even if she had misunderstood the general approach, it was "entirely persuaded" about her understanding.

85. Bearing in mind that it had never been the Respondent's case (or Ms Brownrigg's evidence) that there was a written policy or procedure, and that the evidence on which the Claimant sought to rely was the *absence* of the reference to such a policy, in a letter relating to an IPCC referral that had not been triggered by an ET claim, and that it was this same Tribunal who had seen Ms Brownrigg give evidence, I cannot see any basis on which its conclusion that this letter did not undermine its prior findings and conclusions, can be properly faulted.

86. Ground 4 therefore fails.

87. I can now turn to consider grounds 1 and 2.

Ground 1(a)

88. This ground argued that the Tribunal had erred in relation to the question of whether the Claimant reasonably considered the postponement of the severity assessment of his allegations, until the conclusion of ET claim 10, to be detrimental.

89. Mr Jones accepted, as he must, that determination of the existence of detriment was dependent on whether the Claimant's view was, objectively, reasonably held. But he argued that the Tribunal did not, as it should have (here citing Lord Neuberger in **Derbyshire** at 66), properly consider that objective question from his perspective. He submitted that it should have concluded that, from his point of view, this *was* reasonably viewed as a detriment, given the different purposes of the two processes and that the ET outcome would not necessarily be determinative of the outcome of the other process.

90. Further, submitted Mr Jones, the Tribunal wrongly portrayed the matter as one in which the Claimant had chosen to seek adjudication by the ET, but then chosen to introduce an element of circularity by ticking the box to cause a referral to the IPCC to be made as well. That *assumed* that the premise of the Respondent's approach was justified, which was the thing to be decided. The Claimant was entitled to pursue both processes, and to expect each to be progressed. In the language of **Deer**, he had a "legitimate sense of injustice" because he was treated less favourably in the way that the procedures were applied to his allegations.

91. Mr Jones acknowledged, in the course of oral argument, that, in this particular case, the conduct at issue in ET claim 10, and the conduct referred to the CST for severity assessment were precisely the same. He acknowledged that, in a case of that sort, there *might* be good reasons for, as it were, staying the internal complaint until the ET complaint had been determined, such that it could not reasonably be viewed as detrimental treatment to do so. But, he said, it could not be said to be axiomatic and obvious that it *would* be reasonable to do that in every such case. The issue was sensitive to the more particular facts of the case. While the Tribunal asserted that the Respondent's approach was not surprising, and that the Claimant could not reasonably have considered that this put him at a disadvantage, it did not explain why.

92. Mr De Silva relied on the facts that the conduct at issue in the two processes was identical, and that the trigger for both processes was the Claimant's presentation of ET claim 10. He also said it was wrong to suggest that the Respondent had put the Claimant to an election between the two processes. It had merely decided that the ET process, which the Claimant had instigated, should be allowed to run first. All of these features, said Mr De Silva, meant that the Tribunal had reached a sufficiently-reasoned, and proper, decision, that putting off the severity assessment until the ET claim had run its course could not reasonably be viewed by the Claimant as a detriment.

93. In oral argument, Mr De Silva also suggested that it was significant that the Claimant (who knew that his claim form in ET claim 10 had been sent by the ET to the IPCC, and by them to the CST) had not himself chased the CST (prior to presenting ET claim 11), nor had the IPCC chased it after the 5 July 2016 exchanges. Mr Jones responded that that had not been argued before the ET, and also made a number of other points, on instructions, and submissions to the effect that this was irrelevant to the question at hand. I have not had regard to the question of failure to chase, both because it was not argued below, and because I do not think it bears on whether the impugned decision can reasonably be considered a detriment.

94. My conclusions on ground 1(a) are as follows.

95. I start by noting that the facility to request the ET to pass a copy of the claim form in a protected disclosure case to any relevant regulator is, indeed, just a facility. It is just a route by which an individual who believes his concerns merit the attention of a regulator, can seek to have them brought to the regulator's attention. But the two substantive processes are entirely

separate; and such an individual could equally well choose, instead, simply to contact the regulator direct, whether before, at the same time as, or after presenting their ET claim.

96. In most cases the focusses of the Tribunal's attention, and of the regulator's interest, are also likely to be different. The regulator's interest is likely to be focussed on the underlying subject-matter of the alleged disclosure, not how the individual has allegedly been treated by their employer for raising it. The Tribunal is concerned with the conduct of the employer. It may also have to consider whether the elements of the definition of a protected disclosure are fulfilled, but that would not require it to determine, as such, the truth of the matters it raised.

97. However, in this case, as both counsel agreed before me, both the Tribunal and the regulator were concerned with the *very same* alleged conduct. This was not only because the subject matter of the complaint to both the Tribunal and the regulator was the conduct of the employer. More particularly, it was because the focus for both the regulator and the Tribunal in relation to ET claim 10, was the conduct which was impugned by ET claim 10 *as amounting to detrimental treatment*. A further singular feature, in this case, was that the IPCC procedures were such that its first port of call on receipt of a complaint was to turn to the subject of the complaint to make the initial assessment of it, which may also potentially have led to the Respondent pursuing its own internal investigation of it.

98. Putting all these singular features together, the net effect was, the Tayler Tribunal correctly concluded, that the Respondent was being asked to assess, and possibly investigate in detail, complaints about the very same conduct in respect of which it was simultaneously contesting the very same complaints in the ET.

99. Further, as Mr Jones accepted in argument, while **Deer** establishes that a failure to follow the usual procedure may, in and of itself, amount to a detriment, that does not preclude the need still to apply what I may call the **Derbyshire** guidance, in a case where, as here, it has found (and this finding was not challenged on appeal, as such) that the conduct (in the first period, to which this ground relates) was a reaction to the existence of ongoing litigation.

100. I agree with Mr Jones that it should not be *assumed*, from the fact alone that the ET claim and what I am calling the internal complaint both related to exactly the same conduct, that it is therefore axiomatic that it could not reasonably be viewed as a detriment for the employer to stay the former until the outcome of the latter. But, after careful consideration, I do not agree with him that the Tribunal's decision was based on nothing more than that fact.

101. In particular, there was a further feature of this case, which the Tribunal plainly regarded as significant, over and above the element of the conduct at issue in the two processes being identical. This was that there was also a feature of what the Tribunal called circularity, and I would call recursiveness, to this particular complaint. That is, the Claimant had complained about certain alleged conduct, *then* he had complained about the failure to carry out a severity assessment of that complaint, and *now* he was complaining about the failure to carry out a severity assessment of the decision not to carry out a severity assessment. Nor was the Respondent's role merely confined to conducting a limited sift on behalf of the IPCC, after which it would have no further involvement. If the allegations passed the threshold of raising recordable conduct issues, then a possible outcome was that they would then be referred for detailed investigation by another department of the Respondent itself.

102. That the Tribunal plainly had this recursive feature of this particular set of circumstances in mind, *as well* as the fact that the allegations covered identical territory to ET claim 10, can be seen from its use of the word "circular", followed by its observation about the logic of the Claimant's position in the last sentence of paragraph 57. What the Tribunal said there was not precisely right: Ms Brownrigg had acknowledged that, as and when there was a severity assessment, it would not be appropriate for *her* to conduct it. Instead it would be referred elsewhere within the Respondent. But the broader point about the recursive nature of the complaint was well made; and it was a point which the Tribunal was entitled to take into account as significant to whether the decision to stay the internal process was a reasonable response to the context of the ongoing ET litigation.

103. I have considered carefully what to make of the passages in which the Tribunal referred to the Claimant having "chosen" to bring a complaint in the Tribunal and having chosen that as the venue in which he wanted the allegation tested, which were, potentially, troubling. But the Tribunal did not, merely because the Claimant had presented an ET claim covering the same ground, assume from that fact alone that it was reasonable to stay the internal process. These remarks were by way of a lead in to its identification also of the underlying recursive nature of the complaint, and the implications of that, which plainly informed the conclusion which it then came to in paragraph 58. These remarks do not, I conclude, vitiate or belie its core reasoning.

104. In summary, what the Tribunal had to decide was whether the Claimant could reasonably view as detrimental, the decision to put off the severity assessment until the outcome of the ET proceedings in the circumstances of this particular case. I conclude that the Tribunal did not merely rely upon the identity of the allegations made in the two processes, but identified other features, on which it was entitled to rely in reaching that judgment. Its decision

was not, therefore, insufficiently reasoned. Nor do I consider that it failed to apply the objective limb of the test taking account of his perspective. It plainly did look at whether "he can reasonably have felt at a disadvantage". Whether, objectively, he reasonably could, was a matter for the Tribunal's appreciation in all the circumstances of the case. I do not think it reached an inadequately reasoned or impermissible conclusion on that question.

105. Accordingly ground 1(a) fails.

Ground 1(b)

106. This ground asserts that the Tribunal erred in failing to consider, in its reconsideration decision, whether, if Ms Brownrigg's understanding that there was a general practice was in fact mistaken, that difference might affect whether the Claimant reasonably regarded her decision as a detriment. This is a different point from that raised in ground 4.

107. The nub of Mr Jones' argument, as expressed in his written skeleton, was that whether the Claimant was or was not in fact being treated differently from others in the same category, was highly relevant to whether it was reasonable for him to regard it as detrimental. Mr De Silva simply disagreed.

108. Mr Jones' argument seems attractive at first. However, on examination it faces the following difficulty. While the test of detriment is complainant focussed, it nevertheless has a crucial objective component; and in a case where what I have called the **Derbyshire** guidance falls to be applied (which, it was not contested on appeal, the Tribunal rightly found this was) that requires some consideration (as a touchstone of that component) of whether the employer has acted honestly and reasonably in the context of the litigation. Further, the reasonable

person standing in the Claimant's shoes would need to have regard to *all* the particular relevant circumstances of that very case.

109. That being so, in my judgment, the Tribunal's conclusion that, having regard to all the features of this case, including the duplicative and recursive nature of the complaints, staying consideration of these allegations until the conclusion of ET claim 10 was a reasonable thing to do, holds good, whether or not there was a background general policy of staying consideration of allegations that overlapped with ET claims. That is because it does so, in any event, on the particular facts of this case.

110. Accordingly, I do not think the Tribunal erred, in its reconsideration decision, in concluding that, even if Ms Brownrigg's understanding was mistaken, that did not affect its original conclusion that the staying of this process, in all the particular unusual circumstances of this case, was not reasonably viewed as a detriment.

111. Ground 1(b) therefore fails.

Ground 2(a)

112. In relation to ground 2(a) Mr Jones argued that it was not sufficient to dispose of the claim relating to the second period, that the Tribunal had accepted that the reason why Ms Brownrigg did nothing more after she was told that ET claim 10 had ended, was because the matter of the IPCC referral had slipped off her radar. That, he said, was because the Tribunal failed to consider, as section 27 required it to do, whether the Claimant had been *subjected to a detriment*, because he done a protected act.

113. Had the Tribunal done so, he argued, it should have concluded that, even if (contrary to Mr Jones' case) the Tribunal properly found that it was not a detriment to stay the allegations *pending* the outcome of ET claim 10, it was certainly reasonable for the Claimant to have expected his complaint to be progressed once ET claim 10 had been dismissed. So, the Tribunal should have found that not to do so at that point was a detriment.

114. Further, argued Mr Jones, the Respondent's failure to assess the allegations in the first period was the reason why the matter needed to be, but was not, progressed in the second period. The latter delay was a continuation of the former. The institution and continuation of the second claim was therefore an effective and substantial cause of the failure to progress the matter in the second period. In oral submissions, he added that Ms Brownrigg's mental processes in the two periods could not be separated out. They formed a continuum.

115. Mr De Silva submitted that the Tribunal's finding of fact that Ms Brownrigg took no action because the matter had slipped off her radar disposed of this complaint. This was not conduct because of the prior protected acts, which, at best for the Claimant, were background, or but-for causes, not effective causes of the failure to take action at this point.

116. I agree with Mr De Silva. The Tribunal had evidence from Ms Brownrigg about the very high-volume case-load and the impact on her during this period of a distressing family matter. It also had evidence that there was no system in place that would automatically remind her about this matter. It did not make any finding about any reply from the solicitors to her 5 July 2016 letter, or that anything else occurred to proactively remind her about the IPCC referral in this case. It was fully entitled to accept that, by the time she was told that ET claim 10 was over, she had forgotten about it, and did not remember it then.

117. It is well-established that but-for causation is not sufficient to establish that treatment was because of a protected act. In this case the Tribunal's finding was not that, after hearing that ET claim 10 had ended, Ms Brownrigg took a decision nevertheless to do nothing more about the IPCC complaint, still less that such a decision was influenced by the protected acts. Rather, there was no decision at all, and no consideration given to the question by her, because she had forgotten; nor could the process of forgetting itself be said somehow to have been because of the protected act. Rather, it was found to be because of her high workload, the passage of time, and other personal factors affecting her around this time.

118. Accordingly, the Tribunal's factual conclusion meant that this conduct was not because of the protected act, so detriment did not fall to be considered, and this complaint was therefore properly found to have failed.

119. Ground 2(a) therefore fails.

Ground 2(b)

120. This ground asserts that the Tribunal erred in law in paragraph 60 of the liability decision. Specifically, this relates to its finding that there was, in any event, no detriment to the Claimant by the inaction in the second period, as, given that the claim had been struck out, there was no reason to believe that, had Ms Brownrigg thought about the IPCC reference and at that point referred it to a colleague, this would have resulted in any action being taken.

121. Mr Jones submitted that the Tribunal erred here for two reasons. Firstly, it had relied on what amounted to a "no difference" principle. But, as **Deer** establishes, a procedural failure may, in and of itself, be reasonably viewed as a detriment, though it would have made no

difference to the outcome. Further, and, in any event, the "no difference" conclusion reached by the Tribunal was not supported by the evidence. In particular, the claim in ET claim 10 had foundered because the Claimant had not paid the deposit on time. It had not been dismissed on its merits, or as having no reasonable prospect of success.

122. Mr De Silva was brief. He submitted that the Tribunal had correctly noted, in the first part of paragraph 60, that ET claim 10 was not entirely over at that point, as the Claimant had appealed the making of the deposit order; and it had been entitled to take a view that the Respondent would likely have continued with the stay until the appeal was concluded. More broadly he noted that the whole of paragraph 60 opened with the words "[i]n any event", indicating that it was a separate, and alternative basis for the Tribunal's conclusions, not an essential part of its reasoning.

123. My conclusion on this ground is as follows.

124. First, the focus of the challenge was, indeed, not on that part of this long paragraph which concerned the possible implications of the Claimant having sought to appeal the deposit order, but on the second part in which what is fairly described as a "no difference" principle *was* articulated. It appears that, on this point, **Deer** was not cited to the Tribunal; and it does seem to me that, not having the benefit of that guidance, the Tribunal did, at this point, fall into the same error as the ET in **Deer** did, in relation to the complaints in that case about process. The Tribunal did also, in my judgment, go further than the evidence took it, in holding that there was no reason to believe that further consideration of the allegations would have led to any different outcome, given that the claims had been neither dismissed on their merits, nor adjudicated as having no (as opposed to little) reasonable prospect of success.

125. However, while ground 2(b) therefore, as such, succeeds, Mr De Silva was right that it relates to an alternative basis advanced by the Tribunal for its conclusion. As the rest of the Tribunal's decision stands alone, and all of the grounds of appeal relating to it have failed, the Claimant's success on this one ground alone is not enough for this appeal overall to succeed.

Tayler Tribunal Appeals – Outcome

126. Accordingly, the appeals in respect of the initial and reconsideration decisions of the Tayler Tribunal fail and must be dismissed.

The Jones Tribunal's Decision – Further Background

127. The Jones Tribunal's decision arose from the twelfth Employment Tribunal complaint presented by the Claimant against the Respondent. It came about in this way.

128. On 4 July 2017, the Claimant sent a report which he had compiled, called "The Complete Ridiculous" ("TCR"), to the IPCC. This followed earlier reports, dating from 2013, entitled "The Ridiculous" and "Covering up the Ridiculous", which had featured as part of the claimed protected disclosures in the sixth to ninth ET claims.

129. On 2 August 2017, the IPCC forwarded this document to the DPS-CST. It was considered by DS Sue Murphy. She wrote, on 14 September 2017, the letter to the Claimant to which I have already made some reference, but which I now need to consider in more detail.

130. After explaining her role, DS Murphy continued

> "…..
>
> **Whilst reviewing your complaint it became clear to me that it did not meet the requirements of a complaint under the Police Reform Act 2002. I referred it to my chief inspector, who has**

delegated authority from the Commissioner. They confirmed that your complaint did not need to be officially recorded. We will therefore not be taking it forward for investigation.

The reason I made this decision is because your complaint about the way that the MPS dealt with your reporting of wrongdoing … does not fall within the remit of a complaint which has to be investigated under the Police Reform Act 2002. Section 29 … states that as a serving member of the MPS you cannot make a complaint about 'a person who at the time of the alleged conduct was under the direction and control of the same chief officer …".

With regards to your reporting of wrong doing from 2016, this matter was fully reviewed by Inspector O'Connell, DPS-CST for any misconduct and he sent you a 728 report outlining his review and findings on 11/1/2016. He informed you that most of your report highlighted issues which had previously been dealt with by various employment tribunals which you have taken the MPS to over several years. The additional points which you did raise were reviewed and it was decided that they did not meet the threshold to be investigated as any form of misconduct. It was also decided that your report did not meet the criteria for a referral to the IPCC.

The further report which was sent to the CST via the IPCC … on 2/08/2017 is again an amalgamation of your previous reports. Your various reports were reviewed and no misconduct was been found. It did not meet the requirement for a referral to the IPCC. I also understand from your recent email to this department on 7/9/2017, that at your recent employment tribunal against the MPS on 5/9/2017, the matters against the Met were all dismissed."

131. On 27 September 2017, the Claimant presented ET claim 12. He ticked the box to indicate that he was claiming race discrimination and also referred to "whistleblowing claim regarding breach of legal obligations and concealment of criminal offences" and to attached pleadings "of whistleblowing and victimisation claim." In the box concerned with the remedy sought he referred to "race victimisation and whistleblowing detriment."

132. The attached document began by giving accounts of four episodes in which individuals had died, and which should, he postulated, have led, in each case, to misconduct proceedings against him. In one case the Claimant had noticed that an intelligence report had gone missing, which had not been available to officers investigating the individual's murder. In another, a murder had been committed by a known offender who was at the time on police bail to the Claimant. In another, the Claimant had been the lead investigator of a fraud perpetrated by a carer on a disabled and vulnerable pensioner who had subsequently died. In the last case, the Claimant had identified that a person had mental health issues, but had not secured a mental

health assessment for him, and had him charged and detained. Subsequently, having been bailed by the Court pending trial, he took his own life.

133. The document went on to describe the contents of TCR, and the tabling of it to the IPCC and then its referral to the DPS-CST. Then, under a heading: "Detriment/Victimisation for Past ET Proceedings Against the Respondent" the particulars referred to DS Murphy's letter. They went on to assert that her assessment was wrong, to allege that she was seeking to hide evidence of criminal networks, and protect colleagues, and that she was aware that the Claimant himself should have been subject to misconduct investigations for a pattern of preventable deaths linked to him. It accused her of a corrupt and improper exercise of her duties.

134. The Grounds of Resistance gave the Respondent's side of the history, complained that the particulars of claim lacked various basic and essential particulars, and sought a Preliminary Hearing ("PH") to consider making strike out (on various bases) or alternatively deposit orders. That led to the PH before Judge Jones on 12 January 2018.

The Jones Tribunal's Decision

135. In its Reserved Judgment and Reasons, the Jones Tribunal struck out all the complaints as having no reasonable prospect of success and found them to be totally without merit.

136. The Judge observed that the complaints in the claim form were not clear, but from discussion at the hearing itself, concluded that they were of "detriment following the making of a protected public interest disclosure and of discrimination/victimisation on grounds of race." The protected act was previous ET claims of race discrimination. The Claimant also relied on the sending of TCR to the IPCC as a protected act and a protected disclosure. The Judge noted

that no decision was being made by her as to whether those matters did amount to protected acts or protected disclosures.

137. The Judge referred to the complaint that DS Murphy "subjected him to a detriment and victimised him on racial grounds when she wrote a letter to him dated 16 [*sic*] September 2017 in which she stated that she was not going to officially record his complaint which meant that it was not going to be taken forward for investigation." The Judge described his case that she was seeking to hide evidence of criminal activity in his report, and protect colleagues from being held accountable for mishandling previous protected disclosures; and noted that he alleged that he had been subjected to a detriment by *not* subjecting him to misconduct investigations in relation to what he suggested was a pattern of preventable deaths linked to him.

138. The Judge then set out the Respondent's case that DS Murphy had made a proper decision and that the Claimant's allegations were "wild, unfounded and entirely unsupported by evidence." She summarised DS Murphy's letter and then identified the basis of the Respondent's various applications.

139. The Judge noted that Mr De Silva had acknowledged that the power to strike out a claim under the **Tribunal's Rules of Procedure** on the grounds that it had no reasonable prospect of success "should only be exercised in rare circumstances" and that particular caution was required where the allegations were of discrimination. He had cited to her (and she set out in her decision) the guidance given in **Qdos Consulting Ltd v Swanson**, UKEAT/0495/11, **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 (CA) and **Ukegheson v London Borough of Haringey** [2015] ICR 1285 (EAT). I do not need to set out the recitations of that guidance, as there was, rightly, no criticism on appeal, of the Judge's self-direction on the

exercise of the strike out power, as such. She also considered the law in relation to the exercise of the power to order a deposit.

140. The Judge reviewed the main submissions on each side. This included, at paragraph 14, setting out the Claimant's case that "DS Murphy's decision not to accept his complaint as a formal complaint was done on the grounds of his race, his previous complaints and because he had made protected disclosures." The Claimant had not previously had contact with DS Murphy, but believed she had been influenced by, or was disposed to protect, colleagues in her team, he having complained about three out of 14 of them.

141. At paragraphs 19 – 40 the Judge then set out her substantive reasoning and decision. This section is somewhat discursive and unstructured, but it seems to me that the following strands underpinned her ultimate conclusion.

142. First, she found it highly likely that a Tribunal at a Full Hearing would conclude that TCR was mainly an amalgamation of previous reports he had prepared, together with new allegations relating to the deaths. But the proposition that there had been no investigations relating to his role in those matters was "…difficult to comprehend" and "[h]e was also unable to say why he thought that there might be a cloud over him or whether this was the appropriate way to address it." (Paragraph 22) The non-recording of allegations against himself "cannot be a detriment". Further, as the Judge was not referred to any report of crimes or misconduct towards him in TCR, it was "…not entirely clear" that not recording it was a detriment. Not getting what you want, even if to your disadvantage, "…could technically be seen as a detriment but it is a difficult argument to make." (Paragraph 37)

143. Secondly, she said this in paragraph 29:

> **"29. The Claimant agreed that as a serving member of the Metropolitan Police – the process of making a complaint to the DPS-CST was not open to him because of the provisions of the Police Reform Act 2002. He accepted that this was a process for members of the public. The Claimant accepted that that part of DS Murphy's decision was correct although he stated that she should have designated it as information rather than as a complaint and that would have circumvented the effect of the Police Reform Act. I was not shown or told about a process available to her to enable her to do that or that the DPS-CST have done so in relation to complaints made by police officers who have made complaints about officers under the direction or control of the same chief officer as them; in circumstances where they have not done a protected act, made a public interest disclosure or were of a different race to the Claimant."**

144. Thirdly, the Claimant "…made no allegations that DS Murphy knew of his race when she made her decision or that she knew of his earlier complaints." His suggestion that she knew of him came from the contents of her witness statement produced for that hearing; but he had not been aware of that when he issued his claim form. (Paragraph 30) He produced "no evidence that she was aware of his race, that she knew him, that she knew of his previous complaints."

145. Fourthly, DS Murphy had stated that she reviewed the allegations post 2016 and that no misconduct had been found. The Judge said: "I find that means that she personally reviewed those allegations. She only relied upon Inspector O'Connell's review of the allegations up to 2016." (Paragraph 33)

146. Finally, the Claimant had produced no other *prima facie* evidence tending to show that DS Murphy's letter did not give a true account of her reasons, or which might support an inference that she had been influenced by his race, protected acts, or protected disclosures. (Paragraph 35)

147. Putting it all together, the Judge concluded that, even taken at its highest, there was no reasonable prospect of the claim succeeding, and she struck it out. She also went on to conclude that it was "bound to fail" and was, in that sense, totally without merit.

Jones Tribunal Decision – The Grounds of Appeal

148. There were eight of these, although two of them are parasitic on the others. I can summarise them as follows.

149. Ground 1 was that the Tribunal erred in its understanding of the statutory framework of the **Police Reform Act 2002**. Having regard to the fact that the Claimant alleged in TCR that there had been criminal offences and conduct that would justify disciplinary proceedings, that was a potential conduct matter, and the fact that it was a police officer who had raised these matters against colleagues under the same chief officer was no barrier to taking them forward.

150. Ground 2 was that the Tribunal had erred in stating that there was no evidence that DS Murphy was aware of the Claimant's race or his previous complaints.

151. Ground 3 was that the Tribunal erred in failing to consider the significance of DS Murphy not contacting the Claimant within 28 days of receiving TCR from the IPCC.

152. Ground 4 was that the Tribunal erred in so far as it concluded that the Respondent was entitled to take no action on the footing that TCR contained no new allegations. The Respondent was required to deal with it in any event; and it *did* contain some new allegations.

153. Ground 5 drew on the first four grounds to argue that the Tribunal consequentially erred in concluding that the claims had no reasonable prospect of success.

154. Ground 6 attacked the Tribunal's finding that the Claimant had suffered no, or no arguable, detriment, in relation to the failure to record his complaint, given that it pertained to a series of deaths with which he said he had been associated, leaving him under a cloud.

155. Ground 7 argued that various passages showed that the Tribunal had misdirected itself in law as to the relevant legal tests to apply to the underlying substantive claims.

156. Ground 8 drew on all the others to argue that the Tribunal's finding that the claim was totally without merit could not stand.

Jones Tribunal Grounds of Appeal – Arguments, Discussion and Conclusions

Ground 1

157. Mr Jones set out in his skeleton, a careful analysis of the relevant provisions of the **Police Reform Act 2002**. I do not need to reproduce it in full detail here. The salient points are these. Section 12 defines a "complaint" as a complaint about police conduct originating from a member of the public. It also defines a "conduct matter" as a matter which has not been the subject of a complaint, but in respect of which there is an indication that a police officer may have committed a criminal offence or behaved in a manner which would justify the bringing of disciplinary proceedings. Section 29(3) and (4) define "member of the public" as including a police officer, but excluding a person under the direction or control of the same person as the officer making the allegation. The net effect is that an officer *cannot* bring a

"complaint", as defined, against a fellow officer serving on the same force; but *can* raise a conduct matter, as defined, in respect of a fellow officer.

158. Mr De Silva did not disagree with that analysis as such; but he said that DS Murphy had not mis-stated the effect of these provisions. Her letter was correct in so far as it stated that the Claimant could not make a "complaint" against a fellow officer. Further, and in any event, DS Murphy *had* gone on to consider whether TCR raised any new conduct matter that met the thresholds for internal investigation and/or referral to the IPCC.

159. Mr Jones submitted that, even if DS Murphy's letter could be read that way (which he considered would be a generous reading) the same could not be said of the Judge's decision. Paragraphs 8 and 29 clearly conveyed that the Judge was proceeding on the basis that there was no basis at all on which the allegations in TCR could have been recorded or referred for investigation. Further, the Claimant had not made a concession that there was no route to consideration. He had indicated that he believed there was, though as a non-lawyer he could not be more specific. In all events, the Judge, said Mr Jones, had proceeded on an erroneous legal footing. TCR alleged criminal offences and misconduct by officers, which, as a matter of law, *could* have been investigated as conduct matters.

160. Mr Jones also argued that the allegations relating to the deaths fell within the scope of regulation 11 of **The Police (Conduct) Regulations 2012** because they concerned conduct which, *if* it had taken place, *appeared* to have resulted in death. That had to be recorded, assessed, and referred to the IPCC. But the Judge had failed to take this on board.

161. Mr De Silva submitted that the Tribunal had clearly found that DS Murphy, as her letter conveyed, *had* considered the allegations, including identifying that most had been previously considered, and personally reviewing those that were new allegations. He said it was not, in any event, accepted that DPS-CST was *bound* to record any of the allegations as conduct matters, or to refer them on to the IPCC, and the Claimant had not so argued before the ET.

162. My conclusions on this ground are as follows.

163. First, DS Murphy's witness statement (which I have seen) shows that she did appreciate the difference between what might be called the public complaint route and the conduct matter route. Once the mechanisms of the **2002 Act** are fully appreciated, including how it defines the term "complaint", it can also be seen that her letter accurately stated the position in relation to the public complaint route not being available to the Claimant as such.

164. However, reading paragraphs 8, 21 and 29 of the Tribunal's decision, it appears to me that, while the Judge found that, as a matter of fact, DS Murphy did consider what she found to be the new conduct allegations in TCR, the Judge proceeded on the basis that she had not been persuaded that there was any other route providing a mechanism by which the Claimant was entitled to have conduct allegations against a fellow officer recorded and assessed. That, I conclude, was an erroneous understanding of the underlying legal framework.

165. As to the point made by reference to regulation 11 of the **2012 Regulations**, the Judge had to proceed on the basis of the information and argument presented to her. I have seen what the particulars of claim said about the deaths (which I have summarised above). DS Murphy, in her witness statement that was before the Judge, also provided a cogent explanation for why the

suggestion that the Claimant should have been investigated over the death in custody was wrong. Even had the Judge more fully understood the mechanisms of the **2002 Act** and 2012 regulations, I do not consider that, on the basis of the evidence and arguments presented to her, the Judge should have concluded that allegations had been presented to DS Murphy of conduct by the Claimant which *appeared* to have *resulted* in any of these deaths. The particulars of claim simply fail to make out a cogent case as to that. While Mr Jones said that there was more material in TCR that showed this, the Judge does not appear to have been taken through that.

166. However, given the Judge's failure to appreciate the availability of the conduct route, as well as the complaint route, ground 1 succeeds.

Ground 2

167. Mr Jones submitted that it was simply wrong for the Judge to say that there was no evidence before her that DS Murphy knew of the Claimant's race or his prior complaints. DS Murphy's own letter made reference to the Claimant's various previous reports, and an email from the Claimant to the effect that "at your recent employment tribunal against the MPS on 5/9/2017" the matters against the Met were "all dismissed". The TCR itself raised issues about the treatment of BAME officers. The Claimant had raised complaints of race discrimination himself. Even if he had not stated his own race in terms, the obvious inference or assumption to be drawn from all this material was that he was non-white/BAME.

168. Mr De Silva submitted that the Tribunal correctly found that the nub of the Claimant's claim was that DS Murphy had been prepared, by refusing to record his allegations, to commit an offence and breach ethics, under the influence of, or in order to protect, colleagues, and cover up wrongdoing. While Mr De Silva accepted that it would have been obvious that race

was a relevant matter, and that the obvious assumption or inference was that the Claimant was non-white/BAME, the Tribunal was correct that the Claimant had not alleged in his claim that DS Murphy knew what his *specific* race was, nor had he identified it in his claim form. Mr De Silva, however, accepted that the Tribunal *was* simply wrong to state that there was no evidence that DS Murphy was aware of his previous complaints. But he submitted that none of this undermined the soundness of the overall reasoning, which needed to be considered as a whole.

169. My conclusions on this ground are as follows.

170. It is important to remember that the context was that the Judge's task was to consider whether the claims should be struck out as having no reasonable prospect of success. In some cases, the evidence may clearly indicate that the alleged discriminator simply did not know the complainant's race, or have any reason to suspect what it might be, nor anything about the protected acts or disclosures claimed – where a test paper has been anonymised for example. In such a case there may be a solid foundation for a strike out. But where there is evidence that the decision-maker did have some knowledge of these, of course that knowledge will not by itself make good the claim, but it means that that basic building block is present. For a Judge to proceed on the assumption that it is absent makes a material difference.

171. In this case, DS Murphy plainly *did* have evidence before her of the Claimant's previous complaints, and pointing to the fact that he considered that he had been the victim of racial discrimination and was likely non-white/BAME. Though the evidence was that she did not know him personally before this matter came across her desk, it was also clear that she learned things about him, in the course of considering it. Further, it was his case that he had

complained already about three members of this fourteen-strong team, and that DS Murphy would have been disposed to side with, or support, her colleagues.

172. In paragraph 38 the statement that the Claimant has produced no evidence that DS Murphy was aware of his race, knew him, or knew of his previous complaints, is a firm one, and plainly one to which the Judge attached significance. It means that the Judge has proceeded on the basis that the claims lacked essential building blocks. The Judge also appears to have discounted the evidence found in DS Murphy's witness statement on the basis that the Claimant did not know of it when he issued his claim. The Judge has therefore failed to engage with the Claimant's argument about what might be inferred from the overall picture created by the evidence, and whether that would pass the strike-out threshold in light of the authorities.

173. There was, in this respect, I conclude, a material error on the part of the Tribunal. Ground two therefore succeeds.

Ground three

174. This ground argues that it was an error for the Judge not to draw an inference from the fact that DS Murphy did not write to the Claimant within 28 days of receiving TCR from the IPCC. It was referred on 2 August 2016 and she wrote to him on 14 September.

175. Mr Jones did not address this ground in his written skeleton, but told me in oral argument that it was maintained. However, the only material he was able to show me, indicated, on its natural reading, that, once an investigation is on foot, the *investigator s*hould keep the complainant informed of progress at least once every 28 days. Nor, given the evident scale of the material that was presented by the Claimant in his dossier, do I think that it can be

said that the Judge should have drawn an adverse inference from the time that it took DS Murphy to consider the matter and put together her letter. In fact, the point was so weak, and minor, that I do not think it was wrong for the Judge not to address it in her decision at all.

176. This ground therefore fails.

Ground Four

177. Mr Jones argued that the Judge had erred insofar as she decided that the Respondent did not need to record those allegations in TCR which were not new. There was no provision allowing repeat allegations not to be recorded. Further, there *were* new allegations.

178. Mr De Silva submitted that it was clear from DS Murphy's letter that she had identified that there were some new matters raised in TCR, and she set out her reasons for not recording them. The Judge had found that DS Murphy personally reviewed the new allegations.

179. As to the repetitive allegations Mr De Silva told me that there are in fact statutory provisions that enable no action to be taken in respective of allegations that have previously been raised and considered. But he did not seek to rely on these specifically, as he did not claim that DS Murphy had specifically relied upon them.

180. My conclusions on this ground are as follows.

181. Firstly, it is correct that both DS Murphy, and the Judge, had on board that there were some new allegations. The Judge did find in terms that DS Murphy reviewed them. The Judge

did not make the error of finding that DS Murphy had proceeded on that basis that there was nothing new, still less, of accepting that that would have been a correct view.

182. The Judge did find that, in respect of allegations which had previously been considered by Inspector O'Connell, DS Murphy relied on the outcome of his review. The issue here is whether the Judge ought to have considered that DS Murphy having taken that approach to *those* allegations, rather than considering them herself afresh, was something that might be seen as lending inferential support to the Claimant's claims, and/or undermining the Respondent's defence to them.

183. In paragraph 31 of her decision the Judge observed that "the Claimant takes issue with Inspector O'Connell's process but there is no denying that he did assess the earlier complaints. DS Murphy was correct in her statement." She added that the Claimant referred to no evidence that in so stating DS Murphy was treating him differently because of his race or previous complaints or disclosures. She also noted that there had been a separate ET challenge to Inspector O'Connell's assessment in respect of which a deposit order had been made; and that it was not part of the ET complaint with which she was concerned.

184. I think it is clear from this passage, and in the context of the decision as a whole, that the Judge applied her mind to the question of whether DS Murphy's reliance on the fact that there had been a previous consideration of the same allegations, gave rise to any arguable support for the Claimant's case. Though perhaps she could have spelled it a little more, it is, I think, plain, that the implicit premise of the Judge's approach, was that a failure to examine for a second time, allegations which have been previously been raised and considered, was not,

without more, something to raise alarm bells, or which could support an inference against the Respondent. She looked to see whether there *was* something more, but found nothing.

185. I do not see anything wrong with that approach. I do not think the Judge needed to be shown that there was some particular rule or provision which would justify or explain DS Murphy declining to examine for a second time, allegations that had already been examined on a previous occasion. The good sense of such an approach is obvious. Nor was there any basis to find that the Judge was wrong to conclude that there was nothing else troubling about DS Murphy taking that approach in this particular case.

186. This ground therefore fails.

187. I will take ground 5 later.

Ground 6

188. This related to the Tribunal's conclusion that there was no detriment by DS Murphy declining to record the conduct allegations relating to the deaths.

189. Mr Jones submitted that it *was* a detriment, for the Claimant to be left with a cloud hanging over him, which an investigation might have dispelled. It was also in any event a detriment not to have the procedure followed in relation to these allegations, when he was entitled to have it followed.

190. The heart of Mr De Silva's submission on this ground was that the Claimant had merely *asserted* that there was, or may be, a cloud hanging over him. There was no evidence at all before the Tribunal that anyone else was troubled about his possible wrongful conduct in

relation to allegedly preventable deaths. The Claimant was, the Tribunal found, unable to explain to it why he thought there may be a cloud hanging over him. It was, he submitted, therefore perfectly entitled to conclude that his case that he was subject to a detriment in this regard was "difficult to comprehend."

191. My conclusions on this ground are as follows.

192. First, the Tribunal's conclusion that there was no arguable detriment was confined to this aspect of TCR: the matters said to pertain to his own conduct and the deaths. Secondly, I can see nothing wrong with the Tribunal's conclusion that the Claimant had produced no evidence that he was under a cloud or that there was any reasonable basis for him thinking that he was, or might be. That being so, the Tribunal was, I think, properly entitled to conclude that there was no arguable basis for saying that the non-recording of these allegations was a detriment. It is well-established that the test of detriment, while being relatively low, and Claimant-focussed, is *not* purely subjective. The Tribunal must find that the Claimant *reasonably* feels that the treatment amounts to a detriment.

193. I have already referred to the lack of a coherent case as to why there was evidence that the Claimant had been culpably responsible for any of these deaths. The Judge was also entitled to find that there was no evidence to support a case that anyone else had said or done anything that might suggest that there was, or might be, a cloud hanging over him. Of course, an individual who *has* had the finger of suspicion pointed at him, or aspersions cast, might welcome, or desire, an independent process to lay the matter to rest and clear their name. But on the evidence before her in this case, the Judge was fully entitled to conclude that there was no reasonable basis for the Claimant to consider that there was, or might be, a cloud hanging

over him; and no reasonable basis to conclude that a refusal to record or investigate these matters, for that reason, constituted a detriment.

194. As I have discussed earlier in this decision, **Deer** indicates that a failure to follow proper process *can*, of itself amount to a detriment. But in relation to this matter, for reasons I have already given, I do not think that there is any basis to say that the Judge should have concluded that the Respondent was under a duty to report, investigate, or refer these matters, and hence that there was a detriment to the Claimant simply from the failure to do those things.

195. The fifth ground therefore fails.

Ground Six

196. This ground was to the effect that the Tribunal erred by mis-stating, in various passages in its decision, the legal tests that it was required to apply, or mixing them together.

197. The formulation of this ground of appeal, and Mr Jones in argument, identified the following passages.

198. In paragraph 4 the Tribunal referred to "victimisation on grounds of race"; this was repeated in paragraph 24. But victimisation involves treatment, not on grounds of a protected characteristic, but because of a protected act.

199. In paragraph 25 the Tribunal referred to the direct discrimination and protected disclosure complaints, but omitted the complaint of victimisation.

200. In paragraphs 38, 45 and 47 the Tribunal again referred to "victimisation on the grounds of race", wrongly stating the test of victimisation and/or running it together with the test of direct discrimination.

201. In paragraph 26 the Tribunal referred to the question of whether DS Murphy's conduct was "mainly or only because of his race". But, for direct discrimination to be found, the protected characteristic does not need to be the sole or main reason for the conduct.

202. Mr De Silva submitted that I should not read these passages in isolation. It was clear from other passages, and the decision as a whole, that the Tribunal proceeded on the basis that there were three types of complaint: direct race discrimination, victimisation and protected-disclosure detriment, and understood what the test was for each. In paragraph 14, the Tribunal states that the Claimant "…believed that DS Murphy's decision not to accept his complaint as a formal complaint was done on the grounds of his race, his previous complaints and because he had made protected disclosures." Paragraph 29 refers to the lack of evidence of a comparator being treated differently "…in circumstances where they had not done a protected act, made a public interest disclosure or were of a different race to the Claimant." Paragraph 31 refers to whether DS Murphy was treating the Claimant differently "because of his race or because he had made previous complaints/protected disclosures." Paragraph 35 refers to whether DS Murphy's decision "was made on the grounds of his race or because he made protected disclosures or his previous claims in the Employment Tribunal." Paragraph 38 refers to whether there was evidence to show that the treatment was "in any way related to his race".

203. Referring to the well-known dicta in **Fuller v London Borough of Brent** [2011] ICR 806 (CA) Mr De Silva submitted that I should not focus in isolation on the infelicities of

A expression in the passages highlighted by Mr Jones. Reading the decision as a whole, I could be confident that the Tribunal had correctly understood and applied the law.

B 204. Mr Jones' reply was, in short, that there were just too many mistakes.

205. My conclusions on this ground were these.

C 206. In accordance with **Fuller** I did not look at the particular passages relied on by Mr Jones in isolation, but at the decision as a whole, including the other passages relied on by Mr De Silva.

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207. Because this was a strike out application, the Judge was concerned with the legal framework at, as it were, two levels. Her overarching task was to apply the strike-out test in Rule 37(1)(a) of the **ET's Rules of Procedure**, guided by the authorities in relation to that. But, in order to consider whether the complaints had no reasonable prospect of success she also had to consider the substantive law applying to those complaints. It was just as important to get that right. Unfortunately, the Judge nowhere set out the wording of the tests in sections 13 and 27 of the **2010 Act** and section 47B of the **1996 Act**, nor did she refer to any of the established principles concerning aspects of how those tests were to be applied. The failure to do so was not by itself fatal; but it made it harder for me to determine whether the passages relied upon by Mr Jones reflected no more than infelicities of expression, or careless mis-statements, rather than betraying an erroneous understanding of the applicable legal tests.

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H 208. Some errors or infelicities are not as troubling as others. The use of "on grounds of" where the **2010 Act** now uses "because of", for example, would not by itself cause alarm, as the

two tests mean the same thing – and indeed Mr Jones did not highlight this example. A reference to *victimisation* because of, or on grounds of, *race*, is potentially more worrying, because it is, as such, just wrong. However, I have no doubt, reading the decision as a whole, that the Judge was proceeding on the basis that there were three types of complaint: direct race discrimination, victimisation and protected disclosure detriment, and that she understood that victimisation is treatment because of a protected act, such as a complaint or allegation of race discrimination. Numerous passages show the Judge identifying this, and treating it as distinct from an allegation of treatment because of race, including in paragraphs 5, 9, 14, 15, 31, 33, 35 and 38. I am therefore confident that the references to "discrimination/victimisation on grounds of race" or similar, reflected a clumsily-worded compression, not an underlying misunderstanding of the law.

209. More troubling, however, is the reference to "mainly or only" in paragraph 26. This is simply the wrong test for direct discrimination or victimisation or protected-disclosure detriment (where the test is: "on the ground of"). It would, however, correspond to the right test for an unfair dismissal protected disclosure claim ("reason" or "principal reason"). That in turn prompts a concern as to whether the Judge has erroneously thought that the unfair dismissal test applied to both kinds of claim.

210. This is also troubling because it is part of a passage in which the Judge asks whether it is likely that the Claimant will be able to prove facts from which the Tribunal at a Full Hearing would be able to conclude that DS Murphy's conduct "was not because of the reasons stated in her letter but was instead, mainly or only because of his race and the fact that he had previously brought complaints of race discrimination against the Respondent and because he was a 'whistle-blower'?" The use of "instead" seems to chime with the use of "mainly or only" – as,

if that *were* the right test, it would be right to take the approach that conduct cannot, logically, be mainly or only attributable to two different things; whereas, it can, if the tests be properly understood and applied, be "because of" or "on grounds of" more than one thing.

211. Mr De Silva submitted that the language used elsewhere, and the observations, at one point (paragraph 38) that there was no evidence that DS Murphy's decisions were "in any way related to" the Claimant's race, etc., showed that the Judge was aware of, and did apply the correct underlying test. However, without any reference, in some form of words, to the established guidance on the meaning of "on grounds of" or "because of", I cannot infer from the use of those words, as such, that the Judge had this in mind. Nor does the "in any way related" observation dispose of the concern. It may merely reflect the Judge's general theme that she considered the claims to be very weak, and to lack any supportive evidence at all, indeed to be bound to fail.

212. I have been driven to conclude that I cannot be confident that the use of "mainly or only" in paragraph 26 does not reflect an actual confusion on the part of the Judge as to the correct underlying test that would fall to be applied to one or more of these complaints.

213. I have therefore concluded that this ground also succeeds.

Grounds 5 and 8

214. These grounds are parasitic on the other grounds, arguing as they do, that the Judge erred in concluding that the complaints had no reasonable prospect of success and in concluding that they were totally without merit. I will return to them in a moment.

Jones Tribunal – Overall Conclusion

215. Had only ground 1 succeeded, I might have hesitated as to whether that alone rendered this decision, as it were, unsafe. However, the success of either ground 2 or ground 7 alone would point to the Tribunal's conclusion, that the complaints had no reasonable prospect of success, being fatally flawed. The success of them both certainly does, and the success of all three of grounds 1, 2 and 7 certainly does. Hence ground 5 must also succeed. Mr De Silva accepted that if ground 5 succeeds, ground 8 inevitably must do as well. So it does.

216. The appeal in respect of the Jones Tribunal decision therefore succeeds.

Overall Outcome

217. The overall outcome is therefore as follows.

218. The appeals against the decisions of the Tayler Tribunal are dismissed.

219. The appeal against the decision of the Jones Tribunal succeeds and its Judgment striking out the claims in ET claim 12 and holding them to be totally without merit must be quashed. Both counsel were sent this decision in draft and invited to make submissions on the question of remission. Mr Jones asked for a direction that the matter be heard before a different panel. Mr De Silva indicated that he did not object to that course.

220. In this case, of course, what EJ Jones heard was a strike out application, not the full merits of the claims. But, given the strength of the views that she expressed, including that the claims were totally without merit, and though I certainly do not doubt her professionalism, I think it would be better for any Full Merits Hearing to be before a Tribunal panel of which she

A is not a member, so that the parties can have full confidence that the Tribunal will be able to come to matters with an entirely fresh eye. I will therefore give a direction that remittance be on the basis that any Full Merits Hearing should be before a Tribunal panel of which EJ Jones is not a member.

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