



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Augustine Toko

**Respondent:** The Commissioner of Police of the Metropolis

**Heard at:** London South      **On:** 10 to 14 and 24 May 2021

**Before:** Employment Judge Jones QC  
Ms Natalie Styles  
Mr Andy Peart

**Appearances:**

For the claimant: In person.

For the respondent: Mr Richard Oulton, of Counsel

## JUDGMENT

1. The Claimant's claim of direct discrimination fails and is dismissed

## REASONS

A. THE CLAIMS

1. The Claimant, who was at all material times a probationary police officer, alleges that the Respondent has directly discriminated against him because of his race. At a preliminary hearing held on 6 March 2019, five instances of alleged less favourable treatment were identified:

- "a. From 15th February 2017 for approximately 4 months, while based at Thurlow Park Police station, Sergeant Graham consistently ignored and snubbed the Claimant.
- b. Sergeant Graham failed to do a PDR for the Claimant. This should have been done in May 2017.

- c. Sergeant Graham lied to Teresa Hubbard by saying he had done the Claimant's PDR. (As evidence of the above the Claimant relies, inter alia, in an email from Ms Hubbard to himself sent on 30th December 2017.)
- d. Sergeant Graham ignored or refused to validate overtime which the Claimant had carried out in July 2017.
- e. Sergeant Graham uploaded a document purporting to be the Claimant's PDR which the Claimant had not seen, nor had it been discussed with him. It is the Claimant's case that this was done maliciously. (He saw the document in early December but does not know when it was uploaded)."

If Sergeant Graham treated the Claimant less favourably in the manner alleged, the Respondent accepts that she is vicariously liable pursuant to **Equality Act 2010, ss. 42 and 109**.

2. Although the Claimant resigned from his office with effect from 27 February 2018 he has not alleged that he was constructively dismissed. He did not, it appeared, rely upon dismissal as an act of unlawful discrimination in its own right.

**B. THE HEARING: DATES, MATERIALS AND WITNESSES**

3. The hearing was conducted from 10 to 14 May 2021 inclusive. The Tribunal reserved its decision and met in chambers to further consider our decision on 24 May 2021. The Tribunal was provided with a bundle of documents and read those documents referred to in the parties witness statements and those documents referred to in the course of examination of the witnesses. The Claimant gave evidence. He called no other witnesses. The Respondent called two witnesses: Acting Inspector Graham, who had been the Claimant's line manager during the first part of his probation and Chief Inspector Hubbard-Chason who, at the relevant time, was Acting Inspector Graham's line manager. Both witnesses are referred to in the findings of fact below by the titles they held at the relevant time which are Sergeant and Inspector respectively. Where other officers are referred to, the shortened form of their rank is used. Police Sergeant Button, for example, is referred to as PS Button.

**C. THE HEARING: POSSIBLE CONFLICT**

4. The Employment Judge had from time to time acted on behalf of the Respondent in discrimination claims. That fact was drawn to the attention of both parties on the Friday afternoon immediately preceding the start of the hearing on allocation of the case. The parties were asked whether they had any objection to the Employment Judge hearing the case. There was no response from the Respondent. The Claimant's position was that he was content for the Employment Judge to sit. At the start of the first day of the hearing the Employment Judge raised the issue again. The position of both parties was that they raised no objection to the Employment Judge continuing to sit.

D. THE HEARING: DEPOSIT ORDER

5. A second issue arose at the outset of the hearing: the Respondent objected to the hearing going ahead. The basis of the Respondent's objection was that Claimant had failed to pay a deposit. On 3 February 2020, the Respondent made an application for the claim to be struck out or, in the alternative, for a deposit to be paid as condition of the Claimant being able to pursue the direct discrimination claims. On 1 May 2020 Employment Judge Wright refused to strike out the claim and further refused to make a deposit order on the ground that it was not possible to consider the applications in advance of the full hearing which, at that point, was expected to begin on 19 May 2020. That fixture was then lost and 19 May 2020 became a preliminary hearing at which the Respondent pressed the issue of strike out or deposit order again. That was treated as an application for reconsideration of the refusal to make an order and directions were given for further consideration of the application. The application was considered on the papers on 26 June 2020. Employment Judge Wright decided that the claims had little reasonable prospect of success and indicated that, subject to enquiry into the Claimant's means, she would make a deposit order for a sum not to exceed £1000. The Claimant was given seven days to provide information about his means. The decision was premised on Employment Judge Wright's understanding that the Claimant did not object to the making of the order. It subsequently became clear that he did and that he had lodged an objection that the Employment Judge had not had before her. She therefore decided on 7 July 2020 to reconsider her decision. Directions were given to enable the relevant material to be put before the Employment Judge. The next formal document is dated 3 December 2020. Employment Judge Wright confirmed, in response to my making (with the parties' agreement) enquiry of her, that she was, by that point, inclined to move ahead and make the deposit order. The direction issued on 3 December 2020 was for the Claimant to provide documentary evidence of his creditors. The inquiry into the Claimant's means was, therefore, still ongoing. The Claimant provided further information as to his means on 3 January 2021. The Respondent made some further points in respect of the approach they wanted the Employment Judge to take on the question of means in an email dated 12 January 2021. However, it appears that the process was then overtaken by events. Before any order was formally made, the full hearing came on before us. The Respondent was seeking to rely on an order that Employment Judge Wright had been persuaded to make but which had never in fact been made. We concluded that we could not refuse the Claimant a hearing for failure to comply with an order that had not been made. However, we reminded the Claimant that an Employment Judge had concluded that his claim had little reasonable prospect of success and that the Respondent had made clear that an application for costs might well follow in the event that the claim failed.

E. THE HEARING: BREACH OF OATH WARNING

6. At the end of the day's hearing on 12 May 2021, Sergeant Graham was still being cross-examined. The Employment Judge warned him that he should not discuss his evidence with anyone during the adjournment. Despite this warning, Sergeant Graham made contact with the person allocated by the Respondent as "case handler". He asked her whether he would be able to give evidence about a particular matter. The case handler declined to discuss the matter given the Employment Judge's warning. The conversation was reported to the Respondent's solicitor and it was drawn to the Tribunal's attention by the Respondent's counsel. The case-handler, solicitor and counsel are all to be commended for their immediate

action. The incident reflected very poorly on Sergeant Graham. The Claimant's position was that he was not asking for any specific sanction or consequence beyond asking us to bear the incident in mind when weighing up the reliability of Sergeant Graham's evidence. We invited the Respondent to make submissions in due course as to whether it would be appropriate for us to take the incident into account in assessing Sergeant Graham's credibility and the consequent reliability of his evidence. The Respondent's position, as we understood it, was that it would not be inappropriate to do so but that it should be merely one factor and not a decisive one. When approaching the making of the findings of fact below we have, in consequence, been careful to make sure we look wherever possible beyond Sergeant Graham's raw evidence so as to test its specific reliability in each instance. We have borne in mind that even witnesses who are demonstrated to have been dishonest in respect of one aspect of their evidence should not be assumed to be dishonest in respect of everything they tell a court.

7. Sergeant Graham's cross-examination concluded at lunchtime on 13 May 2021. He was told that re-examination would be dealt with after lunch and the tribunal adjourned. The Respondent's solicitor mistakenly thought that Sergeant Graham's evidence was complete and telephoned him to "check" on him. Sergeant Graham's position is that he thought it must now be open to him to speak about his evidence since the Respondent's solicitor had made contact with him rather than vice versa. He raised a further point of evidence and asked whether he would still have the opportunity to lead it. In fact the point was one that he had already tried to raise in cross-examination. It was not directly responsive to the particular question that he had been asked (although it related to the issues being explored) and the Tribunal had made it clear it could be dealt with in re-examination if the Respondent's counsel considered it appropriate. Again, the matter was immediately brought to the Tribunal's attention and the Claimant's position remained as it had been after the first breach. It was matter of considerable concern to the Tribunal that there should have been one breach of the warning let alone a second. Appearances in court are not unusual for police officers and they might be expected to understand the rules without the need for a specific warning. Where, as here, a specific warning is given it should have been scrupulously observed.

F. FINDINGS OF FACT

8. The Claimant is Mr Augustine Toko. For the purposes of his claim, he identifies his race as "black".
9. The Claimant qualified as a teacher. He has a master's degree in applied linguistics and is presently working towards a doctoral qualification. In 2014, having left teaching, he began to work for the Respondent as a "Designated Detentions Officer" or "DDO". DDO is a civilian role. On 1 November 2016 the Claimant became a probationer police officer.
10. A probationer officer's journey begins with training courses. One of the courses taken is the "Street Duties" course.
11. On 21 January 2017, the Claimant received an email from Sergeant Graham. Sergeant Graham was based on the Thurlow Park Local Policing Team. He had been told that the Claimant and another probationer, PC Claudia Trincas, were to join the Safer Neighbourhood Team at Thurlow Park. The email said:

“I hope you have enjoyed your training thus far and I look forward to meeting you.

If you have anything you wish to discuss, please don't hesitate to contact me ...”

He went on to provide his private telephone number. The Respondent says (and the Claimant accepts) that this first communication is a friendly and informal one. There is no hint of any racial animus on Sergeant Graham's part. The Claimant says that that is hardly surprising since Sergeant Graham had yet to lay eyes on him and therefore could not have known that he was black. Neither party suggested that the Claimant's name would have given rise to any assumption about his race.

12. However, it appears that Sergeant Graham did become aware the Claimant was a member of a racial minority group before the latter first attended Thurlow Park. PC Trincas and the Claimant attended the same course. Whilst on the course PC Trincas made a complaint about the Claimant's behaviour. When it became clear that both she and the Claimant were to be posted to Thurlow Park, PC Trincas tried to ensure that she was posted elsewhere. In part that was because she had a difficulty with the travel that a posting would involve but it was also because she did not want to work with the Claimant. PC Trincas's Police Federation representative contacted Sergeant Graham on her behalf. According to Sergeant Graham's witness statement the Federation representative told him that despite PC Trincas's complaint the Claimant “had been put through as there was a need to recruit a certain number of BAME ethnic minority officers”. In the event, PC Trincas did join the Thurlow Park team. As a result of her complaint however, Sergeant Graham was aware that the Claimant was a member of an ethnic minority but, still more significantly, he had been told that the Claimant's race had resulted in his being set what was, in effect, a lower standard during training. We find that Sergeant Graham accepted the suggestion that the Claimant had been advantaged because of his race as true. The reasons for our conclusion is based on what he told us in oral evidence and, more importantly, because of what he says in an email dated 21 July 2017 to his line manager, Inspector Hubbard-Chason (since promoted to Chief Inspector). In that email he said:

“I also have a few concerns of my own. I have heard that some issues were raised with regards to Toko at Training school and they apparently said that they had a responsibility to recruit a certain number of "tick box" candidates and they would have to put him through and let Lambeth deal with the issue. I have the name of the Instructor that apparently said this but this is unacceptable and it is simply not right to allow this to happen. I have raised this with our local professional standards as it is clear they did not feel he was suitable and decided it was too much like hard work to deal with at the time.”

He identifies the possibility that the Claimant was a “tick box” candidate as one of his own concerns. He says that it is “unacceptable” and not that it *would be* unacceptable *if true* and he had taken steps to have the matter raised formally.

13. The Claimant was formally part of the Thurlow Park team from 15 February 2017. However, he did not begin to attend for duty until 27 March 2017. Sergeant Graham was not there on that day. It was clear from the evidence that Sergeant Graham was spread rather thin. He was frequently required to work on the “GPC” or “Grip and Pace” team. The GPC operation is effectively a “nerve centre” for local police operations. He was additionally responsible for the local distribution of something called “SmartWater” which is, we understand, a fluid used

invisibly to mark property. He also repeatedly emphasised in evidence that he was a relatively recently appointed sergeant (albeit that he had had some previous periods during which he acted up). The purpose of that evidence, we understood, was to make clear to us that he accepted that as a result of time poverty and inexperience his performance as a line manager may have, at times, left something to be desired. He wanted us to appreciate that poor line management is not the same as discriminatory line management.

14. Sergeant Graham was not present on the Claimant's first day. He sent an email on 28 March 2017 in which he apologised for his absence. He allocated to the Claimant some Crime Reporting Information System ("CRIS") and other documents with which he suggested the Claimant should familiarise himself. The Claimant had had training on preparing such reports as part of his Street Duties course. The tone of the email is friendly. It concludes: "I'll have a proper catch up soon. Welcome to the team." The Claimant accepts that the tone of the email betrays no hostility. Again, the Claimant's explanation for the lack of apparent hostility is that Sergeant Graham did not yet know he was black. We have, of course, concluded that Sergeant Graham did already know that.
15. The reason why the tone of this otherwise innocuous email is significant is because of the first issue in the case. The Claimant says that Sergeant Graham ignored and snubbed him from the outset. His allegation has further evolved in that he also now alleges that there was a failure to mentor him. When complaining about being snubbed and ignored the Claimant does not simply mean that he did not receive attention that he might reasonably have expected. The Claimant's case is that Sergeant Graham "hated" him because of his race. He says he was "left alone in a corner". The Claimant says that if he spoke to Sergeant Graham "the expression on his face [would] change dramatically in a disgustful, scornful and spiteful manner as if it is a warning to inform [him] that [he was] not welcomed in [Sergeant Graham's] sight because [he was a] black police officer". We find that the Claimant was not deliberately ostracised, snubbed or ignored. Nor did Sergeant Graham treat him in the hostile manner that the Claimant describes. We make that finding for the following reasons:
  - (1) When we asked the Claimant to give us evidence of specific incidents of ostracism or hostile interaction he was not able to do so. We tried to focus his recollection by prompting him to recall what he considered to be the worst incident. He was not able to provide evidence of the specificity we would expect if the situation had been as he now describes it;
  - (2) There was an absence of contemporaneous complaint. The first express allegation of race discrimination against Sergeant Graham was not made until 30 December 2017. Mr Toko says that it can take time to recognise that you are the victim of discriminatory conduct and further time to muster the material necessary to formulate a complaint. We understand those points and took them into account. However, that is difficult to reconcile with his evidence that Sergeant Graham's behaviour was adverse from the outset and that it was, as the Claimant says in his witness statement, "evident and clear that he disliked and hated [him] because [he] was a black probationary police officer" [our emphasis];
  - (3) The allegation that the Claimant was the victim of immediate, sustained and serious hostile behaviour from Sergeant Graham is also impossible to reconcile with the Claimant describing him in his grievance document of 30 December 2017 as someone whom he "trusted and respected". The Claimant told us that he was sure that

Sergeant Graham was mistreating him because of his race before 21 July 2017. There was no specific complaint for a further 5 months; and finally

- (4) The Claimant's account of consistent overt hostility is also very difficult to reconcile with the tone of the emails that Sergeant Graham sent him in the relevant period<sup>1</sup>.
16. Sergeant Graham told us that he took the Claimant on patrol. The Claimant flatly denied that that happened. Given that, for the reasons set out immediately above, we are not satisfied on the Claimant's own evidence that the treatment that he complained of occurred, we have not felt it necessary to resolve this issue of fact since its sole relevance was to rebut a suggestion of ostracism.
17. What we do accept, however, is that there was a failure sufficiently to mentor the Claimant. Sergeant Graham's evidence was that he did not appoint a specific mentor for the Claimant. Nor does it appear to us from his evidence that he took that role on himself. That is not to say that he never offered advice, nor that advice was not from time to time forthcoming from other more experienced colleagues. What was missing is what Sergeant Graham accepts he did not put in place – a specific mentor, i.e. someone with specific responsibility for monitoring the Claimant's development and providing guidance before poor practices developed into grounds for complaint from others. That sort of mentoring is commonplace in many less hierarchical and less well-resourced organisations. The Tribunal was surprised to find it lacking in the Metropolitan Police. There was no evidence that any other probationer was better treated. At the preliminary hearing on 6 March 2019, the Claimant identified three actual comparators: PCs Trincas and Stringer and an unidentified further "white female who was based at Thurlow Park". The last comparator remained unidentified by the time of the final hearing. There was no evidence that either PC Trincas or PC Stringer had a specific mentor. Sergeant Graham's evidence was that the other probationer constables progressed with fewer problems. The tribunal concluded, therefore, that they were not appropriate comparators as their circumstances were materially different within the meaning of **S. 23** of the **Equality Act 2010**. We felt it necessary, therefore, to go on and to consider the position of a hypothetical comparator (see **Balamoody v UK Central Council for Nursing, Midwifery and Health Visting** [2001] EWCA Civ 2097, [2002] IRLR 288). When dealing with hypothetical comparators the analysis is necessarily compressed. Rather than identifying less favourable treatment and then asking whether the disparity is because of race one must determine, in effect, whether the Claimant would have been less favourably treated were it not for his race. We are not satisfied that he would have been. There was no evidence of Sergeant Graham having been prepared to provide specific mentoring to anyone, certainly not in the absence of a specifically-identified need. He was, we concluded, a reactive manager. The Claimant may have needed, perhaps deserved, a proactive manager, but that is simply not how Sergeant Graham operates.
18. The Claimant was deployed to work in the front office of Brixton Police Station in or about June 2017. It was a three-month attachment and was a normal part of a probationer's development. The Claimant says that he was sent too soon but that appears to have been a view formed with hindsight once difficulties began to arise. We do not consider that he was

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<sup>1</sup> The Claimant suggested that there was a mismatch between the tone of the emails and the tone of any direct interaction. We concluded that, taking those emails with the other matters upon which we relied, the more likely position was that the tone of the emails was reflected in the direct interactions.

singled out for adverse or less favourable treatment in respect of decision to post him. In any event, that is not a specific ground of alleged direct discrimination in the claim.

19. On 8 June 2017 Sergeant Graham received an email from another sergeant, PS Alison Francis. It raised a concern about the standard of the Claimant's CRIS reporting. He is said to have raised two reports rather than the single report that he should have raised. In addition, PS Francis tells Sergeant Graham that neither report "meets the minimum standard". It is unclear whether this is the first such concern that had been raised with Sergeant Graham. It was the first of which there is direct documentary evidence before us. There is no evidence that Sergeant Graham raised the matter with the Claimant or that he took any steps at that point to put in place any specific support or guidance on the question of report writing.
20. Less than a week later the Claimant contacted Sergeant Graham informing him that he was falling behind in relation to his work, including his CRIS reports. He complains that there are hardly any quiet moments in the Brixton Office and specifically asks for advice. Sergeant Graham responded the next day. He did not raise any issue about the quality of the Claimant's reports. He makes a practical suggestion; specifically that the Claimant should ask an officer if they have someone who can relieve him in order to enable him to do the work that he needed to catch up on. Sergeant Graham says, and the Tribunal accepts, that it was a helpful suggestion.
21. According to Sergeant Graham's evidence, just three days later, on 17 June 2017, he completed at least a first draft of an MM1 Form. That is the form used to initiate misconduct proceedings. The form deals with matters which post-date 17 June 2017 and it appears in the bundle immediately after a document dated 16 July 2017. The document itself bears no date. We wondered therefore whether the MM1 was in fact first completed on 17 July 2017 rather than a month earlier. However, Sergeant Graham confirmed his evidence as to the date of first preparation. His evidence was that he would, from time to time, add to the document which means that the fact that it refers to events which post-date 17 June 2017 is not necessarily a reliable indication that the 17 June date is incorrect. This has some significance as there is no indication in the Respondent's evidence that Sergeant Graham had drawn to the Claimant's attention that his performance was considered so poor that misconduct proceedings might be justified. Nor is there any indication that Sergeant Graham was exploring the possibility that there was a need for specific mentoring at this point in order to help the Claimant improve his performance.
22. The Claimant's position is that Sergeant Graham was soliciting complaints with a view to being rid of him. He gave evidence to the effect that Sergeant Graham visited the Brixton Front Office on a number of occasions and spoke to a PC Will. PC Will, as will become clear shortly, made a complaint about the Claimant's behaviour. Sergeant Graham denies that he paid any such visits to PC Will. The Claimant speculates that Sergeant Graham was meeting PC Will in order to persuade her to make complaints. Even taking the Claimant's case at its highest, there is, we conclude, insufficient evidence upon which to base a finding of the kind of conspiracy to harm him that he alleges.
23. There were two different areas of concern emerging in respect of the Claimant's performance. The first area of concern was, as will already have been apparent from our earlier findings, that his report writing was not of an acceptable standard. Report writing was a matter covered in training and the Claimant's shortcomings appear to have played into Sergeant Graham's concern that he had been allowed to advance as a "tick-box" candidate. On 28 June 2017 an



Inspector Mallen emailed Sergeant Graham to ask him to get someone to review the Claimant's CRIS reports. He said: "I have spent the majority of the past few days deciphering what has and hasn't been done on all of them. I think a little refresh training could be of assistance."

24. Two days later a member of the public complained about the Claimant. She had called in to report a theft of money and related threats of violence. She criticised the Claimant for a lack of empathy and for his report saying that it "missed out a lot of the detail". The complaint was reviewed by an Inspector Horn who concluded that the standard of the Claimant's CRIS reporting was "very very poor". He said that there was a significant amount of information missing and that it was "unclear whether a 124D [had] been completed". A 124D is a form on which issues relating to domestic abuse are recorded. In a follow up email Inspector Horn described the Claimant's CRIS report as "shockingly bad". Inspector Hubbard-Chason was copied into the email. Inspector Horn concluded "PC Toko clearly needs speaking to Re this matter. I don't know him so I'll leave it up to you as to whether this is a training issue or a discipline matter however the deficiencies on this report need sorting asap." Sergeant Graham's witness statement suggests that he spoke to the Claimant about the issue. He certainly updated the MM1 to include reference to the incident. Sergeant Graham asked in particular whether it had been made clear to the Claimant in training that the information included on a Form 124D had also to be included in the CRIS report. The Claimant said it had not been covered.
25. On 3 July 2017 Inspector Hubbard-Chason became involved as a result of having been copied in on Inspector Horn's email. She emailed Sergeant Graham saying that it appeared that there were "development issues" in relation to the Claimant which "need[ed] to be addressed". She went on to say that it was the second CRIS report that had been drawn to her attention and that it was of a poor standard. She pointed out she had herself earlier identified one of the Claimant's CRIS reports as requiring Sergeant Graham's attention. She went on to ask Sergeant Graham to draw up a development plan. Inspector Hubbard-Chason also asked whether Sergeant Graham had received a report dealing with the Claimant's performance on the street duties course. He had not. This seems to have prompted both Sergeant Graham and Inspector Hubbard-Chason to contact PS Dacey who had been overseeing Street Duties training when the Claimant participated in it. Later that day, PS Dacey sent Sergeant Graham a copy of the Claimant's Street Duties Course Review.
26. The Review suggests that the Claimant was a "steady all-rounder" who had "performed at the required standard throughout his time with the street duties team". He is described as being "open to feedback" on his performance. There is no suggestion, therefore, that, because of his race, he had been allowed through despite sub-standard performance. The review identifies both strengths and weaknesses. The weaknesses identified focus on report writing. A higher standard is identified as being necessary.
27. Sergeant Graham appears to have set about drafting a development plan. At the same time he was completing a "PDR" form in respect of the Claimant and, it would seem, in respect of PC Trincas. PDR stands for Performance Development Review. A probationer constable could, in theory, expect a PDR after 6 months in the role and another at 12 months. We say "in theory" because the evidence of the Respondent's witnesses is that the PDR process is not observed with the rigour that one might expect. We heard that it is commonplace for the PDR to be late and for it sometimes to be a year or more overdue (although we find it hard to envisage that a delay of that magnitude could happen with probationers given the need to

review their performance for the purposes of confirming them in post). The Claimant was not, on his own evidence, anticipating a review as he reached the 6 month point. We had thought that he might be anxiously anticipating a review, but we accept his evidence that he was not. The Claimant alleges that the PDR form should have been completed in May 2017. Assuming that that is right we note that since PC Trincas's PDR was completed on the same date and because of that conclude that there was no less favourable treatment of the Claimant.

28. The PDR form is of a type familiar to anyone with experience of appraisal procedures. There is a box into which the line manager's comments are entered and a box into which the role holder's comments are to be entered. It is expected that there will be a meeting at which the manager and role-holder will discuss the contents of the form. The line manager is required to assess two things: whether the officer has achieved "IPS" and whether he is "competent". IPS stands for "independent patrol standard". The evidence before us, which we accept, is that the two questions are related but distinct. If an officer does not achieve IPS they are not competent. However, they may achieve IPS and yet still not be competent for other reasons.
29. The PDR form is prepared online. There is a process by which the form can be completed on a computer. It is then subsequently "uploaded" to a system operated by the force's Human Resources team. We understood that when a document is finally "uploaded" it is no longer capable of being changed.
30. The Claimant's PDR form was completed on 6 July 2017. That in itself is somewhat surprising since Sergeant Graham was on leave from 5 to 11 July 2017. Nevertheless, we were shown a computer printout which suggested that Sergeant Graham had tried and failed to upload the form on that day. That failure has a particular consequential significance to which we will return later in this judgment.
31. Sergeant Graham's comments on the form are as follows:

"PC Toko came to my NPT directly from street duties. He has past experience on Lambeth borough as a DDO which has given him an insight into the arrest necessity criteria and booking in of detainees.

He is punctual, neatly presented and is polite and respectful. He has fulfilled numerous aid commitments since being on the team. He has demonstrated that he can investigate crime reports to a satisfactory standard; albeit some more frequent and meaningful updates need to be added to his reports to ensure his progress is clearly documented. He has made a good start on his SOROC completion and I have seen from his street duties report that he has completed many of them.

PC Toko was volunteered for a 12 week attachment to Brixton Front office shortly after coming to NPT. Unfortunately sine (sic) this attachment, I have received numerous emails about poor standards of reporting, from a variety of supervisors.

These concerns all centre around the same or similar Issue, namely that there is insufficient Information in the reports, or he has failed to complete an important aspect which must not be excluded ... namely risk assessments. This in my view points towards simply not knowing and not asking for advice rather than deliberate omissions or failures. These reporting standards will need to be addressed asap, given the high volume of crime reports he is likely to be taking from the public.

One such report had no DASH questions asked and no completion of a 124D which does nothing to understand or alleviate the risk posed.

It is imperative that the risk assessments are done on each report so that secondary investigators are aware of all the facts. If not these other departments will simply pass the report back to PC Toko for further updates and he will become bogged down.

I have decided that it is in PC Tokos best interest to adhere to a development plan. It will be expected that he seeks advice from a supervisor or a CID department where appropriate, when completing reports concerning DV or other risk.

In addition to that all other reports (of any nature) will need to be more detailed. At present some of the reports are giving only the bare minimum of information and as such the reader/ secondary investigator is left with questions unanswered. I.e What injuries were sustained to a victim of assault, the location, witnesses etc. The action plan can be revisited where necessary.

I am content that PC Toko has achieved IPS and he has demonstrated that he can deal with a variety of situations. I have shown not competent in respect of the aforementioned reporting Issues. This Is my only area of concern at this time.”

32. The Claimant accepts that his report-writing was not up to the necessary standard. He accepts, subject to two qualifications, that the PDR comments are fair. The first qualification is that he lays the blame for any inadequacy in his report writing at the feet of Sergeant Graham. Had he been properly mentored, he suggests, there would have been no difficulties. The second is that he does not consider that he should have been recorded as “not yet competent”. There was, as we have found, a lack of specific mentoring. It is not clear to us that it would have ensured that the Claimant was a competent reporter by the date of his PDR. The development plan, to which we turn shortly, was a prompt and appropriate response to the difficulties that were identified in the complaints that Sergeant Graham had begun to receive. Whilst we think earlier specific mentoring would have been helpful, we do not think that Sergeant Graham’s approach would have been any different had the Claimant been of a different race. He was, as we have found, a reactive manager and he had now been prompted by his own line manager to react.
33. There is a dispute as to when the Claimant was first shown the PDR form. The Respondent accepts that the Claimant was not given the chance to comment on the form before Sergeant Graham attempted, unsuccessfully, to upload it. There are no comments from PC Trincas on her form either which might, on the face of it, have suggested that there was no difference in treatment. However, Sergeant Graham told us that he had spoken to PC Trincas before uploading her form. He also described sitting down with other members of the team to take them through their form before uploading it. That means that the Claimant was treated differently and, we conclude, less favourably. There is a benefit to being able to comment on the PDR before it is uploaded. In particular, it would have given the Claimant an opportunity to persuade Sergeant Graham not to mark him as “not yet competent”. Denying the Claimant that benefit leads to a corresponding detriment. Sergeant Graham was unable specifically to explain the difference in treatment. We return to this issue in our discussion and conclusions section below.
34. In addition to the PDR form, Sergeant Graham prepared, as he had been instructed to, a development plan. The development plan is set out in a standard form. The form contains a section headed “development need identified and possible causes”. What is found there is

largely identical to what appeared in the PDR. However, the development plan differs in two ways. First, it sets so-called “SMART” objectives. The plan to address the shortcomings in the Claimant’s report writing was that he was to be “given either a secondary<sup>2</sup> street duties course or ... sufficient mentoring to bring him up to a standard required to fulfil his role adequately”.

36. The second difference was that the development plan raised the second strand of criticisms levelled against the Claimant: his attitude and behaviour. The plan said:

“It has also come to my attention that PC Toko is dismissive of any helpful advice given to him from colleagues, and he simply brushes these off and can come across [as] hostile and disrespectful to anybody who seeks to help him. The attitude does not just relate to colleagues, but also customers who attend the station to make reports which places the organisation in a negative light in terms of professionalism.”

The question of the Claimant’s attitude and behaviour was not raised in the PDR. Indeed, in that document he is described as “polite and respectful”. Sergeant Graham explained this apparent discrepancy by saying that the issues concerning the Claimant’s attitude had not yet been fully investigated and that he thought it would have been unfair for them to have formed part of the Claimant’s permanent record – which would have been the effect of the PDR being uploaded – until they had been. We accepted that explanation.

37. The concerns about attitude are not reflected in the SMART objectives. Sergeant Graham, we accept, did not consider that a good attitude could be taught or developed through mentoring. Instead, he saw a good attitude as something that you had to have naturally. Although that viewpoint seemed to us to be a very limited one, we were persuaded that it was genuinely held since, had he felt otherwise, there was nothing preventing him from identifying a SMART objective that focussed on attitude.
38. During Sergeant Graham’s absence on leave, the Claimant was working overtime as a DDO. He was working in custody suites in other boroughs. Although the evidence was not always entirely clear, a consensus eventually emerged as to how overtime was authorised, organised, worked and paid for. An officer responsible for the relevant custody suite, usually an inspector, would authorise an overtime shift. The money would ultimately come from the custody suite’s budget. If the Claimant volunteered to work the shift, that would then be recorded in a system called “CARMS”. CARMS is a resource management system. It allows a line manager to create shifts and allocate them to particular officers. However, it is line management in the home borough that must create the shift even if the officer is working elsewhere. Sergeant Graham was able to create shifts. So was any sergeant working in the GPC. Inspector Hubbard-Chason could also do it. We accepted her evidence that it was something with which she had particular experience and facility. Once the shift was worked, Inspector Hubbard-Chason would administer the overtime claim, passing it on for payment.
39. On 6 July 2017, the Claimant contacted Sergeant Graham. He says, and we accept, that your sergeant is your designated first point of contact if you are a police constable. He had a problem with an overtime shift that he had worked on 2 July 2017. He had, by mistake, elected to take time off in lieu and he wanted the money instead. He also had overtime shifts that he wanted to work on 10, 11, 28 and 29 July 2017. He describes them in his email as being “on CARMS” but, as we understand it, they needed to be added to CARMS. He asked Sergeant

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<sup>2</sup> By which we understand Sergeant Graham to mean “second”.

Graham to “rectify this issue for [him] on CARMS” sending his best regards. Sergeant Graham took no immediate action because he was on leave.

40. Sergeant Graham returned from leave on 12 July 2021. At 21:06 he sent an email to the Claimant raising the issue of the complaints about report writing. He said that he would “pop down to the front office” the next day and “have a chat about what is needed to improve and identify any concerns [the Claimant might] have over reporting standards”. The purpose of the chat was to “ensure [the Claimant was] supported and help [him] to complete detailed and meaningful reports”. There is no mention in the email of the development plan nor the PDR form. The tone of the email is supportive. Although it mentions complaints, it is not accusatory. The focus is on support and not remonstrating.
41. The Claimant made two replies to the email. The first said he was looking forward to meeting with Sergeant Graham to “talk about specific short falls of the standards of the reports that [he] put on CRIS.” He said he would be “very grateful if a line by line and thorough enlightened advice [were to be] given to [him] to enable [him] to improve on the standards of crime reports”. The second email, sent a few minutes later, chased Sergeant Graham in relation to his overtime. He identified the relevant dates and reiterated that CARMS needed to be amended to allow him to be paid rather than being given time off in lieu.
42. At 18:24 on 13 July 2017, Sergeant Graham invited him to “pop upstairs” to the GPC which, it appears, he did. The two men had an informal conversation. Sergeant Graham says that he raised not only the question of report writing but also the complaints that he had received about “attitude”. They also discussed overtime. Sergeant Graham was apparently sympathetic towards the Claimant’s difficulties with the system and shared that he had himself sometimes made mistakes when trying to select whether to receive pay or time off. Nevertheless, Sergeant Graham did not immediately deal with the Claimant’s request.
43. According to Sergeant Graham they also discussed their “own life experiences and experiences in the MPS”. He says that the Claimant told him that it was difficult for “someone like him” to join the MPS and that he had “not been supported by his community”. Sergeant Graham then spoke about his Chinese wife and his two children. He told the Claimant that his children had been bullied at school and had faced violence and racist comments. He said that his wife would not tell her Chinese friends what he did for a living as it is “engrained in Chinese society that the police are there to serve the Government and not the people”. Sergeant Graham suggests this was something of a moment of bonding. He said that “it made the conversation more easy flowing and [he] felt that [it] allowed [the Claimant] to open up more.” He recalls that the Claimant told him that he had either “seven” or “several” children. He could not remember quite which he had said.
44. The Claimant says that there was no such a conversation. He says that if there had been any conversation about spouses he would have mentioned that his own wife had been white. He has neither seven children, nor several; he has one child. Sergeant Graham suggested that a more or less identical conversation had already taken place on when they patrolled together. The Claimant says (as we have recorded already) that there was no such patrol.
45. We think it likely that there was a conversation that at least touched on these issues at some point. However, if it did take place, we do not think it was on 13 July 2017. First, we do not think that Sergeant Graham would have had two substantially identical conversations. Second, if it happened, in our view, it would be much more likely to have taken the form of a

chat whilst patrolling than coming up as part of conversation in which the Claimant was having shortcomings in his report writing addressed and the existence of complaints about his attitude communicated to him for the first time.

46. Having dealt with the existing complaints in an informal way, there was an immediate development. According to Sergeant Graham's email at 20:14 on 13 July 2017 to Inspector Hubbard-Chason and Inspector Deborah Flynn (who had responsibility for the Brixton Front Office) he had "a long chat" with two of the Claimant's colleagues: Police Staff Paul Carrol and PC Samantha Will. They are described as both being "very stressed at having to work with [the Claimant]". PC Will is said to be "at her wits end with the level of verbal abuse she [was] getting from [the Claimant]". Nothing turns on the specific complaints, so we do not reproduce them here. Two have a particular relevance. One related to an encounter that the Claimant had had with a police officer, PC Lisa O'Leary, whilst he was driving. The story was related by PC Will who suggested that when challenged about driving erratically the Claimant had displayed an "aggressive attitude". Another suggested that the Claimant was working all of his rest days as overtime and was coming to work tired.

47. Sergeant Graham appears to have placed considerable and immediate store in what he was told. In the email he says:

"Taking all this into consideration, coupled with the numerous complaints from Sergeants and Inspectors, I feel PC Toko either needs some urgent action taken. I am concerned with him remaining in the front office If victims are being turned away or treated so badly. I can tell from Samantha's account that she is on the verge of losing her temper if Toko continues this way. I will not accept him treating women as inferior to men."

He goes on to say that he has promised that the issues would be looked into as soon as possible.

48. Sergeant Graham's witness statement suggests that he then had a further conversation with the Claimant on the same day<sup>3</sup> at which he discussed the issues with the Claimant. There does not appear to be any other record of that meeting, although it was not put to Sergeant Graham that it had not taken place. The lack of a record is surprising since Sergeant Graham had gone to the lengths of recording the allegations in his email to his line manager and asked the complainants to put their complaints in writing. By contrast, he does not seem either to have written down what the Claimant's response was or asked him to put his position in writing. The Claimant does not claim that the manner in which the complaints against him were dealt with amounts to an act of discrimination. It is not one of the five alleged instances of less favourable treatment. He did suggest that the complaints themselves were untrue and effectively "trumped up" by Sergeant Graham, but we have already indicated that we do not accept that that is what happened.

49. Sergeant Graham felt that he needed advice and spoke to a Police Sergeant Clive Seal in the Professional Standards Unit. Sergeant Graham raised the question of excessive overtime. PS Seal told him he could restrict the amount of overtime that the Claimant was working if his ability to discharge his duties was being adversely affected. Sergeant Graham then had a

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<sup>3</sup> This is dealt with at Paragraphs 52 to 53 of his witness statement. We deduce that the conversation took place on 13 July because Paragraph 14 begins "the following day" and then makes reference to an email sent on 14 July 2017.

discussion with the Claimant about it. In the event, Sergeant Graham decided not to restrict the ability of the Claimant to accept overtime shifts. Instead, he spelt out the risks of overwork but also told the Claimant that he thought it was good that he had a skill outside his normal responsibilities that could offer occasional overtime. The Claimant says that this conversation proves that Sergeant Graham had power over his overtime. If he could forbid it, he could authorise it and yet he had still not made the changes to CARMS which the Claimant had requested. We accept that Sergeant Graham could have forbidden overtime. We also accept he could make the necessary entries on CARMS. We do not see any real connection between the two propositions. We think that Sergeant Graham's decision not to restrict overtime demonstrates that he was not trying to stop the Claimant earning additional money, as the Claimant had suggested in his evidence to us.

50. Meanwhile, efforts were being made to have the Claimant repeat the Street Duties course. That was one of the SMART objectives identified in the development plan. Inspector Hubbard-Chason had "gone through every CRIS report on [the Claimant's] workfile" she found them to be of a "shocking standard". On 14 July 2017 she wrote to PS Dacey (copied to a Acting Chief Inspector Rutland) saying that the Claimant had arrived "entirely unequipped and of a standard far below what is required". She questioned the accuracy of the report produced at the end of his original Street Duties course, saying:

"I appreciate that his End of Duties Street (sic) Report stated that he was adequate, however all the evidence based on his paperwork and attitude suggests otherwise."

She stated that he should not have been passed as suitable. She reported that the Claimant had been asked, as an emergency measure, to see his team supervisor whenever he submitted a CRIS report "in order to negate any risk". ACI Rutland endorsed the proposal to have the Claimant repeat the Street Duties course. He asked whether it had all been documented on the Claimant's PDR.

51. Consideration was being given to removing the Claimant from Station Reception Officer duties and ACI Rutland instructed Sergeant Graham to obtain statements from the colleagues who had made the complaints.
52. Sergeant Graham next met with the Claimant on 21 July 2017. The principal purpose of the meeting was to discuss the concerns that existed over the Claimant's progression. Again, two very different accounts were given. On the Claimant's account there was a discussion of the development plan but no discussion of any PDR. The Claimant also says that there was no discussion of any complaints about his behaviour and attitude. Finally, he says that he brought up the question of regularising his overtime on CARMS. He said that he "begged" Sergeant Graham to deal with it but he was told that he was "very busy with a lot to do" and was asked to seek help from someone else. On Sergeant Graham's account there was a discussion of both the development plan and the PDR form. However, he accepts that the Claimant may not have appreciated that he had been marked as not yet competent. That was the position later reached by Inspector Hubbard-Chason on investigating the Claimant's subsequent grievance. Sergeant Graham agrees that the question of overtime came up and that he suggested that the Claimant might want to ask someone else to help but says that that was because he genuinely was busy.
53. Although there are no formal minutes, there are three contemporaneous emails. Sergeant Graham sent the first one. It was addressed to Inspectors Hubbard-Chason and Flynn. He

passes on what the Claimant had told him. Simplifying, the Claimant's position was that he had been moved to the front office too quickly; his training in relation to report writing and dealing with the reporting of domestic violence incidents had been insufficient; and Sergeant Graham had not been around sufficiently to mentor him. There is no mention of the behavioural and attitude issues. Sergeant Graham points out that his absences were as a result of being ordered to work in GPC. He raises two other matters. First, he repeats his concern that the Claimant had been allowed to progress as a "tick box" candidate. It is clear from the email that he believes the suggestion to be true. Second, he reports that there has been yet another complaint about the standard of the Claimant's report-writing and he now feels that an MM1 would be appropriate.

54. The second email is from the Claimant and is to the same two recipients. It deals only with the question of overtime and asks Inspector Flynn to update CARMS.
55. The third email is again from the Claimant. This email, dated 23 July 2017 is to Sergeant Graham. It says:

"I write in relation to the development plan meeting I had with you on the 21/07/2017 at 15:00 In the conference room at BRIXTON POLICE station, I did not agree with some of the allegations you wrote on the plan, because some of the allegations are absolutely untrue and deceptive, which does not portray a genuine reflection of my character In the police profession or as a person. It is my intention to negate and refute such blatant lies; which is tantamount to jeopardise my profession. I refer here solely to the section of the development plan that deals with my character traits.

Sir, as concerns the reporting standards, I do perfectly agree I have to learn new things from senior colleagues and improve in this profession. It is my wish to first and foremost act in a positive manner on the development plan, then seek more acquisition of knowledge from other perspectives in the job.

I will be very grateful if the development plan template and all of the complaint letters are sent to me as agreed in the meeting I had with you. I intend to comment on it as discussed with you."

56. We make the following findings about the meeting:
- (1) There was a discussion of the development plan;
  - (2) The discussion of the development plan included discussion of the complaints made about the Claimant's attitude and behaviour (we think that is clear from his email of 23 July 2017);
  - (3) The Claimant was told that the complaints had been submitted in writing (hence his request in the email of 23 July 2017 for sight of the "complaint letters");
  - (4) Sergeant Graham had the PDR form at the meeting but there was no specific discussion of its contents and, on a balance of probabilities, we conclude that it was not shown to the Claimant. We reach that conclusion because we think it very unlikely that the Claimant would have let a "not yet competent" rating pass without comment. We also think that he would have asked for a copy – as he did with the development plan- if he had known of its existence;



- (5) The Claimant accepted, as he did before us, that his report writing was not up to standard but laid the blame in part, again as he did before us, on Sergeant Graham's absence;
  - (6) The Claimant reminded Sergeant Graham that CARMS needed to be updated to deal with his overtime claim and the latter told him he was too busy to deal with it immediately and asked the Claimant to see if an inspector could deal with it instead; and
  - (7) There is no evidence from which we could conclude that Sergeant Graham dealt with other administrative requests made by others more promptly. In fact Inspector Hubbard-Chason suggested that time management was not one of his particular strengths. We do not accept that he would have dealt with the matter sooner had the Claimant been white. If his intention had been unreasonably to delay dealing with the matter and to do so because of the Claimant's race it would be entirely irrational for him to have invited the Claimant to take the matter up with his superior – that would be to draw his own wrongdoing to the attention of his own line-manager.
56. Two days later, Sergeant Graham received a further complaint about a CRIS report and an associated failure to include a 124D from a PS Button.
  57. On 31 July 2017, Inspector Hubbard-Chason wrote to the Claimant to tell him that she had made the necessary adjustments on CARMS.
  58. On 18 August 2017, Sergeant Graham sent the Claimant a copy of his development plan, as the Claimant had requested. He did not send a copy of the PDR. This, he said and we accept, was an oversight. Nor did he send copies of the emails in which complaints had been made about the Claimant. That was because Sergeant Graham had taken advice from professional standards who had advised that they should not be sent. The Claimant was still unaware that his PDR had been completed and that an attempt had been made to upload it.
  59. The Claimant had a meeting with Inspector Hubbard-Chason on 30 August 2017 as a result of which measures were put in place to ensure that he was given closer supervision and mentoring going forward.
  60. At the start of September 2017, the Claimant wrote to Inspector Hubbard-Chason to say that he had been "very stressed up because of what happened to [him] at Brixton front office". He said that he had tried to cope but found it impossible and that he was going home. It appears that he was absent for one day.
  61. On 29 September 2017, the Claimant was posted to Streatham Hill SNT where he was to report to PS Button.
  62. On 2 November 2017, the Claimant had a conversation with PS Button about reviewing his 12 month PDR. This appears to have prompted a conversation about his 6 month PDR. The Claimant wrote to Inspector Hubbard-Chason on the same day saying that he had not been reviewed after his first six months and that he was "worried about it because [he had] seen other police officers being reviewed by their line manager after the first six months of their career". He complains that he should have had that opportunity.
  63. On 3 November 2017, PS Button drew up a further development plan for the Claimant. It identified a number of areas of concern, the specifics of which are not relevant to the issues

that we have to decide. On the same day Inspector Hubbard-Chason wrote to PS Button and the Claimant. The email addresses the question of the 6 month PDR in the following terms:

“As PC TOKO bought (sic) to our attention there may not have been a 6 month PDR review uploaded to HR or discussed with PC TOKO at the 6 month period. This was probably due to the transition period from Street Duties to Neighbourhood Policing and this was overlooked.

PC TOKO, my apologies for this. I am satisfied that this has not been to the detriment of your development as I am aware that PC (sic) Graham highlighted areas of development to you and documented this on a plan when you came to Thurlow Park.”

64. Inspector Hubbard-Chason had followed the issue up with Sergeant Graham. He replied by email on 5 November 2017 attaching the PDR form and saying:

“... It was completed along with a development plan. I’m surprised he does not recall this as I met with him in the conference room some time ago to discuss his PDR and I did inform him that he carried some experience over from his previous role of DDO and I even outlined that I was pleased with his neat appearance and numerous aid that he had done. I did have to outline some crime reporting issues to him due to numerous complaints from supervisors / colleagues and I provided him with SMART objectives. ...”

65. It seems that the Claimant was then shown the PDR. He wrote to PS Button and Inspector Hubbard-Chason on 24 November 2017 saying that he was:

“really depress (sic) about the comments that was (sic) stealthily put on my HR without my consent by SGT DAVID GRAHAM [his] former line manager. Couple (sic) with the fact that [he] was not reviewed after 6 months as a probationer officer it [was] a clear depiction of neglect, lack of guidance and [being] left to struggle by [himself].”

He went on to say that he believed that he had been treated unfairly and that the issue needed to be looked into thoroughly. He also notified PS Button that he had been signed off work with depression. He never returned to work.

66. On or about 28 November 2017, the Claimant lodged a formal grievance. The nub of the grievance was as follows:

“I write to express my dissatisfaction on how I was treated unprofessionally by my former line manager Sergeant Dave GRAHAM ... I was neglected, not guided, ostracised during my first six months as a probationer officer. I was not mentored in any slightest way by him or even assigned someone to mentor me. My first 0-6 months review was not done to by my former line manager. I was surprised to see my current line manager doing 0-6 moths review for other officers. My former line manager went behind my back and stealthily uploaded a PDR on my HR without discussing or communicate with me about his intentions. I only found out this month 11/27 when I was checking something else on my HR.”

His desired outcomes were to be told Sergeant Graham’s rationale for not reviewing him and to be given an explanation as to why he had gone “behind [the Claimant’s] back” and “stealthily uploaded a PDR he never discussed” with the Claimant. His email makes it clear

that the 6 month PDR had now been uploaded. The evidence before us, which we accept, was that it had finally happened as a result of PS Button trying to upload the 12 month PDR. He tried, at the same time, to upload the 6 month PDR. There was some initial difficulty in his doing so, but he eventually managed it. The consequence is that Sergeant Graham never in fact uploaded the PDR, stealthily or otherwise, it was done by PS Button.

67. The grievance went to Chief Inspector Horsfall who essentially sent the Claimant back to talk to Inspector Hubbard-Chason again. The first response, therefore, was to be told that Chief Inspector Horsfall was “not satisfied that [he had] gone through the proper procedure”. The Tribunal felt strongly that, although the Claimant raised no complaint about the handling of his grievance, the process appeared to be opaque in practice and seemed to stand in the way of prompt resolution rather than facilitating it. The Claimant’s response was to indicate that he was happy to discuss the matter in depth. Chief Inspector Horsfall wrote again on 20 December 2017 saying that the Claimant had not followed the correct procedure; needed to meet with Inspector Hubbard-Chason; and, if he was not satisfied, he needed to re-submit the grievance, filling in the form for a second time. In the meantime, Inspector Hubbard-Chason had offered to visit the Claimant at home for a discussion and the latter had taken up her offer of a meeting but suggested that he would come in to work for it. That meeting then took place on or about 29 December 2017. At the meeting, Inspector Hubbard-Chason said that she would investigate what had happened and whether the Claimant had been given a copy of the PDR. She said that she had “previously been told that [he] had a development conversation with [Sergeant Graham] during which [his] development plan was discussed. [She] had automatically assumed that the conversation included [the] PDR.”
68. The investigation was concluded quickly. There was a telephone conversation between Inspector Hubbard-Chason and Sergeant Graham on 30 December 2017. Sergeant Graham accepted that he had not sent the PDR to the Claimant. He maintained that it had been discussed. We have found, of course, that there was no direct discussion of the PDR. We do not think that Sergeant Graham would have given a different account had the investigation concerned any other direct report of his whose PDR he failed to discuss. His account was designed to be self-exculpatory – he was looking to avoid getting into trouble rather than looking in any way to mistreat, still less to treat the Claimant less favourably. He accepted that there was no paper trail to confirm the discussion. All this was recorded in a follow-up email on the same day. Inspector Hubbard-Chason’s conclusion was that the failure to send the PDR was an “administration error”. She issued Sergeant Graham with an “Informal Management Action” which said:
- “I require you to ensure that you hold PDR conversations with all your staff when due. The copy of the PDR must be sent on email so that an audit trail is kept. To ensure that you are up to date with all the different PDRs that are required ... I require you to read Peoples Pages under ‘Performance’. All the necessary information is on these pages. This improvement must be achieved within the next 3 months as you will be responsible for PDRs during this period. The improvement must be achieved and then maintained. Further formal action may follow if the improvement is not achieved or maintained.”
69. There was a debate during evidence as to whether the requirement that Sergeant Graham should “hold PDR conversations with all ... staff” demonstrated that Inspector Hubbard-Chason accepted that the PDR had not been discussed. Her position was that it was simply reminding Sergeant Graham of his duties in the round and that she believed that there had

been a discussion but that, somehow, the Claimant had not become aware that he had been rated as “not yet competent”. We decided that the PDR was not specifically discussed at the meeting on 21 July 2017, so that this particular dispute became academic.

70. The Claimant does not appear to have been satisfied with the outcome and re-submitted his grievance. Chief Inspector Horsfall responded on 3 January 2018 to say that it was accepted that there had been an administrative error in respect of the PDR but that his development had been discussed and that the Chief Inspector was satisfied that the PDR had not been uploaded by stealth. She indicated that the explanations provided seemed to meet the Claimant’s desired outcomes and that she could not, in effect, see what the point of the grievance now was. This was the second time that she had effectively declined immediately to progress a grievance. The Claimant stood his ground and the Chief Inspector referred the grievance for formal determination. In fact, what happened next is that the Claimant was told on 11 January 2018 that his grievance had been allocated to another “informal resolution champion”. The person to whom it was allocated was PS Seal – the person with whom Sergeant Graham had previously liaised on the question of the complaints raised against the Claimant. According to PS Seal’s email of 17 January 2017, he had several meetings with the Claimant in an effort to resolve matters informally but then “conceded defeat”. The Claimant’s position had been that he wanted Sergeant Graham “held to account”.
71. From an email dated 23 January 2018 from PS Seal to a Jayne Paige in the HQ Human Resources, it appears that the Claimant was going to be subject to misconduct proceedings arising from an unconnected and off-duty incident. On the same day, Ms Paige wrote to the Claimant to inform him that the grievance could not be pursued in relation to the PDR since the appropriate way of dealing with it was by way of appeal within the PDR procedure. Another objection appears to have been that “holding Sergeant Graham to account” was not a possible outcome from a grievance. The assumption appears to have been that the Claimant required misconduct proceedings to be taken against Sergeant Graham. Disappointingly, that issue seems never to have been clarified with the Claimant.
72. On 26 February 2018, the Claimant gave notice of resignation. From 15 October 2018 he has been working again as a DDO.

G. RELEVANT LAW

73. The Claimant alleges that the Respondent directly discriminated against him. **Sub-section 13 (1) of the Equality Act 2010** provides as follows:

“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”.

74. Less favourable treatment must be “because of” a protected characteristic. In this context that means that the protected characteristic must be a substantive cause of the less favourable treatment. It does not have to be the sole or principal cause. The protected characteristic may be part of the employer’s reason for action even if they themselves are unaware of it. It may form part of their sub- or unconscious motivation<sup>4</sup>.

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<sup>4</sup> We use motivation here in the sense in which it was used in **Martin v Devonshires Solicitors** UKEAT/86/10 [2011] ICR 352– it is distinct and different from motive.

75. The burden of proof is set out at **Equality Act 2010, ss. 136 (2) and (3)**:

- “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But sub-section (2) does not apply if A shows that A did not contravene the provision”.

The burden is understood to require a claimant to establish a so-called “prima facie” case, which is a useful shorthand for the longer formulation in **s. 136**. If such a case is established, the tribunal then turns to the employer for an explanation for the treatment in question. If there is no satisfactory explanation, the tribunal must decide that there has been discrimination.

76. In what circumstances will the tribunal find that a prima facie case has been established? A mere difference in treatment and in protected characteristic between a claimant and a comparator will not be sufficient to establish an prima facie case (see **Madarassy v Nomura International plc** [2007] ICR 867, CA). What is needed is something in the evidence that points to the difference in treatment being because of the claimant’s race. The fact that the treatment is unfair or unreasonable will not, in and of itself, be sufficient to shift the burden (see **St Christopher’s Fellowship v Walters-Ennis** [2010] EWCA Civ 921). That does not mean that there has to be *positive* evidence that a difference in treatment is because of race (see **Network Rail Infrastructure Ltd v Griffiths-Henry** [2006] IRLR 865 EAT); it may be a question of inference, but the inference has to be based on solid evidential ground and it must lead to a conclusion that the facts proven by a claimant could justify a conclusion that discrimination occurred and not merely that it was a possibility (**South Wales Police Authority v Johnson** [2014] EWCA Civ 73 at Para 23). In looking for that something more, the Tribunal is assisted by the guidance (subsequently revised<sup>5</sup>) given in the case of **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] IRLR 332 EAT which we set out below:

- (1) Pursuant to **Equality Act 2010, s. 136**, it is for the claimant who complains of race discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful ... is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of race discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually

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<sup>5</sup> Revised by the Court of Appeal in **Igen Ltd v Wong** [2005] EWCA Civ 142; [2005] IRLR 258

depend on what inferences it is proper to draw from the primary facts found by the tribunal.

- (5) It is important to note the word 'could' in the **Equality Act 2010, s. 136**. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) ...<sup>6</sup>
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to **Equality Act 2006, s. 15(4)** . This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.
- (10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or a code of practice.

#### H. DISCUSSION AND CONCLUSIONS

- (1) Did Sergeant Graham consistently ignore and snub the Claimant from 15th February 2017 for approximately 4 months, while the latter was based at Thurlow Park Police station?

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<sup>6</sup> We omit the seventh element of the guidance given the repeal of **Equality Act 2010, s. 138**, but no question of evasive answers to any questionnaire, questions or pleadings arises in any event in this case.

77. At Paragraph 15 above (and for the reasons given there) we found that Sergeant Graham did not ostracise, ignore or snub the Claimant. In the circumstances, this element of the claim fails on the facts. The Claimant has not established that he was less favourably treated than his nominated comparators, PCs Trincas and Stringer. Nor has he established that he was less favourably treated than any other white officer (female or otherwise) in this regard.
78. At Paragraph 17 above we found that there was a failure to provide the Claimant with specific mentoring. That is certainly unfavourable treatment. It seemed to us that given the Claimant's acknowledged openness to constructive feedback and his willingness to work to improve his performance, the lack of mentoring was particularly unfortunate. Things might, perhaps, have ended rather differently. We hope that this is something upon which the Respondent will now reflect. However, unfavourable treatment is not less favourable treatment. There was no evidence that Sergeant Graham mentored any other probationer in a way that was denied to the Claimant. For the reasons given in Paragraph 17, we were not persuaded that less favourable treatment could be demonstrated in relation to either a real or a hypothetical comparator. This element of the claim also fails on the facts.
- (2) Did Sergeant Graham ignore or refuse to validate overtime which the Claimant had carried out in July 2017?
79. The Claimant compared his treatment with that received by someone who was identified only by the first name "Gerrard". We were never ultimately told who Gerrard was. We were unable, therefore, to perform the specific comparison that was invited of us. We considered this element of the claim on the alternative basis of a hypothetical comparison.
80. Our critical findings of fact are at sub-paragraphs 56(6) and (7) above. We accept that Sergeant Graham did not deal with the request to update CARMS immediately and that on 21 July 2017 he invited the Claimant to see if someone else could help him. We do not accept, however, that any other subordinate would have been treated any differently. Again, this claim fails on the facts.
- (3)-(5) Did Sergeant Graham: (a) fail to do a PDR for the Claimant in May 2017; (b) lie to Inspector Hubbard-Chason by saying he had done the PDR; and/or (c) maliciously upload the Claimant's PDR which the Claimant had not seen without discussing it with him.
81. The three other alleged instances of less favourable treatment are best dealt with together. We have found the following facts:
- (1) Sergeant Graham completed a PDR form for the Claimant albeit in July 2017 and not May 2017. However, PC Trincas's PDR was completed at the same time so that there is no evidence of less favourable treatment in terms of the timing of the review (see Paragraphs 27 and 30 above);
  - (2) Failure to complete PDRs on time was a widespread if regrettable practice (see Paragraph 27 above);
  - (3) Sergeant Graham discussed PDR forms with other direct reports, including PC Trincas, but did not discuss the form with the Claimant (see Paragraph 33 above);
  - (4) When he tried to upload the PDR form on 6 July 2017, Sergeant Graham had made no attempt to discuss its contents with the Claimant or to obtain his comments which

meant that he was less favourably treated than PC Trincas. Sergeant Graham offered no specific explanation for the disparity of treatment (see Paragraph 33 above);

- (5) Sergeant Graham had a copy of the PDR form with him at the meeting on 21 July 2017 but concentrated entirely on the development plan (see Sub-paragraph 56(4) above);
  - (6) Sergeant Graham failed to send the Claimant a copy of the PDR form, but that was an oversight rather than a deliberate decision (see Paragraph 58 above);
  - (7) The PDR form was ultimately uploaded by PS Button and not by Sergeant Graham (see Paragraph 66 above);
  - (8) The account that Sergeant Graham gave inspector Hubbard-Chason was inaccurate in one respect: he said he had discussed the PDR with the Claimant on 21 July 2017 but he had not. However, he was thereby seeking to protect his own position rather than disadvantage the Claimant and his desire to exculpate himself would have been no different whoever's PDR had been at issue (see Paragraph 68 above); and
  - (8) Although the Claimant does not agree that he should have been rated as not yet competent, the criticisms of his report writing were reasonable and the rating was one which was properly open to Sergeant Graham (see Paragraph 32 above).
81. The consequence of our findings of fact is that the Claimant was not less favourably treated in respect either of any delay in completing the PDR form or by Sergeant Graham telling any lie to Inspector Hubbard-Chason. That leaves one issue: the attempt to upload the PDR form on 6 July 2017 before the Claimant had been spoken to about its contents.
  82. Using PC Trincas as a comparator, there is a difference in treatment and a difference in race. The treatment is also unreasonable in its own right – the Claimant should have had an opportunity to comment on the PDR assessment before Sergeant Graham attempted to upload it. That would have been the fair course and the course that the Respondent's procedure anticipated. Those matters alone are insufficient to reverse the burden of proof.
  83. We do not think there are any other facts upon which we could safely rely in order to reach the conclusion that we could find that the Respondent contravened **Equality Act 2010. s. 13**. We think, on the contrary, that the evidence points the other way. If, as the Claimant alleges, there was conscious hostility to him because of his race (or even if we were to ask whether there might be some sub- or unconscious influence on Sergeant Graham's behaviour), it is difficult to explain why Sergeant Graham would be seeking deliberately to deny the Claimant a chance to comment on a document the *substance* of which the latter agrees was fair and which was in any event expressly discussed with him in the context of the development plan. The Claimant suggests that the assessment of "not yet competent" would have harmed him, but there is no evidence that that is the case. The assessment flowed from the very criticisms that the Claimant accepts were well-founded and the PDR form is at pains to emphasise that the assessment is limited strictly to the shortcomings in respect of report writing. The potentially more damaging criticisms that were raised in the development plan itself (and which were at that point being actively investigated) are deliberately omitted so as not adversely to affect the Claimant's career progress. In the circumstances, we do not think that a prima facie case was made out in this instance and this final element of the claim also fails on its facts.



84. If the burden had reversed, Sergeant Graham accepted he had no specific explanation to offer for the disparity in treatment. We would, nevertheless, have concluded that explanation is that Sergeant Graham was a relatively inexperienced and hard-pressed Sergeant for whom time management and the efficient discharge of his more administrative duties could not be described as a forte. On this specific occasion, as he admits, he did a poor job discharging his obligations. The Claimant deserved better but there was not breach of the Act.
85. In the light of the findings made above, we conclude that the claim fails and should be dismissed.

Employment Judge Jones QC

7 June 2021