EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**AND**	**Respondents**
(1) Richard Lovelock (2) Jonathan Sayers		(1) Commissioner of Police of the Metropolis (2) The Chief Constable, the Police Service of Scotland

Heard at: London Central Employment Tribunal

On: 26, 27, 28, 29 June 2023 (30 June 2023 in chambers)

Before: Employment Judge Adkin
Mr D Kendall
Mr T Harrington-Roberts

Representations

For the Claimant: Claimants in person
For the First Respondent: Mr P Martin, Counsel
For the Second Respondent: Mr R King, Solicitor

JUDGMENT

(1) The following claims brought by both Claimants under the Equality Act 2010 are not well founded and are dismissed:

a. direct race discrimination contrary to section 13 Equality Act ('EqA) 2010;

b. indirect race discrimination contrary to section 19 EqA 2010;

c. direct sex discrimination contrary to section 13 EqA 2010; and

d. indirect sex discrimination contrary to section 19 EqA 2010.

REASONS

Procedural matters

1. This was a hearing in Victory House in which all parties, representatives and witnesses attended in person.

The Claim

2. The Claimants presented their claims on 13 April 2022.

3. The Claimants bring claims for:

   3.1. direct race discrimination contrary to section 13 Equality Act ('EqA) 2010;

   3.2. indirect race discrimination contrary to section 19 EqA 2010;

   3.3. direct sex discrimination contrary to section 13 EqA 2010; and

   3.4. indirect sex discrimination contrary to section 19 EqA 2010.

4. An agreed list of issues is attached as an appendix to this claim.

Evidence

5. The Tribunal received a bundle of documents of 531 pages to which a further 21 pages were added during the course of the hearing.

6. We received witness statements from both of the Claimants and also from their Police Federation representative Mr Rick Prior and heard oral evidence from all three.

7. From the First Respondent we received witness statements and oral evidence from the following:

   7.1. Chief Inspector Will Holland;

   7.2. Superintendent Carl Lindley;

   7.3. Temporary Commander Karen Findlay.

8. From the Second Respondent we received witness statements and oral evidence from the following:

   8.1. Assistant Chief Constable Bernard Higgins (now retired), referred to below as “ACC Higgins”);

   8.2. Chief Supt Mark Hargreaves;

   8.3. Superintendent Murray Main (now retired).

Law

9. We are grateful to all parties for written submissions and brief oral submissions.

DISCRIMINATION – EQUALITY ACT

10. The Equality Act 2010 contains the following provisions:

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> 19 Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.

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

11. A claimant need not themselves have the protected characteristic in order for direct discrimination under section 13 to occur. Direct discrimination may arise because of an *association* with the protected characteristic of someone else (e.g. *Coleman v Attridge Law* C-303/06 [2008] IRLR 722, [2008] ICR 1128, in which it was held by the ECJ that 'associative discrimination' on the grounds of disability was unlawful).

12. Equally, direct discrimination may arise because of a *perception* that a claimant has a protected characteristic (Chief Constable of Norfolk v Coffey [2019] IRLR 805). Underhill LJ said as follows at paragraph 11 that decision:

> It is common ground before us, as it was before both tribunals below, that an act will be caught by s 13(1) where A acts because he or she thinks that B has a [2019] IRLR 805 at 808 particular protected characteristic even if they in fact do not: this is generally labelled '**perception discrimination**'. Judge Richardson gave an example at para 47 of his judgment, taken from the Explanatory Notes to the 2010 Act:
>
> 'If an employer rejects a job application form from a white man whom he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.'
>
> I should say, because it appears that a case of perception discrimination under the 2010 Act has not previously been before this Court, that I am satisfied that the consensus on this issue below was correct. As a matter of ordinary language the phrase 'because of [a protected characteristic]' is wide enough to cover the case where A acts on the basis that B has that characteristic, whether they do or not1; and the Explanatory Notes confirm that that was Parliament's intention.

13. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA as follows:

> (1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has

committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA 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 sex 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 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 s.63A(2). 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) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(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 s.56A(10) of the SDA. 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 respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent 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 respondent 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 respondent 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 code of practice.

14. We have also considered *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

15. In *Madarassy v Nomura International plc* 2007 ICR 867 CA Lord Justice Mummery held as follows:

> "The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (para 56)

16. In *Glasgow City Council v Zafar* [1998] ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well

have treated another raidemployee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

Indirect discrimination

17. As to indirect discrimination, the Equality Act 2010 provides

> 19 Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

18. In *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

Findings of Fact

The Respondents

19. In these reasons, simply for convenience and in the interests of brevity we refer to the First Respondent as the "**Metropolitan Police**", and the Second Respondent as the "**Scottish Police**".

Background

20. The First Claimant Sergeant Richard Lovelock joined the Police Service in 1993 and transferred to the Metropolitan Police in 2008. He was promoted to the rank of Sergeant the following year. In 2015 he completed an Authorised Firearms Officer (AFO) course, having previously had some experience as a AFO in the period 1996-2001. In April 2018 he was posted to the Parliamentary and Diplomatic Protection Command. He qualified as Operational Firearms Commander (OFC) in 2017. In April 2021 he qualified as a National Rifle Officer.

21. The Second Claimant Police Constable Jonothan Sayers joined the Police Service 2002. He transferred to the Metropolitan Police in 2005. He completed the AFO course in 2014 and in December 2014 was posted to the Royalty and Specialist Protection Command. He qualified as a NRO in 2017 and has prior firearms experience from military service.

COP 26 climate conference in Glasgow

22. The COP 26 climate conference took place between 31 October 2021 – 12 November 2021. Attendees included President Joe Biden from the US, Prime Minister Boris Johnson and Prince Charles. There were in the region of 120 world leaders visiting in the first week.

Operation Urram

23. Operation Urram was the policing operation providing security for COP26 in Glasgow.

24. At peak times were up to 10,000 police officers deployed over a 24 hour period. The uncontested evidence of the Second Respondent's senior officers was that this was the biggest policing operation the UK had ever seen at that stage. It is quite clear that it was a police operation on a very large scale.

Mutual Aid agreement for COP 26

25. A mutual aid agreement was drawn up and signed in August 2021 in anticipation of Police Scotland requiring assistance for the COP 26 climate conference in Glasgow. The parties to that agreement were the Second Respondent Police Scotland on the one hand (described as the applicant or AP or CCAP) and 44 Chief Constables of individual police forces in England and Wales and also for Northern Ireland on the other (described as the providers or or PP or CCPP).

26. Under the mutual aid agreement the Home Office agreed to pay to the providers sums set out in a National Policing Guideline document. This would cover such expenses as fuel, maintenance and repair of vehicles and accommodation for officers.

27. Under the heading "4. Pensions, Awards, Insurance, Torts and Discipline" the agreement contained the following clause:

> 4.4 In terms of section 24(1) of the Police and Fire Reform (Scotland) Act 2012, the CCAP [*i.e. Police Scotland*] shall be liable in respect of any unlawful conduct of constables, including Cross-border eight officers provided hereunder by the Chief Constable of PP [*i.e. the Provider*], under his direction and control in the performance for purported performance of their functions.

28. As to misconduct the agreement contained the following:

> "The arrangements for the handling of complaints and conduct issues in respect of the acts and omissions of officers provided under this Agreement shall be as follows:
>
> PP officers are not subject to any legislation concerning police complaints or conduct applicable to any police force or their members other than those applicable to the Police Service of PP and persons serving with PP.
>
> Complaints Investigations by AP
>
> The police officers deployed from PP to AP hereunder are not subject to any of the complaints handling provisions which apply to AP or police officers serving with AP. Any complaint submitted to PP in respect of a deployed officer shall be dealt with by PP.
>
> Misconduct Investigations
>
> The officers of PP are subject to the Police (Conduct) Regulations of the PP as in force and applicable from time to time and Senior Officers of the PP are subject to the Senior Officers Conduct Regulations of the PP as in force and applicable from time to time. Any allegation of misconduct by an officer of PP whilst deployed to the Event must therefore be dealt with under these regulations.

Initial briefing

29. On 29 October 2021 we accept the Claimants' evidence that they arrived in Glasgow and were given a briefing that OPs (observation posts) were *overt*. They were encouraged to use their telescopic sights attached to weapons to conduct observations and to have their weapons on show. They say that they were told that their rifles were to be loaded but without a round in the chamber, therefore the weapon would have to be made ready before it could be fired. They say that that they understood that this was an extra safety measure so that they could use the telescopic sights on their weapons as observation devices.

30. To the extent that any of this was doubted by the Second Respondent's witnesses, we do not hesitate to prefer the Claimants' version of the briefing given to them. First, the Claimants personally attended this briefing, whereas the Second Respondent witnesses did not. Second, our impression is that the Second Respondent witnesses, as senior officers were inevitably focused on the bigger picture of the operation overall. It was the Claimants who were

focused on their particular deployment and that specific briefing and the detail they were provided with. Third, we have not been presented with any evidence which would undermine our confidence that the Claimants accurately recollected this detail.

Police Scotland puppet

31. On 31 October 2021 there was a tweet on the twitter account "Scottish Police Dog Memorial", which contained an image of a toy dog in a police uniform sitting on the wing mirror of a police vehicle in a car park with trees and buildings visible in the background. The tweet was "next #PDKyle met @GlosPolDogs Good chat with the handlers [emoji with smiling face and starry eyes] Kyle is having fun spreading the word about the memorial [smiling emoji with open hands] #CharityMascot.

32. There are comments made by other Twitter users. One is about whether this is one of the newer dog vans.

33. No action, whether disciplinary or otherwise was taken in respect of this tweet. The Claimants rely upon this as a comparator to evidence their claim of direct race discrimination.

Regular firearms officer deployment

34. It is common ground between the parties that a regular, conventional deployment of firearm officers involves three officers being deployed together at an observation post. The roles of the three officers would be typically one as "spotter", one on the rifle, and the third as "relief" i.e. able to go and take a toilet break or perhaps facilitate communication with others.

35. In his oral evidence ACC Higgins expanded that if there are multiple deployments in close proximity a relief might be shared between different posts such that perhaps 7 officers might have been required in order to cover three observation positions. This did not appear to be in dispute.

Actual firearms officer deployment at OP2

36. Both Claimants were deployed with Sgt Duncan Clarke, also of the Metropolitan Police. At that time the Second Claimant PC Sayers did not know either the First Claimant or Sgt Clarke as they were from a different command and he had never previously worked with them.

37. All three were deployed as a team to the Hilton Garden Hotel in Glasgow City Centre. Some delegates at the conference were staying at this hotel which was being held in the Scottish Exhibition Centre (SEC).

38. This has been described to us as Observation Post 2 ("**OP2**"). As we have seen from a satellite image and from a ground level photograph provided by the Claimants (added to the bundle as pages 536 and 537). OP2 comprised three different observation points immediately below the roof line of this six story hotel. They've been described by the Claimants as the East observation point, the North observation point, and the West observation point.

39. At each point there was a hatch below the roof line which would be visible from ground level. The North and East observation points were relatively close at one corner of the building, but they were separated by an internal door and due to a noisy plant room direct verbal communication between these two points was impossible. The West observation point is at the far end of what is a long rectangle building. The SEC at which the COP26 conference was being held was visible from this observation point. We accept the evidence of the Claimants that the distance, internal barriers and noise meant that each observation point was not in easy communication with one another. Radio communication would have to take place through the main control room.

40. PC Sayers' evidence is that when they took over their first night shift the outgoing day shift rifle officers had expressed concerns as to the setup because the observation points were apart from one another leaving the individual firearms officers isolated. This was not the regular deployment described above. PC Sayers' uncontested evidence was that the day shift officers had raised concerns but had been told by the Tactical Firearms Commander in response to these concerns that they should simply run the position as they felt best. Superintendent Main said that he did not have a basis to say that this was wrong, but that it was not raised directly with him or any of the circles that he was in.

41. The Claimants and Sgt Clarke used their discretion and took of each of the three positions. The result was that the three of them were not sitting in proximity to one another and communication between them was restricted.

42. During the course of the Tribunal hearing senior officers from both Respondents suggested that the Claimants should have complained about a non-standard deployment or even refused to carry out their duties in this way. In circumstances in which the Claimants had been told by outgoing day shift colleagues that the matter of the deployment had been raised with more senior officers and that they had been told to run the position as they felt best, we find the approach of the Claimants understandable. We cannot imagine that firearms officers refusing to carry out their duties would have been welcome given the pressures that senior officers were under at that time.

PC Tasha Townsend

43. Sometime during the night on 2 November 2021, Sgt Lovelock recalls his colleague Sgt Clarke walking through the positions accompanied by a female police officer. He denies that he was introduced at that time and we received no evidence to suggest that he was. This was PC Tasha Townsend who was an armed response vehicle officer identified as working for the Bedfordshire Constabulary.

44. Sgt Lovelock admits that Sgt Clarke did show him an image of "Swoop" the toy puppet dog referred to below on his mobile phone, but he says that he cannot remember the setting and that Sgt Clarke did not tell him what he was going to do with this image, nor did Sgt Lovelock ask him.

Twitter post 3.11.21

45. On 3 November 2021 there was a tweet posted at 09:08 by a Twitter account "Police Dog Swoop" with images with the words

> "Swoop was spotted by the Metropolitan Police Rifle Team and invited to help keep a safe over watch here at COP26 #heretokeepyousafe'" ("**the twitter post**")

46. There are three images attached.

47. The first image is the view from behind a firearms officer with a rifle. The firearms officer is Sgt Clarke. The puppet "Swoop" has a paw on his shoulder. Swoop is a hand puppet dog which is obviously named as a reference to "Sweep" the hand puppet dog character from Sooty and Sweep the long running children's television show. The view from the observation point of buildings and a road can be seen. The photograph was taken at night time. The background is somewhat out of focus but would likely be recognisable by someone familiar with the site.

48. The second image shows the puppet Swoop apparently looking through the telescopic site of the rifle on a tripod pointing outward.

49. The third picture shows Swoop seen at a distance in the crosshairs of what appears to be a rifle telescopic sight. Swoop is sitting on the bonnet of a police vehicle. The vehicle has a number 40 on the roof (denoting Bedfordshire Constabulary) and a red * (asterisk) at the front which apparently denotes firearms vehicle. Although the inside of the vehicle is poorly lit appears that there is someone sitting in the police vehicle.

50. Sgt Lovelock's case is that the significance of the number 40 and the red * would be known to senior officers. None of the Scottish senior officers giving evidence to the Tribunal appeared to understand the significance of this number and this symbol.

51. As to the tone of the "tweet", it is clear that the twitter post and the accompanying photographs were intended to be light-hearted and humorous.

R2 becomes aware of Swoop twitter post

52. At 10.00pm Superintendent Murray Main of Police Scotland was informed by VIP Strategic Firearm Commander, Chief Supt Derek McEwarn of the twitter post.

53. Superintendent Main had been in the later part of his career a Tactical Firearms Commander and this was his role at the COP26 conference.

54. By the time Superintendent Main saw the post it had been "liked" 489 times, retweeted 35 times and had attracted 19 comments.

55. The immediate reaction of Superintendent Main was that these photographs had compromised what he understood to be "deliberately discrete locations"

and showed: first what could be observed from those observation points and secondly the type of weapons and tactics deployed at that location. We find that this understanding about these being discrete or covert locations was wrong, in view of PC Sayer's evidence that he had been briefed that these were overt locations. Nevertheless we find that Superintendent Main genuinely held that belief. It is true to say that the photographs do show a particular weapon being used and do reveal to some extent the view from an observation point.

56. Superintendent Main's view was that these Twitter post needed to be taken down. He briefed two more senior officers in Police Scotland, Ch Supt David Duncan & Asst CC Alan Spiers who agree with the concerns that he articulated.

57. The view being taken was recorded contemporaneously in a handwritten log at page 308 which reads:

> "it is still on social media exposing the rifle position exposing officers and the public to potential risk, plus reputational damage. Therefore it is time critical to establish a means to remove the post the only means available is the officers."

58. Supt Main says that he decided that an urgent "face-to-face" meeting was required. Given that in fact the matter was resolved later on by telephone, it is unclear to the Tribunal why Supt Main believed that this communication particularly needed to be face-to-face.

59. Leaving aside the question of whether communication needed to be face-to-face, we do not doubt that Superintendent Main felt under considerable pressure from his senior officers to get this matter resolved during the course of his night shift. From their perspective the tweet was, in the nature of social media, at risk of attracting more attention. Given that they thought that this was potentially embarrassing, they were keen to contain it and get the tweet deleted as soon as they practically could. What this meant was that he needed to identify who had control of the twitter account with some haste.

60. The Operational Firearms Commander Jeremy Roach, of the Metropolitan Police said that he was unaware of any photographs being placed on Social Media, but identified the Officer in the photograph as Sgt Duncan Clarke.

61. Attempts were made to contact Sgt Clarke by telephone.

Telephone calls

62. Superintendent Main suggested that attempts had also been made to contact the Claimants by telephone, as had been done to Sgt Clarke.

63. Superintendent Main's own brief created on 4 November 2021 (338 – 342) specifically records that attempts were made to contact Sgt Clarke, but there is no reference in that brief to attempting to call the Claimants by telephone. Instead what is described is identification of the hotel rooms of the three officers. It is evident from the room numbers that these were all on the same second floor of the hotel.

64. We accept the evidence of both Claimant that neither had missed calls on their mobile phones. It if there were any attempts to contact the Claimants, we find that it that there were not telephone calls placed to their mobile phone. On the balance of probabilities we find that Supt Main was mistaken about attempts being made to contact the Claimants by telephone.

65. We find on the balance of probabilities that no attempt was made to contact the Claimants by telephone and instead the approach taken was to move directly to knocking on their doors.

Early morning visit

66. For both of the Claimants Wednesday 3 November 2021 was rostered as a "travel day".

67. Thursday 4 November was a rest day, on which officers could return to England but in fact both officers chose to remain in Scotland, staying at Braehead Travelodge hotel.

68. At 04:15am on 4 November the First Claimant woken up in hotel room by Supt Main & Sgt Alan Rafferty. He told them he had no personal Twitter account and was not involved in the post

69. A few minutes later at 04:30am the Second Claimant was woken up in his hotel room also by Supt Main & Sgt Alan Rafferty.

70. Superintendent Main's notes record as follows:

> 0415 Spoke to Richard Lovelock
>
> Ps RICHARD CHARLES LOVELOCK
>
> …
>
> Not on Twitter. No personal account.
>
> Wasn't present. Duncan mentioned
>
> Police Dog Swoop. Twifter post unseen
>
> Swoop on bonnet.
>
> Duncan in Edinburgh with wife
>
> 0430 Spoke to John Sayers
>
> Not seen post. Was aware of the post
>
> Phone call from Police Scotland re
>
> a Twitter Account
>
> Doesn't use Twitter. Doesn't know or use

of Police Dog Swoop.

Duncan with wife in Edinburgh.

71. An email entitled “Social Media” from Chief Superintendent Linda Jones sent at 04:26 mentioned that a briefing paper on the matter is being worked on but a chat before “Gold” at 7 am would be helpful.

72. By 04:59 a suggested response to media enquiries had already been drafted by Linda Smith the Newsdesk Manager [302], to be used on a reactive basis. That response read as follows:

> “We are aware of images which were posted social media by an anonymous, non-official police account of Wednesday, 3 November which showed restricted and sensitive operational information. Enquiries are underway into the circumstances.”

Sgt Clarke

73. It seems that Scottish officers rattled the door of Sgt Duncan Clarke’s hotel room at approximately 0500.

74. At 06:41 Sgt Clarke called Superintendent Main. He identified himself as a person who had taken photographs with Tasha Townsend ARV Officer. He explained that the twitter account itself was operated by someone called Andy, surname unknown. Sgt Clarke took full responsibility for it, he had thought it was funny and harmless and would be enjoyed by others. He sincerely apologised.

75. Later on at 08:07 Sgt Clarke updated Superintendent Main to say that PC Tasha Townsend had been contacted and had said that she would remove the post.

76. Shortly after this conversation Superintendent Main handed over to the day shift officers Superintendent Sloan and Ch Supt Gibson.

Decision makers: Silver & Gold Commanders

77. The key decision makers in this case for Police Scotland in relation to a decision to repatriate the Claimants and Sgt Clarke were Chief Supt Mark Hargreaves and Assistant Chief Constable Bernard Higgins.

78. Chief Supt Hargreaves was a Silver Commander for COP26 which meant that he was a senior officer with responsibility for day-to-day policing of the event.

79. His senior officer ACC Higgins was the Gold Commander for the COP26 event. He had been appointed to this position back in October 2019 (the conference was rescheduled due to the Covid-19 pandemic). His role was responsibility for all strategic decisions that affected policing at COP26.

80. In practice Chief Supt Hargreaves would go to ACC Higgins for advice in relation to matters above his command level and in those cases ACC Higgins

ultimately took the decisions, albeit that might follow a recommendation from Chief Supt Hargreaves.

Handover from night to day commanders

81. At 06:00 on 4 November 2021 Ch Supt David Duncan (nightshift Silver Commander) handed over to Chief Supt Hargreaves his daytime counterpart.

82. According to Chief Supt Hargreaves as part of that handover his colleague told him that the twitter post had caused concern for Police Scotland because it contained photographs of an armed police officer observation post at the COP26 campus and it was felt it could therefore have compromised the security of the event. He explained that he had instructed Superintendent Main to identify the officer or officers involved and to get the twitter post removed, as it appeared it had already been viewed several hundred times.

83. This was a significant communication since it was the basis on which ACC Higgins and Ch Supt Hargreaves took the decision to repatriate. This decision was taken within the first 90 minutes of the start of the day shift.

84. The Claimants suggest that given that the report submitted by Superintendent Main nearly three hours later recorded their lack of awareness of the twitter post and his belief in their honesty, the oral handover must have included the view of Superintendent Main that they were not involved. Unfortunately the evidence we have on the precise content of this handover is limited. It seems likely that the handover between the two senior officers covered a variety of matters not simply the twitter post.

Awareness of nationality

85. ACC Higgins says that beyond knowing the names of the officers and that they were Metropolitan Police officers he did not know the race or nationality of the Claimants and makes the point that the Metropolitan Police workforce is multinational with officers from four parts of Great Britain (*sic*) and beyond. He says that there is no way he could have known their race or nationality. Ch Supt Hargreaves gave evidence to similar effect.

86. There is no evidence that the nationality of the two Claimants was categorically known to the two senior officers, nor any evidence that their nationality was discussed.

87. Taking a realistic view of this the Tribunal considers that based on the information of their names and the location of the employer it was more likely that the Claimants were English than any other nationality. Had ACC Higgins or Ch Supt Hargreaves been asked what was *most likely* at the time we find that this is what they would have said, albeit that this would be no more than a probability and less than a certainty.

Decision to repatriate the Claimants

88. We find that by 07:27 on 4 November 2021 at the latest the decision had been taken by the Police Scotland senior officers regarding repatriation on the

recommendation of Ch Supt Hargreaves (as Silver commander) having been endorsed by Assistant Chief Constable Higgins (as Gold commander).

89. At this stage neither of these senior officers had seen the briefing paper that was being prepared. It follows that they were reliant on what they had been told orally about the situation.

90. The evidence of both Ch Supt Hargreaves and ACC Higgins was that in their view the observation post, which was *covert*, had been "compromised". Their clear assumption was that the proximity of officers on observation post would mean that the Claimants must have been aware of the photographs being taken and the posts placed on twitter. Their conclusion was that all three members of the group deployed at the observation post must have known about it and were culpable since even if not directly involved they should not have allowed it to take place. They were sceptical of the Claimants suggesting otherwise, continuing to be sceptical in the Tribunal hearing.

91. The evidence of ACC Higgins was that first time he became aware that the Claimants were alleging that the observation post was a non-standard deployment, such that they were isolated from one another, was on the second day of the Employment Tribunal hearing. We did not form the view that this was disingenuous. It seems that the senior officers had formed their own view of what had occurred based on a standard deployment and did not delve into the detail of the actual deployment before making their decision. The Police Scotland senior commanders assumed this was a standard deployment where there would be good communication between the observation points. We find in fact that they were not right about that and there was not good communication between the observation points at OP2.

92. The Claimants assume that senior commanders must have known the precise actual detail of OP2. They submit that it was not credible that ACC Higgins did not know the layout of OP2 since he must have signed this off.

93. We find that ACC Higgins and Ch Supt Hargreaves did not have a detailed appreciation of the communication between the observation points at OP2 in reality rather than on a plan and wrongly operated on the basis that this was a covert deployment.

<u>Communication from Police Scotland to the Metropolitan Police</u>

94. At 07:24 on 4 November 2021 the URL of the twitter post was sent by WhatsApp from Chief Supt Mark Hargreaves of Police Scotland, who was Silver Commander for COP26 to Commander Karen Findley of the Metropolitan Police [98].

95. Ch Supt Hargreaves wrote the following message to T/Commander Finley three minutes later on 07:27:

> "hi Karen, could do with a chat about this. The 3 – person team is a Met Team. Superintendent Carl Linley is here and understandably irritated to say the least.

> On a more practical level, the officers will be sent home and as per arrangements any conduct issues can be done locally. It does leave ask short of a TRO team and I looking to see if we can arrange a replacement? They are next due on duty on Sunday."

96. Ch Supt Carl Linley was a Metropolitan Police officer who was deployed at COP26 as a Tactical Commander.

97. CH Supt Hargreaves spoke with Commander Findlay shortly after the WhatsApp exchange above. He confirmed the decision to repatriate the three officers. She did not query or disagree with that decision. That is not surprising since it was Police Scotland's decision to make.

98. There is an email dated 4 November 2021 from temporary Chief Inspector Melanie Wade, in the Professional Standards Department of Police Scotland in which she explained that Ch Supt Alan Gibson (who took over from Superintendent Main) had been liaising with ACC Higgins and Supt Carl Lindley (a senior Met officer deployed to Operation Urram) in relation to Superintendent Main's briefing paper, the contents of which have been shared with both.

Firearms

99. In his oral evidence to the Tribunal ACC Higgins explained that for him personally as a senior officer, the use firearms by the police was something of a "hot topic". His evidence was that he had faced significant public scrutiny over previous decisions involving the deployment of firearms in the past.

100. We accept that ACC Higgins had a particular concern about the way that deployment of firearms by police officers in Scotland would be perceived.

Briefing paper

101. By 08:55 4 November Superintendent Main submitted a briefing note headed "inappropriate social media post", a version of which we have seen in the bundle at pages 351 – 356.

102. In that briefing paper Superintendent Main wrote:

102.1. [para 3.10] Sergeant Lovelock and Constable Sayers independently stated they were not responsible for or have access to the Twitter Account 'Police Dog Snoop.' Both stated they had learned of the existence of the photographs, however, **they were unaware of any Social Media posts being placed containing the photos**.

102.2. [para 4.2] Sergeant Alan Rafferty and Sergeant Jim Raeburn both independently assessed the images and recognised the potential for the Rifle post in question to be identified. The implications of any identification were assessed as **low**. The **location of this post is strategically crucial to the overview of the site and there are limited options and no appetite to relocate the post elsewhere**. Both Rifle Tactical Advisors identified **poor weapon handling, potential Health and Safety breaches in terms of working at height and obvious reputational issues**.

102.3. [para 4.4] both Claimants "provided an account which was accepted as an **honest reflection of their knowledge and involvement**".

[emphasis added]

103. This briefing paper was exculpatory in relation to the Claimants' involvement in the matter. Supt Main in his report stated that he believed that they were not responsible for nor did they have access to the twitter account.

104. Neither Ch Supt Hargreaves nor ACC Higgins revisited their decision to repatriate the Claimants already taken some time between 06:00 and 07:27 that morning as communicated to T/Commander Findlay.

105. Ch Supt Hargreaves says that he did not see the briefing note until it was sent to him by Ch Supt Alan Gibson at 10:28am. He responded to a misunderstanding that it was the Metropolitan Police who had opted to withdraw the officers and explained that the decision to remove them have been made by Gold Commander [ACC] Higgins.

106. When Ch Supt Hargreaves was challenged about whether they ought to have reassessed or change their position on receipt of the briefing paper about the twitter post, his evidence was that a decision had been taken, they were under extraordinary pressure in relation to other matters and they simply would not have taken the time to revisit this decision given the other matters that they were dealing with. He said that he did review the briefing paper when it came in but nothing in it caused him to change his mind. The Tribunal has formed the impression that any review of the briefing paper was fairly cursory.

PC Tasha Townsend

107. Superintendent Main confirmed in an email that the post had been removed from Twitter, but raised that it might be on other social media sites. He wrote at 08:55:

> I have not progressed any enquiries in relation to the Bedfordshire Officer identified as Tasha Townsend. I have been advised she is an ARV Officer who concluded her tour of duty on Wednesday 4th November 2021, and is due to return to her home force today, Thursday 4th November 2021. I understand she is the contact with the site Admin, described only as 'Andy' (nfd). I have not explored any issues in relation to her accessing the elevated position of the Rifle Officers.

Claimants notified of repatriation

108. By lunchtime on 4 November 2021 the decision that the three officers were being sent home was communicated to the Claimants by Chief Inspector Holland (MPS liaison officer – MALO).

109. There was some dispute between the Claimant and Chief Inspector Holland about the precise wording used in this discussion. Sgt Lovelock says that Chief Inspector Holland said of the decision of Police Scotland "it is their party – they decide who they invite" and intimated that they had been treated unfairly.

110. It is clear that Chief Inspector Holland did have some sympathy with the Claimant's position. His view is set out in his witness statement which contains the following:

> 28. Personally, I felt that possibly slightly more primary investigation by Police Scotland Professional Standards at the initial stages and then speaking with the MPS professional Standards would have highlighted some more facts of the case against the Claimants. This would in turn provided more information to the Command Team for an informed decision, thus, not putting pressure on the wider operation from losing key skills that have been highlighted pre event as essential for mitigating to threat, risk and harm to the event and the public.
>
> 29. However, it was not my place to express those personal views at the time. My role was to make the experience of repatriation as smooth as possible for the officers. After reassuring them and ensure they knew the next steps after their return to take away as much of the concern as possible for.
>
> 30. I could see that the officers were very disappointed and I spent nearly 2 hours listening to their concerns and ensuring that I took the concern seriously so that they knew they weren't ignored.

111. It is not necessary for us to identify the precise language used in these discussions. We find that Chief Inspector Hollands had some sympathy for the situation in which the Claimants found themselves. He would not necessarily have dealt with the matter in the same way that Police Scotland did had he personally been in charge but that was not his role, as he discussed with the Claimants. We find that he was patient and sympathetic in dealing with the Claimants on 4 November who were understandably upset with the way that they have been treated.

Media reporting

112. Both the Daily Record and the Scottish Sun carried reports about the Metropolitan Police being sent home.

113. The Scottish Sun report was published online at 19:32 on 5 November 2021. This contained commentary from a Scottish criminal lawyer Aamer Anwar who condemned the images as "grotesque" and branding the officers involved a "disgrace". A full quote attributed to him reads as follows:

> "It is grotesque officers who are given the ultimate power of the right of shoot to kill, should think it appropriate to be sharing images of themselves in such a manner.
>
> Sadly it reflects very the gung ho and aggressive matcher attitude of the Metropolitan police, a service facing its worst crisis ever sent supposedly to aid Police Scotland – they are in fact a law unto themselves and a disgrace to their uniform".

114. The report also contained official comments from spokespeople on behalf of both of the Respondents in rather blander terms.

115. It was stated on behalf of the Metropolitan Police that the Directorate of Professional Standards (DPS) recommended that an officer be subject to a misconduct investigation, which would be managed locally by their Operational Command Unit. It went on "the DPS has found no evidence that any other Met police officers were involved in the making or posting of the photograph on social media."

116. A report in the Daily Record appears in the agreed bundle. The report itself is not timestamped or dated, but it is referred to in a roundup of stories published at 19:44 on 5 November 2021, which suggest that it must've been published before that point. The report contains the following:

> "a source told the Record that officers from the Metropolitan Police Services were 'read the riot act' by a top Scots court after pictures were taken yesterday of them in shops you positions around the SEC arena – where much of the conference is taking place.
>
> …
>
> A Police Scotland spokeswoman confirmed they were aware of the images and had refer[r]ed the officers to 'their home force'.
>
> A source told the Record that a chief inspector Police Scotland was awoken in the middle of the night after the pictures leaked and got up at 3am to 'sort it out'."

117. Neither press report actually names any police officer, whether the Metropolitan Police officers being repatriated nor any senior officer at Police Scotland making decisions.

Leak to press?

118. The Claimants have come to the conclusion and suggest to the Tribunal that this story had been deliberately leaked to the press.

119. In their closing submissions they assert that the most likely source of the story was either ACC Higgins "via his friend and support Aemar Anwar" or simply by ACC Gary Ritchie. They posit that it was highly improbable that the source was a low ranking officer "unsighted on the issues surrounding the matter". They say that it was done to make an example of officers front of the National Press.

By implication in the context of this claim this leak was to serve a nationalist or anti-English agenda.

No pleaded claim on leak as discrimination

120. We have reminded ourselves that this allegation goes wider than that those contained in the agreed list of issues.

121. The circumstances of the press coverage are referred to at paragraphs 30 and 31 of the grounds of complaint. In that document the press coverage circumstances which made the repatriations of the Claimants especially embarrassing. It is not alleged in the grounds of complaint that the source of the press coverage was a deliberate leak. It was not identified as part of the list of issues that a leak to the press nor communication to the press generally were acts of discrimination.

122. This Tribunal must therefore proceed with some caution. The suggestion of a leak has been put forward by the Claimants quite cogently in the hearing, but it is not part of the claims that the Respondents (and in particular the Second Respondent) prepared to meet. The Second Respondent has not called evidence from the communication team, nor have we had disclosure relevant to an alleged leak to the press. We cannot therefore conclude that this represents a failure of disclosure on the part of the Second Respondent, since the allegation that there was a leak to the press some has developed through the Claimants' evidence and submissions, but was not one of the central issues in the case identified in preparation for this hearing.

123. With those caveats, we make the following observations. ACC Higgins conceded in his evidence that matters are frequently leaked to the press from the police force. He said that he did not read the Daily Record which he characterised as a tabloid, which we would understand as a statement of personal preference but might find it somewhat surprising if a very senior officer did not ever read the national press as part of his or her role. He explained that a colleague of the same level of seniority as himself in the next office ACC Gary Richie was responsible for dealing with the media. He also explained that Mr Anwar, the criminal defence lawyer who made criticisms of the Metropolitan Police was someone known to him professionally for decades.

124. It seems clear that spokespeople for both Respondents were in communication with the press about the story. The practical effect of the communications, which by 19:32 on 5 November 2021 in the case of the Scottish Sun report included official comment from both Respondents and an apparent resolution of matters, is that the risk of an story about this twitter post appearing unexpectedly and embarrassing the two Respondent organisation was effectively contained. Viewed from the perspective of the communication teams of the two Respondents, it seems to us likely that this was seen as a successful outcome.

125. Returning to the specifics of what is being alleged, beyond speculation the Claimants cannot demonstrate who leaked this, nor whether it was officially sanctioned, nor at what level of the organisation the source of the information

came from. We note the Claimants' evidence that it already appeared to be already the source of internal gossip by the time they were going for breakfast, which suggested that the circumstances of the twitter post was already the topic of gossip internally within police force.

No conclusion on leak

126. Given that there is not an allegation that there was a discriminatory leak it is not necessary for us to make a finding as to the whether there was a leak.

127. We can see that based on timing of the press coverage, which is very close indeed to the material events, and the detailed contemporaneous reporting of repatriation of Metropolitan police officers, which was an internal matter, why the Claimants have formed the view that there was a leak of this story from within Police Scotland.

128. To reiterate, these are matters of conjecture which fall outside of the facts that this Tribunal needs to find to determine the allegations brought.

No disciplinary action

129. Returning to the narrative of internal matters within the respondent police forces, the Metropolitan Police quickly decided that no disciplinary action was necessary. In an email dated 15:53 on 4 November 2021, Inspector Ryan Keating of the Metropolitan Police Directorate of Professional Standards wrote:

> "Sergeant Lovelock … and PC Sayers … were posted to the same post as Sergeant Clarke, although there is no evidence to suggest they were involved – both they and Sergeant Clarke specify that they had no involvement whatsoever, and were not aware of the pictures being taken at the time – there is no evidence to counter or challenge this account."

130. He concluded that:

> "I have determined that there is **not** an indication that Sergeant Lovelock and PC Sayers may have committed a criminal offence, **nor** behaved in a manner that would justify disciplinary proceedings"

No disciplinary action

131. By an email sent on 5 November 2021 at 08:39 Sgt Mark Trower of the Professional Standards Unit within the Parliamentary & Diplomatic Protection Command notified the First Claimant Sgt Lovelock notified as follows:

> " just wanted to let you know and reassure you that following the incident in Scotland, you are not under investigation.
>
> Please can you return to your pre-COP26 duties"

132. A referral was made from Police Scotland's professional standards department to the corresponding department in the Metropolitan Police on 6 November 2021. It was described as a "Non-Criminal Conduct Case". Consistent with the communication sent to the First Claimant the previous day in fact no investigation conduct matter was progressed.

Repatriation

133. On 5 November 2021 both Claimants were sent back to London from COP26.

Near miss report: health and safety

134. The Tribunal heard evidence from the Claimants' Police Federation representative Rick Prior.

135. On 23 November 2021 Rick Prior sent a near miss report filled in by Sgt Lovelock. This is using a standard Police Scotland form created specifically for COP26. In that handwritten account Sgt Lovelock described the communication difficulties between the three positions at OP2. He also raises a concern about working isolated from a Working at Height perspective. He offers the opinion that a minimum of six officers should have been deployed to this location each shift, which would still not have allowed for relief or breaks. (We note that this is not substantially different from an opinion offered by ACC Higgins during his oral evidence).

136. This was responded to by Superintendent Stephen Irvine on behalf of Police Scotland in an email dated 24 November 2021.

Evidential comparator "T"

137. The Second Respondent introduced evidence of an evidential comparator, an officer from another Scottish region, outside of Glasgow who was Scottish, whom we shall refer to as "T", who was sent home from Glasgow to their home unit a few days before the events material to the Claimants' claim.

138. In that case the facts were that "T" met a stranger in a nightclub who went back with the officer to a single occupancy room in a designated police hotel. The duty manager of the hotel asked the visitor to leave.

139. The officer did not deny this version of events put to them and was sent back to their home unit due to reputational risks and security risks identified by Police Scotland. The increased Covid – 19 risk was noted. The decision to send this officer home was taken by Ch Supt Mark Hargreaves, who made the recommendation in the case of the Claimants. His evidence is that he did not know the nationality of this officer, although it was a Police Scotland officer and the Tribunal is told that this officer was Scottish.

140. The matter was then passed to the national conduct unit for assessment as a potential disciplinary matter.

Article 8 right: evidential comparator

141. The Tribunal acknowledges the importance of "naming names". In **Frewer v Google UK** [2022] EAT 34, [2022] IRLR 472 and in particular paragraphs 34 and 36, quoting from the case of Fallows v Newsgroup Limited as well as other leading authorities. In this decision HHJ Tayler reiterated the presumption in favour of the public hearing of Tribunal proceedings and the publishing of publicly accessible judgments, including the naming of names (citing Baroness Hale in R (on the application of C) v Secretary of State for Justice [2016] UKSC 2, [2016] 1 WLR 444 and Lord Rodger in In re Guardian News and Media Ltd [2010] UKSC 1; [2010] 2 AC 697, para 63). Restricting the naming of names is a restriction on the ability of the media to cover a story. In Frewer that the presumption that names should be named potentially included participants in material events, in that case Google's clients, who were not parties. A high threshold is required for any order which derogate from the open justice principle.

142. We have received evidence that the Second Respondent's evidential comparator "T" is married with children. In other words naming this individual might have real consequences for this comparator's family and private life.

143. Taking account of the presumption of open justice and article 10, but balancing this against the article 8 right of "T" (the right to respect for family and private life) that we have concluded that on balance should not name this individual, who is not a party, nor a witness, nor a participant in material events even at a very peripheral level. This person is no more than a comparator being relied upon by a respondent who is very likely unaware of these proceedings taking place. The identity of this person is not relevant or necessary to understand the case. We find that their article 8 rights outweigh the presumption of open justice in this case.

144. We have not made an order since we have never been provided with the name of this individual, nor was it introduced into evidence.

CONCLUSIONS

Disclosure

145. The Claimants complain in their submission document that they were not given adequate disclosure in respect of the initial briefing documents for firearms officers in preparation for Operation Urram.

146. At the core of this issues in this case is the Claimants' contention that they were removed from the Operation and sent home with no evidence of misconduct because they were English. Where there has been a dispute as to how the Claimants were briefed about the deployment when they arrived in Scotland we accept the Claimants' version of events. We do not need to see those briefing documents to resolve that dispute.

147. The Claimants (and the Tribunal in follow up questions) put to the Second Respondents' witnesses that version of events.

Evidence: "break in the evidential line"

148. As to the Claimants submissions on "breaking the evidential line" in respect of the paucity of evidence in relation to the role of Ch Supt Duncan and handover, the Tribunal must do the best it can on the balance of probability. This is not a criminal case in which gaps in the evidence might lead to a suggestion that the case has not been made out beyond reasonable doubt.

Burden of proof

149. Per the guidance of the Supreme Court in **Hewage**, in the present claims of direct race discrimination and direct sex discrimination the Tribunal has been able to make positive findings as to the reason why in each case without needing to consider the operation of the two-stage burden of proof.

150. Had have needed to consider a two-stage operation of proof in respect of both of these claims of direct discrimination we would have found that the Respondents (in reality the Second Respondent) had successful satisfied the burden on them to establish reasons for the treatment.

151. As to the claims of indirect discrimination, our finding is that these claims were misconceived, such that the burden of proof is not something that we have focused on. In reality those claims have taken up very little time; there has not been the need for additional evidence.

DIRECT RACE DISCRIMINATION

Protected characteristic

152. The Claimants are both English.

Knowledge of protected characteristic

153. There is no evidence that ACC Higgins and Ch Supt Hargreaves knew categorically that the Claimants were English nor that they considered themselves English.

154. What they did know is that the Claimants were officers working for an English police force. Given this and the Claimants' first names and surnames, it was more likely that they were English than any other nationality. This was less than a certainty however. Either of them might have come from another part of Great Britain or further abroad.

155. Bearing in mind that direct discrimination under section 13 is broad enough to encompass discrimination by association and discrimination by perception on balance it seems to the Tribunal that the two Claimants would have been seen or perceived by ACC Higgins and Ch Supt Hargreaves as loosely speaking "English" officers, had they been asked about it in a non-technical way at the time that they were dealing with the case.

156. There is no evidence however that the two Police Scotland senior officers consciously thought about or discussed the Claimants' nationality at all. It should be said however that the Tribunal is used to dealing with a situation where there is no direct evidence and inferences must be drawn.

Less favourable treatment

157. Were the Claimants subjected to the following less favourable treatment (within the meaning of section 13 EqA 2010) by the Second Respondent?

158. It seems to us that further investigation could have been carried out which would have exonerated the Claimants. Some investigation would have confirmed what the Claimants said which is that they were not responsible for the offending Swoop tweet and photographs and furthermore that they were not even aware of the photographs or the tweet being uploaded, given that the observation points to which they had been allocated to were not in close communication with one another.

159. The assumptions of the senior officers of the Scottish Police which were that first, the Claimants must have been involved with the making of the tweet; and second that the tweet had compromised covert armed officer positions we find were on the balance of probabilities not correct. On the basis of limited investigation these would have been shown to be wrong. Supt Main in his briefing accepted that the two officers had been honest.

160. With the benefit of hindsight there was an opportunity missed to reconsider whether repatriation was necessary. The Claimants emphasise the national police code of ethics and in particular the importance of fairness and also that it is good practice to review decisions in the light of any new information that is come in relation to them. They highlight in particular the National decision model, a document published on 23 October 2013 and updated 15 December 2014 written by the College of Policing which emphasises the reviewing of decision-making and provides a structure for thinking through the reviewing of decision-making. They emphasise that their replacements were not required until 7 November giving ample time for senior officers to review their decision.

161. Given the circumstances of the Claimants being woken in the early hours of the morning, and sent back to London with something of a question mark over their conduct, we entirely understand why both Claimants feel that they have been the subject of an injustice.

162. We must go on to consider whether the reason for that treatment was because they were English.

Being sent home to make an example of them; Being removed from Operation Urram

163. These allegations are different aspects of the same treatment. It is not in dispute that the Claimants were removed from Operation Urram and sent home. It did look as if an example was being made of them.

164. The Claimants emphasise in particular that they felt embarrassed and that they felt that a lot of officers knew about this situation. They also felt embarrassed on return to the Metropolitan Police and emphasise the knock-on effect on themselves and also domestic arrangements. There is also the press reports which are critical of the conduct of the Metropolitan Police officers, although they are not individually named. We imagine this can only have stoked the internal rumour mill.

165. By contrast, the Second Respondent by contrast says that this was a merely operational decision. They say it was not for them to make any disciplinary sanction which would be a matter for the home force i.e. the Metropolitan police. They say that there was the unique pressure of a very high profile and large scale policing operation with dignitaries from around the world. This background and particular pressure meant that once their senior officers had lost confidence in this small deployment of three armed officers, they simply did not want to take any chances of being in any way further compromised. They emphasise the importance of trust in firearms officers and also the lack of supervision of such officers at observation posts. The reason they did not want to re-examine the matter is that they were busy with other matters and did not have the time. In other words there were competing demands on their time and competing priorities.

166. The Tribunal accepts the evidence of the Second Respondent's witnesses about the degree of pressure that the senior officers were under at that time. It is evident from internal correspondence that they were genuinely concerned about the potential reputational problem given that the images that they thought were irresponsible were on general release in social media.

167. We have considered the "evidential" comparator relied upon by the Second Respondent, and arguments relied upon by both the Second Respondent and Claimants. That is discussed more fully under a separate heading below but is part of our reasoning. In short they were taking a tough line generally.

168. Both Respondents have placed a great deal of emphasis on the health and safety aspect in respect of an officer being in view through a telescopic sight and possible repercussions for public safety and compromise of the security arrangements. The Tribunal finds that health and safety factors have been given greater emphasis in the Tribunal hearing than than the reality of how important these factors were at the time. The Claimants were told to use their telescopic sights and for their rifles to be loaded but not made ready.

169. As to security, it seems that the operation of OP2 was not changed as a result of these events. We have not formed the impression that security was in fact substantially compromised, especially in circumstances where this was an overt rather than covert armed police post. We acknowledge that the first image attached to the Twitter post does contain a somewhat blurry view of what could be seen from that observation point, which might not be readily available in the public realm, but the implications of identification in Superintendent Main's report were assessed as being *low*.

170. Turning to our conclusions, we find that the principle priority of the Second Respondent was the rapid removal of information placed on social media which they thought could be a reputational problem and loss of trust in the three officers deployed to OP2. We accept that the Second Respondent's senior officers decided that they needed to take decisive action and were seen to take decisive action. We find that this is the reason why they acted in the way that they did. Their judgment was that decisive action in this case should extend to the deployment of three officers not merely Sgt Clarke.

171. We accept that Police Scotland's senior officers were under pressure and did not have the time or resources to enter into a detailed investigation, the like of which might be more appropriate if a disciplinary charge was being considered outside of the immediate pressure of the policing operation connected with a large international event. That they were requesting immediate replacements from the Metropolitan Police as early as 07:24 on 4 November demonstrates that they were focused on ensuring that they had adequate firearms officers.

172. The Tribunal is not uncritical of the way that the Claimants were dealt with. We consider that the Claimants were entitled to feel that they had experienced rough justice. They were embarrassed and lost out financially through no fault of their own. Those criticisms notwithstanding, we accept the Second Respondent's explanation for the reasons why the decisions that were taken. We have reminded ourselves that unreasonable treatment itself is not a basis to infer unlawful discrimination (case of **Zafar**).

173. We do not find that the Claimant's nationality was a part of the reason why they were sent home.

<u>Being sent home/returned to their home force without evidence or suggestion of them having engaged in misconduct and/or in inappropriate behaviour;</u>

174. Essentially all of the allegations of direct race discrimination based on nationality are overlapping and similar considerations applied.

175. As to the question of there being a *lack of evidence* for a lack of suggestion of having engaged in misconduct, we find that there was a paucity of evidence although not a total absence of evidence supporting misconduct. Essentially the Claimants were presumed by the Second Respondent's senior officers to be guilty of misconduct by association with Sgt Clarke and an assumption that they must have known that photos were being taken and uploaded. Sgt Lovelock had discussed Police Dog Swoop with Sgt Clarke but that was the extent of the association. Minimal investigation established in the mind of Supt Main at least that the Claimants were not involved.

176. The Second Respondent's case that this was an operational decision motivated by a desire to have absolute confidence in the team's firearm officers. The threshold for action was different to that appropriate to the decision as to whether to investigate or deal with something as a disciplinary matter. That would in any event be a question for the Metropolitan Police as the home force. Ultimately we accept this.

177. We have considered the circumstances of the evidential comparator which did suggest that, broadly speaking, a similar approach was taken with an officer in the Scottish force.

178. For similar reasoning to that given above we did not find that race was a factor in the way that the Claimants were treated. We accept the explanation for the treatment put forward by the Second Respondent.

Being sent home despite decisions not to investigate having been made by local professional standards; and/or

179. Being sent home despite professional standards confirming that there was no case to answer (prior to the decision being made).

180. By 15:53 on 4 November 2021 the Directorate of Professional Standards within the Metropolitan Police had decided that there was no evidence to counter the Claimants' account that they were not involved with the twitter post. Yet on the following day the Claimants were still repatriated.

181. The decision to repatriate the Claimants was taken ACC Higgins and Ch Supt Hargreaves and there was no evaluation by investigation by the equivalent professional standards department within Police Scotland. The Second Respondent's case is that this was an operational decision in respect of the confidence they had in these three officers and not a disciplinary or conduct question which would be amenable to more detailed investigation.

182. Ultimately the Tribunal accept that this was the Second Respondent's approach. The evidential comparator relied upon by the Second Respondent who was also returned to his home unit before a disciplinary process be concluded does provide some evidence that this was their approach, and an approach that they applied to a officer from the Scottish force. In essence the approach was anything which led to a question about confidence would be dealt with swiftly and robustly and if there was need to investigate in detail the purposes of disciplinary matters that would follow on later.

183. We acknowledge the points raised by the Claimants which is that at least in the case of the Scottish officer "T" the senior officers waited for the briefing note before taking a decision and T did not deny involvement. The Claimants point out that the relevant officer (ACC Hargreaves) made a decision in the case of T once in receipt of the briefing. They contrast that with their own case in which the briefing document had not been seen at the point where the decision was taken to repatriate them. This is not part of the claim and the Claimants did not formally apply to amend the claim to include it. Nevertheless given that this argument has been made by the Claimant we have considered it.

184. It is relevant that Supt Main had identified that the twitter post had led to a "time critical" situation. The situation of the officer T being accompanied back to the hotel room was different in the sense that this was not something that had been put into the public domain which required action to address reputational damage, nor was it in any sense an ongoing situation.

185. Ultimately what we take from this evidential comparator at a very broad level is that there was an approach of sending officers home for matters that would be investigated fully at a later stage and this applied to officers from both north and south of the border.

186. At the level of detailed scrutiny being suggested to the Tribunal by the Claimants i.e. regarding the precise timing of the decision and receipt of the briefing note, we find that there were small but significant differences between two cases which explain the slight difference in approach.

Comparators

187. If so, were the Claimants treated less favourably than the following comparators?

188. If so, are any of the individuals proper comparators within the meaning of section 23 EqA 2010? Is there any material difference between the circumstances of their case and the circumstances of the Claimants' case?

Actual comparator - Scottish Police Dog Memorial

189. The actual comparators are the (unnamed) Police Scotland Officers involved in posting images on social media under the title 'Scottish Police Dog Memorial'.

190. We note the position of ACC Higgins which is that there is no problem in principle with photographs of police officers with soft toys being taken in certain situations which do not undermine the integrity of a policing operation. He states that it can be a good idea to create engagement with the public is good for morale.

191. The Tribunal does not see the circumstances of the poster on twitter of an image a toy dog on the wing mirror of a police car in a car park as being sufficiently similar to the photographs of a toy dog in and around and seen through the telescopic sights of police rifles from an armed observation post to be the basis for a real comparator within the meaning of section 23 EqA 2010.

192. The case of the Scottish Police Dog Memorial toy does not have the same ingredients of potential security implications, potential health and safety implications and potential reputational risks as the “Swoop” case.

Evidential comparator

193. The submission of the Second Respondent is that the circumstances of the evidential comparator demonstrate that Police Scotland was taking a tough line generally and that equivalent treatment had been meted out to a Scottish officer.

194. This has provided some assistance to us in our conclusion that the Second Respondent was taking a tough line generally on matters that caused it any concern in relation to the security operation and specifically following a policy of sending officers away and investigating later.

195. Even without this evidential comparator however we did not find that we had sufficient evidence from which we could draw the inference that a hypothetical Scottish officer would not have experienced the same treatment that the Claimants did i.e. being sent away from Operation Urram with investigation to follow on later.

INDIRECT RACE DISCRIMINATION

196. Are the following provisions, criteria or practices ("PCP") within the meaning of section 19 EqA 2010?

196.1. Sending and/or returning officers of English nationality to their home force without proof of them having engaged in misconduct and/or in inappropriate behaviour;

196.2. Undertaking immediate assessments on whether to return officers from England to their home force following complaints and/or concerns having been raised, as opposed to undertaking adequate investigations;

196.3. Sending English officers home despite decisions not to investigate having been made by local professional standards;

196.4. Sending English officers home despite professional standards confirming that there was no case to answer (prior to the decision being made); and/or

196.5. Sending English officers home in order to make examples out of them.

197. Based on the alleged PCPs set out above the claim of indirect race discrimination is fundamentally misconceived.

198. Indirect discrimination is where a policy, criterion or practice (“PCP”) which applies universally has a discriminatory effect on a group with a particular protected characteristic. The PCPs set out above are actions which are, if true, directly discriminatory against English officers. That is the basis for the claim of direct discrimination above, not the basis for a claim of indirect discrimination.

199. The claim of indirect race discrimination based on nationality cannot succeed.

DIRECT SEX DISCRIMINATION

Treatment

200. Were the Claimants subjected to the following less favourable treatment (within the meaning of section 13 EqA 2010) by the Second Respondent?

201. It is not in dispute that Superintendent Murray Main of the Second Respondent's force entered the Claimants' hotel rooms in the early hours of the morning on 4 November 2021.

Actual comparator: PC Townsend

202. Additionally, and/or in the alternative, were the Claimants treated less favourably than the actual comparator, Ms Natasha Townsend, a female officer from Bedfordshire Police?

203. It is convenient to consider the circumstances of the actual comparator first.

204. It is disputed as to whether Natasha Townsend is a proper comparator within the meaning of section 23 EqA 2010 – i.e. whether her circumstances were the same or not materially dissimilar.

205. The Claimants highlight that she was a firearms officer and that she was implicated in the posting of the images on Twitter. She had also been in the vicinity of the OP2.

206. The Respondents argue that she was not part of the team of three in which the Respondent's operational team had lost confidence. The Second Respondent only became aware of her involvement at 06:41 in the telephone conversation with Sgt Duncan Clark in which he explained that she had taken the photographs and third party had then uploaded them.

207. We find that PC Townsend was not in materially similar circumstances for this reason. By the time the Second Respondent became aware that she was involved they already had contacted Sgt Clark who was taking steps to have the offending twitter post removed. Indeed he himself went on to contact Tasha Townsend successfully to arrange for the post to be removed. Additionally, Supt Main did not have the ability to knock on PC Townsend's hotel door at zero 04:15 or 04:30 hours the point at which he knocked on the Claimants' door, because at that stage he simply did not know she was involved.

208. PC Townsend was identified by Police Scotland as being involved with the twitter post in that she took one of the relevant photos. They did not send her home, nor did they make any attempt to locate her hotel room, nor enter her hotel room.

Hypothetical comparator

209. If so, were the Claimants treated less favourably than a hypothetical comparator, namely a female police officer/constable?

210. If so, is the identified hypothetical comparator a proper comparator within the meaning of section 23 EqA 2010? Is there any material difference between the circumstances of their case and the circumstances of the Claimants' case?

211. If so, was any such less favourable treatment because of the Claimants' sex?

212. Considering the case of a hypothetical comparator it seems to the Tribunal that this would have to be an individual who was either part of the deployment of three or implicated in it whose details the Second Respondent had at 04:00 or shortly thereafter. Superintendent Main in his oral evidence to the Tribunal was adamant that if he had the details of a female officer in that situation he would have knocked on their door.

213. The Tribunal has considered whether, in the case of a female officer being woken up in the middle of the night in a hotel room, more caution might have been shown by someone in Supt Main's position. We pondered whether he might for example have been more likely to make sure that there was a female officer present for example.

214. Ultimately, however we have had to focus on "the reason why" the treatment occurred. A comparator, actual or hypothetical, is simply a tool to examine that question. In this case, we are satisfied that we can answer the question what was the reason for the treatment. We find that this was because Superintendent Main was under pressure to find a rapid solution to the twitter post which was deemed potentially embarrassing as well as exposing officers and the public to a potential risk. It was solely for this reason that he knocked on the door of these officers and entered their rooms and not because they were men.

215. It follows that the claim of direct sex discrimination fails.

INDIRECT SEX DISCRIMINATION

216. Are the following provisions, criteria or practices ("PCP") within the meaning of section 19 EqA 2010?

216.1. Entering the rooms of only male officer(s) in the middle of the night in order to investigate concerns/complaints; and/or

216.2. Superintendents/higher ranking officers entering the hotel rooms of male police officers only.

217. For similar reasons as set out in relation to the claim of indirect race discrimination, the basis for this claim of indirect sex discrimination is misconceived. The PCPs set out here are instances of alleged directly discriminatory treatment. They are not policies of general application which adversely affected a particular group.

218. The claim of indirect sex discrimination does not succeed.

LIABILITY OF R1

219. We do not find that there was any contravention of the Equality Act 2010 at all.

220. It follows that we do not find that the First Respondent was liable either by virtue of being the Claimants' employer or as a principal with the Second Respondent as agent.

221. We do not find that the Second Respondent instructed and/or caused or attempted to cause and/or induced or attempted to induce the First Respondent to commit a contravention of the EqA 2010, nor do we find that the the Second Respondent knowingly helped the First Respondent to contravene the EqA 2010.

222. As to whether it might be said that the First Respondent Metropolitan Police independently discriminated against the Claimants, we accept that it was not the position of the Metropolitan Police to make decisions about whether or not to repatriate the Claimants. That was entirely at the discretion of Police Scotland who were running Operation Urram

Reasonable steps

223. If so, did the First Respondent take all reasonable steps to prevent the Second Respondent from contravening the EqA 2010 in the manners alleged and therefore is not liable for such contraventions by virtue of section 109(4) EqA 2010?

224. It has not been necessary for us to consider the “all reasonable steps” statutory defence.

Employment Judge Adkin

Date 21 August 2023

WRITTEN REASONS SENT TO THE PARTIES ON

.22/08/2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

APPENDIX

LIST OF ISSUES

A THE CLAIMS

1. The Claimants bring claims for:

   (a) direct race discrimination contrary to section 13 Equality Act ('EqA) 2010;
   (b) indirect race discrimination contrary to section 19 EqA 2010;
   (c) direct sex discrimination contrary to section 13 EqA 2010; and
   (d) indirect sex discrimination contrary to section 19 EqA 2010.

B LEGAL ISSUES - MERIT

Direct Race Discrimination

1. Were the Claimants subjected to the following less favourable treatment (within the meaning of section 13 EqA 2010) by the Second Respondent?

   a) Being sent home to make an example of them;
   b) Being removed from Operation Urram
   c) Being sent home/returned to their home force without evidence or suggestion of them having engaged in misconduct and/or in inappropriate behaviour;
   d) Being subject to immediate assessments on whether to return the Claimants to their home force following complaints and/or concerns having been raised, as opposed to undertaking adequate investigations;
   e) Being sent home despite decisions not to investigate having been made by local professional standards; and/or
   f) Being sent home despite professional standards confirming that there was no case to answer (prior to the decision being made).

2. If so, were the Claimants treated less favourably than the following comparators?

   a) Police Scotland Officers involved in posting images on social media under the title 'Scottish Police Dog Memorial'
   b) A hypothetical comparator, namely a Scottish police officer.

3. If so, are any of the above individuals proper comparators within the meaning of section 23 EqA 2010? Is there any material difference between the circumstances of their case and the circumstances of the Claimants' case?

4. If so, was any such less favourable treatment because of the Claimants' nationality?

Indirect Race Discrimination

1. Are the following provisions, criteria or practices ("PCP") within the meaning of section 19 EqA 2010?
   (a) Sending and/or returning officers of English nationality to their home force without proof of them having engaged in misconduct and/or in inappropriate behaviour;
   (b) Undertaking immediate assessments on whether to return officers from England to their home force following complaints and/or concerns having been raised, as opposed to undertaking adequate investigations;
   (c) Sending English officers home despite decisions not to investigate having been made by local professional standards;
   (d) Sending English officers home despite professional standards confirming that there was no case to answer (prior to the decision being made); and/or
   (e) Sending English officers home in order to make examples out of them.

2. If so, did the Second Respondent apply any of these PCPs?

3. If so, did the Second Respondent apply, or would it apply, any of these PCPs to persons not of the same nationality as the Claimants applying section 19(2)(a) of the EqA 2010?

4. If so, did any of these PCPs put, or would any of them put, persons who share the characteristic relied on by the Claimants at a particular disadvantage applying section 19(2)(b) EqA 2010?

5. What is the relevant pool for comparison, against which the question of particular disadvantage is examined?

6. Did any of these PCPs put, or would any of them put, the Claimants at the disadvantage in question applying section 19(2)(c) EqA 2010?

7. If so, can the Second Respondent show that the relevant PCP(s) was/were a proportionate means of achieving a legitimate aim applying section 19(2)(d) EqA 2010?

Direct Sex Discrimination

1. Were the Claimants subjected to the following less favourable treatment (within the meaning of section 13 EqA 2010) by the Second Respondent?

   a) Superintendent Murray Main of the Second Respondent's force entering the Claimants' hotel rooms in the early hours of the morning on 04 November 2021.

2. If so, were the Claimants treated less favourably than a hypothetical comparator, namely a female police officer/constable?

3. If so, is the identified hypothetical comparator a proper comparator within the meaning of section 23 EqA 2010? Is there any material difference between the circumstances of their case and the circumstances of the Claimants' case?

4. If so, was any such less favourable treatment because of the Claimants' sex?

Indirect Sex Discrimination

1. Are the following provisions, criteria or practices ("PCP") within the meaning of section 19 EqA 2010?
   (a) Entering the rooms of only male officer(s) in the middle of the night in order to investigate concerns/complaints; and/or
   (b) Superintendents/higher ranking officers entering the hotel rooms of male police officers only.

2. If so, did the Second Respondent apply any of these PCPs?

3. If so, did the Second Respondent apply, or would it apply, any of these PCPs to persons not of the same sex as the Claimants applying section 19(2)(a) of the EqA 2010?

4. If so, did any of these PCPs put, or would any of them put, persons who share the characteristic relied on by the Claimants at a particular disadvantage applying section 19(2)(b) EqA 2010?

5. What is the relevant pool for comparison, against which the question of particular disadvantage is examined?

6. Did any of these PCPs put, or would any of them put, the Claimants at the disadvantage in question applying section 19(2)(c) EqA 2010?

7. If so, can the Second Respondent show that the relevant PCP(s) was/were a proportionate means of achieving a legitimate aim applying section 19(2)(d) EqA 2010?

Liability

1. Is the First Respondent liable for any contravention of the EqA 2010 as alleged by virtue of being the Claimants' employer under section 42 EqA 2010?

2. Was any contravention of the EqA 2010 as alleged carried out by the Second Respondent acting as agent for the First Respondent as principal? Is the First Respondent primary liable for any such contravention as principal by virtue of section 109(1) EqA 2010?

3. If so, did the First Respondent take all reasonable steps to prevent the Second Respondent from contravening the EqA 2010 in the manners alleged and therefore is not liable for such contraventions by virtue of section 109(4) EqA 2010?

4. In the alternative, has the Second Respondent instructed and/or caused or attempted to cause and/or induced or attempted to induce the First Respondent to commit a basic contravention of the EqA 2010 as alleged, contrary to section 111 EqA 2010 for which the First Respondent has primary liability?

5. Further, and in the alternative, has the Second Respondent knowingly helped the First Respondent to contravene the EqA 2010 as alleged contrary to section 112 EqA 2010 for which the First Respondent has primary liability?

C LEGAL ISSUES - REMEDY

1. What losses have the Claimants suffered / what remedy are they entitled to?