Neutral Citation Number: [2026] EAT 1

Case No: EA-2024-000879-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 January 2026

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

MR MOHAMMED RASHAD **Appellant**

- and –

THE CHIEF CONSTABLE OF CLEVELAND POLICE **Respondent**

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- -

Ms H Hogben (instructed by Haighs Laws) for the **Appellant**
Mr S Healy (instructed by Evolve Legal Services) for the **Respondent**

Hearing date: 2 December 2025

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JUDGMENT

SUMMARY

JURISDICTIONAL/ TIME POINTS

The claimant appealed against the ET's refusal to grant a just and equitable extension of time for a victimisation claim (complaint 9) under the Equality Act 2010. He argued first that the ET erred in finding witness evidence "less reliable" due to delay without an evidential foundation to do so, and wrongly inferred forensic prejudice; and secondly that the ET took into account an irrelevant consideration, namely potential reputational damage to a witness.

(1) The ET had not erred in law. Its assessment of deterioration in evidence quality was a permissible, impressionistic evaluation applying **Gestmin** principles. The ET's reasoning sufficiently explained why delay created forensic disadvantage to the respondent's ability to meet the case.

(2) Reputational risk to a non-party witness is not automatically irrelevant. In the policing context, impaired reputation may carry implications for the respondent organisation, forming part of the overall forensic prejudice. The ET was entitled to weigh this factor.

(3) The ET's conclusion on limitation was within its broad discretion under s123(1)(b) Equality Act 2010, and its reasons were adequate.

HIS HONOUR JUDGE BEARD:

1. This is an appeal against ET's refusal to extend time for the claim set out as complaint 9 (but solely related to the claim of victimisation) under s123(1)(b) Equality Act 2010. The ET hearing took place in January–February 2024 and Judgment was issued in June 2024. I shall refer to the parties as they were before the ET as claimant and respondent.

2. Mr Bowers KC sitting as a DHCJ refused grounds 1 and 2 as not being reasonably arguable. The remaining grounds 3 and 4 were permitted to advance to this full hearing. Ground 3 contends an error of fact & law: as the ET found evidence "less reliable" due to delay without supporting evidence and misapplied s123(1)(b) of the Equality Act 2010 by assuming forensic prejudice without the evidence. Ground 4 is that the ET took into account an irrelevant consideration giving weight to potential reputational damage to Acting Inspector Dack, which is not germane to the statutory balancing exercise. The grounds in full are:

> ***Ground 3****: The Tribunal erred in determining that it had no jurisdiction to hear the claim of victimisation. There were two factors which appear to have been decisive in declining to extend time – forensic prejudice [paragraphs 430 and 432] and the impact on the professional reputation of Acting Inspector Dack [paragraph 432].*
> *The ET concluded that the witness evidence in respect of Complaint 9 was less reliable than it would have been had the claim been presented sooner than it was 4 [paragraph 434.5]. However, there was no evidence of forensic prejudice to the respondent in respect of Complaint 9. The Claimant raised a grievance within a day of the interview on 5 March 2021, thus giving the Respondent the opportunity to preserve any evidence of relevance to the allegations against Acting Inspector Dack. The ET gave limited weight to the fact that the Claimant had invoked the internal grievance procedure prior to commencing proceedings [paragraph 420]*
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> ***Ground 4****: Further, the ET erred in the exercise of its discretion under s123(1)(b) EqA by taking into account possible damage to Acting Inspector Dack's reputation and/or by erroneously prioritising that consideration over the prejudice to the Claimant in not having his complaints determined [paragraph 432].*

3. The claimant brought a wide ranging discrimination claim to the ET. It covered events going back a considerable time and involving current and retired police officers. The ET dismissed all of the claimant's claims. It was accepted before the ET that the complaint which is the subject of this appeal was reliant on it forming a continuing act with later complaints in order for it to be considered as presented within ordinary time limits and not needing consideration under just and equitable extension principles. It is of note that, at

paragraphs 105 of the judgment the ET make reference to **Gestmin SGPS v Credit Suisse (UK) Limited** [2013] EWHC 360 indicating its approach to the evidence, particularly in the light of fallibility of human memory.

4. The complaint referred to as "complaint 9" was, for the purposes of this appeal a complaint of victimisation. The foundation was that the claimant had previously brought a claim of discrimination in the employment tribunal. In that claim he had named Acting Inspector Dack as someone who had discriminated against him. The claimant had applied for a particular post of sergeant. A/I Dack was appointed to the recruitment panel for the post. The claimant was not selected to fill the post. It was common ground that A/I Dack had failed to recuse herself from a promotion panel on 5 March 2021. The Claimant raised a grievance about her involvement in the recruitment panel within 3 days of the interview. That grievance was not dealt with immediately and in May 2021 the claimant added to the grievance other matters which he brought before the ET. The claimant's claim was eventually issued in August 2021 after attempts at internal resolution.

5. In evidence before the ET the judgment indicates that A/I Dack told them that recusal had been considered but she, in discussion with other members of the panel, did not believe it was necessary. The evidence was that she considered that the earlier claim had been a significant time earlier and had been withdrawn and it was not necessary for her to recuse herself. There is no indication in the judgment, one way or the other, as to whether the ET considered her account to be credible or reliable.

6. Another witness, Heather Clynch, part of HR had been appointed as a point of contact for the claimant. She indicated that it was her opinion that A/I Dack should have recused herself from involvement. She could not explain why she had not included this as part of her conclusions as to why this opinion had not been included as part of the outcome.

7. The following is the relevant chronology:

a. In November 2015 the claimant presents a first claim of race discrimination in the ET, including allegations against PC Gill (now Acting Insp Dack).

b. 24 February 2021 the claimant was informed that he had been successful in reaching a second stage of selection process for a Sergeant post and would be invited to interview. Later the claimant was informed that the interview was scheduled for 12:45 on 5 March 2021.

c. 5 March 2021 the interview conducted by Supt. Helen Wilson, Chief Insp Jamie Bell, A/I Dack (independent panel member), and George Marratty.

d. 8 March 2021 the claimant emails the respondent to raise formal grievance about Acting Insp Dack's presence at promotion board interview.

e. 15 April 2021 HR emails the claimant asking if legal has responded. On the following day

the claimant replies stating there has been no update on this grievance.

f. 19 April 2021 HR assures the claimant that they will "do a chase around tomorrow."

g. 22 April 2021 ACAS receives Early Conciliation (EC) notification and on the following day issues an EC certificate.

h. 7 May 2021 the claimant and his representative meet the respondent and the claimant provides additional information.

i. 3 August 2021 HR internal communications treat the matter as closed and not recorded as grievance.

j. 20 August 2021 the claimant submits ET1 claims of direct discrimination, harassment, and victimisation, plus application to extend time for further and better particulars and the ET later directs the claimant to provide these by 14 September 2021.

k. 16 August 2022 the claimant is given the conclusions of the grievance outcome in respect of the original complaint about the sergeant interview.

8. The claimant and respondent agree the following legal principles apply:

a. There is a wide discretion to extend time.

b. Prejudice must be evidence-based.

c. The absence of forensic prejudice is not decisive.

9. The ET set out the following in relation to the decision on time limits.

a. At paragraph 420

In light of the above, whilst there is a public interest in encouraging the internal resolution of disputes without the need to issue a tribunal claim, the fact that the claimant invoked the internal grievance procedure prior to commencing proceedings is a factor of limited weight in our decision as to whether the grant of an extension of time is justified.

b. At paragraph 430

Although the respondent was able to lead evidence on these matters at the hearing, we consider that the delay caused some prejudice to its ability to defend the claims. The issues at the centre of these claims were the motivations of various individuals for doing the acts (or omissions) said to be unlawful and, in some cases, whether the alleged act or omission occurred at all, or happened in the way alleged. Whilst some facts that may have a bearing on those issues could be established by reference to documents, others were dependent on the recollections of individuals. Evidence of various factual issues was less good than if a claim about it had been

brought nearer the time and even where witnesses believed their evidence to be accurate, the passage of time left their evidence more vulnerable to being considered unreliable.

c. At paragraph 432

Deciding the claims on evidence that is less good than it would have been if a claim was brought sooner would also be prejudicial to the individuals who are said to have committed the unlawful acts. None of those individuals are respondents and therefore they do not face the risk of having a judgment made against them personally and being liable to pay any compensation. Nevertheless, if we were to determine these claims we would be reaching conclusions about the lawfulness of their conduct, in a public forum and in a public judgment, with potential implications for their professional reputations. In this regard, we note that a point pressed by Ms Hogben when cross-examining Ms Dack was that the allegations made against her in the claimant's earlier tribunal proceedings could have been career-ending if proved. Even if there were no forensic prejudice, as the alleged perpetrators of the unlawful acts they are still, to borrow the words of His Honour Judge Auerbach in the case of Souter 'on the receiving end' of this litigation and there is a public policy in them, not just the respondent, 'benefitting, so far as possible, from the certainty and finality that the enforcement of time limits potentially gives them.'

d. At paragraph 434.5

Complaint 9: The claimant has not proved facts from which we could conclude, in the absence of any other explanation, that Insp Dack's failure to recuse herself was in any way related to race. Therefore, the complaints of race related harassment and direct race discrimination would fail if we were to exercise our discretion to extend time. We do not suggest that the victimisation claim would necessarily fail. However, we do consider that the witness evidence relevant to this claim was less reliable than it would have been had the claim been presented sooner than it was.

Claimant's Argument

10. In respect of ground 4 the thrust of the claimant's argument is that the ET had no evidence upon which to base the conclusion that delay had impaired A/I Dack's memory; her statement was clear and consistent. The respondent had received early notice of the issues in the grievance brought and had every opportunity to preserve evidence. The claimant contends that the ET's balancing exercise was flawed as it was based on a non-existent forensic prejudice and it considered irrelevant reputational concerns. The ET did not give enough weight to the fact that the claimant acted promptly and reasonably by pursuing grievance before litigation.

11. In respect of ground 4 of the appeal the claimant argues that public policy on time limits applies to

parties and not witnesses.

12. In oral submissions Miss Hogben pointed to paragraph 434.5 and the conclusion that witness evidence was less reliable. She argued that there are no ET findings which show evidence to support that conclusion. The evidence given must be the foundation for such facts. That evidence did not demonstrate that A/I Dack had difficulties with the evidence or problems with memory.

13. The ET must have concluded that A/I Dack did not recuse herself and her failure to do so could be an act of victimisation. They were aware she knew that the claimant had made allegations of discrimination against her. A/I Dack had accepted in evidence that she was a bit angry and gave a clear account of reasons for her decision. In her evidence she went through reasons why she had remained on the panel. In addition she gave explanations as to why the claimant performed poorly at interview. The claimant had a point of contact in HR who could not give reasons why she did not say that in her view A/I Dack should have recused herself. In the ET findings, there is, in contrast no mention of A/I Dack not remembering the events and reasons. Indeed the ET seems to have accepted the evidence from A/I Dack about the claimant's performance at interview.

14. Miss Hogben referred to the law being summarised by Laing J in **Miller** (see below) that the ET cannot interfere with the discretion unless it has not been judicially exercised. In the same case it is set out that it is the "forensic prejudice" that is relevant. However, the argument made is that in assessing forensic prejudice without evidence the ET was not exercising it's discretion judicially. It is contended that the effect of that error is that it wrongly tainted the conclusion as to whether there should be a just and equitable extension of time.

15. Miss Hogben accepted that in this case the ET did not decide that on the merits that this claim would succeed. However, the principle set out in the case of **Payone** (see below) was still relevant. In this case the ET must have found that the claimant had proved primary facts from which victimisation could be shown. In paragraph 434.5 the ET had dismissed the direct discrimination and harassment claims based on these facts but then went on to say that they did not "*suggest that the victimisation claim would necessarily fail*". Therefore the claimant could prove facts to shift the burden of proof and the key question becomes why A/I Dack acted as she did. It was argued that the balance of prejudice in those circumstances weighs heavily in favour of the claimant because he had "shifted" the burden of proof. The ET did not explicitly accept her explanation for why she did not recuse herself as being true. As such the ET had gone part of the way to indicating the claimant had established the complaint of victimisation, but not weighed that in the balance.

16. The claimant argues there is a second aspect to ground 3. At paragraph 431 the ET dealt with the claimant's mitigation for presenting the claim late. This was circular reasoning having concluded there was prejudice. They should not have concluded prejudice for the reasons already given. Therefore treating the

raising of the grievance as mitigation of prejudice which did not exist.

17. In respect of the approach to the claimant raising a grievance, the ET approached this treating all complaints as a composite. Complaint 9 related to a specific complaint raised in March 2021. The claimant raised further issues in May 2021, but they were separate from the specific earlier grievance. The ET in considering this issue said it was reasonable for the respondent to take so long over the grievance because of the complexities involved. These were not difficulties which would have affected the interview grievance; that could have been dealt with quickly by the respondent. There were two months between raising the first specific grievance and the further issues. The first was limited in scope and there was not a great deal to capture in terms of evidence. In the ET1 it was highlighted that there was a delay because of the claimant trying to pursue an internal grievance,

18. In respect of ground 4 the claimant contends that the ET error is taking into account an irrelevant consideration; reputational damage to A/I Dack. This relates to paragraph 432 of the judgment. The claimant contends that there is no forensic prejudice which would accrue to witnesses and it is wrong to consider reputational damage to witnesses in a balancing exercise which is about prejudice between the parties. Again the claimant relies on the legal principles set out in **Miller.** The scope for exercising discretion must be to take account of relevant matters only. If an aspect is not relevant to the exercise of discretion it must be disregarded the claimant relies on **Teinaz** (below) para 20. The claimant argues the ET clearly took into account a factor which was not germane to the test of just and equitable between the parties. The claimant dealing with the respondent's skeleton argument refers to the argument that the description of witnesses' reputational damage is a mischaracterisation of the ET's explanation. The claimant contends that in the paragraph 432 "nevertheless" is followed by "even if there were no forensic prejudice" and this means that this was a discrete factor impacting on the decision not to extend time. The claimant went on to argue that only proven allegations could affect reputation. If that was a finding that would outweigh the damage to a witness. If the ET were concerned that there was merit in the complaint that is a reason to extend time. If the opposite were true and the finding was that there was no victimisation then reputation would equally be an irrelevant factor.

Respondent's Argument

19. The Respondent argues the ET correctly applied the law and the grounds of appeal mischaracterise the ET's reasoning. The ET balanced all relevant factors and its decision should stand because it correctly directed itself on law and discretion under s123(1)(b) and considered the following factors. The claimant's familiarity with employment law and procedures. That there was no evidence health prevented timely filing. That the claimant's grievances were raised promptly and by July 2021, internal resolution seemed unlikely. That delay affects reliability of oral evidence and there were differences between grievance case and ET case. That there was prejudice to individuals facing stale claims. That the ET weighed the prejudice to Claimant along with the merits of the complaint; it had some prospect of success.

20. The respondent argues that when reading the judgment I should be conscious of the task the ET was undertaking. The judgment and reasons exceed 80 pages, that is because there were 12 days of the hearing. The ET was dealing with events that happened some 2 and a half years prior to the hearing. The importance of this is that when the ET was dealing with a case of this nature it is important for the appellate body not to be overanalytical (it appeared to me that this was asking me to consider the **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 guidance).

21. The respondent argued that this is, in effect, a reasons based challenge to the judgment. The ET was engaged in an impressionistic analysis of oral evidence and although there are no specific factual findings as to the evidence being unreliable, that does not mean that the ET did not consider that evidence was weaker or vaguer than it might have been at an early stage. An ET is not required to spell out everything that they are considering, clear and concise reasoning is to be encouraged in Judgments. In respect of A/I Dack the ET may have had doubts about the quality of her evidence, paragraph 430 identifies the issues. In dealing with the decision in **Afolabi** (below) Mr Healy pointed out that the decision there was at a preliminary hearing where the respondent chose not to provide evidence. Mr Healy argued it was a matter of taking a step back and viewing the judgment as whole in its context; there was no error of law.

22. In dealing with ground 4 Mr Healy argued that the claimant had mischaracterised the ET findings. This was merely a summing up of a number of matters not the ET relying on reputational damage to the witness as a balancing factor. If that was wrong the ET had not decided that there was a cast iron case of victimisation. In paragraph 432 the ET is setting out that the stakes are high for not only the respondent and the claimant but also for the witnesses. It is not just a relevant consideration for the parties but for witnesses too. It is in everyone's interest not to have litigation hanging over them.

23. In discussion with Mr Healy he accepted my characterisation that his argument was: first that it was based on a mischaracterisation of the ET judgment, second that if that was wrong there was no reason why an ET might not put the effects on witnesses in the balance.

The Law

24. Equality Act 2010 section 123(1)(b) provides, so far as is relevant:

> *(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> -----------------
>
> *(3) For the purposes of this section—*

(a) conduct extending over a period is to be treated as done at the end of the period;

25. Section 136 provides, so far as is relevant:

(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.

26. Limitation Act 1980 section 33(3) provides a useful but not mandatory list of factors for extending time as follows:

a. the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time ---;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f)the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

27. **Robertson v Bexley Heath Community Centre** [2003] IRLR 434 sets out that the discretion to extend time is wide but exceptional rather than the rule. The case of **Chief Constable of Lincolnshire Police v Caston** [2010] IRLR 327 deals with the discretion under s123(1)(b) Equality Act 2010. In **Caston** the claimant filed a discrimination claim outside the statutory time limit. The (EAT) emphasised that there is no presumption in favour of granting extensions and the burden is on the claimant to show why an extension should be granted. The EAT set out that the relevant factors to be considered included the length of, and reasons for, the delay. The relative prejudice to the parties including the merits of the claim. In essence it suggests a structured approach should be taken when exercising discretion under s123(1)(b).

28. In **Miller & Others v Ministry of Justice** UKEAT/0003/15/LA the EAT sets out the approach and clarifies that the ET is required to balance all relevant factors rather than apply rigid rules. The EAT confirmed that the ET should avoid a checklist and instead consider factors holistically and whilst the merits of the underlying claim can be relevant these should not dominate the decision. **Afolabi v Southwark London Borough Council [2003] ICR 800 indicates** that an ET will err if it omits significant factors. It also set out that specific evidence may be required to support an argument of prejudice. **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2018] ICR 1194 however, makes it clear that this is a very broad discretion and as long as it is considered judicially and takes account of evidence which justifies the decision there is no specific reason for a claimant to explain a delay, if there is evidence which explains it.

29. **Logo v Payone GMBH and others** [2025] EAT 95 emphasises the importance of identifying relevant prejudice when deciding whether to extend time and where it is possible to determine a relevant complaint it is not logical to say that this is not a relevant factor. The ET is, of course, to approach relevance following **Wednesbury** principles and in **Teinaz v London Borough of Wandsworth** [2002] IRLR 721 it was made clear that, on appeal, a court can disturb a decision if significant weight given to irrelevant factors. **Wells Cathedral School Ltd v Souter EA-2020-000801** (20 July 2021, unreported) points out that there are public policy considerations which relate to certainty and finality in time limit enforcement. However, this is to be balanced against another aspect of public policy aims; that parties should endeavour to resolve their disputes without recourse to the courts and tribunals.

Discussion

30. The ET's discretion can be challenged if exercised unreasonably in the **Wednesbury** sense. For ground 3, the claimant argues this arose from a lack of evidence. The ET cannot compare the actual hearing with a hypothetical one where the claim was presented in time. When a claim is heard years after filing, it is arguable that any difference in reliability may be minimal. The claim was presented only about two months outside the statutory limit, and the hearing occurred over two years later. On that basis should the ET have been addressing the question of *relative* reliability; whether the same witness would have been more accurate had the claim been presented earlier. It is the late filing that triggers the question of an extension. It may be correct that the respondent's position would have been similar even if the claim had been timely. However, it is because of the late presentation that the question of a just and equitable extension is examined. The ET must focus on the respondent's actual forensic position at the time of hearing. It is not open to the claimant to argue that the position would be same as a reason why the extension should be granted.

31. The ET relied on the guidance in **Gestmin**, which recognises memory's fallibility over time. Assessing credibility and reliability is the ET's role. The claimant's submission that the ET had no

evidence is a difficult one because an ET's assessment of reliability is inherently impressionistic. It is inevitable that part of that assessment will be a view of whether that reliability is strong or has been weakened by the passage of time. That impression can arise out of aspects of the evidence such as the difficulty in recalling specific details whilst still giving the general picture of an event. In this case the ET has apparently accepted the evidence of A/I Dack as credible and reliable. Logically, that would appear to point to her evidence not being compromised by the delay. The ET was able to find, without difficulty, that there was no question of discrimination or harassment in respect of complaint 9. The ET's "evidence" for reduced reliability is its impression of her testimony. However, following that through it has to be asked why the ET did not accept her explanation for failing to recuse herself from the interview process, in response to the victimisation claim. It must, therefore, be assumed that the ET had concerns about that aspect of evidence. Those concerns are not expressed directly in the judgment. On that basis I consider Mr Healy's submission that this ground of appeal is, at its heart. a reasons appeal to be correct.

32. The ET has correctly expressed the law, it is to be assumed that it has applied the law correctly. It has not set out that the burden of proof has been reversed in respect of complaint 9. I am not able to say, as is urged by Miss Hogben, that it is obvious that the ET considered that the burden had transferred to the respondent. It is correct that the ET has clear evidence of a protected act, and evidence of a potential detriment. However, the key question for the ET in such circumstances is whether there is a causative link between the two. The ET here has expressed the guidance about the fallibility of memory as time progresses and has expressed directly its concern that this has occurred in regard to this aspect. This concern could place the respondent at a forensic disadvantage in two potential ways: first in providing evidence which might undermine the claimant establishing the "something more" element required to reverse the burden of proof; second its ability to provides an explanation if the burden of proof is reversed. It is this forensic disadvantage which the ET must consider when looking at the issue of a just and equitable extension.

33. In my Judgment the reasons given by the ET are sufficient. They have expressed the care to be applied in respect of the fallibility of memory. The ET has indicated that it is able to accept certain evidence and draw conclusions, but, albeit, perhaps, obliquely, that it is not able to attach such certainty to complaint 9. In the context of a claim with 22 detailed complaints, a judgment which runs (disregarding the attached schedule) to 83 pages, the ET cannot be expected to provide detailed explanations of every aspect of its decision. Here, it was dealing with the issue of whether time should be extended. It has provided such information as was necessary for a party to know why it had won or lost on the point. On that basis ground 3 of the appeal is dismissed.

34. I do not agree with Mr Healy's submission that the ET judgment does not disclose that the ET

took into account the reputational damage to witnesses in its reasons. In my Judgment the passage is admirably clear; the ET placed reputational damage to witnesses into the mix. The claimant argues that it can never be relevant to take account of the reputational damage to a non-party. This is because any such damage does not address the prejudice to a party but to an individual. It is prejudice to a party's case which should be part of the balancing exercise. As a blanket statement I do not believe that can be justified. For instance, in this a police case, damage to the reputation of a police officer can reflect on the reputation of the force. A finding of discrimination by an inspector in the respondent's force would inevitably damage the respondent in the area of community relations. It appears to me that whilst the risk of reputational damage to a witness is an unusual aspect to take into account, if there is the sort of connection between the reputation of the witness and that of the organisation then it is a legitimate element to take into account insofar as it relates to forensic prejudice.

35. The more interesting aspect of this Ground of appeal is Miss Hogben's submission that this was a decision made after hearing all of the evidence. Her argument is that if the ET thought that there was victimisation, because the burden of proof had shifted and because there was no explanation, then the balancing exercise undertaken was wrong because that should have been put in the balance. Conversely, if the ET had reached the conclusion that the claim was not proved, then there could be no reputational damage. Finally, if it is accepted that in respect of claim 9 the burden of proof had shifted, then it was an aspect that should not have been put in the balance at all because there was only the potential for reputational damage and that could only be resolved by deciding the claim.

36. Despite what was a very attractive argument, I was not, in the end persuaded. This to a great extent is because of the decision I have made in respect of Ground 3. I decided that the ET had not decided there was a shift in the burden of proof. The ET had also decided that, because of the passage of time, the evidence of A/I Dack was compromised on this issue. As such there was a potential risk to reputation which the ET could not rule out and it related to a forensic prejudice in the evidence that A/I Dack could have given on complaint 9. This ground of the appeal is dismissed.