UKEAT/0314/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 & 26 July 2017
Judgment handed down on 24 October 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

THE COMMISSIONER OF POLICE OF THE METROPOLIS — APPELLANT

MR A DENBY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK SUTTON (One of Her Majesty's Counsel) and MR IAN SCOTT (of Counsel) Instructed by: Metropolitan Police Service Directorate of Legal Services Holborn Police Station 10 Lamb's Conduit Street London WC1N 3NR
For the Respondent	MS KARON MONAGHAN (One of Her Majesty's Counsel) and MR DAVID STEPHENSON (of Counsel) Instructed by: Pattinson & Brewer Solicitors 11 Pilgrim Street London EC4V 6RN

SUMMARY

SEX DISCRIMINATION - Direct

SEX DISCRIMINATION - Burden of proof

PRACTICE AND PROCEDURE - Procedural irregularity

1. The Tribunal made findings in favour of the Claimant (also the Claimant below, the Respondent to the appeal) that the Respondent (the "MPS", the Appellant in the appeal) had discriminated against the Claimant on the ground of his sex. The Tribunal made five separate findings of direct sex discrimination and one of victimisation by reason of having brought the Tribunal claim. The MPS in this appeal challenged the decision on several counts and asked the EAT to set aside the decision and remit it to a freshly constituted Tribunal or substitute an order dismissing the claim.

2. The grounds were: failure properly to apply the burden of proof provisions in section 136 **Equality Act 2010**; allowing an unsuitable comparator whose circumstances differed materially from those of the Claimant; misapplying the principle in **CLFIS (UK) Ltd v Reynolds** [2015] ICR 1010 CA that an innocent agent acting without discriminatory motivation is not liable for discrimination; and procedural unfairness by rejecting evidence from MPS witnesses on issues that had not been adequately put in cross-examination. The MPS also asserted that the Tribunal had not properly addressed the issue of discriminatory motivation and that its reasoning was inadequate.

3. The Tribunal had properly applied the burden of proof provisions, properly evaluated the evidence and made findings consistently with the **CLFIS** principle, which had been properly applied. The reasoning was sound and there was no procedural unfairness to the MPS or its witnesses; the issues had been explored in the pleadings (as amended), in witness

statements and in cross-examination, applying the rule in **Browne v Dunn** [1893] 6 R 67 HL, as developed in subsequent cases including **Chen v Ng (British Virgin Islands)** [2017] UKPC 27. There was no error in law in the treatment of the chosen comparator. The appeal failed.

4. The **CLFIS** decision should not be allowed to become a means of escaping liability by deliberately opaque decision making which masks the identity of the true discriminator. Where a claimant is for good reason unable readily to identify which individual is responsible internally within the employing organisation for an act of discrimination, the claimant may, as this case demonstrates, sometimes be permitted to amend during the hearing once the correct person is, or persons are, identified from the evidence.

THE HONOURABLE MR JUSTICE KERR

Introduction

1. I will refer to the Appellant by the name of the organisation for which she is responsible, the MPS (Metropolitan Police Service) and to Chief Inspector Adrian Denby, the Respondent in the appeal, as the Claimant. In this appeal, the MPS was found liable to the Claimant for sex discrimination and victimisation. The MPS' main complaints on appeal, though not the only complaints, are as follows.

2. First, the MPS complains that the Employment Tribunal misdirected itself as to the burden of proof provisions in section 136 of the **Equality Act 2010** ("the Act"), by taking into account, when considering whether the burden shifted to the MPS, its explanations for the alleged discriminatory treatment. The MPS says the Tribunal should have disregarded those explanations at the first stage and only considered them if and when the burden had already shifted to the MPS without regard to them.

3. Secondly, the MPS complains that the Tribunal misapplied the law in **CLFIS (UK) Ltd v Reynolds** [2015] ICR 1010 CA, which rules out "composite" discrimination arising from the influence of an individual discriminator on an individual non-discriminator, within the employing organisation. The former is liable, the latter is not. The MPS says the Tribunal fixed it with liability in respect of innocent agents who merely implemented decisions, without any discriminatory motivation.

4. Thirdly, the MPS complains of procedural unfairness. It contends that the Tribunal unfairly and improperly rejected evidence from its witnesses on points not put or not adequately

put to them in cross-examination, or on points not corresponding precisely with the Claimant's claims as set out in his grounds and amended grounds, and the particulars of those grounds. The MPS says the findings against its witnesses were tantamount to findings of dishonesty and were unjustified.

5. As a result of the sift process, followed by a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, certain grounds were allowed to proceed and the grounds of appeal were amended in accordance with an order of HHJ Hand QC. There is considerable overlap between the grounds, as reformulated.

6. I will address the burden of proof issue first. I will then consider the complaints about application of the **CLFIS** reasoning and procedural unfairness, and the other grounds of appeal, as they arise in respect of each of the Tribunal's five findings of discrimination (and, in the case of its fifth finding, victimisation also). Finally, I will deal separately with two other distinct grounds of appeal, relating to the suitability of the chosen comparator (ground 4) and discriminatory motivation (ground 6).

The Decision of the Tribunal

7. The Tribunal comprised Employment Judge Lewis, sitting with Ms Cameron and Dr Weerasinghe at London Central Employment Tribunal over six days from 18-25 April 2016. Both parties were represented below by the junior counsel who, before me on appeal, appeared with their respective leaders. The Tribunal heard from the Claimant and seven witnesses for the MPS, all senior police officers. Owing to the complaint of procedural unfairness, I had the Judge's notes of the evidence of four of them.

8. The Decision was dated and sent to the parties on 3 May 2016. It addressed eight allegations (two of which were amended during the hearing) of sex discrimination and one of victimisation; the protected act being the making of the sex discrimination claim. The Tribunal also considered and rejected an argument that the claims were out of time and said in the alternative that it would have extended time. There is no appeal against the findings on time limits.

9. The Tribunal preferred the Claimant's evidence to that of the MPS' witnesses, finding the Claimant "impressive and straightforward" while the MPS witnesses were found to be evasive and disingenuous.

10. In 2012, the Claimant was put in charge of one of the five arms of the Territorial Support Group, "TSG1" based at Paddington. His female comparator, Chief Inspector (CI) Edwards, was in charge of TSG3, in Ilford. Both reported up the same chain of command and had identical roles.

11. The TSG had a poor diversity profile. Concern at high level had been expressed about the under-representation of women within it. The concerns about the image of the TSG were sensitive and had been publicly aired. At TSG1, male officers would walk across the office from adjacent showers wearing nothing but a towel. In early September 2014, two members of TSG1 complained of wrongdoing in the form of claiming for overtime not worked.

12. This led to an unannounced visit on 12 September 2014 by officers of the Department for Professional Standards (DPS), who seized documents and served disciplinary notices, called "163 notices" on four officers (officers 2, 3, 4 and 5). A 163 notice does not suspend an officer

but often leads to restrictions on duties during the investigation. It entails suspicion of gross misconduct or even criminal conduct. Beer was also found in the fridge and a price list on the front of the fridge. The Claimant was angry and started his own investigation.

13. Deputy Assistant Commissioner (DAC) Maxine de Brunner paid a surprise visit to TSG1 on 23 September 2014. She encountered a male officer coming from the shower wearing only a towel, her "pet hate", as she told the Claimant on the day. There were major differences in their accounts of the meeting. His account, accepted by the Tribunal, included indications from DAC de Brunner that she felt the Claimant was not the right person to lead TSG1 and confront the negative male-dominated culture there.

14. The Tribunal rejected her evidence that she left the meeting with "full confidence" in the Claimant, evidence it described as "simply not credible"; it did not make sense because she also attributed to the Claimant the statement that the women on the team did not fit in and she did not explain the incongruity between those two pieces of her evidence.

15. The Tribunal then found that she communicated her unhappiness, including the "towel encounter", to Commander David Musker. He had been present at the unannounced visit on 12 September, described as a "raid". After that, a 163 notice was served on the Claimant on 20 October 2014 and he was removed from his command of TSG1 and placed on restricted duties while the matter was investigated. The stated grounds related to the whistleblowing complaints about overtime claimed for hours allegedly not worked.

16. In November 2014, the Tribunal found, a complaint was made against CI Edwards, also about irregular booking, with her knowledge, of overtime not actually worked. This, the

Tribunal found, was not the subject of a formal DPS investigation. It was treated as a "single strand" allegation that was investigated locally. CI Edwards was not issued with a 163 notice. The Claimant later relied on this disparity of treatment as direct sex discrimination.

17. During the hearing, the Tribunal made a disclosure order in relation to documents dealing with the complaint concerning CI Edwards. This did not result in any further disclosure from the MPS. The Tribunal noted a "lack of transparency" regarding the complaint and rejected DAC de Brunner's evidence that she had heard from another officer that it was a local matter, and that she (DAC de Brunner) had made no enquiries about it.

18. The DPS investigation took place up to June 2015. The Claimant provided written explanations for the limited evidence against him of involvement in, or toleration of, the allegedly wrongful overtime practices. Alongside the investigation, during the period from October 2014 to June 2015 there were also four or five "Gold Group" meetings of senior officers of the MPS; and "Chief Officer Group" (COG) meetings every two weeks. These, the Tribunal found, addressed "public confidence" issues arising from the investigation into TSG1.

19. Earlier, in January 2015 a senior officer (Superintendent Blanchard) asked for some of the restrictions on the Claimant's duties to be removed. DAC Fiona Taylor consulted Commander Musker and, having done so, agreed to the request. There were further discussions in March and April 2015 about whether the Claimant could return to Operational Command Unit (OCU) work at Wapping, working under Chief Superintendent (CS) Campbell.

20. This was not inconsistent with the remaining restrictions on the Claimant's duties. DAC Taylor and Commander Musker were prepared to grant the request subject to certain conditions.

A However, the Tribunal accepted the Claimant's evidence that he was then told on 7 April 2015 by CS Campbell that Assistant Commissioner (AC) Patricia Gallan had "blocked his return".

B 21. On 3 July 2015, DAC Taylor lifted the remaining restrictions on the Claimant's duties, saying these were no longer proportionate. Three days later, the Tribunal found, CS Campbell told the Claimant that DAC Taylor's decision had been overruled and that while "on paper" Commander Musker had made the decision, "others were influencing the decision", but "not C the top two". The Tribunal found that when pressed further by the Claimant, CS Campbell had said the decision was that of AC Gallan who had lost confidence in the Claimant's leadership abilities.

D 22. The Tribunal devoted some time to explaining why, by reference to certain emails and other evidence, it preferred the Claimant's account of these discussions, which was disputed, E and why the alternative explanation from the MPS' witnesses of how the decision was made, was not satisfactory. Later in its treatment of the issues, the Tribunal accepted that what CS Campbell told the Claimant, viz that the decision to keep the restrictions in place was AC Gallan's, was true, i.e. it was indeed she who made that decision.

F 23. TSG1 was disbanded on 31 January 2016. Unlike other officers in the investigation, the Claimant was not at this stage (though he was later) offered the low level outcome of G "management action" to resolve the investigation. The Tribunal did not accept from the MPS that the DPS investigation process was independent of the chain of command, that senior officers were merely briefed about progress of the investigation and that they did not exert H influence over the process and over restrictions on duties pending its outcome. The Tribunal

found that DAC de Brunner and Commander Musker influenced the decisions about restrictions on the Claimant's duties.

24. The Tribunal went on to make findings about the Claimant's "Performance and Potential Matrix" (PPM) scores. This went back to December 2014, soon after the Claimant had been served with his 163 notice and placed under restrictions. The scoring system was newly introduced to evaluate potential, alongside existing performance measures. Current "core performance" was scored from one to three, one being the lowest score; future potential was scored from A to C, A being the lowest.

25. The new scheme covered the previous 12 months. The Claimant was initially scored B3, with positive narrative comments. That was reviewed by Commander Musker who reduced the Claimant's score down to B1, a larger drop than any other employee. The Tribunal commented adversely on his inability to explain satisfactorily in evidence his reasons for doing so, and the reasons he gave shortly after his decision. He did not interfere with the initial grading of Chief Inspector (CI) Edwards, the Claimant's female comparator, whose score he left at C2.

26. In February 2015, the promotion process from chief inspector to superintendent was announced, with the rider that candidates must have scored C2, C3 or B3. This meant that the Claimant was ruled out for promotion, but CI Edwards was not. An appeal by the Claimant was unsuccessful. The Tribunal commented that its "strong impression" was that the appeal was "a rubber stamping exercise", which did not bring adequate independent judgement to bear on what Commander Musker had decided.

27. The final part of the Tribunal's factual findings concerned the ultimate outcome of the investigation by the DPS. The investigation concluded that the Claimant had, with good intentions, acted outside permitted overtime procedures and thereby committed misconduct. CS Campbell then notified the Claimant on 24 December 2015 that he proposed to deal with this by "management action", described by the Tribunal as an "informal tool" not forming part of the formal misconduct or performance regime.

28. On 31 December 2015, the Claimant wrote that he wished to appeal against the decision to give him "management action" suggesting that the investigation had been "discriminatory" and "less than impartial". He also wrote of "the impending ET", i.e. a claim in the Employment Tribunal. He had indeed initiated early conciliation procedures as early as 12 October 2015 and had already presented his claim, on 20 November 2015. There was no formal appeal procedure and Commander Musker decided that an ad hoc procedure should not be devised to accommodate the appeal.

29. The Tribunal dealt with the issues in turn in accordance with an agreed list of issues which was in two respects subject to amendments of the claim during the hearing. The Tribunal allowed the amendments, despite the MPS' opposition. They added the contention that Commander Musker, in addition to or in the alternative to AC Gallan, had made two decisions on or about 6 July 2015: the decision to reverse DAC Taylor's decision to lift the restrictions on the Claimant's duties; and the decision that his removal from post was likely to be permanent. There is no appeal against the decision to allow the amendments.

30. The Tribunal noted that they had arisen from oral evidence of Commander Musker owning that the two decisions had been his. They commented (paragraph 11) that it was "only

a question of who made the decision"; that the amendments "did not affect the evidence … or the disputed issues"; that AC Gallan and Commander Musker "came to the tribunal knowing AC Gallan had been accused of overturning the [lifting of] the restrictions"; that the MPS' case was "going to be that it was Cmdr Musker's decision"; and that it would be "wholly inequitable not to allow an amendment to reflect the case which the respondents were themselves putting forward".

31. Subject to that revision to the list of issues, they were agreed. The Tribunal set out the law, including a conventional account of the burden of proof and a brief statement of the principles derived from the **CLFIS** case. The MPS took issue with the Tribunal's formulation (at paragraph 118) of the latter principle, but I detected nothing worse than slightly loose use of language. The real issue is whether they correctly applied the law derived from that case. It is clear that they understood what it decided.

32. The Tribunal then dealt with each of the issues in turn, in accordance with the amended list of issues. Eight acts of direct sex discrimination and one of victimisation were relied upon. The Tribunal found five of the eight acts of direct sex discrimination proved and well founded, the fifth being also victimisation. It dismissed three other allegations of direct sex discrimination.

33. The five acts of direct sex discrimination and one of victimisation found were:

(1) placing the Claimant under a criminal and/or gross misconduct investigation by the DPS, on or about 10 October 2014;

(2) downgrading the Claimant's PPM score from B3 to B1 thereby denying him the opportunity of promotion, on or about 11 February 2015;

(3) Commander Musker, influenced or instructed by AC Gallan, overturning DAC Taylor's decision to lift all the restrictions on the Claimant's duties;

(4) AC Gallan deciding that the Claimant's removal from post was likely to be permanent, on or about 6 July 2015;

(5) Commander Musker's decision communicated in January 2016 refusing to allow the Claimant to appeal against the "management action"; and

(6) this last matter was also found to be victimisation, the protected act being presenting his tribunal claim.

34. The Tribunal found that the decision to restrict the Claimant's duties in or about October 2014 was not sex related; DAC Taylor imposed them on information given to her about potential gross misconduct. By the same reasoning, they decided his original removal from his post was not discriminatory. And they found that dismissal of his appeal against his PPM score was not discriminatory; the appeal panel had rubber stamped Commander Musker's discriminatory scoring decision. These three decisions, adverse to the Claimant, were correct applications of the **CLFIS** principle.

A **The Burden of Proof Issue**

35. The MPS submits in its third ground of appeal that the Tribunal erred in law in concluding, in relation to the five findings of discrimination, that the Claimant had adduced sufficient evidence of discrimination to "shift" to the MPS the burden of proving a non-discriminatory explanation of the Claimant's treatment. The MPS says there were insufficient facts from which - absent an innocent explanation - the Tribunal could infer discrimination, because the Tribunal wrongly took account, in deciding that preliminary issue, of the MPS' explanation for the Claimant's treatment.

36. I use the term "shift" only as a convenient shorthand. I acknowledge (per Laing J in **Efobi v Royal Mail Group Ltd**, UKEAT/0203/16/DA at paragraph 77ff), that a burden of proof does not travel. I agree with Laing J that section 136 of **the Act** places no burden on a claimant, *pace* judicial comment on its predecessors, but enacts a mandatory finding of discrimination where (section 136(2)) "there are facts" - not necessarily proved by the employee but before the tribunal by the end of the hearing - from which the tribunal could, absent any other explanation, find a contravention of one of the non-discrimination provisions.

37. A burden does, in such a case, fall on the employer in that the obligation to make a finding of unlawful discrimination does not apply "if A shows that A did not contravene the provision" (section 136(3)); "A" being the employer. In many cases, tribunals apply the two stage test ordained by section 136 to determine whether unlawful discrimination occurred. But sometimes the reason for the treatment is intertwined with whether the claimant was treated less favourably than a comparator; such that "the decision on the reason why issue will also provide the answer to the less favourable treatment issue" (per Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at paragraphs 7 and 10).

38. Here, the Tribunal explained (at paragraph 135) that it applied the statutory burden of proof at each stage; and where it was "difficult to separate the reason for the respondents' actions from the primary facts, we considered these at the first stage" and "found the **Shamoon** composite 'reason why' approach generally more suited to the facts". Earlier (paragraph 121) the Tribunal stated that it "can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof".

39. Mr Sutton submitted that was a heretical misdirection which violated the orthodoxy of Mummery LJ's guidance at paragraph 58 in **Madarassy v Nomura International plc** [2007] ICR 867: "[t]he absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent". As a result, he argued, the MPS had been required to explain its conduct at the second stage of the process, in a case that ought not to have passed the first stage.

40. The Tribunal cited both **Madarassy** and **Laing v Manchester City Council** [2006] ICR 1519 in support of its position. The latter was approved by the Court of Appeal in the former (per Mummery LJ at paragraphs 67-70 and 79). In **Laing** at paragraphs 54-55, Elias P referred to Peter Gibson LJ's judgment in **Igen Ltd v Wong** [2005] ICR 931, which included the point that the employer's explanation could not be taken into account at the first stage; Peter Gibson LJ agreed with the employees' counsel that in considering whether an inference of discrimination could be drawn at the first stage, the tribunal "must assume that there is no adequate explanation for those facts".

41. However, at paragraph 55, Elias P noted that Peter Gibson LJ had added that it would be "unreal if the … tribunal could not take account of evidence from the respondent if such evidence assisted the … tribunal to conclude that in the absence of an adequate explanation unlawful discrimination … would have been established". Mummery LJ in **Madarassy** pointed out that in **Laing** the employee failed at the first stage because of the Respondents' evidence that others were treated by the same manager with the same rude abruptness as the Claimant. That evidence was relevant and not ruled out of consideration on the ground that it constituted the employer's explanation.

42. For the Claimant, Ms Monaghan submitted that the Tribunal did not misdirect itself. It would be absurd if the burden of proof provision, now in section 136 of **the Act** and designed as it was to help employees establish discrimination which is so rarely overt, should be turned on its head and used as a shield to protect an employer against the tribunal taking account of, for example, dishonest evidence given by its witnesses when considering, at the first stage, whether there are facts from which, absent an innocent explanation, discrimination could be inferred.

43. Ms Monaghan argued that the authorities established only that a tribunal need not consider the employer's innocent explanation at the first stage of the process, which would make more difficult the employee's task of persuading the tribunal to move to the second stage. The authorities do not, she contended, require the tribunal at the first stage to blind itself to evasive, economical or untruthful evidence from the respondent which may help the tribunal to decide that there are facts which suffice to shift the burden to the employer to provide an innocent explanation.

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44. Many of the burden of proof cases, with the notable exception of **Efobi v Royal Mail Group Ltd**, arose when the various predecessors of section 136 were in force. The **Equality Act 2010** is mainly, though not only, a consolidating statue and neither party contended that a change in the wording made all the difference. Laing J in **Efobi** pointed out that the factual materials available to the tribunal at the first stage of the exercise include all evidence called up to the end of the hearing. Mummery LJ made the same point when considering section 63A of the then **Sex Discrimination Act 1975** (at paragraph 70 in **Madarassy**).

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45. In my judgment, Mr Sutton's submissions on the burden of proof, eloquently though they were advanced, are arid and technical. I do not think the Tribunal misdirected itself or made any error of substance. I do not accept Mr Sutton's submission that **Madarassy** is authority for his proposition that the tribunal must blind itself to explanatory evidence from the employer at the first stage of the burden of proof exercise.

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46. The submission places too much weight on Mummery LJ's use of language at paragraph 58, read in isolation from its proper context and ignoring what he said later in his judgment when approving the approach of Elias P in **Laing**. Mummery LJ himself said in **Madarassy** at paragraph 57 that, at the first stage not just the second stage, the tribunal must consider, among other things "available evidence of the reasons for the differential treatment".

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47. Indeed, on the facts of **Madarassy** itself, the employee had scored low in a redundancy exercise and was made redundant while on maternity leave, a decision she alleged was sex discrimination. The scoring in the redundancy exercise was evidence of the employer's explanation for the treatment of the Claimant. It was not thereby rendered inadmissible at the

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first stage. It is frequently impossible to disentangle the treatment from the reason for it, as Lord Nicholls was at pains to point out in **Shamoon**.

48. There is nothing wrong with the tribunal, as this one did, considering all relevant evidence at the first stage of the burden of proof exercise, even if some of it is of an explanatory nature and emanates from the employer, whether or not called by the employer. Furthermore, Elias P at paragraph 77 in **Laing** stressed the need not "to let form rule over substance". He allowed that:

> **"… if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the Tribunal to reach a finding of discrimination even if the prima facie case had not been established. The Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. …"**

49. Those words, in particular, provide ample support for the submissions of Ms Monaghan and for the approach adopted by the Tribunal to the burden of proof issue. I find no merit in this ground of appeal.

The *CLFIS* and Procedural Unfairness Grounds

50. It is appropriate, in my judgment, to deal at the same time with the grounds of appeal founded on the **CLFIS** case (ground 1), the allegations of procedural unfairness in questioning of the MPS' witnesses (ground 2) and the assertion that the Tribunal's findings of fact against the MPS' witnesses were inadequate or inadequately reasoned (ground 5). At the request and invitation of Mr Sutton I will deal separately with ground 6, failure properly to consider the issue of discriminatory motivation.

51. To address the first, second and fifth grounds, for each finding of discrimination made it is necessary to ascertain who, as the Tribunal found, made the decision; whether the decision

maker, consciously or otherwise, made the decision on the prohibited ground of sex; whether the person found by the Tribunal to have unlawfully discriminated was liable in law applying the **CLFIS** principle; and whether the Tribunal's findings were in each case tainted by procedural unfairness.

52. The *ratio* of **CLFIS** is simple: where the case is not one of inherently discriminatory treatment or of joint decision making by more than one person acting with discriminatory motivation, only a participant in the decision acting with discriminatory motivation is liable; an innocent agent acting without discriminatory motivation is not. Thus, where the innocent agent acts on "tainted information" (per Underhill LJ at paragraph 34), i.e. "information supplied, or views expressed, by another employee whose motivation is, or is said to have been, discriminatory", the discrimination is the supplying of the tainted information, not the acting upon it by its innocent recipient.

53. Ms Monaghan submitted that the **CLFIS** principle is open to abuse where the employer operates a system of deliberately opaque decision making, intended to mask the involvement of senior employees in decisions. A tribunal should not allow an employer to hide behind its more junior officers taking responsibility for decisions dictated to them by invisible senior officers. I agree that the **CLFIS** principle needs careful handling, but tribunals can avoid unfairness by permitting appropriate amendments (as in this case) and allowing employees to target alternative decision makers where appropriate (again, as in this case).

54. Mr Sutton relied on the rule in **Browne v Dunn** [1893] 6 R 67 HL. In the course of a defamation action privilege was raised as a defence and the issue arose whether the defence was lost by express malice. The House of Lords dismissed an appeal setting aside a jury verdict for

A the plaintiff. The issue of malice turned largely on the genuineness of a document signed by six defendant's witnesses to whom it was not put in cross-examination at trial that the document they had all signed, employing the defendant solicitor, was in truth a sham and not genuine, a contention of which the defendant appears not to have been properly forewarned.

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55. As Mr Sutton correctly pointed out, Lord Herschell LC (with whom at page 76 Lord Halsbury could not express his concurrence too heartily) said at pages 70-71:

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> **"… it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. … if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and … that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. …"**

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56. Lord Herschell LC went on to make it clear that he was talking about impeaching the witness "upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand" and to accept (at page 71) that:

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> **"… there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. …"**

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57. Lord Morris, whose speech has received less attention that Lord Herschell's, guarded himself (page 79) against "laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit", but agreed that in the instant case the plaintiff could not ask the jury to disbelieve the witnesses who had signed the document constituting employment of the defendant.

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58. **Browne v Dunn** is cited in the 18th edition of *Phipson on Evidence*, at 12-12, for the proposition that "[i]n general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point". The authors comment that "the rule is not an inflexible one" and that failure to put a point to the witness "may be most appropriately remedied by the court permitting the recall of that witness to have the matter put to him".

59. The rule in **Browne v Dunn** has been applied in various contexts and in the course of being applied, to some extent refined over the years. A full and erudite exegesis is found in the recent judgment of HHJ Hand QC in two appeals heard together (**North Cumbria University Hospitals NHS Trust v Dr S M Saiger**, UKEAT/0276/15/LA, 17 July 2017, at paragraph 80ff). The Judge was inclined to treat the rule as one of evidence and practice rather than law. He mentioned a number of the authorities cited to me.

60. I was also taken to Carr J's detailed judgment and Sir Brian Leveson P's short concurring judgment in **Williams v Solicitors Regulation Authority** [2017] EWHC 1478. Carr J noted that in modern litigation the parties have more advance written material than in Victorian times. The springing of an unfair surprise at trial is much reduced by the expansion of pleadings, written witness statements and lists of issues. It is safe to say that here the MPS and the Tribunal had more materials stating the nature of the Claimant's case than did the defence and the jury in **Browne v Dunn**.

61. The parties made written submissions on **Chen v Ng (British Virgin Islands)** [2017] UKPC 27, in which judgment was given after the hearing of the appeal. I bear in mind the

A useful guidance from Lords Neuberger and Mance at paragraphs 54-55, which seems to me the most authoritative recent pronouncement on the subject:

> **"54. … It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.**
>
> **55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."**

62. Applying that guidance to the present context, I think the issue is whether the outcome of the trial was fair in the light of the parties' pleaded cases, the written evidence, the list of issues (as agreed and then amended) and the conduct and course of the trial including the questioning of witnesses, and the matters set out in paragraph 55 in **Chen v Ng**. The context here also includes section 136(2) and (3) of **the Act** which invite the MPS to advance a positive explanation of its conduct unless willing to risk not doing so, and leave the Claimant the option of relying on section 136(2) to the extent that the conduct remained unexplained.

The first finding of discrimination: placing the Claimant under a criminal and disciplinary investigation on or about 10 October 2014

63. The Claimant alleged that the decision to place him under investigation was direct sex discrimination. He named CI Edwards as a comparator and gave particulars saying he "believes this decision was taken and/or influenced by DAC Maxine De Brunner". In response, the MPS pleaded that DAC de Brunner "had no involvement at all (directly or indirectly)" in relation to the matter.

64. The Claimant gave a detailed account of this episode in his detailed written witness statement, which included a clear statement explaining his belief that DAC de Brunner "must have influenced the heavy-handed approach sanctioned by DAC Taylor and the DPS towards me on the basis of her views about me as a man and whether I would be the right person to lead change …" (paragraph 58).

65. Detective Chief Inspector (DCI) Mark Sumner made a short witness statement saying it was his decision to serve the Claimant with the 163 notice and said it was "completely untrue" that DAC de Brunner had some involvement in the decision; she had, he said, "absolutely no involvement in this decision". He added that "throughout the entire investigation I never spoke with or met DAC de Brunner …".

66. DAC de Brunner herself made a witness statement, disputing the Claimant's account of her visit to TSG1 on 12 September 2014. She went on to say that she had "no involvement in the matters set out in the Claimant's claim". She was told, she said, by Chief Superintendent (CS) Bird on 10 October 2014 that the Claimant was included in the investigation relating to TSG1. She said the DPS is "an entirely separate and independent department" and that she "had no involvement in the investigation against the Claimant or the decisions the DPS made in relation to him".

67. There was no plea that the Claimant believed Commander Musker was involved in the initial decision to serve him with the 163 notice; but in the Claimant's witness statement, he questioned whether DAC de Brunner and Commander Musker genuinely believed he was guilty of serious misconduct involving fraud; if they had believed that, he reasoned, they would not

A have entrusted him with duties relating to Prince Charles and the Prime Minister during the period of restrictions on his duties.

B 68. Commander Musker made a witness statement dealing with matters occurring later in the history, particularly the PPM scoring exercise. He said he had known DAC de Brunner since 2006 and had worked under her, but his decision later in the process not to allow an appeal against the "management action" had nothing to do with DAC de Brunner, nor with the C Claimant's gender, he insisted.

69. Such was the state of the documents on the issue at the oral hearing. DCI Sumner was D cross-examined. He was asked many questions about the decision to serve the 163 notice and the DPS investigation. He was asked if he had met senior officers as he was new to the force. He denied meeting them during the investigation or discussing it with them; he denied being E influenced by DAC de Brunner or Commander Musker, who had attended the raid. He accepted there were "one way briefings" to Commander Musker.

70. Commander Musker was asked about the COG and Gold Group meetings, attended by F (among others) DAC de Brunner. He said the COG meetings dealt with issues of public confidence and that TSG1 appeared to be a "rogue unit" where supervision was poor. He gave the COG a "general outline" of the TSG1 situation but denied discussing the issue with DAC de G Brunner, though counsel suggested it was inconceivable that he did not discuss the rogue unit with her.

H 71. He denied being informed of every aspect of the investigation. He sought to differentiate between the public confidence issues, including restrictions on duties during the

investigation, and influencing the course of an investigation into an individual such as the Claimant. He deprecated the presence of alcohol and men wrapped in towels at TSG1, accepted having been present at the raid on 12 September 2014, but denied discussing these things with DAC de Brunner. He denied knowledge of the issue concerning CI Edwards at TSG3.

72. DAC de Brunner acknowledged that she had line managed and promoted Commander Musker. She said she did not recall when the culture at TSG1 had been raised at the COG meetings and it may well have been raised. She said she thought she learned of the allegations about TSG1 from Commander Musker and definitely had a conversation with him about it when he told her of his concerns. She denied expressing doubts to the Claimant on 23 September 2014 about confidence in his leadership. She said the main reason for that visit was that TSG1 had been raided and serious allegations made.

73. She was asked about conversations between her and Commander Musker about the investigation into TSG1 and matters arising from it. She accepted they had had a few conversations about that but denied agreeing with Commander Musker that the Claimant's position was untenable. She agreed that she had a conversation with Commander Musker following her visit to TSG1 when she saw the Claimant on 23 September 2014. She said that conversation would have been about her being reassured that the Claimant would take the lead on the issues that needed resolving.

74. She was then asked about TSG3 and the complaint about CI Edwards. It was put to her that she must have known about it. She said she had been told by CS Bird that the issue at TSG3 was a complaint about how shifts were being recorded; that it was a "local issue" and

was being "managed". She accepted that TSG3 was within her line of command. She was asked why it was not taken further. She said there had been no raid, no DPS involvement and that she did not make further enquiries.

75. The Tribunal did not accept that DCI Sumner had, unaided and uninfluenced by anyone else, made the decision to subject an officer as senior as the Claimant to a gross misconduct or criminal investigation. They noted the extent of Commander Musker's and DAC de Brunner's involvement in the two visits to TSG1 which predated the 163 notice. They found DCI Sumner's evidence "weak and unconvincing".

76. The Tribunal readily inferred that he had been "influenced" by the views of DAC de Brunner and Commander Musker to serve the 163 notice. The Tribunal did not accept that DAC de Brunner asked no further questions about TSG3 and CI Edwards. They found the treatment of her more favourable than that of the Claimant and that the MPS had failed to explain that this was for reasons unrelated to sex. The treatment of the Claimant was a detriment and the claim accordingly succeeded.

77. Mr Sutton submitted that the Tribunal misapplied the **CLFIS** principle: DCI Sumner was an innocent agent not found to have acted with discriminatory motivation. As I understand it, that would mean the Tribunal ought to have found DCI Sumner did not discriminate against the Claimant and that if DAC de Brunner and Commander Musker did, the act of discrimination was not the service of the 163 notice but prevailing upon DCI Sumner to decide to serve it. Ms Monaghan submitted that the finding was that the decision was a joint one and that all three were decision makers acting with discriminatory motivation.

78. I agree with that submission; it reflects the natural and obvious reading of the Tribunal's reasoning. The Tribunal was well aware of the **CLFIS** principle. They had evidence from DCI Sumner that he was the sole decision maker. While they rejected that, the Tribunal clearly found that he took part in the decision. Influence over him by the other two was not exerted in a gender-neutral manner; it occurred in the setting of a culture perceived as hostile to women, illustrated by such matters as men clad only in towels, the under-representation of women and alcohol at work.

79. Furthermore, the Tribunal found (at paragraph 45) that DAC de Brunner could not explain why the 163 notice was not served on 12 September; the decision to serve it was taken on 8 October 2014, after the visit of DAC de Brunner, but without any further information or evidence against the Claimant about the manner in which overtime had been claimed.

80. As to procedural fairness, Mr Sutton complained that the questioning of the three witnesses had been inadequate and that the Tribunal's findings against them were unfair. He stressed the importance of the findings for the reputation of such senior officers. He said that if their evidence were to be disbelieved, it would have to be on a basis that been squarely put to them; and that the Tribunal's findings do not fully and properly reflect the pleaded case and cross-examination.

81. He complained that the questions asked of DCI Sumner did not include a direct suggestion that he had been guided by others in making his decision; the questions to him did not touch upon the perceived anti-female culture; it had not been pleaded against Commander Musker that he influenced the decision to serve a 163 notice on the Claimant; the Commander

had therefore not dealt with the point in his witness statement; and the alleged exertion of influence over DCI Sumner had not been adequately explored with DAC de Brunner.

82. I agree with Mr Sutton that the Tribunal's findings could have important consequences for the reputation of the MPS witnesses whose evidence was not accepted. But I am unable to conclude that there was procedural unfairness of the **Browne v Dunn** type here. The context included the expectation that the MPS would be likely to proffer a full and frank explanation of the Claimant's treatment. The Tribunal noted its omission to do so, its lack of transparency and some evidence "consistent with a desire to disguise the influence of senior decision makers …" (paragraph 132).

83. I think it was adequately put to DCI Sumner that he had conversed with the other two before deciding to serve the 163 notice and that he may have been subjected to their influence. The Claimant had pleaded as much against DAC de Brunner and had elaborated on that in his witness statement. The Claimant had no direct evidence of conversations and had to rely on inference from policy documents and such matters as the holding of meetings, documents from which were not disclosed. A direct question to DCI Sumner of the type envisaged would undoubtedly have elicited a flat denial, which the Tribunal would have rejected.

84. I accept that there was no direct plea that Commander Musker was involved in the decision to serve the 163 notice. Again, when the case was pleaded, the Claimant had no direct evidence of that. In his witness statement, he did emphasise the professional closeness between DAC de Brunner and Commander Musker and he did question whether they genuinely believed he was guilty of serious misconduct involving fraud.

85. It was not disputed that Commander Musker had been present at the raid on 12 September 2014 and in cross-examination of him and DAC de Brunner it emerged that they had spoken in September 2014 about the culture at TSG1. It emerged that he regarded TSG1 as a rogue unit and the Tribunal was clearly entitled to draw the inference that he discussed those issues with DAC de Brunner.

86. I do not consider that it was unfair to Commander Musker that the Claimant did not seek to amend the pleading to add him as an alleged discriminator under this head. The Claimant might well have done so, but because of the opacity of the MPS' decision making, such an amendment would have come late in the proceedings, during the evidence. While it would have been best practice to have applied for such an amendment, the absence of one does not, in my judgment, mean the line is crossed and procedural unfairness established.

87. The influence of DAC de Brunner on the decision to serve a 163 notice was adequately pleaded, evidenced in the Claimant's witness statement and covered in her cross-examination. She was able to deny any involvement whatsoever in the investigation and it was not procedurally unfair to her that the Tribunal rejected her denial. It was not unfair to find that she exerted influence over DCI Sumner to take part in a discriminatory decision to serve the 163 notice. For those reasons, I uphold the Tribunal's treatment of the first finding of discrimination.

The second finding of discrimination: downgrading the Claimant's performance score on or about 11 February 2015

88. The Claimant gave particulars of his claim stating his case that he believed the discriminators were either DAC de Brunner, Commander Musker, or both. The alleged

discrimination consisted in the reduction of his PPM performance score from B3 to B1, ruling him out for possible promotion. The MPS' amended grounds of resistance to this allegation comprised a bare denial that the Claimant's PPM score was discriminatory either by reference to a comparison with that of CI Edwards, or a hypothetical comparator.

89. In his witness statement, the Claimant explained the process in detail, the involvement of Commander Musker in it, and his belief that the DPS and senior officers including DAC de Brunner were aware of his provisional PPM score of B3. He stated at paragraph 109 of his witness statement his belief that DAC de Brunner would have been aware that a reduction in his PPM score would be an effective alternative means of harming his promotion prospects, if a disciplinary finding against him could not be secured owing to the weakness of the evidence against him in the DPS investigation.

90. Commander Musker's written witness statement explained his decision to reduce the Claimant's PPM score and his reasons for it, and denied that they were discriminatory. DAC de Brunner's witness statement included a brief and flat denial of "any involvement in the Claimant's PPM score"; she said she was unaware what his initial score was and unaware also that it had been changed following the moderation process, involving Commander Musker.

91. Commander Musker was asked many questions about his decision to reduce the Claimant's PPM score. It was not put to DAC de Brunner directly that she had taken part in the decision to reduce his PPM score. She was asked questions about her close and longstanding professional links with Commander Musker. It was put to her that the investigation into TSG1 was raised at a COG meeting she had attended and she said she did not recall that particularly.

92. She was asked about conversations between them on the subject of the Claimant and the issue of confidence in his leadership. It was put to her that the two of them had held discussions about the investigation "and matters arising" (in the words of the Judge's note of the evidence). Her answer is recorded as "[w]e have only had a few conversations". It was then put to her that she and Commander Musker made it clear the Claimant's position was untenable; she denied that suggestion, saying she had never had that conversation with Commander Musker at all.

93. The Tribunal dealt with this issue at paragraphs 164-174. They decided that the burden of proof was on the MPS to provide a non-discriminatory explanation for the downgrading. They noted the close connection between Commander Musker and DAC de Brunner and in particular in the matter of the visits to TSG1 in September 2014. They noted that by the time of the downgrading, DAC de Brunner was in a very senior position as "temporary AC" (Assistant Commissioner). The Tribunal drew the inference that Commander Musker was influenced by her when he made the decision to downgrade the Claimant's score.

94. The Tribunal did not suggest that DAC de Brunner had directly discussed the Claimant's score with Commander Musker. That had not been suggested to her; it is difficult to see how it could have been, as there was no document or other evidence to support any direct discussion of scoring between them. The immediate decision maker, on the Tribunal's findings, was Commander Musker; but his decision was influenced by his knowledge of DAC de Brunner's adverse view of the Claimant.

95. Mr Sutton submitted that the Tribunal found discrimination against Commander Musker who was a mere innocent agent, in violation of the **CLFIS** principle that only a person with

discriminatory motivation is liable. Ms Monaghan submitted that the Tribunal's finding was either that Commander Musker alone had discriminated against the Claimant by deciding to downgrade the latter's PPM score or, if its finding was that the decision was a joint one, both had discriminatory motivation.

96. In my judgment, the Tribunal made no finding that DAC de Brunner was party to the decision to downgrade the Claimant's score. Its reasoning was that her influence over the decision was indirect and unwitting; although her influence was tainted by discriminatory motivation, she was not herself the decision maker; the decision itself was Commander Musker's alone and was made with discriminatory motivation; it was he, and he alone, who discriminated. The Tribunal did find that DAC de Brunner was a discriminator in other respects but not in relation to this decision.

97. Turning to the fairness of the treatment of the issue in evidence, I am satisfied that it was not incumbent on counsel for the Claimant, Mr Stephenson, to put to DAC de Brunner the specific suggestion in the Claimant's pleaded case, as explained in his witness statement, that DAC de Brunner had been a direct party to the decision. Mr Stephenson had his client's belief in that but no direct evidence to support it. At most, he could have suggested to her that it was a fair inference from other facts.

98. Since the Tribunal did not find that DAC de Brunner was a party to the discriminatory act of downgrading the Claimant's score, she and the MPS cannot complain that the issue was inadequately explored with her in oral evidence. It is not suggested that Commander Musker was unfairly treated in relation to this issue. It was common ground that he had made the decision; he was asked about it fully and the issue was whether his decision was discriminatory.

There was no procedural unfairness in relation to the second finding of discrimination, which I also uphold.

The third finding of discrimination: Commander Musker overturning DAC Taylor's decision to lift all the restrictions placed on him; AC Gallan instructing or influencing Commander Musker to do so

99. The Claimant's pleaded case was that it was AC Gallan who "determined" that the decision to lift restrictions on his duties should be reversed. The Claimant's case was founded on conversations he had with CS Campbell on 7 April and 6 July 2015, conversations the latter denied but which, the Tribunal accepted, occurred as stated in evidence by the Claimant. The MPS' grounds of resistance included a bare denial that AC Gallan had made any such decision and a denial that the conversation with CS Campbell took place. The MPS did not identify the person who, on its case, made the decision.

100. In his witness statement the Claimant gave an account of his conversations with CS Campbell. In her brief witness statement, AC Gallan said she did not know why the Claimant would suggest that CS Campbell would have attributed to her the decision to prevent the Claimant returning to his role. She said that this "is not a decision I made or was involved in making". Commander Musker's witness statement did not mention the point at all; he had not been targeted in the Claimant's pleaded case and the MPS had not identified him as the decision maker in its pleaded defence.

101. However, at trial the claim was amended, as noted above, to add him as an additional or alternative discriminator to AC Gallan. That arose from the course of the hearing, as already explained. Certain emails disclosed at the start of the hearing indicated that Commander

Musker had been involved in decisions in April 2015 concerning the Claimant's temporary deployment in Wapping. In cross-examination, he said the decisions about those restrictions were his.

102. He was then asked questions on the basis that it was he, Commander Musker, who had made the decision to reverse DAC Taylor's decision. That was consistent with the Claimant's case as eventually amended and consistent with Commander Musker's oral evidence. He was, in effect, owning the decision in place of AC Gallan, who denied involvement.

103. When AC Gallan was questioned, the Claimant had already secured acceptance from Commander Musker that he had made the decision. The pleaded case remained that AC Gallan was the decision maker, but there was (later) discussion of a possible amendment which was put off until a later convenient point in the hearing. When AC Gallan was cross-examined, Commander Musker's evidence was not complete. AC Gallan's oral evidence was interposed to enable her to attend the next day as scheduled. The amendment had not yet been made or discussed; the pleaded case remained against her.

104. It was put to her that on the basis of information imparted to her, she formed a dim view of the leadership of TSG1. She responded that she had an open mind as the allegations were not proven but under investigation. She was kept informed about the investigation but denied exerting influence over it. She was then asked questions about the emails showing Commander Musker's involvement in decisions about restrictions in April 2015 and about the Claimant's conversation with CS Campbell. She was asked whether Commander Musker may have mentioned the issue to her.

105. The note of her response reads: "[i]t looks like it. Taylor makes decisions on restrictions. I would not get involved in that. …". She said it was DAC Taylor's sole responsibility. She did not explain how DAC Taylor's decision came to be overruled. Her answers led to a discussion about a possible application to amend the Claimant's pleaded case. AC Gallan's oral evidence was and remained as in her written statement: that she had no idea why CS Campbell should tell the Claimant that it was she who had blocked the Claimant's return to his duties.

106. The Judge's note then records the question: "Can [you] now understand why he [the Claimant] thought [you] were the decision-maker"? Her answer is recorded as: "[a]sk C [the Claimant] that. But I was not". The next question was: "[w]ho was responsible for not allowing him to return"? Her answer is recorded as: "I don't know. This case was appropriately dealt with at Commander level". That evidence was consistent with Commander Musker having been the decision maker.

107. On the sixth day of the hearing, the amendment was made. It named Commander Musker as an additional or alternative alleged discriminator, but it did not delete AC Gallan as an alleged discriminator. There was no oral abandonment of the allegation against her; the Judge's note records counsel for the Claimant saying of the amendment that is was "not a fresh claim. It is merely identifying the discriminators", in the plural. There was no suggestion from anyone that AC Gallan needed to be recalled; her evidence had been completed.

108. The Tribunal found (paragraph 180) that the decision to overturn DAC Taylor's decision to lift the restrictions on the Claimant's duties had been made by AC Gallan. It noted that the MPS' case was that Commander Musker had made the decision, while the Claimant

argued that he "may have been instructed or influenced by AC Gallan" (paragraph 179). The Tribunal commented at paragraph 180 that if Commander Musker "technically" made the decision, "we believe it was on the instructions or under the influence of AC Gallan".

109. They reasoned that a person senior to Commander Musker would have had to be involved and found that CS Campbell's account, in his conversations with the Claimant, was given and that that account was true. They therefore rejected AC Gallan's protestation of non-involvement in the decision. They went on to find that AC Gallan sought to disguise her involvement in the decision.

110. They drew this inference from the account given by CS Campbell to the Claimant taken together with an analysis of the extensive circumstantial evidence about disapproval of the macho culture at TSG1 and the poor view of the Claimant's leadership of it entertained by senior officers which, they deduced, must have included AC Gallan. The Tribunal went on to reason that the burden fell on the MPS to provide a non-discriminatory explanation of the treatment of the Claimant. They concluded that the MPS had not done so and therefore the allegation succeeded.

111. The MPS submitted that the Tribunal found Commander Musker to be, contrary to his evidence, a mere innocent agent and that it therefore should not have branded him as a discriminator even though he himself claimed to have been the sole decision maker, a proposition they rejected. The finding of discrimination is recorded at the start of the Tribunal's Decision as follows: "Commander Musker overturning DAC Taylor's decision to lift all the restrictions placed on him [the Claimant]. AC Gallan instructing or influencing Commander Musker to do so".

112. I think it is unrealistic to treat that finding as necessarily entailing the proposition that Commander Musker, contrary to his own evidence supported by contemporary emails, played no part in the decision save to act as the innocent instrument of AC Gallan. The Tribunal had already found Commander Musker to have discriminated by taking part in the decision to subject the Claimant to an investigation. On the basis of their findings, he was actuated by discriminatory motivation and would not need much encouraging by AC Gallan to countermand DAC Taylor's decision. I find no misapplication of the **CLFIS** principle.

113. Mr Sutton submitted that it was procedurally unfair to AC Gallan for the Tribunal to find that she took part in the decision. He suggested the allegation against her was effectively dropped and replaced by acceptance that the sole decision maker was Commander Musker. He further contended that it was not sufficiently put in cross-examination of AC Gallan that she had taken part in the decision. She was entitled to assume that when she gave evidence it had become common ground that she was not a decision maker.

114. I reject those arguments. The allegation against AC Gallan was never dropped. She had denied in her witness statement any involvement in the decision and she maintained that denial in oral evidence. She was asked questions about who the decision maker was and she replied that she did not know but it was not she and that the decision was appropriately taken at commander level. The Tribunal rejected her denial and preferred the Claimant's evidence of what CS Campbell said to him, combined with the strong circumstantial evidence that AC Gallan's denial was untrue. I find no procedural unfairness and I uphold the third finding of discrimination.

The fourth finding of discrimination: AC Gallan deciding that the Claimant's removal from his post was likely to be permanent, as communicated to the Claimant by CS Campbell on or about 6 July 2015

115. This finding was closely linked to the previous one. A similar amendment was made late during the hearing, mirroring that made in relation to the previous allegation. In its Decision, the Tribunal pointed out (paragraph 190) that "[o]verturning DAC Taylor's decision in July 2015 to remove the restrictions had the effect of not allowing the claimant to return to his post." TSG1 was later disbanded and the Claimant never returned to his post there.

116. The Tribunal found that, once again, the MPS failed to discharge the burden that fell upon it to provide a non-discriminatory explanation of its officers' conduct. They noted at paragraph 191 that the MPS advanced no explanation at all for the fact that the Claimant was kept away from his post even after the formal investigation was completed. They did not accept Commander Musker's evidence that "he was including the local dealing with the officer 2 allegation". They drew a contrast with the treatment of CI Edwards in that regard (paragraph 191).

117. The MPS' attack on this finding of discrimination travels the same ground as that levelled against the previous finding. The Tribunal clearly found at paragraph 2d that the decision maker was AC Gallan. Commander Musker was not found to be involved in the decision. The MPS had simply failed to explain the treatment of the Claimant in a way that did not involve unlawful discrimination by it. On the same reasoning as before, there was no procedural unfairness to AC Gallan in the Tribunal's reasoning and conclusion. I uphold the fourth finding of discrimination.

The fifth finding of discrimination, and the finding of victimisation: Commander Musker on or about 27 January 2016 refusing to allow the Claimant to appeal against "Management Action" imposed upon him on 24 December 2015

118. The Claimant's pleaded case was that the decision of Commander Musker not to allow him to appeal against the "management action" was both direct sex discrimination and victimisation. In further particulars he explained that he relied on a hypothetical female comparator. He accepted that the right of appeal was not included in any policy or procedure document but asserted that a woman in the same position, and a person in the same position but who had not brought a tribunal claim, would have been afforded a right of appeal outside established policy and procedure.

119. In its written defence, the MPS denied discrimination and victimisation. The MPS agreed that the Claimant had not been allowed by Commander Musker to appeal against the management action imposed upon him. They pointed out that there is no right of appeal in any policy or procedure document against such action. They denied that the refusal to allow a right of appeal outside established procedure was sex discrimination. As to victimisation, they accepted that bringing the tribunal claim was a protected act but denied that refusal to afford an exceptional right of appeal occurred because of that protected act; it occurred because refusal was normal policy.

120. The battleground, therefore, was whether a woman or a non-tribunal claim-bringer would have been treated in the same way as the Claimant was, i.e. would have been refused a right of appeal outside established procedure; and whether that was a detriment. The Tribunal found for the Claimant on both these points. They noted that he faced a high hurdle because

affording a right of appeal would be a concession going beyond established procedure, but found that the burden fell on the MPS to rebut both discrimination and victimisation.

121. They gave reasons for that conclusion (paragraphs 196-200). These centred on dissatisfaction with the evidence of Commander Musker on this aspect of the case. The issues were serious and trust needed to be rebuilt. The Claimant's plea for an appeal had been impassioned. CS Campbell had supported an appeal and someone was "on standby" and available to hear it. The Tribunal noted that Commander Musker professed not to have understood the assertion of "discrimination" as connoting anything beyond unfairness, evidence which they rejected.

122. They went on to consider whether the MPS had discharged the burden of rebutting discrimination and victimisation, and concluded that it had not (paragraph 201). They pointed to latitude to go outside established procedures in other cases and referred to evidence where this had happened in a case involving women officers. They also reasoned that if Commander Musker had regarded the absence of a written procedure for an appeal as genuinely insuperable, he would have referred the Claimant to a written procedure that was available for raising a discrimination issue, namely the "Fairness at Work" procedure (which indeed the Claimant later invoked).

123. They also concluded that refusal to afford a right of appeal against the management action was a detriment, since management action can affect future prospects and appraisals. They therefore found that the fifth allegation of discrimination, and the allegation of victimisation, both succeeded. The MPS appeals against those findings in grounds 3A and 3B of this appeal.

124. In ground 3A, the MPS contends that an omission to accord special treatment over and above that permitted to employees generally, irrespective of gender, cannot be discrimination. Mr Sutton cites in support the decision of Elias P (as he then was) in **Islington LBC v Ladele** [2009] ICR 387. There, the Claimant had alleged discrimination on the ground of religion or belief because she had been required to officiate at same sex civil partnership ceremonies, to which she objected on religious grounds.

125. At paragraph 52, Elias P said the "complaint was not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been". At paragraph 53, he added: "[i]t cannot constitute direct discrimination to treat all employees in precisely the same way". But he added immediately: "[i]t could be direct discrimination if the employer was willing to make exceptions to the general rule but was not willing to do so for a particular worker by reason of a legally prohibited ground".

126. The difficulty for the MPS is that the Tribunal's finding in this case is in accordance with the latter observation of Elias P, not the former. The Tribunal found that the MPS would have been willing to depart from the established procedure in other cases - it had done so in one instance - but was not willing to do so for the Claimant, on two legally prohibited grounds. The analogy Mr Sutton seeks to draw with the facts of the **Ladele** case is therefore not a true one.

127. Mr Sutton took two other points. He argued that the Tribunal had not been entitled to find that the refusal to afford a right of appeal against management action was a detriment. I do not agree with that contention. The Tribunal correctly directed itself in law on the nature of a detriment (see paragraph 117 of its Decision) and was entitled to find that the refusal to permit an appeal was a detriment (see paragraph 202): since the management action was a detriment,

so was the refusal to allow an appeal against it to be brought, resulting in the action staying in place. This reasoning is defensible.

128. Finally, Mr Sutton argued in ground 3B that the Tribunal had found for the Claimant on a point not advanced by him in his claim. As I understood the argument, it was that the Tribunal had found that Commander Musker's failure to refer the Claimant to the Fairness at Work procedure was an act of discrimination, a point never advanced by the Claimant and not forming part of his case. It is correct that the point did not form part of his case.

129. However, it is incorrect to say the Tribunal found Commander Musker discriminated by failing to refer the Claimant to the Fairness at Work procedure. The Tribunal's reference to that procedure was merely part of its reasoning supporting the rejection of the Commander's evidence that the established procedure was set in stone. The Tribunal reasoned that if it had been, there was still a written procedure - the Fairness at Work procedure - which could have served as a forum for challenging what Commander Musker recognised (contrary to his evidence) as a discrimination allegation in the legal sense of the term.

130. I therefore reject the MPS' criticisms of the Tribunal's fifth finding of discrimination, and by the same reasoning, of its finding of victimisation. The Tribunal's reasoning was sound, it reached a conclusion reasonably open to it and one that was not flawed by any misdirection in law.

The Suitability of CI Edwards as a Comparator

131. In the fourth ground of appeal, the MPS challenges the suitability of CI Edwards as a comparator under section 23(1) of **the Act**, which provides (among other things) that on a

comparison in a direct discrimination case, "there must be no material difference between the circumstances relating to each case". Mr Sutton argued that there were clearly material differences between the case of CI Edwards and that of the Claimant and that the Tribunal ought to have ruled out the former as a permissible comparator.

132. Developing his argument, Mr Sutton submitted that the decision to subject the Claimant to an investigation had been made by DCI Sumner, who had no role in the complaint about TSG3 where CI Edwards was in charge. It is true that DCI Sumner did not, on the evidence, take part in any decision as to the treatment of CI Edwards. The difficulty with the MPS' argument is that the Tribunal found that DAC de Brunner was aware of both cases and in a position to decide how the MPS should treat each of the two officers. That meant CI Edwards was a viable comparator.

133. I also reject the argument that the Tribunal wrongly allowed the treatment of CI Edwards to be considered in relation to the complaint about the overturning of the decision to lift restrictions on the Claimant's duties. The Tribunal was entitled to invoke the comparison with the treatment of CI Edwards arising from the complaint against her unit, TSG3, which as the Tribunal pointed out, did not lead to any restrictions being imposed upon CI Edwards (see paragraph 185 of the Decision). The Tribunal did not go any further than that.

134. By the same reasoning, the Tribunal did not err in law in referring to the treatment of CI Edwards when dealing (at paragraphs 190-192) with the complaint based on the decision (found to have been made by AC Gallan) that the Claimant's removal from his post was likely to be permanent. Nor did it err in referring to a hypothetical comparator when assessing that the decision to deny the Claimant an appeal against the "management action". The Tribunal was

entitled to draw the inference that Commander Musker would have treated a woman in the same position more favourably than he treated the Claimant.

Failure to Consider Discriminatory Motivation

135. In its sixth ground of appeal, the MPS asserted, to quote from its skeleton argument, that the Tribunal "failed to address itself to the requirement that those responsible for the impugned acts must have been motivated to act because of a material protected characteristic". Mr Sutton submitted that this was a distinct ground of appeal and did not merely duplicate his attack on the Tribunal's findings based on the **CLFIS** principle, the procedural unfairness arguments and the allegation of inadequate or inadequately reasoned findings of fact, which I have already addressed.

136. I was unable at the hearing, and remain unable, to discern what this ground of challenge adds to those other grounds which I have covered earlier in this Judgment. On each issue where the Claimant succeeded, the Tribunal asked itself whether the alleged discriminatory treatment occurred; whether an inference could be drawn of less favourable treatment because of sex in the absence of an alternative explanation; and if so whether in the light of the MPS' explanatory evidence the decision maker or makers were, consciously or unconsciously, motivated by sex.

137. I am unable to see how the Tribunal can be said to have failed in its task of adequately considering discriminatory motivation. That is precisely what the Tribunal was doing when undertaking the exercise just described. Its reasoning was full and clear. There was no want of sufficient detail or explanation of the Tribunal's findings.

138. The sixth ground of appeal adds nothing to the earlier grounds and does not come near to succeeding. The Tribunal was not required to state in the case of each finding of discrimination whether the discriminatory motivation had been conscious or unconscious. Either would suffice for liability. There is rightly no free standing perversity challenge and I reject the suggestion that the reasons are inadequate.

Conclusion

139. For those reasons, the appeal fails and I uphold the decision of the Employment Tribunal. I agree with Ms Monaghan's observation that the **CLFIS** decision should not become a means of escaping liability by deliberately opaque decision making which masks the identity of the true discriminator. Where a claimant is for good reason unable readily to identify which individual is responsible internally within the employing organisation for an act of discrimination, the claimant may, as this case demonstrates, sometimes be permitted to amend during the hearing once the correct person is, or persons are, identified from the evidence.