Case Number: 2301931/2014 & 2301000/2015

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Bowler	and	The Chief Constable of Kent Constabulary

Preliminary hearing held at Ashford on 22 September 2017

Representation	**Claimant:**	Ms K Annand, counsel
	Respondent:	Mr G Menzies, counsel

Employment Judge Wallis

JUDGMENT

1. The Claimant's application for an order for disclosure is successful in respect of the McClean documents;

2. The order is contained in a separate case management order;

3. The Claimant's application for disclosure of the Somerville documents is dismissed.

REASONS

Oral reasons were given. The Respondent requested written reasons.

1. The parties' submissions were sent to the Tribunal in writing, together with replies thereto, in accordance with the previous order.

2. I had the opportunity to read them before the preliminary hearing. The written submissions were supplemented by oral submissions and bundles of authorities from both sides.

3. I had also read the judgment of the EAT and my notes of the liability hearing. The EAT indicated that I should consider whether additional evidence was necessary.

4. I considered the Claimant's application for disclosure of documents, the Respondent's objection to that application, and the question of whether the Tribunal would need additional evidence to deal with the remitted points.

5. I have not included the arguments put forward by the representatives here as they are clearly and helpfully set out in the written submissions.

6. I began by re-visiting the original list of issues. I noted that the issues with regard to the actions by Mr Somerville were clear. The EAT has in effect required the Tribunal to reconsider the decisions made in respect of issues 5, 6 and 7, in the light of the EAT's comments.

7. The issues were of course worded before the very recent EAT decision in the case of Efobi v Royal Mail Group Ltd. I indicated to the parties that I would make no decision today about whether the burden of proof had changed as a result of Efobi (the Claimant suggested that it had, the Respondent contended that nothing had changed). I wanted to discuss the issue with the Tribunal members and reflect further, but I did not think that this would cause any prejudice to either party.

8. Setting aside consideration of Efobi, I was satisfied that the Tribunal had before it all the evidence necessary to re-visit and make a decision on issues 5, 6 and 7. I was therefore unable to agree to the Claimant's application for disclosure of documents relating to Mr Somerville's performance.

9. I considered that the situation with regard to the issues around Mr McClean's conduct was different. That involved a claim of victimisation. Within that claim, the first issue was whether the four matters relied upon by the Claimant were protected acts. It was later conceded by the Respondent that they were protected acts, and so it was not necessary for the Tribunal to make a decision about that, and we did not do so.

10. The next issue was to decide whether the incidents relied upon by the Claimant had occurred as he described them, and if so, whether they happened because he had done a protected act. We were not invited to consider whether Mr McClean knew that the grievance was related to race. There was no dispute that he knew about the grievance; his evidence was that he did not know 'the details'. He was asked one question about whether he knew that the grievance was about race, and he said 'no'.

11. The Tribunal was not addressed on his knowledge of the detail of the grievance, and specifically whether he knew it was about race, so our attention was not drawn to that; the emphasis by the Respondent at that stage was that the matters relied upon were not detriments. We found that they were detriments.

12. My understanding is that the EAT has in effect (although not in terms) asked the Tribunal to consider whether Mr McClean knew that the grievance was about race, and whether he acted in the way that we found he acted, because of that knowledge.

13. Having looked through my notes of the hearing, I considered that the Tribunal would not have sufficient evidence to come to a view about that, because it was never put forward as an issue and thus not explored. I also considered that in fairness to the Claimant, and indeed to Mr McClean, it would be appropriate to hear further evidence on that point.

14. For the avoidance of doubt, I was unable to agree, if it was being suggested, that the Tribunal's reference in paragraph 16 of the remedy judgment to 'behind the scenes discussions' indicated in some way that we had heard sufficient evidence on that point. It is not clear to me now whether we knew the detail of the appeal grounds when deciding upon remedy, but our focus was on explaining the reasons for the award of compensation.

15. I indicated to the parties that it was never put to the Tribunal that it was necessary for Mr McClean to have known that the grievance was about race, and so this was not a question considered or addressed by the Tribunal at all, once the Respondent conceded that there had been protected acts. This was not a case where it was denied that Mr McClean knew about the grievance; neither was it denied that the grievance was a protected act. However, although there appears to be no case law on the point, the Claimant has accepted, and so must the Tribunal, that the EAT requires the Tribunal to consider whether he did know that it was about race.

16. Accordingly, I decided to grant the Claimant's application for disclosure of the documents relating to Mr McClean's knowledge of the protected characteristic referred to in the grievance, in the terms set out in Ms Annand's submissions at paragraph 53. The documents listed there appear to me to be relevant and necessary to assist the Tribunal in deciding an issue that we had not previously been asked to decide.

17. The Respondent suggested that if successful on this point the Claimant should apply to amend his pleadings, and that this application should not be allowed. I could see no need for any amendment. The points to be considered had been remitted by the EAT; that was sufficient. Of course the Respondent would need to know the detail of the Claimant's case on this point. The parties agreed that that could be achieved by an order for sequential statements instead of the more usual simultaneous exchange.

18. Further directions are set out in a separate case management order.

Employment Judge Wallis
22 September 2017