# EMPLOYMENT TRIBUNALS

***Case number 2407913/2015***

**Claimant:** Mr P Bailey

**Respondents:** 1. The Chief Constable of Greater Manchester
2. Dermott Horrigan
3. The Chief Constable of Lancashire Police

**And**

***Case number 2405789/2015***

**Claimant:** Mr P Bailey

**Respondents:** The Chief Constable of Greater Manchester

**HELD AT:** Manchester **ON:** 29 March 2017

**BEFORE:** Employment Judge Holmes

**REPRESENTATION:**
**Claimant:** Ms J Connolly, Counsel
**Respondents:** Mr S Gorton QC

## RESERVED JUDGMENT ON APPLICATION FOR DEPOSIT ORDERS

It is the judgment of the tribunal upon the respondents' application for deposit orders to be made against the claimant in respect of certain aspects of his claims that :

1.The applications in relation to case no. 2405789/2015, in respect of those parts of the claims identified in the formal deposit order below succeed, but all others fail, and are dismissed.

2.The application in relation to case no. 2407913/2015 succeeds, and deposit orders are made in the terms set out in the formal deposit order below in respect of the claims identified therein.

# DEPOSIT ORDER

**Case no. 2405789/2015**

The Employment Judge considers that the claimant's allegations or arguments that:

a) The failure of the respondent to respond appropriately to his complaints of racial abuse on social media (Item 13 on the Scott Schedule) was an act of detriment on the part of the respondent for having made a protected disclosure;

b) The failure of the respondent to respond appropriately to his complaints of racial abuse on social media (Item 13 on the Scott Schedule) was an act of victimisation on the part of the respondent for having done a protected act relating to his protected characteristic of his race;

c) The failure of the respondent to respond appropriately to his complaints of racial abuse on social media (Item 13 on the Scott Schedule) was an act direct race discrimination;

d) The failure of the respondent to respond appropriately to his complaints of racial abuse on social media (Item 13 on the Scott Schedule) was an act of harassment related to the protected characteristic of the claimant's race;

have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £**£200.00** in respect of each such claim no later than **26 June 2017** as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

**Case no. 2407913/2015**

The Employment Judge considers that the claimant's allegations or arguments that:

a) His removal as disclosure officer from Operation H was an act of detriment on the part of the first respondent for having made a protected disclosure;

b) His removal as disclosure officer from Operation H was an act of victimisation on the part of the first respondent for having done a protected act relating to his protected characteristic of his race;

c) His removal as disclosure officer from Operation H was an act of detriment on the part of the second respondent for having made a protected disclosure;

d) His removal as disclosure officer from Operation H was an act of victimisation on the part of the second respondent for having done a protected act relating to his protected characteristic of his race;

e) His removal as disclosure officer from Operation H was an act of detriment on the part of the third respondent for having made a protected disclosure;

f) His removal as disclosure officer from Operation H was an act of victimisation on the part of the third respondent for having done a protected act relating to his protected characteristic of his race;

have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £**£200.00** in respect of each such claim no later than **26 June 2017** as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

The claimant's attention is drawn to the accompanying Notes attached to this judgment and order.

**REASONS**

1. The claimant was represented by Ms Connolly of counsel, and the respondents by Mr Gorton QC. This application concerns two cases, number 2405789/2015 which relates to an Operation to be referred to as "W" and number 2407913/2015 which relates an Operation to be referred to as "H".

2. The respondents' applications are for deposit orders in respect of parts, but not all, of the claims made by the claimant alleging whistleblowing detriments, and race discrimination in connection with his roles in each of these Operations. The claims made by the claimant are contained in various sources, but for these purposes, those made in connection with Operation W are set out in a Scott Schedule which is at pages 54 to 59 of the Bundle, and the one relevant claim in relation to Operation H is simply that the claimant was removed as the disclosure officer from that Operation. The claimant is a black Police Officer , and Chair of the Black and Asian Police Association, who has previously brought claims against one of the respondents (his employer, GMP) for race discrimination.

3. Counsel had helpfully prepared skeleton arguments , to which they spoke. There was a Bundle for use in this hearing (references to "the Bundle" in this judgment being to that Bundle) , and a further Bundle of statutory and regulatory material (referred to as "the Materials Bundle") . Having heard their submissions , and considered the documentation, the tribunal reserved its judgment which is now given.

***The applications, the grounds relied upon, and the grounds of resistance.***

4. It is proposed to go through each of the claims said by the respondents to have little reasonable prospect of success , and why, to consider also the claimant's response , and then make findings as to their prospects of success, before , in

conclusion, reviewing the application as a whole , taking any further considerations into account.

5. By way of preamble, the claims which are the subject matter of these applications are , in the case of Operation W , four in number, in terms of the factual situations that are alleged, namely that the claimant:

(i) was the subject of a covert investigation from August 2014 instigated following the preparation of a BAPA dossier complied by the claimant which had been provided to HMIC;

(ii) was the subject of an actual investigation in or about October 2014 when investigations were made with officers whose details and information had been included in a BAPA dossier complied by the claimant which had been provided to HMIC;

(iii) was served with a Regulation 16 notice alleging that he had breached confidentiality in leaking information to the Press;

(iv) made complaints that he was the victim of racial abuse on social media sites which were not treated as hate crimes or responded to by the respondent (the GMP) appropriately.

Each claim is put on the alternative basis, against each respondent that it is an act of either :

(a) detriment by reason of the claimant having made protected disclosures;

(b) direct race discrimination;

(c) harassment on the grounds of race;

(d) victimisation (for having complained of race discrimination).

There are thus, potentially, 16 such claims in Operation W, and a deposit order is sought in respect of each of them. There is only one respondent in this claim, the GMP.

6. In relation to Operation H, there are three respondents, one of which is the GMP as well, but only one factual allegation, namely the removal of the claimant from his role as discsloure officer on that Operation.

***<u>A)Operation W – claim (i).</u>***

7. The first application in this instance relates to claims made by the claimant, in his Scott schedule and ET1. They are that the claimant was the subject of a covert investigation in or about August 2014, which is alleged (Item 5 on the Schedule at page 55) to constitute detriment for having whilstleblown , direct race discrimination, harassment or victimisation. The respondents (in this instance solely the GMP) contend that this claim or claims have little reasonable prospect of success. They do so on the basis that the claimant has merely made these claims as an assertion, he

has advanced no proof in support of them. The claimant's claims are based on the suspicion that any such detrimental action was the result of him producing a dossier to HMIC (Her Majesty's Inspectorate of Constabularies). There is, say the respondents no evidential support for this, and, in any event, they contend that the claimant cannot shift the burden of proof for any of the three heads of discrimination claims.

8. Further, for the purposes of the whistleblowing claim, there was no prior protected disclosure. This contention is based upon the fact that the claimant's alleged protected disclosure for these purposes was to the HMIC. That body was not, the respondents contend, either the claimant's employer (which is obviously correct) nor is it a "prescribed person" under s.43F of the Act. Thus, the respondents contend this aspect of all four of the Operation W detriment claims cannot succeed, as there was no qualifying disclosure.

9. In reply, Ms Connolly , in relation to the issue of whether the first disclosure can amount to a protected disclosure, points out that this has not hitherto been pleaded, and she does not concede the point. In overall terms, however, regardless of that issue, she argues that all the evidence needs to be heard, when full disclosure has been given. Looking objectively at events at the time, and the fact that an investigation did commence in or around October 2014 , when officers had certainly, at the least, been asked questions prior to that, the only fair way to deal with the matter is to allow all the evidence to be heard without any pre-condition.

***The tribunal's view on prospects of success.***

10. The legal argument aside, the tribunal does not consider that it is possible to consider the application in relation to these claims in isolation, as they elide very much into the next claims, and hence the tribunal will express its views upon the prospects of success of both claims together.

***Operation W – claim (ii).***

11. The tribunal turns now to the second claim said by the respondents to lack sufficient reasonable prospects of success, that of the claimant "being investigated" in October 2014 (erroneously referred to on page 5 of Mr Gorton's skeleton as October 2015). This claim is made in para.10 of the ET1 (page 14 of the Bundle), and Item 7 of the Scott Schedule .

12. This claim arises out of the claimant's dossier, presented by him to HMIC in June 2014. This led, the claimant contends, to officers of GMP making enquiries into whether the officers referred to in the dossier compiled by the claimant had given their consent to the information that they had given being utilised in this way. The claimant contends that there was encouragement of these officers to make complaints against him.

13. The claimant first raised this allegation in an e-mail (page 341 of the Bundle) of 3 November 2014 to Chief Superintendent Hull. He said that he understood that he was being investigated in relation to a complaint of corruption he had made to

HMIC and the IPCC. He requested further information as to how this had come about and who had authorised the investigation.

14. The reply to his e-mail is at page 342 of the Bundle. This was sent by Deputy Chief Constable Hopkins. He expressed surprise that the claimant was raising this issue, and sought to reassure him that there was nothing untoward in the enquiries that had been made, and why the individuals named in the file had been contacted, which he said was quite correct.

15. Mr Gorton submits that the evidence shows that this action was clearly appropriate , and was unrelated to any of the proscribed grounds relied upon by the claimant. There were good, non – discriminatory or victimising, reasons for the enquiries that were made, and GMP were acting entirely properly in checking that the relevant individuals had given their consent to the claimant including their details in his dossier. He refers to the e-mail exchanges at pages 340 to 340h on this topic. That such enquiries were vindicated is demonstrated by the fact that 7 out of the 13 officers, when approached in this way, then declined their consent (see pages 351 to 352 of the Bundle). The facts show, he submits, that in carrying out these enquiries, and then referring the documents to the IPCC, the GMP was acting quite properly, and in no way were their actions anything to do with the claimant's protected acts or race. There was no "investigation" of the claimant, as such, merely enquiries which were made for valid data protection reasons.

16. For the claimant Miss Connolly submits that this is a classic instance of the tribunal being asked to make an assessment on incomplete material, when full disclosure has not been given, upon highly fact sensitive issues. The tribunal should hear the full story from the respondent's witnesses to show that there were no improper motives at work.

***The tribunal's findings on prospects of success of claims (i) and (ii) (x 4) .***

17. The tribunal notes the arguments of the respondents, and appreciates that they may well have some force. There are, however, it seems to the tribunal, some aspects of the evidence (which, of course, at this stage is not complete, and is the result of what could be considered selective disclosure, as full disclosure has not yet taken place) that cannot at this stage be said to be strongly indicative of the lack of prospects of success for these claims.

***(a) The Protected Disclosure detriment claims – the first disclosure.***

18. Dealing first with the claims based on protected disclosure, there seems to be no answer to the respondents' contentions that the claimant's disclosure to HMIC on 25 June 2014 (which is the first one he alleges that he made before 14 October 2014, his second one, which was to the IPCC) cannot amount to a qualifying protected disclosure, because of the status of the HMIC as neither the claimant's employer, nor a qualifying body under the Act. To that extent, the tribunal accepts that the claimant would have little reasonable prospects of success in succeeding in his protected disclosure detriment claims in respect of any conduct on the part of the respondents between 25 June 2014 and 14 October 2014.

***(b) The Protected Disclosure detriment claims – the second disclosure.***

19. Thereafter, however, the position is different, as the respondents do not contend that the disclosure made to the IPCC on 14 October 2014 was not capable of being a qualifying disclosure. The claimant was, and remains, the Chair of the Black and Asian Police Association ("BAPA"). The dossier he submitted to HMIC, and then IPCC, was from that organisation.

20. The evidence reveals that on 19 October 2014 ACC Dawn Copley, in an e-mail to Det. Ch. Insp. Julian Findle, and Ch. Supt. David Hull (page 339a of the Bundle), was questioning whether the officers whose cases had been included in the dossier complied by the claimant actually knew that their cases were being referred to, and whether their views should be sought before the case was submitted to the IPCC. This was, of course, only 5 days after the claimant made his disclosure to the IPCC on 14 October 2014. It seems implicit in ACC Copley's e-mail that she was aware of that disclosure, or at the very least there is an inference that she was.

21. If, therefore , the claimant's disclosure to the IPCC was a protected disclosure, and ACC Copley was aware of it, and any of the officers with whom she was communication thereafter also were, the burden of proving that the respondents' actions in making the enquiries that they then did were not by reason of the claimant's protected disclosure (see s. 48(2) of the ERA) . In essence, the respondents' application in this regard seems really to be predicated on the argument that, if the burden of proof does shift, they will be able to discharge it.

22. They may be able to, but there are a number of obvious enquiries that arise from even the limited documents that have been put before the tribunal. Of particular note, for example, is the evidence in the e-mail from Det.Ch. Insp. Findle at pages of the Bundle 340B to 340c of the Bundle , in which he sets out his "script" for how he proposes to carry out his enquiries with the officers involved, , or had probably already been doing so. This sets out a number of questions to be asked, in two sets of questions. ACC Copley, however, in an e-mail back to Det.Ch.Insp. Findle on 29 October 2014 (page 340d of the Bundle) sounded a note of caution, and suggested that the first set of questions made it sound that there was an investigation into BAPA about how they had put the dossier together, when there was not. She expressed the fear that this may be making a bad situation worse.

23. The point is made by Miss Connolly that there is a strong and clear identification of the claimant, as its Chair, with BAPA. Hence any investigation into it could be seen to be an investigation into him. ACC Copley requested that the questions be reviewed. From the reply on 29 October 2014 (page 340a of the Bundle) it appears that this may have come too late, as the previous script (and possibly a letter in similar terms) had been already used, and it seems that some officers had already been questioned using the full set of questions that raised concerns on the part of ACC Copley.

24. If ACC Copley could see how the manner in which the investigation was being conducted could be viewed as investigating BAPA, and hence the claimant, the tribunal cannot see how it can be said that the claimant has little reasonable prospect of success in contending that this was indeed what the investigation was

truly doing, and that this was the result of his protected disclosure to the IPCC. In any event, the burden of proof would be on the respondents, and on these documents alone there are clearly issues where the respondents will have to explain the manner in which, and reasons for which, they carried out this (admitted) set of enquiries with these officers.

***(c)The other claims – direct discrimination, harassment and victimisation.***

25. Similarly, whilst the reversal of the burden of proof will not apply to the direct discrimination and harassment claims, until the claimant proves facts from which the tribunal could find that the reason for his treatment was his race, this will not the case for his victimisation claims. It is clearly the case that the claimant had (whether as qualifying disclosures or not) raised in the dossier sent to HMIC and the IPCC allegations of ongoing racism within the GMP. He had thereby done a protected act, quite apart from his previous protected acts of his prior tribunal claims.

26. In the context of these claims the question will be whether the respondents will be able to satisfy the burden of proof when it shifts, as it will do in the victimisation claims. Further, whilst not automatically so, the tribunal considers that on the basic facts of the other two claims, direct and harassment, the claimant has at least reasonable prospects of establishing a prima facie case, so as to reverse the burden of proof.

27. In those circumstances, for the same reasons as apply in the protected disclosure claims, the tribunal considers that the respondents will have to explain how there were non – discriminatory reasons for the fact and manner of the enquiries that they accept they made in October 2014. They may well succeed, once the full picture is available, and their evidence is tested in cross – examination, but on the basis of the limited material before the tribunal at present, the tribunal does not find that the claimant has little reasonable prospects of success on these claims.

***Operation W – claim (iii).***

28. The third set of claims in this Operation relate to service of a Regulation 16 Notice upon the claimant on 19 January 2015 (page 383 of the Bundle) . This was a Notice served under the Police (Complaints and Misconduct) Regulations 2012, akin to a Regulation 15 Notice, under the Police (Conduct) Regulations 2012, both sets of Regulations being contained in the Materials Bundle. The difference between the two sets of Regulations is that the former applies where there has been an external source of complaint. Such a Notice in effect, notifies an officer that he is subject to an allegation of misconduct or failure to meet standards of professional behaviour, and cautions the officer. The claimant was also warned in that Notice that if the allegations were proved before a Gross Misconduct Hearing, he could be dismissed without notice.

29. The Reg.16 Notice in question was signed and served by Det. Insp. Michael Ryan of West Yorkshire Police. Mr Gorton's submissions, and the documents in the Bundle show the process whereby that Force became involved, and the role that Det. Insp. Ryan took. The genesis of the investigation leading to the service of this Notice was an article in the Manchester Evening News on 25 January 2014 (page

389 of the Bundle) , which reported on the departure of two officers from the GMP following an alleged leak about an ongoing investigation.

30. That report itself led to complaints by the two officers referred to in it that this information had been given to the MEN, itself another "leak", a potential breach of professional standards, and improper disclosure. Under the combined effect of the provisions of Schedule 3 to the Police Reform Act 2002, and the 2012 Regulations, the investigation of these complaints was (and had to be) referred to an outside Force, in this instance the West Yorkshire Police ("WYP"). Mr Gorton took the tribunal through the provisions of the Act and the Regulations, and in particular para.19B of Part 3 of Schedule 3 to the Police Reform Act 2002. These provide for the investigating force to consider if the complaint should be the subject of "special requirements", e.g. because there is possible criminal conduct, or potential disciplinary action. Under these provisions, the GMP was the "Appropriate Authority", with whom WYP were obliged to consult. WYP were also obliged to, and did , conduct a severity assessment in relation to the actions of the claimant (and another officer) on or about 7 October 2014 (see pages 331 to 332 of the Bundle).

31. Thereafter, pursuant to Reg.19(6) Mr Gorton submits, WYP served the Regulation 16 Notice on the claimant. He submits that the action of serving the Regulation 16 Notice was that of WYP, and not any of the respondents to the claims. The notice was the "creature" as he puts it, of WYP, and not GMP. The role of GMP was solely to be the "appropriate authority", and to be consulted. Its agreement was not necessary for the service of the Notice upon the claimant. He submits that as a matter of law and fact service of the Notice cannot be the responsibility of the GMP.

32. In the alternative, Mr Gorton submits that there were in any event good reasons for the service of the Notice, wholly unconnected with any protected acts or proscribed motives, and the claimant has no, or little, prospects of success in these claims in any event.

33. In reply Miss Connolly refers to the disclosed documents. On 15 December 2014 (page 373 of the Bundle) there is an e-mail from Det. Insp. Ryan to GMP officers in which he refers to a "consultation with ACC Copley last week". He goes on to refer to his "proposal" to serve the Notice on the claimant. He goes on to say:

*"With the agreement of the Appropriate Authority , we would seek to serve the officer with a notice at the earliest opportunity."*

34. Miss Connolly points out that there are no disclosed notes or any other record of what was said in this consultation with ACC Copley. She also points out that agreement was apparently being sought, even if it was not necessary. It must therefore be the case that there is a real possibility that the GMP officers, particularly ACC Copley, had some influence upon the WYP decision to serve the Notice on the claimant. Further, as can be seen from page 437 of the Bundle, an e-mail from Simon Bottomley of WYP to ACC Shewan, there had also been a telephone conversation between the two officers in which ACC Shewan had asked questions as to whether it would be possible to establish or prove that the claimant had accessed operational files, or leaked information to the press. That may well indicate

that this was not a neutral enquiry, but was the desired outcome that the GMP wanted from the investigation, and is evidence of their attempts to influence it

35. Further, in due course, no further action was ever actually taken following service of this Notice. That , Miss Connolly submits, calls into question why it was ever served in the first place.

***The tribunal's findings on prospects of success of claim (iii).***

36. Whilst taking Mr Gorton's points into account, and accepting the strict legal position as to the respective roles of GMP and WYP in the decision to serve and actual service of the Regulation 16 Notice, the tribunal agrees with Miss Connolly that the claimant's prospects of success cannot be so easily dismissed by this analysis. Whatever the legal position as to legal power of, and responsibility for, service of the Notice, there is an arguable case that the GMP had some influence upon that decision. The fact that there was consultation about this matter, but no evidence at all at present about what was said in this meeting, and possibly others, or other communications, leaves open the possibility, at least, of the GMP having some influence on the decision to serve the Notice. Add to that the fact that this consultation was with ACC Copley, an alleged discriminator, whose involvement at the highest level is a recurrent feature of the claimant's case, and the fact that for two of the claims (the protected disclosure detriment and victimisation claims) the burden of proof will almost certainly be reversed, the tribunal cannot find that these claims have little reasonable prospect of success.

***Operation W – claim(iv).***

37. The final claims in Operation W relate to the respondents' alleged failure to respond adequately to complaints that the claimant made about postings on Facebook and social media. Those claims are set out at Items 12 and 13 of the claimant's Scott Schedule. The origin of the claims is an e-mail from the claimant to ACC Shewan, and DCC Hopkins of 19 March 2015 (page 393 of the Bundle). The claimant had been made aware of postings on Facebook sites associated to retired GMP Officers or staff, which were racist, both in relation to himself, and other BME communities. He complained in this e-mail of feeling further victimised by the GMP, and wanted to register a formal complaint as a victim of racism.

38. The claimant claims that the response of the GMP to his complaint was direct race discrimination, harassment on racial grounds, victimisation for having raised matters relating to race, or detriment for having made protected disclosures, in other words that this failure constituted actionable wrongs on one (or more) of the four proscribed grounds.

39. Mr Gorton's submission is that these claims have little reasonable prospect of success. He sets out , and refers the tribunal to, the supporting evidence in the Bundle, of what the GMP did in response to his complaint. Firstly, it was registered as a "hate incident" on 31 March 2015 (pages 394 to 400 of the Bundle). Thereafter there was e-mail communication between 1 April 2015 and 8 April 2015 in which there was discussion as to how the deal with the complaint and the investigation into it. From that it is clear that the claimant was spoken to on 19 March 2015, as was a

potential witness, Martin Harding, a retired Superintendent, who had brought the matter to the claimant's attention. There was discussion as to how to access the offending sites, Martin Harding being reluctant to re-join them after what he had seen. There was discussion as to how access could be gained, without either obtaining authority under the provisions of RIPA, or someone accessing the site(s) as part of the investigation, via the administrator of the sites.

40. A witness statement was taken from Martin Harding (pages 421 to 424 of the bundle) on 1 April 2015. The claimant's allegations were discussed at a Gold meeting on 27 April 2015 (see pages 426 to 431 of the Bundle for the minutes), held specifically for that purpose. In particular there was discussion as to whether there was sufficient basis for a potential criminal investigation. Actions were discussed and noted, including review of NCRS guidance, and of the decision to determine whether the threshold for a crime or prosecution had been reached. The final action recorded was for ACC Shewan to review the CPS guidance, and to seek an independent third party opinion on the circumstances as presented.

41. Consequently, advice was sought from Paul Giannasi, Head of the Cross - Government Hate Crime Programme in the Ministry of Justice. He provided that advice by e-mail on 22 May 2015 (page 436 of the Bundle) , which was not supportive of criminal proceedings being instigated, but he suggested that the CPS should provide any definitive view.

42. Further, the respondents point out, there was an enquiry made of the Home Office as to whether the allegations made by the claimant should be treated as a hate crime, or a hate incident. The e-mail seeking that guidance was on 2 June 2015, and the reply came on 3 June 2015 (pages 475 and 476 of the Bundle). That advice , whilst somewhat qualified, was that it was appropriate to treat the case as a hate incident, and not a hate crime.

43. Thus, submits Mr Gorton, the claimant has little reasonable prospect of successfully claiming that the response of GMP to his complaints amounted to any actionable form of discrimination or detriment. Indeed, he goes further and says that such a claim is without merit. Factually he says the claimant cannot succeed, and in any event, he is unable to demonstrate that these alleged failings had anything to do with the proscribed grounds.

44. In reply Miss Connolly argues that there are issues of fact which remain to be determined. This can only be done once all the documentary evidence has been disclosed. What has been disclosed is, in some instances, redacted (see, for example, page 406 of the Bundle) without explanation. There are issues as to why the GMP did not do more to source the material that the claimant was complaining about, and expected him to do so. Whilst there is mention of obtaining advice from the CPS there is no evidence this ever occurred. In short, she submits that it is premature to seek to assess the prospects of success on limited disclosure from the respondents.

***<u>The tribunal's findings on prospects of success of claim (iv).</u>***

45. On what is currently before it, the tribunal would agree that this is not one of the claimant's stronger claims. He complains of omissions, in effect, failures to act, and to the extent that these are claimed to be detriments by reason of having made any protected disclosures, or victimisation, the burden of proof will be reversed. Without more, it may well be that the respondents will be able to discharge that burden if this is the totality (when any redaction has been removed, or justified) of the documentary evidence. That evidence, of course, is of limited value, as it will still be necessary for the individuals to explain the reasons for their actions or lack of them, to which the documents will be relevant, but not, of course, determinative. Given that these are alleged omissions, rather than acts, on the part of the respondent, and the evidence shows that there was some considerable discussion as to how to treat these complaints, not least because of the expected sensitivity of the claimant to the issue, the tribunal's view is that the claimant will have, even allowing for the reversal of the burden of proof , something of an uphill struggle. In relation to these claims, therefore, the tribunal would be prepared at this stage, and on this limited information, to find that these claims have little reasonable prospects of success.

***<u>B.Operation H – sole claim.</u>***

46. The tribunal now turns to the one claim in respect of which a deposit order is sought in the Operation H claims, and that is the claim that the claimant's removal from that Operation was a detriment for his having made a protected disclosure, and/or an act of victimisation for raising race claims. There are thus two proscribed grounds, and all three respondents seek deposit orders.

47. The factual basis of the claims is not in dispute. The claimant had been working as the Disclosure Officer on Operation H. A decision was taken, however, to remove him from that role and redeploy him back to a Major Incident Team in the GMP, following the service upon him of the Regulation 16 Notice which is the subject of one of the claims in Operation W discussed above. (Note, there is frequent reference in the e-mail communications to a "Regulation 15" notice being served on the claimant. This seems erroneous, and must, it is presumed be reference to the Regulation 16 notice. Para. 59 of Mr Gorton's Skeleton proceeds on that basis.)

48. The named respondent Det. Ch. Supt. Horrigan is a Lancashire officer, for whom the other respondent is vicariously liable. That force was one of the participating forces in Operation H, and Det.Ch. Supt. Horrigan was Head of the Unit that was running Operation H. He requested that the claimant be removed as Disclosure Officer, and his reasoning is set out in an e-mail to ACC Shewan of 15 May 2015 (page 432 of the Bundle). ACC Shewan replied by e-mail of 20 May 2015 (pages 434 to 435 of the Bundle) in which he expressed his disappointment at the decision made by Det. Ch. Supt. Horrigan, and referred to the strong advice received from the CPS. For his part Det. Ch. Supt. Horrigan replied by e-mail of 12 June 2015 (page 477 of the Bundle) explaining , and indeed, probably quoting from, Counsel's advice which was predicated, he said, on the misconduct allegations alone. Mr Gorton points out that the claimant's account of how he was removed from this

Operation, and the reasons he was given for this, are contained in an e-mail from him dated 19 May 2015 (pages 433a to 433b of the Bundle) , are consistent with the respondents' case.

49. Thus, Mr Gorton submits, there is ample evidence that the decision was nothing to do with any of the protected acts, or proscribed grounds, but was the result of Prosecuting Counsel's advice, and hence the claimant has little reasonable prospects of success in these claims, and deposit orders should be made.

50. In reply, Miss Connolly, in para. 26 *et seq* of her submissions, makes the point that, again, disclosure is incomplete, and some of the material supplied has been redacted without explanation. Evidence of meetings and telephone conversations has not been supplied, and she refers to an e-mail from DCS Jackson of 26 May 2015 (which does not appear to be in the Bundle) which suggests that GMP questioned the view of the CPS. She poses at para. 27 of her submissions a number of questions that she submits require answering before it can be accepted that the decision to remove the claimant from this Operation was discriminatory or on other proscribed grounds. Finally, she points out (para. 28 of her submissions) that Det. Insp. Dean of the Cheshire force was also served with a Regulation 15 notice. He, however, was not removed form the Operation. He does not share the claimant's protected characteristic, nor had he done any protect act. This raises a difference in treatment which requires explanation.

51. In reply Mr Gorton pointed out that Det. Insp. Dean was originally a respondent, but was dismissed from the proceedings, but otherwise did not respond any further to this specific submission, which the tribunal takes for these purposes to be factually correct.

***<u>The tribunal's findings on prospects of success of the Operation H claim.</u>***

52. In relation to this claim, whilst the tribunal agrees that the claimant may appear to have a hill to climb, it may not be a mountain. Whilst appreciating Miss Connolly's points, the fact that "something may turn up" seems very much to be the basis of the claimant's prosecution of this claim. There is certainly nothing at present which would appear to assist him greatly , all the indications from the evidence thus far are indeed that the decision to remove him from this position was instigated by the advice of Counsel advising upon the conduct of the Operation, with a view to securing a successful prosecution. In the absence of any suggestion of any evidence that that was not the reason for his removal, the claimant may well struggle in this claim. That said, the evidence , as Ms Connolly submits, is far from complete.

53. One aspect of the claimant's submissions, however, remains unanswered, and that is the contention made (not challenged by Mr Gorton in his submissions) that Det. Insp. Dean, a Cheshire officer engaged on Operation H, was also the subject of a (or there may be more than one) Regulation 15 Notice, but was not removed from the Operation. The contention is made, again unchallenged, and highly likely to be the case, that this officer does not share the claimant's protected characteristic (being white), nor had he done any protected act. He, however, appears to have been treated differently. It is appreciated that he is a Cheshire officer, and to that extent the GMP had no role in his potential removal or what would

then become of him, but this is a potentially relevant factor in examining the reasons why the claimant was removed, but this officer was not, and the extent to which that decision was in any way influenced by the claimant's race, or his doing of any protected act. It is further, the tribunal considers, a potentially relevant factor that one of the respondents Det. Ch. Supt Horrigan, gave evidence in the claimant's previous tribunal claim, for the respondents to that claim, though he was not a respondent himself. He, and ACC Shewan for the GMP , also a witness in that case are highly involved in the decision and its ramifications.

52. Whilst Mr Gorton submits (para.60 of his Skeleton) that the "start and end point" of these claims against the second and third respondents is the e-mail of 15 May 2015 (page 432 of the Bundle), with all due respect to him, that cannot be right. The start point will be when the fact of the claimant being served with the Regulation 16 Notice was first brought up in the course of the preparation of, and seeking of advice upon , the prosecution that may result from Operation H, and why. It may be that it was noticed by the CPS or Counsel, and raised as a potential issue by them. It may be that it was specifically raised by either the GMP, or the second or third respondent, and advice was specifically sought upon it. At present, one cannot tell, nor is it apparent, why when a similar issue, in terms of service of a Regulation 15 Notice upon Det. Insp. Dean no such action was taken against him.

53. It is to be noted that Det. Insp. Dean was the fifth respondent to these claims, until he was removed following the preliminary hearing on 29 January 2016. The tribunal also notes that , as far as can be seen from the papers before it, this contention that Det. Insp. Dean was a potential "comparator" (it being appreciated that none is actually necessary for victimisation or protected disclosure claims) has not previously been made. The tribunal presumes, however, that Det. Insp. Dean's role was not as a disclosure officer, and there is evidence that it was the fact that the claimant was, and the Regulation 16 Notice related to alleged leakage of confidential information, was an important factor in the decision to remove him from his role in the Operation. That said , the position with Det. Insp. Dean may have some bearing, and raises at the very least a question mark over the respondent's case.

54. That, however, does not mean that the claimant has more than little reasonable prospects of success on this claim. The preponderance of material currently available to the tribunal suggests that the respondents will be likely to be able to show non – proscribed reasons for the claimant's removal, and this must remain something of a speculative claim. Whilst it cannot be , and is not, said to be, without any reasonable prospects of success, the tribunal is satisfied that those reasonable prospects are small.

***Summary of findings.***

55. Thus, the tribunal has found that, of the claims that are the subject matter of the application, in relation to Operation W, only the claimant's detriment claims arising from his first alleged disclosure, which is unlikely to be a protected disclosure, can be said to have little reasonable prospect of success, and those relating to the failure to investigate his complaints arising from the social media postings. In relation to Operation H, the tribunal does find that the one claim (in the sense of factual

scenario, in fact 6 claims in total two against each respondent) that is the subject of the application does indeed have little reasonable prospects of success.

***Should deposit orders be made?***

56. That does not mean, however, that the tribunal is obliged to make any deposit orders. It has a discretion. Counsel referred the tribunal to various authorities , chiefly:

***Sharma v New College Nottingham [UKEAT/0287/11]***

***Anyanwu v South Bank Student Union and ors [2001] ICR 391***

***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126***

***Van Rensburg v RBC of Kingston Upon Thames [UKEAT/0096/07]***

***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14***

***Sharma*** is relied upon by Miss Connolly in particular, as authority for the proposition that a tribunal should apply the same restrictive approach to applications for deposit orders in discrimination claims, as it would in strike out applications, as counselled in ***Anyanwu*** , and other cases in the same vein. She prays in aid the dictum of Wilkie J. at para.21 in ***Sharma*** that it would be illogical to require an Employment Judge to have a different approach depending on whether he (sic) is considering striking out, or making an order for a deposit, as either order is a potentially serious and fatal order.

57. Mr Gorton submits that ***Sharma*** overstates the position, and that ***Ezsias*** and ***Van Rensburg*** demonstrate that in an appropriate case a deposit order can properly be made even in cases of alleged discrimination. He cites in particular the judgment of Elias, P. as he then was, at paras. 26 and 27, where he acknowledges the limited circumstances in which a strike out order would be appropriate where there are disputes of fact, but notes that the test for a deposit order is not as rigorous, and that a tribunal has greater leeway when considering whether or not to order a deposit.

58. ***Van Rensburg*** pre – dates ***Sharma*** by some four years, and the former case was not cited in the latter. It is not suggested that this makes ***Sharma*** *per incuriam*, but this tribunal is faced with two apparently contradictory decisions of the EAT. That contradiction, however, is more apparent than real. As is clearly the case even with strike out applications, there is no absolute rule against making such orders, and hence, a fortiori , deposit orders in discrimination claims. All the caselaw makes it clear that it would be rare to make such orders in discrimination claims, or any claims where there are substantial disputed issues of fact, and caution is advised, but ultimately the decision whether or not to make any of these orders is one for the tribunal's absolute discretion, and the caselaw can, and seeks, to do no more that assist tribunals in how to exercise that discretion.

59. This tribunal therefore concludes , as was submitted, that fact that these are discrimination or whistleblowing claims does not preclude the tribunal from making

such orders if it would otherwise be appropriate to do so, but accepts that it should be cautious before doing so.

60. The tribunal accepts too Ms Connolly's point that this is a fairly late application, coming as it does considerably after the claim was started, and when the matter is listed for a final hearing within the next 9 months. This is perhaps a paradoxical submission given that another factor she relies upon is that the application is premature, as there has not yet been full disclosure.

61. Timing is a relevant consideration, the tribunal agrees, but there is nothing in the rule, nor the caselaw which requires a tribunal to decline the making of a deposit order because of the time at which any application is made. There remains adequate time for payment of any deposit , and the claimant's other claims would be unaffected by the making of such an order whether he complies with it or withdraws the claims at issue.

62. Deposit orders, of course, are not orders striking out claims, they are a "shot across the bows" , as it were , to a party, warning him or her that, if they persist in such claims, and fail in them, particularly for the reasons identified as being the reasons that they are likely to do so, they should expect to be penalised in costs. If made, therefore, such order may focus a party's mind as to whether they really wish to advance a specific claim, by paying the deposit, of whether it is more prudent to abandon it. The risk, identified by Miss Connolly in her submissions, is that such orders may be used oppressively to intimidate a party into abandoning what may be perfectly valid claims.

63. If a party against whom such an order is made does continue, the tribunal at the conclusion of the case, when findings have been made, will then determine whether, if unsuccessful, a claimant should be liable in costs. In reaching that decision, the fact that a deposit order was made would be highly influential.

64. In terms of means, no real argument was advanced on behalf of the claimant that he , backed as he is by the Police Federation, lacks means to discharge any deposit order, and would be driven from the judgment seat by reason of impecuniosity. In her submissions (para. 36) , Miss Connolly contends that the fact the claimant is supported by the Police Federation should not be a determining factor in whether any order should be made. She argues that the tribunal "should still make reasonable enquiries" into the claimant's ability to pay the deposit, and take this into account in fixing the level of the deposit.

65. The crucial question is whether in all the circumstances the claimant should be ordered to pay a deposit as a condition of proceeding with these claims. This issue, of course, only arises in respect of these claims where the tribunal has found that the threshold condition of little reasonable prospects of success has been established.

66. The tribunal has decided that there should be deposit orders in relation to the Operation H claim, but not in all of the claims for which they were sought in the case of the Operation W claim. Dealing with these in reverse order, the tribunal's rationale for not making any order in relation to the first part of the claims in Operation W, that

it has identified as having little reasonable prospects of success, the first protected disclosure, is that this is only a small, discreet and relatively minor aspect of the claims, taken as a whole in that case. In essence, the issue is whether the first alleged disclosure can amount, as a matter of law, to a protected disclosure, by reason of the body to which it was made. That is a short (and possibly uncontravertable ) legal argument. If successful, it precludes certain of the claimant's detriment (but not discrimination) claims from succeeding by reason of the lack of an antecedent protected disclosure. The removal of that particular claim will have no effect at all on the evidence necessary to be heard, by reason of the ongoing discrimination claims, and the fact that the whole history of the claimant's actions, and those taken against him during this period, is likely to be heard in any event. If the respondents' contentions as to the non – qualifying nature of the first disclosure are correct, the claimant should concede that as soon as possible, so as to avoid unnecessary issues being put before the tribunal in the final hearing, but, other than to save what may be no more than a few minutes' legal submission, the tribunal sees no point in, and that it would be disproportionate in, ordering the claimant to pay any deposit in relation to this small part of the claimant's claims in Operation W.

67. The position in relation to the fourth claim, the failure of the respondent to respond "appropriately" to the claimant's complaints about social media postings is different. The tribunal has found that these claims have little reasonable prospect of success. They are a separate and discreet part of the claims. They carry forward, chronologically into 2015, and involve wholly new and separate issues. To that extent, consideration should be given as to whether they should proceed, and making them the subject of a deposit order appears to the tribunal to be a reasonable and proportionate step to take.

68. The position in relation to the Operation H claim is different again. The claim here that the claimant's removal from his post as disclosure officer from that Operation was because he had whislteblown, or was an act of victimisation for having made race claims, is a central and serious part of these claims. The tribunal has found that these claims have little reasonable prospects of success as it looks likely that the respondents will be able to show that the decision was taken , in effect by someone else entirely, and was not influenced at all by any of the proscribed grounds. There are grounds for making a deposit order.

69. Turning to the issue of means, with all due respect to Miss Connolly, the tribunal is not an inquisitorial body, and the claimant is professionally represented. The claimant remains a serving Police Officer, and no information or evidence whatsoever as to his personal means has been adduced before the tribunal. The tribunal notes the requirement under rule 39(2) to make "reasonable enquiries into the paying party's ability to pay" , but given the amounts sought (£200 on each claim in respect of each respondent), and the tribunal's knowledge of the claimant's status as a serving Police Officer, the tribunal does not consider it reasonable to make any further enquiries, particularly in the absence of any submission that the claimant would not be able to afford the sums sought, or any part thereof.

70. The tribunal has considered what the effect may be upon the claims, of the claimant, should he choose not to pay the deposit, and withdraw these claims,

abandoning this aspect of his claims. It seems to the tribunal that the claimant's removal from Operation H would not totally cease to be a relevant issue, but it would be one that went to remedy in the other claims. The claimant complains in the Operation W claim of the service of the Regulation 16 Notice upon him, and this has been discussed above. No deposit order has been made in relation to that claim. It is open to the claimant, it seems to the tribunal, if he succeeds in establishing liability for the service of that Notice as being on proscribed grounds, to include as one of the consequences for which he is entitled to be compensated the consequential (as all respondents would seem likely to have to concede) removal from his post on Operation H.

71. That does not, however mean that a claim which is potentially sustainable as a head of loss in one set of proceedings, should be pursued as a separate cause of action and claim in another , and if such a claim, *qua* claim, has little reasonable prospects of success, the tribunal should recognise that and make the appropriate deposit order, in the knowledge that if, thereby , the claimant is discouraged from pursuing it as a claim, he would not necessarily be deprived of reliance upon the same facts in relation to remedy , if successful in the other proceedings.

72. Thus the tribunal is persuaded that it would be appropriate to make deposit orders in respect of one aspect of the Operation W claims, the failure to respond appropriately to the claimant's complaints of social media postings, i.e. four claims, and in respect of the Operation H claims. In respect of this claim, or rather claims, as there are two bases upon which the claim is advanced, against three respondents, this makes a total of six claims.

73. The tribunal has taken all the circumstances into account, and considers that it is proportionate, and fair to make these deposits orders in respect of these claims only. The amount sought for each claim is £200, and the tribunal will so order, so that the total deposits ordered will be £2000, having due regard to the principles set out in ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14*** as to proportionality. Finally, whereas the former rule specified a period of up to 21 days for the payment of the deposit, the 2013 rules do not. No specific period was sought by the respondents, or argued for by the claimant. The tribunal therefore will adopt the former practice of 21 days, but will specify a date , for the avoidance of doubt. The claimant is free, of course to pay all, or some of it, but if he opts for the latter, he should specify in respect of which of the claims he is paying the deposit, so that it is clear upon which claims , if not all, he is proceeding, and which he is not.

Employment Judge Holmes

Dated: 1 June 2017
RESERVED JUDGMENT AND DEPOSIT ORDER SENT TO THE PARTIES ON

9 June 2017

FOR THE TRIBUNAL OFFICE

**(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.**

**(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

**(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.**