



Neutral Citation Number: [2020] EWHC 2099 (Admin)

Case No: CO/260/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2020

Before :

MRS JUSTICE ELISABETH LAING

Between :

**R (on the application of the DEPUTY CHIEF
CONSTABLE OF KENT POLICE)**

Claimant

- and -

CHIEF CONSTABLE OF KENT POLICE

Defendant

-and-

- (1) PS ANGUS BOWLER**
- (2) DI NICHOLAS STADDON**
- (3) SUPT. MARTIN VERY (now retired)**
- (4) DCI ANDREW SOMERVILLE (now retired)**
- (5) PS SCOTT WILSON**
- (6) PS JOHN MCCLEAN (now retired)**
- (7) INDEPENDENT OFFICE OF POLICE CONDUCT**

Interested Parties

MR ELLIOT GOLD

(instructed by **DAC BEACHCROFT**) for the **Claimant and Defendant**

MR JUDE BUNTING

(instructed by **SLATER AND GORDON LAWYERS**) for the **First Interested Party**

MR MATTHEW BUTT QC

(instructed by **REYNOLDS DAWSON SOLICITORS**) for the **Second, Fourth and Sixth**

Interested Parties

MR JAMES BERRY

(instructed by **INDEPENDENT OFFICE FOR POLICE CONDUCT**) for the **Seventh**

Interested Party

Hearing dates: 10 & 11 June 2020

Approved Judgment

The Hon. Mrs Justice Elisabeth Laing :

Introduction

1. The Second, Third, Fourth, Fifth and Sixth Interested Parties ('the officer IPs') are current or former officers serving the Kent Police Force. In 2014, the First Interested Party ('Police Constable Bowler') (as he then was) brought a claim in the Employment Tribunal ('the ET') against the Defendant. The ET found that two of the officer IPs (Detective Chief Inspector Somerville and Superintendent Very) had directly discriminated against Police Constable Bowler, and that Police Sergeant Wilson, Detective Inspector Staddon, and Police Sergeant McClean had victimised him for doing a protected act (bringing a grievance claiming that he had been discriminated against on the grounds of his race).
2. The Defendant investigated the conduct of the officer IPs, and decided, on various dates in 2017, that they should not face misconduct proceedings. In 2019, the Defendant began a second investigation into the officer IPs. I was told that the officer IPs' Police Federation representatives objected to the second investigation, but they did not bring any proceedings to challenge it.
3. The question at the heart of this application for judicial review is whether a second investigation into the conduct of the officer IPs is lawful. That depends, potentially, on the answers to two questions.
 - a. Was the first investigation into their conduct unlawful and a nullity?
 - b. If not, was the Defendant *functus officio* after deciding that none of the officer IPs should face a misconduct hearing?
4. Mr Gold represented the Claimant and the Defendant. The Defendant did not oppose the application for judicial review. The application was also supported by Police Constable Bowler, represented by Mr Bunting, and by the Independent Office for Police Conduct ('the IOPC'), represented by Mr Berry. The application was opposed by the officer IPs. Mr Butt QC represented the second, fourth and sixth Interested Parties, that is, Detective Inspector Staddon, former Chief Inspector Somerville, and former Police Sergeant McClean. Detective Inspector Staddon lodged an acknowledgement of service, which I have read. Former Superintendent Very and Police Sergeant Wilson do not seem to have lodged acknowledgements of service and did not appear at the hearing.
5. This is my decision after a 'rolled-up hearing' of the application for permission to apply for judicial review and (if permission to apply for judicial review is granted) of the substantive application. The application for permission is opposed on the grounds that the claim is not arguable, and that, even if it is, permission should be refused because of delay, for which no good explanation has been given, and/or because even if the decisions are unlawful, it is highly likely that, had the decision makers not made the errors of which Mr Gold (supported by Mr Bunting and Mr Berry) complained, the outcome for the Defendant would not have been substantially different (see section 31(3D) of the Senior Courts Act 1981).

The judgments of the ET

The liability judgment

6. The ET heard the claim over three days (20, 21 and 22 October 2015). The ET deliberated in chambers for five days (5, 8, 9 and 10 February, and 16 March 2016). Its judgment was sent to the parties on 5 April 2016.
7. It found (paragraphs 134-137) that Detective Inspector Staddon ‘failed to investigate [Police Constable Bowler’s grievance] properly or at all (paragraph 134). His approach indicated that he ‘held a stereotypical view that [Police Constable Bowler] was being over-sensitive about being treated badly because of his race’. The burden of proof shifted. The Defendant did not explain the way the grievance was handled; Detective Inspector Staddon ‘appeared to think he had done everything properly’ (paragraph 136). The ET concluded that the ‘sheer incompetence’ of the grievance process founded an inference of discrimination, because it showed that the grievance was not taken seriously. The reason for that was that the grievance was a complaint of discrimination on the grounds of race. The ET upheld this complaint.
8. The ET rejected Superintendent Very’s evidence that Police Constable Bowler’s representative had told him that the grievance was not about race (paragraphs 80, 81 and 83). The ET held that the deficiencies in the grievance appeal process conducted by Superintendent Very were facts from which it could be concluded that Superintendent Very had discriminated against Police Constable Bowler on the grounds of race (paragraph 139). The handling of the appeal was ‘best described as perfunctory’. The grievance was not taken seriously. The ET inferred that this was because ‘the complaint was viewed stereotypically as over-sensitivity on the part of’ Police Constable Bowler (paragraph 139). There was no explanation from the Defendant. Superintendent Very ‘was adamant that he had acted reasonably’ (paragraph 140).
9. There was no dispute but that there were four protected acts (paragraph 141).
10. The ET held that Police Sergeant Wilson and Detective Inspector Staddon both knew about the grievance. There was no dispute that they made entries in Police Constable Bowler’s pocketbook on 31 March 2014. He was subjected to a detriment because he had done a protected act (paragraph 142).
11. The ET found that Detective Inspector Staddon had been rude to Police Constable Bowler on 9 April 2014, but that he had been rude to others, and this was part of his modus operandi (paragraph 143). It was not an act of victimisation.
12. Police Sergeant Wilson victimised Police Constable Bowler because of the grievance by ‘pocket booking’ him on 19 June 2014 for going to a meeting with Police Sergeant Braithwaite (a representative of the Black Police Association) without his permission and for attending his grievance appeal meeting with Superintendent Very without his permission (paragraphs 86, 144).
13. Police Sergeant McClean victimised Police Constable Bowler because of his grievance in four ways.
 - i. On 19 October 2014, he told Police Constable Bowler that he would not be willing to put him forward for the role of Acting Sergeant in his section and that it would probably be a period of six months before he would consider this.
 - ii. On 19 October 2014, Police Sergeant McClean placed a restriction on the Claimant that he could only speak to officers at French Customs

with his permission. This was not a restriction that was placed on any other officer.

- iii. In late October 2014, Police Sergeant McClean completed the Claimant's performance development review ('PDR'). He did not refer to the Claimant's arrest of a terrorist suspect on 2 October 2014. This was the type of significant event that would normally be referred to in a PDR. It was omitted on purpose.
- iv. In late October 2014, Police Sergeant McClean completed Police Constable Bowler's PDR, giving him the performance ranking 'Meets role expectations but with some developmental needs'. Police Sergeant McClean lowered the Claimant's performance ranking.

14. Police Sergeant Wilson also victimised Police Constable Bowler; he jointly completed the PDR with Police Sergeant McClean as described in sub-paragraph iii, above (paragraph 94).

The remedy judgment

15. There was a further hearing about remedy on 11 July 2016. The ET's judgment was sent to the parties on 5 August 2016. The ET awarded Police Constable Bowler £20,822 compensation for injury to feelings, £5,165 as aggravated damages, and made a recommendation that the Defendant take steps 'for the purpose of obviating or reducing the adverse effect' on Police Constable Bowler of the matters to which the proceedings related (paragraph 66).
16. The ET noted (paragraph 4) the extent to which Police Constable Bowler had lost his former confidence. They described the effect of Detective Chief Inspector Somerville's approach (paragraphs 8 and 9), of Superintendent Very's handling of the grievance appeal, and of the pocket-booking incident (paragraphs 10-12), leading to a period of sick leave.
17. The ET commented on the probative value for the victimisation claims of emails between Detective Inspector Staddon and Police Sergeant Wilson, and on 'the weak and at times incredible explanation' of his 'unjustified conduct' from Police Sergeant McClean, which was 'remarkable' (paragraph 13). Police Constable Bowler felt particularly betrayed by Police Sergeant Wilson, whom he had always loyally supported (paragraph 14). The ET concluded that the officers had had covert discussions about Police Constable Bowler and his grievance (paragraph 16). The ET accepted that Police Constable Bowler felt 'hopeless and powerless' after his appraisal by Police Sergeant McClean in 2014. The ET was not surprised by his further sick leave on 21 November 2014. In that period, the ET found, he felt 'ostracised and unsupported' (paragraph 18).
18. The discrimination and victimisation had 'a cumulative and significantly detrimental effect... causing severe stress, anxiety and upset' (paragraph 19). The ET noted late disclosure by the Defendant (paragraph 20). This upset Police Constable Bowler. There was a 'complete lack of action' from the Defendant when it received the ET's judgment. Police Constable Bowler expected that it would mark a turning point. He thought that there would be a meeting and things would move on. There was no meeting. Nobody mentioned the judgment to him. When he raised it with Inspector Roddy, Inspector Roddy told him that he had been told not to read the judgment and

would not do so (paragraph 21). This made things worse. The ET rejected the Defendant's argument that discussion was prevented by its decision to appeal (paragraph 22).

19. Police Constable Bowler contacted the Defendant's Professional Standards Department ('PSD') to see whether there would any investigation. The ET read the correspondence. It found that Police Constable Bowler had been 'fobbed off' by requests that he put his allegations in writing. The ET said that it 'considered that the Judgment set out a number of matters that could be described as poor management, whether or not there was a discriminatory aspect and considered that the PSD should have considered the contents carefully to decide whether an investigation was required. No further material from [Police Constable Bowler] should be necessary' (paragraph 24).
20. In paragraph 25 the ET described a letter the Defendant sent to Police Constable Bowler's solicitors three months after the judgment was received. It was addressed 'To whom it may concern', although it started 'Dear Angus'. The Defendant apologised to Police Constable Bowler. Managers would get training, and once the appeal was over, 'any issues will be thoroughly re-visited in light of its outcomes and determinations'. The ET found that this was a late, and half-hearted attempt to reduce the compensation payable to Police Constable Bowler.
21. In paragraph 46 the ET said that 'No less than five senior colleagues had discriminated against [Police Constable Bowler] over a lengthy period'.
22. The ET summarised the 'marked effect' on Police Constable Bowler of the discrimination and victimisation in paragraphs 55-56. The effect of the discrimination was compounded 'and made much worse' by the victimisation. 'A long-serving, loyal, and successful officer was worn down by the conduct of his senior officers as they acted in retaliation against his complaints'. He had gone from having an 'almost clear' sickness record (described in paragraph 5 of the remedy judgment) to taking sick leave for stress. His family life had been affected. His two eldest children had been proud of their father and had considered a career in the police. They now had 'a totally different outlook and their confidence in the police has been shaken'.
23. The ET recorded that at the time of the remedy hearing, Police Constable Bowler felt he had no future in the police, as he would always be the officer who made a complaint and took the Defendant to the ET. The ET concluded that the Defendant's actions shook Police Constable Bowler to the core. I was told at the hearing that he has since been promoted, nevertheless, to the rank of Sergeant.
24. In paragraph 47, the ET accepted nine submissions by Police Constable Bowler's counsel which were relevant to aggravated damages. Five concerned the conduct of the Defendant, and three, that of the officer IPs.
 - i. The witnesses suffered 'collective memory loss' during their evidence about the date when they became aware of the grievance, despite being able to recall other matters well.
 - ii. Detective Inspector Staddon 'continued to assert in evidence' that disciplinary matters were outstanding against Police Constable Bowler, despite Detective Chief Inspector Pringle describing them as 'trivial'.

- iii. The Defendants' witnesses gave 'disingenuous evidence' about the plain meaning of words such as 'I cannot see how he can possibly remain at Coquelles', and to the effect that 'contentious' means 'dry'.
25. One of the aspects of the Defendant's conduct which the ET relied on was the PSD's reluctance to investigate, despite the letter in which the Defendant had accepted that things had not been handled well. A ninth point, Police Constable Bowler's expectation that his grievance would be properly investigated, given the Defendant's functions (described in paragraph 47.a) and the seniority of the officers involved, concerned the conduct of the Defendant, and of Detective Chief Inspector Somerville and Superintendent Very.
26. The ET noted in paragraph 62 that awards of aggravated damages are 'relatively rare'. One of the questions was whether the Defendant had acted in a 'high-handed, malicious, insulting or oppressive way'. All the factors referred to by counsel added to the impact of the discriminatory treatment on Police Constable Bowler.
27. The ET recommended that the Defendant
- i. appoint a properly qualified person to conduct a review of
 - 1. the current grievance procedure, and
 - 2. the training of officers who deal with grievances,
 - ii. report on that review to the senior management team, and consult with the Black Police Officers Association and the Police Federation about any recommendations in the report,
 - iii. review its equality and diversity training for officers,
 - iv. provide a copy of the ET's judgments to the officer IPs,
 - v. ensure they read the judgments
 - vi. provide them with equality and diversity training,
 - vii. refer the conduct of the officer IPs to the PSD for investigation, and
 - viii. disregard Police Constable Bowler's sickness absence in considering any application by him for promotion or transfer.

The decision of the Employment Appeal Tribunal

28. The Defendant appealed to the Employment Appeal Tribunal ('the EAT'). In a judgment handed down on 22 March 2017, the EAT allowed the appeal in part. Simler P (as she then was) had reservations about the ET's criticisms of Detective Chief Inspector Somerville's grievance report (judgment, paragraph 40) as the documents showed a more thorough investigation than the ET's judgment suggested. She could not go behind the ET's findings that the investigation was incompetent. She concluded, nevertheless, in paragraph 48, that the ET had made an impermissible leap from the finding of incompetence to a finding of stereotypical assumptions. The ET was not entitled to find that the respondent had shown a prima facie case of less favourable treatment on grounds of race. The finding of discrimination against Detective Chief Inspector Somerville could not stand.

29. She dismissed ground two, which relied on similar arguments to attack the finding of discrimination against Superintendent Very (paragraph 55). She referred to ‘the dishonesty about whether the race element of the grievance had been abandoned’. With one exception, she dismissed the other grounds of appeal, observing more than once, en passant, that it was not legitimate for the ET to supplement gaps in the liability judgment, which had by then been appealed, with findings in the remedy judgment. She allowed the appeal against the victimisation finding against Police Sergeant McClean (paragraph 99). She encouraged the parties to try and come to terms on the issues, but if they could not do so, the issues would be remitted to the ET.

The decision of the Employment Tribunal on remittal

30. There was a further three-day hearing on the remittal to the ET in March 2018. The ET’s judgment was sent to the parties on 11 May 2018. The ET listed the issues it had to decide in paragraph 3 of the judgment. The ET was presented with further written evidence from Police Constable Bowler and from Police Sergeant McClean.
31. The ET noted Detective Chief Inspector Somerville’s seniority, competence, likely investigative experience, and his access to an experienced and professional HR Department. The impression of the ET that he was ill-equipped and out of his depth had not been explained. The question was why he had dealt with the grievance as he had. The ET rejected the explanation that the deficiencies in his report were the result of his lack of experience. That was not credible. It was obvious to him that to read the dictionary definition of ‘racism’ to his officers was not an effective way of investigating the grievance. He could not be bothered to investigate whether there had been discriminatory treatment of Police Constable Bowler. He took what his officers said at face value. He did not want to criticise his white officers. He had not acted appropriately. The ET found that a complaint of race discrimination was seen as ‘particularly toxic’. The ET inferred that part of his evidence was unreliable (paragraphs 37 and 40)
32. There was something more than just an inept investigation. That came from the matters listed in paragraph 43 of the judgment, including ‘the lack credibility in some of Detective Chief Inspector Somerville’s answers in cross-examination; from the fact that he did not seek HR advice specifically about how to handle a complaint of race discrimination when he would have known that this was particularly serious complaint; his failure to explain in any adequate or credible way why his investigation was inadequate – being busy and not having heard a grievance before was not an adequate or credible explanation...’
33. Having found that burden of proof shifted, the ET found that the Defendant had offered no credible explanation. Detective Chief Inspector Somerville, who believed he acted appropriately, did not persuade the ET that there was a non-discriminatory reason for the conduct. The ET upheld that part of the claim.
34. The ET noted that the Defendant had not apparently disputed at the original hearing that Police Sergeant McClean knew about the protected act. In paragraphs 46 - 48 of the judgment the ET explained why they found that he did know about Police Constable Bowler’s grievance, and that it was a complaint of race discrimination. They found that his evidence that Police Constable Bowler did not tell him about the grievance was not credible.

35. In paragraph 49, they said that they did not find Police Sergeant McClean a 'straightforward witness' compared with Police Constable Bowler. It seemed to the ET that on a number of occasions he tried to avoid answering questions. He denied knowing about the race complaint when the documentary evidence clearly told him that that is what it was. They accepted counsel's submission that he had a 'selective memory'.
36. In paragraph 54 they inferred that Police Sergeant Wilson's tipping off Police Sergeant McClean was 'disproportionate and malicious'. He did it because he was annoyed about Police Constable Bowler's race complaint. Police Sergeant McClean carried on with that victimisation. He imposed a detrimental restriction. There was a clear link with the protected act. The unwarranted restriction was a way of keeping a tight rein on Police Constable Bowler because he had made a complaint of race discrimination (paragraph 55).
37. The ET inferred that Police Sergeants McClean and Wilson did not put anything in Police Constable Bowler's PDR about his arrest of a suspected terrorist because they did not want to put anything in it to praise Police Constable Bowler. It was appropriate to draw an inference that they did so because Police Constable Bowler had made a complaint of discrimination (judgment, paragraph 61).
38. The ET rejected the Defendant's explanation that the grade in his October 2014 PDR had been reduced because he asked for a half-hour refresher course. There was no reason to reduce his grade. The ET inferred that the reason for this was the grievance (judgment, paragraphs 62 and 63).

Detective Chief Inspector Swan's decision

39. On 22 September 2016 (after the remedy judgment), Detective Inspector Rose wrote a memorandum to Detective Chief Inspector Swan headed 'Professional Standards Department'. He referred to a meeting with Police Constable Bowler on 6 September 2016. He said that Police Constable Bowler's allegations were in three stages. He asked for 'a Reg 12 assessment' of the officers named in the memorandum. Those included the officer IPs. He said that Police Constable Bowler believed this was a criminal conspiracy and that he had tried to manage those expectations, as he could not see any criminal offences. He had asked Police Constable Bowler for a witness statement. He had initially agreed, but had then said he wanted to rely on the 'available documentation from the Tribunal which I have attached to this report'. A regulation 12 assessment (see further, paragraph 126, below) is an assessment whether the conduct which is the subject of an allegation would, if proved, amount to misconduct, gross misconduct, or neither.
40. Detective Chief Inspector Swan then made an undated report. From internal evidence, it must have been submitted after 2 November 2016. He listed the documents he had reviewed. They included the ET's judgments on liability and remedy. He said that this was his 'assessment as the designated Appropriate Authority ('AA') in to whether I deem there are any conduct matters here which require investigating. It is not a fait accompli but a determination as to whether any officers...may have breached the Standards of Professional Behaviour and whether therefore an investigation would be warranted into their behaviour. Where I deem matters do not warrant an investigation or can be dealt with other than by investigation' he would give reasons.

41. Police Constable Bowler had at first agreed to provide a further statement but had then said that, on advice, he would not provide anything more. Detective Chief Inspector Swan said that he was satisfied he had enough information on which 'to base my initial findings'. Police Constable Bowler's decision had, therefore, not had any adverse impact on his assessment.
42. Detective Chief Inspector Swan described Police Constable Bowler's ET claim in general terms. 'There were *some findings in his favour*' (my emphasis). He summarised some of the relevant provisions of the Equality Act 2010. He believed that Police Constable Bowler took the right course of action in taking out a grievance.
43. At page 59 of the bundle he listed the definitions he had applied. On the same page he said that he was making a 'severity assessment' taking into account 'the extent of the known information and evidence relevant to the allegations before me'. He had noted the '*specific allegations put forward by* [Police Constable Bowler] (my emphasis again) at the [ET] but he would examine the behaviour of the officers 'in its entirety'. He would deal with each officer individually and decide whether 'any conduct investigation is warranted and if so what level of severity should be attached to it'. When dealing with the individuals he would, 'of course pay due reference to the allegations made by [Police Constable Bowler]'.
44. He had read what Police Sergeant Wilson had said in his statement. He noted the findings of the ET. There was enough information to suggest that Police Sergeant Wilson might have breached the Standards of Professional Behaviour. He listed four aspects of Police Sergeant Wilson's conduct. He might have breached the standards of authority, respect and courtesy, equality and diversity, and duties and responsibilities. The list was not exhaustive. He assessed that as misconduct. He would draw up an appropriate regulation 12 notice.
45. He had read what DS McClean had said, and noted the findings of the ET. There was less evidence to suggest a breach of the Standards of Professional Behaviour, but a conduct investigation was warranted. He noted four points about that. He considered that DS McClean might have breached the same standards as Police Sergeant Wilson. The list was not exhaustive. He assessed that as misconduct. He would draw up an appropriate regulation 12 notice.
46. He had the references in Police Constable Bowler's statement to Detective Inspector Staddon's conduct, and what Detective Inspector Staddon had to say, and the findings of the ET. There was enough evidence to suggest that Detective Inspector Staddon might have breached the Standards of Professional Behaviour. He suggested seven 'pertinent points'. He might have breached the standards of authority, respect and courtesy, equality and diversity, and orders and instructions. The list was not exhaustive. He assessed that as misconduct. He would draw up an appropriate regulation 12 notice.
47. Police Constable Bowler had made many references to Detective Chief Inspector Somerville in his statement and papers. Detective Chief Inspector Swan had read Detective Chief Inspector Somerville's account and noted 'what the [ET] findings are'. It was clear that Detective Chief Inspector Somerville was 'not comfortable in dealing with this grievance. By his own admission he was not well versed in dealing with such procedures'. Part of dealing with a grievance is to gather wider information from the person raising the grievance and from those who might be cited in the grievance. 'I am satisfied that this was attempted'.

48. But he did not seek any guidance, and seems to have accepted everything at face value. Despite ‘this unacceptable and poor approach I am not convinced there is any potential misconduct here that warrants any further conduct investigation. This puts me at odds with the Tribunal findings which suggest a clear correlation with the race of [Police Constable Bowler] and that this could not be passed off as simply incompetent or unreasonable. I concur with the Tribunal findings and description of the first stage as being ‘sheer incompetence’; but not that it could be attributed to any discrimination based on race’.
49. Detective Chief Inspector Somerville’s meetings with the parties ‘portray[ed] an acceptable level of interest and desire to establish the facts’. Simler P (as she then was) in paragraph 40 of the judgment of the Employment Appeal Tribunal (‘the EAT’) also noted that there was an apparent disparity between the ET’s findings about the investigation and grievance document, which appeared to show a more substantial investigation. Detective Chief Inspector Swan said that Detective Chief Inspector Somerville had failed to delve deeper. ‘His inclusion of inaccuracies in this Grievance Report stem [sic] from accepting what DI Staddon said on face value and he apologises for that’. He noted that the ET findings were after the shift in burden of proof ‘and it is regrettable that DCI Somerville maintained that he done everything properly’.
50. Detective Chief Inspector Swan saw this as ‘Unsatisfactory Performance rather than any potential misconduct’. Detective Chief Inspector Somerville was not ‘diligent’. He concluded that ‘the most proportionate and justified manner in which this dealt with is by way of Management Action’. This would command the confidence of ‘staff, police officers, the service as a whole and the public’.
51. He had read Police Constable Bowler’s references to Superintendent Very, Superintendent Very’s account (in his statement to the ET) and the ET’s findings about him. ‘Here I draw similar parallels with what I have included when assessing the conduct of DCI Somerville. Martin Very appears not to have been well versed or familiar with dealing with Grievances like many a peer. Whilst I agree that inaccuracies within the original report could have been resolved and addressed, this to me is the only part where Mr Very’s conduct falls short’. He noted assertions that ‘it was inconceivable to believe that Mr Very decided that this was not about race but there is evidence to suggest otherwise...’ Police Constable Bowler’s side said nothing at the time. ‘Indeed, there seems to me to be compelling evidence that at the conclusion of the appeal, all parties were satisfied with Mr Very’s proposals’. He listed that evidence. There was a clear contradiction between the emails from Police Constable Bowler and Police Sergeant Henry in their emails after the hearing and their position at the ET. The only explanation was that their case was that Superintendent Very’s note of the appeal outcome was fictitious. He could see no evidence of that.
52. For those reasons, Detective Chief Inspector Swan ‘determine[d] that there was no case to answer’ and that there was ‘nothing in the documents which warrants instigating any investigation. Mr Very had, in any event, retired, and was now a civilian employee. He would be employed under a ‘totally different contract with no provision for any disciplinary proceedings to be instigated in this case’.
53. Detective Chief Inspector Swan made three recommendations. He believed that ‘there is an amount of organisational learning here’. Acting sergeants should be chosen in a

‘fair and transparent process’. He had read Police Constable Bowler’s remedies statement, ‘...failing to acknowledge what has happened by those ‘around’ any Complainant cannot be right or ethical’. That should be reviewed. Any further letters of apology should clearly identify the subject matter of the apology, and the Defendant should consider whether a personal apology was necessary.

54. Detective Chief Inspector Swan signed a file note dated 16 January 2017 headed ‘Remarks’. It may be that this is the last page of the report I have just described. It announced that it was ‘a determination on whether or not the Regulation Notices in this case are under Regulation 15 of the Police Conduct Regulations or under Regulation 16 of the Police Complaints and Misconduct Regulations, both of 2012’. He stated his view that Regulation 15 notice should be drawn up. ‘The allegations here do not fall under mandatory referral. I am further satisfied that the gravity and content of the subject matter in this case do not warrant voluntary referral to the IPCC’.
55. On 31 January and 1 February 2017, Matthew Pringle served regulation 15 notices on Detective Inspector Staddon, and Police Sergeants McClean and Wilson.

The investigating officer’s report of Detective Inspector Rose

56. On 28 July 2017, Detective Inspector Rose produced an investigating officer’s report on Detective Inspector Staddon, and Police Sergeants McClean and Wilson. In paragraph 3, he divided Police Constable Bowler’s allegations into three segments: pre-grievance, grievance and post-grievance.
57. He said, in relation to the first segment, that Police Constable Bowler felt he was treated unfairly and not supported for promotion. He initially thought it was because of his race but now accepted that it was not, because others were treated in a similar way. In paragraph 5, Detective Inspector Rose recorded Police Constable Bowler’s allegation that Detective Chief Inspector Somerville did not investigate the grievance properly or take it seriously. Police Constable Bowler felt like ‘just another ethnic officer throwing in the racist card because he didn’t get his own way’. Detective Inspector Rose then said ‘Because of this and the finding at the tribunal, DC Bowler feels that DCI Somerville discriminated against him on the grounds of his race’ (paragraph 5). During the ET, it had been clear that Detective Chief Inspector Somerville ‘was not comfortable in dealing with this grievance’. By his own admission, he lacked experience. ‘This was assessed by the [AA] and Management Action was issued to DCI Somerville’ (paragraph 6).
58. The post-grievance allegations were that three officers who were the subject of the report ‘victimised or bullied him in some way, because he raised a grievance’ (paragraph 7).
59. Detective Inspector Rose listed his terms of reference in paragraphs 8-13. They included deciding whether Detective Inspector Staddon was ‘unprofessional and unfair’ towards Police Constable Bowler, whether he ‘prevented Police Constable Bowler from undertaking acting sergeant duties’, whether he was rude to Police Constable Bowler in front of colleagues and called him a liar in open forum’. They also included seeing whether Police Sergeant Wilson’s actions after the grievance were ‘prejudicial and unprofessional’ and whether Police Sergeant McClean had denied Police Constable Bowler acting sergeant opportunities and ‘access to other partner’ [sic].

60. Detective Inspector Rose said that under the Police Reform Act 2002 ('the 2002 Act') a 'conduct matter' is defined as a matter which is not and has not been the subject of a complaint but where there is an indication that a person serving in the police might have committed an offence or behaved in a manner which would justify the bringing of disciplinary proceedings. A notice of investigation must be served on all the subjects of investigation and they must be told whether, if proven, the allegations would amount to misconduct or gross misconduct (paragraphs 14-16).
61. Detective Inspector Rose noted, against all the subjects of the investigation, that the severity of the allegation was 'misconduct'. He listed the allegations in turn (paragraphs 17-23). Detective Inspector Rose quoted two relevant policies: Policy L120, about acting and temporary ranks, and Standard of Professional Behaviour: 'Authority Respect and Courtesy: Police officers do not harass or bully colleagues or members of the public. Challenging conduct or unsatisfactory performance or attendance in an appropriate manner would not constitute bullying'.
62. Detective Inspector Rose then summarised the evidence he considered (paragraphs 28-287). He said that Police Constable Bowler had been given an opportunity to provide a statement. He had chosen not to do so, but provided a copy of his statement for the ET. Detective Inspector Rose summarised that. He also summarised Police Sergeant Henry's witness statement for the ET, and the ET statements from Detective Sergeant McCarthy, Chief Inspector Pate, Police Constable O'Brien, Detective Inspector Staddon, Police Sergeants Wilson and McClean, and Detective Chief Inspector Somerville, a response from Detective Inspector Staddon to 'the Reg 16 that was served on him', a statement under caution by him, and the responses of Police Sergeants Wilson and McClean to 'Regulation 15'. He also summarised accounts from Superintendent Pringle and Superintendent Very. These are not described as an account given in a witness statement for the ET.
63. In paragraphs 288-377 he summarised evidence from his investigation. This was a review of contemporaneous documents, such as Police Constable Bowler's PDRs, and his PDR daybook, and emails. He also referred to a timeline given by Detective Inspector Staddon, and to accounts by Police Constable O'Brien about 'PC Martin allegations', and by Police Constables Martin and Rhodes, and Andy Roberts.
64. Detective Inspector Rose analysed and 'evaluate'[d] the evidence between paragraphs 378 and 399. He said that this was necessary 'in order to reach conclusions'.
65. In paragraph 378, he said that 'Where I have needed to make actual findings I have applied "the balance of probabilities" standard of proof. In deciding whether something is more likely than not to have occurred, I have had regard to all of the available evidence and the weight to be attached to it'.
66. He then said, in paragraph 379, 'Since this case was subject to special requirements, I am only required to form an opinion about whether there is a case to answer for misconduct or gross misconduct for each subject. In doing so I will not reach findings of fact that would be conclusive of misconduct or gross misconduct, these findings are left for any subsequent misconduct hearing or meeting'. He then summarised the allegations and his conclusions on them in relation to each of the subjects of the investigation in turn.
67. Detective Inspector Staddon had supported Police Constable Bowler's promotion aspirations up to 2014. It was clear that Police Constable Bowler did not fully engage

with the promotion process. He rejected an opportunity to work on an underperforming team. There is no evidence that Police Constable Bowler responded to Detective Inspector Staddon's email in February 2012 advising him to improve his portfolio. In February 2013 he told Detective Inspector Staddon that he did not want to take part in the promotion process but then renewed his interest in it. He did not fully engage in the process and 'the change in stance did not automatically enable him to be considered for Acting Sergeant duties'.

68. Police Constable Rhodes was entitled to the acting sergeant role, even though he had not passed the exams, because of his experience. This position would not provide sufficient evidence for a promotion portfolio, according to Detective Inspector Staddon. Detective Inspector Staddon accepted that he was rude to Police Constable Bowler in front of colleagues. He said he had developed his management style over the previous three years.
69. The evidence suggested that Detective Inspector Staddon did not use Police Constable Bowler's name at a meeting when he said that a Police Constable had lied to him. The investigation showed that Detective Inspector Staddon had supported Police Constable Bowler's promotion aspirations until early 2014, when 'a number of factors began to affect the relationship between the officers'. Over a short period, it deteriorated so much that Police Constable Bowler took out a grievance.
70. 'The integrity issue, comments by the force inspectorate and the continued issues over Police Constable Bowler's promotion lead to problems with the relationship'. He referred to the recording of conversations, which 'increased suspicions on both sides that led to the grievance being taken out'. The deterioration in the relationship was 'a human reaction'. The breakdown was nobody's fault. 'I feel', he said that the evidence pointed to faults on both sides. The evidence suggested that as a result of the breakdown, 'Detective Inspector Staddon did indirectly behave differently towards Police Constable Bowler, but more as a consequence of the breakdown rather than for any discriminatory reasons' (paragraph 390).
71. Detective Inspector Rose then considered the allegations against Police Sergeant Wilson. Detective Inspector Rose's description of the allegation was that 'After the grievance procedure was implemented by Police Constable Bowler...DS Wilson became prejudicial, unfair and unprofessional in his interactions with Police Constable Bowler'. Detective Inspector Rose noted that the working relationship between Police Constable Bowler and his managers 'did deteriorate in a short space of time'. He gave examples. He referred again to suspicion between the parties. 'As I have already highlighted, the breakdown is not anyone's fault and it is fair to say that Police Constable Bowler had a part to play'.
72. The entries in the daybook by all parties were 'the culmination of a series of events between Police Constable Bowler and his line managers that led to the grievance and the complete breakdown of the working relationship. The entries were certainly ill-timed. It would be naïve to suggest that someone initiating a grievance would not have a negative effect on a working atmosphere and subconsciously staff/officers would react differently'.
73. He described the allegation against Police Sergeant McClean as that he had 'treated Police Constable Bowler in a prejudicial manner, denying him acting sergeant opportunities and access to partner agencies. Secondly that DS McClean wrote an unfair PDR for Police Constable Bowler'. Detective Inspector Rose referred to an

email from Police Sergeant McClean to Police Constable Bowler dated 24 October in which he explained his 'rationale'. Inspector Roddy supported that approach. He dealt with Police Sergeant McClean's views about visits to the Douane in paragraph 398. He added, 'I did receive information from PC Andy Rhodes that PC Dave O'Brien's wife worked at the Douane which would explain Police Constable Bowler's visits to the building'. That sentence is in red. It is not clear to me what it means or implies. In paragraph 399, he recorded Police Sergeant McClean's explanation for the negative PDR, without comment.

74. In paragraph 400, Detective Inspector Rose said that he had set out, below, his conclusions for the AA to consider. 'These conclusions are based on the evidence obtained during the investigation and summarised above'. He then considered each of the subjects of the investigation in turn.
75. '...it is concluded that' Detective Inspector Staddon did not stop Police Constable Bowler acting as a sergeant, and that he did not breach the acting sergeant policy. Detective Inspector Rose continued (in the same paragraph, paragraph 401) that 'In relation to these elements of the allegations against Detective Inspector Staddon I do not find there is a case to answer'.
76. Detective Inspector Staddon accepted he was rude to Police Constable Bowler in front of his colleagues, so Detective Inspector Rose found there was a case to answer in relation to that allegation.
77. There was no case to answer in relation to the allegation that Detective Inspector Staddon called Police Constable Bowler a liar in open forum. Police Constable Bowler did not allege in his statement that he had been named in open forum. DS McCarthy's statement did not say so.
78. 'The issue of whether Detective Inspector Staddon was inappropriate and prejudicial is concluded that there is no case to answer, however Detective Inspector Staddon and Police Constable Bowler should be reminded of their responsibilities in maintaining a transparent working relationship with other staff/officers'.
79. 'The issue of whether DS Wilson was inappropriate and prejudicial is concluded that there is no case to answer, however DS Wilson and Police Constable Bowler should be reminded of their responsibilities in maintaining a transparent working relationship with staff/officers'.
80. Detective Inspector Rose described the three 'area's' [sic] into which he had broken down the allegations against Police Sergeant McClean. He was 'transparent' with Police Constable Bowler about his 'rationale' in relation to acting sergeant opportunities, orally and in writing. His approach was supported by Inspector Roddy. The position would be reviewed after six months.
81. He said that the two officers had not worked together before. '...in view that there was an acting sergeant in place for his team, it is reasonable for DS McClean to want a period of time to assess an officer before agreeing to provide them with acting opportunities and ultimately support a promotion application'. Detective Inspector Rose added, 'I would also highlight that Police Constable Bowler changed his mind about previous acting roles/promotion processes and did not seem to be fully engaging in the promotion process by failing to engage with the support and help

being offered to update his promotion portfolio'. There was no case to answer about this.

82. Police Sergeant McClean had addressed the issue of visiting the Douane directly with Police Constable Bowler and 'outlined his rationale for this decision' (paragraph 411). Detective Inspector Rose added 'DS McClean indicates that the Douane was not a department relevant to the work of Frontier Ops. He was also aware of the visits made by PC O'Brien and Police Constable Bowler, an issue that was raised by PC Rhodes, who stated that PC O'Brien's wife worked in this office'. The last sentence is in red, again, for no obvious reason. Detective Inspector Rose said that Police Sergeant McClean was 'entitled to be aware where his staff are and ensure they are fulfilling their role'. He would allow proportionate visits, once every five weeks. 'There is no evidence to suggest that this decision was due to the grievance and a reasonable request from DS McClean'. There was no case to answer.
83. Detective Inspector Rose repeated Police Sergeant McClean's argument that training in ACESO equipment was a managerial performance requirement. 'The assessment was one that DS McClean had given to other officers, not primarily to Police Constable Bowler'. Inspector Roddy, who reviewed the decision, found no evidence of discrimination or prejudice. 'In view that this was a consistent approach by DS McClean in respect of this training need for his team reflected in his PDR assessments, there is no evidence to suggest that this was a prejudicial approach taken due to the grievance procedure'.
84. In paragraph 421, Detective Inspector Rose said that for each subject of the investigation, 'I must determine whether there is a case to answer for misconduct or gross misconduct. In other words, whether there is sufficient evidence upon which a reasonable panel properly directed could find, on the balance of probabilities that the conduct of the person under investigation fell below the standard of behaviour expected of them'.
85. Detective Inspector Rose said that misconduct was defined as a breach of the standards of professional behaviour, and gross misconduct, as a breach which was so serious that, if it were proved, dismissal would be justified.
86. He continued, in paragraph 424, 'It is my submission that this case is simply not a Conduct matter. I appreciate that there has [sic] been some findings against Kent Police in an employment tribunal, but this does not make it a conduct matter. The main reasons being as follows:
 - (a) The findings were against the organisation rather than an adverse judicial finding against any of the subjects of the investigation.
 - (b) An employment tribunal is a civil matter, not criminal, therefore once again it does not follow that any finding will result in a Conduct matter as it would normally for a criminal case.'
87. He added, in paragraph 425, 'During the course of this investigation and [sic] have found no evidence that would suggest to me that any of the subjects have either discriminated against Police Constable Bowler or behaved in any other manner that would warrant formal disciplinary proceedings'.
88. The case was 'all about' a breakdown in 'relationship and trust between Police Constable Bowler and his management. I would say from the evidence that there are

faults on both sides of the argument, however at no point does it amount to a Conduct matter. At worst, this is a case relating to how staff are managed and/or behave. Whilst there are admissions by Insp Staddon that he was rude to Police Constable Bowler, this is about his management style; something he has acknowledged. It is not, however, Misconduct' (paragraph 426).

89. In paragraphs 427-429, he re-stated his conclusions that there was no case to answer for misconduct or gross misconduct for any of the three officers, 'based on the evidence presented above'. He listed the evidence 'referred to in this report' in Appendix 2. He said that not all the evidence gathered in the investigation was referred to in the report. Appendix 2 does not refer to any of the judgments of the ET or of the EAT.
90. Detective Inspector Rose recommended that Detective Inspector Staddon be reminded, as a supervisor, to be polite to staff. He made no 'organisational learning recommendations'.

The decision of Detective Superintendent McDermott

91. On 21 September 2017, the AA, Detective Superintendent McDermott, made a 'Regulation 19 Determination' in the cases of Detective Inspector Staddon, and Police Sergeants Wilson and McClean, which he sent to Inspector Watts. The AA said he was required to decide whether or not those officers had a case to answer in respect of a breach of the Standards of Professional Behaviour. He described the test he had to apply in paragraph 3: whether there was sufficient evidence upon which a reasonable panel properly directed could find, on the balance of probabilities, that the conduct of the person under investigation fell below the Standards of Professional Behaviour expected of them. He said that Detective Inspector Rose had 'conducted a balanced and focused investigation'.
92. Detective Superintendent McDermott, 'having assessed the IO report [that is, the report of Detective Inspector Rose] and shown due diligence' was 'satisfied that the IO has addressed the allegations as detailed and conducted a proportionate investigation'. He was satisfied that any recordable criminal matters had been identified and recorded. This makes no sense, as no 'criminal matters' were identified by him or by anyone else. In paragraph 7 he directed himself about the purpose of the police conduct regime. The allegations made by Police Constable Bowler related to colleagues, 'whom [sic] it is alleged acted in a discriminatory manner towards Police Constable Bowler between 2010 and the present time...' In paragraph 9, Detective Superintendent McDermott gave examples of the detriments which Police Constable Bowler alleged he had suffered. He noted that the severity of the allegations was 'initially assessed as misconduct' (paragraph 10). In paragraphs 11-14 he summarised the allegations in the 'Regulation notice[s]' served on each of the officers.
93. His assessment of Detective Inspector Staddon's conduct was that 'there were a variety of factors which played a part in Police Constable Bowler's career progression and there was no evidence which I have assessed that demonstrates that Detective Inspector Staddon discriminated against Police Constable Bowler' (paragraph 30). There was nothing he had read which led him to 'assess on balance that Insp Staddon was potentially in breach of Kent's Acting Sergeant Policy' (paragraph 33). The Policy did not require that 'an Acting Sergeant must be an officer with the Sergeants [sic] examination' (paragraph 34). PC Rhodes was experienced. '...the role he filled was only on a short term'. The investigation had shown that 'a substantive Sergeant

was allocated to this role and was scheduled to join the team within a relatively short period (paragraph 35). In paragraph 36, Detective Superintendent McDermott said 'Insp Staddon also stated that this particular team was well established and in his assessment would not have provided sufficient evidence for a portfolio'.

94. Under the heading 'Determination' he was driven to conclude that 'there is on balance insufficient evidence to substantiate the allegation that Detective Inspector Staddon acted in a malicious way towards Police Constable Bowler'. The fact that Police Constable Bowler may not have been given the opportunities he would have liked did not 'by default mean that Insp Staddon was detrimental towards him'. An effective police service 'naturally' took priority over Police Constable Bowler's aspirations. There was also insufficient evidence to show that Detective Inspector Staddon breached the Acting Sergeant Policy (paragraph 39).
95. His assessment was that the allegation that Detective Inspector Staddon had referred to Police Constable Bowler as a liar 'in open forum' was not made out (paragraph 40). He summarised the evidence (paragraphs 41-42). He assessed the evidence about the allegation that Detective Inspector Staddon was rude to Police Constable Bowler in paragraphs 45-53. Detective Inspector Staddon accepted that he had been 'discourteous', that his conduct fell below the Standards of Professional Behaviour, was abrupt, and he had apologised for it (paragraphs 52-3). There was no doubt, Detective Superintendent McDermott concluded, that Detective Inspector Staddon's behaviour was not 'becoming of a Leader within Kent Police'. Police Constable Bowler felt 'unappreciated, undervalued and unfairly treated' (paragraph 54). There was a breach of the Standards of Professional Behaviour 'in respect of Authority, Respect and Courtesy'.
96. The next allegation he considered was that after Police Constable Bowler took out a grievance against him, Detective Inspector Staddon 'subsequently behaved in an inappropriate and prejudiced manner towards Police Constable Bowler' (heading above paragraph 56). Detective Inspector Staddon denied that he was 'prejudiced and/or unprofessional towards Police Constable Bowler'. It was clear to Detective Superintendent McDermott, 'having objectively assessed both accounts' that the relationship between the two men had become 'strained for a variety of reasons'. He described his assessment of Detective Inspector Staddon's feelings in paragraphs 59 and 60. He referred to Detective Inspector Staddon's concerns about 'the perceived accuracy/integrity of accounts given by Police Constable Bowler', and 'the perceived potential inappropriate interaction with a witness' in paragraphs 61 and 62. He reported Detective Inspector Staddon's belief that his actions and words were not discriminatory towards Police Constable Bowler, and that he treated him no differently from any other officer. He had helped Police Constable Bowler (paragraph 63).
97. Detective Superintendent McDermott's assessment that 'the matters as detailed within the IO Report which caused Insp Staddon concern cumulatively' might have influenced his behaviour towards Police Constable Bowler (paragraph 64). 'However, whilst it is my determination that he may have acted differently towards DC Bowler, it is my view that this break down in their professional relationship did not result in inappropriate or prejudiced conduct by Insp Staddon towards Bowler beyond his interaction...on 9 April 2014 when he was discourteous...'

98. He did not consider that Detective Inspector Staddon had been unprofessional and unfair towards Police Constable Bowler. His assessment of the material was that Detective Inspector Staddon had supported Police Constable Bowler (paragraph 66). He commented, 'It is clearly regretful that their professional relationship led to DC Bowler feeling that he had little option other than to take out a Grievance against Insp Staddon' (paragraph 69). He had not 'viewed evidence that supports the allegation that since 2011 there was a course of conduct or series of events that would support the allegation [sic] that Insp Staddon was unprofessional and unfair towards DC Bowler' (paragraph 70).
99. His determination, based on all he had read, was that 'there is insufficient evidence to support this aspect of the allegation' (apart from the behaviour on 9 April 2014) (paragraph 71). He accepted that Detective Inspector Staddon 'may have acted differently' towards Police Constable Bowler. A number of factors contributed to this, including the grievance process (paragraph 72). He repeated in paragraph 73 what he said in paragraph 70, more or less.
100. I have summarised Detective Superintendent McDermott's assessment of Detective Inspector Staddon's conduct at some length. I will not summarise his other assessments at the same length, but, instead, will refer only to the salient features of those assessments.
101. Detective Superintendent McDermott summarised the evidence of Police Sergeant Wilson. He commented (paragraph 76) that Police Sergeant Wilson was 'clear throughout his evidence that he did not act in a racial [sic] discriminatory manner towards Police Constable Bowler at any time'. He repeated a similarly exculpatory statement from Police Sergeant Wilson in paragraphs 81, 84, and 86. In paragraph 90, he said that there was in his 'determination little doubt' that the relationship between Police Constable Bowler and Police Sergeant Wilson changed for the worse. That deterioration was caused by various factors described in 'the IO report'. The 'challenges' between the parties 'reflects [sic] a Sergeant managing his staff' (paragraph 92). He acknowledged that the entries in Police Constable Bowler's PDR 'were unfortunate in their timing in respect of the ongoing Grievance' but had read nothing which 'on balance convinces me that DS Wilson was trying to discredit DC Bowler due to the Grievance' (missing punctuation in the original). His 'determination' was that Police Constable Bowler was 'not treated differently by DS Wilson as a result of the Grievance process' (paragraph 93).
102. Some of the language in his emails was 'what I assess as being clumsy' (paragraph 94). He accepted that Police Sergeant Wilson 'stated that these were his honestly stated views, the language in my determination is not reflective of the standards of Kent Police' (paragraph 94). He should 'reflect on his terminology and desist from making similar remarks in the future' (paragraph 95).
103. Detective Superintendent McDermott listed three allegations against Police Sergeant McClean at the head of paragraph 96. He summarised the facts in paragraphs 96-106, apparently from Police Sergeant McClean's statement, recording his many denials and explanations. In paragraph 97, he apparently endorsed the view that the assessment/integration period suggested by Police Sergeant McClean was 'not unreasonable'. In paragraph 103, he recorded that Police Sergeant McClean 'stated that his Insp was more than happy with the rigor [sic] he demonstrated in running his team, which was without prejudice or discrimination'.

104. Detective Superintendent McDermott said he had carefully assessed the allegations. He had ‘determined that DS McClean was at all times in my assessment open and transparent in his dealings with’ Police Constable Bowler (paragraph 107). In paragraph 108, he said that evidence he had reviewed ‘is reflective of a decisive and exacting Sergeant...’ He ‘certainly’ did ‘not assess that he was in any way acting in a victimising way towards Police Constable Bowler’ (paragraph 109). ‘In summary, I have determined that there is no basis upon which to assert that DS McClean has been discriminative [sic] or prejudicial in his actions towards DC Bowler’ (paragraph 110).
105. He set out the definitions of misconduct and of gross misconduct below paragraph 110. He did not refer to any of the Standards of Professional Behaviour individually. He determined that neither Police Sergeant McClean nor Police Sergeant Wilson had breached Standards of Professional Behaviour. Police Sergeant Wilson should be given a copy of the report and asked to reflect on his communications.
106. Detective Inspector Staddon had breached the expected standard ‘in respect of Authority Respect and Courtesy’ (‘ARC’). He had made a clear admission of the breach. By his ‘own admission’ he had learnt from ‘this unfortunate incident, which occurred approximately three years ago’ (paragraph 115). Paragraphs 115-116 read as though, by implication, Detective Superintendent McDermott considered that Detective Inspector Staddon did treat Police Constable Bowler unfairly or unfavourably because he raised a grievance; but this only leads to the conclusion that Detective Inspector Staddon breached the ARC standard (paragraph 117). Taking everything into account, ‘this is not a case would justify a written warning...’ (paragraph 119). The case should be dealt with through ‘Management Action’ (paragraphs 120-126).

The law

The relevant provisions

107. Part 2 of the Police Reform Act 2002 (‘the 2002 Act’) is headed ‘Complaints and Misconduct’. Section 9(1) of the 2002 Act (as in force at the relevant time) created the Independent Police Complaints Commission (then referred to in the 2002 Act as ‘the Commission’). The body which was formerly known as ‘the Commission’ is now known as the Independent Office for Police Complaints (‘the IOPC’). I will refer to that body in this judgment as ‘the Commission’, unless the context otherwise requires. Section 12(1) of the 2002 Act defines ‘complaint’ for the purposes of Part 2 of the 2002 Act. In short, a complaint is made by a member of the public. Section 12(2) defines ‘conduct matter’. A conduct matter is not a complaint, but a case in which ‘there is an indication...that a person serving in the police...may have behaved in a way which would justify the bringing of disciplinary proceedings’. ‘A person serving in the police’ is defined in section 12(7). Section 13 enacts Schedule 3, which makes provision for the handling of conduct matters. Section 29 contains further definitions. ‘The Commission’ is defined by reference to section 9. ‘Recordable conduct matter’ (subject to any regulations made under section 23(2)(d)) means a conduct matter which the AA (also defined in section 29(1)) is required to record under paragraph 10 or 11 of Schedule 3, or which has been so recorded.
108. Part 1 (paragraphs 2–8A) of Schedule 3 deals with the handling of complaints. Part 2 deals with the handling of conduct matters.

109. Paragraph 10 of Schedule 3 applies where a local policing body or chief officer has been notified that civil proceedings relating to any matter have been brought by a member of the public against the chief officer and it appears likely to him that the proceedings involve a conduct matter (paragraph 10(1)). The ‘involvement’ referred to in paragraph 10(1) is defined in paragraph 10(6). The chief officer must consider whether he is the AA for that matter, and if not, notify the AA of the proceedings (paragraph 10(2)). If he is the AA, he must decide whether the matter is required to be referred to the appropriate body, or it is appropriate so to refer it (paragraph 10(3)). At the relevant time, that body was the Commission.
110. If the case is one which must be referred, or which it would be appropriate to refer, it must be recorded (paragraph 10(4)). In any other case, paragraph 10(4A) provides that the AA must decide whether the matter falls within a description of matters specified by the Secretary of State in regulations made for the purposes of paragraph 10(4A). If the AA decides that it does not fall within such a description, the AA must record the matter (paragraph 10(4B)). In any other case, the AA may record the matter (paragraph 10(4C)).
111. If the AA records a matter under paragraph 10, and does not refer it to the Commission, the AA may deal with the matter in such manner as it determines (paragraph 10(4D)). The AA is not required to record any conduct matter if it is satisfied that it has been, or is already being, dealt with in misconduct proceedings (paragraph 10(5)). Paragraph 10(7) gives the Secretary of State power to make regulations about the timing of the various steps described in paragraph 10.
112. Paragraph 11 deals with the recording of other conduct matters which come to the attention of the AA otherwise than by the paragraph 10 route and which appear to fall within paragraph 11(2) (paragraph 11(1)). A conduct matter falls within paragraph 11 if (assuming it to have taken place) it appears to have resulted in the death or serious injury of a person, a member of the public has been adversely affected by it, or it is of a description specified in regulations made by the Secretary of State (paragraph 11(2)(a), (b) and (c)) (see further, paragraph 133, below). The AA must decide whether it is required to refer the matter to the Commission, or whether it would be appropriate so to refer it (paragraph 11(3)). The AA must record it if the appropriate authority is required, or it is appropriate, to refer it to the Commission (paragraph 11(3A)). The AA must decide whether, in any other case, the conduct falls within a description of matters specified in regulations by the Secretary of State (see paragraph 133, below). The AA must record the matter if it does not (paragraph 11(3C)). In any other case, the AA has a discretion to record the matter (paragraph 11(3D)). The AA has a discretion about how to deal with matters which are recorded and not referred to the Commission (paragraph 11(3E)).
113. The AA is not required to record any conduct matter if it is satisfied that it has been, or is already being dealt with in misconduct proceedings (paragraph 11(4)). The Commission may direct the AA to record a matter. If it does so, the AA must comply (paragraph 11(5)).
114. Paragraph 13 deals with referring conduct matters to the Commission. The chief officer must refer a recordable conduct matter to the Commission if, whether or not the case falls within paragraph 10, the matter is of a description specified in regulations made by the Secretary of State (see paragraph 133, below), or the Commission notifies the AA that it requires the matter to be referred to it (paragraph

13(1)). In any other case, the AA has a discretion to refer a recordable conduct matter to the Commission if it considers it appropriate to do so by reason of its gravity, or any exceptional circumstances (paragraph 13(2)). In any case where there has been no reference under paragraph 13(1), a local policing body may refer a matter in circumstances which mirror paragraph 13(2) (paragraph 13(3)). Paragraph 13(4)-(5) make provision about time limits.

115. Paragraph 14 imposes duties on the Commission in respect of recordable conduct matters which are referred to it. If the Commission decides that it is not necessary for a recordable conduct matter to be investigated, it may, if it thinks fit, refer the matter back to the AA for it to deal with it as it sees fit (paragraph 14(2)).
116. When a recordable conduct matter is referred to the Commission, and the Commission decides that it is necessary for the matter to be investigated, the Commission must decide what form the investigation must take (paragraph 15(1) and (2)), having regard to the factors listed in paragraph 15(3). Paragraph 15(4) lists the types of investigation the Commission may order. They are an investigation by the AA, such an investigation supervised or managed by the Commission, and an investigation by the Commission. The Commission may at any time replace a determination under paragraph 15 with a different determination (paragraph 15(5)).
117. Paragraph 16 provides for investigations by the AA. It applies in the circumstances described in paragraphs 16(1) and 16(2). Paragraph 16(1) concerns complaints and investigations which result from a determination by the Commission under paragraph 15. Paragraph 16 also applies if the authority has to make any determination in relation to a recordable conduct matter under paragraph 10(4D) (see paragraph 111, above), 11(3E) (see paragraph 112, above) or 14(2) (see paragraph 115, above), and the AA determines that it is necessary for it to investigate it (paragraph 16(2)).
118. The AA (subject to paragraph 16(4) and (5)) must appoint an officer to investigate the matter (paragraph 16(3)). Paragraphs 17-19 make provision for investigations supervised and managed by the Commission and for investigations by the Commission.
119. Paragraph 19A applies paragraphs 19B to 19E to investigations of recordable conduct matters where the person concerned (see paragraph 19B(11)) is a member of a police force or special constable. Paragraph 19B(3) requires a person investigating a recordable conduct matter to make a severity assessment of the conduct being investigated as soon as is reasonably practicable. Such an assessment is an assessment whether the conduct, 'if proved', would amount to misconduct or gross misconduct, and, if the conduct were to become the subject of disciplinary proceedings, of the form such proceedings 'would be likely to take' (paragraph 19B(4)). That assessment may only be made after consultation with the AA (paragraph 19B(5)). When that assessment is done, the investigator must give the person concerned prescribed information about the matter and prescribed information about the effect of paragraph 19C and of regulations under paragraph 19D and any other prescribed information (paragraph 19B(6) and (7)). The investigator may revise a severity assessment (paragraph 19B(9)).
120. Paragraph 19D gives the Secretary of State power to make regulations about the procedure to be followed if the person concerned is interviewed. Those regulations may require the person concerned to attend an interview.
121. Paragraph 22 applies when an investigation of a conduct matter is completed. The person appointed under paragraph 16 must submit a report of his investigation to the AA.

The Secretary of State may make regulations governing the content of such reports (paragraph 22(7)).

122. Where an AA receives a report of an investigation under paragraph 22, the AA must first decide whether to notify the Director of Public Prosecutions. It must also decide, in accordance with regulations made under sections 50 or 51 of the Police Act 1996, whether any person to whose conduct the investigation related has a case to answer in respect of conduct or gross misconduct, and whether any such person's conduct is unsatisfactory, and what action the AA is obliged to, or will, in its discretion, take in respect of the matters dealt with in the report (paragraph 24(6)). Paragraph 24 (7) and (8) require it to notify various things to various people.
123. There are two sets of relevant regulations which were in force at the relevant time, the Police (Complaints and Misconduct) Regulations 2012 (2012 SI No 1204) ('the C&M Regulations') and the Police (Conduct) Regulations 2012 (2012 SI No 2632) ('the C Regulations').
124. Regulation 3(1) of the C Regulations contains definitions. 'Allegation' includes an allegation relating to a conduct matter. 'Conduct matter' has the meaning given to it by section 12(2) of the 2002 Act. 'Disciplinary action' includes a range of sanctions from 'management advice' to dismissal without notice. 'Gross misconduct' means a breach of Standards of Professional Behaviour so serious that dismissal would be justified. An 'investigator' is a person appointed under regulation 13 or appointed or designated under paragraphs 16-19 of Schedule 3 to the 2002 Act. 'Misconduct' means a breach of Standards of Professional Behaviour. A 'misconduct hearing' is a hearing to which the officer concerned is referred under regulation 19 and at which he may be dealt with by disciplinary action up to and including dismissal. A 'misconduct meeting' is a meeting to which an officer is referred under regulation 19 and at which he can be dealt with by disciplinary action up to and including a final written warning. 'Misconduct proceedings' means a misconduct meeting or a misconduct hearing. 'Standards of Professional Behaviour' means the standards of professional behaviour in Schedule 2 to the 2002 Act.
125. The C Regulations apply where an allegation comes to the attention of an AA which *indicates* that the conduct of a police officer *may* amount to misconduct or gross misconduct (regulation 5(1)). At the relevant time they did not apply to former officers but they do now, where the conditions set out in regulation 5(2) are met (subject to the exception in regulation 5(6)). One criterion for their application to former officers is that the allegation must indicate that the conduct might amount to gross misconduct (regulation 5(2)(a)). Where an AA is considering more than one allegation in relation to the same police officer, the allegations taken together are to be treated as one allegation (regulation 5(7)).
126. Part 3 of the C Regulations (headed 'Investigations') does not apply to a case to which paragraphs 16-19 of Schedule 3 to the 2002 Act apply (regulation 11). Paragraph 12(1) requires the AA to assess whether the conduct which is the subject matter of the allegation 'if proved' would amount to misconduct, gross misconduct, or neither. Paragraph 12(2) lists what the AA can do if it decides that the conduct, 'if proved' would not amount to misconduct or gross misconduct. It may take no action, take management action, or refer the matter to be dealt with under the Performance Regulations.
127. Where the assessment of the AA is that the conduct, 'if proved' would amount to misconduct, it must decide whether or not it is necessary for the matter to be investigated, and if it is, the AA must investigate it, and 'shall further determine', if the matter were to

be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing. If AA decides that it is not appropriate to investigate the matter, the AA has the same options as are conferred by regulation 12(2) (regulation 12(3)). Where the AA determines that the conduct, 'if proved' would amount to gross misconduct, it must be investigated (regulation 12(4)). At any time before the start of misconduct proceedings, the AA may revise its assessment of the conduct under regulation 12(1) if it considers it appropriate to do so (regulation 12(5)).

128. Where the matter is to be investigated in accordance with regulation 12, the AA must appoint a person to investigate it (regulation 13(1) and (2)). Regulation 13(4) deals with the qualifications for, and disqualifications from, appointment as an investigator. The purpose of an investigation is to gather evidence to establish the facts and circumstances of alleged misconduct or gross misconduct and to assist the AA to decide whether or not there is a case to answer or not in respect of misconduct or gross misconduct (regulation 14).
129. Regulation 15 requires the investigator to give the officer concerned written notice which, among other things, describes the allegation, and how it is said to fall below the Standards of Professional Behaviour, and states whether the AA's assessment is that it is misconduct or gross misconduct. Regulations 16 and 17 make provision for the conduct of an investigation. The investigator may interview the officer concerned. The officer must attend any such interview (regulation 17(7)).
130. Regulation 18 deals with the report of the investigation. The investigator is required to submit a report of his investigation to the AA (regulation 18(1)). It must give an accurate summary of the evidence, attach, or refer to, any relevant documents, and indicate the investigator's opinion about whether there is a case to answer about misconduct or gross misconduct, or not (regulation 18(2)).
131. Regulation 19(1) requires the AA, when it receives the investigator's report, to decide whether or not the officer concerned has a case to answer in respect of misconduct or gross misconduct, or not. Where the AA decides that there is no case to answer, regulation 19(3) gives the AA the same options as are conferred by regulation 12(2) and (3). Where the AA decides that there is a case to answer in respect of gross misconduct, it must refer the case to a misconduct hearing (regulation 19(4)). Where the AA decides that there is a case to answer in respect of misconduct, it may refer the case to misconduct proceedings, or take management action (regulation 19(5)).
132. Regulation 1(2) of the C&M Regulations contains definitions. The significant concepts are defined by reference to the definitions in the C Regulations.
133. Regulation 7 is headed 'Recording and reference of conduct matters'. Regulation 7(2) of the C&M Regulations specifies descriptions of conduct for the purposes of paragraph 11(2)(c) of Schedule 3 to the 2002 Act. Regulation 7(1)(d) includes 'behaviour which is likely to lead to misconduct proceedings and which ...was aggravated by discriminatory behaviour on the grounds of person's...race'. Regulation 7(1)(f) specifies 'conduct whose gravity or other exceptional circumstances make it appropriate to record the matter in which the conduct is involved'. Regulation 7(1)(g) specifies 'conduct which is alleged to have taken place in the same incident as one' in which conduct specified in regulation 7(1)(a)-(e) is alleged. Any repetitious conduct matter (as defined in regulation 7(3)) is specified for the purpose of paragraphs 10(4A) and 11(3B) of Schedule 3 of the 2002 Act (conduct matters not required to be recorded) (regulation 7(2)). Conduct falling

within regulation 7(1)(a)-(e) or (g) is specified for the purposes of regulation 13(1)(b) (regulation 7(2)).

134. Regulation 16 provides for the contents of the notice required to be given by the investigator to the person concerned for the purposes of paragraph 19(7B) of Schedule 3 to the 2002 Act.

The Code of Ethics, a Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales ('the Code')

135. The Code is a code of practice made under section 39A(5) of the Police Act 1996. The relevant version was presented to Parliament in July 2014. There are nine 'policing principles'. They include accountability, fairness, honesty, leadership, objectivity, openness and respect, which are defined in section 2.1. Paragraph 1.1.4 of the Code says that it requires everyone in policing to prevent unprofessional conduct by questioning behaviour which falls below expected standards. It also supports reporting or taking action against such behaviour. Everyone to whom the Code applies is expected to use it to guide behaviour at all times (paragraph 1.4.2). 'All police personnel in leadership roles are critical role models' (paragraph 1.4.4). Leaders should take 'personal responsibility' for promoting and supporting the principles and standards in the Code (paragraph 1.4.5).
136. Ten 'Standards of Professional Behaviour' are described in section 3. They are said to, and do, originate from the Police Conduct Regulations 2012. They include honesty and integrity, authority respect and courtesy, equality and diversity ('I will act with fairness and impartiality. I will not discriminate unlawfully or unfairly'), conduct ('I will behave in a manner...which does not bring discredit on the police service, or undermine public confidence in policing') and 'Challenging and reporting improper behaviour'.
137. The honesty and integrity standard requires police officers to act with honesty and integrity at all times. Examples of meeting this standard include being 'sincere and truthful' and not using one's position inappropriately to coerce any person or settle personal grievances. The more senior an officer's rank, the greater the potential for harm if the Standards are not met (paragraph 1.3). The 'authority respect and courtesy' standard requires officers to act with self-control and tolerance, and to treat colleagues with respect and courtesy. Officers must avoid any behaviour which might damage their own reputation or that of policing. They must ensure that their behaviour and language could not reasonably be perceived by colleagues to be abusive, oppressive, harassing, or victimising. An example of meeting this standard is to keep an open mind and not to prejudge situations or individuals.
138. The equality and diversity standard requires officers to 'uphold the law regarding human rights and equality', to treat all people fairly, with respect, and impartially. The duties and responsibilities standard requires officers to be diligent. Examples of meeting the standard include being 'aware of the influence that unconscious biases (such as stereotypes or 'group think') can have on your actions and decisions'. The conduct standard requires officers to behave in a way which does not 'bring discredit on the police service or undermine public confidence in policing'. The public expect the highest standards of behaviour. Officers must always think about how a member of the public would see their conduct. They must ask whether a particular act or decision might cause the public to lose trust and confidence in the police. The tenth standard requires police officers never to ignore 'unethical or unprofessional behaviour by' police colleagues, whatever their rank. Paragraph 10.7 says 'The police service will

not tolerate discrimination or victimisation or any disadvantageous treatment against anyone who makes a valid report of unprofessional behaviour or wrongdoing’.

139. Section 5 deals with breaches of the Code. It recognises that these vary in seriousness. They will not always amount to misconduct or require disciplinary action. Some will.

The issues

140. There are seven issues.
- i. Is the conduct of the officer IPs a ‘conduct matter’?
 - ii. Is the conduct of the officer IPs recordable conduct?
 - iii. Should that conduct have been referred to the Commission?
 - iv. Should the conduct should have been investigated, and, if so, should it have been investigated under paragraph 16 of Schedule 3 to the 2002 Act, or under Part 3 of the C Regulations?
 - v. Was the investigation in fact carried out by the Defendant lawful?
 - vi. If it was, was the Defendant *functus officio*, and thus barred from re-opening the investigation?
 - vii. Should permission to apply for judicial review be refused?

In reviewing the decisions in this case I must ask whether the relevant decision-maker asked himself the right questions or questions. I must then consider whether the answers to those questions were open to the decision maker as a matter of law.

Is the conduct of the officer IPs a ‘conduct matter’?

141. It did not appear to me to be in dispute that the conduct of the officer IPs, as found by the ET, involved a conduct matter (as defined). There are two strands in that conduct; the conduct towards Police Constable Bowler and the conduct of the officer IPs at the ET hearings. The gravamen of the conduct of the officer IPs towards Police Constable Bowler, as reflected in the judgments of the ET, is that it amounted to the statutory torts of direct discrimination and victimisation. A person (A) discriminates against another (B) on the grounds of B’s race if A treats B less favourably than he treats or would treat others because of B’s race; see section 13 (1) of the Equality Act 2010 (‘the 2010 Act’). A victimises B if A subjects B to a detriment because B does a protected act (section 27(1) of the 2010 Act). The ET found that the conduct had a significant adverse effect on Police Constable Bowler. The ET also found that the conduct was high-handed, malicious insulting or oppressive, so that it warranted an award of aggravated damages. The ET found, further, in its remedy judgment, that the officer IPs suffered from ‘collective memory loss’ and gave ‘disingenuous’ evidence. It also criticised their evidence in the other judgments.

142. That conduct appears, at least, to involve potential breaches of the Equality and Diversity, of the Honesty and Integrity, and of the Discreditable Conduct Standards. The conduct, as found by the ET, is ‘an indication that’ the officer IPs ‘may have behaved in a way which would justify the bringing of disciplinary proceedings’.

Is the conduct of the officer IPs recordable conduct?

143. If a conduct matter comes to the attention of the AA under paragraph 10 of Schedule 3, it must decide whether it is obliged, or whether it would be appropriate, to refer it to the Commission under paragraph 13. If it decides that the matter must or should be referred, it must record it (paragraph 10(4)). The equivalent provisions in paragraph 11 (if it applies) are to similar effect (paragraph 11(3A)). The judgments of the ET came to the notice of the Defendant, because the Defendant was a party to Police Constable Bowler's claims. Then, if not before (the claims were made against the Defendant), it should have appeared likely to the Defendant that those proceedings involved a conduct matter, as defined in section 12(2) of the 2002 Act. However, the proceedings were not brought by a member of the public. They were brought by Police Constable Bowler. Paragraph 10, therefore, was not engaged.
144. Police Constable Bowler then made allegations at a meeting on 16 September 2016 with Detective Inspector Rose. The Defendant then had to consider whether paragraph 11 applied to those allegations. Paragraph 11 applies if conduct comes to the attention of the AA otherwise than under paragraph 10, and it appears to the AA that the conduct (assuming it took place) appears to have resulted in the death or serious injury of any person, or it is of a description specified in regulations for the purposes of paragraph 11(2)(c). The descriptions are specified in regulation 7(1) of the C&M Regulations. They are a serious assault, a serious sexual offence, serious (so not all) corruption, a relevant offence, a criminal offence or misconduct which is liable lead to misconduct proceedings and which is aggravated by discriminatory behaviour (regulation 7(1)(d)), conduct whose gravity or other exceptional circumstances make it appropriate to record the matter in which the conduct is involved (regulation 7(1)(f)), and conduct which is alleged to have taken place in the same incident as one in which conduct within paragraphs (a) to (e) is alleged (regulation 7(1)(g)).
145. A reasonable decision maker would be bound to conclude that the conduct in this case would be liable to lead to misconduct proceedings. Is it 'aggravated by discriminatory behaviour' on the grounds of a person's race? Mr Gold's argument assumed that the tort of discrimination falls within regulation 7(1)(d). He also argued that victimisation is conduct 'aggravated by discrimination on the grounds of a person's race'. He drew attention to the definition of 'victimisation' in section 2 of the Race Relations Act 1976 ('the RRA'). Section 1 of the RRA defined what are now known as direct discrimination and indirect discrimination. Direct discrimination was defined as treating someone less favourably 'on racial grounds'. The sidenote to section 2 read 'Discrimination by way of victimisation'. Section 2(1) described victimisation as 'discrimination', but by contrast with direct discrimination, it was defined as discrimination 'by reason that' the person concerned had brought proceedings under the RRA (or had done analogous acts). In that significant respect, the definition of 'victimisation' in the RRA resembled the definition of 'victimisation' in the 2010 Act.
146. I do not consider, as a matter of law, that any of the conduct in this case fell within regulation 7(1)(d) of C&M Regulations, for four reasons. First, discrimination is not misconduct aggravated by discriminatory behaviour on the grounds of a person's race. It is discrimination tout court. The discriminatory behaviour does not aggravate underlying misconduct; it is the misconduct. Second, victimisation, as defined in section 27(1), is not 'discriminatory behaviour on the grounds of a person's race'. It is conduct done because of a protected act, not because of race. That

conclusion would have been no different under the RRA, because, although the RRA described victimisation as a species of discrimination, it defined victimisation as being ‘on the grounds’, not of a person’s race, but on the grounds of making a claim under the RRA, or doing something similar. Third (and this point is linked to the first) one of the Standards of Professional Behaviour is ‘Equality and Diversity’. There is little doubt that the conduct found by the ET could be a breach of that standard. It would be tautological to suggest, however, that a breach of that standard could be ‘aggravated by discriminatory behaviour on the grounds of a person’s race’. Fourth, the conduct of the officer IPs at the ET hearing was not aggravated by discrimination. It was conduct which was distinct from the conduct which, the ET found, amounted to direct discrimination.

147. The next question is whether the conduct was conduct ‘whose gravity or other exceptional circumstances make it appropriate to record the matter in which the conduct was involved’. Regulation 7(1)(f) creates a residual category. The criteria of gravity and exceptional circumstances take their colour from the other types of conduct specified in regulation 7(1), and from paragraph 11(2) of Schedule 3 to the 2002 Act, which is the parent provision. That conduct is all intrinsically very serious (see paragraphs 144 and 112, above). No criminal offences are alleged in this case. The factors indicating seriousness here are the acts of discrimination (not, in my view, enough on their own, because of the language of regulation 7(1)(d)), the victimisation by several officers, the effect on Police Constable Bowler, the award of aggravated damages, and the findings about the evidence of the officer IPs. It is difficult to equate this conduct with the types of conduct referred to in regulation 7(1) and paragraph 11(2) of Schedule 3; but if the scheme must be given a purposive interpretation. The conduct, if proved, is conduct which would substantially erode public confidence in the police. ETs rarely award aggravated damages. The ET criticised the evidence of the officer IPs (see paragraphs 8, 17, 24, 31, 32, 34 and 35, above). In my judgment a reasonable decision maker, directing himself correctly in law, could decide that the conduct of the officer IPs fell within regulation 7(1)(f). I have found it more difficult to decide whether a reasonable decision maker would be bound so to decide. On balance, I consider that a reasonable decision maker would be bound to decide that the conduct of the officer IPs, as described in the ET’s judgments, did fall within regulation 7(1)(f).

148. Mr Gold also relied on regulation 7(1)(g), on the assumption that some of the conduct (that is the direct discrimination which the ET found) was caught by regulation 7(1)(d). I have found that it was not. I should consider, in case that is wrong, whether the acts of victimisation found by the ET were alleged to have taken place ‘in the same incident’ as any conduct falling within regulation 7(1)(d). I do not consider that, even arguably, they did. The acts of direct discrimination and victimisation are entirely separate, happened at different times, and with the exception of Detective Inspector Staddon (who was held to have discriminated against, and to have victimised, Police Constable Bowler) were done by different people.

149. The effect of paragraph 10(4B) of Schedule 3 to the 2002 Act is that if conduct does not fall within the description specified by the Secretary of State in regulation 7 of C&M Regulations for the purposes of paragraph 10(4A) of Schedule 3 (that, is conduct which is repetitious) it must be recorded (whether or not there are other reasons for recording it). Paragraph 11(3B) is to similar effect. No-one suggested that the conduct in this case was repetitious conduct. It follows that if paragraph 10

applies, the conduct in this case is conduct which should be recorded, regardless of whether the AA was obliged to, or decided to, refer it to the Commission. If paragraph 10 does not apply, a reasonable decision maker, directing himself correctly in law, would be bound, for the reasons given above, to decide that paragraph 11 applied; and thus bound to record the conduct in this case.

Should the conduct have been referred to the Commission?

150. Whether paragraph 10 or paragraph 11 applies, and a conduct matter comes to the attention of the AA, it must decide whether it is obliged to refer the matter to the Commission, or whether it would be appropriate to do so (paragraphs 10(3) and 11(3)). A recordable conduct matter must be referred to the Commission if it relates to any incident or circumstances in or in consequence of which any person has died or suffered serious injury, or it is specified for the purposes of paragraph 13(1)(b) in regulations made by the Secretary of State (paragraph 13(1) of Schedule 3). Paragraph 13(1)(c) is not relevant. An AA has a discretion to refer a matter to the Commission when it is not obliged to 'if it would consider it appropriate to do so by reason of – (a) the gravity of the matter; or (b) any exceptional circumstances' (paragraph 13(2) of Schedule 3). This language echoes the language of regulation 7(1)(f) of the C&M Regulations.

151. There is in this case no allegation of death or serious injury, so the question is whether the conduct here is specified in regulations for the purposes of paragraph 13(1)(b). The relevant regulation is regulation 7(4) of C&M Regulations. This specifies 'any matter that relates to conduct falling within paragraph (1)(a) to (e) or (g) of regulation 7' of the C&M Regulations. I have already considered paragraph 7(1) (see paragraph 144, above), and Mr Gold's arguments in relation to it. I note that paragraph (1)(f) is not specified for this purpose. I conclude that the Defendant was not obliged to refer the conduct to the Commission. For reasons similar to those given above, I consider, however, that a reasonable decision maker, properly directing himself in law, would have been bound to decide that it was appropriate to refer the conduct to the Commission.

Should the conduct should have been investigated, and, if so, should it have been investigated under paragraph 16 of Schedule 3 to the 2002 Act, or under Part 3 of the C Regulations?

152. Where the AA referred a conduct matter to the Commission, the Commission had to consider, under paragraph 15 of Schedule 3 to the 2002 Act, whether it should be investigated, and if so, what form that investigation should have taken. As the conduct matters in this case were not referred to the Commission as they should have been, there is no way of knowing what the Commission would have done. Assuming, against my earlier conclusions, that the AA was not obliged to refer the conduct to the Commission, it had a discretion, conferred by paragraph 11(3E) of Schedule 3, to deal with the matter in such other manner (if any) as it might determine. No reasonable decision maker could have decided not to have investigated this matter. Presumably because the AA did not refer the conduct matter to the Commission, it then investigated it under Part 3 of the C Regulations. The premise of that investigation was wrong, because the matter should have been referred to the Commission. I will consider, nevertheless, whether the investigation was lawful, on the assumption that Part 3 of the C Regulations did apply.

Was the Defendant's investigation under Part 3 of the C Regulations otherwise lawful?

The decision of Detective Chief Inspector Swan

153. Detective Chief Inspector Swan was asked to do a ‘regulation 12 assessment’. He described his assessment as an assessment ‘as the designated appropriate authority’ of whether there should be an investigation. He also considered that he was doing a ‘severity assessment’. He rightly took into account the findings of the ET, which Police Constable Bowler relied on. He asked himself in each of the cases of Police Sergeant Wilson, Police Sergeant McClean, and Detective Inspector Staddon whether there was enough evidence to show that the officer might have breached the Standards of Professional Behaviour, and concluded that there was. He did not err in law in those conclusions.
154. In assessing the conduct, he was acting as a gatekeeper; his decision affected both whether there would be misconduct proceedings at all, and, if so, whether there would be a misconduct meeting or a misconduct hearing (although that assessment could be revisited). The early stage of the investigation and the nature of the material likely to be available at that stage both suggest that a decision maker should resolve any doubt about whether the conduct is serious enough to justify dismissal in favour of an assessment that the conduct would justify dismissal. Such a decision does not bind the decision maker at the misconduct hearing, but ensures that if there is a doubt, potentially serious conduct is considered in a forum in which, if it turns out on examination to warrant dismissal, that penalty is available. I therefore consider that Detective Chief Inspector Swan’s assessment that the conduct, if proved, would amount to misconduct rather than gross misconduct was, on balance, not one that was open to him.
155. Detective Chief Inspector Swan was not bound by the findings of the ET about Detective Chief Inspector Somerville and Superintendent Very’s conduct. The ultimate decision maker if there were misconduct proceedings would not be bound by the ET’s findings, either. Nevertheless, Police Constable Bowler’s allegation was that both those officers had discriminated against him on the grounds of his race, and that was conduct which, if proved in misconduct proceedings, would amount, at the very least, to misconduct. The findings of the ET that both officers had done so was relevant material which supported Police Constable Bowler’s allegation. Whether the officers had discriminated against Police Constable Bowler would be a question for the decision maker in misconduct proceedings, not for Detective Chief Inspector Swan. Detective Chief Inspector Swan erred in his assessments of the conduct of Detective Chief Inspector Somerville and Superintendent Very. In both of those cases, he substituted his own assessment of the material both for the ET’s assessment (as he acknowledged in the case of Detective Chief Inspector Somerville), and for the assessment of the ultimate fact finder. He acted as a fact finder himself; see, to take but two examples, ‘I am not convinced that...’ (see paragraph 48, above) and ‘...this, to me, is the only part where Mr Very’s conduct falls short’ (see paragraph 51, above). He should have recognised that the ET’s assessment indicated that there was enough evidence to show that the officers might have breached the Standards of Professional Behaviour, and that that, if proved, was, at least, misconduct and that it was not for him to find the facts (cf *R (Chief Constable of Yorkshire Police v IPCC* [2014] EWCA (Civ) 1367; [2015] ICR 184, in particular paragraph 56). For the reasons given above, I consider, further, that no reasonable decision maker, at this early stage, could decide that the conduct was merely misconduct. Moreover, no

reasonable decision maker could decide that such potential misconduct by police officers should not be investigated further.

156. Detective Chief Inspector Swan decided that the Defendant was not obliged to refer the allegations to the Commission, and that it was not appropriate, as matter of discretion, to refer the allegations. He was right to decide that the Defendant was not obliged to refer the conduct of any of the officers to the Commission. For the reasons set out above, he erred in deciding that it was not appropriate for the Defendant to refer the conduct of any officers to the Commission. The only decision open to him as a matter of law was that it was appropriate for the Defendant to refer the conduct of all the officer IPs to the Commission.

Detective Inspector Rose's report

157. The purpose of Detective Inspector Rose's investigation was to establish the facts and circumstances of the alleged misconduct, and to assist the AA in deciding whether or not there was a case to answer in respect of misconduct or gross misconduct. He was to indicate, in his report, an accurate summary of the evidence, attach or refer to any relevant documents, and indicate his opinion about whether there was a case to answer. It is clear from my summary of his report that he did not appreciate that he was not, himself, a fact finder. In the report, he assessed the evidence for himself, and reached his own conclusions about it. The reasoning in paragraphs 378 and 379 (and 421) of the report (see paragraphs 65, 66, and 84, above) is contradictory. Paragraph 378 suggests that Detective Inspector Rose knew that he was making findings of fact. Paragraph 379 suggests that he also knew that he should not be making findings of fact. Paragraphs 390 and 426 of the report, to take two examples, show that Detective Inspector Rose did not, in practice, follow the correct direction he gave himself in paragraph 379 of the report.

158. His conclusions about the three officers exonerate them when the ET had found that they had all victimised Police Constable Bowler, had awarded aggravated damages because of their conduct, and had criticised their evidence. Detective Inspector Rose did not refer expressly to any of those findings. He was not bound by them; but what they did suggest was that, when tested by an independent tribunal, the accounts given by the officers did not stand up to scrutiny. Whether they would stand up to scrutiny in misconduct proceedings was a decision for the decision maker in those proceedings, not for Detective Inspector Rose. The reasoning he used to justify his attempt to finesse the ET judgments in paragraph 424 (see paragraph 86, above) does not explain why the ET findings are irrelevant. His conclusion in paragraph 425 of his report (see paragraph 87, above) is inexplicable. Detective Inspector Rose's conclusions that none of the officers had a case to answer are vitiated by his manifestly wrong approach to his task, and, in any event, were not open to a reasonable decision maker in the light of the judgments of the ET.

The decision of Detective Superintendent McDermott

159. When he received Detective Inspector Rose's report, Detective Superintendent McDermott's task was to decide whether the relevant officers had a case to answer in respect of misconduct or gross misconduct. He directed himself correctly in paragraph 3 of his decision. He did not follow that self-direction, however. My summary of that decision and the passages I have quoted from it show that Detective Superintendent McDermott, like his colleagues, made his own assessment of the evidence, and made factual findings, while claiming that what he had done was to discover that there was

‘no evidence’ to support Police Constable Bowler’s allegations. For example, in relation to Detective Inspector Staddon, he claimed ‘objectively’ to have ‘assessed both accounts’ and to have reached his own view about why the relationship between Police Constable Bowler and Detective Inspector Staddon had become strained (see paragraph 94, above; see also paragraphs 96 and 97). He asked himself, to give a further example, whether he had seen material which ‘on balance convinces me...’ (see paragraph 101, above). He also failed to describe the allegations correctly, in particular the allegations of discrimination and victimisation, to analyse their components, or to view the evidence in the light of those components. All his conclusions are undermined by these legal errors.

160. Detective Superintendent McDermott’s decision that neither Police Sergeant McClean nor Police Sergeant Wilson ‘had breached’ the Standards of Professional Behaviour was one that it was not open to him to make. His decision that Detective Inspector Staddon breached those Standards, but only because Detective Inspector Staddon was rude to Police Constable Bowler was not open to him, either. His conclusions were significantly based on the analysis in Detective Inspector Rose’s report, which he described as ‘a balanced and focused investigation’, and share the flaws of that analysis. Detective Superintendent McDermott did not refer to the evidence given to the ET, or to the ET’s findings, which (at least) suggest that a different interpretation of events was possible, and that, therefore, there was evidence, which, if accepted, showed that there was a case to answer. Nor did he postpone his decision until after the ET had given its judgment on the remittal by the EAT.

Was the Defendant functus officio?

161. The Defendant, Police Constable Bowler and IOPC all submitted that, if they were wrong, and the investigation was not unlawful, the Defendant was, nevertheless, not functus officio, and could have re-opened or revisited the first investigation, in any event. In view of my clear conclusions about the lawfulness of the first investigation, the less I say about this, the better. Regulation 12 of the C Regulations permits the AA to revise its assessment of the conduct under regulation 12(1) at any time before the start of misconduct proceedings, if it considers it appropriate to do so. Detective Chief Inspector Somerville or Superintendent Very dropped out of the picture altogether when Detective Chief Inspector Swan found that they had no case to answer. Moreover, his assessment was that the conduct of the remaining officer IPs if proved, would amount to misconduct, not gross misconduct (an assessment which was not revisited by Detective Inspector Rose or by Detective Superintendent McDermott). I would be inclined to the view that it would be open to the Defendant to review all those assessments, as there have never been any misconduct proceedings involving any of the officer IPs (‘misconduct proceedings’ is defined in regulation 3 of the C Regulations: see paragraph 124, above).

Should permission to apply for judicial review be refused?

162. Mr Butt submitted that permission to apply for judicial review should be refused because the claim is not arguable, because had the errors complained of not been made, it is highly likely that the relevant decisions would not have been substantially different, and on the grounds of delay. For the reasons given above, I consider that the challenge to the Defendant’s investigation is not only arguable, but well-founded. On the material I have reviewed, I cannot say that it is highly likely that had errors complained of not been made, the relevant decisions would have been the same.

163. The sequence of events leading to the lodging of the application for judicial review is described in the witness statement of Detective Chief Superintendent Curtis. In summary, when the Defendant received the decision of the ET on the remittal, it decided to look into Police Constable Bowler's complaints again. A report was produced on 20 June 2018. The Defendant decided voluntarily to refer the matter to the IOPC on 28 August 2018. On about 8 October 2018 the IOPC decided that there should be a local investigation and indicated that the Defendant should get his own legal advice about whether he could re-open the investigation. The Defendant's advice at that stage was that it was lawful to re-open the investigation.
164. In January 2019 Detective Chief Superintendent Curtis decided that new matters should be referred to the IOPC. The IOPC again decided that there should be a local investigation. In February and March 2019, the officer IPs were served with notices telling them that there was to be a further investigation of their conduct. In September 2019, the Defendant, who had been receiving advice from counsel during the course of the investigation, decided to change counsel because Police Constable Bowler objected to existing counsel because, in Police Constable Bowler's view, he was too close to the Kent Police Force. The Defendant's new counsel's view was that the new investigation might be unlawful. The Defendant sought a second opinion from leading counsel. The Defendant received the second opinion, which confirmed the doubts about the lawfulness of the second investigation, in November 2019. On 4 December 2019 the Defendant instructed external solicitors to prepare an application for judicial review. The claim was lodged on 24 January 2020.
165. The grounds for making this claim first arose when each of the unlawful decisions in this case was made. On any view, the claim was not lodged within three months of any of the relevant decisions, nor was it lodged promptly after that period had elapsed. The reason for this is that the Defendant did not take any advice about the status of the first or second investigation until October 2018. The advice in October 2018 was that there was no bar to a second investigation, so the lawfulness or otherwise of the earlier investigation did not matter. The advice changed in September 2019, when the Defendant was first told that a second investigation might be unlawful. It was then that the Defendant began to consider whether or not to apply for judicial review.
166. I have no doubt that this claim was not brought promptly. In particular, the Defendant did not act promptly between September 2019 and 24 January 2020. I have to decide whether there is good reason to extend time. That decision is informed by any prejudice to the officer IPs, by the merits of the claim, and by consideration of the public interest (see, for example, *Maharaj v National Energy Corporation of Trinidad v Tobago* [2019] UKPC 5; [2019] 1 WLR 983). I accept that there is some detriment to the officer IPs. All but Detective Inspector Staddon and Police Sergeant Wilson have retired. The allegations concern events in 2014. They thought that their conduct would not be investigated at all, or would not be investigated further, and would face a further investigation if time were extended. Nevertheless, I consider that the challenge to the Defendant's investigation is not only arguable, but well-founded. I also consider that there is a significant public interest in the proper investigation of potential misconduct by police officers in a case like this. Police Constable Bowler also has an interest in the proper investigation of his allegations. The merits of the claim and the public interest outweigh the prejudice to the officer IPs. I therefore extend the time for bringing this claim.

The position of the retired officers

167. A question which was touched on was the position of the officer IPs who have retired. Mr Butt appears to have accepted in his skeleton argument (paragraph 82) that the retirement of some of the officer IPs is not a bar to a further investigation, even in the case of Superintendent Very. It also appears to be common ground that the effect of regulation 27 of the C&M Regulations is that Part 2 of the 2002 Act applies to an officer who is no longer serving in a police force as if it did not include any requirement for an appropriate authority to determine whether disciplinary proceedings should be brought against such an officer if his conduct is the subject-matter of a report. The question of the application of the conduct regime to those officer IPs who have retired is for the AA to determine.

Conclusion

168. For these reasons I give the Defendant permission to apply for judicial review of the relevant decisions of the Defendant's officers, and allow the application for judicial review. The decisions were unlawful and a nullity. It follows that further investigation into the conduct of the officer IPs is not unlawful on the ground that their conduct was previously the subject of investigation. I will consider any further submissions which the parties would like to make about relief. I will resolve any disputes, if I can, on the basis of their written submissions. In view of the conclusions I have already reached, I have not found it necessary to consider Mr Bunting's argument based on apparent bias.