Neutral Citation no. [2007] NICA 13 (2) | *Ref:* **NICC5501**

Judgment: approved by the Court for handing down | *Delivered:* **1/3/07**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CHARLOTTE CARTWRIGHT and RAYMOND McMICHAEL

Appellants

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent

BEFORE KERR LCJ, NICHOLSON LJ and SHEIL LJ

NICHOLSON LJ

Introduction

[1] This is an appeal by way of case stated against the decision of an industrial tribunal (the tribunal) whereby the tribunal held that the appellants had not proved that they had been victimised by the respondent. The complaints of victimisation were brought by originating applications dated 4 July 2000 and 1 August 2000 respectively and were eventually heard together by order of the tribunal on 20-23 September 2004 and 20-22 October 2004. The decision of the tribunal was given on 8 December 2004. The tribunal stated a case posing five questions for the opinion of the Court of Appeal. Mr O'Hara QC and Mr McArdle appeared for the appellants; Mr McCloskey QC and Mr Maguire appeared for the respondent. Mr McArdle appeared for the appellants before the tribunal; none of the other counsel involved in the appeal did so.

Relevant Facts

[2] (1) The first appellant is and at all material times was a Chief Inspector in the Police Service. She commenced proceedings against the respondent in 1998 before an industrial tribunal ("the first tribunal") alleging discrimination

on the grounds of sex and victimisation. Her complaints were mainly directed at her line manager in RUC Traffic Branch, Superintendent G R Laird. She gave evidence on her own behalf. The second appellant, who was then a police constable but has now retired, gave evidence on her behalf. Superintendent Laird gave evidence on behalf of the respondent. The decision of the first tribunal was given in June 2000.

(2) Two police sergeants, Sergeant E Wilson and Sergeant A L Shirlow, reported in writing to their superiors in January 2000 that without their permission the first appellant had obtained their telephone numbers and given them to Ms Rosemary Connolly, her solicitor, in connection with the proceedings at the first tribunal. Sergeant Shirlow also reported that her address had been given to Ms Connolly for the service of a witness summons to appear before the first tribunal. They reported that they felt these were serious breaches of their personal security and that they were submitting these reports in order that the matters could be investigated. Superintendent Macauley, Superintendent Matchett and Chief Superintendent Lamont were responsible for sending their reports to Assistant Chief Constable Beaney. Mr Beaney was in charge of the investigation into their reports and the subsequent complaint by Superintendent G R Laird.

(3) On 7 March 2000 Superintendent Laird made a written complaint that while he was undergoing cross-examination at the first tribunal on 6 March 2000 a document was produced by the first appellant's side which contained details of his association with Special Branch, allied to traceable details about golf club membership and caravan ownership and his current home address and that these details, on the admission of counsel for the first appellant, were irrelevant to the proceedings in hand. He further complained that he believed that the information in the document was compiled by the second appellant and passed on to "third parties" by the first appellant without permission from her authorities or authorisation from him. He requested a formal disciplinary investigation into the matters. His complaint was also sent to Mr Beaney.

(4) On 23 March 2000 Superintendent Matchett wrote a minute to Mr Beaney in which he stated that the allegations made by Superintendent Laird and Sergeants Wilson and Shirlow arose from sincere apprehensions by officers to whom the Chief Constable would owe a duty of care in respect of their security. He recommended the appointment of an investigating officer. Mr Beaney appointed ACC Albiston as investigating officer on 9 May 2000, responsible for reporting to him and appointed a superintendent to assist him. On 5 January 2001 Mr Albiston was seconded to duties in Kosovo under the auspices of the United Nations. In April 2001 Assistant Chief Constable W C S White was appointed as investigating officer. Between January and April two other ACCs had been appointed but became unavailable.

(5) A form known as Form 17/3 had been prepared by ACC Albiston and served on the first and second appellants on 19 May 2000 on the direction of Mr Beaney under Regulation 5 of the RUC (Discipline and Disciplinary Appeals) Regulations 1988 (as Amended), which are hereafter referred to as the 1988 Regulations. The form served on the first appellant set out the allegations made by Superintendent Laird and his assertion that she had provided this information, which compromised his personal and family security, to her instructing solicitor and counsel and probably other persons unknown but associated with those individuals. It also set out the allegations made by Sergeants Wilson and Shirlow against her. When the form was served on her by ACC Albiston and she was cautioned, she said: "I would need some two to three weeks to master my thoughts on this. At the moment I have nothing to say." Thus she would have been available for interview in June 2000. The form served on the second appellant on the same date set out the allegations made by Superintendent Laird, stating that the information in the document referred to at paragraph (3) was compiled by him and passed on to third parties by the first appellant. Constable McMichael, as he then was, would have been available for interview from the end of May 2000.

(6) It was intended by ACC Albiston to interview the first appellant on 2 January 2001 but she was on annual leave. He was then sent to Kosovo on 5 January 2001. A letter of complaint about delay in the investigation was sent by Ms Connolly on behalf of the first appellant to the Chief Constable, referring to the relevant regulations, on 13 February 2001. A reminder was sent in May. Ms Cartwright was interviewed by ACC White on 4 June 2001. She handed him a prepared typed statement and the interview was tape-recorded. In her typed statement she referred to the complaints made by her against Superintendent Laird at the first tribunal, disputed that the document to which he had referred was produced at the first hearing and asserted that neither his legal representative nor anyone else made any suggestion at the hearing that any aspect of the proceedings had compromised him. She also explained in some detail that her counsel had directed her to obtain the telephone numbers of the sergeants who were on sick leave so that they could be contacted and to obtain the address of one of them for service of a witness subpoena as the first tribunal required the attendance of the witness on the following day. In the course of the interview she stated that McMichael never outlined to her any personal details about Superintendent Laird, that she was not aware of any such details and never passed on such personal details to her legal representative. She was asked to account for her counsel becoming aware of such sensitive information in respect of Mr Laird. She replied that this was a matter for her counsel; that she was not privy to the meetings that counsel had with witnesses. She said that she could understand the concerns raised by Sergeant Shirlow.

(7) The second appellant was not interviewed by any investigating officer or by any subordinate officer. He retired from the Police Service with effect

from 20 April 2001. Ms Connolly was not interviewed. It was decided that it would not be proper to do so. Presumably counsel was not interviewed for the same reason. The investigation of the second appellant was closed in May 2001. He was not informed. His solicitor was informed by letter of 16 July 2001.

(8) Superintendent Kane wrote at three-monthly intervals to Superintendent Laird, Sergeants Wilson and Shirlow informing them that the disciplinary investigation against the first appellant was ongoing, that enquiries had not yet been completed and that they would be kept informed of any further developments. By way of contrast, neither appellant was given any information about the investigation by Superintendent Kane or any other member of the Police Service.

(9) Assistant Chief Constable White, fifth and final investigating officer, recommended in his report dated 21 June 2001 that no disciplinary action should be taken against the first appellant in respect of the allegations by Superintendent Laird as there was no evidence that she had made any improper disclosure of information about him. He recommended that she should be offered "a constructive discussion on how to deal with the home telephone numbers and addresses of members of the Police Service when asked to provide them by or to an outside body, ie that permission of the member concerned should be sought or the relevant member be asked to make contact himself/herself". No recommendation was made about the second appellant as he had retired from the Force. A direction that the first appellant should be the subject of informal discipline as recommended by ACC White was recorded by Superintendent Kane and she was interviewed by Chief Superintendent Hawthorne accordingly on 20 July 2001. She does not appear to have been officially informed of the outcome of Superintendent Laird's complaint.

(10) By originating application dated 4 July 2000 the first appellant complained to the tribunal of unlawful discrimination by way of victimisation contrary to the Sex Discrimination (NI) Order 1976. She described her complaint as follows:

> "In or about December 1998 I initiated a complaint of unlawful discrimination on grounds of sex against my employer – Chief Constable of the RUC. That complaint was followed by three further complaints alleging discrimination on grounds of sex and by way of victimisation. By notice of report dated 19/5/00 I was informed that three complaints had been made against me by the Chief Constable of the RUC concerning evidence that had been adduced on my behalf at the

> Industrial Tribunal hearing into my complaints and concerning contact made with two witnesses in that connection also. I consider that each of the matters was dealt with perfectly properly in the context of the legal proceedings in which I was then engaged. I consider that the decision to initiate formal complaints against me in relation to the three matters complained of amounts to unlawful discrimination by way of victimization (sic) contrary to the Sex Discrimination (NI) Order 1976."

(11) By undated originating application the second appellant also made a complaint of victimisation. He alleged as follows:

> "On or about 19/6/00 I was served with a form 17/3 notification of complaint in which it was alleged that I had given evidence at an Industrial Tribunal hearing and in so doing had compromised the security of another member of the force and acted without authority from my superiors.
>
> I was subpoenaed to attend at the tribunal and when there gave evidence on oath to the best of my knowledge and ability. I consider that in so doing I acted entirely properly and appropriately and I consider that the decision now to serve me with a 17/3 amounts to unlawful discrimination by way of victimisation because I gave evidence in connection with a complaint of sex discrimination brought against the Chief Constable of the RUC."

(12) On 27 June 2002 the second appellant requested further and better particulars of all respects in which Superintendent Laird believed that his (a) personal and (b) family security had been seriously compromised by the disclosure of information by the applicant as alleged … In a reply dated 11 August 2002 the respondent stated that he did not consider "this request to be relevant to the matters the subject of the above proceedings … Further, and or in the alternative, this request is considered by the respondent to be a matter of evidence." On an application by the second appellant the Vice President made an order on 3 October 2004 that the respondent should furnish to his representative answers to an undated notice in identical form to the notice of 27 June 2002 (which the respondent had answered on 11 August 2004). What happened to this order is not clear. There was no further reply by the respondent.

In answer to a Notice for Further and Better Particulars dated 27 August 2002 asking him to specify the precise basis upon which he alleged that he had been discriminated against, the second named appellant replied that he believed "that there was a protracted delay in pursuing the investigation consequent upon disciplinary proceedings which had been initiated against him and which arose out of his having given evidence at an earlier hearing into a claim of sex discrimination by a female Chief Inspector. The respondent failed to have any or adequate regard to the provisions of the Guidance on Complaints and Discipline Procedures, in particular paragraphs 5, 6, 7 and 65 of appendix (10) "Illustrations to investigating officers" and the Guidance to the Chief Constable on Police Complaints and Discipline Procedure, paragraphs 4.10 and 4.12."

In answer to the question: "Specify each and every servant or agent of the respondent whom you allege was guilty of the said discrimination, specifying the discrimination in respect of each and the date or dates thereof," he replied that they were all the persons who were responsible for the delay.

The Legislation

[3] The originating applications were brought by the appellants before the tribunal under the Sex Discrimination (NI) Order 1976 (as amended).

Article 6(1) provides:

> "6.-(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has –
>
> > (a) brought proceedings against the discriminator or any other person under this Order or the Equal Pay Act, or
> >
> > (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Order or the Equal Pay Act, or

(c) otherwise done anything under or by reference to this Order or the Equal Pay Act in relation to the discriminator or any other person, or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order or give rise to a claim under the Equal Pay Act,

or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them."

Article 8(2)(b) provides:

"It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her –

(a) …

(b) by dismissing her, or subjecting her to any other detriment."

Article 42.-(1) provides:

"Anything done by a person in the course of his employment shall be treated for the purposes of this Order as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

Article 63.-(1) provides:

"A complaint by any person ("the complainant") that another person ("the respondent") –

> (a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part III, or
>
> (b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination against the complainant,
>
> may be presented to an industrial tribunal."

Article 63A provides:

> "(1) This Article applies to any complaint presented under Article 63 to an Industrial Tribunal.
>
> (2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –
>
> > (a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part III, or (b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."

Article 76(1) provides:

> "An industrial tribunal shall not consider a complaint under Article 63 unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done."

[4] The forms 17/3 were served on the appellants under Regulation 5 of the 1988 Regulations. Regulation 5 reads as follows:

> "5.—(1) Where a report, allegation or complaint is received from which it appears that an offence may have been committed by a member of or below the rank of chief superintendent (hereinafter referred to as "member subject to investigation"), the following provisions of this regulation shall have effect for the purpose of investigating the matter.
>
> (2) The provisions of paragraphs (3) and (4) shall have effect—
>
> > (a) in relation to a case arising otherwise than from a complaint to which Part II of the Order of 1987 applies; and
> >
> > (b) in relation to cases arising from such complaints where the requirements of the said Order are dispensed with by or under regulations made thereunder.
>
> (3) Unless the chief constable decides that no disciplinary proceedings need be taken, the matter shall be referred to an investigating officer who shall cause it to be investigated.
>
> (4) The investigating officer shall be—
>
> > (a) a member, or if the chief officer of a police force in Great Britain is requested and agrees to provide an investigating officer he shall be a member of that other force;
> >
> > (b) of at least two ranks above that of the member subject to investigation, where that member is the rank of chief inspector or below; or
> >
> > (c) of at least one rank above that of the member subject to investigation,

where that member is of the rank of superintendent.

(5) Neither—

(a) the chief constable;

(b) the deputy chief constable; nor

(c) any member serving in the same sub-division or branch as the member subject to investigation,

shall be appointed as the investigating officer for the purpose of paragraph (3) or Article 5 of the Order of 1987 (formal investigation of a complaint)."

Guidance to the Chief Constable

[5] Section 4 of Northern Ireland Office Guidance to the Chief Constable on Police Complaints and Discipline Procedures reads in part:

"4.1 This section sets out the procedure to be followed where a member of the rank of chief superintendent or below is the subject of a complaint, report or allegation requiring formal investigation …

4.9 … the Chief Constable should maintain close oversight of the progress of each investigation. In particular, he should know at once if an investigation has met serious difficulty or if serious delay is in prospect. This should ensure speedy progress and the quick resolution of difficulties through central direction.

4.10 Inquiries should be carried out as expeditiously and thoroughly as reasonably practicable …

4.11 The purpose of an investigation is to establish the facts about the incident or conduct complained of and, in the light of those facts, to enable an objective assessment to be made of the merits of the complaint …

> 4.12 It is also important that the investigation should be completed as quickly as may be practicable. It sometimes happens that an investigation may be unavoidably protracted for reasons beyond the control of the investigating officer. In this event, an early explanation should be given to the complainant with a copy going to the member concerned; and both should be kept informed (in writing) of the reasons if the delay persists …"

The Hearing before the Tribunal

[6] The appellant's applications were heard together by order of the tribunal. Mr McArdle appeared for the appellants and Mr P Grant appeared for the respondent.

At the outset of the hearing on 20 September 2004 Mr McArdle stated on behalf of Mr McMichael that he intended to call Ms Connolly to give evidence of what happened at the hearing of the first tribunal and in particular the cross-examination of Superintendent Laird, using her notes of the hearing. As appears from the written submissions made to the tribunal by Mr McArdle at the end of the hearing, this evidence was intended to cast doubt on the bona fides of the formal complaint made by Superintendent Laird.

[7] Counsel for the respondent objected to such evidence and the documentation allied to it, drawing attention to the originating application of the second appellant which I have set out at paragraph [2](11).

In reply Mr McArdle submitted that this evidence was relevant because the second appellant was alleging that Superintendent Laird instigated proceedings against him because he gave evidence for the first appellant at the first tribunal and because the Superintendent wanted to "repay" him for embarrassment to the Superintendent.

[8] The tribunal stated that it was common case that the second appellant had done a protected act ie that he had given evidence or information in connection with the first appellant's proceedings at the first tribunal.

The tribunal ruled that his claim was against the named respondent, the Chief Constable, not against Superintendent Laird, and that it would look at the actions of the respondent in instigating a complaint against him and the subsequent actions of the respondent in the treatment of him. It ruled that it would not admit evidence from the solicitor as to her version of events at the

previous hearing of the first tribunal; there was no transcript of it and the tribunal was not in a position to make a decision based on the solicitors' record of proceedings or her record of cross-examination of one of the respondent's witnesses at that previous hearing. It was recorded by the tribunal that having made this ruling the applicants sought an adjournment so that it could be judicially reviewed as they were both unwilling to proceed without the evidence as outlined by counsel. The tribunal stated that it would consider the question of an adjournment on the following day, 21 September 2004.

The first appellant joined in the application for an adjournment, I presume, because Mr Laird had alleged that she passed on to her lawyers the information about Mr Laird's security that Mr McMichael had given to her and also wished to allege bad faith on the part of Mr Laird.

On 21 September 2004 the tribunal refused to adjourn the hearing for the purposes of a judicial review of its ruling, [allegedly] stating that the application to adjourn should have been made the previous day, which in fact had been done as appears from the tribunal's ruling in writing dated 20 September 2004. The only witness called on behalf of the respondent was Assistant Chief Constable Beaney. Mr McMichael gave evidence that he attended the first tribunal under a Witness Order. Ms Cartwright was at that time pursuing a claim of sex discrimination. He gave evidence regarding remarks made by a senior officer, Superintendent Laird, to colleagues in private in the course of a car journey to the north coast. He was the driver on that occasion. After he had given evidence he was called back to be interviewed by Ms Cartwright's legal advisers regarding the car journey, because in the course of giving evidence Mr Laird denied that the journey had taken place. He was then requested by her legal advisers to provide additional information regarding the car journey that would assist Ms Cartwright's barrister to jog Mr Laird's memory of the car journey. He did provide the additional information, alleged by Mr Laird to be breaches of security, assuming that in doing so he enjoyed the protection of the law. This also appears from the written submissions made by Mr McArdle to the tribunal.

The Tribunal's Decision

[9] The tribunal's decision was annexed to the Case Stated. Its ruling on the admissibility of Ms Connolly's evidence was set out. It stated that Mr McMichael had given evidence in relation to Superintendent Laird's golf club membership, caravan ownership and current home address. It stated that it looked to the background to the complaints made by the appellants and the actions of the respondent in handling them. It was satisfied that the allegations of the three police officers, Superintendent Laird, Sergeant Wilson and Sergeant Shirlow, were all potentially serious. Mr McMichael's case was

never fully investigated because he left the police force in February 2001. There was a very lengthy delay in the investigation but they held that there was no victimisation of Mr McMichael by Mr Beaney or anyone else. It was of concern to the tribunal that it took so long for the matters relating to Ms Cartwright to be finalised in July 2001.

[10] It was stated at paragraph 11 that the tribunal did not find that [the appellants] could compare themselves with Sergeants Wilson and Shirlow or Superintendent Laird who brought the complaints against them and that there was no evidence … to show that any of those three people victimised the applicants. At paragraph 12 it found that any motive of victimisation "must fall on the desk of Mr Beaney." At paragraph 13 it held that Mr Beaney had "no motivation to victimise the applicants. He was simply implementing a procedure." It expressed concern that during the investigation the complainants were kept informed about the delays and the applicants were not and that it did appear to be an example of less favourable treatment of one group than other; but this did not establish that the instigator of the complaint procedure, Mr Beaney, was involved. At paragraph 14 it was recorded that Mr Beaney stated that the procedure set out at paragraph 4.12 of the formal investigatory procedure referred to at paragraph [5] of this judgment would not normally be followed for internal disciplinary proceedings. The tribunal stated that it did not draw an inference of victimisation from the evidence. It held that it was satisfied that anyone in the police force who had given information which could compromise another officer's personal security was liable to have disciplinary proceedings instigated against them. The respondent had to act because the personal security of other officers may have been compromised at that time.

At paragraph 15 the tribunal stated that the appellants had not proved that they were victimised by the respondent in being made the subject of an investigation procedure; the appellants were rightly concerned about the excessive delays which were obvious in this investigation. The tribunal was presented with evidence of other cases which had been the subject of excessive delays and heard that the police force was under severe pressure at the time because of a large reduction in numbers. It dismissed the appellants' claims as it was not accepted that they were less favourably treated than others in the police force.

The Case Stated

[11] The tribunal was requisitioned to state a case for the opinion of the Court of Appeal. In the case stated it recorded that both appellants complained that they had been discriminated by way of victimisation by being served with a form 17/3 complaint in relation to evidence given at a previous industrial tribunal hearing. The tribunal referred to the opening

submission of counsel for the appellant, and to the ruling that it gave which was annexed to the case stated and to its refusal to grant an adjournment.

At paragraph 5 the tribunal stated that it considered firstly the claim as set out in the originating application of both appellants and secondly that Superintendent Laird was not a respondent named in either claim. The tribunal was aware that it had no record of the previous proceedings and that the appellants' claim of victimisation related entirely to the instigation of complaints against them by fellow officers including Superintendent Laird.

At paragraph 6 the tribunal set out its findings of fact. These included:

(a) …

(b) At the previous hearing Superintendent Laird gave evidence for the respondent and during his cross-examination was questioned about personal details such as his golf club membership, caravan ownership and home address; this information was obtained by the second appellant; as a result of the evidence coming into the public domain, Superintendent Laird complained to Mr Beaney.

(c) Sergeants Wilson and Shirlow also complained to Mr Beaney because they had been approached at home by the solicitor for the first appellant during the previous hearing. They realised that their home telephone numbers had been disclosed and this was confirmed by evidence at the tribunal, namely that the first appellant had contacted civilian personnel in the police and obtained numbers for these sergeants as instructed by her solicitor because they might have been potential witnesses. The sergeants felt that this had compromised their personal safety.

At paragraph 7 the tribunal referred to its decision that Mr Beaney was entitled to commence disciplinary proceedings against the appellants because of the personal safety risk of three fellow officers which might have been caused by the appellants. He had no personal motive to victimise them and he was acting in his role as Assistant Chief Constable, using a recognised Police Service procedure.

The tribunal accepted that there had been a failure of procedure during the investigation, when Superintendent Laird had been contacted about ongoing delay in concluding the disciplinary process and the appellants had not been contacted. The evidence given and accepted by the tribunal did not implicate Mr Beaney in this failure. He had no knowledge of a letter being sent to Superintendent Laird by a subordinate officer.

The tribunal accepted that the investigation process was never finalised for the second appellant. It rejected his claim of victimisation on the basis that

he was not able to show that he was less favourably treated than another person who was subject to a 17/3 complaint because he had done a protected act ie given evidence at a previous hearing.

The first appellant's disciplinary investigation was finally concluded in July 2001 with an "informal warning" being given. In her case investigations had been completed and a decision on the investigation was made after the investigating officer, ACC White, had considered the complaint and the evidence before him.

The tribunal accepted that there was a `protected act' shown by both appellants and it was known by Mr Beaney. The tribunal found that the comparison of treatment for the appellants who had done a protected act and been subject to an investigation was with persons in the police force who had not done a protected act. Thus, they had to show that they were subject to the investigation, simply because they had taken part in a tribunal hearing and in the course of that hearing given evidence which compromised other officers' personal security. They did not prove this by evidence. The tribunal found that Mr Beaney was a truthful witness and did not find that he was acting in any way other than a professional manner and with no motivation against either appellant.

The tribunal looked at the respondent's explanation for the treatment of the appellants, namely that they were subjected to a disciplinary investigation because of their actions in obtaining evidence for use in the first appellant's earlier hearing. It accepted –

(a) that there was an adequate reason given by Mr Beaney for setting up the investigation, and that it would have been started for any police officer who had possibly compromised another police officer's security or safety;

(b) that there was an adequate reason given for the long delay in finalising the first appellant's investigation and for not completing the second appellant's investigation as he retired from the police force; and

(c) that writing a letter to Superintendent Laird advising him of a delay in the procedure did raise the question of a less favourable approach to the appellants, but it was not sufficient to enable the tribunal to infer discrimination on the grounds of victimisation. It was a matter which did not change the investigation process or influence it.

The tribunal then posed five questions for the opinion of the Court of Appeal as follows:-

1. Did the industrial tribunal err in law in excluding evidence about the reason for which complaints were made to the respondent about the conduct

of the appellants in connection with their involvement in previous proceedings against the respondent?

2. Did the industrial tribunal err in law in holding that the respondent was compelled to instigate a formal procedure to start an investigation of the events leading up to the complaints without hearing evidence to test the credibility of any of the allegations or the bona fides of those who made complaints against the appellants?

3. Having held at paragraph 11 that the appellants had been subjected to potential discriminatory procedures because they had given evidence in the first appellant's previous tribunal hearing, did the industrial tribunal err in law by rejecting their claims of unlawful discrimination by way of victimisation on the ground that any appropriate comparator would have been treated in the same way?

4. Did the industrial tribunal err in law, in light of the burden of proof regulations, in holding that the appellants had not been discriminated against by way of victimisation?

5. Could any reasonable industrial tribunal on the evidence before it, both oral and documentary, and on the facts found, properly directing itself in law have reached the decision arrived at to dismiss the complaints of the appellants.

The Arguments on Behalf of the Appellants

[12] Mr O'Hara QC on behalf of the appellants submitted to this court that the starting–point for the tribunal should have been: were each of the complaints – by Laird, Wilson and Shirlow – genuinely made? He referred to the evidence of Mr McMichael set out in the written submissions made to the tribunal by Mr McArdle. In cross-examination Mr Laird admitted that the car journey had taken place. He had taken exception to the cross-examination about the car journey as against both appellants. He had made a written complaint the day after cross-examination.

As appeared from paragraphs 4 to 6 of the appellants' skeleton argument the appellants intended they claimed, to make the case from the outset that because of the evidence they had given against Mr Laird in the first proceedings he had retaliated by making a complaint against them on trumped-up grounds and had triggered or instigated a disciplinary investigation against them. The respondent could have been under no misapprehension as to the case the appellants proposed to make. Counsel referred to Mr McMichael's Notice for Further and Better Particulars dated 27 June 2002, the answers thereto in which the respondent sought to confine the appellants' claim to the decision of Mr Beaney to initiate disciplinary

proceedings against the appellant and the Order granted by the Vice-President on 3 October 2002 to which the respondent failed to reply. The appellants were not informed of the complaints made by the sergeants in January 2000 until May. If the complaints were genuine, the inertia was remarkable.

The tribunal should have expressed or formed a view about the conduct of the preliminary enquiries, about the complaints by Chief Superintendent Lamont and Superintendents Macauley and Matchett, particularly Matchett's recommendation of 23 March that an investigating officer should be appointed. The tribunal accepted without evidence how the decision was reached to hold a disciplinary investigation. It should have tested whether the complaints were genuine before starting the formal procedure. There was only a document before the tribunal which made the assumption that the allegations were "sincere apprehensions" and made the finding that the allegations were "potentially serious". The tribunal was satisfied that an investigation had to be instituted. It should have made a finding based on evidence.

The issue of the form 17/3 was designed to discourage Ms Cartwright from pursuing her claim against Mr Laird. Was his complaint so designed? Was the disciplinary investigation so designed? The tribunal decided not to investigate anything that happened before Mr Beaney took charge and did not investigate anyone except Mr Beaney, interpreting the proceedings as directed against the Chief Constable, not Mr Laird.

There was no evidence that Mr Beaney investigated or sought to get the investigating officer to enquire about the genuineness, authenticity or lawfulness of the complaints. Were they serious allegations or were they malicious or vengeful?

The tribunal wrongly decided to narrow the issues. It determined that there should be a scrutiny of Mr Beaney's conduct only and that it should be confined to the delay in the disciplinary investigation. Superintendent Matchett who had read the complaints and concluded that the security concerns of the police officers were sincere was not called as a witness. The procedure which Mr Beaney embarked on had been poisoned by the behaviour of Mr Laird who had been caught out in a lie in the witness box by denying that the journey to the North Coast had taken place and was forced to admit that it had taken place.

The tribunal should have investigated how preliminary inquiries about the complaints were investigated by Chief Superintendent Lamont, Superintendent Macauley and Superintendent Matchett. None of these gave evidence to the tribunal. Nor did Superintendent Kane who kept the

complainants informed of the delays in the investigation but kept the appellants in the dark. None of the complainants gave evidence.

In regard to the first question for the opinion of the court, the tribunal interpreted the case wrongly as being against the Chief Constable whereas the appellants' case was that the two sergeants and Mr Laird for no good reason complained and instigated the initiation of the investigations. If there was no procedure for sifting complaints before the appointment of an investigating officer, there was a procedure for ill-founded complaints under Section 4.18 of the Formal Investigation Procedure. I have set out earlier paragraphs of the Section at paragraph [5].

The issue of complaints was within the ambit of the inquiry; Ms Carmichael's complaint was wider than that of Mr McMichael and it should have investigated her complaint about the genuineness of Mr Laird and the two sergeants. It was open to it to find victimisation by Mr Laird, for example. The complaint forms signalled an attack on the formal procedure of investigation.

To establish less favourable treatment by reason of having committed a `protected act' the appellants proposed to show that there were no reasonable grounds for the complaints made against them and that in the case of Superintendent Laird they were made in bad faith.

This court was told that the purpose of calling Ms Connolly was to explain the purposes for which Mr McMichael's instructions were taken in respect of Superintendent Laird's movements. It was contended that her notes of cross-examination would have undermined the basis of his complaint and shown that his allegation that the information had been irrelevant was untrue. Ms Connolly also proposed, it was stated, to give evidence about the telephone numbers of Sergeants Wilson and Shirlow and the home address of one of them for delivery at short notice of a Tribunal Witness Summons, so as to show the absence of any reasonable basis for believing that this had gone into the `public domain'.

It was argued that the ruling of the tribunal shifted the focus of its inquiry away from the substance of the appellant's complaints to an examination of Mr Beaney's decisions and enabled the respondent to avoid calling the complainants and persons such as Superintendent Matchett and Superintendent Kane. The tribunal was wrong in law in confining the appellant's complaints to Mr Beaney's conduct.

In any event Mr Beaney's conduct of the investigation should not have been exonerated. There was no inquiry or no adequate inquiry. The second question was tied in with the first question. As to the third question, paragraph 11 of the decision of the tribunal was an aberration and the attempt

to mend the position in the case stated was unsuccessful. Reliance was placed on passages from the judgment of Sedley LJ in Anya v University of Oxford and Another [2001] IRLR 377, Shamoon v Chief Constable of the RUC [2003] UKHL 11 in which Lord Nicholls said that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identity of the appropriate comparator by concentrating primarily on why the claimant was treated as she was", and Chief Constable of the West Yorkshire Police v Khan [2001] 1 WLR 1947.

The fourth question had to be answered in favour of the appellants. The detriment included the fact that the disciplinary case was left hanging over their heads with the attendant stress. There was no response to their solicitor's letter of 13 February 2001. Mr McMichael was never told that the case against him was over. There was a letter to his solicitor on 16 July 2001. Ms Carmichael was left in the dark. The tribunal should have decided whether there was detriment and measured it.

The fifth question should be answered in favour of the appellants as the tribunal had looked only at the case against Mr Beaney.

The Arguments on behalf of the Respondent

[13] Mr McCloskey QC reminded the court, first of all, of what Sedley LJ had said in Anya's case at paragraph [26]:

> "The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision."

He relied on the Edwards v Bairstow test in regard to the ruling of the tribunal on the first day of the hearing and in respect of the three incidents cited in the forms 17/3 where it was alleged that the appellants had been responsible for disclosures which might compromise the personal security of other members of the Police Service.

There was a critical distinction to be made between the case actually presented to the tribunal and a case that theoretically could have been made but was not made. A number of arguments advanced to this court had not been advanced to the tribunal on the First Question.

The tribunal was only obliged to investigate the case made to it. It was not for the tribunal to investigate the genuineness of the three complainants. The complaints had been received, processed and assessed by Superintendent Matchett who had passed on his findings and recommendations to Mr

Beaney. It was outwith the mandate of the tribunal to investigate how he had made his assessment. Mr Beaney had decided to refer the complaints to an investigating officer whose duty it was to investigate the events which led to the complaints. The evidence proposed to be introduced on behalf of the second appellant was evidence about the merits or otherwise of Superintendent Laird's complaint. That was a matter for investigation by the investigator to be appointed for the purpose of the complaints procedure under Regulation 5 of the 1988 Regulations. The tribunal was entirely correct in making the ruling which it did. To have ruled otherwise would have trespassed well beyond what should properly be investigated by it.

A proper interpretation of the complaints of both appellants was that they were complaining of the service of Forms 17/3. These followed the initiation of the disciplinary investigation by Mr Beaney on behalf of the Chief Constable. The complaints by Mr Laird and the two sergeants preceded the decision of Mr Beaney.

The argument on behalf of the appellants was that industrial tribunals should be encouraged to look at the real complaints rather than the words of complaint. It was never alleged that Mr Laird was a discriminator until the hearing. The original case was that the person who decided to institute the formal investigation was the discriminator. His decision was dictated by the wording of Regulation 5. The answers given on behalf of Mr McMichael to the respondent's Notice of Particulars were relevant. He was asked to name the persons who discriminated against him and replied that all the persons involved in the delay in dealing with the complaint against him were the person who discriminated against him.

The central reasoning of the tribunal was that the allegations made by the three police officers were all potentially serious breaches of security. It was not possible to use an informal procedure against the appellants, having regard to the wording of Regulation 5. The respondent, through Mr Beaney, had to set up a formal procedure to investigate the events which led to the complaints. There was no provision under the 1988 Regulations for a preliminary investigation of complaints before a formal investigation was commenced. The appointment of an Assistant Chief Constable as investigating officer was appropriate, having regard to the rank of Ms Cartwright as a Chief Inspector.

The procedure was delayed due to a series of factors including the reduction in size of the police force at the time, the deployment of officers to Kosovo and the potential conflict of interests between a particular ACC and the first appellant. The reasons for the delay did not amount to victimisation.

The interview which Ms Cartwright had with Assistant Chief Constable White in June 2001 gave her an opportunity to make allegations against Mr Laird and the two sergeants but she did not do so.

The tribunal was satisfied that anyone in the Police Service who gave information to a third party which could compromise the personal security of another officer was liable to have a disciplinary investigation into this potential breach of security. There was no evidence of detriment to either of the appellants.

Mr McCloskey submitted that the answers to the questions raised in the case stated were:

1. The evidence proposed to be introduced on behalf of the second appellant was evidence about the merits or otherwise of Superintendent Laird's complaint but that was a matter for the investigating officer, not for the tribunal.

2. The Chief Constable, through Mr Beaney, had to initiate a formal procedure to deal with "potentially serious allegations". An informal process could not be seen as suitable to deal with such allegations.

3. The appellants failed to prove that they were less favourably treated than other members of the Police Service: see West Yorkshire Police v Khan [2001] ICR 1066 at paragraph 27, per Lord Nicholls in which he stated that "the statute is to be regarded as calling for a simple comparison between the complainant who has done a protected act and the treatment which was or would be afforded to other employees who have not done the protected act". Question 3 did not arise, therefore.

4. The respondent discharged the burden of proving that he did not commit or could not be treated as having committed the unlawful acts alleged. There was no evidence of detriment.

5. The decision of the tribunal was within the boundaries of a reasonable decision. Three was no error of law or fact.

Conclusions

[14] An industrial tribunal should seek to avoid formality in its proceedings and is not bound by any statutory provision or rule of law relating to the admissibility of evidence in proceedings before courts of law. Tribunals should make such enquiries of persons appearing before them and witnesses as they consider appropriate and should otherwise conduct their hearings as they consider most appropriate for the clarification of the issues before them and generally to the just handling of the proceedings: see Rule 11 of Schedule

1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2004.

Secondly, an industrial tribunal has no jurisdiction to consider and rule upon other acts of discrimination not included in the complaints in the Originating Summons: see Sedley LJ in Anya in which he cited the unreported judgment of Mummery J in Qureshi v Victoria University of Manchester (EAT 21 June 1996) at some length. In turn Mummery J relied on Chapman v Simon [1994] IRLR 273 for this basic proposition.

[15] I have already set out in full what the first appellant stated in her originating summons: see paragraph [2](10). For present purposes I repeat the last paragraph:

> "I consider that each of the matters complained of was dealt with perfectly properly in the context of the legal proceedings in which I was then engaged. I consider that the decision to initiate formal complaints against me on these grounds in relation to the three matters complained of amounts to unlawful discrimination by way of victimization contrary to the Sex Discrimination (NI) Order 1976."

It is unnecessary to set out again Article 6(1) of the 1976 Order which I have set out at paragraph [3]. Ms Cartwright's complaint was directed primarily against the decision to initiate formal complaints. The person who made that decision was ACC Beaney, the Head of Complaints and Discipline. But it could properly be argued that those who advised him to made that decision were also alleged to have discriminated against her. By virtue of Article 42(1) the Chief Constable is to be treated as having done what Mr Beaney did. But the industrial tribunal could properly conclude that the complaint was also made against Superintendent Laird, Sergeant Wilson and Sergeant Shirlow.

Doubtless, Ms Cartwright felt aggrieved that a disciplinary investigation was initiated against her, arising out of complaints of discrimination which she had started in 1998. The industrial tribunal hearing those first complaints had not yet reached its decision on 19 May 2000 when she received Form 17/3. She must have felt that she was being `picked on' for having the temerity to bring a case of sex discrimination. She may well have intended to make the case from the outset that Mr Laird was victimising her but she did not say so specifically in her application. When she was eventually interviewed by ACC White more than a year later her typed statement sought to justify the contention in her complaint that her proceedings before the first tribunal were conducted perfectly properly. The taped interview which was conducted under caution, as prescribed by the

guidelines laid down by the Northern Ireland Office, appeared to follow the same pattern.

In the interview she was non-committal about the feelings of Sergeant Wilson who received a telephone call from Ms Cartwright's solicitor. She was disputing that she "gave" or "handed" to her solicitor that telephone number. She had told her solicitor what the telephone number was. She stated that she could understand how Sergeant Shirlow felt about receiving a hand-delivered document at her home which originated from the solicitor. But she sought to justify the fact that the sergeant's home address had been disclosed. She felt that she was entitled to disclose it. She did allege in her typed statement that no document was produced to Superintendent Laird in cross-examination at the first tribunal and stated that no application or suggestion was made that any aspect of the proceedings had compromised him. She did say in the course of interview that she was not told of any personal details about Mr Laird by Mr McMichael and did not pass on any personal details about Mr Laird to her legal advisers. She was asked to account for the fact that counsel representing her became aware of such sensitive information in respect of Mr Laird. She said:

> "That is a matter for my counsel. The meetings that she had with witnesses, I was not privy to any of it."

Her statement was open to the interpretation that she was alleging that Mr Laird made his complaint about her the next day without justification. The matter was not pursued by the investigating officer and he did not ask her to waive privilege so that he could interview Ms Connolly and check whether she had furnished Ms Connolly with the information about Mr Laird of which he complained. At this stage there had been no interview with Mr McMichael whose investigation had been abandoned. It was now June 2001. ACC White did not give evidence to the tribunal.

[16] I have already set out in full what the second appellant stated in his Originating summons: see [2](12). He complained that the decision to serve him with a Form 17/3 amounted to victimisation because he gave evidence against a superior officer in connection with a sex discrimination case against the Chief Constable. Again it is unnecessary to set out Article 6(1) of the 1976 Order. Having read the judgments of the other members of the court in draft, I am not prepared to hold that an industrial tribunal, properly directing itself, was entitled to conclude that the only person against whom the discrimination was alleged was Mr Beaney.

Mr McMichael was never interviewed about this although the form was served on 19 March 2000 and he remained in the Police Service until 20 April 2001. I shall deal with the delay in interviewing Ms Cartwright and the

failure to interview Mr McMichael later. But I must now consider what happened at the hearing of the tribunal.

[17] At some stage before the hearing of the tribunal commenced on 20 September 2004 the appellants decided to claim that they had been victimised by Superintendent Laird, who had a motive for victimising them, and by Sergeants Wilson and Shirlow who, prima facie, had no such motive. As a result Mr McArdle made the application set out at paragraph [6] of this judgment. The court was told by Mr O'Hara QC on instructions that the appellants intended to make the case from the outset that because of the evidence they had given against Mr Laird in the first proceedings he had retaliated by making a complaint against them on trumped-up grounds and had triggered or instigated the disciplinary investigation. Having regard to the views of the other members of the court I am prepared to hold and do hold that allegations against Mr Laird, Sergeants Shirlow and Wilson were implicitly contained in the appellants' original claims.

[18] The gist of the ruling of the tribunal is set out at paragraph [8]. It was made in respect of the application of Mr McMichael during the opening submission by counsel for him. In the case stated the tribunal treated the opening submission as made on behalf of both appellants. Counsel informed the tribunal that he was going to call evidence through Ms Connolly, the solicitor for the appellants, about her notes of the first tribunal's proceedings and in particular her notes of cross-examination of Superintendent Laird. Mr O'Hara QC on instructions told this court that the purpose of calling Ms Connolly was to explain the purposes for which Mr McMichael's instructions were taken in respect of Superintendent Laird's movements. He contended that her notes of cross-examination would have undermined the basis of Mr Laird's complaint and shown that his allegation that the information about his previous activities in the RUC, his home address, his membership of a golf club and his ownership of a caravan on the north coast had been irrelevant was untrue. Ms Connolly, the court was told, also proposed to give evidence about telephone numbers for Sergeants Wilson and Shirlow and the home address of one of them for delivery at short notice of a tribunal witness summons, so as to show the absence of any reasonable basis for believing that this had gone into the `public domain'.

I have no reason to suppose that Ms Connolly would not have given this additional information. I am satisfied that her evidence was admissible to the extent indicated by the other members of the court.

[19] As is apparent from its decision, the Tribunal erred in confining its investigation into the conduct of Mr Beaney. All those police officers who were involved in the investigation of the complaints and were responsible for the delays were potentially liable to scrutiny and Ms Connolly's evidence was relevant in determining whether the appellants were treated less favourably

than other police officers would have been in the same circumstances and whether their protected acts had a significant effect on their treatment.

[20] Accordingly I answer the first question 'Yes'. The tribunal erred in law in excluding the evidence of Ms Rosemary Connolly, as distinct from her notes of the previous hearing.

[21] Regulation 5 of the 1988 Regulations is set out at paragraph [4] and it is unnecessary to set it out again. The reports of Sergeants Wilson and Shirlow and the allegations of Mr Laird which were formally made in writing and received by Mr Beaney made it appear that offences may have been committed by the appellants. Unless he decided that no disciplinary proceedings need be taken, the matters had to be referred to an investigating officer, who had to ensure that they were investigated. In my view Mr Beaney was entitled to decide that disciplinary proceedings should be taken. There was no provision in the Regulations which required or enabled him to carry out a preliminary inquiry into the merits of complaints. Accordingly in answer to Question 2 I am of opinion that the tribunal did not err in law in so far as it held that the respondent was entitled to initiate a formal procedure to start an investigation of the events leading up to the complaints of Mr Laird and the two sergeants without hearing evidence to test the credibility of any of their complaints. Accordingly I agree with my colleagues that the second question should be answered 'No'.

[22] Paragraphs 8 to 12 of the case stated and the last three questions raised for the opinion of the Court of Appeal relate to the carrying out of the investigation initiated by Mr Beaney. In effect the tribunal exonerated him and held that there was no need to examine the conduct of his subordinates or colleagues. In my view they plainly erred in doing so as they appear to have assumed that they could treat Mr Beaney as though he was the Chief Constable and ignored the effect of Article 42(1).

They accepted that there were other cases in which there were excessive delays and referred to the evidence that the police force was under severe pressure at this time because of a large reduction in numbers. They appear to have ignored the fact that ACC Albiston was appointed as investigating officer on 7 May 2000, had a Superintendent to assist him, that the complaints which he had to investigate had been furnished by 7 March 2000, that Ms Cartwright was available for interview as from early June 2000, that Mr McMichael was available for interview from the end of May 2000, that neither ACC Albiston who remained as investigating officer until early January 2001 nor his Superintendent were called to give evidence, that Ms Cartwright was not interviewed until June 2001, that Assistant Chief Constable White who interviewed her did not give evidence and that Mr McMichael was never interviewed. They made no finding as to why Ms Cartwright was not interviewed until more than a year after a formal

complaint (Form 17/3) had been served on her nor as to why Mr McMichael was not interviewed other than to note that he left the police force in April 2001, almost a year after a formal complaint had been served on him.

They heard evidence from Mr Beaney about delays in the completion of other disciplinary investigations. But they made no finding that in any of these cases the member against whom a complaint had been made had not been interviewed as quickly as was practicable. There was no evidence that the investigation was unavoidably protracted for reasons beyond the control of ACC Albiston.

If Ms Cartwright and Mr McMichael had been interviewed within three months of 19 May 2000, the investigating officer might well have decided firstly, that Ms Cartwright was denying that she had made any disclosure of personal information about Mr Laird, secondly, by interviewing Ms Connolly with the permission of Ms Cartwright, that the latter had not passed on information about personal details relating to Mr Laird as alleged by him. It might well have been discovered from Mr McMichael that he did not give evidence about personal details relating to Mr Laird and only gave information to counsel for Ms Cartwright at the request of counsel and that he had no control over the manner in which that information would be used, that he was told that Mr Laird had denied that the journey had taken place about which Mr McMichael had given evidence at the first tribunal and that the information which Mr McMichael provided was to be used by counsel to jog Mr Laird's memory. It might well have been discovered that Mr McMichael's case from the outset was that Mr Laird had made a complaint against him in order to repay him for giving evidence on behalf of Ms Cartwright. An interview with Ms Connolly might have led an investigating officer to conclude that the case being made by the appellant was that Mr Laird was caught out lying about the journey on 6 March 2000 and that out of spite he made the complaints against Ms Cartwright and Mr McMichael the following day.

Mr McCloskey for the respondent submitted to this court that the evidence proposed to be introduced on behalf of Mr McMichael to the tribunal was evidence about the merits or otherwise of Superintendent Laird's complaint and that this was a matter for investigation by the investigating officer. No adequate or any explanation for the failure of ACC Albiston to do so over a period of six months was given to the tribunal.

The tribunal appears to have overlooked the failure of Mr Beaney to oversee the investigation in accordance with Section 4.9 of the Northern Ireland Office Guidance to the Chief Constable. That he had no personal motive to discriminate against the appellants appears to have been foremost in the reasoning of the tribunal.

There was evidence available to the tribunal that the investigation of the formal complaints against the appellants was mishandled. Mr Laird was never questioned about the matters mentioned by Ms Cartwright in her statement and which would have been raised very much earlier by her if the investigation had been dealt with promptly, namely, that no document was produced to him, that neither he nor counsel for the Chief Constable took exception to his cross-examination at the time, that no steps were taken to ensure that any answers which he gave at the hearing before the first tribunal were restricted or expunged from the record of the hearing and that he did not object to answering any questions or his objections were overruled by the tribunal. This might have cast a serious shadow on his allegation that counsel for Ms Cartwright admitted that her questions were irrelevant to the matters in hand. This in turn might have led the investigating officer to report that the complaint by Mr Laird had been influenced by the bringing of complaints against him by Ms Cartwright and by the giving of evidence by a constable against a superintendent.

[23] In Nagarajan v London Regional Transport [1999] IRLR 572 Lord Nicholls who was considering provisions of the Race Relations Act 1976 said at paragraph 23:

> "… on a complaint against an employer under Section 4(1)(a) it matters not that different employees were involved at different stages, one employee acting in a racially discriminatory or victimising fashion and the other not. The acts of both are treated as done by the respondent employer. So if the employee who operated the employer's interviewing arrangements did so in a discriminatory manner, either racially or by way of victimisation, section 4(1)(a) is satisfied even though the employee who set up the arrangements acted in a wholly non-discriminatory fashion."

At paragraph 7 of the case stated the tribunal stated that it did not find evidence to show that Mr Beaney had been motivated to victimise the appellants in any way whatsoever. At paragraph 12 of its decision it stated that any motive of victimisation must fall on the desk of Mr Beaney. As a result it did not examine how the investigation of the appellants' complaints was conducted.

If ACC Albiston had conducted his investigation in accordance with the Guidance given by NIO he would have found, as ACC White reported in June 2001 that there was no evidence that Ms Cartwright had given any information about matters personal to Mr Laird. ACC White recommended that no disciplinary action should be taken against Ms Cartwright in respect

of improper disclosure of information alleged by Superintendent Laird and this appears to have been adopted by Mr Beaney. This did not prevent Superintendent Kane from writing to Mr Laird to inform him that Mr Beaney had directed that she should be the subject of informal discipline. This was seriously misleading as this direction was only given in respect of the complaints of Sergeant Wilson and Sergeant Shirlow and, if she had any chances of promotion, damaged them. The tribunal appears to have made the same misleading statement by its finding at paragraph 10 of the case stated that her disciplinary investigation was finally concluded in July 2001 with an informal warning being given.

The tribunal did not refer to the letter from Ms Connolly to the Chief Constable dated 13 February 2001 complaining that the investigation against Ms Cartwright had not yet commenced, that no explanation of any kind had been given to her client as to why this should be so and it followed that there was no prospect whatever of this investigation being completed "as quickly as may be practicable". It was stated in the letter that the matter was of the gravest possible concern to her client who had been absent from work through ill health as a direct consequence of the initiation of the investigation process. His attention was drawn to his obligations under Section 4.9 of the NIO Guidance. This was followed up by a similar letter in May 2001. Letters were also written on behalf of Mr McMichael who was still in the police force in February 2001 and had only just retired in May 2001. Apologies for the delay were sent by the Deputy Chief Constable on 25 July 2001.

The tribunal was entitled to accept Mr Beaney's explanations of the delays in so far as they related to the appointment of five investigating officers but it effectively disbarred itself from investigating the activities or lack of activity of other officers than Mr Beaney. He appears to have offered no explanation for his own inactivity notwithstanding his obligations under Section 4 of the NIO Guidance.

The tribunal appears to have become confused about the appropriate comparators with the appellants. At paragraph 11 of its decision it stated that it did not find that the appellants could compare themselves with Sergeant Wilson and Shirlow or Superintendent Laird. It was common ground that this was an aberration. In the case stated the tribunal stated that the comparison was with persons in the police force who had not done a protected act. At paragraph 27 of Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 Lord Nicholls said:

> "The statute is to be regarded as calling for a single comparison between the treatment afforded to the complainant who has done a protected act and the treatment which was or would be afforded to

> other employees who have not done the protected act."

In Shamoon Lord Nicholls said at paragraphs 7 and 8:

> "… in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator … and then, secondly, whether the less favourable treatment was on the relevant proscribed ground … Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
>
> No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

This led him to suggest that tribunals may be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was.

[24] I consider there is a strong case that the appellants were treated less favourably by being kept in the dark about the progress of the investigation, meagre though the information was, which was sent to the complainants. I consider that it was open to the tribunal to find that as a result the appellants suffered detriment. The respondent did not call evidence on this issue.

[25] I do not propose to answer questions 3, 4 or 5. I would quash the decision of the tribunal and remit to a freshly constituted tribunal the question whether the appellants were victimised by Mr Beaney and the officers responsible for conducting the investigation, including ACC Albiston and Superintendent Kane. If they were treated less favourably than the appropriate comparators would have been treated, has the employer discharged the onus of showing that this was not done by reason that the

appellants did any of the `protected acts'? If appropriate, the tribunal would then go on to consider the issue of detriment.

[26] As the tribunal confined its investigation to the conduct of Mr Beaney I consider that their decision should be quashed and that a re-hearing should be ordered before a fresh tribunal in accordance with the views I have expressed and the views expressed by the other members of the court.