Case No: IPT/07/18/CH; IPT/07/02/CH

INVESTIGATORY POWERS TRIBUNAL

Date: 1 December 2009

Before :

MR JUSTICE BURTON

SHERIFF PRINCIPAL JOHN McINNES QC

MR ROBERT SEABROOK QC

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Between :

(1)	**MICHAEL NEWELL**	**Complainants**
(2)	**ALASTAIR LLOYD**	
	- and -	
	THE CHIEF CONSTABLE OF THAMES VALLEY POLICE	**Respondent**

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Mr K Galvin (instructed by Reynolds Dawson Solicitors) for the **First Complainant**
Mr B Brandon (instructed by Reynolds Dawson Solicitors) for the **Second Complainant**
Mr N Davy (instructed by **Head of Legal Services, Thames Valley Police**) for the **Respondent**
Mr M Chamberlain (instructed by the Treasury Solicitor) appeared as Counsel to the **Tribunal**

Hearing dates: 12, 13 November 2009

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Approved Judgment

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MR JUSTICE BURTON

Mr Justice Burton :

1. We have heard inter partes, but in private, a preliminary issue of fact, with oral evidence called. This has been the first time that this Tribunal has taken that course, and we have been considerably assisted by Counsel. Mr Galvin and Mr Brandon respectively for the two Complainants, Mr Newell and PC Lloyd. Mr Davy for the Respondent, Thames Valley Police, and Mr Chamberlain acting as Counsel to the Tribunal.

2. It was agreed and ordered that the resolution by the Tribunal of such preliminary issue of fact was necessary and material for its subsequent decision as to whether telephone billing records were lawfully obtained by Thames Valley Police, pursuant to authorisation under the Regulation of Investigatory Powers Act 2000 ("RIPA"). It was common ground that the only basis upon which the Respondent could, and has sought to, justify the obtaining of such telephone billings (which were subsequently disclosed to the Complainants by the Respondent in the course of disciplinary proceedings) was pursuant to an authorisation justifiable by reference to s22 of RIPA, and for the purposes of this case, by reference to s22(1), 2(b) and (5) which reads, in material part, as follows:

> "*(1) This section applies where a person designated for the purposes of this Chapter believes that it is necessary on grounds falling within subsection (2) to obtain any communications data.*
>
> *(2) It is necessary on grounds falling within this subsection to obtain communications data if it is necessary—*
>
> ...
>
> *(b) for the purpose of preventing or detecting crime or of preventing disorder;*
>
> ...
>
> *(5) The designated person shall not grant an authorisation under subsection (3) ... unless he believes that obtaining the data in question by the conduct authorised or required by the authorisation ... is proportionate to what is sought to be achieved by so obtaining the data.*"

3. A complaint was lodged with the Respondent impugning the conduct of members of the Reading Priority Crime Team ("PCT") during the course of a search of premises on 26 March 2006. Four officers, members of the PCT, were in particular under suspicion: the first Complainant, Mr Newell, then Acting Inspector Newell; the second Complainant, PC Lloyd; and two other officers who have not played any part in this preliminary issue, the third Complainant, PC Bartlett, and a fourth officer, PC Ravenscroft, who is not a complainant in this Tribunal. On 7 April 2006, a team of investigators from the Professional Standards Department, headed up by Superintendent (then Detective Chief Inspector) Ward arrived at Reading. The first and second Complainants were suspended. The issue of fact which we have had to

resolve is whether on that day at Reading Police Station the first Complainant was instructed by DI Ward, and, in a separate room, the second Complainant by DI Howard, not to be in contact with each other or with any member of the PCT who might be a witness as to the events of 26 March.

4. The relevance of this is because the billing details subsequently obtained were obtained to discover whether there had been contact between the four officers and with other members of the PCT. The issue before us is not whether the two Complainants were in breach of a lawful order contrary to the Respondent's Code of Conduct, but whether, when applying on 27 April 2006 for a RIPA authorisation in respect of the billing details, the relevant officers applying for and granting the authorisation were entitled to take into account, if they did, that any communications between the members of the PCT since 7 April would have been carried on in breach of an instruction not to be so in contact. Our resolution of that issue would, it was common ground, then inform us in relation to our ex parte considerations with regard to the lawfulness of the grant of the RIPA authorisation.

5. We heard oral evidence from the following witnesses: the first and second Complainants, Mr Martin Elliott, PC Baker and PC Viney for the Complainants, and Superintendent Ward and DCI Howard (as they now are) for the Respondent. We also heard and considered submissions from Counsel.

6. We are satisfied, on the balance of probability, that both DI Ward and DI Howard on 7 April 2006 used words which amounted to a sufficient instruction communicated, respectively, to the first Complainant and the second Complainant, not to contact each other or the other members of the PCT, including the Third Complainant and PC Ravenscroft. Further, and in any event, we conclude that DI Ward *bona fide* and reasonably believed that each of those officers had been given such instructions. Such instruction was given to them orally. It is not in dispute that such instruction was given in writing to the third Complainant (and to PC Ravenscroft). We do not accept the denial by the First or Second Complainants that they were given such instructions.

7. We do not propose to set out in this judgment either the entirety of the evidence or of the submissions, but to indicate only those matters which we have found persuasive in arriving at these conclusions.

1. DCI Ward's contemporaneous Policy log.

8. DI Ward wrote up his Policy log on 6 April 2006, setting out in advance what he planned to do in relation to the four officers, including his plan that each of them be instructed not to make contact with witnesses or other officers under suspicion, together with his rationale for doing so: and further wrote up his log on 7 April 2006, recording the briefing he gave immediately prior to the events of that day, including his instructions to the above effect, given to the officers who would be dealing with the Second and Third Complainants and PC Ravenscroft. We are satisfied both that he had a sensible rationale for doing so, which he further explained in oral evidence, and that the log was genuine: no suggestion was made to him that it was fabricated, and we are satisfied that it was not.

2. The contemporaneous statement by DI Ward made on 7 April

9. This was a record made later on the same day of DI Ward's conversation with the First Complainant, and it records the giving of the instruction to the First Complainant, and that the Complainant responded by saying "*Are you telling me I can't speak to any Police officers?*", to which DI Ward records his reply as being "*No, you are not allowed to speak to any officers who were present at that search*", followed by the recorded reaction of the First Complainant "*Good, because my wife's in the job*", which DI Ward said that he knew. Again no suggestion was made to DI Ward that this statement, made so soon after the event, was fabricated, and we are satisfied that it was not.

3. DI Howard's contemporaneous note of his conversation with the Second Complainant

10. The existence of this document was referred to by officers in the 21 August 2006 interview with the Second Complainant, as being the basis upon which DI Howard had made his statement of 18 August 2006. The original pocket book was only produced shortly before this hearing. It confirmed DI Howard's account that he had given the relevant instruction to the Second Complainant. It was put to DCI Howard in cross-examination of him by Counsel on behalf of the Second Complainant that, when he wrote up the note of the meeting in his pocket book, he included in it something that had not happened. At that stage, on 7 April, there would have been no cause for him to do so, and we are satisfied that his note and his subsequent statement based upon it are an accurate record.

4. The instructions given to the Third Complainant and PC Ravenscroft

11. It is not in issue that the Third Complainant and PC Ravenscroft were given instructions to the same effect on that same day, but at Langley Police Station, and in writing, as DI Howard explained, at the suggestion of another officer, DI Williams. We consider that it is most unlikely that the 'lesser' suspects would be given such instructions (in the case of PC Ravenscroft given by DI Howard himself), and yet not the head of the "*close-knit*" PCT, the First Complainant, or the Second Complainant.

5. Mr Elliott's evidence

12. We accept that Mr Elliott, then Inspector Elliott, was present in the room with DI Ward and the First Complainant, but possibly not for all of the relevant conversation. Inspector Elliott, however, confirmed that DI Ward said to the First Complainant that he "*should not*" speak to those on the PCT. Inspector Elliott may, because of his own apparent preconceptions about "lawful orders" (to which we will return), now characterise that as "*advice*", but that does not detract from its being a sufficient instruction, even in those terms. As to such preconceptions, Inspector Elliott said that he would have objected to or challenged a "*lawful order*" if one had been given to the same effect as the instruction/advice, which was in fact, on his own evidence, given. We are not persuaded by this. His explanation, that contact between suspended police officers is simply a matter for their respective solicitors, rather than, as we are satisfied, a potential matter for the police force itself, is unconvincing, and

i) he agreed in evidence that an order not to be in contact with other officers can be given, and indeed was given, without objection by the Police Federation representatives, to the Third Complainant and to PC Ravenscroft.

ii) his colleague from the Police Federation, PC Viney, who later was responsible for giving advice and support to the Second Complainant, gave evidence that, in his view, non-contact by a suspended officer with fellow suspect officers is sensible, necessary and normal.

Further this is the advice which Inspector Elliott says he himself gave to the First Complainant, although the First Complainant denied that in evidence.

13. The First Complainant was, in our judgment, wholly unimpressive in how he dealt with Inspector Elliott's own evidence that DI Ward did give to the First Complainant the advice/instruction that he *should not* contact the PCT. He did not mention it at all in his statement produced for the hearing, and then, in oral evidence, while accepting that "*advice*" about not contacting members of the PCT was given by DI Ward on 7 April, he said that he rejected such advice, asserting that DI Ward gave such "*advice*" to Inspector Elliott but "*he did not give it to me, did he?*"

14. Even if what was said by DI Ward to the First Complainant and/or Inspector Elliott did not amount to a "*lawful order*" (and we note the conclusions of the Police Disciplinary Appeal Tribunal in this regard), we are satisfied that sufficient words were used by DI Ward, even on Inspector Elliott's evidence, to amount to an instruction.

6. The "*Office Do*" conversation

15. The account given orally in evidence by the First Complainant about an "*office do*" is in our judgment wholly supportive of DI Ward's account. The First Complainant's account was again not given in his statement produced for the hearing, though it was mentioned at his interview on 21 August 2006 (after he had been shown DI Ward's statement, including the passage referred to in paragraph 9 above). His account is that, after being suspended, he asked DI Ward if he could go to the office do, and, when DI Ward then responded by advising him not to go to the office do, the First Complainant then asked "*Are you saying I cannot speak to any police officers?*" (compare DI Ward's account in his statement set out above). We conclude that those words (about not speaking to any police officers), which he concedes he used, are much more likely to have been used by him in response to the giving of the instruction by DI Ward. Inspector Elliott made no mention in his evidence of any discussion about the *office do*.

7. The Second Complainant

16. Neither the Second Complainant nor PC Baker, his Police Federation representative, recollect DI Howard's instruction. PC Baker was not present throughout the discussion. However, PC Baker says that he gave to the Second Complainant advice to similar effect, which the Second Complainant says he also does not recall. Further, the Second Complainant accepts that he was given subsequently (and ignored) clear advice, indeed a clear requirement, to the same effect by PC Viney, his subsequent Federation representative. We consider it is significant that PC Viney said in evidence

that he made it a personal condition of his representing the Second Complainant that he had no contact with the other suspect officers or witnesses, and yet the Second Complainant ignored that advice, as we are satisfied he ignored similar advice from PC Baker and, as we conclude, instruction to that effect from DI Howard.

17. We do not accept that there was an "*off-tape*" conversation on 18 April, after the Second Complainant was interviewed in the presence of his solicitor, by DI Ward, when the Second Complainant said to DI Ward that the instruction not to contact other officers did not apply to contact with the First Complainant, to which the Second Complainant says that DI Ward made no response. It is, in our judgment, most unlikely that the solicitor, who does not speak of such a conversation in his own letter supplied to the Tribunal, would have participated in off-tape conversation of this type. But it is, in any event, in our judgment, wholly clear that DI Ward would never have agreed that the instruction did not apply to the First Complainant. It is apparent to us that, ever since the original "*rationale*" for such instruction, as recorded in his contemporaneous log, it was in fact contact by, and with, the First Complainant which was DI Ward's primary concern. We are accordingly satisfied that the conversation which the Second Complainant now recounts did not occur – although it is perhaps of some significance that, in giving this account, the Second Complainant characterises DI Ward as "*reminding*" him of the instruction. It was only as a result of DI Ward's conversation with Inspector Elliot on 18 April, and then with PC Viney on 19 April, that he learned, and to his considerable concern, that there had been such contact between the First and Second Complainants.

8. DI Ward's belief

18. The one thing that is, in our judgment, beyond doubt, even on the Complainants' own evidence, is that DI Ward believed throughout that he (and, on his instruction, DI Howard) had given the instruction for no contact with PCT witnesses. That DI Ward had this belief, and expressed it, inter alia, to Inspector Elliott and PC Viney, was clear both from their oral evidence and that of the First Complainant himself. Inspector Elliott in particular, in cross-examination by Mr Davy, when asked whether it was clear to him that DI Ward thought that he had given a lawful order not to contact the PCT responded "*Yes, of course he did*".

19. As we have said in paragraph 7 above, these are the matters which have influenced us in arriving at our conclusion set out above. We proceeded to consider the issue of the lawfulness of the authorisation for disclosure of billing records relating to the four officers, then suspected of misconduct in relation to the search on 26 March 2006 and of possible connivance thereafter, upon the basis that the Respondent held the belief, and reasonably did so, that the officers had been in contact with each other, and had been so in contact in breach of an instruction to the contrary.