

Neutral Citation Number: [2018] UKIPTrib IPT_17_93_H

Case No: IPT/17/93/H

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 30th April 2018

Before:

Sir Michael Burton QC (President)

Professor Graham Zellick QC

Between:

GARY DAVIES

Claimant

- and -

BRITISH TRANSPORT POLICE

Respondent

DETERMINATION AND JUDGMENT ON REMEDIES

DETERMINATION

1. This is a determination made under s.68 (4) (a) of the Regulation of Investigatory Powers Act 2000 (RIPA) in favour of the Claimant, Mr Gary Davies, in respect of a claim brought against British Transport Police (BTP) concerning a failure to obtain authorisation for directed surveillance in accordance with Part II of RIPA.
2. This summary of the Tribunal's determination is made pursuant to r. 13(2) of the Investigatory Powers Tribunal Rules 2000.
3. Mr Davies is a retired chief superintendent of another police force with an exemplary record who now works for a local authority. In short, Mr Davies was arrested following a train journey and eventually charged with five offences of sexual assault. He was acquitted on all counts by a jury in the Crown Court.
4. Mr Davies has made a number of complaints against officers of BTP but his claim in this Tribunal is confined to the failure of the police to obtain an authorisation for directed surveillance under s.28 of RIPA.
5. Mr Davies was subject to surveillance by a BTP officer on 10th May 2016 while travelling on a train. The officer decided on this course of action the previous day if Mr Davies were to appear at the railway station, which he did. The officer had arranged for a colleague to travel on the same train to assist if necessary. Mr Davies was observed throughout the journey and photographs were taken. He was publicly arrested at the close of the journey, removed from the train and interviewed.

6. The nature of the surveillance emerged during the Crown Court trial when the Claimant learnt that there was no authorisation, which accounts for the delay in initiating his claim, but it was judged equitable in those circumstances to extend the time limit to enable the case to proceed: Human Rights Act 1998, s. 7(5)(b).
7. Following Mr Davies's 14 complaints to the police, after his acquittal of all charges, a thorough internal investigation was conducted by a BTP Detective Inspector, who concluded that, as the officer's actions were pre-planned and not an immediate response, a RIPA authorisation should have been sought.
8. The Inspector's report covering all 14 complaints was submitted to the "Appropriate Authority" within BTP – a Detective Superintendent – who endorsed the view that the officer's activity fell within RIPA and should have been properly authorised.
9. This conclusion of unlawful surveillance in effect represents BTP's response to Mr Davies's claim and accordingly constitutes an admission of liability.
10. As a result of the conclusion of the Appropriate Authority, the officer in question will face disciplinary proceedings, but these have not yet taken place.
11. It is the finding of the Tribunal that on 10th May 2016 the Claimant was subject to unlawful surveillance in the absence of any authorisation, contrary to the Regulation of Investigatory Powers Act 2000, and amounting to a breach of the Claimant's Convention rights under Article 8 (Human Rights Act 1998).

JUDGMENT ON REMEDIES

12. We turn now to the question of remedies, both parties having made submissions in writing.

13. Mr Davies, the Claimant, seeks a monetary award totalling £85,694, made up as follows:

- £20,000 to cover the unlawful action itself and the non-pecuniary damaging consequences that flowed from it;
- £44,000 in respect of salary lost in consequence of not being promoted during the period he was awaiting trial; and
- £21,694 being the difference between his actual defence costs in the criminal trial of £33,150 and the £11,455.60 which he was awarded from Central Funds. (The judge will normally award reimbursement from Central Funds of the costs of a self-funding defendant who is acquitted in the Crown Court, but those costs will be taxed and reimbursement will be in line with legal aid rates, which accounts for the shortfall.)
- 14. The Respondent analyses the situation very differently. They contend that there was merely a technical breach of RIPA with no bad faith and that none of the consequences detailed by Mr Davies – which are not challenged - flow directly from the unlawful surveillance itself but rather from the entirely proper decision to charge him with several counts of sexual assault resulting in a Crown Court trial. In their view, “just satisfaction” for the breach of RIPA and invasion of privacy is adequately afforded by a declaration alone. No monetary award is either necessary or appropriate.

15. We deal first with the Respondent’s contention that this was a merely technical breach of RIPA, since it underpins much of their argument. It was merely technical, they submit, because DC Day, the investigating officer for the earlier complaint, could have obtained the requisite RIPA authorisation had he applied for it, and his failure to do so was attributable to lack of knowledge that an authorisation was necessary and not through any bad faith.

16. In support of this contention, they have provided a witness statement by Detective Superintendent Nick Sedgemore, the BTP officer who is empowered to grant authorisations for surveillance under RIPA and who would have considered DC Day's application. He has no doubt that he would have granted an authorisation on DC Day's application.

17. Superintendent Sedgemore points to the prevalence of offences of sexual assault on trains and the high importance of investigating them thoroughly and rigorously. He sets out the background facts to DC Day's decision to follow Mr Davies on the train, but omits almost everything of significance that bears on the legal justification for granting an authorisation under RIPA.

18. He does not mention that no proper statement had been taken from the complainant; that Day had only the sketchiest idea of the details of the alleged assaults; that no other enquiries of any kind had been made or even considered; that the circumstances in which the complainant had taken a photograph of Mr Davies were not fully explored, given the notorious difficulties surrounding identification evidence; that there was no urgency, given the fact that the alleged offender was asserted to be a regular commuter on that line; that the identity of the person in the photograph was not known; and perhaps most tellingly of all that DC Day himself had informed the officer investigating Mr Davies's subsequent complaints that there was "*uncertainty in relation to the dates of the incidents*" and, above all, that "*he doubted the credibility of [the complainant]*".

19. Against this factual matrix, the Tribunal is astonished that Superintendent Sedgemore would have been prepared to grant an authorisation for surveillance. The legal requirements for an authorisation do not come close to being met and it is disturbing that the senior officer entrusted with decision-making in this area has so imperfect a grasp of the relevant law.

20. The Tribunal's conclusion is that no authorisation could properly have been granted and, if one had been, it would have been unlawful.

21. As for any want of malice or bad faith on DC Day's part, we observe that, while malice or bad faith would have measurably aggravated the breach, a failure based on ignorance offers no mitigation. A detective of any standing, let alone one with several years' experience, should have knowledge of the legal requirements relating to the investigation of crime, including RIPA, and ignorance is neither excuse nor mitigation.

22. Indeed, a number of other BTP officers of various ranks were involved in this matter and not one of them had an adequate knowledge of the relevant requirements of RIPA. This emerges clearly from the thorough and rigorous investigation by Detective Inspector Ciaran Dermody of the complaints made by Mr Davies of the BTP's handling of the case against him, most of which were upheld (see further para. 42 below).

23. DI Dermody's report was submitted to Detective Superintendent Gill Murray, the Appropriate Authority, and we note the following conclusion in her Adjudication:

"I believe that DC Day's actions taken together demonstrate a serious inability and failure to perform as a Detective to a satisfactory standard. DC Day's performance through this investigation was such a serious display of inability to perform to the required standards that the only outcome available to me is that of Gross Incompetence."

24. For this, the Respondent must, of course, accept full responsibility.

25. We draw attention here to the fact that in his witness statement (referred to in paras. 16-18 above), which adopts a comfortable and convenient resumé of the Respondent's conduct, Superintendent Sedgemore makes no mention at all of the devastating criticisms and conclusions voiced in the two internal reports cited in paragraphs 22-23 above, which adds further weight to our rejection of his views.

26. For these reasons, the Tribunal rejects the argument that this was a mere technical breach. Nevertheless, such a breach does not necessarily lead to a sizeable monetary award. If there were no adverse consequences for the Claimant beyond the invasion of privacy itself, a declaration with or without a very modest financial award would normally suffice. But that is not the case here.

27. In our view, a range of consequences followed which can all be properly attributed to the unlawful surveillance. In other words, if DC Day had not followed Mr Davies on the train that day, in our view Mr Davies would not have suffered the consequences he did.

28. Without the dubious and contaminated evidence obtained from the unlawful surveillance, Mr Davies would not have been arrested in public in front of other passengers with whom he had been travelling for many years and we conclude, on the balance of probabilities, that he would not have faced any charges at all. Instead, the original complaint would have been properly investigated; Mr Davies would have been interviewed and given the opportunity to answer the allegations (which, most surprisingly, he never was); and we doubt the file would even have been submitted to the CPS or, if it was, would not have led to charges.

29. Instead, the stimulated complaints arising from the surveillance activity were judged to lend support to the original or earlier complaint and a prosecution ensued.

30. Mr Davies's treatment and suffering were then exacerbated by the release of a wholly gratuitous press release by BTP, well before the trial, trumpeting his arrest and revealing his name and the street in which he lived.

31. We understand that the BTP do not routinely issue a press release when a suspect is charged. Mr Davies argues that it served no practical purpose: there was no call for witnesses or solicitation of other possible victims. BTP claim that it was designed to protect the public against a possible sex offender in their midst. They claim that they gave careful thought to the physical risks this posed to Mr Davies and his family, but apparently none to the reputation of a man at this stage still innocent in the eyes of the law. We are unpersuaded that, given the nature of these charges, the protection of the public or the public interest called for such a press release, but in any event, it aroused considerable press interest (much of it of a lurid kind) and gave rise to considerable distress to Mr Davies and his family and damage to his reputation and standing in the community.

32. The Claimant is a man with an exemplary record and of unimpeachable character. He had been a Chief Superintendent in another police force and holds a senior and responsible post with a local authority. The charges led to his being required to work at home for 9 months and to his resignation as a chairman of a charitable trust and as a trustee of another charity. The allegations seriously impacted on his relationships with others. He further claims that the 9-month interruption to his normal work almost certainly resulted in loss of promotion and of considerable additional income.

33. It is not for us to express a view on whether the press release was in itself actionable, whether at common law or under the Human Rights Act, but we are bound to view it in the context of the breach of Art. 8 as action taken by the Respondent which aggravated the original invasion of

privacy. In other words, without the unlawful surveillance, there would in our judgment have been no prosecution and no press release.

34. The Respondent points to the fact that the evidence resulting from the surveillance was not excluded by the trial judge. We attach no significance to that. Mr Davies's counsel made no application to have the evidence ruled inadmissible. This was a perfectly proper defence tactic. In any event, unlawfully obtained evidence is generally admissible in English criminal proceedings, as Mr Davies's counsel would have known.

35. Nor do we attach any significance to the fact that the trial judge left all counts to the jury. So far as we are aware, there was no application at the close of the Crown's case to withdraw the case from the jury and direct an acquittal; and even if there had been, we are aware that judges are reluctant to exercise that discretion, especially in cases of sexual assault.

36. Mr Davies was acquitted by the jury on all counts.

37. The Tribunal concludes that this was very far from being a mere technical breach of RIPA. It was a breach founded on ignorance that led to extremely severe and damaging consequences to the Claimant. The invasion of the Claimant's right to privacy on the train by the BTP was exacerbated by his arrest in full view of fellow commuters; the prosecution and trial that in our judgment would in all probability not have taken place; the issue of a wholly unnecessary press release; the inexcusable ignorance of all the investigating officers of the requirements of RIPA; the attempt to make light of the breach by Superintendent Sedgemoor; the absence of any evidence that efforts are being made to make good the widespread ignorance of BTP officers of the relevant law; and the absence of any apology or offer of amends.

38. Accordingly, we reject the suggestion that just satisfaction requires no more than a declaration of unlawful surveillance.

39. We do of course make that declaration, but we are satisfied that this is a case where it is also necessary to award compensation under section 67(7) of RIPA and in accordance with section 8 of the HRA.

40. We therefore make an award of £25,000 to reflect the gravity of the breach and the damage suffered by the Claimant and a further award of £21,694 in respect of the Claimant's defence costs, making a total of £46,694. We make no further or separate award in respect of the possible loss of income resulting from a missed promotion. Although the Claimant presented some evidence in support of the claim, we regard it as too speculative and remote to constitute a separate head of damage, but it has influenced our assessment under the first head. We observe that the damage to his reputation and career prospects has been mitigated by his acquittal and, we hope, this Judgment.

41. The basic award of £25,000 is in line with the modest level of awards in cases under the Human Rights Act and with the jurisprudence of the European Court of Human Rights as well as the practice of this Tribunal. Indeed, the award may be said to be on the high side for breaches of Art 8 and that is to reflect our view of the serious failings of the BTP. It is also £5,000 more than sought by the Claimant under this head.

42. This case has revealed a disturbing lack of familiarity with the relevant requirements of RIPA by almost every officer who was involved. This was the conclusion of DI Dermody in his Investigator's Report:

“ . . . one of the most worrying aspects of this case was the fact that the connotations of the RIPA issue were missed by all ranks from Constable to Chief Inspector. The Investigator suggests that he should speak with the sector commander for this policing area and discuss the issues established within this report and recommends that the BTP CAB expert give a specific briefing.

The Investigator will also be reporting the breach to the Surveillance Commission, for their consideration.”

43. The Respondent has told us nothing further about this in their submissions on remedies and we have no reason to suppose that additional training is being or has been provided. Moreover, we cannot but question whether this lack of legal understanding is confined to this one area of the BTP. We shall be sending this judgment, too, to the Investigatory Powers Commissioner, and we urge the Chief Constable of the BTP to ensure that urgent consideration is given to the need for intensive training on the relevant aspects of RIPA throughout the force. This is doubtless something the Commissioner will be monitoring.

44. Finally, we commend Mr. Davies for his written submissions. He was not legally represented in these proceedings and his submissions were lucid, cogent and balanced.
