



EMPLOYMENT TRIBUNALS

Claimant: Rebekah Newman

Respondent: (1) The Chief Constable of Sussex Police
(2) The Home Office
(3) The Commissioner of Police of the Metropolis
(4) Brendan Gilmour

Heard at: London South via CVP **On: 16 and 17 June 2022**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Crammond, Counsel

For the first respondent: Mr Dracass, Counsel

For the second respondent: Ms Ling, Counsel

For the third and fourth respondent: Ms Lorainne, Counsel

JUDGMENT ON APPLICATIONS UNDER RULE 37 WITH REASONS

Decision

The applications of the first and third respondents that the Tribunal has no jurisdiction to hear the claims against them and/or that the claimant's claims have no reasonable prospect of success in relation to them is not well founded and fails.

However, the claims against the first and third respondent are significantly curtailed and are the subject of separate Case Management Orders.

Reasons

1. This was an Open Preliminary Hearing to determine applications, substantively from the first respondent ('R1') and the third respondent ('R3') that the Tribunal did not have jurisdiction to hear the claims against them; In R1's case alternative applications were made that it could not be vicariously liable for the alleged discrimination/detriment of the fourth respondent ('R4'). In the further

alternative, that none of the alleged protected acts or protected disclosure detriments were made to R1 and it did not have any knowledge of them.

2. If the Tribunal was not with R1 on the strike out applications, to Order the claimant to pay a deposit as a condition of continuing with the claim.
3. All parties were represented. The claimant by Mr Crammond, Counsel, R1 by Mr Dracass, Counsel, the second respondent ('R2') by Ms Ling, Counsel and R3 and R4 by Ms Lorainne, Counsel.
4. Following the Tribunal undertaking its reading, the parties were informed of some provisional observations and submissions were invited on the following matters in addition to any matters the parties wished to address the Tribunal on themselves. These were:
 - The interaction of S.97 of the Police Act 1996 ('PA') and S.42 & S.43 of the Equality Act 2010 ('EqA'), noting that the claimant says S.43 does not refer to PA as one of the 'relevant acts' (paragraph 31 (g) of the claimant's skeleton argument).
 - Which claims was the claimant specifically asserting against R1 and R3, by reference to the particulars of claim on a causal basis
 - Whether the claimant denied the assertion of a lack of knowledge of the nature of the complaints/concerns as set out in paragraph 8 of R1's GOR and whether the '**Jhuti**' (from **Royal Mail Group Ltd v Jhuti 2019 UKSC 55**) principle which appears to be referenced in paragraph 33 (e) of the claimant's skeleton argument, regarding the 'hidden reason', could apply regarding knowledge between 2 respondents
 - Whether it was appropriate for the Tribunal to determine the applications in this window in circumstances where it was being said that the claims against the respective parties were not clear
5. The Tribunal had a Preliminary Hearing Bundle running to 154 pages; a separate Bundle containing the respective applications running to 8 pages; skeleton arguments from all counsel. Each counsel was given an opportunity to supplement their written skeleton arguments in oral submissions.

Relevant and proportionate findings of fact

6. The following findings of fact were reached by the Tribunal, on a balance of probabilities, relevant to the applications before the Tribunal and those necessary for the Tribunal to determine. It has not been necessary, and neither

would it be proportionate, to determine other substantive issues in dispute which are reserved for the final Hearing. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was a document the Tribunal was directed to read or was taken to.

7. The claimant was seconded to work as a Police Advisor for R2 from R1 at the rank of Chief Inspector from October 2014 or 2015. There was a copy of the secondment agreement in the bundle signed on behalf of R1 which was dated 2 October 2014 (page 141). It was not possible or necessary to resolve the start date of the period of the secondment today. It was agreed that it was extended and prevailed during the period of the allegations which pre-dated 7 April 2021 and was due to expire on 6 July 2021.
8. It was not asserted by any party that there was an agency relationship between R1 and R2.
9. The claimant's secondment terminated early on 7 April 2021. This was not disputed.
10. It was not possible for the Tribunal at this Hearing, in the absence of disclosure and evidence to determine the reason why the claimant's secondment terminated early and who caused that to happen, save to say that in the context of the claimant's allegations leading up to that point, the claimant was asserting that this was an act of discrimination (victimisation and/or harassment) and/or protected disclosure detriment.
11. It was also not possible to determine at this Hearing without evidence, whether or not the nature of claimant's concerns and allegations had been made known to R1 at a meeting on 12 April 2021. R1's version of events was disputed by the claimant.
12. R4 was an employee of R3 but who had also been seconded to work for R2 from October 2018 onwards and subsequently became her line manager and thus was working for R2 during the period of the allegations of discrimination/detriment are alleged to have taken place.
13. There was no asserted connection between R1 and R4.
14. By a claim form presented on 6 July 2021, the claimant brought claims against R1, R2, R3 and R4 for harassment and victimisation under S. 26 & 27 EqA and protected disclosure detriment under S.47B Employment Rights Act 1996 ('ERA').
15. The date span of the claimant's allegations was between 19 February 2021 to 4 June 2021. The allegations which post-dated 7 April 2021 were limited in

nature. At the date of presentation of the claim form however, there remained an outstanding investigation in to alleged misconduct of the claimant.

16. A means enquiry of the claimant was undertaken as a result of which the Tribunal was informed that the claimant currently had net take home pay of £6666.66 per month with total monthly outgoings of £4583, thus leaving her with monthly disposable income in excess of £2000.

Applicable Law

17. The Tribunal was referred to the provisions of S.97 (1), (3) and (9) of the PA by R1 and R3. These say:

S.97 - Police officers engaged on service outside their force.

(1) For the purposes of this section “relevant service” means—

(d) temporary service as an adviser to the Secretary of State on which a person is engaged with the consent of the appropriate authority;

(3) Subject to subsections (4) to (8), a member of a police force engaged on relevant service shall be treated as if he were not a member of that force during that service; but, except where a pension, allowance or gratuity becomes payable to him out of money provided by Parliament by virtue of regulations made under the M3Police Pensions Act 1976—

(a) he shall be entitled at the end of the period of relevant service to revert to his police force in the rank in which he was serving immediately before the period began, and

(b) he shall be treated as if he had been serving in that force during the period of relevant service for the purposes of any scale prescribed by or under regulations made under section 50 above fixing his rate of pay by reference to his length of service.

(9) The Secretary of State shall be liable in respect of any unlawful conduct of a member of a police force engaged on relevant service within paragraph (b), (c) or (d) of subsection (1) in the performance or purported performance of his functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment and shall in be treated for all purposes as a joint tortfeasor.

18. The Tribunal also had regard to the provisions of S.42 and S.43 EqA and S.43 KA (2) (d) ERA. These say:

42 Identity of employer

(1) For the purposes of this Part, holding the office of constable is to be treated as employment—

(a) by the chief officer, in respect of any act done by the chief officer in relation to a constable or appointment to the office of constable;

(b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable.

(2) For the purposes of this Part, holding an appointment as a police cadet is to be treated as employment—

(a) by the chief officer, in respect of any act done by the chief officer in relation to a police cadet or appointment as one;

(b) by the responsible authority, in respect of any act done by the authority in relation to a police cadet or appointment as one.

43 Interpretation

(1) This section applies for the purposes of section 42.

(2) “Chief officer” means—

(a) in relation to an appointment under a relevant Act, the chief officer of police for the police force to which the appointment relates;

(b) in relation to any other appointment, the person under whose direction and control the body of constables or other persons to which the appointment relates is;

(c) in relation to a constable or other person under the direction and control of a chief officer of police, that chief officer of police;

(d) in relation to any other constable or any other person, the person under whose direction and control the constable or other person is.

(3) “Responsible authority” means:

(a) in relation to an appointment under a relevant Act, the [F5local policing body or police authority] that maintains the police force to which the appointment relates;

(b) in relation to any other appointment, the person by whom a person would (if appointed) be paid;

(c) in relation to a constable or other person under the direction and control of a chief officer of police, the [F5local policing body or police authority] that maintains the police force for which that chief officer is the chief officer of police;

(d) in relation to any other constable or any other person, the person by whom the constable or other person is paid

43 KA (ERA)

Application of this Part and related provisions to police

(1) For the purposes of—

(a) this Part,

(b) section 47B and sections 48 and 49 so far as relating to that section, and

(c) section 103A and the other provisions of Part 10 so far as relating to the right not to be unfairly dismissed in a case where the dismissal is unfair by virtue of section 103A, a person who holds, otherwise than under a contract of employment, the office of constable or an appointment as a police cadet shall be treated as an employee employed by the relevant officer under a contract of employment; and any reference to a worker being “ employed ” and to his “ employer ” shall be construed accordingly.

(2) In this section “the relevant officer” means:

(a) in relation to a member of a police force or a special constable appointed for a police area, the chief officer of police;

(b) in relation to a member of a police force seconded to the National Crime Agency to serve as a National Crime Agency officer, that Agency; and

(d) in relation to any other person holding the office of constable or an appointment as police cadet, the person who has the direction and control of the body of constables or cadets in question.

19. The claimant referred to the case of ***Commissioner of Police for the Metropolis v Weeks UKEAT/0130/11*** and general well-known authority on the use of the power to strike out discrimination/PID detriment claims for example ***North Glamorgan NHS Trust v Ezsias 2007 IRLR 603*** and ***Chandok v Tirkey 2015 IRLR 195***.

Conclusions and analysis

20. The Tribunal spent considerable time deliberating on the respective written and oral submissions of the parties.

21. Having done so, it concluded as follows.

22. The effect of S.97 (3) was to create an unambiguous statutory service secondment from R1 to R2 pursuant to S. 97 (1) (d) – temporary service as an adviser to the secretary of state.

23. The effect of S.97 (9) was to create an unambiguous statutory assumption of vicarious liability for tortious wrongdoing of employees working in that undertaking.

24. Read in conjunction with the deemed employer provisions of S.42 and S.43 (which appear in a section entitled 'Identity of Employer' in a section dealing with Police Officers) of the EqA, the Tribunal concluded that S.43 (2) (d) applied, such that R2 was the employer under whose direction and control the claimant and R4 worked. The omission of reference to the PA as a 'relevant act' in S. 43 (2) (a) and S.43 (3) (a) thus was not relevant. The same conclusion was reached in relation to the protected disclosures claims pursuant to S. 43 KA (2) (d) ERA, which wording is similar in relation to direction and control.
25. Accordingly, in relation to vicarious liability for the alleged acts or omissions of R4, for the period during which R4 was seconded to R2, including, if it is alleged, that R4 recommended the termination of the secondment, the Tribunal concluded that this could only rest with R2. The Tribunal went on to conclude that it was not proportionate or necessary to consider whether there was or could be concurrent vicarious liability on R1 or R3. No positive case was advanced by the claimant beyond a general assertion that this might apply. This was not sufficient to create concurrent liability in circumstances where S.97 (9) was expressed in absolute terms – 'The Secretary of State shall be liable in respect of any unlawful conduct of a member of the force engaged on relevant service within paragraph (d) of subsection 1. Similarly, S. 43 (2) (d) was absolute in defining as the Chief Officer the person under whose direction and control the constable is. This was also consistent with paragraph 5 of the claimant's particulars of claim. No case appears to be advanced, pursuant to, for example. S. 111 (instructing, causing or inducing) or s.112 (aiding contraventions) EqA. If it was, it was not clear.
26. The case of **Weeks** did not have weight or force in circumstances where it was not being alleged in the factual matrix that R2 was acting as agent for R1 or R3 in relation to the claimant.
27. The claimant referred the Tribunal to clause 2 of the secondment agreement which stated that the secondment did not create an employment relationship between the claimant and the host i.e. R2 however, the Tribunal concluded this could not cut across and oust the statutory provision to the contrary.
28. Standing back and looking at the matter holistically, the Tribunal noted R2's position in relation to R1 and R3's applications was essentially neutral – certainly it did not object. Thus, liability for any successful claims did not leave the claimant without remedy as her substantive claims remain triable against the alleged discriminator and his deemed employer under S.97 (3).
29. In relation to any other (primary) liability on R3, no allegations appeared to be advanced or pleaded clearly. Whilst there were references to R3 in paragraph 11 (v) (lodging a complaint), (x) (completing a complaint form on R3's instructions and (y) (chasing R3 on 3 occasions) in the particulars of claim, this appeared to be part of background narrative and did not go on to feature under

any head of claim and in response to Tribunal questions, no specific assertion was made in relation to R3.

30. In relation to any other (primary) liability on R1, in response to Tribunal questions, the claimant relied on some allegations which occurred from/or the fact/ occasion of the termination of the secondment or thereafter in relation to R1 – for example paragraph 15 (victimisation for protected acts) and paragraph 55 (harassment). The Tribunal concluded that there are allegations in relation to the decision to terminate the secondment and those which post-dated the ending of the secondment, which are triable in relation to R1, subject to the provision of further and better particulars. There was some acceptance by R1 that this was not disputed territory.
31. In relation to R3, as there are no clear assertions. On the basis that the Tribunal has concluded that there can be no vicarious liability on R3 during the period of R4's secondment and there appear to be no clear or insufficiently particularised other allegations made against R3, there is little reasonable prospect of success in relation to such claims against R3. As already noted, no specific assertion could be levelled primarily against R3 even in submissions. This Hearing was taking place almost a year after the claim had been presented. A Deposit Order is made in the sum of £500 in relation to this claim. It is not a pre-requisite for such an application to have been made by R3.
32. The claim against R1 going forward is limited to primary liability allegations against R1 in relation to the fact of termination of the secondment and those which post-date the termination of the secondment only.
33. The application of R1 based on the protected acts and protected disclosures not having been made to R1 and/or the absence of knowledge, required consideration of evidence. None was forthcoming today and it is thus premature to form any view on this. The application to strike out or for a Deposit Order on this application was refused.
34. Bringing this all together, the claims can continue against all respondents to trial, but in relation to R1 and R3 the claims are significantly curtailed and against R1 will require further particulars and in respect of any alleged primary claim remaining against R3, those are the subject of a Deposit Order. It is a matter for the parties to take stock and reflect on the overriding objective and proportionality.

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Employment Judge Khalil

17 June 2022