



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101489/2022

Held in via Cloud Video Platform on 30 May 2022

Employment Judge Brewer

Mr Derek Bolton

**Claimant
In Person**

**The Chief Constable of the Police Service
of Scotland**

**Respondent
Represented by
Ms A Irvine -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Employment Tribunal does not have jurisdiction to hear the claimant's claim of unfair dismissal and that claim is therefore dismissed.

REASONS

Introduction

1. This case was listed for a public preliminary hearing to determine whether the Employment Tribunal has jurisdiction to consider the claimant's claim of unfair dismissal.
2. The claimant represented himself and the respondent was represented by an in-house solicitor, Ms Irvine. The hearing proceeded by way of submissions. At the conclusion of the submissions, given the importance of my decision to both parties, I decided to reserve judgment and to therefore provide the parties with full written reasons which I set out below.

3. One further point to make is that, as I understand it, the claimant is now subject to ongoing criminal proceedings and at the hearing he indicated that the actions of the respondent were in some way criminal and that this too was being pursued. I confirmed that it was not my intention to go further than absolutely necessary in making findings of fact nor to impinge upon any ongoing or potential criminal proceedings.

Issues

4. The claimant's sole claim is for constructive unfair dismissal.
5. The claimant was a serving police officer and the issue in this hearing is whether the claimant, as a serving police officer, was an employee within the meaning of s.230(1) of the Employment Rights Act 1996 (ERA).

Relevant Law

6. The following legislation is relevant to my decision:
 - a. The ERA;
 - b. The Police and Fire Reform (Scotland) Act 2012 (the 2012 Act); and
 - c. The Police Service of Scotland Regulations 2013 (the 2013 Regulations).
7. I shall set out the various sections and refer to other statute law and regulations as relevant in my reasons below. I shall also refer to relevant case law.

Findings in fact

8. It is only necessary to make short findings of fact given the limited issue to be determined.
9. The claimant held the position of police constable between 21 December 1992 and 31 December 2021. Latterly he was a detective constable.
10. On leaving the service the claimant entered early conciliation. He contacted ACAS on 24 February 2022 and received his early conciliation certificate on 28 February 2022.

11. The claimant presented his claim for to the Tribunal on 7 March 2022.
12. The claimant claims he was unfairly constructively dismissed.

Respondent's submissions

13. Ms Irvine submitted that the claimant, as with all constables, was not an employee but an office holder and was therefore excluded from claiming unfair dismissal. She referred to various sections in the ERA and the 2012 Act. She also referred me to a case from 1998 which I shall deal with in some detail.

Claimant's submissions

14. The claimant did not engage with the legislative argument as set out by Ms Irvine, but he maintained that he had been employed as a police officer and he said he was aware of other police officers who had brought unfair dismissal claims in the past.

Decision

15. The starting point is the right being pursued by the claimant; the right not to be unfairly dismissed. This right derives from section 94 ERA and is as follows:

94 *The right.*

- (1) *An employee has the right not to be unfairly dismissed by his employer.*
- (2) *Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)."*

16. The concept of dismissal for unfair dismissal purposes is set out definitively in section 95 ERA as follows:

95 *Circumstances in which an employee is dismissed.*

- (1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—*

- (a) *the contract under which he is employed is terminated by the employer (whether with or without notice),*
 - (b) *he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*
 - (c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*
17. In this case the claimant relies on the definition of dismissal contained in section 95(1)(c) ERA commonly referred to as constructive dismissal.
18. As to the definition of "employee", this is set out in section 230 ERA as follows:
- 230 Employees, workers etc.**
- (1) *In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
 - (2) *In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
19. Thus, in relation to the right to claim unfair dismissal the claimant must have:
- a. worked for the respondent as an employee, that is worked under a contract of employment meaning a contract of service or apprenticeship; and
 - b. been dismissed within the meaning of section 95 ERA.
20. Ms Irvine cited in support of her position the case of **The Commissioner of Police for the Metropolis v Ms A Lowrey-Nesbitt** [1998] UKEAT 952/97/1307, a case concerned in fact with whether a police officer was a 'worker' within the meaning of the ERA such that he could claim unauthorized

deductions from wages (a claim open to employees and workers as defined in section 230 ERA). Given that the definition of 'worker' under section 230 ERA includes but is not limited to a person who worked under a contract of employment, the case dealt extensively with the question of the relationship between a police officer and the Commissioner of police.

21. The judgment of the EAT in this case was given by the then president of the EAT, Morison J. He stated as follows:

"A worker is defined as a person who has entered into or works under a contract of employment or "any other contract..." It is the appellant's case that the relationship between the Commissioner and a serving police officer is not governed by contract but rather by statute and that this reflects the special status which police officers enjoy in the eyes of the law..."

The position of police officers...has been considered by the Courts on a number of occasions.

In Fisher v Oldham Corporation [1930] 2 KB 364, it was argued that the watch committee was the employer of the police in their borough and that there was vicarious liability. In the course of his judgment, McCardie J said this, at page 371:

"Prima facie, therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation."

...In a most general sense, there are aspects of the conditions of service of a constable which would fit well into a relationship governed by a contract of employment. A constable is entitled to pay, other benefits and pension rights. He may well be required to work specified duties at specified times, and to work a specified number of hours per week; he will be subject to agreed procedures for dealing with discipline and suspension. In many respects he is in an equivalent position to that of an employee whilst he is at the station where he is based. To borrow a felicitous expression used by Lord Lowry in another context in Roy v Kensington & Chelsea and Westminster Family Protection

Committee [1992] 1 AC 624 at page 629, the relationship between a police constable and the chief officer of police has "contractual echoes".

However, the case law is clear, as at 1998, that a police constable's status is governed by statute and that he owes allegiance to the community at large, through his oath of office, rather than through private contractual rights and obligations..."

22. Having then dealt with other examples from case law, Morison J concluded:

"In summary, therefore, a constable is an office holder. The terms on which he serves are governed by statute and statutory instrument... The provisions of the Sex Discrimination Act and Race Relations Act have subjected police constables to their protection; the Disability Discrimination Act has not. The general employment protection afforded to civilians working under contracts of employment is not afforded to police officers. As a matter of public policy police constables must not be constrained in the exercise of their functions by their 'employers' asserting private rights. As a matter of public policy, their relationship with the police service is governed and only governed by statute. In performing their duties they must abide by their oath of office. In these circumstances we are quite satisfied that there is no room for the implication of a contract of employment..."

23. That of course was a case concerning the position in England in general and the Metropolitan Police specifically.

24. In Scotland the terms and conditions under which constables serve are set out in Regulations, Determinations, and associated Guidance, including:

- a. Police Service of Scotland Regulations 2013;
- b. Determinations under the Police Service of Scotland Regulations 2013;
- c. Police Service of Scotland (Conduct) Regulations 2014;
- d. Police Service of Scotland (Performance) Regulations 2014; and
- e. Police Service of Scotland (Promotion) Regulations 2013.

25. The 2013 Regulations apply to the respondent. The 2013 Regulations set out the terms of appointment as a police officer including all matters related to pay, holidays, sick pay, maternity and other statutory leave, uniform, probation periods and in essence all of those matters which would otherwise appear in an employment contract or company handbook.
26. Determinations are made by the Scottish government under Regulation 34 of the 2013 Regulations. Determinations set out the detail of those terms of service set out in the 2013 Regulations. There are many determinations, and they cover everything including eyesight standards, duty rosters, pay, overtime, holidays, promotion and so on.
27. In short, the 2013 regulations are the overarching regulations which set out the terms of service of a police officer which are therefore governed by law. Determinations are made under the 2013 Regulations by the Scottish government to fill out the detail of the terms of service. Determinations are also used to vary those terms of service.
28. The Police Service of Scotland (Conduct) Regulations 2014 set out what is in essence a disciplinary procedure, and the Police Service of Scotland (Performance) Regulations 2014 is in effect a very detailed capability procedure.
29. Finally, the Police Service of Scotland (Promotion) Regulations 2013 provide a detailed template for promotion.
30. In short, there is clearly no contract between a serving police officer and the Chief Constable. The police officer's terms of service are statutory and I can do no better than to re-state the words of Morison J in **The Commissioner of Police for the Metropolis v Ms A Lowrey-Nesbitt** (above) that :

“In summary, therefore, a constable is an office holder. The terms on which he serves are governed by statute and statutory instrument... The general employment protection afforded to civilians working under contracts of employment is not afforded to police officers. As a matter of public policy police constables must not be constrained in the exercise of their functions by their 'employers' asserting private rights. As a matter of public policy, their

relationship with the police service is governed and only governed by statute. In performing their duties they must abide by their oath of office. In these circumstances we are quite satisfied that there is no room for the implication of a contract of employment...

31. The claimant was not an employee within the meaning of section 230(1) ERA in that he did not work under a contract of employment and for that reason does not qualify to claim unfair dismissal.
32. I add for the sake of completeness reference to section 200 ERA since Ms Irvine referred to that section in her submissions.
33. Section 200 ERA is as follows:
 - (1) *Sections 8 to 10, Part III, sections 44, 45, 47, 50 to 57 and 61 to 63, Parts VII and VIII, sections 92 and 93, Part X and section 137 do not apply to employment made under a contract of employment in police service or to persons engaged in such employment.*
 - (2) *In subsection (1) 'police service' means-*
 - (a) *service as a member of a constabulary maintained by virtue of an enactment, or*
 - (b) *subject to section 126 of the Criminal Justice and Public Order Act 1994 (prison staff not to be regarded as in police service), service in any other capacity by virtue of which a person has the powers or privileges of a constable."*
34. Section 200 was dealt with in **The Commissioner of Police for the Metropolis v Ms A Lowrey-Nesbitt** because the original decision in the case by the then Industrial Tribunal was that the claimant did have a contract of employment with the Metropolitan Police as that, they argued, explained the need for the exclusion from the right to claim unfair dismissal, among other exclusions, in section 200.
35. However, the Tribunal's reasoning was faulty. They presumed that police officers were employees but were excluded from certain employment rights by

section 200. But that was an incorrect presumption. All section 200 says that certain rights under the ERA do not apply to employment under a contract of employment in police service or to persons engaged in such employment. Section 200 is not predicated on the assumption that persons 'employed' in police service are employed under a contract of employment, that is still a question of fact and, as I have set out above, serving police officers are not engaged under a contract of employment, they are office holders whose terms of service are governed by statute and statutory instrument.

36. For all of those reasons the Employment Tribunal does not have jurisdiction to hear the claimant's claim of unfair dismissal and that claim is dismissed.

Employment Judge: M Brewer
Date of Judgment: 31 May 2022
Entered in register: 31 May 2022
and copied to parties