Michaelmas Term
[2017] UKSC 65
On appeal from: [2016] EWCA Civ 2

JUDGMENT

P (Appellant) *v* Commissioner of Police of the Metropolis (Respondent)

before

Lady Hale
Lord Kerr
Lord Wilson
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

25 October 2017

Heard on 3 and 4 May 2017

Appellant
Karon Monaghan QC
Edward Kemp
(Instructed by Slater & Gordon (UK) LLP)

Respondent
Thomas Linden QC
Jesse Crozier
(Instructed by Metropolitan Police Service, Directorate of Legal Services)

Intervener (1st)
Paul Bowen QC
(Instructed by Equality and Human Rights Commission)

Interveners (2nd) (written submissions only)
D Peter Herbert OBE

(1) Equality and Human Rights Commission
(2) The Society of Black Lawyers, Operation Black Vote
Association of Muslim Lawyers,
NHS BME Network,
BARAC,
BLAKSOX,
The Runneymede Charitable Trust and
The National Black Police Association

LORD REED: (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hughes agree)

1. This appeal concerns the directly effective right of police officers under EU law to have the principle of equal treatment applied to them. The question raised is whether the enforcement of that right by means of proceedings in the Employment Tribunal is barred by the principle of judicial immunity, where the allegedly discriminatory conduct is that of persons conducting a misconduct hearing.

The facts

2. The material facts are in short compass. The appellant was assaulted in 2010, while serving as a police officer, and subsequently suffered post-traumatic stress disorder ("PTSD"). In 2011, she was involved in an incident which led to her arrest. She asserted that her behaviour on that occasion was related to her PTSD. After investigation, she was made the subject of a disciplinary charge before a misconduct hearing constituted under the Police (Conduct) Regulations 2008 (SI 2008/2864) ("the 2008 Regulations"). There, apart from one issue of fact which was resolved in her favour, she accepted that she had been guilty of the misconduct alleged. She relied on her good record as a police officer and her PTSD in mitigation. On 12 November 2012, the persons conducting the hearing ("the panel") imposed the sanction of dismissal without notice.

The proceedings below

3. The appellant appealed against her dismissal to the Police Appeals Tribunal, which could allow her appeal if it considered the disciplinary action taken to be unreasonable. She also instituted proceedings against the Commissioner of Police of the Metropolis ("the Commissioner") in an Employment Tribunal under the Equality Act 2010 ("the 2010 Act"), in which she claimed that the decision to dismiss her constituted discrimination arising from disability and disability-related harassment, and was consequential upon a failure to make reasonable adjustments. In response, the Commissioner contended that the decision, and acts done by the panel in the course of the proceedings, were protected from challenge by the principle of judicial immunity. The appellant indicated her intention to seek a stay of her claim before the Employment Tribunal, pending the outcome of her appeal to the Police Appeals Tribunal, subject to the outcome of a pre-hearing review. In the event, a final determination was made by the Police Appeals Tribunal on 11 June 2013 that the appeal would not proceed.

4. Following a pre-hearing review, the Employment Tribunal struck out the appellant's claim on the basis that the panel was a judicial body, and that since the appellant's claim was to the effect that its decision and the process by which it was reached were unlawfully discriminatory, the claim was barred by judicial immunity. An appeal against that decision was dismissed by the Employment Appeal Tribunal, applying the decision of the Court of Appeal in *Heath v Commissioner of Police of the Metropolis* [2004] EWCA Civ 943; [2005] ICR 329. A further appeal was dismissed by the Court of Appeal on the basis that the present case was indistinguishable from *Heath*: [2016] EWCA Civ 2; [2016] IRLR 301. Laws LJ, giving a judgment with which the other members of the court agreed, remarked:

> "However I have been troubled by a particular feature of the case. If I am right, it would appear that claims of discriminatory dismissal brought by police officers, where the effective dismissing agent is a disciplinary panel such as was convened here, will not be viable in the Employment Tribunals; yet Parliament has legislated to allow such claims to be made." (para 24)

The EU dimension

5. The rights on which the appellant relies are directly effective rights under EU law. Council Directive 2000/78/EC ("the Framework Directive") provides in article 1 that its purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the member states the principle of equal treatment.

6. That principle is defined in article 2(1) as meaning that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in article 1. Article 2(2) defines direct and indirect discrimination. Article 2(3) provides that harassment shall be deemed to be a form of discrimination. Article 2(5) provides that the Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. It has not been suggested that article 2(5) has any relevance in the present context. Article 5 provides that compliance with the principle of equal treatment also requires reasonable accommodation to be provided in relation to persons with disabilities.

7. In relation to the scope of the Directive, article 3(1) provides that, within the limits of the areas of competence conferred on the Community, the Directive shall

apply to "all persons, as regards both the public and private sectors, including public bodies", in relation to a variety of matters relating to employment and occupations, including "employment and working conditions, including dismissals". Article 3(4) permits member states to exclude their armed forces from the application of the Directive, in so far as it relates to discrimination on the grounds of disability and age. There is no corresponding provision in relation to police forces.

8. In relation to remedies and enforcement, article 9(1) requires member states to "ensure that judicial and/or administrative procedures ... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them". Article 17 requires member states to lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to the Directive, and to take all measures necessary to ensure that they are applied. The sanctions may comprise the payment of compensation to the victim, and must be "effective, proportionate and dissuasive".

The Equality Act 2010

9. The Framework Directive is currently implemented in domestic law by the 2010 Act. In Part 2 of the Act, section 4 identifies protected characteristics, including disability as defined by section 6. Section 13 defines discrimination as including the less favourable treatment of a person because of a protected characteristic. Sections 15 and 19 make further provision in relation to discrimination against disabled persons. Sections 20 to 22 make provision in relation to the duty to make reasonable adjustments for disabled persons. Section 26 makes provision in relation to harassment related to a protected characteristic.

10. In Part 5 of the Act, section 39 provides that an employer (A) must not discriminate against a person (B) in a variety of ways, including by dismissing B. It also provides that a duty to make reasonable adjustments applies to an employer. Section 40 provides that an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A's.

11. Special provision is made in relation to police officers by sections 42 and 43. In particular, section 42(1) provides that, for the purposes of Part 5 of the Act, holding the office of constable is to be treated as employment by the chief officer in respect of any act done by the chief officer in relation to a constable, and as employment by the responsible authority in respect of any act done by the authority in relation to a constable. That provision is necessary because, at common law, a police officer is not an employee but the holder of an office. The expressions "chief officer" and "responsible authority" are defined by section 43(2) and (3)

respectively. In relation to officers in the Metropolitan Police, the former expression refers to the Commissioner, and the latter expression refers to the Mayor's Office for Policing and Crime.

12. It is relevant to note that section 42(1) is in substance a re-enactment of section 64A of the Disability Discrimination Act 1995, which was introduced by regulation 25 of the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673). Those Regulations were made under the European Communities Act 1972 ("the 1972 Act"), in order to implement the Framework Directive.

13. Ancillary provisions are set out in Part 8 of the 2010 Act. Section 109 is concerned with the liability of employers and principals. Subsection (1) provides that anything done by a person (A) in the course of A's employment must be treated as also done by the employer. Subsection (2) provides that anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

14. Section 120 confers jurisdiction on an Employment Tribunal to determine complaints relating to contraventions of Part 5. Where a tribunal finds a contravention, it can make a declaration, order the payment of compensation, or make appropriate recommendations: section 124(2). It can thus provide a remedy, in cases of dismissal or other disciplinary action, without necessarily affecting the dismissal or other action itself.

Police misconduct panels

15. Police misconduct panels are established under regulations made by the Secretary of State in the exercise of powers conferred by the Police Act 1996. The Regulations which were in force at the time when section 64A of the Disability Discrimination Act 1995 was introduced left the final decision in cases of dismissal to the chief officer or the police authority. That position was altered by the 2008 Regulations, which were in force at the time of the appellant's dismissal. Those Regulations were themselves revoked and replaced by the Police (Conduct) Regulations 2012 (SI 2012/2632) ("the 2012 Regulations"). The latter Regulations, as amended by the Police (Conduct) (Amendment) Regulations 2015 (SI 2015/626), are broadly (but not entirely) in similar terms.

16. The Schedule to the 2008 Regulations sets out the standards of professional behaviour expected of police officers. Regulation 3(1) defines misconduct as a breach of the standards set out in Schedule 1, and gross misconduct as a breach so

serious that dismissal would be justified. By regulation 5, the Regulations apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct. In terms of regulation 3(1), the "appropriate authority", where the officer concerned is a senior officer (defined as meaning an officer holding a rank above that of chief superintendent) is the police authority, and in any other case is the chief officer. In the present case, the appropriate authority was the chief officer.

17. Ignoring immaterial details, the procedure after an allegation comes to the attention of the appropriate authority can be summarised as follows. The appropriate authority is required by regulation 12(1) to assess whether the conduct alleged, if proved, would amount to misconduct or gross misconduct. If, as in the present case, the appropriate authority determines that it would amount to gross misconduct, the matter then has to be investigated: regulation 12(4). The next stage is for the appropriate authority to appoint an investigator in accordance with regulation 13, and for an investigation to be carried out in accordance with regulations 14 to 18. The next stage is for the appropriate authority, on receipt of the investigator's report, to determine whether the officer concerned has a case to answer in respect of misconduct or gross misconduct, in accordance with regulation 19. Where, as in the present case, the appropriate authority determines that there is a case to answer in respect of gross misconduct, it is required under regulation 19(4) to refer the case to a misconduct hearing, defined by regulation 3(1) as a hearing at which the officer may be dealt with by disciplinary action up to and including dismissal. Under regulation 21, the officer is then entitled to be provided by the appropriate authority with written notice of the conduct that is the subject matter of the case, and how that conduct is alleged to amount to gross misconduct. Subject to the "harm test" explained in regulation 4, the officer is also entitled to a copy of the investigator's report, or such parts of it as refer to him, together with any document referred to in the report which relates to him. Under regulation 22, the officer is required to provide to the appropriate authority written notice of any allegations which he disputes and any arguments on points of law which he wishes to be considered by the persons conducting the misconduct hearing, together with a copy of any document relied on. Lists of proposed witnesses also have to be exchanged: regulation 22(4).

18. The form of the misconduct hearing depends on the rank of the officer concerned. Where, as in the present case, the officer is not a senior officer, regulation 25(4) requires the hearing to be conducted by a panel of three persons appointed by the appropriate authority, one of whom is to be a police officer, another of whom is to be a human resources professional, and the third of whom is to be selected from a list of candidates maintained by the authority. One of the three (either a senior police officer or a senior human resources professional) is to chair the hearing.

19. Both the officer concerned and the appropriate authority have the right to be legally represented at the hearing: regulation 7(1) and (4). The person chairing the hearing has to determine which, if any, of the proposed witnesses should attend the hearing and should give evidence at it: regulation 23(2) and (3). He or she has no power to compel the attendance of witnesses, although he or she can cause a witness who is a police officer to be ordered to attend: regulation 23(3). Nor can he or she administer an oath. Under regulation 28, the members of the panel are to be provided with copies of the documents provided to or by the officer under regulations 21 and 22 respectively, and also, where the officer disputes any part of the case against him, any other documents which, in the opinion of the appropriate authority, should be considered. Copies of documents in the latter category have also to be provided to the officer. Subject to specified exceptions, the hearing is to be in private: regulation 32(1).

20. Subject to specified requirements, the procedure at the hearing is to be determined by the person chairing it: regulation 34(1). The person representing the officer is entitled to address the hearing and to put questions to witnesses, subject to the right of the person chairing the hearing to determine whether any question should or should not be put.

21. At the conclusion of the hearing, the persons conducting the hearing have to decide whether the officer's conduct amounts to misconduct, gross misconduct or neither: regulation 34(13). Where, as in the present case, they find that the conduct amounts to gross misconduct, they may impose any of the disciplinary actions specified in regulation 35(2)(b), ranging from management advice to dismissal without notice. Where, as in the present case, there is a finding of gross misconduct and the persons conducting the hearing decide that the officer should be dismissed, regulation 35(9) directs that the dismissal shall be without notice.

22. An officer other than a senior officer has a right of appeal to the Police Appeals Tribunal against the panel's finding of misconduct or gross misconduct, or against the disciplinary action taken by the panel: regulation 36(2) of the 2008 Regulations, read together with regulation 4 of the Police Appeals Tribunals Rules 2008 (SI 2008/2863) ("the 2008 Rules"), subsequently replaced by the broadly similar Police Appeals Tribunals Rules 2012 (SI 2012/2630). The grounds of appeal were specified at the material time in regulation 4(4) of the 2008 Rules. Put shortly, they are unreasonableness, fresh evidence, and breach of the statutory procedures or other unfairness. Although it is conceded that it might be possible to bring a complaint of discriminatory behaviour under the last of these headings, the tribunal does not possess either the same expertise in relation to equal treatment, or the same powers, as an Employment Tribunal. In particular, it has no power to make declarations, order the payment of compensation, or make appropriate recommendations. Its only power is either to allow or dismiss the appeal against the

panel's finding or the disciplinary action taken. Neither of those forms of relief will necessarily be an appropriate remedy in all cases of discrimination.

Heath v Commissioner of Police of the Metropolis

23. The case of *Heath* concerned events pre-dating the Framework Directive. A civilian employee of a police force brought a claim in an Employment Tribunal under the Sex Discrimination Act 1975 in relation to the conduct of members of a disciplinary board constituted under the Police (Discipline) Regulations 1985 (SI 1985/518). She complained that, as a witness in proceedings before the board, she had been treated by its members in a manner which amounted to sex discrimination. The tribunal held that it had no jurisdiction, on the basis that the members of the board enjoyed judicial immunity. The proceedings before the tribunal and the Employment Appeal Tribunal appear to have been conducted without any reference to EU law, but before the Court of Appeal reliance was placed on article 6 of the Equal Treatment Directive, Council Directive 76/207/EEC.

24. The Court of Appeal accepted that the members of the disciplinary board enjoyed judicial immunity at common law. It is unnecessary for this court to consider the correctness or otherwise of that conclusion, or to consider the issue which divided the Court of Appeal, namely whether the immunity extended to the Commissioner's selection of the membership of the board.

25. The issues arising in relation to EU law were considered by Auld LJ in a judgment with which, in relation to this issue, the other members of the court agreed. He noted that article 1 of the Equal Treatment Directive required member states to take measures to implement the principle of equal treatment for men and women in relation to various stages of employment, including working conditions. Article 5 provided that application of the principle of equal treatment with regard to working conditions meant that men and women should be guaranteed the same conditions. Article 5 also required member states to take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment should be abolished. Article 6 required member states to introduce measures enabling the principle of equal treatment to be relied on before national courts.

26. Auld LJ did not address the question whether the discrimination alleged fell within the scope of the Directive, but identified the first matter as being whether and to what extent the common law rule of judicial immunity should be governed by the Directive in respect of claims made under the 1975 Act. In that regard, Auld LJ considered it important not to confuse procedural or jurisdictional qualifications, such as judicial immunity, with domestic provisions which operated to deprive a

successful claimant in respect of an EU right of his or her full and appropriate remedy, such as the cap on compensation considered in *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2)* (Case C-271/91) [1994] QB 126. If the Directive were to displace judicial immunity, it would follow, so it was said, that it should operate so as to disapply other similar rules, such as sovereign immunity, res judicata, abuse of process, compromise of claims and estoppels. This was regarded as an extravagant proposition. In Auld LJ's view, the terms of the Directive allowed of qualification where member states, within the margin of their appreciation, considered it necessary. The eradication of unlawful discrimination was not of such overriding importance that it should hold sway over other fundamental norms of our law.

Analysis

27. In a case where directly effective EU rights are in issue, EU law must be the starting point of the analysis. It may also be the finishing point, since it takes priority over domestic law in accordance with the provisions of the European Communities Act 1972.

28. The Framework Directive confers on all persons, including police officers, a directly effective right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions, including dismissals: article 3(1)(c). That right is subject to specified exceptions and qualifications, none of which is applicable to the present case. The United Kingdom is obliged, under article 9(1), to ensure that judicial and/or administrative procedures are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. Under article 17, sanctions which are effective, proportionate and dissuasive must be applied. The procedures under national law must also comply with the general principles of effectiveness and equivalence, and with the right to an effective remedy under article 47 of the Charter of Fundamental Rights of the European Union.

29. The principle of equivalence entails that police officers must have the right to bring claims of treatment contrary to the Directive before Employment Tribunals, since those tribunals are the specialist forum for analogous claims of discriminatory treatment under our domestic law. They are expert in the assessment of claims of discriminatory treatment, and have the power to award a range of remedies including the payment of compensation, even in cases where the dismissal or other disciplinary action itself stands. They therefore fulfil the requirements of the principle of effectiveness. To leave police officers with only a right of appeal to the Police Appeals Tribunal would not comply either with the principle of equivalence, since analogous complaints under domestic law can be made to an Employment Tribunal, nor with the principle of effectiveness, since (for example) the Police Appeals

Tribunal cannot grant any remedy in cases where the discriminatory conduct is not such as to vitiate the decision of the misconduct panel.

30. There can be no question of the United Kingdom being entitled to deny police officers an effective and equivalent remedy, where their rights under the Directive have been infringed, as a matter falling within a national margin of appreciation. Nor, indeed, is it suggested that there could be. On the contrary, the right not to be discriminated against on grounds including disability is a fundamental right in EU law, protected by article 21(1) of the Charter. It follows that, even if it is designed to protect the officer under investigation, the creation of a statutory process which entrusts disciplinary functions in relation to police officers to persons whose conduct might arguably attract judicial immunity under domestic law cannot have the effect of barring complaints by the officers to an Employment Tribunal that they have been treated by those persons in a manner which is contrary to the Directive. National rules in relation to judicial immunity, like other national rules, can be applied in accordance with EU law only in so far as they are consistent with EU law: see, for example, *Köbler v Austria* (Case C-224/01) [2004] QB 848; [2003] ECR I-10239, and *Commission v Italy* (Case C-379/10) [2011] ECR I-180. The reasoning of the Court of Appeal in *Heath*, in relation to EU law, cannot therefore be regarded as correct.

31. In the 2010 Act, Parliament sought to implement the Directive specifically in relation to police officers, as Laws LJ noted in the Court of Appeal. As explained earlier, section 42(1) deems a constable to be the employee of the chief officer for the purposes of Part 5 of the Act, in relation to any act done by the chief officer, and the employee of the responsible authority, in relation to any act done by that authority. Section 120 confers jurisdiction on an Employment Tribunal to determine any complaints relating to contraventions of Part 5. Those provisions plainly confer on police constables the right to bring proceedings before employment tribunals in order to challenge discrimination by chief officers and responsible authorities in relation to employment and working conditions, including dismissals. It was presumably envisaged by Parliament that the exercise of disciplinary functions in relation to police officers would fall within the scope of those provisions. That is indeed the case in relation to senior officers, under regulation 34(1) of the 2012 Regulations, and probationary constables, under regulation 13 of the Police Regulations 2003 (SI 2003/527).

32. The problem is that the disciplinary functions in relation to police officers who have completed their period of probation, other than senior officers, are entrusted under secondary legislation to panels; and the exercise of those functions by a panel is not an act done by either the chief officer or the responsible authority. Nor can the exercise of those functions generally be regarded as something done by an employee of the chief officer or of the responsible authority in the course of his employment, within the meaning of section 109(1), bearing in mind that the panel

exercises its most significant functions collectively, and that, at least, those of its members who are police officers will not be employees. Nor can the panel be regarded as exercising its disciplinary functions as the agent of the chief officer or the responsible authority, within the meaning of section 109(2): under the 2008 Regulations, the relevant powers are conferred directly on the panel in its own right. The consequence is that, if section 42(1) is read literally, it is deprived of much of its practical utility, and it fails fully to implement the Directive, contrary to its purpose.

33. The way to resolve the problem is to interpret section 42(1) of the 2010 Act as applying to the exercise of disciplinary functions by misconduct panels in relation to police constables. This runs with the grain of the legislation, and is warranted under EU law, as given domestic effect by the 1972 Act, in accordance with such cases as *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135. In particular, section 42(1) can be interpreted conformably with the Directive if it is read as if certain additional words (italicised in the following version) were present:

> "(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 *or (so far as such acts fall within the scope of the Framework Directive) by persons conducting a misconduct meeting or misconduct hearing* 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."

So interpreted, the Act overrides, by force of statute, any bar to the bringing of complaints under the Directive against the chief officer which might otherwise arise by reason of any judicial immunity attaching to the panel under the common law.

34. It should be emphasised that this conforming interpretation has to be understood broadly: the court is not amending the legislation, and the italicised words are not to be treated as though they had been enacted. The expressions "misconduct meeting" and "misconduct hearing", for example, have not been defined by reference to the relevant regulations. Nor is the use of those expressions

intended to exclude the adoption of a similar approach in relation to other types of panel if that is necessary in order to comply with the Directive. The italicised words are merely intended to indicate how section 42(1) should be interpreted in a case such as the present, in order to avoid a violation of EU law.

Conclusion

35. For these reasons, I would hold that the reasoning in *Heath v Commissioner of Police of the Metropolis* in relation to EU law was unsound, allow the appeal, and remit the appellant's case to the Employment Tribunal.

LORD HUGHES:

36. For my part I agree with the judgment of Lord Reed.

37. I add only that the principle of judicial immunity serves a legitimate end and generally achieves a proportionate and useful purpose. It exists for the protection not only of tribunal members, but also of witnesses, against further litigation inspired by what may well be deep disappointment on the part of those who have not been successful in contested proceedings before the tribunal. It also prevents most collateral challenges to the decisions of tribunals which have been set up, usually by legislation, with the task of making a final decision. The proliferation of litigation is not generally in the public interest, which is best served by a single, final, decision after due process, appealable in the event of demonstrated error of law or principle.

38. For the reasons so clearly explained by Lord Reed, section 42 of the Equality Act (like its predecessor), conformably with the Framework Directive, is plainly meant to provide police constables with the right to complain to an Employment Tribunal of discrimination, and must be construed in the manner which he has set out. It remains the consequence that in relation to discrimination there exists considerable potential for parallel or collateral proceedings in an Employment Tribunal and the statutory Police Appeals Tribunal. The former can grant relief relating to discrimination, but cannot direct an alteration to the outcome of the disciplinary proceedings. The latter cannot grant discrimination-related relief, and does not have the expertise of an Employment Tribunal in that area, although it can and should consider any suggested discrimination when hearing an appeal against that outcome. The inconvenience is well illustrated by the present case, in which P's complaint of discrimination was explicitly limited by her to the outcome of the disciplinary proceedings. Her case, as set out in her witness statement supporting her Employment Tribunal application, was expressly that her mitigation had not, in

breach of the duty to avoid discrimination, been accepted when it should have been. She said this:

> "I am not complaining about anything which was said or done during the course of the disciplinary hearing in November 2012; I am simply complaining that the wrong decision was reached by the MPS at the end of that hearing."

39. For the reasons which Lord Reed explains, this division of justiciability is, in the present state of the legislation, unavoidable. It might, however, usefully be considered in the event of any review of the overall structure.