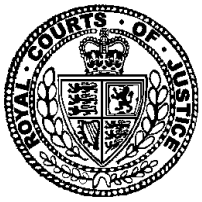

Neutral Citation Number: [2021] EWCA Civ 1961

Case No: A2/2021/0816

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE KERR
[2021] UKEAT 0123_20_1802

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/01/2022
(Postponed from 30/12/2021)

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE COULSON
and
LADY JUSTICE CARR

- -

Between :

NICHOLAS ECKLAND	**Claimant/ Respondent**
- and -	
CHIEF CONSTABLE OF THE AVON AND SOMERSET CONSTABULARY	**Respondent/ Appellant**
NATIONAL ASSOCIATION OF LEGALLY QUALIFIED CHAIRS	**First Intervener**
INDEPENDENT OFFICE FOR POLICE CONDUCT	**Second Intervener**
ASSOCIATION OF POLICE AND CRIME COMMISSIONERS	**Third Intervener**

- -
- -

Dijen Basu QC and **Elliot Gold** (instructed by **Legal Services Directorate, Avon and Somerset Constabulary**) for the **Appellant**
Karon Monaghan QC and **Christopher Milsom** (instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**

James Berry (instructed by **John Bassett** of the **National Association of Legally Qualified Chairs**) for the **First Intervener**
Anne Studd QC and **Victoria von Wachter** (instructed by **Independent Office for Police Conduct**) for the **Second Intervener**
Clive Sheldon QC (instructed by **TLT Solicitors**) for the **Third Intervener** (written submissions only)

Hearing date: 23 November 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Friday, 07 January 2022 at 10:30am

Lord Justice Underhill:

INTRODUCTION

1. The Claimant, who is the Respondent to this appeal, was a constable in the Avon and Somerset Constabulary from 13 November 1998 until his dismissal with effect from 13 December 2018. At the date of his dismissal he held the rank of Detective Sergeant. He claims that his dismissal was unlawfully discriminatory. The issue raised by this appeal is how and against whom he is entitled to bring that claim.

2. The circumstances of the Claimant's dismissal can be sufficiently summarised for present purposes as follows. On 23 March 2018 he gave evidence on oath at Bristol Crown Court regarding the death in prison of a defendant against whom criminal proceedings were ongoing. His evidence was to the effect that he had attended at a mortuary and identified the deceased as the person charged on the indictment in those proceedings. In fact, he had not been to the mortuary and had not identified the deceased. His false evidence in this regard led to an investigation by the Independent Office for Police Conduct ("the IOPC"), which found that there was a case to answer of gross misconduct. That led in turn to misconduct proceedings under the Police (Conduct) Regulations 2012. A misconduct hearing duly took place before an independent panel constituted in accordance with the Regulations ("the Panel"); and it was the Panel that decided his dismissal. It is the Claimant's case that he was at the relevant times suffering from a mental health condition which constituted a disability within the meaning of the Equality Act 2010, and that it was as a result of that condition that he gave the false evidence that led to his dismissal.

3. On 3 May 2019 the Claimant commenced proceedings in the Employment Tribunal ("the ET") against the Chief Constable of the Avon and Somerset Constabulary, who is the Appellant before us, for discrimination contrary to section 39 (2) (c) and (d) of the 2010 Act. Although section 39 is concerned with discrimination against employees, section 42 (1) provides as follows:

> "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."

(We are in fact only concerned with (a), but I quote the entire subsection for completeness.) The Part of the Act referred to is Part 5 ("Work"), into which section 39 falls. "Chief officer" is defined in section 43 (2) in terms that apply to the Chief Constable in this case.

4. The Claimant's Grounds of Complaint allege both "disability-related discrimination" under section 15 of the Act and discrimination by failure to make reasonable adjustments under section 21. As regards the section 15 claim, the discrimination in

question is pleaded as both "the act of disciplining the Claimant" and "the act of dismissing [him]" (see para. 31): the former is a reference to the IOPC's finding of a case to answer, and the latter is, on its face, a reference to the Panel's actual decision to dismiss. As regards the section 21 claim, most of the matters complained of are not material to this appeal, but paras. 37.4 and 39.4-8 contain complaints about the failure of the Panel to make reasonable adjustments in relation to the conduct of the hearing before it.

5. In her[1] Response to the claim the Chief Constable raised various preliminary objections. The objection which is relevant for our purposes is that she had no legal responsibility for the acts of the IOPC or the Panel, who are independent actors, and that the ET had no jurisdiction to entertain the claim in those regards.

6. That objection was heard by Employment Judge Harper MBE at a preliminary hearing on 17 February 2020. By an order with reasons sent to the parties the following day he dismissed the Chief Constable's objection and held that she was the correct respondent in respect of the complaint raised and that the ET had jurisdiction to determine it. He relied in particular on the decision of the Supreme Court in *P v Commissioner of Police for the Metropolis* [2017] UKSC 65, [2018] ICR 560. I shall have to return to that decision later, but in short what the Court held was that in the context of a claim of disability discrimination it was necessary, in order to comply with EU law, to read section 42 (1) (a) in such a way that the actions of a panel determining a charge of misconduct by a police officer fell to be treated as the acts of the relevant chief officer.

7. The Chief Constable appealed to the Employment Appeal Tribunal ("the EAT"). By a judgment handed down on 6 April 2021 Kerr J dismissed the appeal. As he records, counsel for the Claimant in the course of the hearing accepted that he could not proceed against the Chief Constable as regards the part of the claim based on the acts or omissions of the IOPC (see paras. 6-7 of his judgment). He accepted that concession and allowed the appeal in that regard, effectively by consent (see paras. 64-79); and that part of the claim is no longer live. As regards the part of the claim based on the acts or omissions of the Panel, Kerr J relied principally, like the ET, on the decision of the Supreme Court in *P*.

8. This is an appeal by the Chief Constable against that decision, with permission granted by Kerr J himself. She has been represented by Mr Dijen Basu QC, leading Mr Elliot Gold. The Claimant has been represented by Ms Karon Monaghan QC, leading Mr Christopher Milsom. Mr Basu, Mr Gold and Mr Milsom appeared in both the ET and the EAT.

9. Three other parties have been given permission to intervene in the appeal – the National Association of Legally Qualified Chairs ("the NALQC"), the IOPC and the Association of Police and Crime Commissioners ("the APCC"). The NALQC and the IOPC were permitted to make oral submissions and were represented respectively by Mr James Berry and by Ms Anne Studd QC, leading Ms Victoria von Wachter. The APCC has intervened by way of written representations only: the representations were settled by Mr Clive Sheldon QC.

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[1] For convenience I refer to the Chief Constable by the gender of the current incumbent, Temporary Chief Constable Sarah Crew.

THE REGIME APPLYING TO POLICE MISCONDUCT

10. The regime applying to police misconduct is complicated and has a complicated history. In what follows I do not attempt any comprehensive summary and focus only on the features relevant to this appeal.

11. I start with the role of the IOPC (known until 8 January 2018 as the Independent Police Complaints Commission ("the IPCC")). By schedule 3 to the Police Reform Act 2002 (as amended), the chief officer of the relevant force is obliged, or otherwise may consider it appropriate, to refer certain matters involving one of their officers to the IOPC. The provisions are complex. For present purposes it is enough to say that on such referral the Director-General of the IOPC will then determine the correct mode of investigation, which may be an "independent investigation", i.e. one conducted by the IOPC itself. The Claimant's case was so referred and was the subject of an independent investigation. The Director-General is empowered at the conclusion of the investigation to recommend, and if necessary direct, that the Chief Constable initiate disciplinary proceedings against the officer.

12. I turn to the disciplinary proceedings, and specifically to the procedures for a misconduct hearing. The applicable procedures are prescribed by Regulations made by the Secretary of State under the Police Act 1996. The Regulations in force at the time of the proceedings against the Claimant were the Police (Conduct) Regulations 2012 ("the 2012 Regulations"), as amended by the Police (Conduct) (Amendment) Regulations 2015 ("the 2015 Amendment Regulations") and the Police (Conduct, Complaints, Misconduct and Appeal Tribunal) (Amendment) Regulations 2017 ("the 2017 Amendment Regulations"). However, for reasons which will appear, it will be necessary to consider also the predecessors to the 2012 Regulations, which were the Police (Conduct) Regulations 2008 ("the 2008 Regulations"). I do not need to give a comprehensive summary of the provisions relating to misconduct hearings in any of the various versions of the Regulations; and even in relation to those to which I will have to refer I can ignore some immaterial refinements and qualifications. The provisions differ in some respects for officers above the rank of Chief Superintendent ("senior officers"); but I need refer only to those applicable to more junior officers.

13. I start with the 2008 Regulations. These provided for both "misconduct meetings" and, in the more serious kind of case, "misconduct hearings". We are only concerned with the latter. The key features of such a hearing, so far as relevant to the arguments before us, were as follows:

    (1) The hearing was to be conducted by a panel of three persons appointed by the chief officer of the force in which the officer served. Typically the chair would be an officer of the rank of Assistant Chief Constable[2], and the other two members would be an officer of the rank of superintendent (in some circumstances Chief Superintendent) and a lay person chosen from a list maintained by a police authority. (The Regulations allow an option for the panel to include a senior human resources professional, but we were told that this did not occur in practice.) Such panels are generally referred to as "police misconduct panels".

[2] Or a Commander in the case of the Metropolitan Police and City of London Police.

(2) The officer was entitled to legal representation.

(3) Where the hearing was the result of a recommendation by the IPCC, it was entitled to attend the hearing, be legally represented and make representations to the panel.

(4) Where there was a complainant or other "interested person" they were entitled to attend the hearing as an observer and to request the chair to put questions to the officer.

(5) The hearing was normally in private, but in some circumstances the IPCC could direct that it be held in public.

(6) Whether the officer was guilty of misconduct, and the appropriate sanction, including dismissal, were decided exclusively by the panel, with no residual role for the chief officer.

14. Those features were essentially retained under the 2012 Regulations in their original form. However, the 2015 Amendment Regulations made two changes to which I need to refer:

(1) The panel was now to be chaired by a legally qualified chair from a list of persons nominated by the local policing body.

(2) Hearings were now to be held in public, subject to a power for the chair to exclude any person.

15. The 2017 Amendment Regulations, which were in the relevant respects made pursuant to powers in the Policing and Crime Act 2017, amended the 2012 Regulations so as to allow misconduct proceedings to be brought, or to continue, against former police officers.

16. The 2012 Regulations (as amended) have now been replaced by the Police (Conduct) Regulations 2020. These introduced further changes, but since they post-date the events with which we are concerned in this appeal I need not identify them.

17. The operation of the Regulations has at all material times been subject to statutory Guidance.

18. Officers enjoyed a right of appeal to the Police Appeals Tribunal ("the PAT") against decisions of police misconduct panels under both the 2008 and the 2012 Regulations; but the details are irrelevant for our purposes.

19. I should mention one other matter. From 1 December 2013 the College of Policing maintained, on a non-statutory basis, a "Disapproved List" or "Disapproved Register" of police officers who had been dismissed for misconduct or who had retired in the course of misconduct proceedings. That list – now described as the "barred list" – was put on a statutory footing by the 2017 Act with effect from 1 December 2017. The intention and effect of that list is that if a police officer is dismissed for misconduct by one force he cannot be appointed to another: as Mr Basu put it, the panel's decision will thus (subject to any appeal) be "career-ending".

20. As Mr Basu submitted, the effect of the features which I have summarised in the preceding paragraphs is that misconduct proceedings against a police officer are very unlike disciplinary proceedings by an ordinary employer. Although the chief officer retains a limited role, inasmuch as he or she remains responsible for the selection and appointment of the panel (albeit from a defined pool), the clear purpose of the legislative scheme is that the decisions as to both guilt and sanction should be taken out of his or her hands and be made by a process which is transparently independent. A dismissal decision will, as we have seen, be career-ending. The special character of a decision of a police misconduct panel is reflected in the fact that it is well-recognised that its decisions may be challenged by way of judicial review: two recent examples are the decisions of Eady J in *R (Chief Constable of West Midlands Police) v Panel Chair, Police Misconduct Panel* [2020] EWHC 1400 (Admin) and of Nicklin J in *R (Chief Constable of Dyfed Powys) v Police Misconduct Tribunal* [2020] EWHC 2032 (Admin), [2020] IRLR 964. Mr Basu submitted that a police misconduct panel is, and was at the material times, a public authority within the meaning of section 6 of the Human Rights Act 1998 and that its decisions constitute determinations of civil rights and obligations for the purpose of article 6 of the Convention: that may well be right, but it is unnecessary to decide the point here.

THE DECISION OF THE SUPREME COURT IN *P*

21. In *P v Commissioner of Police for the Metropolis*, to which I have already referred, the claimant was an officer in the Metropolitan Police who was dismissed following a misconduct hearing conducted under the 2008 Regulations. She claimed that the conduct for which she was dismissed was the result of a mental health condition amounting to a disability within the meaning of the 2010 Act, and she brought proceedings in the ET alleging disability discrimination, relying on both section 15 and section 21 of the Act; the basic situation was thus very close to that in the present case. The ET struck her claim out on the basis that the decisions of the panel, and any acts done by it in the course of the proceedings, were protected by judicial immunity, relying on the decision of this Court in *Heath v Commissioner of Police for the Metropolis* [2004] EWCA Civ 943, [2005] ICR 329; and its decision was upheld both by the EAT and by this Court.

22. The Supreme Court allowed the claimant's appeal. The only judgment was given by Lord Reed, with whom the other members of the Court agreed. His reasoning can be summarised as follows.

23. His starting-point, at para. 28 of his judgment, was that under EU Directive 2000/78 (the so-called "Framework Directive") the claimant enjoyed a directly effective right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions, including dismissals. The principle of equal treatment includes the right not to suffer disability discrimination.

24. The next step in his analysis was that the claimant was entitled to a remedy for any breach of that right which was both effective and, significantly, equivalent to the remedies available for analogous claims under domestic law. At para. 29 of his judgment he says:

> "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."

25. After noting at para. 31 that by section 42 (1) of the 2010 Act (see para. 3 above) police constables are deemed to be employed by their chief officer (in that case the Commissioner of the Metropolitan Police) for the purpose of Part 5 of the Act, Lord Reed went on to acknowledge that that did not on the face of it assist the claimant because the nature of a misconduct hearing was such that the panel's acts and omissions were entirely independent and could not be attributed to the chief officer. As he said at the beginning of para. 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."

He went on to make the further point that the panel could not be said to be acting as an employee or agent of the chief officer within the meaning of the Act since "the relevant powers are conferred directly on the panel in its own right". He concludes:

> "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."

26. Lord Reed held that in order to achieve the proper implementation of the Framework Directive in such circumstances it was necessary to apply a conforming interpretation to section 42 (1), applying the so-called "*Marleasing* principle". Paras. 33-34 of his judgment read:

> "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."

27. In short, the Supreme Court held that notwithstanding the special characteristics of a police misconduct panel, and in particular its independence from the chief officer, its acts were to be attributed to the Commissioner for the purpose of a claim of disability discrimination; and on that analysis no question of judicial immunity arose.

THE ISSUES ON THIS APPEAL

28. On the face of it, the decision of the Supreme Court in *P* is conclusive against the Chief Constable's case that she has no responsibility for the acts or omissions of the Panel. But Mr Basu submitted that we were not bound by that decision, for essentially two reasons. First, he submitted that it could be distinguished. Second, he submitted that even if it could not be distinguished it was not binding because the Court proceeded on the basis of an assumption about the unavailability of any other remedy which could be shown to be incorrect. I consider the two points in turn.

(1) CAN *P* BE DISTINGUISHED?

29. Mr Basu submitted that *P* was not binding on us because it was concerned with the 2008 Regulations and not the 2012 Regulations (as amended). He emphasised the importance of the changes introduced by the 2015 and 2017 Amendment Regulations which I have summarised at paras. 14 and 15 above.

30. I do not accept that submission. Under the 2008 and the (unamended) 2012 Regulations panels conducting police misconduct hearings were functionally wholly independent of the chief officer: there was (to succumb to the cliché used in the submissions before us) clear blue water between the chief officer and the panel. The changes made in 2015 and 2017 may have widened the channel, but it was there already: indeed it was for that very reason that there was a problem about treating the acts of the panel as attributable to the chief officer under the 2010 Act and thus about the absence of an effective/equivalent remedy. Lord Reed was able to resolve that problem, taking a *Marleasing* approach, by adopting the construction of section 42 (1) (a) which I have set out, and his reasoning and solution are equally applicable, notwithstanding the 2015 and 2017 changes.

31. In fact, by the time that *P* was heard in the Supreme Court, which was in May 2017, the 2008 Regulations had long been replaced by the 2012 Regulations, and the 2015 Amendment Regulations had been in force for two years. Lord Reed was aware of those changes: he refers to both at para. 15 of his judgment, describing the amended 2012 Regulations as being "broadly (but not entirely) in similar terms" to the 2008 Regulations. Ms Monaghan submitted that if Lord Reed had believed that the changes made in 2015 made a significant difference to his analysis he would surely have said so, or at least reserved his position; instead he made a point of emphasising that the Court's decision was not specific to the 2008 Regulations and would apply "in relation to other types of panel if that is necessary in order to comply with the Directive" – see para. 34 of his judgment, quoted at para. 26 above. I agree that it is likely that Lord Reed was indeed deliberately seeking to make clear that the Court's decision would apply equally to the current regime. I would not, however, put that at the centre of my reasoning. Strictly, what matters is not whether Lord Reed believed that his reasoning as regards the 2008 Regulations would apply equally to the 2012 Regulations (as amended), which were not the subject of the Court's decision, but whether in fact it did so. For the reasons which I have given, I believe that it did.

(2) MISTAKEN ASSUMPTION ABOUT OTHER REMEDIES

32. As we have seen, the essential basis of the reasoning in *P* was that unless section 42 (1) were construed in the way proposed the claimant would have no remedy for the breach of her rights under the Framework Directive which satisfied the effectiveness and equivalence principles. Mr Basu submitted that that represented a mistaken assumption on the Court's part. In fact the claimant would have had a straightforward remedy against the panel by advancing a claim under section 29 (6) of the 2010 Act, which falls under Part 3 ("Services and Public Functions"), but unfortunately this point had not been drawn to the Court's attention. Section 29 (6) provides:

> "A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

Section 31 (4) defines "a public function" as "a function that is a function of a public nature for the purposes of the Human Rights Act 1998" (the reference is to section 6 of the 1998 Act). Mr Basu submitted that a police misconduct panel constituted under the 2012 Regulations was plainly exercising a function of a public nature. He contended that a claim of unlawful discrimination under section 29 (6) would satisfy both the

effectiveness and the equivalence principles and accordingly the essential premise of Lord Reed's reasoning was falsified.

33. Mr Basu did not in his skeleton argument articulate on what basis the alleged misapprehension on the part of the Supreme Court in *P* would entitle this Court to disregard its decision. In his oral submissions he accepted that it was not open to us to treat it as *per incuriam*: see *British Council v Jeffery* [2018] EWCA Civ 2253, [2019] ICR 929, at para. 60. He eventually based his submission on the proposition that "a court was not bound by a proposition of law which, although part of the *ratio decidendi* of an earlier decision, had been assumed to be correct by the earlier court and had not been the subject of argument before, or consideration by, that court". I take that formulation from the headnote of the report of the decision of this Court in ***Kadhim v Housing Benefit Board, Brent*** [2000] EWCA Civ 344, [2001] QB 955, in which the point was first decided.

34. I accept that the present case could be said to be covered by the principle in *Kadhim*, since it seems clear from Lord Reed's judgment that the Supreme Court did not consider the possibility that a claim under section 29 (6) could provide the claimant with an effective remedy which satisfied the equivalence principle[3], and in that sense it can be said to have "assumed" that the only means by which the claimant could be afforded a remedy was under Part 5. The question therefore is whether an officer in the position of the claimant in *P*, and the Claimant in the present case, could indeed bring a claim against the panel under section 29 (6), and if so whether that remedy would satisfy the effectiveness and equivalence principles.

35. I find it easier to take the second of those questions first. In my opinion even if a claim could be brought under section 29 (6) it would not satisfy the equivalence principle, because claims under Part 3 of the 2010 Act have to be brought in the County Court (see section 114 (1) (a)) whereas claims under Part 5 have to be brought in the ET (section 120 (1) (a)). In my view the right to pursue a discrimination claim[4] in the County Court is not in the relevant sense equivalent to a right to pursue such a claim in the ET. There are material differences between the two jurisdictions. The most significant are as follows.

36. First, even if the peculiarities of the police disciplinary system mean that issues of misconduct fall to be determined by an independent body exercising public functions, those functions nevertheless arise out of, and in the context of, the employment relationship. In the British system it is the ET which has the appropriate expertise for determining discrimination disputes in the employment field. Lord Reed makes this point in *P*: see para. 29 of his judgment. He does so in response to an argument that the availability of an appeal to the PAT was sufficient to satisfy the effectiveness and equivalence principles, but what he says is equally applicable in this context. Mr Basu submitted that the County Court had equivalent expertise, referring to the power of a judge under section 63 (1) of the 2010 Act to appoint an expert assessor. It may be

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3 Indeed Ms Monaghan, who was counsel for the claimant in *P*, confirmed that to the best of her recollection the Commissioner had advanced no such case.

4 I refer to a discrimination claim generally rather than specifically to a disability discrimination claim because the issue in question will arise in respect of any discrimination claim of a kind covered by the Framework Directive (as almost all claims under the 2010 Act will be).

doubted whether, even with the assistance of an assessor, a County Court judge will typically have equivalent experience of discrimination law to that enjoyed by an employment judge sitting with lay members: discrimination cases in the County Court are something of a rarity. But in any event the real point is that he or she will not have equivalent experience of claims of discrimination in the employment field.

37. Second, the costs regimes in the County Court and the ET are fundamentally different. The normal rule in the County Court is that the loser has to pay the winner's costs, whereas the normal rule in the ET is that each party has to bear its own costs. Mr Basu pointed out that that cuts both ways: if an employee succeeds in a discrimination claim in the ET their net recovery may be seriously impacted by the costs of having instructed a lawyer. That is true as far as it goes, but for many, perhaps most, employees the risk of a substantial costs liability if they lose may be sufficient to deter them from bringing a County Court claim at all. It is at least partly because of that consideration that the ET has since its inception been (normally) a "no-costs jurisdiction". In any event, whatever the relative proportion of cases in which the applicable costs regime may be an advantage or a disadvantage, the important point is that they are different.

38. Third, there were at the time that these proceedings were issued no fees payable for bringing a claim in the ET, whereas fees are payable for the initiation of County Court proceedings. This is probably a less significant consideration than the risk of liability for costs, but it cannot be wholly ignored.

39. Fourth, the ET has powers as to remedies in a discrimination case which a County Court does not. By section 124 (2) it may:

> "(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation."

Subsections (3)-(7) contain various provisions supplementing subsection (2). I note in particular that by subsection (7) the ET is empowered to increase any amount of compensation awarded if a respondent has failed without reasonable excuse to comply with a recommendation made under subsection (2) (b). By contrast section 119 (2) empowers the County Court to grant

> "any remedy which could be granted by the High Court —
>
> (a) in proceedings in tort;
>
> (b) on a claim for judicial review".

That empowers it to award compensation and declaratory relief but not to make a recommendation.

40. For those reasons I do not believe that the right to bring a discrimination claim in the County Court under section 29 (6) can be regarded as equivalent to the right to bring such a claim in the ET under section 39 (2) (read with section 42 (1)). It may well be

that for similar reasons it does not satisfy the principle of effectiveness either, but I need not consider that.

41. Mr Basu submitted that if that were the Court's view the difficulty could be resolved by invoking the *Marleasing* principle and reading down the statutory allocation of claims of this kind to the County Court. He submitted that this could be done by reading words into section 120 (1) (a) of the 2010 Act as follows:

> "An employment tribunal has … jurisdiction to determine a complaint relating to … a contravention of Part 5 (work) *or of section 29 (6) and (7) so far as such contravention falls within the scope of the Framework Directive by persons conducting a police misconduct hearing*."

42. I do not accept that submission. Such a reading down might in principle be possible if it were indeed necessary in order to give effect to the rights of police officers under the Framework Directive (cf. *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust* [2016] EWCA Civ 607, [2016] ICR 903, at para. 55). But I do not believe that it is necessary. On the basis that we are considering there are two possible options for vindicating the claimant's EU rights – in the one case to read down section 42 (1) (a) so as to make the chief officer responsible for the acts and omissions of the panel, and in the other to read down section 120 in order to enable the panel to be proceeded against in its own right in the ET. If that is the choice, I have no doubt that the former course is the more appropriate; and if it is taken the latter does not satisfy the requirement of necessity[5]. My reasons for believing that it is more appropriate that claimants in this kind of case have a remedy against the chief officer than against the panel are as follows.

43. First, the primary purpose of a police misconduct panel is to decide whether to take steps which will affect the relationship between a chief officer and a member of their force – paradigmatically by dismissing them, and thus terminating the relationship, but otherwise by imposing some lesser sanction. It is thus doing what would in ordinary circumstances be the responsibility of the chief officer as quasi-employer[6]; and that is reflected in the fact that it remains the chief officer who appoints the panel. That being so, it seems to me appropriate that the remedy should be against the chief officer rather than against the panel. Mr Basu submitted that it was fundamentally unfair that chief officers should be saddled with responsibility for acts and omissions on the part of police misconduct panels which they were powerless, both in principle and in practice, to prevent. The unfairness was, he submitted, exacerbated by the fact that the effect of the construction of section 42 (1) (a) adopted in *P* would mean that chief officers could not in practice take advantage of section 109 (4) of the 2010 Act, which affords principals and employers a defence against liability for acts done by their agents or

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5 It would also, it appears, mean that no claim under Part 3 would be available, even if the definition in section 29 (6) were otherwise satisfied: see section 28 (2) (a), which excludes claims that can be brought under Part 5.

6 I say "quasi-employer" in recognition of the fact that at common law a constable is an office-holder and is thus neither an employee nor (in the statutory sense) a "worker"; but he or she is nevertheless in a relationship with their chief officer which is akin to an employment relationship and is so regarded in EU law and (by virtue of section 42 (1)) for the purposes of the 2010 Act.

employees if they have taken all reasonable steps to prevent acts of the kind in question. However, that is not axiomatically unjust. On the contrary, at common law principals and employers are vicariously liable for the acts of their agents or employees acting within the scope of what they have been engaged to do, even when they are powerless to prevent the acts in question; and it would be unsurprising for the relationship of a chief officer and a police misconduct panel to be treated as analogous, notwithstanding the panel's functional independence. Clearly the Supreme Court in *P* saw nothing wrong in principle in such liability.

44. Second, it is likely that there will be cases – I suspect quite commonly – where a complainant who alleges that their dismissal (or other disciplinary sanction) was unlawfully discriminatory will also have complaints arising out of their treatment at work; indeed part of the discrimination alleged against the panel may consist of a failure to appreciate that they were victims of such earlier discrimination. It would lead to real difficulties in the assessment of compensation if an ET had to distinguish between the loss (whether in the form of pecuniary loss or of distress or psychiatric injury) attributable to the acts and omissions for which the chief officer and the misconduct panel were respectively liable.

45. Third, there are obvious practical and policy difficulties about the members of a police misconduct panel, and not the chief officer, being the proper respondents in claims of discriminatory dismissal (or other sanction). The costs of defending even unsuccessful claims are liable to be high; and if a claim were successful (which might, it should be noted, be on the basis of discrimination which was unintentional or unconscious) awards could of course likewise be high. The NALQC adduced evidence from its President, Mr John Bassett, a barrister who acts regularly as the chair of police misconduct panels, to the effect that the majority do not have professional indemnity insurance covering such liability; and also that initial enquiries had suggested that such cover would not be available if sought. It is clear from his evidence, but would in truth be obvious in any event, that the risk of such liability would be likely to deter many or most qualified candidates from agreeing to serve on police misconduct panels. Concerns expressed by the NALQC have in fact led to the APCC and the Association of Policing and Crime Chief Executives agreeing to advise their members to provide legally-qualified chairs with an indemnity in terms which it regards as acceptable; but Mr Bassett points out that the two associations have recommended the granting of the indemnity on the basis that their members are under no legal obligation to provide it and that its continuance will be reviewed every six months. In practical terms the availability of the indemnity may well be a satisfactory solution, but the need to adopt a makeshift solution of this kind nevertheless suggests that it is inherently unsatisfactory that panel members should be even potentially liable.

46. I accordingly conclude that section 120 (1) (a) of the 2010 Act cannot be read down so as to enable a claim of discrimination against a police misconduct panel under section 29 (6) to be brought in the ET, which means, for the reasons already explored, that it is not equivalent to a remedy under section 39 (2) and that the decision of the Supreme Court in *P* is binding on this Court notwithstanding that it did not consider the possibility of such a claim. That being so, it is unnecessary that I consider whether the misconduct panel is in any event "exercis[ing] … a public function" within the meaning of section 29 (6).

CONCLUSION AND DISPOSAL

47. For those reasons I believe that this Court is bound by *P* to hold that the Chief Constable was liable for the acts and omissions of the Panel, and I would dismiss this appeal. The shape of the issues before Kerr J was rather different, and my reasoning may not correspond to his at all points; but I do not believe that it is different in any essential respect.

48. I should mention one point in conclusion. Ms Studd drew our attention to paras. 71-79 of Kerr J's judgment in which he discussed the basis on which the IOPC might be made a party to a claim in the ET on the basis of the "secondary liability" provisions under sections 109-112 of the 2010 Act. At para. 73 he said that he accepted "the proposition that the employment tribunal is the most natural forum for a claim of discrimination by a police officer against the IOPC". However, it is clear from the following paragraphs that he was not deciding that it followed from that proposition that the ET would in fact have jurisdiction to decide such a claim (see in particular para. 76) and that he saw real difficulties about the secondary liability analysis. Since the issue does not arise in these proceedings I am not prepared to express any view about Kerr J's analysis; but I am happy to confirm that para. 73 should certainly not be read in isolation from the rest of the passage.

Coulson LJ:

49. I agree.

Carr LJ:

50. I also agree.