



EMPLOYMENT TRIBUNALS

Claimant: Ms L Barbosa Dethling

Respondent: The Commissioner of the Police of the Metropolis

Heard at: Reading (in public; by C.V.P.) **On:** 7 March 2024

Before: Employment Judge George

Appearances

For the claimant: self-representing

For the respondent: Mr O Isaacs, counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING IN PUBLIC

1. The following claims are dismissed because the employment tribunal does not have jurisdiction to consider them:
 - a. unfair dismissal contrary to section 94 of the Employment Rights Act 1994 (hereafter the ERA);
 - b. Harassment under the Protection from Harassment Act 1997 (hereafter the PHA);
 - c. Breach of duty of care leading to personal injury, and
 - d. Breach of the Police (Performance) Regulations 2020 and/or the Police Conduct Regulations 2020 as freestanding complaints. Any complaint that the respondent subjected the claimant to unlawful detriment contrary to the Equality Act 2010 (hereafter the EQA) by an act which contravened the Performance and Conduct Regulations is not affected by this judgment.

REASONS

1. The details of the preliminary hearing, the stage the litigation has reached and the issues which will proceed to final hearing are set out in the Case Summary of the separate record of hearing sent out with this reserved judgment. I refer to but do not repeat those details so that this judgment should not be unnecessarily long. Page numbers in this judgment refer to page numbers in the 222 page electronic hearing file for the hearing on 7 March 2024. The respondent's application is at page 117 and the claimant's full response is at page 118. The latter is referred to as CSUB paras.1 to 39 as the case may be.

Unfair dismissal contrary to s.94 ERA.

2. Part X ERA contains the provisions governing the right not to be unfairly dismissed. The right itself is set out in s.94 ERA. Section 95 ERA contains the definition of 'dismissal' for the purposes of that right.
3. Although the claimant in her response to the respondent's application for orders striking out certain of her complaints appeared to withdraw the claim of unfair dismissal, this was an equivocal withdrawal because she stated that it was:

“on the basis that her dismissal was constructive, rather than a direct act of dismissal from the Respondent.”

4. The wording of s.95(1)(c) Employment Rights Act 1996 (hereafter the ERA) makes clear that dismissal includes where

“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.”

The claimant stated that she had understood that for an unfair dismissal complaint she would have had to be directly dismissed by the respondent and that that was the only reason she agreed to withdraw that complaint. That explanation was consistent with the wording of her purported withdrawal which I accepted did not amount to a withdrawal within rule 52 of the Employment Tribunal Rules of Procedure 2013. I in reality an unfair constructive dismissal complaint is a type of unfair dismissal complaint.

5. The respondent's argument relies upon a different point; they rely upon s.200 ERA, which is headed 'police officers' and, so far as is material, provides as follows:

“(1) [...], Part X (except sections 100, 103A and 134A) and the other provisions of that Part so far as relating to the right not to be unfairly dismissed in a case where the dismissal is unfair by virtue of [section 100[or 103A]] do not apply to employment 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.”
6. Mr Isaacs drew attention to the order of Employment Judge Anstis (page 101) by which he refused permission to the claimant to add complaints that the reason or principle reason for her constructive dismissal was that she had made protected disclosures and/or was on prohibited health & safety grounds. Although the claimant argues that she is appealing this order, until it has been successfully appealed, the claim does not include complaints under s.100 (health & safety) or s.103A (protected disclosure) ERA.
 7. The clear terms of s.200 ERA preclude a claim for unfair dismissal (whether the based on termination by the employer or termination by the employee) by a police officer save in particular circumstances which, I am satisfied, do not apply in the present case. The Tribunal does not have jurisdiction to consider that claim.
 8. What the claimant argued was that Judge Anstis had been wrong to deal with it as an application to amend her claim but it would be wrong for me to go behind the decision of a fellow first instance judge firstly that the amendment was needed and secondly that it should be refused.

Harassment under the Protection from Harassment Act 1997 (hereafter the PHA)

9. The claimant argued that employers can be held liable to their workers for harassment in the workplace for which they were vicariously liable: Majrowski v Guy's and St Thomas' NHS Trust [2006] UKHL 3.
10. The respondent does not argue otherwise but points to the exclusive jurisdiction given to the courts to consider claims under the PHA because of s.3 PHA which states (so far as material):
 - “(1) An actual or apprehended breach of [the section 1(1) prohibition on harassment] may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
 - (2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.
 - (3) Where—
 - (a) in such proceedings the High Court or [the county] court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and

(b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction,

the plaintiff may apply for the issue of a warrant for the arrest of the defendant.

(4) An application under subsection (3) may be made—

(a) where the injunction was granted by the High Court, to a judge of that court, and

(b) where the injunction was granted by [the county] court, to a judge [of that] court.

(5) The judge [...] to whom an application under subsection (3) is made may only issue a warrant if—

(a) the application is substantiated on oath, and

(b) the judge [...] has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction.

(6) Where—

(a) the High Court or [the county] court grants an injunction for the purpose mentioned in subsection (3)(a), and

(b) without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction,

he is guilty of an offence.”

11. It was not, he argued, that the act could not be used by workers in respect of workplace harassment but that they could only enforce a complaint under the PHA in the civil courts and not in the tribunal. In support of this argument, not only did Mr Isaacs point to the absence of express jurisdiction, such as is found for discrimination and victimisation in s.120 EQA, but also to the inclusion of a remedy which the Tribunal has no power to make, namely an injunction.
12. The claimant analysed the question of whether the Tribunal should be regarded as a court for the purposes of s.3 PHA in paras.11 to 17 and relied upon Irwell Insurance Company Ltd v Watson (also known as Watson v Hemingway Design Ltd) [2021 EWCA Civ 67 [2021 I.C.R. 1034, CA.
13. That case involved the Third Parties (Rights against Insurers) Act 2010 (hereafter the TPRI). The claimant brought claims for which the employment tribunal has exclusive jurisdiction (unfair constructive dismissal and disability discrimination including against an individual director). The corporate employer was insolvent and the claimant sought to join an insurer whom he argued would be liable to pay any compensation ordered against his employer under the terms of a contract of insurance between the company and the insurer. The Court of Appeal held that the Tribunal should

be regarded as a court for the purposes of s.2(6) TPRI, relying in part upon the unfortunate situation which would otherwise result from the claimant being in a different situation

14. I note that the claimant did not in her analysis of this authority quote from para.29 of the judgment where the case of Brennan v Sunderland City Council (No.2) [2012] ICR 1183, EAT was considered. There Underhill J, as he then was, held that the employment tribunal does not have jurisdiction to make orders for contribution under the Civil Liability (Contribution) Act 1978 and that the right to contribution could only be created by Parliament.
15. In my view the right to bring 'civil proceedings' under s.3 PHA are civil proceedings in the High Court or county court. Not all of the remedies envisaged by the section are available in the employment tribunal. Although the reference to those courts in s.3 is in the context of the grant of an injunction, the absence of reference to the forum for 'civil proceedings' in s.3(1) does not amount to a grant of jurisdiction to the employment tribunal. We are a creature of statute and look for expressly granted jurisdiction. For example, the EQA is very clear to specify which sections are within the jurisdiction of the employment tribunal and which the county court. Were the claimant's interpretation to be the correct one, there would be nothing to stop a person who has experienced a course of conduct in breach of s.1 PHA but outside the workplace to bring a claim to the employment tribunal. The absence from the PHA of delineation of jurisdiction such as is found in the EQA causes me to think that Parliament did not intend the employment tribunal to have jurisdiction over this Act.
16. It is clear that the employment tribunal has no jurisdiction under the PHA and that claim will be dismissed for that reason.
17. The claimant argues in her para.19 that such an interpretation would indirectly discriminate against police officers, without protection from harassment in the workplace for reasons not related to any particular protected characteristic within the EQA. This is not the case. Such police officers may bring civil proceedings in the High Court or county court and are therefore in the same position as other workers.
18. The next question is whether the harassment complaint which the claimant seeks to bring is one which, properly analysed, does not fall under the EQA but potentially falls under the PHA 1997. The Further and Better Particulars (page 87 para.168) referred to a consistent pattern of behaviour alleged to be "harassing, unwarranted, unreasonable and oppressive." This is consistent with the claimant's draft list of issues (para.2). There is no suggestion that this behaviour was related to a protected characteristic. In para.19 of her response to the application to strike out this claim, she specifically states that the alleged bullying and harassment this was "not due to any protected characteristic but rather through an abuse of position".
19. Based on the above, I am satisfied that the conduct complained of is not alleged to fall under the EQA and the potential claim of breach of s.1 PHA is not one which the employment tribunal has jurisdiction to consider.

Breach of Duty of Care leading to personal injury

20. In support of her argument that this claim should continue, the claimant relies upon Essa v Laing [2004] EWCA Civ 02, CA (CSUB para.29). As she rightly says, this establishes that the employment tribunal can award compensation for psychiatric injury flowing from a discriminatory act. Mr Isaacs confirmed that the respondent is not saying that she is unable to pursue a personal injury claim flowing from unlawful discrimination or victimisation.
21. Essa v Laing is about the compensation that can be awarded in an appropriate case for acts which have been found to be unlawful under the EQA. The EQA establishes the statutory torts of discrimination and victimisation (among others). It is not authority that the employment tribunal has jurisdiction to consider the separate type of complaint of breach of a duty of care. It is about what remedy or compensation is available if the claimant is successful in her complaint that the respondent has committed the statutory torts of discrimination and victimisation.
22. The complaint of a breach of duty of care leading to personal injury, whether under the Health & Safety at Work Act 1974 or common law, can only be brought in the county court or High Court. The employment tribunal has no jurisdiction to consider that complaint as a free standing complaint but the injury alleged by the claimant is one which she potentially could be compensated for if she is successful in one or more of her other complaints.

Breach of the Police (Performance) Regulations 2020 and/or the Police Conduct Regulations 2020

23. This claim is articulated in para.173 of the Further and Better Particulars (page 88 – hereafter referred to as the FPBs) where the complaint is that there was a breach of the requirement to provide the claimant with written notice of a first stage meeting when the respondent initiated disciplinary action against her.
24. The Police (Performance) Regulations 2020 have applied since 1 February 2020 where unsatisfactory performance or attendance by a police officer is alleged. They set out what is, in effect, a three stage process for handling allegations of unsatisfactory performance or attendance or gross incompetence of members of police forces of certain ranks including that previously held by the claimant (see Explanatory Note). The Police (Conduct) Regulations 2020 set out a process to be followed where there are allegations of misconduct, gross misconduct or practice requiring improvement (reg.4(1) of the Conduct Regulations). They were made pursuant to the Secretary of States delegated powers under the Police Act 1996, the Police Reform Act 2002 and the Policing and Crime Act 2017.
25. The claimant argues that the Supreme Court's decision in P v Commissioner of Police for the Metropolis [2017] UKSC 65 permits police

officers to lodge claims in the employment tribunal where they face a disciplinary or performance action within a discriminatory context (para.23 CSUB). What P held was that the chief officer (here the respondent) is deemed to be the employer of the police officer (here the claimant) for the purposes of Part 5 EQA because of s.42(1) EQA. Jurisdiction for alleged breaches of Part 5 EQA (work) is with the employment tribunal and acts in exercise of the disciplinary functions of the chief officer fall within Part 5. The claim remains a claim of discrimination (or victimisation as the case may be) under Part 5 EQA and not a free standing claim under the Conduct or Performance Regulations.

26. One of the claimant's complaints under s.15 EQA is that it was unfavourable treatment for a reason arising in consequence of disability to start absence proceedings. The respondent disputes this. However, were the claimant to show those facts (i.e. that absence proceedings had been started for a reason arising in consequence of disability) then whether or not the responsible officers to whom management of attendance had been delegated, breached the Performance Regulations would potentially be relevant to the success of any defence of justification. I did not understand Mr Isaacs to disagree with this proposition while making clear that, in his words, factually the argument "did not stack up".
27. The claimant made clear that the argument she was putting forward in relation to alleged breaches reg.15 & 16 of the Performance Regulations was a complaint in itself. I have been shown nothing which makes that a free standing cause of action and nothing which gives the employment tribunal jurisdiction over any such alleged cause of action. This does not prevent the claimant from arguing that action was taken in breach of the Performance Regulations if that is relevant to a complaint in the List of Issues. In the same way, a civilian employee could rely upon a breach of an internal policy if that were relevant to an issue in the case.
28. The employment tribunal does not have jurisdiction to consider a free-standing complaint under the Performance or Conduct Regulations.

Employment Judge George

Date: ...3 May 2024.....

Sent to the parties on: 3 May 2024

For the Tribunal Office

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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