Appeal No. UKEAT/0130/11/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 22 November 2011

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

COMMISSIONER OF POLICE OF THE METROPOLIS — APPELLANT

MS N WEEKS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON CHEETHAM (of Counsel) Instructed by: Weightmans LLP Second Floor, 6 New Street Square New Fetter Lane London EC4A 3BF
For the Respondent	Debarred

SUMMARY

SEX DISCRIMINATION – Vicarious liability

As the Employment Judge correctly found at a PHR, the Commissioner of the Metropolitan Police is responsible for the acts of sex discrimination by an officer of the City of London Police who line managed the Claimant, a civilian employee of the Commissioner. **Sex Discrimination Act** ss 17 and 42(2) applied.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the responsibility of the Commissioner of the Metropolitan Police (CMP) for the acts of an officer of the City of London Police (CLP) for what is said to be sex discrimination against a civilian employee of the Commissioner. I will refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Respondent in those proceedings, the Commissioner, against a Judgment of Employment Judge Ms Grewal, sitting alone at London Central at a PHR, in Reasons which were sent to the parties on 7 January 2011. The Claimant was represented by her solicitor and the Respondent by Mr Simon Cheetham of counsel.

3. The sole issue for determination was whether the Claimant was entitled to make the claim against the Commissioner in respect of the acts of the CLP Officer, DS Thomas. The Employment Judge resolved the issue in favour of the Claimant. The Commissioner appeals. He contends that this is an important issue, since it involves a discussion of what is commonplace within the police service and beyond, that is, a number of persons brought together for a particular task, each of whom have different employment relationships.

4. The appeal came before Cox J on the sift, who said that the matter was arguable. Sadly, the Claimant was debarred for having failed at any time to produce a Respondent's answer to this appeal. Mr Cheetham acknowledges that this Judgment may not be the best vehicle for testing the point, since on his case the Employment Judge did not give adequate reasons for the findings which she made.

5. The other problem is that with the Claimant not being here, I have heard only submissions from Mr Cheetham and he has, with commendable professionalism, indicated issues that might have been raised, had legal representation been available in opposition. I reflected with him on whether I should send the matter back to the Employment Judge for further reasons, and on calling in a friend of the court to assist me, but in the light of the decision which I have made, neither of those is necessary.

The legislation

6. The **Sex Discrimination Act 1975**, which applies to this case, prior to its replacement by the **Equality Act 2010**, outlaws discrimination on the grounds of a person's sex. Specific provisions deal with police officers and, for this purpose, part of s.17 is relevant:

> **"(1) For the purposes of this Part, the holding of the office of constable shall be treated as employment-**
>
> **(a) by the chief officer of police as respects any act done by him in relation to a constable or that office;**
>
> **(b) by the police authority as respects any act done by it in relation to a constable or that office.**
>
> **(1A) For the purposes of section 41-**
>
> **(a) the holding of the office of constable shall be treated as employment by the chief officer of police (and as not being employment by any other person); and**
>
> **(b) anything done by a person holding such an office in the performance, or purported performance, of his functions shall be treated as done in the course of that employment.**
>
> **(5) Any proceedings under this Act which, by virtue of subsection (1) or (1A), would lie against a chief officer of police shall be brought against the chief officer of police for the time being or, in the case of a vacancy in that office, against the person for the time being performing the functions of that office; and references in subsection (4) to the chief officer of police shall be construed accordingly.**
>
> **(9) In relation to a constable of a force who is not under the direction and control of the chief officer of police for that force, references in this section to the chief officer of police are references to the chief officer for the force under whose direction and control he is, and references in this section to the police authority are references to the relevant police authority for that force."**

7. Subsections 17(1A) and 17(9) were inserted by statutory instrument on 19 July 2003. The **Equality Act 2010** retains the same principles. The application of the law for police officers has some resonance in s.41, which provides as follows:

> **"(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.**
>
> **(2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act as done by that other person as well as by him.**
>
> **(3) In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description."**

8. The Employment Judge directed herself by reference to those two provisions, which were cited to her in the arguments of the legal representatives below, although it is said that she did not directly descend upon s.17(9).

The facts

9. Since this was a PHR, the judge took the facts on the Claimant's case at its highest. She read the evidence of the Claimant and Mr McMurdie, who is a police officer under the Commissioner, and she made the following findings:

> **"4. The Claimant commenced employment with the Respondent on 29 June 1991 and is a civilian employee of the Respondent.**
>
> **5. From September 2006 to July 2010 the Claimant worked as a Senior Crime Intelligence Researcher in the Dedicated Cheque and Plastic Crime Unit (DCPCU). The unit is funded by the banking industry and was set up in 2002 to investigate and prosecute organised criminal networks responsible for attacks on the payment card industry and to work with partners to share learning and prevention opportunities. It is staffed by staff from the UK Payments Association (UKPA) (formerly known as Association Payment and Clearing Services - APACS), Metropolitan Police Service (MPS) staff and officers and City of London Police officers.**
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> **6. In December 2006 the DCPCU was restructured to establish a dedicated intelligence wing - the Joint Intelligence Unit. Both the DCPCU and the JIU are headed by Detective Inspectors, who in turn report to a Detective Chief Inspector. The head of the Unit is a Detective Chief Superintendent. The Detective Chief Superintendent heading the Unit and the Detective Chief Inspector managing the Unit have always been City of London Police officers.**
>
> **7. The DCPCU has a Steering Group which formally reviews and advises on the workings of the agreement between the Police Authorities and UKPA for the provision of the Unit. About**

half the members of the Steering Committee are UKPA personnel and the other half include the Unit head, the JIU Manager and one representative each of the Commissioners of the MPS and the City of London Police.

8. The JIU had a total of 15 staff. There was a UKPA Intelligence Manager who provided line management for the UKPA/Industry staff and a Detective Sergeant who provided line management for the police officers and police staff.

9. When the Claimant first started working in the Joint Intelligence Unit she was line managed by DS Jason Connell, a City of London Police officer, and the head of the JIU was DI Graham Goodwin, an MPS officer. The Claimant's annual appraisal (performance development review) was carried out by DS Connell and countersigned by DI Goodwin. As such, DS Connell was responsible for assessing the Claimant's performance and making decisions which could impact on her prospects for promotion and career advancement. The responsibilities of the DI and the DS included management, oversight, quality control and the briefing and tasking of the researchers and analysts."

10. DC Connell was replaced by DS Thomas. The judge went on:

"11. He refused the application on the ground that it would impact on the work of the unit. As her manager DS Thomas had the authority to determine the hours the Claimant worked and her application for flexible working. The Claimant then appealed to Detective Superintendent McMurdie of the MPS, who allowed her appeal."

"12. Shortly, thereafter DS Thomas sent a letter to the MPS HR manager requesting that the payment of shift allowance to the Claimant be ceased. As her line manager, DS Thomas was able to determine what supervisory responsibility the Claimant had and her levels of pay."

11. The judge directed herself as to the central issue before her, in the following terms and came to the following conclusions:

"20. The issue for me to determine is whether he had the express or implied consent of the Chief Officer of the Metropolitan Police Service to make the decisions that he did in respect of her employment.

21. DS Thomas was responsible for formally assessing the Claimant's performance in her annual appraisals, determining the hours that she worked, dealing with her application for flexible working, determining her level of responsibility and her levels of pay. Those are important matters in an employment relationship and can only be determined by a person's employer or by someone who the employer has authorised to act on his behalf. A third party cannot determine these employment issues without the express or implied consent of the employer of the person in question. The Respondent was aware that DS Thomas was making these decisions on its behalf. Det. Supt. McMurdie heard the Claimant's appeal against DS Thomas' decision in respect of her application for flexible working and the Respondent's HR department received the instruction in respect of the Claimant's shift allowance. At no stage did anyone say that DS Thomas did not have the authority to make these decisions and that they were not bound by his decisions.

22. It was argued before me that Parliament had specifically enacted legislation to make employers liable for harassment by third parties and if it had wished to make them liable for discrimination by third parties it would have passed similar legislation. In my opinion, it did not enact specific provision to deal with that because it is already covered by existing legislation. A third party can harass someone in the workplace without the consent or authority of the employer. However, a third party cannot discriminate against an employee in respect of promotion or training, or access to benefits, facilities or services, or by subjecting her to a detriment in respect of her hours of work or pay because those matters are controlled

by the employer. A third party can only determine those matters if it is given the authority by the employer to do so.

23. I am satisfied on the facts of this case that DS Thomas, when he made decisions about the Claimant's employment as her line manager, acted with the consent and authority of her employer, and as its agent. It is inconceivable that his making decisions on those issues would not have been challenged if he had not had any authority to make them."

12. The judge considered authorities including **Yearwood v Commissioner of Police of the Metropolis** [2004] ICR 1660, a Judgment I gave in the EAT and which she applied.

The law

13. The starting point is the nature of agency, for the purposes of s.41(2) and its application in respect of police officers. In **Farah v Commissioner of Police of the Metropolis** [1998] QB 65, the Court of Appeal drew a distinction between the duties discharged by a constable in his role as a peace officer. His functions, which were known as police functions, as in they are, expressly in s.17(1), were developed by Otton LJ in the following way:

"In my view the concept of principal and agent is inimical to the status of a police constable. McCardie J in Fisher v Oldham Corporation [1930] 2 KB 364, 372 cited with approval the statement of Griffith CJ in Enever v The King, 3 CLR 969, 977:

> **'Now, the powers of a constable, qua peace officer – are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself… A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.'**

I am prepared to accept that these observations may be strictly obiter as the case was concerned only with the relationship of master and servant. However, with respect to the authors of *Clayton & Tomlinson on Civil Actions Against the Police*, 2nd ed., I do not share their view that the effect of section 5 of the Police Act 1964 which places a police force under the 'direction and control' of the chief constable (or Commissioner) has the effect of changing the special status of a police constable or of subordinating his original authority to that of the chief constable."

14. The matter came again for decision in the EAT in **Chief Constable of Cumbria v McGlennon** [2002] ICR 1156, where Mr Commissioner Howell QC and members considered the impact of **Farah** and came to this conclusion:

"44. A similar reservation is to be found in the authority mentioned by Peter Gibson LJ, at p 1151, para 71, for the general principle, Farah v Comr of Police of the Metropolis [1998] QB 65. Mr Powell relied on that case as authority that there could be no question of agency such as to give rise to any liability of the chief constable on the facts before us; but the statement to which he referred by Otton LJ, at p 85E-F, that "In my view the concept of principal and agent is inimical to the status of a police constable" was quite plainly made only in the context of the individual constable's authority and actions as regards members of the public in his capacity as peace officer. That it cannot have been intended to exclude the possibility of normal agency principles applying to acts done, not in exercise of a constable's original authority in virtue of his own office, but on the (express or implied) actual authority of the chief constable and on his behalf, is shown by Otton LJ's own reference in the passage which follows, at pp 85H-86B, to Hawkins v Bepey [1980] I WLR 419, where he said:

> **'the plaintiff in the present case could only bring herself within section 32(2) if she were able to prove that a police constable acted as he allegedly did on the express, or implied, authority of a superior officer. In which case the act precedent or subsequent would then be treated as done by that superior officer as well as by the constable. She does not allege this.'**

Section 32(2) of the Race Relations Act 1976, to which Otton LJ was there referring, is the exact counterpart to section 41(2) of the Sex Discrimination Act 1975 with which we are concerned.

45. That such authority and agency is recognised as a matter of law to exist through the chain of command as regards functions vested by statute in the chief constable is established by Nelms v Roe [1970] I WLR 4. There it was held that an inspector purporting to issue a notice of behalf of the chief officer of police requiring information about a road traffic offence, having been instructed to deal with such matters by his superintendent though without any express authority from the chief officer, had implied delegated authority from the chief officer to issue the notice by reason of the superintendent's rank and responsibility for administration. Nothing we were shown gives us any ground to think any different principle should be taken as applying to decisions on such matters as posting taken at superintendent or inspector level, or as excluding such decisions from what count as acts of the chief officer within the scope of section 17(1)(a) of the Sex Discrimination Act 1975.

46. That makes it unnecessary for us to determine the further issue on the direct effect of Directive 76/207 raised in response to the amended notice of appeal, but in deference to the full argument we received on this we will express our conclusions on it briefly.

[…]

48. Nor in our judgment can it be argued that the difficulties in the way of a police constable bringing such a claim can be overcome by saying that they are a "barrier" within the domestic legislation that has to be disregarded and disapplied as being incompatible with directly effective Community rights; which is the exception acknowledged by Mummery J and the Court of Appeal to that basic proposition. The reason that a police officer whose claim is outside the limited scope of section 17 of the 1975 Act is unable to bring discrimination proceedings against the chief constable under the Act is nothing to do with any procedural or qualifying barrier of the kind referred to by Mummery J, inhibiting the exercise of a right the Act otherwise provides. It is the much more fundamental one that under the general law of England and Wales a police officer is not an employee at all, and so is outside the protection of the provisions about discrimination in employment altogether in the absence of express positive provision to extend "employment" to him or her artificially. The direct effect of the Community instrument confers no separate jurisdiction on the employment tribunal to alter a police officer's status in law, or create new positive rights or remedies for discrimination outside those the legislation provides. If there is any infringement of the Directive, that is a matter for Parliament or possibly for a court having inherent jurisdiction, but not something for the employment tribunal."

15. Similarly, in **Chief Constable of Kent County Constabulary v Baskerville** [2003] ICR 1463, the Court of Appeal had occasion to deal with the issue of agency. It dismissed an appeal

from a Judgment I had given, although it did have a disagreement with one passage, and Gibson LJ there said this:

> **"32. I start with section 41(2). This is a provision extending to the categories of unlawful acts any acts done by an agent for his principal with the authority of his principal, the mechanism adopted by the 1975 Act being to deem the agent's acts in those circumstances to be acts done by the principal as well. The appeal tribunal was wrong, with respect, in saying (in paragraph 29 of the judgment) that 'section 41(2) creates the relationship of agent and principal as between the chief constables and his junior officers'. Section 41(2) creates no such relationship but prescribes the consequences for the principal of authorised acts done by an agent for his principal."**

16. Finally, the point arose again in **Yearwood**. What we said there was as follows:

> **"Agency**
>
> **35. Submissions were made to us on the nature of agency which we found very helpful. There was substantial reference to *Bowstead & Reynolds on Agency*, I7th ed (2001), para I-00I by Mr Mead, none of which was the subject of criticism in reply on behalf of the applicants. We therefore take the definition to be as follows:**
>
> > **'(I) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.**
> >
> > **(2) In respect of the acts which the principal expressly or impliedly consents that the agent shall so do on the principal's behalf, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.**
> >
> > **(3) Where the agent's authority results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.'**
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> **36. The authors recognise that there are limits on the above definition, for they say, at para 1-003:**
>
> > **'The word 'agency', to a common lawyer, refers in general to a branch of the law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties, by acts which the agent is said to have the principal's authority to perform on his behalf and which when done are in some respects treated as the principal's acts.'**
>
> **37. The justification for the agent's power is a unilateral manifestation by the principal of his or her willingness to have their legal position changed by the actions of an agent. The result of this manifestation is that the agent has the power to affect the principal's legal relations. The authors also deal with the meaning of 'agent' in the abstract, for they say, at para 1-022:**
>
> > **'And where the term agent is used in a statute or formal document, it has been said that it may be presumed that the word is used in this, its proper legal connotation, unless there are strong contrary indications.'**
>
> **38. An important incident of the relationship is that an agent may be appointed to do any act on behalf of the principal which the principal might do himself or herself: para 2-0I7. A phenomenon of the common law of agency is that when the agent acts on behalf of a disclosed**

principal, the agent is not liable to the third party, nor can the third party sue the agent upon it. Yet in the field of discrimination, both are liable by statute.

39. It is next appropriate to consider the application of those principles to the two statutes. In our judgment, the use of the term 'principal' and 'agent' in these statutes connotes the description of the agency relationship described above. The only change from the common law position is, as we have indicated, that both the principal and the agent are liable in discrimination."

17. As will become clear, those cases were decided on the basis that a police officer is not an employee of a chief officer. A chief officer of police has the direction and control of the force within him, but is not the principal nor the employer of police officers. That matter was resolved by the fiction created by s.17 of the Act, which is a deeming provision.

Discussion

18. I turn then to the arguments, applying those authorities. The first proposition is that there is a complete code in respect of the vicarious liability, as it might be put, or the extended liability, of the Commissioner found in the insertion of s.17(9). In my judgment, that is not helpful in resolving the issue in this case, for it deals with the deployment of, in our example, an officer of the Commissioner to policing duties in Nottingham, where he would come under the direction and control of the Chief Officer of Nottingham. That is the explanation of s.17(9).

19. Secondly, the juxtaposition between s.17 and s.41 is clear as to determining the relationship of an officer to his chief officer. I see the force of the argument that s.17(1) makes the deeming provisions "for the purposes of this part" and s.17(1)(a) makes the deeming "for the purposes of s.41". But as Mr Cheetham helpfully accepted, that is directly applicable only to resolving the course of employment issue, which arises under s.41(1). It does not expressly say anything about agency, which is the territory covered by s.41(2). So it seems to me that when Parliament looked again at police officers and made the adjustments which I have cited, the agency provisions in s.41(2) remained unchanged.

20. The question is: was DS Thomas of the CLP in a position to make the Commissioner liable for acts of DS Thomas? I have no doubt that the judge expressed herself correctly in the directions she gave (see paragraph 20 I have cited). It is true in paragraph 21 that she might be thought to have used a slightly wider term "act on his behalf", but given that there is a correct self-direction in paragraph 20, and the terms of the PHR were set out quite clearly by her, the question then arises: did she, having directed herself correctly on the law, fail to apply it?

21. The central criticism Mr Cheetham makes is that there is no delineation here between what might be regarded as police functions on the one hand, and employment matters on the other. I reject that submission. The judge had in mind what issues were firmly within the employment domain. That is clear from Mr Cheetham's acceptance that, in matters of appraisal, DS Thomas was carrying out a function on behalf of, with the authority of, the Commissioner. That was a uniquely employment related matter. Of course, on the most general level anything DS Thomas did would be for the purposes of police work, but that is not the test.

22. As is clear from **McGlennon**, an agency can exist between a chief officer of police and someone else, even though that someone else is an officer and even though that officer is an officer under the direction and control of another chief officer. The findings which I have cited above relate expressly to the employment relationship. DS Thomas is the Claimant's line manager, that is a uniquely employment term. There is no challenge to the findings of fact which the judge made, that DS Thomas was able to determine what supervisory responsibility she had and her level of pay. He was able to make an agreement with the Claimant as to her responsibility and her pay, which would bind the Commissioner, and the Commissioner paid

her. Interestingly, on DS Thomas' rejection of her application for flexible working, his decision was overruled by a senior officer of the Commissioner, and so she won that point.

23. The judge makes the finding about what are important matters in an employment relationship. As to that value judgment, it is her job, and not the job of a court on appeal on questions of law, to make that decision. She it is who has to determine what matters of employment are important, and she has decided, in the references I have given to paragraph 21 of her Judgment, what those matters are. To some extent, Mr Cheetham concedes that they are, certainly as to appraisals and levels of pay

24. He demurs in relation to flexible working, giving as an example a crisis that might occur in order to carry out an investigation at short notice where working hours have to be changed in order to achieve a satisfactory outcome of police work. Nevertheless, the way in which the material was presented to the judge enabled her to form a view about what properly were important employment matters. The issues described by the judge as the "Claimant's case" in paragraph 2 include matters which the judge obviously held were to do with her employment: shift patterns, flexible working, the appeal against flexible working and the supervisory status and responsibility of the Claimant.

25. It may be that Mr Cheetham has a point, in the vivid example which I have cited from him. But the reality of the situation is that DS Thomas was, as he is described, the line manager of the Claimant who made decisions affecting her employment, which were carried out (except for the flexible working appeal) by staff and officers of the Commissioner. In any real sense, therefore, the judge's finding that there was express or implied consent by the Commissioner for DS Thomas to carry out those functions for him, was tenable. She gave specific examples, that the Commissioner was aware of decisions being made by DS Thomas and it is no major

leap to say that these were either expressly or impliedly made on his instructions and with his consent, and on his behalf. In those circumstances, the judge made findings upon which she was able to apply the self-directions.

26. It is not necessary for further findings to be made. With respect to Mr Cheetham, I consider that there is sufficient reasoning here to pass the **English v Emery Reimbold** [2003] IRLR 710 CA test (especially the Court's postscript), and there is no dispute as to her correct direction in paragraph 20, which is in accordance with the authorities cited above. There is no need for any more precise delineation between what might be described as police functions or the functions of a peace officer (see **Farah**), and those of an employment nature.

27. In my judgement, all of the matters which the Claimant puts before the Tribunal, for determination at some stage, fall within the characterisation of employment matters and are, insofar as they are discharged by DS Thomas, the responsibility of the Commissioner. It may perhaps seem unsatisfactory to Mr Cheetham's client that this matter has not been capable of more detailed argument for the reasons I have given above, but in my judgement the judge reached the correct conclusion.

28. There has been no argument before me as to the application of Directive 2006/54 and insofar as Mr Cheetham contends that the judge was approaching this back to front in trying to find a remedy for the Claimant, it is not necessary for me to reach a decision about that, in the light of the decision I have made. Nevertheless, it does seem to me, lacking any argument from the Claimant, that there is substance in the argument that this matter would be affected in her favour by application of the directive.

29. The appeal is dismissed.