Commissioner of Police of The Metropolis v Nagy [2004] ADR.L.R. 09/22

SUMMARY : A tribunal did not err in refusing to strike out claims of sex discrimination made by a civilian employee of a police force for a claim applying the principle in **Chief Constable of Cumbria v McGlennon** [2002] ICR 1156 and under the Equal Treatment Directive in **Chief Constable of Kent Police v Baskerville** [2003] ICR 1463 should be heard unless it is certain to fail. The part of the claim in respect of the investigation of an officer under police discipline regulations is certain to fail: **Yearwood v Commissioner of Police for the Metropolis** UKEAT/0310/03.

JUDGMENT : HIS HONOUR JUDGE McMULLEN QC : EAT : 22nd September 2004

1. This case is about Employment Tribunal procedure in the striking out of a sex discrimination claim. The Judgment represents the view of all three members who pre-read most of the relevant papers. We will refer to the parties as the Applicant and the Respondents as the Commissioner and Mr Lenthall.

Introduction

2. It is an appeal by the Commissioner, the First Respondent in those proceedings, against a Reserved Decision of an Employment Tribunal sitting at London (Central), Chairman Mr S Bedeau, registered with Extended Reasons on 16 March 2004. The Applicant was represented there by a different Counsel and today by Mr Adam Solomon. The Commissioner was represented there and here by Mr Damian Brown of Counsel, and Mr Lenthall was represented by Counsel too. Mr Lenthall's position today is that he is a party to these proceedings, formally constituted as a Respondent but, by a letter sent on his behalf by his solicitors, he plays no part in these proceedings but supports the Commissioner's application, by which we take it the Notice of Appeal as advanced by Mr Brown.

3. The Applicant claimed sex discrimination against both of the Respondents, together with breach of contract. The Respondents denied the substantive allegations. The essential issue was to determine an application to strike out the Originating Application. The Tribunal refused the application. The Commissioner appeals against that Decision, supported by Mr Lenthall. Directions sending this appeal to a full hearing were given by me.

The legislation

4. The rule relating to case management is Regulation 10 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2001**, and Rule 15 (2) (c), relates to strike out. There are also provisions of the **Sex Discrimination Act 1975** which are relevant and correctly summarised by the Tribunal:

"24 Section 6 Sex Discrimination Act 1975 proscribes discrimination against applicants and employees. Section 6(2) states:

"(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her -

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment."

25 As regards the police, section 17(1) provides:

"(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 of that office;

(b) by the police authority as respects any act done by them in relation to a constable of that office."

Sections 41 and 42 concern liability of employers as principals and aiding the commission of unlawful acts. Section 41 provides:

"(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."

26 Section 42 states:

"(1) A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description.

(2) For the purposes of subsection (1), an employee or agent for whose act the employer or principal is liable under section 41 (or would be so liable but for section 41 (3)) shall be deemed to aid the doing of the act by the employer or principal.

(3) A person does not under this section knowingly aid another to do an unlawful act if -

(a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of this Act, the act which he aids would not be unlawful, and

(b) it is reasonable for him to rely on the statement.""

5. The Tribunal directed itself by reference to those relevant provisions, and also to the leading authorities which are cited in its reasons: **The Chief Constable of Bedfordshire Police v Liversedge** [2002] ICR 1135; **McDonald v Advocate General for Scotland; Pearce v Governing Body of Mayfield School** [2003] IRLR 512; **Chief Constable of Kent Police v Baskerville** [2003] ICR 1463.

The facts

6. We will say very little of the facts as there has been no evidence in this case. So far as they are relevant for any understanding of the appeal they can be taken from an earlier interim hearing of a differently constituted Employment Tribunal under Mrs E Prevezer, registered with Extended Reasons on 6 November 2001:

1 The Applicant presented a claim to the Employment Tribunal on 24 May against the First and Second Respondents claiming that she was:

(1) subjected to sexual harassment by the Second Respondent from June 1988 to October 1999;

(2) and that the First Respondent failed to take any action when she made the complaint to them stating that by December 1999 DSL had not been interviewed and nor had the investigation been completed. The Applicant had periods of illness which she said was a result of the stress incurred, she was absent from work from 23 November 1999 to 16 March 1999 and again absent from 21 April 1999 to 8 May 1999. She alleged that she had been treated less favourably by the Respondents on the grounds of her sex.

2 She also alleged that there was an implied term of trust and confidence in the contract of employment that had been broken by the Respondents' by their failure to take her complaints seriously and to investigate the matter thoroughly and expeditiously.

3 The First Respondent in their grounds of resistance indicated that the matter was now under investigation and the Second Respondent was being investigated with the possibility of disciplinary proceedings. Subsequently the Second Respondent fell ill and retired from the Police Force. A stay of all proceedings was requested by the First Respondent while this matter was investigated and this was opposed by the Applicant's legal representatives.

…

10 On the first issue we heard submissions from Ms Mountfield and Mr Brown. Ms Mountfield pointing out that in the IT1 it is clear that the Applicant's is complaining about the lack of action and investigation by the First Respondent when she made a complaint about the Second Respondent and that this could be the basis of a claim for sex discrimination i.e. that they would not have treated a man in the same way and would be the basis of her claim for breach of contract as a breach of the condition of trust and confidence. She referred us to her statement which was part of the IT1 which had been submitted. A statement was dated 21 May and in that statement she says:

"I have lost faith in my employer to protect me or indeed see that the person responsible for changing my life in such a dramatic fashion is dealt with properly. I place of myself in the hands of their system and have been grossly let down. I feel I have been victimised as I am female and my situation has not been taken seriously by those whose responsibility is to my welfare whilst at work."

She goes on to say later: "I also feel the investigation into this matter has not been carried out with my interests at heart." …

13 Ms Mountfield agreed that the complaints set out in her skeleton arguments as in paragraph 3.3 and 4 sets out sufficiently her client's claim and the Tribunal agreed. The complaint therefore that the Applicant makes in this first issue is:

(1) a complaint against the First Respondent that from October 1999 when the Applicant complained about the conduct of the Second Respondent until May 2000 when she put in her ET1 the First Respondent failed to take her complaint seriously or investigate properly, in breach of the implied contractual duty of mutual trust and confidence.

(2) A complaint against the First Respondent that from October 1999 when the Applicant complained about the conduct of the Second Respondent, until May 2000 when she put in her ET1, the First Respondent failed to take her complaint seriously or investigate timelessly [sic] that it may be inferred from all circumstances that this was less favourable treatment on the grounds of her sex and that the complaint of like behaviour made by a man would have been taken more seriously and that this was also sex discrimination contrary to sections 1(1)(a) and 6(2)(a) and/or (b) of the Sex Discrimination Act.

(3) We then considered whether it will be just and equitable to extend the time limit. We heard evidence from the Applicant and from her Mr M her friend who accompanied her to the meetings and to the solicitor and from her Dr E, her General Practitioner. We also heard from DSL. From the evidence we find the following facts:

(a) The last act of harassment complained of occurred in October 1999 and she lodged a complaint to the First Respondent on 19 October 1999. No one for the First Respondent advised the Applicant of the rights to go to an Employment Tribunal or the time limits involved. He [sic] was not referred to any policy documents.

(b) The Applicant had been working at the time as a civilian at the Ruislip Police Station as an administrative officer. She had joined the MP service in June 1993 and worked in the Personnel Office at the Paddington Police Station. In June 1996 she had transferred to Uxbridge Police Station and had begun working on the telephone reporting section. From June 1997 she was working on the major crime and burglary books and her role was to check through the crime entries to ensure details were correct etc. Ms DSL was her line manager and completed her appraisal on each year. The Applicant was not handed the grievance handling pack which has in it a direction that:

"The options available to the victim should clearly and sensitively explained. You must inform the aggrieved of the time limits imposed relating to the lodging of the grievance with the Industrial Tribunal which is three calendar months less one day from the date of dismissal or last incident of alleged discrimination.""

7. Following that hearing, a further interim and directions hearing was conducted by Mr Baron, sitting as a Chairman alone on 12 March 2003, in which it is recorded that the issues were defined as follows by Mr Mead, who was then Counsel representing the Commissioner:

"1 The Originating Application in this matter was issued in May 2000. I was assured by all Counsel that it was not necessary for me to go into the past history of the matter in any detail. Mr Mead explained that in simplistic terms there were four allegations as follows:

1.1 A complaint of sexual harassment against the Second Respondent;

1.2 That the First Respondent was vicariously liable for the acts of the Second Respondent;

1.3 That there was a breach of the implied contractual term relating to the maintenance of mutual trust and confidence by the First Respondent in that it had failed to investigate the Applicant's complaint;

1.4 That such failure was also a breach of the Sex Discrimination Act 1975."

8. The status of the Commissioner and those under his command has changed since the proceedings in this case were instituted in May 2000, for we have been told that, at the relevant time, the Commissioner was responsible for the engagement of police officers and for the employment of civilians, of which the Applicant was one. She was, at the relevant time, an administrative officer in the Hillingdon Division paid at a salary of £17,000 a year from 1993 until the relationship ended in 2000.

9. The procedural history of this case extends beyond those two interim hearings, and has been encapsulated in summary form extending over eight pages. It is not necessary for us to go into the details. Suffice it to say that allegations made by the Applicant about events in 1998 have still not been heard, for there has been constant warfare in the Employment Tribunal about the procedural steps.

10. The Applicant contends that she was subject to sex discrimination by Mr Lenthall over a long period, including acts done at the workplace, and with the knowledge of colleagues of the same or senior rank, who reacted at times with apparent approval and at times with nonchalance. The Applicant's case is that Mr Lenthall made threats to force the Applicant to resign; threatened to transfer her for no good reason; requested other officers and civilians to act on his behalf in relation to discriminatory acts by him; caused disorganisation of her work whilst she was absent in such a way as to cause her to get into trouble; and that the Applicant was working in a male dominated environment in which she as a civilian and a female felt unable to report her allegations because they would not be believed. When a complaint was made, a decision was made to relocate her and the complaint was not treated seriously or quickly enough.

11. In respect of those allegations, the Applicant contends that the Commissioner is liable under the principles set out in **Chief Constable of Cumbria v McGlennon** [2002] ICR 1156, which is broadly speaking that a chief officer, here the Commissioner, is responsible for acts of junior officers acting with his express or implied authority in conducting management decisions which affect officers or others junior to them.

12. The principle in **Liversidge v Chief Constable of Bedfordshire** [2002] ICR 1135 is that a chief officer is not responsible for acts of discrimination, classically sexual harassment, by one police constable against another.

13. The third area where liability has in the past been imposed in the rather strained legal confines, created by the statutes, of police service is where an atmosphere was created which should have been prevented. This principle has been held not to apply in the circumstances set out here: see **Pearce v Governing Body of Mayfield School** (above).

14. On the application to strike out, the Tribunal found that the Applicant's claims should be heard at a Full Tribunal for three reasons. First, the Applicant had contended on the ground of agency that there was discriminatory mishandling of the investigation into her complaints made against Mr Lenthall. These were essentially management decisions for which the Commissioner was liable. The Tribunal upheld that case as arguable.

15. Secondly, the Applicant relies upon the Equal Treatment Directive 76/207/EEC. That too was arguable. The Directive was the subject of a Judgment which I gave leading to **Chief Constable of Kent v Baskerville** [2003] ICR 1463 CA applying a construction to give effect to the purpose of the Directive. I indicated in exchanges with Mr Brown that the Court of Appeal, upholding my judgment, had not disapproved of that construction, to which his response was it had not approved it either. It is contended by Mr Solomon that a Judgment of the EAT, which was the subject of full argument before the Court of Appeal but upon which the Court of Appeal found it unnecessary to base its decision in the light of its earlier decisions upholding the judgment of the EAT (see page 1474 para 42), should in ordinary circumstances be followed.

16. The third ground upon which the Tribunal decided in Applicant's favour on the strike out application was that a claim under the **Human Rights Act 1998** could be and was formulated. The Tribunal did not have much enthusiasm for such a claim under the **European Convention** or the **Human Rights Act**, but decided to allow the matter to go to a full hearing.

The Commissioner's case

17. On behalf of the Commissioner, it is contended that the Tribunal erred on each of those three bases. Mr Brown accepted that the general principle is that cases of discrimination should be heard, but submitted that where there is a certainty that one aspect of a case will fail it should be struck out. This was not an all or nothing approach for, as was clear from the Judgment which I gave on behalf of the EAT in **Yearwood v Commissioner of Police for the Metropolis** UKEAT/0310/03, an eclectic approach can be taken, striking out part of an originating application and, on appeal, doing the same.

18. It was contended that the **Police Regulations**, as construed in **Yearwood**, did not admit of any complaint being made by an applicant before an employment tribunal of the discriminatory handling of disciplinary proceedings within the context of the **Police (Discipline) Regulations 1985**, which

were the relevant regulations in this case. Mr Brown accepted that allegations made against officers outside that disciplinary framework could be weighed in the proceedings, and here to give life to that proposition were Mr Bloggs and Mr Wickstead, whom the Applicant alleges did not act upon her complaint.

19. It is contended that the agency principle was not "pleaded" (a term not in the rules or in the CPR) before the Employment Tribunal and, on the principle set out in **Chapman v Simon** [1994] IRLR 124, should not be allowed to be advanced. As to the claim under the **Equal Treatment Directive**, we have already set out the differing approaches of Mr Brown and myself, and he contends that the **Equal Treatment Directive** is of no assistance in this case. As to the Tribunal's basis for allowing the matter to go forward on the **Convention** point, Mr Brown contends that that is unsustainable.

The Applicant's case

20. On behalf of the Applicant, Mr Solomon contends that all of the facts relevant to the Applicant's case have been set out in the fullest detail. Most unusually in this case, the Originating Application had attached to it four statements of the Applicant, setting out her case. It is contended that any action by Mr Lenthall, who was the Police Officer supervising this civilian employee, is a management decision within the concept of **McGlennon**, at least for the purposes of a allowing a full hearing before a tribunal. It is contended that support for that proposition is given not only in **McGlennon**, but also by the Court of Appeal in **Baskerville** and the EAT in **Baskerville**.

21. It was contended that the procedural tool of a strike out should not be used unless there was certainty that the claim was bound to fail; see **Barrett v Enfield Borough Council** [2001] 2 AC 550 (HL).

22. It was contended that the allegations made by the Constable in **Baskerville**, and which were properly regarded as the subject of a claim before an employment tribunal, were similar to those in the instant case made by this civilian. She contends management decisions were made about her for which the Commissioner gave implied authority to the officers. If the officers managed the civilian in an unauthorized way the Commissioner was still liable.

23. It was submitted by Mr Solomon that **Chapman v Simon** had limited utility where there were, as here, proceedings in advance of a full hearing. The matter could be remedied, if necessary, by further Particulars and, drawing upon the Judgment of Sedley LJ in **Gee v Shell UK Ltd** [2003] IRLR 82, at paragraph 35, employment tribunals should remain a "cost-free user-friendly jurisdiction".

The Legal Principles

24. In our Judgment, the legal principles were correctly set out by the Employment Tribunal from the authorities which it cited and which have been argued in front of us. We have decided that the Applicant's arguments are preferable and we will dismiss almost all of the appeal. We will deal with the part which we will allow. Before we do that, we should say that our conclusions are informed by the very important principle that discrimination cases should be heard as a full hearing, for only then can it be decided whether those findings fall within or without the jurisdiction, for example in a complicated case where there is the interplay between Sections 17 and 41 of the **Sex Discrimination Act** and the **Police Regulations**.

25. That approach is informed by the Judgment of the Court of Appeal in **Baskerville**, by the Judgment of the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96, per Mummery LJ at paragraph s 44 and 45, and Browne-Wilkinson LJ in **Barrett** (above) at page 557. In the employment context those views have been reinforced by the speeches of Steyn LJ and Hope LJ in **Anyanwu v South Bank Students' Union** [2001] IRLR 305, at paragraph 24 per Steyn LJ and paragraph 37 per Hope LJ. In short, we would be very slow to uphold an application to strike out an originating application in a discrimination case without a full hearing, and so would an employment tribunal.

26. The part of the appeal which does succeed relates to the interplay with the **Police Regulations**. The Applicant raised a complaint against Mr Lenthall, as we have said, through the workers in her office and officers, and ultimately a complaint was made to the Commissioner. The Commissioner is required to form a judgement on such a complaint and we are told he did so in December 1999.

Exercising his discretion, he decided this matter should be investigated, pursuant to the statutory requirements of the 1985 Regulations. For a full account of those regulations, see my Judgment for the EAT in **Yearwood** (above). The impact of that Judgment is that the conduct of an officer investigating under those Regulations is not susceptible to a claim under the **Sex Discrimination Act** to the Employment Tribunal.

27. The Investigating Officer here is the subject of criticism, but we reject the contention made by Mr Solomon that that is justicable before the Employment Tribunal. This part of the Originating Application, or the Particulars attached to it, will be struck out. The involvement of the Commissioner, we are told, in that decision is not the subject of any criticism; in other words his decision when receiving the complaint to put this into the statutory procedure is not the subject of a criticism. So we hold that no part of the complaints relating to the investigation by the Investigating Officer may be the subject of the Full Hearing, nor may a criticism of direct sex discrimination made against the Commissioner for his involvement in that decision.

28. We then turn to the other allegations. First, we are satisfied from the extracts we have given above of the complaints made by the Applicant against Mr Lenthall that they are properly to be heard before the Employment Tribunal. Secondly, it is arguable that those being management decisions were the subject of the liability of the Commissioner or, put negatively, we cannot say for certain that they are not, and therefore they will be heard, as Mr Brown realistically accepted in argument. Complaints of delay and not taking the matter seriously are matters for which officers may be responsible and for which the Commissioner may also be responsible on the principle of **McGlennon.** The allegations against Mr Lenthall, therefore, are properly to be heard before the Employment Tribunal and with them the arguments as to the responsibility therefor of the Commissioner.

29. As we understand it, it is alleged that there is a culture of failing to deal with such complaints by female civilian employees in the Metropolitan Police. If there is, then it is arguable that that comes from the top. It is contended by the Applicant that that is properly made. In our judgment it is just about arguable, but we bear in mind that we are at a pre-hearing stage, and can make corrections in that case without injustice. The summary by previous Counsel of the Commissioner's understanding of the Applicant's case is broad enough to include the allegation that the Commissioner is responsible for the actions of Mr Lenthall and others, for the term "vicariously liable" is, within the user-friendly environment of an employment tribunal, apt to include the principles of constructive liability and agency. As that Counsel put it, his summary was a very simplistic one, but at least it serves the purpose of being the vehicle by which the basis of this case was to be known.

30. We then turn to the **Equal Treatment Directive**. It is possible that Mr Brown might have persuaded us that the approach which I took on my own in **Baskerville**, and which was not disapproved by the Court of Appeal, might be the subject of a change of heart by this three-person Tribunal. We say at once it has not been successful. We would generally follow recent EAT authority, particularly when it has not been disturbed by the Court of Appeal. The place for this argument to occur is at the Employment Tribunal and we reject the contention that the Directive argument should have been struck out.

31. Turning then to the Human Rights argument, we have little enthusiasm for this, as is apparent for the Employment Tribunal's judgment, but this is simply an argument and not a matter which will require a detailed examination of facts and findings. It is not appropriate at this stage for us to overturn the exercise of discretion by this Tribunal in refusing to strike out that part of the claim.

32. So, for those reasons, this appeal is allowed in part.

33. Having given directions with the assistance of Counsel for getting this case back on the tracks, all three of us wish to make the following observations. There have been very significant delays in this case because they relate to events in 1998 up to 2000, and the Originating Application was lodged in May 2000. Some of these delays have been caused by waiting for leading judgments, such as the ones which we have cited above. Another delay, for which the Employment Tribunal apologised, was caused by difficulties in the Lay Members' availability.

34. This case, now listed for 20 days, is not likely to be heard until 2005. This cannot be a satisfactory way in which very detailed, fact sensitive issues are investigated for the first time in a judicial forum. Mr Brown has made submissions about the public interest in long cases which cost a good deal of money for public authorities such as his client. That point is well made, but it also affects those who are seeking remedies against such public authorities.

35. Throughout the civil court domain, store is now placed upon mediation. Some cases cry out for mediation. In the experience of this Appeal Tribunal, this is one. The events are long ago, people have moved on, the cost of litigating this is already huge and will get huger; it is quite likely that Decisions of the Employment Tribunal will be met with disappointment by both sides. The delay in this case is wholly unsatisfactory for the purpose of getting to the truth of the issues put forward.

36. We will direct that the parties consider most carefully conciliation by ACAS. The parties are well represented professionally, and ACAS is seised of the duty to conciliate since this is still in the Tribunal, under the **Employment Tribunals Act 1996** Section 18.

37. Alternatively, and this requires investment, the parties should consider mediation. Whether or not that is appropriate is for them, but in our judgment cases of this nature will profit from the assistance of a professional mediator rather than a full-blown hearing over 20 days, where someone must win, someone must lose, and in some cases there is a bit of both. We know Ms Nagy is in court today; she of course cannot make these decisions herself. Mr Lenthall is not, but representatives of the Commissioner are. So we will simply direct that the parties consider most carefully using the services of ACAS or of a mediator in order to avoid this case going to a full hearing.

38. We would very much like to thank Counsel who have appeared today for the constructive and expeditious approach to the resolution of this appeal which is allowed in part.

For the Appellant MR DAMIAN BROWN (of Counsel) Instructed by: Metropolitan Police Service Directorate of Legal Services Wellington House 67-73 Buckingham Gate London SW1E 6BE

For the Respondents (1) MR ADAM SOLOMON (of Counsel) Instructed by: Messrs Turbervilles Solicitors 122 High Street Uxbridge Middlesex UB8 1JT (2) Neither Present nor Represented