



EMPLOYMENT TRIBUNALS

Claimant

Mr D Warburton

Respondent

v Chief Constable of Northamptonshire
Police

Heard at: Cambridge

On: 6,7, 8 January 2020

Before: Employment Judge Johnson

Members: Mr C Davie and Mr R Eyre

Appearances

For the Claimant: Miss G Nicholls, Counsel

For the Respondent: Mr Roberts, Counsel

JUDGMENT

1. The Claimant's claim of victimisation by reason of his making a protected act on grounds of disability is not well founded. This means that the Respondent did not victimise the Claimant because of his protected act of bringing and continuing proceedings against Hertfordshire Constabulary.
2. The Claimant's and Respondent's representatives are to provide written submissions within 14 days concerning the Claimant's application for costs originally raised at the Preliminary Hearing before Employment Judge Brown on 29 November 2019

REASONS

Introduction

1. The Claimant who made an application to the Respondent for appointment as a Police Officer, commenced proceedings in the Employment Tribunal on 29 June 2018 following a period of Acas Early Conciliation from 30 April 2018 until 30 May 2018.
2. He presented a claim of victimisation within the meaning of Section 27 and contrary to Section 39 of the Equality Act 2010. In summary, the Claimant's contention was that the Respondent chose not to progress the vetting

process and did not appoint him as a Police Officer because he presented an Employment Tribunal claim against Hertfordshire Police.

3. The Respondent presented a response on 24 August which resisted the claim.
4. The claim was subject to case management with an initial Case Management Order being made by Employment Judge Kurrein on 31 January 2019. A further Preliminary Hearing took place before Employment Judge Brown on 29 November 2019 following an application having been made by the Respondent to: (i) amend its response; (ii) for there to be a stay pending the outcome of the proceedings brought by the Claimant against Hertfordshire Police; and, (iii) for a deposit order to be made against the Claimant.
5. Employment Judge Brown ordered that: (i) the amendment would be allowed; (ii) that a stay would be inappropriate; and, (iii) that a deposit order would not be made. There was also an order that the Claimant's application for costs made at that preliminary hearing should be 'deferred for consideration at the end of the final hearing'. He was unwilling to grant the Claimant's application for a deposit order in respect of the new ground of resistance raised by the Respondent in its Amended Grounds of Resistance. Consequential case management orders were also made to ensure that the case would be ready for this hearing.
6. In its Amended Grounds of Resistance dated 12 September 2019 (but allowed by the order of Employment Judge Brown dated 29 November 2019), the Respondent denies: (a) that the Claimant has made a protected act; (b) that the Respondent victimised the Claimant; and, (c) that the Claimant was subjected to detrimental treatment contrary to section 27 of the Equality Act 2010.
7. The hearing was listed originally for 3 days commencing on 6 January 2020 with liability and remedy to be considered. It became clear to the Tribunal during the hearing that it would only be possible to conclude the hearing in respect of liability due to time restrictions. Moreover, it was necessary to reserve judgment on liability following the hearing of final submissions on 8 January 2020. Counsel also provided written submissions and the Tribunal wishes to thank both Miss Nicholls and Mr Roberts for providing detailed written submissions and for their further oral submissions at the hearing.

The Evidence used in the Hearing

8. For the Claimant, the Tribunal heard witness evidence from the Claimant Damian Warburton.
9. For the Respondent, the Tribunal heard from Mr Stephen Burke who was the Team Leader for the Vetting Department, Detective Sergeant Anthony Barsby who was based at the relevant time in the Counter Corruption and

Force Vetting Unit and Detective Inspector Mark Brayfield who is Head of the Counter Corruption Unit. All three of the Respondent's witnesses were to some extent involved with the vetting of applications from prospective police officers with the Respondent. For the avoidance of doubt, all of these officers worked for the Respondent alone and did not work for Hertfordshire Police or any other Police Force.

10. This was a case where the hearing bundle was a single lever arch file of some 400 pages. It had been agreed by the parties and prepared by the Respondent. It had been updated prior to the hearing to take account of the Amended Response and additional disclosure including copies of documents relating to the proceedings brought by the Claimant against Hertfordshire Police. No additional documents were introduced during the proceedings. In addition to the Hertfordshire Tribunal claim papers, the documents in the bundle related primarily to the Claimant's application to join the Respondent as a Police Officer. This included an application form, vetting documentation, policy and Code of Practice documentation and emails relating to this application.
11. The parties were allowed regular breaks and were able to request additional breaks as necessary.

The Issues

12. The issues in this case were originally identified in the Case Management Order of Employment Judge Kurrein on 31 January 2019. These were further clarified in the Case Management Summary of Employment Judge Brown on 29 November 2019. They were not challenged by the parties at the hearing and are therefore as follows:
 - (1) The Claimant complains about victimisation within the meaning of s.27 and contrary to s.39 of the Equality Act 2010, in that by presenting and continuing an Employment Tribunal claim against Hertfordshire Constabulary, the Respondent:
 - (i) chose not to progress the vetting process in respect of the Claimant;
 - (ii) when the Respondent later started the vetting process, undertook an excessive process; and
 - (iii) did not appoint the Claimant.

Findings of Fact

13. The Respondent is the Police Force for the County of Northamptonshire. It employs 2,500 people. It is assumed that this figure includes a mix of civilian employees and Police Officers.
14. The Respondent was responsible for the recruitment of its own staff and Officers. However, the administration of the application process was

managed by the Multi-Force Shared Service Resourcing Team (“MFSS”) which was based with Cheshire Police.

15. The Respondent advertised its own vacancies for each intake. It is understood that the actual application for Police recruitment would be made through an on-line portal managed by MFSS. Potential recruits would be informed of their progress by registering with and accessing this portal. Following the assessment of an initial application, candidates would be invited to a Police Assessment Centre where they would be interviewed and tested.
16. If the candidate was successful at the Assessment Centre, they would then be informed via that MFSS portal that pre-employment checks would take place. This would include vetting and this was carried out by the Respondent’s Force Vetting Unit which is part of the Counter Corruption Department. Once the candidate had successfully completed pre-employment checks, they would put forward for training as part of the advertised intake which they had applied for.
17. Vetting would be completed prior to the interview at the Police Assessment Centre using a standard form provided by the Respondent. Vetting involved checks being carried out against the candidate, relatives and other relevant individuals. This required an agreement by the candidate for personal data to be accessed. When completing an application form the candidate was required to identify any information that could be relevant to his or her application and this included convictions and financial matters.
18. Vetting was subject to the APP Vetting Policy produced by the College of Policing. This Policy of some 80 pages in length applies to all applicants to Police Forces in England and Wales. The Policy explains in Section 3 that:

“3.1 Vetting is conducted in the Police Service to help identify, assess and manage risk relating to areas including, but not limited to:

- *national security;*
- *public safety;*
- *public confidence;*
- *protection of organisational assets;*
- *operational safety;*
- *leadership;*
- *corruption / coercion; and*
- *integrity.*

3.2 Vetting clearances must be granted before an individual is appointed. This is because the vetting process can uncover information which shows that the individual is unsuitable to serve in the Police Service. To avoid undue delay in Police

business, vetting clearances need to be processed in a timely manner. Conditional clearances may be granted to an individual based on any known risks pending full clearance being received”.

19. On 3 November 2017, the Claimant submitted an application to the MFSS to become a Police Officer with the Respondent. He had become aware of the Respondent advertising for an intake of new recruits that autumn. The receipt of application was acknowledged by the MFSS by email on the same date. He was advised to log in to the MFSS portal so that he could check the status of his application as it progressed.
20. The application form was understandably lengthy with questions being asked about the Claimant's past and current health. The Claimant stated that he considered himself to be disabled and identified himself as suffering depression caused by prolonged unemployment. He identified a number of previous convictions relating to driving offences between 2000 and 2004. He also referred to a charge of criminal damage in 2008 which he explained was subsequently admitted by Avon and Somerset Police to be unlawful and which gave rise to a successful civil claim against them. He also identified his previous employment which commenced with West Midlands Police in 1998 where he was a Police Officer, followed by a short period in the Army. He then worked as a law lecturer in the University of Buckingham and London from 2011 until 2016. He also provided examples in the form of occasions where he displayed professionalism.
21. Following the acceptance of his application on 3 November 2017, the Claimant emailed Lucy Fletcher at the Respondent. He raised issues relating to whether his Certificate of Knowledge of Policing (CKP) was required for his application and if so, whether his CKP which was obtained in 2014, would be deemed to have expired. Within this email he referred to an application to become a Police Officer with Hertfordshire Police which resulted in an offer, which was subsequently withdrawn. He went on to explain that he had commenced a claim in the Employment Tribunal against them claiming that he had been discriminated against.
22. Miss Fletcher replied to the Claimant on 13 December 2017 and amongst other things, asked why he was not given a start date by Hertfordshire.
23. The Claimant replied within an hour, advising Miss Fletcher that he received a start date with Hertfordshire for 23 July 2017, but shortly before this date he was advised that his vetting had been revoked and he had been rejected as an applicant. He explained that he was not clear what had happened to cause this decision and had presented an Employment Tribunal claim against them complaining of discrimination on grounds of disability contrary to the Equality Act 2010. He had also raised 24 complaints against staff and Officers at Hertfordshire Constabulary. He was at pains to reassure Miss Fletcher that the revocation by Hertfordshire could not be justified.

24. On 27 December 2017, the Claimant was informed by the MFSS that his application form had been accepted and a further email on 3 January 2018 he was asked to arrange an interview using the online portal. An interview was arranged for 10 January 2018. The Claimant was also invited to complete a number of forms which we understood included the Respondent's Police Review Vetting Form. The copy of the form completed by the Claimant was dated as having been completed by him on 9 January 2018.
25. In the section of the form which asked: *'Please include any other information that you feel may be relevant to this application...'* the Claimant provided details of the Hertfordshire Constabulary issue, Employment Tribunal proceedings and complaint. He mentioned that the Hertfordshire Vetting Officer, had checked his work history with West Midlands Police who advised that they had no history of him working for them. Details had been obtained by Hertfordshire from Avon and Somerset Constabulary, who had confirmed that the Claimant had worked as an Officer with West Midlands Police and that he had been involved in an incident of inappropriate behaviour at a social event and an allegation of racial abuse of a colleague. The Claimant contended in his answer on the form that this was untrue and he has a complaint and potential proceedings for defamation pending with Avon and Somerset Constabulary. He also mentioned that he had previously passed vetting for appointment as a Police officer with the Metropolitan Police in 2015. He explained that this offer of appointment would have been made with the same employment information available to Hertfordshire and the only reason that he did not start working in London was because of financial issues.
26. The form also asked for details of previous involvement in the criminal process in relation to criminal offences. The Claimant identified a number of road traffic offences between 1992 and 2004. The Claimant did mention a charge of criminal damage in August 2008. However, he explained that the prosecution was wrongly brought due to his unlawful arrest and it was withdrawn by the Crown Prosecution Service when it reached trial in the Magistrates Court. He also added in his reply that these matters all fell outside the College of Policing and Home Office's,

"parameters for when to reject an applicant and as such, respectfully, I do not expect them to be used to reject me."

He then provided internet 'hyperlinks' to relevant documents.

27. On 17 January 2018, the Claimant was invited to a Police Assessment Centre. On 26 January 2018, he was advised by email from the MFSS that he was given a conditional offer subject to the pre-employment checks being completed.
28. The Claimant was then informed by email from the MFSS on 1 February 2018 at 1215 hours that his application had been unsuccessful due to his

failing to meet the Respondent's requirements in respect of vetting. The email included a paragraph that if the Claimant required any details as to why his application was unsuccessful, he apply directly to Northamptonshire Police. Additionally, it advised that,

"...Chief Officers retain the right to reject any application without stating a reason under Section 6 of the Police Act 1996".

A series of emails then followed.

29. By 1257 hours on the same day, the Claimant replied to the MFSS arguing that they could not assert that they can reject an application without reason,

"...especially as I am suing Hertfordshire Constabulary in discrimination for having rejected me on vetting grounds".

He then went on to warn them that his Solicitor,

"...will be in touch with you regarding the victimisation that you have now committed".

He also advised that he would have the decision judicially reviewed. He requested details of Northamptonshire's force Solicitor and sought confirmation as to whether it was MFSS or the Respondent who performed his vetting.

30. The Claimant was notified that Northamptonshire was responsible for vetting and at 1354 hours on the same day, DS Barsby on behalf of the Respondent emailed the Claimant to suggest that his threat of litigation was premature. He confirmed that the new APP Vetting Policy does allow for a review to take place following a vetting decision and that he would request that the MFSS amend their emails to reflect this. He did suggest to the Claimant that the tone of his response to MFSS earlier that day,

"...is not one I find conducive to a person seeking employment with Northants Police but will take the view that you are clearly very angry in light of your historic dealings with Hertfordshire and therefore will not take issue with your response in these circumstances."

31. The Tribunal heard evidence from Mr Burke concerning the recording of the Claimant's failure in the Hertfordshire vetting process. An extract from Mr Burke's 'Daybook' was included with the bundle. It was redacted to remove all other entries which Mr Burke confirmed related to other applications and were not relevant to the Claimant's complaint. The remaining entry stated,

'Thurs 1/2 REJECT Damian Warburton 14/5/14 by LETTER'

Mr Burke explained that the Daybook was his own personal record and his use of the word 'reject' meant that the Claimant would be rejected from the recruitment process for the current ongoing intake of Officers being recruited. He said that it did not mean that the Claimant would have his application completely rejected.

32. An additional relevant document was the extract from the ORACLE iSupport system. This is a computer software programme which is used by many organisations to manage human resource processes and it is understood that this could be accessed by MFSS. The document concerned a 'Recruitment Support' matter and was summarised as 'RV Failure'. A number of entries were originally entered by Mr Burke at 1047 hours and the most relevant one states,

"Damian Warburton 14/05/1974 has applied for a role as a Police Officer. He has outstanding complaints with other Forces. He cannot be considered until these are resolved. He has been sent a letter explaining this. Once they are settled he is free to apply again."

This document was compared with a screenshot of the Claimant's online application status using the online portal where he had registered his application and which would have been updated by MFSS. This described his Application Status as,

'Application Unsuccessful'

33. Mr Burke gave evidence concerning these documents and explained that if he had meant that the Claimant's application had failed completely he would have informed the MFSS of this decision and written to the Claimant explaining why his application was unsuccessful. He also referred the Tribunal to an extract from the Respondent's new 'Cy-vet' system which recorded the vetting of its staff and Officers. It went 'live' on 1 August 2019 and required the updating of all existing data from the now defunct 'Cyclops' vetting system. It was noted that the Claimant's application was assigned to the new system on 30 October 2019 and its status was described as 'open'. He added that the Claimant's application was the only entry marked open on the system by this stage and Mr Burke confirmed that keeping an application was an unusual step. The only other example he could recall related to an application from a non-UK national who needed certain documentation to be produced by a third party from outside of the UK. This resulted in that application involved being held open for 4 years before he could join the Respondent.
34. The Tribunal felt that Mr Burke gave reliable and credible evidence and was satisfied that his Daybook entry referred to the Claimant only being rejected from the current intake. It is clear that the Respondent continued to keep the Claimant's application open once his vetting had failed and that MFSS had misunderstood the information updated by Mr Burke on Oracle. This is perhaps understandable given the multi-force nature of the

MFSS and that instructions were sent in a relatively terse format, but which used open language which perhaps could be subject to misinterpretation. Indeed, DS Barsby said that he felt Oracle was a very poor system as it did not allow people to talk to each other. In any event, we are satisfied that the Claimant's application to join the Respondent as a Police Officer was only rejected in relation to the current intake that he had applied for and at this stage, it is the Claimant's involvement with DS Barsby that becomes significant.

35. DS Barsby messaged his Line Manager DI Brayfield on 14 February 2018 enclosing a copy of the Claimant's vetting application. He then confirmed to the Claimant that the only information held by the Respondent in relation to vetting was the RV vetting form that he had submitted. He went on to say that the only other information that he had not seen was the entry on the Police confidential vetting system. He provided the Claimant with the relevant extract in his email and it said,

"On viewing the applicant's vetting form, it was noted that he has several ongoing cases with Herts Police and Avon and Somerset Police. He is also taking Herts to the Employment Tribunal. It was decided that we would not start his vetting until the outcome of these cases are known. A letter was sent to him saying he is welcome to apply once they were concluded. A service request which was sent to him saying he is welcome to apply once they were concluded."

36. DS Barsby did seek to reassure the Claimant in this email with these following comments,

"In these particular cases (Officers that have previously served with other Police Forces) I can confirm that it is usual practice in Northants Police not to continue with the vetting application where there are ongoing proceedings between an applicant and a previous Police Force. This is to protect the organisation from any potential risk that could arise as a result of these proceedings.

The reason we do not hold any other information is due to your vetting not being commenced as stated above. I can also confirm that we have not communicated with any other Police Forces with regards to this matter. Therefore, to clarify, your vetting hasn't been rejected, it simply wasn't commenced.

However, as a sign of good faith and in the interest of openness and transparency, I can offer you the opportunity to ask for Police vetting to commence, if you feel that the process adopted above is not proportionate in the circumstances."

37. Between 14 February and 19 February 2018, DS Barsby exchanged a number of emails with the claimant. DS Barsby confirmed that as Mr Burke had recorded on the vetting system that there were several ongoing

cases with Hertfordshire Police and Avon and Somerset Police and as Mr Warburton was also taking Hertfordshire Police to the Employment Tribunal, it was usual practice for Northamptonshire Police not to continue with a vetting application due to the potential risk that might arise. However, as a sign of good faith, he offered the Claimant the opportunity to commence vetting subject of course to Northamptonshire Police fulfilling its obligation to contact any other Forces with whom he had worked. The Claimant was willing to proceed with vetting on this basis although he expected that Northampton Police would not communicate with Hertfordshire. His reasoning was that he had never been employed or performed voluntary work with that particular Force, had never been arrested or investigated by them and his only contact with them was as a rejected applicant. DS Barsby notified DI Brayfield and on 19 February 2018, confirmed to the Claimant that he would supervise the vetting personally.

38. It was made clear in DS Barsby's witness statement and in his witness evidence that his view was that the Claimant's vetting had not been rejected, but it had simply not commenced due to the concerns identified with the other Police Forces. This was why the offer was made to resume the vetting process.
39. Jo Bowden within the Disclosing and Barring Service of the Respondent then commenced a number of enquiries with relevant Forces concerning the Claimant for vetting purposes. On 6 March 2018, she informed DI Brayfield that they were still waiting information from West Midlands Police and Avon and Somerset Police. However, both these Forces appeared to be reluctant to share the information with the Respondent due to complaints which had been raised by the Claimant relating to their handling of his information and sharing of this information which he says has affected his vetting. Eventually, West Midlands Police informed Ms Bowden on 21 March 2018 of extracts from their Centurion system which provided details of two allegations against the Claimant from 1998. Ms Bowden was advised that the Claimant had left that particular Police Force prior to the conclusion of any investigation.
40. DS Barsby kept the Claimant informed of the checks that were being made with regard to vetting during March and April. He explained to him that a response was still awaited from Avon and Somerset Police and that information had been received from West Midlands Police. The Claimant expressed concern about the information which had been provided by West Midlands Police and sought to explain that while it related to inappropriate behaviour, it took place at a high spirited social event with three hundred or so Officers and that at the age of 23 he was somewhat immature. DS Barsby was very clear in his reply that he would consider everything as appropriate but did his best to be reassuring and suggested that judged in the context of when the event took place, he thought that it was likely to be more acceptable then than it would be now.

41. In the meantime, DS Barsby was becoming increasingly frustrated with the lack of a response from Avon and Somerset Police and started to approach them directly towards the end of April.
42. By this point, the Claimant contacted DS Barsby to explain he had been in touch with Avon and Somerset Police himself to see what he could do to get them to respond to Northamptonshire Police in respect of the vetting process. He had been advised by a Richard Budd who was a PSD investigator that the Force had taken a policy decision not to respond because of an ongoing public complaint and litigation that the Claimant had in progress with them. DS Barsby replied on 27 April and expressed surprise because he had not been told this by the Force and had not even received a reply from them. He added, on 2 May 2018 that he was getting very frustrated by Avon and Somerset Police and was seeking a formal response. The Claimant replied by return and provided DS Barsby with details of Andrew Knight who was a Legal Officer at Avon and Somerset Police. DS Barsby confirmed that he would contact him immediately. Mr Knight did respond to DS Barsby but explained that he was only involved with the civil claims which the Claimant had made against the Police and he was not involved directly with the vetting matter. He had been informed by the PSD they had investigated the Claimant's complaint and were producing a draft report which they wished to consider before they decided whether or not to disclose the information being requested by Northamptonshire Police. DS Barsby acknowledged this email and informed the Claimant that he was promised a response by Avon and Somerset in the near future. However, he warned the Claimant that he could not proceed with his vetting until he had received the necessary information from Avon and Somerset Police. He added that,

“you haven't failed vetting with Northants. I just cannot proceed without all the information”.

He apologised and empathised with the Claimant suggesting that he would be finding this extremely frustrating. It certainly did appear to the Tribunal that DS Barsby was doing his utmost to support the Claimant with the conclusion of the vetting application and had reached a point where he was struggling to understand why another Force would not provide the necessary information. However, this was something which was beyond his control and he could not take any further action until this information had been provided.

43. The Claimant replied to this email and acknowledged that this was a frustrating matter. He explained that he was aware of the appeal process to follow if the Officers at Avon and Somerset Police were unwilling to provide the information that was being sought. He did ask DS Barsby the following question,

“Have you not had a situation before where a relevant Force fails to respond to a vetting request? Must that failure lead to an inability to make a decision?”

44. He then referred to the APP document and suggested that there would be room for Northamptonshire Police to exercise discretion when a Force refuses or neglects to respond to requests for information. DS Barsby acknowledged this email and confirmed that he would return with a view in due course. He then responded and explained that he had read through the APP document and suggested that the Claimant's interpretation of the language could easily be construed in an opposite way and he described it as being a "*little ambiguous*". He did confirm that he would not close the Claimant's file but would leave it open in the hope that he could resolve this matter with Avon and Somerset Police in the near future. The Claimant acknowledged that the language used in the APP could be construed either way but acknowledged that there was a willingness on the part of Northamptonshire Police to wait until Avon and Somerset Police had returned concerning the information. The Claimant then contacted DS Barsby on 13 May 2018 to advise that Avon and Somerset Police had told him that the PSD report is complete and should be shared with him later that week. He was hopeful that they would then also respond to Northamptonshire Police.
45. It appears that nothing further was heard from Avon and Somerset Police and that as of 2 May 2018, the vetting process with the Respondent was put on hold.
46. Nothing further then appeared to happen with regards to this process. On 2 August 2018, Jo Bowden the vetting Officer with the Respondent, emailed Hertfordshire Police seeking any information of the vetting levels held and any relevant information and files that they held for the purposes of vetting. Under cross examination, DS Barsby informed the Tribunal that by this point in time, the Claimant was clearly not going to be starting work with Hertfordshire Police. He was of the view that Ms Bowden had sent this email in error and without DS Barsby's consent. It was at this stage that DS Barsby was awaiting information from Avon and Somerset Police and this was the Police Force which was preventing the Claimant's vetting with the Respondent from being completed.
47. It was made clear by all three of the Respondent's witnesses that this application was, in their experience, an unusual case. This was partly because of the Claimant's Employment History as he was a rejoiner from West Midlands Police. 7.19 of the APP vetting guide placed a clear obligation on the recruiting Force to ensure the integrity of an applicant who is rejoining or transferring from another Police Force. Section 7.24 requires a Professional Standards check to be carried out by the recruiting Force with the relevant PSD at the Force where the applicant previously worked. The APP vetting Code of Practice for October 2017 at Section 6, advises that the vetting decision must be made on a case by case basis. The reason why the application could not be progressed by the Respondent was not due to any failing on their part, but because of a failing on the part of Avon and Somerset Police in providing the necessary information.

48. It is understood that this information is still awaited from Avon and Somerset Police. Mr Burke provided evidence to suggest that it was unusual for a lengthy period of time to be involved in the provision of information. The only example that could be provided was in respect of the case where a wait of four years took place due to documentation being sought from outside of the UK. The APP Policy on vetting does not appear to provide clear guidance as to what should happen when there is a failure to disclose by another Force. DS Barsby was of the view that discretion must remain with the Officers working in the vetting team. We recognised that DS Barsby was extremely understanding in how he engaged with the Claimant and the efforts that he made to progress this matter. However, he explained that his role involved the assessment of risk which will help him determine whether an individual is safe to be employed by the Police. In this situation he explained that he had a number of Police Forces who held onto information and that he was obliged to obtain this information from them. The only concern he had was whether the Claimant was sufficiently “*ethical*” to join Northamptonshire Police. He was simply trying to establish this information through the vetting process.

Legal Issues

Victimisation

49. Section 27 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race or sex in this case), A treats B less favourably than A treats or would treat others.

Causation

50. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason?

Comparators

51. For the purposes of direct discrimination, Section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the Complainant and the comparator must be either the same or not materially different. Comparison may be made with a hypothetical individual.

The Burden of Proof in Discrimination Cases

52. Section 136 EqA sets out the burden of proof that applies in discrimination cases. Sub-section (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, sub-section (2) does not apply if A shows that A did not contravene the provision.
53. The Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd. v Wong and Others CA [2005] IRLR 258.

Discussion and Analysis

Protected Act

54. There can be no dispute that Employment Tribunals which the Claimant has brought against Hertfordshire Police are covered by Section 27(2) of the ERA. The bringing of proceedings under the Equality Act 2010 are a protected act unless in accordance with Section 27(3) the complaint is made (amongst other things) in bad faith. The Tribunal were of the opinion that the Claimant believed that when he issued the proceedings against Hertfordshire Police they were genuine. Subsequent case management in this particular case may have brought into question its merits. The making of a Deposit Order by Employment Judge Smail in his Order dated 12 September 2018, does not amount to a final decision. The Claimant continues to feel that his claim is genuine. It is fair to say that the way that he conducts himself with employers could be described as being more litigious than most other members of the public. However, there is no evidence that has been made available to this Tribunal that they have ever been considered to be vexatious or unreasonable.

Detriment

55. The Respondent did not progress the Claimant's vetting process because of the ongoing Employment Tribunal proceedings with Hertfordshire Police, but more importantly because of the failure of Avon and Somerset Police to provide the information which had been requested on numerous occasions and which they appeared to have refused to disclose. The decision to place vetting on hold was consistent with the Respondent's vetting processes and a reasonable step to take taking into account the obligations provided with regards to vetting by the APP vetting guide and Code of Practice. This was not an excessive process. The involvement of DS Barsby could not be considered a detriment, in fact, DS Barsby should be commended for the efforts that he went to in trying to progress the

Claimant's vetting process. He was simply following expectations placed upon him with regards to vetting and he gave reliable evidence as to the steps that he was taking and why he was taking them. He did not go beyond what was reasonably required by the APP Guidance and Code of Practice. The Claimant was not appointed to the Respondent but when he commenced proceedings it was not the case that he had been told that his application process had come to an end. The application had simply been put on hold. As was described in the findings of fact, it was an exceptional situation, but it would have been possible for the Claimant to wait until matters had been progressed to see whether his application could continue. The evidence given by Mr Burke confirmed that an applicant waited for four years before being allowed to complete his vetting process. While this might seem a lengthy period of time, it does mean that while vetting will be carried out, it would not be carried out in a way that would prevent an applicant from proceeding due to a failure on the part of a third party body holding relevant information.

56. In considering this decision, the Tribunal did shift the burden of proof given that there was a prima facie case established by the Claimant that he had suffered a detriment. This was because of the use of the wording "*rejection*" in Mr Burke's Daybook and the comment of "*RV failure*". However, the Tribunal is satisfied that the explanation given by Mr Burke with regard to the meaning of the word 'reject' and the problems caused by interpretation on the Oracle system meant that this was a matter where the Claimant had not been permanently rejected. The activities of DS Barsby, once the Claimant complained about the vetting issue reveals a great deal of hard work on his part and he has sought to the application and to calm the Claimant in what was an understandably stressful situation. He provided appropriate clarity and provided continuous updates as to where the application was. Indeed, he worked tirelessly to ensure the vetting process could be progressed in so far as it was a matter within his control. Indeed, the Claimant confirmed that he did not have any issues with DS Barsby and the email correspondence between them indicated that they struck up a good relationship. The reason why this matter stalled is due to the failure of Avon and Somerset Police. DS Barsby reasonably believes that he is unable to take it further and the explanation which he gave as to why adhering to vetting was so important, satisfies the Tribunal that it was reasonable for him to expect all the necessary information to be obtained before he could progress the matter to its eventual conclusion.

Reason

57. While the Tribunal is of the view that the Claimant did not suffer the detriments which he identified as his issues in these proceedings, it has considered the question 'what would happen if the Claimant had been able to establish that he had suffered detriments which he identified'? Even if this is the case, the Tribunal is not satisfied that the reason for this detriment is because the Claimant had made a protected disclosure. It is true that the Claimant had presented an Employment Tribunal claim against Hertfordshire Police. However, the detriment which the Claimant

has identified was not caused by the proceedings which he brought against Hertfordshire Police, but due to the absence of the information being provided by Hertfordshire Police and Avon and Somerset Constabulary not providing the necessary information.

Conclusion

- 58. For the reasons given above, the conclusion of the Tribunal is that the Claimant's claim of victimisation is not well founded. This means that the Respondent did not victimise the Claimant and subject him to the identified detriments by reason of his raising a protected act, namely Employment Tribunal proceedings against Hertfordshire Police.

- 59. I am aware that there is an outstanding issue with regards to costs in this matter which was Ordered by Employment Judge Brown in his Case Management Order of 29 November 2019. Accordingly, the parties are requested to provide any submissions in relation to the question of the costs application within 14 days of the date of this Judgment.

Employment Judge Johnson

Date: 24 February 2020

Sent to the parties on: .02.03.2020.....

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For the Tribunal Office