EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4109987/2015 and 4123241/2018 (P)

Decided on the basis of written submissions
27 April 2020

Employment Judge M Whitcombe
Mr I C MacFarlane
Mr W Muir

Ms K Harper	**Claimant** **Represented by:** **Mr M Allison** **(Solicitor)**
The Chief Constable, Police Service of Scotland	**Respondent** **Represented by:** **Ms A Irvine** **(Solicitor)**

RECONSIDERATION JUDGMENT

The unanimous judgment of the Tribunal upon reconsideration is as follows.

(1) The conclusions we reached in relation to issues 2.7 and 2.8 (generally referred to at the original hearing as the "natural justice" points) are confirmed, with the additional reasons contained in paragraphs 5 to 15 below.

(2) We confirm our conclusions and reasoning in relation to original issue 2.6.

(3) No other aspect of our judgment was challenged, and those other aspects therefore stand.

REASONS

Introduction

1. This is an application by the claimant for reconsideration of certain aspects of our judgment on liability sent to the parties on 24 February 2020. Briefly summarised, our judgment was that the claimant's claims for victimisation and detrimental treatment because of having made protected disclosures succeeded on one point only: the allegation of victimisation in relation to Sergeant Bell's actions on or about 30 April 2015. All of the other allegations failed and those other claims were dismissed for reasons set out over 44 pages.

2. With the agreement of the parties, this reconsideration application was dealt with entirely on the basis of written submissions (code "P") as a pragmatic way forward given the practical implications of the Covid-19 pandemic for "in person" hearings. By agreement, we moved straight to a full determination of the application on its merits and in accordance with rule 72(2) of the ET Rules of Procedure 2013. It was assumed, rather than decided, that the application passed the "reasonable prospects" test in rule 72(1). The parties were each given a fresh opportunity to make their submissions in writing. In the claimant's case, the final written submissions incorporated and superseded those made as part of the original application. The respondent replied to those submissions in writing. All three members of the Tribunal have contributed to this judgment.

3. Although Mr Allison had asked for a right of reply before the respondent had even made its own submissions, we indicated that we would invite a reply from the claimant only if fairness required it – for example if the respondent raised genuinely new points which could not reasonably have been anticipated in the claimant's submissions. Having read the respondent's submissions we did not think that fairness required that the claimant should have a third opportunity to make submissions and no reply was invited.

Reconsideration principles

4. The core principle to be derived from rule 70 of the ET Rules of Procedure 2013 is that the ET may "reconsider any judgment where it is necessary in the interests of justice to do so". On reconsideration the original decision may be confirmed, varied or revoked and if revoked it may be taken again.

Original issues 2.7 and 2.8 (the "natural justice" points)

5. The first challenge to our reasoning and conclusions concerns the agreed issues listed in bold at paragraphs 2.7 and 2.8 of our original reasons. They both concerned alleged victimisation contrary to s.27 of the Equality Act 2010 and/or regulation 7 of the Part-time Workers Regulations 2000.

    a. Issue 2.7 concerned an alleged breach by the respondent of the procedural fairness requirements of the Police Service of Scotland (Conduct) Regulations 2014 when investigating allegations of misconduct against the claimant.
    b. Issue 2.8 concerned an alleged decision by the respondent not to inform the claimant of the investigation into her conduct until July 2015.

6. By the end of the original merits hearing these issues were referred to as the "natural justice" points because both concerned the claimant's entitlement to be made aware of the charges against her before the respondent reached any adverse conclusion. Mr Hay, the claimant's advocate, dealt with them together and referred to them as being "two sides of the same coin".

7. We also dealt with both points together in paragraphs 99 to 103 of our original reasons, and we refer back to those paragraphs.

8. For present purposes we do not need to dwell for very long on any of the following issues, which were resolved in the claimant's favour and which are not now challenged.

    a. *That the claimant had done the protected acts on which the*

victimisation claims were founded. In part, this was conceded by the respondent (see issue 3 at page 5 and paragraph 67 of our original reasons). Our reasoning on the aspect not conceded is at paragraph 68 of our original reasons.

b. *That the key aspects of the facts alleged by the claimant were proved.* The respondent had reached the conclusion that "improvement action" was required before the claimant had been given any opportunity at all to respond to the allegations against her. She had been denied any prior notice of the charges against her, still less any opportunity to dispute them, before the respondent reached its decision (see paragraph 101 of our original reasons).

c. That the above treatment was to the claimant's detriment (see paragraph 102 of our original reasons).

9. The key issue at the merits hearing, and the key point of challenge now, concerns the reason for that detrimental treatment. When considering whether an employment tribunal's reasons are ***Meek***-compliant or compliant with rule 62, the parties can be taken to know the submissions they made at the hearing. We carefully considered the oral and written submissions made by Mr Hay on behalf of the claimant on these points, and we deal with them in paragraph 103 of our original reasons. As we noted in that paragraph, the claimant's submissions were based on inferences to be drawn from:

a. the lack of a good explanation; and

b. the cumulative weight of the other allegations in the case.

10. As for point b., and as noted in paragraph 103 of our original reasons, we had rejected all of the other allegations of victimisation in the case save for that concerning Sergeant Bell, so the "cumulative weight" referred to by Mr Hay simply was not there. We did not uphold the allegation of victimisation in relation to the decision to *start* the investigation, nor did we uphold allegations of victimisation in relation to other decisions taken *during the course* of that investigation.

11. As for the victimisation allegation we upheld concerning the actions of Sergeant Bell, there was no evidence that Sergeant Bell had anything at all to do with the failures of natural justice in the respondent's subsequent investigation of the claimant's conduct. Other individuals bore responsibility for those failures and there was no suggestion that Sergeant Bell (of more junior rank) had influenced any of them. Therefore, there was no basis upon which to infer that the failures of natural justice had been motivated by a protected act, even if Sergeant Bell's own acts had been so motivated.

12. That leaves the lack of a good explanation for the procedural failures we identified, which appears to be the sole focus of Mr Allison's submissions in this application. Anyone familiar with unfair dismissal cases will know that serious procedural failures, including failures of natural justice, can occur without any particular conscious or sub-conscious motivation on the part of an employer. We did not think that the mere fact that there was a failure of natural justice in this case was sufficient, without more, to pass the burden of proof to the respondent. On the contrary, we thought and still think that on this issue the case was a good example of the scenario outlined in ***Madarassy v Nomura International plc*** [2007] ICR 867, CA, considered along with other leading authorities at paragraph 59 of our original reasons. We noted the relevant principles at paragraph 59.3 and had them very much in mind when reaching our conclusions. If they are re-worded slightly so as to apply to a claim for *victimisation* rather than a claim of *direct discrimination*, they would read as follows: *it is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected act and detrimental treatment*.

13. While proof of protected acts and detrimental treatment are of course *necessary* prerequisites of a successful claim for victimisation, they are not in our judgment *sufficient* on their own to pass the burden of proof. Additional factors are necessary to pass the burden of proof to the respondent. We will call them "***Madarassy***" factors.

14. The basis of our reasoning was a lack of those ***Madarassy*** factors. In our original reasons we simply said that there was insufficient basis for us to draw an inference that the protected acts were the reason (in the sense of conscious or subconscious motivation) for the detrimental treatment (i.e. the failures of natural justice). That reflected the way in which Mr Hay had put the argument on behalf of the claimant in submissions. We do not recall him analysing *this* point in terms of the burden of proof, nor was he obliged to do so. Given the nature of the challenge now made by a different representative in this reconsideration application we will also express our reasoning on this point in terms of the burden of proof. All that the claimant had established was (a) a protected act and (b) detrimental treatment. None of the other additional and essential "***Madarassy*** factors" identified in submissions on behalf of the claimant by Mr Hay were made out, and consequently the burden of proof did not pass to the respondent. Further, nothing else potentially amounting to a "***Madarassy*** factor" has been identified by Mr Allison in his submissions on this reconsideration application.

15. For those reasons, it was neither necessary nor appropriate for us to scrutinise the respondent's explanation for the treatment, as Mr Allison now argues. That stage of the analysis had simply not been reached. As Mr Allison correctly notes in his submissions, we did not on this issue move straight to the second stage of the burden of proof analysis and consider whether there was a lawful reason for treatment, nor did we say that we had done so. There is a good reason for that – the claim failed at the first stage of the burden of proof analysis. The claimant had proved no more than a protected act and detrimental treatment. She had failed to prove anything additional which might be sufficient to pass the burden of proof of the reason for that detrimental treatment to the respondent.

16. We therefore reject Mr Allison's submissions on behalf of the claimant that we variously:

    a. failed to make the necessary factual findings;

b. erroneously failed to scrutinise the respondent's reason for the detrimental treatment;
c. have not given sufficient reasons;
d. reached a conclusion "vitiated by error of law";
e. failed to apply the burden of proof provisions.

17. While we still consider that our original reasons were ***Meek***-compliant, in that they were quite sufficient for the parties to understand why the claimant lost on these points, we are entirely happy to supply additional reasons in order to eliminate any remaining doubt about our reasoning. That would be in the interests of justice given the age and convoluted procedural history of this litigation. We therefore confirm our original conclusions on issues 2.7 and 2.8 and supplement our original reasons with the additional reasons set out in paragraphs 5 to 15 of this decision.

Original issue 2.6 (attendance at the home of Bruce Harper)

18. This aspect of the claim concerned the reasons why police officers visited the home of Bruce Harper, the claimant's ex-husband. Once again, the claimant established the relevant protected acts and the detrimental treatment. No useful purpose would be served by going over the fine detail now since it is not challenged. The real issue at the merits hearing was whether the conscious or sub-conscious motivation for the visit was one or both of the claimant's protected acts.

19. Mr Allison suggests that when considering the reason for that visit we have conflated issues or misapprehended or mistaken the evidence. We think those criticisms are ill-founded for the reasons set out in the following paragraphs.

20. Once again, the structure and content of our reasons to some extent reflected the way in which the claimant's submissions had been made to us by a different representative. At the merits hearing the submission made on behalf

of the claimant was that the reason for the visit was "clearly connected" to the allegations made by Sergeant Bell, a point which Mr Allison does not appear to pursue any more. However, that is why it was necessary for us to record that the ultimate source of the report of an incident between the claimant and Mr Harper in the street was not Sergeant Bell, but Sergeant Dodds.

21. We see no inconsistency between our findings of fact in paragraphs 30, 30.1, 30.2 and 30.3 and our reasoning in paragraph 96. Nor do we agree that we conflated two distinct issues. Therefore, it would not be appropriate to revoke or vary our decision in the interests of justice on either basis.

22. Mr Allison's summary of our reasoning in paragraph 96 is incomplete, inaccurate and fails to note the penultimate sentence "*Bruce Harper was also a potential witness to aspects of the wider neighbour dispute*". If paragraph 96 of our original reasons is summarised accurately or quoted in full, then the two issues of: (1) the alleged incident between Bruce Harper and the claimant in the street; and (2) the wider neighbour dispute are clearly noted, and certainly not conflated.

23. Further, that analysis is quite consistent with and supported by the findings of fact set out earlier in the reasons. In paragraph 30.3 we found, among many other things, that the overall purpose of the visit was as described by the officers conducting that visit. That in turn links to paragraph 30.2 which records the stated purpose as having been to investigate concerns Mr Harper might have had in relation to the claimant's conduct "*towards him or others*", before going on to refer additionally to "*the general concerns the neighbours had raised*". Once again, our finding as to the purpose of the visit was the gathering of evidence in relation to both: (1) the claimant's conduct towards Mr Harper; and (2) the wider neighbour dispute. Once again, both issues were noted and they were not conflated.

24. Finally, we were entirely stated that the ostensible purpose of the visit was the true purpose of the visit. That is clear from our findings at paragraphs 30, 30.1, 30.2 and 30.3. The fact that the officers did not ask about specifics is

not surprising given that Mr Harper was only prepared to speak informally, and not to give a statement (see paragraph 30.1). The respondent's case as to the ostensible purpose of the visit was consistent with and supported by the objective facts and the nature of the allegations about the claimant's conduct (see paragraph 96). We do not accept Mr Allison's criticism that we simply assumed that the stated purpose of the visit was the real purpose of the visit. Our analysis is contained in paragraph 30.3 (read with the preceding paragraphs) and paragraph 96 of our reasons.

25. Nothing in Mr Allison's submissions makes us want to alter our approach to issue 2.6 in the interests of justice. We therefore confirm our decision and reasoning in relation to original issue 2.6.

Employment Judge:	M Whitcombe
Date of Judgement:	27 April 2020
Entered in Register,	
Copied to Parties:	30 April 2020