Appeal No. UKEAT/0123/20/JOJ (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 17-18 February 2021
Judgment handed down on 6 April 2021

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

THE CHIEF CONSTABLE OF AVON AND SOMERSET CONSTABULARY APPELLANT

MR NICHOLAS ECKLAND RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR DIJEN BASU

(One of Her Majesty's Counsel)
MR ELLIOT GOLD
(Of counsel)

Instructed by:
Shahzad Hamid, Solicitor
Legal Services Directorate
Avon and Somerset Constabulary
Force Headquarters
PO Box 37, Valley Road
Portishead, Bristol BS20 8QJ

For the Respondent

MR CHRISTOPHER MILSOM
(of Counsel)

Instructed by:
Binder Bansel, Solicitor
Penningtons Manches Cooper LLP
125 Wood Street
London EC2V 7AW

SUMMARY

DISABILITY DISCRIMINATION – Discrimination by other bodies

The employment judge had erred in law in deciding that the appellant Chief Constable (the respondent below) was liable for any disability discrimination by the Independent Office for Police Conduct (IOPC).

The judge had not erred in law in deciding that the Chief Constable was liable for any disability discrimination by the statutory police misconduct panel which determined disciplinary allegations against the claimant police officer (the respondent to the appeal).

The judge had not determined the preliminary issues before him in a fair and even handed manner; he should not have quoted extensively from the claimant's written arguments while failing to deal adequately with those of the Chief Constable.

However, that procedural unfairness did not affect the outcome of the appeal, which turns on conclusions of law. It is therefore unnecessary to remit the matter back to the tribunal for further consideration.

THE HONOURABLE MR JUSTICE KERR

Introduction

1. In this appeal, the appellant (the respondent below) (**the Chief Constable**), challenges the decision of Employment Judge Roger Harper MBE, sitting alone, that the "correct identity of the Respondent" to the disability discrimination claim of the claimant police officer (the respondent to this appeal) (**the claimant**) was the Chief Constable only and was not in addition the Independent Office for Police Conduct (**IOPC**), which investigated and considered a disciplinary allegation against the claimant; nor the police misconduct tribunal (**the panel**), or its three members, which determined disciplinary proceedings against the claimant.

2. The judge so held when determining, in a reserved decision dated 18 February 2020, three preliminary issues argued before him the previous day at the employment tribunal sitting in Bristol. The Chief Constable appeals against that decision on three grounds. They are, first, that the judge erred in deciding that the Chief Constable could be held liable for discriminatory acts of the IOPC's Director General; second, that he erred in deciding that the Chief Constable could be held liable for discriminatory actions by a statutory police misconduct panel; and third, that the judge failed to give the Chief Constable a fair trial and determination of those issues.

3. The claimant was alleged to have lied to a Crown Court. A disciplinary investigation ensued in accordance with a complex and detailed statutory regime involving the Chief Constable, the IOPC and the panel, about which I will need to say more shortly. The Chief Constable appointed the panel to determine the allegation. The panel found the case proved and decided in December 2018 that the claimant should be dismissed with immediate effect for gross misconduct. The claimant appealed to the Police Appeals Tribunal but then withdrew his appeal.

4. The claimant brought a disability discrimination claim against the Chief Constable only. He claims to be disabled by depression and episodic paroxysmal anxiety; and that he was subject

to disability discrimination in various ways "both during his service and upon his dismissal" (grounds of complaint below, paragraph 2). The Chief Constable responded that the claims fell outside Part 5 of the Equality Act 2010, the tribunal had no power to determine them and the Chief Constable was "not the correct respondent" (amended grounds of response, paragraph 2).

5. An employment judge, EJ Midgley, then directed a trial of three preliminary issues intended to address that aspect of the dispute, which were the three issues determined by Judge Harper as I have indicated. The IOPC and the panel members were not informed nor present at the hearing, despite their strong interest in the issues. Nor have they been served with the papers on this appeal. Consequently, I have not heard argument from them.

6. I made it clear at the hearing that if this matter goes any further, they should be put on notice and may want to seek permission to make submissions; especially since during argument before me Mr Milsom, for the claimant now and below, withdrew his opposition to the first ground of appeal and conceded that the judge was wrong to determine, implicitly, that the Chief Constable was liable for any discrimination by the IOPC.

7. I asked for the precise scope of that concession to be put in writing. Mr Milsom's formulation was as follows:

> **"The Claimant concedes that the Chief Constable is not in principle liable for any discriminatory conduct of the IOPC. In any case where the IOPC's performance of its functions gives rise to discrimination the Claimant acknowledges that it must be joined as a party to proceedings. The Claimant, however, suggests that the IOPCs liability as regards a disciplined officer is to be determined within the scope of Part V Equality Act 2010 (read together with the ancillary provisions of ss109-112) and thus heard in the Employment Tribunal. To the extent the ET determined otherwise it is therefore agreed that it erred in law."**

Facts and Procedural History

8. Detailed findings of fact have not yet been made by the tribunal. I will therefore confine my brief account to uncontested facts. The claimant joined the Avon and Somerset police force in 1998 and rose to the rank of detective sergeant. He claims that his disability afflicted him from

2013 onwards. The Chief Constable does not accept that he was at the material times disabled within the Equality Act 2010 (**the Equality Act**).

9. In 2018, the claimant's work involved him in investigating organised crime networks. On 23 March 2018, he gave evidence on oath at Bristol Crown Court regarding the death in prison of a certain defendant against whom criminal proceedings were ongoing. His evidence was to the effect that he had attended at a mortuary and identified the deceased as the person charged on the indictment in those criminal proceedings. In fact, he had not been to the mortuary.

10. When this was discovered, the Chief Constable referred the issue to the Director General of the IOPC for investigation. After the IOPC had carried out its investigation, the Director General decided to refer the matter to the Director of Public Prosecutions (**DPP**), who decided not to prosecute. The Director General indicated that in his opinion the claimant had a case to answer for gross misconduct. The Chief Constable agreed, deciding that the claimant had a case to answer and appointed the panel to determine the allegation that the claimant had lied to the Crown Court.

11. The claimant was charged with gross misconduct. The allegation was that contrary to his evidence to the Crown Court, he had not attended the mortuary and had not seen the deceased; nor had he attempted to correct his evidence at any time. The allegation was tried by the panel on 12 and 13 December 2018. The tribunal recognised that the claimant had been "under pressure" but concluded that he had "failed to take appropriate care … to ensure that his evidence was verified and correct".

12. The panel decided on 13 December 2018 to dismiss the claimant summarily for gross misconduct. The claimant then appealed to the Police Appeals Tribunal. He brought his claim for disability discrimination against the Chief Constable on or about 2 May 2019, with the appeal

pending. The hearing of the appeal began on 27 September 2019 but was not completed that day. Meanwhile, the tribunal claim proceeded.

13. A preliminary telephone hearing was heard by EJ Midgley on 24 October 2019. He gave directions, including a direction that a hearing should be held in February 2020 to determine the following preliminary issues:

> **"1.1. Whether the named respondent is the correct respondent in respect of claims brought pursuant to the Equality Act 2010 relating to:**
>
> **1.1.1. the actions of the Director General of the Independent Office for Police Conduct ('IOPC'), and those to whom he delegated his responsibility, including the investigation of allegations of police misconduct in accordance with the Police Reform Act 2002 ('PRA') and/or the service of a statutory misconduct notice to an police officer pursuant to regulation 16 of the Police (Complaints and Misconduct) Regulations 2012 ('P(CM)R');**
>
> **1.1.2. the investigation and determination of allegations of police misconduct, the respondent having determined that the claimant had a case to answer for gross misconduct, pursuant to regulation 19(4) PRA and/or**
>
> **1.1.3. the procedure adopted by and/or the decision of the statutory misconduct hearing panel appointed pursuant to regulation 25 (4) (a) Police (Conduct) Regulations 2012 ('PCR')."**

14. The claimant's appeal to the Police Appeals Tribunal was resumed on 6 December 2019. On 9 December 2019, before the appeal had been determined, the claimant withdrew it. The parties then appeared before EJ Harper on 17 February 2020 to argue the three preliminary issues directed by EJ Midgley.

The Decision of the Employment Judge

15. In his written decision dated 18 February 2020, the judge identified the three preliminary issues. He thanked counsel (the same counsel as in this appeal) for their written and oral arguments and stated that he had explained at the hearing that he would reserve his decision. He listed the numerous cases and documents he had considered. He stated that he would not set out the facts since his task was to determine the correct respondent or respondents.

16. The judge outlined the nature of the disability discrimination claim. He then referred to the arguments. For the most part, I do not need to set these out in detail since they are similar to the arguments made in this appeal, to which I am coming. The judge briefly addressed the Chief Constable's argument that "the only remedy in respect of the conduct of the Director General [of the IOPC] and the misconduct panel is a s29 EqA 2010 complaint for discrimination in the exercise of a public function which would have to be heard in the County Court".

17. He was not happy with that argument, commenting on it as follows:

> **"The fragmented conclusion resulting from the respondent's arguments is at odds with the Employment Tribunal being the most appropriate forum for the determination of work based employment disputes. See also paragraph 7 below. The respondent's conclusion may possibly also lead to a concurrence of litigation in the ET and the County and/or High Court which could lead to very unnecessarily expensive, protracted, and delayed litigation to rival a Jarndyce v. Jarndyce type of situation. In this day and age, with the laudable goals of inexpensive, efficient, easily accessible, and streamlined Justice this cannot possibly be either correct, the intention of Parliament, or desirable."**

18. I interject that the concession now made by Mr Milsom for the claimant is not that a claim against the IOPC or its Director General would be heard in the county court; while his argument below was that the Chief Constable would be liable and not the IOPC in the event of discrimination by the latter, it is now that that is wrong but that a claim against the IOPC would be dealt with in the employment tribunal.

19. The judge accepted virtually all the claimant's arguments and rejected those of the Chief Constable. His reasoning closely followed the skeleton argument of the claimant, which was before him, as was that of the Chief Constable. So closely did he follow in his judgment the course of the claimant's skeleton that the Chief Constable's solicitor later complained, in support of the third ground of appeal, that the appeal tribunal should:

> **"consider the following paragraphs of the Judgment with the corresponding portions of the Claimant's main submissions, set out in the table below:-**

Judgment	Claimant	Comment
4.3	4	Largely copied
4.6	5	First sentence copied exactly

5	6	First 2 sentences … are a copy of paragraph 6 of the submissions
7	11	First sentence of paragraph 7 of judgment, similar to paragraph 11
7	48	Quotation from Lord Reed's judgment is taken from the longer extract in paragraph 48. References to Part V and III EqA are taken from paragraphs 12 – 14 of the skeleton argument
8	15	Again, taken from the quotation from Lord Reed's judgment
9	16, (i), (ii), (v)	Paragraph 9 is essentially copies from these parts of paragraph 16
10 (stem)	17 (stem)	Same
10(i)	17(i)	Same
10(ii)	17(ii)	Same
10(iii)	17(iii)	Same
10(iv)	17(iv)	Same
10(v)	17(viii)	Same
10(vi)	17(ix)	Same
19(vii)	17(x)	Same
10(viii)	17(xii)	Same
10(ix)	17(xiii)	Same
10(x)	17(xiv)	Same
10(xi)	17(xv)	Same
10(xii)	17(x..vi)	Same
10(xiii)	17(xviii)	Same – including no reference to *"any **such** appeal"*, which makes no sense given that the learned judge did not also copy (prior to paragraph 10(xiii) of his judgment) paragraph 17(xvii) of the submissions which refers to certain appeals. The judge may have omitted this paragraph because the Respondent pointed out that this appeal provision relates only to misconduct ***meetings*** (for less serious misconduct) not misconduct ***hearings*** where dismissal is possible – relevant to this case. He has seemingly not noticed that paragraph 17(xvii) relates to those (inapplicable) appeals. This shows the dangers of 'copying and pasting' from submissions.
10(xiv)	17(xix)	Same
11(i)	19(i)	Same
11(ii)	19(v)	Same
11(iii)	19(viii)	Same
11(iv)	19(ix)	Same
12(i)	20(i)	Similar – one of the few places where alterations appear to have been made to reflect the Respondent's comments
12(ii)	20(ii)	ditto
12(iii)	20(iv)	Ditto
12(iv)	20(v)	Same
12(vi)	20(viii)	Same
12(vii)	20(ix)	Same
12(viii)	20(x)	Same
14.1	25	Almost identical
14.2	26	Almost identical
14.3	27 (stem), 28	Taken from the stem of paragraph 27 and from 28.
14.4	29 (stem), 30	As above
14.5	32, 33	Taken from paragraph 32, with the last 16 words of paragraph 33
15	42	Similar"

20. The claimant does not dispute the correctness of the table as a fair account of the correlation between his skeleton argument and the judge's decision. By contrast, there is no wholesale quotation from the Chief Constable's skeleton argument. The paragraphs quoted verbatim or nearly verbatim from the claimant's skeleton effectively constituted the judge's reasoning and conclusions. Mr Milsom, while understandably content that his arguments found favour below (including the now disavowed argument that the Chief Constable is liable for any discrimination by the IOPC), did not seek to defend the judge's drafting technique.

21. The judge's short conclusion was set out near the end of his judgment, at paragraph 17, in the following terms:

> **"The case of *P v. Commissioner of Police for the Metropolis 2018 ICR 560* remains good law and is a binding authority on this tribunal in this case and The Chief Constable of Avon and Somerset Constabulary remains the correct respondent and the Employment Tribunal sitting in Bristol the correct forum in which the case should be heard."**

Determination of Police Misconduct Allegations

22. In order to assess the arguments in this appeal, it is necessary to understand at least parts of the complex and detailed legal regime governing disciplinary proceedings against police officers, including some of the history of how the provisions have evolved. I will omit as much as I can.

23. The office of constable is an ancient common law one, but the law regulating the exercise of that office has become overlaid with layer upon layer of oft amended statute and statutory instrument (stated as amended below save where indicated). The provisions are labyrinthine; simplification would deliver swifter and better justice.

24. The terms and conditions of police officers are determined by regulations under the Police Act 1996, sections 50 and 51. By section 88(1) the chief officer for the area is liable for unlawful

A acts committed by an officer as an employer is for an employee and, in the case of a tort, is treated as a joint tortfeasor.

25. In 2008, the Police (Conduct) Regulations 2008 (**the 2008 Conduct Regulations**) were made (replacing earlier 2004 regulations). They are the forerunner of the Police (Conduct) Regulations 2012 (**the 2012 Conduct Regulations**), which after being amended several times, in turn have since (from 1 February 2020, after the time relevant to this case) been replaced by the Police (Conduct) Regulations 2020 (**the 2020 Conduct Regulations**).

26. The Police (Complaints and Misconduct) Regulations 2004 (**the 2004 Complaints and Misconduct Regulations**) were also replaced, first by the Police (Complaints and Misconduct) Regulations 2012 (**the 2012 Complaints and Misconduct Regulations**) and then by the Police (Complaints and Misconduct) Regulations 2020 (**the 2020 Complaints and Misconduct Regulations**).

27. The regime includes a code of conduct which at the time relevant to this case was in Schedule 2 to the 2012 Conduct Regulations. My account below is mainly based on the two sets of 2012 regulations, since they were in force at the times relevant for this case. It goes without saying that lying to a Crown Court is a breach of the code of conduct. There is also a duty on officers to report, challenge and take action against misconduct by another officer.

28. Under the Police Reform Act 2002 (**PRA 2002**) the then Independent Police Complaints Commission (**IPCC**), now called the IOPC, was given increased powers over police misconduct. The picture since is broadly of increasing distance being put between the alleged miscreant officer and the disciplining body. The IOPC has a Director General, responsible under section 10 of the PRA 2002 for the IOPC's functions including ensuring that arrangements "contain and manifest

an appropriate degree of independence" (section 10(1)(c)) and "to secure that public confidence is established and maintained" (section10(1)(d)).

29. Functions are allocated in disciplinary cases between the "appropriate authority", for present purposes the chief constable for the area; to local policing bodies (with which I am not concerned); and to the IOPC through its Director General. The initial phase of the disciplinary process is in Schedule 3 to the PRA 2002, given effect by section 13. The type of issue relevant in this case is a "conduct matter" (other than one reported by a member of the public) which includes a crime or behaviour justifying disciplinary proceedings, i.e. misconduct (section 12(2)).

30. The procedures are elaborate and detailed. I need only refer to parts of them. A feature of the system is a ping pong-like passing back and forth of a complaint between the Director General and the chief constable, no doubt with the intention of maintaining appropriate checks and balances. Some less serious complaints can be resolved locally. Others are referred to the Director General and in some cases must be referred to him or her.

31. Part 2 of Schedule 3 is headed "Handling of Conduct Matters". Certain "conduct matters" are sufficiently serious that they must be "recorded" by the chief constable because they are "of a description specified" in regulations (Schedule 3, paragraph 11(1)(b) and (2)(c)). Conduct falling into this category includes defined conduct such as serious cases of assault, sex offences, corruption and also (relevant for present purposes) "conduct whose gravity or other exceptional circumstances make it appropriate to record the matter in which the conduct is involved" (regulation 7(1)(f) of the 2012 Complaints and Misconduct Regulations).

32. I was told by counsel for the Chief Constable that perjury would be treated as "recordable" under that provision, while a fraudulent expenses claim would not. If the "recordable conduct matter" is of a "description specified", including conduct of sufficient gravity, the chief constable

must refer it to the Director General (paragraph 13(1)); and even if there is no such obligation the chief constable may so refer it (paragraph 13(2)) if he or she considers that appropriate due to "the gravity of the matter" or "any exceptional circumstances" (paragraph 13(2)).

33. The chief constable must determine whether the matter is one that "he is required" to refer to the Director General or "is one which it would be appropriate to so refer" (paragraph 11(3)). In either case, the chief constable "shall record the matter" (*ibid.*, paragraph 11(3A)).

34. Should the chief constable fail to "record" a matter that is in the Director General's view "recordable", the Director General may "direct the [chief constable] to record that matter" and the chief constable must comply (paragraph 11(5)). The chief constable must "refer a recordable conduct matter to the Director General", in addition, if the latter notifies him or her "that it [apparently meaning the Director General] requires that matter to be referred to the Director General for its consideration" (paragraph 13(1)(c)).

35. One way or another, these tangled provisions eventually lead, in serious cases such as this one, to the Director General becoming seised of the matter. Part 3 of Schedule 3 then applies. It is headed "Investigations and Subsequent Proceedings". The Director General determines under paragraph 15(2) and (4) which of (at the relevant time) four (now, since 1 February 2020, three) forms the investigation shall take. At the relevant time and since, the Director General was under an express duty under paragraph 15(4A) to have regard to the seriousness of the case and the public interest in deciding what kind of investigation to ordain.

36. The Director General's options were (at the relevant time and since) an investigation by the "appropriate authority"; or (now abolished) an investigation by that authority under the supervision of the Director General; or, an investigation by that authority under the management (now, direction) of the Director General; or, an investigation by the IOPC. The Director General

A can change the form of the investigation while it is taking place (paragraph 15(5)-(8)). In the present case, the investigation was of the fourth kind, reserved for the most serious cases.

37. In such a case, the IOPC appoints an investigator who is usually not a police officer but B clothed with all the powers of one, for the purpose of carrying out the investigation (paragraph 19(2) and (4) of Schedule 3 to the PRA 2002). She acts on her own behalf, not as agent of the IOPC or Director General. Having carried out her investigation, she reports to the Director C General, who decides (as happened in this case), if there is evidence of criminal conduct, whether to refer the matter to the DPP for consideration of a prosecution (see paragraphs 22 and 23).

38. The Director General must, under paragraph 23(6), notify the chief constable that the D latter must determine whether the accused officer has a case to answer in respect of misconduct or gross misconduct, or no case to answer, and, what action, if any, the chief constable is "required to, or will in its discretion, take …" (paragraph 23(6)(a)(ii)). The chief constable must then make E those determinations and inform the Director General in a memorandum setting them out, and if disciplinary action is decided upon, the reasons for deciding upon that course (paragraph 23(7)).

39. Still the disciplinary proceedings proper have not yet started, at this stage. Nor are they F about to start. The chief constable is made to own the determinations and the Director General passes judgment on them. The Director General considers the memorandum and whether he or she regards the chief constable's determinations as "appropriate" in the light of the investigating officer's report (paragraph 23(8)(a)) and determines (23(8)(b)) whether or not to make G "recommendations" under paragraph 27.

40. Such "recommendations" are apt for cases less serious than this one, for example cases of poor performance. There are provisions in paragraph 27 making the "recommendation" H become something more like a direction with which the chief constable must comply.

41. If the case is (like this one) too serious for a recommendation, the chief constable must "take the action which has been or is required to be notified or, as the case may be, which is or is required to be set out in the memorandum" (paragraph 27(2)(a)); and if that action is disciplinary proceedings, it is the "duty" of the chief constable to "secure that those proceedings, once brought, are proceeded with to a proper conclusion" (paragraph 27(2)(b)).

42. And all the above must happen, in a serious case, before the disciplinary proceedings even start; even if the allegations are straightforward, simple and obviously serious, as in this case. Substantial parts of the machinery just described have been in place since the PRA 2002 was enacted. The regulations under it have evolved, like the statute. The two sets of regulations already mentioned are the current incarnation of regulations of the same name made in 2004.

43. It is necessary also to refer to police misconduct panels. Under the 2008 regime, they were provided for in Part 4 of the 2008 Conduct Regulations, regulations 19-40. The chief constable was responsible for telling the accused the name or names of the person or panel members appointed to determine or chair the misconduct proceedings (regulation 21). The accused officer could object to a person and the chief constable might or might not uphold the objection and replace the person.

44. Interim procedures for dealing with documents and identifying witnesses then followed. The person conducting or chairing the proceedings was responsible for deciding which witnesses should attend and give evidence (regulation 23). By regulation 25, the three person panel was chaired by a senior officer sitting with two others who were either a senior officer of the rank of at least superintendent, or a senior human resources professional considered to have the necessary skills and experience.

45. In a case of gross misconduct, there is a right of appeal on limited grounds from a misconduct hearing to the Police Appeals Tribunal, pursuant to the Police (Appeals) Tribunal Rules 2012 (the equivalent provisions are now in the 2020 regulations of the same name).

46. The 2008 Conduct Regulations applied to allegations coming to the attention of the "appropriate authority" on or after 1 December 2008 (regulation 1). Their time was about to end when on 13 November 2012 the woman known as "P" in *P v. Commissioner of Police for the Metropolis* [2018] ICR 560 (of which more anon) was dismissed. Her case therefore involved an examination of the 2008 Conduct Regulations, as we shall see.

47. The 2008 Conduct Regulations were replaced by the 2012 Conduct Regulations, made on 18 October 2012, in respect of allegations coming to the attention of the appropriate authority on or after 22 November 2012. They replaced their 2008 counterpart the same day. Part 4 of the 2012 Conduct Regulations, again, dealt with misconduct proceedings.

48. No procedural changes material to this case were relied on as at the time when the 2012 regime first replaced the 2008 regime. There were changes later, to which I am coming. The regime was overhauled in 2012 because of the advent of statutory directly elected Police and Crime Commissioners, as provided for by the Police Reform and Social Responsibility Act 2011.

49. I was told that from 1 December 2013, the College of Policing adopted a non-statutory "Disapproved List" or "Disapproved Register" of police officers who had been dismissed, or retired while subject to gross misconduct proceedings. The 2012 Conduct Regulations were then amended in 2015 by the Police Conduct (Amendment) Regulations 2015 (**the 2015 Conduct Amendment Regulations**).

50. The two changes of potential significance were, first, that misconduct hearings were to be held (subject to a discretion to exclude persons) in public, from 1 May 2015 (regulation 9); and

secondly, that from 1 January 2016, legally qualified chairs of misconduct panels were appointed regulation 5). The obvious purpose of both measures was to enhance public confidence through increased accountability and independent determination of allegations.

51. The explanatory memorandum accompanying the 2015 Conduct Amendment Regulations explained, furthermore, at paragraph 7.12:

> **"In order to ensure that any officer dismissed from the police is not re-employed by another force, provision has been made so that a copy of any written notice of outcome where an officer is dismissed should be forwarded to the College of Policing. Police forces will be able to check potential recruits against information held by the College as part of their vetting processes."**

52. On 31 January 2017, the Policing and Crime Act of that year received the royal assent. Among other things, it inserted a new Part 4A into the Police Act 1996, putting on a statutory footing the "barred list" of police officers found guilty of gross misconduct. A power to make regulations concerning the barred list was included in the new Part 4A. The power was not exercised until December 2017.

53. First, in May 2017, *P v. Commissioner of Police for the Metropolis* was argued in the Supreme Court. Ms P was dismissed for gross misconduct and brought a claim against the Commissioner alleging that her treatment by the misconduct panel amounted to disability discrimination and disability related harassment. An employment tribunal struck out the claim, holding that the panel enjoyed immunity from suit as a judicial body. Appeals to this appeal tribunal and to the Court of Appeal failed, but the claimant succeeded before the Supreme Court.

54. Lord Reed JSC gave the leading judgment with which the other justices agreed. He defined the issue at [1]: whether enforcement of the directly effective right of police officers under EU law to have the principle of equal treatment applied to them, was barred by the principle of judicial immunity, where the alleged discriminatory conduct is that of persons conducting a misconduct hearing.

55. The Supreme Court held that the EU law principles of equivalence and effectiveness required that police officers had to have the right to bring claims of unequal treatment before employment tribunals, which were the specialist forum for analogous claims under domestic law. Parliament had sought to implement the Equal Treatment Directive (2000/78) for police officers by section 42(1) of the Equality Act, which must be read as applying to the exercise of disciplinary functions by misconduct panels, to which secondary legislation entrusted those functions. The Equality Act overrode any bar to complaints by reason of judicial immunity.

56. Lord Reed JSC summarised the provisions constituting the disciplinary regime, as it then stood, in his judgment at [15]-[22], including the right of appeal to the Police Appeals Tribunal. At [15], he noted that the 2008 Conduct Regulations had been replaced by the 2012 Conduct Regulations, which had been amended by the 2015 Conduct Amendment Regulations. He described the 2012 Conduct Regulations, as amended, as "broadly (but not entirely) in similar terms" (at [15]).

57. At [29], Lord Reed held that to leave police officers with their right of appeal to the Police Appeals Tribunal would not comply with the principle of equivalence or the principle of effectiveness; the Appeal Tribunal was unable to grant a remedy where any discriminatory conduct was not such as to vitiate the decision appealed against.

58. The heart of the reasoning can be found at [32]-[34]:

> **"32 The problem is that the disciplinary functions in relation to police officers … are entrusted under secondary legislation to panels; and the exercise of those functions by a panel is not an act done by either the chief officer or the responsible authority. Nor can the exercise of those functions generally be regarded as something done by an employee of the chief officer or of the responsible authority in the course of his employment … bearing in mind that the panel exercises its most significant functions collectively, and that, at least, those of its members who are police officers will not be employees. Nor can the panel be regarded as exercising its disciplinary functions as the agent of the chief officer or the responsible authority … under the 2008 Regulations, the relevant powers are conferred directly on the panel in its own right. The consequence is that, if section 42(1) is read literally, it is deprived of much of its practical utility, and it fails fully to implement the Directive, contrary to its purpose.**

33 The way to resolve the problem is to interpret section 42(1) of the 2010 Act as applying to the exercise of disciplinary functions by misconduct panels in relation to police constables. This runs with the grain of the legislation, and is warranted under EU law, as given domestic effect by the 1972 Act, in accordance with such cases as *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135. In particular, section 42(1) can be interpreted conformably with the Directive if it is read as if certain additional words (italicised in the following version) were present:

> **"(1) For the purposes of this Part, holding the office of constable is to be treated as employment- (a) by the chief officer, in respect of any act done by the chief officer *or (so far as such acts fall within the scope of the Framework Directive) by persons conducting a misconduct meeting or misconduct hearing* in relation to a constable or appointment to the office of constable; (b) by the responsible authority, in respect of any act done by the authority in relation to a constable or appointment to the office of constable."**

So interpreted, the Act overrides, by force of statute, any bar to the bringing of complaints under the Directive against the chief officer which might otherwise arise by reason of any judicial immunity attaching to the panel under the common law.

34 It should be emphasised that this conforming interpretation has to be understood broadly: the court is not amending the legislation, and the italicised words are not to be treated as though they had been enacted. …"

59. There is no suggestion that the Commissioner submitted that she could not be held liable for any discriminatory act of the misconduct panel if, contrary to the decision of the Court of Appeal in *Heath v. Commissioner of Police for the Metropolis* [2005] ICR 329 (overruled in *P*), the panel's conduct of the proceedings was not protected by judicial immunity. The Commissioner had the *Heath* case in her favour and, on the basis of it, had succeeded at all three stages of the case until it reached the Supreme Court. She appears not to have advanced any contingent alternative argument along the lines advanced by the Chief Constable in this case.

60. On 7 December 2012, a few weeks after the Supreme Court judgments in *P*, the Home Office published statutory guidance under section 87 of the Police Act 1996, emphasising the need for legally qualified chairs of misconduct panels to be appointed on a fair and transparent basis. At paragraph 2.216 the guidance stated as follows:

> **"2.216. The appropriate authority is responsible for appointing all three panel members. The LQC must be chosen from a list of candidates which is selected and maintained by the local policing body through the process described in Annex F. The appropriate authority should select the LQC at the earliest opportunity following the decision to refer to misconduct proceedings. In accordance with procedural fairness and principles of natural justice, the selection of the LQC should be on a fair and transparent basis. Good practice will be selection through a rota system by which the next available LQC is selected for the next hearing. Bad practice will be to select on the basis of which LQC will be more likely to give the verdict required. The manner of selection should be made clear to all parties to the hearing."**

61. A week later on 15 December 2017, the new Part 4A of the Police Act 1996 was brought into force together with the Police Barred List and Police Advisory List Regulations 2017 and the Police (Conduct, Complaints and Misconduct and Appeal Tribunal) (Amendment) Regulations 2017.

62. The former created the statutory barred list, to include police officers dismissed from positions within policing or who would have been dismissed if they had not resigned or retired during investigations, or against whom an allegation comes to light after their departure, which would have led to their dismissal. Once included on the barred list, the person may not work for any police force or other specified law enforcement bodies. The latter provides (pursuant to section 23(2)(k) of the PRA 2002) for conduct matters to be dealt with in the case of persons who have ceased to serve with a police force since the time of the conduct.

63. Finally I mention, though it is not directly relevant to this appeal, that under the 2020 Conduct Regulations and amendments to the PRA 2002, Schedule 3, the IOPC can now (since 1 February 2020) treat conduct matters as having been referred to the Director General in cases where the appropriate authority has not recorded the matter; and can itself undertake the role of presenting the case against the officer concerned.

Issues, Reasoning and Conclusions

First ground: the judge erred in deciding that the Chief Constable could be held liable for discriminatory acts of the IOPC's Director General

64. The position is unusual in that as explained above, it became clear at the oral hearing that both parties support this ground of appeal and neither defends the (largely implicit) contrary

A conclusion of the judge that the Chief Constable is the "correct respondent" in respect of any discriminatory acts by the IOPC or its Director General in the course of the disciplinary process.

65. For the Chief Constable, Mr Dijen Basu QC submitted that the role of the IOPC is, by its B nature, independent of and separate from that of the Chief Constable, as indeed the IOPC's very name indicates. There could be no possible basis for in some way imputing to the Chief Constable any discriminatory acts by the IOPC, the Director General or the statutory investigator.

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66. Mr Basu emphasised that in the statutory scheme, the final decision as to whether a misconduct hearing should take place always rests with the Director General and not the chief constable. The former, not the latter, has the power to supervise, direct and ultimately determine D the course of events where an allegation of misconduct is made against a police officer. It would make no sense for the law to treat the relationship as it were the other way round.

67. Mr Basu further submitted that in carrying out their functions in relation to the claimant, E the IOPC and the Director General were acting "in the exercise of a public function that is not the provision of a service to the public or a section of the public" within section 29(6) of the Equality Act, which prohibits discrimination, harassment or victimisation by such a person (other F than (per section 29(8)) in the case of harassment, in respect of religion or belief or sexual orientation); and that the IOPC was therefore by section 29(7)(b) placed under the duty to make reasonable adjustments.

G 68. In written argument, Mr Basu contended that the claimant could bring such a claim against the IOPC or its investigator in the county court (see section 114(1)(a) of the Equality Act), in relation to anything done other than something that might be said to amount to an act of H disciplining the claimant under the 2012 Conduct Regulations or the 2012 Complaints and Misconduct Regulations.

69. For the claimant, Mr Milsom framed his concession in writing in the manner quoted above, submitting that the IOPC's liability should be "determined within the scope of Part V" of the Equality Act, "read together with the ancillary provisions" in sections 109-112. Claims within the scope of Part 5 are those arising in relation to employment and holding the office of constable is treated as employment (section 42(1)). An employment tribunal (see section 120(1)(a)) has jurisdiction to determine such a claim.

70. The "ancillary provisions" to which Mr Milsom alludes provide for various forms of secondary liability: vicarious liability for the acts of employees acting in the course of employment and agents acting with the authority of the principal (section 109); concurrent liability of the employee or agent in such a case (section 110); liability for instructing, causing or inducing contraventions of (among other parts) Part 5 (section 111); and liability for aiding a contravention (section 112).

71. Mr Milsom was understandably concerned that his concession should not mean that his client would have to pursue the Chief Constable in the employment tribunal and the IOPC in the county court. The solution he proposes is one that envisages a claim also being brought against the relevant chief constable, to whose liability the IOPC's liability is ancillary. A free standing claim against the IOPC without any claim against the chief constable might still, presumably, have to be made in the county court.

72. Neither party developed their arguments very far. At the hearing, Mr Basu appeared content to accept the claimant's concession for the purpose of determining this ground of appeal. It is obviously convenient – and avoids any risk of breaching the principles of equivalence and effectiveness in the case of claims falling within the Framework Directive - for any secondary

A claim of discrimination against the IOPC in a case such as this be heard in the employment tribunal, together with any primary claim against the chief constable.

B 73. I accept the proposition that the employment tribunal is the most natural forum for a claim of discrimination by a police officer against the IOPC. It is required to carry out a statutory investigation because the complainant officer holds the common law office of constable and that office is treated as employment by section 42(1) of the Equality Act. The employment tribunal

C is the body best equipped with the powers and expertise to provide the most appropriate form of adjudication.

D 74. The employment tribunal is a better forum than the Administrative Court, in a judicial review, for that reason. The employment tribunal's powers include a better suite of remedies. It is the specialist tribunal entrusted by Parliament with the task of determining claims of discrimination arising at work. The reasoning to that effect of Lord Kerr in *General Medical Council v. Michalak* [2017] 1 WLR 4193, at [14]-[21] (when considering the position of the GMC

E as a "qualifications body" under the Equality Act) is also applicable here.

F 75. I propose to determine this ground of appeal on the narrowest possible basis, not having heard full argument from the parties, still less from the IOPC. I accept that, in the circumstances of the present case where a claim of discrimination is brought against the Chief Constable, a claim may also be brought, in the same proceedings in the employment tribunal, against the IOPC,

G provided that claim is founded on secondary liability under one or more of sections 109-112 of the Equality Act.

H 76. However, I am not thereby deciding that any claim for discrimination brought by a police officer against the IOPC arising from the statutory disciplinary process can be brought in an employment tribunal. In the absence of any primary claim against a chief constable to which the

IOPC's liability is said to be ancillary under one or more of sections 109-112, a clear basis in the Equality Act for bringing such a claim in the tribunal, rather than in the county court under section 29, may or may not exist. I express no view on that issue as I do not think it needs to be determined in this appeal.

77. The problem that arises as between a police officer facing disciplinary process and the IOPC is similar to that which arose in *P v. Commissioner of Police for the Metropolis* concerning the relationship between the police officer and a misconduct panel. In ordinary employment relationships, the investigatory function, like the adjudication function, is carried out by the employer, internally. But for police officers, the investigatory function is, like the adjudication function, conferred by secondary legislation on an external body.

78. As Lord Reed JSC observed in *P* at [32], the misconduct panel cannot be regarded as the agent of the chief constable. No more can the IOPC be regarded as her or his agent in carrying out its investigatory function. It does so independently of the chief constable and not in the exercise of an authority conferred on it by the chief constable. Secondary liability under section 109 via an agency relationship is therefore not likely to be made out.

79. However, I do not rule out the possibility of secondary liability of the IOPC for discrimination on some other basis arising from a disciplinary process; and I accept that if that is properly pleaded and proved it could be included in a claim brought in the employment tribunal together with a claim against the relevant chief constable. Further than that, I need not go and am not prepared to go. To that extent, the first ground of appeal succeeds.

Second ground: the judge erred in deciding that the Chief Constable could be held liable for discriminatory actions by a statutory police misconduct panel

80. The Chief Constable submitted at length that he cannot be liable for any discrimination by the panel. Below, he submitted that the panel has separate legal personality and can be sued in the county court for discrimination under section 29(6) and section 114(1)(a) of the Equality Act. In this appeal, Mr Basu added the alternative argument that a claim against the panel or its members could be brought in an employment tribunal by adopting a purposive or rectifying construction of section 120(1)(a), to avoid duality of forum and ensure adherence to the principles of effectiveness and equivalence and compliance with relevant human rights standards.

81. Specifically, Mr Basu and Mr Gold proposed that section 120(1)(a) should be read as if the words italicised below were added: "An employment tribunal has … jurisdiction to determine a complaint relating to … a contravention of Part 5 (work) *or of section 29(6) and (7) so far as such contravention falls within the scope of the Framework Directive by persons conducting a police misconduct hearing*".

82. In support of that position, Mr Basu made the following main points, as I paraphrase them. A chief constable is powerless to stop any discrimination by a misconduct panel. Even if he protests, the discrimination may continue. In an extreme case, he would have to resort to a judicial review claim against the panel which, though competent (see e.g. McGowan J's decision in *R (Chief Constable of Thames Valley Police v. Police Misconduct Panel* [2017] EWHC 923 (Admin)) is not desirable.

83. The law should not, says Mr Basu, immunise the discriminator (the panel) and penalise the innocent non-discriminator (the Chief Constable). Rather, it should provide for a remedy against the discriminator, and does so, whether in the county court or in the employment tribunal. The relationship between the Chief Constable and the panel is in no way analogous to one of agency or employment, where vicarious liability is recognised because the person vicariously liable can influence the behaviour of the agent or employee; unlike in the case of the panel.

84. The Chief Constable is (subject to qualification in rare cases on narrow grounds) bound by the statutory provisions to implement the decision of the panel to dismiss or otherwise discipline the officer, even if the panel's decision or process is discriminatory and therefore unlawful. The statutory regime gives the Chief Constable no remedy over against the panel or its members in such a case. Nor, probably, does the common law produce a duty of care owed by panel members to the Chief Constable.

85. The claimant's remedy should, the Chief Constable therefore contends, lie directly against the panel or its members because they comprise the body invested with responsibility for performing the public function of exercising disciplinary jurisdiction over the officer. The purpose of the regime is to protect the public and maintain public confidence in policing; it is not, as in the case of an ordinary employee, to protect the interests of the employer.

86. The panel is required to be, and is, a body that meets the standards of an independent and impartial tribunal within article 6 of the European Convention on Human Rights (**ECHR**). The Police Appeals Tribunal is not; it cannot cure any defect in compliance with article 6 by a panel, because it cannot revisit findings of fact. The claimant is therefore not in need of a remedy against the Chief Constable for any breach of article 6; the claim can be brought (whether in the county court or in the employment tribunal) against the panel itself, or its members.

87. The rules applying to misconduct panel proceedings at the time that was relevant when *P. v. Commissioner of Police for the Metropolis* was decided, were the 2008 Conduct Regulations and the 2004 Complaints and Misconduct Regulations. Under the then regime, there was no provision for a legally qualified chair to be appointed and no requirement that hearings should be held in public, as is the position under the rules applicable in the present case.

88. Nor did the applicable rules at issue in *P* feature the statutory "barred list" which prevents an officer dismissed by a panel (or a former officer who would have been dismissed) from working again for a police force. The advent of the barred list and its establishment on a statutory footing means that the decision of a misconduct panel is, literally, career ending, which was not so at the time *P*'s case was decided.

89. That means, Mr Basu submits, the officer's right to a process compliant with article 6 is engaged; the panel is determining the civil right lawfully to practise a profession, unlike in *P* and unlike in a case of ordinary dismissal without any bar on subsequent employment within the profession: see *Mattu v. University Hospitals Coventry and Warwickshire NHS Trust* [2013] ICR 270, per Stanley Burnton LJ at [50]-[52]; per Elias LJ at [105]-[106]. The Supreme Court in *P* did not have to consider any issue as to compliance with article 6.

90. Nor is it suggested anywhere in the judgments in *P* that the justices considered the logical corollary of article 6 application: that a misconduct panel exercises a public function so as to engage the anti-discrimination provisions in section 29(6) and (7) of the Equality Act. The issue in *P*'s case was quite different: it was whether the panel members enjoyed judicial immunity from suit as the lower courts had held. It was not contended in the Supreme Court that, if they did not, they and not the Chief Constable should bear responsibility for any discrimination.

91. Mr Basu submitted, further, that when enacting section 42(1) of the Equality Act, Parliament had omitted to re-enact, as part of it, what had previously been section 64A(2)(b) of the Disability Discrimination Act 1996; yet Lord Reed JSC in *P*'s case at [12] had described section 42(1) as "in substance a re-enactment of section 64A …", as he had not been informed otherwise. The significance of this, Mr Basu said, was that section 64A(2) of the 1995 Act formerly included not just sub-paragraph (a) ("the holding of the office of constable shall be treated as employment by the chief officer of police …"), corresponding to what is now section

42(1) of the Equality Act, but also (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".

92. Mr Basu submitted, as I understood his argument, that the absence of that express vicarious liability provision from the Equality Act, contrasted with its presence in the earlier Disability Discrimination Act 1995, made it likely that misconduct panel members were not to be identified with the chief constable appointing them. A purposive construction of section 42 was required so as not to prevent police officers from bringing harassment claims in respect of acts done by their colleagues who were acting other than as agents. Further, the panel members would neither be acting as an agent of the chief constable nor could they fall within the equivalent of s64A(2)(b) of the 1995 Act because of the requirement that the panel be independent for the purposes of article 6 of the ECHR.

93. Mr Basu added the point that serious practical difficulties would arise if a chief constable is to be fixed with liability for acts of discrimination by a misconduct panel. Their members, including now the legally qualified chair, might or might not choose to cooperate with a chief constable facing discrimination proceedings arising from a dismissal or other disciplinary action decided upon by a misconduct panel. They might not wish to help the chief constable in her or his defence of the claim.

94. Conversely, the chief constable might decide that it was expedient not to defend the actions of a misconduct panel and, instead, to settle a discrimination claim or make admissions of discrimination by the panel members, in circumstances that might involve serious injustice to the panel members; cf. the situation in *James-Bowen v. Commissioner of Police for the Metropolis* [2018] ICR 1353, SC, and the decision in that case that the Commissioner owed no duty of care to the officers concerned.

95. Those pragmatic considerations also, said Mr Basu, point in the direction of the panel and its members (who were likely to be persons of standing with adequate means to meet a claim and, probably, professional indemnity insurance) being able to and required to defend themselves, rather than a chief constable without involvement in alleged discrimination, or power to stop it, being artificially and unjustly made liable.

96. For the claimant, Mr Milsom advanced what he called the short answer to the appeal, followed by a longer answer. The short answer was that the reasoning and decision in *P v. Commissioner of Police for the Metropolis* is applicable to the present case; the changes to the statutory regime since it was decided are not fundamental and some of them were known to the justices and alluded to by Lord Reed JSC in his judgment.

97. The Supreme Court, said Mr Milsom, devised its purposive interpretation of section 42 of the Equality Act attributing to a chief constable the actions of the misconduct panel, in the full knowledge that the panel decided disciplinary issues in its own right and not as the chief constable's agent. The same purposive reading of section 42 must be applied here to ensure that the claimant's Framework Directive rights are respected, just as in *P*'s case.

98. Mr Milsom's longer answer was detailed and I need only pick out some highlights, briefly. First, he said that the question of compliance (or otherwise) with article 6 of the ECHR of, respectively, the current statutory disciplinary scheme and the version of it considered in *P*'s case, was not relevant. There would be no breach of article 6 on either party's case and it was not for the Chief Constable to invoke the claimant's article 6 rights as a basis for depriving him of his Framework Directive right to an effective remedy in a single and readily accessible forum.

99. Next, the Chief Constable could bring judicial review proceedings against a recalcitrant misconduct panel which might be putting a chief constable in danger of exposure to

discrimination proceedings; although that would be unusual, such claims are not unknown and have been recognised as competent in other contexts, such as a local authority instructing its leader to bring a judicial review claim against the authority itself in respect of a planning decision (*R. v. Bassetlaw DC ex p. Oxby* [1998] PLCR 284, CA).

100. Mr Milsom submitted further that it would be contrary to the principles of equivalence and effectiveness if the claimant had to litigate on two fronts to vindicate his Framework Directive right to equal treatment; that the county court is a less preferable, costs bearing forum; and that the reasoning of Lord Kerr in *Michalak* (mentioned above) supported the rejection of any "dual forum" solution. The remedy for the whole of the discrimination must lie exclusively in the employment tribunal.

101. Further, Mr Milsom contended that a remedy in the county court under section 29(6) of the Equality Act would also offend against the claimant's right under article 14 of the ECHR, read together with article 6, because being a police officer is a paradigm instance of "other status" within article 14; and because police officers would be at a disadvantage in bringing discrimination claims as compared with other persons enjoying the right to compliance with article 6 in relation to the determination of their civil right to exercise their profession.

102. For those additional reasons, the same purposive construction of section 42 of the Equality Act should be observed in the present case as had been ordained in *P*'s case. That did not mean, however, that a misconduct panel is immune from any responsibility for discrimination. The panel or its members could be secondarily liable under section 111 of the Equality Act, either to the chief constable under section 111, read with Part 3 (exercise of public functions); or to the claimant under section 111, read with Part 5 (work).

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103. As for the point that it was hard on the Chief Constable to be liable for discrimination inflicted on a police officer by a body appointed but not controlled by him, operating independently of him, Mr Milsom submitted that vicarious liability by its nature may involve an "innocent" party bearing the burden of liability where the tortious conduct is committed by another; and that the claimant's Framework Directive rights would not be fully respected if he had to bring proceedings against panel members, who might well have no assets of substance and no access to institutional support.

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104. I have carefully considered these rival contentions and the plethora of legal materials deployed in support of them. In my judgment, the judge reached the right conclusion. The reasoning supporting the claimant's short answer to the appeal should be accepted, making it unnecessary to spend much time considering the points made in the longer answer.

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105. I start by rejecting the suggestion that the claimant should have to bring a claim in the county court against the panel or its members under sections 29 and 114 of the Equality Act. I do not think that would fully respect a police officer's Framework Directive right to equal treatment and the principles of equivalence and effectiveness. The police officer would have to litigate the same cause in two different venues, one of them costs bearing.

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106. While I appreciate that limits to the employment tribunals' jurisdiction make that inevitable in some cases – for example, where a contract claim above £25,000 is brought concurrently with a claim for unfair dismissal – in such cases the jurisdictional limits are the same for everyone and Framework Directive rights are not engaged. The principles of equivalence and effectiveness are not infringed; nor is there any question of discrimination falling within article 14 read with article 6 of the ECHR.

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107. But where the right to equal treatment is engaged, the reasoning of Lord Kerr in *Michalak* and of Lord Reed in *P* provides sufficient support for rejection of the twin jurisdiction solution advocated by the Chief Constable below and maintained in this appeal. The next question is then whether to accept the invitation to construe section 120(1)(a) of the Equality Act as if it had added to it conferral of jurisdiction on the employment tribunal to hear a complaint relating to a contravention "*of section 29(6) and (7) so far as such contravention falls within the scope of the Framework Directive by persons conducting a police misconduct hearing*".

108. Such a purposive construction would be permissible if it were needed to comply with the principles of effectiveness and equivalence, just as the purposive construction of section 42 adopted by the Supreme Court in *P* was permissible even though it involved adding to the scope of the provision. Otherwise, Ms P would have had no remedy in respect of discrimination by the misconduct panel which decreed her summary dismissal, just as the claimant in this case would lack an effective remedy for any discrimination by the panel.

109. However, in this case the proposed purposive construction of section 120(1)(a) is not needed to vindicate the claimant's Framework Directive right to equal treatment. That can be achieved by the same purposive construction of section 42(1) as adopted by Lord Reed JSC in *P* at [33]: to treat holding the office of constable as employment by persons conducting a misconduct hearing in respect of any act done by those persons in so far as such acts fall within the scope of the Framework Directive; provided the Chief Constable is held liable for any discrimination by the panel.

110. The purposive construction of section 120(1)(a) sought by the Chief Constable in this case is needed, rather, to eliminate the twin forum defect and thereby pave the way for exonerating the Chief Constable from any vicarious liability for discrimination by the panel. I do not think it would be right to read the additional words into section 120(1)(a) where the real purpose of doing

so is not to ensure Framework Directive rights of police officers are fully respected, but to rescue the Chief Constable from vicarious liability.

111. Whether or not the Chief Constable should be fixed with vicarious liability for acts of discrimination by the panel is not a matter of Framework Directive rights or human rights but of domestic law and statutory construction. Furthermore, vicarious liability of the Chief Constable for discrimination by the panel is needed in this case as it was in *P*'s case. Without it, the claimant must (absent the proposed purposive construction) claim against the panel or its members in the county court, which would offend against the principles of equivalence and effectiveness.

112. I recognise that legal liability for acts of discrimination by a misconduct panel involves hardship to chief constables and that they may face practical difficulties in deciding whether to defend claims and in securing cooperation from panel members. To some extent, those problems already existed when *P*'s case was decided in the Supreme Court. I recognise, also, that when that case was decided, the statutory regime was already on its present trajectory towards putting greater distance between the chief constable concerned and the misconduct panels.

113. I am prepared to accept Mr Basu's point that the Supreme Court was not required to consider all the arguments against his client's vicarious liability. They did not arise in the appeal and are not to be found in the judgments. I accept also that the distance between the misconduct panels and the chief constables is greater now than it was in 2017. But the legislature made no adjustment in the light of *P* to deal with vicarious liability, either to the Equality Act; or to the PRA 2002, the Police Act 1996 or the various regulations enacting the disciplinary regime.

114. I agree with Mr Basu that judicial review is an awkward remedy for a chief constable concerned to rein in discrimination by a misconduct panel, for which the chief constable may later have to answer before an employment tribunal. It is in theory possible that some of the

hardship could be obviated by a cross claim in the employment tribunal by the chief constable against the panel members, under section 111(5)(a) of the Equality Act; but that is perhaps unlikely in practice and far from an ideal solution.

115. A broader right to seek contribution from a misconduct panel founded on the Civil Liability (Contribution) Act 1978 would be likely to face insuperable difficulties in the light of this Appeal Tribunal's decision in *Brennan v. Sunderland City Council* [2012] ICR 1183; though Bean LJ noted recently that *Brennan* is a "controversial decision" which the Appeal Tribunal reached without any satisfaction and raised the possibility that it may not have been correctly decided (*Irwell Insurance Co. Ltd. v. Watson* [2021] EWCA Civ 67, at [29] and [32]-[34]).

116. Assuming that *Brennan* continues to be followed, I conclude that the solution to the Chief Constable's problem must lie with the legislature. For those reasons, which largely echo the reasoning in *P* and some of the submissions of the claimant in reliance on that decision, the second ground of appeal does not succeed.

Third ground: the judge failed to conduct a fair trial and make a fair determination of the issues before the employment tribunal

117. Mr Basu's complaint was that the judge had not properly considered the arguments. The judge produced his reserved judgment the day after the hearing, having considered 37 authorities and a bundle comprising about 1,200 pages, without having had a reading day beforehand. He resorted to wholesale quotation and adoption of the claimant's arguments, largely by lifting them verbatim or nearly verbatim into his judgment.

118. The Chief Constable submitted that he did not receive a fair determination of his case. The judge's handling of the case fell below the "Plimsoll line of due process", Mr Basu submitted; as had happened in *IG Markets Ltd v. Crinion* [2013] EWCA Civ 587, where the judge below

had adopted wholesale the arguments of one party and incorporated them wholesale into his judgment (see especially per Underhill LJ at [4] and [16]; per Sir Stephen Sedley at [38]-[40]; and per Longmore LJ at [42]-[43]).

119. For the claimant, Mr Milsom accepted that the judge had presented his reasoning and conclusions in an unfortunate manner but submitted that no harm was done because the reasoning was "*Meek* compliant", i.e. adequate, since it was abundantly clear to the Chief Constable why he had lost and the claimant had won.

120. Mr Milsom reminded me that a judge did not need to deal with every point and that reasons for a tribunal's decision are addressed to parties already familiar with the dispute and the issues and need not be discursive.

121. In my judgment, the claimant's submissions are wide of the mark. The complaint is not that the reasons are inadequate or that the Chief Constable does not know from reading them why he lost and the claimant won. That would be a complaint of inadequate reasoning, which could be cured on a remission for further reasons or a few questions under the well known *Burns/Barke* procedure.

122. This complaint is more serious: it is of a lack of even handedness in treating the parties' respective arguments or, in other words, an unfair trial. I regret to say I think the complaint is well founded. The judge fell into the error of just adopting one side's case and rejecting the other side's. That is not reasoned adjudication so much as selection from a pool of two alternatives. It was remiss and I must uphold this ground of appeal.

123. However, the failure to deal with the parties' cases in an even handed way does not have any bearing on the outcome of this appeal, because the other two grounds of substance turn on an analysis of the law. The facts have not yet been determined and no substantive harm has been

done to the position of the Chief Constable by the tribunal's failure to deal with his arguments properly.

Conclusion; disposal

124. I will therefore allow the appeal in respect of the first and third grounds but I dismiss it in respect of the second ground. The Chief Constable is liable for any discrimination committed by the panel but not for any committed by the IOPC. There is no need to remit any of the preliminary issues for further consideration by the employment tribunal. The claimant's application can now proceed on its merits, if it turns out that he is indeed disabled within the Equality Act.

125. However, if there is an appeal against this decision, the IOPC and the members of the panel, or their respective legal representatives, should be sent a copy of the appeal bundle so that they can consider their position and make any representations they may consider appropriate. They should also be sent a copy of this judgment.