



EMPLOYMENT TRIBUNALS

Claimants: 1. Emily Coffey
2. Tracey Bocking

Respondent: The Chief Constable of Greater Manchester Police

Heard at: Manchester Via video hearing **On:** 15 March 2022

Before: Employment Judge Serr

Representation

Claimant: Mr Menon, Counsel

Respondent: Mr Gorton QC, Counsel

JUDGMENT

1. The Respondent's application to strike out the Claimants' Claims is refused.

REASONS

1. The Respondent brings an application for a strike out or deposit order pursuant to Rule 37 or Rule 39 of the Employment Tribunal Constitution and Rules of Procedure Regulations 2013 ("The Rules").
2. The issue at this Public Preliminary Hearing (PH) for the Tribunal to determine was set out in a case management order of EJ Leach. It was as follows:

At all relevant times, did Merseyside Police and/or Deputy Chief Constable Green of Merseyside Police act as an agent of the respondent (Greater Manchester Police) such that the second respondent is liable for the acts of Merseyside Police and/or Deputy Chief Constable Green pursuant to section 110 Equality Act 2010.

3. At the outset it was confirmed that in fact it should read pursuant to s.109 (2) Equality Act not s.110. There is no claim against any named individual employee or agent.

Case No: 2408158/2021 & 2408403/2021

4. The matter was listed for 1 day via CVP. There were connection problems at the outset resulting in the Tribunal having to hear the case via MS Teams. The Tribunal was presented with a substantial amount of documentation – a PH bundle running to over 500 pages, a supplemental bundle of a further 43 pages and witness statements from both Claimants. In addition, the Tribunal had skeleton arguments from both sides. In the end the Tribunal was referred to only a very limited number of documents said to be relevant to the application. The Claimants were not called to give evidence as their witness statements were largely uncontentious. The Tribunal is grateful to counsel for the economy of their submissions, which allowed the hearing to be completed well within the time allocated.

The Facts

5. The following facts are relevant to determine the application. As this was a PH the Claimants' cases were taken at their highest. The Tribunal proceeded on the basis that the Claimants had been discriminated in the manner alleged within their various statements of case.
6. Both Claimants are employees of the Respondent. Ms Emily Coffey is a police officer and at the relevant time held the rank of Chief Superintendent. Ms Bocking was a civilian employee and at the material time was a personal assistant to the command team.
7. On or around 18/2/19 and 23/3/20 respectively the Claimants were seconded to the Northwest Regional Organised Crime Unit ("ROCU"). Ms Coffey was the head of ROCU, Ms Bocking PA to the command team.
8. It is necessary to say something about ROCU and its structure. The agreements that form the basis for ROCU are lengthy and of some complexity and the Tribunal makes limited reference to them in this judgment to that necessary for resolution of the PH issue.

The General Agreement

9. On 1 July 2014 the Respondent along with 5 other constabularies entered into a service level agreement known as the 'collaborative services general agreement'. The purpose of the general agreement was to allow for collaboration between the forces to provide a more effective and efficient response to the work of policing across the police areas. Clause 2.2 stated inter alia that the Parties are responsible for ensuring that they comply with their legal duties in regard to their officers and staff "in particular in regard to...discrimination legislation". Clause 9.1 stated that each party will remain liable in accordance with the law for the acts and omissions of its own officers and staff and Clause 9.2 provides inter alia for parties to indemnify each other for claims brought as a result of breach of its obligations under the general agreement.

10. Clause 10 is headed people matters.

Clause 10.1.1. confirms that staff who work within collaboration agreements continue as employees and officers of the original employing body. Their pay, welfare, pensions, terms and conditions, annual appraisals and all other respective employment and service matters shall remain the responsibility of the original policing body/Chief Constable.

Clause 10.2 states Chief Constable's retain legal direction and control and thus liability for their respective officers and staff working within any specific collaboration arrangements. Officers and staff working within the collaboration arrangement are required to work to the instruction of the specific collaboration manager.

Clause 10.4 states that complaints grievances and conduct issues in respect of staff and officers within collaboration agreements are to be dealt with by their employing force.

The TITAN Agreement

11. This agreement which formed ROCU was entered into by the Respondent and 5 other constabularies in September 2015 (and updated in 2017 according to the bundle index). It is a collaboration of the type governed and authorised by the general agreement.

12. TITAN is funded by its collaborators. Merseyside Police was the collaboration lead. The Collaboration Lead is the accountable body for TITAN collaboration and responsible for providing information about the manner in which functions are discharged under the provisions of the Collaboration Agreement-Clause 4.5.

13. Assistant Chief Constable (ACC) Green was the TITAN ACC Lead and effectively managed the collaboration manager. Ms Coffey was the collaboration manager and head of TITAN. ACC Green remained employed by Merseyside Police (his home force) and the Claimants as indicated remained employed by the Respondent. ACC Green was a chair of the management board who in turn reported to the Chief Constables-Section 6 and Appendix 1.

14. The Collaboration Partners will indemnify and keep indemnified each other in relation to acts or omissions of their own officers and staff- Clause 8.5

15. Once staff are on secondment, they are subject to the control and instruction of the Collaboration Manager who has day to day management responsibility for the unit- paragraph 6.2

The Secondment Agreement

16. A pro forma secondment agreement was contained in an appendix to the Titan agreement at Appendix 14.
17. The Tribunal had sight of both completed signed secondment agreements for both Claimants. Relevant clauses include the following:
18. Clause A- the initial period of secondment is 2 years which can be extended by agreement
19. Clause B- The home force remains responsible for payroll of the secondee.
20. Clause I- The secondee is subject to their home force complaints procedure. Whilst on secondment the secondee will be expected to adhere to the national expected standards of behaviour and procedures of Police Staff.
21. Clause P- the secondment can be terminated early for a number of reasons prior to the end of the secondment including conduct or performance issues
22. Clause R- while on secondment the Home Force has vicarious liability for any unlawful acts committed by the secondee.

The Claimants' Claims

23. The facts giving rise to the Claimant's claims can be dealt with relatively briefly. They largely appear in the claim forms and further particulars dated November 2021.
24. From about March 2020 Ms Coffey was subject to micromanagement by ACC Green which undermined her autonomy and discretion as head of ROCU. This took the form of unnecessary meetings often booked to clash with time off for her childcare commitments. This resulted in her having to make last minute alternative arrangements for childcare or attend late or miss the meetings.
25. On 8 January 2021 Ms Bocking acting as PA for Ms Coffey sent an email to Ms Coffey headed 'Jon Rooke'. It stated "we need a code. So if you see something purple in your diary that says blocked for John Rooke then it's so Lisa doesn't fill it. Likewise, if you want to block off some time put Johns name in and I know you want to keep it free". This was an attempt by Ms Bocking to devise a code understood between her and Ms Coffey to prevent ACC Green ignoring pre booked time off in her diary and in particular time

Case No: 2408158/2021 & 2408403/2021

off that had been expressly booked for childcare reasons. The code was in fact never implemented.

26. The email of 8 January 2021 came into the possession of ACC Green. He referred Ms Coffey to the professional standards branch of Merseyside Police on the basis of misconduct. They in turn referred the matter to the Respondent who responded that the issue was not one of misconduct but performance and should be dealt with accordingly.
27. ACC Green summonsed the Claimant to a meeting on or about 12 March 2021 at which he summarily terminated her appointment as head of ROCU. The ostensible reasons given by ACC Green for the termination (which were wholly without justification) was that Ms Coffey was party to, or condoned, a dishonest attempt by her PA, Tracey Bocking to insert fictitious appointments in her diary in order to thwart ACC Green from diarising meetings at which she was required to attend and/or that she had not reported Ms Bocking to ACC Green. She was given 28 days- notice.
28. Ms Bocking's secondment was terminated by ACC Green shortly thereafter.
29. Both secondments ended with effect from 9/4/21.
30. Both Claimants brought a grievance in respect of their treatment. This was investigated by ACC Hartley of South Yorkshire Police. By a letter dated 6 August 2021 he upheld both grievances finding that the secondments were unfairly terminated and recommending that both Claimants be reinstated back into role. The Tribunal was told this recommendation has not been adopted. It seems that this may be due to a decision taken by Merseyside Police but this was not entirely clear to the Tribunal.
31. In respect of Ms Coffey the micro-managing, the reference to the professional standards branch and the termination of secondment are acts of direct sex discrimination contrary to s.13 Equality Act 2010 or alternatively harassment contrary to s.26 Equality Act 2010. It seems the termination is also said to be an act of victimisation contrary to s.27 Equality Act 2010.
32. In respect of Ms Bocking the claim is based on associative discrimination. Raising the email of 8/1/21 with the Respondent, alleging that Ms Bocking compromised the effective operation of ROCU and had acted dishonestly and terminating her secondment with ROCU are all said to be acts of direct discrimination or harassment and/or victimisation.

Case No: 2408158/2021 & 2408403/2021

33. In respect of both Claimants the failure by the Respondent to take reasonable steps to implement the recommendation and to give official and public recognition of the exoneration by DCC Hartley of the charge of dishonesty are said to be 'ratification' of the acts of discrimination by ACC Green.

The Parties submissions

34. The Respondent's written application for strike out and deposit is set out in the amended response to both claims and the document entitled application for deposit orders in default of strike out. In simple terms the Respondent states that:

34.1 ACC Green was not, and never did, act on behalf of the Respondent. He was never at the control or direction of the Respondent but was acting independently of the Respondent as a Merseyside Police officer and as a ROCU officer. He never carried out any functions on behalf of the Respondent and was never authorised to do so. He was not the agent of the Respondent within the meaning of s.109 Equality Act (EqA) 2010.

34.2 If ACC Green was never the agent of the Respondent, he could never have his actions ratified by the Respondent.

34.3 The Respondent took no steps that could be regarded as knowingly helping another to do an act which contravenes the EqA; The Respondent did not ratify any act of ROCU or Merseyside Police. S.112 is not applicable.

35. In his written and oral submissions Mr Gorton QC for the Respondent contended that there was no evidence that ACC Green was acting as the Respondent's agent. He was certainly the agent of his employer the Merseyside constabulary and possibly TITAN (ROCU). The Respondent in fact is blameless in respect of the Claimants. It sought to have the Claimants reinstated but this was refused by ACC Green.

36. In respect of ratification if ACC Green was not acting as agent for the Respondent then he could not have his actions ratified by the Respondent.

37. There has not been any action by the Respondent that could be said to knowingly have helped ACC Green commit any breach of the Equality Act.

38. Mr Menon on behalf of the Claimants drew the Tribunals attention to s.39 of the Equality Act. It is the employer that is prohibited from discriminating against an employee. As the Claimants at all material times retained employment with the Respondent it is only the Respondent who could be liable for discrimination. The arrangement established by the various

Case No: 2408158/2021 & 2408403/2021

agreements have clear indicators of agency. The Claimants remained in employment, ACC Green was according to the governance and management structure her line manager. ACC Green in turn was answerable to the 6 Chief Constables, who were signatories to the agreement, through the management board.

39. Ratification applies to someone who was not initially an agent but can become an agent by subsequent ratification by the principal. That is what occurred in this case.
40. So far as s.112 is concerned the Respondent did aid ACC Green by agreeing to the Claimants return from secondment and by not implementing the recommendation of the grievance process to reinstate the Claimants.

The Law

41. S.42 of the Equality Act 2010 (EqA) is headed police officers and deems police officers as employees of the Chief Constable.

42 Identity of employer

(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 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.*

42. S.109 EqA is headed liability of employer and principles.

109 Liability of employers and principals

(1) *Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

(2) *Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*

(3) *It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

(4) *In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*

- (a) from doing that thing, or
- (b) from doing anything of that description.

43. S.112 is headed aiding contraventions

(1) *A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).*

44. S.109 (2) EqA is to be construed according to the common law rules of agency- see *Kemeh v Ministry of Defence* [2014] EWCA Civ. 91.

45. Bowstead and Reynolds on Agency 22nd Edition Article 1 defines agency as

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

46. In *Unite the Union v Nailard* (2018) IRLR 730 in respect of the above definition Underhill LJ noted that in the commentary the authors make it clear that the definition in article 1 involves choices on their part which are not necessarily definitive; and that 'there are many acceptable uses of the term [agency] which do not always coincide with each other' (see para 1–002). They also observe, at para 1–003, that 'no one has the monopoly of the “correct” use of this or any other term'

47. The phrase "with the authority of the principal" in sub-section (2) might at first sight appear to connote a specific authorisation to do the act complained of; and that would not be an unexpected provision since at common law such authorisation is the main basis on which a principal may be liable for a tort committed by his agent (see Bowstead and Reynolds on Agency (21st ed) article 90 (2) (a)). But that construction is negated by sub-section (3), which makes it clear that an act may be done with the principal's "authority" for the purpose of sub-section (2) even though he or she has no prior knowledge of it- *Nailard* at para 16.

Conclusions

48. In reaching its conclusions the Tribunal reminds itself of the following principles:

48.1 This is an application for a strike out or a deposit order under the Rules. Accordingly, the Tribunal is at this stage considering whether the contention that the Respondent is liable for the impugned actions of ACC Green pursuant to s.109 (2) has no reasonable prospect of success or little reasonable prospect of success. Unless the Tribunal is of the view that there is no prospect of success the Tribunal is not definitively determining the issue. As previously indicated, the Claimants' cases are taken at their highest.

48.2 There is a strong public interest in allowing discrimination claims to be heard. A Tribunal should be slow to strike out any such claim save in the clearest of cases- *Anyanwu v South Bank Student Union* (2000) ICR 391.

49. The Tribunal finds that the contention that ACC Green and Merseyside Police were acting as agents of the Respondent pursuant to s.109 (2) EqA 2010 such that the Respondent is liable for any discrimination perpetrated against the Claimants by ACC Green/Merseyside Police has a reasonable prospect of success. Accordingly, the application for a strike out or deposit fails and is dismissed. The Tribunal's reasons are as follows:

49.1 ACC Green, an employee of the Merseyside constabulary took various actions in respect of the Claimants including terminating their secondments. The Tribunal considered what was the source of the authority to undertake such action and concluded it was arguably the Respondent itself. So far as it is said to be Merseyside the Claimants were not employees of Merseyside and had no legal relationship with it. So far as it is said to be the general, TITAN or secondment agreement the Claimants were not party to the first two. In any event the Respondent was a party to all three and there are some indicators of a principal-agent relationship between the Respondent and ACC Green within them, including the fact that ACC Green was the line manager of Ms Coffey and answered to the Chief Constables in the structure. The Claimants remained at all times employees of the Respondent who retained legal liability for them.

49.2 As the Claimants' counsel observed it is the employer who is liable for discrimination under the EqA pursuant to s.39. If the Respondent is correct, it is difficult to identify who would be liable for acts of discrimination perpetrated against the Claimants by officers or civilian staff of another force while seconded. It cannot have been the intention of the

Case No: 2408158/2021 & 2408403/2021

constabularies to leave such workers with no effective remedy and indeed the various agreements suggest the opposite. Mr Gorton QC suggested that the appropriate Respondent may be ROCU itself under the contract worker provisions in s.41 EqA. Even assuming s.41 had some applicability ROCU is not a legal entity in itself. Counsel could give the Tribunal no example of any action in public or private law having been previously brought against ROCU. Even assuming it was an unincorporated association it was unclear in whose name the action would be brought with suggestions including the management board, the Chief Constables and the North West Joint Oversight Committee. The absolute requirement of an effective remedy under EU law would seem to be arguably achieved through liability being fixed on the Respondent – see *Chief Constable of Avon and Somerset Police v Eckland* (2021) EWCA Civ. 1961.

49.3 The general principle that a police officer in force A can be an agent of Force B when managing an officer or staff member of force B was established in *Commissioner of Police for the Metropolis v Weeks* UKEAT/0130/11/JOJ.

49.4 Finally, Mr Gorton QC emphasised the fact that the Respondent took no actions which were culpable or blameworthy itself. It had nothing to do with the decisions taken by ACC Green and in fact tried to get the decision reversed. The Tribunal notes that the Claimants dispute the assertion that the Respondent has acted appropriately throughout. In any event this does not preclude liability being imposed on it as a principal. Further, the agreements contain express indemnity provisions, the existence of which may be in part for these exact circumstances.

50. As the Tribunal has found that it is reasonably arguable that DCC Green was the agent for the Respondent it is unnecessary to consider the argument on ratification.

51. Strictly speaking the issue as to knowingly helping under s.112 was not identified as an issue to be determined at the PH. For the avoidance of doubt the Tribunal would not have struck the claim out or ordered a deposit in respect of this argument which raises issues of fact to be properly determined at the final hearing.

52. The Respondent invited the Tribunal to add ROCU as an additional party under Rule 34 of the Tribunal Rules if it was unsuccessful in its application for strike out or deposit. It declines to do so essentially for the reasons given in paragraph 48.2 above.

53. The Claim will now be listed for a telephone case management hearing for 2 hours as soon as practicable to allow the Tribunal to identify the issues in the case and make directions in advance of the hearing listed from 27 November to 8 December 2023.

Employment Judge Serr

Date 16 March 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
7 April 2022

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FOR THE TRIBUNAL OFFICE