EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Sarkar	**v**	The Commissioner of Police of the Metropolis

Heard at: London Central **On**: 14 October 2022

Before: Employment Judge B Beyzade

Representation

For the Claimant: In person
For the Respondent: Mr C Adjei, Counsel

JUDGMENT

The judgment of the tribunal is that:

1.1 The respondent's application for strike on the grounds that the claimant's claim for race discrimination and religion or belief discrimination have no reasonable prospect of success is granted. The claimant's claims are therefore struck out under Rule 37(1)(a) of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*.

REASONS

Introduction

1. By a complaint dated 08 September 2021 (assigned claim number 2201676/2021) the claimant presented a complaint of race discrimination

and religion or belief discrimination. The respondent denied the claimant's claims and raised a jurisdictional issue in paragraphs 14-16 of its Grounds of Resistance.

2. At the outset of this hearing the claimant confirmed that he pursued claims in respect of direct discrimination because of race and victimisation and also direct discrimination because of religion or belief and victimisation. The claimant describes himself as being Indo-Bengali Scottish and Jewish.

3. This preliminary hearing was set down following a Preliminary Hearing before Employment Judge Davidson on 22 June 2022 to consider the following:

   (i) the jurisdictional issue raised in paragraphs 14 – 16 of the respondent's Grounds of Resistance, namely that the claimant's claims do not fall within section 120 of the Equality Act 2010.

   (ii) If the claims proceed, the Tribunal will make further case management orders.

4. Paragraphs 14-16 of the respondent's Grounds of Resistance state:

   "14. The Tribunal does not have jurisdiction to hear the Claims because they do not fall within s.120 of the Equality Act 2010 which sets out the Tribunal's jurisdiction to hear discrimination claims.

   15. More particularly, the Respondent was neither the Claimant's employer or prospective employer and the alleged discrimination does not arise out of and is not closely connected to the employment relationship that used to exist between the Claimant and the Respondent and/or it would not have contravened the Equality Act 2010 if had occurred during the currency of that relationship.

   16. Accordingly, the Claims have no reasonable prospects of success and the Respondent requests that they be struck out pursuant to rule 37(1)(a) of the Tribunals Rules of Procedure and further requests that this application be heard and determined at the preliminary hearing that has already been listed for 27th June 2022."

5. A file of documents had been provided which were referred to during this hearing. I understood that the claimant had contributed to that volume.

6. I advised parties that I intended to rely not only on the narrative in the ET1 but also all of the additional information which the claimant had supplied in response to orders made at the previous Preliminary Hearing (namely in his email dated 11 October 2022).

7. I took account of all of the documents lodged for the hearing, to which reference was made. The documents are referred to by page number.

8. The respondent's representative provided a Skeleton Argument in advance of this Preliminary Hearing and copies of authorities and the claimant provided his Skeleton Argument within an email dated 11 October 2022 (referred to above), to which reference was made. I considered both parties' written submissions and any authorities sent to the Tribunal.

9. In regard to the claimant's position, I took account of the narrative information set out in the ET1, all further information supplied by the claimant in response to the orders made at the Preliminary Hearing and to all of which were included in the volume of documents relied upon for this hearing.

10. The claimant appeared in person whereas the respondent was represented by Mr C Adjei, Counsel. Both the claimant and the respondent's representative made oral submissions.

Overview of the facts

11. I summarised the information given to me as follows, which did not appear to be in dispute and were supported by the documents before me:

12. The claimant served as a Police Constable with the respondent from 1992 until 2003.

13. The respondent states in its Response that during this time, the claimant was the subject of a number of complaints that were either unsubstantiated, withdrawn, resolved informally, or resulted in dispensation and that at the time of the claimant's resignation, he was under investigation for failing to disclose that he was a serving Police Constable when he admitted that he had committed a driving offence; he instead stated that he was a trainee nurse on a low income.

14. Between 2005 and 2006, the claimant served as a Police Constable with Tayside Police and in 2007 he served as a Police Constable with Greater Manchester Police.

15. In 2010, the claimant applied to Tayside Police, but his application was unsuccessful. The claimant made an application to transfer from Greater Manchester Police to Police Scotland in 2019 but this application was not successful. His service with Greater Manchester Police ended in 2019.

16. In December 2021, the claimant applied to the College of Policing for the post of Senior Administrator. As part of the application process, the College of Policing required that the claimant be vetted.

17. The respondent is a separate organisation from the College of Policing. The respondent provides vetting services to the College of Policing as part of the College of Policing's recruitment process pursuant to a written Service Legal Agreement (see pages 41-47 of the Hearing Bundle).

18. Any appeal process pursuant to that agreement is managed by the respondent with support from the College of Policing and follows the respondent's appeal process.

19. On 01 December 2021, the claimant secured a conditional offer of employment from the College of Policing that was subject to the satisfactory completion of pre-employment checks (see pages 55-59 of the Hearing Bundle).

20. Therefore, in December 2021, as required by the College of Policing's recruitment process, the claimant completed a vetting form, and this was submitted to the respondent for vetting clearance.

21. The respondent refused vetting clearance and the claimant was notified of this decision on 05 March 2022 (see pages 102-104 of the Hearing Bundle).

22. The respondent's reasons for the refusal were as follows:
    22.1. previous complaints made against him and his disciplinary record;
    22.2. failing to declare his previous employment with Tayside Police;
    22.3. the reasons why his previous application to Police Scotland was withdrawn (which the respondent says were bad judgment and unprofessionalism on the part of the claimant).

23. The claimant started ACAS Early Conciliation on 05 March 2022 and ACAS issued an Early Conciliation Certificate on 23 March 2022.

24. The claimant presented his claim to the Tribunal on 04 April 2022.

25. The claimant relied on a document from the Metropolitan Police Vetting Unit of 17 May 2022 at pages 105-106 of the Hearing Bundle. This is a letter from Mr P Slater, Service Delivery Manager (Vetting) stating:
"I am writing in respect of your recent appeal regarding your application for a role within the Metropolitan Police Service. I have completed a review of your vetting application and the evidence supplied in your appeal.

Your case has been carefully reviewed and at each stage I have decided that due consideration was taken in relation to all aspects of the process.

There is no basis to conclude that the decision to refuse your clearance was incorrect therefore the decision to refuse your clearance remains.

The appeal decision is final and there are no further avenues of appeal."

26. On 17 May 2022, the College of Policing informed the claimant in writing that it was withdrawing the conditional offer of employment with immediate effect because he had not passed the pre-employment checks (see pages 107-108 of the Hearing Bundle).

Oral submissions

27. Both parties made oral submissions at this hearing.

Respondent's submissions

Relationship between the claimant, the College of Policing, and the Metropolitan Police Service

28. The respondent's representative said that it cannot be factually accurate that the claimant brought his claim against the respondent having relied on the letter dated 17 May 2022 as at page 9 of the Hearing Bundle (in box 8.2 of his ET1 Form), the claimant provides as follows in the details of the claim "*I attach the appeal document which I have submitted to the Metropolitan Police in line with their own internal appeals process*." The claimant does not state he received the appeal outcome from the respondent, and he could not have done so at the date he presented his claim (the appeal outcome post-dated the presentation of his claim).

29. The respondent's representative referred to the sentence in box 8.2 of the ET1 which states, "*The Metropolitan Police have initially refused me vetting on grounds I maintain are discriminatory due to me being Indo-Bengali Scottish (racist) and Jewish (anti-Semitic)*" and he maintains that that is the basis of the claimant's claim. He also submits that the claimant has not pleaded a claim for victimisation.

30. The respondent's representative details that although the claimant worked for the respondent from 1992 until 2003, that employment relationship ended around 19 years ago.

31. He states that the chronology in his Skeleton Argument is not disputed including the fact that in December 2021 the claimant applied for the position of Senior Administrator at the College of Policing and that the conditions of any appointment decision required that he must be vetted.

32. He refers to the written Service Level Agreement ("SLA") between the College of Policing and the respondent effective January 2018 (see page 41 of the Hearing Bundle) requiring the provision of vetting services for the College of Policing by the respondent. The Metropolitan Police Service are described as the Vetting Service Provider whereas the College of Policing are the Vetting Service Customer. The College of Policing, he says, are clearly a separate organisation.

33. The respondent's representative sets out that on 01 December 2021 the claimant received a conditional job offer from the College of Policing and that the first paragraph of the offer letter stated that he was being offered the position of Senior Administrator. The letter also stated that his start date will be confirmed upon satisfactory completion of the pre-employment checks and that the offer is made subject to conditions including "*security and criminal records clearance to the level appropriate for your job*."

34. In addition the letter refers to the full terms and conditions for the position being offered to the claimant a copy of which was enclosed and appears at page 61 of the Hearing Bundle. According to clause one of the Terms and Conditions of Employment, the claimant's employer was the College of Policing of Registered Address: Leamington Road, Ryton-on-Dunsmore, Coventry CV8 3EN registered under company number 8235199. The respondent's representative emphasises that this was a newly established organisation as stated in clause 3, and that in terms of its structure and organisational operation flexibility was required (this was in terms of changes to the claimant's job title or function). He further states that the contract did not stipulate that the organisation was related to another legal entity or part of another entity.

35. The respondent's representative refers to page 78 of the Hearing Bundle and the fact that the claimant completed the vetting application on the Metropolitan Police Service's standard Vetting Form and that this is consistent with the fact that the respondent says that it provided a vetting service. This is a 24-page document, but the relevant parts are at pages 98 and 99 of the Hearing Bundle (which requires that section 11 be 'completed by Sponsor' i.e. the College of Policing, who are also identified as Security Controller). At the bottom of the page in answer to the question "*Do you know if the candidate has current national security vetting clearance granted by another police force or government department/agency?*" the "*no*" box is ticked, which the respondent says suggests that it is possible for other agencies to carry out vetting also.

36. The respondent's representative refers to the vetting decision which appears at pages 102 to 104 of the Hearing Bundle and the penultimate line which says that the claimant's sponsor or recruitment team have been notified of refusal of vetting. He avers that this is consistent with the SLA requiring the College of Policing to be informed about vetting decisions.

37. He also makes refers to the appeal outcome at page 105 of the Hearing Bundle and that on the same date a further email is sent from the College of Policing which appears at page 107 and states "*Thank you for your interest in working with the College of Policing and for the time you have invested in the application process*." He then says the letter at page 108 of the Hearing Bundle was sent on the same day indicating as follows:
"We have been advised by our vetting provider that your application for security clearance (and your subsequent appeal) has been refused."

38. The respondent's representative therefore says that referring back to page 106 and the letter from the Metropolitan Police Service, it is clear that the claimant applied for a role at the College of Policing and that he received a job offer from the College of Policing. He refers to there being no documents apart from this letter that say that the claimant applied for a

role with the Metropolitan Police Service (and that this is at odds with the other documents and what the claimant says).

39. He also submits that the claimant could not rely on the letter at page 106 of the Hearing Bundle because he had already issued his claim before that letter had been received by him. He submits that the vetting decision from the Metropolitan Police Service was followed by the withdrawal of the job offer from the College of Policing. It is clear in his submission that the vetting was carried out by the Metropolitan Police Service and the withdrawal of the job offer was conducted by the College of Policing.

40. He therefore submits that there was no relationship between the claimant and the respondent that fell within s 120 (1) of the *Equality Act 2010* ("EqA") Part 5 work S 108, 111 or 112 (as they relate to part 5 work and reference is made to paragraph 17 of his Skeleton Argument in which he states that this provision in s 120 of the EqA is the one that the claimant is most likely to rely on because the other provisions in the section clearly do not apply to the claimant).

41. Paragraph 19 of the respondent's Skeleton Argument explains that Part 5 (Work) sets out a number of work-related provisions concerning, for example, employees (ss.39 & 40), contract workers (s.41), police officers (ss.42-43), office holders (ss.49-52) and trade organisations (s.57).

42. It is contended that the only work-related provision that it could possibly arguably apply to the claimant is that concerning employees in s 39 and s 40. However the claimant was not an employee or an applicant of the Metropolitan Police Service at the material time so on the face of it he does not fall within s 39 or 40 of the EqA (s 39 is headed *Employees and Applicants* whereas s 40 is headed *Employees and Applicants: Harassment* and the claimant does not fall within those provisions as an employee or applicant of the Metropolitan Police Service).

s 110 – liability of employees and agents

43. The respondent also says that by virtue of s.110(1) EqA 2010 (liability of employees and agents), the agent of a principal may be liable for acts or omissions that are done by them but are treated as having been done by the principal under s.109(2) EqA 2010, if this conduct amounts to discrimination, harassment or victimisation that is prohibited by the EqA. This may be a possible argument made by the claimant. However, in order to assert that the respondent is liable as an agent, the claimant must first show that the respondent was an agent of the College of Policing.

44. The respondent's representative submits that the common law concept of agency is in play terms of s110 of the EqA and that this was confirmed in the case of *Kemeh v Ministry of Defence [2014] EWCA Civ 91*. The respondent contends that there is no evidence of any agency relationship between the respondent and the College of Policing, i.e. that the College of Policing was acting as a principal and the respondent was an agent. Agency is a fiduciary relationship which is akin to a trustee relationship. It involves putting your interests second in favour of your principal's interests and not making a profit from your relationship unless you are authorised to do so. In the SLA, the College of Policing is a customer which contracts with the respondent who is the service provider.

45. The respondent's representative relies on the definition of agency relationships contained in *Bowstead and Reynolds on Agency*. This provides that an agent has the authority to alter the legal relationships of a principal relating to third parties. In *Kemeh* it is made clear that this is not always the case for example with estate agents. However, generally speaking that is an ingredient of an agency relationship. He emphasises that the SLA does not contain any provisions suggesting that the College of Policing is authorising the respondent to alter the College of Policing's relationship with third parties and that this would be contrary to the letter sent by the College of Policing which appears at page 108 of the Hearing Bundle (the respondent simply communicated their vetting decision, and it did not withdrew the job offer). The respondent contends that there can be

no agency relationship and it is certainly not clear if this is an argument that the claimant is pursuing in any event (it has been covered in the respondent's submissions as the claimant is a litigant in person).

s 108 of the EqA – Relationships that have ended

46. S 108(1) of the EqA requires that the discrimination must arise out of and be closely connected to a relationship that used to exist between the parties.

47. Whilst s 108(7) of the EqA appears to exclude claims of victimisation, it has been held by the Court of Appeal in *Rowstock Ltd v Jessemey [2014] EWCA Civ 185* that s108(1) should be interpreted as if there were added at the end the words "In this section 'discrimination' includes 'victimisation'.

48. The House of Lords in *Rhys-Harper v Relaxion Group plc and other cases [2003] ICR 867, HL* held that in relation to antecedent discrimination legislation it was possible to bring claims of post-termination discrimination, for example relating to employment references, confidentiality, restrictive covenants, and bonuses. The respondent avers that the vetting process arose out of the relationship between the respondent and the College of Policing pursuant to the SLA, and it was not part of a contractual or a non-contractual entitlement.

49. Whilst the respondent's representative acknowledges that there was an employment relationship between the claimant and the respondent, he says that that relationship ended 19 years ago.

50. The vetting of the claimant by the respondent was not an incident of the employment relationship between the claimant and the respondent. Instead, the vetting process arose out of the commercial agreement (the SLA) that respondent had with the College of Policing, and the relationship that exists with the claimant is between a candidate and a vetting body. That is clearly not an employment relationship.

51. For the claimant to succeed under s108 of the EqA he has to show that the discrimination arose out of or is closely connected to a relationship which used to exist between them. If the claimant had not been employed by the respondent in the past, the respondent would still have carried out the vetting process. In the respondent's submission, the process is not something that arises out of and is closely connected to the employment relationship that the claimant once had with the respondent.

52. The respondent's representative submits that it cannot be sensibly argued that the fact that the vetting process would have used and/or relied on the claimant's employment history with the respondent (as part of his employment record), means that the vetting process was an incident of the employment relationship. This information was a necessary piece of information for anyone engaged in conducting the vetting process in respect of the claimant.

53. The respondent's representative emphasises that the vetting relationship was created by the SLA, and it did not arise out of an employment relationship. If another body had carried out the vetting process they too would have carried out the same process as the respondent. It is the respondent's position that it just so happened that the respondent used to employ the claimant (albeit this was quite some time ago). The respondent's representative referred to Lord Hobhouse's statement in *Rhys-Harper* at paragraph 139 of his Judgment which clearly stated that the further removed the conduct was in time from the employment, the greater the likelihood was that the conduct is too remote, and the employment has become a matter of history.

54. In terms of the letter at page 106 of the Hearing Bundle and the suggestion that this shows that the Metropolitan Police Service perceived that he was their employee, taking the claimant's case at its highest, this simply shows that the respondent misperceived that the claimant had applied to them for employment and accordingly that he was their prospective employee. However, the respondent's representative says that that misperception

cannot form the basis of jurisdiction. In any event this does not fall within s 108 of the EqA as it is not connected with a past relationship that has ended. It is about, taking the claimant's case at its highest, the Metropolitan Police Service misperceiving that they embarked upon or attempted to embark upon on an employment relationship and it is difficult to see how this can fall within section 120 of the EqA. He submitted that at best this was an error or misperception, and the claimant clearly does not consider that he applied for a position with the respondent, nor could he reasonably believe this (it is not a position that is supported by the numerous documents that the Tribunal has been referred to).

s 111 of the EqA – Instructing, causing or inducing contraventions

55. The respondent's representative points out that the claimant does not allege that the respondent has instructed, caused or induced another to do anything in relation to him that breaches Part 5 or s.108 or s.112 (aiding contraventions) of the EqA. The claimant says the respondent discriminated against him by refusing his vetting clearance. The claimant has not said that the respondent has instructed, caused or induced another person to do this in his ET1 Form and for this reason it is submitted that the claimant cannot rely on s 111 of the EqA.

56. Furthermore s111(7) of the EqA does not apply unless the relationship between the respondent and the other person it has allegedly instructed, caused of induced contraventions must be such that the respondent was in a position to discriminate against that person. The respondent also says that no such claim is made by the claimant.

S 112 of the EqA Aiding contraventions

57. This provision makes it unlawful for a person to aid acts of discrimination by another person. S.112(1) requires that the person must knowingly help another to commit a basic contravention (which is defined in the same terms as in s.111).

58. The respondent submits that the claimant does not assert that the respondent knowingly aided another person to commit a basic contravention or any breach of the EqA. This is not part of the claimant's factual narrative.

59. The respondent's representative contends that the Tribunal lacks jurisdiction to hear the claimant's claim and that the claim should be struck out under Rule 37(1)(a) of the *Employment Tribunal Rules* on grounds that is has no reasonable prospects of success. He asserts that the Tribunal should make its decision based on the documents and narrative that the respondent's representative provided at the outset which is not disputed.

Claimant's submissions

60. In his email dated 11 October 2022 the claimant states, "*The Respondent themselves refer to me and perceived me as having applied for a position within the MPS, thus they are the correct body to be considered as respondent in this matter, as defined as such by themselves*." The claimant confirmed to me that this was a reference to the letter to him from the respondent dated 17 May 2022 at page 106 of the Hearing Bundle.

61. The claimant accepted that the letter at page 106 advised him the outcome of the appeal relating to his vetting application (and that the respondent was not withdrawing the job offer made to him by the College of Policing). However he points out that the first paragraph of the said letter refers to "…*your application for a role within the Metropolitan Police Service.*"

62. He was unsure why the letter in question referred to his application for a role with the Metropolitan Police Service. He said he did not know why the respondent's employee had put this in writing to him. He further stated that this was an official letter from the Metropolitan Police Service, and he took that as a direction on how to proceed based on his limited knowledge of employment law and knowledge of the law generally.

63. The claimant confirmed that this was not the only basis on which he decided to make a claim against the respondent. There were other matters he considered. He believed that the respondent were guilty of direct discrimination and victimisation. He acknowledged that whist the College of Policing may have no powers to conduct vetting, they have an affiliation with the respondent. He described that the Metropolitan Police Service are holders of the drawbridge in terms of who enters the College of Policing. He said he passed the interview and the medical checks.

64. The claimant said he noted the respondent's point that the College of Policing had the ultimate say, and that they may be separate. He acknowledged that he was not an employee of either organization. However he said that the Metropolitan Police Service are the agency who have the final say. He said that the position that the Metropolitan Police Service hold is connected directly with the College of Policing.

65. He maintained that after he had received the letter in May 2022 from the respondent that gave him direction in terms of who should be the respondent in his claim. He stated that the issues raised in his claim concerned the respondent's policies and that they were relevant to the recent history of the Metropolitan Police Service.

66. He said that the respondent perceived him as having applied for a position within their organisation and there was no mention of the College of Policing in their correspondence. He also said that vetting was one of the areas of policing. He also mentioned that as he is not a lawyer, he found it difficult to distinguish between the Metropolitan Police Service and the College of Policing (and to determine what constitutes an employer). If the respondent's letter had specified that his employer was an outside organization he said he could have taken advice in terms of whether to pursue the Metropolitan Police Service or the College of Policing.

67. In terms of why he did not pursue a claim against the College of Policing, the claimant says that although he accepts that the position he applied for

was with them, they had made it clear from the outset that it was the Metropolitan Police Service who had the ultimate say in terms of vetting. The College of Policing played no part in that. The form he submitted for vetting was a Metropolitan Police Service form and it was submitted to the Metropolitan Police Service directly. The claimant referred me to the correspondences relating to the vetting process at pages 48 to 53 and also 54-74 and 75-101 of the Hearing Bundle.

68. He also maintained that the relationship between the Metropolitan Police Service and their role in the recruitment process that was being carried out was a reason why he contended that the Metropolitan Police Service are liable (he referred back to page 106 of the Hearing Bundle which he said shows they are responsible in respect of his discrimination claim).

69. The claimant submitted that he believes there was an acknowledgment by the respondent that his claim related to the fact he was a previous employee. He stated that he believed the respondent said this was a separate or irrelevant matter. The claimant submitted that if he were not a previous employee of the respondent he would not necessarily be refused vetting or be treated in this matter. The fact that he was previously employed by them had led to the particular outcome. He stated that they have used his previous employment records that they held on file for him to draw their conclusions or rationale for refusing vetting. This information was held because of the previously existing relationship from the past.

70. The claimant also submitted that any assertion that he served as a PC in Scotland was untrue. He maintained that he never served as a PC in Scotland or Tayside Police. He also stated that he disclosed the true position regarding Police Scotland. He said the wording on the vetting form was confusing and he did not fail to disclose anything. He informed me that the alleged disparaging remarks made towards him were withdrawn by Police Scotland. He challenged them in an Employment Tribunal claim made in Scotland. His Tribunal claim did not progress to a final hearing.

71. He confirmed he contended that the respondent was acting as an agent, that he also brought his claim pursuant to s 108 of the EqA (relationships that have ended). He said there may be some direct connection between the Metropolitan Police Service and College of Policing and that somehow the Metropolitan Police Service were acting as an agent or employer in respect of this matter. However he was not in a position to contradict that the College of Police were a separate legal entity. He accepted that they are two separate organisation, but his perception is that the Metropolitan Police Service were in change of vetting. He said that the agency relationship therefore exists, and they pass the final decision to the College of Policing (they also communicate with candidates directly), but that the College of Policing cannot overrule that process.

72. He said they used his employment record from 19 years ago as the primary reason for refusing vetting and the previous employment relationship still existed. They used that as the rationale for the outcome.

73. The claimant indicated that if the Tribunal found that the College of Policing (and not the respondent) were responsible in respect of the claimant's claim, he would ask that any time bar issue in regards to bringing a claim against the College of Policing be addressed and that time be extended. I advised that there was no application before me today to amend the claim or in relation to time bar, so I will not be considering those issues. He said he acted in good faith and did not have any regard or knowledge in terms of any employment relationship or legislation.

74. He said he disputed what the respondent's representative had said. In regards to documentation relating to the SLA he did not dispute this, and he accepted that the SLA was a genuine document. He said he recognises that what constitutes an agent is a matter of law. He said that he did not dispute what the documents the respondent's representative provided showed, including the documents relating to vetting. He disputed that the timeframe of 19 years since his employment with the respondent had

ended rendered the past relationship he had with them as irrelevant. He reiterated that the letter at page 106 of the Hearing Bundle was confusing.

75. He also accepted that the issues relating to occupational pensions are not relevant. He says however that there was an inseparable relationship between the respondent and the College of Policing, and even their Head of Policing still referred to him as an applicant of theirs, and that indicated that there was more of a relationship than what the respondent suggests. He stated that the respondent should be held accountable in respect of his claim regardless of who ultimately held responsibility for his employment.

76. In relation to the issue in terms of the letter from the Head of Policing at page 106 postdating the claim, the claimant said he had to submit his Tribunal claim within a short time after he received the ACAS Early Conciliation Certificate. He said this was a time sensitive matter and he regarded the respondent as the responsible body in terms of his claim.

77. He further stated that he had contacted ACAS to start Early Conciliation in response to the respondent's initial refusal following their vetting decision. He had appealed against the decision. He had not been told by either the respondent or anyone else that his claim should be directed to the College of Policing in the meantime. The letter from Mr Slater corroborated his belief that the respondent was the proper party that he should pursue. He said it made sense to him at the time and he acted in good faith.

78. He confirmed that he named the respondent as the Metropolitan Police Service because he received the vetting decision from them, and he believed that they were responsible for any discrimination.

79. He submitted that everything was encapsulated in his earlier email dated 11 October 2022 and in his oral submissions made at this hearing (which were in response to the respondent's submissions in relation to the SLA and their employment law points). He invited me not to strike out his claim.

Respondent's reply

80. The claimant relies on the respondent having used as part of its vetting process information it held relating to his past employment by the respondent. The respondent submits that this is not sufficient to enable the claimant's claim to fall within s 108 of the EqA. The respondent's provision of this information was not an incident of the parties' past employment relationship and the respondent referred to paragraph 39 of its Skeleton Argument. This information is the same that any other agency would have provided, and the information was required for the purposes of vetting.

81. The respondent's representative maintained that the information about the claimant's past employment was held by the respondent as a vetting body. He said that they may also have that information as a past employer. If they had that information it was not an incident of the past employment relationship. They have to look at all the information that they had. If this information were not included the vetting process would not be complete.

82. The respondent's representative mentioned that the claimant says that the respondent had the final say, but this was not correct. Whether the claimant was appointed or not is a matter for the College of Policing as evidenced by the correspondence at page 108 of the Hearing Bundle.

83. In terms of the claimant's claim pursuant to s 110 of the EqA the respondent's representative says that the claimant's claim cannot succeed by establishing an agency relationship simply on the basis of the error by the respondent. The respondent's failure to correct any error is not a sufficient basis upon which to claim that the Tribunal has jurisdiction to hear the claimant's claim against the respondent.

Claimant's further points

84. The claimant indicated earlier in this hearing that he wanted to rely on additional correspondence with the respondent in relation to the letter at

page 106 of the Hearing Bundle showing that he attempted to clarify the position and there was no reply. The claimant says he will not be supplying the additional correspondences as he did not believe these would add anything. He says that all these will show is that he questioned the validity of what Mr Slater said and having not received any response to his correspondence. He maintained he has been consistent, and he always said that the respondent were responsible for the matters in his Claim Form. The letter he received in May 2022 was confusing and corroborated his belief. When he did not receive any response it made him believe that what Mr Slater said was accurate. He said he is not disputing that the respondent and the College of Policing were separate organisations.

85. He confirmed he accepted that the respondent was not his employer. He maintained that the respondent were acting as an agent acting for the College of Policing. He did not regard the respondent as his employer or prospective employer. He also relied on the relationship he had with the respondent as his past employer (albeit some 19-years ago). He accepted that he made his application to the College of Policing and that the respondent are a vetting agent (he said that is a sufficiently close relationship). He said the respondent must ultimately be held accountable for any decisions made, and he disputed that he could still be appointed by the College of Policing (notwithstanding the respondent's vetting decision).

Law

Strike Out

86. Rule 37(1)(a) of *Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules") provides:
"(1) At any stage of the proceedings, either on its own initiative or on the application of a party a Tribunal may strike out all or any part of a claim or response on any of the following grounds-
(a) that it is scandalous or vexatious or has no reasonable prospect of Success;"

87. The test of "*no reasonable prospect of success*" was considered in *North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA*, per Maurice Kay LJ:

> […] what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. […] […] It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

Equality Act 2010 ("EqA")

88. Under S.120(1) EqA, a Tribunal has jurisdiction to determine a complaint relating to:
-a contravention of Part 5 (work); and
-a contravention of s.108 (relationship that has come to an end), s. 111 (Instructing, causing or inducting contraventions) or s. 112 (aiding contraventions) that relates to Part 5.

89. Part 5 sets out a number of work-related provisions concerning, for example, employees (s.39 and s. 40), contract workers (s.41), police officers (s.42-43), office holders (s.49-52) and trade organisations (s.57).

90. The only work-related provision that it could be possibly argued applies to the claimant is that concerning employees (ss.39 & 40 of the EqA). These provisions prohibit employers from certain kinds of acts of discrimination, victimisation and harassment as regards their employees and those applying to become their employees.

91. By virtue of s.110(1) EqA (liability of employees and agents), the agent of a principal may be liable for acts or omissions that are done by them but are treated as having been done by the principal under s.109(2) EqA, if this conduct amounts to discrimination, harassment or victimisation that is prohibited by EqA.

92. It was held by the Court of Appeal ("CA") in *Kemeh v Ministry of Defence [2014] EWCA Civ 91; [2014] IRLR 377* that the common law concept of agency was being used in the predecessor provision concerning race discrimination (which was held to be materially identical to s.110(1) EqA – see *Kemeh*, paras.6 & 37). It is therefore the case, that it is this common law conception of agency that is being used in s.110(1) EqA.

93. In *Kemeh* the CA referred to *Bowstead and Reynolds on Agency* and this had also been referred to in a previous EAT decision (*Yearwood v Commissioner of the Police of the Metropolis [2004] ICR 1660*) that had concluded that it was the common law concept of agency that applied in the discrimination legislation in force at that time (*Kemeh*, paras.17 & 20).

S.108 – Relationships that have ended

94. The relevant parts of this section provide as follows:

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another (B) if—

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act

(3) It does not matter whether the relationship ends before or after the commencement of this section.

….

(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.

(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.

95. Despite the terms of s.108(7), which appear to exclude claims of victimisation, it has been held by the CA in *Rowstock Ltd v Jessemey [2014] EWCA Civ 185, [2014] IRLR 368* that ss.1 should be interpreted as if there were added at the end the words "In this section 'discrimination' includes 'victimisation'".

96. The House of Lords in *Rhys-Harper v Relaxion Group plc and other cases [2003] ICR 867* held that in relation to antecedent discrimination legislation it was possible to bring claims of post-termination discrimination.

97. I considered s.111 of the EqA which relates to instructing, causing, or inducing contraventions.

98. I also considered s.112 of the EqA relating to aiding contraventions. This provision makes it unlawful for a person to aid acts of discrimination by another person. S.112(1) requires that the person must knowingly help another to commit a basic contravention (which is defined in the same terms as in s.111).

Tribunal deliberations and decision

Respondent's strike out application

99. The respondent makes an application for strike out. I considered whether the claimant's claim has no reasonable prospects of success. There is a long line of authority to support the proposition that the threshold that must be reached to support a strike out on the basis of no reasonable prospect of success is a high one and that it would be particularly unusual to strike out a discrimination case on this basis without having heard evidence.

100. That said, it appears that the facts are not in dispute in this case, and even if they were, the documentary evidence which the claimant does not or cannot contest appears to set out the position clearly. The claimant has not or has chosen not to lodge documents which counter the respondent's position.

101. My starting point therefore was that this claim should not be struck out at this stage unless I was persuaded that, taking the claimant's case at its highest, and accepting that he could prove everything he offers to prove, that he still has no reasonable prospects of succeeding with his claim.

Jurisdiction generally

102. As stated above the respondent's representative summarised the key facts relating to this application in his submissions. The claimant did not dispute the facts relied on by the respondent. He confirmed that he did not assert that the SLA between the respondent and the College of Policing referred to above was not genuine. He emphasised that the respondent in their letter dated 17 May 2022 stated, "*I am writing in respect of your recent appeal regarding your application for a role within the Metropolitan Police Service*." The respondent contended that this was evidently a mistake.

Race discrimination and religion or belief discrimination claim

103. The jurisdiction of the Employment Tribunal is an entirely statutory creation, it has no common law or other inherent jurisdiction.

104. The claimant brings his claim for discrimination under the EqA. It is understood that the same facts are relied on in respect of each head of claim.

105. In order to pursue his discrimination claim under EqA he must show he was a job applicant, an employee, a contract worker, or that his circumstances were covered by some other provision which confers jurisdiction on the Tribunal.

Employment status

106. Given that the claimant was not an employee of respondent at the time of the alleged discrimination, and he did not apply to become the respondent's employee, the provisions of sections 39 and 40 of the EqA 2010 do not appear to apply in respect of the claimant's claim.

107. The claimant does not say he has entered into a contract with the respondent under which he agreed to work for it, or that he has been supplied by a third party (e.g. an employment agency) to carry out work for the respondent. Although the claimant referred to the respondent acting as an agent, this was in the context of the respondent's role in terms of the vetting process. It was not asserted (nor was there any evidence before the Tribunal) that the respondent acted as an employment business or a recruitment agency.

108. This, however, does not show what would be necessary to confer jurisdiction on the Tribunal, namely that he agreed with the respondent to do work for it or agreed with a third party to go to work for the respondent. Alternatively, there is no reasonable prospect of the Tribunal determining that it has jurisdiction to hear the claimant's claim on the basis that the claimant was an employee, a contractor, or as an applicant for employment (of the respondent).

S 110 EqA Liability of employees and agents

109. It appears that the claimant is seeking to argue that the Tribunal has jurisdiction to hear his claim pursuant to the provisions relating to agents in s 110 of the EqA. However, in order to assert that the respondent is liable as an agent, the Tribunal must be satisfied that the respondent was an agent of the College of Policing. The respondent contends that there is no evidence of any agency relationship between the respondent and the College of Policing.

110. The claimant's position is notwithstanding the lack of any contractual connection between him and the respondent, nonetheless the latter is an agent of the College of Policing. The reasons he gives for this include the respondent:

111.1 stated that he was applying for a role within the Metropolitan Police Service in its letter dated 17 May 2022;

111.2 the respondent has an affiliation with the College of Policing;

111.3 Required the claimant to apply on its vetting form and controlled the vetting process including the outcome and the claimant's appeal; and
111.4 Ultimately had the final say (the Metropolitan Police Service are holders of the drawbridge in terms of who enters the College of Policing).

111. There is nothing in the material before me to suggest that the College of Policing expressly or impliedly agreed that the respondent should act on its behalf and in fact it had expressly contracted with the respondent to provide it with vetting services which is an insufficient basis for an agency relationship (see paragraph 40 of *Kemeh* and *Bowstead and Reynolds on Agency* at paragraph 1-004). Under the terms of the SLA, the College of Policing engaged the respondent to provide vetting services for its benefit and there is nothing in that SLA to suggest that the respondent was authorised to act on the College of Policing's behalf nor does the SLA contain any provision that evidences a fiduciary relationship between the respondent and the College of Policing.

112. I am satisfied that on the balance of probabilities the reference to the Metropolitan Police Service at paragraph 1 of the letter dated 17 May 2022 (upon which the claimant placed significant emphasis) was an error. This is inconsistent with all the other documentation which suggests that the College of Policing was the organisation to which the claimant had applied for employment, and they were a separate legal entity from the respondent. The claimant clearly received this letter after he made his claim to the Tribunal. The claimant says the respondent's overall role in the process was significant. However (and in any event) taking the claimant's case at its highest as I am bound to do, neither the content of the letter dated 17 May 2022 or the respondent's role in terms of the recruitment process (carrying out vetting services including the above matters), are sufficient for me to conclude that the respondent was acting as an agent of the College of Policing. Ultimately the respondent did not have any power pursuant to the SLA or any of the other documents before me, to act on the College of Policing's behalf or to alter its legal relations

with third parties (see *Kemeh* paragraph 41). It was clear that the withdrawal of the claimant's job offer was sent by the College of Policing.

113. Unfortunately, none of the matters he relies upon shows that the respondent was an agent of the College of Policing. The Tribunal therefore does not have jurisdiction to consider the claimant's claim under s 110 of the EqA.

114. Alternatively, in view of the above, there is no reasonable prospect of the Tribunal determining that it has jurisdiction to hear the claimant's claim pursuant to s 110 of the EqA on the basis that the respondent was an agent of the College of Policing. I am satisfied that the respondent has shown that the claimant has no reasonable prospect of success in terms of any claim based on the fact that the claimant's claim falls within s.110 of the EqA because the respondent was an agent of the College of Policing. There is no reasonable prospect of the claimant showing at a final hearing that the respondent was an agent of the College of Policing.

S. 108 of the EqA Relationships that have ended

115. In order to be able to rely on s.108 of the EqA, the claimant must be able to argue that the decision to refuse vetting clearance arose out of and is closely connected to the prior employment relationship between himself and the respondent that ended in 2003 (s.108(1)(a)) and that the vetting refusal would have breached the EqA if it had been done whilst the claimant had been employed by respondent (s.108(1)(b)).

116. Applying to the guidance in *Rhys-Harper* to the present case, the vetting of claimant by the respondent did not arise out of the employment relationship between the claimant and the respondent. Instead, the vetting process arose out of the commercial agreement that respondent had with the College of Policing (which was governed by the terms of the SLA). It was not contended that the terms of the SLA were not genuine and there was no evidence before the Tribunal to suggest that the SLA and its

various clauses did not genuinely reflect the commercial relationship between the respondent and the College of Policing.

117. If the claimant had not been employed by the respondent in the past, the respondent would still have carried out the vetting process. The vetting process is not something that arises out of and is closely connected to the employment relationship that the claimant once had with the respondent. Nor can it be reasonably argued that the fact that the vetting process would have utilised information relating to the claimant's employment history with the respondent as part of his employment record, means that the vetting process arose out of or is closely connected to the employment relationship. This information was a necessary piece of information for any organisation that processes vetting applications in respect of applicants for employment. Moreover, the relationship between the respondent's role in the vetting process and the College of Policing arose out of the SLA which was a commercial agreement.

118. The employment relationship in the instant case ended in 2003 and the vetting refusal occurred some 19 years later in 2022. As a result, it is highly likely that the claimant's employment with the respondent has, to use Lord Hobhouse's words, "*become merely a matter of history*," so that it is not closely connected to the past employment.

119. The Tribunal therefore has no jurisdiction to hear the claimant's claim against the respondent pursuant to s 108 of the EqA.

120. Alternatively, I am satisfied that the respondent has shown that the claimant has no reasonable prospect of success in terms of any claim based on the fact that the claimant's claim falls within s.108 of the EqA because the alleged discrimination does not arise out of and is not closely connected with the employment relationship that used to exist between the parties (some 19 years ago).

S.111 of the EqA Instructing, causing or inducing contraventions

121. The claimant does not allege that the respondent has instructed, caused or induced another to do anything in relation to him that breaches Parts 3, 4, 5, 6 or 7 or s.108(1) or (2) or s.112 (aiding contraventions) of the EqA. Such contraventions are known as "basic contraventions." The claimant's case according to his ET1 Form is that the respondent discriminated against him by refusing his vetting clearance. The claimant has not asserted that the respondent has instructed, caused or induced another person to refuse his vetting clearance.

122. Therefore the Tribunal has no jurisdiction to hear the claimant's claim pursuant to section 111 of the EqA. Alternatively the respondent has shown that there is no reasonable prospect of the claimant establishing that the Tribunal has jurisdiction to hear his claim under section 111 of the EqA.

S.112 of the EqA Aiding Contraventions

123. S. 112 of the EqA provides that "*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).*" The claimant does not allege that the respondent knowingly helped another to commit a basic contravention. This is not asserted in the pleadings or in any of the other documents before the Tribunal. It is the claimant's pleaded case that the respondent has refused him vetting on discriminatory grounds. In those circumstances the claimant cannot place reliance on section 112 of the EqA.

124. Therefore the Tribunal has no jurisdiction to hear the claimant's claim pursuant to section 112 of the EqA. Alternatively the respondent has shown that there is no reasonable prospect of the claimant establishing that the Tribunal has jurisdiction to hear his claim under section 112 of the EqA.

Conclusion

125. On the basis of the documents and information provided and having considered parties' submissions, it appears that the Tribunal has no jurisdiction to hear the claimant's claims pursuant to section 120 of the EqA.

126. While I take account of the fact that the claimant is a litigant in person, and notwithstanding his limited previous experience engaging with the Employment Tribunal, the claimant has had a fair opportunity to set out any jurisdictional basis in respect of his claim (both in his written arguments sent by email prior to this hearing and in his oral argument made during this hearing). Moreover, the respondent has shown that the claimant's potential or purported jurisdictional arguments do not give rise to any gateways in terms of the claimant being able to advance the claims he is seeking to bring, which leads me to conclude that the claimant's claim against the respondent has no reasonable prospect of success.

127. The claimant's claim does not fall within any of the provisions or gateways to jurisdiction that are specified in s.120 EqA.

128. On this basis the Tribunal has no jurisdiction to determine his claims, irrespective of whether he is right about all or any of the matters he wishes to complain about and see adjudicated.

129. Therefore, on the basis of the information and documents supplied and having read and heard parties' submissions, I agreed that there were no reasonable prospect of the claimant's claim succeeding against the respondent.

130. Alternatively there is no reasonable prospect of the claimant successfully arguing that his claim falls within the provisions set forth in s 120 of the EqA.

131. The claim for race discrimination (direct discrimination and victimisation) and religion or belief discrimination (direct discrimination and victimisation) are therefore stuck out pursuant to Rule 37(1)(a) of the ET Rules.

Disposal

132. I have concluded in relation to the claimant's claim brought against the respondent that there are no reasonable prospects of success, and therefore the respondent's application for strike out is granted. This means that this claim is struck out pursuant to Rule 37(1)(a) of the ET Rules.

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Employment Judge Beyzade

Dated: 03 November 2022

Sent to the parties on:

.04/11/2022

For the Tribunal Office