EMPLOYMENT TRIBUNALS

Claimant: Novlett Williams

Respondent: The Commissioner of Police of the Metropolis

HELD AT: London Central (via CVP) **ON:** 6 January 2025

BEFORE: Employment Judge Mellor (sitting alone)

REPRESENTATION:

Claimant: Mr C Milsom, counsel.
Respondent: Mr K Bryant KC and Mr P Martin Counsel.

RESERVED JUDGMENT

Upon hearing the parties:

(1) The claimant's complaint of unfair dismissal is dismissed upon withdrawal.

(2) The respondent's application to strike out two of the claimant's complaints of direct race or sex discrimination pleaded at paragraphs 45 (a) and 45(e) of the amended particulars of claim is refused.

REASONS

Introduction

1. This hearing was listed as a public preliminary hearing to determine the following issues:

a. Does the claimant have the right to bring a complaint of "ordinary" unfair dismissal, pursuant to section 94 of the Employment Rights Act 1996 (ERA)?
b. Does the tribunal have jurisdiction to consider the claimant's complaints of direct race or sex discrimination, pleaded at paragraphs 45(a) and 45(e) of the amended particulars of claim?
c. At the discretion of the Judge conducting the hearing, were the discrimination complaints made within the time limit section 123 of the Equality Act 2010?
d. To finalise a list of issues for the final hearing, review the current listing and consider any outstanding case management issues, and give further case management directions, as appropriate

2. Mr Milsom agreed the claimant cannot bring a claim of ordinary unfair dismissal given she is an office holder and section 200 ERA. That claim therefore is being brought under section 39 of the Equality Act instead. I have dismissed any claim for ordinary unfair dismissal upon withdrawal. For the sake of clarity where in this judgment I have referred to the respondent as the claimant's 'employer' that is within the meaning of section 42 EqA.

3. I was not invited by the respondent to determine issue c. That will remain an issue for the tribunal at the final hearing in July 2025.

4. I have made relevant case management orders for the preparation of the final hearing.

5. The only issue that remained in dispute was (b). At the beginning of his submissions Mr Bryant clarified this was an application to strike out those elements of the claim under rule 38 of The Employment Tribunal Procedure Rules 2024 on the grounds that it has no reasonable prospect of success.

6. There were some technical issues at the beginning of the hearing which impacted on the amount of time available. Initially I wondered if there was sufficient time to decide issue (b) in circumstances where there needed to be case management of both claims together. However, it was agreed that I could make case management orders in preparation of hearing both claims as currently listed in July 2024 irrespective of my decision on the strike out. In the end I had insufficient time to give a decision on issue (b) and so I reserved that element giving this decision in writing. Everyone agreed with that approach.

The Claimant's Complaints

7. The relevant complaint for the purpose of this decision is the Direct race and/or sex discrimination – section 13 Equality Act 2010 or victimisation under section 27 at paragraph 45 of her pleadings:

> The Claimant is a Black British female.
> Did the Respondent subject the Claimant to the following treatment:

(a) Disproportionately pursuing her for notification errors following her trip to Kenya for a presentation in December 2022 and informing her offender manager of alleged notification errors;
(b) From June 2021 to present, failing to pay her appropriate back pay or consider alternative solutions following her reinstatement after the Police Appeals Tribunal decision;
(c) From August 2021 and continuing until her resignation, imposing additional notification requirements on her through the Integrity Assurance Unit ("**IAU**") ;
(d) Constructively dismissing her pursuant to s.39(7)(b) EqA on 30 March 2024; and
(e) Pressuring the Claimant to take a caution, in circumstances where this did not occur with white and or male officers.

8. In her amended grounds of complaint, the claimant pleads (amongst other things, but relevant for my decision):
    a. On 21 November 2021 she returned her annual notification form via DC Groves where she indicated "*nothing new or changed*". DC Groves is her offender manager, the claimant being subject to notification requirements under Part 2 of the Sexual Offences Act 2003 for five years as a consequence of her conviction in 2019.
    b. On 23 August 2021 the respondent through the Integrity Assurance Unit (IAU) placed eight additional notification requirements on the claimant. This decision is the subject of allegation (c) above. The claimant asserts it was DAC Cundy, her line manager, who had imposed these additional notification requirements.
    c. The claimant was invited by Mr Herbert to attend a conference in Kenya. On 22 November 2021 the claimant informed DAC Taylor she would be taking annual leave. She also informed DAC Cundy, but not DC Groves.
    d. She says the respondent offered the claimant to take a caution for the notification errors. She refused as she felt the offer of a caution was another route to dismissal which was unfounded and would not have been applied to white and/or male counterparts.
    a. In May 2023 the claimant was charged with5 (later 7) counts of failing to comply with the notification requirements. She believes the "Respondent applied pressure to the Crown Prosecution Service to bring these charges in its ongoing attempt to dismiss the Claimant. The Claimant's lawyers wrote to DI Wilkinson informing them of the Claimant's poor mental health and providing several medical document in support. The prosecutor at CPS responded that there will be no change".
    b. The claimant feels the actions taken against her were disproportionate to her role in any crime and were treated far more seriously than many of her male and/or white colleagues. Although there is no direct comparator the claimant indicates she will rely on white male evidential comparators who were not subjected to the same or similar treatment despite committing more serious misconduct.

9. The respondent resists the claims in their entirety. In so far as is relevant to the decision I have to make the grounds of resistance set out the basis for the

application to strikeout as the tribunal lacking jurisdiction because the allegations 45(a) and (e) do not arise in the employment field. They therefore do not fall for consideration under Part 5 of the Equality Act 2010. The allegations are acts or omissions of the Respondent and his officers in respect of his/their role as a criminal investigation authority and so fall within Part 3 and so are only justiciable in the Civil Courts.

Claimant's first claim

10. Before I move on to the law, I consider appropriate to also set out some of the issues in the first claim. The claimant asserts the following acts (among others) are discriminatory:
    a. Within 24 hours, the decision was taken by DCI Peter Wallis to treat the Claimant as a suspect rather than a witness (allegation 2(a))
    b. In or around February 2019, DCI Wallis recommending to the CPS that the Claimant should face criminal prosecution rather than internal regulatory proceedings (allegation 2 (b))
    c. At the first hearing of her case at Harrow Magistrates' Court on 12 March 2019, DCI Wallis seeking to have bail conditions imposed on the Claimant (allegation 2(c)).

11. The respondent has not applied for those claims to be struck out for want of jurisdiction. Mr Bryant also confirmed the respondent does not apply to strike out allegation 45(c) in the second claim (additional notification requirements). Mr Milsom argued this is inconsistent with the respondent's application.

The Law

12. The parties were largely agreed on the legal principles, but not their application on the facts.

Strike Out

13. Rule 38 provides:

> (1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—
>
> (a)that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

14. Striking out discrimination claims should only be done in the most obvious cases (**Anyanwu and anor v South Bank Student Union and anor 2011 ICR 391**; **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126**). This is because they involve an investigation as to why an employer took a particular step; the dispute between the employer and employee is the 'reason why' the act complained of was done. It is very difficult to determine that without hearing evidence.

15. The employment tribunal is a creature of statute and so only has jurisdiction under the Equality Act 2010 within the definition of section 120 EqA which provides:

> (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to –
>
> a. A contravention of Part 5 (work);
> b. A contravention of section 108, 111, 0r 112 that relates to Part 5.

16. That jurisdiction is exclusive, meaning that an employee cannot choose the venue as between a county court or an employment tribunal.

17. Complaints about discrimination outside the employment field, for example in the provision of goods or services, are brought in the county court (section 114 EqA).

18. The question of whether the act complained of was done in the employment field or outside of it becomes more complicated where the claimant is employed by an employer who provides public services or is a prosecuting authority. There are two particularly relevant cases on this, although neither of them involves the police.

19. **London Borough of Waltham Forest v Martin UKEAT/0069/11 ('Martin')**. Mr Martin is black. He was employed by the respondent as a bus driver. He was prosecuted for benefit fraud by the local authority where he resided who happened also to be his employer. At a preliminary hearing Mr Martin's remaining complaint of race discrimination was refined and three alleged acts of discrimination were identified. These were:

    a. The decision that Mr Martin should be prosecuted for benefit fraud, and the subsequent investigation and pursuit of the criminal proceedings against him. He alleged the decision maker was the manager of the internal investigations within the council's corporate audit and anti-fraud team.
    b. The decision to prosecute him instead of imposing an administrative penalty, a decision also alleged to be made by Mr Verdin.
    c. The decision to impose a two-year final written warning – the length of the warning was said to be discriminatory compared to white colleagues who had one year warnings.

20. At the preliminary hearing the employment judge refused to strike out allegations1 and 2 and considered the decision to prosecute and the decision to discipline were inextricably linked.

21. Keith J concluded that was wrong and found the tribunal did lack jurisdiction:

> *[21] Part III of the Act is headed "Discrimination in Other Fields," to contrast it with "Discrimination in the Employment Field," to which pt II relates. Part III includes s 19B(1), which provides, "it is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination". A particular field to*

which pt III expressly applies is criminal prosecution. That is because s 57(4), which is in the part of the Act headed "Enforcement of Pt III", limits the remedies which are available when the alleged discriminatory act was done by a person in carrying out functions as a public prosecutor and which is unlawful by virtue of s 19B. It follows that an allegedly discriminatory decision to prosecute someone for criminal offences is outside the employment field, and within the field of allegedly discriminatory decisions made by public authorities, for which the remedy is a claim in the County Court.

[22] Subject to the arguments advanced today by Mr Jervis, that must apply in my opinion even in those cases where the public authority happens to be the employee [sic] *of the person against whom the prosecution is to be brought. If it were otherwise it would mean that employees of those public authorities who have prosecutorial powers would have additional rights over other members of the public who are prosecuted, because they, unlike the latter, would be able to pursue claims of discrimination in the Employment Tribunal. It would also mean that employees of those public authorities, which have other powers (for example, local planning authorities), would have additional rights over other members of the public who have their planning applications refused, because they, unlike the latter, would be able to bring claims of discrimination in connection with the processing of their planning applications in the Employment Tribunal. Parliament could not have intended that to happen.*

[23] I acknowledge of course that if an employee of an employer that is also a prosecuting authority is prosecuted by that authority the prosecution might have an indirect impact on his employment, because the fact of his prosecution is more likely to come to the attention of his line managers than if his employer was not the prosecuting authority, and that may result in action being taken against the employee. In the present case it resulted in disciplinary proceedings being brought against Mr Martin. It indirectly caused Mr Martin not to get a clean bill of health from the Criminal Records Bureau, and it was that which ultimately led to Mr Martin's dismissal, even though he was subsequently reinstated. That was one of the points powerfully made today by Mr Jervis, but in my opinion the fact that the decision to prosecute may have consequences for the employee's future employment does not bring the decision to prosecute within the employment field.

[24] Two other points were made by Mr Jervis. First, the officers in the CAAFT were out to get Mr Martin, and Mr Jervis spent some time this morning attempting to show that their abuse of power, as he characterises it, was committed in the course of the employment, and they were liable to be disciplined for that abuse of power by the same disciplinary process as Mr Martin could be disciplined by as an employee. I do not regard that as relevant to whether the decision to prosecute Mr Martin and not to impose an administrative penalty instead were within the employment field. It is relevant only to whether Mr Martin could bring his claim against the council rather than against Mr Verdin by virtue of s 32(1) of the Act, which creates in effect vicarious liability for the statutory tort of race discrimination.

[25] Secondly, Mr Jervis made the point that the difference between Mr Martin's income after August 2003 and the income which he had declared for the purpose of his entitlement to benefits only emerged when it was picked up by the computer at the National Audit Office, to which the council had sent details of Mr Martin's income (because as an employer it provided details of the sums paid to its workforce) and Mr Martin's benefits, because as a local authority it provided details of the benefits paid to local residents. The council was informed of that discrepancy, and that was how the CAAFT came to investigate the benefits that Mr Martin had received. The discrepancy would not have emerged had Mr. Martin not been on the council's employment payroll.

In my opinion the fact, if it be the case, that the information that caused the council to decide to prosecute Mr Martin was only acquired because Mr Martin was its employee does not bring the decision to prosecute him within the employment field.

[26] For these reasons, I have concluded that the decisions to prosecute Mr Martin and not to impose an administrative penalty instead were not capable of amounting to acts of discrimination over which the Employment Tribunal had jurisdiction. …'

22. The Court of Appeal in **Tiplady v City of Bradford Metropolitan District Council [2019] EWCA Civ 2180 'Tiplady'** confirmed that the decision in *Martin* was a rightly decided. Mrs Tiplady sought to bring a claim under section 103A ERA and section 47B. The detriments she complained of occurred as a householder and not as an employee. The claimant believed the council had behaved in an unreasonable way in the handling of two disputes relating to properties owned by her and her husband.

23. Mrs Tiplady's claim was heard in full by a tribunal who dismissed her claims. Regarding the whistleblowing complaint the tribunal concluded that the detriments had been suffered by her in her capacity as a householder and not as an employee – the 'employment filed point'. The tribunal accepted that "the detriment must be in the *employment field* [original italics]. The mere fact that a person happens to work for the body in question is not enough: the detriment must be in the employment and does not include detriment in the private or personal capacity".

24. Mrs Tiplady sought to argue the 'employment filed' was a misdirection and that there is no law that precluded certain "private" activities of employers to be immune from liability in PIDA claims. Thus, Mrs Tiplady never sought to argue the detriments occurred in her employment rather the language of section 47B is simply 'any detriment' which would, she submitted, extend to detriments done by an employer even when they occurred in private.

25. In summarising the case law including *Martin*, Underhill LJ concluded that:

[22] Although the nature of the issue in Shamoon meant that Lord Hope did not have to explain in what kind of case such a detriment would fall outside the employment field, Martin provides a good example, and I believe it was correctly decided. Keith J rightly emphasises the importance of the distinction between the different Parts of the Act. The main difference in the 1976 Act was as to where complaints can be enforced –ie whether in the ET or in the County Court – though there were some substantive differences as well. If 'detriment' were given an unlimited meaning it would mean that the self same act could form the basis of claims in both the ET and the County Court, but it is clear that Parliament intended that the various Parts of the relevant statutes should be mutually exclusive. The particular point that Keith J makes at para 22 of his judgment about the importance of employees of public authorities not being in a better position than other citizens is also cogent, but it derives from the more basic point that it is an integral part of the structure of the legislation that it is necessary to characterise detriments as arising in either the employment field or some other field.

26. As to how one identifies the detriment arising in the employment field Underhill LJ went on to say:

> *[45] There remains the question of how exactly a detriment is to be recognised as arising, or not arising, 'in the employment field': what are the boundaries of the field? Lord Hope did not have to consider this in Shamoon, and Martin was a plain case because it concerned the exercise of public powers which clearly fell in a different 'field' under the 1976 Act. Broadly, the test suggested by Mr Lewis to the ET, and which it accepted, of asking in what 'capacity' the detriment was suffered – or, to put the same thing another way, whether it was suffered by the claimant 'as an employee' – seems to me likely to produce the right answer in the generality of cases. This is not strictly the same as the 'two hats' analysis which Mrs Tiplady challenges, because the focus is not on the hat being worn by the employer but on that being worn by the employee; but in practice these may, if I may mix my metaphors, be two sides of the same coin. But I do not think the boundaries of the employment field should be drawn narrowly…. There are bound on any view to be borderline cases, and I do not think that it would be right for us in this case to attempt any kind of definitive guidance. I would only add that I think it was sensible of the ET in this case to give Mrs Tiplady the benefit of the doubt as regards detriments (11) and (12).*

27. Detriment 11 was the application for a search warrant by the council and12 the execution of the search warrant. The tribunal found "*That was because at the meeting on 14 July 2016 the Respondent had dealt with the Claimant in her capacity as an employee not just as a householder. It was only because she was a senior planning officer that she was given the opportunity to reconsider whether to allow officers to access her property. The application for the search warrant followed fairly swiftly after that meeting and the Tribunal could therefore see how it might be characterised as taking place in the employment field to some extent*"

28. I was also referred by Mr Milsom to the case of **Eckland v Chief Constable of the Avon and Somerset Constabulary [2021] EWCA Civ 1961** in respect of the equivalence principles. Mr Milsom did not rely too heavily on this argument, primarily because the 'employment filed' issue should be left to be determined on full evidence and so it is not necessary at this stage to consider equivalence. We also were bound by time constraints and further this decision may be impacted by the **European Union (Withdrawal) Act 2018 Para 3(1) of Schedule 1** which provides there is *"no right of action in domestic law…based on a failure to comply with any of the general principles of EU law*". Those issues were not explored in the hearing before me, and before a determination could be made on the general principle of effectiveness and equivalence both parties ought to be given the opportunity to address it. I do not consider it fundamental to my decision on strike out today, but it may have to be addressed at a later date.

29. I was also referred to the **Sexual Offences Act 2003** sections 80 to 88, and section 91. Together with the **Sexual Offences Act 2003 (Notification Requirements) (England and Wales) Regulations 2012** and the **Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004.** I have not set those out again here, but the point made by Mr Bryant being these pieces of legislation form the statutory basis upon which the claimant was

required to notify the police of certain information because of her conviction i.e. it was not imposed as her employer, but as an offender.

Submissions

30. I received written skeleton arguments from Mr Bryant and Mr Martin, and Mr Milsom and I have considered those carefully. The parties are largely in agreement on the law, that if the acts complained of occurred outside of the employment field then the tribunal does not have jurisdiction to hear the complaints (save for Mr Milsom's potential argument on effectiveness and equivalence).

31. Mr Bryant submitted this case was almost on 'all fours' with *Martin* which determined the borderline between in/out of the employment field. If the act complained of is part of the criminal prosecution, then it cannot fall within part 5. The distinction between 45(a)&(e) and (c) is the latter is risk management rather than the application of a statutory regime.

32. Mr Milsom's submission was in summary: the boundaries of the employment field should not be drawn too narrowly and in this case can only be determined once the tribunal has heard evidence. He relied on the cautionary cases on striking out discrimination claims.

33. Mr Milsom further submitted the 'incoherence' of the respondent's argument. The inference he invites me to draw is that in the absence of running this argument on allegations 2b, and c in the first claim (see para 9 above) and also 45(c) in this claim the respondent accepts those were done in 'the employment field' and they do fall within Part 5. If they do, so too must allegations 45(a) and (e) or at the very least it is arguable that they do and so should not be struck out.

34. He submitted both *Martin* and *Tiplady* were heard on their full facts and that is what should happen here. The true test is the capacity in which the detriment is suffered and that needs to be determined at a final hearing. These are the sought of vagaries of jurisprudence where strike out is singularly inappropriate. In fact *Martin* was not heard on its full facts, but was an appeal against a decision not to strike out.

Decision and Conclusion

35. The tribunal can only hear a claim under sections 13 and 27 of the EqA if the acts alleged occurred in the employment field. The issue for me is whether the claimant has no reasonable prospect of persuading the tribunal the allegations 45(a) and (e) are within the employment field thereby falling within part 5 and the jurisdiction conferred by section 120 EqA.

36. *Martin* is binding authority on me that an act which falls outside the employment field falls out with the tribunal's jurisdiction. However, it is not binding authority on where that line is drawn as per Underhill LJ's decision in *Tiplady*: "*There are bound on any view to be borderline cases, and I do not think that it would be right for us in this case to attempt any kind of definitive guidance".* There are

some distinctions that can arguably be made between *Martin* and the instant claim:

a. Mr Martin complained about the decision to prosecute him in circumstances where the employer was also the prosecuting authority. In the instant case the claimant is not challenging the decision to prosecute her per se. Any decision made to prosecute (or lay charges) is taken by the CPS not her employer.
b. Her complaint is that she was disproportionately pursued and that her employer notified her offender manager. It is her claim that the 'reason why' they did this was to create a set of circumstances to bring about her termination because she is black and/or a woman. The context she relies on is the pursuit of a judicial review against the reinstatement decision and the additional notification requirements. She is not saying simply the decision to prosecute her was discriminatory, she is saying the decision was bound up with the respondent's desire to terminate her role because of her race and/or sex. To that end she claims in her grounds of complaint she will rely on evidential comparators. I am unaware from the decision in *Martin* whether there was any such comparator, but it appears not.
c. The decision maker in *Martin* was not his line manager, here the claimant complains about decisions taken by DAC Cundy. She alleges his position as her line manager was disproportionate to her role and was fearful, he was reporting her to someone else. No such connection or reason is identified in *Martin*. Although Mr Martin alleged 'abuse of power' and that the CAAFT were out to get him, here Ms Williams' directly argues DAC Cundy was part of the campaign to bring about the end of her employment. That may bring it within the employment field. This, the claimant argues, is not simply the passing on information, but the pursuit of her with the aim of ending her employment.
d. Arguably, the claimant's allegations are not an indirect impact of the application of the statutory regime and decision by the CPS to charge, but the other way around. The pursuit of that action was a means to an end.

37. Notwithstanding the attractiveness of Mr Bryant's argument, I have reached the conclusion it is at least arguable (or more than merely fanciful) that the detriments complained of were suffered by her as an employee because the motive was to bring about termination of employment. I am particularly persuaded by Underhill LJ's comments "*I do not think the boundaries of the employment field should be drawn narrowly…. There are bound on any view to be borderline cases".* He goes on to agree the tribunal were right to give the benefit of doubt to Mrs Tiplady in respect of the allegations arising out of the application and execution of a warrant. Both of those actions, on the face of it, are decisions taken by the Council as a prosecuting authority. Yet the tribunal, rightly in Underhill LJ's opinion, concluded they 'might' be characterised as in the employment field because of the surrounding facts.

38. I do attach some relevance to the respondent not advancing the same argument in respect of the allegations 2a, b and c in the first claim. There could be several

reasons for that decision, and it was due to be heard in the summer of 2024, so those reasons could include cost saving/proportionality. Given this is an issue of jurisdiction it may well be raised at the final hearing. However, it does support the submission that this is a borderline case. It appears it was not so clear in relation to those allegations so as to prompt that defence or application on claim one. It adds weight to my conclusion that the allegations at 45(a) and (e) are also borderline.

Conclusion

39. Having considered the claim presented and the nature of the allegations they are not as clear cut as in *Martin*. There is no bright line, rather they are borderline. Mr Bryant may well be right that they fall within the respondent's role as criminal investigators and into Part 3, but given the context set out by the claimant and her allegation that these decisions formed part of a campaign to dismiss her from her employment it seems to me it is more than merely fanciful to argue they are detriments suffered by the claimant as an employee. That is a matter that can only properly be determined on hearing evidence, at which point the tribunal will be able to decide whether it has jurisdiction.

40. It therefore, cannot be said that the allegations at paragraph s 45(a) and (e) have no reasonable prospect of success and I refuse to strike them out.

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Employment Judge Mellor

Date 10 January 2025

JUDGMENT SENT TO THE PARTIES ON

16 January 2025

FOR THE TRIBUNAL OFFICE