

Court of Appeal considers liability of Chief Constable in disability discrimination claim

By [Grace Nicholls](#)

3PB Barristers

Chief Constable of Avon and Somerset Police v Nicholas Eckland [2021] EWCA Civ 1961

Introduction

1. The Claimant had commenced employment as a constable for Avon and Somerset Constabulary from November 1998. He was, at the point of his dismissal in December 2018, a Detective Sergeant.
2. The facts are as follows: “On 23 March 2018 he gave evidence on oath at Bristol Crown Court regarding the death in prison of a defendant against whom criminal proceedings were ongoing. His evidence was to the effect that he had attended at a mortuary and identified the deceased as the person charged on the indictment in those proceedings. In fact, he had not been to the mortuary and had not identified the deceased. His false evidence in this regard led to an investigation by the Independent Office for Police Conduct (“the IOPC”), which found that there was a case to answer of gross misconduct. That led in turn to misconduct proceedings under the Police (Conduct) Regulations 2012. A misconduct hearing duly took place before an independent panel constituted in accordance with the Regulations (“the Panel”); and it was the Panel that decided his dismissal”.¹
3. The Claimant contends that he was suffering from a mental health condition amounting to a disability under s6 EqA 2010 and that his condition had resulted in him giving false evidence which led to his dismissal.

¹ Paragraph 2 CoA Judgment

4. For the avoidance of doubt, no findings of fact have been made by the Tribunal in relation to the substantive hearing given the below timeline of events in relation to the correct Respondent.

The Employment Tribunal

5. In May 2019, the Claimant brought claims against the Chief Constable of Avon and Somerset Constabulary for discrimination contrary to s39(2)(c) and (d) of the Equality Act 2010 (herein "EqA 2010"). His claims were discrimination arising from disability (s15 EqA 2010) and a failure to make reasonable adjustments (s20/21 EqA 2010). The s15 claim was pleaded as "the act of disciplining" the Claimant and "the act of dismissing" the Claimant. The s20 claim included an allegation that the disciplinary panel had failed to make reasonable adjustments during the disciplinary hearing.
6. The Chief Constable's Grounds of Resistance averred that she had no legal responsibility for acts of the IOPC or the disciplinary panel and the Tribunal therefore did not have jurisdiction to hear those claims.
7. A Preliminary Hearing took place in February 2020. The Tribunal Judge dismissed the Chief Constable's objection and held that the Chief Constable was the correct Respondent. As stated by the Court of Appeal later, the Tribunal held that "in the context of a claim of disability discrimination it was necessary, in order to comply with EU law, to read section 42 (1) (a) in such a way that the actions of a panel determining a charge of misconduct by a police officer fell to be treated as the acts of the relevant chief officer."²
8. S42(1) EqA 2010 is as follows:

"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."
9. The Chief Constable appealed to the EAT.

² Paragraph 6 CoA judgment

10. Of note, the IOPC and panel members were not informed nor present at the Tribunal hearing, despite clear and evident strong interests in the outcome.³

The EAT

11. The appeal to the EAT was against the determination that the correct identity of the Respondent to the disability discrimination claim was the Chief Constable only. The Chief Constable argued that it should also be the Independent Office for Police Conduct as they had investigated and considered the disciplinary allegation.

12. The 3 grounds of appeal were as follows⁴:

Ground 1: the Judge erred in deciding the Chief Constable could be held liable for discriminatory acts by the IOPC's Director General

Ground 2: that the Judge erred in deciding that the Chief Constable could be held liable for discriminatory acts by a statutory police misconduct panel

Ground 3: that the Judge failed to give the Chief Constable a fair trial and fair determination of those issues

13. During the course of the EAT hearing, counsel for the Claimant made the following concession:

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

14. Kerr J dismissed the appeal by the Chief Constable in April 2021. He held that the ET had not erred in law in deciding that the Chief Constable was liable for any disability discrimination by the panel who made the decision to dismiss the Claimant. The EAT also

³ Paragraph 5 EAT judgment

⁴ Paragraph 2 EAT judgment

held that the Judge below had not determined the preliminary issues in a “fair and even-handed manner” and he “should not have quoted extensively from the Claimant’s written arguments while failing to deal adequately with those of the Chief Constable”⁵. However, that procedural unfairness was not determinative as the question was a question of application of the law.

The Court of Appeal

15. The Chief Constable’s appeal was heard before Lord Justice Underhill, Lord Justice Coulson and Lady Justice Carr. The IOPC, among others, were interveners at this stage in proceedings.
16. Lord Justice Underhill held that: “misconduct proceedings against a police officer are very unlike disciplinary proceedings by an ordinary employer. Although the chief officer retains a limited role, in as much as he or she remains responsible for the selection and appointment of the panel (albeit from a defined pool), the clear purpose of the legislative scheme is that the decisions as to both guilt and sanction should be taken out of his or her hands and be made by a process which is transparently independent. A dismissal decision will, as we have seen, be career-ending. The special character of a decision of a police misconduct panel is reflected in the fact that it is well-recognised that its decisions may be challenged by way of judicial review: two recent examples are the decisions of Eady J in *R (Chief Constable of West Midlands Police) v Panel Chair, Police Misconduct Panel* [2020] EWHC 1400 (Admin) and of Nicklin J in *R (Chief Constable of Dyfed Powys) v Police Misconduct Tribunal* [2020] EWHC 2032 (Admin), [2020] IRLR 964”⁶
17. The Court of Appeal went on to consider *P v Commissioner of Police for the Metropolis* [2017] UKSC 65. In that case, the Claimant was a Metropolitan Police Officer who was dismissed for misconduct. The ET struck her claim out on the basis that the decisions of the panel were protected by judicial immunity. The Supreme Court allowed the Claimant’s appeal. Lord Reed held that “under *EU Directive 2000/78 (the so-called "Framework Directive")* the claimant enjoyed a directly effective right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions, including dismissals. The principle of equal treatment includes the right not to suffer disability discrimination.”⁷

⁵ EAT Summary

⁶ Paragraph 20 CoA judgment

⁷ Paragraph 23 CoA judgment

18. Lord Justice Underhill held that the Court was bound by the Judgment in *P* and therefore dismissed the Chief Constable's appeal. The Court of Appeal therefore held that the Chief Constable would be liable for the acts and omissions of the Panel.

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Grace Nicholls

Barrister

3PB Barristers

0330 332 2633

grace.nicholls@3pb.co.uk

3pb.co.uk