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SEMINAR FOR THE CORPORATION OF LONDON

*Employment Tribunal Litigation & the
Police Regulations*

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The Purpose of this Seminar

1. The City of London Police is the territorial police force responsible for law enforcement within the City of London. As is the case with all other police forces in the United Kingdom, it employs civilian staff alongside police officers. Both civilian staff and police officers enjoy rights which can be enforced before the employment tribunal, albeit the rights the civilian employee can enforce before that judicial body are far wider than those an officer can enforce.

2. In addition, the City of London Police, as is the case with all other police forces in the United Kingdom, is, subject to the statutory complaints procedure contained in the Police Reform Act 2002. That procedure requires it to take action in relation to certain kinds of complaints and requires it in specified circumstances to refer such complaints to the Independent Police Complaints Commission. The existence of this procedure circumscribes a police force's discretion in dealing with complaints. No other employer in the United Kingdom is subject to such a regime. Where a grievance is raised by an officer or a civilian employee it potentially falls into that procedure and if it does that procedure can come into conflict with the procedures an employer is required to follow in relation to civilian staff and in the employment tribunal where a claim has been issued arising from that grievance.

3. The existence of these statutory regimes can, and does sometimes, come into conflict with the statutory regime that Parliament has created to provide and enforce employment rights. Broadly speaking, the following potential flashpoints exist:

- a. where a civilian employee has raised a grievance against a police officer or another employee or both which engages the statutory regime relating to complaints against the police. Following the statutory regime, especially where it results in delay or an inconclusive or only partially communicated result, runs the risk of infringing the employee's employment rights;
- b. where a police officer or a civilian brings a complaint in the employment tribunal (often following an internal grievance as set out under situation (a) above) which is concurrent with the statutory complaints procedure. This will give rise to conflicts between the procedure the Employment Tribunal would like to follow and the procedure the Force is obliged to follow under the statutory complaints regime which may eventually include taking disciplinary action against officers who are subject of the complaint;

c. where a police officer brings a complaint in the Employment Tribunal which is concurrent with a procedure being followed (either against the officer in question or another officer) under the Police (Conduct) Regulations 2012;

d. where a police officer brings a complaint in the Employment Tribunal (which will most likely be a claim for disability discrimination and the failure to make reasonable adjustments) which is concurrent with a procedure being followed under the Police (Performance) Regulations 2012;

4. The purpose of this Seminar is to:

a. understand the differences between employee and officer rights and how they are enforced;

b. understand the procedure the employment tribunal follows;

c. understand the procedures that must be followed under the Police (Conduct) Regulations 2012 and the Police (Performance) Regulations 2012;

d. understand both how an employee's employment rights and how the procedure the employment tribunal follows might come into conflict with the procedures under the Police (Conduct) Regulations 2012 and The Police (Performance) Regulations 2012;

e. discuss how these conflicts might be best resolved.

Employee Rights compared with Officer Rights

5. Police officers are not employees. At common law, they are officer holders.

Police cadets are neither officeholders nor employees: Wiltshire Police Authority v Wynn [1980] ICR 649 CA. Neither are they 'workers' which is a statutory term defined in the Employment Rights Act 1996, the existence of which extends some employee rights to workers who are not employees. The consequence of falling outside of the definition of 'employee' and 'worker' is that neither police officers or cadets enjoys either the common law rights of employees or the significant body of 'employment rights' contained in the employment rights act and other legislation which adopts its definitions of 'employee' and 'worker'.

Common Law Rights of Employees

6. At common law, the relationship between the employer and the employee is governed by contract. The parties themselves agree the terms between them. However, certain implied obligations exist at common law. The most

obvious obligation is that the employee must work and the employer must pay him. The employee must provide his services personally. The relationship is an on-going one subject to each party's right to terminate it by giving notice.

7. In order to make the agreement work, there is implied into every contract of employment, an obligation on both employer and employee not to act in a manner which is not calculated or likely to seriously damage or destroy trust and confidence without reasonable cause.
8. This obligation is not the only implied obligation but it is the most important. If either party breaches it, it entitles the other to terminate the contract without notice. In the case of the employee, that entitles the employee to resign and claim constructive dismissal, which gives rise to a claim in an employment tribunal. In the case of the employer, this entitles the employer to dismiss the employee without notice (but not without procedure!).
9. If an employee raises a grievance which has the potential to be upheld, there is more than a fair possibility that the allegations which are found to have been proven might constitute a breach of the implied term of trust and confidence. Potentially, they may give the employee grounds for resigning and claiming constructive dismissal. Acts of discrimination, or failing to take

action in respect of such acts, are likely to amount to breaches of the implied of trust and confidence.

10. The Courts have also held that one aspect of the duty to maintain trust and confidence is an obligation on the employer to deal with grievances promptly and reasonably: W A Goold (Pearmak) Ltd v McConnell [1995] 516, EAT and Waltons & Morse v Dorrington [1997] IRLR 488, EAT. Delay in dealing with grievances exposes the employer to the risk of constructively dismissing an employee. It is also a matter from which an employment tribunal may draw inferences of discriminatory motive. It can constitute a breach of the ACAS Codes. Delay will never assist an employer in defending a claim.

11. An officer's conduct in the workplace and how any officer should behave towards any other officer are set out in the police standards of professional behaviour which have a statutory footing. They are to be found in Schedule 2 of the Police (Conduct) Regulations 2012. Those standards are:

- a. Honesty and Integrity: police officers are honest, act with integrity and do not compromise or abuse their position;

- b. Authority, Respect and Courtesy: police officers act with self-control and tolerance, treating members of the public and colleagues with

respect and courtesy; police officers do not abuse their powers or authority and respect the rights of all individuals;

- c. Equality and Diversity: police officers act with fairness and impartiality; they do not discriminate unlawfully or unfairly
- d. Use of Force: police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances;
- e. Orders and Instructions: police officers only give and carry out lawful orders and instructions; police officers abide by police regulations, force policies and lawful orders;
- f. Duties and Responsibilities: police officers are diligent in the exercise of their duties and responsibilities;
- g. Confidentiality: police officers treat information with respect and access or disclose it only in the proper course of police duties;
- h. Fitness for Duty: police officers when on duty or presenting themselves for duty are fit to carry out their responsibilities;
- i. Discreditable Conduct: police officers behave in a manner which does not discredit the police service or undermine public confidence in it,

whether on or off duty; police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice;

- j. Challenging and Reporting Improper Conduct: police officers report, challenge or take action against the conduct of colleagues which has fallen below the standards of professional behaviour.

12. A breach of any of those standards constitutes misconduct. Regulation 3 defines “misconduct” as a breach of the Standards of Professional Behaviour. Regulation 3 defines “gross misconduct” as a breach of the Standards of Professional Behaviour so serious that dismissal would be justified.

Employment Rights of Employees and Police Officers Compared

13. Employment rights only apply to police officers if Parliament has expressly legislated that they should apply to them, since the common law excludes them.

14. Civilian staff, of course, are employees and enjoy full employment rights.

15. The following employment rights have been expressly extended to police officers:

- a. all the rights contained in Part 5 (which is entitled 'Work') of the Equality Act 2010) which is basically the full corpus of anti-discrimination legislation in the employment sphere: Section 42 of the Equality Act 2010. This includes direct and indirect discrimination and harassment because of sex, race, disability, sexual orientation, religion and age; the duty to make reasonable adjustments in relation to disabled persons and equal pay between men and women¹. It also includes claims of victimisation. Victimisation is where an officer or employee has been subjected to a detriment for having raised a claim of discrimination;
- b. the right not to suffer a detriment during employment or the right not to be dismissed for having made a protected disclosure contained in Sections 47B and 103A of the Employment Rights Act 1996 (commonly known as the whistleblowing legislation);
- c. less favourable treatment or detriment suffered by a part-time worker under the Part-Time Worker Regulations²;

¹ Blackburn v Chief Constable of West Midlands Police [2009] IRLR 135, CA

² Regulation 15 of PTWR;

- d. less favourable treatment or detriment suffered by a fixed-term employee under the Fixed Term Employee Regulations 2003³;
- e. the Working Time Regulations⁴;
- f. the right not to be dismissed for raising health and safety issues⁵

16. Civilian police employees are by virtue of Section 200 in fact excluded from the following rights:

- a. the right to written statement for reason for dismissal;
- b. the right to an itemised pay statement;
- c. the right to time off for public duties;
- d. the right against suffering any detriment for a prescribed family and domestic leave.

³ Regulation 17 FTER;

⁴ Regulation 41 of WTR

⁵ Sections 100 and 134A of the Employment Rights Act 1996

e. the rights against being subjected to a detriment in connection with Sunday work.

17. In the main, it can therefore be seen, that the Employment Tribunal has jurisdiction in the police context over all claims of discrimination whether made by civilian employees or police officers or cadets. Discrimination, for these purposes, includes discrimination against whistle-blowers, part-time workers and fixed-term workers and those who have raised health and safety issues.

18. As will be discussed below, allegations of discrimination are likely to involve allegations of wrongdoing which are likely to have the potential to amount to breaches of professional standards or conduct matters.

19. The only rights police officers enjoy which are enforceable in the Employment Tribunal which are not related to discrimination are those which derive from the Working Time Regulations. These are unlikely to involve allegations of breaches of professional standards or amount to conduct matters. The same can be said of claims for equal pay.

Dismissal

20. A civilian employee can claim unfair dismissal. A police officer cannot. However, a police officer, it is fair to say, enjoys greater protection against the prospect of dismissal than an employee does due to the procedures contained in the Police (Conduct) Regulations 2012.
21. An employee has the right to argue in a judicial forum that his dismissal fell outside the band of reasonable responses after the event. A police officer has the right to argue in a quasi-judicial forum but one with a procedure very similar to that to be found in an employment tribunal, prior to the event, that he or she should not be dismissed.
22. According to statute, both an employee and a police officer have the right to claim their dismissal is discriminatory after the event before an employment tribunal.
23. However, in contradiction to that right, it has been held that a police misconduct panel, being a quasi-judicial body, enjoys immunity from suit. In other words, things said or done by the panel in the course of making its decision are protected by judicial immunity: Heath v Commissioner of Police for the Metropolis [2005] IRLR 270 CA and Lake v British Transport Police [2007] ICR 1293 CA. It may be that the decision itself can be challenged if the challenge to it can be separated from any challenge to manner in which it reached its decision: P v Commissioner of Police for the Metropolis [2016]

IRLR 301. In P v Commissioner of Police for the Metropolis [2016] IRLR 301, the Court of Appeal commented on the anomaly and suggested the Police Conduct Regulations 2003 be amended to remove it.

Pay Disputes

24. Some of the rights enjoyed by employees are enjoyed by Police Officers and Cadets albeit they are enforced in a different way. An employee's right to be paid derives from his contract of employment. A police officer or cadets' right to pay derives from the Police Act 1999 and the Police Regulations 2003 made pursuant to that Act.

25. A civilian employee who is not paid in accordance with his contact can bring a claim for breach of contract (if no longer employed) or a claim for unlawful deduction of wages under Section 13 of the Employment Rights Act 1996 in the Employment Tribunal.

26. A police officer or cadet cannot bring such a claim: Metropolitan Police Commissioner v Lowrey-Nesbitt [1999] ICR 401. A police officer or cadet who is not paid in accordance with the Police Regulations 2003 can however bring an action for a statutory debt in the County or High Court (see, for example: Allard and others v Chief Constable of Devon & Cornwall Constabulary [2015] EWCA Civ 42).

Industrial Action

27. Civilian employees can take industrial action. Police officers or cadets unlike employees are not permitted to belong to a trade union other than the Police Federation: Section 64 of the Police Act 1996. It is a criminal offence for a police officer to induce or attempt to induce breaches of discipline which would include the taking of industrial action: Section 91 of the Police Act 1996.

Grievances from civilian staff

28. An employer is expected to follow the process described in the ACAS Code of Practice on Disciplinary and Grievance Procedures and in the ACAS Guide: Discipline and Grievances at Work. The sanction on an employer for not following the ACAS Guidance is a potential uplift on the damages of the employee if the employee subsequently brings tribunal proceedings against the employer relating to the subject of the grievance, succeeds in them and the employer's failure to follow the ACAS procedures is deemed unreasonable.

Grievances Against Police Officers

29. Police Officers are subject to their own statutory regimes dealing with discipline and police forces are subject to a statutory regime dealing with

complaints. Where a police officer or civilian employee raises a grievance both the statutory regime dealing with complaints and the statutory regime dealing with discipline are potentially in play which can delay resolution of the grievance.

30. The Police Act 1996 is the source of the regime relating to discipline (and as discussed below performance). The Police (Conduct) Regulations 2012 deal with conduct and performance respectively.

31. The Police Reform Act 2002 is the source of the regime relating to complaints. The Police Reform Act 2002 deals with the Independent Police Complaints Commission. The Police (Complaints and Misconduct) Regulations 2012 deal with complaints and how they interact with questions of conduct and referral of complaints to the Independent Police Complaints Commission.

32. The Regulations are drafted in a manner which makes them rather impenetrable. Below, is a summary of the process that must be followed according to those Regulations in the event of a complaint being raised by a civilian member of staff or police officer. The most likely situation where there is ‘interface’ between the Employment Tribunal, which has jurisdiction to hear claims under the Equality Act 2010, and the statutory police complaints procedure is where allegations of discrimination are made against other police officers or civilian staff.

33. So what are the rules relating to conduct matters which come to the attention of the chief officer a police body? The legislation sets out the process of consideration that should take place where conduct matter comes to the attention of local policing body or chief officer (see paragraph 11 of Schedule 2 of the Police Reform Act 2002). The procedure applies where a “conduct matter” comes to the attention of the chief officer (paragraph 11(1)(a)) and the conduct falls within one of a number of heads (paragraph 11(1)(b) and (2)). A conduct matter is defined at section 12(2) as being any matter which has not been the subject of a complaint but where there is an indication that a **police officer** may have committed a criminal offence or behaved in a manner which could justify the bringing of disciplinary proceedings.

34. Note that a conduct matter is where there is an indication that the behaviour of a police officer may have breached the Standards of Professional Behaviour, amounting either to misconduct or gross misconduct, such that it could justify the bringing of disciplinary proceedings. The use of the word “may” in “may... have behaved in a manner” and “could” in “which could justify the bringing of disciplinary proceedings” shows that the enactment sets a low bar.

35. The heads, to which paragraph 11 refers, are death and serious injury (paragraph 11(2)(a)), where a member of the public has been adversely

affected (paragraph 11(2)(b)) or where the conduct falls within a description in regulations made by the Secretary of State (paragraph 11(2)(c)).

36. The descriptions in the Regulations are those stated in Regulation 7 of the Police (Complaints and Misconduct) Regulations 2012. They are a serious assault, a serious sexual offence, serious corruption, **behaviour which is liable to lead to misconduct proceedings and which is aggravated by discriminatory behaviour on a protected ground**, a relevant offence and conduct whose gravity or other exceptional circumstances make it appropriate to record the matter.

37. A relevant offence is, pursuant to Regulation 1 an offence for which the sentence is fixed by law (being a life sentence for murder, see Section 277 of the Criminal Justice Act 2003) or an offence for which a person of eighteen years or over may be sentenced to imprisonment for a term of seven years. **This would include racially or religiously aggravated assault, criminal damage or public order offences under Sections 28 to 31 of the Crime and Disorder Act 1998.** It would not include the offence of harassment under Section 2 of the Protection of Harassment Act 1997.

38. Note that discriminatory behaviour *per se* does not fall within this description, unless it constitutes a racially or religiously aggravated assault, criminal damage or public order offence. What does is behaviour that amounts to

misconduct *per se* but which is also aggravated by discrimination. What amounts to this is not always easy to identify.

39. Note, also, the description of conduct whose “gravity” or “other exceptional circumstances” make it appropriate to record the matter. The word “other” in “other exceptional circumstances” would indicate that the gravity itself would have to be exceptional, being the first exceptional circumstance. As to the meaning of “exceptional”, this should refer to something which is unusual or not typical. It is something higher than usual but less than something extraordinary.

40. Where a conduct matter comes to the attention of the Chief Constable and falls outside these enactments, paragraph 11 does not apply. That is not, however, the end of it. It may fall within Police (Conduct) Regulations 2012 which is considered this below.

Referral to the IPCC

41. Where a conduct matter falls within both paragraph 11(1) and paragraph 11(2) of Schedule 3 to the Police Reform Act 2002, the appropriate authority must determine whether it is required to refer it to the Independent Police Complaints Commission and record it (paragraph 11(3)).

Mandatory Referral

42. It is mandatory for the appropriate authority to refer a matter where it relates to a person's having died or suffered serious injury (paragraph 13(1)(a)), it falls within a description in regulations made by the Secretary of State (paragraph 13(1)(b)) or the Commission notifies the appropriate authority that it requires it to be referred (paragraph 13(1)(c)). Such criteria are very unlikely to be in play in an employment situation.

43. Serious injury is defined in section 29 as "a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of any bodily function". These appear to be physical injuries. **There is no reference to psychiatric conditions, which would seem to fall outside the meaning of a "bodily function".**

44. The descriptions to which paragraph 13(1)(b) refers are stated by Regulation 7(4) of the Police (Complaints and Misconduct) Regulations 2012, which in turn refers back to Regulation 7(1)(a)-(e) and (g). These are a serious assault, a serious sexual offence, serious corruption, a criminal offence or **behaviour liable to lead to misconduct proceedings and aggravated by discrimination on a protected ground, and a relevant offence.**

45. **To that extent, and only to that extent, a complaint by an officer of discrimination must be referred to the IPCC for it to investigate.**

Discretionary Referral

46. Where a conduct matter falls outside each of these descriptions, referral is not mandatory. However, the appropriate may refer where it considers that it would be appropriate to do so, pursuant to paragraph 13(2) by reason of its gravity or any exceptional circumstances. Note that the word “other” does not appear before the words “exceptional circumstances”, unlike in Regulation 7(f) of the Police (Complaints and Misconduct) Regulations 2012.

47. To that extent, a complaint by an officer of discrimination may be referred to the IPCC for it to investigate.

48. Where the appropriate authority determines that the matter falls to be mandatorily referred or that it is appropriate to refer, it must record the matter, pursuant to paragraph 11(3A). Where a matter falls outside either of these two categories, the appropriate authority must, pursuant to paragraph 11(3B) determine whether the matter is repetitious or was resolved, within the meaning of Regulation 7(3) of the Police (Complaints and Misconduct) Regulations. Where it is/was, the appropriate authority must record the matter (paragraph 1(3C)). Where it is/was not, the appropriate authority has a discretion to record it (paragraph 11(3D)).

49. Where the appropriate authority records the matter but is neither required to refer the matter to the Commission nor does so, it may deal with the matter in such other manner as it determines (paragraph 11(3E)). That would include investigating the matter as a misconduct issue or taking no action. Where the appropriate authority determines that it is necessary for the matter to be investigated by the appropriate authority, an investigation should take place pursuant to paragraph 16 and the Police (Complaints and Misconduct) Regulations 2012. Regulation 11 of the Police (Conduct) Regulations 2012 specifically provides that its own Part 3, concerning investigations, does not apply to a case to which Police Reform Act schedule 3 paragraphs 16-19 apply.

Other conduct matters

50. A conduct matter, as defined by Section 12 of the Police Reform Act 2002, may fall within paragraph 11(1) of Schedule 3 but outside paragraph 11(2). In that instance, it travels along a different route, through the Police (Conduct) Regulations 2012.

51. Section 50(1) of the Police Act 1996 permits the Secretary of State to make regulations as to the administration of police forces. Section 50(2)(e) states specifically that this includes the conduct and efficiency of police officers and the maintenance of discipline. Section 51 repeats this in respect of special

constables. Section 50(3) requires the Secretary of State to make regulations governing misconduct proceedings. Section 84 requires regulations in respect of legal representation at those hearings.

The Police (Conduct) Regulations 2012 – when do they apply?

52. The resulting regulations are the Police (Conduct) Regulations 2012. Regulation 5 provides that they apply where an “allegation” comes to the attention of the appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct. The word “allegation”, pursuant to regulation 3, means an allegation relating to a complaint or conduct matter. A “conduct matter”, pursuant to regulation 3, has the same meaning as that stated at Section 12(2) of the Police Reform Act. That is, where there is an indication that a police officer may have committed a criminal offence or behaved in a manner which would justify the bringing of disciplinary proceedings. It is the same as that described above in the Police Reform Act 2002.

53. Regulation 5 states no more than that the regulations apply when an allegation comes to the appropriate authority, not when an actual conduct matter comes to its attention. An allegation is a claim or an assertion that someone has done something, typically made without proof. Despite the word “allegation” being used, however, it is doubtful whether this has any different

meaning to Section 11 of the Police Reform Act 2002, which refers to when a conduct matter comes to the attention of the Chief Constable.

54. The first step for the appropriate authority under the Conduct Regulations, therefore, is to consider whether it has, actually, received an allegation that the conduct of a police officer may amount to misconduct or gross misconduct; this should already have been assessed pursuant to the Police Reform Act 2002 so it should not be difficult to do. In any event, this is a low bar. Where an allegation does not indicate that the conduct of a police officer may amount to misconduct, the regulations will not apply.

55. Where the regulations apply, the first mandatory step that they require the appropriate authority to take is the performance of a severity assessment, pursuant to Regulation 12. This enjoins the appropriate authority to assess whether the alleged conduct, if proved, would amount to misconduct or gross misconduct or neither (Regulation 12(1)). Depending upon whether it amounts to misconduct or gross misconduct, the appropriate authority may or must refer the matter to an investigation (Regulation 12(3)-(4)).

56. Note that the obligation is to consider whether the conduct would amount to misconduct if proved. There is no permission for the appropriate authority to apply a merits / prospect of success test.

Grievances Against Other Employees

57. Given that the Police (Complaints and Misconduct) Regulations 2012 define

‘misconduct proceedings’ as including:

“in relation to a person serving with the police who is not a member of a police force or a special constable”... “any proceedings or management process during which the conduct (as opposed to the performance) of such a person is considered in order to determine whether a sanction or punitive measure is to be imposed against him in relation to that conduct”, allegations of discriminatory behaviour against other civilian staff are subject to the same process.

Conclusions

58. Where a manager learns of an incident involving discriminatory behaviour, he

or she may wish to deal with it at the lowest possible level without involving

PSD – and may resolve it to the satisfaction of all concerned. Where,

however, it is appropriate to refer, the manager should do so. That is a matter

to be considered on a case-by-case basis.

59. If and/or when a matter is referred to PSD, an appropriate person must then

assess whether it falls within Police Reform Act and, if not, Police (Conduct)

Regulations 2012 and deal with it accordingly.

Discipline: Staff and Officers

60. As we have seen above, the findings of an investigation report, whether produced by the IPCC or locally, may lead to the need to consider proceeding against the subject of the complaint under the Police Misconduct Regulations 2003, if the subject of the complaint is an officer. If the subject of the complaint is a civilian employee, then disciplinary proceedings under the contractual disciplinary procedure will need to be commenced, including a consideration of whether further investigation needs to take place and how the disciplinary charges should be framed.

61. The procedural requirements in relation to an employee are low. In order to avoid an unfair dismissal, an employee need only show that he had a genuine and reasonable belief in the guilt of the employee established by an adequate investigation. That test is much lower than the requirement to prove the misconduct on the balance of probabilities which is the requirement under a hearing which takes place under the Police (Conduct) Regulations 2012.

The Interplay between the Police (Conduct) Regulations 2012 & Employment Tribunal Procedure

62. The Police (Conduct) Regulations 2012 contain detailed provisions. From an employment perspective, what is most notable about them are:

- a. the harm test (Regulation 4);
- b. the right to legal representation (Regulation 7);
- c. stay pending any criminal proceedings against the officer in question (Regulation 9);
- d. suspension (Regulation 10);
- e. the rule preventing an officer from resigning or retiring (Regulation 10A);
- f. detailed provisions as to the investigation process (Regulations 11 to 18);
- g. detailed Provisions relating to the procedure for misconduct hearings (Regulations 19 to 37);
- h. detailed rules as to the attendance of witnesses (Regulation 23);
- i. provisions relating to appeal (Regulations 38 to 40).

63. As set out above, an officer's ability to challenge the process or decision of a police conduct panel is extremely limited due to the panel's immunity from suit.

64. However, the fact that the process is quasi-judicial and subject to strict rules, can bring it into conflict with the employment tribunal's own process, where a complainant has brought a claim which is premised on the acts of an officer who is subject to misconduct proceedings. It is likely that the allegations giving rise to the proceedings themselves gave rise to a complaint to the IPCC. This will give rise to what in the Employment Tribunal's view might be considered an unacceptable delay.

65. It is common for Employment Tribunal proceedings to be stayed pending the outcome of such proceedings. It is important to understand that a stay is not automatic. It has to be justified.

66. The problem is that the Employment Tribunal will want to order full disclosure of all documents relating to the claim. The Employment Tribunal is required to comply with the overriding objective which applies to all civil proceedings which requires that the claim be dealt with expeditiously and fairly. It does not like delay. Furthermore, the parties to the litigation are required to co-operate with the Employment Tribunal in furthering the overriding objective. They are

expected to co-operate with each other in preparing the case for trial. Parties are expected to take a 'cards on the table approach'.

67. Certain of the rules contained in the Police (Conduct) Regulations 2012 tend to militate against that approach. The harm test in Regulation 4, for example, can result in the refusal to disclose documents. Regulation 4 provides that:

Information in documents which are stated to be subject to the harm test under these Regulations shall not be supplied to the officer concerned in so far as the appropriate authority considers that preventing disclosure to him is—

- (a) necessary for the purpose of preventing the premature or inappropriate disclosure of information that is relevant to, or may be used in, any criminal proceedings;
- (b) necessary in the interests of national security;
- (c) necessary for the purpose of the prevention or detection of crime, or the apprehension or prosecution of offenders;
- (d) necessary for the purpose of the prevention or detection of misconduct by other police officers or police staff members or their apprehension for such matters;
- (e) justified on the grounds that providing the information would involve disproportionate effort in comparison to the seriousness of the allegations against the officer concerned;
- (f) necessary and proportionate for the protection of the welfare and safety of any informant or witness; or
- (g) otherwise in the public interest.

68. The default position in the employment tribunal is that all documents which are relevant to the issues in the case, whether they assist or harm the case of the party in whose possession they are must be disclosed in full. Any request for derivation from this principle must be justified and properly explained before the Employment Tribunal.

Witness Evidence

69. Although police conduct hearings are held in public, Regulation 23 provides that those who give evidence should not be able to attend the hearing or hear the evidence of other witnesses. This is in complete contrast to the approach at the Employment Tribunal where witnesses prepare written statements, usually having had sight of the statements of the other witnesses on their side prior to exchange of witness statements and certainly having sight of everyone else's witness statements following exchange of witness statements. The approach in each forum is diametrically opposed. Plainly, if there are employment tribunal proceedings concurrent with a police misconduct hearing, the stricter approach under the police misconduct process could be compromised.

Stay of Concurrent Proceedings

70. The Force may consider that it wishes the internal misconduct hearing to be concluded prior to the hearing of the discrimination claim. However, the law relating to whether concurrent proceedings should be stayed is far more relaxed than it used to be. The principles

- a. the rule against double jeopardy is of no assistance in this context:

Saeed v Greater London Council (Inner London Education Authority)

[1985] I.C.R. 637, QBD. Its only application is where there are two sets of criminal proceedings. It does not apply where there are concurrent civil or domestic proceedings on the one hand and criminal proceedings on the other. In any event, this is right that the subject of the complaint himself would have to assert;

- b. the protection given to a defendant facing a criminal charge to remain silent does not extend to giving him as a matter of right the same protection in concurrent civil proceedings: Jefferson v Bhetcha [1979] 2

All ER 1108, CA (even if an internal domestic tribunal could be properly classified as civil proceedings). In any event, this is right that the subject of the complaint himself would have to assert;

- c. the privilege against self-incrimination does not apply because, whilst it is applicable in civil proceedings, it applies only in court proceedings;

d. the approach that has been taken by the Courts since the 1970s in considering whether to stay civil proceedings pending criminal trial is that the discretion should be exercised only if there was a real, and not merely a potential, danger that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings: Jefferson Ltd v Bhetcha [1979] 2 All ER 1108;

e. the fact that the judge in criminal proceedings has extensive powers to control those proceedings in order to ensure a fair trial, including power to exclude evidence, has been given as a strong ground against a stay being granted in the civil forum in several cases: Secretary of State v Crane [2001] 2 BCLC 222, Ferris J;

f. Ferris J in Secretary of State v Crane observed that while the civil court will clearly strive to avoid a manifest risk of injustice, it should not go out of its way to anticipate the existence of a mere possibility of injustice;

g. the power to stay civil proceedings is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice: Neill LJ in R (on the application of Fayed) v Panel on Takeovers and Mergers [1992] BCLC 938 at 947.

Public Interest Immunity

71. In cases where the complaint which is the subject of the grievance and/or which has led to misconduct proceedings gives rise to the belief that a criminal offence has been committed (which would be fairly unusual in employment type complaints), the Force may be able to rely on public interest immunity to prevent disclosure of documents or witness statements or witnesses being asked question on certain topics.

72. It is a general rule of law founded on public policy and recognised by Parliament that any documentary evidence may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

73. Public interest immunity may be claimed:

- a. in the interests of national security, good diplomatic relations and international comity;
- b. to protect the identity of informants in criminal cases and sources of criminal intelligence generally;

- c. where confidentiality is essential to the administration of justice;
- d. in the interests of the proper functioning of the public service; an
- e. in order to safeguard confidentiality where there is no compelling public interest in ordering the disclosure of the relevant information.

74. However, the circumstances in which such a defence could be relied on to hold up or prevent disclosure or witness evidence being given in employment tribunal proceedings pending an internal misconduct hearing would be extreme.

Discrimination and the Power to Draw Inferences

75. Failing to disclose documents, delays in procedure and responding to claims in a manner which might be considered evasive or equivocal or giving evidence which might be considered such in discrimination claims in employment tribunal proceedings runs its own risk. The Employment Tribunal has the power to infer discriminatory intent or purpose from such actions.

76. If there is to be any derivation from the course of action the Employment Tribunal expects, the objection must be spelt out to it and clear reasons given if a police body is not to suffer the adverse effects of such derivations.

Suspension

77. An employee can be suspended in accordance with the terms of the contract.

The terms relating to suspension are generally not onerous. Whilst a suspension is no longer a neutral act, and it can in theory be challenged in the High Court by way of injunction, success in such claims is rare and the cost of challenge is prohibitive anyway. An unjustified suspension may be the basis of a constructive dismissal claim.

78. An officer may only be suspended in accordance with Regulation 10 of the Police (Conduct) Regulations 2012. The following conditions must be satisfied:

- a. having considered temporary redeployment to alternative duties or an alternative location as an alternative to suspension, the appropriate authority has determined that such redeployment is not appropriate in all the circumstances of the case; and

- b. it appears to the appropriate authority that either:
 - i. the effective investigation of the case may be prejudiced unless the officer concerned is so suspended; or

- ii. having regard to the nature of the allegation and any other relevant considerations, the public interest requires that he should be so suspended.

Retirement and Resignation

79. An employee can resign at any time or take retirement if he or she has reached retirement age. An employee can therefore do this during a disciplinary investigation or process. A resignation in such circumstances may often be accompanied with an allegation that the resignation amounts to a constructive dismissal due to things said and done during or leading up to the investigation.
80. Regulation 10A of the Police (Conduct) Regulations 2012 prevents an officer from resigning or retiring during a misconduct investigation or misconduct proceedings without the permission of the Appropriate Authority. The granting of permission is also subject to restriction and is not given as of right.

The Police (Performance) Regulations 2012

81. The Police Act 1996 is the source of the regime relating to performance. The Police (Performance) Regulations 2012 deal with performance.

82. These Regulations provides for a process of management action giving the officer in question, explanation of how his performance should improve, warnings, a timescale within which to improve. This may eventually escalate to a performance hearing would could result in dismissal.

83. It is often the case that the above process may lead to a request for reasonable adjustments if the performance is due to illness or a condition from which the officer suffers. This may lead to a claim for disability discrimination.

84. It is far less likely that there will be any grounds for a stay or delay of the Employment Tribunal proceedings in such cases. However, the allegations made in any Employment Tribunal proceedings really ought to be considered as part of the internal process wherever possible. Care needs to be taken that things done or said in defending the proceedings do not damage the internal process.

Conclusions

85. Claims brought by police officers in the employment tribunal constitute only a fraction of the total number of claims brought in the employment tribunal. Many employment lawyers and employment judges will be unfamiliar with

police law and in particular the statutory framework which exists around pay, discipline, performance and complaints. Police cases are unique.

86. The Employment Tribunal will tend to look at a police case in the same way as it might look at any other. The Employment Tribunal has its own expectations as to how an employer should operate and respond to claims made against it. The Employment Tribunal will expect litigation to proceed speedily and in a culture of full and open co-operation between the parties.

87. If the Force cannot comply with the expectations of the Employment Tribunal in that regard due to what it considers is the appropriate process under the complaints procedure contained in the legislation, it must consider, where the complainant is a member of civilian staff, how that interacts with the employment rights of the complainant and in all cases where employment tribunal proceedings have arisen as a result of the complaint, or even in response to the complaint, how those procedures impact on the procedure the Employment Tribunal would normally wish to follow. Any derivation has to be explained and justified.

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