Appeal No. UKEAT/0222/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 16 November 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS C M BUTTERWORTH APPELLANT

(1) THE POLICE AND CRIME COMMISSIONER'S OFFICE FOR GREATER MANCHESTER
(2) MR T LLOYD RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM OHRINGER (of Counsel) Instructed by: DWF LLP Solicitors 1 Scott Place 2 Hardman Street Manchester M3 3AA
For the Respondents	MR JOHN CROSFILL (of Counsel) Instructed by: Weightmans Solicitors First Floor 3 Piccadilly Place Manchester M1 3BN

SUMMARY

VICTIMISATION DISCRIMINATION

VICTIMISATION DISCRIMINATION - Protected disclosure

SEX DISCRIMINATION - Post employment

TRANSFER OF UNDERTAKINGS

The Claimant left the service of Greater Manchester Police Authority ("GMPA"), having agreed a settlement of claims of sex discrimination against it. Eighteen months later, in accordance with the **Police Reform and Social Responsibility Act** ("PRSRA"), the GMPA ceased to function: its policing role was thereafter performed by the Office of the Police and Crime Commissioner ("PCCO"). The Claimant wished to claim for acts of sex discrimination by the PCCO and the Commissioner, harassment, and victimisation of her for not having complained of sex discrimination against the GMPA, though she was not and never had been employed by the PCCO. An Employment Tribunal held it had no jurisdiction to consider her claim. The Claimant appealed, arguing that Schedule 15 of the **PRSRA**, paragraph 5, provided that the PCCO succeeded to the liabilities of the GMPA, and that the duty not to discriminate was such a liability; that in any event, section 108 **Equality Act** had that effect, and it was necessary to provide for post-termination claims of discrimination and victimisation under the **Equality Act** and the **Employment Rights Act** (in respect of whistleblowing) to ensure the effectiveness of the anti-discrimination provisions and of the revised **Equal Treatment Directive** 2006/54. It was held that "liability" held its natural meaning, and the context tended (contrary to the Claimant's submissions) to confirm this; that in order to ground liability section 108 required a relationship which had to be between employer and employee, and the Claimant had never been an employee of the PCCO; and that the **Equal Treatment Directive** did not require that a different interpretation be given to the Act nor was it necessary for it to be effective that there should be one.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This appeal, from a decision of Employment Judge Ross sitting in Manchester, whose Reasons were delivered on 1 April 2015, raises what is said to be a new question of law considering the scope of the post-employment provisions of the **Equality Act 2010** ("EqA") and the **Employment Rights Act 1996** ("ERA"); in particular, as Mr Ohringer, for the appellate Claimant puts it:

> **"a. Whether s.108 of the EqA prohibits post-employment termination, harassment and/or victimisation where the alleged perpetrator was not the claimant's employer but its replacement following a statutory re-organisation.**
>
> **b. Whether the prohibition on subjecting a worker to a detriment on the grounds of her having made a protected disclosure under the ERA also extends to the employer's replacement.**
>
> **c. Whether the successor of an employer, following a statutory reorganisation, is within the scope of the post-employment provisions of the legislation."**

2. So put, the answer cannot be given, because it cannot be given in such general terms. The word "replacement" or the word "successor" has no particular legal meaning. All, it seems to me, depends upon the terms of the particular statute by which a statutory reorganisation is effected.

3. The decision of the Tribunal here was that, in the particular circumstances of the case and the provisions of statute that were applicable, the claims made by the Claimant against four Respondents, of which the Respondents to this appeal were the Third and Fourth Respondents, whom I shall call, respectively, the Police and Crime Commissioner's Office for Greater Manchester "the PCCO" and Mr Tony Lloyd "the Commissioner" should fail.

The Facts

4. The facts were agreed. It is not necessary to recite them all, though they are few in number. The principal agreed facts were that the Claimant was employed by the Greater Manchester Police Authority ("GMPA") from 29 July 1996 until 21 May 2011. On 22 November 2012, therefore some 1½ years later, the Commissioner took appointment as the first Police and Crime Commissioner for Greater Manchester when the provisions of the statute creating the PCCO came into effect. The Claimant had never been employed by either the PCCO or the Commissioner. She had left the GMPA under terms that had been agreed in a settlement agreement, I infer, to which the terms of section 288 of the **Trade Union and Labour Relations (Consolidation) Act 1992** apply.

The Law

5. The transfer of some of the functions that the GMPA had had was effected by the **Police Reform and Social Responsibility Act 2011** ("PRSRA"), section 98 of which provided merely that Schedule 15 should have effect. Schedule 15 provided by paragraph 5 under the heading "Initial transfer from police authorities":

> **"(1) At the relevant commencement time, all property, rights and liabilities which immediately before that time were property, rights and liabilities of the existing police authority for a police area are to transfer to, and by virtue of this paragraph vest in, the new policing body for that police area.**
>
> **(2) This paragraph does not apply to any rights or liabilities under a contract of employment (which are dealt with in paragraph 6)."**

6. Paragraph 6, headed "Transfer of staff", provides:

> **"(1) Subject to sub-paragraphs (5) and (6), this paragraph applies to any person who immediately before the relevant commencement time is a member of the staff of the existing police authority for a police area (the "existing employer").**
>
> **(2) A contract of employment between a person to whom this paragraph applies and the existing employer is to have effect from the relevant commencement time as if originally made between that person and the new policing body for the police area in relation to which the existing employer was established (the "new employer").**
>
> **…**

(4) Without prejudice to sub-paragraph (2) -

(a) all the existing employer's rights, powers, duties and liabilities under or in connection with a contract to which that sub-paragraph applies are by virtue of this paragraph transferred to the new employer at the relevant commencement time; and

(b) anything done before that date by or in relation to the existing employer in respect of that contract or the employee shall be deemed from that date to have been done by or in relation to the new employer."

7. The other sub-paragraphs of paragraph 6 are not material to the present discussion save to note that they are reminiscent of and reflect the provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2008** ("TUPE") implementing the **Acquired Rights Directive**. Further material provisions of the Schedule include paragraph 21, which is headed "Continuity" and provides, materially:

"(1) The abolition of an existing police authority, the transfer or abolition of its functions, and the transfer of its property, rights and liabilities, do not affect the validity of anything done before the abolition or transfer."

8. Paragraph 23, headed "Transfers: supplementary provision", provides, materially:

"(1) All property, rights and liabilities to which a statutory transfer applies are to be transferred by that transfer, notwithstanding that they may be or include -

(a) property, rights and liabilities that would not otherwise be capable of being transferred, or

(b) rights and liabilities under enactments.

(2) The property, rights and liabilities which may be transferred by a transfer scheme include -

(a) property, rights and liabilities that would not otherwise be capable of being transferred, or

(b) rights and liabilities under enactments."

The Appeal

9. A primary contention of Mr Ohringer and one of two basic routes by which he seeks to argue the five grounds of appeal is that these provisions are such that the PCCO and the Commissioner are liable for any obligations not to discriminate against the Claimant. His first submission is that the effect of the Schedule was to transfer the obligation not to discriminate

against the Claimant from the Police Authority to the PCCO (see paragraph 49 of his skeleton argument). It seems to me that this argument turns upon the precise meaning and effect of the statute by which the statutory reorganisation was achieved. Though the words "replacement" and "successor" in the broad questions posed by Mr Ohringer are not capable of answer in respect of any and every situation in which they might be said to arise, this particular situation has its own particular statute, which requires, therefore, particular scrutiny. The answers to which I shall come are particular to this statute in its context.

10. In the course of argument Mr Ohringer submitted that the word "liability" in paragraph 5 was to be read in a sense distinct from that which might otherwise have been its expected meaning in a statute of this type. He argued it was capable of including the obligation not to discriminate. Mr Crosfill, who appears here to respond, argues that it should have what he would submit to be a conventional meaning in context. Mr Ohringer's starting point and that of Mr Crosfill were identical, thus in argument Mr Ohringer submitted that in normal use the word "liability" referred to something that must be choate, complete and identifiable as such. The obligation not to do something was not a liability in this usual sense. Mr Crosfill agreed, but Mr Ohringer went further. He noted that in the case of **BT Pension Scheme Trustees Ltd v British Telecommunications plc** [2010] EWHC 2642 Ch, a Judgment of Mann J, there was an extended consideration of various cases in which the word "liability" had been considered (see paragraphs 53 to 60). He noted in particular at paragraph 59 that context was all-important. As Woolf J himself had said in **Walters v Babergh District Council** [1983] 82 LGR 235:

> **"It is always dangerous to look to decisions on similar words in different Acts of Parliament as aids to interpretation."**

11. In common with one of the judgments to which reference was made by Mann J, I too had looked before coming into court at *Stroud's Judicial Dictionary* for the several meanings of

the word "liability", which seem to me fully to justify that comment by Mann J. It is Mr Ohringer's submission that the context here is supplied in particular by paragraph 23. Paragraph 23 showed that a wider scope was given for "liability" than would otherwise be the case. The background could not be overlooked. In general, Parliament must be taken to have intended generally that employees who blew the whistle or made claims of a breach of their equality rights whilst in employment should be free of retaliation by someone closely connected to that employment at any later date. Liability in the sense of a duty not to discriminate in that way should therefore easily be inferred, and paragraph 23 showed the possibility of this.

12. The conflicting argument put by Mr Crosfill was that his preferred interpretation of the word "liability" as it appears in paragraph 5(1) fitted more naturally with the first-impression reading, as both his and Mr Ohringer's reactions had shown. The word "liability" had to be understood in the same sense as it was used in the very next paragraph, because that too dealt - and dealt immediately after paragraph 5 - with a transfer of liabilities. There, in sub-paragraph (4), there was a reference to:

> **"all the existing employer's rights, powers, duties and liabilities under or in connection with a contract …"**

That phrase clearly distinguished between "duties" and "liabilities". The former was apt to include the obligation not to discriminate. There was no such similar reference in paragraph 5 nor in paragraph 23. He urged that it was important that there should be clarity so that a reader of the statute would know precisely what obligations and liabilities had or had not transferred and observed rhetorically that the incoming Commissioner could not expect to owe a duty to persons who had ceased to be employees some time before or whom he might know nothing but in respect of potential liabilities to which he might be subject. He observed that the sense in which "liability" was used in both paragraph 5 and, he might have added, paragraph 23 had the

sense of the transfer of that which was of a proprietary nature. That did not apply to the obligation that, Mr Ohringer's argument would have it, had been transferred here.

13. In my view, Mr Crosfill's arguments in this respect are broadly to be preferred. Mr Ohringer argued that the expression "rights, powers, duties and liabilities" contained in paragraph 6(4) was of no assistance to the scope and meaning of "liabilities" to be adopted in paragraph 5 because paragraph 6 was essentially to replicate the provisions of **TUPE** without, he suggested, the draughtsman having given particular thought to the difference in wording that might arise. He did not directly confront the difference that the words would have if indeed the draughtsman had had proper regard to the whole phrases that were in the statute. I do not think that is a satisfactory answer to the point that arises in respect of paragraph 6(4).

14. Mr Ohringer placed higher emphasis on his arguments under paragraph 23. The difficulty with this, as it seems to me, is that it does not define or give scope to that which falls at first sight under the heading "Liability". It does provide that a liability properly so identified may transfer when because of presumably other provisions of common law or statute it would not, but the phrase "would not otherwise be capable of being transferred" does not help to alter the nature of that which is a liability in the first place. It does not - in my view, not could it - go so far as to create in the word "liability" a sense also of duty or obligation.

15. I have accordingly come to the view in common with the Employment Judge that what transferred under paragraph 5 as property, rights and liabilities did not include that which would transfer as duties in respect of paragraph 6(4). I am further satisfied that this is the proper approach to the transfer of liabilities or duties in respect of employees because of the wording

of paragraph 6 itself and its close relationship with **TUPE**. Under paragraph 6 the provisions have application to any person who:

> **"… immediately before the relevant commencement time is a member of the staff of the existing police authority …"**

16. It is the contracts of employment of such individuals that are transferred to the PCCO. Sub-paragraph (4), referring back as it does to sub-paragraph (2), refers to a contract of employment with such a person. In other words, a person who was not employed immediately before the relevant commencement time would not have their contract nor rights, powers, duties and liabilities under or in connection with that contract transferred to the PCCO under paragraph 6. The effect of that is that they would remain exercisable if at all against the Police Authority by whom they had formerly been employed. This, it seems to me, was a deliberate choice by Parliament. It may replicate the provisions of **TUPE**, which, as a matter of observation, may apply to many situations in which only a part of an undertaking may be transferred whilst the transferor employer remains in business and capable of discharging any obligations that fall upon it. However, in a statute that envisages the replacement (in the colloquial sense) of the functions performed by a Police Authority by the functions to be performed by a Commissioner's Office it would be plain that there would be unlikely to be any continuing function for the Police Authority subject only to the other provisions of the statute. Yet paragraph 6 does not transfer any rights, powers, duties and liabilities except in connection with those contracts that were in existence immediately prior to the commencement.

17. Accordingly, paragraph 6 has the effect that duties do not transfer where a person is not employed immediately before the relevant commencement time even though they have previously been employed by a Police Authority. For this additional reason, I cannot construe

the **PRSRA 2011** as providing for the transfer to the PCCO of the obligation not to take any action against the Claimant that might be thought discriminatory.

18. The second way in which Mr Ohringer puts his argument is that section 108 of the **EqA** has effect. Section 108 of the **EqA** is headed "Relationships that have ended". It provides, so far as material:

> **"(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."**

19. Subsection (2) provides for a similar position in respect of harassment, and subsection (3) observes that it does not matter whether the relationship ends before or after the commencement of the section. Section 108 therefore provides statutorily for what can be called post-termination discrimination. Under the **EqA** victimisation is not "discrimination", though it was so classed under the predecessor legislation. The question arose whether the Act was such that post-termination victimisation was covered by the Act. In the case of **Rowstock Ltd v Jessemey** [2014] ICR 550 the Court of Appeal held that it did. This was entirely consistent with the line of authority that began in the European Court of Justice in the decision of **Coote v Granada Hospitality Ltd** [1999] ICR 100, which considered that the **Equal Treatment Directive** 76/207 established the principle that member states were under an obligation to ensure effective judicial control to protect the rights provided for by the Directive, which would be deprived of an essential part of its effectiveness if there was no remedy against measures taken by an employer as a reaction to proceedings brought by an employee to enforce compliance with the principle of equal treatment. It was thus necessary for member states for introduce measures necessary to provide judicial protection for workers whose employer after

the employment relationship had ended refused to provide references and did so in reaction to the fact that the employee had earlier brought legal proceedings against the employer. The decision on the question submitted for preliminary ruling to the Court was answered in the terms set out at page 114A-C on what might seem a narrow basis, that Article 6 of 76/207:

> **"… requires member states to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of that Directive."**

However, the broader principle expressed in the Judgment is that of effectiveness. The aim is to ensure that equal treatment is not defeated by employers after the termination of the relevant employment acting in a manner detrimental to the employee.

20. In **Rhys-Harper v Relaxion Group plc** [2003] UKHL 33, [2003] ICR 867 the House of Lords considered whether the expression "employee" used in the **Sex Discrimination Act 1975** and **Race Relations Act 1976** included ex-employees. Mr Ohringer took me carefully through the Judgments of each of Their Lordships, in particular pointing out that in the Judgment of Lord Nicholls of Birkenhead at paragraph 37 the context was that once two persons entered into the relationship of employer and employee:

> **"37. … the employee is intended to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions are concerned with the manner in which the employer conducts himself, vis-à-vis the employee, with regard to all the benefits arising from his employment, whether as a matter of strict legal entitlement or not. …"**

21. He noted (paragraph 44) that incidents of the employment were not necessarily confined to the precise duration of the period of employment itself. Some benefits accrued before and some after, but all arose equally from the employment. At paragraph 114 Lord Hope of Craighead said much the same:

> **"114. … the relationship between the employer and the employee does not necessarily come to an end at the precise moment when their contract terminates. There may well be things that**

> **need to be done to bring their relationship to an end after the contract has terminated. There may also have been agreements entered into during the employment about benefits to be enjoyed afterwards, such as the continued use of sports facilities, which remain to be implemented or there may be evidence that it is the employer's practice to allow the continued use of such facilities. At that stage the employer will, of course, be dealing with someone who strictly speaking is a former employee. But the fact that this description applies will not of itself remove that person from the scope of the Directive, so long as the transactions that remain to be completed are attributable to a continuation of their relationship as employer and employee."**

22. It is unnecessary to cite the other expressions of opinion, which are much to the same effect, save that at paragraph 211 in the speech of Lord Rodger of Earlsferry:

> **"211. Therefore, although being employed is one of the keys which unlocks access to the rights and remedies conferred by the anti-discrimination Acts, to a considerable extent those Acts are actually concerned with discrimination in relation to the various kinds of opportunities that employees may enjoy in addition to any contractual rights. Of course, not even all contractual rights end on the termination of employment: an employee may still have both rights and obligations under the contract. Most obviously, an employee may have a right under his contract to be paid a pension or to continue to enjoy free medical insurance, while he may also be bound by a restrictive covenant in the contract. Not only an employee's rights and obligations under the contract of employment can continue after the employment itself comes to an end: an employer may continue to afford his former employees opportunities to enjoy some of the additional non-contractual benefits, such as access to sports or other recreational and social facilities. Since the anti-discrimination Acts are not tied to contractual rights and obligations, there is in principle no reason why the Acts should cease to have effect in respect of these continuing opportunities. I therefore have difficulty in seeing why Parliament, however cautious its approach, would ever have intended that it should be lawful for an employer to discriminate against a former employee in these respects. The idea, for instance, that Parliament intended that, after the 1976 Act was in force, an employer should still be able to bar a black former employee from entering the employer's social club while allowing white former employees to continue to enjoy the facility strikes me as untenable.**
>
> **212. The same applies to the provision of references. In some cases the employee may have a contractual right, whether express or implied, to be supplied with a reference. But even where that is not so, since an employee or former employee will often stand little chance of getting a new job without a reference, an employer will recognise at least a moral duty to provide one …"**

23. In his skeleton argument at paragraph 34 Mr Ohringer said that the Directive, the explanatory notes to the **EqA** and the reasoning in **Rhys-Harper** placed the emphasis on prohibiting discrimination in the discharge of responsibilities arising through employment and continuing after termination. It was not relevant for the purpose of the legislation whether those responsibilities were in the hands of the ex-employer, or had been passed on to someone else. He noted that paragraphs 10.57 to 10.62 of the **Equality and Human Rights Commission Code of Practice on Employment 2011** were consistent with that approach. That argument would apply to the rights asserted in respect of the **EqA**. The protection of whistleblowers is to

be found in the **ERA 1996** and is domestic in origin. Here, Mr Ohringer argued that the public policy in providing robust and expansive protection was similar and that similar purposive approaches to the underlying legislation fell to be applied.

24. Mr Ohringer drew particular attention to two decisions, the first in time being that of **Woodward v Abbey National plc (No. 1)** [2006] ICR 1436. That was a case in which the Claimant had complained that after her employment had ended she had suffered a detriment contrary to section 47B(1) on the ground that she had made a protected disclosure during her employment. On appeal to the Court of Appeal from the dismissal of her claim on the basis that the Employment Tribunal had no jurisdiction to hear such a post-termination complaint the Court of Appeal thought that the context and purpose of the insertion of the provisions relating to public interest disclosure into the **ERA** by the **Public Interest Disclosure Act 1998** was to protect workers who made disclosures of information in the public interest, so as to provide them with a right of action if they suffered detriment as a result, and that it would be palpably absurd and capricious for Parliament to have afforded protection only in respects done by the employer while the contract of employment subsisted.

25. The decision second in time, **BP plc v Elstone** [2010] ICR 879, was a decision of the Appeal Tribunal over which I presided. In that case the Claimant suffered a detriment at the hands of his current employer. He argued that the reason for his suffering that detriment was that in employment he had made a protected disclosure. The point in the case was that the employment during which he had made the disclosure was with an earlier and separate employer. Nonetheless, we held that the statute was to be construed so that he had a right of action. Mr Ohringer draws attention to paragraph 34, in which is said:

> **"34. … First, the courts are obliged to take a purposive approach to the statutory provisions, so as to advance the protection of whistle-blowers from later retribution by an employer. It is protection, rather than the identity of the employer, which is central to this. …"**

26. Mr Ohringer argued that though **Rhys-Harper**, **Coote**, **Elstone** and **Woodward** were all cases in which the Claimant was either an employee (in the sense of an ex-employee) of the alleged discriminator or was in employment by the alleged discriminator, and was not as here someone who had never been in an employment relationship directly with the alleged discriminator, nonetheless section 108 should be purposively construed so as to provide for that. He argues, as said in paragraph 34 of **Elstone** - which I have already quoted in substance above - that for the protection to be given, the responsibility not to discriminate may be in the hands of someone who has never been the employer, as here. The essence of the approach in the European Court of Justice was to provide an effective support for the principle of equal treatment now to be found in Directive 2006/54. That says in recital 32:

> **"Having regard to the fundamental nature of the right to effective legal protection, it is appropriate to ensure that workers continue to enjoy such protection even after the relationship giving rise to an alleged breach of the principle of equal treatment has ended. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection."**

27. Article 17(1) provides:

> **"Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."**

28. At Article 24 under the heading "Victimisation":

> **"Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."**

29. He submits therefore that where the statute appears at section 108(1)(a) to limit itself to a "relationship that used to exist *between them*" [emphasis added], the words "between them" are not an essential aspect of the relationship, nor of the test described. The test is one of a sufficiently close connection. The same test was that which was referred to in the speech of

Lord Hobhouse in **Rhys-Harper** (see paragraphs 139 and 140). To give little or no weight to the words "between them" would fulfil the purpose of providing effective protection. The requirement that there be a close connection would sufficiently exclude a flood of claims. It would necessarily confine the potential proceedings to those against an employer who if it never had been an actual employer of the Claimant was nonetheless closely related to one which was, or to an employment relationship that the Claimant had previously enjoyed.

30. Mr Crosfill responds by arguing that the reference to "relationship" in context denoted a relationship that was recognised elsewhere within the **EqA 2010**. The discrimination would have to arise in the relevant respect under section 39 of the Act. Section 108 is general to all the different forms of discrimination to which the **EqA 2010** relates, only some of which relate to discrimination in employment. The relationships recognised in Part V refer to employees and applicants; though he accepts that "employee" may mean "ex-employee", it does not mean "non-employee". There are, he submits, restrictions upon the scope of the discrimination statutes. These boundaries to the scope of the statutory scheme have been recognised in many cases.

31. An example is the case recently decided in the Court of Appeal of **Halawi v World Duty Free Group UK Ltd t/a World Duty Free** [2014] EWCA Civ 1387, [2015] IRLR 50. That was a case in which the Claimant who worked airside at Heathrow selling cosmetics at a retail outlet in circumstances that rendered her indistinguishable, so far as public appearances were concerned, from a direct employee, nonetheless was engaged to work there upon terms and through a web of relationships that gave her no standing to complain of the act of discrimination in respect of which she sought to sue. At all levels below the Supreme Court, each of the Judges who had dealt with the case recognised that they felt uneasy with the

outcome - see my own comments when the case was before the Appeal Tribunal - but nonetheless felt that the general prohibition against discrimination could not extend to provide her with a potential remedy in this particular case. By way of postscript, in February this year the Supreme Court rejected an application for permission but did so in terms that were strikingly trenchant for the Supreme Court, commenting that there was no conceivable way in which the Claimant could show the necessary relationship that would entitle her to sue. The case is one of many that demonstrate that there are limits within which the discrimination statutes can apply.

Discussion

32. The question that Mr Ohringer asks is whether there is sufficient proximity between the position of the PCCO and Commissioner and the Claimant to enable her to sue. To my mind, much depends upon the issue with which I first began this Judgment: the scope of Schedule 15 to the **PRSRA**. Under that Act, as I have pointed out, the rights, obligations and duties of an employee under a contract of employment would not transfer to the PCCO unless the employee were employed immediately prior to the transfer, which the Claimant here was not. That inevitably draws a line between such a person, and such a relationship, and other relationships that may be created or recognised after. The fact that the PCCO is created does not of itself have the effect that it becomes an ex-employer of the Claimant, nor she an ex-employee of it.

33. The words "between them" in section 108 of the **EqA** must be given some force. I cannot ignore them as mere surplusage. If they did not exist, then the text of close connection would provide for a limit to claims, but the Act itself calls for a relationship that used to exist "between them". Those last two words are present in the statute. The purpose of Parliament in inserting them was to provide for relationships of an employment type that had once existed

between the parties as such. In just the same way as an employee of a Police Authority who is not employed immediately before a transfer does not have rights, powers, duties and liabilities transferred under paragraph 6 of the Schedule, and therefore cannot enforce any rights, powers, duties and obligations against the new body created, this seems to me effectively to prevent the Claimant raising a claim in the current context.

34. The purpose of the provisions in general is undeniable. The prohibition of discrimination is important, indeed essential, but I accept that there are some relationships where the general appeal to the social advantage of eliminating forms of discrimination may be morally justified but give rise to no legal remedy. Here, as it seems to me, Parliament does not enact by section 108 a section that can trump the provisions under the **PRSRA**, nor do I see that the appeal to the European authorities to which I was taken takes the matter very much further. It shows no case in which somebody who was not an employee and had no employment relationship was able to sue. If it had been intended in the particular context of the replacement, using the word colloquially, of a Police Authority by a Police Commissioner and his office that the latter should inherit all of the duties not to discriminate against any former employee which that former employee might have been able to assert against her former employer, the Police Authority, it could have said so, but it did not. Parliament was not, in my view, required as a matter of European legislation or case law so to do. I accept Mr Crosfill's appeal that European law does not directly affect the particular decision in this particular case.

35. I have thus dealt with the two arguments that Mr Ohringer has advanced and given my reasons for rejecting both of them. Those arguments broadly cover the ground to which the grounds of appeal themselves were directed, but it is important to look at those grounds themselves. The first ground was - and I summarise - that Schedule 15 provided for the transfer

of all rights and liabilities of the Police Authority to the PCCO, the effect of which was to transfer the obligations applying to ex-employees under section 108 **EqA** and section 47B **ERA** from the Police Authority to the PCCO. For the reasons I gave in dealing with the first point, that contention cannot stand, and the first ground must be dismissed.

36. The second was that further and/or in the alternative the Tribunal erred in law in failing to interpret the relevant provisions of the **EqA** and the **ERA** as covering the conduct not only of an ex-employer but of anybody that takes the place of the ex-employer. I have already made observations about the breadth of the expression such as "takes the place of", but it is said in this second ground (paragraph 15) that that interpretation is correct as a matter of domestic statutory construction because it gives effect to the intention of Parliament to protect ex-employees from treatment that would be unlawful during the currency of their employment. That, however, has to be read whilst looking at what Parliament did in the **PRSRA**, as the Employment Judge herself did. The provisions reflect the provisions of **TUPE**, which do not go as far as Mr Ohringer's argument would. The second ground, at paragraph 15b, was that a proper interpretation would recognise that for ex-employees to be adequately protected the legislation must extend to anyone who continued to hold rights or responsibilities relating to the individual that have arisen from the employment relationship. Once one concludes, as I do, that the Act has not transferred the responsibilities, then this ground cannot stand. Paragraph 15c is no more than an appeal to general rhetoric.

37. The third ground was that the **EqA** must be interpreted to give full effect to the European Directive 2006/54 and the Tribunal's Judgment failed to give full effect to the recast Directive and was in error. I have dealt with that.

38. The fourth was that if section 108 **EqA** is limited to cover only ex-employers it is incompatible with the recast Directive. In my view that argument has no substance, because the recast Directive does not require section 108 to be read in any way other that in which it is expressed. It refers to relevant relationships that are "between them", and I do not see that European law requires those words to be omitted.

39. The fifth ground is consequential upon findings in the Claimant's favour in any of the first four grounds; it therefore falls too.

Conclusion

40. A reference is sought; it seems to me there is no lack of clarity in the position that applies, and, despite the quality of Mr Ohringer's arguments, this appeal must be, and is, dismissed.

Application to Appeal to the Court of Appeal

41. The application is made centrally upon the question of the victimisation provisions. I do not think it could be at all arguable that a claim for sex discrimination or for harassment made against someone who is not and has never been the employer could succeed, nor do I read the application as seeking to challenge centrally the conclusions in respect of the **PRSRA**. It does raise the point whether section 108 itself too much restricts the ability of a Claimant to bring a claim of victimisation, because of the force of the words "between them". The argument is one that I have considered and rejected. If there is to be any point that is to go forward, it is that latter point, and it must be borne in mind that the Claimant here raised a number of claims only some of which were victimisation. The argument seems to me, for the reasons I gave,

potentially a step too far, and I shall leave it to the Court of Appeal whether it thinks that in respect of the section 108 point this is the right case in which to consider the question further.