

## Immunity of Police Misconduct Panel from employment claims

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**Employment analysis: Can police officers bring proceedings in the employment tribunal challenging the actions or decisions of the Police Misconduct Panel?**

**Jesse Crozier of Devereux Chambers, who acted as junior counsel for the police in a recent case, explores the nature of the immunity of the Police Misconduct Panel.**

### Original news

*P v Metropolitan Police Commissioner* [2016] EWCA Civ 2, [2016] All ER (D) 147 (Jan)

*The Court of Appeal, Civil Division, dismissed a police officer's appeal against the decision of the Employment Appeal Tribunal upholding the determination of the employment tribunal, which had struck out her disability discrimination claim nominally brought against the Metropolitan Police Commissioner but, in substance, against a Police Misconduct Panel (the Panel), on the basis that the Panel was a judicial body and, as such, enjoyed immunity from suit. Heath v Metropolitan Police Commissioner [2004] EWCA Civ 493 [2005] IRLR 270 was binding upon the present court and could not be distinguished from the present case.*

### What were the issues in this case?

The claimant, identified as P, was dismissed from her post as a Police Constable by the Panel for gross misconduct. She brought proceedings in the employment tribunal against her statutory employer, the Commissioner, alleging that the Panel had discriminated against her on the grounds of her disability in reaching the decision to dismiss.

The Panel (and its predecessors) is a body established under statute to consider acts of alleged police misconduct which may give rise to dismissal. It has many of the characteristics of a judicial body, being an independent body which hears evidence, entitles officers to legal representation, and has a statutory route of appeal to the Police Appeals Tribunal.

Back in 2004 the Court of Appeal reviewed the status of the Panel in *Heath v Commissioner*. In that decision the court (Auld and Neuberger LLJ, Holman J) held that the Panel was a judicial tribunal established at law, and therefore enjoyed immunity from suit. No action in discrimination could therefore be pursued against the Panel in the employment tribunal.

This appeared to settle the status of the Panel. However, the Court of Appeal (Pill, Wall and Maurice Kay LLJ) looked again at a police officer's right to bring a claim to the employment tribunal in *Lake v British Transport Police* [2007] EWCA Civ 424, [2007] ICR 1293. *Lake* was a whistleblowing case in which the Court of Appeal decided (somewhat elliptically) that a whistleblowing case could be maintained in the employment tribunal, notwithstanding the Panel's immunity:

'This is not a case in which the manner in which the [Panel] has conducted proceedings has been challenged...The challenge is that they reached the wrong decision and that the Employment Tribunal has jurisdiction to hear and consider evidence and make its own decision.'

The essential question in P's case was whether *Heath* remained good law in light of the Court of Appeal's subsequent decision in *Lake*.

## On what grounds did the claimant appeal to the Court of Appeal?

At first instance, the tension between *Heath* and *Lake* was resolved in favour of the Commissioner and the claimant's claim was struck out. On appeal to the Employment Appeal Tribunal, Langstaff J upheld the first instance decision and reiterated the core immunity principle:

'Judges may not be sued for their judgments, however erroneous; nor may they be sued for what they may say during the course of a hearing.'

He went on to find that:

'[T]he allegation [of disability discrimination] is centred on [the Panel's] conduct, when exercising its judicial functions. So viewed, the case falls four-square within the core principles established by *Heath*.'

In the Court of Appeal, P sought to challenge the correctness of *Heath* on two grounds. First, P argued that *Heath* was decided per incuriam and was in effect wrongly decided, as (it was suggested) was demonstrated by *Lake*. Second, it was argued that on a proper construction of the Equality Act 2010 (EqA 2010), Parliament has bestowed jurisdiction on the employment tribunal to consider cases of discrimination brought by police officers, and the immunity recognised in *Heath* could not therefore be maintained.

## What conclusions did the Court of Appeal reach and what were its reasons?

The Court of Appeal decided that there was in fact no conflict between *Heath* and *Lake*, and no basis on which to find that *Heath* should not be followed. P's argument that *Heath* was decided without reference to relevant statutory provisions under the (then) Sex Discrimination Act 1975 was not borne out on a proper reading of *Heath*.

The Court of Appeal also found that *Lake* was no departure from the principle in *Heath*. In *Lake* the Court of Appeal cited *Heath* with approval. The court in P considered that *Lake* in fact turned on a peculiar feature of the Police (Conduct) Regulations 2004, SI 2004/645 under which a sanction of dismissal imposed by the Panel could be reviewed by the Chief Constable. The claim before the employment tribunal in *Lake* could therefore proceed against the Chief Constable for his decision at the review stage, the Chief Constable not being a judicial or quasi-judicial body. Properly construed, the court found that the decision in *Lake* was 'to leave no doubt that the claimant was entitled to pursue his [whistleblowing] claim against the Chief Constable, unconstrained from the adverse findings of fact made by the disciplinary Panel'. However, the right of review by the Chief Constable under the Police (Conduct) Regulations 2004 has not been repeated under the Police (Conduct) Regulations 2008, SI 2008/2864 (under which P was dismissed) or the subsequent Police (Conduct) Regulations 2012, SI 2012/2632.

While the Court of Appeal was 'troubled' by the impact of *Heath* on Parliament's apparent intention in granting police officers the right to bring discrimination claims, it observed Parliament passed EqA 2010 after *Heath* and took no steps to remove the immunity cloak. In light of these findings, the Court of Appeal in P considered itself bound by *Heath*. The attempt to neutralise its impact was 'entirely hopeless'.

## What are the implications of the Court of Appeal's comments on the law in this area?

As matters stand, police officers cannot bring proceedings in the employment tribunal challenging the actions or decisions of the Panel. The impact of *Lake* has now been recognised to be of 'extremely limited scope'. The same will apply to those facing other statutory disciplinary tribunals, such as healthcare professionals.

The boundaries of the immunity as it applies to the Panel have not however been tested. In *Heath*, Neuberger LJ (as he then was) considered the possibility of challenging the appointment of the Panel for sex discrimination, as this was an antecedent act to the constitution of the Panel—Auld LJ and Holman J disagreed. However, outside the employment sphere Devlin LJ described judicial immunity in *Lincoln v Daniels* [1960] 3 All ER 205 in very broad terms—it applied to everything said or done in the course of proceedings, and to everything done from the inception of proceedings onwards. Whether this wide application of judicial immunity will be held to apply to the Panel process as a whole will be a matter for later decisions.

The Police (Performance) Regulations also have an equivalent to a Panel, a Third Stage Review. This has features comparable to judicial proceedings, but there is no authority on the extent to which it is a judicial body immune from suit. Again, it remains to be seen whether a Third Stage Review will be considered to be a judicial body comparable to the Panel.

The decision in *P* does, however, mean that decisions of the Panel are only challengeable by appeal and, following appeal, by judicial review on ordinary public law grounds. The employment tribunal will not have jurisdiction to consider such complaints.

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*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*