



15 June 2016

## PRESS SUMMARY

### **McBride (Appellant) v Scottish Police Authority (Respondent) (Scotland) [2016] UKSC 27** *On appeal from [2013] CSIH 4*

**JUSTICES:** Lady Hale (Deputy President), Lord Clarke, Lord Wilson, Lord Reed and Lord Hodge

#### **BACKGROUND TO THE APPEAL**

This appeal concerns the proper approach of Employment Tribunals (“ETs”) when ordering that an employer reinstate an employee who has been unfairly dismissed. The appeal arises from the scandal over the disputed identification of a fingerprint in a murder inquiry in 1997, which resulted in the trial and conviction (later quashed) of David Asbury (“the McKie Scandal”). A fingerprint at the murder scene was identified by four experts from the Scottish Criminal Records Office (“SCRO”) fingerprint bureau as belonging to Detective Constable Shirley McKie. The SCRO provided services for the police and Crown Office, and their experts’ duties included signing fingerprint reports for use in criminal trials and giving evidence at trial. As a result of the identification, DC McKie was charged with perjury for giving evidence at Mr Asbury’s trial that she had never been to the crime scene. During DC McKie’s trial differences of opinion emerged about the fingerprint identification and she was acquitted. The McKie Scandal generated much media interest and criticism of the fingerprint service in Scotland.

The appellant, Ms McBride, was one of the experts involved in the McKie Scandal, and she and the other experts were suspended from 3 August 2000 while investigations took place. One investigation concluded that the experts had not been guilty of any malicious wrongdoing and recommended that they return to work without any disciplinary action being taken. Accordingly, in May 2002 Ms McBride and the other experts resumed work on restricted duties and undertook extensive retraining. They sought to return to full duties (including the signing of joint reports and giving evidence in court) but were not allowed to do so. This was because there remained disagreement, within the SCRO, nationally and internationally, over the McKie Scandal and concern that any evidence from the experts at trial would be undermined by cross-examination on matters relating to the scandal.

In 2007 the Scottish Police Services Authority (“SPSA”, the respondent, now known as the Scottish Police Authority) was established. David Mulhern was tasked with integrating the fingerprint service into a new Scottish Forensic Science Service. He made it clear he did not want the experts involved in the McKie Scandal to transfer to the SPSA but that redeployment was an option. After her employment transferred to the SPSA, Ms McBride indicated that she would discuss redeployment but wished first to discuss reinstatement to unrestricted duties. There was no such discussion and she was dismissed. She claimed for unfair dismissal. The ET held that Ms McBride had been unfairly dismissed and ordered that she be reinstated “to the position of Fingerprint Officer and treated in all respects as if she had not been dismissed.” In its reasoning the ET held it would be practicable for the SPSA “to reinstate the claimant to the role of (non-court going) fingerprint expert”. The SPSA appealed, and the Employment Appeal Tribunal (“EAT”) revoked the ET’s judgment on remedy and remitted the case to a freshly constituted tribunal to determine compensation, holding that the ET’s decision that it was practicable for the SPSA to comply with an order for reinstatement was perverse. On Ms McBride’s appeal to the Court of Session, although the Inner House rejected the EAT’s conclusion that the ET’s order for reinstatement was perverse, it held that the ET had erred in law by ordering the SPSA to employ Ms McBride on altered contractual terms. Ms McBride appealed to the Supreme Court.

## JUDGMENT

The Supreme Court unanimously allows Ms McBride’s appeal. Lord Hodge (with whom the other Justices agree) gives the leading judgment. The case is remitted to the original ET, or to a tribunal which includes the member or members of the original ET who are still in office, to consider in what respects it should vary its order for compensation in view of the time that has passed since the order.

## REASONS FOR THE JUDGMENT

Lord Hodge observes that the ET’s order for reinstatement (set out at [18]) viewed alone is not open to criticism, as it reflects the definition of such orders set out under s.114(1) of the Employment Rights Act 1996. The question is whether the context in which the order was made and the ET’s reasoning in support of the order should give rise to a different interpretation of the order [39].

Lord Hodge answers this question in the negative. The ET was not seeking to impose a contractual limitation in the reinstatement order removing the excluded duties (i.e. signing reports and attending court to give evidence) from Ms McBride’s job description. Rather it was recognising a practical limitation on the scope of her work caused by circumstances beyond her and her employer’s control [40]. This conclusion is supported by four reasons:

- (1) The ET was aware both of Ms McBride’s terms of employment and that for several years previously she had been actively employed as a fingerprint officer but had not been asked or allowed to sign reports or give evidence in court. That was the status quo to which she would have returned pursuant to a reinstatement order [41].
- (2) The ET was aware that Ms McBride wanted to perform the excluded duties but held that the SPSA’s decision that she could not return to those duties was reasonable [42].
- (3) The ET rejected the idea that continuing in a non-court going role amounted to alternative employment. It criticised Mr Mulhern’s evidence, which had been calculated to give the impression that Ms McBride had done little of value in the previous years, and accepted the evidence of Ms McBride’s managers about the amount of work carried out by fingerprint experts which does not involve the excluded duties and their assessment that Ms McBride had made a valuable contribution in the years in which her duties had been restricted [43].
- (4) The ET’s references to Ms McBride being reinstated to a “non-court going fingerprint officer role” were included in parenthesis and spoke of an understanding, which may suggest that the ET was considering the practical context of the reinstatement rather than an alteration of the terms of employment. The words in parenthesis confirmed that the order for reinstatement did not amount to an order that the employer must alter the status quo by allowing Ms McBride to resume the excluded duties [44].

Lord Hodge rejects an additional argument by the respondent that the ET’s view on the practicability of compliance with the reinstatement order was perverse because it had the potential to expose the SPSA to a claim by Ms McBride that it was in fundamental breach of her employment contract by refusing to allow her to perform the excluded duties. This argument was not developed in the courts below and, in any event, would not have succeeded if properly developed at the time in the light of the ET’s findings of fact [30-31 & 46-52].

*References in square brackets are to paragraphs in the judgment*

**NOTE:** This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>