



EMPLOYMENT TRIBUNALS

Claimant

Mr Zaman AND

Respondents

- 1. Working on Wellbeing Limited T/A Optima**
- 2. The Commissioner of Police of the Metropolis**
- 3. Shared Services Connected Limited**

Heard at: London Central (Remotely)

On: 30 July 2020

Before: Employment Judge Brown

Representation

For the Claimant: In Person

For the Respondents:

- 1. Ms M Stanley, Counsel**
- 2. Mr P Martin, Counsel**
- 3. Mr D Isenberg, Counsel**

JUDGMENT AT OPEN PRELIMINARY HEARING

The Judgment of the Tribunal is that:

Optima (R1) were agents of Shared Services (R3) and subagents of the MPS (R2), so that all the Respondents acted as principals or agents in relation to the Claimant's application for employment at R2.

REASONS

1. This Open Preliminary Hearing was to determine the following issues:
 - (a) Whether the First and/or Third Respondent should be removed from the proceedings.
 - (b) Whether the claims against any of the Respondents should be struck out.
 - (c) Whether a deposit order should be made in respect of any of the Claimant's claims.

The Claimant's Claim

2. By a claim form presented on 23 December 2019, the Claimant brought complaints of disability discrimination against the Respondents.
3. The Claimant had undertaken the recruitment process to become a police officer with the Second Respondent. In his claim form, he alleged that he was told by the medical assessor that he had failed the medical assessment because of his past mental ill health, which the assessor thought might recur. The Claimant said that, despite providing a current report by his specialist psychiatrist and full past mental health history, medical notes/reports and a letter from his GP, the medical assessor did not change the outcome on appeal.
4. At a Preliminary Hearing on 5 May 2020, I explained the difference between direct disability and discrimination arising from disability to the Claimant. I ordered that, on 2 June 2020, the Claimant should write to the Respondents and the Tribunal, saying whether he contended that;
 - 4.1. The Respondents rejected him because of his past disability, or perceived disability; OR
 - 4.2. That the Respondents rejected him because of something current arising out of his past disability; Or
 - 4.3. Whether he contends all these things.
 - 4.4. If the Claimant contends that he was rejected because of something current, which the Respondents believed arose from his past disability, he should say what that current thing was.
5. The Claimant clarified, in correspondence, that he was bringing a claim of direct disability discrimination; not a claim for discrimination arising out of disability. By email to the Tribunal and the Respondents on 1 June 2020, the Claimant said, “I am contending I have been rejected based on my Past disability Discrimination Equality Act 2010” [53].
6. The Claimant had been treated for psychosis between about 2015 and 2017.
7. The First Respondent (“Optima”) is an occupational health and wellbeing company. The Third Respondent (“Shared Services”) is an organisation providing a range of support services to the public sector. The Second Respondent (“the MPS”) outsources some or all of its recruitment services to Shared Services. The contract between Optima and Shared Services was in the hearing bundle for this Open Preliminary Hearing [283 to 310].

Scope of this OPH

8. There was a 310 page Bundle of documents for this hearing, page numbers in these reasons refer to page numbers in that Bundle.
9. There were witness statements from the following witnesses:
 - 9.1. The Claimant
 - 9.2. For the First Respondent;

- 9.2.1. Dr Greg Irons, Consultant Occupational Health Physician and Optima's Chief Medical Officer dealing with Metropolitan Police Service matters;
 - 9.2.2. Dr Mary Sherry, Consultant Occupational Health Physician delivering occupational health assessments for the Metropolitan Police;
 - 9.2.3. Mr James Leckie, Service Delivery Director for Optima.
 - 9.3. For the Second Respondent;
 - 9.3.1. Mr Robert Walsh, Senior Resourcing Lead within Strategic HR;
 - 9.4. For the Third Respondent:
 - 9.4.1. Ms Danielle Roche, Head of Assessment Delivery;
10. At the start of the Open Preliminary Hearing I made clear to the parties that I would not conduct a "mini-trial" on conflicting evidence; I would not hear witness evidence about the merits of the claim.
11. The parties agreed that I should only accept witness evidence, and hear cross examination, about the agency relationship between the three Respondents. That was a discreet issue which could appropriately be decided, on the evidence, at a Preliminary Hearing.
12. I heard evidence from all the witnesses and submissions from all the parties on the agency issue.
13. I dealt with the strike out / deposit order applications separately.

Findings of Fact

14. Around July 2019 the Claimant applied, via the Second Respondent's careers website, for the role of Police Officer.
15. Mr Walsh told the Tribunal that, in 2015, MPS outsourced its recruitment delivery to Shared Services, the Third Respondent. This meant that Shared Services became responsible for managing the recruitment process and liaising directly with candidates regarding their applications. In 2019 Shared Services used Optima, the First Respondent, to conduct the medical aspects of the recruitment process.
16. Mr Walsh described the application process for candidates applying to become a Police Constable ("PC") at the time relevant for this case (June 2019 to November 2019).
17. Candidates completed an online application form, which required that they fulfil specific eligibility criteria. Candidates were subject to a security check and, if there were no security concerns, they completed an online questionnaire, to demonstrate that they had the verbal reasoning and language requirements to be a PC.

18. Candidates who passed this stage were invited to the Day One assessment. On Day One, candidates underwent a national assessment process, used by all police forces. This included a competency based interview, a written exercise and a virtual reality scenario-based exercise.
19. On successful completion of Day One, candidates were invited to attend Day Two. Candidates were asked to complete/provide an OH Recruitment Questionnaires on Day Two. This questionnaire was principally completed by the individual candidate, but their GP was asked to confirm whether the information provided by the candidate was correct.
20. Where the candidate disclosed any serious or significant mental health issues on the form, or the GP suggested that the information provided by the candidate regarding their health and medical history was not accurate, the candidate would be asked by First Respondent's medical team to complete a Medical Recruitment PH Questionnaire [114-116]. This was completed by the candidate at the Day Two assessment centre.
21. Both questionnaires were then reviewed and assessed by one of the First Respondent's Medical Officers (MOs). Medical Officers are Occupational Health professionals. In accordance with the Home Office circular 59/2004 [218-221], the MO was required to consider all of the information presented by the candidate and assesses the candidate's case on its individual merits. The Second Respondent required the First Respondent to adhere to the terms of this circular and the corresponding Medical Standards set by the Home Office [222-223] when assessing the candidate's case.
22. A decision regarding a candidate's medical suitability for the PC role was made by the MO. The Home Office Circular and Medical Standards required the MO to determine, based on the evidence presented, the candidate's fitness to serve at the time of assessment and for a reasonable period thereafter. Where there was any concern that the candidate was not fit to serve as a PC based on the information the candidate had provided, or further medical information was required from the candidate for the First Respondent's medical team to make a definitive decision regarding their suitability for the role, the candidate's application would be rejected. The First Respondent's medical team would inform the Third Respondent of their decision and the Third Respondent would formally relay this information to the candidate [128].
23. Contractually, Shared Services had entered into an agreement with the Minister for the Cabinet Office on or about 1 November 2013 (the "Framework Agreement"). Under this Framework Agreement, UK Government departments, their arm's length bodies and executive agencies, non-departmental public bodies, NHS bodies and local authorities, including MPS, could procure Shared Services to provide certain back office services by entering into call-off agreements with them.
24. Clause 48 of the Framework Agreement [227] provided that it was not intended that anything in the Framework Agreement, nor any actions taken by either party to the Framework Agreement "shall create a partnership, joint venture or

relationship of employer and employee or principal and agent between the parties, or authorise either party to make representations or enter into any commitments for or on behalf of any other party.”

25. In accordance with Schedule 2.1 of the Framework Agreement, SSCL entered into a call-off order with MPS (Contract Reference Number: SS314164) (the "Call-Off Order) which dealt specifically with the services to be provided to MPS.
26. Under this Call-Off order, Shared Services was responsible for facilitating and running the assessment centres and generally managing the stages of the recruitment process. Shared Services would progress administrative steps such as updating the recruitment tracking system ("Oleo" system) and sending out rejection letters if a candidate's application was not to be progressed. Shared Services did so in accordance with the parameters in the Service Definition Document, whereby MPS had determined when a candidate should be progressed and when he or she should not.
27. Clause 27 of the Call-off Order [233] provided that Shared Services was, in performing the recruitment services, acting as a facilitator of recruitment activities, but was not making any final employment decisions.
28. Shared Services, in turn, had a Master Services Agreement with Optima (pages 283 – 310), for Optima to provide the services set out at Schedule 1, Part B of that contract: “to deliver the medical assessment component of the pre-placement screening service” which was “part of the Client’s [the Met] recruitment process” (page 296).
29. The medical screening services for specialist roles were set out at Table 1. An applicant’s mental health was screened as part of the health questionnaire by Optima. Optima Health were required to “appropriately assess and manage applicants who have been referred by the standard pre-placement check process to provide SSCL [Shared Services] with a Medical outcome” (page 296). Schedule 1, Part B of the sub-contract agreement stated that this was to be: “in line with police regulations and the requirements of the Client [the Met]” and that “the police regulations...impose a number of constraints on service delivery and processes”. Further, it required that Optima Health’s “processes and operating model shall comply with all police regulations and national guidance” (page 296).
30. The contract stated that Optima was “an independent contractor and that neither the Subcontractor [Optima Health] nor any consultant is a partner, agent, employee, or principal of SSCL or the client [the MPS]”.
31. The parties’ administrative responsibilities were set out at Table 3 (page 299), this stated that Optima Health recorded medical outcomes and Shared Services issued rejection letters.
32. In this case, the Claimant successfully undertook all stages of the process including Day One and was then sent an "Occupational Health Recruitment Questionnaire" (OH questionnaire) to complete.

33. On or about 17 August 2019, the Claimant attended a medical assessment day and submitted his completed OH questionnaire dated 29 July 2019. In it, he confirmed that he did not have a health condition or disability that might impair his ability to undertake effectively the duties of the position [101]. However, he declared that in the past he had experienced "anxiety and stress". [107]
34. On 29 July 2019 the Claimant's GP, Dr. Daniel Brown, in response to the section of the questionnaire asking that he confirm that "the information disclosed by the applicant within this form is accurate and in line with the health information I know to be current", had answered "No". Dr. Brown stated on the form that the Claimant was "diagnosed with psychosis in 2015 and disengaged from psychiatric services". [108].
35. On or about 17 August 2019 the Claimant also completed a Medical Recruitment P.H. Questionnaire in which he disclosed that he suffered with depression and anxiety between 2014 and 2016 [114] but stated that he had "fully recovered". [116].
36. Dr. Mary Sherry works as a consultant clinician for Optima. Dr Sherry confirmed in evidence to the Tribunal that she decided that the Claimant was a medical "fail". Dr Sherry explained that this was a decision that the Claimant was medically unfit for the role of a Police Constable.
37. On or about 21 September 2019 Dr. Sherry telephoned the Claimant and informed him his application to the MPS would not be continued.
38. Ms Roche, Head of Assessment Delivery for Shared Services confirmed that, on Day Two of the assessment day, a candidate would have a medical screen and biometric testing, and if the candidate failed any of these, they would automatically fail the assessment.
39. Ms Roche told the Tribunal that, once a candidate was assessed as medically unfit, the recruitment system would be updated with a "medical fail" and Shared Services would issue an email to the candidate confirming that they had failed the assessment. She said that and "entry level administrator" would send that out that email.
40. Mr Walsh, the MPS' witness, confirmed that a medical decision to fail and reject the application would, indeed, be made by Optima. He said, at paragraph 2.6 of his witness statement, "In some cases, where additional information and/or evidence is required, the candidate may be contacted directly by the First Respondent's medical team by telephone and advised of their decision. During these conversations, the candidates are informed that the decision to reject their application is based on the evidence presently available to the First Respondent and that they would like the candidate to provide further medical information so that the candidate's application to join the Second Respondent as a PC can be given further consideration."
41. Mr Zaman received an email from Shared Services, at page 128, on 23 September 2019, confirming that it was not possible to progress his application

following completion of pre-employment checks. This email also explained that he may appeal.

42. From the documents, and the evidence, therefore, Dr Sherry's decision to medically fail the Claimant was entered into Shared Services' computer records and the Claimant's application was automatically rejected as a result.
43. On or about 29.10.19, the Claimant submitted his Recruitment Process Appeal Form [141] along with a specialist report by a consultant psychiatrist Dr. Richard Duffett [133 – 135]. The Claimant appealed the decision to reject his application on medical grounds and stated that he has "no current mental health issues...it's a past problem..." [144].
44. Dr Greg Irons, Chief Medical Officer for the First Respondent dealt with the appeal and he referred the Claimant to Dr David Price, Consultant Psychiatrist for the First Respondent, who met the Claimant on 8.11.19 and prepared a report dated 12.11.19 [152 – 155]. This report expressed significant concerns about the Claimant undertaking the role of a Police Officer.
45. Thereafter, Dr. Irons rejected the Claimant's appeal for the reasons he gave at GI(11) and the Claimant was then emailed on or about 22 November 2019 by Shared Services and told that "Your grounds of appeal have been considered against our appeal criteria and we regret to confirm to you that our original position in respect of your application stands, meaning we cannot progress your application for this position further." [160].
46. Dr Irons told the Tribunal that he was asked to give his medical opinion. He confirmed that he would not expect that anyone else would override that medical opinion.
47. Ms Roche said that, at the relevant time, candidates could appeal on two grounds, "security vetting" and "medical". Where the appeal was on the basis of security vetting, the appeal would be referred to MPS for review. However, this was not the standard procedure when appeals were made on the basis of a medical decision. She said, "At the time the medical fail automatically led to a rejection."
48. Mr Walsh also said, in his witness statement at paragraphs 2.9 and 2.10, "Following review of the candidate and their papers, the psychiatrist will produce a report outlining their findings. The CMO will then consider all of the evidence, including the psychiatrist's report, and determine whether or not the candidate can be deemed medically fit for the PC role. The First Respondent subsequently informs the Third Respondent of their decision and the Third Respondent formally confirms the outcome of the appeal to the candidate in writing.... I was not involved with the Claimant's application or appeal, nor was any other representative of the Second Respondent. Accordingly, the Second Respondent was not, at any point during the recruitment process, aware of the Claimant's past health issues."
49. Once more, on the documents and the oral evidence, pursuant to the processes adopted by all 3 Respondents at the time, Dr Irons' decision to reject the

Claimant's appeal automatically led to the Claimant's application being rejected by Shared Services and, therefore, the Claimant's recruitment application to the MPS coming to an end.

Relevant Law

50. Sections 109 and 110 Equality Act 2010 provide

“109 Liability of employers and principals (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval. (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A— (a)from doing that thing, or (b)from doing anything of that description. [...]

110 Liability of employees and agents (1) A person (A) contravenes this section if— (a) A is an employee or agent, (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).[...]

51. The concept of agency is a common law concept. The case law regards Bowstead and Reynolds on Agency as the definitive work on agency. The definition at paragraph 01-001 of Bowstead is cited in the case law. The current wording of paragraph 01-001 (21st edition published in 2017, updated by supplement in 2019) reads: (1)Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party. (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties. (3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority. (4)A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.

52. Regarding contractual provisions regarding the existence of an agency relationship or otherwise, the authors of Bowstead & Reynolds observe, at §2-031:

“The substance of the matter is more important than the form: a contract describing the parties as principal and agent is not conclusive that they are such, and conversely there may be an agency relationship though the agreement creating it purports to exclude the possibility. It will be rare, however, that it would be appropriate to ignore an express denial of agency, at least outside a statutory or regulatory context, since agency is in general a voluntary relationship”.

53. The authors of *Bowstead & Reynolds* also state at §1-047, “Sometimes a person may be asked to undertake a specific task on behalf of a principal under close direction of the principal and sometimes in the principal’s presence. The task may be no more than to deliver a document, or orally communicate the principal’s decision, when delivery or communication, as the case may be, is likely to change the principal’s legal position. Such a person may be called a nuntius, or messenger. The term is not, however, one of art, and there are various other cognates, such as amanuensis, functionary, ministerial agent, and conduit, depending on the task...It may be argued that a person performing such tasks is not an agent at all, not least because in the absence of discretion there will be limited place for the application of fiduciary duties”.
54. In *Yearwood v Commissioner for Police for the Metropolis* [2004] ICR 1660 and *Kemeh v Ministry of Defence* [2014] ICR 625 the EAT and Court of Appeal, respectively, confirmed that an “agent” for the purposes of the Equality Act 2010 was an “agent” at common law.
55. *Kemeh v Ministry of Defence* [2014] ICR 625 concerned the interpretation of s32 *Race Relations Act 1976*, the predecessor provision to 109 *EqA*. There was no equivalent in s 32(2) to the phrase in s109 sub-section (1) 'whether or not it was done with the employer's knowledge or approval'. However Elias LJ, who delivered the leading judgment, said, at paras 11–12 (p 379):'11. Read literally, subsection (2) might suggest that the principal must authorise the act of discrimination itself before liability arises. But I agree with the EAT in *Lana v Positive Action in Training (Housing) Ltd* [2001] IRLR 501 paragraph 32 (Mr Recorder Langstaff presiding) that this would virtually render the provision a dead letter. In my judgment, Parliament must have intended that the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do. It is a moot point whether the common law would in any event impose liability in these circumstances. The scope of the principal's liability for an agent at common law is not entirely clear, although it seems likely that he will be liable for certain tortious acts of the agent, such as misrepresentations, provided they are sufficiently closely related to the agent's actual or apparent authority: see *Bowstead and Reynolds on Agency*, 19th edn, para. 8–182. Whether racial abuse would fall within that principle is problematic, but s.32(2) removes the uncertainty which might otherwise exist.”
56. In *Kemeh*, while Elias LJ confirmed that the common law definition of agency applies in this context, at [34] he also said that the concept of agency at common law "is not one which can be readily encapsulated in a simple definition. As the editors of *Bowstead and Reynolds* point out, 'no one has the correct use of this or any term'. The requirement that an agent must have power to affect the

principal's legal relations with third parties is not part of the essential definition of agency.”

57. In *Kemeh*, there had been argument about two competing concepts of agency. Elias LJ said, “Even in the so-called 'general concept of agency' advanced in *Yearwood*, it would be necessary to show that a person (the agent) is acting on behalf of another (the principal) and with that principal's authority. Once it is recognised that the legal concept does not necessarily involve an obligation to affect the legal relations with third parties, I doubt whether the concepts are materially different.”
58. In *Unite the Union v Nailard* [2019] ICR 28, CA, Underhill LJ said that, in *Kemeh*, Elias LJ had stated that the effect of what is now s 109(2) is that 'the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do'.

Discussion and Decision

59. SSCL entered into a call-off order with MPS (Contract Reference Number: SS314164) (the "Call-Off Order") which dealt specifically with the services to be provided to MPS. Under this Call-Off order, Shared Services was responsible for facilitating and running the assessment centres and generally managing the stages of the recruitment process. Shared Services would progress administrative steps such as updating the recruitment tracking system ("Oleo" system) and sending out rejection letters if a candidate's application was not to be progressed.
60. On the facts, the MPS contracted out the conduct of many of its recruitment processes to Shared Services. The MPS specified the recruitment processes to be followed.
61. Shared Services, in turn, had a Master Services Agreement with Optima (pages 283 – 310), for Optima to provide the services set out at Schedule 1, Part B of that contract: “to deliver the medical assessment component of the pre-placement screening service” which was “part of the Client’s [the Met] recruitment process” (page 296).
62. Accordingly, Shared Services engaged Optima to carry out the medical assessment part of the MPS’ recruitment process.
63. The MPS was not involved in the medical assessment, although it required that decisions were taken in accordance with the Home Office circular 59/2004 [218-221].
64. While Clause 27 of the Call-off Order agreement [233] between MPS and Shared Services provided that Shared Services would not make any decision regarding employment/recruitment, in fact, at the time, MPS did not reserve, or exercise, any independent review of the decision regarding medical fitness. On the facts, MPS did authorize Shared Services to make these final decisions on medical fitness. Shared Services was not simply a “messenger”.

65. If an MO engaged by Optima decided that a candidate failed the medical assessment, this automatically led to the candidate's application to MPS being rejected. The rejection was an administrative step.
66. On the facts, the MPS, authorized Shared Services to conduct its recruitment process, including carrying out the medical assessment, which determined whether an application was rejected. In turn, Shared Services authorized Optima to carry out the medical assessment on its behalf. Neither Shared Services nor Optima exercised any independent scrutiny of Optima's decision. The medical assessment was definitive – if the Optima doctors failed a candidate on medical grounds, this automatically led to Shared Services rejecting the candidate's application to join the MPS. In doing so, Shared Services were carrying out functions which the MPS authorized it to carry out.
67. On the facts in this case also, Drs Sherry and Irons of Optima made the decision to reject the Claimant's application on medical grounds. Their decision automatically led to the Claimant's application being rejected. Optima were authorized to do this by Shared Services, which was authorised, in turn, by MPS, to make the decision about whether the Claimant's application was accepted or rejected on medical grounds.
68. Optima were agents of Shared Services and subagents of the MPS within the meaning set out in *Kemeh v Ministry of Defence* [2014] ICR 625 and *Unite the Union v Nailard* [2019] ICR 28, CA. If they discriminated in the course of those functions, then they were acting as agents for Shared Services, who were acting as agents for MPS.
69. All the Respondents were potentially liable as principals or agents in respect of the decision to reject the Claimant's application, if there was any discrimination in that decision.

Employment Judge **Brown**

Date: 6 October 2020

JUDGMENT AND REASONS SENT TO THE
PARTIES ON

07/10/2020

FOR THE TRIBUNAL OFFICE