IN THE INDUSTRIAL DISPUTES TRIBUNAL OF THE
SOVEREIGN BASE AREAS
OF AKROTIRI AND DHEKELIA

SITTING AT EPISKOPI

Case No: 1 and 2 / 2016

Coram: The Hon. Mr Justice R G Chapple, Senior Judge, Chairman

Ms. Lena Panayiotou, Member of the Panel

Mr. Andreas Konstantinou, Member of the Panel

CONSTANTINOS PETROU
Claimant 1

and

MUSTAFA KAMAL
Claimant 2

- v -

THE ADMINISTRATOR OF THE
SOVEREIGN BASE AREAS

Respondent

Mr Robertos Vrahimis for the Claimants
Mr Michael Hadjiconstantas for the Respondent

12 September 2016

DECISION

I. The 1st claimant, Constantinos Petrou, was appointed a police officer of the
Sovereign Base Area (“SBA”) Police on 13th May 1996; he was promoted to the
rank of police Sergeant on 2\textsuperscript{nd} August 2003 and to the rank of Inspector on 1\textsuperscript{st} August 2007. The 2\textsuperscript{nd} claimant, Mustafa Kamal, joined the SBA Police as a police constable on 22\textsuperscript{nd} July 1991; he was promoted to the rank of police Sergeant on 1\textsuperscript{st} January 2001 and to the rank of Inspector on 1\textsuperscript{st} December 2007.

2. By an internal loose minute dated 15\textsuperscript{th} May 2014, applications were invited from Inspectors of at least two years’ seniority for promotion to the rank of Chief Inspector. The loose minute made no mention of any terms or conditions of appointment on promotion, nor of the salary that would be paid to the successful applicants.

3. The remuneration of police officers is by way of being positioned on one of a number of pay scales, according to rank and seniority – the officer then moves up the pay scale, salary being increased by specified annual increments, until the officer reaches the top of that scale (see Police and Prison Officer (General) Regulations 2007). A copy of the pay scales is the first exhibit to Mr Allison’s affidavit. The provisions for calculating pay on promotion are to be found in General Orders, Chapter 2, Paragraph 21. A Civilian Pay and Personnel Instruction (“CPPI”) explaining how pay would be calculated on substantive promotion was released on 18\textsuperscript{th} February 2010. It provided that:

“the starting salary for employees on substantive promotion will be the more favourable of the following options:

- the first step (minimum) of the new pay scale (incremental date then being the date of promotion) or
- placed on the pay point of the new pay scale that is equal to the previous salary or assimilated to the next highest and then awarded one extra increment (incremental date then remain the same in both scenarios)

Where an individual was on the maximum of their pay scale for a year or more, they will be awarded two extra increments in their new pay scale…..”
4. Both Claimants were successful in their applications; both were appointed and started working as Chief Inspectors on 7th July 2014. It is clear that both Claimants expected their pay on promotion to be calculated by reference to pay scales. However, it is agreed by all that simply to apply the CPPI or otherwise the general provisions would be unfair and unjust, for this reason: as Inspectors, the Claimants received an additional sum of €9,316 per annum by way of allowances (a package of compensatory payments, primarily to reflect the hardship of shift-working). That allowance is not payable to Chief Inspectors and above. If the regulations were strictly applied, the Claimants would end up with less on promotion to Chief Inspector than they had been receiving as Inspectors. Accordingly, there began a series of proposals on behalf of the Chief Constable and counter-proposals by the Claimants as to the remuneration that would be paid in their new rank. Mr Allison, acting head of the Locally Employed Human Resources Team initially suggested that the Claimants be placed on the appropriate scale (as per the regulations) but with an additional “mark time” payment of €9,316 per annum. That was, understandably, not attractive to the Claimants: there was then a pay freeze in place – it was likely to take many years for “mark time” pay to be eroded, which would adversely affect their pension entitlement.

5. The claimants in correspondence cited the example of promotions to the rank of Chief Inspector in 2005 when those successful in that round of promotions were placed initially on scale A11, increment 11, moving the following year to scale A12, increment 7 and thereafter moving up the scale by annual increments.

6. Following a meeting between the Claimants, the Chief Constable and Mr Allison on 17th October 2014, Mr Allison (his email dated 23rd October) offered to place both Claimants on scale A11, increment 7. That offer was rejected by the Claimants who, on 30th October, indicated that they would be prepared to accept a starting salary on scale A11, point 8; this email was sent by Chief Inspector Petrou, but written on behalf of both Claimants (“myself and Kemal had a chat about our pay and conditions and I am informing you we will both of us be happy to accept pay scale A11, increment 8”). Mr Allison and the Chief Constable, by letters to the Claimants dated 19th December agreed with that proposal. That salary was then paid monthly, back-dated to their date of promotion in July.
7. The Claimants assert that there was a further element to the agreement struck between the parties – that the Claimants would not be subjected to any reduction in pay by reason of the austerity measures that were to be introduced at some stage in the future. The Respondent denies that this formed any part of their agreement – and indeed the Claimants’ pay, along with all other Crown employees, was reduced when the Crown Employees (Pay and Allowances) Ordinance 2015 came into force on 1st September 2015. It was that reduction, it seems clear, that was the catalyst for these claims to be filed, on 27th January 2016.

8. In short summary, Mr Vrahimis puts the claim in this way: that the claimants proposed and agreed, albeit reluctantly, to remuneration starting on scale A11, point 8 (a lower starting point than their colleagues promoted in 2005) because of the additional agreed protection from the forthcoming austerity measures. The Respondent then, it is argued, acted in breach of that agreement by implementing the Crown Employees (Pay and Allowances) Ordinance 2015, failing to protect them, by one means or another, from the effect of that Ordinance. This, the Claimants’ argument continues, allows the December 2014 agreement effectively to be re-opened. That agreement, it is said, was not reached fairly, inasmuch as the parties were not in equal bargaining positions, the Claimants felt intimidated and under an obligation to agree. They add that they were discriminated against because they were not treated in the same way as those promoted to the rank of Chief Inspector in 2005. An additional claim is advanced on behalf of Chief Inspector Kemal, that he was subjected to further discrimination since his pay increase on promotion was less than that resulting to Chief Inspector Petrou. Albeit that they were paid the same on promotion, prior to promotion Chief Inspector Kemal was earning more than Chief Inspector Petrou by reason of his greater seniority. It is pointed out that Chief Inspector Petrou is a Greek Cypriot Christian and Chief Inspector Kemal a Turkish Cypriot Muslim. At the conclusion of Mr Vrahimis’ oral submissions, it is right to note, we were told that Chief Inspector Kemal simply “wondered” whether this may account for the reduced pay increase.

9. The Claimants seek declarations that they have been discriminated against and that their placement on scale A11 increment 8 was “illegal.” Alternatively, they seek a declaration that they were protected from austerity measures and as a
result, the reduction of pay imposed upon them was unlawful. They also seek consequential awards of damages.

10. The Respondent defends the claims both on the facts and the merits but also submits that this Tribunal has no jurisdiction to hear or adjudicate upon these claims, save for any discrimination claim brought under the Employment (Equality) Ordinance 2013 – and as to that, submits that no cause of action has been raised, either on the pleadings or on the affidavit evidence served.

11. It has pragmatically and sensibly been agreed between the parties that we should decide as a preliminary point whether this Tribunal has jurisdiction to hear these claims. If it does not, that of course is the end of the case; if it does, we will then proceed to a full hearing on the merits. We are grateful to Mr Vrahimis and to Mr Hadjiconstantas for the way in which they have assisted the Tribunal in the presentation of their respective cases. We have the advantage of full and helpful skeleton arguments from the advocates, comprehensive affidavits from both Claimants and from Mr Allison and, on Thursday and Friday last week, oral submissions from both advocates.

12. No useful purpose would be served by lengthy repetition of that which is contained in the respective skeleton arguments. The Respondents argue that the jurisdiction of the Industrial Disputes Tribunal is clearly and unambiguously set out in section 16(1) of the Annual Holidays with Pay Ordinance 1973, the Ordinance that created it. The only industrial disputes justiciable in the Industrial Disputes Tribunal are:
   (a) those arising under the Annual Holidays with Pay Ordinance 1973
   (b) those arising under any other Ordinance which specifically gives jurisdiction to the Tribunal and
   (c) those referred to it by the Administrator.

13. With the exception of any claim for discrimination, the Respondent argues, these claims do not satisfy any of the qualifying criteria and thus this Tribunal has no jurisdiction. As Mr Hadjiconstantas expressed it, the case does not pass through any of those “gateways.” As to the claim for discrimination, on the face of it, the Employment (Equality) Ordinance 2013 does confer jurisdiction but the papers do not disclose any arguable case that any discrimination was because of a protected characteristic – none whatever in respect of the 2005 Chief Inspectors and nothing beyond Chief Inspector Kemal’s “wondering” as to the reduced
increase in pay on promotion compared to Chief Inspector Petrou. Accordingly, the Respondent says, that part of the claim should be struck out.

14. The Claimants submit that there is clear jurisdiction. One need look no further, argues Mr Vrahimis, than the definition of “industrial dispute” contained within section 2 of the Annual Holidays with Pay Ordinance. An industrial dispute is there defined as:

“any dispute between employers and employees or between employees and employees, connected with the employment or non employment, or the terms of the employment or with the conditions of labour, of any persons, whether in the service of the employers with whom the dispute has arisen or not.”

15. That is, says Mr Vrahimis, a very wide definition and, to quote paragraph 1.3.2 of his skeleton argument, “seems to bring under the ambit of IDT jurisdiction “any industrial dispute” i.e. all claims that involve “employment” whether these claims involve disputes between employers and their employees or between themselves. These disputes may concern any matter of employment whether that involves with terms and conditions of employment. It even encompasses claims of non-employment by claimants that may believe that the employer has not hired them for illegal reasons.”

16. Without prejudice to the generality of that submission, the claimants also say that the Employment Rights (Particulars of Employment) Ordinance 2001 gives jurisdiction – it refers (section 9 of the Ordinance) any dispute arising from it for resolution by the Industrial Disputes Tribunal. Further, any claim for discrimination is referred to the Tribunal by the provisions of the Employment (Equality) Ordinance.

17. As has rightly been said, the Industrial Disputes Tribunal is a creature of statute (or in this jurisdiction, ordinance). It has no inherent or “free-standing” jurisdiction whatever. Such power and jurisdiction as it has derives only from the Ordinance that created it, subsequent Ordinances which refer disputes to it and referral by the Administrator of any particular case. The jurisdiction of the Tribunal is to be found in section 16(1) of the creating Ordinance, as follows:

“There shall be established an Industrial Disputes Tribunal which shall have exclusive jurisdiction to consider and determine the following industrial disputes:-
(a) any industrial disputes, including any ancillary or incidental matter thereto, arising out of the operation of this Ordinance or any Regulations or Rules made thereunder;

(b) any industrial disputes, including any ancillary or incidental matter thereto, which may be referred to the Tribunal under the provisions of any other Ordinance or Regulations made hereunder; and

(c) any industrial disputes which may be referred to the Tribunal by the Administrator, whether with the joint consent of both parties or under any collective agreement or settlement in force concerning the determination of industrial disputes by arbitration."

18. There is, it seems to us, much to be said for extending the jurisdiction of the Industrial Disputes Tribunal to cover all industrial disputes, without qualification, as defined in section 2 of the Ordinance. However, that is, emphatically, not what the Ordinance says. It does, whether or not for good reason, contain qualifications, which we should not and cannot, as a matter of law, ignore. The words of section 16 are plain, straightforward and unambiguous. There is no room for doubt or alternative interpretation: the Industrial Disputes Tribunal has jurisdiction only if the case involves an industrial dispute (as defined by the Ordinance) AND that dispute arises from (a) the creating Ordinance, (b) any other ordinance which in terms endows the Tribunal with jurisdiction or (c) the Administrator refers the specific dispute for resolution by the Tribunal. As Lord Reid observed in Pinner -v- Everett [1969] 1 WLR 1266, “In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.”

19. Mr Vrahimis submits that it cannot have been the intention of the legislature to set up a new court simply to deal with disputes about holiday pay, therefore it is proper to look for some other meaning of what on the face of things appear to be plain words. The problem with that argument – and in our judgment it is fatal to the argument – is that it is abundantly clear from the words used that the legislature was not establishing a new tribunal to deal only with holiday pay
disputes. It is clear from section 16(b) that it was envisaged that (as has been the fact) the work of this court would grow as subsequent ordinances have given it further jurisdiction, most notably perhaps the Employment (Termination) Ordinance 2010 and the Employment (Discrimination) Ordinance 2013.

20. Equally fatal to the approach for which Mr Vrahimis contends is this: had the intention of the legislator been to give the Industrial Tribunal jurisdiction to deal with all industrial disputes, it would have been simplicity itself to have said so. Section 16 would then have consisted of one short and concise sentence. There would have been no need whatever for paragraphs (b) or (c). Why would a power be given to the Administrator to refer an industrial dispute over which, where Mr Vrahimis right, it already had jurisdiction? Mr Vrahimis’ argument confuses a definition with jurisdiction.

21. If this Tribunal has jurisdiction in this case, it can only come from section 16(b) of the creating ordinance since (i) this is not a dispute about holiday pay and (ii) the Administrator has not referred this case to us for resolution. Mr Vrahimis argues that the Employment Rights (Particulars of Employment) Ordinance 2001 gives this Tribunal jurisdiction, section 9 of which provides as follows: “the competent court for the resolution of any civil dispute arising under the provisions of this Ordinance shall be the Industrial Disputes Tribunal…” If then this case can be said to be an industrial dispute arising from the terms of that ordinance it can be determined by this Tribunal. We should then look at what rights and duties are conferred and imposed by this ordinance. It places an obligation on an employer to provide, within one month of the commencement of employment, a written statement of the particulars of that employment and specifies that no contract term shall be less favourable to the employee than is provided by any ordinance, regulation or order (section 4(3)).

22. The provision of written particulars of employment can have no relevance here – it applies only at the commencement of employment, which, for both Claimants, was many years ago. It does not apply on promotion. As to section 4(3), Mr Vrahimis sought to argue, as we understand it, that the terms of the promotions were less favourable than the provisions of the Property Ordinance and/or the Human Rights Ordinance (relying on property rights provided by the European Convention of Human Rights), the continued receipt of wages being said to be “property.” Suffice it to say that inventive though this argument is, it bears no
close analysis, stretching the meaning and sense of section 4(3) well beyond breaking point.

23. We turn to look at the Employment (Equality) Ordinance which protects employees from discrimination, harassment or less favourable treatment than others. Complaints about discrimination, harassment or less favourable treatment under the Ordinance are within the exclusive jurisdiction of this Tribunal (section 19 of that ordinance). We remind ourselves that the Claimants allege that they have been discriminated against when their position is compared with those promoted to the rank of Chief Inspector in 2005, since they ended up on a lower pay scale. However, discrimination is only actionable if it can properly be said that it is because of a protected characteristic (that is to say, race, age, religion or belief or sexual orientation). Mr Vrahimis rightly concedes that any potential discrimination as a result of treating the claimants differently from those promoted in 2005 cannot realistically or arguably be said to be due to a protected characteristic. But he argues that any discrimination (“discrimination per se” as he puts it in his skeleton argument) is actionable, without the “protected characteristic” requirement, returning to section 4(3) of the Employment Rights (Particulars of Employment) Ordinance 2001 and the general observations made in the judgements of Lord Nicholls and Baroness Hale in Ghaidan –v- Godin-Mendoza [2004] UKHL 30. As we observed when Mr Vrahimis cited this authority, we of course align ourselves with all that was said about the “insidious practice” of discrimination. In passing we note that this case involved discrimination on the ground of sexual orientation – a protected characteristic. We are at a loss to understand how section 4(3) of the Employment Rights Ordinance (or any other ordinance) can give rise to a general right of action for any different treatment regardless of whether it is in the context of a protected characteristic. The only contending ordinance is the Equal Rights Ordinance and that is restricted to discrimination, harassment or less fair treatment by reference to a protected characteristic.

24. We are then driven to agree with the Respondent that there is no arguable or realistically sustainable claim for discrimination when looking at the 2005 promotions as against these Claimants. There remains the suggestion, not made in the claim form or subsequent pleadings, but surfacing for the first time in Mr Vrahimis’ skeleton argument, that Chief Inspector Kamal has been discriminated
against in that he received the same pay on promotion as Chief Inspector Petrou. He had more seniority in rank of Inspector and thus was positioned higher on the incremental scale and paid more Inspector Petrou, yet on promotion, both were put on the same salary scale and incremental position. He therefore received less of a pay increase on promotion than Chief Inspector Petrou. The alleged unfair treatment was, it is said, due to ethnic or religious differences, as outlined earlier in this judgment. However, as we have noted earlier, the case here amounts to nothing more than “wondering” whether it was those differences that were the reason for the difference. Wondering is not a sufficient foundation upon which to embark upon or pursue the case further. Wondering whether something may be so is never a sufficient basis upon which to launch or continue litigation. For what it is worth, the correspondence seems to us to provide the obvious answer to the reason why both Claimants were treated in the same way – that is what the claimants asked for and agreed to.

25. Thus we uphold the submissions made by the Respondent that this tribunal has no jurisdiction to hear these claims and that the claim for discrimination should be struck out as disclosing no arguable cause of action. Accordingly these claims are dismissed.

26. We would add that whilst we have no hesitation in dismissing these claims, we have found no satisfaction in doing so. At first blush, anyone in the position of these Claimants, aggrieved at the way they feel they have been treated, would altogether reasonably think that the court to which to direct themselves for resolution of the dispute would be the Industrial Disputes Tribunal, the clue being contained within the title. Logic and common sense would surely endorse that view. We would very much have liked to resolve this dispute, but try as we have, we cannot on any interpretation find any jurisdiction to do so. It is a source of considerable regret to us that the legislation as it presently stands prevents us from doing justice between the parties, giving us, as it might be, no room to manoeuvre. At an earlier stage in this course of this case, the Administrator was asked to give this Tribunal jurisdiction (a referral under section 16(1)(c). He declined to do so. That seems to us a shame – surely it would have been in the best interests of all that matters were finally resolved between the parties, rather than the unsatisfactory outcome that has been thrust upon us and the parties?
27. Mr Hadjiconstantas drew attention to an article (Flag I of his bundle) which spoke of the frustration felt by English Industrial Tribunals, prior to rectifying legislation in 1994, that they were then unable to deal with breach of contract claims, which were justiciable only in the County and High Courts. He observed that we, in this jurisdiction, remain in that frustrating position. Now, both in England and in the Republic of Cyprus, tribunals can deal with, for all intents and purposes, all disputes pertaining to employment. The SBA Industrial Disputes Tribunal thus finds itself out on a limb, reflecting neither Republic of Cyprus nor English law and unable to deliver justice in cases such as this. As matters presently stand, employees may be faced with the prospect of launching actions in two courts to deal with the same factual situation – on any showing a needless waste of money and resources. We would urge that consideration be given to enacting legislation to extend the jurisdiction of the Industrial Disputes Tribunal so that it can do that which its title suggests it should do. The legislature should have more faith than it apparently has in the Tribunal it created.

The Hon. Mr Justice R G Chairman,
Senior Judge

Ms. Lena Panayiotou
Member of the Panel

Mr Andreas Konstantinou
Member of the Panel