



# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Ms S Okafor

AND

Nursing and Midwifery Council

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT PRELIMINARY HEARING

HELD AT: London Central

ON: 8 February 2017

EMPLOYMENT JUDGE: Miss A M Lewzey

### *Representation*

For Claimant: In Person

For Respondent: Mr D Northall of Counsel

### RESERVED JUDGMENT

The judgment of the Tribunal is that:

- (i) The Claimant's application to postpone the hearing is refused.
- (ii) There is no jurisdiction for the Tribunal to determine the claims pursuant to section 120(7) Equality Act 2010.
- (iii) The claims are estopped by earlier High Court proceedings.
- (iv) The claims are out of time and it is not just and equitable for time to be extended to found jurisdiction.
- (v) In those circumstances, there is no jurisdiction for the Tribunal to determine the claims which are dismissed in their entirety.

## RESERVED REASONS

### Introduction

1 At the beginning of the hearing Ms Okafor indicated that she thought that there were further relevant documents. She referred to a key document being a judgment at a preliminary hearing in a claim that she brought in 2011 against the Local Supervisory Authority, which she tells me is the administrative arm of the Respondent, under case number 2202480/2011. She said that she was aware of another parallel case that was relevant because one of the key questions was whether the Respondent is a professional body. I advised Ms Okafor that a decision of another Employment Tribunal is not binding on me.

2 Ms Okafor had a large number of documents with her. I had a lengthy discussion with her about which of these documents she wished to refer to and arranged for copies of those that she selected to be made so they could be available for the hearing.

3 Ms Okafor explained that she was very content with the questions that were before the Tribunal at this preliminary hearing, but indicated that she might need time to collect her thoughts in order to respond. It was clear to me that Ms Okafor fully understood the issues before the Tribunal today and was very familiar with her own case.

4 I had before me a bundle of documents to which I refer by reference to the relevant page number.

### Application to Postpone

5 Ms Okafor applied for the preliminary hearing to be postponed on the grounds of firstly, her medical condition, and, secondly, her lack of representation.

6 I have questioned Ms Okafor about her health grounds. She has told me that she was in Nigeria from 30 December 2016 returning to this country on 4 February 2017. During her absence she became concerned about a return of her cancer condition. Upon her return she tells me that she contacted the Royal Marsden Hospital who told her that she would have to obtain a referral through her GP. She has not yet contacted her GP to make an appointment.

7 I accept her condition is potentially very serious, but she has demonstrated in the last hour that she is well able to concentrate and deal with the issues that are before me today and I have no medical evidence to say that she is unfit to attend today's hearing.

8 As far as the representation issue is concerned, Ms Okafor has had since 22 November 2016, the preliminary hearing for case management before Judge Snelson,

to arrange for representation. Indeed, she did not go to Nigeria until the 30 December 2016, so she had over one month in which to arrange representation. Should the claims proceed, it will be open to her to obtain representation for the balance of the proceedings.

9 In those circumstances I refuse the application to postpone this preliminary hearing.

**Preliminary Issues**

10 The issues for determination at this preliminary hearing are:

10.1 Whether the Tribunal’s jurisdiction has been ousted by virtue of section 120(7) Equality Act 2010.

10.2 Whether the complaints are estopped by the earlier High Court proceedings or, alternatively, are an abuse of process.

10.3 Whether the claims are out of time.

10.4 Whether the claims should be struck out as having no reasonable prospect of success.

**Submissions**

11 I have a written skeleton argument from Mr Northall on behalf of the Respondent which he has supplemented orally. Miss Okafor addressed me orally. I refer to the submissions, as appropriate in my conclusions.

**Jurisdiction: section 120(7) Equality Act 2010**

12 The Claimant makes claims of direct discrimination and victimisation on the grounds of disability. She has withdrawn her claims on that rely on race as a protected characteristic. The disability relied upon is cancer, which is deemed disability, which the Respondent accepts. There is also a claim for other payments which has not been particularised. The claim is against the Respondent as a qualifications body under section 53 of the Equality Act 2010.

13 Section 120 of the Equality Act 2010 provides:

“(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

- (a) a contravention of Part 5 (work);
- (b) a contravention of section 108, 111 or 112 that relates to Part 5.

.....

(7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.”

14 The Respondent is the statutory regulator established by The Nursing and Midwifery Order 2001. That order provides:

“29.....

(3) If, having considered an allegation, the Health Committee or the Conduct and Competence Committee, as the case may be, concludes that it is well founded, it shall proceed in accordance with the remaining provisions of this article.

.....

(5) Where a case does not fall within paragraph (4), the Committee shall—

(a) make an order directing the Registrar to strike the person concerned off the register (a “striking-off order”);

(b) make an order directing the Registrar to suspend the registration of the person concerned for a specified period which shall not exceed one year (a “suspension order”);

.....

(9) The person concerned may appeal to the appropriate court against an order made under paragraph (5) and article 38 shall apply to the appeal.

.....

### **38.— Appeals**

(1) An appeal from—

(a) any order or decision of the Health Committee or the Conduct and Competence Committee other than an interim order made under article 31, shall lie to the appropriate court; and

.....

(4) In this article “*the appropriate court*” means—

.....

(c) in any other case, the High Court of Justice in England and Wales.”

15 The only question for me in relation to this issue is whether the Claimant’s complaints were by virtue of an enactment subject to an appeal or proceedings in the nature of the of an appeal pursuant to section 120 Equality Act 2010. The Claimant was not an employee of the Respondent and therefore jurisdiction can only lie under section 53 Equality Act 2010 against the Respondent as a qualifying body. The jurisdiction is limited by section 120(7) which excludes jurisdiction where a complaint under section 53 relates to an act in respect of which an appeal or proceedings in the nature of an appeal could be brought under any enactment.

16 The Respondent’s conduct and competence committee was empowered by article 29 of The Nursing and Midwifery Ordered 2001 to consider and respond to allegation concerning the Claimant’s fitness to practice. The Claimant appealed to the High Court where the appeal was dismissed by Picken J (150-180) and subsequently to the Court of Appeal where Simon LJ refused leave to appeal (183).

17 I have been referred to the decision in **Michalak v The General Medical Council [2016] IRLR 458**. This case held that judicial review proceedings were not in the nature of an appeal within the meaning of section 120(7).

18 Since the Claimant's appeal against her suspension and striking off have already been determined by the High Court, there is no jurisdiction to consider the Claimant's claims for the Tribunal by virtue of the provisions of section 120(7) Equality Act 2010 and, accordingly, the claims are dismissed.

### **Estoppel/Abuse of Process**

19 The High Court determined the Claimant's appeal against the decision to remove her from the register. One of the Claimant's grounds of appeal to the High Court was that the panel discriminated against her on the grounds of disability. The decision of the High Court is lengthy and considered all of the 10 grounds of appeal that were relied on by the Claimant. The High Court found that the Respondent had not discriminated against the Claimant.

20 Mr Northall relies on the doctrine of res judicata and refers me to the two branches, namely, cause of action estoppel and issue estoppel. In this connection he refers to the description of both branches in the House of Lords in **Arnold v National Westminster Bank plc [1991] 2 AC 93**. Cause of action estoppel applies where a cause of action in the second action is identical to a cause of action in the first and issue estoppel arises where a particular issue in a cause of action has been litigated and decided already. Mr Northall also relies on the rule in **Henderson v Henderson** of abuse of process. This doctrine operates to prevent a claimant from pursuing complaints in a subsequent proceeding that could have been raised in earlier proceedings.

21 Mr Northall argues that the complaint in these proceedings was the decision to remove the Claimant from the register. The High Court found in the judgment of Picken J that there was nothing in this ground of appeal. Both the appeal to the High Court and the claim to this Tribunal refer to the Claimant's cancer as the disability and argue that the decision to strike off was discriminatory.

22 Ms Okafor opposes these arguments. She explained her claim in relation to the suspension and striking off and argued that she was victimised as a result of bringing a case against the Respondent through the local supervising authority.

23 I have considered this preliminary issue in the context of the two claims that have been identified. The claim of direct disability discrimination as set out in the particulars of claim is based on the suspension and striking off the register which, Ms Okafor alleges was on the grounds of her cancer. That is the claim that was before the High Court in the appeal against the decision of the Respondent. The claim is estopped on the grounds of cause of action estoppel and issue estoppel. In relation to the claim of victimisation, Ms Okafor has explained that the protected act is the earlier proceedings against the Local Supervising Authority. This is a matter that could have been addressed in the appeal before the High Court. It falls under the doctrine in **Henderson v Henderson..**

24 In these circumstances, it is my decision that the claims are estopped and/or an abuse of process and are, accordingly, dismissed.

### Time Limits

25 The third preliminary issue is whether the claims are out of time.

26 Section 123 Equality Act 2010 provides:

“(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

.....

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

27 Time runs from the date of the act complained of, namely the date of the relevant decision. It is important to distinguish between the alleged discriminatory decision and its effects..

28 It is for Ms Okafor to put forward a good reason for the delay in bringing the claim.

29 The decisions about which Ms Okafor complains are the decision to suspend her from the register on or about 30 September 2011 and the decision to strike her off the register on 23 July 2014. The claim was presented to the tribunal on 28 July 2016. It is substantially out of time. The only issue is whether time should be extended on the just and equitable grounds. Ms Okafor has not put forward any reason for the delay she argues that to dismiss without a hearing is a breach of her article 6 rights but puts forward no reason why she could not have presented her claim on a more timely basis. I do take into account the decision in **Robertson v Bexley Community Centre T/A Leisure Link [2003] IRLR 434** see a that an extension of time is the exception rather than the rule.

30 It is my decision that the claim is out of time, and it is not just and equitable for time to be extended and in those circumstances, there is no jurisdiction for the tribunal to consider it.

31 In relation to the claim for other payments, this is completely unparticularised. The Claimant’s statement of remedy dated 4 November 2016 seeks reinstatement on the register and compensation for loss of earnings. No other sums are claimed. The

claim for other moneys appears to be a claim for remedy in relation to the claims of direct discrimination and victimisation. There is no freestanding claim for other moneys.

32 In the light of my decisions, there is no need for me to consider whether to strike out the claim is on the merits. The claims are dismissed in their entirety.

**RESERVED JUDGMENT & REASONS**

Employment Judge Lewzey  
17 February 2017