



EMPLOYMENT TRIBUNALS

Claimant: Dr Saleem Althaf

Respondent: General Medical Council

HELD AT: Manchester

ON:

7 May 2019

23 March 2020 (In Chambers)

Employment Judge Holmes

REPRESENTATION:

Claimant: In Person

Respondent: Mr I Hare, Leading Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Tribunal has no jurisdiction under the Equality Act 2010 to determine the claimant's claims of race discrimination that he brings against the respondent, and the claims are struck out.
2. The Tribunal has no jurisdiction to determine any claims that the claimant brings against the respondent for detriment by reason of his having made any protected disclosure, and these claims too are struck out.
3. As no claims in respect of which the Tribunal has any jurisdiction remain, the claimant's claims are accordingly all struck out.

REASONS

1. The Tribunal convened to determine by way of preliminary hearing an application made by the respondent to strike out the claimant's claims against it.
2. The procedural history of the claims is that by a claim form accepted by this Tribunal on 1 March 2018 the claimant brought claims of race discrimination, and whistleblowing detriment against the respondent. By email of 1 March 2018 he stated that he wished to amend his ET1 form. He also explained that he had issued

another claim in the East London Employment Tribunal against Southend University Hospitals NHS Foundation Trust, and provided details. He had also made a claim against this respondent. He asked that the claim against this respondent be heard together at East London.

3. The claim in the East London Tribunal had been presented on 5 May 2017, under case no. 3200410/2017. The claimant made claims against three respondents, this respondent being the third.

4. On 7 August 2017 solicitors acting for the claimant in the East London claims wrote to the Tribunal withdrawing his claims against this (the third) respondent.

5. The respondent responded to these claims by an ET3 filed on 4 April 2018. In the particulars of the Response it is pleaded that the claimant had brought the same claims in the East London proceedings, which he had withdrawn, and these proceedings were thus an abuse of process. Secondly, it was pleaded that the claims were out of time. Further, it was pleaded that, as the claimant had a right of appeal against the respondent's decisions, the Tribunal's jurisdiction was excluded by the operation of s.120(7) of the Equality Act 2010. An application to have the claims struck out was intimated.

6. The claimant responded by email to the Tribunal of 24 April 2018, informing the Tribunal that he was having his case assessed by Medical Defence Shield, and objecting to any proposal to strike out.

7. On 1 June 2018 the Tribunal proposed to combine this claim with that proceeding before the East London Tribunal. Medical Defence Shield then did indeed come on record for the claimant, and by letter of that date objected to the proposed combination. By email of 6 June 2018 the respondent agreed with that objection.

8. This Tribunal accordingly, by letter of 18 June 2018, listed a preliminary hearing to determine whether the claim should be struck out as an abuse of process. It was directed that skeleton arguments were to be exchanged by 23 July 2018 for a hearing on 30 July 2018.

9. That date, however, was vacated, and re-listed for 7 December 2018. On 6 November 2018 Medical Defence Shield ceased to act for the claimant. On that date, however, the Tribunal could not hold the preliminary hearing due to lack of judicial resource. It was then re-listed, and this was the earliest date available.

10. The claimant attended in person, and the respondent was represented by Mr I Hare QC. Skeleton arguments had already been lodged, and the parties made their submissions. The claimant had sent to the Tribunal some documentation which was largely evidential. No evidence was heard.

11. The respondent, in the course of this hearing, having learnt that no dismissal judgment had ever been issued by the East London Tribunal in relation to the claimant's 2017 claims before it, did not pursue its application, in the alternative, for these claims to be struck out on the basis of *res judicata*.

12. Following the hearing, however, on 9 May 2019, a Note was received (which has been copied to the claimant) in which the respondent made further submissions in relation to this issue. Enquiries with the East London Tribunal had revealed that no dismissal judgment had been issued, and that its practice was not to do so, in breach, it is submitted, of the rules. The respondent therefore invited the East London Tribunal to issue a dismissal judgment now, and intended to renew its application on this basis once one was issued, and then make further, brief submissions.

13. For that reason, in part, this Tribunal awaited any such developments, and by letter of 26 September 2019 from the East London Employment Tribunal, and that Tribunal's judgment promulgated the same day, it became clear that the East London Tribunal did not dismiss the withdrawn the claims made in those proceedings against the respondent in these proceedings, namely the GMC.

14. Following that clarification, the Employment Judge sought clarification from the respondent as to the position in these proceedings. By email of 29 November 2019 the respondent's senior legal adviser confirmed that the respondent was relying now only upon the other grounds for striking out the claims as set out in its Skeleton and submissions in the hearing on 7 May 2019.

15. In these circumstances the position is precisely as it was at the hearing before this Tribunal on 7 May 2019, and the respondent does not (and cannot) pursue an order striking out the claims as *res judicata* following the withdrawal only of the same claims in the East London Tribunal.

16. Given the delay, the Tribunal wrote to the claimant to check whether he was still pursuing these claims, and he replied on 24 February 2020 that he was. He intimated that he would send a more detailed reply within the next 7 days, but he has not done so. There is, in fact, no need for him to do so, and he has already advanced his arguments in the hearing on 7 May 2019, based on the respondent's application as it then was, and which has now not changed.

17. The Tribunal was provided with a bundle by the respondent, in which the Skeleton arguments of both parties were included (pages 84 – 90 for the respondent, pages 91 – 96 for the claimant).

The background.

18. The claimant appeared before a Fitness to Practise Panel (abbreviated to "FTP" by the claimant, and "FPP" by the respondent; the Tribunal will use the latter) on 23 May 2013 to answer an allegation that his fitness to practise was impaired by reason of misconduct arising out of his treatment of three patients while employed as a middle grade locum doctor within the Accident & Emergency department of the Prince Charles Hospital in Merthyr Tydfil between August and November 2010. The FPP heard evidence over several days and concluded that the claimant's fitness to practise was impaired and imposed conditions on his registration for a period of nine months. Those conditions were reviewed by another FPP on 3 June 2014 which decided that, in light of the evidence of remediation and current practice provided by the claimant, the conditions could be lifted.

19. The claimant thereafter returned to work with the Trust which he was employed, and was subject to further appraisal for revalidation that is required of all doctors by the GMC every five years (see paras. 302 to 306 the judgement of the East London Employment Tribunal). Dr Rothnie of that Trust was its Responsible Officer for this process, him that the GMC's Revalidation Adviser wrote on 11 May 2017 confirming that the claimant had been informed that his license to practice would be withdrawn on 15 June 2017 following a recommendation made by Dr Rothnie. This document was in fact produced by the claimant.

20. The claims that the claimant makes in these proceedings are set out in his claim form , presented on 25 February 2018 (pages 56 to 70 of the bundle). The details of his claims are set out in box 8.2 of the claim form, where he says this:

"I am a medical doctor registered with the GMC.

The origin of the claim relates to the handling by the GMC of complaint against me in November 2010 and the subsequent fitness to practice proceedings lasting up to June 2014. The discriminatory/unfair processes could not be challenged at the time due to lack of venue and are being brought further to the direction of the Supreme Court in the case of Dr Eva Michalak in 2017.

Further aspects of the claim relates to the mishandling revalidation process initiated by my employer Southend University Hospital (claim ref. 3200410/2017 Mr S Althaf v Southend University Hospitals NHS Foundation Trust & Other previously listed and also Q665 – C0R4).

In summary, the GMC failed to follow proper procedures will handling my concerns expressed about my victimisation by my employer further to whistleblowing, unfairly handled the subsequent retaliatory referral by my employer and discriminated against me as a doctor of non-UK original/qualification in addition to fusing reasonable adjustments in relation to my health (diabetes/mental health).

The GMC further discriminated against me/was involved in the victimisation of me as a whistleblower due to actions they took in dealing with my revalidation and Licence to Practice. As a result of their actions in 2015 to 2017 I am no longer able to work in my medical career."

21. The claimant , by email of 1 March 2018 (not included in the bundle) stated an intention to amend his claim form , to make it explicit that some of the decisions/proceedings related to the handling of his revalidation appeal in October 2017 onwards , with the last event dated February 2018 . Further, although also not included in the bundle, the claimant , following service of the respondent's response (pages 71 to 81 of the bundle) , did send an email to the Tribunal on 24 April 2018, copied to the respondent, in which he made reference to his hope of representation, and to the claims that he had brought in the East London Tribunal, in which the GMC were also a respondent. He went on to say this:

"The claim covers the processes of the GMC which are not subject to statutory appeal, particularly in respect of whistleblowing victimisation and discrimination. This was not an option available to me until clarified by the Supreme Court. My internal

challenges the GMC have been dismissed by them as not against an appealable decision, without an opportunity for hearing.

The characterisation of my claim is an abuse of process as well as without substance, even before the detail has been considered is unfair.”

The Submissions.

Respondent’s submissions.

22. Given that there is a prepared Skeleton argument, it is not proposed to rehearse the submissions at length again here, and they will in any event become apparent during the ensuing discussion. In summary, however, the respondent’s application was based on three arguments. The first relates to the status of the respondent, and how it is not a body in respect of which the Tribunal has any jurisdiction to hear the claimant’s claims under the Equality Act 2010. The second related to the previous claim made by the claimant, which he withdrew and which, it is argued, precludes him from re-litigating this matter before this Tribunal. That, now, of course, is not pursued. The third is that the claims are out of time. It is logical to take them that order, and to consider the respondent’s and the claimant’s submissions in relation to each of them.

i)No jurisdiction – s.120(7) of the Equality Act 2010.

The Respondent’s submissions.

23. The respondent understands the claimant’s claims to relate to two slightly different proceedings by the GMC. The first is in relation to the initial fitness to practice proceedings, which ended in 2014, and the second was in relation to the revalidation process which ended in October 2017. The respondent’s arguments apply to both claims.

24. Starting with the status issue, Mr Hare took the Tribunal to the statutory regime under which the respondent was established, namely s.1 of the Medical Act 1983. Its regulatory functions include the supervision of Fitness to Practise, for which purpose the Fitness to Practise Panel (previously, now the Medical Practitioners Tribunal) was established to carry out and keep under review the licensing of medical practitioners to practise. Revalidation of licences to practise is part of this Panel or Tribunal’s work. This Tribunal was referred to the relevant regulations, the General Medical Council (Licence to Practise and Revalidation) Regulations 2012, under which doctors are subject to annual appraisal, which leads to the Responsible Officer making a recommendation as to whether a doctor should be revalidated, and have his or her licence to practise renewed. The GMC’s Registrar then has the power to withdraw a doctor’s licence to practise.

25. A statutory appeal against the Registrar’s decision is provided to a Registration Appeals Panel, and thence to the County Court, under s.29F and paragraph 8 of Schedule 3B to the Medical Act 1983.

26. The Tribunal was referred to s.53 of the Equality Act 2010, which refers to “qualifications bodies”. Mr Hare conceded that the GMC would fall within the remit of

this section, but for the exclusion provided for in s.120(7) (erroneously written as s.120(1) in Mr Hare's Skeleton) of the Equality Act 2010, which provides :

(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.

27. Mr Hare's submission is that as the claimant's claims arise out of the decision of the GMC (acting by its Assistant Registrar) to withdraw the claimant's licence to practise on 9 May 2017 , against which the claimant appealed under the relevant statutory provisions, which are s.29F of the Medical Act 1983, which provides that if a licensing authority decides to withdraw a licence to practise from a medical practitioner, the practitioner may appeal to the Registration Appeals Panel. That is, he submits, an appeal, or proceedings in the nature of an appeal, falling within s.120(7) of the Equality Act 2010.

28. In support of this contention Mr Hare cited **Khan v General Medical Council [1996] ICR 1032**, a judgment of the Court of Appeal, and **General Medical Council and ors. v Michalak [2017] UKSC 71**. The former considered the effect of similarly worded provisions excluding the jurisdiction of the Employment Tribunal in s.54(2) of the Race Relations Act 1976. The case related to the registration issues, and the GMC's role in the supervision of registration , in that instance, of Overseas Qualified Practitioners. A right of appeal against a decision of the GMC to impose limitations upon, or to refuse or withdraw , registration of an Overseas Qualified Practitioner was provided to a Review Board under s.29(1) of the Medical Act 1983. The Court of Appeal upheld a first instance Tribunal decision that such proceedings were "in the nature of an appeal" , and confirmed that this had the effect of ousting the Tribunal's jurisdiction.

29. **Michalak**, Mr Hare explained, whilst finding that the Employment Tribunal did have jurisdiction on the facts of the case before the Supreme Court, did not overrule **Khan**, in fact , it approved it. The difference in **Michalak** was that the claimant in that case did not have a statutory right of appeal. As set out in para. E of page 4197 of the WLR report of the judgment of Lord Kerr :

".. But neither this nor any other of the possible statutory avenues of appeal is relevant to the respondent's position. Her complaints do not relate to any action by the GMC as to her registration. Her series of claims of discrimination on the part of the GMC relate to the manner in which it pursued its fitness to practise application and its failure to investigate her complaints against other doctors in the trust where she had been employed. No statutory appeal is available to her to pursue those complaints."

30. The GMC's argument in **Michalak** was that the availability of judicial review to the claimant meant that there was an appeal process which fell within s.120(7), and hence the claims could not proceed before the Employment Tribunal. That argument failed, but **Khan** was cited, and not overruled. The distinction was that judicial review did not meet the statutory wording in s.120(7), as it is not a remedy afforded "by way of an enactment", and is not a full appeal. **Khan** accordingly remains good law, and should be applied.

31. Mr Hare stressed that whether the claimant exercised the right of appeal or not is irrelevant (though he did in respect of the withdrawal of his licence in 2017) it is the existence of the right which triggers the application of s.120(7).

Claimant's submissions.

32. In his written submissions the claimant initially sets out various matters relating to why he has brought the claims that he has, and the various difficulties that he has experienced in terms of his health, and obtaining representation. He argues that it would be an injustice to strike out his claims. Not being legally qualified, however, he feels unable to argue about matters of law.

33. He makes reference to the High Court proceedings in January 2012 in which he challenged the GMC's conduct of his case. It is unclear precisely what the claimant is referring to, but he clearly attempted some form of legal redress before the High Court in relation to the GMC's processes.

34. The claimant continues in his Skeleton Argument to set out the history of his involvement with the GMC, his appeal against the FTP verdict, and his withdrawal of that appeal. He goes on to refer to the GMC pursuing him for costs and putting him through bankruptcy proceedings in August 2014. He refers to his withdrawal of a "claim" against the GMC in May 2017, but it is unclear whether he is referring to the East London Employment Tribunal claims or some other proceedings. Given that solicitors acting for the claimant in the Employment Tribunal proceedings did indeed withdraw his claims against the GMC by letter of 7 August 2017 (page 49 of the bundle) in the same way this is what the claimant is referring to.

35. The claimant makes reference to the striking out of his appeal against the withdrawal of his license to practice, and claims that this is incorrect, as he had challenged the manner in which his license to practice was withdrawn, which he contends is based on flawed proceedings, discriminatory actions and the non-provision of reasonable adjustments. He contended that the GMC had acknowledged at various times in correspondence with a number of the challenges that he wished to bring were not open to statutory appeal or rectification.

36. He went on to express the hope that he could verbally explain more clearly in the hearing why his claims fell within the jurisdiction of the tribunal and should proceed to a full hearing.

37. The claimant continues by making complaint of the non-cooperation by the GMC since 2010, and its allegedly false contentions that documents did not exist, or subsequently found to have been destroyed.

38. He ended by contending that the GMC had not suffered any prejudice at this stage the claimant, and he asked to be allowed to provide an "amended version" of his claim, which the Tribunal takes to mean a more fully particularised version thereof.

39. The claimant argued to the contrary on the law as asserted by Mr Hare. He considered that he was in the same position as the doctor in ***Michalak***. He did not have any right of appeal against what he argues was a form of conspiracy or collusion between the respondent and officers of Southend University Hospitals NHS

Foundation Trust. He argued that he had no right of appeal against that, and so was like the claimant in *Michalak*.

Discussion and findings – s.120(7).

40. The sole issue is whether the respondent falls within the type of body that the claimant can claim against under the Equality Act 2010. The Tribunal's conclusion is that it is not, for the reasons advanced by Mr Hare. Clearly, it would potentially fall within the section, but for the exclusionary provisions of subsection (7). The claimant's case is that he had no such right of appeal that would bring the GMC into the exception. With respect to him, he misses the point. Whilst he claims "*The claim covers the processes of the GMC which are not subject to statutory appeal, particularly in respect of whistleblowing victimisation and discrimination*", he cannot claim before this Tribunal about "processes". He can seek to claim about acts of discrimination. The acts he seeks to complain of are either the imposition of conditions upon his registration (23 May 2013), the revocation of those conditions by the GMC (3 June 2014), unlikely to be a source of complaint, and/or the withdrawal his licence to practice 11 May 2017, and the revocation of his licence to practice on 23 October 2017.

41. It is clear that those three matters, the initial imposition of conditions upon his licence to practice, its withdrawal and the dismissal of the appeal against the withdrawal, are all "acts", positive acts in respect of which the claimant seeks to bring claims of race discrimination or whistleblowing detriment in this Tribunal.

42. As the respondent submits, however, these three acts are all ones in respect of which there was a right of appeal, provided by the legislation. That right of appeal, unlike *Michalak* was not by way of judicial review, the reason why the GMC's argument failed in that case.

43. The wording of s.120(7) is important. It disapplies s.120(1)(a), 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. The acts complained of were indeed subject to proceedings in the nature of an appeal. The claimant seeks to go around this by broadening the scope of his claims, by claiming that he wishes to complain of matters in respect of which there was no such right of appeal. By this he means the GMC's alleged failure to question or doubt the information being provided to it by Southend University Hospital NHS Foundation Trust, which itself acted out of discriminatory or retaliatory motives on the grounds of the claimant's race or his making of protected disclosures.

44. That may be so, but the terms of s.53 are themselves instructive. The section confers jurisdiction to consider discrimination claims under the Equality Act 2010 in these terms:

53 Qualifications bodies

(1) *A qualifications body (A) must not discriminate against a person (B)—*

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

- (b) *as to the terms on which it is prepared to confer a relevant qualification on B;*
 - (c) *by not conferring a relevant qualification on B.*
- (2) *A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—*
 - (a) *by withdrawing the qualification from B;*
 - (b) *by varying the terms on which B holds the qualification;*
 - (c) *by subjecting B to any other detriment.*
- (3) *A qualifications body must not, in relation to conferment by it of a relevant qualification, harass—*
 - (a) *a person who holds the qualification, or*
 - (b) *a person who applies for it.*
- (4) *A qualifications body (A) must not victimise a person (B)—*
 - (a) *in the arrangements A makes for deciding upon whom to confer a relevant qualification;*
 - (b) *as to the terms on which it is prepared to confer a relevant qualification on B;*
 - (c) *by not conferring a relevant qualification on B.*
- (5) *A qualifications body (A) must not victimise a person (B) upon whom A has conferred a relevant qualification—*
 - (a) *by withdrawing the qualification from B;*
 - (b) *by varying the terms on which B holds the qualification;*
 - (c) *by subjecting B to any other detriment.*

45. To quote Lord Kerr , speaking of the claimant in ***Michalak*** “*Her complaints do not relate to any action by the GMC as to her registration*” . By contrast with these claims, it is to be noted that in each instance under s.53 , reference is made to either the conferring, or arrangements for deciding the conferring, withdrawal, or variation of the terms of any qualification. In short, all such claims must somehow relate to the qualification, and what the claimant is seeking to bring about in these proceedings is precisely that, the imposition of conditions upon, then the withdrawal of, the qualification of his licence to practise medicine.

46. This is the important distinction between the claimant here , and the claimant in ***Michalak*** In respect of each of the matters that the claimant seeks to bring

discrimination claims , there was a right of appeal, provided by statute, and hence this Tribunal has no jurisdiction to determine these claims.

The protected disclosure claims.

47. The Tribunal now turns to the protected disclosure claims. These are not expressly addressed in Mr Hare’s Skeleton, nor the claimant’s. They differ, of course, from the race discrimination claims because , whereas the latter are brought under the Equality Act 2010, the former fall under the jurisdiction of the Employment Rights Act 1996. The protection against detriment which is afforded to “whistleblowers” derives from s.47B of that Act, which provides that a “worker” has the right not to be subjected to any detriment by his employer done on the ground that he had made a protected disclosure.

48. The claimant was not a worker of the GMC, nor could it be considered his “employer”. There are no analagous “qualification bodies” provisions in the Employment Rights Act , nor any other legislation of which the Tribunal is aware, which would entitle the claimant to complain of the acts of the GMC in relation to his licence to practise as some form of victimisation for having made protected disclosures.

49. Neither party has really addressed these claims in their arguments, but the Tribunal cannot see any basis for it having any jurisdiction to consider these claims, and strikes them out.

The remaining issues.

50. The respondent was also seeking to strike out the claims on the basis of *res judicata*, but that has now been superseded by the East London Employment Tribunal’s judgment, or rather, absence of any judgment dismissing the claims against this respondent.

51. Finally, time limits were to be in issue. Given that the last act of the GMC of which complaint is, or can be, made was 23 October 2017, there could be time limit issues, unless the last date in respect of which any claim can be made is later (perhaps 25 October 2017, or even later as the claimant would argue). There is, however, in the light of the Tribunal’s findings on jurisdiction, no purpose in considering those issues any further.

Employment Judge Holmes

23 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 March 2020

FOR THE TRIBUNAL OFFICE

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