EMPLOYMENT TRIBUNALS

Claimant: **Mr G Dimitrov**

Respondent: **Health & Care Professions Council**

Heard at: London South Croydon

On: **4 November 2019**

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Did not attend and was not represented
Respondent: Ms A Ahmed, Counsel

OPEN PRELIMINARY HEARING

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

The Employment Tribunal has no jurisdiction to hear the Claimant's Claim. It is therefore dismissed.

REASONS

These reasons were given orally but have been requested in writing by the Respondent.

Background

1. By a Claim form which was received by the Employment Tribunal on 12 November 2018, the Claimant has brought complaints against his ex-employer, the Respondent, of race and religion or belief discrimination.

2. The Claim was originally rejected by the Tribunal in its letter to the Claimant dated 29 November 2018 on the basis that the Claimant had not gone through the process of ACAS Early Conciliation or indicated why he was exempt from doing so. The Claimant subsequently provided an Early Conciliation Certificate indicating that Early Conciliation commenced on 4 December and ended on 4 December 2018. The Tribunal subsequently wrote to the parties accepting the Claim on 4 January 2019.

The Claim

3. The Claimant essentially alleges discrimination by the Respondent as a qualifications body under sections 53 and 54 of the Equality Act 2010 (EqA).

4. In its Response which was received by the Tribunal on 5 April 2019, the Respondent denies the Claim in its entirety and submits that the Claimant is precluded from bringing the Claims to the Employment Tribunal under section 54 EqA.

The Preliminary Hearing

5. A Preliminary Hearing on case management was listed to take place on 20 June 2019. However, this was subsequently vacated and relisted for Open Preliminary Hearing with a duration of two hours to determine the jurisdictional issue raised at paragraphs 56-63 of the Respondent's grounds of resistance. The parties were subsequently sent notice of a new preliminary hearing date for today in a letter dated 10 September 2019. This was sent by email to the Claimant at the email address provided within his Claim form.

6. It would appear from my file that the Claimant was in email correspondence with the Respondent's solicitors certainly as recently as 17 September 2019.

7. The Claimant did not attend today's hearing notwithstanding the usual checks of the Employment Tribunal premises and attempts to contact him by telephone which were repeatedly disconnected. In the circumstances I decided to continue with the hearing in the Claimant's absence.

Documents

8. I was provided with written submissions by the Respondent for today's hearing as well as supporting legislation and case law.

Findings and conclusions

9. Today's hearing is to deal with the jurisdictional point raised at paragraphs 56 to 63 of the Respondent's grounds of resistance. This is in essence whether the Tribunal has jurisdiction to deal with the Claimant's Claim.

10. The Claimant has brought complaints of disability and race discrimination against the Respondent which is a statutory health regulator. The Respondent currently regulates 16 professions in the healthcare sector. Its principal functions are set out in the Health Professions Order 2001, namely, to establish from time to time standards of education, training, conduct and performance for members of the relevant professions and to ensure the maintenance of those standards.

11. The Claimant is not and has never been an employee or worker of the Respondent. His complaints relate to applications he has made in respect of his professional qualifications. His claim can only be brought under sections 53 and 54 of the Equality Act 2010 ("EqA").

12. The Respondent's position is that the Employment Tribunal does not have jurisdiction to hear this Claim and it should be struck out in its entirety. In short, the Respondent submits that the route that the Claimant must take, as prescribed by the relevant legislative provisions, is an appeal to the Respondent's Council and if he is dissatisfied with the outcome of that appeal, then to the County Court.

13. The legislative route is as follows.

14. Section 53 EqA sets out the causes of action that can be brought against a qualifications body and the parameters of those causes of action. Section 54 EqA defines a qualifications body. Section 120 EqA provides the Employment Tribunal with jurisdiction to determine a complaint relating to a person's work. Section 120(7) EqA provides that this right does not apply to contravention insofar as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.

15. I was referred to section 212 EqA which deals with general interpretation and defines "subordinate legislation" so as to include "subordinate legislation within the meaning of the Interpretation Act 1978". Section 21 of the Interpretation Act 1978 defines subordinate legislation as including "Orders in Council, orders, rules, regulations…"

16. I was also referred to Articles 37 and 38 of the Health Professions Order 2001 which sets out the mechanism available to the Claimant to appeal against any decision of the Respondent body.

17. In essence this provides the Claimant with the right to appeal to the Respondent's Council, and if he is dissatisfied with the outcome, he can then appeal to the County Court.

18. The Claimant's outstanding applications to the Respondent in respect of his professional qualifications are set out at paragraph 8 of the Respondent's counsel's submissions. I have no reason to doubt that this is an accurate statement as to the status of those applications, which I summarise as follows:

    18.1 In respect of the first application, Counselling, the Claimant has missed the deadline in which to appeal, but there is nothing to stop him applying for a Period of Adaption ("PoA") or Aptitude Test which would then be subject to a right of appeal;

    18.2 In respect of the second application, Forensic, the Respondent has accepted this;

    18.3 In respect of a third application, Clinical, the Claimant has appealed, and the appeal hearing is outstanding and will be heard on 12 December 2019;

    18.4 In respect of the fourth one, Occupational, the application is ongoing the Claimant has been asked to provide further information but to date has not done so.

19. I have considered the Respondent's submissions and the case law that I have been referred to.

20. From this I have concluded that the Claimant has not yet availed himself of, or concluded in one case, the appeal process that is available to him by which to challenge decisions made by the Respondent with which he is dissatisfied.

21. I was referred to the Supreme Court case of **General Medical Council and others v Michalak (Solicitors Regulation Authority and others intervening)** [2017] UKSC 71. Whilst this case was decided on different facts, in particular that there was no defined appeal process in contrast to the matter before me, it is instructive as to how an Employment Tribunal should approach such matters. The essential issue there was whether the availability of judicial review triggers the exemption from the Employment Tribunal's jurisdiction contained within section 120(7) EqA. This in turn was found to depend on whether that remedy can properly be described as "a proceeding in the nature of the appeal" and whether it is available to the Respondent "by virtue of an enactment". Both these conditions must be satisfied before section 120(7) EqA is invoked.

22. In the case before me, these conditions are met in respect of the four applications that are being dealt with by the Respondent.

23. I note in particular the rationale set out at paragraphs 17 and 18 of **Michalak**:

    "17. These considerations provide the backdrop to the proper interpretation of section 120(7). Part of the context, of course, is that appeals from decisions by qualification bodies other than to the Employment Tribunal are frequently available. It would obviously be undesirable that a parallel procedure in the Employment Tribunal should exist alongside such an appeal route or for there to be a proliferation of satellite litigation incurring unnecessary cost and delay. Where a statutory appeal is

available, employment tribunals should be robust in striking out proceedings before them which are launched instead of those for which specific provision has been made. Employment tribunals should also be prepared to examine critically, at an early stage, whether statutory appeals are available.

18. Parliament plainly intended that section 120(7) would exclude jurisdiction for certain challenges against decisions of qualification bodies. The rationale for doing so is plain. Where Parliament has provided for an alternative route of challenge to a decision, either by appeal or through an appeal-like procedure, it makes sense for the appeal procedure to be confined to that statutory route. This avoids the risk of expensive and time-consuming satellite proceedings and provides convenience for appellant and respondent alike. That rationale can only hold, however, where the alternative route of appeal or review is capable of providing an equivalent means of redress."

24. I was also referred to the Employment Appeal Tribunal ("EAT") decision in **King v Health Professions Council** [2013] ICR 39 at paragraphs 24 and 25. I was not convinced that this was an argument raised by the Claimant in his Claim form or necessarily applicable here, but I had regard to it given the explanation as to why the Employment Tribunal does not have jurisdiction in matters such as this:

"24. The principal focus of Mr Downs' argument was first that the Claimant sought to challenge the provisions of the Order under which the HPC operated: this was the way she had put her case as recorded by Judge Stewart. His principal argument orally, faced with the new skeleton argument on behalf of the Appellant, was to argue that section 63 of the 1975 Act (and cognate provisions in the 1976 Act and Age Regulations) provided that jurisdiction did not apply to a complaint in respect of which "an appeal ... may be brought ...". Thus the fact there could be no appeal, because there had been no application (the Claimant having been deterred, but not prevented from making one) was not relevant: for it was open to the Claimant to take the action which it was necessary to take to trigger such an appeal. She could, simply by making an application (as she had not done) provoke a response from the HPC. If the HPC refused the application, she had an appeal to Council, and if Council did not accept her appeal, onward to the County Court. The act of which she complained, therefore, was potentially subject to an appeal.

25. This was consistent with the scheme of the Act which was designed to ensure that discrimination (if it existed) was not left unremedied. But it also preserved the ability of a body charged with professional oversight to take a careful look within its own procedures at what was alleged. The County Court, on appeal to it, would have the advantage of a careful and considered approach by the statutory body charged with overseeing registration for entry to the profession. That was appropriate, whereas requiring the HPC to address arguments in the forum of an Employment Tribunal without there having been careful consideration of the issues internally within the HPC first was not. The purpose of excluding jurisdiction because of the presence of another appeal was because Parliament accepted that in the case of qualifying bodies another appeal route might well be more appropriate. Great damage might be done to this carefully established structure if parties were at liberty to proceed against a body such as the HPC where they had made no application for registration to it in the first place. Thus the scheme should be construed so as to provide that a Tribunal had no jurisdiction where it lay in the Claimant's own hands whether there was an appeal against any substantial injustice she felt she had suffered. The Claimant here could access an appeal merely by making an application. Not to make an application, when it was within her power to do so would be to side step the provisions which ensured that the appropriate route (appeal to Council, followed by County Court) was followed."

25. **King** was a case where the Claimant was challenging, on grounds of sex, race and age discrimination, the refusal of approval of her qualifications before making a formal application for registration. In that case, the EAT held that no separate jurisdiction arose under relevant sections of the legacy legislation (that is the legislation which the EqA replaced) dealing with direct discrimination, in a situation where on the face of it the internal appeal process did not apply, given that the Claimant had not made an application. The more obvious cause of action for that Claimant was to make an application, and if refused, to appeal against it. I also took into account paragraph 40 of the Judgment insofar as the argument extended to a potential complaint of indirect discrimination and accepted the conclusions of the EAT in paragraphs 40, 41, 42 as to why this was not appropriate.

26. I do agree with the sentiments expressed by Employment Judge Coles in **Koziel v Health Professions Council** (UKET 1501802/2011 19 March 2012) at paragraph 29 of the Judgment. Whilst this is a decision of the Employment Tribunal it is of persuasive authority. The words of the Employment Judge are by way of comment and are to an extent analogous and of assistance to the situation before me, and might be of aid to the Claimant over and above what has already been said:

"In other words, it seems to me, the more profitable routes might have been for the Claimant to elect for an aptitude test or a further adaption period (which may derive from the former) and, if she fails in any regard and believes she has failed because of discrimination against her, then she has the option to appeal and, if the appeal is rejected, it is common ground that Article 37(10) of the Health Professions Order 2001 provides a further right of appeal to the County Court against any unfavourable decision."

27. In the circumstances I have reached the conclusion that the Employment Tribunal has no jurisdiction to hear the Claimant's Claim which is dismissed.

Employment Judge Tsamados

17 February 2020