EMPLOYMENT TRIBUNALS

Claimant: Dr. Srinivasa Reddy Krishna Thalagavara

Respondents:
1. General Medical Council
2. Professor T Stephenson
3. Mr N Dickson
4. Mr V Donnelly
5. Mr K Done
6. Ms J Farrell
7. Ms C Couchman
8. Mr J Barnard
9. Ms H Eldridge
10. Dr N Seivewright

HELD AT: Manchester **ON:** 26 May 2017

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Not present or represented but sent written representations on 15 May 2017

Respondents: Mr I Hare, one of Her Majesty's Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant's allegations of detriment described in the respondents' response to the claimant's composite amended claim with particulars as items d, f, m, v and y are dismissed under Rule 37 as they have no reasonable prospect of success.

2. All other applications are dismissed.

REASONS

Introduction

1. The claimant presented a claim on 21 June 2016 alleging direct and indirect discrimination on the grounds of race and disability, harassment and victimisation and the failure to make adjustments. The claimant subsequently provided a Schedule of Issues. At the second preliminary hearing before Employment Judge Holmes on 7 September 2016 the claimant provided further particulars. At a further preliminary hearing before Employment Judge Holmes on 16 January 2017 the claimant was ordered to produce an amended claim in a single document with the Employment Judge recording that:

> "There should be no question of the claimant seeking to raise anything further that could be said to be a new claim."

2. The claimant produced a single document, his fourth document, described by him as a composite amended claim with particulars on 10 March 2017 and the respondents responded in a document submitted to the Tribunal and copied to the claimant on 3 April 2017.

3. In the final paragraph of the response it was stated that:

> "The respondents hereby apply for a preliminary hearing to strike out the claim in whole or in part on the grounds that it is out of time, otherwise outside the jurisdiction of the Tribunal, should not be brought against the individual respondents or has no reasonable prospect of success. In the alternative the respondents will seek a deposit order."

4. That application was listed for hearing on Friday 26 May 2017 and in advance of it the claimant sent written representations setting out his opposition to the applications.

The General Medical Council ("GMC")

5. The General Medical Council is a body corporate having the functions assigned to it by the Medical Act 1983. The over-arching objective in exercising their functions is the protection of the public. Its objectives are to protect, promote and maintain the health, safety and wellbeing of the public, to promote and maintain public confidence in the medical profession and to promote and maintain proper professional standards and conduct for members of that profession.

6. The GMC has statutory functions under section 35C of the Medical Act 1983 which apply where an allegation is made to the General Council against a registered practitioner that his fitness to practise is impaired. Impairment for the purposes of the Act can be by reason only of:

(a) Misconduct,

(b) Deficient professional performance,

(c) A conviction…,

(d) Adverse physical or mental health…

7. Section 35C(4) provides that the Investigation Committee shall investigate the allegation and decide whether or not it should be considered by a Medical Practitioners Tribunal ("MPT") and thereafter the process follows the pathways laid down in the Medical Act 1983 and the General Medical Council (Fitness to Practise) Rules 2004 until such time as it is concluded although interim orders can be made along the way.

8. Section 40 of the Medical Act 1983 provides that some decisions of a Medical Practitioners Tribunal are appealable to the High Court. Those decisions are a decision of a Medical Practitioners Tribunal under section 35D giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration, or a decision under section 41(9) giving a direction that the right to make further applications under that section shall be suspended indefinitely. Other decisions are also appealable to the High Court. The High Court may on the hearing of an appeal dismiss it, allow it and quash the direction or variation appealed against or substitute another decision which could have been made by an MPT or remit the case to an MPT with directions as to its disposal at a further hearing.

9. The power to impose interim orders is provided by section 41A in appropriate circumstances where an Interim Orders Tribunal ("IOT") or an MPT is satisfied that it is necessary for the protection of members of the public or otherwise in the public interest or in the interests of the registrant for the registration to be suspended or made subject to conditions. Interim orders are also subject to an appeal to the High Court.

10. The General Medical Council (Fitness to Practise) Rules 2004 deal with the process to be followed and provide for the investigation of allegations. Where the registrar considers an allegation falls within the appropriate section of the Act he shall refer the matter to a medical and a lay case examiner. The practitioner is informed of the referral of an allegation for consideration. The registrar shall investigate and may direct an assessment of the practitioner's health. When the case examiners have completed their examination they can decide that the allegation shall not proceed or to issue a warning or to refer the allegation to the committee or to a Tribunal.

The Relevant Law

11. In his composite amended claim the claimant limits his claims against the respondents to victimisation under section 27 of the Equality Act 2010 and instructing, causing or inducing contraventions under section 111 of the Equality Act 2010. The protected characteristics relied upon by the claimant are depression which amounts to disability under section 6, and his Indian ethnic origin as race under section 9 of the Equality Act 2010.

12. Section 27 of the Equality Act 2010 provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

13. Section 111 relates to Instructing, causing or inducing contraventions and provides as follows:

"(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do so in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3) inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought –

(a) By B, if B is subjected to a detriment as a result of A's conduct;

(b) By C, if C is subjected to a detriment as a result of A's conduct; and

(c) By the Commission.

(6) For the purposes of subsection (5), it does not matter whether –

(a) The basic contravention occurs;

(b) Any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to a attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating –

(a) In a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) In a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C."

14. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at 9.16 refers to section 111(1) stating that:

> "It is unlawful to instruct someone to discriminate against, harass or victimise another person because of a protected characteristic or to instruct a person to help another person to do an unlawful act. Such an instruction would be unlawful even if it is not acted upon. It is also unlawful under subsections (2), (3) and (8) to cause or induce or to attempt to cause or induce someone to discriminate against or harass a third person or to victimise a third person because they have done a protected act."

15. According to the Code of Practice, for the Act to apply (section 111(7)):

> "The relationship between the person giving the instruction, or causing or inducing the unlawful act, and the recipient must be one in which discrimination, harassment or victimisation is prohibited. This will include employment relationships, the provision of services and public functions, and other relationships governed by the Act."

16. As to who is protected, the Code of Practice states that:

> "The Act provides a remedy for (a) the person to whom the causing, instruction or inducement is addressed and (b) the person who is subjected to the discrimination or harassment or victimisation if it is carried out, provided that they suffer a detriment as a result."

17. Section 53 of the Equality Act 2010 refers to Qualifications bodies (A) providing, in summary, that they must not discriminate against a person (B). The GMC (A) accepts that it is a qualifications body for the purposes of the claimant's (B's) claim.

18. Section 120 of the Equality Act 2010 deals with jurisdiction, giving an Employment Tribunal jurisdiction to determine a complaint relating to a contravention of Part 5 (work), which includes section 53 dealing with Qualifications Bodies, but at (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".

19. Neither party referred me to the recent case of **Hemdan v Ishmail and Al-Megraby**, UKEAT/0021/16/DM at the Employment Appeal Tribunal on 10 December 2016 before Mrs Justice Simler (President), Mr Jenkins and Ms Sutcliffe. The case seems to me to be relevant because it concerned the making of deposit orders. In summary:-

(1) A deposit order was wrongly imposed in circumstances where the Employment Judge recognised that the claimant would find it difficult to comply with its terms.

(2) In fact it was not practically possible for the claimant to comply with the deposit order, which was set at so high a level in context as to impede her access to justice because she could not comply with it.

(3) The order imposed was not therefore a proportionate and effective means of signalling to the claimant the low prospects of success and warning her as to costs.

20. Having set out rule 39 the judgment states as follows:

"(10) A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of Courts and Tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

(11) The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a full hearing and therefore access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

(12) The approach to making a deposit order is also not in dispute in this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a Tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a Tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

(13) The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise….

(15) Once a Tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited Tribunal resources, are also relevant facts. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

(16) If a Tribunal decides that a deposit order should be made in the exercise of the discretion pursuant to Rule 39, subparagraph (2) requires Tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires Tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to

> consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued…
>
> (17) An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means of ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice."

21. In the case of Ms Hemdan the Employment Appeal Tribunal set aside the deposit orders made against her totalling £225 and determined a proportionate deposit order could not have been more than a nominal sum in respect of each allegation, and accordingly the Employment Appeal Tribunal substituted deposit orders of £1 in respect of each allegation, saying that:

> "Although these are nominal amounts, the warning in respect of costs that is one of the consequences of a deposit order will continue to have effect and force in relation to the two allegations if the sums are paid and the allegations are pursued but ultimately fail."

22. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides that:

> "(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –
>
> (a) That it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious…

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

23. Rule 39 deals with deposit orders and provides:

"(1) Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit…

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order –

(a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) The deposit shall be paid to the other party…"

24. Rule 42 deals with written representations and provides that:

"The Tribunal shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than seven days before the hearing."

25. Rule 47 deals with non attendance and provides that:

"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

26. Counsel for the respondents referred me to **Ukegheson v Harringey London Borough Council UKEAT/312/14**, a judgment of Langstaff J (President) dealing with striking out claims under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013. It was held that:

"The correct approach to a request to strike out a claim was to take the allegations in the claim at their highest unless they could be conclusively disproved as demonstrably untrue and, while there was no blanket ban on the use of strike out in any particular class of case the discretion should be used sparingly and cautiously based on the claim form, which set out the essential facts a respondent was required to answer and which, if disputed, should not result in a case being dismissed by a strike out on the grounds of no

> reasonable prospect of success; but, since the Employment Judge had omitted to refer to the need to take the claimant's case at its highest and had found facts some of which were disputed, her approach was flawed and the appeal should be allowed unless her decision was plainly right in any other matters claimed…"

27. Mr Hare referred to the case of **Dr P J Jooste v General Medical Council & others UKEAT/0093/12/SM** on the question of "continuing act", in particular paragraph 45 where His Honour Judge McMullen QC sitting alone stated that:

> "The simple question is whether or not there was a continuing act in this case by the GMC by reason of its decisions. In my judgment, the rather liberal approach to continuing acts in cases relied on by Dr Jooste's representative (for example, **Hendricks v Commissioner of Police for the Metropolis [2002] IRLR 95**) is not as appropriate for cases of continuing act allegations by a regulatory body. In **BMA v Chaudhary [2003] EWCA Civ 645**, Mummery LJ said the following:
>
> '(67) …Cases such as Rovenska and the instant case, in which applications are made for registration by regulatory authorities and are rejected, are distinguishable from the cases in which an employer continuously applies a requirement or condition, in the form of a policy, rule, scheme or practice operated by him in respect of his employees throughout their employment: see **Barclays Bank PLC v Kapur**, **Cast v Croydon College**, **Owusu v London Fire & Civil Defence Authority**'."

28. In the case of **General Medical Council & others v Michalak [2016] EWCA Civ 172** in the Court of Appeal before Lords Justices Moore-Bick, Kitchin and Ryder it was held that:

> "Section 120(7) of the Equality Act 2010 was a provision of general application designed to regulate competing jurisdictions and to ensure that the most specialist body heard the complaint; that, in the case of complaints of discrimination, harassment, victimisation, or unlawful treatment under section 53 of the Equality Act for which there was no statutory route of appeal, that body was the Employment Tribunal; that the general right to seek judicial review, though now enacted, did not constitute 'proceedings in the nature of an appeal' for the purposes of section 120(7) and could not oust the jurisdiction of the Employment Tribunal; and that, accordingly, the Employment Tribunal had jurisdiction under section 120(1) to hear the complaints raised under section 53."

29. The claimant also refers to **Michalak** and there will appear below an extract from the judgment of Lord Justice Moore-Bick.

30. In **GMC v Michalak** counsel for the respondents referred to paragraph 29 in the judgment of Lord Justice Ryder as follows:

> "In **Jooste v GMC** Judge McMullen QC, again sitting in the Employment Appeal Tribunal, followed his earlier obiter reasoning in **Tariquez-Zaman**. Dr Jooste claimed that acts of an 'interim order panel' of the GMC suspending his registration were discriminatory under the Equality Act 2010. The Employment Appeal Tribunal held that the Employment Tribunal had no

> jurisdiction to hear the claimant's claims against the GMC as the remedy available in judicial review was an alternative statutory remedy such that the Employment Tribunal's jurisdiction was precluded by section 120(7) of the Equality Act 2010. The Employment Appeal Tribunal accordingly concluded that the Employment Judge had correctly struck out the claimant's claims."

31. In paragraph 33 Lord Justice Ryder states that:

> "Section 120(1) of the Equality Act 2010 describes the jurisdiction of the Employment Tribunal to determine a complaint under Part 5 of the Equality Act 2010. Section 120(7) provides that subsection (1)(a) does not apply to a contravention of section 53 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. Where there is a defined statutory route of appeal for actions upon a medical practitioner's registration, such as that described in sections 38 and 40 of the Medical Act 1983, the jurisdiction of the Employment Tribunal under section 53 is precluded. **Khan v GMC [1996] ICR 1032** remains authority for that proposition."

32. Counsel for the respondents referred to the judgment of her Honour Judge Eady QC sitting alone in the Employment Appeal Tribunal in the case of **Mrs B Robinson v Royal Surrey County Hospital NHS Foundation Trust & others, UKEAT/0311/14/MC**. In paragraph 25 of her Honour Judge Eady QC's judgment:

> "The claimant further relies on authority from the civil jurisdiction that a claim should not be struck out without giving the party concerned an opportunity to amend if that would save the claim; see **Soo Kim v Youg [2011] EWHC 1781 QB**:
>
> 'However where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right…'
>
> See also **Lambrou v Cyprus Airways** applying **HM Prison Service v Dolby**:
>
> 'Alternatives to striking out, such as ordering further particulars, should be considered in the first instance'."

33. More specifically, in **Romanowska v Aspirations Care Limited** Langstaff P made clear that:

> "It would be wrong to strike out a case where it was necessary for the ET to assess what was in the employer's mind; that could not be determined without hearing evidence from the employer."

The Alleged Protected Acts

34. In his composite amended claim with particulars alleging victimisation the claimant sets out three protected acts as follows:

20.1 On 25.11.2013, the claimant informed the respondent(s) regarding Cwm Taf University Health Board continuing to harass and victimise the claimant for making protected disclosures.

20.2 On 20.03.2014, the claimant informed Mr Dickson regarding Mr Donnelly and Mr Done subjecting the claimant to possible harassment by a threatening referral to FTP hearing, if he refused to consent for HA (a health examination).

20.3 In November 2014, the claimant submitted a formal complaint to Professional Standards Authority regarding Mr Dickson failing to protect disabled British minority ethnic whistle-blower from ongoing harassment, victimisation and disability discrimination by the respondent(s) and Cwm Taf University Health Board.

The GMC Process

35. On 4 October 2013 the Clinical Director, Mental Health Directorate of the Cwm Taf Health Board, wrote to the GMC in Wales with information that the claimant had been medically suspended since 23 August 2013 pending the outcome of a preliminary investigation into a number of concerns regarding his behaviour and performance.

36. By 31 October 2013 the Head of HR at Cwm Taf made a telephone call to the GMC because the claimant had informed her that he was being investigated by the GMC. Certain medical issues were noted but will not be referred to in this judgment with a view to protecting the claimant's medical confidentiality.

37. In February 2014 the claimant was invited to undergo a health assessment for the GMC. He initially agreed but withdrew partway through the assessment. The reporting doctor concluded that the claimant was not fit to practise.

38. An interim orders panel of the GMC imposed conditions on the claimant's registration in November 2014, these conditions being renewed and/or varied at subsequent hearings on 30 September 2015 and 1 February 2016. The claimant did not challenge the interim orders in the High Court under section 41A of the Medical Act 1983.

39. In 2015 the claimant returned to India and in May 2015 confirmed to the GMC that he would not agree to a health assessment.

40. On 21 September 2015 it was decided that his case should be referred to a Medical Practitioners Tribunal.

41. The claimant’s case came before the Medical Practitioners Tribunal on 16 May 2016. He chose not to attend. The MPT determined that the claimant should be invited to undergo a health assessment and adjourned the hearing until 8 August 2016.

42. On 29 July 2016 the GMC acceded to the claimant's request for the administrative erasure of his name from the register and so his registration was

removed at his own request. This removal brought the fitness to practise process involving the claimant to a conclusion.

The Application to Strike Out or for a Deposit Order

43. In their response to the claimant's composite amended claim with particulars the respondents, at paragraph 25 onwards, set out the three alleged protected acts and then the claimant's pleaded detriments, as they understand them, from (a) to (z).

44. In his written submission the claimant has not suggested that the respondents have not properly captured in their response the detriments that he has alleged in his composite amended claim.

45. When putting his case Mr Hare thought it appropriate to deal with some of the alleged detriments together because he was asking for them to be struck out or for a deposit for the same reason.

46. The first ground of application is that when following the fitness to practise process through with the claimant the first respondent (and where appropriate the other respondents) acted in accordance with the GMC's governing statute and regulations following the claimant being referred by his then employer and not because the claimant had done a protected act for the purposes of section 27 of the Equality Act 2010. The investigation process followed the referral on 4 October 2013. The claimant was aware of the GMC's involvement before the claimant's first alleged protected act which involved his letter dated 25 November 2013 to Cwm Taf which he copied to one of the first respondent's investigating officers.

47. The alleged detriments covered by this part of the application are those set out in the response at (a), (b), (c), (e), (i), (j), (q), (t), (w) and (z).

48. An examination of the alleged detriments in question shows that they do seem to relate to steps taken by one or more respondents in relation to the GMC's fitness to practise process.

49. Detriment (f) is that the GMC threatened the claimant with administrative erasure from the register for failing to pay the annual registration fee on 14 July 2014 and detriment (o) is that on 17 December 2014 Ms Couchman threatened the claimant with administrative erasure again for not paying the annual registration fee.

50. It was submitted on behalf of the respondents that payment of the annual fee is an administrative matter and that where a registrant does not pay the annual fee by the due date a letter is automatically sent by way of reminder without human intervention. The letter from Ms Couchman on 17 December 2014 dealt with a number of matters and with regard to fees she reminded the claimant of the requirement for all registered doctors to pay an annual fee for the retention of their name on the register, and that failure to pay would put him at risk of erasure.

51. It was argued on behalf of the respondents that the correspondence with the claimant concerning outstanding fees was not sent because the claimant had done a protected act but because the claimant had not paid his fees.

52. Item (s) in the list of detriments identified by the respondents is that the first respondent made two fresh allegations of misconduct against the claimant for refusing a health assessment and for breaching patient confidentiality on 22 June 2015.

53. I was taken to a response to these allegations made by the claimant on 19 July 2015. With regard to an allegation of inappropriately disclosing the unredacted medical records of a particular patient the claimant pleaded guilty to the charge stating that at the time he believed it was his duty to disclose the patient's details to public and statutory organisations in England and Wales. It was his belief based on the evidence made available to the GMC that the Health Board had exploited the patient's vulnerability by colluding with a MIND advocate with the sole purpose of victimising him for expressing patient safety concerns.

54. With regard to failing to be examined by the GMC health assessor he pleaded "the fifth" for various reasons involving the process being followed by the GMC.

55. With regard to this alleged detriment the respondents submit that the claimant cannot make it out on the basis of his own admissions in respect of his conduct.

56. Item (k) on the list of detriments identified by the respondents is that the GMC refused to investigate the claimant's complaints made from July to September 2014 against some ten doctors (including Dr Joseph) at the Health Board and the GMC, the seventh respondent, Ms Couchman, and the third respondent, Mr Dickson, caused senior doctors at the Health Board to discriminate against him.

57. With regard to the claimant's allegations as to a refusal to investigate various complaints, the respondents have provided documentary evidence of their communications with the claimant in which they say the complaints were rejected following investigation.

58. Alleged detriment (r) is that the eighth respondent, Mr Barnard, declined to review the decision made on behalf of the first respondent not to investigate Dr Joseph.

59. In a letter dated 17 September 2015 written by Charlotte Binks, Corporate Review Manager, reasons were given, set out over 4 pages, for the decision of the Assistant Registrar that the decision to close the complaints about Dr Joseph should not be reviewed.

60. Alleged detriment (p) involved Ms Couchman dismissing the claimant's grievances against Mr Donnelly, Mr Dickson and Ms Farrell on 16 April 2015.

61. It is correct that in a letter dated 16 April 2015 Ms Couchman stated that she had already written to the claimant about Mr Donnelly. With regard to Ms Farrell and Mr Dickson she had looked back over the records of the claimant's case and could not see that Mr Donnelly, Ms Farrell or Mr Dickson had in any way acted inappropriately and the claimant was informed that his case was being progressed in line with the GMC's usual procedures.

62. Alleged detriment (v) is that the respondents failed to acknowledge the claimant's formal complaint against Dr Seivewright.

63. On 13 November 2015 a letter was sent to the claimant concerning his complaint against Dr Seivewright stating that they would not be taking the matter any further for the reasons set out in the letter, thus acknowledging and dealing with the claimant's formal complaint.

64. Alleged detriment (m) is that Mr Donnelly and the GMC caused the interim orders panel to discriminate against the claimant, and item (y) is that the GMC continued to obtain extension of the conditions from the IOP/IOT and the High Court.

65. Mr Hare submits that these are both governed by section 120(7) of the Equality Act 2010 which provides that the Employment Tribunal's jurisdiction to determine a complaint relating to a contravention of Part V (work) "does not apply to a contravention of section 53 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".

66. Both of these alleged detriments are ones that could have been the subject of an appeal to the High Court under section 40(7) of the Medical Act 1983 and therefore the Tribunal does not have jurisdiction to deal with them.

67. Alleged detriment (d) is that Mr Done and the GMC at an unspecified date caused or induced or attempted to cause or induce Rhondda Cynon Taf Council Social Services to harass/victimise the claimant by establishing a child protection plan from 4 November 2013. Allegation (n) is that Mr Done, Mr Donnelly and the GMC caused the same Council to discriminate against the claimant by rejecting his housing and council tax benefit claims.

68. Put simply on behalf of the respondents these are two new claims not previously referred to and there has been no application to amend. They should not be allowed to continue.

69. Before dealing with further alleged detriments counsel for the respondents submitted that the respondents accepted that the ongoing fitness to practise proceedings before the GMC constituted a continuing act, but in his submission there were various stages along the way that had their own end points once particular decisions had been made and so were not part of the continuing act.

70. In this category counsel referred to alleged detriments (g), where Mr Done and Mr Donnelly refused to obtain the claimant's medical reports before the health assessment; and (h), whereby the tenth respondent, Dr Seivewright, lied in his report dated 2 July 2014 about the length of the claimant's depression.

71. As to these matters counsel submitted that the relevance of the initial assessment in 2014 had a limited life. Anything older than 12 months would never be relied on in GMC hearings dealing with a registrant's health. It was just part of the history.

72. Alleged detriment (l) is that Mr Done and Mr Donnelly placed false information before the GMC's case examiner leading to the decision on 14 October 2014 to refer his case to the IOP which caused the case examiner to discriminate against him.

73. Mr Hare submits that once the determination has been made by the case examiner the examiner's role in the proceedings is terminated.

74. Alleged detriment (u) is that the GMC, Mr Donnelly, Mr Done and Dr Seivewright caused the case examiners to discriminate against the claimant.

75. Alleged detriment (x) is that the ninth respondent failed to disclose all the documents to the MPT.

76. As to item (x) the MPT did not in the end determine matters. The claimant's name was voluntarily erased from the register.

77. Putting documents before the MPT is an allegation of a procedural irregularity. Given the way the procedure went, the voluntary erasure, this could not amount to victimisation.

78. Counsel accepted that these latter items were less clearly candidates for the strike out application that the others. He sought a deposit order if allegations of detriment were not struck out, noting from the claimant's submissions that he had very limited means. This did not mean the Tribunal should exclude a deposit order entirely. The procedure was designed to protect respondents who might not be able to recover any costs. It would be legitimate to impose a modest deposit order in respect of the last five items g, h, l, u and x.

79. As to the individual respondents remaining parties, the claimant relied on section 111, but in counsel's submission the doctrine of instructing, causing or inducing contraventions did not work here.

80. In the response at paragraph 32.2 the respondents plead that:

> "Dr Krishna may not rely on section 111 of the 2010 Act against the individual respondents because of the effect of section 111(7): since the individual respondents were not capable of committing a basic contravention (as they are not themselves qualifications bodies), they can have no ancillary liability. In any event, it is disproportionate and contrary to the overriding objective to include the individual respondents where the GMC does not deny any potential liability for the conduct relied upon Dr Krishna."

81. As to the inclusion by the claimant of various named respondents, to include people merely because they had received letters sent to them by the claimant was, in the submission of counsel, unreasonable conduct. This was not an appropriate case for there to be named individuals as well as the first respondent. It was oppressive, particularly where there was a claim for exemplary damages. The first respondent did not deny any potential liability for the other respondents.

Claimant's Written Representations

82. The claimant took the view that the following issues fell to be determined arising out of the application made on behalf of the respondents:

(a) Does the Tribunal have jurisdiction to determine the claims?

(b) Is the claimant entitled to bring proceedings against the individual respondents?

(c) Are the claims out of time?

(d) Do the claims have no reasonable prospect of success?

(e) Should the Tribunal consider deposit orders?

83. As to jurisdiction, the respondents accept that the Tribunal has jurisdiction and so I will not set out the claimant's representations on this point.

84. As to bringing proceedings against the individual respondents, the claimant refers to section 110 of the Equality Act 2010 which provides that:

(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).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if –

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so…

85. The claimant argues that the GMC and/or the individual respondents have contravened the Equality Act 2010. In either case and pursuant to section 110(2) the claimant exercises his right to pursue claims against the individual respondents.

86. When considering the question whether the claims are out of time the claimant quotes section 123 of the Equality Act 2010 which provides as follows:

(1) [Subject to section 140A] 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of –

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

87. The claimant submits that we are here dealing with acts extending over a period with time running from the end of the course of discriminatory conduct. According to the claimant the last discriminatory act occurred on 17 June 2016 and he submitted his claim on 21 June 2016 well within time.

88. The claimant provides extracts from the cases of **Hendricks v The Commissioner of Police of the Metropolis [2002] EWCA Civ 1686** which refers to numerous alleged incidents of discrimination linked to one another as evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period", and the claimant also relies on **Aziz v FDA [2010] EWCA Civ 304**. Quoting from Lord Justice Jackson:

> "The claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."

89. The claimant argues that the complaints in the amended particulars are so linked as to constitute an ongoing state of affairs.

90. As to reasonable prospect of success, the claimant starts by setting out sections 27, 111 and 136 of the Equality Act 2010.

91. When setting out section 111 in his written representations the claimant **substitutes** what he considers to be the **appropriate parties** for the letters A, B and C as follows:

(1) A person (A) **(GMC)** must not instruct another (B) **(individual respondent)** to do in relation to a third person(C) **(claimant)** anything which contravenes Part …5…(a basic contravention)

(2) A person (A) **(GMC)** must not cause another (B) **(individual respondent)** to do in relation to a third person (C) **(the claimant)** anything which is a basic contravention.

(3) A person (A) **(GMC)** must not induce another (B) (**individual respondent)** to do in relation to a third person (C) **(the claimant)** anything which is a basic contravention.

(4) …

(5) Proceedings for a contravention of this section may be brought –

(a) By B **(individual respondent)**, if B **(individual respondent)** is subjected to a detriment as a result of A's **(GMC's)** conduct;

(b) By C **(claimant)**, if C **(claimant)** is subjected to a detriment as a result of A's **(GMC's)** conduct.

(6) For the purposes of subsection 5 it does not matter whether –

(a) The basic contravention occurs;

(b) The other proceedings are, or may be, brought in relation to A's **(GMC's)** conduct.

(7) This section does not apply unless the relationship between A **(GMC)** and B **(individual respondent)** is such that A **(GMC)** is in a position to commit a basic contravention in relation to B **(individual respondent)**.

(8) …

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating –

(a) In a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A **(GMC)** and B **(individual respondent)**, A **(GMC)** is in a position to contravene in relation to B **(individual respondent)**;

(b) In a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B **(individual respondent)** and C (claimant), B **(individual respondent)** is in a position to contravene in relation to C **(claimant)**.

92. The claimant then goes on to refer to section 136 of the Equality Act dealing with the burden of proof which states:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) **(GMC and/or individual**

> **respondent)** contravened the provision concerned, the court must hold that the contravention occurred.

93. As to strike out the claimant sets out rule 37 of the 2013 Rules of Procedure.

94. In the words of the claimant, the respondents deny victimisation of the claimant and reiterate that they were pursuing fitness to practice proceedings as noted in paragraph 31 of the ET3. The claimant relies on the case of **Michalak v GMC [2016] EWCA Civ 172**, a judgment of the Court of Appeal given by Ryder LJ, Senior President of Tribunals, Kitchin LJ and Moore-Bick LJ who added a few observations of his own, as follows:

> "I agree with Ryder LJ that, whereas qualifications bodies may be presumed to have special expertise in judging the skills and qualities required by a member of the profession in question, they cannot be presumed to have special expertise in recognising unlawful discrimination, victimisation, harassment or unlawful detriment. In the Equality Act 2010 Parliament has not only rendered acts of the kind described unlawful, but has provided a process by which a remedy can be obtained by means of a complaint to an Employment Tribunal. The remedies available include an award of damages, which in many cases will be what the claimant primarily seeks. Section 120(7) contains a provision of general application designed to regulate competing jurisdictions. One would therefore expect that it was intended to exclude from the jurisdictions of the Employment Tribunal only those cases in which some alternative provision has been made for obtaining a remedy for unlawful acts of the kind in question. Such a remedy is likely to found, if anywhere, in legislation which deals with the procedures governing the way in which a particular qualifications body reaches its decisions and provides an appeal process which extends to decisions infected by unlawful acts of the kind under consideration. In my view considerations of that kind point clearly towards the conclusion that the words 'by virtue of an enactment' in section 120(7) are directed to cases in which specific provision is made in legislation for an appeal, or proceedings in the nature of an appeal, in relation to decisions of a particular body, as, for example, in Khan v General Medical Council [1996] ICR 1032. They are not, in my view, intended to refer to the general right to seek judicial review merely because, since 1981, that happens to have been put on a statutory footing. In the present case the President of the Employment Appeal Tribunal considered it appropriate in the interests of the orderly development of the law to follow and apply the decision in Joost and cannot be criticised for having done so. Nonetheless, he clearly had some misgivings about the decision. For the reasons I have given I think Joost was wrongly decided. On its true interpretation section 120(7) of the Equality Act 2010 does not apply to a claim of the kind which Dr Michalak seeks to pursue in this case."

95. I have quoted rather more extensively from the judgment of Lord Justice Moore-Bick than the claimant did. The claimant only included in his submission the first sentence, but it seems to me that the whole of the quoted passage is relevant to this case.

96. The claimant relies on the judgment of the House of Lords in the case of Swiggs & others v Nagarajan dated 15 July 1999 as setting down the correct test for

unlawful victimisation with reference to inferences which may be drawn from findings of primary fact.

97. The claimant also relies on **Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14/MC** with reference to paragraph 26 of the judgment given by Her Honour Judge Eady QC:

> "Langstaff P made clear it would be wrong to strike out a case where it was necessary for the ET to assess what was in the employer's mind; that could not be determined without hearing evidence from the employer…Alternatives to striking out, such as ordering further particulars, should be considered in the first instance."

98. The claimant then extracts:

> "Where… there is a defect in a pleading it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right…"

99. The claimant refers again to the case of **Robinson** in which Her Honour Judge Eady refers to the well known cases of **Anyanwu** and **Ezsias** and state that:

> "The case law, however, cautions ETs against striking out a claim in all but the clearest of cases, particularly where that claim might involve allegations of discrimination or, by analogy, of whistle-blowing detriment."
>
> And also that:
>
> "Strike out should be recognised as a draconian act."

100. The final case referred to by the claimant is **Balls v Downham Market School [2011] IRLR 217** with reference to the judgment of Lady Smith in particular paragraph 6:

> "Where strike out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the structure of the exercise that the Tribunal has to carry out is the same; the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has **no** reasonable prospect of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

101. In concluding his written representations the claimant submits that there must be a full hearing of the evidence for the Tribunal to make findings of fact and reach appropriate inferences. The law is clear that the Tribunal must be extremely slow to strike out a discrimination claim at a preliminary hearing on the ground that it has no

reasonable prospect of success. The claimant therefore invites the Tribunal to dismiss the strike out application and proceed to make Case Management Orders for a full liability hearing.

102. As to a deposit order, the claimant sets out rule 39 and then by reference to earlier argument submits that the Tribunal should dismiss the deposit order applications. As to means:

> "The claimant has no savings and is entirely dependent on state benefits for his livelihood because of the detriment caused by the GMC and the individual respondents as noted in the ET1".

Discussion and Conclusions

103. The claimant was aware of the hearing on 26 May 2017 and he provided written representations in advance of it. He did not attend. I decided to proceed with the hearing in the absence of the claimant on the basis that he appeared to have made a conscious decision not to attend but to submit written representations instead.

104. I remind myself that the correct approach to a request to strike out a claim is to take the allegations in the claim at their highest unless they can be conclusively disproved as demonstrably untrue, and that whilst there is no blanket ban on the use of strike out in any particular class of case the discretion should be used sparingly and cautiously based on the claim form which sets out the essential facts a respondent was required to answer and which, if disputed, should not result in a case being dismissed by a strike out on the grounds of no reasonable prospect of success.

105. I shall look at the alleged detriments that the respondents seek to strike out in the order in which they were presented by Mr Hare in his application. He started with the allegations described in the response as (a), (b), (c), (e), (i), (j), (q), (t), (w) and (z). I have summarised his submission at 39 above as follows:

> "When following the fitness to practise process through with the claimant the first respondent (and where appropriate the other respondents) acted in accordance with the governing statute and regulations following the claimant being referred to the GMC by his then employer and not because he had done a protected act for the purposes of section 27 of the Equality act 2010. The investigation process followed the referral on 4 October 2013. The claimant was aware of the GMC's involvement before the claimant's first alleged protected act which involved his letter dated 25 November 2013 to Cwm Taf which he copied to one of the first respondent's investigating officers."

106. I take the claimant's claim as pleaded at its highest, and remind myself that in the case of complaints of victimisation against qualifications bodies under section 53 of the Equality Act 2010 for which there is no statutory route of appeal, the appropriate body to hear them is the Employment Tribunal.

107. Looking at these particular allegations of detriment it does not seem to me that from the pleadings it can be conclusively disproved as demonstrably untrue that

they were done because the claimant had done one or more protected acts and so I am unable to conclude that they have no reasonable prospect of success.

108. Having reached that conclusion is there a proper basis for doubting the likelihood of the claimant being able to establish the facts essential to satisfy a tribunal that the alleged detriments were done because the claimant had done one or more protected acts? Given that the fitness to practise proceedings were commenced prior to the first alleged protected act, and given that these alleged detriments relate to the operation by the respondents of the fitness to practise process which is governed by statute and regulation, it seems to me that I can be satisfied that the claimant has little prospect of success in satisfying a Tribunal that the actions of the various respondents were done because the claimant had done a protected act. In my judgment it is more likely than not that the various actions of the respondents will be found to have been done because the claimant was referred to the first respondent and the statutory process thereafter had to be followed through to its conclusion.

109. Alleged detriment (f) is the threat of administrative erasure from the register for failing to pay the annual registration fee (ARF) on 14 July 2014. In his amended claim with particulars the claimant says that as a result of the actions of his former employer, not a respondent, in dismissing him he was evicted from hospital accommodation on 25 June 2014 for rent arrears, and as a result "was left isolated, homeless, helpless and without money in the UK. Hence he could not pay his annual retention fee to the first respondent by the due date of 15.06.2014. Hence he was threatened with 'administrative erasure' on 14.07.2014".

110. I am satisfied that the letter sent from the first respondent to the claimant on 14 July was an automatic, computer generated response to his failure to pay the annual retention fee one month earlier on 15 June and not generated because the claimant had done a protected act. This alleged detriment will therefore be struck out as in my judgment it has no reasonable prospect of success.

111. Alleged detriment (o) is a threat of administrative erasure on 17 December 2014, this time on the basis of the human intervention of Ms Couchman.

112. In his composite amended claim with particulars the claimant says that:

> "Further on 17.12.2014, Ms Couchman threatened the claimant with administrative erasure for not paying ARF despite the knowledge about his mental health and financial problems."

113. I have seen a copy of the 17 December 2014 communication from Ms Couchman to the claimant reminding him that all registered doctors are required to pay an annual fee with failure to pay it putting him at risk of erasure from the register. She went on to explain to the claimant that it was open to him to apply to relinquish his licence if he was not practising medicine in the UK and she also informed him that there was a discount scheme offering a 50% discount if annual income was less than £31,000 in the registration year. I have also taken into account that the claimant has had ample opportunity to amend his pleaded case. Taking this allegation at its highest in my judgment it is not an allegation that the claimant was subjected to a detriment because he had done a protected act, but an allegation that following his continuing failure to pay the ARF the threat of administrative erasure was made

"despite the knowledge about his mental health and financial problems". I conclude that the alleged detriment as pleaded was not done because the claimant had done one or more protected acts and therefore that this allegation has no reasonable prospect of success. It is dismissed.

114. Alleged detriment (s) relates to two fresh allegations of misconduct. According to the composite amended claim with particulars:

> "On 22.06.2015, the first respondent declared completion of the investigation but slapped the claimant with two new misconduct charges. They were a) Refusing second health assessment and b) Breaching patient confidentiality"

115. From the way in which the alleged detriments are pleaded it seems to me that conscious decisions were made to add the new charges against the claimant as the fitness to practise process continued. It does not seem to me that I can find no reasonable prospect of success, but given the claimant's subsequent response to the new allegations as set out above at paragraphs 53 and 54 I conclude that this alleged detriment has little reasonable prospect of success on the basis that refusing the second health assessment related to the ongoing fitness to practise process and breaching patient confidentiality was an allegation the claimant accepted.

116. Alleged detriment (k) is identified by the respondents as the GMC refusing to investigate the claimant's complaints against ten doctors at Cwm Taf and that the GMC, Ms Couchman and Mr Dickson caused senior doctors at Cwm Taf to discriminate against him. The claimant pleads that:

> "It emerged that senior medical professionals at CTUHB had lied and/or provided misleading information to the First Respondent. As a result, they had caused or induced or attempted to cause or induce, the First Respondent to discriminate against or harass the Claimant because of his protected characteristics and to victimise the Claimant because he had done a protected act. Hence the claimant submitted formal complaints against Dr A Shetty, Dr M Self, Dr R Hailwood and Dr H Griffiths on 31 July 2014; against Dr C Jones, Dr M Winston, Dr R Quirke and Dr M Tidley on 22.08.2014; against Professor J P Richards on 16.09.2014; and against Dr S Joseph on 19.09.2014. Unfortunately the first respondent refused to investigate the complaints and caused the claimant to lose faith in the professional regulatory system."

117. Again the pleaded case is such that in my judgment I am unable to find that it has no reasonable prospect of success but I am able to conclude that the allegation that the first respondent did not investigate the named doctors because the claimant had done one or more protected acts has little reasonable prospect of success because I have been taken to copies of letters written on behalf of the first respondent in which they explain to the claimant why they cannot proceed to investigate his complaints because it is not within their jurisdiction to do so. The refusal to investigate is thus a matter of jurisdiction unrelated to the claimant's protected acts.

118. Alleged detriment (r) concerns Mr Barnard declining to review the decision made on behalf of the first respondent not to investigate Dr Joseph. The claimant pleads that Ms Couchman:

> "Acknowledged the claimant's concerns about Dr S Joseph, CTUHB, and agreed to pass on the same to Mr Barnard, rule 12 investigation manager. Unfortunately Mr Barnard, after five months i.e. on 17.09.2015, declined to review the decision **not** to investigate Dr S Joseph by lying about the content of the letter from CTUHB dated 27.08.2013."

119. A letter sent to the claimant on 17 September 2015 concerning his complaint about Dr Joseph sets out a reasoned decision as to why the earlier decision would not be reviewed. Again taking the pleaded allegation of detriment at its highest I am unable to find that this is a matter with no reasonable prospect of success, but given the reasoned letter sent to the claimant explaining the reasons for the refusal to review I conclude that this allegation has little reasonable prospect of success.

120. Alleged detriment (p) as pleaded by the claimant is that:

> "Subsequently on 16.04.2015, Ms Couchman dismissed the claimant's grievances against Mr Donnelly, Mr Dickson and Ms Farrell and threatened him with referral to FTP, if he refused HA…"

121. Again I am unable to conclude that this alleged detriment as pleaded has no reasonable prospect of success but having seen the letter in which the claimant's grievances were dismissed, the reasons for dismissal do not seem to me to relate to the claimant having carried out one or more protected acts. The letter explains in straightforward terms why Ms Couchman acted as she did, which was not for a reason related to the alleged protected act. For these reasons it seems to me that this allegation has little reasonable prospect of success.

122. Alleged detriment (v) concerns a complaint concerning Dr Seivewright with the claimant pleading that:

> "Further the claimant submitted a formal complaint against Dr Seivewright on 13.10.2015 for preparing a prejudiced psychiatric report dated 02.07.2014. Regrettably the respondents have failed to acknowledge the complaint to this date, let alone act on it."

123. I have been provided with an email sent to the claimant on 13 November 2014 in connection with his complaint concerning Dr Seivewright in which his complaint is rejected. It therefore seems to me that the allegation that there was a failure to acknowledge the formal complaint against Dr Seivewright is an allegation that has no reasonable prospect of success and should be dismissed.

124. Alleged detriments (m) and (y) relate to the decisions of the interim orders panel.

125. Given that the claimant had a statutory route of appeal to the High Court in respect of these decisions I conclude that these allegations have no reasonable prospect of success as the Tribunal has no jurisdiction to hear them. The claimant could, and should, have made application to the High Court in respect of these matters.

126. Alleged detriments (d) and (n) are said to be new claims not previously referred to with no application from the claimant to amend his claim to allow them.

127. Perusal of the earlier pleadings does not reveal that these allegations have been made previously so I find that they are new matters. Employment Judge Holmes specifically told the claimant that there should be no question of him seeking to raise anything further that could be said to be a new claim. It seems to me that these are new allegations of detriment, although there has been no application to include them, and that it is appropriate that they should be struck out on the basis that the Tribunal has no jurisdiction to consider them.

128. Alleged detriments (g), (h) and (l) are categorised by the respondents as related to limitation. Where a Tribunal might proceed to hear otherwise out of time claims in appropriate circumstances where it was felt just and equitable to do so, I do not find it appropriate to conclude that these allegations have no reasonable prospect of success or little reasonable prospect of success where the respondents have accepted that the GMC fitness to practise process amounts to a continuing act.

129. Alleged detriments (u) and (x) relate to the fitness to practise process and in my judgment should be allowed to proceed, it not being possible to say that they have no reasonable prospect of success or little reasonable prospect of success. The way the claimant puts these allegations, and the fact that the respondents have not included with the other allegations related to the fitness to practise process leads me to conclude that they are allegations of a different character.

130. As to the claimant's claims brought under section 111 relating to instructing, causing or inducing contraventions, Mr Hare simply submits, as pleaded, that the claimant may not rely on section 111 because of the effect of section 111(7) as set out above. In his submission since the individual respondents were not capable of committing basic contraventions (as they are not themselves qualifications bodies) they can have no ancillary liability.

131. The claimant in his written representations with reference to the individual respondents refers to section 110 dealing with liability of employees and agents, arguing that the GMC and the individual respondents have contravened the Equality Act. He submits that in either case, and pursuant to section 110(2), he exercises his right to pursue his claims against the individual respondents.

132. I take from paragraph 16 of the claimant's composite amended claim with particulars a sample allegation under section 111 adding the letters used in section 111(3) to the various parties:

> "Previously on 01.10.2014, Mr I Harrison, Senior Finance Assistant, RCT Council, **(B)** had rejected the housing and council tax benefit claim submitted by the claimant **(C)** on 04.07.2014, stating, 'you are currently unable to return to paid employment within your profession in the UK whilst GMC assesses your fitness to practice'. Mr Done, **(A)**, Mr Donnelly, **(A),** and the first respondent **(A)**, had caused or induced, or attempted to cause or induce, Mr Harrison and RCT Council **(B)** ,to discriminate against or harass the claimant because of his protected characteristics and to victimise the claimant because he had done a protected act."

133. In this allegation C is subjected to detriment as a result of A's conduct and section 111(6) allows C to bring proceedings against A.

134. Having considered the way that the claimant pleads his various claims, I am satisfied that the individual respondents might be capable of committing basic contraventions for the purposes of section 111 taking into account section 110 of the Equality Act dealing with liability of employees and agents, and also bearing in mind section 109 which deals with the liability of employers and principals.

135. It seems to me that these are matters to be determined at the final hearing rather than being dealt with summarily at this stage in the proceedings.

136. As to the respondents' contention that it is disproportionate and contrary to the overriding objective to include the individual respondents where the GMC does not deny any potential liability for the conduct relied upon by the claimant, I have considered this and also the claimant's written representations and I am not persuaded that it is right to remove individual respondents for the reasons described by the respondents in their submission.

Whether to order a Deposit

137. I have set out above the reasons why I have concluded that 14 of the claimant's alleged detriments, described by the respondents by the letters a, b, c, e, i, j, k, p, q, r, s, t, w and z, have little reasonable prospect of success and so the Tribunal may make an order requiring the claimant to pay a deposit not exceeding £1,000 as a condition of continuing to advance those allegations or arguments.

138. The only information I have concerning the claimant's means is that which has been provided by him and it is to the effect that he is living off benefits with no assets. I am aware that he is no longer a registered medical practitioner.

139. I remind myself from **Hemdan** that an order to pay a deposit must be one that is capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum he is unlikely to be able to raise. A deposit order should not operate to impair access to justice.

140. The making of a deposit order is a matter of discretion. Under Rule 39(5) the consequences to a respondent of a Tribunal deciding a specific allegation against the claimant for substantially the reasons given in the deposit order are that the claimant shall be treated as having acted unreasonably in pursuing the specific allegation for the purposes of Rule 76, which deals with when a costs order shall be made, and that the deposit shall be ordered to be paid to the respondent.

141. The making of an order for costs at the end of a hearing is another exercise of discretion for the Tribunal which may make such an order, where a party has acted unreasonably, and in reaching its conclusion it may have regard to the paying party's ability to pay.

142. Given that the making of deposit orders at the start of a case and costs orders at the end are both matters of judgment for the Tribunal, taking into account, as well as the outcome of the case, the means of the claimant, it does not seem to me to be to be fair, just or proportionate to order the claimant, with the limited means described, to pay a deposit in order to proceed with the allegations that, in my preliminary view on the pleadings, have little reasonable prospect of success.

Conclusion

143. The claimant's alleged detriments described by the respondents as d, f, o, v and y are struck out because they have no reasonable prospect of success. All other applications are dismissed.

Employment Judge Sherratt

21 June 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

29 June 2017

FOR THE TRIBUNAL OFFICE