THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		*Respondent*
(1) Mr N Vishwanath **(2) Mrs M Vishwanath**	**AND**	**County Durham & Darlington NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **London Central** **On: 13 & 14 July 2017**

Before: **Employment Judge Johnson** **Members:** **Ms H Szumowska**
Ms E Ebenezer

Appearances

For the Claimants: **Both in person**
For the Respondent: **Dr E Morgan of Counsel**

JUDGMENT

1 The first claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010 is not well-founded and is dismissed.

2 The second claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

1 The two claimants are husband and wife. The first claim, Mr N Vishwanath, is hearinafter referred to as Dr Vishwanath. The second claimant, Mrs M Vishwanath, is hereinafter referred to as Dr Rao. The respondent was represented by Dr Morgan of counsel. There was an agreed bundle of documents marked R1, comprising two A4 ring binders containing a total of 514 pages of documents. Evidence was given on behalf of the respondent by Mr

Paul Cummings (Deputy Medical Director) and Dr Robin Mitchell (Clinical Director).

2 Dr Vishwanath gave evidence throughout the first day of this hearing and was asked questions by way of cross-examination by Dr Morgan and was also asked questions by the Employment Tribunal panel. At the end of Dr Vishwanath's evidence, Dr Morgan for the respondent enquired as to whether Dr Rao wished to provide any evidence which was in anyway different to that which had been given by he husband. Dr Morgan pointed out that the claimants' witness statements were identical. Dr Morgan indicated that his questions for Dr Rao would be exactly the same as those he had put to Dr Vishwanath. The Tribunal Judge explained to Dr Rao that she was quite entitled to give evidence herself and thereby submit herself to cross-examination by Dr Morgan and to answer questions from the Tribunal. The Tribunal made it clear that it had no intention of limiting Dr Rao as to the evidence which she wished to give to the Tribunal, provided that it was relevant to the issues to be decided by the Tribunal and did not contain evidence which could and should have been included in her witness statement. Dr Rao confirmed that her evidence to the Employment Tribunal would be exactly the same as that provided by Dr Vishwanath, her husband. Dr Rao confirmed that her replies to questions put to Dr Vishwanath by way of cross-examination, would be exactly the same. On that basis, Dr Morgan confirmed that he would be willing to agree to Dr Rao taking the oath and confirming under oath that the evidence in her witness statement was accurate, true and correct and that the answers given by Dr Vishwanath to questions in cross-examination and from the Employment Tribunal may be accepted by the Tribunal as if she had been asked the same questions and had provided exactly the same answers. The Tribunal recorded Dr Rao's concession on this point in the following terms:-

> "I am content for all of my husband's replies to Dr Morgan's questions to stand as my replies to the same questions."

Dr Rao then took the oath and said under oath:-

> "I confirm that all of my husband's replies to Dr Morgan's questions are accepted by me as my replies to the same questions."

On that basis, Dr Morgan had no questions for Dr Rao, nor did the Employment Tribunal.

History

3 Both claimants are Radiologists. Dr Vishwanath's employment with the respondent began in 2006 and Dr Rao's employment with the respondent began in 2007. Dr Vishwanath was dismissed on 3 July 2015. Dr Rao resigned on 31 July 2015.

4 In November 2012 the respondent commenced an investigation into work carried out by four of their Radiologists (Dr Cox, Dr Minty, Dr Vishwanath and Dr Rao) for a private medical company, Medica. The basis of the investigation was that

those Radiologists may have been undertaking work for and being paid by Medica during time when they were supposed to be working for and were being paid by, the respondent. In October 2013, all four Radiologists were invited to disciplinary hearings, which included allegations that they had failed or refused to cooperate with the investigation. Dr Cox and Dr Minty were invited to disciplinary hearings to take place in September 2014, but both resigned with immediate effect on 15 September 2014. The disciplinary proceedings in respect of both of those Doctors came to an end on 19 December 2014. Both Dr Cox and Dr Minty subsequently issued proceedings in the Employment Tribunal.

5 The first and second claimants were invited to attend disciplinary hearings in April 2015. Both commenced Employment Tribunal proceedings on 2 May 2015, which were eventually settled.

6 On 3 July 2015 the first claimant was dismissed for gross misconduct. He submitted an appeal against that dismissal on 12 July and raised a formal grievance on14 July 2015. The second claimant resigned before the conclusion of her disciplinary process, on 31 July 2015. The first claimant added a claim of unfair dismissal to his Employment Tribunal proceedings on 17 November 2015 and the second claimant added an allegation of unfair constructive dismissal to her claims on 15 January 2016.

7 Employment Tribunal claims by Drs Cox and Minty were dismissed by Judgment promulgated on 8 December 2015. Both Drs Cox and Minty were referred by the respondent to the General Medical Council on 21 April 2016.

8 On 23 April 2016, the respondent entered into separate compromise agreements with each of the two claimants, the effect of which was to settle all of their claims in the Employment Tribunal and indeed any other court. Agreed sums by way of compensation were paid to each claimant shortly thereafter. On 4 June 2016 the respondent reported both claimants to the General Medical Council.

9 It is the respondent's act of reporting each claimant to the General Medical Council (GMC) which forms the subject matter of the current Employment Tribunal proceedings. A somewhat unusual aspect of this case is that neither claimant challenges that the respondent was entitled to report them to the GMC, nor does either claimant challenge what the respondent has said about them in those reports. The sole basis of the complaint by each claimant relates to the **timing** of the referral to the GMC. Both claimants allege that the respondent could and should have reported them to the GMC before their respective compromise agreements were concluded and that by deliberately delaying the referrals to the GMC until after the compromise agreements were concluded, the respondent committed an act of victimisation against each claimant.

10 The claim forms in the current proceedings were presented to the Employment Tribunal on 28 October 2016. Neither claim form contains details of any legal representative then acting for the claimants. There followed six preliminary hearings between 20 December 2016 and 27 June 2017. At the hearings on 20 December 2016 and 20 January 2017, both claimants were represented by Mr P Strelitz of counsel. Mr Strelitz had acted for both claimants in the earlier

Employment Tribunal proceedings which were settled when they entered into the compromise agreements in April 2016. Mr Stelitz acted as the "advisor" who provided the appropriate certificate under section 201(3A) of the Employment Rights Act 1996 and the Equality Act 2010. At paragraph 4 of the case management summary from the preliminary hearing on 20 January 2017 it states as follows:-

> "I took time today to clarify with Mr Strelitz on behalf of the claimants as to exactly what was the act of discriminatory behaviour or victimisation about which the claimants complained. Is it:-
>
> 4.1 The fact of the referral to the GMC?
>
> 4.2 The content of the referral to the GMC?
>
> 4.3 The timing of the referral to the GMC?"

Mr Strelitz confirmed that the claimants make no complaint about either the fact of the referral or the content of the referral, but only complain about the **timing** of the referral. The claimants' case is that the referral to the GMC was deliberately withheld or delayed by the respondent until after the claimants had entered into the compromise agreements and that it could and should have been made before completion of the compromise agreements. The claimants allege that because the referral was not made until after the compromise agreement was signed, they have suffered additional stress and anxiety."

11 It was raised by the Employment Judge with Mr Strelitz on that occasion, as to whether either of the claimants wished to make or maintain any challenge to the validity of their respective compromise agreements. If so, was either claimant to allege that their compromise agreement was either void or voidable for misrepresentation or any other defect. Mr Strelitz confirmed in clear and unequivocal terms that neither claimant wished to challenge the validity and enforcibility of their respective compromise agreements. Both claimants have maintained that position throughout these proceedings and confirmed at the start of this hearing that this still remained their position.

12 Whilst maintaining that their reporting of the claimants to the GMC could not and did not amount an act of victimisation, the respondent raises two specific points relating to the jurisdiction of the Employment Tribunal to consider these complaints. The first is that any referral of a doctor to the GMC is a matter which attracts "absolute privilege" and is thus something which falls outside the jurisdiction of the Employment Tribunal. The second jurisdiction point is that all of the claimants' claims against the respondent arising out of their employment and its termination were covered by the terms of the compromise agreements in April 2016, the effect of which was to prohibit either claimant from continuing any existing proceedings or bringing any further proceedings against the respondent in respect of any matter relating to their employment. Neither claimant specifically dealt with these jurisdiction points in their witness statements or in their evidence given to the Employment Tribunal. That is not of course to say that either claimant accepted that the Employment Tribunal did not have

jurisdiction to hear their claims. It is sufficient to record that neither claimant accepted that the doctrine of absolute privilege applies not just to the fact or content of a referral, but also to its timing and neither claimant accepted that the jurisdiction of the Tribunal to hear their present claims was ousted by the 2016 compromise agreements.

13 The claimants' evidence was that they could and should have been referred to the GMC by the respondent many months before the compromise agreements were signed. Dr Vishwanath's evidence was that both should have been referred to the GMC once the investigation into their conduct was concluded and the formal disciplinary process was commenced. Dr Vishwanath's evidence to the Tribunal was that the latest date by which he should have been referred to the GMC was when he was summarily dismissed for gross misconduct on 3 July 2015. Dr Vishwanath also pointed out that Drs Cox and Minty were referred to the GMC on 21 April 2016 and he could see no good reason why he and Dr Rao were not also referred to the GMC by then at the very latest. The settlement meeting at which negotiations took place about the settlement of the claimants' claims took place on 19 April 2016 and the claimants did not sign their settlement agreements until 23 April 2016. The claimants insisted that the late referral of their cases to the GMC was a deliberate act, designed to prolong their suffering if the GMC carried out a further protracted investigation into their professional conduct. The claimants insisted that, had they been referred to the GMC by mid 2015, then any GMC investigation and disciplinary process would have been concluded by the time the compromise agreements were signed and the agreed compensation paid. Had that been the case, then each claimant would have been able to put this whole sorry affair behind them and continue with their professional lives with a new employer in the South East of England.

14 Dr Vishwanath made specific reference to minutes of various meetings of the respondent's senior management teams, at which reference was made to the possibility of the claimants being referred to the GMC. The first of those is at page 191 in the bundle which is a meeting which took place on 24 February 2015. Both Mr Cummings and Mr Mitchell for the respondent accepted that they were always aware from the outset of the investigation into the claimants' conduct, that a referral to the GMC was a distinct possibility.

15 Included in the bundle at pages 250-255F, is an extract from the guidance issued by the GMC which explains the thresholds for referral in cases where there is concern about a doctor's fitness to practice. It sets out that under section 35C(2) of the Medical Act 1983 as amended, a doctor's fitness to practice can be impaired on a number of grounds, one of which is "misconduct". At paragraph 7 on page 251 the guidance states:-

> "Where the events that gave rise to the concerns took place more than five years ago we would only investigate if, despite the difficulties that arise as a result of the delay, there is a public interest in progressing the matter."

Paragraph 3 on page 250 states:-

> "We can act on any information we receive from any source, which raises a question about a registered doctor's fitness to practice. Common sources of information include patient complaints, referrals from employers, media reporting and notifications from the police."

Paragraph 11 on page 252 states:-

> "Some cases that appear to meet the threshold for an investigation, are referred for provisional enquiries. These are cases where, although the allegation initially appears to be serious, we need more information to decide whether to investigate further. This may be because it is not clear whether there will be sufficient evidence to support the allegation, or because further review including through expert input might show that the allegation is not as serious as first appeared."

Paragraph 14 on page 253 states:-

> "For the remainder of cases, we carry out a full investigation into the doctor's fitness to practice before we decide what action to take."

Paragraph 15 headed "Cases where we are likely to take action" on page 253 states:-

> "In some cases, the allegations about a doctor are so serious that, if proven, they are likely to result in us taking action on the doctor's registration. These types of cases tend to fall within five main headings:-
>
> (a) sexual assault or indecency;
>
> (b) violence;
>
> (c) improper sexual or emotional relationship with a patient or someone close to them;
>
> (d) dishonesty;
>
> (e) knowingly practicing without a license.
>
> 16 Therefore any allegations that fall within any of these five categories are likely to meet the threshold to be referred to us."

16 The allegations against both claimants were effectively of dishonesty. The claimants were accused of working for and being paid by Medica during hours when they were supposed to be working for and being paid by the respondent, or during hours when they were in receipt of sick pay from the respondent, having informed the respondent that they were too ill to attend for work.

17 Both Mr Cummings and Mr Mitchell gave their evidence to the Tribunal in a measured and consistent manner. Dr Vishwanath did not challenge the accuracy of their recollection of any of the material events which had taken place. Both Mr

Cummings and Mr Mitchell confirmed under oath that they played no part in and indeed were completely unaware of, any negotiations which led to the completion of the compromise agreements in April 2016. The claimants simply did not believe Mr Cummings and Dr Mitchell about that. Neither claimant could produce any evidence whatsoever to contradict what was said by Mr Cummings and Dr Mitchell in this regard. The Tribunal accepted the evidence of Mr Cummings and Dr Mitchell, which was that such negotiations would take place via the respondent's lawyers under the direction of the respondent's Chief Executive Officer. These were not "medical matters" with which either Mr Cummings or Dr Mitchell would get involved. The Tribunal accepted completely the evidence of Mr Cummings and Dr Mitchell to the effect that they played no part in those negotiations and were completely unaware of those negotiations. The Tribunal accepted their evidence which was that they only found out about those compromise agreements after they had been concluded and after the court proceedings and Employment Tribunal proceedings were thereby brought to an end.

18 The evidence of Mr Cummings and Dr Mitchell was similarly measured and consistent when they were asked to provide an explanation as to why they had waited so long before making the referral to the GMC and in particular, why they had waited until after the compromise agreements were concluded. Their evidence was that there had indeed been some delay and that this delay was longer than would normally have been the case. However, the delay was caused by the protracted nature of the original investigation (in which both claimants had refused to cooperate), the disciplinary proceedings, the grievance process, the appeals in the disciplinary and grievance process, the Employment Tribunal proceedings and the County Court proceedings. The evidence of Mr Cummings and Dr Mitchell was that it was their normal policy to wait until all internal procedures had been concluded, including investigations and disciplinary procedures. This was because those procedures may well produce evidence which could exculpate the employee in respect of any allegation made against that employee. Similarly, where an employee challenged the outcome of the internal processes by issuing proceedings in the Employment Tribunal or other courts, the respondent's policy was to wait until those court proceedings were concluded, again to see whether any evidence was produced or any finding made which could or did exonerate the employee. The respondent's policy in this regard was to give the employee every possible opportunity to adduce evidence which could lead the respondent to decide not to make a referral to the GMC. Mr Cummings and Dr Mitchell specifically referred to the cases of Drs Cox and Minty. In both of those cases, no referral was made to the GMC until such time as their Employment Tribunal claims were dismissed and the time for lodging an appeal to the Employment Appeal Tribunal had expired. Only then was a referral made to the GMC. The claimants in the present case insisted that it was wholly inappropriate to compare their cases with those of Drs Cox and Minty, insisting that any referral to the GMC had to be considered on its own merits. Mr Cummings and Dr Mitchell readily agreed that any referral of a doctor to the GMC should be considered on its own merits, but simply used Drs Cox and Minty as an example of how the respondent's policy was consistently applied. The Tribunal accepted the evidence of Mr Cummings and Dr Mitchell in this regard. The Tribunal found that the reason why the respondent delayed the

referral of the claimants to the GMC, was because it was their general policy to wait until all internal proceedings and external court or Tribunal proceedings were completed, before making any such referral. That was particularly the case where the allegations against the doctor did not relate to their medical skills or anything which could endanger patient safety.

19 Of particular significance in this regard, was the evidence from the minutes of the various meetings in the bundle which showed that the respondents were in regular contact with the GMC Employment Liaison Officer, Ms Helen Dolan. That lady is an employee of the GMC, part of whose role is to assist employers of doctors in the correct implementation of Good Medical Practice, a publication which underpins doctors' conduct and their supervision. The Tribunal accepted the evidence of Mr Cummings and Dr Mitchell to the effect that at no stage did Ms Dolan criticise or challenge the respondent's policy of withholding a formal referral to the GMC until such time as all internal and external proceedings were concluded. Dr Vishwanath's interpretation of the minutes which refer to Ms Dolan, was that she had advised that a referral should be made and that once such advice was received by the respondent, then they should have acted upon it my making an immediate referral to the GMC. The Tribunal preferred the evidence of Mr Cummings and Dr Mitchell, which was that Ms Dolan was simply being kept informed as to the progress of the investigation into the claimants' conduct, which was to her no more than a "live case" which could eventually lead to a formal referral.

20 Dr Vishwanath focused particularly on the extract from the minutes of the meeting of 11 August 2015, which was attended by Dr Mitchell and Helen Doran (with apologies from Paul Cummings). At page 202 in the column for "Action to be Taken", it states "RO to refer radiologist". That was acknowledged to mean the responsible officer, in this case Dr Mitchell. Dr Vishwanath insisted that this amounted to a specific acknowledgement by the respondent that the time had come for the claimants to be referred to the GMC. Dr Mitchell's evidence concentrated in the paragraph which appears alongside that entry which states:-

> "Chris Gray advised that the employment tribunal is going to a second leg as it ran short of time. In regard to the other two consultants, one was dismissed and an employment tribunal is scheduled for November and the other resigned. Referral to GMC was discussed and expected from EDTFT – RO/MD."

Dr Mitchell said that this was simply a discussion of the ongoing Employment Tribunal proceedings and that the respondent did expect at some stage to make a referral to the GMC. It was not an acknowledgement that a decision had been taken at that stage to make that referral immediately. It was to be left to the reporting officer (himself) to decide when the referral should be made.

21 The Tribunal again accepted the evidence of Dr Mitchell in this regard. The Tribunal found that, at this stage, there was no obligation on the respondent to make a referral to the GMC in all the circumstances of this case. It was not, and indeed could not have been, in the contemplation of Dr Mitchell the stage that the claimants' Employment Tribunal proceedings would be concluded by the

completion of a compromise agreement. The Tribunal accepted Dr Mitchell's evidence that the sole purpose in waiting until all of those court proceedings were concluded, was to give the claimants every opportunity to adduce evidence which could lead the respondents not to make a referral to the GMC.

22 In paragraph 14 of Mr Cummings witness statement, he states:-

> "In all four cases, however, it is the case that each doctor was only referred to the GMC once all internal and external processes had been concluded so each doctor was treated in exactly the same way. Indeed, from the investigation stage onwards, our focus was on treating all four doctors the same in any event because I knew that the claimants had already brought claims in the employment tribunal that were dismissed. The delay was in all cases longer than would normally have been the case (as a result of the protracted nature of the disciplinary, grievance and tribunal processes) and the tribunal will see that the GMC pushed to receive them. However the respondent was aware that it could be issued with yet further claims if it could be accused of acting prematurely and so it opted for the more cautious approach."

Mr Cummings' explanation for this evidence was that he did not wish the claimants to make any further allegations in the existing proceedings to the effect that they were being victimised by a premature referral to the GMC in respect of allegations which remained the subject matter of court proceedings. Dr Vishwanath seized upon this particular statement, insisting that it should be interpreted to mean that the reason for the delay in the referral to the GMC was because the claimants may issue Employment Tribunal proceedings alleging discrimination. Dr Vishwanath insisted that this fell fairly and squarely within the definition of "victimisation" in section 27 of the Equality Act 2010. The "detriment" is the additional stress, worry and anxiety caused by a further investigation by the GMC which was done because Mr Cummings believed the claimants might do a protected act, namely issuing proceedings or adding further claims to existing proceedings. Mr Cummings' evidence was that the respondent was simply being cautious in its approach to the referral to the GMC, because of the plethora of claims which had already been issued by these claimants and Drs Cox and Minty. The Tribunal found that Mr Cummings' approach was entirely reasonable in all the circumstances of the claimant's case. The Tribunal accepted Mr Cummings' evidence that the reason why the referral to the GMC was delayed was to ensure that all internal disciplinary proceedings and external court proceedings were concluded before the referral. The Tribunal found that the decision to delay the referral until after those proceedings were concluded was not an act of retaliation in response to either claimant having issued proceedings or having made any complaint about discrimination. On Dr Vishwanath`s own case, the information which the respondent had in April 2016 was no different to the information they had when they dismissed him in July 2015. On that basis, there was no reason why the referral could not have been made by July 2015 at the latest. Dr Vishwanath would not accept that the only thing which had changed in the intervening period, was that all of the court proceedings issued by himself and his wife had been brought to an end.

23 The Employment Judge specifically asked Dr Vishwanath to state when he alleged that the act or acts of victimisation had taken place. Was it in July 2015 when the respondent failed to report the claimants to the GMC, or was it in June 2016 when the referral was finally made? The claimant's evidence was that the act of victimisation took place when the respondent made its decision not to refer them until after the compromise agreements had been signed. The decision to make a referral was of course that of Dr Mitchell. The Tribunal found that Dr Mitchell played no part whatsoever in the negotiations which led to the completion of the compromise agreement and indeed only found out about that agreement after it had been completed.

24 The claimants have accepted that at no time during the internal investigation and disciplinary process or indeed the external Employment Tribunal or court proceedings, did they ever raise with the respondent the possibility of them being referred to the GMC. The GMC is of course responsible for the registration of all doctors, including the claimants. The Tribunal found that the claimants were aware of their own obligations under Good Medical Practice that they could, if they so wished, have referred themselves to the GMC for investigation of the allegations raised by the respondent. Both claimants had the benefit of advice, assistance and representation from the British Medical Association (BMA) throughout the internal proceedings. The claimants at the very least had access to professional legal advice in the court proceedings and certainly had representation from Mr Strelitz for a length period of time. The Tribunal found that the claimants were aware throughout of the possibility of a referral to the GMC, as a serious allegation of dishonesty was, (on their own case) something which would probably be referred to the GMC at some stage. At no time did the claimants, the BMA or their legal representative raise the issue of the GMC referral. The Tribunal found it more likely than not that the claimants were aware throughout that at some stage there was likely to be a referral to the GMC.

25 No evidence was given to the Employment Tribunal about the negotiations which led to the conclusion of the compromise agreements. The Tribunal found that neither Mr Cummings nor Dr Mitchell played any part in those negotiations. The claimants of course did play a major part along with their counsel Mr Strelitz. No mention was made in the compromise agreements of the terms of any reference being given to or on behalf of the claimants, by the respondent. No mention is made anywhere in the compromise agreements of any provision whereby the respondents would be prohibited from making a referral to the GMC, or anything whereby the contents of any such referral were to be agreed in advance by the claimants. The Tribunal found it likely that the claimants and their expert advisers would have been fully aware throughout as to the prospect of a GMC referral at some stage. All would recognise that the respondents had a statutory obligation at some stage to make that referral, once they were satisfied that the appropriate threshold had been reached and that all internal and external procedures had been concluded.

26 The terms of the compromise agreements were put to Dr Vishwanath by Dr Morgan. Dr Vishwanath agreed that Mr Stelitz of counsel confirmed on 22 April that the wording of the agreements was approved by him and that he had completed the advisor's certificate, as was his duty. The documents were signed

by the claimants on 23 April and by the respondent on 3 May. On 23 April the claimants wrote to the Employment Tribunal formally withdrawing their claims and that letter was acknowledged by the Tribunal on 10 May when the proceedings were effectively concluded. The compromise agreement itself appears at page 130-144 in the bundle. It is a substantial document. The relevant extracts are set out below:-

> "4.1 In reliance on the warranties given by the employee in this agreement and without any admission of liability the employer shall pay to the employee the sums under this agreement in full and final settlement of all or any claims or other rights of action or costs or expenses (whether under the laws of England and Wales, European Union or any other law) that the employee has or may have against the employer, its directors, officers, agents or employees arising out of or in connection with the employee's employment and/or its termination whether under common law, contract, statute or otherwise including and limited to claims for unfair dismissal, direct disability discrimination, discrimination arising in consequence of a disability, indirect disability discrimination, failure to make reasonable adjustments, harassment related to disability, victimisation and wrongful dismissal provided the facts relating to the matter were known to the employee at the date of signing this agreement.
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> 4.3 The employee further agrees to accept the sums payable under this agreement in full and final settlement of all of any other claims which he has or may have against the employer or its directors, officers, agents or employees, arising out of or in connection with his employment and/or its termination which are not listed in clauses 4.1 or 4.2 in respect of which the Employment Tribunal and/or the High Court and/or the County Court has jurisdiction.
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> 4.6 The employee agrees that except for the payment set out in this agreement he shall not be entitled to any further sums arising out of or in connection with his employment and/or its termination, including but not limited to bonuses, benefits, payments or awards.
>
> 4.7 The employee agrees that in signing this agreement he hereby withdraws any complaint, appeal or grievance internally with the employer arising out of or in connection with his employment and/or its termination and will not bring or pursue or incite or encourage others to bring or pursue any further internal complaint or grievance, whether in accordance with a grievance procedure or the ACAS Code or otherwise.
>
> 5.1 The employee acknowledges and accepts that the employer in entering this agreement acts in reliance on the employee warranties contained in this agreement and the payment of the compensation payment is conditional on such warranties being true and accurate. The employee represents and warrants that:-

(a) the claims and prospective claims referred to at clauses 4.1 to 4.2 amount to the entirety of the claims which he believes he has or may have against the employer or its directors, officers, agents or employees, whether at the time of entering into this agreement of in the future arising out of or in connection with his employment and/or its termination;

(b) he has not commenced any claim other than the claims to be withdrawn under clause 7 and shall not commence any claim or proceedings in relation to those claims or prospective claims referred to in clauses 4.1 and 4.2 whether in the Employment Tribunal, the High Court, the County Court or otherwise;

(c) he has not commenced and shall not commence any other claim not referred to at clauses 4.1 and 4.2 whether arising in the Employment Tribunal, the High Court, the County Court or otherwise against the employer which without limitation includes any such claim of which the employee is unaware at the date of this agreement and which is not in the contemplation of the parties at the time of signing this agreement."

27 The Tribunal found that the claimants, their professional advisors and legal advisors must have had in their contemplation at the time when entering into this agreement, that there remained outstanding the possibility of a referral to the GMC. The Tribunal accepted the evidence of the respondent's witnesses, to the effect that they could not contract out of their statutory obligations to make a referral to the GMC, should the circumstances so warrant.

28 As is referred to above, the claimants and their counsel have made it clear throughout the present proceedings that the compromise agreements were valid, binding and enforceable against both sides. Both claimants have provided warranties in return for the payment of a substantial sum of money. Those warranties include binding agreements not to commence any future or further proceedings against the respondent in respect of anything arising out of their employment with the respondent or its termination. The Tribunal found that the present proceedings are a clear breach of those warranties, which should be given in each case their ordinary meaning.

29 The Tribunal did raise with Dr Morgan on behalf of the respondent the not unusual circumstance where an employee may be permitted to bring new proceedings for victimisation, once the employment relationship has come to an end. It is common ground that the employer cannot contract out of its obligations under the Equality Act and any agreement purporting to do so will not be recognised by the courts. The Tribunal suggested to Dr Morgan that there may be circumstances which occur after the employment relationship has come to an end which still permit the employee to bring proceedings against the former employer, regardless of any compromise agreement. Dr Morgan acknowledged

that, but submitted that the circumstances of these claimants cases were such that the GMC referral must have been at least in their contemplation if not uppermost in their minds at the time they entered into the compromise agreements and that it would be wrong in law for the claimants to be able to avoid their clear and unequivocal warranties in this way.

30 It was held by the Employment Appeal Tribunal in **Lunt v Merseyside TEC Limited [1999] ICR 17** that a blanket compromise agreement could not compromise claims which had never been raised. In simple terms, a compromise agreement cannot be used to sign away all of the employee's rights to bring a Tribunal claim. Thus, the compromise agreement will only be valid insofar as it settles those complaints which have already been raised. However, the Employment Appeal Tribunal stated in **Hilton UK Hotels Limited v McNorton EAT0059/04** that the **Lunt** case did not determine that a party cannot contractually compromise a future claim of which he or she has no knowledge. Any such future claims could only be compromised "in language which is absolutely clear and leaves no room for doubt as to what it is the parties are contracting for".

31 The Tribunal found in the present case it was the clear and unequivocal intention of the parties that compromise agreements would bring to an end all current and future proceedings which the claimants could bring against the respondent. The Tribunal found that the prospect of referrals to the GMC was something which the claimants' advisors and legal representatives must have had in their minds at the time the terms were negotiated and agreed and the documentation completed. For those reasons, the Tribunal found that the claimants are bound by the warranties given in those compromise agreements and have thereby agreed to exclude the jurisdiction of the Employment Tribunal to hear the present complaints.

32 The Tribunal then turned its attention to the "absolute privilege" point. Absolute privilege is a complete defence in English law to an action for defamation, whether it be libel or slander. If a defence of absolute privilege applies, it is irrelevant if the defendant has acted with malice, new information was false or acted solely to damage the reputation of the claimant. Absolute privilege may be deployed in a narrow range of cases, such as statements made in judicial proceedings, communications between solicitor and client and statements made in or for the purposes of proceedings before an enquiry which amount to judicial or quasi-judicial proceedings, such as those before the Solicitors' Disciplinary Tribunal or the General Medical Council. Absolute privilege also attaches to statements made during parliamentary proceedings, to written and oral statements made to the police and evidence given in any court proceedings.

33 There is no doubt that the contents of the referral to the GMC by the respondent in respect of each claimant would and indeed did attract absolute privilege. That is clear from the decision of the Honourable Mr Justice Eady in **White v Southampton University QB02010/0728** and of Mr Justice Burnett in **Vaidya v General Medical Council CO-4376/2008**. It is Dr Morgan's case on behalf of the respondent that anything whatsoever to do with a referral to the GMC attracts absolute privilege and that must include the **timing** of any such referral. The

Tribunal was not referred to any specific authority which dealt with the timing of any such referral, whether to the GMC or any other quasi-judicial body. Having carefully considered those authorities and the circumstances of these claimants' claims, the Tribunal could see no reason why the doctrine of absolute privilege should not include the **timing** of a referral, as well as the fact of and content of any such referral. The doctrine is, as it says, one of "absolute" privilege. The Tribunal found that a doctrine is untrammelled by any matters relating to time. The doctrine of absolute privilege therefore applies to the timing of the respondent's referral of the claimants to the GMC and accordingly the Employment Tribunal does not have jurisdiction to hear their complaints of victimisation relating to the timing of their referral.

34 **S.27 EQUALITY ACT 2010 states as follows;**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-
(a) A has done a protected act, or
(b) A believes that A 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.

35 Both claimants had done a protected act, by bringing proceedings against the respondent alleging a breach of the Equality Act. That is not in dispute. The claimants both say that the delay in reporting them to the GMC caused additional stress and anguish as a result of the subsequent investigation. That is accepted as falling within the definition of a "detriment", on the basis that each claimant would have preferred to be treated differently by being reported earlier. What the Tribunal must decide is whether the respondent`s decision as to when to report them to the GMC was in any sense whatsoever influenced by their protected acts. The Tribunal found that it was not, for the reasons given by the respondent`s witnesses, which were accepted as honest and truthful by the Tribunal. The Respondent delayed reporting the claimants to the GMC because it wanted to wait until all internal and external proceedings were concluded, so that the claimants were given every opportunity to challenge the allegations which formed the subject matter of the referrals.

36 For those reasons, the claimants' claims of victimisation are not well-founded and are dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
4 August 2017
JUDGMENT SENT TO THE PARTIES ON

8 August 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL