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EMPLOYMENT TRIBUNALS

Claimant: **Mr C Chauhan**

Respondents: **1. Ramsay Health Care UK Ltd**
2. Mr C Ranaboldo
3. Mr S Emerson

Heard at: **East London Hearing Centre**

On: **12 September 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: In person, also represented by Dr J L Onwude (colleague)

Respondents: Ms S Ramadan (solicitor, Capsticks solicitors, London SW19)

JUDGMENT

It is the judgment of the Employment Tribunal that:-

(1) The respondents were not relevant qualification bodies for the purposes of sections 53 and 54 of the Equality Act 2010. It follows that the tribunal has no jurisdiction to consider the complaints against any of the respondents and the body itself or its medical director, the second respondent, or the general manager of Springfield Hospital, the third respondent.

(2) The claimant's claims are therefore dismissed against all respondents.

(3) Accordingly, the 5-day hearing starting on 25 September 2018 is vacated and will not be taking place.

(4) The claimant has asked for full reasons and these will follow separately. I have indicated that the appeal time limit should not run until the full reasons are sent to the parties.

(5) The claimant is ordered to pay a contribution towards the costs of the respondents in the sum of £3,000.

The above Judgment was sent to the parties without written reasons on 5 October 2018. As stated in the judgment, the claimant had asked for written reasons. These now follow below.

REASONS

1 The claimant, Mr Chauhan, is a consultant orthopaedic surgeon currently working for Southend University Hospital NHS Foundation Trust. He works about 2½ days per week and is on call for 1 day every 2 weeks. As it happens his wife currently works as a full-time band 5 nurse in the same Trust.

2 The first respondent is a large provider of private healthcare services in the UK. I am told it is one of the big 3 - Spire, Ramsay and Nuffield. It is a large international corporation founded by Paul Ramsay in Australia. It has a strong presence in Australia, Singapore and France apparently, and there are 22 hospitals in the UK. It is a UK registered company.

3 The claimant informed the tribunal that when he works for Ramsay private healthcare he could earn approximately 4 or 5 times as much as he earns when he works in the NHS.

4 Sometime in 2013 the claimant met David Hewitt who was then the General Manager of the Springfield Ramsay Hospital in Chelmsford. Mr Hewitt has now been replaced by Stuart Emerson who is the third respondent in these proceedings.

5 The second respondent in these proceedings is the Medical Director for all the Ramsay UK Hospitals. He is based in the Southampton area. The Ramsay administrative Head Office is in Old Broad Street in the City of London.

6 The Responsible Officer for the Ramsay Group of Hospitals used to be Dr Sheila Peskett who was based at Springfield. It is not known who the Responsible Officer now is after she retired.

7 David Hewitt advised the claimant to apply to work with Springfield Hospital. It was also, as I have been told, a major advantage to the Springfield to be using a consultant from Southend University Hospital Trust because Ramsey provide services for NHS patients, funded by the NHS, for services carried out at the Springfield. The claimant informed the tribunal that some two-thirds of the patients he saw at Springfield had come from the Southend University Hospital principally and were introduced by him.

8 The claimant applied to Springfield in September 2013 filling out an application form and providing his documentation. He was applying for "practising privileges". I understand that once practising privileges are granted they can be easily transferred to

other hospitals within the Ramsay Group. His practising privileges were subject to a routine annual review on the anniversary of their first granting.

9 The claimant was granted practising privileges on 6 January 2014 and retained those privileges. However, as the result of one incident arising in an operation he performed, the claimant was taken off working on upper limb surgery but retained on lower limb surgery i.e. no more shoulders.

10 Following a procedure on patient TL in October 2017, an investigation was made into that operation and a wider investigation of the claimant's practices. As a result, on 5 March 2018, the claimant's practising privileges were withdrawn altogether. I do not know for sure if he could re-apply for those practising privileges. Ms Ramadan was not sure on the point either. This has affected his income greatly. He worked approximately 40% of the time for the Ramsay Group and 60% of the time for the NHS.

11 It is because of that withdrawal of the practising privileges that he brings this claim. He made an early conciliation reference to ACAS on 4 February, a certificate was issued on 14 February and he brought his claim on 27 March 2018. It is abundantly in time relative with the withdrawal of privileges on 5 March.

12 Initially he wrongly brought his claim under section 29 of the Equality Act 2010. That is the section that refers to public functions and services. It is clearly not the right section. Anyway section 29 is only justiciable in the County Court as the claimant accepts.

13 At a case management preliminary hearing on 8 June before Judge Hallen the claimant corrected the error and stated that the claim was in fact under sections 53 and 54 of the Equality Act 2010. It has proceeded thus ever since.

14 Curiously, and I do not know how this happened, a notice of hearing for a 5-day final hearing was issued by this tribunal on 11 September for a hearing to start on 25 September; no case management had been made and the case would have had to be postponed anyway if it had proceeded after today's preliminary hearing on jurisdiction.

15 From the outset, the respondent has taken the point that the respondent Ramsay Health Care UK Ltd and its Medical Director and the General Manager of Springfield, were not proper respondents to this tribunal claim. They argue under sections 120, 53 and 54 the respondent is not a "qualifications body" within the meaning of sections 53 and 54 (3) of the Equality Act 2010. Judge Hallen listed this case for today, 12 September, for that jurisdictional point to be decided.

16 Section 54(2) provides that a qualifications body is an authority or body which can confer a relevant qualification. Section 54(3):

> "A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession."

And that is what I must decide at this hearing. It is principally a legal question but I find as a fact that the claimant filled out an application form which I have been shown. The

granting of practising privileges for Ramsay Group hospitals is governed by rules. The "The Facility Rules" is a 53-page book of detailed rules. Particular focus has been on the accreditation section at paragraph 43 to paragraph 59.

17 The claimant confirmed in his witness statement that when he started he provided 12 separate documents:

17.1 Application form,

17.2 CV,

17.3 Medical indemnity insurance policy,

17.4 Certificate of medical registration,

17.5 Post-graduate qualifications,

17.6 Royal College of Surgeons Fellowship Awards,

17.7 Certificate of completion of specialist training (which qualifies him as a consultant),

17.8 Appraisal portfolio,

17.9 Information Commissioner Registration,

17.10 Immunisation record,

17.11 CRB certificate (which he was going to acquire and Ramsay were going to pay for), driving licence, passport and recent utility bill and

17.12 Names of 2 referees.

The process took 2 months to check through and he was granted his practising privileges which he held for over 4½years. I am informed this is not untypical for any private healthcare provider to have similar accreditation processes.

18 The claimant also explained some of the background about the Responsible Officer, something I was previously unaware of. NHS Trusts will also have a Responsible Officer who is usually a medical director. In this case the responsible officer was Sheila Peskett certainly in the term previously. This has now apparently changed. As it happens she was based at the Springfield Hospital. Responsible Officers are agents of the GMC who submit lists of medical practitioners employed in their organisations.

19 The claimant was never an employee of Ramsay Health Care UK, he worked there on a fee paid basis. There is no dispute about that. He does not need employment status to bring a complaint against a qualifications body.

20 For the purposes of the definition I am prepared to accept that the process the

claimant went through to obtain these practising privileges probably does fall within the definition of "authorisation, qualification, recognition, registration, enrolment, approval or certification…. ". Accreditation is something which sounds similar to certification, and approval is the same.

21 I have a problem with the second part of the definition: "… which is needed for or facilitates engagement in a particular trade or profession". Under section 212 (the definitions section) a "trade includes any business" and "profession includes a vocation or occupation".

22 Logically the problem for the claimant is he was then, and now still is, a Consultant Orthopaedic Surgeon FRCS ED (orthopaedic and trauma) and works at Southend University Trust as such a consultant, and always did. That appears very clearly to me to be his "trade or profession". I have been shown a copy of his practising certificate. I understand these are all online now. Paper certificates are a thing of the past.

23 This case is governed by case law which is squarely on point, and binding precedent. That has made my task easier today:-

23.1 *Tattari v Private Patients Plan Ltd* [1997] IRLR 586, CA;
23.2 *Kulkarni v NHS Education Scotland* UKEATS/0063/12;
23.3 *Loughran & another v Northern Ireland Housing Executive* [1998] IRLR 593, HL
23.4 *Pemberton v Inwood* [2018] EWCA Civ. 56, CA.

24 *Tattari v Private Patients Plan Ltd* is the closest on the facts. It was decided under section 12 of the Race Relations Act 1976 whose provisions are cited in that judgment and include the same words: "which is needed for or facilitates engagement in a particular profession or trade". That, in my judgment, is the all-important part of the definition. The facts were that Dr Tattari was a plastic surgeon qualified under Greek law. Private Patients Plan was an insurance scheme providing private medical reconstructive surgery. This is a case where considerable financial advantage would accrue to Dr Tattari if he was allowed to practice under the Private Patients Plan. He challenged it in the employment tribunal and the case was appealed to the Employment Appeal Tribunal, then to the Court of Appeal.

25 The word "facilitates" was emphasised. Mr Chauhan relies heavily on that word in his arguments today. Quoting from the judgment of Beldam LJ: "It was argued that the word "body" should be given a broad interpretation and certainly ought not to be confined to non-commercial bodies". Having established that PPP was a body for the purposes of section 12 it was said that it was a body capable of conferring recognition or approval that if it gave recognition or approval to a medical practitioner it would: "facilitate his practice because it would give him access to significant number of patients in the private medical field of reconstructive plastic surgery". The judge concluded that it was not an authority or body within the meaning of section 12 and stated that the section had to be read as a whole and not construed piecemeal i.e. taking the word "facilitates" out of context. I am bound by that authority.

26 The GMC certainly is a qualifications body. As the claimant was at pains to point out. In the case of *Michalak v General Medical Council* [2017] UKSC, 71, SC, the

Supreme Court found the GMC to be a body whose decisions could be challenged before an employment tribunal. S 120(7) of the Equality Act 2010 (about appeal rights) did not mean that it could not be challenged in an employment tribunal under sections 53, 54, and 120.

27 There is a big distinction between the GMC that grants the right to practice as a consultant orthopaedic surgeon and the Ramsay practising privileges which give him right to practice *qua* surgeon at the Springfield Hospital and, by transfer, at other private hospitals in the Ramsay Group of hospitals.

28 The second authority *Kulkarni v NHS Scotland* was an appeal, again by the unsuccessful consultant, to the EAT from a tribunal's decision. Dr Kulkarni complained that he needed a trainee. It would affect his practice in general if he were to be granted a trainee, something which NHS Education Scotland apparently had the power to do. In the EAT Lady Smith's judgment was that this was not a qualifications body for the purposes of sections 53 & 54 of the Equality Act. The focus in that case may have more been on the first part of the definitioni.e. "authorisation … certification". The *Tattari* case was cited, the *Loughran* case was also cited which I will come to below.

29 This was a case in which Mr Kulkarni was arguing it would facilitate his engagement. That was the point also taken in the *Tattari* judgment. However, *Tattari* said the section must be read as a whole. The *Kulkarni* case is not so helpful because it focuses on the first part of the definition which I am prepared to assume in Mr Chauhan's favour, for the sake of argument.

30 Turning now to *Loughran & another v Northern Ireland Housing*, it is a case in the House of Lords which came from the Northern Ireland courts. The claimants were qualified solicitors; that was their profession and they were challenging their non-inclusion in the panel of lawyers could undertake work for the Northern Ireland Housing Executive. It is similar to qualified barristers being admitted to the panel of Treasury Counsel.

31 The *Tattari v PPP* case was cited. *Loughran* was decided under parallel legislation the Fair Employment legislation in Northern Ireland. I have not looked into this in detail to see if there is a proper read across between the Northern Ireland legislation and the legislation applicable in England, Wales and Scotland. Given the other 2 authorities I can see how the outcome today was inevitable.

32 The last case was of interest because the decision went the other way. It went in the claimant's favour in the English Court of Appeal. This is a case involving the Reverend Canon Pemberton and the Right Reverend Richard Inwood former Bishop of Southwell and Nottingham. Canon Pemberton, in a same-sex marriage, applied for an Extra Parochial Ministry Licence ("EPML") and the Bishop had refused to grant it. The question of whether the Bishop was a qualifications body was one of the matters for consideration in the judgment. The Canon was applying for the position of Chaplaincy and Bereavement Manager. In the judgment of Lady Justice Asplin in the Court of Appeal at paragraph 43:

> "It is clear that the EPML was a condition of the employment on offer. It was needed for, or, at the very least, would have facilitated the appointment and it is common ground that the position of Chaplaincy and Bereavement Manager amounted to a "vocation" for the purposes of section

> 212 of the 2010 Act. I am unable to accept Mr Linden's [respondent's] submission that the EPML was equivalent to a character reference and could not amount to a "relevant qualification". I agree with Mr Jones that it is quite clear from the job description that the person taking up the post was required to hold the appropriate licence and be "accredited" by his or her faith body."

33 I need read little more than that to show that the case is clearly distinguishable from the other 3 authorities already cited. The major distinction is that it was common ground that the position of Chaplaincy and Bereavement Manager was a vocation which under section 212 is included in the section 53 definition of "profession". Therefore, the point was clearly decided in favour of the claimant. Clearly Mr Chauhan wishes to rely on this case because it is the only one of the 4 authorities in which the case went the claimant's way.

34 Unfortunately, the claimant has put many hours of work into this but there is a void at the centre of his contentions. He attempts to distinguish the *Tattari* case because it was decided under the Race Relations Act 1976, but there is no significant difference between section 12 of the RRA and the current sections 53 and 54. He also attempts to distinguish it because it involved an insurance provider. I cannot see that as a significant distinction. He is silent on the all-important provisions about "profession".

35 He distinguishes the Kulkarni case which maybe he was correct to do so not that it helps him. The *Loughran* case is more appropriate or similar to the facts of his own case. He distinguishes it because it is decided under the Fair Employment (Northern Ireland) Act 1976 and he distinguishes it because the substantive claims of *Loughran* and *Kelly* were different from his own substantive claims. I do not see that as a significant distinction affecting the *ratio decidendi*.

36 As far as I can see the claimant's reliance upon the *Pemberton v Inwood* case is only on the conclusion in that case. The reasoning was different and highly distinguishable. He does not tackle the central reasoning as it would apply to his case. It is significant that in the *Pemberton v Inwood* case a thorough review of authorities was made and all the 3 authorities I have cited already were cited, and distinguished.

37 Mine is not a marginal decision today. I consider I am bound to reject the claimant's contention that Ramsay Health Care UK Ltd was a qualifications body in its exercise of the grant and withdrawal of practising privileges at Ramsay Health Care UK Hospitals.

38 On the evidence I have heard from Mr Chauhan he stated that it applies blanket ban to him working for private healthcare providers. I am not convinced this is so. He did apply to one smaller local private healthcare provider in the Southend area and was refused. Apparently after that provider telephoned the Springfield Hospital to take up a reference; whether this would happen with every private healthcare provider I have no idea.

39 The claimant is quick to acknowledge that he also has a GMC record with historic problems. He had a protracted dispute with them. His GMC registration was restored after ruling of the High Court in 2009.

40 The whole litigation left him with debts of £0.5m. He is still suffering from the consequences of it, hence the limited costs order I make below. His finances are being

managed by Step Change, a debt advisory agency. He pays an interest only mortgage on his property and he is currently aged 53. He says his wife has had to go back to working full-time at Southend as a result of a drop in his consultant income.

41 The claimant told me he had not applied to any of the other Big 3, Spire Healthcare / Nuffield Healthcare as he is apprehensive that it would have the same outcome. That may or may not be but I cannot accept his assertion that he can no longer work in private healthcare in the UK. It has not been fully backed by evidence.

42 The claimant's situation before Sprigfiels, and now after the withdrawal of practising privileges is the same. He is still working for Southend University Hospital as a consultant orthopaedic surgeon. That remains his profession. He says there is greater scrutiny of his practice and that may be so as a result of the incidents at the Ramsay Group. He says the Responsible Officer / Medical Director of the Trust is exercising more scrutiny. However, I understand there are no restrictions on his practice. He carries out orthopaedic surgery on upper and lower limbs in trauma (A & E) largely.

43 I reject the claimant's contentions, and the full and final merits hearing will not now take place.

Costs application

44 The respondent applied for costs after the end of the hearing and after I had announced the judgment but not given these reasons for lack of time. They are applying for £12,000 costs. (Originally, they wrongly included VAT of another £2,500). The total costs applied for is £12,063.65.

45 I was shown 2 letters dated 13 June and 17 August. They were without prejudice save as to costs.

46 The second letter of 17 August set out the 4 authorities discussed in the above judgment. The respondent was urging him to take legal advice on his claim. I understand (although it is not part of the record of that hearing) that Judge Hallen at his preliminary hearing on 8 June 2018 also urged the claimant to take legal advice because this is a technical area on which there is case law.

47 The claimant stated that in fact he was away from mid-August until the end of August so he had no chance to do anything about this. It is possible he would have been pushed to actually see a lawyer at this time but he will have received this letter. He could have easily applied for a postponement of the preliminary hearing. The letter was sent to him by email only. He was on holiday in the Grand Canyon, he said reception was poor. I can well believe that but I cannot accept that he did not have Wi-Fi sufficient to pick this up. As the hearing was imminent, he should have been checking his emails.

48 If he is hard up he could have made an appointment sometime to go to a law clinic locally in Southend or in Chelmsford where there are likely to be quite high calibre volunteers. If the claimant had sought competent legal advice, I would be astonished if he had been told anything other than the fact that his chances of success

were non-existent. Even if he had been successful in the tribunal the chances of a successful appeal by the respondent would be overwhelming.

49 In the circumstances and given that it is reasonably technical and legal area and he is a non-lawyer Dr Onwude has a bit of tribunal experience but not specifically on these sections. He was clearly out of his depth in the arguments that were needed to get the claimant through. The claimant stressed the word facilitate but that has been considered in 2 cases not to have availed the claimant's because the section must be read as a whole.

50 I cannot accept that this situation would also be saved by a reliance on trade. I consider a trade example might be a gas installation plumber requiring a Corgi licence. That is more properly a trade than a profession, it could be either but profession, vocation and occupation are what seems to me to apply to the claimant; he was bound to lose.

51 On the question of whether to make a costs order at all I am satisfied for the purposes of rule 76(1)(a) the Employment Rules of Procedure 2013 that the claimant has acted unreasonably in either bringing and conducting the claims without taking some specialist advice on sections 53 and 54 and the case law, and without heeding the respondent's sensible and moderate letter without prejudice save as to costs.

52 Of the £12,000, bearing in mind the claimant's limited means with limited equity in his house, his vehicle, and his historic debt situation, under Rule 84 of the Employment Tribunals Rules of Procedure 2013 I will limit the claimant's contribution to £3,000, which I consider would be affordable at a stretch. As I said to the parties, the prerogative of mercy really belongs to the receiving party rather than to the tribunal. I feel sure that the respondent will not enforce instantly for the full amount and that some agreement may be reached about instalments.

53 Accordingly, £3,000 costs are awarded.

Employment Judge Prichard

20 November 2018