Case No. 1304444/2017
2404530/2019
2406439/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Dr Adil Razoq (Claimant)	and	1. General Medical Council 2. Sarah Gibson 3. Willie Paxton 4. Kristan Matuszcsak (Respondents)

Held at: Birmingham, remotely by CVP

On: 14 and 29 September 2020

Before: Employment Judge T Coghlin QC

Representation:

Claimant: In person

Respondent: Mr Ivan Hare QC

JUDGMENT

1. The following parts of the claim are struck out as having no reasonable prospect of success (adopting the numbering set out in the respondents' skeleton argument dated 11 September 2020 as set out in paragraph 8 of the Reasons below):

a. Allegation (4.3) insofar as it is alleged that the respondents asked leading questions of Dr Fertleman;

b. Allegation (10.2); and

c. **Allegations (18) and (21) insofar as they relate to the investigation of a complaint against the Dumfries Trust.**

2. Save as set out above, the respondents' applications for strike out and/or deposit orders are refused.

The parties' attention is drawn to the direction set out in the final paragraph of the Reasons below to provide the tribunal within 7 days their dates of availability (to the end of February 2021) to attend a case management preliminary hearing with a time estimate of 2 hours.

REASONS

Introduction

1. This an application made by the respondents to strike out the claimant's claims of sex, race and religious discrimination and victimisation on the grounds that they lack reasonable prospects of success, pursuant to rule 37(1)(a) of the 2013 Employment Tribunal Rules of Procedure ("the 2013 Rules"), or alternatively for a deposit order on the grounds that the allegations advanced by the claimant have little reasonable prospects of success under rule 39 of the 2013 Rules.

2. The claimant is a doctor registered with the first respondent, the GMC, which is the professional regulator for doctors in the United Kingdom. The case concerns investigations which the GMC undertook in relation to the claimant, culminating in fitness to practice (FTP) proceedings taking place, where all the charges against the claimant were dismissed. The second respondent, Ms Gibson, was a Senior Investigations Officer at the GMC and was acting as an Assistant Registrar in the claimant's case. The third respondent, Mr Paxton, was the GMC's Employer Liaison Officer for Scotland in 2018-2019, and the fourth respondent, Mr Matuszczak, was an Investigation Manager at the GMC overseeing the Provisional Enquiry into the claimant's case in 2018-2019.

3. The claims are brought by way of three ET1s. The first two claims were brought against the GMC only; the three individual respondents were named as respondents only in the third claim. Part of the first claim was struck out by EJ Lloyd at a preliminary hearing on 31 May and 1 June 2018 on the ground that it related to a matter in respect of which a statutory appeal was available (see s120(7) EqA). The claims were consolidated on 22 October 2019. At a hearing on 29 November 2019 a list of the matters requiring

further particularisation was produced, following which the claimant provided further particulars on 20 December 2019. The parties agreed the outstanding issues relating to the pleadings as recorded in a consent order on 28 March 2020.

4. For the purposes of his claim of race discrimination, the claimant describes his race as Middle Eastern. His religious discrimination claim is put on the basis that he is Muslim. For the purposes of his victimisation claim, the claimant relies on a number of protected acts, namely his first two tribunal claims, and the following further complaints:

    a. about Daniel Gore dated 13 January 2016 addressed to H Molly and the Corporate Review Team ("CRT");

    b. about Rashida Conroy dated 31 March 2016 addressed to Patricia Collins and the CRT;

    c. about Rashida Conroy dated 4 April 2016 addressed to Patricia Collins (and others);

    d. about misconduct dated 26 January 2016 addressed to Charlotte Spink and the CRT;

    e. about racism dated 14 November 2016 addressed to Charlotte Spink and the CRT; and

    f. about racism and the Case Examiners' letter dated 15 November 2016 addressed to Simon Haywood.

5. For the purpose of this application only, the respondent is content to assume that each of these constituted a protected act for the purpose of section 27(2) EqA.

6. The claimant makes a number of allegations of detrimental treatment, which are enumerated in the respondents' skeleton argument dated 11 September 2020.

7. In broad terms the overarching complaint made by the claimant is that the GMC (and latterly the other named respondents) investigated complaints relating to him in a manner that was unnecessary, unbalanced and characterised by unreasonable delay, while acting entirely differently when addressing complaints which he made against other doctors who did not share his protected characteristics.

8. The specific allegations are as follows. I use here and throughout this judgment the numbering used in the respondents' skeleton argument.

(1) In 2014, the GMC started an investigation into the claimant which was not justified/did not meet the threshold for an investigation and/or did not meet the triage criteria.

(2) The GMC failed to investigate whistleblowing concerns raised by the claimant in an email sent on either 19 or 20 November 2014.

(3) The GMC investigated the complaint lodged against the claimant by the Peterborough hospital.

(4) The GMC carried out an inadequate investigation in that:

(4.1) Key witnesses were ignored: for Patient A (Dr Scott); Patient B (Dr Ullah for two years; Night SHO; Night Nurse; Site Manager; AMU Nurse; next day 11 SHO; next day Registrar); Patient C (F2 doctor; Night Sister; 2 SHO doctors); and Patient D (Night Nurse in CCU; Night Sister in CCU).

(4.2) Irrelevant witnesses were relied upon: Paul McCulloch-Underwood; Melissa Blinston; Imogen Harmati; Sandeep Deshmukh; Abdul Hameed; Dr Min; Dr Nazir; and Dr Ashour.

(4.3) The GMC influenced witnesses: Dr Fertleman and Dr Cleaver.

(4.4) The investigation took too long – some two and a half years.

(4.5) The GMC failed to request patient notes on Patients A-D as part of the investigation.

(4.6) The GMC failed to keep the claimant up to date with the progress of the investigation.

(4.7) The GMC failed properly to consider the claimant's submissions.

(4.8) The GMC shared information concerning issues/complaints/concerns raised about the claimant with other hospitals as part of the investigation.

(4.9) The GMC failed to question any of the information provided to them by the hospitals but instead accepted it at face value and therefore failed to properly investigate it.

(5) The GMC referred the case to an expert, Dr Fertleman, when this was not warranted.

(6) The GMC decided to refer the case to Case Examiners and the Case Examiners decided to continue the investigation.

(7) The GMC decided to refer the case to the FTP (fitness to practice panel).

(8) The GMC failed to drop the allegations/investigation in response to 11 letters sent by the claimant in 2015 and 2016 on (and to): 2 February 2015 (Daniel Archer); 14 September 2015 (Daniel Gore); 21 December 2015 (Stephanie Pollitt); 6 January 2016 (Charlotte Spink); 27 January 2016 (J Colvin); 2 February 2016 (Colin Rafferty); 7 February 2016 (Charlotte Spink); 27 April 2016 (Abdus Choudhury); 17 June 2016 (Simon Hayward); 15 November 2016 (Simon Haywood); and 16 November 2016 (Charlotte Spink).

(9) The GMC failed to investigate clinical concerns raised by the claimant about other doctors namely Dr Fertleman, Dr Cleaver, Dr Nazeer, Dr Randall, Dr Jobson and Dr Kama on: 9 January 2015; 18 January 2016; 21 March 2016; 27 May 2016; 17 June 2016; 20 June 2016; 14 November 2016; and 25 November 2016.

(10) The decision to start an investigation and the length of time taken to investigate in respect of:

(10.1) The referral from Sandwell Hospital.

(10.2) The charging order.

(10.3) An alleged failure by the claimant to disclose information concerning his suspension to the Responsible Officer between 2011 – 2014.

(10.4) An allegation that there were inaccuracies in the claimant's CV.

(10.5) An allegation that there was an inaccuracy in the claimant's CV in respect of June/July 2007.

(10.6) An allegation that the claimant had failed to disclose his suspension Medway Hospital.

(11) The GMC failed to carry out a separate investigation (i.e. separate to and independent from the investigation into the claimant) in respect of Dr Fertleman or Dr Cleaver either on its own initiative or when the claimant made a formal referral.

(12) The GMC and Mr Paxton advised and encouraged Dumfries Hospital to make a referral against the claimant on 13 October 2018.

(13) The GMC, Miss Gibson, Mr Paxton and Mr Matuszczak started an investigation into the referral which was not justified/did not meet the threshold for an investigation and/or did not meet the triage criteria.

(14) The GMC, Miss Gibson, Mr Paxton and Mr Matuszczak failed to question any of the information provided to them by the Dumfries Hospital but instead accepted it at face value and therefore failed to properly investigate it.

(15) The first stage of the investigation (the preliminary stage) took 7 months.

(16) In May 2019 the GMC, Miss Gibson and Mr Matuszczak decided to drop the investigation but then restarted it.

(17) The GMC, Miss Gibson and Mr Matuszczak failed properly to consider the claimant's defence to the referral which was included in the bundle of documents from Dumfries Hospital.

(18) The GMC, Miss Gibson and Mr Matuszczak failed to investigate either Mr Donaldson or Dumfries Trust for misconduct.

(19) The GMC, Miss Gibson and Mr Matuszczak decided to continue with the investigation after having received a written submission from the claimant on 5 May 2019.

(20) The length of time the investigation took (8 months).

(21) The GMC, Miss Gibson and Mr Matuszczak failed to investigate the formal referral made by the claimant against Mr Donaldson and Dumfries Trust.

The hearing before me

9. The claimant represented himself at the hearing before me, and the respondents were represented by Mr Ivan Hare QC. Between them they provided me with over 50 pages of helpful written submissions. That does not reflect any particular prolixity in either set of submissions, merely the wide-ranging nature of the case and the factual complexity of it.

10. Remarkably, given the nature of the applications which were before me which call for a summary assessment of the merits of the claim, I was provided with bundles of documents running to no fewer than 1,814 pages. I understand that disclosure has yet to take place, and I expect that the bundle at trial would be larger still. I did not hear oral evidence but was referred by both parties to various parts of the documents in the bundles.

11. The hearing was punctuated and interrupted on a number of occasions due to difficulties with the CVP video platform and connectivity issues.

The legal framework

12. The GMC has never employed the claimant, and his complaint is brought under section 53 of the Equality Act 2010 ("EqA"), which provides so far as relevant:

"(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment.

…

(5) A qualifications body (A) must not victimise a person (B) upon whom A has conferred a relevant qualification—

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment."

13. Section 120 EqA provides in relevant part:

"(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

(b) a contravention of section 108, 111 or 112 that relates to Part 5.

…

(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."

The power to strike out

14. Rule 37(1)(a) of the 2013 Rules provides that the tribunal may strike out all or part of a claim on the ground that it lacks reasonable prospect of success.

15. I was referred to and have had regard to a range of cases which offer guidance as to how this power should be exercised including **Anyanwu v South Bank Students' Union** [2001] IRLR 305; **Mechkarov v Citibank NA** [2016] ICR 1121; **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126; **HM Prison Service v Dalby** [2003] IRLR 694; **Hasan v Tesco Stores Ltd** UKEAT/0098/16; and **Ahir v British Airways plc** [2017] EWCA Civ 1392.

16. Key principles which emerge from these authorities were summarised by Mitting J in **Mechkarov** as follows:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

17. The caution which tribunals should exercise before striking out discrimination claims was explained by Lord Steyn in **Anyanwu**:

"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

18. However there is a countervailing public interest, identified by Lord Hope in **Anyanwu**, which is that the time and resources of the employment tribunals (and for that matter of the parties) should not be taken up with having to hear evidence in claims which have no reasonable prospects of success.

19. In **Ahir**, Underhill LJ said:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'.
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> "… [T]he whole problem with a strike-out is that the appellant has no chance to explore what may lie beneath the surface, in particular, by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.
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> "… [I]n a case of this kind, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."

20. If the power to strike out is engaged on the ground that the tribunal is satisfied that the claim (or part of it) has no reasonable prospect of success, the tribunal has a discretion as to whether to exercise that power: see **Dalby** and **Hasan**.

<u>The power to make a deposit order</u>

21. Rule 39 of the 2013 Rules provides as follows:

> (1) Where at a preliminary hearing (under rule 53) 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
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> (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.
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> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
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> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
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> (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 (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

22. In **Hemdan v Ishmail** [2017] IRLR 228 Simler P (as she then was) gave the following explanation of the deposit order regime and the way in which it should be applied by the tribunal:

"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 thereby 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 on 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. where, for example as in this case, the preliminary hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested.

…

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 factors. 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 exercise of the discretion pursuant to reg. 39, sub-paragraph (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 (see, for example, the cases to which we were referred in writing by Mr Milsom, namely *Aït-Mouhoub v France (App No 22924/93)* [1998] ECHR 22924/93 at paragraph 52 and *Weissman v Romania (App No 63945/00)*, unreported, 4 May 2006 (ECHR)). In the latter case the Court said the following:

> 36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.
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> 37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …
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> …
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> 42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …'

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or 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. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

The respondents' general contentions

23. On behalf of the respondents, Mr Hare QC made some overarching points.

The position of qualifying bodies

24. Mr Hare QC submitted that qualification bodies such as the GMC are in a materially different position than employers. He relied on the statutory exclusion of the tribunal's jurisdiction for discrimination claims against qualification bodies "*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*" (s120(7) EqA). I do not agree that this in itself sheds any light on the approach which I should take to striking out of claims in respects of alleged acts which are not subject to appeals or proceedings in the nature of appeals. It is merely a reflection of Parliament's intention that there should not be duplicity of proceedings in respect of a certain subset of the functions which the body in question may be tasked with carrying out.

25. Next, Mr Hare QC observes that qualifications bodies such as the GMC have no day-to-day contact with the individual in question in the way that an employer might. As a broad proposition that may well be true, but the same could be said of various employers, including in particular large employers, where decision-makers will do things which affect individuals whom they may not know or frequently come into contact with. For example, it is not uncommon that discrimination claims are made against organisations by unsuccessful job applicants, or by employees who allege discriminatory decision-making by someone within the organisation who has never had day-to-day contact with them. It is quite possible, and by no means inherently implausible, that an individual decision-maker may be influenced consciously or subconsciously by protected characteristics possessed (or perceived to be possessed), or protected acts done (or believed to have been done), by an individual whom he or she has never met in person. Furthermore, in the course of long-running investigations the degree of interaction which individuals within the GMC may have with a particular doctor who is either the subject of investigations, or the maker of complaints, or both, may be quite extensive, with often detailed correspondence passing back and forth.

The nature of the claimant's allegations

26. The respondents also submit that the claimant is seeking a widespread review of the respondents' decision-making in relation to the claimant. That is certainly true, but that does not in itself say anything about the merit of the claimant's claims. I bear in mind that the assessment of the merits of those claims must be an assessment of their merits

as claims of unlawful discrimination and victimisation. But such claims can often be mounted on a broad front, and in some cases the basis on which inferences of discrimination or victimisation can be drawn only emerge from a consideration of the broad picture as a whole. This may be such a case.

27. The respondents assert that the claimant is prone to making allegations of discriminatory conduct whenever a decision is taken by anyone which is adverse to him, and my attention was drawn to various matters in support of that assertion. But this is not something to which I attach any real weight when considering whether the claim or part of it has no reasonable prospect of success, or whether the claimant's allegations have little reasonable prospect of success. Those threshold questions require the tribunal to focus on the prospects of success of *these* claims, on their own merits, and not on whether the claimant may or may not have made other allegations in other circumstances. A general propensity to make allegations of discrimination might be relevant, if at all, only in considering the subsequent question of whether to exercise the discretion to make a strike-out or deposit order assuming the threshold for making such an order is crossed.

No basis to conclude that treatment was on a proscribed ground

28. The respondents contend that the claimant has advanced no basis from which the tribunal at trial could properly conclude that the decisions taken in relation to him were materially affected by his race, sex, religion or protected acts. I accept that it is not enough for a claimant to point merely to a difference in status and a difference in treatment, or to rely on a bare allegation of unlawful discrimination or victimisation.

29. Here, however, the claimant can point to a number of comparators whose treatment is, on his case, notably different from his own in a number of respects. In his written submissions the claimant sets out, and by way of tables summarises, the nature of the allegations made against him (as he characterises them) as against the nature of allegations made against his comparators (again as he characterises them), and the differential treatment which he says was applied in each case. This goes for Dr Cleaver, Dr Fertleman, Dr Kama, Dr Randall, Dr Donaldson, and Dr Jobson. He relies on all of them as comparators for the purpose of his race and religious discrimination claims, and on Dr Cleaver for the purpose of his sex discrimination claim. In his written and oral submissions the claimant compares the allegations which he faced with the allegations made (in all or most cases by himself) against each of these comparators, and submitted that the allegations against him were demonstrably less serious as regards issues of probity and issues of clinical concern, and that they were less well

evidenced. His analysis draws on evidence in the form of contemporaneous medical records and other documentation, and on the determination of the Medical Practitioners Tribunal Service (MPTS) which ultimately found (after a hearing lasting for some weeks between March and August 2017) that none of the charges against him was proved (and many of them were found to give rise to no case to answer under Rule 17(2)(g) of the General Medical Council (Fitness to Practise) Rules 2004) and made some criticisms of at least some of the comparators. The fact that the MPT did not uphold the allegations against the claimant is not of course proof that they were entirely unreasonably brought (still less discriminatory) but it is a matter to which the claimant is at the very least entitled to pray in aid in developing an argument that the allegations against him were weak.

30. The respondents do not accept the claimant's description of the allegations against him, saying that he has sought to downplay their seriousness and cogency, and I do see some force in that. However at this preliminary stage, for the purpose of a strike out or deposit application, I am not able to say that the claimant has no (or little) reasonable prospect of showing that the allegations against his comparators (or at least a number of them) were at least as serious and cogent as those against him. These are questions of fact requiring consideration by a full tribunal in greater depth than is possible at this summary stage. The tribunal is likely to be assisted in this task by oral evidence both from the claimant and from any witnesses whom the respondents choose to call, as well as a close consideration of documentary evidence beyond what is practicable at a preliminary stage.

31. The claimant then goes on to say that the treatment which was afforded to him was in various respects fundamentally different from that afforded to each of his comparators, and that those differences were consistently adverse to him. He says that in his case, there was a lengthy and detailed investigation, which ran for over 3 years, including the obtaining of numerous witness statements designed to incriminate rather than to exculpate; that the allegations against him were not subject to serious scrutiny or challenge (until they reached the MPT fitness to practise hearing at which they fell away, largely on the basis of a submission of no case to answer); that other allegations were instituted against him at the GMC's own initiative; that his clinical practice was subjected to scrutiny by an independent expert; and that he was ultimately referred to a fitness to practise panel. By contrast, he says, his comparators were treated radically differently and more favourably: in each case, the allegations against them were investigated either not at all or in a cursory manner, and were swiftly dismissed with none of the delay which characterised the investigation into him; none of the comparators other than Dr Kama had their practice subjected to scrutiny by an

independent expert; and there was none of the same selection of witnesses calculated to incriminate rather than exculpate.

32. Once again, I am not in a position at this preliminary stage to say that the claimant's case in this respect lacks merit. At least the majority of the differences in treatment are a matter of record; some questions are nuanced (such as the suitability of the witnesses whose evidence was or was not gathered by the respondents) and again these are questions which are worthy of consideration by a full tribunal panel at trial, with the benefit of hearing evidence.

33. That leaves the crucial question of the reasons for the respondents' actions. The claimant alleges a consistent pattern whereby he was repeatedly treated in a markedly more adverse way than his comparators, who did not share his protected characteristics. When those individuals made allegations against him, or articulated concerns about him or his conduct or capability, their allegations and concerns were taken seriously and led to adverse treatment of the claimant. But where he made allegations or raised concerns at least equivalent gravity and cogency about them, his allegations were not taken seriously and were brushed aside. If the claimant makes out this case, I am not able to say that he is unlikely to establish a *prima facie* case based on this pattern of treatment which requires a non-discriminatory explanation from the respondents. I bear in mind that decision-makers may have mixed motives, and that in order to establish unlawful discrimination or victimisation it is enough that the relevant protected characteristic or protected act was a material (in the sense of non-trivial) reason for the treatment: it need not be the sole or even predominant reason.

34. As the courts have frequently observed, in considering whether the claimant has made out a *prima facie* case, it is important to bear in mind that it is unusual to find direct evidence of discrimination on the relevant proscribed ground. Inferences of discrimination may emerge from an overall pattern of behaviour, which must be considered holistically by the tribunal.

Limited freedom of decision-making

35. Mr Hare QC submitted that the respondents' decision-making in such cases is substantially curtailed in various respects by the statutory framework within which the GMC and its officers are required to act, and he took me through the various statutory provisions to show the way in which decision-making is prescribed. However at various points in the decision-making process there is an express or implied power to exercise

judgment and/or discretion. As the 2014 report into the GMC's decision-making, on which the respondent generally rely, put it,

> "As cases progress through the procedures, decision-makers must weigh the evidence available, frequently including both mitigating and aggravating factors, and measure the facts of the situation against the guidance and criteria. There are, particularly at the end of investigation stage, often several potential outcomes and in selecting from these, decision-makers possess a degree of agency. As long as the outcome can be shown to be reasonable and in line with the guidance, there may not be a single 'correct' result." (B/1129); "CEs [case examiners] make their decisions within the framework provided by GMC guidance and their training, but they are still required to make judgements and weigh the available evidence to reach their decisions." (B/1132).

36. If the claimant is able to establish the principal facts which he seeks to establish – that allegations of comparable gravity and seriousness were treated differently in his case and the cases of his comparators – then this would illustrate the degree of flexibility which in fact and in practice exists in relation to various aspects of decision-making; and with that flexibility comes scope for conscious and subconscious biases to influence decision-making.

Different decision-makers, and written decisions

37. The respondents say that there was a range of different decision-makers which detracts from the clarity of that pattern, and/or from the cogency of the inferences which might be drawn even if such a pattern could be established. That is a fair point, and an important one, but in my judgment it is a matter to be weighed in the balance along with the other evidence at trial. The tribunal may need to consider matters such as what, if any, connection or links there were between different decision-makers at different stages in the process.

38. The respondents also say that the decision-making in question is all clearly recorded in the documentary record, where reasons are given for the decisions that were taken, and that this is the best evidence that in reality would be likely to be found for decision-making. This is an important factor and I certainly see the force in the respondents' submission on this point.

39. However the accuracy or completeness of the explanations for decisions given by the respondents are challenged by the claimant. He has set out reasons why he challenges them (see for example pages 5-6 and 8-9 of his written submissions where he responds to the GMC's reasoning in relation to Dr Cleaver and Dr Fertleman respectively).

40. In a case where the respondents were acting on the basis of a wide range of complaints, allegations, concerns, and evidence, I cannot say with confidence that the written records of decisions represented a complete and realistically incontestable explanation for each of the decisions that was taken.

41. Further, the respondents' assertions on the two points I have just mentioned – that different decisions are taken by different individuals, and that all decision-making is recorded in writing - are not wholly borne out by the 2014 report into the GMC's decision-making processes on which the respondents rely. The report noted:

    "it emerged that informal and unrecorded conversations about the nature of cases and their potential outcomes take place between colleagues. This is not surprising and collegial discussion would be expected in any workplace. It is also not known to what extent, if any, such discussions may shape decision-making. However, in a context as contested and controversial as FtP procedures, accountability and transparency are important values." (B/1130).

    "We have already noted above the existence of undocumented, informal discussions between GMC staff about cases and their management. …In our analyses, the strongest voices within the FtP procedures were those of the CEs, whose role as recorded in the case files and as discussed by our interview participants, was more extensive than revealed by a simple description of the FtP system which would typically feature only their decision-making function at the end of investigation stage. The structure and the discursive style of those decisions typically present CEs as detached – as being removed from other activity within the FtP procedures. However, CEs are often involved at all stages of the FtP procedures, offering case advice, contributing to investigation planning, and feeding into the process of producing particulars. Whether these other functions have any bearing upon their decision-making at the end of investigation stage is not known but it is clear that they are not reflected or revealed in the decision rationales." (B/1132).

    The report concluded (B/1133):

    "we identified informal and sometimes unrecorded aspects to decision-making which may occur in discussions between staff. In such instances, the defensibility of decisions may be compromised as the clarity and transparency of the processes through which they were reached may be susceptible to challenge."

Oral evidence

42. It is the GMC's position that it would be unlikely to call evidence from the relevant decision-makers (though I would assume that the second to fourth respondents might well wish to attend to give evidence of the decision/s which they individually took), but would offer witness evidence at a general level from someone well-placed to give it, such as a senior representative of the GMC who exercises the powers of a Registrar. I recognise that the individual decision-makers might be expected to have limited direct recollection of their decision-making beyond what was recorded in their written decisions. But if the actual decision-makers are not called, then it may – depending on the tribunal's assessment of the facts overall – be difficult for the respondent to

discharge its burden of proof assuming the claimant has established a *prima facie* case (see **Efobi v Royal Mail Group Ltd** [2019] ICR at [44] and [57]; **AB v BA** [2006] IRLR 471).

43. Moreover, this is not a case where witness evidence from the respondents would be unnecessary. Even if actual decision-makers are not called, the respondent would need to give evidence at least at a general level (as Mr Hare QC confirmed it would intend to do) about how its procedures at each stage are operated in practice, and how the documentary evidence shows that they operated and how decisions were taken in this particular case, and there would undoubtedly be much in that which the claimant would challenge. Although given at a general level, that evidence could be extremely important.

44. For example, Mr Hare QC submitted that the question of delay – here, the process against the claimant, which ultimately resulted in no charges being upheld against him – was explicable on the basis that wherever possible, the intention of the GMC is to consider all allegations relating to a particular doctor "in one go", and that it is not unusual for investigations to take a matter of years. These are matters of evidence which I have no doubt the claimant would vigorously contest at trial.

Knowledge of religion (and other protected characteristics or acts)

45. The respondents say that there is no reason to think that any decision-makers in this case were aware of the claimant's religion, or the religion (if any) of any of the comparators, and a person cannot be influenced, consciously or sub-consciously, of something of which he or she is unaware.

46. The claimant's response is that there was material from which the GMC and the relevant decision-makers could be expected to have strongly presumed that he is Muslim. This arises from a number of matters. The claimant says that the GMC keeps records of the ethnic background of doctors (see A/206-207), though I do not know the extent this information may have been available to individuals or what level of enquiry would be required to unearth it; that the GMC had his CV and other documentation which indicated the university at which he obtained his primary medical qualification (in his case the University of Tishreen in Syria); and that all those concerned were aware of his name, which he says is recognisably Middle Eastern. The claimant might also point out that correspondence seen by relevant individuals within the GMC refers to him having worked, or having said he had worked, in Syria (see eg B/244-246). He says that one or more of these pieces of information would inevitably tend to create a

strong presumption that he was Muslim, whereas no-one would ever realistically presume that individuals with the names possessed by his comparators were Muslim: the only comparator with a non-European name is Dr Vijaykumar Kama, whose name might suggest a Hindu rather than Muslim background.

47. I see some force in these submissions and it seems to me that the question of whether any individual did or did not know or presume that he was Muslim is one that would need to be determined on the evidence at trial. (Similar points may be made about the decision-makers' knowledge of the claimant's race, , and whether he had done protected acts.)

The 2014 report

48. Mr Hare QC directed my attention to a report written in December 2014 into decision-making in the GMC's FTP procedures (B/1071-1151). I have already set out some extracts above.

49. The report presented findings from an in-depth qualitative review of GMC decision-making within the FTP procedures which aimed to identify instances of bias or discriminatory practice, and more generally to assess the quality of GMC decisions and decision-making processes. Mr Hare QC drew attention to the authors' core findings that

> "No evidence of bias or discriminatory practices was identified, either in the GMC's guidance and criteria documentation for decision-makers, or the sampled case files."

50. The respondents say that the claimant's case seeks to prove that discriminatory decision-making is rife within the GMC, and that the report gives objective reasons to think that it is not.

51. It seems to me that the report potentially offers some support to the respondents' case, but it is evidence to which I can only attach limited weight at this preliminary stage. A number of points may be made about it:

    a. Such material needs to be analysed with great care, having regard to the particular facts of the case: see the observations of Underhill LJ in **Bailey v Chief Constable of Greater Manchester Police** [2017] EWCA Civ 425 at [99], in considering the converse (but in my view comparable) case where there is evidence of discriminatory conduct and attitudes being widespread in a particular organisation.

b. The reason why the report was commissioned in the first place was because

> "for a number of years, there has been evidence that some demographic cohorts of doctors – notably non-UK trained doctors, black and minority ethnic doctors, male and older doctors - are overrepresented in FTP procedures and are at increased risk of progressing further through the system and receiving higher impact outcomes."

The report offers no firm explanation for that overrepresentation and those different impacts, and the alternative causes that it mentions are put forward tentatively, as "*only suggestions*." (B/1130-1131).

c. Although this report appears to me to be well-written, I am in no position to attempt a thorough analysis of the robustness of its methodology or its conclusions, and ultimately the report is in large part opinion evidence. That does not mean that it would not be admissible and possibly very important evidence, but it does mean that I approach it, at this preliminary stage, with some caution.

<u>Arguments about specific allegations</u>

52. In addition to its general, overarching points, the respondent advances arguments particular to each individual allegation. On some discrete matters I consider that the claimant's claim does lack reasonable prospects of success, as I shall indicate below.

53. Otherwise my response to the respondent's arguments in respect of each individual allegation is that I am not persuaded that the claimant's claims and contentions have little or no reasonable prospects of success. As I have already described above, I consider that there are issues of contested fact to be resolved by a full tribunal at trial.

54. In many instances (purely by way of example Allegations 4.4, 4.6, 4.7 and 4.8) the respondents' case is in essence that it acted in line with its usual approach. What that approach is, and if so whether the respondents departed from it, and if so why, are questions of fact that I cannot properly resolve at this stage of proceedings. I am mindful of the need to take a cautious approach to striking out claims of discrimination at a preliminary stage.

55. I shall pick up below some of the points made in respect of individual allegations insofar as the arguments relied on by the respondents have not been addressed above. I shall not address every Allegation individually, and where I do not, it is because I am not

satisfied that there is little or no reasonable prospect of it succeeding and that it is a matter which should be determined on its merits by a full panel hearing the matter at trial.

Allegation (2) The GMC failed to investigate whistleblowing concerns raised by the claimant in an email sent on either 19 or 20 November 2014.

56. The GMC says that it did not receive this email, because it was not sent to them. However it was in papers referred by the Peterborough Trust to the GMC. This may explain why the matter was not investigated, but that is a question of fact (and the claimant notes that the GMC was itself ready and able to identify, of its own motion, other matters adverse to the claimant). The GMC also says that the matter came to its attention in June 2018 by which time it was too late to investigate. Whether the passage of time explains a decision or failure to investigate at that later stage is again a question of fact for trial.

Allegation (4.1) The GMC carried out an inadequate investigation in that key witnesses were ignored: for Patient A (Dr Scott); Patient B (Dr Ullah for two years; Night SHO; Night Nurse; Site Manager; AMU Nurse; next day 11 SHO; next day Registrar); Patient C (F2 doctor; Night Sister; 2 SHO doctors); and Patient D (Night Nurse in CCU; Night Sister in CCU).

57. The key submission made by the GMC is that it acts as investigator and prosecutor in disciplinary proceedings and that it is no part of its statutory functions to carry out investigations on behalf of a doctor against whom an allegation is made, and there is no requirement to do so. The GMC relies on **R (Johnson & Maggs) v Professional Conduct Committee of the Nursing and Midwifery Council** [2008] EWHC 885 (Admin) in which Beatson J held at [64]-[68] that Article 6 of the European Convention on Human rights creates no free-standing positive duty on those bringing disciplinary proceedings (there, the NMC) to gather evidence.

58. But that is far from dispositive of the claimant’s case which is brought not as a claim for judicial review but for unlawful discrimination and victimisation. The question is not whether the GMC was under a legal *obligation* to collect evidence but whether in practice, in the discretionary decisions it took with regard to the gathering of evidence, it treated the claimant less favourably on proscribed grounds than it treated or would treat others without his protected characteristics (or whether it was materially influenced by his protected act/s). These are questions of fact.

Allegation (4.2) The GMC carried out an inadequate investigation in that irrelevant witnesses were relied upon: Paul McCulloch-Underwood; Melissa Blinston; Imogen Harmati; Sandeep Deshmukh; Abdul Hameed; Dr Min; Dr Nazir; and Dr Ashour.

59. The GMC says that it acted in accordance with its usual practice in seeking information from organisations at which he had undertaken locum work in the past six months. Whether the GMC acted in accordance with its usual practice in this regard will be a matter of evidence.

60. The GMC says also that the concerns that were raised as a result of those enquiries were such as would naturally lead to witness statements being obtained. That may very well turn out to be correct; but there are potentially questions of judgment and discretion here, and the claimant has produced detailed arguments (which I cannot at this summary stage say have little or no reasonable prospects of success) to show that the respondent was less quick to find what he would describe as inculpatory evidence in relation to his comparators.

Allegation (4.3) The GMC influenced witnesses: Dr Fertleman and Dr Cleaver.

61. The claimant asserts that the GMC inappropriately influenced Dr Fertleman and Dr Cleaver in the evidence which they gave. In his written and oral submissions the claimant explained that this took two forms.

62. First, he said that leading questions had been asked of Dr Fertleman. The letter of instruction addressed to Dr Fertleman asked the question of whether the standard of care provided by the claimant during the relevant treatment “fell seriously below the standard of a reasonably competent Speciality Registrar in General Medicine.” (B/172-173, 176). The claimant says that the use of the word “seriously” was leading. I see no merit in this argument and were it a self-standing allegation I consider that it would have no reasonable prospect of success. The question of whether care fell “seriously below” the standard expected of a reasonably competent doctor is one which forms part of the relevant statutory test. The GMC’s Guidance for Experts (which has general application beyond the claimant’s case) advises experts of this threshold and specifically asks them to address it: C/56-57 at §3.24.4 and §3.25.2. To ask Dr Fertleman this question was to invite him to address the relevant test, and is not arguably leading or discriminatory or an act of victimisation. The claimant also complains about further questions asked of Dr Fertleman as set out in the addendum to his report dated 10 March 2017 (C/63-65). These questions appear to me, again, to be entirely unobjectionable attempts to clarify the report. The claimant could not explain

to me in what way these questions were leading. I consider the allegation that the GMC acted in a discriminatory or victimising manner towards the claimant by asking leading questions of Dr Fertleman is one which has no reasonable prospect of success. I see no reason why this allegation should proceed, and I strike it out.

63. There are other aspects of this allegation which I do not strike out, because they will turn on evidence which is not yet available namely the transcript of Dr Fertleman's evidence. The claimant says that during Dr Fertleman's evidence to the FTP, he was contacted by Katie Brooks of the GMC by email and by telephone, and that this was improper. If indeed someone communicated with Dr Fertleman during his evidence then this may, depending on the circumstances and depending on the evidence as to what the usual practice is in the FTP tribunal, be a matter that along with others is capable of amounting to discrimination. He also says that Dr Fertleman admitted during his evidence that he believed (the claimant says he had been led to believe by the GMC) that his duty was owed to the GMC and not to the FTP tribunal. If Dr Fertleman had been led to believe this, then the source of that belief would be a matter of evidence.

64. Further, the claimant says that Dr Cleaver was "coached" in relation to her evidence at the FTP tribunal, in two ways. First, by being shown the claimant's statement in advance of the hearing. I do not know whether, having regard to the usual practice of the relevant FTP tribunal, this is unusual. That would be a matter evidence. Second, by being told what questions she would be asked. The claimant says that these matters were admitted by Dr Cleaver in cross-examination. I cannot make a proper assessment of these allegations without seeing the transcript of the hearing.

65. In themselves, these matters are not obviously discriminatory, but if proven they might arguably form part of a broader pattern of conduct on the part of the GMC which a tribunal could find to amount to unlawful discrimination or victimisation. Without the relevant evidence I am not satisfied that these elements of the allegation have either little or no reasonable prospects of success.

Allegation (4.4) The investigation took too long – some two and a half years.

66. The GMC's position is that the investigation into the claimant was complex, with a number of allegations of different kinds from different sources, and that it is a "matter of regret" to the GMC that "some of its investigations in relation to doctors do take a number of years." The claimant points to shorter investigations into his comparators Dr Kama and Dr Donaldson (the GMC disputes the claimant's account of how long the

investigation into Dr Kama took, but on any view it was shorter than the claimant's). In my judgment these are matters of evidence and I am not in a position to conclude that the claimant's allegation in this regard has little or no reasonable prospect of success.

Allegation (4.5) The GMC failed to request patient notes on Patients A-D as part of the investigation.

67. There is an issue of fact here. The claimant asserts that patient notes in respect of these patients were only requested after significant delay and a good deal of prompting by him (itemised in detail at pages 11-12 of his written submissions).

Allegation (9): Failure to investigate others

68. The first respondent says that the allegation in respect of the failure to investigate Dr Fertleman is out of time. For the following reasons, I do not consider that this point greatly assists the respondents.

69. This is not run as a preliminary issue, whereby I am asked to determine whether the claim is or is not out of time, but rather as Mr Hare QC confirmed it is advanced as a strike-out or deposit point. Accordingly the question is one of whether the claim has little or no reasonable prospect of success, having regard to the potential time limit point open to the first respondent.

70. The respondent says that the relevant decision was taken on 4 January 2017, following a complaint about Dr Fertleman by the claimant in September 2016, and that the allegation of discrimination in relation to this was not raised by the claimant until his first ET1 which was filed on 15 December 2017, so that the claim was out of time. The claimant subsequently lodged the same complaint against Dr Fertleman on 30 August 2018 and by a decision dated 9 November 2018 the first respondent informed the claimant that there were no grounds to review its decision of 4 January 2017. The claimant then lodged his second ET1 on 8 April 2019 (following an early conciliation process running from 11 March to 2 April 2019) in which he again complained against the decision not to investigate Dr Fertleman. The respondent says that the 9 November 2018 decision was not a fresh decision, and that even if it could be said to be so, the second ET1 is itself out of time in any event.

71. The respondents further submit that a decision not to investigate another doctor is not in itself conduct extending over a period, and they rely on **Chaudhary v Royal College of Surgeons** [2003] ICR 1510 at [67] in support of this submission. So far as it goes, I

would be inclined to accept that submission. But even assuming it to be correct, it does not follow that there is no room for the concept of conduct extending over a period to apply here. It is the claimant's case that the respondents *repeatedly and continually* failed or refused to investigate allegations made by him against others (while taking more seriously, and treating him unfavourably because of, the things they said against him), and that there was (on his case) a pattern of discriminatory behaviour, or a discriminatory state of affairs, and that pattern this continued sufficiently long to bring the allegation about the failure to investigate Dr Fertleman in time. If the claimant makes out that case, then the fact that each individual decision would, *if taken in isolation*, be regarded as a one-off act is not an answer to the complaint that there was conduct extending over a period. The respondents also observe that the decisions in question were taken by different individuals at different times: but that is a factor (and no more) to be taken into account in considering the factual question of whether conduct should be regarded as extending over a period (see **Aziz v FDA** [2010] EWCA Civ 304 at [33]).

72. In addition, the tribunal at trial would need to consider whether, even if this aspect of the claim was out of time, it would be just and equitable to extend time. In saying this I appreciate that the claimant has not specifically addressed any arguments on the "just and equitable" point in his written or oral submissions, but I do not think it would be right to hold this against him: he is a litigant in person who has done his best to resist a strike out application advanced on a very broad front, and the question of a "just and equitable" question is anyway one which the tribunal would be entitled (and likely) to explore at trial. This would also involve consideration of the claimant's reason (if any) for not having brought a claim sooner, and I know nothing about that. But a matter which the tribunal may obviously wish to weigh in the balance would be that the respondents' treatment of Dr Fertleman would need to be considered in detail in any event since it is relied on by the claimant not only as an act of discrimination and victimisation against him, but also by way of comparison for the purpose of his separate claims (which are not said to be out of time) as to the respondents' pursuit of an investigation and process against the claimant. In those circumstances the tribunal at trial might well, in the exercise of its broad discretion, decide that it would be just and equitable to extend time. This decision raises questions of fact and judgment for the tribunal at trial, the answers to which I am unable and unwilling to second-guess at this stage.

73. For these reasons I do not see that the respondents' time point adds a great deal of weight to their overall argument on strike out or deposit, and I am not persuaded that this Allegation has little or no reasonable prospect of success.

Allegation (10.2): The decision to start an investigation and the length of time taken to investigate in respect of the charging order.

74. The charging order was obtained in relation to five sets of legal costs which Dr Razoq had been ordered to pay to the GMC, totalling over £18,000. An allegation previously pleaded by the claimant in relation to obtaining the charging order was struck out by EJ Lloyd since it was a matter to which there was a right of appeal (A/97 at para 16). The respondent's position is that there was anyway no "investigation" in relation to the charging order. The claimant has not responded to that, and has not spelled out any coherent case in respect of this issue. I can see nothing in the allegation and it represents an invitation to the tribunal to go behind decision of EJ Lloyd, and in my judgment it has no reasonable prospect of success. I see no reason why costs and the resources of the parties should be taken up addressing this issue, and I strike it out.

Allegations (18) and (21): the Dumfries Trust

75. The claimant alleges that the respondents failed to investigate either Dr Donaldson, the medical director of the Dumfries NHS Trust, or the Dumfries Trust itself, for misconduct. The respondents point out that they have no statutory power to investigate an NHS Trust, solely registered medical practitioners.

76. The claimant has not disputed this analysis. In my judgment these parts of Allegations (18) and (21) have no reasonable prospect of success. I see no reason why it would be in the interests of justice not to strike them out. The time and resources of the tribunal and the parties should not be taken up with considering these matters, and the claimant's claim in respect of the alleged non-investigation of the Trust's medical director will in any event proceed.

Conclusions

77. I conclude that the following allegations have no reasonable prospects of success and are struck out:

    a. Allegation (4.3) insofar as it is alleged that the respondents asked leading questions of Dr Fertleman;

    b. Allegation (10.2); and

c. Allegations (18) and (21) insofar as they relate to the investigation of a complaint against the Dumfries Trust.

78. To this extent, and to this extent only, the respondents' application to strike out succeeds. I do not make any deposit orders.

79. The matter will now be listed for a preliminary hearing for the purpose of case management. The parties are to inform the tribunal within 7 days of the date when this judgment is sent to them of their dates of availability (to the end of February 2021) to attend a 2-hour preliminary hearing which will be conducted remotely. A notice of hearing will then be sent in due course.

Employment Judge Coghlin QC
30 October 2020
Judgment sent to Parties on