EMPLOYMENT TRIBUNALS

BETWEEN

DR A ABDEL BARI

Claimant

- and -

GENERAL MEDICAL COUNCIL

Respondent

Heard at: OPH, held at London Central ET

On: 10 September, 2021

Before: Employment Judge O Segal QC

Representations
For the Claimant: In person
For the Respondent: Mr I Hare Q.C., counsel.

JUDGMENT

This claim is dismissed as the tribunal does not have jurisdiction to hear it, pursuant to s. 120(7) Equality Act 2010.

REASONS

1. The Claimant ("**C**"), by an ET1 presented on 16 March 2021, brought a complaint of race discrimination by reason of the Respondent ("**R**") by its Interim Orders Tribunal ("**IOT**") making an order for interim conditional registration on 25 February 2021.

2. The details of complaint in the ET1 refer to an alleged history of discrimination by R against C. However, there are no particulars given in the ET1 of that alleged historic discrimination; and it would appear that the most recent previous decision taken by R in respect of C before February 2021 was its decision in about August 2020 to conclude an investigation into complaints against C without further action. Thus, the only act by R relation to which C could present a complaint in time on 16 March 2021 is the IOT order made on 25 February 2021.

3. C also issued proceedings in the High Court on the same day as the present ET claim, challenging the IOT's order for interim conditional registration (CO/1460/2021). Unfortunately, that High Court action was pursued (only) as an application for judicial review, which failed as such. However, I am told by Mr Hare that the High Court has been invited to treat C's claim as an application under s. 41A(10) of the MA (see below).

The law

4. Section 41A of the Medical Act 1983 (MA) provides:

> *(1) Where an Interim Orders Tribunal … [is] satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of a fully registered person, for the registration of that person to be suspended or to be made subject to conditions, the Tribunal may make an order—*
>
> > *(a) that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding eighteen months as may be specified in the order (an "interim suspension order"); or*
> >
> > *(b) that his registration shall be conditional on his compliance, during such period not exceeding eighteen months as may be specified in the*

order, with such requirements so specified as the Tribunal think fit to impose (an "order for interim conditional registration").

…

(10) Where an order has effect under any provision of this section, the relevant court may—

(a) in the case of an interim suspension order, terminate the suspension;

(b) in the case of an order for interim conditional registration, revoke or vary any condition imposed by the order;

(c) in either case, substitute for the period specified in the order (or in the order extending it) some other period which could have been specified in the order when it was made (or in the order extending it),

and the decision of the relevant court under any application under this subsection shall be final.

…

(14) In this section "the relevant court" has the same meaning as in section 40(5) above.

5. Section 40 of the MA provides:

…

(5) In subsections (4) and (4A) above, "the relevant court"—

(a) in the case of a person whose address in the register is (or if he were registered would be) in Scotland, means the Court of Session;

(b) in the case of a person whose address in the register is (or if he were registered would be) in Northern Ireland, means the High Court of Justice in Northern Ireland; and

(c) in the case of any other person ... means the High Court of Justice in England and Wales.

6. Section 53 of the Equality Act 2010 (EqA) provides:

…

(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.

7. It is common ground that R is a qualifications body within the meaning of s. 54 of the EqA

8. Section 120 of the EqA provides:

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

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

...

(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.

9. In Khan v General Medical Council [1996] ICR 1032, the CA held that proceedings in the nature of an appeal are proceedings which provide the opportunity to have the disputed decision overturned by a differently constituted set of persons; see at 1042E-F, per Hoffmann LJ: *Section 29 of the Act of 1983 allows the decision of the General Medical Council to be reversed by a differently constituted set of persons. For present purposes, I think that is the essence of what is meant by "proceedings in the nature of an appeal.*

10. In Ali v Office of the Immigration Services Minister [2021] ICR 452, the EAT held that there is no requirement under s. 120(7) of the EqA that proceedings in the nature of an appeal should expressly include discrimination as a ground of appeal: see at [34]; or that the specialism of an ET in discrimination matters should lead to a narrow construction of s. 120(7): see at [43]-[45].

11. In General Medical Council v Michalak [2017] UKSC 71; [2017] 1 WLR 4193, the Supreme Court decided that judicial review did not constitute proceedings in the nature of an appeal. However, in giving his reasons for reaching that view, Lord Kerr observed (at [12], emphasis added):

> *The Medical Act also provides for various other types of appeal against fitness to practise decisions. To take an example,* ***section 41A(10)*** *(as inserted by article 13 of the 2002 Order)* ***states that the "relevant court" has the power to terminate an interim order of suspension****, and section 41A(14) states that "relevant court" has the same meaning as in section 40(5) . Section 40(5) contains the definition of the "relevant court" as the High Court.* ***In effect, therefore, an appeal against the making of an interim order of suspension lies to the High Court****.*

12. Lord Kerr also noted (at [17]):

> *It would obviously be undesirable that a parallel procedure in the employment tribunal should exist alongside such an appeal route or for there to be a proliferation of satellite litigation incurring unnecessary cost and delay. Where a statutory appeal is available, employment tribunals should be robust in striking out proceedings before them which are launched instead of those for which specific provision has been made. Employment tribunals should also be prepared to examine critically, at an early stage, whether statutory appeals are available.*

13. For completeness, I mention that at [30] Lord Kerr comments on the case of Jooste v General Medical Council [2012] Eq LR 1048, EAT, confirming that it was wrongly decided by the ET declining jurisdiction to hear the claimant's claim. On the face of that paragraph in Michalak, it would appear that Jooste was, like the present case, a complaint about an order of the Interim Orders Panel. However, in fact, Dr Jooste's material complaints concerned other alleged discriminatory acts of the GMC, in

respect of which he did not have a statutory right to challenge in the High Court (save any general entitlement to bring an application of judicial review).

Discussion

14. C addressed me on the merit of his historic and his most recent complaint against the GMC. He also referred to matters which post-date the present claim.

15. On the issue of jurisdiction, C's argument to me was that:

    a. It has been confirmed in more than one case (he referred me in particular to the tribunal case of Malik v GMC) that the tribunal has jurisdiction to hear discrimination claims against the GMC.

    b. His complaint was one of race discrimination;

    c. That was the exclusive jurisdiction of the ET.

16. The first two propositions are correct. As a matter of law, the last proposition is wrong.

17. Leaving aside that the civil courts have jurisdiction to determine discrimination complaints which do not arise at 'work' (or in analogous situations provided for specifically by statute), C is able, in a claim to the High Court seeking an order that the conditions imposed on him by the IOT be revoked, to raise any matter – including any alleged race discrimination – which supports that claim. See in this context the references to Ali above.

18. In any event, as decided *obiter* in Michalak, section 120(7) EqA has the effect that where a doctor wants to challenge a decision of an IOT to place conditions on his/her practice, that challenge must be made to the High Court. I must therefore dismiss this claim to the ET.

Postscript

19. During his submissions to me, C mentioned his concerns that, by reason of his race, inter alia: (1) R was not conducting any, or any proper investigation into the complaints against him; and(2) R had not properly investigated and/or imposed

appropriate sanctions on a white doctor against whom C had himself made complaints. R did not accept those allegations, and in respect of the investigation into C's conduct Mr Hare explained R's position that that investigation was ongoing and had been delayed beyond the period provided for by R's own policy mainly because it needed to, but had not yet been able to, obtain all the relevant NHS records.

20. Without deciding the point, I suggested to C – and Mr Hare did not dissent – that if C wished to pursue either or both of these complaints as claims of race discrimination, they would not fall within the scope of s. 41A MA, and that an ET would in principle have jurisdiction to determine those complaints of race discrimination.

Oliver Segal QC
Employment Judge

Date: 10 September, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON : 13/09/2021

FOR THE TRIBUNAL OFFICE: