Case Number: 2423769/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Dr J Onwude**

Respondents: **(1) The General Medical Council**
(2) Mr N Dickson
(3) Miss R Morris

Heard at: **London East Hearing Centre**

On: **26 April 2018**

Before: **Employment Judge Moor**

Representation

Claimant: In person
Respondents: Mr I Hare (Queen's Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. **the Respondents' response was presented in time; and**

2. **the claims of race discrimination against all three Respondents are struck out and this claim is thereby dismissed in its entirety.**

REASONS

1 The General Medical Council ('the GMC'), the first Respondent, regulates professional doctors in the UK. This regulation is governed by the Medical Act 1983 ('the MA').

2 Mr Niall Dickson, the second Respondent, was formerly the Chief Executive Officer of the GMC. Miss Rachel Morris, the third Respondent, is an Investigation Manager at the GMC.

3 Dr Onwude, the Claimant, is a doctor registered with the GMC. He practices privately, primarily as a gynaecologist.

4 Complaints made against doctors are made to the GMC. If it considers there are allegations to answer, the GMC brings charges against the doctor before the Medical Practitioners Tribunal ('MPT'), formerly known at the 'fitness to practice panel'. The GMC has the responsibility for investigating and framing (not in the pejorative sense) the allegations.

5 Dr Onwude brings a claim of race discrimination against the GMC and the other named Respondents. The issues in his claim are set out at paragraph 3 and 4 of EJ Burgher's Preliminary Hearing Summary of 9 February 2018. Putting it broadly, the claim is about alleged acts by the GMC or its officers in connection with proceedings brought against Dr Onwude before the MPT. In this claim he relies on the 'protected characteristic' of race in that he is black.

6 On 15 December 2016 the MPT decided that Dr Onwude was guilty serious professional misconduct. It applied to him the sanction of 'erasure' from the register.

7 Dr Onwude succeeded in much of his appeal against this decision before Collins J at the High Court on 8 March 2017. The erasure sanction was quashed and some charges were remitted back to the MPT for further consideration.

8 One of the charges concerned invoices for over £60,000 that Dr Onwude had sent to the patient complainants. This charge was framed by the GMC as follows:

> '*You were not honest and/or open in your financial arrangements with Patient A and/or Patient B in that you failed to inform Patient A and/or Patient B about your fees and charges … (b) before asking for Patient A's consent to treatment; (c) at any time before sending the invoices…'*.

9 The MPT found this charge proved and found Dr Onwude to have been dishonest. Collins J decided this finding could not be upheld. He held it was '*that finding which essentially justified the decision of the most serious sanction, namely that erasure should be applied'* (para 4 between paras 15 and 16). Collins J made this decision on the facts, not on the basis that the charge itself was not framed clearly or adequately particularised.

Issues in the Claim before the Employment Tribunal

10 The issues in the race discrimination claim presented to this Tribunal are as follows (I use the same numbering as EJ Burgher).

> *3.1 Miss Morris, the third Respondent, misrepresented her evidence to the High Court in the application for an extension of the interim order on 11 July 2014;*
>
> *3.2 Contrary to procedure, on 25 July 2015, the GMC Investigations officer framed allegations against the Claimant without specific particularity;*
>
> *3.3 Between 5 December 2016 and 15 December 2016 the MPT panel, chaired by Rev Lloyd Richards, refused to allow the Claimant to call defence witnesses;*

3.4 On 15 December 2016 the MPT panel, chaired by Rev Lloyd Richards, decided to follow the 2015 Sanctions Guidance when the Claimant alleges that the 2009 Sanctions Guidance was applicable;

3.6 Contrary to procedure, the Claimant was not sent the outcome of the MPT 'forthwith'. The Claimant stated that Juliette Cunliffe sent the MPT outcome to him on 26 January 2017. The Respondents contend that the MPT outcome was sent on 16 December 2016 by special delivery.

4 The Tribunal will also be required to consider whether the Claimant has presented the claims within the time period specified by section 123 of the Equality Act 2010 ('the EQA') and, if not, whether it is just and equitable to extend time.

11 Dr Onwude confirmed that he was not and had never brought a claim that the decision of erasure itself was made because of his race (EJ Burgher's issue 3.5).

Applications at this Preliminary Hearing

12 At this Preliminary Hearing the Respondents make an application to strike out the claim on the grounds that:

12.1 in relation to Issues 3.1-3.4, the Tribunal does not have jurisdiction to hear the claims, in view of s120(7) EQA; and/or

12.2 the Tribunal does not have jurisdiction to hear Issue 3.1 because of the public policy of judicial proceedings immunity; and/or

12.3 pursuant to Rule 37 of the Employment Tribunal Rules of Procedure 2013 ('the Tribunal Rules'), all of the issues in the claim have no reasonable prospect of success; and/or

12.4 the claim has been brought out of time and it is not just and equitable to extend time.

13 In the alternative, the Respondents seek a Deposit Order, under Rule 39 of the Tribunal Rules, as a condition of Dr Onwude pursuing the claims on the grounds they have little reasonable prospect of success.

14 Dr Onwude makes applications to:

14.1 strike out the grounds of resistance for late presentation; and

14.2 add three new individual Respondents: Rev Lloyd-Richards, who chaired the MPT hearing; Ms Cunliffe, and Mr Jess. ACAS Certificates for those individuals are dated 16 February 2018 and 19 February 2018.

15 While the time point was not included in the list of issues for today, both parties

consented to my deciding it at this hearing.

Relevant Factual and Procedural Background

16 In February 2013 the GMC received a complaint about Dr Onwude from Patients A and B whom he had treated in March 2008 and 2011-12.

17 On 8 August 2013 the Interim Orders Panel imposed interim conditions on Dr Onwude's registration.

18 The GMC applied to the High Court for an extension to the interim order of conditions ('the extension application') as it was required to do. Section 41A(7) of the MA gave the court the power to do so. The GMC relied on a witness statement from Miss Morris (13-29) in which she summarised the expert report of Dr Cox. (Dr Onwude told me that he had seen Dr Cox's report prior to consenting. He states he was in Marbella at the time of the extension application. He took into account the costs risk when consenting. He states only saw Miss Morris' statement a year later. Mr Hare informed me that the GMC sent Miss Morris' statement by email and post to Dr Onwude on 11 July 2014, and that they had received a red receipt tag for the email.)

19 On 23 July 2014 Dr Onwude consented to the extension application. The Consent Order was approved by HHJ Raynor QC sitting as a judge of the High Court. The reasons for it refer to section 41A(6) of the MA; the Part 8 Claim Form; and Miss Morris' witness statement in support (31).

20 In 2015 new Sanctions Guidance was approved by the GMC (403) for use by MPT and GMC decision makers. At page 4 of the Guidance (407) it is recorded in a clear box at the bottom of the introduction '*This document will be used by MPTS fitness to practice panels from 3 August 2015*.'

21 The GMC laid charges against Dr Onwude to be heard at an MPT hearing. It commenced on 21 September 2015. It lasted about 28 days and finally concluded on 15 December 2016. It is not in dispute that the MPT panel used the 2015 Sanctions Guidance.

22 During the MPT hearing, Dr Onwude made various applications for witnesses to be called and recalled (see Mr Hare's Skeleton Argument para 19). They were rejected by the MPT with written reasons.

23 At a certain point in the MPT hearing, Dr Onwude absented himself and played no further part in it.

24 On 23 March 2016 the Court of Appeal decided in Michalak v GMC & os [2016] EWCA Civ 172; [2016] ICR 628 that the Employment Tribunal had jurisdiction to hear Dr Michalak's claim of race discrimination.

25 On 1 July 2016 Dr Onwude's application for Judicial Review was refused. It had included the grounds that are issues 3.1 and 3.2 (minus the discrimination allegation) (455). Dingemans J's reasons were that the matters relied on should be challenged by

way of appeal after the MPT Hearing. (The oral renewal and a further application for judicial review were also rejected).

26 On 15 December 2016 the MPT decision was to erase Dr Onwude from the register. It also decided upon an immediate suspension.

27 Notice of that decision was sent to Dr Onwude at the correct address by special delivery the following day, 16 December 2016. (Page 309 evidences an attempt to deliver on 19 December 2016). The decision was sent again by email on 21 December 2016 (308). Dr Onwude received this email.

28 On 8 March 2017, Collins J allowed Dr Onwude's appeal. He quashed the sanction of erasure and remitted some of the lesser charges to the MPT. In his appeal Dr Onwude relied upon his complaints at issues 3.2 (inadequate particularisation of honesty allegation) and 3.3 (denial of witnesses) but did not identify them as acts of race discrimination (Tab 5 of Authorities bundle). Collins J decided that the charge of dishonesty could not be upheld.

29 On 1 November 2017 the Supreme Court rejected the GMC's appeal in GMC v Michalak [2017] 1 WLR 4193.

30 On 15 November 2017 Dr Onwude attempted to present his claim to the Tribunal but had not undertaken Early Conciliation. Having secured an ACAS certificate, he presented a valid claim on 20 November 2017.

31 On 22 November 2017 the Tribunal sent the Notice of Claim to the Respondents requiring the response to be received '*by 20 December 2017'* (72). The Respondents sent the ET3 and Grounds of Resistance to the Tribunal by email on 20 December 2017.

32 As I understand it, Dr Onwude has brought contempt of court proceedings against Miss Morris in relation to her witness statement referred to above.

33 Mr Hare informed the Tribunal during the hearing that approximately 30% of doctors registered with the GMC are black or of another ethnic minority.

Submissions

34 Mr Hare and Dr Onwude made helpful and succinct oral submissions to supplement their full written submissions. They have both assisted me. I am grateful for the courteous and straightforward way in which they presented their cases.

35 Mr Hare did an admirable job of guiding me through the relevant statutory provisions and authorities. He avoided the legalese that can so often bamboozle a lay representative. He observed his duty to the Tribunal by referring to authorities that were arguably against him. I do not repeat his submissions, which are encapsulated in his Skeleton Argument dated 6 April 2018.

36 Dr Onwude also prepared a written skeleton, which he supplemented orally. I

summarise his main submissions as follows.

36.1 His claim was mainly about breaches of procedure.

36.2 His claim was on all fours with Michalak. He suggested the principle of that case was that discrimination claims concerning the 'way' in which the GMC pursued fitness to practice proceedings were all justiciable in the Tribunal because those claims were not appealable.

36.3 All that section 120(7) EQA excludes from the Tribunal's jurisdiction so far as relevant to him, is the erasure decision, which was appealable.

36.4 He referred to para 18 of Lord Kerr's judgment in Michalak that the rationale behind the exclusions in section 120(7) (the need to avoid parallel litigation etc) only applies where '*the alternative route of appeal or review is capable of providing an equivalent means of redress'*. And he interpreted this as meaning that s120(7) could not exclude this claim because the remedies in the Employment Tribunal (recommendations and compensation) could not be provided in a High Court appeal and therefore it did not provide 'an equivalent means of redress'.

36.5 He argued, relying on the recent case Ayodele v Citylink Ltd [2018] IRLR 114 CA, that the Respondents had the burden of proof in race discrimination cases and had not provided any factual grounds of resistance to the claim. (I sought to assist Dr Onwude on this by copying the so-called revised 'Barton Guidance' set out in the annex to Igen v Wong, which sets out the 2-stage process a Tribunal must take when considering direct discrimination claims. I explained that, at the first stage, Ayodele confirms that the Claimant has the burden making an arguable (*prima facie*) case.) Be that as it may, Dr Onwude maintained his argument that once he had asserted race discrimination then the burden of proof was on the Respondents to resist and they had not done so.

36.6 He submitted that his discrimination case was based on breaches of procedure that had not happened to anyone else: in the 600-odd appeal cases he had reviewed, he contended he was the *only* doctor to have been subjected to the breaches of procedure he complained about. Therefore, he argued, he had been '*singled out'*. He could only conclude that this was because of his race. He was unable to say, of those 600 cases, whether any others were brought by black doctors. He did not agree with the proposition that it was likely that some of those 600-odd appeals were likely to have been brought by black doctors, given that about 30% of registered doctors were black or from other ethnic minorities.

36.7 He submitted each issue established a reasonably arguable case that he had been subjected to a detriment. Issue 3.1: the extension of the conditions order. Issue 3.2: the allegation was not clear and he did not understand himself to be facing an allegation of dishonesty. Issue 3.3: meant he was not able to call or recall witnesses, which put him at a

disadvantage in the MPT hearing. Issue 3.4: under the old Sanctions Guidance he would have been given the right to make submissions about the immediate suspension.

36.8 In relation to issue 3.1, he maintained his allegation that Miss Morris had 'lied' in her Witness Statement by referring to '*ulcer*' in her summary of Dr Cox's expert report rather than *'venous leg ulcer*'. (Although he accepted, after I had pointed him to it, that it was obvious she was referring to a 'leg ulcer' from paragraph 34 of the statement.) He argued that this alleged lie was a breach of the law, which the Tribunal had jurisdiction over if it was tainted by race discrimination and he could think of no other reason why she would have summarised the report in that way. (He referred to Fairclough Homes Ltd v Summers [2012] 1 WLR 2004 as an example of where a claimant had exaggerated his claim.)

36.9 In relation to issue 3.2 he relied on Salha v GMC PC 32/2003 and Fish v GMC [2012] EWHC for the well-established and uncontroversial principle that an allegation of dishonesty must be '*unambiguously formulated and adequately particularised'*.

36.10 In relation to issue 3.4 he argued that there was a difference between being 'in force' and 'in use' and that while the Sanctions Guidance 2015 was 'in use' at the time of his hearing it was not 'in force'. The phrase 'in force' was from the 2009 guidance.

36.11 In relation to issue 3.6: while he did not concede the point, having now seen the delivery slip at 309, he did not argue it was not genuine. And, therefore, if the deemed service provisions were as Mr Hare had described, an attempt to deliver the MPT outcome decision to him on 19 December meant that the GMC had indeed sent notification of its decision 'forthwith'.

36.12 He informed the Tribunal of his reasons for not bringing the claim within the primary time limit of 3 months minus a day. (The Respondents did not require this evidence to be given under oath/affirmation. I treat it as undisputed evidence.) He said it was due to the series of things that had happened to him that he had formed the view that what had happened to him was race discrimination. He had seen the Supreme Court judgment in Michalak and understood then that it was open to him to bring it in the Employment Tribunal. He contended that because he was still having issues with the GMC, that the issues in this claim were continuing.

36.13 In respect of the Respondents' alternative deposit application he informed the Tribunal of his means. Again the Respondents did not need this evidence to be given under oath/affirmation. Upon my asking about his means he informed me had only earned £11,000 in the tax year 2016/17. (I note this was the year during which he had been subject to conditions on his registration and the two and a half months of erasure.) When I asked what he was earning at present, he informed me about £3000 a week before tax. Dr Onwude described these means as 'scant'. He has

two dependents.

37 Oral argument concluded at 4.50pm and I therefore reserved my decision. I indicated my provisional view that, on issues 3.1, 3.2 and 3.6, I preferred the Respondents' submissions. But I informed the parties that I would prepare a fully reasoned decision in writing on all issues having considered them.

Law

Equality Act: Direct Race Discrimination, Section 53(2)

38 Part V of the EQA includes discrimination claims in connection with work and other related fields. Section 53 concerns claims against qualifications bodies. It is accepted that the GMC is one such qualifications body. Section 53(2) provides:

> *'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.'*

39 Dr Onwude's case rests on section 53(2)(c). Thus, before the Tribunal gets to the reason for the treatment complained about, it must first ask whether, by that treatment he was subjected to a 'detriment'.

40 Under section 39 of the EQA (relating to discrimination in employment), the meaning of 'detriment' was considered in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL (para 34). To find a detriment the Tribunal

> '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work*'.

An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

41 It seems to me that 'detriment' under section 53(2)(c) should be interpreted in accordance with and by analogy with Shamoon. The test is whether a reasonable doctor would or might take the view that they had been disadvantaged by the act complained of.

42 Once detriment is established, this claim relies on section 13 of the EQA, direct discrimination. It provides: *'(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*'

43 As set out above, the protected characteristic Dr Onwude relies upon is his race.

Time Limits

44 Section 123(1)(a) of the EQA requires a claimant to bring a claim under Part V within 3 months of the act complained of. Section 123(3) provides that conduct extending over a period is treated as having been done at the end of that period.

45 Under Section 123(1)(b) the Tribunal may allow a complaint brought within any such time as it thinks '*just and equitable*'. In considering whether to allow a claim brought after the primary time limit, the Tribunal may consider any factor that appears to it relevant including the length of the delay and the reasons for it.

Section 120(7) - Alternative Appeal

46 Section 120(7) of the EQA excludes the Tribunal's power to hear a claim against a qualification body under 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*'.

47 It is not in dispute that section 40(1) of the MA provides that decisions of an MPT to erase or suspend a doctor from the register are appealable decisions.

48 Thus, had Dr Onwude brought issue 3.5 to the Tribunal (against the decision to erase him from the register), it is unarguable that section 120(7) excludes the Tribunal's power to hear such a claim.

49 One of the questions in this case is whether section 120(7) excludes the Tribunal's power to hear a discrimination claim concerning the acts of the GMC in preparing for and in the course of proceedings leading to an appealable decision, the decision to erase.

50 These appeals are as of right and by way of rehearing before the Administrative Court. That hearing is on paper save in exceptional cases.

51 The Civil Procedure Rules ('CPR') 52.21 governs these appeals. An appeal will be allowed where the decision of the lower court (here the MPT) was:

> '*(a) wrong; or*
>
> *(b) unjust because of a serious procedural or other irregularity in the proceedings of the lower court.*'

52 In Ghosh v GMC [2001] 1 WLR 1915 it was established at para 33 that this right of appeal was not limited or qualified in any way. But the fact it was on paper meant that the appellant doctor had to show that some error had occurred in the proceedings before the MPT or in its decision.

53 While an appeal is usually on the papers, in exceptional cases it need not be. The Administrative court has experience of dealing with discrimination claims, for example in the education sector. CPR 52.21 does not exclude discrimination grounds in such appeals.

54 An appeal also lies against the decision by the High Court to extend interim conditions. This appeal is to the Court of Appeal, see section 16 of the Senior Courts Act 1981 and, for example, GMC v Hiew [2017] 1 WLR 2007.

55 In Michalak the doctor's allegations included the manner in which the GMC had pursued fitness to practice proceedings against her. No adverse decision had been made against her by the MPT. She therefore had no statutory right of appeal (para 12). Her only other route of redress for the matters she complained about was an application for judicial review. The Court of Appeal and Supreme Court held that, for the purposes of section 120(7) of the EQA, an application for judicial review was not 'an appeal or proceedings in the nature of an appeal'.

56 In Michalak Lord Kerr observed at paragraph 17:

> '*Part of the context, of course, is that appeals from decisions by qualifications bodies other than to the employment tribunal are frequently available. It would obviously be undesirable that a parallel procedure in the employment tribunal should exist alongside such an appeal route or 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.*'

57 He went on at paragraph 18 after setting out the rationale for exclusion of the Tribunals where an appeal route existed he said:

> '*that rationale can only hold, however, where the alternative route of appeal or review is capable of providing an equivalent means of redress.*'

58 I agree with Mr Hare that this last sentence anticipates Dr Onwude's argument in that case that, where there is no statutory appeal, judicial review was sufficient.

Other Relevant Provisions of the Medical Act 1983

59 Section 35E of the MA provides that where an MPT gives a direction that a person's name shall be erased from the register[1] it '*shall forthwith serve on the person concerned notification of the direction … and of his right to appeal against it under section 40'*.

60 Sch 4 of the MA, paragraph 8(1), applies to any notice required to be served under section 35E. Paragraph 8(2) provides that *'Any such notice may be so served … (c) by sending it by a registered post service; [or] (d) by sending it by a postal service which provides for the delivery of the notice by post to be recorded.*'

61 Paragraph 8(5) provides that the service of a notice '*effected by sending it by post shall be deemed to have been effected at the time when the letter containing it would have been delivered in the ordinary course of post*'. This 'deemed service' provision means that

[1] The wording of the Act in fact states from 'the MPTS' but all agree that this must mean 'the register'.

when the decision is actually received is not relevant: what is relevant is whether it was sent by one of the postal methods specified.

62 The parties agree that where a doctor is charged with dishonesty, those allegations must be framed unambiguously and with sufficient particularity.

Witness Civil Immunity From Suit

63 It is a well-established principle of the common law (judge-made law) that a witness has absolute immunity from suit. In other words, a witness cannot be sued in the civil courts for the contents of their witness statement. A simple and recent statement of this principle is contained in the speech of Lord Hobhouse in Arthur J S Hall & Co v Simons [2002] 1 AC at p740G-H (a case concerning advocates immunity):

> *A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury,* ***and the witnesses*** *… are granted civil immunity. This is not just privilege for the purposes of the law of defamation but true immunity…'.* (my emphasis)

64 As Lord Hobhouse's speech shows that redress against witnesses who are said to have perjured themselves is through contempt of court proceedings or in a criminal prosecution.

65 Yet, Dr Onwude maintains that if you lie under oath in a witness statement it is 'against the law' and therefore he can bring a civil claim for that. He cannot. It is the criminal law that provides an avenue for redress not the civil courts or tribunals.

66 Mr Hare drew my attention to P v Comm of Police of the Metropolis [2017] UKSC 65 in order to distinguish it from the present case. P concerned a police officer's ability to challenge her dismissal by a police misconduct panel as disability discrimination. The Met contended the decision was covered by the civil immunity rule because the police misconduct panel was akin to a judicial body. That contention was unsuccessful because the Supreme Court decided that the EQA expressly treated police officers as if they were employed for the purposes of the Act and that meant the EU Framework Directive (concerning disability discrimination in employment) applied to them. This meant the police officer had a directly enforceable right not to be discriminated against because of disability.

67 I agree with Mr Hare's submission that Dr Onwude's case is not P's case because it is not a case concerning employment and therefore he cannot argue he has any directly enforceable right under the Framework Directive, as could P. The rule as to judicial immunity therefore applies in his case.

Tribunal Power to Strike Out for No Reasonable Prospects of Success

68 Rule 37 of the Tribunal Rules allows a Tribunal to strike out a claim where it has '*no reasonable prospect of success'*. That is a high threshold.

69 In discrimination claims, where the **reason** for the treatment is in dispute, the Tribunal is unlikely to strike out a claim on the papers. See, for example, the guidance of the Court of Appeal in Anyanwu v South Bank Students Union and others [2001] ICR 391. However, where, on the claim at its highest, there is no claim in law or it is a plain and obvious case where there are no reasonable prospects of success, the Tribunal should strike out the claim because there is the strong public policy purpose of preventing hopeless claims from taking up the time and money of the other party and the Tribunal.

70 Thus, for example, if a Claimant cannot show on his claim at its highest that he has been subject to any detriment, this would be a plain and obvious case to strike out. It would not involve the Tribunal looking at the reason for the treatment, but at the alleged treatment itself.

Calculation of Time in the Tribunal Rules and Time for Presenting a Response

71 Rule 4(3) of the Tribunal Rules provides that:

> *'Where any act is required to be, or may be, done within a certain number of days of or from an event, the date of that event shall not be included in the calculation. (For example, a response shall be presented within 28 days of the date on which the respondent was sent a copy of the claim: if the claim was sent on 1st October the last day for presentation of the response is 29th October.)'*

72 Rule 16(1) provides that the response to the claim shall be presented '*within 28 days of the date that the copy of the claim form was sent by the Tribunal*'.

Application of Law to Issues at this Preliminary Hearing

Time for Submission of Respondents' Response

73 Logically, the first issue to deal with is whether the Respondents' Response (also referred to as the Grounds of Appearance) has been presented in time.

74 The relevant 'event' under Rule 4 is the date that the claim form was sent by the Tribunal, the 22 November 2017. That day does not count when calculating the 28 days. Time for submission of the response started to run on 23 November. The 28th day after that is 20 December 2017. The response was therefore submitted within the time allowed by Rule 16(1).

75 Dr Onwude is not correct to submit that the Respondents' response has been submitted 1 day late. The Respondents therefore have not presented their response late and are entitled to appear.

76 In any event, the response would still not have been out of time because Rule 5 gives the Tribunal power to inform the Respondents of an extended deadline. Thus the deadline given in the Notice of Claim was correct.

77 In the further alternative, Rule 5 would have given me a discretion to extend time. Given that the Tribunal informed the Respondents that the deadline for presentation was

20 December 2017 the only fair decision would have been to extend time to allow for submission to that day because it was reasonable for Respondents to follow the deadline given by the Tribunal.

The Strike Out Applications

78 I shall deal with each application issue by issue and with the applications that are the most clear-cut.

Issue 3.1 – the Morris Witness Statement

79 In my judgment this issue should be struck out for two separate but equally clear reasons.

80 First, the rule as to judicial immunity gives Miss Morris complete immunity from being sued in a civil court or tribunal for the content of her statement.

81 For the avoidance of doubt this includes being sued for race discrimination, which is a civil claim. The public policy considerations are the same. P v Comm for Police of the Metropolis does not decide otherwise.

82 I was not assisted by Dr Onwude's reference to Fairclough Homes case here. That case concerned where a Claimant in proceedings had lied and whether his claim should be allowed to proceed. It is not relevant to this case where Dr Onwude is objecting to a witness statement given in proceedings elsewhere.

83 The complaint is about the content of the statement. Dr Onwude argues that Miss Morris' summary of Dr Cox's statement was a 'lie'. He has refused to contemplate that the difference in the summary might not be because of a 'lie' but because Miss Morris made an honest summary whereby she used a generic term. As the Respondents point out, Dr Cox refers to it as a 'leg ulcer' in certain parts of his report and a 'venous ulcer' in others (3-12). Indeed, I note that Dr Onwude did the same thing as Miss Morris when he referred to it as an 'ulcer' (not a 'venous ulcer') at the conclusion of his appeal in the High Court (see the verbatim transcript at para 42 in the discussion with Collins J). Nor did Dr Onwude accept the idea that Miss Morris' summary may be an honest error. If, despite this, he insists in pursuing his allegation that her summary was a 'lie' then his argument can be put in the contempt of court proceedings.

84 Second, there is an alternative reason why this issue should be struck out. Dr Onwude has not persuaded me that Miss Morris' statement subjected him to any detriment. He consented to the extension of conditions order. In my judgment he has no reasonable prospect of being able to argue that he had any reasonable prospect of showing that he would have refused to consent to the extension of conditions order even if he had seen the statement[2]. Nothing turned on the description of the ulcer being venous. What was important was the fact that there were allegations, supported by an expert witness, that he had not followed appropriate guidance. Therefore no reasonable doctor

[2] It is not for me to decide the dispute as to when the statement was provided/seen; however, if the GMC can show that the email was received, that will be strong evidence that Dr Onwude had an opportunity of seeing Miss Morris' statement prior to consenting to the Order.

can have decided that they were disadvantaged by Miss Morris' summary. I note that Dr Onwude did not appeal the order, as he had the right to do.

85 As there is therefore no reasonable prospect of establishing that he was subject to a detriment by Miss Morris' allegedly inaccurate summary, then there is no reasonable prospect of success. And, under Rule 37, I would have struck out this part of the claim in any event.

Issue 3.2 – Framing of Dishonesty Charge

86 The parties agree that a charge of dishonesty must be unambiguous and sufficiently particularised.

87 In my judgment, the natural meanings of the phrase 'not honest' and the word 'dishonest' are exactly the same. By which I mean the meaning generally understood. If I asked a reasonable woman on any kind of public transport in the UK what 'not honest' meant, she would reply 'dishonest' (along with perhaps some more colloquial adjectives).[3]

88 For this reason, in my judgment, no reasonable doctor could have apprehended this charge to be anything other than an allegation that he had been dishonest. It was entirely clear and unambiguous.

89 The charge was also sufficiently particularised and no reasonable doctor could have considered otherwise. The words of the charge after '*in that*' clearly set out what alleged facts the GMC was relying on: that he had failed to inform of his fees before seeking the consent of Patient A and before sending the invoices. Thus the details of the charge (the particulars of it) were clear on its face. (Whether it was an appropriate one to make on those facts is a different issue and one that Collins J decided emphatically in Dr Onwude's favour in his appeal.)

90 Thus it is clear, in my judgment, Dr Onwude will not be able to establish that he was subject to any detriment because the charge was unambiguous and sufficiently particularised. Any reasonable doctor would have understood that they were facing a dishonesty charge. Any reasonable doctor would have known the facts relied upon for that charge.

91 Dr Onwude undoubtedly has a sense of grievance about the dishonesty charge. I can understand why, given the decision of Collins J. But that sense of grievance is entirely unjustified *vis a vis* the framing of the charge and he cannot bring it before the Tribunal.

92 I therefore strike out this issue as having no reasonable prospect of success.

Issue 3.4 – MPT followed 2015 Guidance rather than 2009 Guidance

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[3] According to the OED, the prefix *dis*- in dishonest means: *With privative sense, implying removal, aversion, negation, reversal of action*. Examples include 'displease'. Etymologically speaking, therefore, alleging 'not honest' is clearer than alleging 'dishonest' as *dis* only implies negation. This is however to introduce an etymological digression not introduced by the parties. It is the natural meaning of the words used that counts.

93 In my judgment there is no possibility of Dr Onwude establishing that the MPT ought to have used the 2009 rather than the 2015 Guidance. This is because, as the 2015 Guidance made abundantly clear, it was to be used from 3 August 2015. Dr Onwude's hearing started in the following month. The 2015 Guidance was therefore the one that had to be used.

94 There is no sensible distinction in this context, as Dr Onwude sought to argue between, 'in force' and 'in use'. One word is used in the 2009 Guidance, the other in the 2015 Guidance. The words 'in use' bear their natural meaning. That the MPT used the 2015 Guidance is therefore entirely unsurprising. Raising an argument about this is completely without merit. This issue therefore does not get off the ground as a factual argument. It has no reasonable prospects of success and I strike it out.

Issue 3.6 – Service of the MPT Decision 'forthwith'

95 Given that I have found that the provisions as to service of the MPT outcome are 'deemed service' provisions, all that the GMC has to show is that it sent the decision in the post (or by recorded delivery). Service is then deemed as taking place in the ordinary course of post.

96 The Claimant has not contended that the attempt-to-deliver evidence is not genuine, and, while not conceding the point, did acknowledge that, if the document is genuine, then the GMC sent the decision 'forthwith'.

97 There is nothing to suggest that the delivery note is not genuine. There is no prospect of arguing on the facts therefore that the GMC did not serve the decision 'forthwith', as the section 35E MA required. I therefore strike out issue 3.6 as having no reasonable prospect of success.

Issue 3.3 – refusing to allow recall or calling of witnesses

98 That leaves issue 3.3, the allegation that between 5 December 2016 and 15 December 2016 the MPT panel refused to allow Dr Onwude to call defence witnesses.

99 I agree with the Respondents that the Tribunal has no power to hear this issue because it has been excluded by the operation of section 120(7) of the EQA.

100 The real question is whether the words '*the act complained of*' is '*subject to an appeal*' include a procedural complaint before the MPT.

101 In my deliberations, I was initially attracted by the simplicity of the argument if the 'act' complained of is not appealable then the Tribunal can hear it. Here the denial of witnesses *on its own* would not be appealable and therefore, the argument goes, section 120(7) does not bite. But, on reflection, in my judgment that would be too simple a construction of the relevant section. It would be to empty it of substance.

102 Where there has been an appealable decision, the appeal requires grounds. The allowable grounds are very wide: going to the correctness of the decision and/or to procedure and/or other irregularity in proceedings (CPR 52.21) and see Ghosh. It seems

to me if the issues before the Tribunal include complaints that the doctor could have brought as *grounds* in any appeal then they are excluded under section 120(7) of the EQA. Appealable acts, seem to me to include, 'acts that could form the grounds of an appeal'.

103 That Lord Kerr required Tribunals to examine 'critically' whether statutory appeals were available, anticipates this interpretation. (It is also to do what Dingemans J did at the judicial review.)

104 If a doctor can complain about anything that happened at the MPT, even if they could be or were grounds in his statutory appeal, as separate acts of discrimination, then there would be the difficulty of parallel litigation and no finality of litigation. If time limits were complied with, there would be the prospect of the MPT sanction appeal being heard at the High Court at the same time as the discrimination claim on MPT procedure being heard at the Tribunal. What the effect of my interpretation avoids is the wholly unsatisfactory possibility of, for example, the Administrative Court deciding, in the statutory appeal, that there was no breach of procedure but the Employment Tribunal, in the discrimination claim, decides that there was and that it was discriminatory. Section 120(7) anticipates this by excluding the Tribunal as an avenue of redress. The public policy of finality in litigation is a powerful reason for doing so.

105 It seems to me that what section 120(7) does is the same or similar to the common law rule of issue estoppel and the rule in Henderson v Henderson *(1843) 3 Hare 100.* This rule stops a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. In other words: if it was open to you to argue this issue in a previous court or tribunal then you are excluded from doing so elsewhere in the future.

106 Issue 3.3, as an allegation of discrimination as well as breach of procedure, could have been made on the appeal to Collins J.

107 I agree with the Respondents that it is only where an appeal wasn't possible that a doctor could bring procedural arguments before the Tribunal: this was Dr Michalak's case. All that her case decided was that the opportunity to bring a judicial review was not in the nature of an appeal and therefore section 120(7) did not apply to it.

108 The final sentence of paragraph 18 of Lord Kerr's speech does not lead to any different conclusion. There Lord Kerr, it seems to me, was addressing the issue in that case: whether, in the absence of a statutory appeal, judicial review was a sufficient form of redress. Where there is a statutory appeal, it is not open to the Tribunal to compare and contrast its procedure and the available remedies with those of the statutory appeal route because section 120(7) is an absolute bar. In other words, Parliament has decided an appeal is enough even if it does not provide for the same remedy.

109 Even if I am wrong about section 120(7), this claim has been brought a long time beyond the primary time limit of 3 months minus 1 day. The Claimant argues that this is an act extending over a period. Even if it were, the act's last date would be 15 December 2016. (Beyond that date the failure to call witnesses is an act with continuing consequences not an act extending over a period.) Thus, the primary time limit for this issue expired on 14 March 2017.

110 I would not have exercised my discretion to extend time in this case for the following reasons.

110.1 The delay is a long one, about 88 weeks. That is a factor against extending time. It has weight because of the public policy that discrimination cases should be determined and resolved quickly.

110.2 Dr Onwude has not told me of anything that happened after hearing of the MPT outcome that led him to decide his claim was about race discrimination or even that reinforced his suspicion. He said he had realised this after the series of events he was complaining about. The difficulty for him in relation to time is that issue 3.3 is close to being at the end of this series of events. Everything he complained about he knew about by the time of receiving the MPT decision on 20 December 2016.

110.3 There was nothing stopping him from beginning a claim in the Tribunal. Michalak in the Court of Appeal had been decided a whole year before. He has not told me he thought he could not bring a claim at the right time. I acknowledge that the Supreme Court decision gave him the idea of bringing a claim but that is not the same thing as thinking he did not have a claim beforehand. I do not find the Michalak factor, therefore, a weighty one.

110.4 On the other hand this case is not only hanging over the GMC but the individual Respondents. All three suffer a prejudice in having to instruct solicitors, take time to respond, give evidence and the costs of that.

111 Overall it seems to me that the factors lying in favour of extending time do not outweigh the factors against and for that reason I do not consider it just and equitable to allow the claim to be brought out of time.

Issues 3.1-3.4 Jurisdiction section 120(7)

112 It follows from my decision in relation to issue 3.3 that I would have also decided that issues 3.2-3.4 were not justiciable before the Tribunal because its jurisdiction was excluded by section 120(7) EQA: those procedural matters could equally have been grounds of appeal. Given that a right of appeal exists in relation to the extension of interim conditions, it also follows that issue 3.1 would also have been excluded on those grounds.

Claimant's Remaining Applications

113 Now that I have decided that the whole claim be struck out, there is no need to determine Dr Onwude's remaining applications to strike out the Respondents' response and add individual Respondents. In the latter case, there is not a claim to add them to.

Conclusion

114 Even in the absence of the interesting argument on jurisdiction under section

120(7), none of these claims would have been allowed to go to a full hearing because they have no prospect of success or are out of time.

115 Issues 3.2 and 3.4 were wholly without merit for the reasons I have given. The public does not fund the Employment Tribunal in order that a party can bring hopeless arguments before it: any reasonable person would consider that 'not honest' means 'dishonest' and that when a Guidance document is described as being 'in use' from a certain date it is unsurprising that it is the Guidance that is used from that date.

116 Upon seeing the delivery evidence at 309 and the Notice of Claim, Dr Onwude should also have withdrawn issue 3.6 and his application to strike out the response.

117 The witness immunity point is well set out in the authorities and, upon seeing them, issue 3.1 cannot in my view have been the subject of any reasonable argument.

118 Undoubtedly Dr Onwude had a difficult experience in being subject to the misconduct charges and at the MPT hearing and by being erased from the register for 2.5 months. But that difficult experience does not mean he is justified in bringing claims that have no prospect of success before this Tribunal. I encourage him to take several steps back and consider the wisdom of continuing in his claim for contempt against Miss Morris. It will not only be his purse that is damaged by taking unreasonable points but the public one.

Employment Judge Moor

30 April 2018