Appeal No. UKEAT/0169/11/CEA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 18 May 2012
Judgment handed down on 13 July 2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MS D KING — APPELLANT

HEALTH PROFESSIONS COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SPENCER KEEN (of Counsel) & MS MONIKA SOBIECKI Instructed by: Free Representation Unit
For the Respondent	MR MARTIN DOWNS (of Counsel) Instructed by: Bircham Dyson Bell LLP 50, Broadway London SW1H OBL

SUMMARY

DISCRIMINATION BY QUALIFYING/QUALIFICATIONS BODY

A medical professional who had taken a career break sought to return to her work as a biomedical scientist, for which she required to be registered anew by the Health Professions Council. She was deterred from applying when it indicated in correspondence that her qualifications were not sufficient to be recognised, and wished to bring a claim alleging discrimination on the grounds of sex, race and age against the HPC, since (in particular) a doctor resident abroad who applied for registration with her qualifications would (she claimed) be acceptable, whereas she was not. When she claimed, the Employment Judge first accepted jurisdiction, then on review declined jurisdiction but on a basis the parties agreed to be erroneous. The relevant statutes all provide that for there to be a claim of discrimination against a qualifying (or qualifications) body, it must be "in the terms on which it is prepared to confer a professional or trade qualification on him". It was held on appeal that this phrase did not cover letters to the Claimant saying that certain qualifications would not be accepted if she were to apply. Nor was there refusal of an application, since none had yet been made. Accordingly, there was no jurisdiction, since the Act did not provide for it. The Claimant was not without remedy, since it remained open to her to apply.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Access to work as a biomedical scientist has depended since July 2003 on registration of the worker by the Health Professions Council ("HPC").

2. The HPC's functions and process are set out in the Health Professions Order 2001 (SI 2002 Number 254) by article 9:

> **"(1) A person seeking admission to a part of the register must apply to the Council and, subject to the provisions of this Order, and in particular paragraph (4) if he satisfies the conditions mentioned in paragraph (2) he shall be entitled to be registered in that part.**
>
> **(2) Subject to paragraph (3), the conditions are that the application is made in the prescribed form and manner and that the applicant –**
>
> > **a) satisfies the Education and Training Committee that he holds an approved qualification awarded –**
> >
> > > **(i) within such period, not exceeding five years ending with the date of the application, as may be prescribed, or**
> > >
> > > **(ii) before the prescribed period mentioned in (i), and he has met such requirements as to additional education, training and experience as the Council may specify under Article 19 (3) and which applied to him;**
> >
> > **b) satisfies the Education and Training Committee in accordance with the Council's requirements mentioned in article 5 (2) that he is capable of safe and effective practice under the part of the Register concerned; and**
> >
> > **(c) has paid the prescribed fee" …**
>
> **"(4) Where a person who –**
>
> > **(a) is not registered on the date of coming into force of an order made under Article 6 (1) which relates to his profession; but**
> >
> > **(b) has been on a register under the 1960 Act in the 5 years immediately preceding the date mentioned in sub-paragraph (a),**
>
> **applies for admission to the register in the relevant period, the Education and Training Committee shall, if it is satisfied as to his good character, grant the application."**

3. An appeal is provided for by Articles 37 and 38. So far as material to the present case they provide:

> **"37 (1) Where the Education and Training Committee under this Order**
>
> > **(a) refuses an application for registration …**
> > **(b) in determining an application under article 9 … imposes additional conditions which must be satisfied before the applicant may be omitted to the Register.**
> > **(c) removes the name of a registrant from the register … or**
> > **(d) fails within the terms of Article 9 (7) to issue a decision,**
>
> **the person aggrieved may appeal to the Council within the prescribed period.**
>
> **(2) No appeal lies to the Council where the person aggrieved has been refused registration solely because he has failed to pay the prescribed fee for registration or has failed to apply in the prescribed form and manner and accordance with Article 9 or 10" ….**
>
> **38 (1) An appeal from …**
>
> > **(b) any decision of the Council under Article 37 …**
>
> **shall lie to a County Court …..**
>
> **(2) In any appeal under this Article the Council shall be the Respondent.**
>
> **(3) The court … may**
>
> > **(a) dismiss the Appeal;**
> > **(b) allow the appeal and quash the decision appealed against**
> > **(c) substitute for the decision appealed against any other decision the Practice Committee concerned or the Council as the case may be, could have made; or**
> > **(d) remit the case to the Council …**
>
> **to be disposed of in accordance with the directions of the court … ."**

4. Doctor King, the Claimant and Appellant in this appeal, complains that she was prevented from registering by discrimination – indirect discrimination in the case of sex and age, and both direct and indirect in the case of race.

5. The background to those claims is that Doctor King obtained a BSc in Life Sciences in 1978 from the Polytechnic of Central London, a BA in 1980 from the Open University, an MSc in Immunology in 1983 from Chelsea College, University of London and a PhD in Chemistry in 1985 from the City University, London. She undertook post-doctoral research and taught, and then from 1987 - 1997 worked for the Institute of Bio-medical Sciences ("IBMS"). She became an ordinary member of the Society for General Micro-Biology in 1978, a fellow of the Chemical Society in 1978, a fellow of the Institute of Medical Laboratory Sciences in February 1991, and in June 2010 was awarded a First Diploma from IBMS in recognition of her continuing professional development achievements.

6. She took a career break (to care for her husband). By the time she wished to return to work – in 2005 – she needed to be registered by the HPC. Article 9 (2) (a) required her to satisfy the Education and Training Committee that she held an "approved qualification" (see above).

7. An "approved qualification" is dealt with by Article 12 in these terms:

> **"(1) For the purposes of this Order a person is to be regarded as having an approved qualification if**
>
> **a) he has a qualification awarded in the United Kingdom which has been approved by the Council as attesting to the standard of proficiency it requires for admission to the part of the Register in respect of which he is applying;**
>
> **b) he is an EEA national and has a qualification to which the European Communities (Recognition of Professional Qualifications) Regulations 1991 or, as the case may be, the European Communities (Recognition of Professional Qualifications) (Second General System) Regulations 1996 apply; or**
>
> **c) he has elsewhere than in the United Kingdom, undergone training in one of the relevant professions and either –**
>
> > **i) holds a qualification which the Council is satisfied attests to a standard of proficiency comparable to that attested to by a qualification referred to in sub-paragraph (a), or**

> **(ii) the Council is not so satisfied, but the applicant has undergone in the United Kingdom or elsewhere such additional training or experience as satisfies the Council following any test of competence as it may require him to take, that he has the requisite standard of proficiency for admission to the part of the Register in respect to which he is applying ….”**

8. The Claimant was told by telephone that her qualifications were not approved by the Council. On 23 June 2009, the HPC wrote to her to say that if she did not hold an “approved course” qualification, she would need to contact the IBMS in order to gain their Certificate of Competence which also fulfilled the requirement. The only other route was by way of an international application for which (said the author of the letter) “I believe you do not qualify”.

9. A list of approved qualifications was sent with the letter. Whatever may have been the status of the courses the Claimant had successfully completed earlier in her education, they were not detailed in the list then current, nor have they been since.

10. On 28 October 2009, Claire Harkin, Customer Services Manager in the Registration Department, wrote to Doctor King to tell her “we cannot accept an application unless you have successfully completed a (sic) HPC approved programme or you hold the IBMS certificate of competence.” Doctor King found that when she enquired of hospitals whether she could be taken on as a trainee to achieve registration that under the circumstances and in view of the fact that she was a Fellow of the IBMS it would not be appropriate. Accordingly, she considered that what HPC had done was to bar her from registration by insisting upon her having qualifications which she did not possess, and preventing her from being assessed in the same way as she would have been had her existing qualifications been obtained overseas. She would have qualified under transitional arrangements had she applied in time, but had taken a career break. She

contended that since more women were likely to be affected by career breaks, that overseas applicants would be advantaged in comparison to her by the provisions criteria and practices of, and applied by, the HPC, and that she would not have been in the position she was had she been a younger trainee, she had a viable case in respect of sex, race and age discrimination.

The Discrimination Provisions

11. **The Sex Discrimination Act 1975** applies to this claim. By Section 13 (headed "Qualifying Bodies") is provided: -

> **"(1) It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a woman –**
>
> **(a) in the terms on which it is prepared to confer on her that authorisation or qualification, or**
>
> **(b) by refusing or deliberately omitting to grant her application for it or**
>
> **(c) by withdrawing it from her or varying the terms on which she holds it …**
>
> **(3)**
>
> **(a) "authorisation or qualification" includes recognition, registration, enrolment, approval and certification."**

Section 12 (1) and (2) contain identical wording in respect of the **Race Relations Act 1976**. The **Employment Equality (Age) Regulations 2006** "**The Age Regulations**") provides:

> **"(1) It is unlawful for a qualifications body to discriminate against a person –**
>
> **a) in the terms on which it is prepared to confer a professional or trade qualification on him;**
>
> **b) by refusing or deliberately not granting any application by him for such a qualification; or**
>
> **c) by withdrawing such a qualification from him or varying the terms on which he holds it**
>
> **(3) In this regulation – 'qualifications body' means any authority or body which can confer a professional or trade qualification … "professional or trade qualification" means any authorisation, qualification, recognition, registration, enrolment approval or certification which is needed for, or facilitates engagement in, a particular profession or trade."**

12. No party takes any point on the subtle differences between the Age Regulations on the one hand and the 1975 and the 1976 Acts on the other

13. Each legislative provision has a similar section or regulation restricting the jurisdiction of an Employment Tribunal. Thus section 63 of the **Sex Discrimination Act 1975** provides, under the heading, 'Jurisdiction of Employment Tribunals': -

> **"(1) A complaint by any person ('the Complainant') that another person ('the Respondent') –**
> **a) has committed an act of discrimination … against the complainant which is unlawful by virtue of part ii … may be presented to an Employment Tribunal.**
> **(2) Sub-section (1) does not apply to a complaint under Section 13(1) of an act in respect of which an appeal, or proceedings in the nature of an appeal, may be brought under any enactment."**

Part II of the Act deals with discrimination in the Employment field.

14. There are cognate provisions in the **Race Relations Act 1976** (Section 54) and the **Age Regulations** (Regulation 36 (1) and (2) (a)).

Proceedings before the Employment Tribunal

15. On 8 June 2010 Employment Judge Tayler in a conspicuously careful and clear set of reasons ordered that issues of jurisdiction arising out of these provisions, and the question whether the complaints were out of time, should be considered at a pre-hearing review. That pre-hearing review came before Employment Judge Stewart. He concluded that there had been no application for registration made by the Claimant to the HPC. (She had written in 2009 to the Privy Council, which is responsible for some of the affairs of the HPC, saying that she could not proceed through the usual appeal route as she had not been able officially to apply for state

registration as there was no pathway open to her – she sought to appeal, but did not contend she had made any application). It was common ground between the parties (see, e.g. paragraph 51) that the Claimant had never made an application to the HPC such as to receive a decision on it, or for there to be a failure to make a decision, either of which would be appealable. He took the view that sections 13 of the SDA, 12 of the RRA and Regulation 19 of the **Age Regulations** did not require that there should first be an application for registration before the action of the qualifying body could be rendered unlawful:

> **"They merely required a formulation of terms on which the qualifying body is prepared to confer registration. If those terms are discriminatory, then the qualifying body had acted unlawfully."**

Since there had been no application, there could be no internal appeal to the Council, hence no onward appeal to the County Court, and hence no statutory provision to prevent a Tribunal having jurisdiction.

16. Employment Judge Stewart was asked to review his decision. He decided to do so, and reversed it. It is against that decision, reasons for which were dated 29 March 2011, that this appeal is brought.

17. He understood that he was being asked by counsel to accept that the HPC was required by Parliament (under Article 12 of the Health Professions Order 2001) to consider and set up a list of approved qualifications. He summarised his decision on this submission in paragraphs 10 and 11 of his Reasons:

> **"… The Respondent when it exercised its judgement as to the courses to be included in the list of approved courses was implementing the will of Parliament. If it implemented that will incorrectly, that is a matter**

> **upon which the Claimant might seek Judicial Review: it does not fall to an Employment Tribunal to declare that the Respondent has failed to discharge its function correctly or has been remiss in its interpretation of its remit from Parliament or that Parliament has failed to comply with the Directives from Europe. That is the province of the Administrative Court.**
>
> **11. On the other hand, if the Respondent has implemented the will of Parliament correctly but the effect of that correct implementation is that the Claimant is treated less favourably than others in ways that might suggest unlawful discrimination on the grounds of age, gender or nationality, then the Respondent has a complete answer in pointing out that its actions were the embodiment of the will of Parliament and therefore must be lawful.**
>
> **12. Therefore I was wrong to ignore the source of the Rules which the Respondent advised upon …"**

Submissions

18. Before me neither party invited me to uphold the reasoning of Employment Judge Stewart. The Claimant has had representation from Mr Keen and Ms Sobiecki of counsel under the auspices of the Free Representation Unit to advance her arguments, whereas previously before the Judge she appeared in person. Mr Downs of counsel, who did not appear before Judge Stewart, appeared for the Respondent. Both parties produced arguments of high quality for which they are to be commended.

19. Each party, for its own purposes, contended there had been no actual application for registration by Doctor King. Although at one stage I had wondered whether what had happened, factually, might amount to an application within the meaning of the legislation (if not within HPC's own rules, there potentially being a distinction as to the meaning of "application" between those rules and the statute) neither party asked me to take this course, and I am content to resolve this case on the basis I do not do so. The utility of this judgment as a precedent may be limited as a result.

20. The skeleton originally submitted by Doctor King and answered by the Respondent was supplemented by a revised argument delivered only two days prior to the hearing. Though Mr Downs indicated he would have wished more time to deal with the issues raised, the case had gone on for so long (for various reasons) that he did not invite any adjournment. Doctor King submitted that the Judge appeared to be saying that the fact that the statutory regime required the HPC to draw up a list of approved qualifications meant that it was obliged by statute to indicate to the Claimant that she could not apply to it with any prospect of success. If so, this was no basis to decline jurisdiction. In **Hampson v Department of Education and Science** [1991] 1AC 171, the House of Lords held that statutory protection for acts of discrimination done "in pursuance of any instrument made under any enactment by a Minister of the Crown" only extended to acts carried out in the necessary performance of an express statutory obligation and did not extend to discretionary acts. In **General Medical Counsel v Goba** [1998] IRLR 425, the EAT had confirmed that "the act complained of in its doing and the way it was carried out must have been one which was reasonably necessary in order to comply with any condition or requirement of the statute or order". The fact that the HPC was obliged to consider qualifications under Article 12 did not excuse it of any discrimination so as to render the Claimant's case unarguable.

21. Mr Downs did not argue the contrary, and expressly accepted that he was not relying upon the statutory scheme as excusing discrimination and eliminating jurisdiction.

22. I agree with Mr Keen's submissions on this point. The list of approved qualifications was not laid down by statute. It was left to the choice of the HPC. The fact that it had to make a choice was prescribed by statute: but not the nature of the actual choice to be made. There is nothing inconsistent between a statutory regime requiring a choice to be made, and the

discrimination statutes requiring that any such choice does not have a discriminatory effect. Accordingly, the Judge was plainly wrong.

23. However, it is necessary to consider whether, though wrong in his reasoning, the Judge was nonetheless right in the result as Mr Downs claims he was, and Mr Keen denies.

24. The principal focus of Mr Downs' argument was first that the Claimant sought to challenge the provisions of the Order under which the HPC operated: this was the way she had put her case as recorded by Judge Stewart. His principal argument orally, faced with the new skeleton argument on behalf of the Appellant, was to argue that section 63 of the 1975 Act (and cognate provisions in the 1976 Act and **Age Regulations**) provided that jurisdiction did not apply to a complaint in respect of which "an appeal … may be brought …". Thus the fact there could be no appeal, because there had been no application (the Claimant having been deterred, but not prevented from making one) was not relevant: for it was open to the Claimant to take the action which it was necessary to take to trigger such an appeal. She could, simply by making an application (as she had not done) provoke a response from the HPC. If the HPC refused the application, she had an appeal to Council, and if Council did not accept her appeal, onward to the County Court. The act of which she complained, therefore, was potentially subject to an appeal.

25. This was consistent with the scheme of the Act which was designed to ensure that discrimination (if it existed) was not left unremedied. But it also preserved the ability of a body charged with professional oversight to take a careful look within its own procedures at what was alleged. The County Court, on appeal to it, would have the advantage of a careful and considered approach by the statutory body charged with overseeing registration for entry to the profession. That was appropriate, whereas requiring the HPC to address arguments in the forum

of an Employment Tribunal without there having been careful consideration of the issues internally within the HPC first was not. The purpose of excluding jurisdiction because of the presence of another appeal was because Parliament accepted that in the case of qualifying bodies another appeal route might well be more appropriate. Great damage might be done to this carefully established structure if parties were at liberty to proceed against a body such as the HPC where they had made no application for registration to it in the first place. Thus the scheme should be construed so as to provide that a Tribunal had no jurisdiction where it lay in the Claimant's own hands whether there was an appeal against any substantial injustice she felt she had suffered. The Claimant here could access an appeal merely by making an application. Not to make an application, when it was within her power to do so would be to side step the provisions which ensured that the appropriate route (appeal to Council, followed by County Court) was followed.

Discussion

26. As Mr Downs submitted, there is a point preliminary to any question whether s. 63 of the 1975 Act, s. 54 of the 1976 Act, or Regulation 36 of the **Age Regulation** applies. It is whether there has been a complaint, which comes under section 13 (1) of the 1975 Act (or the corresponding provisions). It is trite that the **Sex Discrimination** and **Race Relations Acts** and the **Age Regulations** do not outlaw sex, race, and age discrimination in whatever circumstances they occur. The circumstances in which such discrimination gives rise to a claim are carefully defined. For discrimination by a qualifying (or qualifications) body to be capable of a complaint to an Employment Tribunal it must come within the terms of section 13 (1).

27. Whether an indication in advance of any application such as that made by the HPC here, to the effect that a would-be applicant's qualifications would not be acceptable, is such an act depends on the way in which section 13 (1) is to be construed.

28. Sub-sections 13 (1) (a), (b), (c), form a coherent group. All deal with a situation where less than the benefits of full registration are conferred: (a) deals with conditional registration; (b) with a refusal of registration; and (c) with a withdrawal of registration. None deals with the process of application for registration, unless the words "in the terms on which it is prepared to confer on her that authorisation" comprehend the process of application. Although on a casual reading of the section, I had initially taken the words to include such a process, on any focussed consideration it is clear this is not the case. Neither as a matter of logic or language do the words cover either facilitating, or hindering the process of application. The 'terms' deal with the extent of enjoyment of the authorisation or qualification once conferred. Linguistically, the authorisation or qualification is to be provided "***on*** terms". So viewed, it is plain that (coherent with the general pattern formed by 1(a), (b) and (c)) the "terms" are the terms applying to the qualification once granted – effectively, qualification subject to a condition.

29. Sub-section 13 (3) does not affect this interpretation.

30. That the words are used in this sense in s.13 of the **Sex Discrimination Act 1975** is demonstrated by comparison with section 6. Section 6 (1) provides as follows:

> **"it is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman –**
> **(a) in the arrangements he makes for purpose of determining who should be offered that employment or**
> **(b) in the terms in which he offers her that employment, or**
> **(c) by refusing or deliberately omitting to offer her that employment."**

The words in (b) and (c) echo those in section 13 (1) (a) and (b) with only those alterations which are made necessary by the context. But a distinction is plainly drawn between "arrangements made for the purpose of determining" the offer of employment, and the concept of "terms on which employment is offered." The terms and conditions of employment, once offered and accepted, are distinct from the arrangements made for determining who should receive the offer. There is no sub-section in section 13 equivalent to section 6 (1) (a).

31. The position under the two other legislative provisions is identical.

32. Mr Downs took me to **Koskinen v Council of Professions Supplementary to Medicine and the Privy Council** [2005] EWCA Civ 363. An Employment Tribunal held it had no jurisdiction to hear complaints of race discrimination made against the Health Professions Council (sued in its former name). The Employment Appeal Tribunal dismissed an appeal. On further appeal to the Court of Appeal, the Council for Professions Supplementary to Medicine was held not to be a qualifying body of the kind mentioned in section 12 because the Council as such did not confer an authorisation or qualification. Though obiter (see paragraph 89 of the Judgment of Mummery LJ, with which Maurice Kay and Keene LJJ both agreed) the Court recognised that it was in a position to express a view on the other grounds which had been fully argued. The second point made to it by the Council for Professions Supplementary to Medicine had been that the acts complained of did not fall within the terms of section 12 (1) (a) or (b):

> **"(Counsel for the Council) contends that the acts complained of by Mr Koskinen do not fall within these provisions. They have simply informed him that his UK Diploma is not recognised as a qualification.**
>
> **93 They have not said anything about the terms on which they were prepared to confer authorisation or qualification and they have not refused or deliberately omitted to grant his application, because the Council never actually received from him a relevant application …**

> **95 … None of the acts of which he makes complaint are acts which are rendered unlawful by Section 12 (1). It may be that some other procedure was appropriate for him to follow in order to advance the complaints which he has made in these proceedings but we are only concerned with whether he can maintain a claim in the Tribunal under the 1976 Act.**
>
> **96 In my view, (counsel for the Council) is right. What he has alleged is not rendered unlawful by Section 12"**

33. Two matters follow. First, the natural reading of section 13 (and section 12 of the 1976 Act) as I see it is also that which appealed to Mummery LJ. Secondly, though this court is technically not bound by the decision (being obiter), since it is one with which the entire Court was in agreement, following argument, it is not merely to be regarded as persuasive but as highly so.

34. In the course of argument I referred the parties to **British Judo Association v Petty** [1981] ICR 660, a decision of the Employment Appeal Tribunal presided over by Browne-Wilkinson J (as he was). The passage at 664 D - G makes it plain that he, too, read the provisions in the same way as have I.

35. Given that the Claimant's substituted skeleton argument raised points which the Respondent wished time to consider, and given the prominence which the argument as to the scope of section 13 (and the commensurate provisions in the other legislation) adopted during the course of the argument, the parties wished to consider whether to make further submissions on paper. Those further submissions draw attention to the case of **Virik v General Medical Council** (1995) EAT/919/95, in which the Appeal Tribunal presided over by Tucker J said ".. the clear wording of the subsection.." (there the **Race Relations Act**, s.12) "..relates to terms imposed upon an authorization at the point that it is granted and does not relate to terms which

are a precedent to it being granted.". That expresses succinctly the point I make at paragraphs 26-34 above, initially reached in ignorance of the **Virik** decision.

36. Mr Downs argues that the Claimant is in reality complaining about the likelihood of unlawful discrimination against her *if and when* she applied for registration. On that basis, an appeal (or proceedings in the nature of an appeal) could be brought by her, in respect of the subject matter of her claim, and the jurisdiction of the Tribunal is thereby excluded by the statutory provision.

37. The Claimant seeks to meet these arguments by pointing to the fact that in other provisions the discrimination statutes allow for anticipated or likely discrimination (as in the provision that indirect discrimination is made out where a "..respondent applies *or would apply*, any provision, criterion or practice…" (emphasis added)). Thus the provision should be interpreted to permit the deterred applicant to proceed as if she were a disappointed applicant. She would interpret the phrase "terms on which (the HPC) is prepared to confer" the qualification as including, but not limited to, the requirement that the Claimant's degree be included on the list of degrees devised by the HPC as a necessary preliminary to acceptance of an application.

38. She submitted that **Petty** was of no assistance in understanding the scope of the phrase; **Virik** was a case in which there was little discussion of the meaning of the word "term", and the document which was alleged to be discriminatory in that case was titled "advice": it did not contain terms as such. Moreover, the interpretation which appealed to me (see above) did not take account of developments in Community Law, and the general acceptance of the principle of equality. European Directives aim to provide access to occupation and employment which is unfettered by discrimination. The domestic statutory provisions must be interpreted so as to

permit the Claimant a remedy where otherwise her access to the labour market in her chosen profession would be hindered by indirect discrimination: given the proper approach to the construction of legislation (to interpret provisions to the fullest extent possible to achieve a result in harmony with European Directives and Regulations) the Acts and **Age Regulations** should be interpreted so that a person deterred from application by discrimination should be afforded a proper chance of a remedy.

39. I cannot accept the Claimant's arguments here. I reject her interpretation of "the terms on which.." (etc). The case law is consistent, and compelling. My reasoning, independent in origin of those authorities, is to the same effect. Comparison of the wording of (for example) ss. 6 and 13 of the **Sex Discrimination Act 1975** confirms that the natural reading of the words was that which Parliament had in mind. The words are not capable of the meaning, in context, which Mr Keen and Ms Sobiecki would wish to attribute to them.

40. As to the argument that this natural meaning can and should be stretched to the extent necessary to accommodate principles of equal treatment derived from European Union provisions and decisions, I reject that too. Dr King's potential claim is in reality one of indirect discrimination. So far as indirect discrimination is concerned, justification of a particular provision, criterion or practice is permissible under law. Matters of proportionality come into play in determining justification, for the discriminatory effect of any such PCP must be no greater than is necessary to achieve the legitimate aim, corresponding to a real need of the undertaking, to which the PCP seeks to give effect. Ensuring a just result and best assessment of proportionality in the context of professional registration, where there is a public interest in ensuring that it is not conferred too lightly, nor maintained when it would not be desirable to do so, is better achieved by reference to the qualifications (or qualifying) body, which by reason of

its structure and membership is ideally placed to evaluate the pros and cons of any restriction – in this case, the appropriateness of particular qualifications - than by proceeding to an employment tribunal without being informed what is the best assessment of the body directly charged with promoting the public interests in these respects. The judicial assessment of proportionality will have to balance such conclusion as properly drawn in respect of those interests on the one hand against the discriminatory effect of the provision, criterion or practice on the other, and to do so needs to be properly informed as to those interests and their weight. Accordingly, where there is an appeal provided for by legislation, as there is where there is an application made to the HPC, issues of discrimination may be adjudicated on in the first place by that body, and its decision (which will indicate its view of the proportionality of any restriction) open to review in the courts. The principle of equality is not offended by this. The Claimant, though factually deterred, is not legally prevented from applying to the HPC.

41. So much for section 13 (1) (a). Subsection 1(b) cannot apply, for there has been no application to refuse or "deliberately not grant".

42. The argument which Mr Downs described as "his best point" when invited just after the start of proceedings to respond to the appeal, resting on the word "may" in section 63, does not fall for consideration in the light of my conclusion that the act complained of (whatever one might think of its merits) does not fall within the scope of section 13, and hence it is unnecessary to consider the exclusion of jurisdiction, since jurisdiction has not been established in the first place.

43. Lest it be thought that the conclusion is a hard one against the Claimant, in circumstances which call for sympathy, she has the option of making an application to the HPC, which if it

should refuse would give her the right of appeal applying the same legal principles as to discrimination as would an Employment Tribunal.

Conclusion

44. For the reasons set out above, the Employment Judge was in error of law in his approach. However, the conclusion to which he came, properly analysed, depended upon a construction of the relevant sections and regulation. The conclusion to which he came, though erroneously reasoned, was in the result plainly and unarguably right. For those reasons, this appeal must be dismissed.