Appeal No. UKEAT/0036/09/SM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 3 December 2009

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

DR G IGBOAKA — APPELLANT

THE ROYAL COLLEGE OF PATHOLOGISTS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR C CARR (of Counsel) Instructed by: Messrs Edward & Co Solicitors Maple House High Street Potters Bar Herts EN6 5BS
For the Respondent	MR J DAVIES (of Counsel) Instructed by: Messrs Beachcroft LLP 100 Fetter Lane London EC4A 1BN

SUMMARY

RACE DISCRIMINATION: Discrimination by other bodies

PRACTICE & PROCEDURE: Costs

Claims brought under ss12 and 13 **Race Relations Act 1976**. Properly struck out by Employment Tribunal under Rule 18(7)(b) as having no reasonable prospect of success.

Costs of aborted EAT hearing to be paid by Appellant who was wholly responsible for those wasted costs.

HIS HONOUR JUDGE PETER CLARK

1. This is an appeal by Dr Igboaka, the Claimant before the Watford Employment Tribunal against the judgment of Employment Judge Palmer sitting alone at a Pre-Hearing Review (PHR) held on 29 October 2008 striking out all of his claims brought against the Respondent, the Royal College of Pathologists (the College), on the grounds that they had no reasonable prospect of success (see Employment Tribunal Rule 18(7)(b)).

2. That judgment with reasons was promulgated on 25 November 2008.

Background

3. I take the relevant background from the findings made by Employment Judge Bedeau following a PHR/Case Management Discussion held on 4 August 2008 contained in his judgment and orders dated 29 August and the findings of Employment Judge Palmer in her reasons.

4. The Claimant was at all relevant times a medical practitioner and Fellow of the College. He is black.

5. On 2 August 2007, he lodged a claim form ET1 at the Tribunal naming two Respondents, (1) the General Medical Council (GMC) and (2) the College.

6. He complained of unlawful discrimination on the grounds of his race and age.

7. All claims save that of direct race discrimination against the College were withdrawn at the PHR before Judge Palmer.

8. The complaints made against the GMC were struck out by Judge Bedeau on the basis that the Tribunal had no jurisdiction to entertain them by virtue of section 54(2) of the **Race Relations Act 1976 (**RRA) and regulation 36(2)(a) of the **Age Regulations 2006**.

9. In short, that Judge found that the Claimant had a right of appeal against the GMC's decision said to be an act of unlawful discrimination on the grounds of his race and/or age, to erase his name from the Medical Register, to the High Court under section 40(1)(a) of the **Medical Act 1988**.

10. In these circumstances, he could not bring a claim in the Employment Tribunal under section 12(1) RRA, his only potential course of action, by virtue of the prohibition contained in section 54(2), see **Khan v GMC** [1994] IRLR 646, **Chaudhury v The Royal College of Surgeons and Others** [2003] ICR 1510, both Court of Appeal.

11. An appeal against Judge Bedeau's strike out decision PA1634/08 was lodged out of time. The Registrar refused to extend time. An appeal against her decision was dismissed by Underhill P, on 9 June 2009.

12. Following the directions set out at paragraph 36 of Judge Bedeau's order in relation to the Claimant's remaining claims against the College, the position at the outset of the PHR before Judge Palmer, at which the Claimant was represented by counsel other than Mr Carr and the College by Mr Davies, I am satisfied that the relevant question for determination was ultimately this; did the only two in time claims of direct racial discrimination brought against the College and set out at paragraphs 38 and 39 of the Claimant's further and better particulars of claim,

referred to by Judge Palmer as his written answers, have no reasonable prospect of success such that they should be struck out?

13. For the purposes of that question, the Tribunal was required to assume that any factual disputes were resolved in the Claimant's favour. That assumption, it seems to me, deals with the concern as to the fact sensitive nature of discrimination claims identified by the House of Lords in **Anyanwu** [2001] ICR 391 as applied by the Court of Appeal in **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126.

14. The relevant allegations at paragraphs 38 and 39 of the written answers set out in tabular form were in these terms:

> **"38. 3 May 2007, Dr Peter Cowling, RCPath, FTPP decided to suspend my GMC Registration and erase my name from the Medical Register. These are considered unfair and disproportionate. An appeal is in place.**
>
> **39. 13 August 2007, the Royal College of Pathologists RCPath said it would be inappropriate to investigate the complaints until the GMC and Tribunal processes have been completed, thus ignoring the fact that the Tribunal proceedings were started to protect my position."**

Dr Peter Cowling was Director of Professional Standards at the College.

The Law

15. Section 12 RRA is headed "Qualifying bodies":

> **"(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 person-**
>
> **(a) in the terms on which it is prepared to confer on him that authorisation or qualification; or**
>
> **(b) by refusing, or deliberating omitting to grant, his application for it; or**
>
> **(c) by withdrawing it from him or varying the terms on which he holds it."**

16. Section 13 is headed "Persons concerned with provision of vocational training":

> **"(1) It is unlawful, in the case of an individual seeking or undergoing training which would help to fit him for any employment, for any person who provides, or makes arrangements for the provision of, facilities for such training to discriminate against him –**

(a) in the terms on which that person affords him access to any training course or other facilities concerned with such training; or

(b) by refusing or deliberately omitting to afford him such access; or

(c) by terminating his training; or

(d) by subjecting him to any detriment during the course of his training."

17. I should also refer to section 33 RRA headed "Aiding unlawful acts":

> **"(1) A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description."**

18. Section 54 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…. against the complainant which is unlawful by virtue of Part II, or, in relation to discrimination on grounds of race or ethnic or national origins, or harassment, or**
>
> **(b) is by virtue of section 32 or 33 to be treated as having committed such an act… against the complainant, may be presented to an Employment Tribunal.**
>
> **(2) Subsection (1) does not apply to a complaint under section 12(1) of an act in respect of which an appeal, or proceedings in the nature of an appeal, may be brought under any enactment."**

The Employment Tribunal Conclusions

19. As to the paragraph 38 complaint, the GMC's Fitness to Practice Panel (FTPP) decision to suspend the Claimant's GMC registration and erase his name from the register, the allegation was that Dr Cowling acting on behalf of the College aided and abetted the act of the FTPP which was itself an act of direct racial discrimination.

20. Judge Palmer dealt with that way of putting the Claimant's case at paragraph 33 of her reasons where she said this:

> **"The Respondent cannot be liable for aiding an unlawful act under section 33 Race Relations Act in a situation where the person primarily responsible for the discrimination (in this case the GMC) cannot be liable because section 54(2) RRA applies. The Fitness To Practice Panel is an organ of the GMC and as such must not discriminate under section 12 RRA. Thus any claim must be brought against the GMC. Because there is an appeal procedure available to the Claimant under section 40(1)(a) of the Medical Act 1983, which he is pursuing,** [I interpose successfully] **he cannot make a claim against the GMC in the Employment Tribunal. It follows therefore that the Tribunal has no jurisdiction to hear a claim against an aider and abetter under section 33 RRA where there can be no claim against the person who is alleged to have done the unlawful act (*see Khan v General***

> ***Medical Council [1994] IRLR 646 CA*). The provisions on aiding and abetting cannot establish jurisdiction where there is no jurisdiction to proceed against the person who has aided and abetted."**

21. As to the paragraph 39 complaint, she held at paragraph 29 of her reasons:

> **"I find that the Respondent is not a body concerned with provision of vocational training. Its function is to set the standards for training in pathology which includes involvement in the content and structure of training. It provides the infrastructure to support training in the pathology specialties but it does not provide the vocational training itself or make arrangements for its provision, whether in the form of training courses or placements which involve on the job training. Exceptionally, the College assisted the Claimant to find a training place in a hospital in Manchester. This was not a function of the College, nor its practice, and such assistance has never previously been provided."**

The Appeal

22. Mr Carr now appearing for the Claimant takes three points in advancing this appeal:

(1) that Judge Palmer was wrong in law in holding that the College was not a person concerned with the provision of training for the purposes of section 13 RRA (ground 1).

(2) she was wrong to find that there had been no variation in the qualification bestowed on the Claimant by the College, that of Fellow, for the purposes of section 12 RRA (ground 2).

(3) that she was wrong to find that the acts complained of at paragraph 38 and 39 of the written answers were the acts of the GMC and not acts for which the College was principally liable (ground 3).

23. As to ground 3, Mr Carr accepts by reference to the EAT judgment in **Moyhing v Homerton University Hospitals NHS Trust and Others** UKEAT0851/04 MAA 3 May 2005, Burton P, presiding, that if the principal actor is the GMC, the College cannot be liable as an aider and abetter under section 33 RRA by virtue of the provisions of section 54(2). He also

acknowledges that he is bound by the only two extant complaints of direct discrimination, that is the paragraphs 38 and 39 complaints. I shall deal with each ground of appeal in turn.

Ground 1

24. Assuming in the Claimant's favour that it is at least arguable that when the College assisted the Claimant in obtaining training at Manchester Hospital in 2004, they were making arrangements for training which fell within section 13(1), that is not the end of the matter.

25. Section 13(1)(a) to (d) circumscribe the nature of the actionable discrimination of which he can complain. In fact, he has not complained about that training. If he did, such complaint would be out of time. Further neither of the paragraph 38 or 39 complaints are about training. Consequently the claim as constituted does not even arguably fall within section 13. It is bound to fail.

Ground 2

26. The College was a qualifying body for the purpose of granting a fellowship within the meaning of section 12 RRA. However, the Judge made clear findings of fact that the Claimant retained his Fellowship of the College. The terms of this Fellowship are not varied, see paragraph 31 read with paragraph 16 to 17 of her reasons.

27. Mr Carr submits that a variation may be implied, see **British Judo Association v Petty** [1981] ICR 660. In that case the Association granted the female claimant a qualification as a judo instructor but later prohibited her from refereeing a men's competition.

28. I accept that a variation may be implied but there is no indication that the Judge excluded that possibility. She simply accepted that there was no evidence to support a variation of the terms on which the Claimant held his Fellowship.

29. Mr Carr sought to link the suspension from practice by the GMC (paragraph 38 complaint) with some sort of limitation on the Claimant's qualification as a Fellow of the College. He seeks to equate the actions of the College's professional standards unit with the decision of the GMC FTPP, and finally with the Claimant's Fellowship. I am far from convinced that the case was put that way below but had it been, it would surely have failed.

30. Returning to the case of **Petty**, I note this observation by Browne-Wilkinson P at 664D.

> **"If there were two separate bodies, one of which awarded qualifications and the other of which selected referees, it would no doubt be correct to say that the selecting body, by not inviting women to referee men's competitions, would not infringe section 13. But that is not the case here. The Association both awards the qualifications and selects the referee."**

31. There, as the former President pointed out, the Judo Association conferred the qualification on Ms Petty and then stopped her making full use of it in men's competitions.

32. However, that is not the present case where the Claimant's inability to practise was entirely due to the actions of the GMC FTPP. It had nothing to do with any limitation on his fellowship of the College, there being none.

Ground 3

33. In my judgment, the Judge was plainly entitled to find that the act complained of at paragraph 38 was that of the GMC through its FTPP and not the College. The College cannot be liable as an accessory to that act for the reasons given at paragraph 33, and accepted quite properly by Mr Carr.

34. The paragraph 39 complaint has nothing to do with the GMC. The College decided to defer investigating the Claimant's grievances contained in his letter dated 1 August 2007 until after both the GMC and these Employment Tribunal processes were completed. That cannot be linked to any variation in the terms on which he held his Fellowship of the College for the purposes of section 12(1)(c) RRA, nor was it a complaint about training opportunities for the purposes of section 13.

35. Insofar as it is sought to tie in the paragraph 39 complaint to the complaints raised in the grievance letter of 1 August 2007, there is no extant complaint and anyway the paragraph 39 complaint relates to the College's decision to defer investigating the Claimant's complaints, not the substance of those out of time complaints.

36. In short, neither of the live complaints raises any cause of action under either section 12 or 13 RRA. In these circumstances the Employment Judge was right to strike out the claims. This appeal fails and is dismissed.

37. I have before me an application for costs by the Respondent which is really directed to the aborted hearing before Bean J on 22 July 2009. I see from the judgment which he gave on that occasion that he formed the view that if the appeal is dismissed as it now has been, Dr Igboaka will have no answer to an application for costs.

38. I take it, because there is a reference to the schedule of costs prepared by the Respondent, matters in relation to the costs of that aborted hearing and earlier adjournment request.

39. Plainly the adjournment on the last occasion was entirely caused by Dr Igboaka dismissing his solicitors shortly before the hearing. I understand they have now been reinstated. In these circumstances I have no hesitation in finding that the adjournment was entirely caused by the Appellant's unreasonable conduct of these proceedings, and accordingly that the fees of counsel and his instructing solicitor, together £1,530 plus Value Added Tax, are properly recoverable from the Appellant.

40. As to the further costs claimed, I bear in mind the Appellant's means. I am told that he is currently on restricted duties and earns £2,200 per month net.

41. I also take into account that Mr Davies does not press the item headed in the schedule "Adjournment request 19 June 2009". He does press the costs claimed in relation to two subsequent adjournment requests made by the Appellant on 6 July and 20 July.

42. However, I am not persuaded that anything like that amount of work would be required to deal with repeat requests once the initial position had been established both with the client and with the benefit of advice from counsel.

43. I agree with Mr Carr that it is not unusual where an Appellant is in person for the represented Respondent to have carriage of such matters as preparing bundles for the hearing.

44. In these circumstances, I am not prepared as a matter of discretion to award more than the sum of £1,530 plus VAT which I mentioned earlier. That is the amount of costs the Appellant will pay.