EMPLOYMENT TRIBUNALS

Claimant: Mr G Rakoczy

Respondent: Manchester University NHS Foundation Trust

Heard at: Manchester **On:** 28 May 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr M Islam-Choudhury, Counsel

JUDGMENT

1. The following claims are struck out because they have no reasonable prospects of success:

   (a) The complaint of unfair dismissal under both section 98 and section 103A Employment Rights Act 1996;

   (b) The complaint of detriment in employment because of a protected disclosure contrary to section 47B Employment Rights Act 1996 insofar as it is based on PD1 and D1;

   (c) All complaints of direct age discrimination;

   (d) The complaints of race discrimination identified as allegations LFT1-LFT9.

2. The remaining complaints will proceed.

REASONS

Introduction

1. Following four case management preliminary hearings, this preliminary hearing was listed to consider an application by the respondent to strike out parts of the claim, or in the alternative for a deposit to be ordered. The applications were based on the List of Complaints and Issues which was annexed to my Case Management Order sent to the parties after the preliminary hearing on 7 January 2019. There was one amendment made to that List of Issues at the start of the hearing (the addition of a reference to paragraph 17 of the claimant's Scott Schedule in allegation LFT19) but that did not make any difference to these applications. I will continue in these Reasons to refer to the various allegations by reference to the List of Complaints and Issues.

2. I had the benefit of a bundle of documents running to 554 pages. Any reference in these Reasons to a page number is a reference to that bundle unless otherwise indicated.

3. I also had the benefit of oral submissions from the claimant and Mr Islam-Choudhury, together with a written submission from Mr Islam-Choudhury running to eight pages and 38 paragraphs. The claimant confirmed he had seen that written submission before the oral hearing.

4. In order to explain my decision on these applications I will first summarise the background and then the law which applies to applications to strike out a claim. I will then deal with each allegation or group of allegations in turn, summarise the position of each party on that matter and explain my decision on whether it should be struck out or not.

Background

5. The claimant was employed as a Consultant Paediatric Surgeon by the respondent Trust between January 2005 and 1 June 2017 when he was dismissed, on the face of it because of his capability. Following complaints by colleagues about his work the respondent referred him to the independent National Clinical Assessment Service ("NCAS"). In March 2015 the NCAS assessment found that the claimant had a need to make improvements in nine areas of his practice and concluded that he was not performing at the level expected of a Consultant Surgeon specialising in paediatric surgery. It said that at times he presented safety risks for patients.

6. The claimant did not accept that this assessment was valid. He complained about it both internally through the grievance procedure and externally.

7. The General Medical Council ("GMC") proceeded with its own assessment. It reported in March 2017. The claimant was assessed against the "domains" of practice and cause for concern was found in three of them. It was noted that the claimant had not been able to demonstrate any improvement when assessed by the

GMC even despite the passage of time since the NCAS report. The GMC assessment was that he would only be fit to practice if he successfully completed an English language test conducted by IELTS.

8. As a consequence of these assessments the Interim Orders Tribunal ("IOT") of the Medical Practitioners Tribunal ("MPT") restricted the claimant's practice. The IOT interim order of 14 March 2017 appeared at pages 535-540. It heard legal submissions from counsel for the GMC and a solicitor for the claimant before deciding that an interim order was appropriate. The claimant was not allowed to work above the level of a Specialist Registrar, and would be required to work under direct clinical supervision. This meant that he was unable to perform his contractual duties as a Consultant Paediatric Surgeon.

9. Capability proceedings ensued. The claimant did not accept the findings of the GMC and sought to challenge them in the internal capability proceedings and elsewhere.

10. The capability hearing before the respondent's panel took place on 18 May 2017 and the decision issued on 1 June 2017 (pages 541-547). The panel found that the claimant was not competent and capable of carrying out the duties of a Consultant Paediatric Surgeon, and that his lack of capability was not remediable. It considered the NCAS report and the GMC assessment. On remediation it recorded that the claimant disputed the NCAS and GMC assessments, that the claimant disagreed with almost every aspect of them and had sought external appeal mechanisms in respect of the NCAS assessment. The panel accepted evidence that the claimant had a lack of insight into his clinical failings.

11. The key conclusions were put as follows:

> **"Whilst any assessment may be subject to some criticism, and whilst there may be legitimate disagreement about particular aspects of particular areas of any assessment, the Panel feels that the NCAS and GMC reports are a reasonable and robust assessment of your level of competence in both 2014 and 2016. It is noteworthy that between these two assessments was a period in which you could have made every effort to improve, to meet the standard required of a Consultant Surgeon in your chosen field, yet instead you opted to disagree with, criticise and challenge almost every negative aspect of the reports and assessments and indeed did so again at the hearing.**
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> **The findings of both reports give cause for very significant concern with regards to your capability to perform at Consultant level. The reports provide a consistent view as to your capability, and their findings must be taken seriously by the Trust. In all the circumstances, and notwithstanding the evidence of Mrs Taylor and the testimonials you provided (which inevitably represent a partial view of your practice), the Panel finds that it is reasonable for the Panel to rely on the outcomes of the two assessments to reach the conclusion that you are not operating at the level of a Consultant Paediatric Surgeon.**
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> **The second issue is whether your lack of capability is remediable and what action should be taken in consequence.**
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> **The Panel found that your lack of capability is not remediable. In reaching this decision the Panel considered remediation both within the Trust and remediation**

external to the Trust. The Panel reached this conclusion based on the evidence presented in both the NCAS and GMC assessments, the investigation report and the evidence presented at the hearing.

The Panel is of the unanimous view that you lack the insight to benefit from a reasonable period of remediation and are not at all confident that even an extensive period would be sufficient to remediate you to work at the level of a Consultant Paediatric Surgeon. The Panel's view is that any protracted remediation period would have a significant negative impact on the resources of the Trust with limited prospect of success.

Your insight into your capability is a real concern to the Panel. You have rejected both external assessments of your capability and you do not accept that there are significant areas of retraining that you need to undertake to achieve a satisfactory level of competency. This is evidenced in your non acceptance of the NCAS assessment of your practice and later in your criticism of the GMC assessment. Whilst the Panel accept that there may be differences in opinion of the assessors who have undertaken these processes it is clear that they are unanimous in their overall view when presenting their reports back to the Trust. Your lack of insight into their assessment of your capability demonstrates that remediation would be a protracted process with limited chance of success.

Overall, and on balance, the Panel preferred the evidence and assessment of both NCAS and GMC and the views of the Clinical Head of Division as to your competency and the likelihood of successful remediation to your evidence and that of your witnesses."

12. The claimant pursued an appeal against the dismissal. It was heard on 6 June 2018. The outcome letter of 13 June 2018 (pages 548-554) rejected the appeal. It was not a complete re-hearing. The appeal panel concluded that the dismissing panel had properly weighed the evidence available and rejected the likelihood that the NCAS and GMC reports were so flawed as to render them incapable of being relied upon. The decision that the claimant had not been sufficiently competent and capable to carry out his duties was a proper one, as was the conclusion that he was not capable of remediation.

13. In February 2019 the MPT issued its decision. The interim order was superseded by an immediate order lasting for 12 months. The MPT disagreed with the GMC assessment in certain respects. The GMC had failed to prove that the area of maintaining professional performance was unacceptable, or that there was cause for concern in relationships with patients or working with colleagues. However, it reached the following findings which were adverse to the claimant:

- There was cause for concern in relation to assessment and technical/operative skills.
- The claimant had failed to achieve the minimum acceptable score in the IELTS test.
- Although fitness to practice was not impaired by reason of deficient professional performance, it was impaired by reason of knowledge of the English language.

- The claimant was not permitted to engage in any clinical duties, either paid or voluntary, until he had evidence of achieving the required scores in the IELTS.

- There would be a review of whether he had passed the IELTS or equivalent within the 12 month period.

Relevant Legal Principles

14. The power to strike out arises under what is now rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 so far as material provides as follows:

> **"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success…"**

15. As far as "no reasonable prospect of success" is concerned, a helpful summary of the proper legal approach to an application to strike-out is found in paragraph 30 of **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session:

> **"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls* v *Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd* v *Patel* [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd* v *Patel*, supra; *Ezsias* v *North Glamorgan NHS Trust* [[2007] ICR 1126]). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias* v *North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)."**

16. In **Mechkarov v Citibank NA [2016] ICR 1121** the EAT (Mitting J) summarised the approach in discrimination cases as follows in paragraph 14:

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

17. In **Ahir v British Airways plc [2017] EWCA Civ 1392**, Underhill LJ put it as follows (paragraph 16):

> **"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."**

Unfair Dismissal

18. The first matter addressed in submissions by Mr Islam-Choudhury was the unfair dismissal complaint. He emphasised that the undisputed facts (summarised above) showed that the conclusion that the claimant was not competent in his role was supported by two independent assessments by external bodies. The respondent also had the fact that the claimant had been restricted by the IOP for some months prior to the hearing. He submitted that the claimant had no reasonable prospect of showing that this was anything other than a dismissal by reason of capability, and that the decision to dismiss him fell within the band of reasonable responses. The conclusion that the deficiencies in performance were not remediable was also entirely reasonable given the approach the claimant took to the assessments of his shortcomings. Rather than accept and work on them he had chosen to challenge them at every turn. The terms of the dismissal letter were clear and cogent and there was no reasonable prospect of the claimant succeeding in saying that in truth the principal reason for his dismissal was any protected disclosure.

19. In response the claimant relied primarily on the MPT decision from February 2019. He described it as completely freeing him of all charges. He said it showed that his complaints about the NCAS and GMC assessments had been well-founded, and it had been outside the band of reasonable responses for the Trust to have accepted what NCAS and the GMC were saying. He was unable, however, to point to any evidence which showed that any protected disclosure had been the reason or principal reason for the dismissal.

20. I rejected the claimant's argument about the significance of the MPT decision. Firstly, as a document which post-dated dismissal and appeal, it is of little relevance to an unfair dismissal complaint. The reasonableness of the respondent's actions and decision will be judged in the light of the information before it at the time the decision to dismiss was taken. That the MPT subsequently took a different view on some aspects does not mean that any reasonable employer could only have rejected the NCAS or GMC assessments. Secondly, the claimant's submission overlooked the question of the continuing restriction in relation to the IELTS requirement. The MPT upheld the GMC decision that he should not be allowed to practice until he had passed that test. He had still not passed it by the time of the appeal decision in 2018. He remained subject to the IOP restriction at that time.

21. The claimant's case on unfair dismissal concentrated on the substantive decision. He was not suggesting that the procedure had been unfair. He had been represented by the Medical Defence Union. His grounds of appeal were concerned with a failure by the panel to weigh the evidence before it properly, not with any procedural issues.

22. In those circumstances I concluded that his unfair dismissal complaint had no reasonable prospect of success. Even though his case was put in part on the basis of a whistleblowing complaint, meaning that there is a public interest in such complaints being determined on their merits, the undisputed facts were such that the decision to dismiss him was plainly within the band of reasonable responses. He had no reasonable prospect of a Tribunal finding otherwise, even with the subsequent partial vindication resulting from the MPT decision. I struck out both elements of his unfair dismissal complaint.

Protected Disclosure 1/Detriment 1

23. PD1 was a written complaint of 12 April 2013. It appeared in the bundle at pages 265-267. It was a complaint that Mr Bruce and another colleague had told other members of the team that the claimant's clinical actions had not been correct. Mr Islam-Choudhury submitted that this could not amount to a protected disclosure, but that in any event the detriment relied upon could not be a detriment because of the disclosure. The detriment was the subject matter of the disclosure. There was no link alleged between PD1 and any later detriments, or dismissal.

24. This was plainly correct. The Scott Schedule identified as a detriment the very actions which subsequently formed the basis of PD1. That detriment could not be a consequence of the disclosure if it preceded it. There was no reasonable prospect of success on this allegation and I struck it out.

Protected Disclosures PD2-PD5, PD7, PD8, PD10-PD14

25. Mr Islam-Choudhury argued that the claimant had no reasonable prospect of establishing that he reasonably believed that these disclosures were made in the public interest. He characterises them as complaints by the claimant about how NCAS and the GMC had been doing their assessments of him, and therefore matters that concerned him alone.

26. The claimant argued that these matters were reasonably believed to be in the public interest because they concerned the system by which clinical professionals are subject to assessment and regulation of their performance, and there was a public interest in the assessments being done properly. He said that the points he was raising in his various alleged protected disclosures were systemic failings, not matters that only affected him.

27. Bearing in mind the proper approach to the question of whether a disclosure is made in the public interest as considered by the Court of Appeal in **Chesterton Global Ltd t/a Chestertons v Nurmohamed [2017] IRLR 837**, it seemed to me the claimant had reasonable prospects of success on this issue. It will turn upon the evidence about the information disclosed by the claimant and his own evidence

about his belief at the time. I declined either to strike out these matters or to order that a deposit be paid in order for this aspect of the claim to be pursued.

Detriments D2-D6, D8 and D9

28. These alleged protected disclosure detriments consisted of allegations that the Trust had failed to take any heed of points made by the claimant in protected disclosures, and/or had failed to investigate them or unnecessarily prolonged the investigation of the grievance. Mr Islam-Choudhury submitted that there was no reasonable prospect of success because the issue for the Tribunal was not whether the respondent behaved reasonably in those respects, but rather whether it treated the claimant detrimentally because he had made a protected disclosure.

29. Having heard from the claimant I concluded that there were reasonable prospects of success on these allegations. Underlying the claimant's case it seemed to me was the proposition that the respondent failed to engage fully with the points he was making because he was challenging NCAS and GMC assessments. The test was not whether any protected disclosure was the sole or principal reason for subsequent detrimental treatment, but simply whether it had a material influence, consciously or subconsciously, on the mental processes of the decision makers. That is a highly fact sensitive evaluation for the Tribunal to make, even before regard is paid to the public interest in having whistleblowing complaints determined on their merits.

30. Accordingly, I was not persuaded by Mr Islam-Choudhury that there was no reasonable prospect of success in these allegations, or indeed that there was little reasonable prospect of success such as to warrant a deposit order being made.

31. It is important to emphasise, however, that my view is based on a summary assessment without having seen the evidence of which the parties are aware. The claimant is not guaranteed to succeed on these allegations even though I think he has a reasonable chance of succeeding based upon the limited information before me.

Race Discrimination

32. Mr Islam-Choudhury submitted that the allegations of direct race discrimination had no reasonable prospect of success in relation to all the allegations of less favourable treatment because there was simply no basis for thinking that the claimant's race (as a Hungarian national) had played any part in the way he was treated. The case that this was related solely to the concerns about performance of his role was overwhelming.

33. In response the claimant submitted that the case on race discrimination was summarised accurately at the end of his Scott Schedule (page 125). There he explained the core of his case that:

> **"Mr Bruce did not want an Eastern European [to] lead this department, he made several efforts to paralyse me and achieve that I did not survive [in this department]. If I am younger or not Hungarian it would never have happened."**

34. In oral submissions the claimant amplified this and said he would rely on the history of non English consultants leaving the department and also on an alleged failure by Mr Bruce to challenge junior doctors who would refer to the claimant's nationality when it was unnecessary and irrelevant.

35. I took into account the important public principle that discrimination complaints should not be struck out without a hearing on the merits save in the most obvious cases. I assumed in favour of the claimant that he would be able to prove that there was a pattern of non English consultants leaving the department early, and that his allegation about Mr Bruce not correcting references to his nationality would also be proven.

36. Even then, however, it seemed to me that the allegations set out in LFT1-LFT9 had nothing to do with that argument. They were allegations made against colleagues, predominantly where those colleagues had expressed concerns about the claimant's clinical practice. He had not identified any basis on which the Tribunal could conclude that those concerns were raised because his race had a material influence on it.

37. The position was different, I concluded, in relation to allegations LFT10-LFT21. These were concerned with the initial NCAS referral by the respondent and the capability proceedings which ensued, culminating in dismissal and the rejection of his appeal. Although Mr Bruce was not a member of the panel which dismissed the claimant, the claimant's case is plainly that he had an influence over it, either by inappropriate collaboration with NCAS or otherwise. That seemed to me to be an inherently fact sensitive set of allegations which could not be said to have no reasonable prospect of success. I therefore declined to strike out that race discrimination case.

38. However, I was satisfied that there was little reasonable prospect of success and I ordered that a deposit be payable if those allegations of race discrimination are to be pursued. The deposit order will be issued separately.

Age Discrimination

39. The age discrimination case was based simply on the assertion by the claimant in his Scott Schedule that if he had been younger Mr Bruce would not have forced him out because he would not have been worried about the claimant becoming head of the department.

40. In my judgment this was based upon a misconception by the claimant. It may be right to say that he had the prospect of becoming the most senior doctor in the department because of his age, but the proper comparison for age discrimination purposes would be with a person of a lower age group who was also in the position of becoming the head of the department after Mr Bruce. The operative factor here was not the claimant's age but the fact he was Hungarian.

41. The claimant did not identify any other basis upon which he pursued his age discrimination complaint. I concluded it had no reasonable prospect of success and it was struck out in its entirety.

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Employment Judge Franey

3 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 June 2019

FOR THE TRIBUNAL OFFICE

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