EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr Anthony Adams	**v**	**General Medical Council**

Heard at: Cambridge

On: 15 January 2024 (in person)

Before: Employment Judge L Brown

Appearances

For the Claimant: Mr Varnam, Counsel.
For the Respondent: Mr Mensah, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is:

1. The application for a strike out of the Claimants fails and is dismissed.

2. The application for a deposit order on the Claimants claims fails and is dismissed.

REASONS

THE HEARING

1. I heard evidence from the Claimant and had a witness statement from him that ran to 11 pages.

2. I had a 374-page bundle.

3. I received written submissions from both parties and also oral submissions at the end of the hearing.

4. All submissions were taken into account although I do not repeat them in full here.

THE ISSUES

5. This public preliminary hearing was listed to determine the Respondent's strike out application under Rule 37(1)(a) of the Employment Tribunal's Procedure Rules 2013 ("ET Rules"). The Respondents application is made on three grounds, as per the Respondents skeleton argument as follows: -

    1.1 The Tribunal has no Jurisdiction to hear the Claimant's claims as it was contended that the Claimant had an alternative right of appeal, pursuant to Section 120(7) (1)(a) of the Equality Act 2010 ("EqA");

    1.2 The Claimants claims had no reasonable prospects of success under s.19, and s.27 of the EqA.

    1.3 The Claimants claims were presented out of time, and it would not be just and equitable to extend time to allow them to proceed.

Facts

6. The facts in this matter are not in dispute. The Claimant is a doctor, specialising in emergency medicine. From November 2010 until February 2012, he was employed as a consultant in emergency medicine at Kettering General Hospital ('KGH').

3. Whilst employed by the Respondent, the Claimant raised concerns about the way the A&E department at KGH was being managed. In particular the following occurred: -

3.1 The Claimant had a private meeting with the HR manager [P.53-55] and it is alleged that in the meeting on the 24 November 2011 the Claimant referred to 'racial bias every day'.

3.2 The Claimant then took part in a collective grievance about the assistant director of operations, as contained in a letter dated 24th of May 2011 [P.58-59]. In this letter was an allegation in general terms of harassment.

4. Following the matters outlined at 3.1 and 3.2 above the Claimant was then taken through a disciplinary investigation. On the 9 February 2012 the Claimant was dismissed from KGH. KGH alleged that he was dismissed due to a breakdown of trust and confidence, arising from the Claimant's relationships with his colleagues.

5. The Clamant appealed his dismissal and his appeal was dismissed [P.65 & P.110].

6. In May 2012 the Claimant commenced a claim against KGH [P.68-74] alleging unfair dismissal and race discrimination.

7. KGH referred the matter to the Respondent on the 23 May 2012 [P.110]. They then carried out an investigation into the Claimant under its Fitness to Practise rules, and this included the Respondent contacting the Claimant's new employer North Lincolnshire and Goole NHS Foundation Trust ('NLAG').

8. On the 14 December 2012 the Claimant was given the opportunity by the Respondent to comment upon information sent by KGH and also NLAG [P.148]. In particular the Respondent provided a copy of a letter from Dr O Ashaolu, the clinical director consultant in accident and emergency medicine at NLAG [P.143-146]. In short, the letter raised issues about Claimants ability to work in a team, either as a member or as a leader, as well as suggesting that his number of completed clinical episodes was lower than another, unnamed, doctor, and was judged to be 75% compared to his counterpart.

9. On the 28 January 2013 Jackie Uppal of the Respondent noted she had not received any comments from the Claimant [P.150]. The Respondent then decided there would be no further action taken as the issues did not ultimately impact on his fitness to practise. The Claimant was notified of this in writing on the 15 of February 2013 [P.151].

10. The Respondents reasons for the decision reached were then set out in a document described as 'Annex A' [P.152-153]. There was a finding that the Claimant's fitness to practise was not impaired, and that the case examiners for the Respondent had decided to take no action [P.157].

11. Annex A was sent to the Claimant on the 15 February 2013 [P.151-4] It contained the following comments: -

    (1) '...while [C] will quickly see bullying behaviour in other senior staff towards himself he is seemingly unaware that his own behaviour… can be perceived as bullying.'

(2) *'the repetition of very similar problems in his current employment following his recent dismissal suggests he has not taken steps to address the criticisms of his behaviour and that there has been no mitigation or insight.'*

(3) *'While there is no real danger to patient safety, [Claimants] presence in a department is said to be disruptive in that juniors feel unable to approach him for help and he has poor relationships with nurses and other departments, affecting the smooth running and efficiency of workplaces he is employed within.'*

(4) *'… The repetition of similar concerns from entirely separate trusts suggests a pattern of concern and the possibility that [C] has failed to recognise the impact of his actions and alter his behaviour.'*

(5) *'It was accordingly concluded that guidance concerning interactions with colleagues on the importance of treating everyone with respect should be reiterated.'*

12. On the 15 February 2013 the Respondent wrote to KGH and NLAG with the text of Annex A incorporated into those letters to them [P.154-156; 158 -160].

13. The Claimant subsequently settled his claim against KGH. NLAG did not renew the Claimants contract after January 2013.

14. The Claimant alleges that he then experienced difficulties in obtaining further long-term employment within the NHS. It was undisputed that Annex A remained on his records as maintained by R, and it is the Claimants assertion that such information has been accessed by other prospective employers when making enquiries about him after he applied for roles with them, and that it contributed to him being unable to find long term employment. The Claimant alleges that he was then forced to retire from practising as a doctor in the UK as a result of the contents of Annex A.

15. In or around October 2019 the Claimant became aware of the fact that Annex A was still held on his GMC file after making a subject access request. At this time, he was engaged in further litigation with KGH, NLAG and another NHS Trust.

16. On 24th January 2022 the Claimant emailed the Respondent raising concerns about the information held on his record [P.234]. In particular he referred to a Dr Chilton being involved as a witness in his claim against KGH and said as follows: -

    'Dr Chilton's stated objective was for the GMC to reopen the complaint against me.'

    He also said: -

    'Furthermore, his allegations that I had had similar problems at Peterborough, Northampton and Northern Lincolnshire and Goole Hospitals were just a compete fabrication with the apparent aim to coerce/manipulate the GMC into reopening its investigation.'

17. On the 25 June 2022 he asked the Respondents to '*rectify my record,'* and to review its comments about him in Annex A, and to remove the comments he asserted were unfounded [P.235-240]. He referred to his past litigation with KGH, and in particular said that at a hearing before Judge Kurrein, about his post-termination victimisation claims in 2020, and it is to be noted that his claims were struck out at that hearing, Judge Kurrein said that he didn't consider the remarks made by the Respondent about the Claimant in Annex A to be '*an exoneration.*'

18. The Respondent replied to the Claimant on 6 September 2022 treating the Claimants request as a 'right to rectification request' under article 6 of the General Data Protection Regulations ('GDPR') [P.267].

19. The Respondent refused to amend Annex A, relying on article 6(1)(e) of GDPR maintaining it had a statutory basis for retaining his personal data. They said that if he was unhappy about the way they used his personal date he could complain to the Information Commissioners Office('ICO') [P.267] On the 8 September 2022 they confirmed no amendments would be made to Annex A, but they would keep a copy of Claimants comments and details of the settlement of his two 2012 claims against KGH on file [P.268].

20. On 1 December 2022 the Claimant commenced ACAS early conciliation. A certificate was issued on the 4th of January 2023 and the Claimant issued proceedings against the Respondent on the 31 January 2023.

21. The Claimant now brings the following claims against the Respondent: -

19.1 The Claimant contends creating Annex A with the prejudicial comments about him on or around the 15 February 2013, then maintaining it as a record from that date to the present date, and refusing to amend it on the 6 September 2022, following the Claimants request that they do so, amounts to victimisation contrary to S.27 of the EqA, relying on the following protected acts: -

19.1.1 in 2011, the Claimant made complaints to his employer of race discrimination, victimisation, and was party to a collective grievance about behaviours affecting patient care, which all resulted in him being dismissed for gross misconduct in February 2012;

19.1.2 in May 2012, the Claimant made a complaint of unfair dismissal, race discrimination and victimisation to the employment tribunal under the Equality Act 2010, which was settled by COT3 agreement.

20 In short, the Claimant said he was subjected to a detriment because he did those protected acts by the Respondent publishing and retaining prejudicial comments on the Claimants professional records since 2013 following an employer referral. The Claimant asserts a continuing act of victimisation.

21. The Clamant also asserts that the Respondent's refusal to amend the prejudicial information on his record amounts to indirect discrimination on the grounds of race, contrary to S.19 of the EqA. The PCP's contended for were as follows: -

21.1.1 publishing advice and the details of the employer referral to prospective employers;

21.1.2 failing to remove the advice and details of the employer Respondents referral from the accessible information on his professional record under rule 12;

21.1.3 putting BME doctors at a disadvantage in the circumstances;

21.1.4 the disadvantage and continuing disadvantage to the Claimant in obtaining future employment by the comments made by the Respondent on his professional record;

21.1.5 the comments on the Claimants record which are alleged to be based on untested, inaccurate, and misleading information.

The Law

Jurisdiction

1.1 The Tribunal has no Jurisdiction to hear the Claimant's claims as it was contended that the Claimant had an alternative right of appeal, pursuant to Section 120(7) (1)(a) of the Equality Act 2010 ("EqA");

Qualifications bodies and relevant jurisdiction under s.120(7) EqA

22. It is not disputed that the Respondent was a qualifications body for the purposes of s.54 EqA. The first issue I had to determine is whether the Tribunal has jurisdiction to determine the Claimants complaints, in light of s.120(7) EqA.

23. Qualifications bodies are prohibited from discriminating against individuals upon whom they have conferred a relevant qualification. S.53 EqA states that:

(2)A qualifications body (A) must not discriminate against a person (B)upon whom A has conferred a relevant qualification—

(a)by withdrawing the qualification from B;

(b)by varying the terms on which B holds the qualification;

(c)by subjecting B to any other detriment.

23. However, the jurisdiction of s.53(2) is limited by the operation of s.120 EqA, which states as follows:

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

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

[…]
(7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.

24. Accordingly, where an individual complains about an act done by a qualifications body but has "*by virtue of an enactment […] an appeal or proceedings in the nature of an appeal*" in relation to that act, the ET's

jurisdiction is ousted from determining any complaint of discrimination in relation to the same act. There cannot be concurrent jurisdiction: either s.120(7) applies or it does not (**GMC v Michalak** [2018] I.C.R 49 (UKSC).

Definition of 'appeal or proceedings in the nature of an appeal'.

25. In **Michalak,** Lord Kerr defines "an appeal" as follows [my emphasis added]:

[20] In its conventional connotation, an "appeal" (if it is not qualified by any words of restriction) is a procedure ***which entails a review of an original decision in all its aspects.*** *Thus, an appeal body or court may examine the basis on which the original decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken* ***and, if it disagrees with those conclusions, substitute its own.***

26. This was recently confirmed by His Honour Judge Auerbach in **Mr Sanwar Ali v Office of the Immigration Services Commissioner** UKEAT/0271/19/VP at paragraph 34 where it said: -

"the "act complained of" means the substantive conduct complained of – here the refusal to re-register the companies and the removal of them from the register".

27. **Ali** confirmed that it is not necessary that the statutory appeal mechanism expressly cover the allegations of discrimination in relation to the substantive conduct complained of (**Ali** at [34]). What is required is that the substantive act itself be covered by a relevant appeal mechanism. Thus, in **Ali,** the Claimant could properly have advanced his allegation, that the refusal to register his companies and/or the removal of them from the register was discriminatory, as part of the relevant statutory appeal process.

28. In this hearing before me therefore one of the central issues that arose is what the appeal process was that was available to the Claimant at all material times in relation to the maintenance of, and the contents of the record held by the Respondent about the Claimant. In particular was it an appeal process as per **Ali '***which entails a review of an original decision in all its aspects',* and was there a right of review open to the Claimant against the decision to publish Annex A that could, as per **Ali** ***'. if it disagrees with those conclusions, substitute its own.'***

29. In **Khan v General Medical Council** [1996] ICR 1032, CA the ET's jurisdiction was found to have been ousted by s.120(7): The GMC refused the Claimant full registration under s.25 of the Medical Act 1983, which would have enabled him to practise in the UK. However, the tribunals decision, that it did not have jurisdiction, was upheld when it was found that the Claimant's right under the Medical Act 1983 to apply for a review of the decision of the GMC (under ss.28-29) meant that the tribunal lacked jurisdiction to hear his race discrimination claim.

30. In **Dr G Igboaka v The Royal College of Pathologists** UKEAT/0036/09/SM, it was found that the Claimant had a right of appeal against the GMC's decision, where it was 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, and the employment tribunal struck out the claim on that basis in that it lacked jurisdiction.

30. In the above two cases the central complaint was that the qualifications body had imposed a discriminatory refusal, sanction, or rejection in relation to the Claimant. The complaint of discrimination was inextricably tied up with the sanction ultimately imposed.

31. In **Dr M Uddin v GMC & Ors** UKEAT/0078/12/BA, the ET was found to have jurisdiction to determine a complaint of discrimination against the GMC. In that case the Claimant, an individual of Bangladeshi origin, alleged that the GMC chose to initiate and pursued disciplinary proceedings against him in a way they would not in respect of people of different ethnic origin (p.795 at [4]; p.41 authorities bundle).

30. The relevant passages of the judgment are as follows (my emphasis added): -

> *25. Dr Vaidya made it clear that* ***the claims which are the subject of this appeal are not claims against the GMC panels, but of "administrative and procedural actions by the GMC staff that predate" their decisions. These acts were described by Langstaff P as being "upstream" of the decisions to erase Dr Uddin's name from the Register*** *and to make an order for his immediate suspension.*
> *[…]*
>
> *30.* ***There is no right of appeal under the MA sections 40 or 38 in respect of acts complained of by Dr Uddin which led up to but did not include the erasure of his name from the Register and the imposition of immediate suspension.*** *[…]*
> *[…]*
>
> *32. The EJ erred in holding that the ET had no jurisdiction to hear Dr Uddin's claims because of the availability of an appeal under the MA.* ***No appeal was provided by MA in respect of events before the erasure of Dr Uddin's name from the Register and the order for immediate suspension on 29 October 2010.***

Applying the Law to the Facts

32. I therefore asked myself if the decision to place the details of Claimants dismissal from KGH, and details of what NLAG said about him, into Annex A was a decision that was an appealable decision and as such was not therefore ousted by S.120 (7) of the EqA?

33. The Respondent asserted that the Claimant did have an alternative remedy available to him. They said he had the right to an internal review at any point from February 2013 and I noted that he did not respond to the Respondents request for comments on Annex A, this being at the Rule 4 stage of the Respondent's procedure, albeit that this was based on advice given to the Claimant by the Medical Practitioners Society not to comment.

34. It was never suggested to me by the Respondents that had the Claimant commented in February 2013 to the Respondent, about the contents of Annex A, that it would have resulted in Annex A being amended in some way to result in the complete removal of the derogatory comments about him that he asserted were a detriment to him, in that he asserted it put off future employers from employing him. It had similarities with the case of **Uddin** as in that case there was no right of appeal under the Medical Act 1983 under sections 40 or 38 in respect of the acts complained of by Dr Uddin, which led up to, but did not include, the erasure of his name from the Register and the imposition of immediate suspension. Similarly in this case the act of placing Annex A on the GMC records about the Claimant was also not appealable under the Medical Act 1983.

35. I asked myself if, as per **Ali,** this opportunity to comment in February 2013 satisfied the threshold set out in **Ali** for something that could be characterised as a statutory appeal. **Ali** confirmed that what is required is that the substantive act itself be covered by a relevant appeal mechanism. Thus, in **Ali,** the Claimant could properly have advanced his allegation, that the refusal to register his companies and/or the removal of them from the register was discriminatory, as part of the relevant statutory appeal process.

36. It was never suggested in this case that the Claimant had a statutory right of appeal pursuant to the Medical Act 1983 against the publication of Annex A by the Respondent, and that such an appeal would result in the removal or amendment of Annex A in some way so that the discrimination complained of could be remedied as part of the statutory appeal.

36. I therefore did not find that the opportunity to comment under Rule 4 of the Respondent's procedures amounted to a statutory appeal. It was simply an opportunity to comment before a decision was taken at the Rule 4 stage about the publication of Annex A. This right to comment would not have addressed the alleged discriminatory impact on the Claimant, as it was never conceded by the Respondent, they may have decided not to publish it at all as a result of any comments by the Claimant.

37. It was also suggested that because the Claimant had the' right to rectification' option open to him via an application to ICO that this in effect this was a right of appeal that also ousted the jurisdiction of this Tribunal. The Respondent relied on article 16 of the GDPR which provides that:

The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or

her. Taking into account the purposes of the processing, the data subject shall have the right to complete personal data completed including by means of providing a supplementary statement.

33. The Claimant asserted that the right to go to ICO is not *'proceedings in the nature of an appeal.'* The Claimant also asserted that a data subject may make a complaint to the ICO. They submitted however that would not be in the nature of an appeal, rather it is a fresh approach to a first instance decision maker. They asserted it would not amount to a review of the original decision made by the Respondent to place Annex A onto the register.

34. The Claimant went on to say that in fact the information in Annex A was not simply inaccurate and in some respects was in fact accurate because it referred to complaints and comments made about the Claimant by the KGH and NLAG which were as a matter of fact made. In effect therefore those comments made about him could not be rectified as they had been made. The Claimant also said the comments in Annex A largely consisted of opinion and inference which it would be difficult to challenge and that as a matter of data protection law they may well be entitled to retain Annex A.

35. The Claimant said that in effect the maintenance of Annex A in its current form was prejudicial and unjustified, whether the basic information was accurate or not, and in effect that the maintenance of Annex A in its current form was discriminatory against him. They referred to Lord Kerr in **Michalak** - paragraph 18 - where he said that section 120(7) *'can only hold where the alternative route of appeal or review is capable of providing an equivalent means of redress.'*

36. The Claimant submitted that making an application for rectification of the register would not provide an equivalent means of redress in that it would not change the maintenance of the record about the circumstances of his departure from KGH and comments made about him by NLAG

37. The final point made by the Claimant was that the right to complain to ICO does not serve the statutory purpose for which section 120/7 was designed, which was to ensure matters concerning professional qualifications were dealt with by a specialist tribunal with greater expertise in this niche area than the employment tribunal as per **Khan V General Medical Council** 1996. They submitted ICO's expertise in relation to the rectification of the register does not extend to the prejudicial nature of the material but only to the right, as a matter of data protection law, of the Respondent to hold it.

38. The Claimant also relied on paragraph 22 of **Michalak** where Lord Kerr said that an appeal in a discrimination case must confront directly the question whether discrimination has taken place, not whether the GMC had taken a decision which was legally open to it. It was said the ICO route would not confront at all the issue of whether the maintenance of the register in the form of Annex a would deal with the allegation and question of whether it discriminated against the Claimant.

39. I therefore asked myself whether ICO, as per **Ali**, was able to deal with allegations of discrimination in relation to the maintenance of the register by the Respondent. It was never suggested to me by the Respondents that ICO would be able to investigate the question of discrimination in any application by the Claimant for rectification of the register.

42. I found that the right to complain to ICO would not amount to an appeal to ICO against the decision of the Respondent to keep the records about the Claimant on its register per se, and about things said about him by others at KGH and NLAG, but instead ICO could only look at whether any data was inaccurate. In short, I found any complaint to ICO would be about the data and its accuracy or otherwise and not the PCP's alleged by the Claimant and its alleged discriminatory effect on him of the way the Respondent insisted on keeping Annex A on its register.

40. I found that the original decision of the Respondent to publish Annex A was an administrative decision, as was also the case in **Dr M Uddin,** and that was not appealable under the Medical Act 1983 to the High Court, as it was in other cases referred to above where the jurisdiction of the Tribunal was ousted. However, in this case, unlike in the **Dr M Uddin** case, as he was not suspended there was no further appeal mechanism open to him as there was nothing to appeal against as he had no restrictions placed on his ability to practice.

49. As to any right of rectification via ICO I did not find that this ousted the jurisdiction of this tribunal. The right of rectification would not include a review of the contents of Annex A and whether or not this discriminated against the Claimant directly or whether it was an act of victimisation against him. It would not as per the case of Ali, be able to in the case of the contents of Annex A, **'. if it disagrees with those conclusions, substitute its own.'**

50. The guidance on the ICO website says as follows: -

What should we do about data that records a disputed opinion?

It is also complex if the data in question records an opinion. Opinions are, by their very nature, subjective, and it can be difficult to conclude that the record of an opinion is inaccurate. As long as the record shows clearly that the information is an opinion and, where appropriate, whose opinion it is, it may be difficult to say that it is inaccurate and needs to be rectified.

50. As pointed out by the Claimant some of the matters factually were accurate in that these things had occurred, and the Claimant had been dismissed on the basis of such allegations and not had his contract renewed. In any event the Respondents would be able to say that the matters included in Annex A simply recorded the opinions about the Claimant held by KGH and NLAG and I found it was highly unlikely that any appeal to ICO would give the Claimant any remedy on this issue, and I found the right of redress to ICO did not amount to an appeal within the meaning of **Ali.**

51. In short, the idea that an appeal to ICO was an appeal open to the Claimant missed the point of the Claimants complaint, which was that to maintain the publication of Annex A about him on this register was an act of either victimisation and/or indirect discrimination against him, in that it is said that doctors of his ethnic origin are more likely to be disciplined. These were allegations of discrimination and victimisation under the EqA, and no evidence was presented to me that the ICO right to rectification would deal with any allegations of discrimination and victimisation and I found they would not. As set out in **Michalak** at paragraph 22:

'*an appeal in a discrimination case must confront directly the question whether discrimination has taken place, not whether the GMC had taken a decision which was legally open to it.'*

50. I did not therefore find that any appeal to ICO would provide the Claimant with, as per **Michalak**, '...*an equivalent means of redress*…'.

51. As to any appeal against any decision from ICO to the First-Tier Tribunal (Information Rights) I found that the same arguments applied in favour of the Claimant, in that in any such appeal all they could do would be to look at the contents of Annex A, and that appeal would only review the original decision of ICO about the accuracy of the data itself, and would not in my judgement remove any references as to the fact of the allegations against the Claimant when he left the employment of KGH and NLAG.

52. I therefore found that this tribunal had jurisdiction to hear this claim by the Claimant against the Respondent, and that the Claimant had no statutory right of appeal that ousted the jurisdiction of this Tribunal.

The Claimants claims had no reasonable prospects of success under s.19, & s.27 of the EqA.

53. The Respondents applied also to strike out the Claimants claim on the basis that it had no reasonable prospects of success. Rule 37(1)(a) of the ET Rules provides as follows:

Striking out

37.—(1) 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;

54. In **Cox v Adecco and ors** [2021] I.C.R 1307 (UKEAT) at [28] His Honour Judge Taylor said as follows at paragraph 28: -

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the Claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the Claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the Claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success, had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

55. In **Mr V Mbuisa v Cygnet Healthcare Limited** UKEAT/0119/18/BA, Her Honour Judge Eady said as follows:

19. […] The striking out of the claim amounts to the summary determination of the case. It is a draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial.
[…]

56. In order for me to strike out this claim I would have to conclude not just that that the Claimant's claim is likely to fail, or that it is possible his claim will fail, but instead I would have to be satisfied there are no reasonable prospects of success (**Balls v Downham Market** [2011] IRLR 217 (UKEAT) at where it was said as follows: -

'6. *Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.'*

57. I must be wary of conducting a 'mini-trial', which presents the possibility of binding the trial tribunal on preliminary factual findings: **Mr A Kwele-Siakam v The Co-Operative Group Ltd** UKEAT/0039/17/LA at [25].

58. I also reminded myself of the case of **Anyanwu and Anor v South Bank SU** [2011] UKHL 14, at [24], where it said as follows:

For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.

59. It has repeatedly been reiterated in the authorities that contentious facts should properly be determined at trial, and the tribunal should be slow to strike out claims where central facts are disputed (see, for example, **Ezsias v North Glamorgan NHS Trust** [2007] I.C.R 126 (CA); where Lord Justice Maurice Kay said as follows: -

'*27. I too accept that there may be cases which embrace disputed facts, but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success -- see* ***ED&F Mann Liquid Products Limited v Patel*** *[2003] EWCA Civ 472 at paragraph 10 per Potter LJ; a commercial rather than an employment case. However, what is important is*

the particular nature and scope of the factual dispute in question. In the present case it is stark.

29. …….It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.

Applying the Law to the Facts

60. In the Respondents submissions, in relation to the victimisation claim, where it asserted that the claim had no reasonable prospect of success, Counsel said that the protected acts asserted by the Claimant were as follows: -

58.1 raising complaints of discrimination victimisation.

58.2 raising a collective grievance on patient safety [P.58/9]

58.3 Making a complaint to the ET in 2012

59. They asserted that it was not clear when or whom from the Respondents saw the letter [P.58/9] or who at the Respondent, decided that because of his employment tribunal claim in 2012 they would produce and then retain the information contained in Annex A.

60. In particular the letter [P.58/59], was the letter whereby a general grievance was raised by a number of doctors, including the Claimant, against Michael Woods, the Assistant Director of Operations whereby they said he was incapable of leading in a competent manner. This relates to paragraph 58.2 above.

61. Counsel also said that it was clear that Annex A did not stop the Claimant obtaining some employment in September 2017, between March and April 2018, from May to July 2018, August 2018, and June to December 2019, and in particular he was referring to the witness statement of the Claimant.

62. Counsel also said that making the entry at Annex A was obligatory for the Respondent and that the Respondent is obliged to disclose the fact that a registrant has been subject to an investigation in respect of their fitness to practise under section 35(B((1)(b) of the Medical Act 1983. In addition to saying the Respondent had no discretion on this issue he also said that retaining comments on the professional record to comply with the regulatory requirements is ‘appropriate’ [paragraph 21 - written submissions].

63. He also said that the Claimant could have contributed/made comments in relation to the entry on Annex A but chose not to and did not reply to correspondence from Jackie Uppal, the Investigation Officer, on the 14

December 2012 [page 48] and on the 28 January 2013 [page 150]. This resulted, he said, in the case examiners considering matters without his input which formed the basis for Annex A.

64. Counsel went on to say that they anticipate that the Claimant may attempt to argue that an Annex A had been retained for an unauthorised period of time [P.206] In particular he said also [P.324] that it was stated that the retention of the record was for four years if the concern was not about or could not lead to a finding of impaired fitness to practise. Counsel submitted however that this only applied where a case was closed at 'triage' which was not the case with the Claimant as he was subject to an investigation. He went on to say at paragraph 27 of his submissions that where cases were closed in 'stream one', following an investigation with no further action, that the records should be retained for 20 years after closure and that in any event in accordance with the guidance at [P.338] that the summary record has to be retained permanently.

65. He said that the reason for the failure of the Respondent to amend Annex A was that Annex A contained information available to the case examiners relating to the position 'as they understood it in February 2013' and this was information the Claimant could have commented upon at that time, and he also suggested he could have sought to amend it.

66. Counsel for the Claimant pointed out the case law which, as I have set out above, is that it is rarely appropriate to strike out discrimination claims without a full investigation of the facts, and that this Tribunal should not conduct a mini trial but should rather take the Claimants case at its highest.

67. In relation to the victimisation claim Counsel for the Claimant asserted that there were clear protected acts and at least one arguable case of detriment which was the production maintenance and refusal to edit Annex A, which was a detriment, as it contained substantially critical comments concerning the Claimant, and that those comments were by reason of inclusion in Annex A disseminated to KGH and NLAG, and on the Claimants case they had been more widely disseminated. I took this mean that they had been disclosed to other potential employers.

68. He also said, that prior to the comments being included they were never discussed with the Claimant. However, I found that the contents of Annex A were discussed with the Claimant before they were published and the Claimant chose, on advice, not to comment on them.

69. Counsel for the Claimant went on to say that the key question in this case would prove to be the '*reason why'* i.e., were the protected acts the reasons for the detriments that followed, and in this case, this being the production maintenance and refusal to edit Annex A, and that this case must be determined on the totality of the evidence.

70. He said that the Claimant's position was that the material already raised the real question as to why the Respondent refused to change Annex A by

removing it or editing it. He said that Annex A included apparent findings against the Claimant without the Claimant's side of the case ever being taken into account.

71. In relation to the Claimants claim for indirect discrimination he said this was ultimately factual and that the matters he complained of were clearly capable of being PCPS. He went on to say that the question of group disadvantage was very fact specific but that the Claimant would rely on the well documented difficulties that BME doctors experienced compared to white doctors, and would contend that on average BME doctors are more likely to be disadvantaged by having prejudicial information on their record, and by the dissemination of that current and prospective employers in the negative reaction to such information is more likely in the case of a BME doctor.

72. He concluded by saying that the Claimant had suffered this disadvantage and would rely on his difficulties of obtaining lasting employment. He said that only left the question of whether the Respondent could show the PCPS were a proportionate means of achieving A legitimate aim but that the Respondent could not succeed on this point at this stage without putting forward cogent evidence as to its aims and as to proportionality and that the Respondent has yet to identify what its legitimate aims are said to be.

72. In relation to the victimisation claim Counsel said that, whilst it is not disputed that the Respondent has a statutory obligation to maintain the register as it does, its refusal to allow the Claimant to have the contents of it amended at this stage, whilst they may be guided by policy obligations upon the Respondent, cannot be said not to be fact sensitive.

73. This Tribunal heard no evidence from the Respondents about their statutory obligations and whether there was or was not any discretion whatsoever about the maintenance of records about individual doctors.

74. Whilst it is true that this Tribunal did not know, and nor does the Claimant know, who took the decision to maintain the register and the contents of Annex A in its current form I found that is not to say that the Claimants claim on this had no reasonable prospects of success. I found that it would not be possible to determine this issue without hearing from the Respondents witnesses as to what their policy said, how they took their decision to maintain Annex A in its current form, and why it was not possible to allow the Claimant to ask for it to be amended in some way at this stage.

75. In addition, in determining this issue the motivation of the decision makers would need to be examined so as to determine whether there was any element of victimisation against the Claimant for bringing the claims against previous NHS trusts, or whether it was the straightforward application of their policies pursuant to their statutory obligations.

79. I did not therefore find that the victimisation claim had no reasonable prospect of success and I therefore find that this is a matter upon which the

tribunal needs to hear full evidence from the Respondents witnesses and only then can the claim be determined. I concluded that if I were to strike out this claim now, I would be conducting a mini trial. In taking the Claimants case at its highest, as I must, then it cannot be said that the Claimant has no reasonable prospect of success in his claim for victimisation.

80. In relation to the indirect discrimination claim the PCPS are ones that can be advanced as defined in the list of issues in the bundle [page 49 to 52].

81. In relation to 4B of the list of issues, which relates to failing to remove the advice and details of the employer's referral from the accessible information on his professional record under rule 12, I find that the decision makers processes about this needs to be examined fully. Whilst the Respondent undoubtedly have a statutory duty to maintain its records about doctors it was not clear to me what any review mechanism was for the maintenance of those records. Whilst it was not disputed that the Claimant chose not to respond or engage with the Respondents in February 2013, when it was initially published, I did not hear evidence about whether once it had been published there was some further right to review, or not, of the records. In any event the legal issue is did this indirectly discriminate against the Claimant and if it did then the Respondents needed to give evidence about their policy on this and how it was a proportionate means of achieving a legitimate aim.

82. Taking the Claimants case at its highest, as I must, and having concluded the evidence would need to be heard from the Respondents in relation to its defence of the maintenance of the register being a proportionate means of achieving a legitimate aim, then I could not conclude that the claim had no reasonable prospects of success.

83. Having concluded that both the claim for victimisation and for indirect discrimination were matters upon which further and full evidence would need to be heard from the Respondents, and taking the Claimants case at its highest, I do not find that those claims have no reasonable prospects of success and I do not therefore strike out the Claimants claims.

The Claimants claims were presented out of time, and it would not be just and equitable to extend time to allow them to proceed.

84. The Respondent states that as Annex A was formulated in 2013 there is no ongoing or continuing act and that the matter was finalised in 2013. This is a reference to the Claimant settling his claim against KGH at that time. They refer to this claim being issued on the 31st of January 2023 and that as any claim or action crystallised in February 2013 that it must have been reasonably foreseeable to the Claimant that the alleged detrimental impact, he now relies upon was clear then and he could have advanced his claim at any point from this date. They say that Judge Kurrein's statement that Annex A 'was not an exoneration', as a trigger for the Claimant then acting on the contents of Annex A, cannot be relied upon.

85. The Respondent submits that though the Claimant has been unrepresented at times during this litigation he has experience of tribunal claims and the importance of time limits and that he is cognisant, by virtue of the outcome of the open preliminary hearing in January in April 2020, when time was an issue in the claims then.

86. They say that the Claimant is well versed in the continuing act argument as he has relied upon this in previous claims and in particular **Hendricks V Commissioner of Police for the Metropollis** 2003 IRLR, 96, page 225, para 102.

87. The Respondents referred to the Court of Appeal decision in **Robertson V Bexley community centre T/A Leisure Link** 2003 IRLR 434, CA, where it was recited that Employment tribunals should consider when exercising the discretion, the following principle:-

'There is no presumption that they should do so unless they can justify failure to exercise their discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant considers it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.'

88. Counsel for the Claimant pointed out that time limits will not be fatal to all of the Claimants claims. He said that the refusal to alter Annex A following the Claimants request in 2022 was only made on the 6th of September 2022 and that the Claimant approached ACAS within three months, beginning with that date of the 1 December 2022, so that part of his complaint was in time. He went on to say that in so far as the Claimant complains about the existence of Annex A on his record it is in time in any event insofar as it relates to the period on and after the 2nd of September 2022. He said therefore that the question of time was only applicable to the initial creation of Annex A on or around the 15th of February 2013 up to its maintenance on the 1st of September 2022.

91. I found that part of the Claimants claim in relation to the maintenance of the register was in time, this being the maintenance of the register at least three months less one day backwards in time from the date that the Claimant first contacted ACAS, and as he contacted ACAS on the 1 December 2022 three months less on day prior to that was the 2 September 2022.

92. The remaining issue therefore was whether or not the maintenance of the record from when it was first created on the 15th of February 2013 up to the 2nd of September 2022 was a continuing act of discrimination by the Respondent? In cases like these, of discrimination, whether or not something is a continuing act or not is often best determined as part of the final hearing of the claim after all evidence has been heard.

93. During oral submissions Counsel for the Claimant referred to the fact that there were review periods in relation to the maintenance of the record by

the Respondent and so in that sense the decision to maintain Annex A in its current form would be reviewed at intervals. It seemed to me therefore that it was at least arguable that instead of this being a one-off act of discrimination when the decision was made to publish Annex A in 2013, that if, at intervals, decisions were made to maintain it then each time such a decision was made another act of potential discrimination then took place. This would be very relevant as to whether it was a continuing act or not and whether such review decisions amounted to a continuing discriminatory state of affairs and I found this was a matter that required evidence from the Respondents.

93. Taking the Claimants case at its highest, as I must, on the issue of limitation, there is an arguable case that this was a continuing act of discrimination against the Claimant. In any event even if it was not then the Claimant will ask the tribunal to exercise its just and equitable jurisdiction in his favour to extend time for the bringing of this claim from the date of the last discriminatory act which in my judgement may be the last time that the records were reviewed. I was not given any evidence during the hearing about the last time that the maintenance of this record was reviewed by the Respondents. I therefore concluded that the issue of whether this was a continuing act, or a one-off act of discrimination was evidence sensitive and taking the Claimants case at its highest I could not find that this claim had no reasonable prospects of success in relation to time limits alone.

94. I make no determination as to whether or not these claims are in time or out of time and this is a matter to be decided by the Tribunal at the final hearing of this matter.

Deposit Order

95. I turn now to the issue of the application against the Claimant for a deposit order.

96. Rule 39 of the ET Rules states that: -

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded. […]

General Principles

97. In **Hemdan v Ishmail and anor** [2017] ICR 486, EAT, it was said that the purpose is not to *"make it difficult to access justice or to effect a strike out through the back door"* (at [11]).

98. In **Sharma v New College Nottingham** EAT 0287/11, the tribunal was held to have erred in making a deposit order, even though the contemporaneous documentation was at odds with the Claimant's case.

99. In **Javed v Blackpool Teaching Hospitals NHS Foundation Trust** EAT 0135/17, Mrs Justice Laing said a summary assessment of contemporaneous documents in discrimination claims where inferences need to be drawn is difficult and she said at paragraph 40 as follows: -

[40] […] An undisputed document could, I have no doubt, provide evidence wholly inconsistent with, or contradicting, a primary factual allegation made by a Claimant, so, for example, if a Claimant sought to establish that he was in Bristol on a particular date and not in Hull and there were several documents signed by him or photographs of him in Hull on that particular date, contemporaneous documents could show that the primary fact which he sought to establish was not capable of being established. It is considerably less easy to see, however, how a document could contradict the inference which the Claimant seeks to persuade an employment tribunal to draw when he makes an allegation of race discrimination.

100. Given the costs consequences laid out by r.39(5)(a) of the ET Rules consequent upon a deposit order being made, which means that if the Claimant fails in his claims he faces a much higher risk of an adverse costs order against him, and the resulting draconian effects on a Claimant's rights

of access to justice, the tribunal must be satisfied that there is a "proper basis" for making one in the first place, as re-stated in **Sami v Avellan** [2022] EAT 72 at [26].

102. Even if a tribunal concludes that a claim or allegation has little reasonable prospect of success, it does not follow that a deposit order must be made, because r.39(1) says that an order "*may*" be made in those circumstances. In **Hemdan** (above) at [15], it was noted that regard should also be had to the following factors:

(i) The need for case management and for parties to focus on the real issues in the case;

(ii) The extent to which costs are likely to be saved; and

(iii) The extent to which the case is likely to be allocated a fair share of limited tribunal resources.

103. I must also consider the rights of the paying party in accessing justice, with particular consideration as to their means and ability to pay. However, in this case there was no issue with the Claimants ability to pay a deposit order as it was confirmed to me by Counsel for the Claimant, he could pay a £1000.00 deposit order on each claim of victimisation and indirect discrimination.

101. Where in **Javed** it says that *'..It is considerably less easy to see, however, how a document could contradict the inference which the Claimant seeks to persuade an employment tribunal to draw when he makes an allegation of race discrimination,'* I asked myself whether the nature of Annex A and the statutory obligation of the Respondent to maintain its register meant that a Tribunal could not draw an inference that Annex A in its current form, and the maintenance of it, was either an act of victimisation, or that it was indirectly discriminatory against the Claimant, and that the prospect of a Tribunal drawing such any such inference had 'little prospect of success.'?

102. I did not find that the prospect of a Tribunal drawing such an inference that the maintenance of Annex A was had '*little prospect of success.'* There was some prospect of success on this and something more than 'little prospect of success.' This issue was dependent on the evidence of the Respondent as to why they would not amend the register when requested to by the Claimant, and whether they had any discretion at all on this. They also needed to set out why maintaining this record for as long as they have done for over 10 years was a proportionate means of achieving a legitimate aim and again this was fact sensitive on which we needed to hear evidence from the Respondent.

102. I also asked myself if the Claimant had *'little prospect of success'* in overcoming any arguments on limitation. Part of his claim at least is in time. The rest of it depends on how often the register was reviewed, and also depends on the evidence of the Claimant in not taking action earlier than he

did, and which, to some extent, depends on his evidence on his understanding of limitation rules throughout the period of time of the record being maintained, and what advice he received on limitation throughout that period, if at all, until he contacted ACAS.

103. On the basis of **Sharma,** I reminded myself that a tribunal should be slow to make a deposit order where there are factual issues in dispute.

103. I therefore determined that the issues on limitation were fact sensitive, and that this needed to be determined by the Tribunal hearing all the evidence at the final hearing.

Conclusion

104. I therefore find that it cannot be said that that these claims have no reasonable prospects of success and the application by the Respondent for a strike out of the Claimants claims is therefore dismissed.

105. I also find that it cannot be said that these claims have little prospect of success and therefore I do not make a deposit order on these claims.

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Employment Judge Brown

Date: 2 February 2024…….

Sent to the parties on:
8 February 2024 .....

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For the Tribunal Office