Michaelmas Term

[2017] UKSC 71

On appeal from: [2016] EWCA Civ 172

JUDGMENT

Michalak (Respondent) v General Medical Council and others (Appellants)

before

Lady Hale

Lord Mance

Lord Kerr

Lord Wilson

Lord Hughes

JUDGMENT GIVEN ON

1 November 2017

Heard on 4 July 2017

Appellants	Respondent
John Bowers QC	William Edis QC
Ivan Hare QC	Adam Ohringer
(Instructed by GMC Legal)	(Instructed by RadcliffesLeBrasseur (Leeds))

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LORD KERR: (with whom Lady Hale, Lord Mance, Lord Wilson and Lord Hughes agree)

Introduction

1.
Ewa Michalak began employment as a doctor with the Mid-Yorkshire Hospitals NHS Trust in April 2002. She remained in that employment until she was dismissed in July 2008. Following her dismissal, Dr Michalak brought an unfair dismissal claim against the Trust in the Employment Tribunal. The tribunal found that her dismissal had been unfair and contaminated by sex and race discrimination and victimisation. Dr Michalak received a compensation award and a public apology from the Trust.

2.
Before the tribunal had issued its determination, and, on foot of Dr Michalak's dismissal, the Trust had reported her to the General Medical Council (the GMC) in relation to her conduct, so that the question of whether she should continue to be registered as a medical practitioner could be considered. The Trust later accepted that there had not been proper grounds on which to refer her to the GMC. She remains registered as a medical practitioner, therefore.

3.
In the meantime, however, the GMC had begun fitness to practise proceedings against Dr Michalak under Part V of the Medical Act 1983. She claims that the GMC discriminated against her in the way in which it pursued those proceedings. She also alleges that the discrimination extended to the GMC's failure to investigate complaints that she had made against other doctors employed by the Trust.

4.
Dr Michalak presented a claim to the Employment Tribunal in relation to these complaints in August 2013. The respondents named on the application form were the GMC, Niall Dickson, its chief executive, and Simon Haywood, an investigation officer of the GMC. They are the current appellants, although for all intents and purposes, the effective appellant is the GMC. It is agreed that the second and third appellants' cases do not require separate consideration.

5.
The appellants applied to have Dr Michalak's complaint to the tribunal struck out on the basis that the tribunal did not have jurisdiction to hear the claims. The complaints of discrimination and breach of contract against the GMC relating to the period before 1 October 2010 were struck out. The tribunal decided that it did have jurisdiction in relation to complaints regarding unlawful sex, race and disability discrimination after that date but not in relation to breach of contract. So far as the complaints against the second and third appellants were concerned, the complaint was confined to one of unlawful discrimination and the tribunal considered that it had jurisdiction to entertain this complaint.

6.

The appellants appealed, arguing that section 120(7) of the Equality Act 2010 precluded jurisdiction, since judicial review afforded an appeal for the acts complained of. The Employment Appeal Tribunal (Langstaff P) agreed and allowed the appeal. An appeal against that decision was successful before the Court of Appeal (Moore-Bick, Kitchin and Ryder LLJ) [2016] ICR 628. It held that the Employment Tribunal had jurisdiction to deal with Dr Michalak's complaints and remitted the case to the tribunal for further case management.

7.
The appeal to this court raises a single issue. It is whether the availability of judicial review proceedings in respect of decisions or actions of the first appellant excludes the jurisdiction of the Employment Tribunal by virtue of section 120(7) of the Equality Act.

Section 120(7)

8.
Under section 120(1)(a) of the Equality Act, an employment tribunal has jurisdiction to determine a complaint relating to a person's work. But section 120(7) provides that "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". Section 53 deals with discrimination by qualifications bodies. Section 54 defines qualifications bodies. In its material parts, it provides:

"(2) A qualifications body is an authority or body which can confer a relevant qualification.

(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

…

(5) A reference to conferring a relevant qualification includes a reference to renewing or extending the conferment of a relevant qualification."

9.
All parties accept, therefore, that the GMC is plainly a qualifications body. It is an independent organisation which regulates the profession of doctors within the United Kingdom under the Medical Act 1983. Its main objective, under section 1(1A) of that Act, is "to protect, promote and maintain the health and safety of the public". The GMC maintains the register of doctors and is responsible for certain undergraduate and postgraduate medical education, and for the training and revalidation of doctors. Under Part V of the Medical Act and the General Medical Council (Fitness to Practise) Rules 2004, the GMC has power to investigate complaints against doctors.

10.
Under the "fitness to practise" jurisdiction, the GMC receives and considers complaints about medical practitioners. Where it is decided that the complaints warrant an inquiry, the GMC prepares the evidence and the drafting of allegations. Any hearing that follows is conducted by the Medical Practitioners' Tribunal Service. It is described as a part of the GMC but is independent of it.

11.
A decision to erase a medical practitioner's name from the register or to suspend, or to impose conditions on his or her registration may be appealed to the High Court under sections 38 and 40 of

the Medical Act. The High Court may allow the appeal and quash the original decision; it may also substitute a new decision for the original decision; or remit the matter for re-hearing.

12.
The Medical Act also provides for various other types of appeal against fitness to practise decisions. To take an example, section 41A(10) states that the "relevant court" has the power to terminate an interim order of suspension, and section 41A(14) states that "relevant court" has the same meaning as in section 40(5). Section 40(5) contains the definition of the "relevant court" as the High Court. In effect, therefore, an appeal against the making of an interim order of suspension lies to the High Court. But neither this nor any of the other possible statutory avenues of appeal is relevant to the respondent's position. Her complaints do not relate to any action by the GMC as to her registration. Her series of claims of discrimination on the part of the GMC relate to the manner in which it pursued its fitness to practise application and its failure to investigate her complaints against other doctors in the trust where she had been employed. No statutory appeal is available to her to pursue those complaints.

13.
It is accepted, however, that she could seek judicial review of the decisions that are said to constitute the various acts of discrimination. The essential issue in the case, therefore, is whether the availability of judicial review animates the exemption contained in section 120(7). This in turn depends on whether that remedy can properly be described as "a proceeding in the nature of the appeal" and whether it is available to the respondent "by virtue of an enactment". It is important to note that both these conditions must be satisfied before section 120(7) comes into play. Both issues will have to be examined separately but, first, one must look at the context in which they require to be decided and that is provided principally by the Equality Act itself.

The Equality Act

14.
The purpose of the Equality Act 2010, as explained in the Explanatory Memorandum (para 10), is "to harmonise discrimination law, and to strengthen the law to support progress on equality". The Act repealed and replaced existing equality legislation, including the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

15.
In these various items of legislation, Parliament provided for discrimination claims in the work, employment and occupation contexts to be dealt with by a specialist tribunal, first called the Industrial Tribunal and now known as the Employment Tribunal. The establishment of these specialist tribunals reflected the growing awareness of the importance which should be attached to equal treatment rights in the field of employment, not least because those rights are protected under European Union law - see, for instance, article 16 of the Framework Equality Directive (2000/78/EC) which required member states to take measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment were abolished.

16.
Not only was the Employment Tribunal designed to be a specialised forum for the resolution of disputes between employee and employer, it was given a comprehensive range of remedies which could be deployed to meet the variety of difficulties that might be encountered in the employment setting. Thus, for instance, the tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters that arise in the proceedings before it (section 124(2)

(a)); it may order a respondent employer to pay compensation to a complainant employee (section 124(2)(b)); and it may make a recommendation (section 124(2)(c)). If a recommendation is not followed, the tribunal has power (under section 124(7)) to increase the award of compensation, or, if an award has not been already made, to make one.

17.
These considerations provide the backdrop to the proper interpretation of section 120(7). Part of the context, of course, is that appeals from decisions by qualification bodies other than to the Employment Tribunal are frequently available. It would obviously be undesirable that a parallel procedure in the Employment Tribunal should exist alongside such an appeal route or for there to be a proliferation of satellite litigation incurring unnecessary cost and delay. Where a statutory appeal is available, employment tribunals should be robust in striking out proceedings before them which are launched instead of those for which specific provision has been made. Employment tribunals should also be prepared to examine critically, at an early stage, whether statutory appeals are available.

18.
Parliament plainly intended that section 120(7) would exclude jurisdiction for certain challenges against decisions of qualification bodies. The rationale for doing so is plain. Where Parliament has provided for an alternative route of challenge to a decision, either by appeal or through an appeal-like procedure, it makes sense for the appeal procedure to be confined to that statutory route. This avoids the risk of expensive and time-consuming satellite proceedings and provides convenience for appellant and respondent alike. That rationale can only hold, however, where the alternative route of appeal or review is capable of providing an equivalent means of redress.

19.
Quite apart from the range of remedies available to it, the Employment Tribunal, as a forum for dealing with complaints by employees concerning their employment, has distinct advantages for complainants. It is a specialist tribunal with expertise in hearing discrimination claims across a range of sectors; it is designed to be accessible to litigants in person; and it is generally a cost-free jurisdiction (Rule 74 of the Employment Tribunal Rules of Procedure).

Proceedings in the nature of an appeal

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. Judicial review, by contrast, is, par excellence, a proceeding in which the legality of or the procedure by which a decision was reached is challenged. It is, of course, true that in the human rights field, the proportionality of a decision may call for examination in a judicial review proceeding. And there have been suggestions that proportionality should join the pantheon of grounds for challenge in the domestic, non-human rights field - see, for instance, Kennedy v Charity Commission (Secretary of State for Justice intervening) [2014] UKSC 20; [2015] AC 455, paras 51 and 54; and Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening) [2015] UKSC 19; [2015] 1 WLR 1591, paras 96, 113 and 115; and Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355, paras 133, 143 and 274-276. But an inquiry into the proportionality of a decision should not be confused with a full merits review. As was said in Keyu at para 272:

"… a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision-maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense."

21.
Judicial review, even on the basis of proportionality, cannot partake of the nature of an appeal, in my view. A complaint of discrimination illustrates the point well. The task of any tribunal, charged with examining whether discrimination took place, must be to conduct an open-ended inquiry into that issue. Whether discrimination is in fact found to have occurred must depend on the judgment of the body conducting that inquiry. It cannot be answered by studying the reasons the alleged discriminator acted in the way that she or he did and deciding whether that lay within the range of reasonable responses which a person or body in the position of the alleged discriminator might have had. The latter approach is the classic judicial review investigation.

22.
On a successful judicial review, the High Court merely either declares the decision to be unlawful or quashes it. It does not substitute its own decision for that of the decision-maker. In that sense, a claim for judicial review does not allow the decision of the GMC to be reversed. It would be anomalous for an appeal or proceedings in the nature of an appeal to operate under those constraints. 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.

23.
The genesis of the view that judicial review was in the nature of an appeal lies in the obiter dictum observations of His Honour Judge McMullen QC in Tariquez-Zaman v General Medical Council (UKEAT/0292/06/DM). In that case, the issue was whether section 54(2) of the Race Relations Act 1976 (which was in similar terms to section 120(7) of the Equality Act) precluded the Employment Tribunal from entertaining the complainant's claim. Judge McMullen's conclusion on the issue was obiter because the claimant had voluntarily relinquished his registration. There was therefore no action by the GMC on which Dr Zaman could found his claim. At para 31 of his judgment, Judge McMullen dealt with the argument that judicial review was in the nature of an appeal in these terms:

"… judicial review is aptly described as proceedings in the nature of an appeal. Judges in the administrative court are familiar with dealing with cases under the Medical Act in the form of appeals proper; thus, they constitute the obvious destination intended by Parliament for disputes of this nature, once a decision had been made at first instance. So, if I were required to make a decision, I would uphold the submission that section 54(2) ousts the jurisdiction of the ET because, in this case, proceedings can be brought by way of judicial review."

24.
Judge McMullen had relied on the decision of the Court of Appeal in the case of Khan v General Medical Council [1996] ICR 1032. In that case, the appellant's application for full registration as a qualified medical practitioner had been refused by the GMC after a five-year maximum period of limited registration. His application for full registration in accordance with section 25 of the Medical Act 1983 was refused by the GMC. He then applied to the Review Board for Overseas Qualified Practitioners for a review pursuant to section 29 of the Act. That application failed, as did a second application and request for review. The appellant then made a complaint to an industrial tribunal that

he had been indirectly discriminated against on the ground of his race within the meaning of section 1(1)(b) of the Race Relations Act 1976, contrary to section 12(1) of the Act. On a preliminary issue the industrial tribunal found that the right under section 29 of the Medical Act 1983 to apply for a review of the decision of the General Medical Council was a proceeding, “in the nature of an appeal” for the purposes of section 54(2) of the Race Relations Act 1976 and the appellant’s right to present a claim under section 54(1) was therefore excluded.

25.
The appellant’s appeal to the Court of Appeal was, unsurprisingly, dismissed. It was clear that his application to the Review Board constituted a proceeding in the nature of an appeal. The question of whether judicial review, as opposed to review by a differently constituted body, would qualify as a proceeding in the nature of an appeal, was not germane to the issue in Khan. In Zaman, however, Judge McMullen found a passage from the judgment of Hoffmann LJ to be particularly instructive. At 1042, Hoffmann LJ had observed:

“It is a short question of construction which, in my judgment, admits of an easy answer, namely, ‘Yes’. Section 29 of the Act of 1983 allows the decision of the General Medical Council to be reversed by a differently constituted set of persons. For present purposes, I think that this is the essence of what is meant by ‘proceedings in the nature of an appeal’. I note that in Wootton v Central Land Board [1957] 1 WLR 424 Lord Evershed MR had to consider whether an application to the Lands Tribunal by a party who was dissatisfied with the determination of a land value by the Central Land Board was in the nature of an appeal. He maintained that it was. He said that it might fairly be described as an appeal to another body having the right either of affirming the development value or altering it.”

26.
In saying that the decision could “be reversed by a differently constituted set of persons”, Hoffmann LJ did not have in mind a judicial review challenge, in my opinion. It was because the Review Board could, by the recommendation that they made to the President of the GMC, effectively reverse the decision of the GMC, that he considered that a review was in the nature of an appeal. The review by the Board was open-ended and the decision that they were entitled to reach was unconstrained and not inhibited by the circumstance that the GMC had reached a particular decision.

27.
Hoffmann LJ did refer to judicial review later in his judgment. At p 1043, dealing with an argument that claimants such as Dr Khan were not able to pursue claims for race or sex discrimination if they were not permitted to make complaints to an industrial tribunal, he said this:

“For my part, I do not see why [an application for review under section 29] should not be regarded as an effective remedy against sex or race discrimination in the kind of case with which section 12(1) of the Race Relations Act 1976 deals. That concerns qualifications for professions and trades. Parliament appears to have thought that, although the industrial tribunal is often called a specialist tribunal and has undoubted expertise in matters of sex and racial discrimination, its advantages in providing an effective remedy were outweighed by the even greater specialisation in a particular field or trade or professional qualification of statutory tribunals such as the review board, since the review board undoubtedly has a duty to give effect to the provisions of section 12 of the Act of 1976: see per Taylor LJ in R v Department of Health, Ex p Gandhi [1991] ICR 805, 814. This seems to me a perfectly legitimate view for Parliament to have taken. Furthermore, section 54(2) makes it clear that decisions of the review board would themselves be open to judicial review on the ground that the board failed to

have proper regard to the provisions of the Race Relations Act 1976. In my view, it cannot be said that the Medical Act 1983 does not provide the effective remedy required by Community law."

28.
It is important to understand that Hoffmann LJ was not referring here to judicial review as a possible candidate for inclusion in the category of a proceeding in the nature of an appeal. His remarks in this passage were made in the context of an argument that, in order to have an effective remedy, a claimant had to be allowed to present a complaint to the industrial tribunal. He was merely pointing out that the availability of the review procedure, especially when considered with the opportunity to apply for judicial review of that review provided an adequate remedy.

29.
More importantly, this passage emphasises the breadth of the review procedure. As Hoffmann LJ pointed out, the review board was bound to have proper regard to the provisions of the Race Relations Act. It could only do so by conducting a scrupulous inquiry as to whether the discrimination alleged had in fact taken place - in other words, a full-blown inquiry into the allegations of discrimination was required. I do not consider, therefore, that the decision in Khan supports the proposition that section 54(2) ousted the jurisdiction of the Employment Tribunal because proceedings could have been brought by way of judicial review.

30.
Judge McMullen returned to this theme in his later decision in Jooste v General Medical Council [2012] EQLR 1048. In that case Dr Jooste claimed that the acts of an "Interim Orders Panel" of the GMC suspending his registration were discriminatory under the Equality Act. Judge McMullen, sitting in the Employment Appeal Tribunal, upheld the decision of the Employment Tribunal, that it had no jurisdiction to hear the claimant's complaints against the GMC as the remedy available in judicial review was an alternative statutory remedy under section 120(7). At para 44 of his judgment he said that "an appeal simply is the opportunity to have a decision considered again by a different body of people with power to overturn it." For the reasons given earlier, I cannot agree with that statement. An appeal is different from a review of the legal entitlement to make a decision; it involves an examination of what decision should be taken in the dispute between the parties. The Court of Appeal in the present case concluded that Jooste had been wrongly decided. I agree.

By virtue of an enactment

31.
The GMC accepts that when the provisions which preceded section 120(7) were originally enacted they did not exclude decisions subject to challenge by way of the prerogative writs. That is because judicial review originated as a common law procedure and not by virtue of any enactment. The appellant argues, however, that judicial review proceedings became proceedings "by virtue of an enactment" on the coming into force of the Senior Courts Act 1981. Section 31(1) of that Act provides:

"(1) An application to the High Court for one or more of the following forms of relief, namely -

(a) a mandatory, prohibiting or quashing order;

(b) a declaration or injunction under subsection (2); or

(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review."

32.
The appellants' case misconstrues both section 31(1) of the Senior Courts Act and section 120(7) of the Equality Act 2010. It rests on a misunderstanding of the nature of judicial review. Judicial review is not a procedure which arises "by virtue of" any statutory source. Its origins lie in the common law. As Laws LJ said in R (Beeson) v Dorset County Council [2002] EWCA Civ 1812:

"The basis of judicial review rests in the free-standing principle that every action of a public body must be justified by law, and at common law the High Court is the arbiter of all claimed justifications." (at para 17) [emphasis added]

See also the observations of Lady Hale in R (Cart) v The Upper Tribunal [2011] UKSC 28; [2012] 1 AC 663, para 37:

"… the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law - that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise."

33.
Section 31 of the Senior Courts Act did not establish judicial review as a procedure, but rather regulated it. The remedies remain the same as those under the prerogative writs. All that section 31 does is to require that applications for judicial review be brought by way of a new procedure under the rules of court. The point was put succinctly and clearly in terms with which I fully agree by Moore-Bick LJ at para 53 of his judgment in the Court of Appeal in the present case, where he said:

"… the words 'by virtue of an enactment' in section 120(7) are directed to cases in which specific provision is made in legislation for an appeal, or proceedings in the nature of an appeal, in relation to decisions of a particular body, as, for example, in Khan v General Medical Council [1996] ICR 1032. They are not … intended to refer to the general right to seek judicial review merely because, since 1981, that happens to have been put on a statutory footing."

34.
Another way of looking at the question is to consider what the effect would be of the repeal of the 1981 Act. I suggest that the High Court's jurisdiction would remain, even if the procedure by which it would have to be brought might require to be provided for in any amending legislation.

35.
Section 120(7) is part of a carefully constructed statutory scheme. It is the most recent incarnation of similarly worded provisions in legislation such as is mentioned in para 14 above. Before 1981, there could have been no question of judicial review coming within any of the predecessor provisions. Given the importance of judicial review, it is to be assumed that Parliament would have had the procedure in mind when it formulated the phrase now contained in section 120(7). Had it, in 1981 or in 2010, intended to remove all decisions by qualification bodies whose decisions were susceptible to judicial review from the jurisdiction of the Employment Tribunal, one would surely expect that to be provided for expressly.

Conclusions

36.

In my view, judicial review in the context of the present case is not in the nature of an appeal. Nor is it a remedy provided by reason of an enactment. I would dismiss the appeal.

LORD MANCE:

37.
I agree with Lord Kerr that the appeal should be dismissed broadly for the reasons he gives. My only additional observations are these:

i)
I would not circumscribe the development of judicial review or its ability to cater, in appropriate circumstances, for close examination of a claim on its merits: see eg the authorities which Lord Kerr cites in para 20;

ii)
judicial review may, in appropriate circumstances, lead the court to a conclusion that there exists only one possible outcome of a relevant legislative or executive decision-making process: see eg In re G (Adoption: Unmarried Couple) [2008] UKHL 38; [2009] AC 173, para 144;

iii)
conventional appellate review is itself not infrequently circumscribed by considerations of respect for the original or first instance decision-maker: see eg the discussion in Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577; see also Datec Electronic Holdings Ltd v United Parcels Services Ltd [2007] UKHL 23; [2007] 1 WLR 1325.

38.
Here, however, the Employment Tribunal offers the natural and obvious means of recourse in respect of the respondent's surviving complaints. There is no need in this context to strain the ordinary usage or understanding of the concept of "appeal" to embrace judicial review. In parenthesis, it is unsurprising to find that, where the Medical Act 1983 does allow an appeal, it does so expressly: section 40. Finally, the history, which Lord Kerr recounts under the rubric "By virtue of an enactment" in paras 31 to 35, points very strongly against judicial review having become, suddenly but silently in 1981, a relevant "appeal" for the purposes of the similarly worded predecessor provisions to section 120(7) of the Equality Act 2010.