Case No: A2/2014/4139

Neutral Citation Number: [2016] EWCA Civ 172

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Langstaff J

UKEAT/01213/14/RN

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 23/03/2016

Before:

LORD JUSTICE MOORE-BICK

(Vice President of the Court of Appeal Civil Division)

LORD JUSTICE KITCHIN

and

THE SENIOR PRESIDENT OF TRIBUNALS

- -

Between:

Dr. Michalak (Appellant)

- and -

The General Medical Council & Others (Respondent)

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Mr. William Edis QC (instructed by **RadcliffesLeBrasseur, Leeds**) for the **Appellant**

Mr. John Bowers QC and Mr. Ivan Hare (instructed by **the General Medical Council**) for the **Respondent**

Hearing date: 3 December 2015

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Judgment

Lord Justice Ryder:

1. This case raises an important question about the remedies and routes of appeal available to individuals who claim to have suffered from discrimination, victimisation, harassment or detriment in the treatment that they have received from a qualifications body. In particular, it concerns the jurisdiction of the Employment Tribunal ['ET'] to hear and determine complaints against qualifications bodies under Part 5 of the Equality Act 2010 ['EA 2010'].

2. The appeal is brought by a registered medical practitioner, Dr. Michalak ['the appellant']. The first respondent is the General Medical Council ['GMC'], the second respondent is the Chief Executive and Registrar of the GMC and the third respondent is, or at the relevant time was, an employee of the GMC.

3. The appellant was dismissed by the NHS Trust that employed her as a doctor. Following her dismissal she made a successful claim to the ET for unfair dismissal. The ET found that her dismissal had been unfair and contaminated by sex and race discrimination and victimisation. The appellant received a compensation award and a public apology from the Trust.

4. Prior to the ET's determination and as a consequence of her dismissal, the NHS Trust referred the appellant to the GMC so that the issue of her registration as a medical practitioner could be considered. The Trust later accepted that there were never proper grounds on which she should or could have been referred to the GMC. Accordingly, the appellant's full registration as a medical practitioner remains intact.

5. Following her referral to the GMC, the appellant complained that in the investigation and hearing of her case the GMC acted to her detriment and in a manner unlawful under the EA 2010. It is the ET's jurisdiction to hear that complaint that is the question in this appeal.

6. The decision in this case has the potential to affect a number of regulatory bodies (known collectively as 'qualifications bodies') and the individuals who are regulated by them. We are very grateful to Mr. Edis QC and Mr. Bowers QC who appeared before us on behalf of the appellant and the GMC, respectively, for their helpful submissions.

7. The question to be determined is whether the ET has jurisdiction to hear a complaint against a qualifications body under section 120 EA 2010, or whether the ET's jurisdiction is ousted by section 120(7) EA 2010 because of the availability of judicial review. There are two related matters which can be summarised as follows: first, what was Parliament's intention in enacting section 120(7) EA 2010 (and comparable clauses in the precursor legislation) and second, does the opportunity to commence judicial review proceedings against a qualifications body constitute 'proceedings in the nature of an appeal' for the purposes of section 120(7)?

8. Under the Medical Act 1983 ['MA 1983'], the GMC is a corporate body which has powers and duties to inquire into complaints about a registrant's fitness to practise. The procedure, known as 'the fitness to practise' jurisdiction, is set out in the MA 1983 and accompanying rules, the General Medical Council (Fitness to Practise) Rules 2004, whereby the GMC is charged with considering inadequate or improper conduct by medical practitioners who are referred to it. The GMC has the power to register and, in an appropriate case, to remove, limit or suspend the registration of a medical practitioner.

9. Under the 'fitness to practise' jurisdiction, the GMC receives, scrutinises and screens initial complaints about medical practitioners. Where the complaints go forward to an inquiry, the GMC is responsible for the preparation of the evidence and the drafting of allegations. Any hearing that follows is heard by the Medical Practitioners' Tribunal Service which is styled as a part of the GMC but is operationally independent of it.

10. A decision of the GMC to erase, suspend, or to impose conditions on a medical practitioner's registration is susceptible of a statutory route of appeal to the High Court by sections 38 and 40 MA 1983. In respect of such acts or decisions, a medical practitioner has 28 days to appeal to the High Court which is empowered to dismiss the appeal; allow the appeal and quash the original decision; substitute a new decision for the original decision; remit the matter for re-hearing, and in all circumstances make a costs order. It is common ground between the parties that where Parliament has provided a statutory route of appeal for a complaint, then section 120(7) EA 2010 precludes such a complaint being brought before the ET for determination.

11. The appellant's complaints in these proceedings do not fall within the statutory route of appeal to the High Court that is set out in sections 38 and 40 MA 1983 because the complaints are not about the appellant's registration. The appellant issued proceedings in the ET against the three respondents complaining of various decisions and actions

within the fitness to practise investigation that were alleged to be unlawful under the EA 2010 but which fell short of actions upon her registration to which the statutory route of appeal applied. The particulars were:

a. Harassment in respect of the GMC's conduct that occurred before 1 October 2010;

b. Unlawful sex, race and disability discrimination in respect of the GMC's conduct that occurred before 1 October 2010;

c. Unlawful sex, race and disability discrimination in respect of the GMC's conduct that occurred on or after 1 October 2010; and

d. Unlawful discrimination against her by the second and third respondents within the terms of section 53(2)(c) EA 2010.

12. A preliminary hearing was held on 17 February 2014 in Leeds before Judge Keevash. He found that the ET had jurisdiction to hear the appellant's claims against the GMC under the Race Relations Act 1976 ['RRA 1976'] (in respect of matters that pre-dated 1 October 2010) and under the EA 2010 (in respect of matters that post-dated or were continuing at 1 October 2010). The respondents appealed his decision to the Employment Appeal Tribunal ['EAT'] on the basis that the decision amounted to an error of law in light of the decision of the EAT in *Jooste v GMC* [2012] EQLR 1048.

13. On 25 November 2014 the matter came before the President of the EAT, Langstaff J. His decision is reported at UKEAT/0213/14/RN. The President held that the ET was bound to follow the decision of His Honour Judge McMullen QC sitting in the EAT in *Jooste*. In that case, Judge McMullen held that an application to the ET under section 120(1) EA 2010 was precluded by section 120(7) EA 2010 because of the availability of judicial review under section 31 Senior Courts Act 1981. It was common ground before Langstaff J that the Employment Judge had misdirected himself as to the law in failing to follow *Jooste* with the consequence that his decision had to be set aside. The President granted the appellant permission to appeal to this court on the basis that there was sufficient reason to doubt whether the decision in *Jooste* was correct.

The Legal framework

14. The Equality Act 2010 came into force on 1 October 2010. The aim of the Act is to legally protect people from discrimination in the workplace and more generally. It replaced previous anti-discrimination laws with a single enactment. Prior to this, claims of harassment or discrimination had to be brought under a variety of enactments, including the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

15. The jurisdiction of the Employment Tribunal to determine complaints under Part 5 of the EA 2010 (of which section 53 is a part) is defined by section 120 of the Act, which provides that:

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

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

(b) a contravention of section 108, 111 or 112 that relates to Part 5."

16. Section 120(7) EA 2010 provides that:

"(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."

17. This subsection mirrors identical provisions that were to be found in section 54(2) of the Race Relations Act 1976 and section 63(2) of the Sex Discrimination Act 1975.

18. It was common ground before the EAT that the GMC is a "qualifications body" as defined in section 54 EA 2010. Under section 53 EA 2010, it is unlawful for a qualifications body to discriminate against, harass or victimise a person upon whom it confers or has conferred a relevant qualification by, inter alia, withdrawing or varying the terms on which that qualification is held, or subjecting that person to any detriment. Section 53 provides that:

"(1) A qualifications body (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(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.

(3) A qualifications body must not, in relation to conferment by it of a relevant qualification, harass—

(a) a person who holds the qualification, or

(b) a person who applies for it.

(4) A qualifications body (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(5) A qualifications body (A) must not victimise 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.

(6) A duty to make reasonable adjustments applies to a qualifications body.

(7) The application by a qualifications body of a competence standard to a disabled person is not disability discrimination unless it is discrimination by virtue of section 19."

19. Counsel for the GMC, Mr Bowers, submitted that a long line of case law has determined that section 120(7) EA 2010 includes judicial review with the consequence that the ET is precluded from determining such matters, that this is a correct understanding of the law, and should not be disturbed by this court. Judicial review now exists in a statutory form which has altered the basis and content of the same and is appropriately described as proceedings in the nature of an appeal. Counsel for the appellant, Mr Edis, on the other hand, submitted that Parliament never intended that judicial review be within the ambit of section 120(7) EA 2010 or section 54(2) RRA 1976 and that if Parliament had so intended, it would have said so specifically. Judicial review was never intended to be caught by section 120(7) and its availability does not preclude the ET from determining an application under section 53 EA 2010.

20. Mr. Edis submitted that the purpose of section 120(7) is to enable particular matters, such as those in respect of a practitioner's registration which are diminution of professional status questions, to be determined by a specialist professional body and ultimately the High Court. He further submitted that the ET is the specialist tribunal which determines whether acts or omissions amount to breaches of equality legislation and it would be wrong to conceive of

Parliament intending to oust that jurisdiction simply because of the availability of the supervisory jurisdiction of the High Court in judicial review.

21. In order to frame the submissions on the two issues that inform the answer to the question in this appeal, it is necessary to review the authorities. In *Khan v General Medical Council* [1986] ICR 1032 the Court of Appeal was asked to consider the precursor to s120(7) EA 2010, namely section 54(2) of the RRA 1976, which provided in respect of the jurisdiction of the ET that:

"(2) Subsection (1) does not apply to a complaint under section 12(1) of an act in respect of which an appeal, or proceedings in the nature of an appeal, may be brought under any enactment'

22. In *Khan* the actions that were taken by the GMC were actions taken by a qualifications body concerning a medical practitioner's registration. The issue that the Court of Appeal was asked to determine was whether or not the procedures provided for by section 29 of the MA 1983 (now repealed) were "proceedings in the nature of an appeal". Section 29 provided a two-stage process whereby once a decision had been made, that decision was open to review by a review board. Although the review board had no power itself to alter the decision, it was able to make a recommendation to the President of the GMC. The President could alter the decision, although he did not in Dr. Khan's case.

23. The Court of Appeal in *Khan* held that the two-stage process provided by section 29 RRA 1976 was a statutory review procedure enacted for the purpose of adjudicating medical qualifications that was "in the nature of an appeal" and therefore fell within the procedure envisaged by section 54(2) RRA 1976. Hoffmann LJ agreed with Neill LJ in stating at 1042F that:

"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 the present purposes, I think that this is the essence of what is meant by "proceedings in the nature of an appeal."'

24. It is apparent from that that the concept of an appeal is to be construed widely. That said, the reasoning behind the conclusion is important and in my judgment critical to this appeal. Neill LJ identified that where no statutory route of appeal was provided for, the medical practitioner could go to the industrial tribunal (as the ET then was). At 1041F he said as follows:

"In such a case and in the other cases set out in section 29(3) the practitioner retains a right to bring a complaint to the industrial tribunal. The reason for that is simple. There are, in those cases, no proceedings in the nature of an appeal available against the initial decision. Mr Griffiths said that is an important provision because it shows how carefully this legislation is worded and how the statute itself draws a distinction between cases where there is a proceeding in the nature of an appeal, on the one hand, and cases where there is no such appellate machinery and where the practitioner can go to the industrial tribunal if he thinks it is right."

25. Furthermore, *Khan* is authority for the proposition that there is an underlying rationale to the reservation of jurisdiction by proceedings in the nature of an appeal to a specialist professional body. Hoffmann LJ identified the intention of Parliament in reserving to a qualifications body as a specialist professional body matters that required even greater expertise than a specialist tribunal such as the ET. At 1043F he said:

"… 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 or 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 *Reg v Department of Health, Ex parte Gandhi* [1991] ICR 805, 814. This seems to me a perfectly legitimate view for Parliament to have taken. …"

26. In *Chaudhary v Specialist Training Authority Appeal Panel & Ors* [2005] ICR 1086 the Court of Appeal considered whether the application of ECHR principles consequential upon the enactment of the Human Rights Act 1998 made any material difference to the principles set out in *Khan.* In the context of considering whether the MA 1983 provided an effective remedy, Pill LJ held that the statutory route of appeal provided by section 29 MA 1983 afforded a lawful alternative to a complaint to the Employment Tribunal. Pill LJ also highlighted the availability of judicial review as an effective safeguard to decisions of the appeal panel / review board. At [32] Pill LJ said as follows:

"The procedure is a lawful alternative in this context to a procedure by way of complaint to an employment tribunal under section 54(1). The remedies available by way of judicial review (*R (Alconbury Developments) v SS for Environment, Transport and the Regions* [2002] 2 AC 295) provide an appropriate safeguard for applicants in the present circumstances. It will be open to the court, on judicial review, to consider whether the appeal panel had acted in a racially discriminatory fashion."

27. I do not take that to be a statement of principle that the availability of judicial review precludes a professional practitioner from making an application to the ET where no statutory route of appeal is prescribed. On the contrary, in my judgment Pill LJ was simply emphasising the point made by Hoffmann LJ in *Khan* at 1043E-G regarding judicial review being a safeguard, that is an effective remedy where a statutory route of appeal, formal or informal, had not been provided.

28. In *Tariquez-Zaman v GMC* (UKEAT/0292/06/DM) His Honour Judge McMullen QC sitting in the EAT decided a case concerning alleged acts of discrimination and victimisation that amounted to actions upon a registrant's registration where the terms on which the medical practitioner held his registration were varied by the GMC. The issue was whether the precursor to section 120(7) EA 2010, namely section 54(2) RRA 1976, precluded the ET from considering the matter. Judge McMullen's conclusion on the issue is *obiter* because the claimant had, following a referral to the GMC and commencement of the fitness to practise procedure, voluntarily relinquished his registration. Expressing a view as to whether the ET would have had jurisdiction to hear the complaint, Judge McMullen stated that the availability of judicial review would preclude the ET from hearing the matter under section 54(2) RRA 1976. At paragraphs [30] – [31] Judge McMullen explained his reasoning as follows:

"[30] An appeal may be mounted under the Medical Act against the more serious determinations; but it is apt to include as proceedings in the nature of an appeal, proceedings for judicial review. As Neill LJ pointed out: the essence is the conduct of the case by somebody different from the person against whom a complaint is made, or who has decided it at first instance, with the opportunity for a reversal of the judgment. That is precisely what the role of the court is in a judicial review. The dispute is taken away from the immediate environment of the actors – in this case the GMC and the medical practitioner – and put in the hands of a judge who has power to quash the judgment made below.

[31] Thus judicial review is aptly described as proceedings in the nature of an appeal. Judges in the administrative court are familiar with dealings 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 s. 54(2) ousts the jurisdiction of the ET because, in this case, proceedings can be brought by way of judicial review.'

29. In *Jooste* Judge McMullen again sitting in the EAT followed his earlier *obiter* reasoning in *Tariquez-Zaman*. Dr. Jooste claimed that the acts of an 'Interim Orders Panel' of the GMC suspending his registration were discriminatory under the EA 2010. The EAT held that the ET had no jurisdiction to hear the claimant's claims against the GMC as the remedy available in judicial review was an alternative statutory remedy such that the ET's jurisdiction was precluded by section 120(7) EA 2010. The EAT accordingly concluded that the Employment Judge had correctly struck out the claimant's claims.

30. Judge McMullen's reasoning is developed at [42]:

"Judicial review arises under the SCA; that establishes the right of judicial review in its modern name and form, prescribes rules for running the proceedings and the remedies that are available. In my judgment, judicial review is aptly described as arising under an enactment, originally a common-law matter and originally subject to prerogative orders but now controlled by the 1981 Act.'

He goes on at [44] to say:

"Thus the exclusion [of the ET] is by virtue of an enactment and it does provide for proceedings in the nature of an appeal. An appeal simply is the opportunity to have a decision considered again by a different body of people with power to overturn it."

31. Finally, in this review of relevant decisions, the cases of *Depner v GMC* (UKEAT/0457/11/KN) and *Uddin v GMC* [2013] ICR 793), were heard together by Slade J and were awaiting judgment when *Jooste* was decided. In *Depner,* the Employment Appeal Tribunal decided that where a claimant has a statutory right to the review of a decision about

registration, as is the case under sections 38 and 40 MA 1983, then section 120(7) EA 2010 precludes an application to the ET. *Depner* followed *Khan* which Slade J considered to be good law.

32. In *Uddin*, the High Court was asked to consider claims of race discrimination and harassment that were alleged to have occurred during the disciplinary process that led to Dr. Uddin's eventual suspension by a fitness to practise panel and ultimately his removal from the register of medical practitioners. The acts of alleged discrimination pre-dated the proceedings before the fitness to practise panel and whether the complaint was otherwise within a statutory right of appeal under sections 38 or 40 MA 1983, was a question that was not answered because the acts alleged to constitute harassment and discrimination were insufficiently identified for the ET to be able to determine whether they were decisions amenable to judicial review.

Discussion

33. Section 120(1) EA 2010 describes the jurisdiction of the ET to determine a complaint under Part 5 EA 2010. Section 120(7) EA 2010 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. Where there is a defined statutory route of appeal for actions upon a medical practitioner's registration, such as that described in sections 38 and 40 EA 2010, the jurisdiction of the ET under section 53 is precluded. *Khan* remains authority for that proposition.

34. In any consideration of whether there is a route of appeal, a broad interpretation is permitted consistent with the purpose identified which is to reserve decision making, including on any review or appeal, in certain professional matters that touch upon registration, to the specialist professional body. Accordingly, an internal review or appeal may be sufficient even if a statutory appeal to the High Court is absent. That would equally oust the jurisdiction of the ET as in *Khan*. For those cases, the ultimate remedy of judicial review is available as an effective safeguard.

35. That leaves the circumstance that exists in the present case where no statutory appeal to the High Court or internal review or appeal is provided for. Is judicial review within the contemplation of Parliament as 'proceedings in the nature of an appeal' such that its availability ousts the jurisdiction of the ET to consider section 53 claims? In my judgment there are significant objections to that construction. Although judicial review is undoubtedly a remedy of last resort, it is not an appeal on the merits that provides a determination of the unlawful treatment complained of. Section 31 of the Senior Courts Act 1981 sets out the modern jurisdiction:

"[31] Application for judicial review.

(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.

(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—

(a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting or quashing orders;

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if—

(a) the application includes a claim for such an award arising from any matter to which the application relates; and

(b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.

(5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition—

(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or

(b) substitute its own decision for the decision in question.

(5A) But the power conferred by subsection (5)(b) is exercisable only if—

(a) the decision in question was made by a court or tribunal,

(b) the decision is quashed on the ground that there has been an error of law, and

(c) without the error, there would have been only one decision which the court or tribunal could have reached (5B) Unless the High Court otherwise directs, a decision substituted by it under subsection (5)(b) has effect as if it were a decision of the relevant court or tribunal.**]**

(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—

(a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

36. By section 31(5) the High Court can quash a decision of the GMC but cannot make an award of damages without other relief. Although the High Court can grant a declaration it would not ordinarily make a finding on contested evidence and cannot issue a recommendation in respect of the unlawful treatment alleged, namely discrimination, harassment or victimisation. Furthermore, because the GMC is not a tribunal or court for the purposes of section 31(5A), the High Court cannot substitute its own decision for the decision in question. The GMC is not empowered to make a decision in respect of a section 53 complaint with the consequence that although a decision infected with unlawful treatment can be set aside, the claimant cannot obtain any other effective remedy for it.

37. Just as the purpose of section 120(7) EA 2010 is to ensure that the most specialist body hears the complaint, where a complaint is focussed not on the specialist medical or other professional knowledge of the qualifications body but on unlawful treatment of the nature prohibited by section 53, the ET rather than the administrative court in its judicial review jurisdiction is the specialist tribunal charged by Parliament to make decisions of that kind. To submit in that circumstance that the ET's jurisdiction is ousted by the availability of judicial review flies in the face of long established authority. In *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835, at 852 Lord Scarman held as follows:

"My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision." (emphasis added)

38. Likewise, in *Ex parte Waldron* [1986] 3 Q.B. 824, Glidewell LJ held that when a court is determining whether to allow an application for judicial review to proceed, a key consideration is whether there is another route to the same remedy that would be quicker or would be provided by a body which has some technical knowledge more readily available. At 852 he held:

"Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by judicial review when an alternative remedy is available."

39. We heard detailed submissions on the question of whether the enactment of section 31 of the Senior Courts Act 1981 with effect from 1 January 1982 was a substantive rather than a procedural reform of judicial review. I do not propose to express a view about the interesting and markedly different submissions that we heard on the topic, save to say that there are aspects of the modern procedure that can be said to have been changed substantively rather than just procedurally in and after 1982. The observations of Lord Denning MR in *O'Reilly v Mackman* [1983] 2 AC 237 at 255G to 256C and Lord Woolf in *M v Home Office* [1994] 1 AC 377 at 420G to 421B are apposite. In my judgment, however, that is not the point.

40. It matters not that one could characterise judicial review after January 1982 as being 'by virtue of an enactment' nor that it is possible to argue that judicial review proceedings are 'in the nature of an appeal' if one accepts that 'a review' is within the broad purposive meaning of 'an appeal'. Neither attribution is sufficient in my judgment to satisfy the purpose of section 120(7) EA 2010 as explained in *Khan*. The modern form of judicial review may well be enacted but is not related to the statutory scheme within which the unlawful treatment complained of occurred nor is any remedy that is available in judicial review a remedy on the merits of discrimination, harassment, victimisation or other unlawful treatment, let alone from a specialist forum equivalent to the ET. Just as the ET does not provide an equivalent forum to that of a specialist body apt to determine matters among others of medical education, practice or standards so the judicial review court should ordinarily yield to a specialist tribunal unless that tribunal's jurisdiction is expressly excluded. Furthermore, as a matter of general principle, judicial review should not be used where an alternative remedy is available.

41. It is not as if the draftsmen of the EA 2010 did not have judicial review in mind. Section 113 EA 2010 provides that:

"Proceedings

(1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.

(2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.

(3) Subsection (1) does not prevent—

(a) a claim for judicial review;

(b) […]"

42. The wording of section 113 adds weight to the submission that had Parliament intended to include judicial review in section 120(7) it could have said so and further, judicial review is identified as the ultimate safeguard that is itself not ousted by any of the other provisions of the Act.

43. In *Jooste*, Judge McMullen considered that his conclusion that judicial review was caught by section 120(7) EA 2010 was reinforced by Hoffmann LJ's judgment in *Khan*. He concluded at 1043E-G of *Khan* that Hoffmann LJ "made clear that there was an effective remedy by way of judicial review". It is important to note that while Hoffmann LJ does refer to judicial review in this part of his judgment in *Khan*, he is referring to it as being a safeguard in respect of the decisions of the review board of the GMC from which no statutory appeal to the High Court lay. He is, therefore,

considering judicial review as a mechanism by which the internal appeal decision might be reviewed rather than as an effective appeal of a GMC decision in and of itself.

44. Accordingly, I have come to the conclusion that there is force in Mr Edis's submission that where a claimant seeks to show that a decision involves unlawful discrimination but does not seek any of the discretionary remedies available in judicial review under CPR 54.3(1), then on the GMC's construction of section 120(7) EA 2010 the jurisdiction of the ET would be ousted and there would be no alternative remedy. I also accept Mr Edis's submission that the ET is set up to deal specifically with discrimination and related issues in employment and work. The process of the ET is designed to further that object and provide assistance in the form of rules on costs, disclosure and evidence, including, where appropriate, the reversal of the burden of proof. The benefit of that process is not available in judicial review.

45. The ET is better equipped to deal with disputed decisions of fact and to examine courses of conduct. It is able to call on witnesses to provide evidence. These matters are important in discrimination claims which turn, in general, on the question of why a claimant was treated in a particular way and whether that treatment points to discrimination in respect of a protected characteristic. Judicial review, on the other hand, is set up to consider procedural unfairness and the lawfulness of a decision. It naturally goes more to the question of how a decision was made rather than why it was made. Judge McMullen identified that distinction at [31] in *Jooste* but then failed to take the argument to its logical conclusion.

46. The existence of judicial review does not preclude the use of the ET because that was never the intention of Parliament and the case law before *Jooste* did not suggest so precisely because judicial review was not contemplated to be and is not a specialist forum for the determination of discrimination and related unlawful conduct. It is of course an ultimate safeguard in that it enables a remedy to be obtained where no other remedy exists, but here, the ET has a sufficient jurisdiction with appropriate remedies which should be used before recourse to judicial review is contemplated.

47. For all these reasons, I would allow the appeal and restore the decision of the Employment Tribunal.

Lord Justice Kitchin:

48. I agree that the appeal should be allowed for the reasons given by Ryder LJ. I also agree with the observations of Moore-Bick LJ on the meaning of section 120(7) of the Equality Act 2010.

Lord Justice Moore-Bick:

49. I agree that the appeal should be allowed for the reasons given by Ryder LJ There are powerful practical reasons, to which my Lord has drawn attention, for thinking that Parliament intended that claims against qualifications bodies for discrimination in the course of carrying out their functions should be determined by the Employment Tribunal. Ultimately, the question turns on the meaning of section 120(7) of the Equality Act 2010, on which I wish to add a few observations of my own.

50. Section 120(7) provides as follows:

"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."

51. In *Jooste v General Medical Council* [2012] EqLR 1048 the Employment Appeal Tribunal held that following the enactment of the Senior Courts Act 1981 the right to apply for judicial review is statutory in nature and that, since decisions of the General Medical Council infected by unlawful discrimination can be challenged by way of judicial review, those decisions are "by virtue of an enactment" subject to "proceedings in the nature of an appeal" and therefore fall outside the jurisdiction of the Employment Tribunal. In my view, however, that is wrong and proceeds on a misunderstanding of the purpose of section 120(7).

52. I agree with Ryder LJ that, whereas qualifications bodies may be presumed to have special expertise in judging the skills and qualities required by a member of the profession in question, they cannot be presumed to have special expertise in recognising unlawful discrimination, victimisation, harassment or unlawful detriment. In the Equality Act 2010 Parliament has not only rendered acts of the kind described unlawful, but has provided a process by which a remedy can be obtained by means of a complaint to an Employment Tribunal. The remedies available include an award of damages, which in many cases will be what the claimant primarily seeks. Section 120(7) contains a provision of

general application designed to regulate competing jurisdictions. One would therefore expect that it was intended to exclude from the jurisdiction of the Employment Tribunal only those cases in which some alternative provision has been made for obtaining a remedy for unlawful acts of the kind in question. Such a remedy is likely to be found, if anywhere, in legislation which deals with the procedures governing the way in which a particular qualifications body reaches its decisions and provides an appeal process which extends to decisions infected by unlawful acts of the kind under consideration.

53. In my view considerations of that kind point clearly towards the conclusion that 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] I.C.R. 1032. They are not, in my view, 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.

54. In the present case the President of the Employment Appeal Tribunal considered it appropriate in the interests of the orderly development of the law to follow and apply the decision in *Jooste v GMC* and cannot be criticised for having done so. Nonetheless, he clearly had some misgivings about the decision. For the reasons I have given I think *Jooste* was wrongly decided. On its true interpretation section 120(7) of the Equality Act 2010 does not apply to a claim of the kind which Dr. Michalak seeks to pursue in this case.