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AC-2022-LON-003515

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Wednesday, 6 March 2024

Before:

MR JUSTICE GRIFFITHS

BETWEEN :

THE KING

on the application of
RADOSLAW KALETA

Claimant

- and -

THE JUDICIAL APPOINTMENTS AND CONDUCT OMBUDSMAN Defendant

- and -

REGIONAL EMPLOYMENT JUDGE JOANNA WARD Interested Party

THE CLAIMANT appeared in person.

MR B SEIFERT (instructed by Government Legal Department) appeared on behalf of the Defendant.

THE INTERESTED PARTY was not represented.

J U D G M E N T

MR JUSTICE GRIFFITHS:

- 1 This is an application for permission to apply for judicial review following refusal on the papers by Lang J. The application has been presented to me by the claimant and I am grateful to him for the enormous effort that he has made to assemble the materials he relies upon in the correct form and in a form which has made it possible for me to review those materials thoroughly before this hearing. I am grateful to him also for his skeleton argument and for the oral submissions which he made to me in support of his renewed application.
- 2 The claim for judicial review is in respect of a decision identified in the claim form as being dated 5 September 2022. It was a decision by the defendant, the Judicial Appointments and Conduct Ombudsman, in a report upon a complaint by the claimant. The report is signed by Mr Douglas Marshall of the Judicial Appointments and Ombudsman's office. It is dated 5 September 2022, which is the date of the decision on the claim form, and it runs to some 16 pages. I will come back to the content of those pages, but the substantive decision which the claimant seeks to challenge is the defendant's conclusion as to whether further investigation was necessary in accordance with section 110(3) of the Constitutional Reform Act 2005. Because he did not consider that a review was necessary, he was not able to carry out a review pursuant to that section. That is the decision under challenge.
- 3 In support of the claim for judicial review, the claimant has lodged a statement of facts relied upon, which is appendix 1 to the claim form, and a statement of grounds relied upon, which is appendix 2.
- 4 The background is that he lodged a claim in the employment tribunal against the Royal Marsden NHS Foundation Trust. There was a hearing of that claim in the London Central Employment Tribunal which concluded on or about 2 March 2022. A decision was not immediately forthcoming and the claimant made a number of representations in order to obtain that decision. He complained to the President of Employment Tribunals, Judge Clarke, on 6 June 2022, who responded on 29 June 2022 and forwarded the complaint to the interested party, who is Regional Employment Judge Joanne Wade, for her to investigate.
- 5 The judgment was eventually delivered by the employment judge who had conducted the hearing which concluded in March 2022. He delivered it on 1 July 2022. There was, therefore, a delay of a little under 4 months in the provision of that judgment. The applicant considers that there was misconduct and maladministration by the employment judge and by the regional employment judge who he accuses of ignoring the maladministration and attempting to cover it up.
- 6 In due course, although not quickly enough for the claimant to find satisfactory, Regional Employment Judge Wade, after another three weeks, replied to his complaint and he particularly relies upon that reply, which was in a letter dated 19 July 2022 from the interested party to the claimant. It was headed as being in the matter of a complaint against the employment judge. It says in the first paragraph:

“I note your concerns and understand your distress and frustration about the considerable delay in the written judgment being provided following the hearing which ended on 4 March 2022. I apologise for the delay, as does Employment Judge Emery who I have spoken to and who has asked that his apology be passed on. Happily, the judgment was sent to you on or about 1 July 2022.

“Complaints against Employment Judges are governed by the Judicial Conduct (Tribunal) Rules 2014. In addition, there is “supplementary guidance” on the operation of the rules.”

- 7 The interested party then provided links to the texts of both the rules and the guidance. She continued in her letter by referring to rule 31 by which, as she put it:

“...I must initially consider whether an allegation of misconduct has been made. Such a complaint or part of a complaint must be dismissed if it falls into any of the 12 categories set out at Rule 34. Those categories include one where the complaint is ‘about a judicial decision or judicial case management and raises no question of misconduct’ (Rule 34(b)).

The guidance says this about personal misconduct:

‘Personal misconduct relates to the member’s behaviour, for example a judge shouting or speaking in a sarcastic manner in court; or misuse of judicial status. Personal misconduct does not relate to how the tribunal member has managed a case or hearing or to any decisions or judgments made in the course of proceedings. The only way to challenge such matters is through the appellate process.’

The guidance says this about Rule 34(b):

‘The constitutional independence of the judiciary means that decisions made by a tribunal member during the course of proceedings are made without the interference of ministers, officials or other judicial office-holders (unless they are considering the matter whilst sitting in their judicial capacity, for example, in an appeal hearing). Judicial decisions include, but are not limited to, the way in which proceedings are managed, disclosure of documents, which evidence should be heard, and the judgment given.’”

- 8 The interested party continued in her letter as follows:

“I wish to emphasise the points made in the above extract. The judicial complaints process deals with allegations of personal misconduct by judges. I have considered whether the delay and the fact that you did not receive updates informing you of the delay, or time estimates of when the judgment would be ready, amount to personal misconduct. Whilst the delay was considerable, you have now received the judgment and Employment Judge Emery has apologised. He has also explained to me that the judgment was long and complex, and that he under-estimated how long it would take to write, given his other commitments. He has also provided some personal information mitigation, which I will not disclose for obvious reasons. I have, therefore, decided that whilst the delay and lack of

communication with you was not acceptable, it does not amount to misconduct under the rules.

For all the above reasons, I dismiss your complaint under rule 34(b) whilst repeating the apology for the delay.”

- 9 The claimant says that in fact the Regional Employment Judge Wade had not investigated his complaints properly or at all, and that what she said in her letter was contradictory to the facts of what really happened.
- 10 He complained to the President of Employment Tribunals on 10 August 2022, and received no acknowledgement of that communication. He made other complaints; for example, against Regional Employment Judge Wade’s response of 19 August 2022, which was to an earlier letter from him of 18 August 2022, and in which she said she would not respond to any communication on the matter.
- 11 Following this correspondence, the claimant lodged the complaint about maladministration with the Ombudsman’s office on 14 August 2022 which led to the decision of the defendant Ombudsman under challenge.
- 12 Prior to making that decision the Ombudsman, Mr Marshall, requested a number of documents such as correspondence between the applicant, the employment tribunal and the President’s office. The claimant’s case is that the ombudsman failed to draw appropriate inferences about what actually happened in his case.
- 13 The decision letter and document dated 5 September 2022, which is the subject matter of the proposed claim for judicial review, begins by identifying the complaint which is set out in letters from Mr Kaleta (the claimant) on 14, 15 and 25 August 2022, asking for review of the process by which the interested party handled his complaint about the employment judge and his employment tribunal proceedings. The defendant then identified his remit and referred to it as follows:

“My remit enables me to consider concerns about the process by which complaints about judicial officeholders are considered under the arrangements for dealing with judicial conduct matters. In accordance with section 110(2) of the Constitutional Reform Act 2005, I am required to carry out a full investigation into a complaint where three conditions have been met, the first of which is that I consider a full investigation to be necessary. My remit specifically precludes me from reviewing decisions taken by those considering conduct complaints; I can look only at the process by which those complaints were handled”.

- 14 He then enclosed a copy of the relevant part of the Constitutional Reform Act 2005 which provides as follows at section 110:

“110 Applications to the Ombudsman.

(1) This section applies if an interested party makes an application to the Ombudsman for the review of the exercise by any person of a regulated disciplinary function, on the grounds that there has been –

- (a) a failure to comply with prescribed procedures, or

(b) some other maladministration.

(2) The Ombudsman must carry out a review if the following three conditions are met.

(3) The first condition is that the Ombudsman considers that a review is necessary.

(...)

(6) But the Ombudsman may not review the merits of a decision made by any person.

(7) If any of the conditions in subsections (3) to (5) is not met, or if the grounds of the application relate only to the merits of a decision, the Ombudsman –

(a) may not carry out a review, and

(b) must inform the applicant accordingly.”

15 The Ombudsman’s decision went on to set out at some length the complaint and some of the subsequent correspondence, including a chronology of events from the claimant and his commentary upon it. The letter then said this, under the heading “My decision”.

“I have decided that Mr Kaleta’s complaint does not warrant a full investigation. In reaching this conclusion, I am commenting solely on the process by which Regional Employment Judge Wade handled his complaint under the arrangements for dealing with judicial office holders’ personal misconduct. I cannot comment on the merits of Regional Employment Judge Wade’s decision or the complaint raised by Mr Kaleta about Employment Judge Emery and his employment tribunal case.”

16 The decision then said, under the heading “Factors taken into account”:

“I have taken the following factors into account in reaching my decision:

- Mr Kaleta’s views, as expressed in his correspondence with my office and previously with the employment tribunal; and
- the employment tribunal papers regarding the handling of the complaint.”

17 The letter then set out extracts and summaries of those materials, including a lengthy quotation from the letter of the interested party to the claimant dated 19 July 2022, which I have myself already referred to and, to some extent, quoted at some length.

18 After setting out these and other materials, the defendant concluded his decision in a final section on pages 15 and 16 of his letter headed “My findings”. He said this:

“I appreciate that Mr Kaleta has strong concerns about the matters referred to in his correspondence to the Employment Tribunal and

subsequently to the Judicial Appointments and Conduct Ombudsman's office. I have considered the points Mr Kaleta raised. Regional Employment Judge Wade's role was to consider whether there were issues of personal conduct on the part of a judicial office holder in the Employment Tribunal which might warrant the Lord Chancellor and Lord Chief Justice imposing a disciplinary sanction, and my role is to consider whether an appropriate process was followed in addressing the complaint."

19 The Ombudsman then went on to say that he had found that the interested party "appropriately sought comments from Employment Judge Emery..." and had apologised for the delay, alongside conveying the apology from the Employment Judge, as well as explaining that (after the judgment had been provided on 1 July 2022) the delay, after taking into account some mitigating reasons from the employment judge, "did not relate to judicial misconduct under the Conduct Rules".

20 The Ombudsman acknowledged the concerns raised by the claimant about the time taken for him to receive a response to his complaint from the interested party, as well as obtaining an initial response from Judge Clarke, and that, at the time of submitting his complaint to the Ombudsman on 14 August, he had not received a response from Regional Employment Judge Wade. However, he noted that such a response had subsequently been provided on 17 August 2022. He said:

"I note the reasons and apologies provided for this by Judge Clarke and Regional Employment Judge Wade, and whilst it is unfortunate that the complaints were not responded to sooner, I do not think that the time taken was so excessive as to amount to a finding of maladministration on the part of the Employment Tribunal."

21 He then said:

"I can see no substance to Mr Kaleta's complaint that Regional Employment Judge Wade provided him with a contradictory response to his complaint."

And he gave his reasons for that conclusion.

22 He then referred to the claimant's assertion (which he relies upon and repeats in the hearing before me today) that the employment judge "ignored all four emails sent to the Tribunal between March and June 2022 and Regional Employment Judge Wade has not even bothered to investigate this issue further." To that point, the Ombudsman referred to the explanation of Regional Employment Judge Wade in her letter of 19 July 2022 and to her statement that:

"Whilst the delay was considerable, you have now received the judgment and Employment Judge Emery has apologised. He has also explained to me that the judgment was long and complex, and that he under-estimated how long it would take to write, given his other commitments. He has also provided some personal information mitigation, which I will not disclose for obvious reasons. I have, therefore, decided that whilst the delay and lack of communication

with you was not acceptable, it does not amount to misconduct under the rules.”

23 I set out that quotation in full, although I have included it in my decision already, to demonstrate that the Ombudsman set it out in full and considered it as relevant to his response to the complaint that the Employment Judge had ignored four emails.

24 The Ombudsman said, after citing that passage:

“This response was reiterated in later correspondence from Regional Employment Judge Wade. Therefore, I do not agree that Regional Employment Judge Wade failed to address this matter.”

25 The Ombudsman continued:

“Having considered the correspondence in this complaint, I am content that Regional Employment Judge Wade followed an appropriate process in considering the concerns which Mr Kaleta expressed in his correspondence with the Employment Tribunal, taking account of appropriate legislation and guidance. I do not see any substance to the claims that Regional Employment Judge Wade did not properly address the complaints raised. Whilst I cannot review the merits of Regional Employment Judge Wade’s decision. Rather, I can only consider the process by which Regional Employment Judge Wade investigated Mr Kaleta’s complaint under the Judicial Conduct arrangements, and it is my view that the appropriate process was followed to determine the matters raised under the Judicial Conduct arrangements.”

26 The Ombudsman then noted the claimant’s unhappiness at not receiving a response to his request to the Employment Tribunal for correspondence between the President’s Office and Regional Employment Judge Wade’s office, and said that that was not something he could comment on, and that he could only suggest that that might be raised with the Information Commissioner’s Office if the claimant wished to pursue a complaint.

27 The decision concluded as follows:

“Therefore, in accordance with section 110(3) of the Constitutional Reform Act 2005, I do not consider that further investigation is necessary in respect of matters that come within my remit.”

28 As a result of the provisions of section 110 of the Constitutional Reform Act 2005, which I have already read, the ambit of the Ombudsman’s powers was limited in the way that he identified; and the consequence of his decision, based upon the materials and reasoning which he had set out at some length in his 16 page decision, was that, pursuant to section 110 of the Act, he was not permitted to review the merits of the decision, or to carry out a review, because the first condition of the three set out in section 110 was not satisfied, namely, that he considered a review to be necessary.

29 The statement of grounds in the claim form complains of pre-determination and alleges that the Ombudsman failed to display a balanced approach. The claimant says that the Ombudsman’s review of the evidence and submissions was incoherent and arbitrary in that he chose to choose one fact or opinion from Regional Employment Judge Wade’s letter, and

measured evidence and his submissions against it, without allowing for divergence of views, and other matters. It says that he failed to accord with the standard of review, which must be reasonable and rational. He says that he failed to establish sufficient information when making the decision not to investigate fully, or to take into account all material considerations, like “the Employment Tribunal failing the principles of good administration and principles of good complaint handling”, being open and accountable, acting fairly and proportionately, and that he failed to consider that a review of his decision (which is described as biased) was required in the circumstances. Other complaints are made. These are crystallised in the defendant’s skeleton argument in which, having referred to a number of the facts which I have already cited, he suggests that:

“It is highly likely that in return for the receiving of an award of an MBE from the Royal Family the interested party abused her position and status to intentionally influence the outcome of the cases against the defendant (respondent) the Royal Marsden NHS Foundation Trust to the extent that all claims against it failed and were dismissed by the Employment Judges residing at the London Central Employment Tribunal.”

- 30 He says in his skeleton that the interested party’s conduct, as he describes it, in covering up the Employment Judge’s neglect of his case, as well as maladministration occurring in that Tribunal generally, is “perceived as scandalous and unreasonable”. I have to say there is not a shred of evidence to support those allegations which are, in any event, irrelevant to the decision which is under challenge; the exercise of powers in respect of that decision; and the approach to it which was taken by the Ombudsman, which is the proper subject of a claim for judicial review.
- 31 The claimant does, however, move on to more relevant territory when he cites Civil Procedure Rules 54.1(2)(a) defining a claim for judicial review as “a claim to review the lawfulness of (...) (ii) a decision, action or failure to act in relation to the exercise of a public function” and indicates that his claim, if it is allowed to proceed, will be that, what he calls the court, but what I think he must mean to be the defendant Ombudsman, failed to examine the fairness and rationality of Regional Employment Judge Wade’s investigation and, as he puts it, “cover up” of Employment Judge Emery’s misconduct; and how she made the decision, and wrote the letter, with what he describes as “false information”; the Ombudsman’s factual knowledge about the details of the process followed by the interested party; and what is described as “his failure and insufficient reasons behind his decision to adequately investigate the decision of the interested party”; and what he alleges to be pre-determination, namely, as he puts it, “the Ombudsman’s incoherent review, impartiality and lack of balanced approach as a further cover up of the serious maladministration and dishonesty of the judge.”
- 32 He then proceeds to give his reasons for saying that the reasons of the judge refusing permission on the papers, Lang J, are wrong.
- 33 The difficulty with the submissions is that they do not clearly distinguish between the claimant’s dissatisfaction with the decisions and processes for which Employment Judge Emery was responsible, and the decisions and processes for which Regional Employment Judge Wade was responsible, the decision and processes for which other persons, other judicial officer holders in the Employment Tribunal system, were responsible, and the actual decision of the defendant in this case made on 5 September 2022.

- 34 He also needs, if he is to show that his appeal is arguable to the extent that would make it appropriate to grant permission for it to proceed, to demonstrate not that the decision under challenge was wrong, but that it was irrational or otherwise unlawful – that being the ambit of a claim for judicial review.
- 35 The Ombudsman is said to have made an irrational decision. That is a submission that is made to me today. The claimant says that the Ombudsman did not review the evidence properly and that his review of the evidence was incoherent. However, having carefully perused the decision, I do not consider it to be arguable that it was irrational or otherwise unlawful. The claim for judicial review is not an appeal against the decision; it is not an opportunity to make a fresh decision. It is a review of the lawfulness, rationality and process behind the decision itself.
- 36 The claimant has, in my judgment, not succeeded in identifying arguable grounds upon which that might be done in a claim for judicial review of the decision of the defendant dated 5 September 2022. For that reason, permission must be and is refused.
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CERTIFICATE

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