1 November 2017

PRESS SUMMARY

Michalak (Respondent) v General Medical Council and others (Appellants) [2017] UKSC 71
On appeal from [2016] EWCA Civ 172

JUSTICES: Lady Hale, Lord Mance, Lord Kerr, Lord Wilson, Lord Hughes

BACKGROUND TO THE APPEAL

Ewa Michalak was a doctor employed by the Mid-Yorkshire Hospitals NHS Trust from April 2002 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 due to sex and race discrimination and victimisation. Dr Michalak received a compensation award and a public apology from the Trust.

Before the tribunal had issued its determination, the Trust had reported Dr Michalak to the General Medical Council to consider whether she should continue to be registered as a medical practitioner. The Trust later accepted that there had not been proper grounds to refer her and she remains registered as a medical practitioner. In the meantime, however, the GMC had begun fitness to practice proceedings against Dr Michalak. She claims that the GMC discriminated against her in the way in which it pursued those proceedings, including a failure to investigate complaints she had made against other doctors employed by the Trust. In August 2013, Dr Michalak brought a claim in the Employment Tribunal against the GMC, its chief executive and one of its investigation officers in relation to these complaints.

The GMC argued that section 120(7) of the Equality Act 2010 meant that the Employment Tribunal did not have jurisdiction to hear the claim, as judicial review already provides for an appeal in these matters.

The issue in this appeal was whether the availability of judicial review proceedings in respect of decisions or actions of the GMC can properly be described as proceedings "in the nature of an appeal" and, on that account, the jurisdiction of the Employment Tribunal is excluded by section 120(7) of the 2010 Act.

JUDGMENT

The Supreme Court dismisses the appeal. Lord Kerr gives the judgment with which all other members of the panel agree. Lord Mance provides an additional short judgment with further explanation of his reasons.

REASONS FOR THE JUDGMENT

It is accepted that Dr Michalak could seek judicial review of the decisions that are alleged to constitute discrimination. The issue is whether the availability of judicial review comes within section 120(7) of the 2010 Act. This depends on two requirements being satisfied: (i) whether judicial review can be described as a "proceeding in the nature of an appeal" and (ii) whether it is available "by virtue of an enactment" **[13]**.

The Employment Tribunal was designed to be a specialised forum for the resolution of disputes between the employee and employer, with the power to award a comprehensive range of remedies. Where Parliament has provided an alternative route of challenge to a decision through an appeal or an appeal-like procedure, however, 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 is convenient for both the appellant and respondent. Employment tribunals should be prepared to examine critically whether statutory appeals are available, and where they are, should strike out proceedings before them. This rationale only applies where the alternative route is capable of providing an equivalent means of redress, however. **[16-18]**.

Conventionally, an "appeal" is a procedure which entails a review of an original decision in all its aspects – an appeal body may thus examine the basis on which the original decision was made, assess the merits of the conclusions reached and, if it disagrees, substitute its own view. Judicial review, by contrast, is a proceeding in which the legality of or procedure by which a decision is reached is challenged. It cannot partake of the nature of an appeal – the remedy available on a judicial review application in circumstances such as the present is a declaration that the decision is unlawful or that the decision be quashed. The court cannot substitute its own decision for that of the decision-maker and, in that sense, the decision of the GMC could not be reversed. 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. **[20-22]**.

The origins of judicial review lie within the common law and it is not a procedure which arises "by virtue of" any statutory source – section 31 of the Senior Courts Act 1981 did not establish judicial review as a procedure, but rather regulated it. If Parliament had intended that judicial review was within the scope of the procedures contemplated by section 120(7), one would expect that it would have provided for it expressly **[32-33, 35]**.

Lord Mance agrees with Lord Kerr but adds that he would not necessarily limit the ability of judicial review to cater for a close examination of a claim on its merits – in appropriate circumstances, judicial review may lead the court to a conclusion that there exists only one possible outcome of a properly conducted legislative or executive decision-making process. In this situation, however, the Employment Tribunal offers the natural means of recourse and there is no need to strain the ordinary understanding of the concept of "appeal" to embrace judicial review **[37-38]**.

References in square brackets are to paragraphs in the judgment