THE EMPLOYMENT TRIBUNALS

Claimant: **Mr. Sanwar Ali**

Respondent: **Office of the Immigration Services Commissioner**

Heard at: **East London Hearing Centre**

On: **1 November 2018**

Before: **Employment Judge Barrowclough, sitting alone**

Representation

Claimant: In person

Respondent: Ms. Laura Robinson (Counsel)

RESERVED JUDGMENT ON OPEN PRELIMINARY HEARING

The Tribunal determines that, pursuant to ss.53 and 120(7) Equality Act 2010, it has no jurisdiction to hear and determine any of the Claimant's complaints. Accordingly, all the Claimant's complaints are struck out as having no reasonable prospect of success under Rule 37(1)(a) Employment Tribunals (Constitution & Rules of Procedure) Regulation 2013.

REASONS

1. By his claim, presented to the Tribunal on 27 June 2018, the Claimant, Mr. Sanwar Ali, raises complaints of both direct and indirect race discrimination, racial harassment and victimisation against the Respondent, the Office of the Immigration Services Commissioner. All those complaints are resisted and disputed by the Respondent in its ET3 Response, in which it goes on to assert that the Tribunal has no jurisdiction to hear the Claimant's claim, alternatively that it would amount to an abuse of process to do so, and lastly that some at least of

those complaints are out of time. The case was listed for a Case Management Discussion, which took place before Employment Judge Brook on 14 September 2018. At that hearing, the learned judge directed that there should be an open preliminary hearing to determine the jurisdictional and time points raised by the Respondent, and went on to give directions for the steps to be taken in preparation for such a hearing. The preliminary hearing took place before me on 1 November 2018, when the Claimant represented himself and also gave evidence, and the Respondent was represented by Ms. Robinson of counsel, who called Mr. Stephen Seymour, the Respondent's director of operations, and at the conclusion of which I reserved my judgment. An agreed bundle, to which the Claimant added a number of documents at the commencement of the hearing, was handed up for the assistance of the Tribunal.

2. I summarise the relevant facts and the background to these proceedings from the evidence I heard and read as follows. The Respondent is an executive non-departmental public body established by the Immigration and Asylum Act 1999 ('the 1999 Act') to regulate the provision of immigration advice and services throughout the UK. Its aims include the protection of consumers by ensuring the continuing fitness and competence of registered organisations and their advisers, setting standards for registration, and promoting good practice throughout the sector. The Respondent also operates a scheme for receiving complaints relating to immigration advice given by registered (and other) organisations and individuals, and enforces its regulatory regime through prosecuting individuals who are acting illegally in providing immigration advice or services. It has specific responsibility for (a) assessing applications to be admitted to its regulatory scheme; (b) regulating immigration advice organisations and advisers in accordance with its code of standards; and (c) maintaining and publishing a register of regulated organisations. The Respondent has the power to accept, refuse or cancel an organisation's application and/or registration, and those admitted to its regulatory scheme must apply annually for continued registration, whereby they can continue to provide immigration advice and services lawfully. Persons or organisations who are accepted by the Respondent as qualified to provide immigration advice and services are registered under s.84 of the 1999 Act. If an application for registration or continued registration within the regulatory scheme is refused, then the organisation or individual concerned has the right to appeal that decision to the First-Tier Tribunal (General Regulatory Chamber) by virtue of s. 87 of that Act.

3. The Claimant was at all material times the owner and operator of a number of companies which provide immigration advice and services, initially at least via internet websites which, the Claimant says, are visited by millions every year. Those companies include ImmEmp Solutions Ltd, trading as Workpermit.com ('Workpermit'), and Visa Joy Ltd ('Visa Joy'). Both companies were registered under s.84 for a period of approximately 13 years. On 31 March 2014, a caseworker in the Respondent's compliance and complaints team called Vincent Perera wrote to the Claimant informing him that the Respondent had decided to refuse the application for the continued registration of Workpermit, and consequently its registration under the Respondent's regulatory scheme was cancelled. Mr. Perera wrote to the Claimant once more on 18 August 2014, this time informing him of the refusal of the application for continued registration of Visa Joy, and that its registration was also cancelled. On both occasions,

detailed reasons for the Respondent's decision were provided, copies of which are at pages 46 to 60 (Workpermit) and 67 to 80 (Visa Joy) in the bundle.

4. The Claimant duly commenced appeals against both those decisions. A 'case management note' arising from an interlocutory hearing of the First-Tier Tribunal in the Workpermit appeal which took place on 10 June 2014 (page 66 in the bundle) records that the Claimant had then been specifically advised that he was at liberty to pursue allegations of race discrimination relating to the Respondent's refusal and cancellation decisions in his appeal to the First-Tier Tribunal, if he wished. In addition, EJ Brook recorded in his CMD Order that *'Mr. Ali candidly confirmed that, in consultation with his then counsel, he decided not to pursue assertions of race discrimination despite that invitation, apparently in the belief that he would not get a fair hearing and was anyway 'bound to lose".*

5. Both the Claimant's appeals were dismissed by the First-Tier Tribunal, those determinations being dated 6 October 2014 at pages 81 to 90 (Workpermit), and 24 November 2014 at pages 91 to 96 (Visa Joy). The Claimant appealed against those decisions to the Upper Tribunal, which itself dismissed his appeals and upheld the First-Tier Tribunal determinations (pages 101 to 103 and 123 to 143); and subsequently to the Court of Appeal, which also dismissed both appeals. A copy of the Court's judgment, handed down on 5 October 2017, is at pages 153 to 164; and costs in the sum of £6,192 were ordered to be paid by the unsuccessful appellants to the Respondent, which costs are apparently still outstanding.

6. In Mr. Perera's letters to the Claimant concerning Workpermit (31 March 2014) and Visa Joy (18 August 2014), the Claimant had been informed that, under ss.91 & 92B of the 1999 Act, he would be committing a criminal offence, punishable by a fine or imprisonment, if Workpermit and/or Visa Joy continued thereafter to provide immigration advice or services, or advertised the provision of such services. Mr. Seymour says that, as a result of his office being notified in January 2017 by the Home Office of various remarks concerning the Respondent on the Workpermit website, it became apparent that that company was possibly providing immigration advice unlawfully, since its registration had been cancelled, and an investigation was commenced. That revealed that Workpermit was claiming supervision of the immigration advice and services being provided by a lawyer based in Romania as satisfying s.84 of the 1999 Act. The same or a similar arrangement, Mr. Seymour says, has occurred in a number of other cases, and a trial or hearing at which the legality of one such arrangement will be determined is to take place in the New Year.

7. On 21 February 2017, the Claimant was invited to provide details of how Workpermit were satisfying the requirements of s.84 at an interview conducted under the Police and Criminal Evidence Act 1984. No such interview then took place, and on 19 May thereafter investigators from the Respondent attended the offices of Workpermit, where they executed a search warrant granted by Westminster Magistrates Court under s.92A of the 1999 Act, seizing a number of emails and invoices relating to the provision of immigration services. The Claimant was invited once again to participate in an interview under caution on 6 June 2017, but stated that he was seeking further advice. A number of further appointments for such an interview have been suggested, but to date no such interview has in fact taken place.

8. Mr. Seymour states that the Respondent has an internal complaints procedure, initially to the head of HR and thereafter to the Commissioner, if an individual considers that the Respondent has failed to provide a satisfactory standard of service, details of which procedure are on the Respondent's website. If a complainant remains dissatisfied at the end of that process, it is open to them to pursue the complaint or alleged injustice through their MP to the Parliamentary Ombudsman. Information and details concerning the complaints procedure are included on the Respondent's website. Mr. Seymour identified the Respondent's applicable policy in relation to criminal prosecutions at pages 165 to 169, and said that there were currently about twenty criminal investigations in progress. Most concerned situations where advice and services were being provided in the complete absence of any registration or registered adviser, although two organisations had claimed a UK based supervisor, and one an overseas supervisor. Under the Respondent's regulatory scheme, there were currently about 3,500 registered individual advisers, operating through about 1,600 organisations, none of which had claimed a non-UK based supervisor.

9. In his witness statement, the Claimant asserts that the Respondent's decisions to refuse Workpermit and Visa Joy's continued registration as being qualified to provide immigration advice and services under s.84 and to cancel their registration was motivated or infected by race discrimination; that his earlier complaints concerning some members of the Respondent's staff have resulted in him and his companies being victimised; and that the Respondent's threats of criminal prosecution and their obtaining and executing a search warrant are discriminatory and amount to harassment. The Claimant includes at paragraph 31 of his statement an 'overview' of the discrimination he alleges. Whilst it is correct that the Claimant's companies did in fact exercise their rights of appeal against the registration refusal and cancellation decisions, the Claimant says that the First-Tier Tribunal *'and other Courts that we have already gone to are not suitable venues for the hearing of racial discrimination claims. If you dare to criticise the Respondent, you will weaken your case and are more likely to lose'.* The Claimant sets out in his statement what he says happened at the First-Tier Tribunal hearing on 10 June 2014 that he attended, and says that there was a marked disinclination on the part of the Tribunal to deal with his allegations of discrimination; and that the professional advice from counsel he then received was, in effect, not to pursue the matter in that forum.

10. The Claimant also deals at some length with complaints he has raised about members of the Respondent's staff and his dealings with them, in particular a Mr. Dean Morgan, which stretch back for more than 10 years, and about which nothing has been done. He contends that there is no appeal possible where, as here, the Respondent has failed to deal with his complaints against Mr. Morgan and others; that the Respondent's approach has been racially discriminatory and that it encourages fraud and corruption. Whilst the Claimant acknowledges that it would be possible perhaps to apply for Judicial Review, he says that would not be a suitable remedy.

11. In conclusion, the Claimant suggests that the Respondent has been operating a system for about 10 years where there were no effective appeal rights against their complaint determinations, short of Judicial Review. Secondly,

he contends that it is not possible to separate the actions which the Respondent takes as a regulator from its enforcement function, which he suggests has been racially motivated in his case. Thirdly, that raising the issue of discrimination at the First-Tier Tribunal was counterproductive and only harmed his case, and that it and the Upper Tribunal are not suitable venues within which to raise discrimination issues. Finally, that it is only recently that the law has changed to make it easier to bring claims against regulators in the Employment Tribunal.

12. In her closing submissions, Ms. Robinson relied and expanded upon her skeleton argument, copies of which had been provided at the commencement of the hearing. Ms. Robinson draws a distinction between the (first) period of time, during which the Respondent refused to continue and cancelled the registration of the Claimant's two companies which had provided immigration advice and services, followed by the Claimant's attempts to overturn those decisions; and the later period of time, from January 2017 onwards, in which the Respondent investigated and commenced enforcement action against those two companies for allegedly providing such advice and services unlawfully.

13. In relation to that first period, Ms. Robinson accepts on behalf of the Respondent that it was then acting as a '*qualifications body*', as defined in s.53 Equality Act 2010, in relation to its function of registering appropriate individuals and institutions under its regulatory scheme. S.53 provides that a qualifications body must not discriminate against a person in the arrangements it makes for deciding upon whom to confer a relevant qualification (ss.1), or by varying or withdrawing a relevant qualification already conferred (ss.2); and there are comparable provisions in subsections 3 to 5 in relation to unlawful harassment and victimisation. S.120 Equality Act confers jurisdiction on the Tribunal to hear and determine complaints under s.53, since that section falls within Part 5 of the Act (s.120(1)(a)). However, that subsection does not apply to a contravention of s.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'* (s.120(7)).

14. Ms. Robertson submits that *'the act complained of'* by the Claimant in that first period, namely the Respondent's refusal of his applications for continued registration and the cancellation of the existing registrations, was in fact the subject of appeal, by virtue of the 1999 Act, to the First-Tier Tribunal, the Upper Tribunal, and ultimately the Court of Appeal. Secondly, as was clear from the First-Tier Tribunal's interlocutory order at page 66 and as the Claimant himself acknowledged at the earlier CMD in these proceedings, he (as well as his then counsel) was reminded at an early stage in that appeal process that he was able and entitled to raise and pursue allegations of race discrimination as part of his appeal; but chose not to do so. Thirdly, that is not simply a theoretical right, since it is clear from the case of **Kenny Kehinde Tuki t/a Ikut & Associates v Office for Immigration Services Commissioner IMS/2011/7/RCR** that allegations of race discrimination by the Respondent have been raised by others and duly heard and determined by the First-Tier Tribunal. In these circumstances, Ms. Robertson submits, the Tribunal has no jurisdiction to hear the Claimant's complaints arising before January 2017 in the light of the provisions of s.120(7) Equality Act 2010. Secondly and in the alternative, to hear those complaints would amount to an abuse of process, since they have already been considered and adjudicated on by the First-Tier and Upper Tribunals and

by the Court of Appeal, and it is well-established that it is incumbent on a party to bring forward his full case for judicial determination (**Henderson v Henderson**).

15. In relation to the later, post January 2017, period, when the Respondent accepts that it has looked into and commenced enforcement action against the Claimant's two identified companies, Ms. Robertson simply submits that, in undertaking those functions, the Respondent was and is not acting in the capacity of a *'qualifications body'* within s.53 Equality Act 2010; and that there is no alternative route by which jurisdiction could be conferred on the Tribunal. She submitted that the Claimant's citation of and reliance upon **Michalak v General Medical Council [2017] UKSC 71** was mistaken. In that case, the claimant was complaining that the GMC had discriminated against her in the manner in which they had pursued 'fitness to practice' proceedings against her. That amounted to discrimination in the course of their deciding whether Ms. Michalak should continue to be registered, a function of their role as a qualifications body; and the Supreme Court had determined that the Tribunal had jurisdiction, since the only other remedy was judicial review. Here, by contrast, the Respondent had already determined, in exercising its role as a qualifications body, that the Claimant's companies should not be on their register as regulated organisations; and the appeal process in relation thereto had been exhausted. In this later period, Ms. Robinson submitted, the Respondent was investigating whether criminal offences had been committed by the Claimant's companies in the provision of immigration services, in its regulatory enforcement role. S.53 did not apply to the Respondent in exercising and undertaking that function, and accordingly there was no jurisdiction for the Tribunal to hear the Claimant's post January 2017 complaints.

16. Ms. Robinson put forward subsidiary submissions in relation to time limits and deposit orders, as set out in her skeleton; but primarily relied upon those summarised above.

17. In reply, the Claimant had helpfully prepared his own skeleton argument, which he adopted and relied upon. He drew attention to s.54 Equality Act, which defines a qualifications body as *'an authority or body which can confer a relevant qualification'*, that being *'an authorization, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession'*. The Claimant submitted that the Respondent plainly falls within that definition, and that s.53 of the same Act sets out the prohibited conduct, which covers and includes the complaints he now brings. Accordingly, the Tribunal has jurisdiction to hear and determine those complaints. The Claimant went on to submit that the Respondent's capacity in its dealings with himself and others remained constant, that its enforcement function was part and parcel of its overall regulatory role, and that it was artificial to try to separate the various functions the Respondent undertook, and to apply different rules to each. The Claimant re-iterated his assertion that he had been *'steered away'* from bringing and pursuing discrimination allegations in the First-Tier Tribunal hearing, although he accepted that he was being advised by counsel at the time; asserted that the Respondent's discriminatory conduct towards him was ongoing, in their continued refusal to address his complaints and to prosecute him/his companies, and thus was a continuing act, so that his claim was in time; and that deposit orders were not appropriate, since his complaints had reasonable prospects of success.

18. I agree with Ms. Robinson that it is sensible and appropriate, at least for the purposes of considering the applicable legal principles, to consider the complaints raised by the Claimant as falling into two separate periods, the first being those relating to the Respondent's refusal of the Claimant's companies' application for continued registration and the cancellation of their registrations, and the steps then taken to overturn those decisions; and the second and later period covering the complaints arising from the Respondent's enforcement activities since January 2017.

19. In relation to the complaints arising in the first period, I have no hesitation in accepting Ms. Robinson's submissions, which are plainly correct. There is no doubt that the Respondent was then acting in the capacity of a qualifications body, that s.53 Equality Act 2010 prohibits such a body from acts and omissions of the type which the Claimant alleges in his claim, and that s.120 of the same Act confers jurisdiction on the Tribunal to determine such complaints, unless the act(s) complained of may be subject to appeal under another enactment. The Claimant (or rather his companies, and I should make clear that no submissions or evidence were put forward by either side as to any distinction between the two, so I do not address that potential issue in this judgment) did in fact bring and pursue appeal proceedings against the Respondent in respect of its decisions to refuse his applications for continued registration and the cancellation of existing registrations, pursuant to the Immigration and Asylum Act 1999. There is no doubt that the Claimant was able to include the allegations he now puts forward of race discrimination, racial harassment and victimisation relating to those decisions by the Respondent in those appeals, that he was reminded of that option at a time when he could have pursued it, and that, apparently with the benefit of legal advice, he chose not to do so. Whether or not the Claimant had good reasons for acting as he did, as to which I make no finding, is immaterial: the simple fact is that he had a right to and could have raised those allegations in those appeals. It follows in my judgment that the provisions of s.120(7) Equality Act 2010 apply to the Claimant's complaints which arise in the period before January 2017 and when the Respondent was acting in the capacity of a qualifications body, that the Tribunal has no jurisdiction to hear them, and that they must be struck out. For the avoidance of doubt, and in case I was wrong in coming to that conclusion, I make plain that I would have struck out those complaints as amounting to an abuse of process, for the reasons outlined by Ms. Robinson.

20. It seems to me that the position in relation to the later period, from January 2017 onwards, when the Respondent was investigating possible offences by the Claimant and his companies and commencing enforcement action by means of interviews under caution, is not quite so clear cut. Accordingly, bearing in mind that the Claimant was representing himself, that there seems to be no appeal against the Respondent's actions in the later period short of Judicial Review, and that s.54 Equality Act does not provide any definition of a *'qualification body,'* in terms of its having different or varying functions which is helpful in the circumstances of this case, I put the Claimant's case to Ms. Robinson. That is in essence that the Respondent's capacity in its dealings with the Claimant has been unchanging, that enforcement action is simply one aspect of the Respondent's overall regulatory role, and that it is arbitrary and artificial to separate the functions which the Respondent may

undertake from time to time and to apply different rules to each, as well as being confusing for the layman.

21. As noted at paragraph 2 of these Reasons, under the 1999 Act which established the Respondent, it has a number of statutory functions, some of which have been set out above. Ms. Robinson submits that those functions should be read and understood disjunctively, rather than conjunctively; and that in exercising its enforcement function the Respondent is not acting as a qualifications body, as defined in s.53. I agree. I accept that the fact that the Claimant's companies' registrations were cancelled and their applications for continued registration refused by the Respondent, acting as a qualification body, is ultimately irrelevant to the enforcement action subsequently undertaken. That proposition can be tested and proved by the fact that, as Mr. Seymour stated, most of the criminal investigations and prosecutions undertaken by the Respondent were against organisations which were never registered nor had qualified advisers under the regulatory scheme, so that the fact that the Respondent in other circumstances undertakes regulatory functions as a qualifications body would be immaterial. Secondly, to allow any such unregistered organisation to have recourse to the Employment Tribunal simply because it objected to the enforcement action being taken against it would be to open the proverbial floodgates, and in my view is outside the scope of the statutory provisions, which were designed to provide redress against discriminatory acts related to or arising out of the authorisation, qualification or recognition (et seq) needed for, or which facilitates, engagement in a particular trade or profession. Finally, I accept Ms. Robinson's analogy and comparison of the Respondent with the police. They too have a number of functions as a qualifications body, for example in relation to examinations for entry and promotion, and at the same time an obvious enforcement function, with significantly greater powers than the Respondent: yet there is no option for those aggrieved with their discharge of that function to complain to the Tribunal. For these reasons, I find that the provisions of s.53 Equality Act 2010 do not apply to the Respondent's investigation and enforcement actions from January 2017 onwards concerning the Claimant and/or his two companies; that the Tribunal has no jurisdiction to hear the Claimant's complaints in relation to that period and those actions; and that they too must be struck out.

22. If I was wrong in coming to that conclusion, I would have been minded to have struck out the complaints as being out of time, since the last date for interview under caution proposed by the Respondent of which I am aware was 6 June 2017, over a year before the Claimant's claim was presented, although I appreciate that subsequent interviews were suggested. In any event, in my judgment and for the reasons I have given, the whole of the Claimant's claim against the Respondent must be struck out.

Employment Judge Barrowclough

20 December 2018