2017 EWHC 1322 (QB)

Case No: HQ17X00165

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 June 2017

Before :

MASTER DAVISON

- -

Between :

DR THAMOTHERAMPILLAI NIMALRAJ	**Claimant**
- and -	
NHS THURROCK CLINICAL COMMISSIONING GROUP	**Defendant**

- -
- -

Mr Jason Coppel QC (instructed by **Taylor Wood Solicitors**) for the **Claimant**
Ms Fenella Morris QC (instructed by **Capsticks LLP**) for the **Defendant**

Hearing date: 22nd May 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Master Davison:

Introduction

1. Dr Nimalraj is a medical practitioner who was the Interim Accountable Officer of the Thurrock Clinical Commissioning Group ("the CCG"). He commenced employment in that role on 1 April 2013. At a meeting on 17 August 2016 he was dismissed with one month's notice. By letter dated 28 August 2016, that dismissal was confirmed. His last day of service was 17 September 2016. The issue that arises in this case is whether the dismissal was "because of redundancy". On that issue turns the question whether Dr Nimalraj is able to stand for election to the governing body of the CCG. By reason of the statutory provisions set out below, if he was dismissed because of redundancy, then he is eligible. But if he was dismissed for any other reason, then he is ineligible and will remain so until 17 September 2021.

Narrative

2. CCGs are the NHS Bodies which are responsible for the planning and commissioning of health care services for their local area. CCGs are clinically led. They were created pursuant to the Health & Social Care Act 2011 and commenced operations on 1 April 2013. Dr Nimalraj was elected to the governing body of the Thurrock CCG and served on the board from the outset. Paragraph 12(1) of Schedule 1A of the National Health Service Act 2006 provides that all CCGs must have an Accountable Officer, who is appointed by NHS England. The Accountable Officer provides executive leadership and is responsible for ensuring that the CCG complies with its duties and obligations. It is the most senior officer role within the organisation. Until February of this year the CCG did not have a permanent Accountable Officer. But when the CCG was first established on 1 April 2013 the role of Interim Accountable Officer was undertaken by Dr Nimalraj. Thus, Dr Nimalraj had two roles within the CCG: member of the governing body and Interim Accountable Officer. It was expected that he would, in due course, be permanently appointed to the latter role.

3. By letter dated 27 February 2014, the Chair of the CCG, Dr Deshpande, suspended Dr Nimalraj from his role as Interim Accountable Officer because of allegations that he had (a) cast two votes during the election process for membership of the board of the CCG and (b) had been working as a GP on a day when he was supposed to be working for the CCG as Interim Accountable Officer. An investigation followed. In the meantime, the role of Interim Accountable Officer was undertaken by the CCG's chief operating officer, Amanda Ansell. She was appointed (Acting) Interim Accountable Officer from 1 March 2014.

4. On 17 April 2014 Dr Nimalraj's suspension was lifted. Essentially, he was absolved of any wrongdoing. However, "areas of concern and development" were identified and it was agreed that a development plan would be drawn up to cover such things as time management, conciliation, governance etc. It was further agreed that for a period of two weeks (reviewable) Ms Ansell would continue to cover the duties of Interim Accountable Officer. However, Dr Nimalraj never in fact returned to that role. On 6 June 2014, he was interviewed for the substantive, permanent role of Accountable Officer. The CCG's interviewing panel recommended him for the job. But NHS England vetoed the appointment – as they were statutorily entitled to do. This was partly because of the recent internal investigation. The view of NHS England was that a number of actions had been put in place for personal development and there had been "insufficient time to see whether there has been adequate progress on this". The other reason was that Dr Nimalraj was judged (by NHS England) to have shown insufficient "insight, understanding or experience of senior management to fulfil the role". NHS England recommended that "current acting arrangements for the Accountable Officer continue with Mandy Ansell remaining in post".

5. There followed two strands of process. The first was that Dr Nimalraj raised a grievance with the CCG in relation to his non-appointment to the post of Accountable Officer and also in relation to Mandy Ansell. The grievance was not upheld and an appeal by Dr Nimalraj also

failed. That process was exhausted by July 2015. In January 2016, he instigated a complaint to the Parliamentary and Health Service Ombudsman. But this was not pursued.

6. The second strand of process was that in July 2015 NHS England took action to place conditions on Dr Nimalraj's inclusion in the Medical Performers List (which regulates whether and under what conditions a medical doctor can work in primary care in the NHS) and then, in September 2015, they reported him to the GMC alleging he was unfit to practise. Although conditions were initially placed upon Dr Nimalraj, he appealed to the First Tier Tribunal, which set them aside. That was in December 2016. The referral to the GMC was concluded after the investigation stage with no further action. That was in September 2016.

7. By around the last quarter of 2016, the suspension and then the processes instigated by Dr Nimalraj and by NHS England were exhausted or close to being so. Those had occupied the best part of 2½ years during which Dr Nimalraj had retained the title and salary of Interim Accountable Officer, although the actual role was being carried out by Mandy Ansell who throughout had been styled "(Acting) Interim Accountable Officer". To state the obvious, in the peculiar circumstance of this case, during this time the CCG had a requirement for two Interim Accountable Officers. In the period from February 2014 to April 2014, the requirement arose out of the fact of Dr Nimalraj's suspension. In the period from April 2014 onwards, the requirement arose out of the fact that the CCG felt unable to dismiss Dr Nimalraj because he had raised a grievance about his non-appointment to the substantive Accountable Officer role.

8. On 17 August 2016, there was a meeting between Dr Deshpande and Dr Nimalraj, attended also by a Human Resources Adviser. The meeting was to discuss Dr Nimalraj's continued employment as Interim Accountable Officer. The CCG was under pressure from NHS England to appoint a permanent, substantive Accountable Officer. In view of that, the stance taken by the CCG at the meeting was that the role of Interim Accountable Officer "should no longer exist". The interim role "had to go". Dr Deshpande is recorded as saying: "… you were interviewed for AO and NHSE did not endorse the appointment … and therefore would not move you into this role and therefore you were not allowed to continue in the role of Interim Accountable Officer." The upshot of the meeting was that Dr Nimalraj was dismissed. No redundancy payment was offered on the ground, explained at the meeting, that the "post would not be redundant as not a substantive role".

9. By letter dated 28 August 2016, Dr Deshpande confirmed to Dr Nimalraj that he was dismissed. The thrust of the letter was that because NHS England had vetoed Dr Nimalraj's appointment to the permanent role of Accountable Officer, the CCG "appeared to have no option but to end your employment as Interim Accountable Officer". The CCG was "coming under immediate pressure from NHS England to appoint a substantive Accountable Officer who it considers to be suitable". It was therefore "no longer practical" for Dr Nimalraj to remain as the Interim Accountable Officer – a fact he had appeared to accept at the meeting. However, at that time at any rate, Dr Deshpande was "very happy" for Dr Nimalraj to continue his governing board role as Clinical Lead. He was permitted to stay on in that role under a short term contract as an "office holder" rather than employee. That position, (as with all GP board positions), lapsed at the end of 2016.

10. It was Dr Nimalraj's intention to stand for re-election and he submitted an application. There was a vetting process during which concerns were raised about Dr Nimalraj's eligibility. The concern was that he was ineligible because Schedule 5 of the National Health Service (Clinical Commissioning Groups) Regulations 2012 list persons "disqualified from membership of governing bodies". By paragraphs 6 and 7 of the Schedule, those included:

> "6(1) A person who, has been dismissed within the period of five years immediately preceding the date of the proposed appointment, otherwise than because of redundancy, from paid employment by any of the following – ..
>
> (b) a CCG;

> 7. A health care professional (within the meaning of section 14N of the 2006 Act) or other professional person who has at any time been subject to an investigation or proceedings, by any body which regulates or licenses the profession concerned ("the regulatory body"), in connection with the person's fitness to practise or any alleged fraud, the final outcome of which was—..
>
> > (d) a decision by the regulatory body which had the effect of imposing conditions on the person's practice of the profession in question, where those conditions have not been lifted."

11. The CCG determined that Dr Nimalraj was ineligible to stand because of (a) his dismissal from the post of Interim Accountable Officer (which, it maintained, was not because of redundancy) and (b) the conditions placed upon Dr Nimalraj's continued inclusion in the NHS Performers List.

12. The second ground was withdrawn when the conditions on Dr Nimalraj's inclusion in the NHS Performers List were lifted. However, the first ground was maintained.

13. On 16 January 2017 Dr Nimalraj issued this Part 8 Claim seeking a declaration that on a true construction of Paragraph 6(1)(b) and the events which have happened he was not and is not disqualified from standing for election to the board because his dismissal was on the grounds of redundancy.

14. In February 2017, Ms Ansell was appointed to the permanent role of Accountable Officer.

Redundancy

15. The words "because of redundancy" in the 2012 Regulations are not further defined. The parties were agreed that "redundancy" should be given its ordinary, English language meaning. Both referred also to the statutory definition of redundancy contained in section 139 of the Employment Rights Act 1996. Mr Coppel QC submitted that it did not matter which definition was taken (though he submitted the first was correct); in each case the definition was satisfied. Dr Nimalraj was dismissed because of redundancy and he was therefore eligible to stand for the board. Ms Morris QC, with equal emphasis, submitted that neither definition was satisfied and so Dr Nimalraj was ineligible.

16. These are the definitions that were in play. The definition of "redundant" from the Shorter Oxford English Dictionary 6th Ed is:

> "Superfluous, excessive, unnecessary; having some additional or unneeded feature or part".

And of "redundancy" is:

> "The condition of being surplus to an organisation's staffing requirements; loss of a job as a result of this; a case of unemployment due to reorganisation, mechanisation etc."

17. Section 139(1) of the Employment Rights Act 1996 ("ERA"), in relevant part, is:
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> "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> have ceased or diminished or are expected to cease or diminish."

The submissions of the parties

18. The central submission of Ms Morris QC for the defendant was that the CCG required an Accountable Officer (and before someone was appointed, an Interim Accountable Officer), but Dr Nimalraj could not undertake that role because NHS England did not agree to his being appointed to it. That was the reason for the dismissal and that reason did not amount to redundancy. Redundancy was not the label which the CCG attached to the dismissal and nor was it the substantive or "underlying" reason. The reason for dismissal had to be looked at through the lens of all the relevant facts. These included that Dr Nimalraj had been given the interim role and training intended to bring him up to the standard required for the permanent job; but he had not attained that standard. That is why he was dismissed from the interim role. My attention was drawn to the dictionary definition of redundancy and to the wording of section 139(1)(b) ERA, both of which referred to the organisation or business's staffing "requirements". It was submitted that these definitions were not satisfied because the CCG had never at any stage required two Accountable Officers. At all stages, the requirement had been for one such person and that requirement had therefore not "ceased or diminished".

19. Ms Morris QC took two further points. First, (and in response to a question from me), she said that if redundancy was a reason for the dismissal, it was not the only one and it did not displace or "cleanse" (her word) any other causative reasons, which included the fact that Dr Nimalraj was not "up to the job" of Accountable Officer. Second, to the extent that there was or may have been a redundancy situation, that was not what caused the dismissal. What caused the dismissal was the decision of NHS England that Dr Nimalraj was not appointable.

20. Lastly, Ms Morris QC submitted that if the result was harsh to Dr Nimalraj, that was (a) simply the result of applying the words of a statutory instrument which allowed no discretion in the matter and (b) a reflection of the very high standards of probity expected from those who aspired to sit on the governing body of a CCG.

21. Mr Coppel QC for the claimant submitted that "redundancy" should be given a wide, purposive construction. The statutory intention was to exclude persons who were unsuitable either because of some other job or office which they held and which conflicted them out of the role of CCG board member or because of conduct issues. These were the mischiefs at which Schedule 5 was aimed. It was not intended to bring within its scope someone who had been dismissed for some anodyne, organisational reason. The court should simply apply the dictionary definition and ask, was Dr Nimalraj dismissed because he was "surplus to requirements"? If so, he was redundant within the meaning of paragraph 6 and should not be excluded from office as board member – a position embraced by the CCG itself until they changed their mind. He invited me to focus my attention on Dr Nimalraj's dismissal from the position he actually held. He was not the Accountable Officer. He was one of two Interim Accountable Officers. The job could be done, indeed was being done, by one person. Even if he had been the only Interim Accountable Officer, he would still have been "surplus to requirements" because a permanent Accountable Officer was to be, and was in the event, appointed. It did not matter whether the dictionary or the statutory definitions were taken; each was satisfied. In support of this he referred me to the well-known test set out in *Safeway Stores v Burrell* [1997] ICR 523.

Conclusions

22. "Redundant" and "redundancy" are words in ordinary, everyday use and also statutory constructs of employment law. Redundancy is a somewhat moveable and fluid concept, which is illustrated by the fact that in employment law the two statutory definitions are quite different. The section 139 ERA definition is set out above. In section 195(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, a dismissal for redundancy is one that is for "a reason not related to the individual concerned or for a number of reasons all of which are not so related" – the statutory purpose being to bring all employees affected by a proposal for collective dismissals within the requirements of the Act for consultation and notification. "Redundancy" and "redundant" take their colour from the context in which they are found. The parties submitted that I should take the ordinary, English language definition and I agree. The statutory purpose of Paragraph 6 of Schedule 5 of the National Health Service (Clinical Commissioning Groups) Regulations 2012 is not to confer on anyone a right to a redundancy

payment or a right to be part of a collective consultation exercise. The statutory purpose is to disqualify from standing for election to the board of a CCG those persons who have been dismissed in the previous 5 years for a reason other than what I might call "mere" redundancy. To put it another way, the purpose was to disqualify those whose dismissal reflected or might reflect adversely upon them. "Redundant" in that context was intended to mean simply "surplus to requirements" or "no longer needed" – a somewhat looser test than that set out in section 139 ERA.

23. It is clear that that definition is satisfied. Dr Nimalraj was dismissed because the CCG had two Interim Accountable Officers when the requirement for employees to do that work was one. If attention is focused on the recruitment of Ms Ansell to the substantive and permanent role of Accountable Officer, the analysis is no different. A new person was coming in and the person in the interim role was no longer required. That it was Dr Nimalraj's services as Interim Accountable Officer that were dispensed with in preference to those of Ms Ansell and that this was because he was deemed by NHS England to be not up to the job of permanent Accountable Officer does not detract from or qualify the fact that he was redundant. It is a commonplace of employment practice that the axe may fall on one person rather than another because their skill set and/or experience and/or attendance record (to take three examples) are judged by the employer to be inferior. That does not convert a dismissal for redundancy into a dismissal for something else. It merely explains and justifies why that person was chosen.

24. If the definition of redundancy in section 139 ERA is taken rather than the dictionary definition, it makes no difference to the outcome. Following the illuminating analysis of HHJ Peter Clark in *Safeway Stores v Burrell* [1997] ICR 523 (EAT) the questions are these (I quote from the Headnote): first, it had to be established that the employee had been dismissed, secondly, that the requirements of the employers' business for employees to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish, and, thirdly, that the dismissal was caused wholly or mainly by that cessation or diminution. Those conditions are satisfied in this case. The defendant's focus on the fact that the work to be done (i.e. the work of Accountable Officer) remained constant throughout was a classic (though commonplace) error of analysis. The statutory definition in fact focuses not on the work to be done but, rather, on the employees who do it. At the risk of repetition, in the peculiar circumstances of this case the CCG had two Interim Accountable Officers responsible for work which could (and normally would) be carried out by one person. If the CCG had let the situation ride until the actual appointment of Ms Ansell to the substantive role of Accountable Officer, they would still, at that point, have had two persons when the requirement was for one. In both cases, the requirement for employees to do work of a particular kind had ceased or diminished or was expected to cease or diminish. Dr Nimalraj's dismissal was caused by that state of affairs.

25. Dr Deshpande said in the 17 August 2016 meeting that "the post would not be redundant as [it was] not a substantive role". Although this point was not specifically taken by Ms Morris QC, for the sake of completeness I mention that this is irrelevant; see *Lee v Nottinghamshire County Council* [1980] IRLR 284 (CA). The fact that a job is temporary does not deflect the straightforward application of the redundancy definition to the facts; see also *Grunfeld, The Law of Redundancy, 3rd Ed at 131*.

26. This result accords with common sense and the justice of the case. On the material before me, there is no good reason to disqualify Dr Nimalraj from standing for election and Mr Coppel QC had a fair point when he said that the CCG had only lately and belatedly objected to his candidacy. Schedule 5 was not intended to set standards of absolute probity. That is clear from the fact that even those with certain criminal convictions are not disqualified; see paragraph 4 of the Schedule. But even if that <u>was</u> the standard, the independent bodies who have scrutinised Dr Nimalraj's conduct have not found him wanting in probity. Such objections as there may be to his standing are a matter for the democratic process of the election. There is no statutory obstacle and, subject to counsel's suggested wording, that is the declaration I will make.

27. I will make no determination on the legality of the objection based upon paragraph 7 of Schedule 5. The objection on that ground was withdrawn before proceedings were issued. In those circumstances, any ruling that I were to make would be superfluous and unnecessary.