



EMPLOYMENT TRIBUNALS

BETWEEN

MRS N LEEKS

Claimant

and

CAMBRIDGE UNIVERSITY HOSPITALS NHS FOUNDATION TRUST

Respondent

Heard at: Watford (by CVP video link)

On: 8- 9 September 2020

Before: Employment Judge Skehan
Ms Edwards
Ms Crosby

Appearances

For the claimant: In person on 08 September 2020, no appearance on 09 September 2020

For the respondent: Mr Sheppard, of Counsel

RESERVED JUDGMENT

1. The claimant's claim for disability discrimination contrary to the Equality Act 2010 against the respondent is unsuccessful and dismissed.
2. The claimant's claim for detriment arising from a protected disclosure contrary to the Employment Rights Act 1996 is unsuccessful and dismissed

REASONS

1. This litigation arises from the claimant's application for employment with the respondent as a 'Medical Equipment Library Technician' on 28 July 2017. The claimant was interviewed and given a conditional offer of employment by the respondent. The respondent withdrew the conditional offer of employment on 5 December 2017, following receipt of references from the claimant's previous employers.

Applications and miscellaneous matters

2. This final hearing was scheduled to start at 11am on 8 September 2020 by video CVP link. The hearing had been converted to a CVP hearing at late notice by the employment tribunal. Due to administrative difficulties, the hearing did not commence until 12 noon on that day.
3. At the outset of the hearing the employment tribunal asked the claimant about any reasonable adjustments that would be needed to allow the claimant to fully participate within the hearing. The claimant submitted that she was very tired and requested that the hearing be postponed. The respondent objected to postponement of the claim. The claimant's disabilities were acknowledged by the employment tribunal however, it was explained that the employment tribunal must act in accordance with the overriding objective to deal with cases fairly and justly. It was explained that the tribunal would allow the claimant breaks as required, however it did not appear to the tribunal to be in accordance with the overriding objective to postpone this matter further.
4. The claimant raised issues in relation to the bundle and complained that she did not have a hard copy bundle. The claimant submitted that the hearing should be postponed for this reason. The tribunal heard submissions from both parties in relation to the circumstances surrounding the provision of a hard copy of the bundle to the claimant. The claimant complained that she did not receive the electronic copy of the bundle until 8am that morning. It could be seen from the documentation provided that:
 - 4.1. The respondent provided a paginated hard copy of the bundle (as it then existed) to the claimant on 24 May 2019.
 - 4.2. The claimant provided a list and copies of additional documents she wished to be added to the bundle in response to an Unless Order made by the employment tribunal. These documents were paginated and sent with an updated index by post to the claimant by special delivery on 21 April 2022 to arrive the next day. Further, the respondent sent the claimant an email on 21 April 2020 with an electronic copy of the index and confirmation that the claimant would be receiving the additional documentation by post. The respondent received notification from the post office relating to the special delivery stating 'We're holding this item at Tooting DO. We've received a request not to deliver to the property your item is addressed to today. We'll attempt delivery as per the instructions we've received which is usually on the next working day.'
 - 4.3. They respondent wrote to the claimant on 7 May 2020 noting that the claimant was not accepting deliveries from Royal mail and/or has not collected the documents that had been posted to her. The respondent considered that it had discharged its obligations further to the case management orders sent the parties on 15 February 2020. However, to assist the claimant, an electronic version of the paginated additional (claimant's) documents were provided to the claimant.
 - 4.4. The respondent sent a further hard copy of the entire hearing bundle to the claimant on 21 August 2020 by Royal Mail Special Delivery to arrive with the claimant on 22 August 2020. The tribunal was referred to a tracking note stating 'sorry, we tried to deliver your parcel on 22-8-2020 but there didn't seem to be anyone in.'
 - 4.5. The respondent wrote to the tribunal and the claimant on 1 September 2020. It was noted that the claimant already had a paginated bundle in

hardcopy form save for some additional documents that the claimant sought to rely on.

- 4.6. On 8 September 2020, the morning of the hearing, due to late conversion of the hearing to CVP, the respondent emailed the claimant with access to an online file sharing site which contained copy of the paginated hearing bundle for use at the hearing.
5. The employment tribunal carefully considered the matters complained of by the claimant relating to provision of the bundle. The tribunal concluded that the claimant was provided with a paginated bundle in May 2019. The respondent had taken all reasonable steps to ensure that the claimant had a complete hardcopy bundle prior to the final hearing. The confusion in relation to the bundle has been caused by the claimant's apparent unreasonable disposal of the original bundle provided to her and/or failure to collect undelivered items from the post office. Further, it is reasonable to conclude that the claimant will be familiar with the documentation referred to in the final hearing, making navigation of an electronic bundle somewhat easier. It is reasonable in these circumstances to expect the claimant to utilise the electronic bundle provided by the respondent for use during the final hearing. When viewing this matter in light of the overriding objective to deal with the matter justly and fairly including avoiding unnecessary delay, the employment tribunal concluded no postponement should be granted for a reason connected to the claimant's possession of a paper copy of the bundle.
6. The employment tribunal revisited the issues to be determined by the tribunal. We referred to the case management summary prepared by EJ McNeil QC on 24 October 2018 and the parties agreed that the issues for the tribunal were set out therein. The claimant informed the tribunal that the list of issues was incomplete in that it should also include a claim for discrimination on the grounds of religion or belief. The claimant said that this was a claim contained within the original ET1 and should be included within the list of issues. Time was taken by the employment tribunal to revisit the ET1 in detail. The employment tribunal was unable to identify any claim for discrimination on the grounds of religion or belief within the claimant's ET1 and the claimant's submissions were treated as an application to amend her claim to include a claim for discrimination on the grounds of religion and/or belief.
7. The claimant's proposed amendments relating to religion or belief was not in writing for the tribunal to consider. The gist of the claimant's claim was that it was that the respondent was told that previous employment had been terminated for a reason connected to her religion and/or belief and this had tainted the withdrawal of her employment. The tribunal considered this application to amend in accordance with the provisions set out within *Selkent Bus Co Ltd v Moore UKEAT/151/96* and the presidential guidance. The tribunal considered the timing of the application, the explanation for any delay and the failure to include the allegations from the outset, the applicability of any relevant time limits, the nature of the amendment and the balance of prejudices between the claimant and the respondent. It was noted that the application for amendment was made on the first morning of the final hearing. This litigation was commenced in April 2018 and no reasonable explanation was provided for the extreme lateness of the application. There had been previous preliminary

hearings where no mention of a claim relating to religious discrimination has been made by the claimant. It was noted that the allegations arise from matters occurring in 2017 and the new claim is substantially out of time. The tribunal was not provided with any reasonable explanation for this extreme delay. In considering the balance of prejudice it was noted that should a new claim be allowed on the first morning of the final hearing, it would be likely that a postponement of the final hearing may be required to allow the respondent to properly answer the claim. The end result would be a further delaying of the final hearing and the further dulling of recollections relating to what happened in 2017. The tribunal found that there would be considerably more prejudice to the respondent where this additional claim to be included than there would be to the claimant were the application to be rejected. The employment tribunal refused to allow the claimant's requested amendments to ET1.

8. The tribunal discussed a proposed time-table for the hearing with the parties. The employment tribunal had read the witness statements prepared by the parties. The facts giving rise to this litigation were contained. The tribunal was expected to hear evidence from the claimant and one respondent witness. In accordance with the provisions of rule 45 of the Employment Tribunal rules, the employment tribunal told each party that it would be reasonable to keep cross-examination to one hour. The employment tribunal acknowledged that the time required for cross-examination depended upon the answers provided by the witness under cross examination and this timetable would be reviewed by the employment tribunal, if required, as the matter proceeded to ensure fairness.
9. Due to the late start and the above applications, the employment tribunal suggested that the parties may wish to take a short lunch break. The tribunal noted that this may allow the claimant to finish earlier if that was preferable to her. The claimant informed the employment tribunal that she wished to take a full hour for lunch, and this was agreed by the tribunal.
10. On resumption of the hearing following the lunch break the claimant told the employment tribunal that she was tired and dehydrated and that she wished for the claim to be postponed. For the same reasons as set out above, the tribunal refused the claimant's application for a postponement and the claim proceeded.
11. The claimant gave her evidence under affirmation and was asked to confirm her name and address by the tribunal. The claimant's written witness statement was taken as her evidence in chief and the claimant was cross-examined. During the course of the claimant's evidence she was referred to documentation within the electronic bundle. Although the employment tribunal had been provided with paper copies, in an attempt to assist the claimant, the employment tribunal judge also accessed and navigated the electronic bundle, located on a shared file within the respondent's solicitor's system. The employment tribunal clerk also accessed the bundle in this way and was able to share the CVP screen as requested during cross examination. It was noted that all of the documents to which the claimant was referred were, or should reasonably have been, familiar to the claimant and although slow, the employment tribunal was satisfied, taking all the circumstances into account, that the matter was conducted fairly and justly and in accordance with the provisions of the overriding objective..

12. At the conclusion of the claimant's evidence on the first day of the hearing there was a brief discussion between parties and the tribunal in relation to preparation for the second day of hearing. It was noted by the employment tribunal that while provision of an electronic bundle was deemed sufficient, it would be preferable for the claimant to have a paper bundle to speed up the process. The respondent agreed to investigate the possibility of providing a copy of the paper bundle to the claimant that evening. It became apparent to the employment tribunal that the claimant had not provided a residential address to the tribunal or the respondent. The claimant was unwilling to provide her residential address and chose to provide only a 'PO Box' address to the tribunal and the respondent for the purposes of attempting to deliver a further paper copy of the bundle. The parties were reminded that the second day of the hearing was due to commence at 11am to accommodate the claimant's disability.
13. On the morning of day two of the hearing, the claimant did not log into the CVP hearing at 11am or at all. The employment tribunal clerk attempted to contact the claimant by telephone but received no answer. The employment tribunal was provided with emails from the claimant sent at 10:23am and 10:42am. These emails contained a request for a stay/postponement of the hearing. Attached to these emails were the following documentation:
 - 13.1. A copy of an envelope addressed to the claimant with a sender stamp from a separate firm of solicitors;
 - 13.2. A statement of fitness for work dated 10 August 2020, stating that the claimant was not fit for work for one month due to acute chronic fatigue – undergoing investigation, Angina Bullosa, Haemorrhagica, Hallus hernia and symptomatic on tablets still, chronic cough;
 - 13.3. An internet speed test stating 'your Internet connection is slow. Your Internet connection should be able to handle one device at the time streaming a video. If multiple devices are using this connection at the same time, you may run into some congestion'.
14. The employment tribunal was satisfied that the claimant had notice of the tribunal hearing and all reasonable attempts were made by the tribunal to contact the claimant. The tribunal considered it in accordance with the provisions of rule 47 and the overriding objective to proceed to consider the claimant's application in her absence.
15. The tribunal revisited issues relating to the bundle, as set out above, in detail. The respondent's solicitors had been unable to provide a further hardcopy bundle to the claimant at short notice. It appeared to the tribunal that the claimant's unwillingness to provide a direct postal address had contributed to the difficulties in providing hardcopy documents to the claimant in the past. For the same reasons as set out above, the tribunal concluded that it was not in the interests of justice or in line with the overriding objective to postpone this matter to allow a further hardcopy of the tribunal bundle to be delivered to the claimant.
16. The employment tribunal did not consider that the claimant's allegations in relation to previous conduct of this litigation and alleged non-compliance with directions on the respondent's part as set out in paragraphs 3,4,5,6 ,7, 8, 9, 10 of the claimant's request for a postponement to warrant postponement of this

matter when considered in accordance with the provisions of the overriding objective. The employment tribunal considered the claimant's representations in respect of her slow Internet speed. It was acknowledged that access to the bundle had been slow on the previous day. However, this has been the case for all parties seeking to access the documents through the shared site. On the previous day, the claimant had logged into the CVP hearing, a further separate user within the claimant's household had also logged into the CVP hearing and the claimant had access (although slow) to an electronic bundle. Although progress was slow when accessing documentation, the connection was sufficient to allow the tribunal to deal with the matter fairly. The claimant had made no effort to log into the hearing on the second day of hearing. The tribunal did not consider the claimant's slow Internet connection to be sufficient to prevent the claimant from participating within the hearing or warrant postponing of the hearing when considered alongside the overriding objective to deal with the matter fairly and justly.

17. The employment tribunal noted that the proposed timetable had potentially limited cross examination of the respondent's single witness to one hour. The employment tribunal had indicated that this would be reviewed by the would be extended should it be in the interests of justice to do so. The Employment tribunal did not consider that the imposition of this initial timetable was sufficient reason for postponement of the hearing. Further time for cross examination would have been allowed had it been reasonably requested.
18. The tribunal considered the claimant's health issues and the fit note attached to the email. However it was considered that in light of the fact that the claim had been listed for CVP, removing the requirement for travel and all further requested adjustments short of postponement were provided where possible, a postponement would not be in line with the overriding objective.
19. The employment tribunal proceeded to consider the claim in the claimant's absence in accordance with the provisions of Rule 47 of the Employment Tribunal Rules. The employment tribunal heard evidence from Mr Armstrong. His witness statement was accepted as his evidence in chief. Mr Armstrong was not cross-examined as the claimant was not present, but the employment tribunal asked questions to clarify their understanding of the evidence. The employment tribunal heard oral and written submissions from Mr Sheppard. The claimant was not present and did not provide any submissions, however the tribunal considered the entirety of the issues to be determined in accordance the applicable statutory and case law framework. The tribunal also considered the comments within the claimant's witness statement.

The Facts

20. On 28 July 2017, the claimant applied for the position of Medical Equipment Library Technician' with the respondent by filling in and submitting the respondent's application form.
21. The application form contained an equal opportunities section. Within this section, the claimant indicated that she considered herself to have a disability and described her disability as a 'long-standing illness or health condition'. Within the main part of the application form under the heading of 'Disability', it is stated that:

'The Trust is a 'two ticks' employer. This means that if you consider yourself to have a disability AND fulfil the essential criteria listed on the person specification for the post the Trust is committed to offering you an interview. Please tell us if you consider yourself eligible and provide details of any adjustments/adaptions you may need during the application or interview process'.

In response, the claimant confirmed that she considered herself to have a disability and said, in relation to special arrangements interview, that

'I have foot muscle problems, consequently I am unable to wear trendy smart interview shoes hence, if invited for interview, I would require a compassionate understanding of my footwear appearance by the interview panel '

22. Within the application form the claimant also gave considerable detail relating to previous employers dating back to January 2000. In particular:

22.1. The claimant wrote that, 'on 24 May 2010 I made whistleblowing disclosures about uncompleted 1985 BTEC Higher National Certificate Medical Lab Science studies of ... to Pauline Carol Lewis the St. George's Healthcare NHS Trust ('St. George's') local counter fraud officer, following which I was punished with dismissal on 21 June 2011accusing me of carrying out misconduct actions of unauthorised access to HR employee files ... I was struck off the HCPC register on 31 July 2015

22.2. The claimant, under the heading 'current job, course or other main activity' gives details of her employment with King's College Hospital NHS Foundation Trust ('Kings College') between 15 February 2016 and July 2017. As this is a 'current employment' box on the application form, there is no request to provide any 'reason for leaving'. There is no information relating to the claimant's employment with King's College provided within the application form would indicate that her employment with King's College was terminated for any reason.

22.3. The claimant gives details of employment with Norfolk and Norwich University Hospitals NHS Foundation Trust ('Norfolk and Norwich') between 1 April 2014 and 20 December 2014. Under 'reason for leaving' the claimant writes: 'non-conformation of/in post, following completion of a six-month of a possible nine month probationary period of employment. The job I accepted was offered on a six-month probationary employment, that was due to end in November 2014 but was later extended to a December 2014 termination.

22.4. The claimant gives additional details relating to her employment with St. George's between 1 March 2005 and 20 June 2011. Under 'reason for leaving', the claimant repeats the information set out above.

22.5. The claimant also gives details of a large number of potential referees within the application form.

23. Mr Armstrong told the tribunal that he conducted the shortlisting process with Ms Cawthorne. We were referred to documentation showing that the claimant scored quite highly within the shortlisting exercise scoring 12 out of a possible 15 in relation to essential criteria. Mr Armstrong was aware that the claimant had been previously dismissed for allegations of misconduct from St. George's. He considered that this would need to be explored further at the interview

together with the gaps within the claimant's employment history. It was noted that the claimant had been struck off by the HCPC, but this was not considered relevant for the post being applied for by the claimant.

24. The claimant met the respondent's person specification and as the claimant had declared a disability she was offered an interview in line with the respondent's 'two tick' policy. Mr Armstrong was aware that the claimant had indicated she was disabled because she had been awarded an interview under the 'two tick' process. He had also seen the claimant's application form comments relating to 'foot muscle problems' as set out above.
25. Mr Armstrong did not have access to the equality and diversity monitoring section of the application form at any stage during the recruitment process. Mr Armstrong told us that it is possible he may have been provided with a copy of the diversity and monitoring form as part of the pack of information provided to him following the decision to withdraw the claimant's offer of employment, however he could not recall if that was the case. We concluded on the balance of probability that Mr Armstrong did not have access to or knowledge of the contents of the claimant's diversity and monitoring form prior to making his decision to withdraw the conditional offer of employment.
26. Mr Armstrong also had, prior to the interview seen the claimant's application form containing references to the claimant's reference to a 'whistleblowing' incident within St. George's as set out above. Mr Armstrong told the tribunal that he was not concerned about previous whistleblowing on the claimant's part at St. George's as the respondent tries to promote an open and honest culture and supports staff in raising concerns that they may have.
27. The claimant was one of three individuals interviewed for the role. The claimant attended an interview on 17 August 2017 and was interviewed by Mr Armstrong, technical services manager and Ms Cawthorne.
28. Mr Armstrong said that the claimant appeared keen to explain what happened during her previous employment with St. George's during the interview. There was also discussion relating to the claimant's dismissal from Kings College. Mr Armstrong said that the claimant told him during the interview that she was dismissed because she wanted to pray at certain times of the day and he took the claimant's explanation at face value. The claimant says that she informed the interviewing panel that King's College had summarily terminated her contract of employment on trumped up allegations of religious misconduct of failure to recognise a female Church of England chaplain who was driving away worshippers from a multifaith public access spiritual sanctuary room for religious minorities such as Jews, Buddhists, Janists and other non-Moslems and non-Christian groups. During the course of cross-examination the claimant told the tribunal that during the interview she spoke of going to spend time in the sanctuary during her statutory break and that she didn't refer to 'prayer time'.
29. The tribunal concludes on the balance of probabilities that following the exchange between the claimant and the interview panel relating to her employment with King's College, Mr Armstrong was genuinely left with the impression that the claimant's employment had been terminated by Kings College because she wanted to pray at certain times of the day.

30. Mr Armstrong and Ms Cawthorne both agreed that the claimant had interviewed very well and that she was the best candidate. On 24 August 2017, Mr Armstrong called the claimant and made a conditional offer of employment. We were referred to the respondent's internal documentation. The job offer was conditional upon satisfactory pre-employment checks including reference checks, DPS checks where applicable, occupational health services and ISQ where applicable. This offer was repeated in writing by letter from the respondent dated 30 August 2017 confirming that the offer is subject to a satisfactory reference from current or most recent line manager and additional satisfactory references to cover the past three years of employment history.
31. The respondent requested references from the contact names provided by the claimant covering the previous three-year period in line with their normal policy. The respondent received the following references from the claimant's previous employers:
- 31.1. Ms Loughrey from Matchtech where the claimant worked as a local between 2 March 2015 and 2 April 2015. This reference confirms that the claimant was contracting through Matchtech as a locum biomedical scientist between those dates.
- 31.2. Ms Kerry from Norfolk and Norwich relating to the claimant's employment between May 2014 and December 2014. This reference stated that the claimant was 'dismissed at the end of probation periods due to not meeting the required standard'. This reference had been filled in in detail. The form provided for the referee to tick 'outstanding', 'good', 'average', 'poor' or 'unable to comment' in relation to 16 separate headings and then provided space for the referee to give further explanation. Ms Kerry recorded the claimant's performance as 'poor' in relation to theoretical knowledge, practical ability/technical skills, clinical skills, willingness to learn, self-organisation skills, contribution to the team/department, performance where there were challenges/constraints, ability to handle responsibility, leadership qualities, interpersonal skills, rapport kindness and attitude towards colleagues, relationship with line managers and overall performance. Ms Kerry ticked 'average' in relation to the claimant's punctuality. Ms Kerry ticked 'unable to comment' in relation to the claimant's relationships with patients and relatives and the claimant's relationships with external agencies and organisations. The reference indicated that the claimant's overall performance was poor and the reference was provided on the basis of close observation of the claimant. The referee indicated that she would not re-employ the claimant in a similar role and she would not recommend the claimant for the post. The part of the form relating to sickness record was left blank.
- 31.3. Ms Gibson from Norfolk and Norwich Hospital relating to the period from May 2014 to December 2014. This reference stated 'dismissed on the grounds of capability from her post as a biomedical scientist (Band 5) due to poor performance during the probationary period. The referee indicated that she would not re-employ the claimant in a similar role. The part of the form relating to sickness record was left blank.
- 31.4. Ms Sarmin in relation to the claimant's employment with King's College relating to the claimant's employment between February 2016 in

July 2017', stated that the claimant had been dismissed from her employment due to conduct. The part of the form relating to claimant's sickness record was filled in as set out below, but the remainder of the form was blank.

32. On consideration of the references, Mr Armstrong considered that the information provided by the two referees from Norwich and Norfolk was different from that provided by the claimant on her application form. Further, claimant should have declared on her application form that she had been dismissed due to conduct from Kings College. Mr Armstrong concluded that the claimant had not been truthful in her application form and the respondent had not been provided with satisfactory references from her most recent line manager and satisfactory references to cover the past three years of her employment history as required within the conditional offer of employment.
33. Mr Armstrong along with Ms Barnett commenced the withdrawal of conditional offer procedure. This was conducted in accordance with the respondent's written procedure and we were referred to the relevant documentation. The first step within this procedure is for the appointing officer to request that the conditional offer is withdrawn. The appointing officer is required to discuss this with their divisional head of workforce and complete the withdrawal of conditional offer – manager application form. This is then sent off for approval by the respondent's head of resourcing. Mr Armstrong spoke with Libby Cook being the divisional head of workforce. Miss Cook enquired whether or not Mr Armstrong had explored all referees and the basis for withdrawal. Mr Armstrong explained that the basis for withdrawal was on multiple unsatisfactory references. The withdrawal request was thereafter approved by the nurse recruitment manager.
34. Mr Armstrong made efforts to contact the claimant to inform her of the decision several times by telephone but was unable to make contact. Mr Armstrong's attempts are referred to in a subsequent email of 2 November 2017 where he requests that the claimant contact him by telephone. The claimant says that prior to receiving the decision she made attempts to contact Mr Armstrong, but her calls were not returned. It is possible that the claimant made these attempts as she has claimed. It does not have any bearing on the issues to be determined by the tribunal and the tribunal makes no adverse credibility findings relating to the claimant arising from this evidence.
35. Mr Armstrong and the claimant managed to speak on 9 November 2017. Mr Armstrong explained to the claimant, in person, the reason for withdrawal of her conditional offer of employment was that the references that had been received did not meet the respondent's standards and indicated concerns over previous dismissal and previous performance. We were referred to Mr Armstrong's written record of this conversation. This records that the claimant was frustrated with the outcome and requested to see the references. Mr Armstrong explained that he could not show the claimant the references and that the employer followed a strict process which meant he was unable to reconsider. The claimant was informed that any concerns should be raised with recruitment when the claimant received the formal letter. On 5 December 2017 Mr Armstrong emailed the claimant a letter confirming withdrawal of the conditional offer of employment. This letter confirms that the reason for

withdrawal was because the references received not meeting the respondent's expected standards.

36. The employment tribunal asked Mr Armstrong about the absence records included within the reference provided Ms Sarmin of King's College. Mr Armstrong told us that he did not consider the claimant's previous absence records to be an issue or noteworthy and it played no part in his decision to withdraw the conditional offer of employment. In considering this matter the employment tribunal noted that there may be an error in the reference provided by Ms Sarmin, in that the absence record refers inter alia to absence between 26/04/2017 and 31/05/2017 recorded as an absence of 6 days. It may be that there is an error in the dates recorded by hand or alternatively an error in the calculation of the length of absence. The employment tribunal spent considerable time examining this issue and finds on the balance of probability that the respondent genuinely did not consider the claimant's previous absence records disclosed by King's College to be an issue and they played no part whatsoever in Mr Armstrong's decision-making process.
37. For the sake of completeness, we note that there was some confusion during the recruitment process in relation to other pre-employment requirements such as the requirement for an exposure prone procedures (EPP) test and the requirement for HIV blood test. Considering the entirety of the evidence available we conclude on the balance of probability that this confusion had no bearing whatsoever on the respondent's decision to withdraw the claimant's conditional job offer.
38. The claimant alleges that the job offer was withdrawn by the respondent on account of her disabilities both historical and current impairments as she had indicated on her application for, her occupational health declaration and a long-term disability related sickness absence during the King's College employment period. The claimant complains that Ms Kerry's references dishonest, inaccurate, misleading and discriminatory on the grounds of her disability.

Deliberation and findings

Disability Discrimination

39. The employment tribunal referred to the claimant's impact statement of 24 October 2018 and concluded that the claimant had a disability within the meaning of section 6 (1) of the Equality Act 2010 (EqA)

Did the respondent know that the claimant with a disabled person at the time that it took the decision not to offer her employment?

40. Mr Armstrong was aware, prior to the claimant's interview that the claimant was a disabled person as the claimant had been awarded an interview under the 'two tick' policy referred to above. Therefore we find on the balance of probability that Mr Armstrong was aware that the claimant suffered an unknown long-term illness or condition due to the claimant's reference to the existence of a disability. We have found that Mr Armstrong did not have sight of the diversity monitoring form and the only specific information known to Mr

Armstrong, prior to taking the decision to withdraw the claimant's conditional offer of employment, related to the claimant's leg muscles and footwear as set out above.

41. Did the respondent not offer the claimant employment because of her disability?
42. Mr Armstrong was aware of the claimant's disability to the extent set out above prior to the claimant's interview. The claimant performed well at interview and Mr Armstrong made a conditional offer of employment to the claimant in the knowledge that she was a disabled person and with the specific knowledge set out above. We consider it unlikely that information known to Mr Armstrong prior to making the offer would form the basis of withdrawal of that offer. In light of the negative references received by Mr Armstrong post interview, we conclude, the balance of probability, taking into account the entirety of the information, that the claimant's disability played no part whatsoever in the withdrawal of the conditional offer of employment. The sole reason for the withdrawal of the conditional offer of employment related to the content of the references received from the claimant's previous employers.
43. The burden of proof provisions in the EqA 2010 are set out in section 136(2) and (3) and states: "(2) If there are facts from which the court [or tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision." This is effectively a 2 stage approach: Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent. Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?. In these particular circumstances the employment Tribunal concludes that the claimant has not been able to show a prima facie case. Taking the entirety of the circumstances into account the tribunal concludes that the reasons set out above that the claimant's claims are unsuccessful and dismissed.
44. The claimant, within her witness statement makes reference to the cases of West v Yorkshire Ambulance Service NHS Trust ET/1801740/2015 and Pnaiser v NHS England & Anor UKEAT/0137/15/LA these cases relate to scenario where a job offer was withdrawn on the basis of a references highlighting long-term absence. These cases do not assist the claimant as we have found it more likely than not that Mr Armstrong did not consider (either properly or mistakenly) the information provided by the Kings College relating to the claimant's previous sickness absences to be significant in any way. The claimant's previous absence from work was not a factor in Mr Armstrong's decision to withdraw the claimant's offer of employment.
45. Turning to the content of the references received relating to the claimant's previous employment at both St. George's and Norwich in Norfolk hospitals, the gist of the claimant's argument appears to be that the content of the reference relating to the claimant's poor performance and/or conduct has been tainted by disability discrimination. The content of the references is created by third party referees is not an issue for this tribunal. We have looked at how these references were treated by the respondent on receipt. There is nothing on the face of the references that has been referred to by the claimant or identified by the employment tribunal that could reasonably raise any concern on the part of a third-party recipient relating to disability discrimination. We have

expressly addressed and discounted any potential taint by reference to previous long-term absence. We accept on the balance of probabilities that Mr Armstrong, on receipt of these references considered them both to raise issues in relation to the information/ lack of information provided on the claimant's application form and also to not meet the respondent's required standards. We note that Mr Armstrong followed and documented his following of the respondent's written policy in respect of the withdrawal of conditional offers. Care was taken by the respondent to ensure that a decision was not unduly reliant upon a single reference. In the claimant's case the decision to withdraw her conditional offer of employment extended to multiple references, raising serious issues relating to the claimant's ability to perform the role that not been apparent to the respondent previously from either the claimant's application form, or the interview process. The claimant had not referred to a conduct dismissal from Kings College on her application form and that was a serious omission. Further, the impression given to Mr Armstrong during interview was at odds with the information provided within the reference. The employment tribunal is unable to identify any potential arguable allegation of unlawful disability discrimination arising from the respondent's withdrawal of the conditional offer of employment made to the claimant in accordance with the respondent's internal policies.

Protected interest disclosure

46. We note the provisions of section 49B Employment Rights Act 1996 relating to the health services and in particular the provision of section 49B(7)(e) including NHS foundation Trusts. This legislation prohibits an NHS employer from discriminating against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.
47. In the claimant's circumstances, she had openly told the respondent on her application form that she made a protected disclosure to St. George's Hospital relating to the qualifications/lack of qualifications of a former colleague. Further, during the interview, the claimant discussed her alleged protected disclosure. Mr Armstrong told the tribunal that he was not concerned about the concerns that the claimant had raised at St Georges Hospital as the respondent tries to promote an open and honest culture and he encouraged staff in raising any concerns that they may have. We conclude that it did 'appear to the respondent that the claimant made a protected disclosure' and the claimant does qualify for protection under the legislation.
48. We must go on to look at causation and whether the claimant has been discriminated against because of that protected disclosure. Mr Armstrong expressly tells us that the claimant's previous protected disclosure had no negative influence upon his decision-making process. The claimant disclosed the existence of a previous protected disclosure in writing and discussed this at interview. The claimant performed well at interview and a conditional offer of employment was made by Mr Armstrong to the claimant in the knowledge that she had made a protected disclosure. No further information relating to protected disclosure was provided following the making of the conditional offer. We therefore find on the balance of probability that the claimant's previous protected disclosure played no part whatsoever in the respondent's decision to

withdraw the conditional offer of employment. The conditional offer of employment was withdrawn for the reasons relating to the references received set out above.

49. For the reasons set out above the claimant's claims are unsuccessful and are dismissed.

Employment Judge Skehan

Date: 3 October 2020

ORDER SENT TO THE PARTIES ON

23/12/2020

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FOR THE TRIBUNAL OFFICE