



# THE EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Dr S Saiger

- v (1) NHS England  
(2) NHS Trust Development  
Authority/ Monitor operating as NHS  
Improvement  
(3) Hunter Healthcare Resourcing Ltd

**Heard at:** London Central

**On:** 8, 10, 11, 12, 15 and 16 January  
2018

**Before:** Employment Judge JL Wade

**Members:** Mr T Robinson  
Mr J Carroll

## Representation:

**Claimant:** Mr R Powell, Counsel  
**First Respondent:** Mr C Stone, Counsel  
**Second Respondent:** Mr A Sugarman, Counsel  
**Third Respondent:** Ms M Bayoumi, Counsel

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. The Respondents did not subject the claimant to detriment, including denying her the loss of a chance to be shortlisted for the roles applied for.
2. The Tribunal does not have jurisdiction to consider her claim under sections 47B(1) and 48 of the Employment Rights Act 1996, but if it had, the claimant did not suffer detriment.
3. The "*Kratzner* defence" does not apply to deprive the Tribunal of jurisdiction.

4. There is no chance (0%) that the claimant would have been short listed or appointed to the roles she applied for.

## REASONS

- 1 The claimant applied for two senior roles with the first and second respondents jointly. Her application was dismissed at the first sift by the third respondent, a recruitment agency which had been engaged to assist. She says that the reason why her application was rejected was that she was a notorious whistle-blower who was well known for bringing discrimination claims against NHS Trusts. She also complains about an alleged detriment which occurred after the decision not to progress her application had been made.
- 2 At a Preliminary Hearing on 3 January the tribunal struck out claims that the second and third respondents had themselves directly decided to eliminate the claimant from the process. The issues which proceeded are as set out below.

### The Issues

- 3 The list of issues referred to a time limit issue but this was not argued.

#### ***Jurisdiction***

3.1 Is the claim within the scope of the Tribunal's jurisdiction: *Kratzner v R+V Allgemeine Versicherung AG* C-423/15?

3.2 Is the claim under section 47B(1) and 48 of the Employment Rights Act 1996 within the tribunal's jurisdiction as Dr Saiger was a job applicant, not an employee or ex-employee of any of the respondents, at the material time?

#### ***Liability: Sections 55, 39(3) and 27 of the Equality Act 2010***

3.3 Did Dr Saiger do protected acts? It is not seriously contended that her earlier litigation did not contain protected acts.

#### ***Third respondent***

3.4 Did Mr Simpson victimise Dr Saiger? Was the effective cause of his decision not to long list, whether consciously or unconsciously, that the claimant had done a protected act?

3.5 It was not seriously contended that this was not a detriment.

***First respondent***

3.6 Did Ms Bullers victimise Dr Saiger?

3.7 Was the effective cause of her comment about the claimant's CV, repeated by Mr Simpson, whether consciously or unconsciously, that the claimant had done a protected act?

3.8 It was not seriously contended that this was not a detriment.

***Second respondent - agency***

3.9 Was the relationship between Hunter Healthcare Resourcing Ltd and NHS Improvement one of Principal and Agent within the meaning of section 109(2) of the Equality Act 2010? The first respondent admits that the third respondent was its agent.

3.10 If the claims under sections 55, 39(3) and 27 EqA are not upheld then, in the alternative:

***Whistle Blowing***

3.11 Was the failure by Mr Simpson to long list on the ground of Dr Saiger's protected public interest disclosures?

3.12 Was the action of Ms Bullers on the ground of Dr Saiger's protected public interest disclosures?

***"Loss of Chance"***

3.13 What is the percentage chance that the Dr Saiger would, but for the alleged unlawful act of Mr Simpson, have been (a) shortlisted for interview, and (b) offered employment with either the 1<sup>st</sup> or 2nd Respondent?

**The Evidence**

4 We heard from the claimant who left the hearing after her evidence had a concluded. We also heard from Ms Christine Perry, retired Director of Nursing at Royal Cornwall Hospitals NHS Trust, who line managed the claimant in 2016.

5 For the third respondent, we heard from Mr Matthew Simpson, Associate Partner and, for the first, from Ms Helen Bullers, Acting Director of People and Organisational Development. As background, we read the statements of recruitment panel members who did not attend to give evidence because the direct claim against them had been struck out on 3 January: Professor Jane Cummings (Chief Nursing Officer, NHS England), Ruth May (Executive Director of Nursing of NHS Improvement), Anne Rainsberry (former London Regional Director), Anne Eden (Executive Regional Managing Director (South) of NHS

Improvement) and Stephen Russell (Executive Regional Managing Director (London) of NHS Improvement).

## The Facts

6 The claimant qualified as a State Enrolled Nurse (Mental Health) in 1988 and has had a long and varied career working mainly in England for a variety of Trusts; she continues to work both within the NHS and in other similar roles and expressed to us her strong dedication to it. She gained a PhD in Strategic Leadership and Change, Cultural Philosophy and Information Technology in 2008 following which a number of her roles have been in clinical governance, quality assurance and patient safety. She is a graduate of the Kings Fund Nurse Leadership programme and went to Australia on an associate visiting professorship in 2013.

7 After some debate, the parties agree that, whilst they are associated with one another for a variety of purposes, the trusts are separate employers. This means that because the claimant had never worked for either respondent before, she was a job applicant for the roles in question.

8 Whilst varying in small ways from trust to trust, nursing job titles, the experience they reflect and status they carry across the NHS are recognisable by an experienced recruiter reading a CV. Moving up from the senior ward post of matron the roles are:

a. *Associate/ Assistant Director of Nursing.* S/he will frequently hold responsibility for specific subjects such as governance and will take responsibility for reporting to the board on that subject. They may deputise for the chief nurse when s/he is away. They do not sit on the board.

b. In larger Trusts, there can be a *Deputy Director/ Deputy Chief Nurse.* They do not sit on the board.

c. *Chief Nurse/Director of Nursing.* Every Trust has the chief nurse on the board. We note that in 2014 the claimant's tribunal claim related to the failure to appoint her to this role and the tribunal's conclusion was that there was no chance that she would have been appointed although she was victimised in the process.

d. *Deputy Regional Chief Nurse.* Whilst not sitting on the board in the region, this post is equivalent to board level because they would have sat on the board in their previous role. Between the Chief Nurse and the Deputy Regional Chief Nurse there is sometimes a "*patch*" director with responsibility for a sub-division of a region.

e. *Regional Chief Nurse.* There are four in NHS England and so these are amongst the most important nurses in the country. There are four equivalently senior roles for the regions of NHS improvement. The two organisations are distinguished by the fact that one is the provider and the other the commissioning organisation.

f. *Regional Chief Nurse for NHSE and NHSI.* These are the two roles in question in this case. They were recruitments to the South and the London regions and spanned both NHS England and NHS Improvement so that they were senior to the Regional Chief Nurse roles.

g. *National Chief Nurse and Deputy Chief Nurse.* Jane Cummings is the Chief Nurse for England and NHS England. Ruth May is an Executive Director of NHS Improvement, the most senior nurse in that organisation and the second most senior nurse in the country.

9 By way of scale, the South and the London regions each cover about 150,000 nurses and have budgets running into billions of pounds.

10 Looking at the claimant's CV, it is a fact that she has very little experience at board level in an NHS organisation. The exact extent of her experience and aptitude can of course be argued indefinitely, and there will have been times when, as an associate director, she acted up and attended board meetings, often to discuss the specialist issues which she was responsible for. This is not the same as having a board level role. Her most recent chief nurse experience was between 2003 and 2005 when she was Director of Nursing at Langbaugh PCT, a small PCT consisting of four community hospitals served by about 1,000 nurses.

11 Also, the majority of her work in the last ten years has been in short interim roles at associate and deputy chief nurse level. This is probably not for want of trying, but that this is the case.

### ***The claimant's earlier litigation***

12 On 28 August 2007 and 29 May 2008 the claimant, who was an assistant director at the time, issued proceedings against North Cumbria Acute Hospitals NHS Trust and others. She was successful in her claims of race discrimination and victimisation. Despite the predictions of the EAT at the time, she has not since made it to a chief nurse role.

13 On 2 April 2014 the claimant issued a victimisation claim against the same Trust, the NHS Trust Development Authority (the second respondent in this case) and the recruitment advisers, Odgers. The findings against the first two respondents were overturned at the EAT. The victimisation finding against Odgers was not appealed although the tribunal decided that there was no prospect that the claimant would have been recruited to the chief nurse post in question. This litigation concluded in mid-2017.

14 The claimant says that Ruth May knew of the tribunal proceedings and assumes that this would be a negative thing. She says that she contacted her to talk about the behaviour of the main perpetrator, Peter Blythin, but there is no evidence of this and the claimant did not provide details in her witness statement or ET1. Ms May and Mr Blythin did not work for the same organisation at the same time. Jane Cummings also held roles in the North West during this time and the claimant says she would have known about her claims.

15 The claimant did not disclose in her pleadings the fact that she has brought two other victimisation claims. She explained that since these were not against NHS organisations she did not consider them relevant.

16 In January 2015 the claimant's company, SM Saiger Ltd, entered into a contract with the third respondent. This was only a payroll arrangement and Hunter did not act as her recruitment adviser as she was not a recruitment candidate or a direct contractor for Hunter. We accept that there were no notes about the claimant on Hunter's database although we find it surprising. Whilst we would expect them to be careful to create database entries for all possible recruits who they came into contact with, nothing has been found despite enquiries during disclosure. Also, Mr Simpson took the trouble to go into the office during the hearing to double check the position and said that all he could find was a payroll entry. We accept that Hunter held no record of the claimant's history and therefore no record of her litigation history.

17 The claimant says that at this point she verbally told Ben James, the managing director of Hunter, the history of her career and litigation in the NHS and so assumed that when she had contact again, this time with Matthew Simpson, he knew all about it. Mr Simpson denied that Mr James passed on any information.

18 On 25 January 2016 the claimant started an assignment as Associate Director of Clinical Governance at the Royal Cornwall Hospitals NHS Trust. She had overall accountability to the Director of Nursing, Ms Perry, who sat on the board. Her salary was the equivalent of £65,000 per annum. The role was temporary.

### ***Recruitment by NHSE and NHSI***

19 In early 2016 Hunter Healthcare, the third respondent, won a contract from the first respondent, NHS England, to search for regional chief nurses for the London and the South regions. The contract was signed between the parties in February 2016 with Mr Simpson, Associate Partner, leading on the project. He had experience in the NHS and had headed the recruitment function for Monitor, the second respondent. 99% of his contact during the recruitment process was with Helen Bullers, NHS England Acting Director of People.

20 The process was quite unstructured compared to some recruitments and there was no application form. Candidates were to submit a CV and there was to be a covering letter; it was not stated that this had to demonstrate the

competencies required for the role and so the applicants were left to decide what to write. The third respondent's search proposal highlighted that they would be looking first at the candidate's CV. This was appropriate because they were recruiting from a very small pool of very senior and well-known nurses who needed already to be working at high level if they were to be shortlisted.

21 The claimant did not apply at this stage and a longlist of candidates was produced by Mr Simpson. There was a small amount of contact between himself, Ms May and Ms Cummings, for example as to whether a particular candidate should be encouraged to apply. He had asked whether, given his particular experience, it was worth his while applying and they responded positively that it was. All the candidates were allowed to make contact in this way; when she became involved the claimant did not do so.

22 The decision was then made that rather than recruit to this post, NHS England would join forces with NHS Improvement and recruit jointly so that the regional nurses would have both a provider and a commissioner remit. Only one of the organisations would be the employer; which was yet to be decided.

23 A new job description was approved and an advert went out. The first criterion on the extensive person specification required "Significant experience as a senior nurse, experience at board level or equivalent..." The salary was to start at £131,000 to reflect the seniority required. This was considerably more than the claimant had ever earned.

***The claimant enquires about the roles***

24 In June 2016 the claimant telephoned Mr Simpson in response to the advert. They had a conversation and he sent her the job description and person specification. He must have told her to send a CV and cover letter. She said in evidence, for the first time, that he said that she sounded "ideal for the job", although when pressed she pulled back from that, only to assert it again later. He says that he very rarely turned the candidates away at that stage, preferring to look at their CVs as part of the selection process, but he would not have said that she was ideal if she told him about her experience because she had not had the right senior roles for this job. We find his version more credible.

25 He recalls her asking who was on the selection panel and he was surprised by this because it is an unusual question and rather presumptuous. He supplied the information and so the claimant knew from then onwards that Jane Cummings and Ruth May, who she believed would have a view about her earlier litigation, were involved. The claimant says that he volunteered the information but there would be no reason for that because it is an unusual question at the first stage. The claimant does not suggest that she discussed her litigation history although she could have asked his advice about how to refer to it. If she had been intent on setting herself up to fail she could have put the information in her covering email and CV to make sure it was seen, but neither mentioned it.

26 Before she sent it off, the claimant discussed her application with Chris Perry who thought that she was a “credible candidate”. She did not ask Ms Perry’s advice on the final CV. Ms Perry says that if the claimant had asked advice, she would have advised her to beef up any information about her board level experience.

27 The CV showed that the claimant had worked at director level only once in recent years, between March and April 2012 when she worked as an interim as Director of “Nursing and Governance” at NHS Outer North London though this was not a board level chief nurse post. At one point the claimant said that if she known that board level experience was so crucial amongst the many other points on the person specification, she would have known not to apply but later on she disagreed with this statement. The claimant’s CV did not demonstrate that she had it, and her covering letter was ambivalent about it.

***The claimant applies for the roles***

28 On 24 June 2016 the claimant sent the third respondent her CV with a covering letter. Although she said the opposite in her statement, she did not show Ms Perry the covering letter. The respondent says that the motivation for this was that Ms Perry would have dissuaded her from mentioning the previous litigation. The omission was ill-advised because the letter is not very readable or well-organised and it does spend about half of the time talking about the litigation without clearly explaining why. All in all, it was not a persuasive document. However, Ms Perry was very strongly supportive of the claimant and we are not sure that she would have tried to persuade her to take another approach because she liked the claimant just as she was. Also, the claimant says that she asked two senior mentors for advice about the covering letter and they approved it. We have to say that, because it is an unhelpful letter, we find it unlikely that anyone senior gave it much attention.

29 The letter is peppered with references to the litigation. She says that the litigation:

“resulted in the removal from the Trust of the whole of the Non-Executive Board, the CEO and a number of Executive Directors. At the time of my case the North-West SHA were always aware of my on-going discrimination and my legal case”.

This last sentence is not relevant except to alert the recruiter to the involvement of Jane Cummings. The claimant is also critical of the NHS, saying that since the litigation she has not been able to find a permanent role and:

“It is a fact that the NHS speaks in its constitution of fairness and equality and yet it has been a difficult and at times utterly heart-breaking experience for me to continue to do what I believe I was trained to do – lead my profession....”

She portrays herself as struggling against the odds to do good work in the face of a self-serving and nepotistic NHS, all of which portrays her as a sort of Robin



Hood character. It is easy to see why the respondent argues that she was setting herself up to fail but also why she says she was just “telling it how it is”.

30 The claimant says she referred to the litigation because she had been criticised in the earlier litigation for not mentioning it when she applied for a job. She also wanted to be transparent. These are valid points but the manner in which she chose to raise it and the prominence which she gave it in her covering letter are disproportionate and unusual to say the least.

31 Mr Simpson says that he read only the CVs of all the new candidates. His plan was to pick out those who should go on the long list together with those who had already been long listed in the first round of recruitment. He says that he read the claimant’s CV and, in a mere 1 to 2 minutes, decided that her experience was not sufficiently senior or at board level for her to be recommended to the panel. As it turned out, the decision was made at this point that her application was not going to proceed. The decision was made without Mr Simpson knowing that the claimant was a whistleblower or regular litigator and without the input of anyone on the panel.

32 Mr Simpson says although he was intrigued by an attachment entitled “Lanerhill Lane” which he opened only to find that it was a “letter head” with the claimant’s address, he did not google the claimant or read her covering letter.

33 He makes the point that the claimant’s CV was not without merit, it was just that other CVs were better. Various other candidates had been Chief Nurses or equivalent. One had been chief nurse at a failing Trust which the claimant suggested should disqualify her but Mr Simpson’s formulaic approach focused on the experience and not the quality of the experience. Perhaps this was a failing, but it is not obvious that it was a failing at the long list stage. As a generalist, he was not able to say whether someone had been a good chief nurse or a bad chief nurse and he knew that the panel stood a much better chance of deciding this.

34 On 13 July, Mr Simpson sent the panel his recommendations for the candidates who should join the long list and those who should not proceed. All CVs and covering letters were attached. Whilst the claimant argued that it was unlikely that Jane Cummings and/or Ruth May would not recognise her name, their evidence is that they did not read the list and the documents show that they did not respond to his recommendations. Therefore, even if they would have recognised the claimant’s name, they did not exercise any influence over the decision not to recommend the claimant. Helen Bullers did not participate either because she was on holiday. The allegation that the first and second respondent made the decision not to recruit the claimant, rather than Mr Simpson, was struck out on 3 January but for the avoidance of doubt we confirm here that they were not at all involved.

35 Mr Simpson went ahead with the process without chasing the panel for confirmation that they were happy with his choices. This was outwith the agreed procedure but he felt he had no choice because the timetable was very tight. He

spoke to the long-listed candidates and, in a conference call on 22 July, made recommendations to the panel as to who should be on the shortlist. By now the claimant was no longer on the radar.

36 During this time the claimant chased Mr Simpson asking for news and he told her that he was awaiting the decision of the panel, which was not really true.

***Dr Saiger is informed that her application will not progress***

37 Dr Saiger emailed again on 20 July and, whilst her email was quite forceful, we do not draw a conclusion from it that she was “waiting to pounce”. He responded the same day saying that the application would not be progressed:

“I am sorry about the delayed reply, I was awaiting final confirmation of the decisions from NHSE and NHSI and only received this late yesterday. I regret to inform you that your application is not progressing to the next stage....”

38 This explanation was not correct. It elicited a challenging email from the claimant which made it clear that she could well be taking things further; this would have included the possibility of litigation although no explicit threat was made. She wanted to know details of the process and who made the decision:

“within seven days of receipt of this email.... I reviewed the specification of these roles with specificity [sic] to my own skills and knowledge and concluded that all aspects had been met”.

At this stage, she said she assumed that Hunter healthcare was not involved indicating that that she did not think that Hunter knew about her background. During the hearing she emphasised the opposite, stating that Hunter *did* know via Ben James.

39 Mr Simpson was surprised by her tone, as well he would be, since applicants are usually much more conciliatory. At this point he googled her and discovered her litigation history. He immediately emailed Helen Bullers, now back from holiday, and suggested that she google the claimant. The email reads as if he had just discovered all this for the first time.

40 Ms Bullers replied with a comment that the claimant’s CV for March/April 2012 was incorrect and she remembered because she had responsibility for interim appointments at that time. The CV shows that the tasks for her time as “Interim Director of Nursing and Governance” were governance tasks and it is not quite clear how the term “nursing” crept in. As to the rest, she commented “probably best not on email!” This is evidence of the sudden sensitisation of the respondents to the fact that the claimant was potentially “trouble”. However, the decision not to progress the claimant’s application had already been made.

41 Of course, the claimant was potentially “trouble” as her email demonstrated so it would have been odd if there was no reaction at all. Mr Simpson volunteered

the point that his partner is Asian and his children mixed race and he would not have had a negative view had he known about the claimant's litigation from the start, so what he was reacting to was her challenge and not her original litigation. It is important to remember that NHS whistleblowers are heavily encouraged and protected.

42 Mr Simpson sent a reply, which Ms Bullers had approved, explaining that the panel had made the decision, when and how. Neither he nor Ms Bullers paid much attention to the wording and we accept his explanation that, whilst being untrue, what he said was best for the client's credibility and was consistent with his previous emails to the claimant. We agree that it was an expedient statement which did not render Mr Simpson untrustworthy when it came to the much more important question of whether he knew the claimant's background when he failed to long list her.

43 They had concentrated on the part of the email which challenged the claimant's CV. The claimant says that questioning her CV was a detriment, which it could have been if done maliciously. Ms Bullers maintained during the hearing that the claimant's job title on her CV was misleading. The claimant seemed to agree that it was not cast in stone and that she had been given the title, to include "nursing", by somebody who told her that that was the appropriate one to use; in other words, there was no evidence that it had been the "official" interim title.

44 Firstly, we cannot say that Ms Bullers was wrong to challenge the CV because it does appear inaccurate. Secondly, if she was motivated to make this comment by anything other than the desire to be accurate, it was her wish to close down any dispute rather than an adverse reaction to a protected act or protected disclosure. Once Ms Bullers knew the claimant's name, she knew her reputation, and that there was a danger. She particularly wanted to protect Jane Cummings but not to act against the claimant because of a protected disclosure or protected act.

45 At this point, the claimant thought that the panel had made the decision and it was only when she saw the lack of documentary evidence and read the witness statements that she would have known that those who knew about the whistleblowing had not been involved in the decision not to long list her. With hindsight, it would have been better if Mr Simpson had said from the start that he, and only he, had made the decision to reject the claimant's application but he did not realise this at the time.

46 Further attempts were made to write to the claimant to appease her and during this process Mr Simpson and Ms Bullers used personal email addresses, presumably to avoid detection, although ultimately they understood that the emails had to be disclosed, and they were. Resolution was not achieved and the ET1 was issued on 16 November 2016.

47 The candidates who were appointed to the two roles had considerably more senior experience than the claimant. Having reviewed their CVs it is clear to us

that they were, at CV stage, patently more qualified for the two jobs than the claimant and that she stood no chance at all of being shortlisted or of getting a job.

## Conclusions

### ***Mr Simpson did not know the claimant's background when he made the decision not to progress her application***

48 Our key conclusion is that Mr Simpson did not know about the claimant's litigation history at the point he decided not to recommend her to go forward in the recruitment process. We reach this conclusion because:

a. We find that it has been his practice, over nearly 20 years in recruitment, not to read the covering letter unless the CV is satisfactory. He considers that the CV is "the facts" and if someone does not have the right CV, then looking at more qualitative information is not necessary. The claimant's CV did not mention her litigation history and he did not read the covering letter, which did.

b. This particular recruitment lent itself to this approach because they were looking for a very senior person who was able to do a job at a very senior level so that merely having aptitude or promise would not be sufficient. This meant that a very quick look at the CV was the right way to identify who was a likely candidate.

c. This approach was contained in the original Hunter healthcare proposal to NHS England. Given that there was no application form or competency-based process, the CV had a high prominence.

d. Mr Simpson was adamant that he never googled candidates. We found this very surprising but it made sense that there was no benefit in googling one who was being rejected at the first fence.

e. He did not recognise the claimant's name. He would only have done so if Ben James knew her, saw her application coming in and thought to tell Mr Simpson about her reputation. It is not particularly likely that he did so given that Mr Simpson, rather than he, was running the recruitment and Mr Simpson was convincing in his evidence that he did not know. Although she said the opposite in her evidence, at the time the claimant did not think that Hunter knew her background so it is by no means certain that Mr James knew anything at all.

f. There was no database entry at Hunter for the claimant, let alone any written information about her background.

g. Whilst notorious at the time, many whistleblowers lose their notoriety fairly quickly but continue to think that they are marked indefinitely. The claimant has

an unusual name and her 2014 litigation was still going on in 2017, but in the North of England, and it is not inevitable that Mr Simpson knew of her.

h. The claimant is a senior nurse who has a number of important achievements to her name. Ms Perry thought very highly of her. However, the role she was applying for was a number of grades higher than the roles she has filled in her career to date. Her early directorships were on a small scale, there was a directorship in a recruitment consultancy but this was outside the NHS and the interim NHS Outer North London role was governance and not board level. A requirement for recent experience was not a hidden additional criterion, it made sense that current experience is more valuable in a rapidly changing environment. Therefore, it is not surprising that Mr Simpson dealt with her CV cursorily and dismissed it rapidly.

i. Mr Simpson's email to Helen Bullers of 22 July is consistent with his only just finding out the claimant's background.

j. Mr Simpson's credibility was not so damaged by his email of 29 July to lead us to reject his explanations. The email was not the truth but the reasons for writing it that way were understandable.

49 A recruitment process that looks at actual achievements in the CV only, rather than at aptitude more broadly, may be open to a whole range of accusations about discrimination, it may also not find the best person for the job. However, that was the process which Mr Simpson followed. In this case, his reasoning that the claimant was not among the better candidates, based on the CV, was accurate and cogent. There is no room even to consider drawing an inference of victimisation because he had no knowledge of the protected act.

50 The victimisation claim against the third respondent fails along with any protected disclosure claim under the Employment Rights Act 1996.

51 The latter claim was hardly progressed by the claimant and is run in the alternative to her victimisation claim. She provided no evidence of her 16 alleged protected disclosures apart from the three which were also protected acts and so this claim did not really take off.

### ***The claim against Ms Bullers***

52 Ms Bullers knew of the claimant's history but had been away at the time Dr Saiger was told she was not to progress and did not participate in that decision.

53 Her reason for the alleged detriment of challenging the CV was because she thought it was wrong, and we find that the title given by the claimant probably was inaccurate. In those circumstances, there was no detriment by Ms Bullers, or by Mr Simpson when he repeated it.

54 Whilst Ms Bullers wanted to protect Ms Cummings and close down any conflict, her reason was not the protected acts or protected disclosures and she would have acted the same whatever the claimant's reasons for challenging the decision not to longlist her.

***Jurisdiction to hear a protected disclosure claim by a job applicant***

55 Having decided that the protected acts/ protected disclosures were neither the reason why:

- a. The claimant's job application was not progressed or
- b. Ms Bullers and Mr Simpson challenged her CV

it is not necessary to go further. However, it is helpful to decide on the question of jurisdiction over the Employment Rights Act 1996 protected disclosure claims. We conclude there is not jurisdiction because:

55.1 The claimant was not employed by any of the respondents at the time of the claim, nor had she been. The NHS is not a single employer as the claimant agrees.

55.2 She was not a former worker of any of the respondents in the sense envisaged in *Woodward v Abbey National* [2006] ICR 1436. Therefore, she was an external job applicant.

55.3 That job applicants are not covered by the current legislation is clearly illustrated by the fact that the government introduced section 49B to the Employment Rights Act giving the Secretary of State power to make regulations prohibiting an NHS employer from discriminating against an applicant because of a protected disclosure. There are not as yet any such regulations in force.

55.4 In the light of these firm indications to the contrary, it would not have been appropriate to take the purposive approach urged by the claimant under Article 10.

***The claimant's motivation***

56 In *Kratzner v R+V Allgemeine Versicherung AG* C-423/15, the ECJ held that the Tribunal did not have jurisdiction where a person made an application for a post with the sole purpose of claiming compensation. The respondents argue that the same principle applies to applicants who are not genuine, perhaps for other

reasons such as pursuit of a campaign to highlight the “closed shop” nature of the senior NHS.

57 The claimant has a very esoteric view of her history, it could be called blinkered or manipulative. Her life has been exhausting in that she has been working in interim roles a long way from home for years for which she blames the senior NHS and this gives her a motive for behaving cynically. This attitude is well illustrated by her description of the litigation which she has been involved in. She regularly reminded the tribunal that “judges get it wrong” and where she had lost a point she explained it by the respondent unfairly investing in QCs etc. In one of the cases which did not involve the NHS, she lost completely but portrays it as a win because the tribunal did not award costs against her. We felt that to some degree the claimant was playing with the system, making broad assertions, resiling slightly when challenged and then going back to them. She wanted to win on her own terms and had very little interest in fighting the case in the conventional way. She was, however, genuine in wanting to fight it as a champion of those who “the system” will not promote.

58 The respondent challenged the claimant’s motives in a number of ways. For example:

58.1 She had asked who was on the panel. Whilst this may have been an unusual question, it does not lead us to the conclusion that she was looking to apply only because she believed that Jane Cummings or Ruth May would be sure to reject her.

58.2 Whilst the claimant mentioned her litigation extensively in her covering letter, it is not in her CV or her covering email and so she was not pressing the point home. She could have brought wider claims, eg race discrimination. She did not generate a press campaign as far as we know.

58.3 The way she describes the litigation in her covering letter is ill-advised in that she appears bitter against the NHS but this is consistent with her view that she would be an excellent regional chief exactly because she has experience of what she regards as the closed and hierarchical senior NHS.

58.4 The respondents say that the claimant changed her evidence at will and lacked credibility. It is true that the claimant had a very broad-brush style and seemed untroubled when what she had asserted was found not to be true. It sounds as if we are making excuses for her, but we did not find that this style led us to conclude that she was cynically litigating solely for ulterior gain. It seemed as if she thought the substance was true even if the specifics were not.

59 On the other hand, Ms Perry thought her a credible candidate and she thought so herself, especially as she believed that it was discrimination which had prevented her from getting to a higher grade.

60 It is also the case that the claimant is still earning an income from her nursing work in its various manifestations and so it is not obvious that she needs to make a profit from litigation instead, certainly as a sole purpose for litigating.

61 In conclusion we find that the claimant's motive for applying were mixed and did not fall into the *Kratzer* category. She did not expect to get one of the jobs because of the "nepotism" excluding her but she genuinely thought she *should* get one, and if offered it she would have said yes. We find that the Tribunal has jurisdiction.

### **Agency**

62 Whilst the first respondent admits that Hunter Health Care were its agent, the second respondent does not. Thankfully we do not need to decide this point. Greater minds than ours have struggled with it as illustrated by the comments of Lord Justice Elias in *Kemeh v MOD* [2014] IRLR 377. Whilst we are able to find that the common law definition applies and that Hunter were not the agent in the sense of being authorised to affect the second respondent's legal relations with a candidate, we were not sure that this would lead to a definitive conclusion. In *Unite v Nailard* [2016] IRLR the EAT took Lord Justice Elias' comments to mean that authority to bind the principal was not always necessary, which may be why the first respondent made its concession. Also, whilst all the personal and contractual dealings between Hunter and the other respondents were with Helen Bullers and the first respondent, it was a joint appointment.

### **"Loss of Chance"**

63 If we are wrong, and the claimant was victimised or subjected to detriment under the Employment Rights Act, it will be clear from the above that there was no chance at all that she would have been shortlisted or that she would have secured either role.

Employment Judge Wade 18 January 2018