



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Gbefa

Respondent: Primary Care Recruitment Limited

Heard at: North Shields

On: 7 and 8 June, 2018

Before: Employment Judge Nicol

Members: Ms L Georgeson
Mrs P Wright

Representation

Claimant: Mr B K Gbefa, husband

Respondent: Ms S Brewis, Counsel

REASONS

1 At the end of the hearing, the Tribunal gave its Judgment and Reasons for the Judgment. The respondent has now requested that the Tribunal should set out its Reasons in writing. The Tribunal is satisfied that the request was made within the prescribed time limit and it is therefore appropriate that the Reasons should be provided in writing. Whilst the wording and order may differ from the announced version, this is with the benefit of more preparation time and is not the result of further deliberations by the Tribunal.

2 This is a complaint by Blebinami Gbefa, the claimant, against Primary Care Recruitment Limited, the respondent. The claimant alleges that she suffered a detriment because she was victimised by the respondent as set out in Section 27 of the Equality Act, 2010. This is denied by the respondent.

3 Originally, the claimant also included a complaint against the respondent alleging breach of contract. A differently constituted Tribunal at a previous hearing allowed this complaint to be withdrawn but it was not dismissed as the claimant indicated that it might be the subject of different proceedings in the County Court. This Tribunal confirmed that it was only concerned with the complaint relating to victimisation and that it would not and did not make any findings concerning the

allegation of breach of contract save to the extent that it was necessary to deal with the allegation of victimisation.

4 The claimant had also included a second respondent, ID Support Limited, but the complaint against it was dismissed at the previous hearing.

5 At the previous hearing, the Employment Judge identified the issues to be considered by this Tribunal. At the start of this hearing, the parties confirmed that they agreed with these issues and they were adopted by this Tribunal. They were

5.1 Was the respondent's conduct in failing immediately to provide the agreed reference set out in the COT3 on, or around 11 August 2017, because of the claimant's protected act in bringing the earlier discrimination claim?

5.2 Was the provision of the employment reference for the claimant on, or around, 11 August 2017 at least in part consciously or subconsciously motivated by the claimant's protected act in bringing the earlier discrimination claim?

6 The Tribunal heard evidence from the claimant and from Joanne Wood, director, Victoria Keepin, assistant director, and Brad Wood, director of finance and IT, on behalf of the respondent. The witnesses gave their evidence in chief by submitting written statements that were read by the Tribunal at the start of the hearing and, subject to any necessary corrections, confirmed on oath or affirmation at the start of each witness's oral evidence and, as permitted by the Tribunal, answering supplemental questions. All witnesses were cross-examined.

7 The Tribunal had before it an agreed bundle of documents, marked 'Exhibit R1'. Both parties made oral closing submissions by reference to skeleton arguments.

8 From the evidence that we heard and the documents that we have seen, the Tribunal finds the following facts.

9 In an application form dated 28 May, 2014, the claimant applied to be registered with the respondent as being available to undertake work as a carer and/or a support worker. The claimant was accepted by the respondent and, according to the agreed reference, was registered with the respondent from 18 August, 2014, to 31 October, 2014. However, she only worked one shift, which commenced at 20.00 on 21 August, 2014, and ended at 08.00 on 22 August, 2014.

10 The claimant commenced proceedings against, among others, the respondent. Following a hearing on 13 and 14 April, 2015, and deliberations on 24 April, 2015, that Tribunal found that the respondent had discriminated against the claimant because of pregnancy.

11 The full judgment and reasons were included in the bundle before this Tribunal. The Tribunal noted that the earlier Tribunal commented on the failure of a party to those proceedings, who was employed by the respondent, to submit a witness statement or to be present during the hearing, although they had a potentially important role in relation to the issues. The earlier Tribunal also found that evidence given on behalf of the respondent was not true. Whilst the contents of the judgment and reasons

were not relevant to these proceedings, they did show that the respondent was aware, or should have been aware, that its evidence would be subject to scrutiny and would not necessarily be accepted at face value.

12 The earlier Tribunal ordered that a remedies hearing should take place but the outstanding issues were dealt with through ACAS and the parties signed a COT3 agreement. Among other things, the agreement included provisions that

The respondent...warrant that they shall use their best endeavours to ensure that neither they...make, publish or otherwise communicate, or cause or induce any third party to make, publish or otherwise communicate, any comments of a disparaging or derogatory nature about the claimant.

And

The respondent agrees to provide a written factual reference (as attached) to any prospective employer upon request. The Respondent will endeavour to keep to the terms and spirit of this reference should it receive any further or written or oral request...

13 The attached reference recognised that the respondent could not comment directly on the claimant's work with a client but would include

I can confirm that according to our records [the claimant] was a registered member of [the respondent] between 18 August, 2014, and 31 October, 2014, and undertook paid work during this period.

14 The respondent's evidence was that the reference and the surrounding circumstances were to be kept confidential. To safeguard this, only Mr and Mrs Wood, Ms Keepin and Victoria Cowan, HR manager, were aware of the situation.

15 Before the events that are the subject of these proceedings, the claimant made two requests for a reference from the respondent and these were provided without any problems. After these events, a further request was made and this was also dealt with to the claimant's satisfaction.

16 On 7 August, 2017, the claimant applied to ID Support Ltd for employment. In the application form, she stated that she had been employed by the respondent from August, 2014, to October, 2014, which was in accordance with the reference attached to the COT3. She gave Mrs Woods' email address as the contact details for a reference, which had been agreed with the respondent.

17 On 8 August, 2017, ID Support Ltd wrote to the claimant stating

'...I am delighted to confirm your offer of a 0 hour Support Worker post subject to receipt of a minimum of 2 written satisfactory references...'

18 On 11 August, 2017, Victoria Hartley, recruitment and admin manager for ID Support Ltd, sent an email to Mrs Wood, headed with the name of the claimant, seeking a reference for the claimant. At that time, Mrs Wood stated that she was 'on holiday' from the respondent as she was setting up a new venture. She stated in

evidence that she simply forwarded the request to 'hr@primarycarerecruitment.co.uk'. Although this appears to be a generic email address, Mrs Wood claimed in evidence that it was the email address of Ms Cowan. The email address is not consistent with other personal email addresses within the respondent.

19 This is in contrast to the respondent's response to the claimant's claim form. This states that the claimant sent the email to

the respondent's generic HR email address...accessible by all members of respondent's HR department and...was subsequently dealt with by one of the temporary administrative workers...

It is also in contrast to a witness statement signed as being true by Mrs Wood and prepared for the earlier hearing in these proceedings. This enlarges on the premise that the generic email address was used and that a temporary worker provided the reference.

20 In support of her contention that she was on holiday, Mrs Wood produced a commercial sublease agreement. According to this, company referred to as Maison Jolis Limited was to take possession of premises on 7 August, 2017. The sublease has not been executed or dated (although it was to be signed and sealed on 4 August, 2017) and the Tribunal was not provided with any other information as to the directors/shareholders of the company.

21 According to Mrs Wood, she had forgotten that Ms Cowan was also on leave at that time. The Tribunal was not shown the forwarded email that Mrs Wood sent so it was not aware of the comments, if any, which Mrs Wood included.

22 The only other evidence available to the Tribunal concerning the whereabouts of Ms Cowan was a holiday application form. This showed her as being on holiday from 31 July, 2017, to 14 August, 2017, inclusive. However, it did not show the number of days leave that was being applied for or the date of her return to work. Assuming that she was absent from the office during this period, the Tribunal did not have any information as to whether she could access her work emails or whether she accessed the email supposedly forwarded to her by Mrs Wood.

23 For reasons that were not explained to the Tribunal, the email was replied to by Andrew Chandler, contracts and audit manager. In evidence, it was suggested that Mr Chandler had a legal background and that he could be pedantic about details. He is no longer employed by the respondent and it was stated that this was not related to the circumstances of this case.

24 He stated

I can confirm that the above named person was engaged by us as a temporary worker, within the meaning of the Agency Workers Regulations, for the following period: start date 21 August, 2014, end date 21 August, 2014.

25 It was suggested by the respondent that Mr Chandler had simply referred to the respondent's record system that showed that the claimant worked one shift starting on

21 August, 2014, at 08.00 and ending on 21 August, 2014, at 18.00. It was suggested by the respondent that the system could only show the start day for a night shift because it would produce payment for two shifts if the finishing date was different. Also, the system recorded all shifts as being 08.00 to 18.00, irrespective of what was worked. No evidence was produced to confirm this. The respondent has produced various documents concerning the claimant, including her timesheet for the shift in question. It would seem inconceivable that someone in Mr Chandler's position would not have been aware of the shortcomings of the shift recording system (assuming there were any) and would not have known to check the details elsewhere. Also, he refers to the period of engagement, not the day of the shift as such. The dates of engagement could only be ascertained by checking other records.

26 Mr Chandler was not called to give evidence and he did not provide a written statement, which might have been admitted in evidence, if the Tribunal agreed.

27 On a hard copy of Mr Chandler's email a note has been indorsed, signed 'V Hartley 14.08.17'. The note states

Spoke with Primary Care who said there was an issue re B. G. & could not legally inform ID of the issue for another year. They would definitely not re-employ her & would not give a better reference.

28 The respondent's evidence was that it did not know to whom Ms Hartley had spoken but had been told that it was a female. Ms Keepin denied that it was her and Ms Cowan was stated to still be on leave at the relevant time.

29 Ms Cowan was not called to give evidence and she did not provide a written statement, which might have been admitted in evidence, if the Tribunal agreed.

30 On 14 August, 2017, the claimant sent an email to Mrs Wood and Ms Cowan, complaining that the agreed reference had not been supplied to ID Support and asking that the correct one be sent. The claimant also stated that failure to do this 'may diminish my chances of get the job'.

31 In her evidence, Mrs Wood conceded that she had received this email and that she had spoken to Mr Chandler about it. However, she denied having told him about the earlier proceedings or authorising him to respond to the claimant's email. She said that she intended to deal with the matter on her return to the office.

32 On 15 August, 2017, ID Support Ltd formally withdrew the offer of employment stating that it had received references

...and one of them has proved to be unsatisfactory.

It was accepted by both parties that this referred to the reference from the respondent.

33 Mr Chandler replied to the claimant's email on 16 August, 2017, by which time Ms Cowan should have returned from leave. He stated

Further to the below I can confirm that we supplied a reference confirming your previous engagement...within the meaning of the Agency Workers Regulations. This reference did not disclose any matters that are

prohibited under the agreement and, as such, was fully compliant with that agreement...

34 It appeared from Mrs Wood's evidence that she thought that Mr Chandler was just trying to be helpful but, in effect, that he did not know what he was referring to, although this would seem to be out of character for Mr Chandler. Mr Wood suggested that 'agreement' actually referred to the Regulations but could not explain this further.

35 The claimant requested a copy of the email that had been supplied on 28 August, 2017.

36 Although this was a bank holiday, by around this time, Mrs Wood was back at work for the respondent.

37 Several days later on 31 August, 2017, Mr Chandler sent another email to Ms Hartley, apparently in response to the original email, setting out the agreed reference. The email did not contain any explanation as what had happened or why this reference was now being provided.

38 Almost at the same time, Mrs Wood sent an email to the claimant complaining that she had given the wrong email address to Ms Hartley and requesting that Mrs Wood's email address be used in future. This was despite the fact that the claimant had used Mrs Wood's email address and Mrs Wood forwarded the email to the address that she told the claimant not to use. Mrs Wood informed the claimant that this had resulted in the agreed reference not being used but that the information given 'was a true reflection of your engagement' with the respondent. The claimant was also informed that the agreed reference had now been sent to ID Support Ltd.

39 The claimant pursued the issue of the reference with ID Support Ltd and was told that the job offer was withdrawn because the reference did not agree with the information that the claimant had provided.

40 The contentions of the parties were set out in their closing submissions and the skeleton arguments, which need to be read for their full terms and effects. Briefly, the claimant contends that she lost an opportunity for employment because the respondent gave a reference that was not in the agreed form and also made oral comments that were damaging to her. Further, this was because of the fact that the claimant had successfully brought earlier proceedings against the claimant. The respondent contends that it had previously and subsequently provided references in the agreed form and that this supports its contention that there was not any animosity towards the claimant. This was an unfortunate mistake that arose because someone who did not know the true situation gave a reference in good faith believing it to be true. Further, that when Mrs Wood became aware of the problem, she acted to correct it. Whatever, the reason for the wrong reference being given it cannot be referred back to the previous proceedings.

41 The Tribunal had regard to sections 27 (victimisation) and 109 (liability of employers and principals) of the Equality Act, 2010, and had particular regard to Subsections (2) and (3) of Section 136 of the Equality Act, 2010, which provide

(2) If there are facts from which [the Tribunal] could decide in the absence of any other explanation that a person (A) contravened the provision concerned, [the Tribunal] must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

42 In relation to all of the claimant's complaints, the Tribunal had regard to the authority referred to in the respondent's closing submission, Shawn Scott v London Borough of Hillingdon 2001 EWCA Civ 2005.

43 It was not in dispute that

43.1 There had been previous proceedings between the parties where allegations of discrimination had been made and which had been decided in the claimant's favour

43.2 The remedy in those proceedings had been agreed through ACAS

43.3 There was an agreed form of reference which was to be used by the respondent in respect of the claimant

43.4 The claimant applied for employment with ID Support Ltd and a reference was requested from the respondent

43.5 A reference was supplied by the respondent but not initially in the agreed form

43.6 As a result of that reference, the offer of employment from ID Support was withdrawn.

44 ID Support Ltd sought a reference for the claimant from the respondent quoting an email address at the respondent that the claimant had been asked to use. Despite this, the respondent supplied a reference that was not in the agreed form, differed from information supplied to IS Support Ltd by the claimant and was not accurate. On the basis of the reference supplied, ID support Ltd withdrew the offer of employment that it had made to the claimant. ID Support Ltd supplied information that it had obtained further comments about the claimant from the respondent. The respondent could not offer an explanation for this but did not seem to dispute that the relevant conversation had taken place. The comments recorded were of a nature that were likely to discourage a potential employer from engaging the claimant.

45 The Tribunal was satisfied that the claimant had lost the opportunity of employment because of the conduct of the respondent and this could be related to the claimant having previously done a protected act, that is commencing proceedings alleging discrimination against the respondent.

46 With regard to Section 136 of the Equality Act, 2010, the Tribunal was satisfied that the claimant had established facts from which the Tribunal could decide in the absence of any other explanation that the respondent had contravened the provision concerned, which is set out in Section 27 of the Act. Accordingly, the burden of proof passes to the respondent.

47 The evidence of Ms Keepin and Mr Wood were largely unhelpful as neither claimed to have any real knowledge of the matters in question. The Tribunal did not receive any evidence from Mr Chandler, Ms Cowan or Ms Hartley. Whilst it is for the parties to decide how to present their respective cases and which witnesses to call, this left considerable gaps in the evidence.

48 The respondent's main evidence was given by Mrs Wood. The Tribunal found her evidence lacking in credibility. She had asked that requests for references in respect of the claimant were sent to her. The Tribunal considered that it was unlikely, even if Mrs Wood was occupied with other matters, that she would not recognise the claimant's name when she received an email about her. On her evidence, she forwarded the request to an email address that she claimed at the time was a generic email, which it appears to be, and which she subsequently told the claimant not to use. It was then accessible by a variety of employees of the respondent, very few of whom were supposed to know the situation concerning the claimant. The Tribunal does not know why Mr Chandler dealt with the request rather than an HR assistant, possibly one of the temporary ones Mrs Wood referred to in various places. It is surprising that someone in Mr Chandler's position would have dealt with references. The reference he gave was, at very least, misleading and did not truly record the circumstances of the claimant. Mrs Wood then received an email from the claimant querying the reference given. This time Mrs Wood takes an interest and in evidence admitted speaking to Mr Chandler about it. However, despite it being obvious that something had gone wrong, she chose to leave sorting it out until she returned to her work for the respondent. Even then, it took a further email from the claimant before she actually did anything. In the meantime, Mr Chandler had replied to the claimant's email seeking to justify the contents of the reference. He did this by reference to an 'agreement', even though, on Mrs Wood's evidence, he knew nothing about one. Why was he not instructed to refer the matter to Ms Cowan? Did he speak to her on his own initiative? The Tribunal considered that Mr Chandler's email was clear and unambiguous. He must have known about the agreement as this is the only way in which his email makes any sense. The Tribunal considered that Mrs Wood's denial that she told Mr Chandler about the email at this stage is not believable and the question arises as to whether Mr Chandler did in fact know about the agreement when he gave the original reference. When Mrs Wood finally does something, she leaves Mr Chandler to supply a copy of the agreed reference, which he does without any explanation or indication that the earlier reference was wrong and/or withdrawn. Mrs Wood simply told the claimant that the correct reference had now been sent. Mrs Wood then invents a set of circumstances in which she said the original reference was given and this is maintained through the response to this claim and in Mrs Wood's statement for the preliminary hearing in these proceedings. It is inconceivable that she believed that statement to be true. Originally, she even tried to blame the claimant for giving the wrong email address. Mrs Wood has continually sought to avoid responsibility, blame others and avoid taking action, even when she might have been able to correct the situation. At this hearing, she changed her account to adopt facts that could not be disputed because of the correspondence but still did not give a believable explanation for other matters.

49 Then there is the issue of the oral communication. The respondent does not really dispute it but cannot explain it. The Tribunal accepted that the conversation had taken place and that Ms Hartley spoke to someone who knew the situation concerning

the claimant. On the respondent's evidence, if it was a female, this could only have been Mrs Wood, Ms Keepin or Ms Cowan. However, the reference to not being able to explain the 'issue' with the claimant for a further year suggests that someone else, less closely involved, may have also been aware of the situation. The comments made were bound to make a prospective employer question the appropriateness of employing the claimant, especially when coupled with the apparent difference in the information given by the claimant and the respondent. Even if it was the difference in the information that decided the question of whether to employ the claimant, the oral comments were disparaging of the claimant.

50 The Tribunal finds that the respondent gave a reference that was in the wrong form and not factually correct, gave information orally that was damaging to the claimant and failed to act quickly or appropriately to correct the situation when it was aware of the problem. The respondent has failed to give a satisfactory explanation for any of this.

51 Having regard to all of the above, the Tribunal unanimously finds that the respondent has not discharged the burden of proof and, accordingly, the Tribunal also unanimously finds that the claimant's complaint that she suffered victimisation is well founded.

52 After the Tribunal had delivered its decision, there was insufficient time to decide the appropriate remedy. Following discussion with the parties, it was agreed that there shall be a hearing to decide the appropriate remedy on 3 August, 2018, and the parties shall comply with the Order made by the Tribunal setting out directions for the preparation for the hearing.

Employment Judge Nicol

Date 25 June, 2018

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.