



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs N Leeks

v

**Norfolk and Norwich University
Hospitals NHS Foundation Trust**

Heard at: Watford

On: 5 & 6 June 2019

Before: Employment Judge Wyeth
Mr N Ramgolam
Mr S Bury

Appearances:

For the Claimant: Mrs P Lewis, counsel
For the Respondent: Mr C Adjei, counsel

JUDGMENT

1. The claimant's complaint of direct disability discrimination is not well founded and fails.
2. The claimant's complaint of victimisation is not well founded and fails.
3. Accordingly, the claimant's claim is dismissed in its entirety.

REASONS

The claims

1. By way of a claim form issued on 9 February 2018 and a further claim form issued on 26 February 2018, the claimant brings complaints of direct disability discrimination under s13 Equality Act 2010 ("EqA") and victimisation under s27 EqA. The respondent defends the claims.
2. In short the claimant alleges that the respondent provided references to two potential employers which she says led those potential employers to withdraw offers of employment. The claimant contends that the references were unduly negative because she was disabled and/or because she had issued a previous tribunal claim against the respondent for disability discrimination. The respondent says that the references were genuine and

honest accounts of the claimant's period of employment.

The issues

3. The parties' representatives confirmed that the claims and issues identified by EJ Henry at the closed Preliminary Hearing on 20 July 2018 and recorded in his Order at p64-71 were accurate and complete. Accordingly it was agreed that the issues for this tribunal to determine are as follows:

Direct discrimination because of disability (s13 EqA)

- 3.1 It is not in dispute that the claimant is a disabled person for the purposes of s6 EqA by reason of her fibromyalgia, anxiety and depression and arthritis [as clarified by the claimant at the outset of the full merits Hearing].
- 3.2 It is not disputed that the respondent provided [two] reference[s] for the claimant that [were] not favourable to the claimant.
- 3.3 By the provision of those references, did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The claimant relies upon a hypothetical comparator.
- 3.4 If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

Victimisation (s27 EqA)

- 3.5 Did the claimant do a protected act or did the respondent believe that the claimant had done or might do a protected act? The claimant relies upon the claim she issued at the tribunal on 14 May 2015 [claim number 3400800/2015] alleging disability discrimination.
- 3.6 In presenting that claim, did the claimant give false evidence or false information or make a false allegation and if so was the evidence information or allegation made in bad faith?
- 3.7 Did the respondent subject the claimant to the following treatment:
- 3.7.1 Provide references that were not favourable to the claimant in terms of her performance?
- 3.8 If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Remedy

- 3.9 In respect of any proven unlawful discrimination, the tribunal will be concerned with issuing a declaration thereof, and compensation to include an award for injury to feelings, and make such appropriate

recommendations for the purpose of obviating or reducing any adverse effect relating to the claim.

Procedure

4. This matter was originally listed by EJ Henry to be heard over four days from 3 to 6 June 2019. As we understand it, due to lack of judicial resource, the parties were informed on Friday 31 May 2019 that the trial would not proceed on 3 June 2019. The parties immediately requested a preliminary hearing at which each party was seeking to strike out the other party's case for failure to comply with earlier directions. We further understand that the matter came before EJ Henry on 4 June 2019. He established that despite the failure to comply by the specified dates, both parties agreed that the case was now ready for trial. That was certainly the position of both parties and their representatives when the matter came before us on 5 June. Furthermore, both parties agreed that the matter could be heard and completed within two days. As a consequence, the trial commenced on 5 June 2019 before this tribunal for two days.
5. We had before us a bundle of documents consisting of 480 pages. After completing our reading but before oral evidence began, Mrs Harris, on behalf of the claimant, made an application to have further documentation included in the bundle. This included the reasons of the HCPC Conduct and Competence Committee regarding proceedings involving the claimant. The respondent did not object to the inclusion of those documents and accordingly they were added to the back of the bundle. The respondent also produced a copy of the ET1 form in the earlier 2015 claim (claim number 3400800/2015) which was also added to the bundle by agreement.
6. The page references below relate to the bundle unless otherwise stated.
7. We were provided with witness statements from the claimant and Mrs Susan Kerry on behalf of the respondent. Everybody agreed that Mrs Kerry would give evidence first even though the burden of proof was on the claimant in this case (and thus she would ordinarily have given evidence initially). This was for two reasons. Firstly (and principally), Mrs Kerry no longer worked for the respondent, having retired in March 2018, and was not able to be in attendance at the tribunal to give evidence on the second day. Furthermore, the focus of this claim was, of course, on her actions and the reason for them. As such, it assisted everyone (particularly the claimant) to understand her evidence before the claimant advanced her own case.
8. We heard submissions from each side just before lunch on the second day. We reserved our decision so that we could spend the remainder of the time deliberating. A provisional date for remedy was listed for 6 September 2019 which will no longer be required.

The facts

9. We make the following findings of fact in relation to this matter.

10. The respondent is an NHS Trust engaged in providing medical services to the public. The claimant was employed by the respondent from 19 May 2014 until 20 December 2014 as a Band 5 Biomedical Scientist.
11. As part of her health clearance before commencing employment, the claimant disclosed information to the Occupational Health assessor that she had a condition that the assessor concluded came within the definition of a disability for the purposes of the Equality Act 2010. Notwithstanding this, the claimant would not disclose to her employer the nature of the apparent disability and would not authorise the Occupational Health assessor to do so.
12. During her relatively short period of employment, the respondent had genuine concerns about the claimant's performance and capability in her role. As a consequence the Chief Biomedical Scientist, Susan Kerry, who was the claimant's line manager throughout, referred the claimant to Occupational Health for further assessment on 18 July 2014. In that referral at p154 she stated that:

“[The claimant] has not been absent from work but I am worried that her health is preventing her from fulfilling her contract. She started work with us on 19.05.14 but we have been unable to put her on to the full shift due to performance issues which we think may be related to her health.

[The claimant] has disclosed that she has a health issue but has not informed me of the condition. I do understand that her Health Clearance for the job did say that her condition came under the DDA. I have been informed that standing for any length of time is an issue and working to the pace we require may not be possible. I am also concerned that we may be exacerbating the health problem.”
13. On 24 July 2014, Occupational Health specialist, Dr MF, sent a report to Mrs Kerry stating that the claimant was fit for the role and did not require any adjustments other than the provision of a grip mat. Notably, he records that the claimant did not think that fatigue impaired her work in her previous employment or in her current role. As for night shifts, Dr MF concluded that he did “not consider there [was] currently a medical contraindication to [the claimant] undertaking either evening or night shift” work.
14. In accordance with that report, issues with the claimant's performance were not considered to be disability related. Factually, as a tribunal, we find that to be the true position. We are satisfied that the claimant's poor performance was not because of her disability.
15. Dr MF also indicated he would be requesting further medical evidence from the claimant's GP. On 9 October 2014, he wrote again to Mrs Kerry informing her that the claimant's GP had stated to him that she was supportive of the claimant's decision to remain employed and that none of the medical problems identified should stop her from working at present. Accordingly his earlier advice did not change.
16. In the meantime, around the same time as referring the claimant to Occupational Health, Mrs Kerry became aware of proceedings before the Health Care and Professionals Council (“HCPC”) involving the claimant.

The claimant had requested time off to attend an HCPC hearing in London.

17. Consequently, Mrs Kerry raised the matter with her manager, Richard Pipkin, Network Blood Science Manager as she was concerned that the claimant had not been candid about the matter and that the situation may be more serious than the claimant disclosed at her original interview. On 24 July 2014, Mr Pipkin informed the claimant that he would be investigating her potential non-disclosure to the respondent of the HCPC proceedings.
18. For these purposes it is not necessary to address all the detail regarding the HCPC issue, but the matter was investigated by Carole Rowe, HR Officer, and although her investigation concluded after the claimant's employment had ended, she determined that, had the claimant still been employed, she would have been subject to a disciplinary for failing to be transparent about the HCPC proceedings.
19. On 4 September 2014, the claimant attended her first probationary review meeting with Mrs Kerry. In advance of that meeting the claimant had been provided with a table summarising the performance concerns that Mrs Kerry wanted to discuss with her. This meeting highlighted genuine concerns about the claimant's performance. For example on p169, it is recorded in the Skills and Ability section that the claimant "is not able to perform to a consistent level" and that the respondent had been "unable to get [the claimant] on to shifts as she is not performing up to a standard we would expect." Further on in the document, under Attitude/Manner/Motivation Mrs Kerry recorded in the 'Unsatisfactory' column "not always satisfactory".
20. A second review meeting was held on 26 September 2014 raising the same concerns. At the claimant's request, Susan Kerry agreed to provide the claimant with task sheets to provide guidance for the various tasks she was required to undertake.
21. An outcome letter dated 29 September 2014 (p191) was sent to the claimant summarising all the concerns Mrs Kerry discussed at the probationary review meeting. The letter again referred to the claimant being unable to perform to a required consistent standard, that she was unable to complete tasks assigned in a timely manner, some of her breaks were longer than they should be, that it was felt that the claimant had no motivation to work and there were occasions when she seemed to "have a bit of an attitude".
22. There was then a follow up meeting on 10 October 2014 to discuss any progress in the claimant's performance improvement. Matters appeared not to have improved and accordingly Mrs Kerry wrote to the claimant on 28 October 2014 to request that she attend a further follow up meeting on 5 November 2014 to discuss:
 - Not meeting the required standard of work and keeping up with tasks
 - Failing to perform tasks within allotted time frames
 - Only able to carry out one task at a time when it is often required for staff to carry out many tasks
 - Do [*sic*] not seem to remember certain tasks from day to day
 - Completion of Task Sheets

- Your state of health”.

23. The respondent also referred the claimant back to Occupational Health for further assessment on 5 November 2014. The claimant cancelled this appointment and did not attend the second review meeting scheduled for this date. On the same day, Mrs Kerry informed the claimant that her probationary period was to be extended to 19 December 2014.
24. The second probationary review meeting was rearranged for 14 November 2014. During that meeting, the claimant disagreed with the views expressed by Mrs Kerry and as a consequence, the meeting was brought to an end to enable the claimant to submit a written response setting out her “perspective of the position” by 24 November 2014. Despite being granted additional time to prepare her response, as at 1 December 2014 the claimant had not provided the required documentation.
25. We interpose at this stage that according to the evidence of Mrs Kerry, which we accept, she had received numerous complaints about the claimant’s performance from other members of her team. In particular, a member of the laboratory team reported on 22 September 2014 that the claimant had taken a break of 50 minutes instead of her entitlement of 15 minutes and had not made up the time. Likewise, on 5 November 2014, the claimant’s day supervisor raised continued concerns regarding the claimant’s performance on her task sheet noting amongst other things that the claimant had been 30 minutes late for work (but had subsequently made the time up). Mrs Kerry received further emails from members of the laboratory team in November 2014 raising concerns about the length of time the claimant was taking to perform her work and the disruption this was causing the team.
26. We also accept Mrs Kerry’s evidence that the claimant had a tendency to be rude towards her and other colleagues and could be accusing at times.
27. A further meeting was held with the claimant on 1 December 2014 because the respondent considered that the claimant’s performance and attitude to work since the meeting of 14 November 2014 had “reached a point which” had given the respondent “serious cause for concern”. The claimant was advised by Richard Pipkin at that meeting and in a follow up letter of the same date, that his view was that the claimant had “not demonstrated that [she was] able to meet the standards required for [her] post and [he had] recommended that a meeting was held to consider non-confirmation in post i.e. dismissal on the grounds of capability/unacceptable performance.”
28. There was a final review meeting held on 18 December 2014 which was chaired by Diane Gibson, EPA Network Manager. The claimant failed to attend and did not give any reasons for her non-attendance. In accordance with the letter sent to her in advance of that meeting, the respondent proceeded in her absence. It was determined that the claimant’s appointment to the post was not confirmed and that she was to be dismissed on grounds of capability due to poor performance during the probationary period.

29. The claimant's employment came to an end on 20 December 2014 which we accept was due to poor performance unrelated to any disability. The respondent wrote to the claimant confirming this decision on 22 December 2014. The claimant appealed that decision but it is not necessary to set out the detail of the appeal for the purposes of what we have to decide in this claim.
30. On 14 May 2015, the claimant issued an employment tribunal claim (claim number 3400800/2015) alleging disability discrimination. The claimant relies upon that earlier claim as a 'protected act' for the purposes of s27 Equality Act 2010. That claim was somewhat discursive in nature and did not clearly set out the basis for alleging disability discrimination. It contained broad allegations the gist of which were that the claimant had been treated unfavourably by the respondent failing to make reasonable adjustments, terminating her employment, falsely accusing her of a slow pace of work, being of a hostile and argumentative disposition and giving an employment reference that led to the withdrawal of an offer of alternative employment with Ipswich Hospital as a Band 6 Biomedical Scientist on 12 January 2015.
31. Needless to say, the respondent defended that claim. The respondent requested clarification of the claim because, as referred to above, it was far from clear why or how the claimant was stating that any alleged treatment was discriminatory due to her disability. That further particularisation was never forthcoming and eventually the claim was struck out by EJ Postle at a Preliminary Hearing (that was not attended by the claimant) on 28 August 2015. The Judge also made a costs order against the claimant. Those orders were the subject of an appeal to the EAT by the claimant but were upheld by HHJ Hand QC who dismissed the appeal.
32. It is, of course, not the function of this tribunal to determine the merits of that earlier claim. The respondent, however, alleges that the claimant cannot rely on that claim as a protected act because the respondent says she made the allegations of disability discrimination in bad faith. As a consequence, it is necessary to make certain findings relevant to dealing with that issue.
33. We simply observe that, for the reasons already identified above, the claimant's allegations of disability discrimination in the earlier claim (being of a general and vague nature) appear on the face of it to have been without any real merit. To that extent we have some sympathy with the respondent's position regarding that claim. Ultimately, however, we do not accept that simply because the claim appeared to have little or no merit and was struck out because of the claimant's failure to properly particularise her complaint, it must follow that the claim of discrimination was made in bad faith. We are not satisfied that the claimant made her complaint in bad faith, however misguided the claimant's belief in her claim of disability discrimination might have been. Other than the circumstantial evidence of how the claim eventually progressed, there was no evidence before us to suggest that the claimant did not hold a belief (albeit it what seems to be a wholly misguided one) that her disability may have played a part in the treatment she received from the respondent at that time such that she knew

the allegations to be false at the time she submitted the earlier claim. We therefore do not find that the earlier claim was made in bad faith.

34. As referred to above, the claimant was the subject of a disciplinary hearing held by the HCPC on 29 to 31 July 2015. At the conclusion of that hearing the claimant was struck off the HCPC register. The claimant produced to us a copy of the reasons of the HCPC on the first day of this hearing and with the respondent's agreement, they were added to the end of our trial bundle and subsequently referred to in cross-examination of the claimant. Notably in paragraph 44 and 45 of the HCPC reasons, the panel stated the following:

"44. [the claimant] in her persistent denial of the allegations [being addressed by the HCPC] has shown a disregard for truth and a willingness to accuse others of untruthfulness. It is apparent from her written statement submitted to the Panel today on the issue of impairment of her fitness to practice that she does not accept the Panel's findings of fact and continues to blame others.

45. In short, [the claimant] has shown herself to be untrustworthy and untruthful. She has shown no remorse and a total lack of insight".

35. We make it abundantly clear that we are not in any way bound by these earlier findings of the HCPC nor are we influenced by them. We nevertheless consider this particular reference to be insightful because it is consistent in our view with the difficulties faced by those managing the claimant when raising concerns about her poor performance. It is also relevant to the central matter in dispute which is whether the claimant was given a negative reference for a proscribed reason for reasons explained below.
36. On 30 August 2017, the claimant received an offer of employment with Cambridge University Hospitals NHS Foundation Trust (hereinafter referred to as "Cambridge") for the position of Medical Equipment Library Technician, subject to suitable pre-employment checks including references.
37. Neither party was able to be specific about the date, but at some point in September or October 2017, Mrs Kerry provided a reference (at p141 to 146) for the claimant following a request from Cambridge.
38. On 12 October 2017, the claimant received a conditional offer for a different position with a different employer, namely as student Dental Nurse with the University College London Hospitals NHS Foundation Trust (hereinafter referred to as "UCL").
39. Again, neither party was able to be specific about the date, but at some point thereafter in October 2017, Mrs Kerry provided a reference (at p147 to 150) for the claimant following a request from UCL.
40. On 23 October 2017, the claimant received a letter from UCL informing her that the offer had been withdrawn and was later told by UCL on 6 November 2017 that this was because of the reference received from Mrs Kerry on behalf of the respondent. Even though no correspondence from UCL was produced to us as evidence, we accept the claimant's stated case

that this offer was made and withdrawn.

41. Likewise, on 5 December 2017 the claimant received a letter from Cambridge withdrawing the offer because of the reference provided by Mrs Kerry on behalf of the respondent. Again, no correspondence from Cambridge was produced to us as evidence, but we accept the claimant's evidence that this offer was made and withdrawn.
42. Understandably, at the hearing before us there was a considerable amount of focus upon these two references and cross-examination of Mrs Kerry about the content. There is no doubt that both references prepared by Mrs Kerry were negative but, given the findings of fact already set out above, that should have come as no surprise to the claimant.
43. We find as fact that both references are broadly accurate and are an honest account by Mrs Kerry of the claimant's performance during her short period of employment with the respondent. They correctly reflect all the problems that were encountered and recorded in the contemporaneous documentation before us for that period.
44. There were only two specific purported errors identified in the references. The first was the reference to the fact that the claimant's HCPC registration had been suspended on 1 April 2015 in the Cambridge reference. The second was a reference to two days' absence in the UCL reference when the claimant had in fact only taken one day.
45. With regard to the latter error, we accept Mrs Kerry's explanation that this was an innocuous mistake and that she had misread the sickness records. As for the former purported mistake, we consider this to be more significant for the following reasons. Firstly, we have doubts about whether this is an error at all because the date specified (1 April 2015) was only a few months before the claimant's final disciplinary hearing in July 2015 and there is every probability that the claimant could have been suspended at that time. More importantly, if Mrs Kerry was intending to be vindictive in terms of these references that she prepared, she could have legitimately stated on each reference that the claimant had been struck off in July 2015 by the HCPC and could have also referred to the strong terms in which the panel made its findings as set out above. She did neither in each of her references.
46. Having heard evidence from Mrs Kerry we are entirely satisfied that regardless of what she knew about the earlier tribunal claim and allegations of disability discrimination, this had no bearing at all on the content of the references that she provided to Cambridge and UCL. Furthermore, the claimant's disability had no bearing on the content of the references provided to Cambridge and UCL and Mrs Kerry was not consciously or subconsciously motivated by the fact that the claimant had a disability when providing those references. As we have already found on the evidence before us, the claimant's poor performance was not directly or indirectly in consequence of any disability.
47. We accept that the references provided by Mrs Kerry contrast somewhat

with two earlier references about the claimant that were provided by another colleague of hers, Mr Adrian Reynolds. On 25 November 2014, the Recruitment Department of Addenbrooke's Hospital, Cambridge wrote to Mr Reynolds explaining that the claimant had applied for the post of Biomedical Scientist at Ipswich Hospital and had named him as a referee. Likewise, on 10 December 2014 the recruitment company, HCL Healthcare Ltd wrote to Mr Reynolds requesting a reference on behalf of the claimant. Mr Reynolds provided a reference in respect of the Ipswich position on 1 December 2014 (p132 to 138). His reference to HCL appears at p139 to 140 but is undated.

48. Mr Reynolds was a Senior Biomedical Scientist who worked closely with the claimant on day to day basis. We note that even the content of his references raised doubts about aspects of the claimant's performance. Notably, with regard to the Ipswich position, out of all the categories, Mr Reynolds rated the claimant 'good' in just four categories, 'average' in five, 'poor' in one category and 'unable to comment' in the remaining four. The 'poor' score was in answer to "Relationship with Line Manager". By way of explanation he added by hand "*relationship with me is quite good but poor with Band 8 Lab Section Manager*". That was a direct reference to the difficult relationship the claimant had with Mrs Kerry. Chronologically that is significant. Clearly even Mr Reynolds recognised that there were difficulties between the claimant and Mrs Kerry long before the claimant issued her tribunal claim the following year in May 2015. Furthermore, notwithstanding his ratings for the claimant, the handwritten narrative betrayed cracks in the claimant's ability to perform to an acceptable standard. When asked to provide reasons for the ratings, Mr Reynolds stated the following:

"[The claimant] can perform quite well when given a single task but struggles to efficiently multi-task which is essential in this Lab. She has not been able to fully participate in night shift work without another qualified staff member due to concerns about workload management."

49. On page four of the reference (p134), Mr Reynolds repeats concerns about the claimant's slow performance and ability to keep up with the work. He answered "no" to the question as to whether he would re-employ the claimant in a similar role and openly stated that he would not employ her in such a busy Lab as the respondent's. Furthermore, Mr Reynolds makes reference to the claimant being a "*touch argumentative at times and ... not always respond[ing] well to criticism or well-meant advice*".
50. Even though his ratings were more positive than those given by Mrs Kerry in her later references, overall this was hardly a glowing reference and not one free of concerns.
51. Nevertheless, the claimant sought to rely on Mr Reynolds' references to demonstrate that Mrs Kerry's references were inaccurate and deliberately misleading. Having considered the evidence carefully we reject that suggestion. As we understand the position from the claimant's own case (and her earlier tribunal claim), Mr Reynolds' reference also led to the offer of the Ipswich role being withdrawn. Regardless of whether or not that is correct, it cannot be said that the references prepared by Mr Reynolds are free of concerns about the claimant's performance. In any event, we accept the evidence of Mrs Kerry that Mr Reynolds did not have knowledge of all

the facts regarding the claimant's performance and issues concerning her employment and did not have full access to management information that would have been available to, and known by, Mrs Kerry and her senior, Mr Pipkin. In particular, Mr Reynolds stated in his references that the claimant was not subject to formal disciplinary or performance management procedures even though she was without doubt the subject of both at the time he prepared them.

52. We also find as fact that the references prepared by Mr Reynolds would have been tempered by the fact that he was still working closely with her at the time (which would have made the provision of a more negative reference, however accurate or truthful, problematic) and he was not specifically authorised to provide a reference for her on behalf of the respondent.
53. For all these reasons we reject the suggestion that any contrast between Mr Reynolds' references (given before the claimant's employment had ended) and Mrs Kerry's references (provided over two years after the claimant's employment had been terminated for poor performance and following the claimant being struck off the HCPC register) infers or implies that Mrs Kerry had been misleading or deliberately inaccurate in her response to Cambridge and UCL. Indeed, we find the content of each of Mrs Kerry's references to be more consistent with the evidence regarding the claimant's performance during her period of employment and a more accurate reflection of what was happening during that time than the references provided by Mr Reynolds.

The Law

54. Section 13, Equality Act 2010 provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

55. Need it be said, disability is a protected characteristic in accordance with section 4 of that Act. Disability is further defined in section 6.
56. In accordance with section 136(2), if there are facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated against the claimant, the tribunal must hold that the discrimination occurred unless the respondent shows that it did not contravene the Act (this is commonly known as the shifting or reverse burden of proof rule).
57. The application of s136 EqA has been explained in a number of cases, most notably in guidance from the Court of Appeal decision in Igen Ltd (formerly Leeds Careers Guidance) and others v Wong and other cases [2005] ICR 931. In Igen Ltd the Court was considering the previously applicable provisions of the Race Relations Act 1976 but the guidance is still applicable to the equivalent provision of the EqA (Efobi v Royal Mail Group Ltd [2019] IRLR 352 CA). In essence, the claimant must prove facts from which inferences could be drawn that the respondent has treated the

claimant less favourably on the protected ground. At this stage, the tribunal is entitled to have regard to all material facts including evidence of whether less favourable treatment occurred and other facts that might indicate the reason for the treatment (as confirmed in Laing v Manchester City Council EAT 0128/06). Likewise, in accordance with the Court of Appeal decision in Madarassy v Nomura International Plc [2007] ICR 867, put in basic terms, the claimant must show more than the possibility of discrimination occurring. To succeed in a complaint of this kind it is not enough for a claimant to simply assert that there has been less favourable treatment and that she has a protected characteristic. Nor is it enough for a claimant to prove facts that the respondent *could* have discriminated. Instead the claimant must also adduce some evidence of the reason for the treatment such that the tribunal can conclude on the balance of probabilities that the respondent did discriminate against the claimant as a consequence of or in relation to that treatment.

58. If having regard to all material facts at the first stage of the 'reverse burden of proof test' the claimant satisfies the tribunal that on the face of it there can indeed be an inference drawn of discrimination, then the burden passes to the respondent to demonstrate that in fact the treatment sustained by the claimant was nothing to do with her protected characteristic.
59. In essence, the tribunal must focus upon what the true reason was for the treatment received. In order to identify the reason for the act complained of there should be intense focus on the mental processes of the decision maker. It is the reason for the decision maker's actions, rather than the actions of another upon whose information the decision maker innocently act with which is of concern to the tribunal (CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439 CA).
60. There is rarely evidence of overt or deliberate discrimination and therefore the tribunal may need to examine the context of the events to determine whether there are appropriate inferences that can be made from the primary facts. Likewise, discrimination may not be a conscious act but there must be a sound evidential basis before it can be inferred that the alleged discriminator's actions were subconsciously motivated by a protected characteristic.
61. The provisions of s136 EqA were also considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC. Where a tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. Furthermore, although the law anticipates a two-stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (see Madarassy). If the reason for the treatment remains unclear following any findings of fact made (after considering the whole of the evidence) then it will be necessary to apply s136 in order to reach a conclusion on that issue.
62. Section 27, Equality Act 2010 provides that:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because

- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
 - (2) Each of the following is a protected act –
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
 - (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
 - (4)
 - (5)"
63. Section 27(3) is designed to protect bona fide claims of victimisation only.
64. There is no need for a claimant in a victimisation claim to compare her treatment with that of a comparator. The question is simply whether the protected act was an effective cause of the detrimental treatment. In accordance with the House of Lords decision in Chief Constable of West Yorkshire v Khan [2001] ICR 1065, a tribunal must determine what the real reason for any detrimental act (consciously or unconsciously) was by the respondent. The test is subjective. As with direct discrimination, it is the reasons for the actions of the decision maker which should be considered and therefore the extent of knowledge of the decision maker of the protected act can be an important consideration.
65. The burden of proof provisions of s136 EqA equally apply to complaints of victimisation.
66. Neither in the case of direct discrimination nor in the case of victimisation is it necessary for the protected characteristic or protected act to be the only or even the principle reason for the act complained of. It is enough if, in either case, it contributed significantly to the alleged discriminator's thought processes. In this context, significant means more than trivial.

Conclusions

67. Applying the relevant law to the facts that we have found and addressing the issues identified at the outset, we are satisfied that the respondent did not treat the claimant less favourably because of her disability, did not victimise the claimant and, for that matter, did not discriminate against the claimant because of her disability in any other way.
68. There is no dispute that the references Mrs Kerry gave in respect of the claimant were negative. These were bound not to be of the claimant's liking but they were for all intents and purposes a fair and generally accurate reflection of the claimant's period of employment with the respondent and the concerns arising during that time. The respondent would have provided those references to any prospective employer of anyone in not materially different circumstances to the claimant regardless of whether they were disabled or not. The giving of negative references had nothing to do with

the claimant's disability and was not because the claimant was disabled.

69. We have found that the claimant's allegations of disability discrimination (however vague) in her earlier claim were not made in bad faith. Accordingly, the claimant's earlier tribunal claim (number 3400800/2015) was a protected act for the purposes of s27 of the Equality Act 2010.
70. Nevertheless, we are entirely satisfied that the fact that the claimant issued her earlier tribunal claim had absolutely no part to play in the nature or content of the references that were provided by Mrs Kerry to Cambridge and UCL.
71. For completeness we should add that the claimant's poor performance was not in consequence of her disability either directly or indirectly.
72. Accordingly, the claimant's claims of disability discrimination and victimisation are not well founded and are dismissed.

Employment Judge Wyeth

Date: 24/7/2019

Judgment sent to the parties on

31/7/2019

.....
For the Tribunal office