



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Joanne Tierney

**Respondent:** Mid and South Essex NHS Foundation Trust

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** 26 November 2020

**Before:** Employment Judge P Housego

## Representation

**Claimant:** David Tierney, the Claimant's husband

**Respondent:** Serena Crawshay-Williams, of Counsel, Capsticks LLP

# JUDGMENT

1. The name of the Respondent is amended, as above.
2. The claims for unfair dismissal, and for notice pay and other pay, are dismissed on withdrawal by the Claimant.
3. The claims for age sex and disability discrimination are dismissed as having no realistic prospect of success.

# REASONS

1. The Respondent indicated that the correct name for the Respondent was as above. Mr Tierney did not object, and so I amended the name of the Respondent.
2. The claim for unfair dismissal was discussed. Mr Tierney appreciated the problems in that claim: not only had Mrs Tierney not been an employee – it was the cause of her complaint that she was not allowed to become one – but that even if she had been an employee she had not the two years' service needed to bring a claim for unfair dismissal (and for wages) and there was no reason put forward that did not require two years' service.

Those claims were withdrawn.

3. Mrs Tierney had been a senior HR adviser. She was not in employment from 2009, as she was caring for her son, who has autism.
4. In March 2020 she applied for a 6 month contract with the Respondent, in the HR team. She had competency based interviews and completed forms. On 27 March 2020 Ross Petty-Fernandez called Mrs Tierney to say that a job offer would be made. There was then a substantial delay. This at precisely the time lockdown had just started, which may have been a contributing factor
5. On 11 May 2020 she was made a conditional offer of employment. The conditions were primarily a medical examination, and the provision of references.
6. Also on 11 May 2020 was asked about references. Mrs Tierney had difficulty with current references, because the standard policy of the Respondent was to ask for employment references from the last 3 calendar years, and she had not worked in that time. However they said other references would be acceptable, from that period.
7. She offered a reference from the British Medical Association, where she had worked for many years, but not since 2009, from a yacht club where she had volunteered, and from a school where she also volunteered.
8. Unfortunately the BMA responded to the Respondent that they had no trace of Mrs Tierney.
9. On 20 May 2020 Mrs Tierney underwent the medical examination successfully (though, and as she had anticipated, suffering bruising from the taking of a blood sample).
10. On 21 May 2021 Hannah Anderson told Mrs Tierney that a reference from a past employer, a reference from somewhere she had volunteered and a personal statement would suffice. Mrs Tierney says that Ms Anderson was unclear about the requirements for someone in her position. Mrs Tierney says that later in the day Ross Petty-Fernandez called her and was also unclear about exactly what they needed from her. Later Ms Ross emailed Mrs Tierney and stated that a reference from the yacht club would be sufficient. Mrs Tierney asked if that, plus one from the BMA would be sufficient, but that as it was half term it might be difficult to get a school reference quickly.
11. Mrs Tierney says that Ms Ross and Mr Petty-Fernandez did not really know what to do, and on occasion said different things to her.
12. At 16:57 on 22 May 2020 Ms Ross emailed Mrs Tierney to say that management had decided to withdraw the offer for want of references.
13. Mrs Tierney lodged a grievance, but withdrew it in June as she felt that it was not being progressed in accordance with the Respondent's policy.

14. I take Mrs Tierney's case at its highest, and so have not set out the Respondent's position in any detail, only recording (because this is a public document) that they say they tried to be as helpful as possible, and were hamstrung by the BMA's statement and the absence of anything other than Mrs Tierney's own statements.
15. Mr Tierney explained that the three discrimination claims were interlinked. Mrs Tierney was female, and the carer for their son, who was within the definition in the Equality Act 2010 as disabled. Those who were not old enough to have 3 years' work experience were allowed to provide character references. More women than men were carers. Accordingly she was asserting discrimination against her as a female carer of a disabled son, who was not young enough to avoid reference requirements.
16. Exactly how that fell within the Equality Act 2010 was discussed. Mrs Tierney was not saying that the Respondent had discriminated against her because she was an older female carer of a disabled son, but that they had applied their reference policy in a way that had prevented her complying with it. She could have complied with their requirements had they not so hastily withdrawn the offer.
17. This is an entirely understandable reason to feel a sense of grievance, and I have no doubt but that Mrs Tierney (and Mr Tierney) are entirely genuine in bringing the claim.
18. The delay from verbal offer to written offer, and the apparent suddenness of the withdrawal over 21/22 May 2020 without waiting for school and yacht club references may mean that this was not fair. I am taking the claim at its highest, but there is a real problem for Mrs Tierney's claim.
19. It is that Mrs Tierney is clear that she was able to provide suitable references, and should have been approved: she says that the Respondent was unfair in not working harder with her to agree what references would be acceptable and that Ross Petty-Fernandez and Hannah Anderson were not clear about the Respondent's requirements and said different things to her.
20. Mrs Tierney does not say that they did this because of her age, her disabled son or because she is a woman, so that none of her discrimination claims are of direct discrimination. This was fully explored in the hearing.
21. Mrs Tierney relies on indirect discrimination, which requires a provision criterion or practice (a "PCP"). In Mrs Tierney's case it is (for all three claims) the requirement to provide employment references for the 3 calendar years prior to application. That is capable of being a Provision, Criterion or Practice on which to base the claims. But it was not, on Mrs Tierney's case, a Provision, Criterion or Practice that the Respondent applied. They would take a past reference from the BMA – but the BMA did not provide one. They would take a reference from another organisation where Mrs Tierney volunteered, and while that too can be a Provision, Criterion or Practice Mrs Tierney says that she had so volunteered and could have provided such a reference: and so if that was

a Provision, Criterion or Practice it was not one that disadvantaged her.

22. Mrs Tierney's best point may be that it may be easier for an employed person to provide references than for someone in her situation, but that is not a causative link to discrimination by reason of a protected characteristic, and cannot found a discrimination claim.
23. After discussing this with Mr Tierney in some depth, I came to the conclusion that while Mrs Tierney has a very real sense that she has been treated very unfairly, the reason for that is the way the Respondent dealt with her references (or did not), which she says they should have found a way to accept. In summary this was an asserted failure to apply a Provision, Criterion or Practice with which she could comply – not a Provision, Criterion or Practice which she could not meet. Therefore an indirect discrimination claim cannot succeed. Mrs Tierney does not say that the reason for that (asserted) unfairness was motivated by the fact that she is the female carer of her disabled son with a non-recent prior work history, and so no direct discrimination is claimed.
24. For these reasons I concluded that the discrimination claims have no reasonable prospect of success, and so must strike them out.

**Employment Judge Housego  
Date 27 November 2020**