



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss E Sampson

**Respondent:** NHS Blood and Transplant

**Heard by Cloud Video** On: 17 and 18 November 2020

**Before:** Employment Judge Reed  
**Members** Mr P Bompas  
Ms S Maidment

**Representation**  
**Claimant:** Ms A Williams, Counsel  
**Respondent:** Mr C Baker, Solicitor

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claimant was unlawfully discriminated against on the ground of disability.
2. This matter will now be relisted for the determination of remedy.

## REASONS

1. In this case the claimant Miss Sampson said she had been unlawfully discriminated against on the ground of disability. It had been determined at an earlier hearing in this matter that she was disabled by reason of depression and anxiety. In September 2018 she was offered a job with the respondent, NHS Blood and Transplant. However, upon receipt of references that offer was withdrawn. She asserted that the withdrawal of the offer amounted to discrimination arising from disability. The claims were resisted by the respondent.

2. We heard evidence on behalf of the respondent from Ms Venus, who was a party to the decision to withdraw the offer of employment. We also heard from the claimant herself and our attention was directed to a number of documents. We reached the following findings of fact.
3. The respondent is a specialist health authority within the National Health Service. Essentially, it handles and deals with the majority of blood donated throughout the country.
4. The respondent advertised a vacancy for the position of Healthcare Technical Officer or HTO and Miss Sampson applied for that position on 3 September 2018. She was interviewed on 19 September and made a provisional offer of employment on 27 September. The offer was expressly subject to the satisfactory outcome of health clearance, references, pre-employment declaration and other necessary checks.
5. Miss Sampson completed an online questionnaire for the respondent's occupational health provider, pursuant to which she was declared "medically fit" for the duties of the position. However, on 1 October the respondent received a reference from Miss Sampson's previous employer, Public Health England, indicating that her reliability was poor due to sick leave and that she had had 151 days of sickness absence over seven periods within the last twelve months.
6. Ms Venus spoke to Miss Sampson by telephone on 2 October and obtained further information about her absences. Miss Sampson attended a meeting with Ms Venus and her colleague Mr Lam on 10 October, during which the matter was discussed further. As a result, on 16 October Ms Venus spoke to Miss Sampson by telephone and explained that the offer was being withdrawn. That conversation was followed up in writing in an undated letter. A detailed letter was sent on 23 November explaining precisely why the decision had been taken.
7. Under s15 of the Equality Act 2010, a person (A) discriminates against a disabled person (B) if:
  - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
8. It was conceded by the respondent that the withdrawal of the job offer to Miss Sampson amounted to unfavourable treatment. At an earlier case management hearing it had been concluded that the "something arising in consequence of the claimant's disability" was the respondent having been informed by Public Health England that the claimant had taken 151 days sickness leave in a year of employment. It was perhaps more accurate to describe it as simply the absences themselves, which it was agreed were a consequence of disability. They had led to the withdrawal of the offer so Miss Sampson had indeed been treated unfavourably because of something arising from disability.

9. The respondent, however, said that the withdrawal was a proportionate means of achieving a legitimate aim.
10. The respondent identified five aims which it asserted were legitimate, namely:
  - (a) Statutory duty (Part 1), namely responsibility of the respondent pursuant to the NHS Blood and Transplant (Establishment and Constitution) Order 2005 to promote or secure the effective provision of services under the National Health Service Act 2006 and to perform such functions in connection with (a) collecting, screening, analysing, processing and supplying blood, blood products, plasma, stem cells and other tissues to the health service (b) the preparation of blood components and reagents. This is coupled with a direction from the Secretary of State pursuant to the NHS Blood and Transplant Directions 2005 to provide screening, testing and processing for the preparation of blood, stencils and tissue.
  - (b) Statutory duty (Part 2) – the respondent's duty to care towards its employees in accordance with its statutory obligations including the health and safety at work etc Act 1974, relating to the claimant and others.
  - (c) External regulations – the respondent being subject to independent, external auditing of its statutory obligations by three external regulators, namely (1) Medicines and Healthcare Products Regulatory Agency (2) Human Tissue Authority (3) Care Quality Commission and held to account for any failings (with the risk of losing its licence if it fails to meet its statutory obligations).
  - (d) Patient safety – the role of HTO involves making a life-saving pharmaceutical blood product pursuant to statutory duty and externally regulated. Once the blood product has been tested there is no further testing of it and it will enter the patient's body. Further, the role involves time critical deadlines due to the shelf life of blood products and in the event that the product is made incorrectly or does not meet the time critical deadlines, there is a significant risk to the patient's safety which could ultimately result in the patient's death.
  - (e) Attendance at work – employees are expected to attend work on a regular or frequent basis so that their employment tasks are fulfilled.
  - (f) To avoid the impact of likely absences on the claimant's potential colleagues.
11. It was not entirely clear what concessions had been made by Miss Sampson in relation to these matters and particular issue was taken with two of the aims, namely (b) and (e).
12. As to (b), it was suggested that a duty of care to Miss Sampson herself could not be relevant, since she was not an employee at the time. Essentially, however, what the respondent was saying was that it was

appropriate to take steps to avoid recruiting someone into a position in which they might themselves be endangered. If a danger might be posed to someone if they were an employee, a way of avoiding that state of affairs would be not to recruit in the first place.

13. Similarly, in relation to aim (e) it was legitimate for the respondent to seek to bring about a situation where their employees provided regular attendance.
14. We took the view that these were all legitimate aims and perhaps might best be summarised as ensuring the safe and efficient running of the service.
15. What we then had to ask ourselves was whether the “non recruitment” of Miss Sampson was a proportionate means of achieving those aims.
16. The respondent concluded that, in the light of her previous record, there was a very good chance that her attendance as an employee would be less than satisfactory. It was suggested that there was insufficient evidence to establish that belief.
17. It is right that Miss Sampson herself indicated at the time of her interview that her mental health had improved. It is also correct that she had not attended her GP for a considerable period and although she had previously taken medication for her condition, she no longer had to. On the other hand, she would not necessarily have had to attend her GP every time she was absent (and clearly had not in the past, given the record of absence with Public Health England).
18. It is correct that the occupational health advisor found her to be medically fit for the proposed role but that recommendation was of very limited value. In the reply to the questionnaire from occupational health the claimant had simply indicated that she had had 21 days or more absence within the previous two years. No further enquiries were apparently made by occupational health on that subject. What their opinion might (or sensibly should) have been had they known of the precise extent of her absences is clearly impossible to say.
19. The HTO role which was initially offered to Miss Sampson was on night work. Miss Sampson herself indicated that she would be favourably disposed towards such work. She had done night work in the past, although that did not appear to have been on a particularly extensive basis.
20. Ms Venus was mindful of health and safety documents she had seen that suggested that night work might be deleterious for those suffering from depression but they could not take account of Miss Sampson’s particular case or take into account the assurances she gave the respondent (to the effect that her mental condition was improving and that night work would suit her).
21. The fact remained however, that Miss Sampson’s previous attendance record was very poor. Taking all these matters into account, we concluded that it was reasonable for Ms Venus to entertain doubts, at the least, as to the ability of Ms Sampson to provide regular service.

22. She also had to bear in mind the particular role Ms Sampson would be undertaking. The bulk of blood donations made throughout the country would arrive at the respondent's premises in Filton in the afternoon and the evening. There were three people on the night shift, two HTOs and a Senior Technical Officer, whose responsibility was to prepare samples for analysis. The test results had to be obtained by 9.00am, with a view to the relevant products being sent out for transfusion that day. Transfusion would have to take place by midnight.
23. In other words, this was a small team undertaking tasks under some pressure, with literally a life and death implication.
24. When she worked for Public Health England, Miss Sampson had access to a manager for support. That was clearly of assistance to her in dealing with the issues that arose from her disability. However, since she would be working at night for the respondent, that sort of support was simply not available for her.
25. That would feed into a further concern of the respondent, namely as to the claimant's own health and safety. Ms Venus feared that her condition might be exacerbated in those circumstances. She also had concerns about the two colleagues with whom she would work. If Miss Sampson was absent from work, her duties would have to be undertaken by her colleagues, which would put them under more pressure. There was the possibility of seeking cover from other shifts but as she pointed out, Miss Sampson's colleagues on day shift would not be likely to find night shift duties particularly attractive.
26. In short, Ms Venus entertained perfectly reasonable concerns firstly, that the efficient and effective running of the service might be adversely affected due to Ms Sampson's attendance and secondly that that might impact on Miss Sampson's colleagues adversely. Furthermore, the very job itself (and the hours when it was carried out) might put Ms Sampson under such pressure that it would exacerbate her condition or at least trigger the sort of absences she had had with her previous employer.
27. The question for us, then, was whether in the light of those genuine and reasonable concerns, the withdrawal of the offer of employment was proportionate. In our view it was not.
28. There were no "reserve" candidates that could be immediately recruited in place of Ms Sampson. It followed that a fresh recruitment exercise would have to be undertaken if she were rejected and it would be some time before an appointment could be made.
29. Furthermore, the respondent was entitled within its own procedures to employ Ms Sampson on a probationary period in order to see whether their fears were well founded in relation to her attendance. If they were, her employment could be terminated at a relatively early stage.
30. We took Ms Venus' point that recruitment of a replacement would have to be put on hold until her employment was terminated, and potentially even

beyond that date if she appealed. Clearly, that would be inconvenient for the respondent. On the other hand, such a process could be carried out over a relatively short period. The issues to be addressed would not be complicated.

31. That potential inconvenience had to be weighed against the unfavourable treatment suffered by Miss Sampson. A job she very much wanted to have and in which she believed she would perform well (and the respondent had no doubt that she possessed the required abilities) would be taken away from her.
32. We do not wish to understate the genuine and considered concerns of the respondent. The view of the decision taker in a situation such as this must be given respect and taking Miss Sampson on would clearly involve some risk. However, Miss Sampson effectively gave assurances about her prospective attendance. The relatively short period over which it could be determined whether the respondent's concerns were well-founded or not reduced that risk to a level that, given the consequences for Miss Sampson, rendered the withdrawal of the offer disproportionate.
33. In all the circumstances, our conclusion was that although the respondent did indeed have legitimate aims, the withdrawal of the offer of employment to Miss Sampson was not a proportionate means of achieving those aims. It followed that her claim succeeds and this matter will now be listed for determination of remedy.

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Employment Judge Reed

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Date 18 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....29 December 2020.....

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FOR THE TRIBUNAL OFFICE