EMPLOYMENT TRIBUNALS

Claimant: Miss T Spinelli

Respondent: Mrs M Dabke

FINAL HEARING

Heard at: Croydon (remote public hearing by video)

On: 11-12 February 2021
15 March 2021 (in chambers)

Before: Judge Brian Doyle
Ms S Goldthorpe
Mr P Adkins

Appearances
For the claimant: Mr O Isaacs, counsel
For the respondent: Mr T Goodwin, counsel

RESERVED JUDGMENT

The claimant's complaint of direct disability discrimination in relation to the respondent's withdrawal of a job trial, contrary to sections 6, 13 and 39(1)(a) of the Equality Act 2010, is well-founded and the claim is upheld to that extent only. The matter will be re-listed for a remedy hearing.

REASONS

Introduction

1. This is the unanimous reserved judgment and reasons of the Tribunal.

2. In this claim the claimant complains that the respondent withdrew an offer of a job trial or an offer of employment from the claimant when considering the recruitment and selection of applicants for the position of after-school nanny to the

respondent's children. At an earlier stage of the proceedings, the claim was also framed as being one of dismissal. The scope of the claim is now considerably narrowed as a result of evidence and submissions.

3. The claim is based upon direct disability discrimination (sections 6 and 13 of the Equality Act 2010) and upon potential causes of action arising from section 39(1)(a), (1)(c) and (2)(c). The disability relied upon is Undifferentiated Connective Tissue Disorder (UCTD), an autoimmune disease.

4. The pleaded case is to be found in the original ET1 claim presented on 7 June 2019 [2-13] with grounds of complaint [14-16]. An Acas early conciliation process commenced on 13 May 2019 and ended on 3 June 2019 [1]. The claimant's case is supported by an original schedule of loss dated 7 June 2019 [16-17] and revised on 12 January 2020 [18]. The respondent's ET3 response is dated 10 September 2019 [19-26], with grounds of resistance appended [27-32].

5. The claim had earlier been the subject of a case management hearing before Employment Judge Andrews on 29 November 2019. It had been preceded by case management agendas prepared separately by both parties [33-43]. Judge Andrews's case management summary and orders were sent to the parties on 11 January 2020. They appear at pages [44-51] of the document file. There is a separate judgment dismissing various other complaints upon withdrawal by the claimant.

6. At a preliminary hearing on 8 January 2021 [193-194], Employment Judge Richardson permitted an amendment to the claim so as to include a complaint under section 39(1)(a) of the Equality Act 2010. The judge refused a further application to amend, which was intended to include discrimination by reference to perceived disability.

7. The final hearing was due to take place on 15-16 July 2020, but was postponed and re-listed in circumstances arising from the current pandemic.

8. The Tribunal heard the evidence of the parties over two days on 11 and 12 February 2021. That hearing was conducted via the Cloud-based Video Platform (CVP). The Tribunal then adjourned the hearing and reserved its judgment. It set the parties a timetable for the production of written submissions and replies. The Tribunal then met in chambers on 15 March 2021, again via CVP, to consider its judgment and reasons. This reserved judgment and reasons result.

The issues

9. In the claimant's counsel's opening note, it is suggested that the only residual issue for the Tribunal is whether the claimant's dismissal (on the claimant's case) or the arrangements for who was offered employment or who was not offered the role (on the respondent's case) amounted to direct discrimination because of disability (that is, whether the reason was in no sense caused by unlawful disability discrimination). By the time of closing submissions and replies, the residual issue had narrowed to the question of whether the respondent's withdrawal of an offer of a job trial amounted to direct disability discrimination.

10. The claimant suggested that the issues for the Tribunal to decide were as follows. (1) Was the claimant disabled at the material time? (2) Was the role being offered or was the claimant offered "employment" as defined in section 83(2)(a) Equality Act 2010? (3) Was the claimant treated less favourably than a hypothetical comparator either in not offering employment to the claimant (under section 39(1)(c) Equality Act 2010) or in dismissing the claimant (under section 39(2)(d) Equality Act 2010)? See the claimant's counsel's opening note paragraph 16.

11. The respondent's account of the issues to be decided was relatively more expansive. (1) Did the claimant have at the relevant time a disability within the meaning of section 6(1) Equality Act 2010, in that: (a) Did she suffer from UCTD at the relevant time (29 April to 8 May 2019)? (b) Does UCTD amount to a physical or mental impairment? (This is not in dispute.) (c) Does her UCTD have an adverse effect on her day-to-day activities? (d) If so, is that effect (i) substantial; and (ii) long-term? (2) If it is established that the claimant was disabled, did the respondent have the requisite knowledge? (3) Who is an appropriate comparator? (The claimant appears to rely on a person known only as Candidate A, being the person who the respondent hired to perform the role for which the claimant applied. (The respondent agrees that Candidate A is an appropriate comparator.) (4) Did either of the following alleged acts occur: (a) the respondent withdrew a job offer made to the claimant; or, in the alternative, (b) the respondent withdrew a trial shift offered to her? (5) If so, did the alleged act amount to less favourable treatment? (This is not in dispute.) (6) If so, did the respondent subject the claimant to that less favourable treatment because of her disability? See the respondent's counsel's opening note paragraph 8.

The evidence

12. The Tribunal had before it an agreed file of documents comprising 235 pages inclusive of index. References to pages in that document file appear in square brackets above and below. During the course of the hearing further documents were disclosed by the claimant. If relevant, specific reference will be made to those documents in these reasons.

13. The Tribunal heard evidence from the claimant herself, and from the respondent and her husband (Mr H Dabke). Their evidence took the form of written witness statements, which were taken as read. That evidence was supplemented by limited additional evidence-in-chief and by re-examination, and subjected to cross-examination, and also questions from the Tribunal.

Assessment of the evidence

14. The respondent's counsel submitted that the claimant was not a credible witness (respondent's closing submissions paragraphs 4-8). Counsel invited the Tribunal to prefer the respondent's evidence where there was a dispute of fact.

15. The claimant's counsel accepted that aspects of the claimant's evidence appeared to be unreliable. He stressed that that did not mean that her views were not honestly held. He contended that the fact that the claimant may appear unreliable

in one respect necessarily undermined the totality of her evidence or preclude her from succeeding in her claims of unlawful discrimination (claimant's closing submissions paragraphs 2-7).

16. Before the commencement of the hearing, the Tribunal had been asked to take account of the claimant having ADHD among other conditions (paragraph 15 of the claimant's counsel's opening note). It has done so. However, making that allowance and accounting for the claimant's first language not being English, the claimant was not an impressive witness at the hearing. The Tribunal accepts the respondent's counsel's analysis of her as a witness (set out in paragraphs 4.1-4.8 and 5 of his closing submissions). At the same time, however, the Tribunal accepts that her unreliability as a witness does not necessarily mean that she was a dishonest witness or that her evidence is undermined in all respects and for all purposes. It is still necessary to make appropriate findings of fact before determining whether the claim of disability discrimination can succeed or fail.

17. The claimant and her husband were relatively more impressive as witnesses. The Tribunal accepts the respondent's counsel's characterisation of them in paragraph 7 of his closing submissions. Nevertheless, their evidence was given carefully and guardedly. The Tribunal formed the view that there was more to their evidence than appeared simply from a reading of their witness statements. An important consequence of their evidence was the reluctant admission that they made in relation to the reason given to the claimant at the time for the postponement (and ultimate cancellation) of her job trial.

18. Before leaving its assessment of the evidence, the Tribunal must deprecate the claimant's approach to disclosure of relevant documents (see respondent's counsel's closing submissions paragraphs 9-12). While disclosure is a continuing obligation, the production of documents at the last minute and during the hearing itself is at best unhelpful. Documents that were not part of the agreed file included an email concerning the claimant's mortgage, two screenshots regarding the claimant's visit to St George's Hospital and two documents regarding Universal Credit. There were also other documents in the claimant's possession or control, and which would normally have been subject to disclosure – such as her CV at the relevant time – that might have assisted the Tribunal. It was for the claimant to provide those documents rather than for the respondent to request them.

Submissions

19. The Tribunal is particularly grateful to the quality of advocacy and submissions by both counsel in a difficult case. Both counsel had prepared helpful opening notes reviewing the issues, the chronology and the relevant law. When the Tribunal adjourned and reserved its judgment, both counsel complied with a reasonably tight timetable for the production of closing submissions and replies. The Tribunal does not seek to set out the (not unreasonably) lengthy submissions. Instead it incorporates those notes, submissions and replies into these reasons by reference.

Disability: findings of fact

20. The claimant is a Brazilian-born Italian national. She is a permanent resident of the UK since 2007. She is described in her up-to-date CV for the purposes of these proceedings [89-91] as a degree-qualified nanny and "early years" consultant. She holds a full driving licence and owns a car. The claimant has experience of being an after-school nanny for various families at various times between 2010 and 2019. She has been an "early years" consultant. Between 2016 and 2019 she was the owner and managing director of a nursery school. Since 2007 she had held various other positions in nursery schools or in the childcare sector. She had previously been a teacher in the Brazilian school system. She was well-educated and otherwise well-qualified for her chosen career.

21. The claimant's claim to the protected characteristic of disability rests upon an impairment or condition said to be Undifferentiated Connective Tissue Disease (or Disorder) (UCTD). The Tribunal is naturally slow to rely upon Wikipedia entries as evidence. The respondent was understandably disparaging of this source put in evidence by the claimant. The Tribunal appreciates that it is only relied upon as a general signpost or introduction to what, in general terms, this disease consists of. It is not relied upon as medical evidence (although there is citation of medical literature footnoted) establishing that the claimant has this condition or that she has a disability as a result of it.

22. Treading with much care and circumspection, accordingly, the Tribunal has been referred to this material at [92-93] in the document file. What this material shows in general terms – and we hesitate to describe it as evidence, much less as an expert commentary upon the claimant's condition – is that UCTD is a disease in which the body attacks its own tissues. It is diagnosed when there is evidence of an existing autoimmune condition which does not meet the criteria for any specific autoimmune disease. It can be referred to as latent lupus or incomplete lupus. It is sometimes used interchangeably with the overlapping condition of mixed connective tissue disease. Symptoms typically include fatigue, a general sense of feeling unwell and fever.

23. That is as far as the Tribunal feels comfortable in any degree of reliance upon that material. The same can be said of other similar material exhibited in the document file at [94], [95-98], [99-105] and [106].

24. Turning then to the claimant-specific medical evidence, the first item is an NHS Emergency Department Discharge Summary dated 26 February 2019 [108-110]. This records a diagnosis of "Paraesthesia (numbness/tingling) (Confirmed)" to be followed up in "neurology hot clinic with outpatient MRI results (*thus*)." Having set out her presentation and her history, the clinician recorded an impression of "Suspicion of demyelinating disorder based on clinical presentation but no objective signs on examination, no evidence of optic neuritis on ophthalmological examination." There is a reference to "Patient reports Hashimotos Thyroiditis", but otherwise nothing appeared to be identified from investigations and results.

25. Next is a letter from the Department of Neurology at St George's Hospital following a clinic on 5 March 2019 [111-112]. It is addressed to the Rheumatology

Department. This records a diagnosis of “non-specific sensory symptoms – associated facial photosensitive rash with prior diagnosis of alopecia areata and associated arthritic pain” and “autoimmune hypothyroidism” with a “Strong family history of immune disease.” The consultant neurologist posed the question of whether “there is an underlying autoimmune disorder that could explain some of her slightly odd symptoms.”

26. A third item is dated 10 April 2019 and results from that last referral [113-114]. The consultant rheumatologist records the claimant as describing “symptoms possibly compatible with Raynaud’s phenomenon”. He speculates that she “has an undifferentiated connective tissue disorder although her symptoms are likely to be multifactorial”. There is a reference to a thought “that her symptoms to an extent would have been triggered by the extreme stress and anxiety she had … in 2015 and 2016.”

27. Then there is a Statement of Fitness for Work dated 20 May 2019 following an assessment by the claimant’s GP that day [115]. The claimant was advised that she was not fit for work from 20 May 2019 to 5 July 2019 because “under investigations rheumatologist (*thus*).”

28. A further item refers to an ultrasound appointment for 1 June 2019. It related to her neck [116]. No specific reliance appears to be placed upon the results [117].

29. There is a follow up report from the consultant rheumatologist dated 10 July 2019 [118]. He refers to the claimant being “very hypermobile … contributing to fatigue, tiredness, aches and pains as well as headaches and palpitations … her symptoms are multifactorial.”

30. The subsequent item is an NHS Emergency Department Discharge Summary dated 19 September 2019 [107]. The claimant had visited the Emergency Department with an eye problem. Upon examination, no abnormality was detected. The clinician recorded (so far as relevant for the Tribunal’s purposes): “Pc Right sided tingling on face, right eye blurring, jaw pain, tingling in neck, Intermittent dizziness. Under Rheumatology and ENT for Undifferentiated Connective Tissue Disorder.”

31. By 1 October 2019 a consultant haematologist was reporting a diagnosis of “Persistent right small cervical lymph nodes likely reactive”, “Connective tissue disorder” and “Hyperthyroidism” [119-120].

32. The claimant’s own Disability Impact Statement prepared for these proceedings is also instructive [121-124]. It is dated 15 December 2019. It is not necessary to extract it in full. The essential elements are as follows.

33. The claimant avers that she has suffered with fatigue most of her adult life. In 2008 she was diagnosed with an "underactive thyroid." In 2012 her diagnosis was of an autoimmune thyroid disease (Hashimoto Disease). In the period 2018 and 2019 or so she had been suffering with fluctuating severe fatigue, pain, numbness, mood swings, rashes, etc, with a more recent diagnosis of undifferentiated connective tissue disease during 2019. She is medicated for her various conditions.

34. The general day-to-day symptoms that she suffers include severe fatigue, joint pain, and muscle aches. During a flare up of her condition the fatigue becomes exhaustion, including fever. Her joint pain becomes so severe that she cannot stand for longer that 10 minutes or walk for longer than 10 minutes. Her muscle pain become so severe that her muscles become extremely painful to touch, swollen, stiff and numb. She cannot (as an example) hold things such as a kettle with her right hand or arm during a flare up. Apart from medication, she has learnt to self-manage her condition.

35. Her evidence is that dealing with her unpredictable disease is physically, socially, and emotionally draining, and she experiences daily episodes of fatigue and brain fog. She has had periods of sadness that were hard to get out of. She is more emotional than she used to be. Her fatigue can be very different from ordinary tiredness. Simple physical and/or mental activities can make her feel exhausted and struggling to function. Simple activities such as cooking, cleaning the house, food shopping, going out socially, going up more than one flight of stairs, amongst some others. The fatigue also impacts her cognitive function, in that she has “brain fogs” on occasions, momentary memory problems, word-finding difficulties, slurred speech, inability to plan or organise thoughts and loss of concentration.

36. In her account, the claimant’s pain can manifest itself in many ways such as stiff and aching muscles, painful joints, nerve pains, twitching muscles, cramps, tingling and numbness – pain that is on most occasions unbearable. It starts with fatigue and it quickly becomes painful exhaustion. Simple activities such as eating and feeding herself cause her jaw and right arm to ache. Showering, dressing, going up or down the stairs, washing up dishes and mopping the floor are all painful. She struggles with pain and fatigue every morning, even now with treatment. It takes from 1 to 3 hours to become less painful. When she wakes up, she must start moving her fingers, hands and feet in bed slowly for about 30 minutes. By doing so it allows her to get out of bed and take her medications. The medications take the edge off the pain and allow her to start her day. However, it does not relieve all the pain, the fatigue or the muscle stiffness. She cannot get out of the house and go to work, hence why she works from home in the mornings and then afternoons only for her employers.

37. During the afternoon and early evening, with the help of her medications, and if she is not experiencing a "bad day" or a flare up period, she can get on with most of her activities, but in a limited way. She can collect children from school using a car or walk if no longer that 10 minutes. She can take children to the park and watch them in the playground if she can have a shaded space to protect herself from the sun. She can cook them meals that would take her about 30 minutes to prepare and which are not labour-intensive, such as too much chopping or making a dough.

38. The claimant’s account is supported by her GP, as is the diagnosis of UCTD, in a letter dated 17 January 2020 [125-126] supported by the relevant medical documentary evidence [127-133].

Disability: relevant law

39. The Tribunal has directed itself in accordance with the provisions of section 6(1) and Schedule 1 of the Equality Act 2010; the statutory guidance on the meaning of disability; and the EHRC Code of Practice on Employment (Appendix 1).

40. Particular assistance has been obtained from the following case law authorities: *College of Ripon and York St John v Hobbs* [2002] IRLR 185 EAT; *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 EAT; *McDougall v Richmond Adult Community College* [2008] ICR 431 CA; *Boyle v SCA Packaging Ltd* [2009] ICR 1056 HL; *J v DLA Piper UK LLP* [2010] IRLR 936 EAT; *Rayner v Turning Point* (2010) UKEAT/0397/10 EAT; *Aderemi v London & South-Eastern Railway Ltd* [2013] ICR 591 EAT; *Lawson v Virgin Atlantic Airways Ltd* (2020) UKEAT/0192/19 EAT.

Disability: discussion and conclusion

41. The respondent's approach to the question of whether the claimant satisfied the definition of disability at the relevant time focused upon whether there was a contemporary diagnosis that she had a recognised condition of UCTD and whether she had identified the adverse effects of an impairment that could be immediately connected to or associated with or identified as arising from UCTD. If that has been the respondent's approach, then the Tribunal does not accept that it is the correct or appropriate approach.

42. It is an unnecessary and futile exercise to comb the medical evidence for a point in time when the clinicians were able definitively to attach the label UCTD to the claimant's diverse ("multifactorial") collection of medical conditions, impairments and adverse effects. It is equally unhelpful, and likely to be impossible to achieve, to attempt to isolate the particular adverse effects that flowed from a diagnosis of a recognised but unspecified autoimmune disease (albeit at one stage a tentative or speculative diagnosis) which related to UCTD alone.

43. The Tribunal accepts the claimant's submission that the case law authorities have long sought to differentiate between the existence or identification of an impairment and its effects from the cause of any underlying impairment. That is the effect of *Hobbs* and *J* as well as is made clear in paragraph A6 of the statutory guidance on the meaning of disability. That the claimant did have a diagnosis of UCTD was eventually confirmed in the medical evidence dated 20 September 2019 [107]. It had not been formally diagnosed as such before then. At best there was only a tentative diagnosis at the time of the events with which the Tribunal is concerned (see the position at 10 April 2019 contained in document [113]). In the Tribunal's judgment that does not matter to the legal question posed to it.

44. Without any need for expert witness evidence, it is tolerably clear that the claimant has long had the symptoms and adverse effects of an underlying autoimmune disorder. This is a group of diseases which are referred to variously under different names and labels, many of which had been applied to the claimant's medical status. As her counsel submitted, the condition has different names and is variously referred to as a "mixed connective tissue disease" or "latent lupus" or

"incomplete lupus" [92] or a "systemic autoimmune disease" that does not necessarily satisfy the criteria for a defined connective tissue disease [94-96 and 99]. What an impairment might be called in the medical literature is not relevant in disability discrimination law to the determination of the question whether a claimant has an impairment and, if so, whether it has adverse effects upon her.

45. The Tribunal agrees that the medical evidence is supportive of the existence of an impairment consistent with UCTD that has a long-term and substantial adverse effect upon the normal day-to-day activities. The Tribunal refers to its findings in relation to the claimant's medical history above and its acceptance of her account in her disability impact statement of the adverse effects of her condition on her normal day-to-day activities. That those adverse effects are substantial and long-term has not really been put in issue, but the Tribunal would have no hesitation in concluding that those additional requirements are satisfied by the evidence and its findings of fact – at the relevant time. As the statutory guidance requires (paragraphs A8 and B6), it is necessary to look at the complete picture.

46. If it were necessary to go further, the Tribunal would adopt the reasoning advanced by the claimant's counsel's opening note, his closing submissions and his written reply (of which, see in particular paragraphs 8-13). The claimant had a protected characteristic of disability by virtue of a generic autoimmune disorder and an eventual diagnosis of UCTD. That conclusion is not disturbed by Employment Judge Andrews's case management summary.

Discrimination: findings of fact

47. The respondent and her husband are working parents. They have two young children of primary school age. Since September 2018 they had employed an after-school nanny to collect their children from their separate schools; bring them safely home; supervise them at home; and carry out core childcare tasks, such as feeding them, helping them to shower or bathe, assisting with homework and helping to prepare them for school the next day. The after-school nanny was expected to work from 3pm to 7pm on weekdays during school terms and further hours by arrangement during school holidays.

48. The respondent's existing after-school nanny resigned on 15 April 2019. The respondent and her husband began to look for a replacement. The respondent wished to hire an experienced, committed, caring and reliable after-school nanny, who would look after the children's needs, health and development, ensuring a safe, secure and happy environment for them while she and her husband were at work.

49. The respondent shared her requirements among friends. She also contacted and registered with After School Nannies [52], an agency that she had used in the past. Hiring an after-school nanny through this agency was her ideal as it performed detailed checks on potential candidates, conducted a pre-screening interview and provided all relevant information (including candidates' CVs). The agency also provided ongoing support and guidance during the recruitment and selection process, all in return for an agreed fee.

50. Between 21 and 23 April 2019 the respondent also completed registration with a relevant website – childcare.co.uk – and posted her requirements [53]. Those requirements were broadly as described above, with the addition that the respondent "Will be keen on someone who has a car and can drive though not mandatory and with a valid DBS certificate and 2-3 references."

51. On 24 April 2019 the respondent also registered with another agency, Koru Kids [55].

52. After School Nannies provided detailed profiles of five potential candidates on 24 April 2019 [52 and 136-138]. The respondent indicated to the agency which of these potential candidates were of interest.

53. On 25 April 2019 After School Nannies informed the respondent that one of the potential candidates (referred to in these proceedings as "Candidate A") was keen to meet her and explore the role further. The respondent scheduled a meeting with Candidate A for 27 April 2019 [56-57]. However, on 26 April 2019 Candidate A asked to re-schedule that meeting, which as a result was postponed to 1 May 2019 at 7pm [58-61].

54. Between 23 and 25 April 2019 the respondent contacted a couple of candidates on childcare.co.uk after checking their profiles against her requirements. She set up an interview with one of those candidates ("Candidate B") for 30 April 2019, who also emailed her CV at the respondent's request [62-64].

55. On 25 April 2019 the claimant contacted the respondent via a message on childcare.co.uk [54]. The respondent did not respond to her immediately, but she did so on the evening of 27 April 2019 once Candidate A had rescheduled her interview.

56. On 26 April 2019 the respondent held a telephone interview with a candidate from Koru Kids ("Candidate C"). That candidate was not available on a permanent or long-term basis. The respondent informed that candidate accordingly.

57. The respondent contacted the claimant on 27 April 2019 via the childcare.co.uk website [54]. The claimant's profile showed her to be Ofsted-registered and so the respondent asked her whether she was a childminder. It also appeared that the claimant lived in the Croydon area, whereas the respondent lived in the Wimbledon area. The claimant responded that she lived in Croydon/Mitcham and about 20-30 minutes' drive to Wimbledon. She revealed that she was a driver and was available to start fairly soon. The claimant suggested a telephone call to discuss her experience if that would help. The respondent replied: "Great thanks Helena [the claimant's profile name]. I will try and call you tomorrow if that is ok? I will message you with the time tomorrow. Thanks ... Also if possible if you can send me your CV if you have an updated one to my email …" [54].

58. On 28 April 2019, after a telephone conversation [65], the respondent invited the claimant to an interview at her home at 7pm on 29 April 2019 [66]. She reminded the claimant to send her CV by email [67]. The claimant did not do so. The claimant's relevant CV at that time has not been produced in evidence, but see [89-

91]. The non-provision of a CV does not appear to the Tribunal to have affected the respondent's otherwise positive attitude towards the claimant at this stage of the recruitment process.

59. On 29 April 2019 the claimant telephoned the respondent to reconfirm the interview and to advise that she might be slightly late as she needed to collect a prescription. This was followed by a text message that she would arrive at 7.25pm [66].

60. At the start of the interview the claimant apologised for being late. She repeated that she had had to collect a prescription. The respondent's husband sat in on the interview. The couple's children briefly came into the room and were introduced to the claimant. Although the claimant estimated that the meeting lasted 2 hours, and that she played with the children, it seems unlikely on the balance of probabilities that it lasted more than 45-60 minutes.

61. The respondent explained her requirements and the tasks associated with the role. She tried to understand the claimant's background and experience in the absence of her CV. The absence of a CV did not appear to be a handicap. There was a discussion about the basis on which the claimant might be engaged in the role (whether as employed or self-employed) and as to the respondent's preferred and more easily-managed payroll arrangements via Nanny Tax. The respondent asked about the claimant's expectation as to remuneration. The claimant expressed her preference to be treated as self-employed, responsible for invoicing, tax and national insurance herself. The respondent and her husband had no experience of this and preferred any nanny to be employed and to be paid via Nanny Tax. The claimant seemed open to this. The respondent asked the claimant to illustrate how this would work and to provide detailed calculations as to what she had in mind regarding salary. The claimant agreed to do so. There was a discussion about whether the respondent could use childcare vouchers in part-payment and whether the claimant was also available for additional baby-sitting duties (which she was).

62. The discussion then turned to the claimant's potential availability. As to planned holidays, the claimant said that she had scheduled a couple of days off, one of which was to attend a doctor's appointment. She referred to the need for a blood test.

63. The claimant had brought original identification documents. The respondent took photocopies of them.

64. The respondent asked the claimant whether she was available that week. She wished to arrange a trial session to assess the claimant's ability to manage the children and to observe how the children reacted to her. (This was the respondent's preference in respect of all potential candidates). The claimant stated that she was fairly flexible apart from the need to have a blood test. It was agreed that she would undertake a trial that Friday, 3 May 2019. The Tribunal regards that offer of a trial as a sign that the claimant was regarded as a serious candidate, regardless of whether the respondent had seen or read the claimant's website profile and regardless of whether the claimant had provided a full CV. The respondent had enough information to be able to assess the claimant for the role she wished to fill.

65. For the avoidance of any doubt, the Tribunal finds that no offer of employment or engagement was made at this meeting. There was no offer capable of being accepted and the claimant did not accept any such offer. Apart from anything else, there had been as yet no firm proposal made as to the amount or method of remuneration, the claimant's employment status if to be employed or engaged, and when any such employment or engagement would commence. All that was offered and accepted at this meeting was a trial day on 3 May 2019.

66. Apart from the references to the collection of a prescription before the meeting had started, and to the doctor's appointment, a blood test and the likelihood of further appointments during the meeting, no mention was made of the claimant's medical status or any disability.

67. Later that evening, at 21:10, the claimant texted the respondent to ask for her email address [67]. She said that she would send her that night or the following morning the reference details and her thoughts regarding the hourly rate. The respondent replied with her email address and thanked the claimant "for coming over to see us this evening" and she wished her a lovely evening [67]. The claimant thanked the respondent [68].

68. Then at 22:59 the claimant emailed the respondent with some calculations as to possible remuneration and methods of payment [72 and 77]. Even for an experienced Employment Tribunal panel, those calculations are not immediately transparent or readily understandable. Nevertheless, it is clear from the evidence that the respondent regarded the financial aspects of any engagement of the claimant as being manageable or "doable", provided that she was the right candidate. The claimant attached some reference feedback forms from previous employers [74-75] and some incomplete information about a possible referee [73].

69. On 30 April 2019 the respondent emailed the claimant in order to clarify some matters from the previous evening's meeting. These matters concerned the references and childcare vouchers [76-77]. The email thread begins at 09:38. The respondent thanked the claimant for sending all the details the night before and promised to go through all the information and come back to her. The claimant acknowledged that at 09:53. Then at 10:00 the respondent asked the claimant to clarify the identity and details of a potential referee who had been mentioned the night before and she also followed up the question of using childcare vouchers in payment. At 10:17 the claimant responded to the question regarding the referee.

70. At 10:28 the respondent emailed the claimant in these terms (as originally expressed by the respondent and without any editing by the Tribunal): "I also wanted to check again the dates you are not around. You mentioned something about 20th May and another date? Separately you mentioned something about collecting prescription, having blood tests and doctor appointment. I hope you are well and hope it wasn't too much trouble for you to come over yesterday. Thanks again for come over yesterday" [76].

71. The Tribunal did not find the respondent's evidence on this to be persuasive. It regards this email as a clear indication that the respondent was having doubts

about the claimant and that those doubts were prompted by concerns as to the claimant's health status. The Tribunal does not accept the explanation proffered that the respondent was merely being courteous or empathetic. The Tribunal agrees with the claimant's counsel that this was a veiled inquiry about the claimant's health, designed to prompt a response.

72. Also on 30 April 2019, at unspecified times, the respondent's husband made two online checks of the claimant's certification with the Disclosure & Barring Service (DBS) [79].

73. Concerned by the earlier email, the claimant called the respondent in the evening of 30 April 2019. She explained to Mrs Dabke the essential details of her health condition, although not its symptoms or effects. The claimant told the respondent that she had an autoimmune disorder described as lupus. She explained that she was under the care of the rheumatology team at St Georges Hospital and that she would have to attend the odd blood test and doctor's appointment, but that she would do her very best to ensure that all appointments were booked outside her working hours.

74. The claimant felt that the respondent was very dismissive on the telephone. The respondent said that she was going to "Google" the health condition as she was not aware of what it was and she wanted to ensure that it was ok for her to work. This coincides with the negative interpretation that the Tribunal places upon the respondent's earlier email enquiry. The claimant explained that it was ok for her to work and that her health condition did not cause any negative impact on her performance and that it was not a contagious condition.

75. There was no mention during this call of withdrawing any offer that had been made, either of a job trial (in the Tribunal's finding) or of employment (which the Tribunal does not find had been made). There was no discussion of, for example, reasonable adjustments that might be necessary. The respondent said that she would need to research the matter online and discuss it with her husband. In the Tribunal's assessment, the respondent's reaction to the claimant during this telephone call was equivocal and it left the claimant with a negative impression about the prospects for her employment with the respondent.

76. The respondent's evidence about what she then did is unsatisfactory. The Tribunal finds that it is probable that she did research the claimant's medical conditions online; that this heightened her already existing concerns about the claimant's health; and that this formed the basis of a discussion with her husband that was very likely to be a negative one. The Tribunal infers that the respondent was now possessed of information about the condition the claimant had revealed and about its possible adverse effects upon her.

77. On the evening of 1 May 2019, at 18:05, the claimant texted the respondent and asked whether she had contacted her referees yet [68]. The respondent replied (as originally expressed by the respondent and without any editing by the Tribunal): "No I havent been quite a busy day today at work. I will message you as soon as I write to them" [68].

78. Then the following morning, 2 May 2019 at 08:06, the respondent texted the claimant in these terms (as originally expressed by the respondent and without any editing by the Tribunal): “I was wondering if we can reschedule the trial as I have friends coming tomorrow afternoon to stay. So best not to meet tomorrow. I also plan to write to the contacts for references in next couple of days and need time to think about the costs. It is a bit busy at work so sorry for moving things around and for the inconvenience. I will message you once I work things out and I might have some further questions” [69].

79. The claimant replied at 11:08: “That is no problem at all! Thank you for letting me know and I wait for you to get back to me” [70].

80. The Tribunal is not satisfied on the basis of the evidence before it that, even if the respondent did have friends coming to stay, it was the real reason for postponing the trial. That has not been established in the evidence. The respondent had arranged for Candidate A to have a trial on 3 May 2019 and that trial was not postponed. It was conceded in cross-examination that the “friends coming to stay” explanation was not the true reason for the cancellation of the claimant’s trial.

81. The Tribunal does not accept that objectively Candidate A was at this stage the respondent’s preferred candidate because neither Candidate A nor the claimant had yet had a trial day and the respondent regarded a trial as a key part of the decision as to which candidate to recruit. It is possible that Candidate A had subjectively become a candidate preferred to the claimant, but only because the respondent now had serious concerns about the claimant’s health status.

82. The respondent did not contact the claimant over the next 11 days until the claimant initiated renewed contact by text on 13 May 2019 at 11:26: “I wonder whether if you have decided about the day I would be starting? Or anything you decided?” [70].

83. The respondent replied at 15:21 (as originally expressed by the respondent and without any editing by the Tribunal): “Sorry for coming back late. We had guests over. We have started another Nanny couple days back. Thanks very much for coming over to meet us and responding to all our queries. I will of course get in touch if something changes” [71].

84. Candidate A had commenced as the respondent’s after-school nanny on 8 May 2019 [78]. Documents relevant to Candidate A’s candidacy, references and employment contract appear in the document file at [136-157].

85. On 22 May 2019, in documentation signed on 4 June 2019, the claimant entered into a contract of employment via Nanny Tax HR with another employer as a nanny commencing on 1 June 2019 [81-84]. A similar agreement was made with a second employer on and from the same dates in what appears as a “nanny share agreement” [85-88].

Discrimination: relevant law

86. The Tribunal has had regard to section 13, section 23, section 39(1)(a) and (c), section 60 and section 136 of the Equality Act 2010 and the EHRC Code of Employment.

87. Assistance has been obtained from the following case law authorities: *Nagarajan v London Regional Transport* [1999] IRLR 572 HL; *Anya v University of Oxford* [2001] ICR 847 CA; *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 HL; *Igen Ltd v Wong* [2005] IRLR 258 CA; *Laing v Manchester City Council* [2006] ICR 1519 EAT; *Advance Security UK Ltd v Musa* (2008) UKEAT/0611/07 EAT; *Stockton on Tees Borough Council v Aylott* [2010] ICR 1278 CA; *R (E) v Governing Body of JFS* [2010] 2 AC 728 UKSC; *Jennings v Barts & the London NHS Trust* (2012) UKEAT/0556/12; *Gallop v Newport City Council* (2013) EWCA Civ 1583 CA; *McCubbin v Perth and Kinross Council* (2013) UKEATS/0025/13 EAT; *Urso v Department for Work and Pensions* (2017) EAT 0045/16 EAT; *Mutombo-Mpania v Angard Staffing Solution Ltd* (2018) UKEATS/0002/18 EAT; *Onu v Akwiwu; Taiwo v Olaigbe* [2016] ICR 756 UKSC.

Discrimination: discussion and conclusions

88. As the claimant's counsel submits, Ms Spinelli's case is that Mrs Dabke made prohibited enquiries of the claimant's health. Those enquiries are said to be contrary to section 60 of the Equality Act 2010. It is said that this places a burden on the respondent to establish that the reason for the claimant's treatment thereafter was not her disability. The Tribunal agrees.

89. Section 60 provides, so far as is relevant, that a person (A) to whom an application for work is made must not ask about the health of the applicant (B) — (a) before offering work to B, or (b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work. A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision.

90. Where B brings proceedings before an employment tribunal on a complaint that A's conduct in reliance on information given in response to a question about B's health is a contravention of a relevant disability provision then, in the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of section 136(2) as facts from which the tribunal could decide that A contravened the provision.

91. Section 136 provides that 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, unless A shows that A did not contravene the provision.

92. The Tribunal agrees that the enquiry was made either by email on 29 April 2019 at 10:28 or in the telephone conversation of 30 April 2019. As a result, it is now for the

respondent to establish that it did not make stereotypical assumptions about the claimant's condition. See section 13 and also paragraphs 16.57 and 16.60 of the EHRC Employment Code of Practice.

93. It is then for the respondent to demonstrate that the claimant's disability was in no sense whatsoever connected to the decision to withdraw or not to honour the offer of a job trial. Has the respondent provided a non-discriminatory explanation and, on the balance of probabilities, is it an adequate explanation that the disability was not a ground for the treatment in question? As counsel put it, if it cannot do so, then the claim succeeds. The Tribunal agrees.

94. The claimant's counsel points to a number of factors that inhibit the respondent's ability to discharge the burden of proof upon it. (1) The lack of diversity training undertaken by respondent. (2) The opaque method of selection and the lack of any selection criteria. (3) The acceptance that the assessment of who to pick is a holistic one which would necessarily involve the personal characteristics of Candidate A and the claimant. (4) The failure to explain why the respondent undertook further research online if it were not material to the decision to be taken about who to appoint. (5) The lie told to the claimant about the reasons for the trial being postponed and the fact that this is contrary to the respondent's ET3 response, which suggested that all candidates should have a trial. (6) The chronology of events. The Tribunal notes in particular the delay in telling the claimant that her job trial would not be rearranged and that another candidate had since been appointed – and even then only because the claimant followed the matter up with the respondent when she had heard nothing further.

95. The Tribunal agrees. Some of those factors are more important than others: particularly (3), (4), (5) and (6). On their own, factors (1) and (2) would not have weighed heavily with the Tribunal, but taken with the other factors, they have some significance. In any event, the Tribunal is equally satisfied that the claimant has proven facts from which the Tribunal could reasonably conclude that the reason for the treatment complained of was the claimant's disability.

96. As both counsel in their submissions acknowledge, that then leads to the issue of the respondent's knowledge of the claimant's disability. The Tribunal does not agree with the respondent's submission that actual knowledge is required. That is not the point that is addressed in *Urso* and in *Gallop*. Following *McGubbin*, the correct questions to ask are: (1) did the respondent have actual knowledge of the claimant's disability and (2) if not, did she have constructive knowledge?

97. As to (1), that hinges upon what findings the Tribunal can properly make about what the claimant revealed to the respondent in the telephone call of 30 April 2019. Here the Tribunal trod with some caution given the view it has taken of her as a witness.

98. In the ET1 grounds of claim the claimant says that she explained to Mrs Dabke the details of her health condition. She also explained that she was under the care of the rheumatology team at St Georges Hospital and that she had to attend the odd blood test/doctor appointment. She explained that it was OK for her to work and

that her health condition did not cause any negative impact on her performance and was not contagious.

99. In her witness statement she goes relatively further than this. She adds that she said that she was undergoing tests for lupus or another connective tissue disorder that her symptoms might better fit. She said that it was likely that her condition would fit the description of lupus because that condition was genetic in her family.

100. The Tribunal accepts the claimant's evidence in her original claim form and in her witness statement. It does not accept that she went further, as she did in her oral evidence, and described the symptoms of her condition. The Tribunal would have expected that to have been established in her evidence-in-chief and not in cross-examination. The Tribunal declines the claimant's invitation to prefer her evidence that she stated that she had had fatigue, pain, numbness, mood swings, rashes, etc over a number of years.

101. However, in the Tribunal's judgment, what she did say to the respondent is enough to establish that the respondent had actual knowledge that the claimant was a person with a disability. The respondent knew that she had a hospital appointment, that she was undergoing blood tests, that she was being investigated for lupus or another connective tissue disorder, that it was likely that she would be diagnosed as such because of her family traits, and that the claimant was being or would be likely treated with medication for her condition.

102. If the respondent's knowledge was not actual knowledge of the claimant's disability, then it was most certainly constructive knowledge of it, based upon what she asked the claimant, what the claimant told her and what her online researches would have revealed.

103. In conclusion, therefore, the Tribunal is satisfied that the burden of proof had shifted to the respondent via sections 60 and 136. There are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened sections 13 and 39(1)(a) on the ground of disability in withdrawing the offer of a job trial. The Tribunal concludes that the contravention occurred, because the respondent has not discharged that burden of showing that she did not contravene the provision.

104. If it were necessary to explain this conclusion further then the Tribunal would gratefully adopt the reasoning in the claimant's counsel's closing submissions and reply, which the Tribunal found to be the relatively more compelling analysis of the evidence and the law.

105. In summary, the respondent discriminated against the claimant, because of the claimant's protected characteristic of disability, by treating the claimant less favourably than the respondent treated Candidate A (or would have treated other hypothetical candidates), who was not (or who were not) disabled, in recruiting and selecting for the role of after-school nanny. That is a breach of section 13 (read by reference to section 23) and section 39(1)(a), as viewed via the provisions of section 60 and section 136. The complaint of disability discrimination is well-founded to that extent only.

Remedy

106. The Tribunal has not yet heard focussed evidence on the question of remedy. A remedy hearing will be required. It maintains an open mind as to remedy. The Tribunal will now give instructions for a one day remedy hearing to be listed.

107. However, it may be that the parties will be able to agree remedy between them in the light of: (1) the time-limited financial loss; (2) the Tribunal's provisional view that this may be a case in which any compensation for injury to feeling may fall within the lower *Vento* band (as uprated); and (3) this is not a case that obviously or self-evidently gives rise to exemplary or aggravated damages.

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Judge Brian Doyle
Date: 29 March 2021