EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110245/2021 (V)

Held remotely by means of the Cloud Video Platform on 15, 16 and 17 December 2021

Employment Judge W A Meiklejohn
Tribunal Member Ms N Elliot
Tribunal Member Mr A Ward

Mr S McCready	**Claimant** **In person**
Manchester Metropolitan University	**First Respondent** **Represented by:** **Ms R Kight – Barrister**
Mr W Perrott	**Second Respondent** **Represented by:** **Mr P Grant Hutchison - Advocate**
Clean Air Ltd	**Third Respondent** **Represented by:** **Mr P Grant Hutchison - Advocate**
Ms M Legg	**Fourth Respondent** **Represented by:** **Ms R Kight – Barrister**
Dr R Erfani	**Fifth Respondent** **Represented by:** **Ms R Kight – Barrister**

Prof L Qian	**Sixth Respondent** **Represented by:** **Ms R Kight – Barrister**
Mr I Heatherington	**Seventh Respondent** **Represented by:** **Mr P Grant-Hutchison – Advocate**
Innovate UK Loans Ltd	**Eighth Respondent** **No appearance and no representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows –

(a) The claims brought by the claimant against the fourth and eighth respondents having been withdrawn by the claimant, those claims are dismissed.

(b) The claims brought by the claimant against the first, second, third, fifth, sixth and seventh respondents do not succeed and are dismissed.

REASONS

1. This case came before us for a final hearing, conducted remotely by means of the Cloud Video Platform, to deal with both liability and, if appropriate, remedy. The claimant appeared in person. Ms Kight represented the first, fourth, fifth and sixth respondents. Mr Grant-Hutchison represented the second, third and seventh respondents.

Procedural history

2. A preliminary hearing (before Employment Judge Hoey) took place on 24 September 2021 (95-115). This dealt with a number of preliminary matters

including the decision that the case should be heard in Scotland, the claimant having also presented similar claims in Manchester. Various case management orders were made.

3. EJ Hoey directed the claimant to consider carefully the claims he was advancing and the parties responsible for those claims. He gave the claimant until 18 October 2021 to advise the Tribunal whether he wished to maintain his claims against the second, fifth, sixth, seventh and eighth respondents. We speculate that this list should have included the fourth respondent.

4. It was apparent that the claimant had considered his position in relation to the fourth and eighth respondents as he withdrew his claims against them (and accordingly we have dismissed those claims). It was not apparent that the claimant had done so in relation to the second, fifth, sixth and seventh respondents and so his claims against those individuals proceeded before us.

5. At the time of the preliminary hearing it had not been conceded by the respondents that the claimant was disabled. The claimant has multiple sclerosis which is a deemed disability in terms of paragraph 7 of Schedule 1 to the Equality Act 2010 ("EqA"). By the time the case came before us, disability status was accepted on behalf of the respondents.

Nature of claims and list of issues

6. The claimant alleged direct disability discrimination contrary to section 13 EqA. EJ Hoey described the background in these terms –

> "*The claimant believes that he was rejected for a job because of his disability (and that the failure to offer him the role amounted to direct disability discrimination). The role was filled around March 2021 (with the claimant's interview in February 2021). He also argues that the failure to confirm the position with him amounted to unlawful direct disability discrimination.*"

7. Leaving aside those relating to disability status and remedy, we noted that EJ Hoey had recorded the issues which we had to decide as follows –

Direct disability discrimination (Equality Act 2010 section 13)

1.2 Did the respondents do the following things:

1.2.1 Reject his application for the role applied for

1.2.2 Refuse to engage with his communications to explain whether or not he had been successful with the role

1.3 Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular whom he says was treated better than he was.

1.4 If so, was it because of disability?

Evidence

8. We heard evidence from the claimant. We also heard evidence from the fifth, sixth, second and seventh respondents (in that order). The evidence in chief of all of the witnesses was contained in written witness statements. These were taken as read in accordance with Rule 43 of the Tribunal Rules.

9. We had a joint bundle of documents extending to 377 pages. We refer to this above and below by page number.

10. Rather than referring to the respondents numerically, we will from this point refer to the first respondent as "MMU", to the third respondent as "CAL" and to the remaining respondents by name.

Findings in fact

11. MMU is a university located in Manchester. Dr Erfani is employed by MMU as a Senior Lecturer in the Department of Engineering. Prof Qian is employed by MMU as a Professor in the Department of Computing and Mathematics. Both of these Departments sit within MMU's Faculty of Science and Engineering.

12. CAL is a private limited company based in Bolton. It is involved in the design and manufacture of education and commercial fume cupboards. Mr Perrott is CAL's Managing Director. Mr Heatherington is CAL's Sales and Technical Director.

13. The claimant graduated from the University of Strathclyde in 2014 with a MEng in Chemical and Process Engineering. Between 2018 and 2020 he worked for a company in Nottingham undertaking Research and Development as a CFD Engineer (CFD is computational fluid dynamics).

KTP Associate position

14. MMU and CLA were successful in an application for funding for a 26 month project which involved the recruitment of a Research and Development Computational Fluid Dynamics Engineer (Knowledge Transfer Partnership Associate) (the "KTP Associate"). A Local Management Committee ("LMC") was established and held its first meeting on 21 July 2020 (140-144). Membership of the LMC included Dr Erfani, Prof Qian and also Mr R Jamshidi, Academic Adviser, from MMU and Mr Perrott and Mr Heatherington from CAL. The first LMC meeting was chaired by Mr A Kenney, KTP Adviser. Thereafter Mr Perrott was to be the chair of the LMC.

15. The meeting covered the proposed recruitment of the KTP Associate. The following are excerpts from the LMC minutes (at 142) –

> *"….The LMC agreed a job title of R&D Engineer and a salary of £30k (dependent on experience). It was suggested that, whilst it is requested that a candidate should have a PhD or MSc by Research, that equivalent experience should also be considered…."*

> *"The associate would be employed by the university but based at the company under the company's terms and conditions such as annual leave, hours of work etc. The associate would be under the university's pension scheme and have a standard 6-month probation. It is imperative to make the associate feel part of the company to ensure they integrate in to the business well…."*

16. The KTP Associate position was duly advertised (145-146). There were also a Job Description (146-149) and a Person Specification (150-151). We understood these might be the versions used when the position was re-advertised (as described below) because they referred to the required qualification being a "*PhD or near completion*" whereas we understood that as originally advertised the requirement was to hold a PhD.

First round of interviews

17. These were held remotely in October 2020. The interview panel comprised Dr Erfani, Prof Qian, Mr Jamshidi, Mr Perrott and Mr Heatherington. Two candidates, HB and ER, were preferred and attended for an informal second interview at CAL's premises. Thereafter a verbal offer was made to HB.

18. An issue arose with HB's PhD. He had completed the work but it had not yet been assessed. Because the position had been advertised on the basis that a PhD was required, MMU's HR Department required that the post be re-advertised including "*or near completion".* This resulted in further applications, including the claimant's (182-185).

19. A formal offer (ie with a written contract) was made to HB in January 2021. Unfortunately, by then HB had a job offer from another university, which he had decided to accept (179). ER was then approached but he too had accepted a job elsewhere (187).

Second round of interviews

20. Of the candidates who responded to the second advertisement, four were shortlisted for interview including the claimant. The interviews were conducted remotely by the same interview panel on 29 January 2021. The claimant performed well at interview and emerged as the preferred candidate

21. As at 29 January 2021 the interview panel had a concern about the timing of the appointment, because the funding was to be withdrawn if the KTP Associate had not started work by 29 April 2021. This was confirmed in an email sent by Ms J Bottomley of the eighth respondent to Prof Qian and Mr Hetherington on 29 January 2021 (200-201).

22. During his interview the claimant told the panel that he had just started a job with Siemens on a three month fixed term contract. The claimant said that he *"intended to honour"* his contract with Siemens which was to end on 26 April 2021. When asked by Mr Heatherington if he would hand in his notice to Siemens, the claimant said that he was not willing to do so.

23. The question arose as to whether the claimant would stay with Siemens if offered an extension to his contract. Dr Erfani, Prof Qian, Mr Perrott and Mr Heatherington all stated that the claimant's response was non-committal.

24. Within the bundle we had notes taken by Mr Heatherington (196-197) and Mr Jamshidi (198-199) during the claimant's interview. In Mr Heatherington's case these were a typewritten version of handwritten notes taken at the time. Mr Heatherington's notes disclosed the claimant being asked by Dr Erfani *"If you are selected for this position, when can you start"* with the claimant replying –

> "*Just started new job at Siemens for 3 months doing multi-phase simulations. Can't commit to future availability if Siemens offer an extended or permanent position."*

25. Mr Jamshidi's notes recorded the claimant's answer to the same question in these terms –

> "*3 months from now"*

Notwithstanding this, we accepted the evidence of the four panel members who appeared as witnesses before us that the claimant would not commit to what he would do if offered an extension of his fixed-term contract by Siemens. The claimant's position was that he was "*adamant"* that he had not mentioned the possibility of an extension of his contract with Siemens during the interview on 29 January 2021 but we preferred the evidence of the respondents' witnesses that this did arise.

26. Mr Perrott asked the claimant if he would be willing to travel in the UK or abroad if required by the project. In response the claimant disclosed that he was taking immune suppressive medication and was shielding. Mr Perrott told the claimant that he also took immune suppressive medication and was shielding.

Phone call on 1 February 2021

27. Mr Perrott planned to call the claimant on 1 February 2021. Before doing so, he spoke with Mr Kenney about the 29 April 2021 deadline referred to in the email of 29 January 2021. Mr Kenney confirmed to Mr Perrott that the deadline was now 29 July 2021 (202-203).

28. Mr Perrott then called the claimant and they spoke for around 45 minutes. The conversation included a reference by Mr Perrott to the condition by reason of which he takes immune suppressive medication. This led the claimant to disclose his MS. Mr Perrott did not share that with the other panel members.

29. The claimant's evidence included the assertion that Mr Perrott had described him as *"the ideal candidate".* Mr Perrott *"would not guarantee"* that he referred to the claimant in those terms but acknowledged that the claimant was the best of the second round of applicants. A salary figure of £33k was discussed and the claimant indicated he would accept this. There was discussion about the project and the claimant asked to meet the panel again to talk about the academic collaboration. Mr Perrott agreed to provide the claimant with the confidential work plan for the project (210-224).

30. The claimant contended that he had received a job offer during this telephone conversation. Mr Perrott refuted that. During cross-examination, the claimant

accepted that "*I never got a contract or a formal offer"* but maintained he had *"accepted the job".* We did not believe that the job was offered by Mr Perrott or accepted by the claimant during their telephone conversation.

31. We formed that view because it seemed to us that the most reliable account of this telephone conversation was the contemporaneous one given by Mr Perrott in his email (204) to the other members of the interview panel shortly after the call. In that email Mr Perrott said the following –

> "*I had a good 45 mins conversation with Stuart.*
>
> *He is very interested and is keen to learn more about our project. He asked a lot of questions about commercialising the work.*
>
> *He doesn't know if Siemens would potentially extend his current fixed term employment. He can find out but wants to know more about our KTP first.*
>
> *The £33k salary is lower than he would like but it is only one part of his decision. He would accept our salary if he thinks this is [the] right role for his professional development.*
>
> *He would need to work from home until it is safe because of Covid (he has not been vaccinated and doesn't know if vaccination is compatible with his medical condition).*
>
> *We agreed to set up a remote second interview so that he can have more time to discuss and understand the role, especially with the academics. Can we allocate 1.5 hours?*
>
> *Perhaps we can share the work plan before the 2nd interview."*

32. It seemed to us that this was broadly consistent with the evidence we had from Mr Perrott. The direction of travel was towards the job being offered to the claimant but that point had not been reached. It was a positive discussion but no offer was made.

Second interview on 4 February 2021

33. A second interview was arranged for 4 February 2021. In advance of this, Prof Ling suggested discussing with the claimant whether he would be interested in doing a PhD with MMU while undertaking the KTP Associate role (225). Dr Erfani followed up with suggestions as to how this might be funded (228).

34. The parties gave differing accounts of the second interview on 4 February 2021. The claimant referred to his understanding that "*pending my queries being satisfied I would be offered the job".* He continued "*All my queries were satisfied, including that I could undertake a funded PhD with MMU. I expressed my satisfaction with the proposed academic collaboration."* The claimant concluded this chapter of his evidence by saying "*I unambiguously reiterated my desire for the job several times throughout the meeting, including in my closing remarks in which I informed the panel my queries had been satisfied and I was very keen on the job."*

35. Dr Erfani's evidence confirmed that the academic collaboration had been discussed but that doubt remained about the claimant's ability to commit to a start date – "*We shared much more detail about the role and went through the work plan with Mr McCready. Mr McCready asked a lot of questions and seemed interested. Mr McCready remained however unable to commit to a start date due to his role with Siemens and, if his position with Siemens was to be extended, he would not be able to start the Role at all."*

36. Prof Qian's evidence was similar – "*During the second interview, Mr McCready asked us a lot of questions about the Project and he seemed interested. When asked about the Siemens position, Mr McCready confirmed that he still did not know whether the Siemens role would be extended."*

37. The evidence of Mr Perrott and Mr Heatherington focussed more on the panel's discussion following the second interview, reflecting the fact that much of that interview was taken up with discussion of the detail of the project between the claimant and the academics. Mr Perrott said "*Following the claimant's interview, the members of the interview panel agreed that we should re-*

advertise the role for a third round of applicants….the claimant was not able to commit to starting the role as soon as possible. We therefore decided to keep our options open with the Claimant and seek further applicants." Mr Heatherington said "*Following the claimant's second interview, the interview panel made the decision to go through another round of recruitment as soon as possible. We hadn't ruled the Claimant out at this stage. However, given that he was unable to commit to the role for another three months, we felt the best idea was to use that time productively by looking at other candidates."*

Phone call on 5 February 2021

38. On 5 February 2021 the claimant emailed Mr Perrott seeking a follow up conversation (236). Mr Perrott telephoned the claimant. The claimant did not disclose at the start of the call that he had already seen the KTP Associate job re-advertised. According to the claimant, Mr Perrott told him that *….the panel had concluded that "it would be a shame for you to be stuck working at home".* The claimant said that Mr Perrott told him that Innovate UK might not allow him to be employed if based remotely and indicated that he would speak to Mr Kenney and get back to the claimant.

39. The claimant repeated his desire to get the job and his willingness to relocate when it was safe for him to do so. He then disclosed to Mr Perrott that he had seen the job re-advertised online. According to the claimant Mr Perrott "*confessed"* that this had been the result of the panel's discussion after the claimant left the meeting on 4 February 2021 – they had decided to "*return to advert".*

40. As he had done following the telephone conversation on 1 February 2021, Mr Perrott reported to the other panel members by email. He did this on 8 February 2021 in these terms (237) –

> "*Stuart asked me to call him on Friday.*
>
> *I explained our concerns about remote working limiting the knowledge transfer part of the project, and him missing out on learning more about business in general from us.*

We also discussed the potential for the associate to stay on at Clean Air after the project.

He gave me an assurance that he would move to the Bolton/Manchester area when it was safe for him to do so. And he said he wanted to stay with Clean Air after the project – again subject to it being safe.

He confirmed that he really wants the role.

He added that the way he was working remotely remotely with Siemens could be applied to our work.

He had noticed that we have re-advertised the role.

I checked with Andrew Kenney at Innovate UK to get his opinion on carrying out our project remotely during Covid and he said it was OK. They have some other associates who are shielding and it was not adversely affecting their projects.

I think we should keep our options open with him, whilst seeing what calibre of candidates we get from this latest advert."

41. Mr Perrott told us that he had been "*caught on the hop"* by the re-advertising of the post taking place so quickly after the second interview on 4 February 2021. The claimant put a negative slant on the reference to his working at home, but we were satisfied that Mr Perrott's concern was as expressed in his email to the other panel members, ie the benefit of the project to the claimant. It was common ground that Mr Perrott had not called the claimant back after speaking with Mr Kenney.

Post is filled following re-advertisement

42. The re-advertisement of the KTP Associate position produced another batch of applications. Following a further round of interviews the preferred candidates were AM and PG. They were invited for an informal discussion with

Mr Perrott at Clean Air on 9 March 2021. Following this Mr Perrott reported to the rest of the panel on 10 March 2021 (275) and offered the post to AM, who accepted. Mr Perrott's email to the panel concluded "*Once A has accepted I'll call P and Stuart and let them know they were not successful."*

Claimant's health

43. We noted the claimant's evidence that his health had been adversely affected. He said "*Over the following weekend (beginning 6th Feb 2021) I suffered a relapse of Multiple Sclerosis which actively continued for approximately 8 weeks and resulted in permanent tinnitus in both ears in addition to sensory & mobility loss in my left leg."* The claimant did not require to be absent from work as a consequence of this.

44. The claimant produced a letter from his Consultant, Dr N MacDougall, dated 28 September 2021 (377) which referred to a diagnosis of "*Highly active relapsing remitting MS"* and referred to the claimant describing *"a relapse affecting his left leg in February".* Our view of this was that the claimant had suffered the relapse he described but there was insufficient evidence to establish a causal link between this and his treatment by the respondents.

Ghosting

45. The claimant's attempts to find out what was happening about his application for the KTP Associate position were described by him in these terms –

> "*I contacted MMU to receive an update on my application a further 8 times over the 10-week period following the 5th February. I sent an email to the email address advised on my application portal at Man Met Jobs….on 8th March. I also submitted a ticket on the MMU HR website on 8th March. I called the phone number provided on the application portal at Man Met Jobs twice on 11th March, without the line being busy on both occasions. I emailed Michelle Legg….on 12th March. I received a response from Michelle Legg on 17th March informing me that someone would get in*

> *touch with me, which never happened. I replied to Michelle's email on 24th March, 29th March without reply. I emailed again on 14th April asking for an update and expressing that I was "extremely upset" at receiving no communication. Having received no further communication, I sought Early Conciliation with ACAS on 26th April."*

46. It was evident from this that there had been a failure of internal communication within MMU. Dr Erfani was involved on 10 March 2021 when he responded to Mr Perrott's email of that date (see paragraph 42 above) in these terms – "*I am happy with your choice just to be in a safe side please do not contact P and Stuart at this instant till we sign the contract with A."*

47. Mr Perrott had told PG when he visited Clean Air on 9 March 2021 that he would hear the outcome by the end of that week (12 March 2021). Having made a *"direct commitment"* to PG to communicate the outcome, Mr Perrott did so despite Dr Arfani's email. Mr Perrott accepted that he should have contacted the claimant when AM signed his contract. He was contrite about this –

> *"When AM signed his contract, I should have called the Claimant to inform him that his application had been unsuccessful. I've always believed that if someone has invested their time and effort into a job interview or other proposal then they deserve to be given feedback explaining how the decision has been made. I would have been quite happy to do this, as I am no stranger to delivering bad news in my role. However, regretfully, the need to get in touch with him slipped my mind. One of our company values is open and honest communication both internally and externally. I am disappointed that I did not live up to my own expectations."*

48. We did not doubt that these sentiments were genuine and Mr Perrott apologised to the claimant during his evidence. Mr Perrott was reminded about the need to communicate with the claimant when contacted by ACAS. He wrote to the claimant on 7 June 2021 (304) in terms which included the following paragraph –

"*During the interview process however, you told the panel consisting of individuals from both Clean Air and Manchester Metropolitan University that you has just started a three-month contract at Siemens. You also said that you did not know if you would be offered more work by Siemens, and you were unsure whether, if offered, you would accept more work from them."*

Claimant's employment

49. The claimant's employment with Siemens did continue beyond 26 April 2021. He was offered (and accepted) extensions on 6 April 2021 (299), 10 May 2021 (302) and 6 July 2021 (305). His employment with Siemens ended on 13 August 2021. Since then the claimant had been seeking fresh employment but without success.

Comments on evidence

50. It is not the function of the Employment Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have focussed on those parts of the evidence which had the closest bearing on the issues we had to decide.

51. All of the witnesses were credible in the sense that they gave their evidence to the best of their recollection. Where there were conflicts between the evidence of the claimant and that of the respondents, we favoured the latter. This was because (a) there was broad consistency amongst the respondents' evidence and (b) in the case of the evidence of the phonecalls between the claimant and Mr Perrott, Mr Perrott's version was supported by the emails he sent to the other interview panel members shortly after those calls.

52. The claimant sought to persuade us that Mr Perrott had attempted to turn the interview panel against him when reporting the phonecall of 1 February 2021. We did not agree. We formed the view that Mr Perrott was well disposed towards the claimant but shared the concern of the other panel members about whether the claimant would actually be available to take up the KTP Associate post if it was offered to him.

53. The claimant pointed to some identical language contained in the witness statements of Dr Erfani and Prof Qian as evidence of collusion. He also suggested that the interview notes of Mr Heatherington might, when the original handwritten notes were typed up, have been adapted to suit the respondents' position. Suffice it to say that we did not believe these assertions were well founded.

Submissions

54. The claimant, Ms Kight and Mr Grant-Hutchison all provided written submissions and we are grateful to them for the evident care taken in the preparation of these. As these are available within the case file we comment on them, and their oral submissions, fairly briefly.

55. The claimant submitted that we should accept his evidence that he had told the interview panel on 29 January 2021 that he was available to start on 26 April 2021. This was supported by the interview note made by Mr Ramshidi.

56. The claimant argued that he had made a commitment to the position throughout the process, and particularly during his telephone conversation with Mr Perrott on 1 February 2021. He had committed to moving to the Manchester/Bolton area and to accepting the salary offered. He asked us to accept that there had been a verbal offer during that conversation but, after disclosure of his disability, no formal offer was made. He argued that the panel's decision to re-advertise was the same as not offering him the job.

57. The claimant refuted Ms Kight's argument that he might have accepted the three extensions offered to him by Siemens anyway. Those extensions had been offered through discussion about his MS relapse and his inability to find other work. The claimant pointed out that his salary at Siemens was £21k per year, contrasting this with the KTP Associate salary of £33k plus £2k training allowance plus a funded PhD.

58. The claimant argued that the respondents, by not offering him the job, were treating him less favourably than an actual comparator (HB, ER and AM) and/or a hypothetical comparator. It could not be explained away as "*different"* treatment. He also argued that these other *"second interview"* candidates had been in materially the same position as he was in terms of getting feedback.

59. Ms Kight argued, under reference to ***Chandhok and another v Tirkey 2015 IRLR 195***, that the claimant should not be allowed to depart from his pleaded case. His assertion that his treatment by the respondents was due to his having to work remotely, due in turn to his because of his MS, was a section 15 EqA (**Discrimination arising from disability**) claim. He had not pled any sort of conspiracy.

60. Ms Kight said that she was not addressing section 109(2) EqA because this had not been identified as an issue. The position was as stated in the grounds of resistance – the claimant would have been employed by MMU but under the control of CAL.

61. Ms Kight asked us to accept that the claimant had not been offered the KTP Associate position, either formally or informally. In any event, it had not been for Mr Perrott to offer it; that was up to the whole interview panel. The claimant, Ms Kight submitted, had been *"hedging his bets"* as at 1 February 2021. He was now looking back and had convinced himself that he had been offered the position.

62. In relation to the burden of proof provisions in section 136 EqA and under reference to ***Madarassy v Nomura International plc [2007] IRLR 246*** and ***Igen v Wong [2005] IRLR 258***, Ms Kight argued that it was for the claimant to prove facts from which the Tribunal could conclude that the respondent did commit the discriminatory act, not merely that it could have done so. The burden of proof did not shift simply on the claimant establishing the facts of a difference in status (relative to the relevant protected characteristic) and a difference in treatment per se.

63. Ms Kight submitted that no actual comparator had been identified by the claimant. The circumstances of the three persons to whom the KTP Associate position was offered (HB, ER and MA) were materially different to those of the claimant. The reason for the claimant not being offered the job was, Ms Kight contended, not because of his disability but because of his lack of commitment to a sufficiently early start date.

64. Ms Kight accepted that there had been a delay in the respondents telling the claimant that his application had been unsuccessful. She argued however that this did not amount to less favourable treatment than someone else in materially the same circumstances as the claimant but who did not have MS.

65. Mr Grant-Hutchison said that he was happy to adopt Ms Kight's written submissions as there was little difference between the positions of the parties she represented and that of his clients.

66. Mr Grant-Hutchison said that there was no concession by those he represented in relation to knowledge of the claimant's disability. He accepted that Mr Perrott knew about the claimant's MS but suggested it was for the Tribunal to decide whether Mr Perrott knew this was a disability.

67. Mr Grant-Hutchison asserted that the claimant had in his cross-examination shown antipathy towards Mr Perrott. He appeared to be suggesting that Mr Perrott has somehow poisoned the panel's mind in relation to his willingness to accept the job. However, the evidence showed that the interview panel members were all concerned about the claimant's commitment to a start date. This had nothing to do with the claimant's MS. Further, Mr Perrott had encouraged the second interview on 4 February 2021 and disclosure of the work plan.

68. Under reference to ***Chief Constable of Hampshire v Bullale [2012] EWCA 1549*** Mr Grant-Hutchison submitted that we should adopt a two-stage approach – (i) whether the treatment has been proved to be less favourable and (ii) that the reason for that less favourable treatment was the protected

characteristic. Mr Grant-Hutchison said that the relevant hypothetical comparator was *"any individual with the claimant's talents who was also unable to give a commitment to commencing employment at the relevant time and who did not have the disablement of multiple sclerosis".* He argued that, in relation to such a comparator, there was no unfavourable treatment. If there was, the reason was not disability.

69. It was, Mr Grant-Hutchison contended, difficult to describe the hypothetical comparator in relation to the failure to provide feedback. It would need to be someone in the same group of applicants as the claimant. The lack of structure in providing feedback applied to all applicants in this group. If keeping the claimant "*hanging on"* was unfavourable treatment, it was not because of his MS. Mr Grant-Hutchison acknowledged that there was fault on the part of Mr Perrott (in respect of the delay in giving feedback) but this did not mean that there was discrimination.

70. We invited the claimant to respond to the submissions of Ms Kight and Mr Grant-Hutchison and he did so in some detail. The claimant did not accept that there was a distinction between remote working and his disability – he only had to work remotely because he was disabled. He argued that the only concern expressed to him had been about working from home.

71. The claimant sought to address the point that there was no reference in Mr Perrott's email of 1 February 2021 to a job offer or any expression of commitment or keeping his options open. He asked us to accept his evidence that he had made a commitment during his phonecall with Mr Perrott on 1 February 2021 and indeed had made a commitment (to the KTP Associate position) throughout the process. The only contrary indicator was his unwillingness to serve notice on Siemens.

72. The claimant disputed that there had been a lack of structure about the provision of feedback. It was, he submitted, clearly Mr Perrott's task to do so. That was confirmed by Dr Erfani's email to Mr Perrott of 10 March 2021. The claimant asked us to accept that there had been a refusal by Mr Perrott to get back to the claimant and not merely an oversight.

Applicable law

73. Section 13(1) EqA (**Direct discrimination**) provides as follows –

"*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."*

74. Section 23 EqA (**Comparison by reference to circumstances**) provides, so far as relevant, as follows –

"*(1) On a comparison of cases for the purpose of section 13….there must be no material difference between the circumstances relating to each case.*

(2) The circumstances relating to a case include a person's abilities if –

(a) on a comparison for the purposes of section 13, the protected characteristic is disability…."

75. Section 39(1) EqA (**Employees and applicants**) provides as follows –

"*An employer (A) must not discriminate against a person (B) –*

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment."

76. Section 136 EqA (**Burden of proof**) provides, so far as relevant, as follows –

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

Discussion

77. We approached this by looking in turn at each of the issues we had to decide.

Did the respondent do the following things:

1. Reject the claimant's application for the role applied for?

2. Refuse to engage with his communications to explain whether or not he had been successful for the role?

78. We answered the first question – did the respondent reject the claimant's job application – in the affirmative. It was not in dispute that –

(a) MMU had advertised the KTP Associate position.

(b) The claimant had applied for the position.

(c) The claimant had not been appointed to the position.

79. That arguably sat more comfortably with the language of section 39 EqA – *"not offering"* – rather than rejecting, but the result was the same. The claimant applied for the job, his application was considered, and he was not appointed, which equated to rejection.

80. We initially answered the second question – did the respondent refuse to engage etc – in the negative, but with a significant proviso. We had some difficulty with *"refuse"*. We considered that to find that the respondents *"refused"* to communicate we would need to be able to identify some positive act amounting to a decision not to tell the claimant the outcome of his application. We found no such act. The email Dr Erfani sent to Mr Perrott on 10 March 2021 (see paragraph 46 above) was consistent with a decision to tell the claimant that he has been unsuccessful rather than not to do so.

81. Our proviso relates to our view that the respondents had *"failed"* rather than "*refused"* to engage with the claimant's communications about whether or not he had been successful. There was some force in Ms Kight's argument that the claimant should not be allowed to depart from his pleaded case, and so we reminded ourselves of what the claimant had said in his ET1.

82. The claimant had used the term *"ghosting"* when referring to the 10 week period from 5 February 2021 during which he was emailing MMU without response (save for one email from Ms Legg). According to Wikipedia –

> "*Ghosting…. is a colloquial term which describes the practice of ending all communication and contact with another person without any apparent warning or justification and subsequently ignoring any attempts to reach out or communication made by said person."*

83. We believed that it would not be fair to the claimant to decide this issue against him just because, with the wisdom of hindsight, arguably the wrong word had been used to articulate what the issue was. It was understandable that the claimant believed his communications were being ignored. When he referred to "*ghosting"* he was meaning that failure to communicate. We therefore approached this issue by reading in *"fail"* instead of *"refuse"* and, having done so, we decided it in the affirmative.

Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular whom he says was treated better than he was.

84. This took us to the question of who was the appropriate comparator. In the course of his evidence the claimant contrasted the way he had been treated with the way that the other successful (in the sense of being at some point preferred) candidates had been treated. They were HB and ER from the first round of interviews and AM from the third round of interviews. Each of them had been offered the KTP Associate job whereas the claimant had not. That was less favourable treatment. In finding that the claimant had not been offered the job, we preferred the evidence of Mr Perrott to that of the claimant in relation to their phone call on 1 February 2021 (see paragraphs 30-32 above).

85. We reminded ourselves that, in terms of section 23(1) EqA, there must be *"no material difference between the circumstances relating to each case".* Looking at these putative comparators, we found two material differences between their cases and that of the claimant -

    (a) The second interview which each of them attended at CAL's premises was for the purpose of a final selection. It was not to discuss the academic collaboration.

    (b) When the job was offered, the interview panel did not have a concern about their commitment to a start date.

86. Our finding that there were material differences between the cases of the claimant and his named comparators meant that they were not appropriate comparators for the purpose of the claimant's direct discrimination claim. We moved on to consider whether the claimant had been treated worse than a hypothetical comparator, ie than someone else would have been treated.

87. We agreed with Mr Grant-Hutchison's formulation of the hypothetical comparator – "*any individual with the claimant's talents who was also unable to give a commitment to commencing employment at the relevant time and who did not have the disablement of multiple sclerosis".* We did not believe that such a comparator would have been offered the KTP Associate job on or around 4 February 2021, when the interview panel decided to re-advertise

rather than appoint the claimant. The claimant was accordingly not treated less favourably than the hypothetical comparator. Our reason for so believing is tied in with our answer to the "*because of"* question to which we now turn.

If so, was it because of disability?

88. Here we agreed with the argument advanced by Ms Kight that *"Where the act complained of is not inherently discriminatory, liability will depend on whether the protected characteristic formed part of the "mental processes" or "motivation" of the putative discriminator, that being "the reason why" they did it".* A decision not to offer a job to an applicant is not in itself inherently discriminatory. The issue we had to decide was whether the decision not to offer the KTP Associate position to the claimant was because of his disability.

89. Ms Kight's answer was that the claimant had not been offered the job initially due to uncertainty about his willingness to commit to a suitable start date, and subsequently because a better candidate was identified. We agreed with that. While the claimant pointed to Mr Ramshidi's interview note as indicating that he (the claimant) had committed to starting *"3 months from now"* the evidence of those of the respondents who were members of the interview panel was that the claimant would not commit to what he would do if offered an extension of his fixed-term contract by Siemens (see paragraph 25 above). We were satisfied that this was the reason for the decision to re-advertise, and therefore not offer the job to the claimant. Unfortunately for the claimant, this resulted in MA being identified as a better candidate.

90. We understood that the claimant perceived that there was a link between his disclosure to Mr Perrott of his MS and his not being offered the KTP Associate position. However, when viewed objectively, we found that was not the case. The treatment about which the claimant complained was not because of his disability but because of his unwillingness to commit to a suitable start date.

The "ghosting" issue

91. We have focussed thus far on the first aspect of the claimant's complaint of unlawful direct disability discrimination, being the failure to offer him the KTP

Associate position. We now consider the second aspect being, as EJ Hoey put it, "*the failure to confirm the position with him".*

92. We did not entirely agree with Mr Grant-Hutchison that it was "*difficult to describe the hypothetical comparator".* We also did not agree that it would need to be someone from the same group of candidates as the claimant. There was no-one else in materially the same circumstances as the claimant, ie an applicant who had been interviewed, had emerged as the preferred candidate, had been perceived as unwilling to commit to a start date, who had thereafter been kept "*hanging on"* . However, with the addition of "*and who did not have MS",* that was in our view an apt description of a hypothetical comparator.

93. Dr Erfani provided this explanation in his witness statement –

> "*52. On 17 March 2021 Michelle Legg, Talent Acquisition Adviser at the University, contacted me to ask me to contact Mr McCready to give him the outcome of the interview because he had got in touch asking for the outcome (page 282). I didn't see this email trail at the time, but I have since seen that Mr McCready was chasing Ms Legg for a response (page 281 and 283-284). I have also later seen that there was an error in the HR ticketing system which meant that Ms Legg had not received all of Mr McCready's emails (pages 300-301).*
>
> *53. I had not realised that feedback had not yet been given, and on 19 March 2021 I emailed Mr Perrott stating that "now would be a good time" to let P and Mr McCready know about the outcome of their interview if he had not yet done so (page 285).*
>
> *54. I assumed at that point that feedback would be provided but I later found out as part of these proceedings that feedback to Mr McCready had not been provided. Mr Perrott provided a formal letter of feedback on 7 June 2021 (page 304)."*

94. Our view of this was that Dr Erfani, and by extension MMU, were entitled to believe that feedback to the claimant was being given by Mr Perrott. In those circumstances it would not have been appropriate for MMU or Dr Erfani to

communicate with the claimant. The claimant's MS played no part in any failure by MMU to communicate with the claimant.

95. So far as Mr Perrott was concerned, we accepted his evidence (see paragraphs 47-48 above) that his failure to communicate with the claimant was due to oversight. We found no connection between that and the claimant's disability. The failure to tell the claimant that he had not been successful was discourteous but not discriminatory. The hypothetical comparator would have suffered the same treatment.

96. Taking up Mr Grant-Hutchison's invitation to decide whether Mr Perrott knew that the claimant's MS was a disability, Mr Perrott's evidence was that he thought, because the claimant was taking immune suppressive medication as he himself did, it might be for the same condition. That led to the claimant's disclosure of his MS. We had no evidence about Mr Perrott's knowledge of MS or its status as a deemed disability but it seemed to us, looking at matters in the round and on the balance of probability, that Mr Perrott did equate the claimant's disclosure of his MS with his having a disability.

Burden of proof

97. We agreed with Ms Kight's submission that, in effect, section 136 EqA was not engaged. Per ***Madarassy*** there had to be something more than the difference in status (relative to the protected characteristic) and difference in treatment. We found no "*something more"* in this case. If it had been necessary for us to do so, we would have found that the respondents had shown that they did not contravene section 13 EqA and so, in terms of section 136(3) EqA, the reversal of the burden of proof under section 136(2) EqA did not occur.

Section 109(2) EqA

98. We took Ms Kight's point that this had not been identified as an issue but we will make brief comment about it. Section 109(2) EqA provides as follows –

> "*Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal."*

99. If this had been an issue before us, we would have had to decide whether MMU acted as CAL's agent when dealing with the claimant's application for the KTP Associate position. We believed that the relationship between the parties was clear without any need to engage section 109(2) EqA. MMU was to be the employer and CAL was to be the work location. We understood this was the arrangement under which a Knowledge Transfer Partnership normally operated. Consideration of whether there was an agent/principal relationship between MMU and CAL seemed to us an unnecessary complication.

Decision

100. For the reasons set out above, we decided that the claimant's complaint that his treatment by the respondents amounted to unlawful direct disability discrimination had to fail.

101. We should add for the sake of completeness that we did not find that the claimant had made out any element of his complaints against Dr Erfani and Prof Qian, nor against Mr Perrott and Mr Heatherington, as individuals. They acted throughout in their capacity as employees of MMU and CAL respectively. There was no treatment of the claimant by any of them which could give rise to personal liability.

102. In closing we wish to record our appreciation of the way in which the claimant conducted himself throughout the hearing. He was well prepared and behaved courteously towards the respondents and the Tribunal. We thank him for that.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 06 January 2022
Entered in register: 10 January 2022
and copied to parties