



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms O Onakoya

**Respondent:** Adada Ltd t/a Adada Care Services

**Heard at:** Cardiff and on video      **On:** 30 September, 1 and 2  
October 2024

**Before:** Employment Judge S Moore

**Members:** Ms C Bleasdale  
Ms K Smith

**Representation:**

Claimant: In person

Respondent: Ms Cho, Litigation Consultant

**JUDGMENT** having been sent to the parties on 3 October and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

## REASONS

1. The claim was presented on 29 February 2024 following a period of ACAS Early Conciliation commencing on 9 January 2024 and ending on 16 February 2024. The Tribunal sat in person in Cardiff on 30 September 2024, 1 October 2024 and hybrid on 2 October 2024 in order to give Judgment.
2. The complaint of direct disability discrimination succeeded. The following complaints of harassment related to disability succeeded:
  - a. Calling the claimant to meetings on 12 and 13 December 2023 and make repeated and invasive enquiries about the claimant's physical condition and;

- b. On 15 December 2023 isolate her from the distribution of essential work items.
3. The remaining complaints of harassment related to disability did not succeed.
4. We had an agreed bundle of documents before us. The Claimant gave witness evidence for herself and also submitted a written statement from a Ms Zenab. We heard from the Respondents witnesses, Miss Megan Armes, Miss Hayley Tideswell and Mr Akukalia who is the CEO.
5. There was a written statement submitted from Daniel Omubo but Mr Omubo did not attend to give live evidence, the reason given was that he had left his employment. His witness statement was not signed or dated. This was discussed with the respondent who said the statement was signed electronically. The respondent was asked to provide confirmation of Mr Omubo's approval of the statement which could have been in the form of the email sent with the statement for exchange or a later email but this was not forthcoming.
6. The Claimant represented herself and the Respondent was represented by Ms Cho who is a Litigation Consultant.

#### The claims and issues

7. The Claimant brought the following complaints of disability discrimination, where the Claimant is not disabled but was perceived to be disabled by the Respondent:
  - a) Direct discrimination in relation to the withdrawal of an offer of employment or dismissal.
  - b) Harassment related to the protected characteristic of disability in relation to the words and conduct of the Respondent's employees discussing a perceived disability with the Claimant during the training week.

#### The Issues

8. The issues between the parties are set out in the attached appendix.

#### Findings of Fact

9. The claimant is a Nigerian national.
10. We set out firstly our findings in relation to the Claimant's employment history prior to applying for work with the Respondent. The Claimant

undertook an MSc at the University of South Wales between September 2022 and August 2023. In March 2023 the Claimant signed on with a work agency called Best Connections to undertake some cleaning jobs in Cardiff but as it transpired the Claimant was only ever offered one shift with Best Connections.

11. At the time the Claimant started her application to the Respondent she had not commenced employment with a company called Atlas. The claimant worked a small number of shifts with Atlas starting on 18 October 2023 with further shifts worked at the beginning of December 2023.
12. In June 2023 the claimant initiated the application process with the respondent. On 30 August 2023 she attended a video interview and was offered employment on 8 September 2023 which was subject to a number of conditions. The offer letter provided that the Respondent had to receive satisfactory references and it would be their final decision to determine whether the references met the requirements. The Claimant signed the offer letter indicating she accepted those conditional provisions and was asked to provide the names and addresses of two work related referees.
13. On 22 September 2023 Mr Omubo emailed the Claimant sending her a number of attachments for completion and explained she needed to provide an editable CV with all employment dates included and this time stating that references would be needed for a 3 year period. They also needed to be provided on proper company note paper or email addresses.
14. On 4 October 2023 the Claimant sent Mr Omubo the relevant documents, these included her application form on which she included two references from her employment in Nigeria. The first was for a nursery called Cradle Path and the dates of employment were described as 2016 to 2017. The second employer was called "Abimbola" and the dates were said to be from 2019 to 2020. She also returned a completed health declaration to which she replied "no" to all of the questions. On the health declaration the Claimant was asked if she had any illness, impairment, disability (physical or psychological) which may affect her work, she ticked "no". She was asked whether she had ever had any illness, impairment or disability which may have been caused or made worse by her work to which she ticked "no" and also whether she had difficulty standing, bending, lifting or other movements. She was also asked whether or not there was any additional relevant information regarding her health not covered in the above questions and also whether she had any back or limb disorders to which all of the answers were "no".
15. The Claimant also attached a CV which gave different dates regarding her employment with Cradle Path as 2020 to 2022 and that another employer had been Beachland Hospital in Lagos between 2015 and 2020. The

Claimant did not disclose her employment with Best Connections or Atlas albeit it should be noted at that time she had not started work for Atlas and had done one shift with Best Connections.

16. Thereafter, for a period of some weeks, Mr Omubo and the Claimant exchanged numerous email communications as there were various issues with the referees in Nigeria including that they were not completing the forms or they had not provided the information on a proper email address, namely being a gmail rather than a proper work related email address.
17. It is plain from these communications that the Respondent operated a diligent and strict vetting procedure with Mr Omubo following up all of the discrepancies with the Claimant seeking the appropriate clarifications. Indeed Mr Omubo told the Claimant on 7 November 2023 that she would not be able to start onto the training until these matters were resolved.
18. By 15 November 2023 the Claimant had received satisfactory references from Cradle Path and Beachland Hospital and on 16 November 2023 she was told as such by Mr Omubo but that she still needed to edit her CV to ensure that it matched the information that had been provided on the references. There was a gap in the CV from May 2022 to August 2023 and the Claimant was told she needed to provide an edited CV explaining the gap. She duly did so and that CV was before us. It is noted that name of Beachlands Hospital was amended to Olabeesi Olabanjo University Teaching Hospital and the Claimant gave information about her role at the hospital which we considered to be relevant. She was employed for 5 years as a care giver, she helped patients with personal care, washing bed linen, clothes, laundry, performing check up on service users, offering massage, maintaining client records and retrieving when asked by supervisors, preparing meals for patients and so on.
19. The Claimant was subsequently invited to attend training on 20 November 2023 but did not have the relevant accommodation so training was subsequently rearranged for her to start on 11 December 2023. The Claimant had to secure accommodation in Ellesmere Port and a car, at her own cost, in order to be invited onto the training.
20. We turn now to the events at the training which took place at the Respondents offices in Capenhurst between 11 and 15 December 2023. Upon her arrival at the training she was greeted by Mrs Armes, who was the Recruitment Manager and HR Officer for the Respondent and directed to the first floor where training was due to take place. Mrs Armes told the Tribunal she immediately noticed that the Claimant was walking slowly and appeared to struggle out of the car and on the loose stone path and appeared to be flustered from arriving late, pausing at the bottom of the stairs walking slowly up to the training venue. Mrs Armes told the Tribunal

in her statement that the Claimant, as we have found above, had not declared at the interview or onboarding process she had a medical condition that would impact on her work and she was concerned by her perception of the Claimant's apparent physical infirmity and sought advice from the Respondents HR helpline. Upon advice she called the Claimant out of the training and into a meeting with two other managers, Ms Law and Ms Tideswell.

21. The Tribunal had sight of the notes of this meeting although the notes had not been shared with the Claimant until these proceedings. The Claimant agreed under cross-examination the content was largely accurate.
22. The Claimant was told by Mrs Armes that she had observed her struggling when she arrived this morning and was asked to explain so that they could help where they could. The Claimant explained that it was a physical challenge (which is how the Claimant wishes her condition to be described); it was later clarified that the Claimant's condition is a bow leg<sup>1</sup>. She said that it did not mean she could not do anything, if she had a short leg or a bad hand she would have declared it, she did not want sympathy and that she had a car for travel.
23. Mrs Armes went on to ask the Claimant a number of questions about her physical challenge including if she had had it from birth, took a prescribed medication, whether she wore any particular footwear and then mainly about how she would be able to manage the role that she had been employed to do, which was a domiciliary care assistant assisting people in their own homes to provide care for those individuals.
24. We do find it must have been somewhat intimidating for the Claimant to be removed from training and called into a meeting with three managers and asked questions of this nature. However we also find that the Respondent were entitled to make these enquiries at this stage given that she had not disclosed any of this to the Respondent throughout the onboarding process.
25. Mrs Armes did not feel that she had an adequate enough information from the Claimant from those discussions so she therefore asked the Claimant to write a written statement explaining the history of her physical challenge and the implications on the role. Mrs Armes told the Tribunal the reason she asked the Claimant to write this statement was so that they could perform a risk assessment and see if reasonable adjustments were needed.
26. The Claimant then wrote out her own statement and gave it, presumably, to Mrs Armes. It was a short handwritten statement which said that she was a lady with a bow leg from birth and she had had an operation at 10 years old to correct the leg, after that she had been using pain relief once she feels

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<sup>1</sup> This is how the claimant wishes to describe her physical challenge.

pain like a bone pain on the joint, she may be a little slow in walking and climbing a staircase but she had worked in a creche and done personal cleaning and had researched the job.

27. Mrs Armes was evidently still taking advice from the HR helpline and was advised that she might refer the Claimant to Occupational Health. She shared this information with Mr Akukalia and someone who is referenced as OM but we do not know who that was. She says that acting on advice it was deemed that the statement the Claimant had provided was not sufficiently detailed and therefore another meeting would be required. The Claimant was called into a further meeting on Tuesday 12 December 2023 this time attended by Mrs Armes and Mrs Tideswell. The Claimant was asked questions by Ms Armes and the minutes provide they were as follows:

*Responses from questions asked by Megan.*

*Because had from birth disability for me it's a normal thing gone from all schooling, I can achieve what others can do I travelled by foot to training no issues I understand not big here in Nigeria a common thing physically ok.*

*Working history did not affect my previous jobs they just checked in on me had a face-to-face Interview was discussed when in interview in one place.*

*I saw It on internet I know it's a care job I know it Dom care I googled it to find what it entails.*

*I've not asked would it impact my role its not difficult it is taking care of someone I do same chores at home like washing the toilet I looked after my elderly grandmother alone but not in care company.*

*I can do positioning perfectly I won't have a problem as long as I'm shown how to do this and be with some else training makes perfect, I think I'll be fine*

*I able to bend down to my knees with no issues.*

*I can walk 10-15 minutes perfectly.*

*I can manage to complete long days with short breaks.*

*I can stand for a long period of time*

*I feel physically able to complete CPR including transferring them to the ground.*

*I have not been in the situation climbing stairs without a rail.*

These notes of that meeting were signed by the Claimant on 12 December 2023.

28. It should be noted that none of the respondent's minutes of the meetings on 11 or 12 December 2023 reference the Claimant disclosing that she had been working in the United Kingdom. It is here where the witness statement of Mrs Armes does not match the contemporaneous documents. Mrs Armes' witness statement says that the Claimant told her and Mr Akukalia during an informal discussion on 13 December 2023 that she had previously worked in the UK. However, this cannot be right because on **12 December 2023** Mr Omubo emailed the Claimant as follows:

*"I had a discussion with my colleague Megan who informed me you made her aware that you have been working in an office in the UK. However, this information was not reflected on your CV hence a reference was not requested. Kindly note, I would need you to edit your CV to include your current employment in the UK and provide me with an email that a reference can be sent to. Kindly treat as urgent."*

29. The Claimant told the Tribunal that she had previously told Mr Omubo that she had been working in the UK before December. We do not find this to be the case as Mr Omubo had been extremely diligent and we think it is implausible that if the Claimant had earlier disclosed to him that she was working in the UK that he would not have followed that up. However we also note that by this time the fact that the Claimant disclosed that she had been working in the UK was not deemed sufficiently important to include in any of the notes of the meetings that the Respondent made of the meetings with the Claimant and the email from Mr Omubo did not indicate that there was any problem about this let alone a specific problem with integrity or dishonesty. The email gave the very clear direction to the Claimant that the onboarding process would continue and that she would need to further amend her CV and provide contact details for all referees.
30. There was a further meeting on 13 December 2023 (described by Ms Armes as the informal meeting see above), this meeting was not minuted but everyone accepts it took place. The Claimant says this was the third meeting where she was subjected to intrusive questioning regarding her legs and says that she felt shocked and demoralised and had been traumatised psychologically. This meeting was attended by the CEO Mr Akukalia, Mrs Armes and Tracey Casey who was the trainer present that week.
31. The respondent witnesses gave different accounts of this meeting. Ms Armes' witness statement said that it was during a break in training there was a discussion between the claimant, herself, Mr Akukalia and Ms Casey as to how the training was progressing and how she was finding the recruitment / training process so far. She then says the claimant disclosed the UK employment history.
32. Mr Akukalia's witness statement said that on 13 December 2023 he was informed by Ms Armes that she had concerns regarding the wellbeing of the claimant who had displayed potential mobility challenges so he invited the claimant an informal welfare conversation. The discussion was reported as follows:

*"During the meeting, I explained to Ms Odunayo that we have a duty of care to our staff. As the Claimant had not declared any health challenges during*

*her interview or on our health declaration form, I wanted to give her the opportunity to suggest any support or adjustments that may required for her to carry out the role safely. At no point was the Claimant berated for not including the information on the health declaration form. I did state that to uphold our duty as an organisation to make reasonable adjustments to the Claimant's working condition, we have to be made aware of any condition or health problems that may limit someone's ability to carry out their role.*

33. He went on to explain the physical nature of the role and that she would be expected to use the stairs daily. He admitted using a comparison with migraines with the claimant's legs to explain things could get worse if the claimant kept going to work daily but said this was in the context of trying to get the claimant to say if she needed adjustments.
34. The Claimant was asked about this meeting specifically in relation to her harassment claim that she had been berated at the meeting for failing to disclose her physical challenge on her health declaration forms. The Claimant accepted under cross-examination that she had not been berated and indeed it was noted after a question from the Judge she did not know the meaning of the word berate, after it was explained that this meant.
35. The Claimant also accepted that her claim that there had been no space on the health declaration forms from the Respondents to have disclosed her condition was inaccurate and there was such a space and it had not been disclosed.
36. During the meeting with Mr Akukalia the Claimant sought to reassure the Respondents she was capable of performing a role and Mr Akukalia also explored with the Claimant how she would be able to undertake the role in connection with certain tasks that would need to be carried out.
37. Mr Akukalia's witness statement was also inconsistent with documents that were before the Tribunal. Mr Akukalia told the Tribunal in his witness statement that he asked the Claimant to write a statement after a meeting on 13 December 2023. This cannot be correct as Mrs Armes had asked the Claimant to write a statement after the meeting on 11 December 2023 and we have outlined that statement above. None of the Respondents witnesses properly addressed or explained what happened next after the third meeting between the various people with the Respondent and the Claimant. We therefore looked at the contemporaneous emails in the bundle to try and ascertain what had actually happened from the documents and have made the following findings.
38. On 13 December 2023 at 11:45am Mr Omubo emailed the Claimant again. He said he wanted to remind the Claimant that they needed her proof of address and there were pending documents that need urgent attention



- “before you can be handed over”. These were an edited CV to reflect the two previous jobs in the UK and contact details for the above jobs for reference purposes. We find that if there had been an issue with the Claimant not previously disclosing UK employers the Respondent would not still be processing her or pursuing her references and other documents to finalise her being handed over as part of compliance. It is plain from this documentation that at this stage the Respondent was still, as far as Mr Omubo was concerned, intent on taking on the Claimant or else why else would they have been seeking this information. The Claimant asked Mr Omubo to call her in response to that email and as of 14 December 2023 the Claimant had provided and Mr Omubo had obtained a reference from Best Connections confirming that she had been employed from 23 March 2023 to date. He asked her to update her CV and provide details of the second employment contact which must have been a reference to Atlas. The Claimant replied to that email on 6.23pm informing him that the manager of Atlas had said he would send her his email.
39. The following day, which was the Friday, Mr Omubo emailed the Claimant again stressing she had pending compliance needing the edited CV and a contact detail for the second referee, so as of 15<sup>th</sup> Mr Omubo did not have the contact for Atlas.
40. It falls now to deal with another event on 15 December 2023, for ease of reference in the Chronology, which are matters that the Claimant says took place at the conclusion of the training. None of the Respondents witness evidence addressed this event at all despite being on notice of this complaint. It was pleaded in her ET1 and was in the list of Issues as a harassment claim. It was also referenced in the claimant’s witness statement. The claimant has been consistent in her account of what happened. For those reasons we accept what the Claimant’s evidence says about this incident in the absence of any explanation from the Respondents (until evidence at the hearing see below).
41. On 15 December 2023 at the conclusion of the training the Claimant says she was isolated from the distribution of essential work items. She explained to the Tribunal in more detail that everyone at the training had their uniforms handed out to them except the Claimant. There were names on the list correlating who had been given a uniform, those names were checked off and the Claimant’s name was not on the list, she had no uniform and her name was not on the list, she was embarrassed and felt very humiliated about this immediately associating not being given a uniform with the enquiries that had been made earlier in the week about her physical challenge and her ability to undertake her role.
42. The Tribunal asked the Respondents witnesses about this and Mrs Armes was unable to tell the Tribunal whether or not a uniform was issued as she

was not in work on that day and this was dealt with by Tracey Casey who was not called as a witness to this Tribunal. Mr Akukalia was also unable to explain or tell the Tribunal whether or not a uniform had been given to the Claimant but he did tell the Tribunal that he had not, under any circumstances, given any instruction that she should not be given a uniform. They speculated that a uniform may not have been available in the claimant's size.

43. We accepted what the Claimant told the Tribunal. Someone at some point decided that she would not be given a uniform on the Friday and her name would not be on the check off list unlike any of the other attendees. There was some speculation that the reason may have been there was no uniform size available for the Claimant but we do not accept this explanation as there was no evidence to support it. All other attendees were issued with a uniform apart from the Claimant and we had no explanation from the Respondent as to the reasons. We find the reason was there had been a decision taken that the claimant would not be starting her employment with the respondent.
44. We had sight of a document in the bundle at page 154. We find that this must have been part of an email sent to the Respondent, Mr Obama over the weekend of 16 or 17 December 2023. For reasons we do not know only part of the email is included but from the email and the contemporaneous emails around it, it is plain that it is an email from the Claimant to Mr Obama because she is responding and providing information that she has been asked to provide by him covering the gap in her CV which was relevant to September 2022 to 2023 when she was studying for the MSc and explaining the agency work she undertook during that time. It references attaching an updated CV and also provides contact details for Best Connections and Mr Hinds at Atlas Cleaning Services.
45. The reason we find that the Claimant must have provided this to Mr Omubo over the weekend of 16 and 17 December 2023 is that he acknowledges it on 18 December 2023. The Claimant says to Mr Omubo, "all corrections noted" and he replied in an email we consider to be an important email because he told the Claimant "Documents well received.". For these reasons we find that the Claimant as of 18 December 2023 had provided all of the information she had been asked to provide to the Respondent including the names of the two referees for the UK employment.
46. Mr Omubo goes on to tell the Claimant he needed her to fill in a gap of employment form, notwithstanding she had already given that information in the email we have described above and needed information about work experience. At no time or at no place during this email does Mr Omubo tell the Claimant that she has not provided the relevant information in order for

the Respondent to obtain references which was later relied upon as a reason for withdrawing the job offer.

47. We also observe at this point there is another significant gap in the evidence that was before us from the Respondent. We do not know what happened from the exchange of this email early on Monday 18 December 2023 from any of the evidence from the witnesses that were called to this hearing from the Respondents. As of 18 December 2023 the Claimant had provided everything she had been asked to provide. There was no evidence that Atlas were contacted by the Respondent to request a reference and as Mr Omubo's email of 14 December confirms, they had received the reference from Best Connections. If the respondent had asked Mr Hinds or Atlas for a reference undoubtedly they would have disclosed such documents to this Tribunal given the importance of such a request to their reasons for withdrawing the job offer. The fact they have disclosed no such documents leads us to conclude that they did not ask Mr Hinds or Atlas for a reference. This is corroborated by what the claimant later tells Mrs Armes (see below).
48. Mrs Armes witness statement simply stated as follows, *"On 18<sup>th</sup> we felt the Claimant had not provided the correct information on multiple occasions. Upon asking her, the Claimant said she could not provide a reason."* This simply cannot be right on a number of grounds. The Claimant was not asked about this until later in January 2024, which we will return to below but, there is no evidence that the Claimant was asked why she had not provided correct information and as we have found above, by this point she had.
49. Mrs Armes goes on to say, *"because we were unable to obtain satisfactory references and because the Claimant had not been transparent about her previous work in the UK a letter withdrawing the offer of employment was sent to her on 19 December"*, but, as we have noted above, at this time satisfactory references had been received both from the Nigerian employers and Best Connections. The reason a satisfactory reference had not been received from Atlas is because the Respondent had not asked for one.
50. Mrs Armes was asked what references had not been provided and she was unable to assist the Tribunal with this. She told the Tribunal she would have known references had not been received as she would have checked on the system but she was unable to explain why there was no evidence before the Tribunal showing that the Respondent had contacted Atlas for a reference after they had been provided the contact details by the Claimant over the weekend of 16 and 17 December.
51. This does not sit comfortably with the previous behaviour of Mr Omubo who had been extremely diligent in following up references and matters required for the vetting procedure. As Mr Omubo was not called to this Tribunal to

give evidence, and there was no contemporaneous documents we were unable to be assisted on this point by anything other than the evidence of the Claimant, which I will return to below.

52. Mrs Armes was asked who decided to withdraw the offer of employment to the Claimant and she told the Tribunal it was a team decision taken by herself, the CEO and Mr Anura who was the Operations Manager at that time.
53. Mrs Armes authored the letter withdrawing the offer of employment which was sent to the Claimant by email at 1.14pm on 19 December 2023. The heading was "withdrawal of offer of employment". It referenced the conditional terms we have quoted above and stated that it came to light through further investigation the claimant had not included the most recent references on your CV as requested. Then:

*"As you are aware you have had two previous employers in the UK including office cleaning work and you have not been able to fulfil the two reference requests in a timely manner and one reference has not been returned."*

It goes on to say she had not received responses to the reference requests and based on the same the company was unable to proceed with the proposed appointment. This was not accurate. At that time the Respondent had received a reference from Best Connections and they have not made a request to Atlas for a reference and therefore it is not correct to say that Mrs Armes had not received responses to reference requests.

54. On 20 December 2023 at 2.48pm the Claimant replied to Mrs Armes in which she complained about the withdrawal of the reference and told her she had diligently provided the information requested. Significantly, the Claimant told Mrs Armes that she was still awaiting an email as per her last conversation with the referee at 13.44 on 19 December 2023. The Claimant told the Tribunal that she had contacted Mr Hinds at Atlas and he told the Claimant that he had not received any reference request from the Respondent. Therefore the Claimant told Mrs Armes on 20 December 2023 that Atlas had not been contacted for a reference.
55. We accepted the Claimant's evidence about this as not only is it supported by a contemporaneous email from her on 20 December 2023, there was also no documentary evidence from the Respondent to say that they had contacted Atlas which we found above to be entirely inconsistent with all of the other behaviour by Mr Omubo's diligent behaviour. The respondent were reminded that it was the claimant's case the referrer had not been contacted upon the provision of her schedule of loss.

56. The Claimant was invited to a grievance meeting on 3 January 2024, the notes of that meeting were in dispute, they were not sent to the Claimant to agree and she did not agree them at this hearing under cross-examination.
57. Thereafter, following that meeting, Mrs Armes wrote to the Claimant on 4 January 2024 and stated that again, any offer was conditional on receipt of two satisfactory references, one of which should have been from the last or present employer. She went on to claim that it had come to light that the Claimant had not included recent references on the CV and had been established that she was asked to update her CV including work history and the Claimant accepted she had not supplied the most current work history. None of this was established according to the emails we have set out above. Ms Armes said that despite the Respondents efforts to obtain references for work history parties identified, they had not been forthcoming. Although it referred to references in the plural as 'they' it went on to say 'a' reference had not been received. It was unclear which references Ms Armes was referring to having not been received at that stage.
58. Mr Akukalia was also asked by the Tribunal when he gave his evidence about who made the decision to withdraw the job offer from the Claimant. Mr Akukalia firstly told the Tribunal that he was responsible for the decision but his witness statement did not give that impression. Mr Akukalia's witness statement largely focused on the meetings with the Claimant and her physical challenge and how that would potentially impact her ability to perform her role. After describing the meeting on 13 December 2023 he stated as follows, "I was later informed that the Claimant did not provide adequate references as per her offer of employment" and made a reference to him later finding out she had been dismissed from her previous job, but he did not say anything about his involvement in the decision making process. He told the Tribunal initially that he had been responsible for that decision as it was a matter of integrity because the Claimant had not disclosed her UK employers and they had not obtained references but he then later told the Tribunal that he had asked the team to follow the protocol in respect of the references. Mr Akukalia was passionate in his insistence that the reason for the decision to withdraw the employment was not the Claimant's perceived disability but the issues over the references.
59. The Respondent has a practice of a thorough and diligent procedure obtaining references for the people they employ to look after vulnerable individuals. It is wholly appropriate for the Respondents to properly ensure that employees are thoroughly vetted and hold proper references and that they have displayed that they do so in order to ensure that the vulnerable people they look after are kept as safely as they can be through proper processes. The Claimant did not disclose the UK employers until it came out at the meetings on 12 December 2023. As she had only worked one shift for Best Connections in March 2023 and had not started work for Atlas

at the start of the onboarding process we find that the Claimant did not deliberately hide that information from the Respondent. She was not told that after onboarding there was an ongoing duty to disclose other employment and when she was asked about it she readily volunteered and proactively provided the necessary information to obtain references.

### The Law

60. The provisions governing employee status for the purpose of these proceedings are set out in s230 ERA 1996 and s39 and s83 EA 2010.

### Direct disability discrimination pursuant to Section 13 of the Equality Act 2010 ("EA 2010").

61. The less favourable treatment need not be because of a protected characteristic of the claimant but may be because he or she associates with someone with the protected characteristic or is perceived to have the protected characteristic even though that perception is wrong.

62. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

63. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

64. On the burden of proof Section 136 EA 2010 provides 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.

65. In **Igen v Wong [2005] IRLR 258 (CA)** the guidance issued by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** was approved in amended form. The Tribunal must approach the question of burden of proof in two stages.

"The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate

explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.” (paragraph 17, per Gibson LJ)

66. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

#### S 26 EQA 2010 – Harassment

67. A person (A) harasses another (B) if—

A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account the perception of B; the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

68. Part 7 of the EHRC Code provides that unwanted conduct ‘related to’ a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.

69. In **Hartley v Foreign and Commonwealth Office Services UKEAT/33/15** the employee had been dismissed for capability reasons. The employee had Asperger’s syndrome. The EAT held that whether conduct is “related to” a disability should be determined having regard to the evidence as a whole; the perception of the person who made the remark is not decisive.

70. At paragraph 24 Judge Richardson held:

“A’s knowledge or perception of B’s characteristic is relevant to the question whether A’s conduct relates to a protected characteristic but there is no warrant in the legislation for treating it as being in any way conclusive. A may, for example, engage in conduct relating to a protected characteristic without knowing B has that characteristic.”

71. It is a question of fact for the Tribunal as to whether the conduct complained of occurred. If so, the Tribunal must determine if it had the purpose or effect as set out in S26 (1) (b). The test has subjective and objective elements to

it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser has on the Claimant. The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

72. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495** the EAT held that the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the only necessary or possible route to the conclusion that the conduct in question is related to the particular characteristic. Nevertheless there must still be some feature or features of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct is related to the protected characteristic. The Tribunal must articulate what these features are.

73. **UNITE the Union v Nailard [2018] IRLR 730** is a case about third party liability for harassment however the EAT's reasoning at paragraphs 100 – 103 (as to how a Tribunal should approach the issue of "related to" under S26) was upheld (per Lord Justice Underhill at paragraph 98). The ET should focus upon the conduct of the individual or individuals concerned and ask whether their conduct is associated with the protected characteristic. The first task is to identify the conduct; the next is to ask whether that conduct is related to the protected characteristic. The focus must be on the person against whom the allegation of harassment is made and his conduct or inaction, it will only be if his conduct is related to the protected characteristic that he will be liable under S26. It will be a matter of fact whether the conduct is related to the protected characteristic.

## Conclusions

### Employment status

74. The respondent's position on this was far from clear. The response stated that "the Claimant's contract of employment had not begun at the time that the Respondent notified the Claimant that unfortunately it would not be continuing with her employment." It was unclear why this would mean the claimant was not entitled to bring her claims as an applicant under s39 EA 2010. The employment status was noted as an issue in the list of issues.

75. Ms Cho submitted that the claimant was not an employee as there was a conditional offer that had not crystallised. This was on the basis that there was an offer of employment conditional on obtaining satisfactory references and as these could not be obtained there was no contract of employment.



76. It is not proportionate to determine this issue as the claimant is able to rely on her status as a job applicant under s39 EA 2010 in any event for both the direct discrimination claim and the disability related harassment claim.

Direct discrimination claim

77. This was plainly a case about the reason why the job offer was withdrawn on 19 December 2023 leading to the claimant's dismissal (or by not offering her employment under s39 (1) (c) EA 2010). This Tribunal was presented with two different reasons. The Claimant's case was the reason the job offer was withdrawn was because the respondent perceived her to be disabled. The respondent says the reason why the job offer was withdrawn was that they had not been able to obtain satisfactory references.
78. In our judgment, the reason relied upon by the respondent was not plausible and inconsistent with the evidence. As of 18 December 2023 they had a reference from the Nigerian employers and a reference from Best Connections. They did not have a reference from Atlas because they had not asked for it (see paragraphs 45, 48, 50, 55 and 56 above). The respondent cannot reasonably say with any credibility that the reason the offer of employment was withdrawn was that they were unable to gather satisfactory references. If they had had concerns about the Claimant's late disclosure of being employed by UK employers they would have said so in the notes of the meetings or in any of the emails before us and they would not have continued on with the process of obtaining the UK employers references.
79. If this position had been taken upon the discovery of the UK employment on 12 December 2023 (see paragraph 29), this explanation may have had more weight but according to Mr Omubo the Best Connection reference was perfectly acceptable (see paragraph 46) where he told her the reference was in and that the documents had been "well received." As of 18 December 2023 everything is in order. The Claimant is told so by Mr Omubo. We therefore consider that the claimant has proven facts from which we could decide in the absence of any other explanation that the respondent has contravened s13 EA 2010. We look to the respondents for a reason as to why there was such a change in position as of 19 December 2023. We find there was no satisfactory or plausible reason provided. The explanation is that they were unable to obtain references but this is factually inaccurate in respect of Best Connections and the reason no reference was available for Atlas was that it had not been requested even though the claimant had provided the contact information. We find the reason the job offer was withdrawn, leading to the claimant not being offered employment was because the respondent perceived her to be disabled.
80. We also find it appropriate to draw inferences from the following.

81. Mr Omubo was not called to give evidence to this Tribunal and there was no satisfactory reason before us. The fact that someone has left employment does not mean that they cannot come and give evidence. He did not have a signed witness statement; the statement was not dated and therefore we felt we could attach little or no weight to it. He could have provided explanations for most of not all the matters set out above.

82. We also took into account that the inconsistencies in the respondent's witness statements not only with each other but with the documents in the bundle (see paragraphs 29, 32, 38, and the inconsistent account of the claimant not having provided references). The respondent's witness statements did not properly address the reason for the treatment, who took the decision and when and the accounts that were provided did not tally with the documents. We also took into account the non provision of the uniform on 15 December 2023, which only happened to the claimant.

#### Harassment

83. We deal with each allegation of unwanted conduct as follows:

Throughout the training week 11th to the 15th December 2023 inquire about whether the Claimant was a disabled person, whether she was on regular medication, whether she could perform the duties of a healthcare worker, whether she could walk long distances or quickly, and whether she could stand for any significant periods of time and question the claimant invasively about her physical condition and instruct the Claimant to provide an official statement regarding the condition of her legs

84. Our findings of fact about the first meeting and asking the claimant for a statement after that meeting are at paragraph 24 – 26. Factually the above conduct occurred and it is plain that the conduct was related to a perceived disability. We therefore have considered whether the conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We do not consider it had the purpose because the purpose was to explore with the Claimant her physical challenge given that she failed to disclose that to the Respondents and identify and explore with her what tasks might be affected by the physical challenge. We do consider it had the effect accepting the claimant's evidence about how she said the questioning made her feel. However in regard to that first meeting and asking the claimant for a statement we have concluded that it was not reasonable for the conduct to have that effect. The claimant had failed to disclose any physical impairment and as such the respondent were reasonably exploring the impact of the claimant's physical challenge with

her at an initial meeting, having regard to the type of work she would be undertaking and their duty of care to the claimant and the service users.

85. Our conclusions on the reasonableness of the conduct having the harassing effect does not however extend to the second and third meeting. The Claimant told them at the first meeting she was capable of doing the job and they had documents in their position to support her capability of performing in a care based role and had done so for a long period of time. The Claimant was called into two further meetings where she was outnumbered by senior managers and the CEO. This must have been intimidating not because of in any way the behaviour of Mr Akukalia, but because simply of his seniority and the inequality of the positions between the Claimant as a very new candidate in training and the senior management team. The claimant had to repeatedly justify her capability and was asked intrusive questions about condition for a second and third time. The appropriate and sensitive way to have dealt with those questions should have been by a medical professional by way of a referral to Occupational Health and pause the onboarding procedure.

86. The further meetings were plainly related to the Claimant's disability. We do not think that they were done with the purpose of harassing the Claimant, but we do find that they had the effect of harassing the Claimant and it was reasonable for the Claimant to have felt that way.

Berate the Claimant for not having disclosed disability in any forms provided to her

87. The claimant accepted this had not happened. This complaint therefore does not succeed.

Isolate her from distribution of essential work items on the last day

88. In respect of the harassment claim in relation to the uniform, we find this claim is well-founded. We accepted the Claimant's evidence that she was the only one not given her uniform and made a finding that somebody by 15 December 2023 had taken the decision not to provide her with the uniform as her employment was not going to be continuing. No one bothered to explain the position to the claimant or take steps to prevent her from finding out in the way she did. This was in front of all of the other attendees at the training and it must have been embarrassing and obvious to everyone that she had been singled out and not given a uniform nor was her name even on the list. This was a particularly disappointing aspect of how the respondent's case had been presented in that there could well have been reasonable explanations as to why this happened, but they were not offered to us and we can only go on the basis of the evidence that is before this Tribunal.

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Employment Judge S Moore  
Dated: 13 November 2024

REASONS SENT TO THE PARTIES ON

22 November 2024

Adam Holborn  
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

**List of issues**

1. Employment status

- a) Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?
- b) Was the Claimant an employee of the Respondent within the meaning of section 83 of the Equality Act 2010?
- c) Was the Claimant a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?
- d) Was the Claimant an applicant for employment or an applicant for a role as a worker?

2. Disability

- a) Did the Respondent perceive that the Claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Claimant says that her perceived disability related to the fact that she is bowlegged.

3. Direct disability discrimination (Equality Act 2010 section 13)

- a) Did the Respondent do the following things:
  - i) withdraw an offer of employment or
  - ii) dismiss the Claimant from employment?
- b) 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 they were treated worse than someone else would have been treated.
- c) The Claimant says they were treated worse than the people who were on the training course with her who were not disabled.
- d) If so, was it because of perceived disability?
- e) Did the Respondent's treatment amount to a detriment?

4. Harassment related to disability (Equality Act 2010 section 26)

- a) Did the Respondent do the following things:
  - i) throughout the training week 11th to the 15th December 2023 inquire about whether the Claimant was a disabled person,

whether she was on regular medication, whether she could perform the duties of a healthcare worker, whether she could walk long distances or quickly, and whether she could stand for any significant periods of time.

- ii) Question the Claimant invasively about her physical condition.
  - iii) Instruct the Claimant to provide an official statement regarding the condition of her legs
  - iv) Berate the Claimant for not having disclosed disability in any forms provided to her.
  - v) Subject her to further scrutiny about past employment and isolate her from the distribution of essential work items on the final day of training.
- b) If so, was that unwanted conduct?
- c) Did it relate to perceived disability?
- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- e) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.