



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Russell

Respondent: The Chestnuts Surgery (a partnership)

Heard at: London South **On:** 7/5/2024 - 10/5/2024
(Croydon) via CVP

Before: Employment Judge Wright
Ms J Cook
Mr C Rogers

Representation:

Claimant: Mr T Pullen – Kent Law Clinic

Respondent: Ms A Johns - counsel

REQUEST FOR WRITTEN REASONS

Oral judgment having been given on the 10/5/2024 and further to the respondent's request for written reasons, these written reasons are provided.

WRITTEN REASONS

1. It was the unanimous Judgment of the Tribunal that the claimant's claims under the Employments Rights Act 1996 (ERA) and Equality Act 2010 (EQA) are not well founded, they therefore fail and are dismissed.

2. The claimant presented a claim form on 7/11/2022 following a period of early conciliation which started on 5/10/2022 and ended on 7/10/2022. The claimant was employed by the respondent as a Health Care Assistant. Her employment commenced on 8/10/2018 and terminated on 18/8/2022.
3. A case management hearing took place on 25/5/2023 and that resulted in an agreed list of issues.
4. Under the Equality Act 2010 (EQA), the claimant claimed the protected characteristic of age (s.5). She described her particular age group as '65 years of age or older'. She also made reference to employees generally considered to be approaching retirement. The prohibited conduct upon which she relied is only direct discrimination (s.13). The complaint is detriment (s.39(2)(d)). The claimant expressly does not rely upon the dismissal as an allegation of discrimination.
5. The claimant also claimed she was actually dismissed by the respondent and that her dismissal was unfair contrary to s.94 ERA. The claimant expressly said that she was not claiming constructive unfair dismissal (it being the respondent's case that the claimant resigned her role on 21/7/2022) (page 91).
6. The claimant withdrew her claim for holiday pay at the outset of the hearing.
7. When dealing with any preliminary matters at the outset of the hearing, Mr Pullen made an application, which in essence requested that the Tribunal do not make any findings in respect of why the claimant's job offer was withdrawn. The respondent objected to the application. The application was refused for the reasons given at the time. Mr Pullen then applied for a reconsideration of the decision and again, the application was refused. The Tribunal adjourned for an early lunch in order that the claimant could consider her position in respect of the Tribunal's decision. Mr Pullen attempted a further reconsideration after lunch. He had made the application, it had been refused, then reconsidered and further refused. The only route he had in respect of a further challenge was to appeal the decision.
8. The Tribunal heard evidence from the claimant. For the respondent it heard from: Ms Lyn Walker (respondent's finance bookkeeper) and Mr Shaun Potter (respondent's practice manager).
9. There was a 118-page electronic bundle with an additional four pages. Further disclosure was provided during the hearing. There were relevant documents referred to by the respondent's witnesses and which had not been included in the bundle. There was no satisfactory explanation for this.
10. Submissions were heard and considered.

11. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing. That included the documents referred to by the witnesses and taking into account the Tribunal's assessment of the evidence.
12. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence.

Findings of fact

13. In respect of the allegations the Tribunal had to determine, the relevant starting point is early 2020. The claimant was placed on furlough leave in April 2020 and she said she returned to work in the Autumn of 2021. Ms Walker said she had checked the dates and the claimant's leave commenced in May 2020 and ended in approximately April 2021.
14. There was a return to work meeting on 28/10/2020 with Mr Potter at which a phased return to work was discussed. It was anticipated the claimant would return to work in late 2020, however there was then a second lockdown and she did not do so. The claimant denied retirement was discussed at this meeting and said that she had said she wanted to consider drawing her pension. She was asked if that may have been perceived by Mr Potter as her wanting to retire, rather than to draw her pension; and she replied 'no, not really'.
15. The Tribunal finds that at this point in time, there may have been a miscommunication. From the claimant's point of view, she was considering drawing her NHS pension as an extra form of income. It is possible in the NHS to 'retire and return' (as explained by Ms Walker). Mr Potter may well have interpreted this as the claimant wanting to draw her pension, to retire and to leave the respondent's employ. The Tribunal finds however, that whatever impression Mr Potter had at this time, it did not influence subsequent events and the claimant's plans at various times changed and were communicated to the respondent as set out below.
16. As a result of the meeting, the claimant's hours of work were reduced and her contract was varied by agreement to 15-hours per week, as evidenced by an amended contract dated 2/12/2020 (page 73).

17. The claimant wished to explore the position should she claim her pension. She was provided at some point in late 2020 with the form 'NHS Pensions – Retirement benefits claim form (AW8) (referred to as AW8).
18. The claimant originally completed this form in December 2020. The actual date is not clear as the claimant overwrote it (the date is not material). The form asked for the 'last day of Scheme membership or last day of employment if later or 75th birthday if earlier...'. The claimant did not insert a date in this section of the form.
19. In parts 8.1 and 8.2 of the form, the claimant was asked 'have you any other work in the NHS at the time of retirement from this job?' and 'will you be re-employed in the NHS after retirement from this job?'. The claimant had answered 'no' to both questions.
20. The Tribunal therefore finds that from the respondent's point of view, anyone who saw this form, would have the impression that the claimant intended to claim her pension at some future unspecified date AND she intended to leave her employment with the respondent and did not intend to continue working in the NHS.
21. It appears Ms Walker saw the form prior to the witness section being completed as she sent an email to Mr Potter on the 15/4/2021 (subject: Jane Russell – Retirement form) (page 82). Ms Walker said there were parts of the form which needed to be completed by the respondent, the claimant had not had her signature witnessed and Ms Walker had put the form on Mr Potter's desk. It is assumed Mr Potter saw the form, however, he may not have reviewed it in any detail. The form must have then been returned to the claimant.
22. Ms Walker saw the form again at some point after the 20/4/2021 as she realised there was a problem with the witness declaration (the witness cannot have witnessed the claimant's signature as the claimant had originally signed the form in December 2020, she then amended the date of the signature and the witness did not sign the form until 20/4/2021).
23. The Tribunal finds that from this point, both Ms Walker and Mr Potter would have the impression the claimant wanted to draw her pension and did not intend to continue to work for the respondent due to the content of the form.
24. Mr Potter then contacted the respondent's accountant who suggested the form be sent to it for processing on the 28/4/2021 (page 83).
25. In the morning of 10/5/2021 Ms Walker sent an email to Mr Potter and reported that she had spoken to the claimant about a leaving date and the claimant, 'wants to leave on the 16th September but only for 24hrs and come

back!!!!!!!'. The Tribunal finds that the exclamation marks indicate the claimant had by this point communicated that she wanted to draw her pension and to continue working. This was a change to the claimant's previous position.

26. Mr Potter sent an email to the claimant on 10/5/2021 in the afternoon, in which he referred to the form the claimant had completed and his understanding that the claimant intended to retire on 16/9/2021 and 'maybe stay on part time as a possibility is this correct?' and he offered to meet the claimant to discuss (page 85). His reference to 'part-time' when the claimant worked 15-hours per week indicates that he understood the claimant wished to further reduce her hours. He also said that the accountant had said that it was too early to submit the form 'just yet'.
27. The claimant said that there was no other document which referenced her retirement after the 10/5/2021 and that the prospect of her retiring had then 'entirely fallen away'. She therefore said there is no basis for Mr Potter to understand that she intended to retire at the end of 2022.
28. Mr Potter scheduled three meetings with the claimant via his Outlook Calendar:
 - at 8:43 on 5/7/2021 he scheduled a meeting for 14/7/2021;
 - at 9:32 on 5/7/2021 he scheduled a meeting for 12/7/2021; and
 - at 12:34 on 9/7/2021 he scheduled a meeting for 26/7/2021.
29. The Tribunal finds that it is likely the claimant declined the invitation to the first meeting, hence it being rearranged shortly thereafter. It is also possible that she subsequently declined to attend the second meeting, hence a third meeting being arranged.
30. It was Mr Potter's evidence that during a meeting which took place after the 10/5/2021, the claimant informed him that she no longer intended to retire later in 2021 and that she would reconsider her position at the end of 2022, by which time it may be more financially viable.
31. The claimant's evidence was that 'the prospect of my retirement had entirely fallen away after [she] had first raised retirement but then decided against pursuing it in mid-2021' (witness statement paragraph 8). This is not accepted.
32. The claimant said that she obtained a forecast of her benefits to be paid out from the NHS. She realised however that the income would be too low for her to 'retire immediately' and that she would need to contribute into the scheme for another 8 to 10 years to achieve a 'sufficiently high level of pension to

retire comfortably'. The claimant did not date these events in her witness statement (paragraph 6) or provide any documents in relation to this.

33. The claimant said that she did not wish to 'fix upon a specific retirement date' and that she decided against completing the AW8 form. She went on to say that she advised Mr Potter of this and of her wish to continue working. The claimant said Mr Potter was 'OK' with her decision and said that he was 'happy' for her to continue working.
34. Both the claimant and Mr Potter agreed they had a good working relationship and Mr Potter said there were no issues with the claimant's performance.
35. Factually and obviously, the claimant did not retire on 16/9/2021 (her 66th birthday). The Tribunal finds however that there were further discussions about the claimant drawing her pension (whether or not those discussions were formal or were more akin to informal chats between the claimant and Mr Potter). The claimant must have communicated to Mr Potter that the projected pension at age 66 was not at a rate which would let her 'retire comfortably'.
36. The Tribunal finds however, that the claimant did indicate to Mr Potter that she was considering at least drawing her pension at the end of 2022 and that she was looking to reduce her hours of work. That was notwithstanding the role she applied for in July 2022 was based upon an 18-hour week. The claimant said the location of that role was 3 miles from her home and that she was agreeable to working three-six-hour shifts. It was therefore amenable and convenient for her.
37. Mr Potter said that there was no reason for him to 'make up' the date of the end of 2022 and the Tribunal agreed. After considering the evidence, including the contemporaneous documents and based upon the balance of probabilities, the Tribunal finds that the claimant did inform Mr Potter that she was considering drawing her pension at the end of 2022 and gave him the impression she was looking to reduce her hours. It was therefore reasonable for him to have this understanding of the claimant's future plans. That is notwithstanding that the claimant now said this is untrue.
38. The claimant was dissatisfied in her role and had been since she returned to work after furlough leave. She looked for an alternative local role. In July 2022 she saw the role of phlebotomist at the Medway Maritime Hospital (MMH) advertised to work three-six-hour shifts per week. She applied for the role and was successful. She received a conditional offer of employment dated Friday 15/7/2022 (page 90). It was sent under the cover of an email dated 15/7/2022 sent at 16:43 headed 'your conditional offer' (page 92). The email stated: *'Further to your recent interview I am pleased to confirm your appointment to the above post subject to receipt of satisfactory employment*

checks'. The Tribunal was only provided with the first page of the offer letter. The claimant was asked to disclose the full letter. Mr Pullen said that he did not have the full copy and the claimant was unable to obtain it.

39. The letter stated:

'This offer is conditional based upon satisfactory clearance of the following checks:

- Verification of identity and right to work (link will be sent via TrustID for a virtual document upload)
- Evidence of professional registration and qualification (where necessary)
- References satisfactory to the Trust
- Health Assessment
- Disclosure and Barring Service check
- Model Declaration.'

40. The claimant worked Mondays and Wednesdays. There were two incidents on Wednesday 20/7/2022. The claimant said the 20/7/2022 was the hottest day of the year (27 degrees at 8am). She had not been in work on Tuesday 19/7/2022 and her colleagues had removed cooling equipment (air conditioning unit, a fan and suchlike) from her treatment room. There was also a performance issue when an administrative colleague, in the claimant's view, interfered with her medical decision.

41. This prompted the claimant to send an email to Mr Potter on the following day (21/7/2022 page 91):

'Dear Shaun,

To be honest I have been unhappy for some time now with certain incidents and the way the Chestnut surgery is run.

Experienced nursing staff leaving, my appraisal being cancelled several times, exclusion of using certain types of equipment, and more being expected from me, including training other members of staff on a salary that doesn't reflect my true worth.

Then we come to the non-clinical reception/admin staff who think that they manage the surgery and not yourself. On many occasions they have given me nothing but grief and stress that is tantamount to bullying, and yesterday's debacle was another example of their unwelcome interfering and disrespectful behavior and their actions have prompted me to send you this email.

So I am happy to inform you that I have been offered a position with the Phlebotomy department at Medway Maritime Hospital, my CV has been with the head of phlebotomy Wendy Matthews for a few months now, so it was flattering to be recognized for my skills and experience at my time of life. So I have accepted their kind offer to go back to Medway where my NHS journey

first began, and where teamwork and respect go hand in hand - unlike my current position.

It is for the above reasons that I today give notice of my resignation, and I would like to discuss a leaving date with you as soon as possible.

King regards'

42. The Tribunal makes several findings in respect of this email. It is telling that the claimant did not resign upon receipt of the offer from MMH. She resigned after the incidents on the 20/7/2022. She clearly had a job offer and was considering it. She however resigned after the incidents on the 20/7/2022.
43. The claimant sought to establish that this was a conditional resignation, subject to agreeing a termination date with Mr Potter.
44. The Tribunal finds that there is no ambiguity about the fact the claimant was resigning. A resignation is a unilateral act and there was no uncertainty that the claimant communicated she was resigning and terminating her employment.
45. The words prior to the comma in the final sentence are 'It is for the above reasons that I today give notice of my resignation'. Those words are unequivocal. It is also open to the claimant to resign with or without giving her contractual notice. There was no mention of the contractual notice the claimant had to give to the respondent, which was one calendar month (clause 11.1 page 78).
46. There may however have been some lack of clarity in respect of the discussion about the leaving date. It could be interpreted that the claimant wished to discuss with Mr Potter as soon as possible; a leaving date. Or, that she wished to discuss her leaving date with Mr Potter; and wanted that date to be as soon as possible.
47. The Tribunal finds the claimant intended to bring forward her leaving date as early as possible. She did not offer to work her notice period, she was unhappy at the respondent and (not unreasonably) wanted to start her new job as soon as possible.
48. Whatever she intended, what happened was that she had a telephone discussion with Mr Potter the following day. Mr Potter said that as the claimant was so unhappy, he did not require her to work her notice period, he agreed that she would receive full pay and that her employment would terminate in four-weeks' time (from the 21/7/2022) on the 18/8/2022.
49. If the claimant's resignation was conditional (the Tribunal finds it was not), the claimant had the opportunity during this conversation to clarify that with Mr

Potter and to state that she intended to continue to work and would formally resign, in due course, when she received an unconditional offer from MMH.

50. The claimant blamed Mr Potter for not realising that any offer from MMH would be conditional and for 'accepting' her resignation.
51. This is slightly disingenuous. Mr Potter would not be aware of the terms of any offer from MMH and could not possibly know that the job offer was conditional. For all Mr Potter knew, the job offer could have been unconditional and the MMH could have had satisfactory references from elsewhere. Although Mr Potter knew he had not provided a reference for the claimant, she also offered her Nurse Mentor as a referee to MMH.
52. Her understanding also contains a common misconception that a resignation has to be 'accepted'. It does not. A resignation is a unilateral act. Once an employee has resigned, if they wish to withdraw their resignation, they can only do so with the employer's agreement. The claimant had by the words used in the first part of the final sentence of her email, resigned and terminated her contract of employment. The Tribunal does not accept the claimant's contention that Mr Potter knew the job offer from MMH was conditional or that he was given the impression the claimant's resignation was conditional.
53. The claimant wrote to accept the role with MMH at 9:03 on the 22/7/2022 (page 92). Notably she accepted this role after she had resigned from the respondent which again indicates to the Tribunal that her primary concern was to terminate her contract with the respondent. She then had a conversation with Mr Potter. The Tribunal finds Mr Potter providing a reference for her was discussed and in view of the working relationship between the claimant and Mr Potter and his view that there were no performance issues; he either said or gave the impression that the reference would be favourable. Furthermore, a termination date was discussed and agreed.
54. The Tribunal finds if it was the claimant's argument that the resignation was conditional upon receiving an unconditional job offer from MMH, then she would not have agreed to a termination date suggested by Mr Potter at this time.
55. Following the conversation with Mr Potter on the 22/7/2022 the claimant was asked via email by MMH for her consent to approach her referees and she replied and consented (page 96). This further emphasised to the Tribunal that the claimant knew MMH had not yet contacted her referee(s) (the job offer letter referred to referees (plural) and it is therefore assumed more than one was contacted and indeed, the claimant offered in her email of response the contact details of her Nurse Mentor as an additional referee).

56. Even if the claimant was still under the impression her resignation was conditional, Mr Potter wrote to her on the 25/7/2022 (page 97):

'Re: Notice of Resignation

Further to your email of the 21st July 2022 and our telephone conversation on the 22nd July 2022, I accept your resignation of employment with The Chestnuts Surgery.

As discussed on the telephone you raised several concerns in your notice letter and I will take these forward, however we agreed that it was best for you to take your notice period off from the surgery with full pay.

I can confirm your last official working day will be Wednesday 18th August 2022 and I will calculate your final pay and annual leave until this date.

I wish you all the best for the future and will be sorry to see you leave; I would like to thank you for your contribution to the surgery and the patients you have looked after during your time here.

Yours sincerely'

57. This letter was also unequivocal. Mr Potter referenced the claimant's email of the 21/7/2022 and the conversation the following day. He 'accepted' the claimant's resignation; even though there was no requirement for him to do so. He confirmed the agreed last date of employment and that the claimant was not required to work her notice period.

58. This was a further opportunity for the claimant to set out her position that she had not resigned from the respondent and that she did not intend to resign until she received an unconditional offer from the MMH. She did not do so as the Tribunal finds she had intended to resign irrespective of the status of the offer from the MMH.

59. The MMH then approached Mr Potter for a reference in respect of the claimant on the 25/7/2022 and he responded on the 26/7/2022. Mr Potter said the online reference form was difficult to complete and that the link kept 'crashing'.

60. There were some acknowledged errors in the reference. The claimant's start date was incorrect (although the error is understandable). Mr Potter was asked (page 110):

'Is Jane currently the subject of any disciplinary actions or the subject of a current investigation?

Yes

If yes — please provide details

N/A'

61. This is incorrect. The claimant was not the subject of any current disciplinary action or an investigation. Furthermore, the comment 'N/A' is ambiguous. This should have prompted further enquiry from the MMH.

62. A further question was asked of Mr Potter (page 111):

'Would you re-employ Jane in a similar role / offer a further period of study?

No

If no — please state why

Jane has indicated she is looking to retire from the surgery before Christmas time.'

63. Unlike the response to the question regarding current disciplinary action/investigation, Mr Potter did provide a further explanation to this question. This again should have indicated to MMH that there was something odd about his previous response.

64. The claimant relied upon Mr Potter's response as an act of direct discrimination.

65. The claimant was waiting to hear from MMH regarding her induction and she contacted the recruitment team on the 5/8/2022. She was told the job offer had been withdrawn.

66. The claimant's husband sent an email to Mr Potter on the 5/8/2022 at 10:56 (page 100). The email had an inappropriate/offensive tone and it informed Mr Potter that the claimant's job offer had been withdrawn (it actually said 'they have now rejected her application'). The email said:

'I don't know what you put in your reference regarding Jane's new position at Medway, or if you refused to give a reference...'

67. The claimant therefore did not know whether or not Mr Potter had provided a reference or if the issue was the content of the reference. Mr Potter however knew he had had provided a reference and its content.

68. The claimant's husband's email prompted Mr Potter to call the claimant. She told him the job offer had been withdrawn and he immediately offered to call the hiring manager at MMH. In a WhatsApp message at 11:28 he informed the claimant he had called MMH and had left a message. Mr Potter continued his exchange with the claimant until the evening of the 5/8/2022. He ended by informing the claimant of one other vacancy he was aware of, another possible vacancy and offered to provide a personal reference.

69. Mr Potter also sent an email to the MMH at 11:57 in which he explained there was an error with regards to the disciplinary action/investigation question/point. He also said (and this was his more contemporaneous account shortly after he had provided the reference):

‘... I would not employ comment as a service we are looking to expand and grow and need a full time HCA rather than a part time, the issue for us is Jane was looking to reduce hours to a single day towards Christmas time, therefore not fitting in with the business model we are looking for.’

70. The Tribunal finds this reflects Mr Potter’s understanding that it was the claimant’s intention to reduce her hours at the end of 2022.

71. The Tribunal finds Mr Potter’s comment in the reference to be ill-judged; although it accepts his explanation for it. It also finds that there was no malice towards the claimant from Mr Potter and his actions, even in the light of the claimant’s husband’s inappropriate email, once he became aware MMH job offer had been withdrawn demonstrate that. He immediately called the claimant and then MMH. He also emailed MMH at 11:57 on the 5/8/2022. He sought to correct any negative impression MMH may have formed about the claimant.

72. The MMH sent the claimant a copy of Mr Potter’s reference on 9/8/2022 (page 106). In the email chain, there is then a redacted email – it is not clear why it was redacted. Later the same morning, the Resourcing Team Leader from the MMH informed the claimant:

‘Sorry, I am unsure of anything else past this but it would have been the answer to investigation that would have withdrawn the application.’

73. MMH’s explanation to the claimant at the time was therefore that the job offer was withdrawn due to the comment about an ‘investigation’ and not because of the comment regarding re-employing the claimant. Although the claimant’s husband’s email referred to contact with the Union and said ‘you have not heard the last of this matter’, there was no evidence to suggest that MMH was aware of any potential legal action proposed by the claimant. The Tribunal therefore accepts MMH’s reason for the withdrawal of the job offer which it gave at the time, which was because of the incorrect response in respect of an ‘investigation’. There is no reason why MMH would not give the true reason for the withdrawal of the offer.

74. The claimant also referred to this reason for the withdrawal of the job offer (witness statement paragraph 24). Furthermore, the claimant was asked if MMH informed her of the reason the job offer was withdrawn was in respect of the comment regarding the ‘investigation’ and the claimant replied that was what she understood, although it did not make sense to her as she was not under investigation.

75. The claimant was also told by MMH that despite the fact she had not been informed (prior to her enquiry) that the job offer had been withdrawn; that the job had been 'given' to someone else the previous week. MMH did not take any steps to clarify any information with either the claimant or Mr Potter prior to taking its decision. It also did not take proactive steps to inform the claimant of its decision once it had been taken.

The Law

76. S.13 EQA provides:

(1) 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.

77. S.23 EQA provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

78. S.136 EQA provides:

(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 that the contravention occurred.

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

...

(6) A reference to the court includes a reference to-

(a) an employment tribunal;...

79. In *Madarassy v Nomura International plc [2007] ICR 867, CA*, Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination'.

80. If a claimant establishes a prima facie case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other*

cases [2005] ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

81. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, the House of Lords adopted Brightman LJ's definition of 'detriment' when he stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.

82. In respect of unfair dismissal s.94(1) ERA provides that an employee has the right not be unfairly dismissed. S.95(1)(a) refers to circumstances in which an employee is dismissed and sets out that for this Part, an employee is dismissed by his employer if:

(a) the contract under which he is employed is terminated by the employer (whether with or without notice).

83. S.95 ERA provides:

Circumstances in which an employee is dismissed.

(1) For the purposes of this Part [Part X Unfair Dismissal] an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Conclusions

84. The Tribunal has found the claimant's resignation of 21/7/2022 was express and unequivocal. There was no ambiguity. As such, there was no dismissal by the respondent and the claim of unfair dismissal fails.
85. The claimant's claim of direct unlawful discrimination is based upon the protected characteristic of age. This was set out in the claim form as (page 22):

[25]...

b) Age discrimination

- i. The Claimant claims that the statement in the reference that the Respondent would not re-employ her because she "has indicated she is looking to retire from the surgery before Christmas time" amounts to an unlawful act of direct age discrimination by virtue of ss.5,13 and 39 of the Equality Act 2010 ("EqA 2010").*
- ii. For the purpose of s.5 EqA 2010, the relevant age group is persons aged 65 and older (or other appropriate age range encompassing employees who are generally considered to be approaching retirement).*
- iii. The Claimant avers that the Respondent is unable to show that the Respondent's treatment of her was a proportionate means of achieving a legitimate aim, within the meaning of s.13(2) EqA 2010.*

86. The claimant did not specifically identify the less favourable treatment in the claim form. She had however in the preceding paragraphs referred to the reference and said that it contained material inaccuracies (paragraph 20, page 20). Paragraph 21 (page 20) went onto say the inaccurate statements:

'Taken separately and/or together, these inaccurate statements caused the Claimant to suffer detriment and damage as regards her prospective employment with the Trust and were injurious of her character, reputation and feelings.'

MMH was defined as 'the Trust' in the claim form.

87. After discussion at the preliminary hearing on 25/5/2023, this was captured in the list of issues as (page 42):

Age Discrimination

41 This claim relates to the reference provided by Mr Potter on or around 26 July 2022. It is the Claimant's case that the job offer she had secured from Medway Hospital was withdrawn because of the content of the reference.

42 The Claimant claims that the statement in the reference that the Respondent would not re-employ her because she 'has indicated she is looking to retire from the surgery before Christmas time' amounts to an unlawful act of direct age discrimination by virtue of ss.5, 13 and 39 of the Equality Act 2010.

88. The less favourable treatment contrary to s.13(1) EQA was therefore the withdrawal of the job offer by MMH. The detriment (s.39(2)(d)EQA), was the fact the claimant could no longer pursue the opportunity she had been offered with MMH.

89. In respect of the claim of unlawful direct age discrimination, the respondent is not the party who is liable for the less favourable treatment, MMH is. As per s.13(1) EQA:

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.

90. MMH is 'person (A)' and it was not a respondent to this claim.

91. As discussed on the first morning, the less favourable treatment is the withdrawal of the job offer by MMH. MMH is therefore 'person (A)', not the respondent. For that reason, the claim fails against the respondent. There is no less favourable treatment of the claimant by the respondent. In fact, the respondent/Mr Potter, attempted to mitigate any less favourable treatment of the claimant by MMH in the immediate aftermath of the conditional job offer being withdrawn. Mr Potter did his best to assist the claimant. Clearly however, he had no control, influence or input in respect of the decisions taken MMH.

92. The respondent is not liable for any (if any), breach of the EQA by MMH.

93. For those reasons, the claimant's claims are not well-founded and are dismissed.

10/5/2024
Employment Judge Wright

JUDGMENT SENT TO THE PARTIES ON
23/05/2024

.....

.....
FOR THE SECRETARY OF EMPLOYMENT
TRIBUNALS