



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr H Wise

**Respondent:** Leicestershire Partnership NHS Trust

**Heard at:** Leicester  
Nottingham – Reserved Judgment

**On:** 5 and 6 August 2019  
Reserved: 9 August 2019

**Before:** Employment Judge Britton  
**Members:** Mrs B Tidd  
Dr G Looker

## Representation

**Claimant:** In person

**Respondent:** Ms S Omeri of Counsel

# RESERVED JUDGMENT

The claim of race discrimination is dismissed.

# RESERVED REASONS

1. The Claim (ET1) was presented to the tribunal on 26 July 2018 having been prepared by the Claimant. In essence, his case is that the Respondent (the Trust) wrongfully withdrew an offer of employment that it had made to him. As to the factual scenario in that respect, we will deal with it under findings of fact. Although he ticked the box signifying this was a claim of race discrimination, he did not say why. Stopping there, the Claimant is a black African, originally from the Democratic Republic of Congo, who obtained asylum in this country and in due course qualified as a podiatrist.
2. During the telephone case management discussion in this matter heard by Employment Judge Moore on 30 November 2018, he articulated his case in terms of the scenario and as why he was the victim a of race discrimination as follows:

*“... He was not able to identify an actual comparator and seeks to rely on a hypothetical comparator. The claimant asserts that anyone else ( not<sup>1</sup>) of his race would not have had the offer withdrawn in the same circumstances. The respondent says that the reason and only reason was the HPC report content. ...”*

So, she accurately defined that this is a case of section 13 Equality Act 2010: direct race discrimination. As to particularisation of the same, she did not order anything further, doubtless taking in account that the Claimant was unrepresented and that the basic scenario in this case was capable of discernment from the pleadings.

3. However, it is significant that even when it came to the Claimant’s witness statement before us, accusations that he in due course made in this case (which are very serious) had not been articulated therein. As to where this takes us in terms of credibility is an issue that we will rehearse in terms of the findings of fact.
4. In terms of making our findings, we took evidence under oath from the Claimant and we have already referred to his statement-in-chief. We then heard from two witnesses for the Trust; the first of these was Catherine Holland who was on the interview panel. She is one of three lead podiatrists in the Respondent’s team; the other two are Pauline Kelly who was her co-interviewer on the panel which interviewed the Claimant and Matthew Wright who was not on the panel. He also gave evidence before us and in each case, their evidence-in-chief was by way of written statements. All three of these lead podiatrists run the various teams across the county; Mr Wright is primarily based on Loughborough but he supervises 14 podiatrists at 8 sites: some of the work is peripatetic. Finally we had regard to a joint bundle of document<sup>2</sup>s prepared by the Respondent.

### Findings of fact

5. Against that background, circa the start of 2018 the Trust advertised for a band 6 part-time podiatrist. This was at 22½ hours on a six month contract. The Claimant applied on 12 February. His application is before us commencing at Bp65. This was a lengthy application, inter alia in it the Claimant disclosed that in terms of fitness to practice he had been suspended from practice for one year on 24 August 2016. He then set out his current conditions of practice at Bp 66. These included that if he did obtain any employment, he would have to notify the professional panel which supervises such as his registration, which is the Health and Care Professional Council (HCPC).
6. A condition viz practice in terms of his then restrictions was that he would have to be provided with a workplace supervisor who would in turn be a registered podiatrist with the HCPC and there must be meetings “*at least every 3 months*”.
7. The Claimant was shortlisted. As is the usual case with such as NHS Trusts, there was inter alia an ethnic monitoring form on which he disclosed that he

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<sup>1</sup> This word was clearly erroneously omitted and thus we have inserted it. Ms Omeri did not disagree with us.

<sup>2</sup> When referred to by us it is Bp followed by the page number.

was a black person. This document does not go before the panel. It follows that before the panel met to interview him on 7 March 2018, they did not know that he was a black person.

8. Immediately prior to that interview, Mrs Holland went on the HCPC site and downloaded it seems the various documents which were originally in this bundle in the wrong place chronologically between Bp174 and 177. The tribunal has renumbered those so that they now appear between Bp 88a and 88e. Revealed in terms of those documents is first of all his current condition of practice. Then set out underneath under the heading "*Allegation*" were the charges that the Claimant had been found guilty of by the HCPC: Put at its simplest, sexual misconduct whilst working as a professional podiatrist. On the second page was set out the current restrictions on his practice as to which we have referred.
9. On the third page was set out the procedural history. This showed that on 24 August 2016 there had been a hearing before the Conduct and Competence Committee of the HCPC and the outcome was that he was suspended. This was for a period of 12 months, something which again he disclosed to Mrs Holland and Ms Kelly at the interview on 7 March. Above that was reference to a review hearing which was heard on 18 August 2017 and above that reference to a second review hearing heard on 16 January 2018. It is that one which imposed the restrictions on practice in place as at 7 March 2018.
10. Suffice it to say that it is clear that in the context of the interview, Ms Kelly and Mrs Holland asked the Claimant about all of this, as to which see inter alia viz Mrs Holland the record of the interview at Bp83. Recorded was "*HCPC – allegations of inappropriate behaviour approx 12 months late: 12 months supervision as employer had no choice ...*". Then there is an entry on the left. This is because after the interview, Mrs Holland rang the Claimant to ask him to confirm that he was not under any restriction that would prevent him from treating female patients. He so confirmed.
11. The all-important point is that despite the previous suspension and then the subsequent restrictions on practice, Mrs Holland and Ms Kelly decided that they would offer the Claimant the post, albeit this was a conditional offer because under the Trust policy, it would be subject to pre-employment checks. In that respect, the policy is before us at Bp 34 – 61 and the significance of the pre-employment checks is in particular at Bp 54 under paragraph 13 and subparagraphs thereto.
12. Stopping there, at the interview stage, the panel must ensure that they check inter alia the candidate's professional registration. We do not agree with the Claimant that this means a thorough examination and dealing with any issues that arise at that stage, and because the pre-employment checks at paragraph 13.7 most definitely leave the employer with the right to further look into these matters in that process.
13. The Claimant ultimately conceded before us that that is the case.
14. However, Mrs Holland and Ms Kelly knowing as they did of at least some of

the history in relation to the HCPC, were letting the Claimant know that their view was that he should be appointed albeit subject to the pre-employment checks. The question then becomes is why did they not at that stage look further into the matter. It becomes the issue apropos why the offer of employment was to be withdrawn following further deliberations involving Mr Wright as well as the Manager of the team, Mr Pabani, circa 19 April 2018.

15. The reason is, as Mrs Holland put it, her naivety. She had never had to deal with a case like this one before and the view we got on her evidence, and indeed looking at cross-referencing to the comments that Ms Kelly was to make to Daniel Norbury<sup>3</sup> in due course (which can be found at Bp 215 – 216), could be summarised that they were aware that post the suspension, the Claimant had not been able to practice for about two years. They clearly were impressed by him. They accepted what he said about this being an allegation and seemed to have thought from what he was saying that it was not corroborated. They seemed to have taken on board that what the Claimant was really saying was that although he had been found guilty by the HCPC, it was unfair because there was no corroboration.
16. To turn it around another way, they did not come out of the interview meeting considering that this raised issues about safeguarding. Indeed, Mrs Holland told us that at that time, she thought that as he would be a new employee, they would be able to ensure there was no problem through usual supervision. But what neither of them did was to go onto the HCPC site and research the decision of the HCPC and its reasons including findings of fact or indeed its reasons for imposing the practice restrictions at the two review hearings.. This information is published on the internet by the HCPC. As to why they did not we put it down to inexperience.
17. Mrs Holland accepted that had they done so, in the light of what that showed, then the Claimant would never have got past the interview stage.
18. Their shortcoming cannot however be race discrimination and because Ms Kelly and Mrs Holland obviously knew the Claimant was a black person from when they interviewed him, yet they gave him the job, subject to the pre-employment checks. The Claimant accepts this.
19. So, he then received a letter on 15<sup>th</sup> March from the Trust which was a conditional offer of employment (Bp 123 – 125). In the meantime, Mrs Holland had on 12 March informed her line manager (Mr Pabani) that in terms of requesting authority to appoint, the Claimant was subject to the restrictions on practice including supervision. This information had in turn been passed through to the senior team within HR at headquarters that deals with thereafter the process of recruitment, inter alia including the pre-employment checks. This is headed up by Caroline Smyth who in turn reports to Mr Norbury. We add in that there is a line HR person for the actual podiatry team who is Jasveer (Jas) Lally.

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<sup>3</sup> Interim Deputy head of Environmental Services. He investigated the reason for the withdrawal of the offer of employment following the Claimant's written complain to him dated 8 May 2018 (Bp 205-8).

20. The significance of the HCPC restrictions was at that stage not spotted.
21. But the letter that the Claimant received on 15 March in terms of the conditional offer (Bp 88f –88h moved from Bp123 – 125) made absolutely clear that this was not a final offer and was indeed conditional and subject to the pre-employment checks to which we have referred. With this letter the Claimant was sent a booklet that he had to complete. He completed that and again disclosed the involvement of the HCPC at Bp 148 – 149. When he went to see Katrina Wingfield (a HR person in the recruitment team under Caroline Smyth) on 22 March 2018, he brought with him the full adjudication reports of the HCPC, which run before us between Bp 178 – 191.
22. As to what she then did with this, it is clear that she was also making the usual type of reference checks including the equivalent of CRB. A few days thereafter she got a reference from the Claimant's last employer, Harrogate and District NHS Foundation Trust (Bp 103 – 103). This explained how the Claimant had worked as a Specialist Podiatrist, having previously been a locum, for that Trust between 20 April 2015 and 26 September 2016. Flagged up was that by August 2016, there was an investigation underway by the HCPC and that the Claimant did not wait for the outcome but resigned from that Trust. The alleged misconduct had not occurred whilst the Respondent was employed at that Trust. Otherwise, the reference was satisfactory.
23. During this period of reference gathering there may have been a period when Katrina was on leave. Suffice it to say, (as to which then see the email trail between Bp 202 and 200), that as at 13 April Caroline Smyth obviously had via Katrina the pre-employment checks and in particular this full report viz the HCPC's involvement with the Claimant. She was passing it back via Jas to Mr Pabani for him to have a look at. It can be seen that Mr Pabani immediately reacted on 19 April having had the documentation referred through to him via Jas and was then in turn showing clear concerns, as to which his email speaks for itself, and he was wanting the views of Wright, Kelly and Holland. These are at Bp 200 – 201; and further observations (Bp215-6) as to the import of all of this in terms of what Miss Kelly, Mrs Holland and Mr Wright were to record for Mr Norbury when in due course he asked for their observations post the Claimant's complaint.
24. At this stage we stop because although the Claimant had of course told Ms Kelly and Mrs Holland that this was an uncorroborated "allegation" and that he was a victim of injustice, this was not what emerged from the HCPC documentation now of course with the Trust. We remind ourselves that as with other professional disciplinary bodies, the HCPC disciplinary panel is quasi-judicial with an appointed panel guided by a senior legal adviser. In this case, this was the Rt Hon Douglas Hogg QC. The panel heard evidence. The complainant was corroborated. The Claimant denied the allegations.
25. That panel found that he was guilty in particular of sexual misconduct. It concluded the misconduct was serious: hence the sanction of 12 month's suspension from practice.
26. At the first review hearing held just before the suspension ended, that panel

was not satisfied that he had taken ownership for what had happened and still displayed a lack of sufficient insight; and so although it was prepared to allow him to resume practice, it put restrictions on it which at that stage included that he would have to have a minimum of a monthly supervision via any employer who gave him employment and there would be the need to notify the HCPC as already set out.

27. Finally, when the second review panel met approximately a year thereafter, as is apparent from its adjudication it was again not satisfied that the Claimant was showing ownership and it considered that there were still safeguarding issues. It was however prepared to reduce the amount of supervision to at least every three months.
28. The summary is then this. When Mr Wright saw all of that, and he had not done so before, he was concerned that this raised safeguarding issues and in the context that he was not prepared to take the risk of employing the Claimant because he was not satisfied that three monthly supervision would be sufficient. As far as he was concerned, he was not going to have the Claimant practicing, particularly as it would involve female patients, without in fact the most intense of supervision and which he could not provide given his other responsibilities. It had been intended that the appointee to the post would work out of Loughborough and thus under the management of Mr Wright.
29. Having read all this HCPC documentation, Mrs Holland shared his view. Ms Kelly was more equivocal, but suffice it to say that Mr Pabani, who had of course to take the final decision, agreed with the majority view.
30. Stopping there, we factor in that on 3 April 2018 Mr Wright, knowing only that Mrs Holland and Ms Kelly were about appointing the Claimant, albeit there had been the suspension in the past but not knowing the details for the reasons we have now gone to, had decided to offer the Claimant, again subject to the continuing recruitment checks which were yet to be completed by Katrina and Ms Smyth, a permanent post at 37 hours a week. Of course, this would be far more advantageous to the Claimant. How can that be race discrimination?
31. The Claimant was faced with the obvious difficulty in this respect. Albeit Mr Wright may not have known the Claimant was a black person, but of course the name Harmony Wise might have given a pointer, either way he was not about not appointing the Claimant despite at that stage the suspension issue. What the Claimant then did was to change his approach before us. He now argued, having never put this before, that Mr Wright deliberately engineered the offer of this post on 3 April to the Claimant because knowing that he was a black man, he was then about deliberately setting him up in order to cold bloodedly in due course cancel the offer and because the claimant is black.
32. Of course, first of all if Mr Wright did not know the Claimant was black, and his evidence was that he did not, the accusation would fall at the first post. Second, where is the evidence to support what is a very serious accusation? There is none. Mr Wright was absolutely clear that he did no such thing. Why would he when he was about wanting to appoint someone to this post and his thoughts at that stage were that if someone was already well down the recruitment

process, then why waste time going outside for a further candidate.

33. It follows that the tribunal dismisses this accusation. There is no evidence whatsoever to support it. Mr Wright was a compelling witness who was not undermined by the questioning of him. His team includes BME personnel. The tribunal was driven to conclude that the Claimant was by now clutching at straws as his case fell apart before us.
34. So, as at 19 April the full purport of the HCPC panel was considered. The Claimant says before us that the Trust should not have considered the rationale, that is to say the reasoning, behind the HCPC's decisions. That is something confined to the HCPC. We do not agree. Safeguarding is absolutely fundamental to such as hospital trusts. The Respondent would be courting disaster if it was to ignore the findings of a professional conduct panel. It follows that we conclude that the Trust was entitled to take on board the findings on the three occasions by the HCPC.
35. Against that background, on 25 April Mr Wright telephoned the Claimant and informed him that the offer was now withdrawn and because of the HCPC findings. The letter that was then issued via Katrina was unfortunately generic giving no reasons for the withdrawal. The Claimant understandably wanted to know the reasons and he therefore made the complaint to Mr Norbury, to which we have referred, on 8 May 2018. At this stage, he was not raising in any shape or form race discrimination and he did not use the word discrimination. He did refer to prejudice but this was in the context of the factual scenario.
36. Stopping there, we can understand how the Claimant must have felt, after all he had a good interview on 7 March. He had made what he thought was sufficient disclosure about the HCPC. In fact, it was not; but we do not blame him for that. He had then been congratulated by Mrs Holland on his conditional appointment when she phoned him on 12 March and therefore was entitled to believe, albeit of course there is the policy and the pre-employment check regime, that the job was in the bag so to speak. He would obviously have felt this even more when Mr Wright telephoned him on 3 April.
37. We will also accept that as at 8 May he was not about alleging race discrimination, he was more wanting a full explanation and hoping that the Trust would reconsider and confirm he was to be appointed into the post.
38. Of course as we know, Mr Norbury made the investigations to which we have referred and then wrote back to the Claimant confirming that the reason for the non-appointment was in fact the HCPC (Bp 218). The Claimant then wrote on 31 May the document headed "Consolidated appeal..." and sent it to Mr Norbury. In it the Claimant used the word "discrimination" but did not elaborate. But there is no such appeals process under the Respondent's policies and procedures in this type of scenario where a conditional job offer is withdrawn. This was confirmed to him by Mr Norbury on 12 June 2018(Bp 232).
39. The final point to make on this scenario is that toward the end of this case, the Claimant made a further serious accusation against Mr Wright, linking it as he did to the HCPC. What he about suggesting is that the latter is institutionally

racist with a stereotyped prejudice against black men. As regards Mr Wright, the Claimant went further (and this was during his closing submissions) in saying that Mr Wright shared the same stereotype prejudice, that is to say because the Claimant is a black man, he would never be believed in comparison with, for instance, a white female complainant. This goes back to the HCPC findings.

40. He had not put this to Mr Wright and so in fairness to the latter, we re-called him. Suffice it to say that Mr Wright was absolutely clear that there was no such prejudice; and there is no evidence whatsoever before this tribunal to support it. If the Claimant had an issue with institutional racism, so to speak, with the HCPC, he never once appealed its findings.
41. What it means is that as this case progressed, perhaps in desperation as it became so clear that his case was failing, the Claimant unfortunately brought up these serious allegations against Mr Wright without a shred of evidence to support them.
42. We then add that he had made plain as the case progressed that not only did he not consider that there was racially discriminatory behaviour by Ms Kelly and Mrs Holland, as we have already stated, but he also excluded from any conspiracy Smyth, Jas or Norbury; and now focussed his case almost entirely on Mr Wright for reasons which are really not clear other than perhaps it was because Mr Wright was the person in the witness box who he could attack in this respect given any contention against Mrs Holland was untenable; but of course he had the hurdle of trying to get over Mr Wright's offer of 3 April 2018.
43. So those are our findings of fact.

### The law

44. As to the legal framework in a case of this nature, we are most grateful to the closing written submissions of Ms Omeri, which accurately set out the law engaged. Thus, under section 13 of the EqA:

#### **"13 Direct discrimination**

- (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."*

45. In terms of dealing with comparators, and this includes hypothetical comparators, section 23 of the EqA:

#### **"23 Comparison by reference to circumstances**

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

46. So, the hypothetical comparator in this case, as set out by EJ Moore, means



that the Claimant’s contention is that absent that he is a black African man and he would not have had the offer withdrawn. To turn it around another way, somebody in the same circumstances who was not a black African man would have been appointed.

**Conclusion**

- 47. The evidence before us was clear, particularly given the content of the HCPC findings and the tribunal and particularly its panel members’ extensive knowledge of the world of work and particularly institutions such as NHS Trusts. We are with Ms Omeri, and it echoes of course the evidence of Mr Wright, that in this situation with these clear safeguarding risks still flagged up by the HCPC, that any applicant at the same stage in the process as the Claimant, in other words to be appointed subject to pre-employment checks, would have had the post withdrawn once the full contents of the HCPC findings came to light.
- 48. It follows that the claim fails.

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Employment Judge Britton

Date: 29 August 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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