



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Donna Bailey

**Respondent:** Age UK West Sussex

**Heard at:** Southampton

**On:** 28, 29 January 2019

**Before:** Employment Judge Hargrove

**Representation**

**Claimant:** In Person

**Respondent:** Miss K Anderson, of Counsel

## JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant was not dismissed by the respondent when the respondent withdrew the conditional offer of employment on 2 August 2017 nor was she dismissed for her political beliefs or affiliations.

## REASONS

1. By an ET1 dated 2 November 2017 the claimant commenced proceedings against her former prospective employer, the respondent. Before identifying the issues raised by the claim, the tribunal sets out the salient background facts based on the evidence given by the claimant and, for the respondent, the witnesses Linda Ryan (LR), Head of Community Services and Dianne Henderson (DH), Chief Executive since 2006. Each relied upon signed witness statements and referred to a joint bundle of documents.
2. The respondent provides a range of services to people in later life in West Sussex. As a charity it relies upon income derived from services commissioned by West Sussex County Council (WSSCC) in addition to other charitable donations.

- (1) On 12 June 2017 the claimant applied for the recently advertised post of Head of Community Activities and Well-being. The job description and person specification for the post are at pages 38 – 41. In particular, at page 38 in the job description the respondent said: “This is a senior role within a major local organisation with a £2m turnover, responsibility for projects with £1m turnover. The post holder will lead, direct and manage a range of services providing health and wellbeing services in the community within this department. There is a major tender due. There are currently eight projects within this department, and there is scope for redesign and growth.”

There are guidance notes for applicants at pages 41 – 44.

- (2) The vacancy was advertised but the claimant was contacted and alerted to apply directly by LR out of the blue at the end of May 2017. LR knew the claimant as they had worked together on a project in 2016/2017 with the claimant’s then current employer, Possibility PP. They had also met at commissioning groups and training sessions when the claimant was employed at her previous employer Impact Initiative (II) where she had worked from 2009. In 2010 the claimant had been interviewed by DH for a managerial post at Age UK and had not been appointed. It seems the charity sector in West Sussex is relatively small and employees of the various organisations frequently meet. DH and LR had discussed the claimant as a potential suitable applicant for the advertised post.

- (3) The claimant’s application form was well drafted following the criteria identified in the guidance and in the job description and person specifications. It identified in a series of bullet points her experience of operational management in the health and social care sector first with II from 2009 – 2016 and then for PP from April 2016 – to then date at an annual salary of £37,000 per annum. It identified at that stage two referees:

Her current Line Manager Geraldine Desmoulins, the Chief Executive of PP;

A former colleague at II, Emma Sears who had worked with her at a café for service users with II.

- (4) The claimant was shortlisted and was invited for interview with DH and John Dixon Chair of the Trustees on 19 June 2017 for about an hour. The claimant then had a less formal interview with LR and Ray Kaveney, Head of Finance. Later that afternoon DH emailed the claimant offering her the post “subject to satisfactory references – let me know when I can request these”. The salary was identified at £38,500 per annum and a start date agreed. The claimant replied raising some queries. Initially, she refused the post on financial grounds but accepted on the 21 June when offered on increase to £40,000 per annum plus a review in six months. What particularly made it an attractive prospect was that DH and LR were due to retire in a few years and there was the prospect of promotion to CEO.

- (5) The initial start date was due to be 1 or 2 August but it was put back to 7 August at the claimant's request because her then boss, Ms Desmoulins, needed time to appoint a successor.
- (6) It is agreed that not only in the offer letter but also in the contract of employment signed by the claimant on 26 June (at page 71), and in the guidance notes, the offer was subject to the receipt of satisfactory references. The respondent reserved the right to withdraw the offer if a reference was unsatisfactory or if an unsatisfactory reference was received after the start of employment, it could be ended on notice. The notice clause in the contract identified the period of notice during the six months probationary period as being two weeks pay.
- (7) The claimant had past political associations with the BNP but some nine years before, ie in about 2008. The claimant had ceased to be a member and I accept no longer shared its views. The claimant did however, notify LR about her past about a week after the initial approach in May 2017. LR did not consider it of any great significance and did not mention it to DH. The claimant also rang DH and told her sometime before she signed the contract on 26 June. DH's view at that time, I accept, was that in view of the time which had past it did not make any difference. It is likely that the claimant's actions in disclosing her past was influenced by the fact that it could have come to light from internet searches.
- (8) The appointment was notified to service managers of the respondent in an email on 21 June and was placed on the respondent's website for public consumption on or about 8 July 2017.

### References

- (9) In the meantime, the claimant had notified the respondent of a change from Emma Sears to Caroline Ridley, the CEO of II, as her second referee. Relevant to that decision is the fact that the claimant negotiated an agreed termination with II on terms which included an NDA, and the provision of a reference whose terms had been agreed between the claimant and II. The terms of that reference which was provided to the respondent by Caroline Ridley on 10 July 2017 are at pages 109 – 110. It contained a factual statement identifying the job titles which she had held with II from 2009 – March 2016 (see especially at page 110):

“It is our policy to only provide references containing information as to employees' roles and dates of employment. This should not be seen as implying any comment about the candidate or their suitability for employment as Head of Community Activities and wellbeing at Age UK West Sussex”.

- (10) There is also within the bundle a draft of the agreed reference format with blanks which the claimant has produced as having been agreed as part of the settlement agreement. I conclude that the claimant was initially intending to use Emma Sears as a referee because she thought that Emma Sears would provide more information as to her character, but the claimant then changed her mind. The result was that CR

provided only a limited reference with no information as to how the claimant had performed in her roles with II.

(11) That reference was provided to the respondent on 10 July 2017. DH claims that she attempted to contact CR to speak to her but she was then away on holiday.

(12) The next event was on 11 July 2017 when DH emailed Kim Fleming (KF) (Senior Contracts Commissioning Manager at WSCC) notifying that the respondent had made the appointment of the claimant Donna Bailey who KF would know from II and PP.

(13) On 21 July 2017, KF emailed DH (see page 112):

“Sally raised concerns about Donna’s suitability for the Senior role regarding her political beliefs which I understand raised a significant issue during her time with II. You are dealing with society’s most vulnerable people, we would like reassurance that it will not impact on the work you carry out and your good reputation as an inclusive organisation is not put at risk by this appointment”.

(14) The Sally referred to is Sally Tabbner, hereinafter called ST, who was KF’s Line Manager at WSCC. DH has given evidence to the tribunal at some length about her attitude to this communication from KF.

(15) Meanwhile, in a second witness statement from the claimant dated 29 January 2019, the second day of this hearing, the claimant states that on examination of a note of a meeting of the WSCC health and wellbeing board of 13 July 2017 on the WSCC website, DH attended as a member of the board and that ST also attended. DH admits that she did attend but has no recollection of whether ST also attended but accepts that she may have done. DH adamantly denies having any conversation with ST about the claimant either then or later in this chronology.

(16) It is accepted that on 24 July 2017 the claimant had a prearranged meeting with DH at the Littlehampton office which was to deal with the DBS checks for the claimant. The topic of KF’s email of 21 July was raised by DH and it is agreed that DH expressed a dim view of it (she may even have used the expression “Snotty email”. She said she would give a robust response. In fact, she had given a response at 8.19 on that day (see page 111). This states:

“I am dealing with Donna; if you have explicit information WSCC wish to share I would welcome this”.

(17) KF responded on the same day at 12.52 stating

“I do not have any information to share re: Donna, I was merely asking for reassurance”.

(18) This exchange was disclosed to the claimant in response to an SAR made by the claimant in early August 2017. DH claims that she took up

the issue with the email with KF much later, long after these events had been concluded. What is of some significance is that DH admits that she did not tell the claimant at the meeting on 24 July that the factual reference which she had received from CR dated 10 July was unsatisfactory.

- (19) On 25 July 2017, there was an internal exchange of emails between DH and John Dixon (see page 114). John Dixon is the Chairman of the Trustees. PH stated:

“I feel I need to update you! From googling and a phone call from Donna there is a lot of material from her political past on the web. Nothing since November 2008 but it is still out there. She was an active member of the BNP. She is no longer involved in any formal politics and regrets past activity. She told me she raised the issue recently. Mad as she may have been I don't think we can hold nine year old stupidity against her. I have a very positive reference from her current employer and a formal HR one from Impact Initiatives. I plan to plough ahead. Let me know if you think differently”.

- (20) John Dixon replied on the same day:

“I think you are right. Clearly it is a significant issue and she needs to be aware of the consequences of any unsuitable political action....but hopefully both she and we can then get on and work together... John”

- (21) At 15.59 on Monday 31 July 2017, DH emailed the claimant (page 118):

“I spoke to Impact Initiatives today and I cannot get a reference that is no more than dates you worked for. As your dates are after the BNP time, I am very concerned there is another reason for this lack of information. This position is a very high profile post as a member of our senior management team. I need more information from you as I currently do not have two satisfactory references. I am out of the office now but back in Tuesday I will be free approximately 9.45 – 11.00 please ring me”.

- (22) The content of this email corroborates the fact that DH had finally spoken to CR directly on that day and I have no reason to doubt that CR declined to answer a series of questions about the claimant's performance at II. I accept that DH surmised, correctly as it turned out, that there was likely to have been an outstanding settlement agreement which the claimant had reached with II.

- (23) The respondent has also disclosed an exchange of emails that DH had with the respondent's employment legal advisors, Ellis Whittam, on 1 August beginning at 8.25am: (see page 127)

“A new Issue. I have made the appointment of a new Senior Manager (to replace Kim). She is due to start on 7 August. I have received one very satisfactory reference but the second (for a job more like the one for us) is dates only. I rang the CEO of that charity. She could not answer any of my questions saying I cannot answer that to all of them.

I take it there is therefore a compromise agreement in place. There is a nine year history which is not great but she has been up front about that and I and my Chair agreed to go ahead. This job, for which no proper reference post dates that. I have emailed her asking her to ring me to explain but I am getting very nervous we may have made the wrong appointment. Our contract and offer letter states subject to references, if I don't get a good explanation can I withdraw the offer?"

(24) Ellis Whittam responded on the same day at 9.00am:

"You can withdraw an offer for any non discriminatory reason before employment starts, so yes you could withdraw it. Many firms these days have a policy of only giving dates references. It is increasingly common. Where they have that policy they often refuse to give any more detail, even for new employees. While you are right to be suspicious this may be the explanation".

(25) Shortly after receipt of that email, there was an SMT meeting attended by DH, LR and Tamsen Harward, who had recently been appointed to a new post as Marketing Manager (with little if any prior experience of dealing with vulnerable old people). The note headed "minutes" reads:

" Donna Bailey Head of Community Activities concerns over lack of detailed second reference for this senior post were discussed. The second referee offered by Donna provided a written reference of a list of dates employed but nothing else. These dates confirm her employment with II was later than the issue raised by Donna herself. DH rang CEO at II, Dianne asked a number of questions about performance but the answer to all was could not say anything to all of them. After discussion it was agreed that the judgment to offer a referee for a post at this level who could not offer any information other than dates was very serious and reluctantly SMT supported the view to withdraw the offer of employment".

This was sent to the claimant later, in response to an SAR.

(26) On the same day DH wrote to the claimant withdrawing the offer of the post. It is said to have been sent by email and post but there is no transmission record which has been produced by the respondent, apparently because records have since been deleted. The claimant did not receive any email but did receive a hard copy by post at home on her return from work on 2 August. Before that at 17.24 she responded by email to DH's email of 31 July (see page 118).

"I am sorry that I didn't reply to your email sooner. I only check my emails every couple of days. Thanks for your voicemail I have been in a meeting this afternoon and have just finished. I did try and call you at Haywards Heath but couldn't get through. Anyhow I will call you first thing tomorrow morning to discuss this with you, resolve and hopefully reassure you. I am also around on Friday afternoon. I am sorry that you are having to chase this up. I am hoping we can get it sorted quickly".

(27) The hard copy letter of 1 August reads:

“Our offer of the role of Head of Community Activities and Wellbeing was made subject to receiving two satisfactory references. As my email of 31 July pointed out we did not receive a satisfactory reference from II and I am very sorry to say I must withdraw our offer of the post. I wish you well for the future”.

(28) The claimant responded by email to that letter having read it on the evening of 2 August at 11.24pm (see page 119) she stated amongst other things:

“I have not been given the opportunity to explain my situation regarding the dates only reference provided by CR of II. I left Impact Initiatives after almost seven years as a result of a mutual settlement agreement. I have attached the relevant part of the agreement which relates to references – as you can see Caroline was only obliged to provide a dates only reference. However, I am able to provide an additional reference in view of II”.

She then went on to say that she wanted the opportunity to discuss the situation with DH as she was very much looking forward to starting her new role.

(29) During the course of the hearing, concerned as I was at the unknown reasons for the severance between the claimant and II following a compromise agreement, I determined that I should make enquiries as to what the source of the problem was, if there was a problem, and in particular whether or not it concerned in any way the claimant’s political history. In those circumstances I required the claimant to disclose more of the reasons for the severance. The claimant has thereby in responding to my questions NOT breached the confidentiality agreement, which the tribunal was entitled to look behind. Suffice it to say that I am satisfied that there was some form of misunderstanding between the claimant and CR but that it had nothing whatsoever to do with the claimant’s past political history many years ago.

(30) Following the SMT meeting and the sending of the hard copy letter to the claimant DH had emailed John Dixon at 11.46am on 1 August (see page 116).

“Update on Donna. I could not get a proper second reference for Donna. I spoke directly to the CEO at II but she would not give me more than dates of employment. There was obviously an issue she would not/could not discuss. This was a referee given by Donna who had not mentioned any issues at Impact Initiatives. Her employment at Impact Initiatives post dates the BNP time. I have taken the decision to withdraw the offer of the job (consulted Ellis Whitton) I will dig out other applications and see if we can interview some of them. When do you go on leave”.

(31) The response is of some significance from John Dixon at 23.22 on 1 August:

“What a pain! but you are absolutely right as this is the second concerning indication. I think we did have another front liner if she is still available??. I am not going on leave until the beginning of September”.

- (32) The claimant telephoned DH on the morning of 3 August. I accept that the claimant offered another reference but DH had already made her decision. It had been endorsed by the SMT the day before and she refused to reopen it.

### The Issues

3. The claimant has to satisfy the tribunal on the balance of probabilities that there was a concluded and unconditional offer of employment which she accepted.
4. Alternatively, if it was conditional, she has to satisfy the tribunal on the balance of probabilities that the condition was satisfied by the reference or references she provided or caused to be provided. I accept that the obiter dicta in *Wishart v The National Association of CABs* 1990 IRLR page 393 is that a condition satisfactory references is to be measured by a subjective test of what was satisfactory to the employer, not an objective test of what a reasonable person in the position of the employer would consider, in other words not an objective test.
5. What is clear to me however, is that if I conclude that the respondent in the form of DH was acting in bad faith and that the reason put forward for cancelling the offer of employment was not because of the unsatisfactory reference then the condition would not be satisfied and the claimant would be entitled to succeed in her claim for wrongful dismissal. Under Article 3C of the Employment Tribunals Extension of Jurisdiction Order 1994 the claimant would be entitled to succeed at least in a claim for two weeks notice pay under her contract of employment (see *Sarker v South Tees Acute Hospitals NHS Trust* 1997 IRLR page 328).
6. Again, if the claimant establishes that there did come into existence a valid and unconditional contract of employment which was then terminated by the respondent by DH, the claimant also may have a valid unfair dismissal claim notwithstanding that she did not have the necessary length of service under section 108(1) to claim unfair dismissal. For this to succeed the claimant would have to satisfy the Employment Tribunal that the reason or principal reason for the claimant's dismissal was because of the claimant's political opinions or affiliation (see section 108(4) of the Employment Rights Act). This provision was brought into effect in response to a decision of the European Court of Human Rights. Judgment in *Redfearn v UK* 2014 IRLR. I accept that this phrase is also apt to include past political opinions and affiliations. Thus the test which I have to apply is whether the claimant has satisfied me that the reason for the revocation of the offer of employment was not because of an unsatisfactory reference but that the reason, or at least the principal reason, was because of the claimant's political affiliations in the past. I accept that at once that the claimant honestly believes that the reason was her past political beliefs and I accept that DH's actions are in some respects open to



question such that the claimant's belief is not unreasonable. However the outcome depends in the end upon what I make of the credibility of DH, who has accepted that her actions are in some respects open to criticism.

7. I have reached the conclusion that DH's evidence is broadly credible. First, she was aware, having been notified by the claimant in advance of the offer of employment and the signature on the contract of employment by the respondent and the claimant, that the claimant had a past history with the BNP but chose to ignore it. Looking carefully at the succession of emails sent by DH, her position in that respect did not change up to and including the sending of the withdrawal letter. There is more than a suspicion that John Dixon's email of 1 August 2017 endorsing DH's earlier decision also took into account as a second concern the claimant's past political history, but by then the decision had been made by DH and endorsed by the SMT. John Dixon was not present at the SMT meeting and did not participate in that decision.
8. The absence of any reference to the claimant's political history in the notes of the meeting of the SMT is an indication that it was not mentioned and not considered. I accept that, in the light of the fact that the claimant had produced one glowing reference; and another which did at least corroborate the claimant's work history with II in a range of posts which formed the basis of the claimant's apparent suitability for the appointment, there is an argument for saying that the reference position was arguably reasonable and not unsatisfactory. But that is not the test; which is of satisfaction in the view of the employer, in this case DH and the SMT.
9. I have also taken into account that another employer has subsequently accepted these references for the claimant's current job. I have also taken into account the following criticisms of DH's actions:

First the failure to follow up more actively the supposed inadequacy of CR's factual reference after the 10 July, until 31 July;

Secondly, her failure to notify the claimant that there was anything wrong at the DBS meeting on 24 July;

Thirdly, the fact that the respondent's position changed or apparently changed, with regard to the continuation of the offer of employment soon after receipt of KF's email. This is open to the interpretation that the respondent was concerned as to the possible impact on WSCC's future commissioning of contracts with the respondent, if the claimant's former political affiliations became public knowledge,

Fourthly, the abrupt decision making process which DH appears to have adopted in deciding to revoke the offer without giving the claimant an opportunity to respond to the notification that the II's factual reference was considered to be unsatisfactory.
10. All of these matters led to the claimant's belief that the reference reason was not the true one. In the end, but not without some hesitation, I have accepted that DH's explanation is the truth of the matter. She was genuinely concerned that, for such a senior post, a past employer was not in a position to provide a reference which corroborated in any way the claimant's suitability for the

responsibilities of the tasks which she was to undertake with the respondent. There is also the fact that the claimant thought that that reference was suitable. I do not consider that that in itself was a particularly serious matter but it was something that DH was also entitled to consider in addition to the unsatisfactory nature of the reference provided by the longest termed former employer of the claimant. I am not satisfied that the reason or principal reason for the decision by DH and the SMT to revoke the appointment was because of the claimant's past political affiliations. I am satisfied that the reason was that a reference for a senior post did not provide any useful information about the claimant's performance in the post.

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Employment Judge Hargrove

Date: 21 February 2019