



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A A Agbonkhina  
**Respondent:** Solent NHS Trust  
**Heard at:** In Chambers **On:** Thursday 5 and Friday 6 August 2021  
**Before:** Employment Judge Matthews  
**Members:** Mr N Cross  
Ms C Earwaker  
**Representation:**  
**Claimant:** In Person  
**Respondent:** Miss R Kennedy of Counsel

## UNANIMOUS RESERVED JUDGMENT

1. Mrs Agbonkhina's claim that she was discriminated against by the Respondent by being treated less favourably than others because of her race, by reference to section 13 of the Equality Act 2010, is dismissed.
2. The Respondent's application for costs is dismissed.
3. The deposit of £100 paid by Mrs Agbonkhina as a condition of being permitted to continue her claim of discrimination is to be returned to Mrs Agbonkhina.

## REASONS

### INTRODUCTION

1. Mrs Aminat Adebawale Agbonkhina claims that she was discriminated against by the Respondent Trust in that she was treated less favourably than a comparator because of her race. This claim is brought as one of direct discrimination by reference to section 13 of the Equality Act 2010 (the "EA"). The issue was identified by Employment Judge O'Rourke at a Preliminary Hearing on 11 April 2019. In short, Mrs Agbonkhina says that the Trust, in rescinding a conditional offer of employment to her, treated her less favourably than it treated or would have treated others because of her race. The Trust says there was no discrimination. In addition to this claim, Mrs Agbonkhina originally brought a claim of disability discrimination. That was dismissed by Employment Judge Fowell in a Judgment sent to the parties on 28 September 2018.

2. We heard from Mrs Agbonkhina, who produced a written statement. Mrs Agbonkhina also produced statements from Ms Joy Essien and Ms Rebecca Arnold (friends of Mrs Agbonkhina). These statements included a note that they had been signed but they did not bear a signature as such. In any event, we explained to Mrs Agbonkhina that we would read them but would give them little evidential weight as neither person appeared. On the Trust's side we heard evidence from Ms Sarah Garratt (Clinical Lead for the Trust's Urgent Response Team). Ms Garratt produced a written statement. There was an electronic bundle of documentation, an updated Schedule of Loss and a Statement of Costs supporting the Trust's application for costs, should the case be decided in the Trust's favour. All references in this Judgment are to pages in the electronic bundle unless otherwise specified. (Note: the numbering of pages in the hard copy of the bundle does not exactly correspond to the page numbers in the electronic bundle.)
3. The hearing was a remote hearing using the VHS Platform consented to by the parties. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
4. The case had been set down for two days. In the event, it was possible to hear the evidence and argument in one day with Judgment reserved to allow us to better consider the evidence and our conclusions. This was done at a decision meeting on the morning of day two.
5. The events with which we are concerned are now over four years old. At this distance, memory may be unreliable. Wherever possible we have relied on the contemporaneous documentation, although some of that leaves a few unanswered questions. However, we are satisfied that we have the evidence necessary to make the decision we are required to make.

## **FACTS**

6. The Trust is a Southampton based NHS Trust, serving Portsmouth and Southampton.
7. Mrs Agbonkhina describes herself as of Black African origin.
8. In or around the Spring of 2017 Mrs Agbonkhina applied for the role of Community Healthcare Support Worker with the Trust. Mrs Agbonkhina's application form is at 79-92. The application form named two "Referees". First, was a Mrs Lisa Parret of Southern Health Foundation Trust, where Mrs Agbonkhina had been employed between April 2012 and April 2013. Second, was a Ms Margie Jamias, also at Southern Health Foundation Trust.
9. Mrs Agbonkhina was one of three applicants for the post. On 11 May 2017 Mrs Agbonkhina was interviewed for the post by Ms Garratt and Ms Sally Davis. In Ms Garratt's words, Mrs Agbonkhina performed well at the interview and achieved the highest score amongst the applicants.

10. On the day of the interview, or shortly thereafter, Ms Garratt telephoned Mrs Agbonkhina to let her know that she had been successful and that Human Resources would be in touch to progress matters.
11. There are three aspects of this conversation that are in dispute. First, Ms Garratt says that, in that conversation, she suggested that Mrs Agbonkhina should come in to shadow someone in the team for a few hours to gain a greater understanding of the job role. Ms Garratt's evidence was that she made the suggestion because she was concerned that Mrs Agbonkhina was interested in a nursing role. The job on offer was somewhat different, in that it involved a large component of social care. Mrs Agbonkhina, however, says that Ms Garratt did not suggest shadowing but, rather, insisted on it. Mrs Agbonkhina's point is that Ms Garratt would not have insisted on shadowing had Mrs Agbonkhina been of White British ethnic origin rather than of Black African ethnic origin. There is no corroborative evidence either way on whether or not Ms Garratt suggested or insisted. However, we prefer Ms Garratt's evidence on the point, which makes sense in context. In any event, there is no suggestion that Mrs Agbonkhina demurred at the time.
12. The second dispute is this. It is common ground that taking references from Southern Health Foundation Trust was discussed. (In her witness statement at paragraph 10 Mrs Agbonkhina says that this discussion took place during the interview. We will return to the significance of this in our conclusions.) Ms Garratt says the conversation was confined to an agreement that Southern Health Foundation Trust might not be a good source for a reference, as it was some time since Mrs Agbonkhina had worked there. Mrs Agbonkhina, however, says that she expressly told Ms Garratt not to approach Southern Health Foundation Trust for a reference. Again, we prefer Ms Garratt's evidence. It would be surprising if Mrs Agbonkhina, having provided the details of two referees at Southern Health Foundation Trust in her application form, then required that they not be approached. Our finding is supported by the content of an e-mail from Ms Garratt to Ms Georgia Durban (HR Administrator) dated 20 May 2017 (93), which records that Mrs Agbonkhina ("Ade") had advised that her references (from Southern Health Foundation Trust) were somewhat dated. There is no mention that they should not be approached.
13. The third dispute is that Mrs Agbonkhina says that she offered to get a reference from a named nurse at NHS Professionals but Ms Garratt insisted that NHS Professionals be contacted direct. Again, we think this unlikely. Mrs Agbonkhina did not mention the point when she later provided contact details for NHS Professionals (see 95). Further, Ms Garratt does not touch on it in her e-mail to Ms Durban of 20 May (93).
14. Mrs Agbonkhina's contract of employment is at 100-102. The offer of employment and contract is expressed to be "*subject to satisfactory pre-employment checks*". To allow for these, the start date was given as 26 June 2017. Mrs Agbonkhina's signature of the form expressly acknowledged "*the requirement to fulfil the pre-employment check to the satisfaction of Solent NHS Trust prior to commencing employment.*"

15. The Trust had a “Policy Relating to Obtaining and Providing Employee References” (62-78). This can be referred to for its full content. Here we record some extracts relevant to the decision the Tribunal is required to make.

**“3.1 Receiving References**

3.1.1 *References should only be sought with the express permission of the person to whom it relates.*

3.1.2 *Two independent references” .... “should be sought on behalf of prospective employees as part of the pre-employment screening process. At least one of these must be provided by the individual’s present or most recent employer.” ....*

“3.1.5 *At interview the Recruiting Manager should ask the individual to confirm the names of referees that the Trust can contact if the candidate is successful and ask them to confirm the position that these referees hold in relation to their employment. One of which must be the most recent employer. Any potential areas of concern should be fully explored prior to an offer of employment being made, seeking advice from your HR Services Co-ordinator in the first instance.*

3.1.6 *References are intended to enhance the recruitment and selection procedure but are no substitute for effective managerial assessment in this respect.*

3.1.7 *Employers, particularly those outside the NHS are increasingly taking a cautious approach when giving references and will only provide basic factual information to confirm periods of an individual’s employment and position held whilst avoiding subjective questions on skills and personal qualities. It is, therefore, crucial that managers use all the appropriate selection tools available to them as part of the recruitment process and relevant to the role in question in order to assess an applicant’s suitability for a particular role.”*

....

“3.1.9 *Managers must not permit candidates to commence employment until references and other pre-employment checks satisfactory to the Trust have been received.” ....*

**“3.2 Recruitment Process in relation to references**

3.2.1 *A prospective employee is given a conditional offer of employment pending the receipt of references satisfactory to the Trust from their former employers and other pre-employment checks. This offer may be withdrawn in the event that this condition is not met, therefore, the manager must not allow this person to commence employment until the content of the reference or other pre-employment checks are known to be satisfactory.*

3.2.2 *If there are concerns with the content of the reference, the manager should seek guidance from the relevant HR Business Partner and consider the potential retraction of the offer of employment. They should also ensure that the outcome is communicated to the candidate that their offer has been withdrawn due to unsuccessful pre-employment checks. A model letter is attached at appendix B.”*

16. Mrs Agbonkhina attended the shadowing session on 16 May 2017. Mrs Agbonkhina shadowed Ms Selina Bell (Community Health Support Worker, apparently of White British ethnic origin). It seems that Ms Bell told Mrs Agbonkhina that she had not had to shadow anyone when she joined in 2012. This appears, at some stage, to have suggested to Mrs Agbonkhina that she

had been singled out for shadowing because of her Black African ethnic origin. However, as Ms Garratt points out in her statement, shadowing was not something that was being done in 2012 (so Ms Bell would not have been asked to shadow in any event) and some female staff of White ethnic origin have been asked to shadow since 2015 (WS 12 and 13).

17. Ms Garratt reports that the shadowing went well. There is evidence that Ms Garratt discussed the shadowing with Mrs Agbonkhina on the telephone. Mrs Agbonkhina thought Ms Garratt was furious with her over an aspect of the shadowing but Ms Garratt says she was concerned about the adequacy of the job description and not at all furious with Mrs Agbonkhina.
18. On 23 May 2017 Ms Georgia Durban (Human Resources Administrator) sent Mrs Agbonkhina an email confirming that an offer of employment was being processed. In line with the Trust's requirements, Ms Durban explained that a required pre-employment check was obtaining two references (94). Ms Durban asked Mrs Agbonkhina to confirm that she was happy for the Trust to contact Mrs Agbonkhina's current and previous employers for references.
19. Earlier that day Mrs Agbonkhina had sent an e-mail to Ms Garratt giving contact details for NHS Professionals (95). NHS Professionals is an organisation that provides bank staff to NHS service providers nationally. Later the same day Mrs Agbonkhina provided Ms Durban with contact details for Thornbury Nursing Services (96).
20. On the same day, 23 May, when forwarding the NHS Professionals contact details to Ms Emily Bull (HR Co-ordinator), copy to Ms Durban, Ms Garratt asked that a third reference (that is, in addition to those from Thornbury Nursing Services and Southern Health Foundation Trust) be obtained from NHS Professionals. Ms Garratt commented (99) *".... are we able to ask if there were any issues with any placements as this has been Ades most recent employment. I would like as much information as possible."*
21. Whilst the Trust's procedures did not envisage a third reference as such, they did require that one reference be provided by an applicant's most recent employer.
22. In addition to contacting NHS Professionals and Thornbury Nursing Services for a reference, the Trust sought a reference from Southern Health Foundation Trust, in any event. First, on 24 May 2017 the Trust asked Ms Parret, one of the two contacts at Southern Health Foundation Trust that Mrs Agbonkhina had named in her job application form, to provide a reference (128-129). Ms Parret was chased for a reply on 3 and 17 June 2017 but it seems none was received. The other named contact at Southern Health Foundation Trust, Ms Jamias, was contacted on 6 June and chased on 16 June with the same result.
23. Apparently, NHS Professionals sent a reference to the Trust on or before 30 May 2017 (106-107 – see the date on the bottom right of the reference). The reference provided employment dates and confirmed that Mrs Agbonkhina was still able to book assignments with NHS Professionals but declined any

further comment on the basis that NHS Professionals did not work directly with Mrs Agbonkhina. It suggested that Mrs Agbonkhina should be contacted for alternative referees.

24. On 6 June 2017 Ms Durban sent Mrs Agbonkhina an e-mail (108). It included *“Please can you chase your referee’s as we still haven’t received your references.”* Ms Durban was either in ignorance of the fact that a reference had been received from NHS Professionals or omitted to be clear that a reference had been received but it was not adequate.
25. On or around 9 June 2017 Thornbury Nursing Services sent a reference to the Trust (98), which seems to have been sent on 12 June (see 122). In essence it was to the same effect as that from NHS Professionals.
26. On 14 June 2017, presumably not knowing that a reference had already been received from NHS Professionals and (if it had arrived) that a reference had come in from Thornbury Nursing Services, Ms Garratt sent an e-mail to Ms Bull asking for her help in Ms Durban’s absence (98). Ms Garratt comments on this in her statement (WS 15):  
*“I forwarded the email address for NHS Professionals to Emily Bull on 14 June 2017 (page 86) and said that I was interested to hear if there were any concerns with Mrs Agbonkhina’s performance which led to a bank placement with the Older People Mental Health service with Southern Health NHS Foundation Trust being terminated. I had heard from a Healthcare Assistant who worked for the Trust that there may have been some concerns about AA’s performance when she worked at Southern Health. I had no more information than that and therefore decided that I should not let that conversation influence any decision I made. I decided simply to ensure that, as is normal procedure, satisfactory references were received.”*
27. Although it has no bearing on the decision we are required to make, there is some confusion over who, at the Trust, was involved at this stage. From a timeline prepared later by the Trust it appears that Ms Durban was on leave from 12 to 16 June 2017 (183). In Ms Durban’s absence, Ms Katie Seeley (HR Administrator) became involved. Both are referred to as having spoken to Mrs Agbonkhina on 14 June, but any conversation must have been with Ms Seeley.
28. In an e-mail dated 27 June 2017 (114) Mrs Agbonkhina writes that she spoke to Ms Durban on 14 June (it must have been Ms Seeley) regarding the references. The e-mail records that Ms Durban (Ms Seeley) had confirmed that a reference had been received from NHS Professionals and that Mrs Agbonkhina should chase the other one up so as to avoid a delay to her start date. In her statement in these proceedings, and in an e-mail to Ms Helen Pretty (HR Support Services Manager) on 30 June 2017 (122) Mrs Agbonkhina says the conversation went further. Mrs Agbonkhina says that she remembers Ms Durban (Ms Seeley) saying (WS 8) *“We have received your reference from NHS Professionals, and we are happy with it, chase the other up.”* We did not hear from Ms Durban but in a memorandum dated 20 March 2018 recounting events Ms Durban writes this (131) *“I can confirm that I spoke to Aminat to say that we had received her reference from NHS*

*professionals but I just had confirmed that we had received it as it was not my decision to say if it was satisfactory or not, that was down to Sarah Garratt – the recruiting manager.”* If Ms Durban did have that conversation, it cannot have been on 14 June, because she was on leave on that date. However, to reach the decision we are required to make, it is not necessary for us to make a finding of fact on this issue.

29. We return to Ms Garratt’s e-mail of 14 June. Ms Bull forwarded this to Ms Seeley (HR Administrator) who replied on 15 June 2017 timed at 1614 (97). It is tolerably clear that Ms Seeley had seen both the references. Ms Seeley had concluded that the references were not adequate and had spoken to Mrs Agbonkhina on 14 June 2017 noting “.... *she was hard to understand and didn’t seem to grasp that we needed more references. I also contacted Thornbury for another reference but have not yet heard back from them. Please can you give me a call to discuss when you can?*”
30. Ms Seeley spoke to Ms Garratt on 15 June (183) and agreed a course of action. This was set out in an e-mail from Ms Seeley to Mrs Agbonkhina timed at 1646 on 15 June 2017 (114). The content of the e-mail was straightforward:  
*“As per our telephone conversation a couple of days ago, we requested your references again. Unfortunately we still have not received another reference from any of the three referees. As part of the recruitment process we do need all checks to be complete and this includes two references, one from a current and one from a previous employer.  
Please could we ask you to chase these references again for us, and see if we can get a response within the next week as I am conscious that your start date is just over a week away.  
Unfortunately, if we do not receive a satisfactory reference back by 22<sup>nd</sup> June 2017, then we will unfortunately have to withdraw your offer of employment with Solent.”*
31. Mrs Agbonkhina’s evidence is that she did not pick up Ms Seeley’s e-mail of 15 June 2017 until her attention was drawn to it when she went to the Trust on 26 June 2017, that being her start date, for induction (see 115). On 27 June 2017 Mrs Agbonkhina sent a reply (114). In essence, Mrs Agbonkhina’s position was that, since references had been received from NHS Professionals and Thornbury Nursing Services “*everything is fully in place now*”.
32. Taking stock at this point what seems to have happened was this. The Trust had asked for references from three sources. Two inadequate references had been received from NHS Professionals and Thornbury Nursing Services. Both had been approached for a further reference without result. No reply had come in from two contacts at a third source, Southern Health Foundation Trust.
33. Whether or not Mrs Agbonkhina fully understood this to be the case is a moot point. On 27 June 2017 Mrs Agbonkhina’s position appears to be that satisfactory references had been received (see paragraph 31 above). That is surprising. When Mrs Agbonkhina had attended induction with Ms Helen

Pretty (HR Support Services Manager) on 26 June, Ms Pretty had told her that the references from Thornbury Nursing Services and NHS Professionals were not satisfactory (see 115). In evidence in these proceedings, Mrs Agbonkhina has modified her position. In essence Mrs Agbonkhina's position is not that satisfactory references had been received, but that she had not been told that the references were inadequate. Mrs Agbonkhina says that, if she had been told that, she would have been able to do something about it.

34. There seems to have been scope for confusion and misunderstanding, certainly prior to Mrs Agbonkhina's meeting with Ms Pretty on 26 June, by which time it was probably too late. On the papers we have seen, there is no clear written communication to Mrs Agbonkhina that the two references were inadequate nor that nothing had been heard from the third source. We suspect that, by 27 June, there was a combination of either denial or wishful thinking on Mrs Agbonkhina's part coupled with a lack of clear communication on the Trust's part.
35. In any event, Ms Garratt was proceeding on the basis that Mrs Agbonkhina was aware that inadequate references were all that had been received and that Mrs Agbonkhina had been warned by Ms Seeley's e-mail of 15 June of the consequences if the position with the references was not remedied. Ms Garratt says that, on 27 June 2017, she made the decision to withdraw the offer of employment to Mrs Agbonkhina on the ground that no satisfactory reference had been received from any of the three sources approached.
36. There is evidence that there was a telephone conversation between Mrs Agbonkhina and Ms Garratt on 27 June and Ms Garratt confirmed her decision (see, for example, 119 and 39 para 11). If Mrs Agbonkhina appealed to Ms Garratt to reconsider, Ms Garratt remained unmoved and did not change her decision.
37. It is common ground that no letter was written to Mrs Agbonkhina, such as that set out at Appendix B in the Trust's policy on the subject (74), confirming that her offer of employment was withdrawn. The Trust accepts that this should have been done. Rather than in a letter, the final confirmation of the decision to withdraw the offer appears to have been communicated in an e-mail from Ms Pretty to Mrs Agbonkhina on 28 June 2017 (122).

### **APPLICABLE LAW**

38. So far as they are applicable, sections 4 and 9 of the EA provide as follows:

***"4 The protected characteristics***

*The following characteristics are protected characteristics-"*....

*"race:"*

***"9 Race***

*(1) Race includes- ....*

*"(c) ethnic or national origins"*

39. So far as it is applicable, section 13 of the EA provides as follows:

***"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."*



40. So far as it is applicable, section 39 of the EA provides as follows:

***“39 Employees and applicants***

*(1) An employer (A) must not discriminate against a person (B)-*

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

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

*(c) by not offering B employment.*

*(2) An employer (A) must not discriminate against an employee of A's (B)-*

*(a) as to B's terms of employment;” ....*

*“(c) by dismissing B;*

*(d) by subjecting B to any other detriment.”*

41. So far as it is applicable, section 109 of the EA provides as follows:

***“109 Liability of employers and principals***

*(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.”*

42. So far as it is applicable, section 136 of the EA provides as follows:

***“136 Burden of Proof***

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

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

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

## **CONCLUSIONS**

43. The central issue can be put simply. Mrs Agbonkhina says that the Trust, in rescinding a conditional offer of employment to her, treated her less favourably than it treated or would have treated others because of her Black African ethnic origin.

44. Mrs Agbonkhina relies on a hypothetical comparator being a person in her circumstances but without the protected characteristic of her Black African ethnic origin. A person of White British ethnic origin is an obvious example.

45. Whilst the issue can be put simply, there are a number of sub-issues raised by Mrs Agbonkhina. These have not been identified in the case management of these proceedings as distinct claims of discrimination. However, whether they are distinct claims of discrimination or not, they are at the very least contextual evidence that may or may not support the issue of whether or not the rescinding of the conditional offer of employment to Mrs Agbonkhina was less favourable treatment of her because of her race. We will examine each in turn before coming to the main issue.

46. Before we do so, there is one other preliminary. To the extent that it has been considered, we think that both parties have accepted that Mrs Agbonkhina was an employee of the Trust who was, in effect, dismissed because she did not satisfy the condition subsequent of obtaining satisfactory references. If so,

this means the circumstances fall within section 39(2)(c) or, perhaps, (d) of the EA. If that is not the case, they fall within section 39(1) of the EA. For our purposes, it does not matter which.

47. Shadowing

48. Mrs Agbonkhina says that, in insisting that she shadow the job, Ms Garratt was treating her less favourably than she would have treated the comparator because of her Black African ethnic origin.

49. Our findings do not support this. First, we accept the evidence that Ms Garratt did not insist on shadowing. Rather, she suggested it. Second, and more importantly, the comparator would have been treated in the same way. Ms Garratt had a genuine concern that Mrs Agbonkhina was interested in a role that would provide more nursing opportunities and wanted to be sure Mrs Agbonkhina understood what the job entailed before committing to it. We are reinforced in our conclusion by the evidence that White female staff applying for the same role had undertaken shadowing since 2015. This was neither a freestanding act of discrimination nor a pointer to why Ms Garratt decided to rescind the offer of employment.

50. The approach to Southern Health Foundation Trust for a reference

51. Mrs Agbonkhina says that she expressly forbade the Trust from approaching Southern Health Foundation Trust for a reference. When the Trust did so, Mrs Agbonkhina says it was in breach of paragraph 3.1.1 (see paragraph 15 above) of its procedures and it treated her less favourably than it would have treated the comparator because of her Black African ethnic origin.

52. Again, our findings do not support this. We do not think the evidence supports Mrs Agbonkhina when she says that she had not given her permission for it to contact Southern Health Foundation Trust. Rather, there was a discussion about the appropriateness of that approach, but nothing more. The Trust was entitled to rely on Mrs Agbonkhina's reference to Southern Health Foundation Trust as a referee in her application form. The comparator would have been treated in the same way.

53. We think Mrs Agbonkhina is also suggesting that, in seeking three references, the Trust was in breach of paragraph 3.1.2 of its procedures, again treating her less favourably than it would have treated the comparator because of her Black African ethnic origin. However, in our view, the comparator would have been treated in the same way. We know from the evidence that Ms Garratt had been told of a possible concern about Mrs Agbonkhina's time with Southern Health Foundation Trust (see paragraph 26 above). It was proper to pursue that line of enquiry and we have no doubt it would have been pursued had it related to the comparator. In short, we do not think it had anything to do with Mrs Agbonkhina's protected characteristic.

54. There is no freestanding act of discrimination in any of this nor is there a pointer to a discriminatory motive on Ms Garratt's part in her decision to rescind the offer of employment.

55. A reference from a named nurse?

56. Mrs Agbonkhina's case is that she offered to obtain a reference from a named nurse at NHS Professionals but Ms Garratt insisted on an approach to the body itself. In doing so, Mrs Agbonkhina says, Ms Garratt was making it difficult or impossible to obtain an adequate reference treating her less favourably than she would have treated the comparator because of her Black African ethnic origin.

57. Once again, the facts do not support this conclusion. On our findings we doubt that Ms Garratt insisted that the body itself be approached rather than a named nurse. Certainly, there is no evidence that Mrs Agbonkhina objected at the time. Even if Ms Garratt had so insisted, we would conclude that the comparator would have been treated in the same way. There is no evidence that this would not have been normal practice.

58. Again, there is no freestanding act of discrimination in any of this nor is there a pointer to a discriminatory motive on Ms Garratt's part in her decision to rescind the offer of employment.

59. Breaches of the Trust's procedures

60. The relevant applicable procedures are set out in paragraph 15 above. We have already referred to some of the issues arising from these in our conclusions. Here we turn to two other points arising from the procedures.

61. Mrs Agbonkhina suggests that she was not asked to confirm the names of her referees at interview as is required by procedure 3.1.5. However, in paragraph 5 of her commentary on the Response in these proceedings Mrs Agbonkhina says the reverse (37), that she was asked about referees. There appears to be no evidential foundation for this allegation.

62. There is another point arising from the content of procedures 3.1.6 and 3.1.7, that we will return to this below.

63. The main issue

64. Having looked at the sub issues, both as possible freestanding acts of discrimination and possible pointers to Ms Garratt's motivation in rescinding the offer of employment, we return to that primary issue: did Ms Garratt, in rescinding a conditional offer of employment to Mrs Agbonkhina, treat her less favourably than she treated or would have treated others because of Mrs Agbonkhina's Black African ethnic origin?

65. In considering our conclusions we have sought to see the issue in the way Mrs Agbonkhina says she sees it. Paragraph 3 of Mrs Agbonkhina's commentary on the Respondent's Response in these proceedings is instructive in this respect (36). We understand Mrs Agbonkhina to be saying this:- Because there was one other person on the interview panel, Ms Garratt could not stop Mrs Agbonkhina being selected for the post at that stage.

Thereafter, because of Mrs Agbonkhina's Black African ethnic origin, Ms Garratt put every obstacle she could in the way of Mrs Agbonkhina obtaining adequate references to enable Ms Garratt to rescind the offer.

66. Are there facts from which we could decide, in the absence of any other explanation, that Ms Garratt rescinded the offer of employment because of Mrs Agbonkhina's protected characteristic?
67. As far as the sub issues are concerned, we have explained why we do not think they amount to factors which, in the absence of any other explanation, would enable us to decide that Ms Garratt's motivation for rescinding the offer was Mrs Agbonkhina's protected characteristic. This is so whether they are considered singly or as a whole.
68. There is however, one further issue which we see as central to what we are required to decide. This results from both the room for confusion and misunderstanding arising from the sequence of events and from the contents of paragraphs 3.1.6 and 3.1.7 of the Trust's procedures (see paragraph 15 above).
69. In paragraphs 33-34 above we have explained why we think there was scope for confusion and misunderstanding on Mrs Agbonkhina's part albeit, we think, tinged with an element of denial and wishful thinking.
70. As far as paragraphs 3.1.6 and 3.1.7 of the procedures are concerned, we think they amount to a pointer to Ms Garratt to go an extra mile in the face of uninformative factual references.
71. We do not know what happened when Ms Garratt spoke to Mrs Agbonkhina by telephone on 27 June 2017 and confirmed her decision to rescind the offer of employment. However, it seems to us that there were two options open to Ms Garratt. First, Ms Garratt could choose not to change her decision to rescind the offer. Second, Ms Garratt could allow more time for Mrs Agbonkhina to source adequate references. We think that a bystander might have thought the second course of action more in keeping with paragraphs 3.1.6 and 3.1.7 of the Trust's procedures. Nevertheless, Ms Garratt had a managerial choice, open to her under the Trust's procedures, to rescind the offer of employment to Mrs Agbonkhina because references satisfactory to the Trust had not been received and that is the way Ms Garratt chose to go. The issue for us is, in context, was Ms Garratt's choice tainted by a discriminatory motive. The test is, is this a fact from which we could decide, in the absence of any other explanation, that Ms Garratt rescinded the offer of employment because of Mrs Agbonkhina's protected characteristic?
72. We pressed Ms Garratt on the reason behind her choice on several occasions, pointing out paragraphs 3.1.6 and 3.1.7 of the Trust's procedures and that Mrs Agbonkhina had scored well at interview and had done well on the shadowing day. Ms Garratt's reply was consistent. Ms Garratt had thought the decision had been made and it was time to draw the matter to a conclusion. Having weighed all the circumstances we accept that evidence. We have a, perhaps unfounded, suspicion that the hint of a concern at

Southern Health Foundation Trust might have played some part. However, even if that was so, it would have been a non-discriminatory motive.

73. Our conclusion, therefore, is that, taking all the circumstances into account, there are no facts from which we could decide, in the absence of any other explanation, that Ms Garratt rescinded the offer of employment because of Mrs Agbonkhina's protected characteristic.

74. If we were to be wrong about this and we should draw an inference, we would conclude that Ms Garratt has shown us that the reason for rescinding the offer of employment was not Mrs Agbonkhina's protected characteristic. Rather, it was the absence of adequate references.

75. Accordingly, the claim of race discrimination is dismissed.

76. Costs

77. The Trust makes its application for costs based on Employment Judge Fowell's order that a deposit be paid on the basis that Mrs Agbonkhina's claim had little reasonable prospects of success. The basis for an award of costs under rule 76(1)(b) of the Employment Tribunals Rules of Procedure 2013 (the "ET Rules") is that a claim had no reasonable prospect of success.

78. Whilst Mrs Agbonkhina has not succeeded in her claim, we do not conclude that it had no reasonable prospect of success. Mrs Agbonkhina had valid questions giving rise to genuine issues arising from the rescission by the Trust of her offer of employment. Accordingly, the Trust's application for costs is dismissed.

79. The Deposit

80. We have decided the specific allegation in favour of the Trust but not for substantially the reasons given in the deposit order. In particular, having had the benefit of all the evidence, in our view it cannot be said that the claim had little reasonable prospect of success. Accordingly, acting in accordance with rule 39(5) of the ET Rules, we direct that the deposit be refunded.

**Employment Judge Matthews**  
**Date: 11 August 2021**

Sent to the Parties: 17 August 2021

FOR THE TRIBUNAL OFFICE