



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Mushtaq
Respondent: Dr Waheed Hussain t/a
Clarendon Medical Centre

HELD AT: Leeds **ON:** 12 and 13 August 2019

BEFORE: Employment Judge Cox
Mr D Wilks
Mrs L Hill

REPRESENTATION:

Claimant: Mrs A Mushtaq, Claimant's
sister
Respondent: Mr Clement, counsel

REASONS

1. Mrs Mushtaq presented a claim to the Tribunal alleging that the Dr Waheed Hussain trading as the Clarendon Medical Centre ("the Practice") offered her a job as a receptionist and then withdrew it because it found out that she was pregnant. If that happened then that amounted to an act of unlawful discrimination contrary to Section 39(1)(c) read with Section 17(2) of the Equality Act 2010.
2. At the hearing the Tribunal has heard evidence from Mrs Mushtaq herself. On behalf of the Practice, it heard evidence from Miss Zaibun Khan, who is a senior office supervisor, Mrs Rizwana Shaheen, who is an office supervisor, and Mr Qasim Khan-Alizai, who is the practice manager. Mrs Mushtaq alleged that it was Miss Khan and Mrs Shaheen who told her that she had been offered the job and Mr Khan-Alizai who withdrew the job offer.
3. From that evidence and from the documents to which the witnesses referred it, the Tribunal makes the following findings of fact.
4. On or around 24 October 2018 a member of the Practice's reception staff indicated that she intended to resign from her post. As a result, the Practice advertised on the NHS Jobs website for a medical receptionist/care navigator and Mrs Mushtaq

applied for that post. She was interviewed by Mr Khan-Alizai on 16 November. On 29 November she undertook a work assessment based on a practical exercise, along with the other candidate who reached that stage. Mr Khan-Alizai told Miss Khan and Mrs Rizwana to get both candidates to bring three forms of identification and details of two referees with them to the assessment, but the Tribunal heard no evidence that the candidates were in fact asked to do so. Mr Khan-Alizai was intending to appoint one or both candidates, dependent upon the feedback on their performance from Miss Khan and Ms Johnson, a senior GP secretary, who were involved in the work assessment. Miss Khan and Ms Johnston both said that the other candidate had performed better in the assessment and Mr Khan-Alizai decided that the Practice would offer her the post.

5. On 4 December Mr Khan-Alizai wrote to the successful applicant and offered her the job. He also emailed Mrs Mushtaq on that date to tell her that her application had been unsuccessful. Unfortunately that email never reached Mrs Mushtaq because there was a small error in the email address. Initially Mrs Mushtaq asked the Tribunal to accept that the copy of this email, produced in evidence at the Hearing, was a forgery of some sort. By the end of the Hearing she appeared to accept that this email was in fact sent on 4 December by Mr Khan-Alizai.
6. On 5 December the successful candidate wrote to the Practice to say that she did not intend to take up the offer.
7. Because Mrs Mushtaq had not received the email of 4 December, she telephoned the surgery repeatedly to try and find out if her application had been successful. On 14 December she left a message asking Miss Khan to 'phone her to let her know what was going on. She phoned again that afternoon and spoke to Miss Khan, who said that she had no idea what was happening but she would ask Mr Khan-Alizai to get back to her as soon as possible. On 18 December Mrs Mushtaq called again to speak to Miss Khan but Miss Khan was on the 'phone. Mrs Mushtaq called again twice later that day and again left messages for Miss Khan to call her back to let her know what was going on. On 20 December Mrs Mushtaq called the surgery again. On her first call she got no response. She called again and left a message for Miss Khan to call her back. On 28 December Miss Khan called her and asked her to drop off a driving licence, passport and bank statement. A few minutes later Miss Khan called her again and said that she also needed to provide a passport-sized photograph. Miss Khan confirmed the details of the documents Mrs Mushtaq needed to bring in in an email the same day. Mrs Mushtaq dropped the documents off on 2 January.
8. All these calls were documented by the call log record of calls to and from the surgery and the transcripts of these calls, all of which were produced in evidence at the Hearing.
9. In her claim form, Mrs Mushtaq said that Miss Khan phoned her on 17 December and told her that she was being offered the job and then later that evening Mrs Shaheen phoned her and confirmed that she was being offered the job. During the course of giving evidence she changed her position and said it was at some point in the week beginning 17 December that she received these calls.
10. Mrs Mushtaq's evidence was that when Miss Khan called she said: "I'm sorry Atiya for not getting back to you I've been busy. Congratulations you've got the job do you accept it" to which Mrs Mushtaq replied "yes". Mrs Shaheen telephoned her later. In her claim form and in her witness statement Mrs Mushtaq said that both

these calls happened on Monday 17 December. In her evidence to the Tribunal she said they happened at some time in the week beginning 17 December and that Mrs Shaheen phoned the day after Miss Shah's call. Mrs Mushtaq's evidence was that Mrs Shaheen confirmed the job offer and asked her to bring in her identification documents so that they could "start the process and apply for a smart card". A smart card is a security pass held by the Practice's employees.

11. With regret, the Tribunal has concluded that Mrs Mushtaq has not been truthful in her evidence in relation to these conversations, for several reasons.
12. The conversations do not appear in the call record and transcripts. Mrs Mushtaq asked the Tribunal to find that the call record had been tampered with to remove references to the calls. The Tribunal does not accept that it is likely that the Practice would have doctored the call record in any way. Mr Khan-Alizai confirmed that the record was generated automatically by the Practice's computer system on entering the telephone numbers of the Practice and Mrs Mushtaq. Mrs Mushtaq had the opportunity to produce her own mobile 'phone records to provide evidence that she did receive the calls but she did not do so. The Tribunal also accepts Mr Khan-Alizai's evidence that the transcripts that were produced for the Tribunal related to the calls in the call record.
13. It is inherently unlikely that Mrs Mushtaq can remember, as she asserted, the exact words that Miss Khan used in making the job offer, especially since she was unclear about when the calls were made.
14. It is inherently unlikely that Miss Khan or Mrs Shaheen, who worked as administrators doing clerical work, would have authority to make a candidate a job offer. Their evidence, which the Tribunal found credible, was that they had no such authority: it was Mr Khan-Alizai's job within the Practice to decide who should be offered employment. That was reflected in the fact it was him who sent the letter to the successful candidate and it was him who sent the email to Mrs Mushtaq to tell her that she had not been successful.
15. The Tribunal accepts Miss Khan and Mrs Shaheen's evidence that they did not know what the position was in relation to the vacancy at the time when they were alleged to have made the job offer to Mrs Mushtaq. They knew the job was being re-advertised because the successful candidate had turned it down but nothing more. That evidence is supported by an email that Miss Khan sent to Mr Khan-Alizai on Friday 14 December in which she asked: "Atiya just called regarding the job. She wanted to know if she has got the job or no"? As Miss Khan and Mrs Shaheen were not even aware of what the position was, it is not credible that they would have made a job offer to Mrs Mushtaq.
16. If Mrs Mushtaq had in fact been offered the job during the conversations with Miss Khan and Mrs Shaheen (and her case was that this was the only time that the job offer was made) she would have followed up on that to have the offer confirmed in writing. In fact, she did not contact the Practice again until 4 January 2019, when she sent an email to Mr Khan-Alizai thanking the Practice for the job offer and informing him that she was pregnant.
17. The Tribunal accepts Mr Khan-Alizai's evidence, which was supported by the documentary evidence, that the job was re-advertised on 16 December 2018. It is difficult to understand why the Practice would be taking that step if it had already decided that Mrs Mushtaq would be offered the job.

18. On 6 January, the staff member whose resignation had caused the vacancy to be advertised in the first place had told Mr Khan-Alizai in an email that she had decided to stay after all. Mr Khan-Alizai wrote to Mrs Mushtaq on 7 and 8 January 2019 in response to her email of 4 January. In the email of 7 January Mr Khan-Alizai told Mrs Mushtaq that the Practice was unable to offer her the job. He said that because she had delayed in bringing her identification documents into the Practice it had had no choice but to recruit someone else. That was not in fact the reason for its decision not to recruit Mrs Mushtaq. It is not surprising, therefore, that Mrs Mushtaq replied saying that she had been asked to bring in her identification documents and had done so on 2 January. She went on to say that she had been expecting to be given a start date. She asked for more detail on why the job was offered to someone else. Mr Khan-Alizai replied on 8 January that she had never been offered the job, and attached a copy of the email that the Practice had sent to her on 4 December that, had it arrived, would have informed her that she had been unsuccessful in her application. He also now told Mrs Mushtaq that a staff member who was working her notice had changed her mind so the Practice no longer had a vacancy to fill. Although the Tribunal accepts that the information Mr Khan-Alizai was giving Mrs Mushtaq was confusing and untrue, the Tribunal nevertheless considers that if Mrs Mushtaq had in fact been offered the job by Miss Khan and Mrs Shaheen, she would have told Mr Khan-Alizai this at some point during this exchange of emails. She did not do so. The Tribunal accepts that the first that the Practice knew that she was alleging that Miss Khan and Mrs Shaheen had offered her the job was when it received the Tribunal claim form.
19. Mrs Mushtaq argued that the fact that Miss Khan asked her to bring her identification documents and a passport photograph into the Practice supports her case that she had in fact been offered a job which she had accepted. In an email on 17 December Mr Khan-Alizai did ask Miss Khan to contact Mrs Mushtaq and ask her to bring in identification documents, a passport size photo and two references. As explained above, Miss Khan followed this up with Mrs Mushtaq by 'phone and email. The Tribunal accepts Mr Khan-Alizai's evidence, however, that it was routine to ask applicants for employment with the Practice to provide these documents and he was asking for them because he viewed Mrs Mushtaq as a potential applicant for the re-advertised post. He also told Miss Khan in that email to arrange a quick meeting between Mrs Mushtaq and himself when she dropped off the documents so that he could explain what was going to happen next. He intended to explain to her that she would be considered for the re-advertised post if she wanted. In the event, that meeting did not happen and in any event the vacancy disappeared.
20. For all these reasons, the Tribunal rejects Mrs Mushtaq's evidence that she received a clear and unequivocal job offer from the Practice. As an offer was never made, it cannot have been withdrawn because the Practice learnt of her pregnancy. Her claim therefore fails and is dismissed.

Costs application

21. The Respondent made an application under Rule 76 of the Tribunals Rules of Procedure that Mrs Mushtaq should be ordered to pay towards its costs in defending this claim. The Tribunal is satisfied that there are grounds for making a costs order against Mrs Mushtaq. The Tribunal accepts that the circumstances surrounding the recruitment exercise were unclear and confusing: the email of 4

December never arrived; Mrs Mushtaq had to make repeated 'phone calls to find out whether she had been successful in her application; she was then asked to provide her identification documents with no explanation as to why she was being asked to do so; and Mr Khan-Alizai did not initially tell her the truth about why her application was unsuccessful. The Tribunal accepts that Mrs Mushtaq was justified in feeling upset that the Practice had "messed her around" at a time when she was anxious to secure a source of income for herself and her growing family. The Tribunal still considers, however, that it was unreasonable for her to bring a claim to the Tribunal based from the outset upon an untruth, namely that a clear offer of employment was made to her by Miss Khan and Mrs Shaheen when in fact it never was.

22. Further, the Tribunal is satisfied that it was unreasonable for Mrs Mushtaq to pursue her claim even when the Practice gave her a full explanation and offered her a sum in settlement. The Tribunal was referred to a letter that the Practice sent to Mrs Mushtaq on 16 July 2019 which set out clearly the events that established that no job offer had been made to her. That letter was sent to her at a point when she had all the documentary evidence that the Tribunal saw during the course of the Hearing. At this point, it should have been clear to her that it was very unlikely that she would be able to convince the Tribunal that an offer of employment was made to her.
23. When deciding whether to make a costs order and in deciding how much to order a party to pay, the Tribunal has a discretion to take into account the party's ability to pay. The Tribunal decided to exercise that discretion in Mrs Mushtaq's case. Based on the evidence she gave, the Tribunal accepts that Mrs Mushtaq is a single parent with five children under 11 living on state benefits and that she has little or no disposable income at the end of a week. The Tribunal nevertheless considers that it should exercise its discretion to make a costs order because this claim was based on a lie and it was made against an organisation which, as Mrs Mushtaq will be aware, is providing health care in an area of great economic and social deprivation which has got better things to do with its resources than expend them on defending a claim without merit.
24. The Tribunal accepts that the amount of the costs that the Respondent is seeking, namely £4,200, is a reasonable figure. It is limited to the sum the Practice has paid for legal representation at the Hearing. The £2,900 that is claimed in relation to counsel's fees includes counsel's travel and accommodation expenses, the time spent on a telephone conference before the Hearing, and time in preparing for, travelling to and attending at the Hearing over two days. The Practice paid a £600 fee for the use of the online portal the Practice used to give direct instructions to counsel to attend and represent them. That fee was unavoidable and, in any event, the Tribunal accepts that if the Practice had taken the alternative route of asking a solicitor to instruct counsel then the amount of fees that it would have incurred would have been at least as much as the portal fee. The £700 in VAT that the Practice has been charged is unavoidable and the Practice has confirmed that it is not recoverable by the Practice.
25. The Tribunal has taken into account that Mrs Mushtaq is of limited means and has limited ability to pay a costs order. It has also, however, taken into account the financial impact on the Practice of this meritless claim. Although the amount of £4,200 that is claimed is reasonable, the Tribunal has decided, in the light of Mrs

Mushtaq's limited means, to order her to pay only £500 towards the Respondent's costs and to give her until 10 September 2019 to make that payment.

Employment Judge Cox
Date: 23 August 2019