EMPLOYMENT TRIBUNALS

Claimant: Mr S Patel

Respondent: Bolton NHS Foundation Trust

HELD AT: Manchester **ON:** 9 and 10 February 2017
3 and 24 March 2017
(in Chambers)

BEFORE: Employment Judge Sherratt
Mr J Ostrowski
Ms S Khan

REPRESENTATION:

Claimant: Ms S Ibrahim, Counsel
Respondent: Ms R Eeley, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claims are dismissed.

REASONS

Background

1. The parties came before Employment Judge Franey at a preliminary hearing on 2 November 2016 when both parties were represented by their solicitors. Employment Judge Franey helpfully summarised the case as follows:-

> "(2) The claimant applied for employment with the respondent in its Blood Sciences Laboratory. He was given a conditional offer which he accepted. There was a referral for Occupational Health advice. The advice received was that the claimant would require between two and three weeks off every three months in order to receive treatment for his cystic fibrosis. He would not be available for work in those periods. The offer of employment

was withdrawn. The claimant maintains that this amounted to unlawful disability discrimination.

(3) The respondent admits that the claimant was a disabled person by reason of cystic fibrosis, but denies any unlawful treatment. It says that the withdrawal of the job offer was justified and that the adjustments sought by the claimant would not have been reasonable. The essence of the respondent's case is that the requirement to provide a rota over an 18 week period covering eight different types of shift and a 24/7 service meant that it could not reasonably be expected to accommodate such regular periods of unavailability in the rota."

2. With the agreement of the parties the list of complaints and issues was amended on 19 December 2016 and became as follows:-

Discrimination arising from disability – section 15 Equality Act 2010

(1) The respondent accepts that the withdrawal of the provisional offer of employment on 19 April 2016 fell within section 39(1)(c) and section 15(1)(a) in that it amounted to unfavourable treatment because of something (the claimant's anticipated unavailability every three months and the need for an Occupational Health assessment) which arose in consequence of his disability. The issue between the parties is whether the respondent can show that the withdrawal of the offer was a proportionate means of achieving its legitimate aim of managing the rota so as to ensure proper service delivery.

Reasonable adjustments – sections 20 and 21 Equality Act 2010

(2) The respondent accepts that the claimant was an interested disabled person within the scope of Part II of schedule 8 to the Act, and that it had the requisite knowledge under paragraph 20 f schedule 8. The first issue is whether the respondent applied a provision, criterion or practice ("PCP"). The claimant contends for three PCPs as follows:

(a) A requirement that a candidate for employment be available to meet the requirements of the respondent's rota. The respondent accepts that this PCP was applied.

(b) A practice of not employing someone whose sickness absence level is anticipated to exceed the trigger point under the respondent's sickness absence policy. The respondent does not accept that this PCP was applied because its case is that anticipated sickness absence was not a factor (as opposed to the unavailability to be put on the rota).

(c) A practice of not seeking and/or considering further reports, information or documentation in relation to the disability and effect of the disability of a candidate, other than that of the advice and/or initial advice of Occupational Health during the recruitment process. The respondent does not accept that any such PCP is applied.

(3) The respondent accepts that the first two PCPs (if applied) placed the claimant at a substantial disadvantage due to his disability. His disability meant that he would not be consistently available to work under the rota and that if put on the rota in the usual way he was more likely to have sickness absence during the trigger points under the absence policy. The issue is therefore whether the respondent failed in its duty to take such steps as it was reasonable to have to take to avoid the disadvantage. The adjustments for which the claimant contends are as follows:

(a) To tolerate his periods of unavailability by making arrangements for the rota to be covered by others. The respondent disputes that this could reasonably be done given the complexities of the rota and the need to maintain 24/7 service.

(b) To tolerate a higher level of sickness absence due to cystic fibrosis before triggering measures under the absence policy. The respondent accepts that this would have been a reasonable adjustment but (as indicated above) denies that this PCP was applied to the claimant.

(4) The respondent does not accept that the third PCP, if applied, placed the claimant at a substantial disadvantage. The issues to be determined are therefore:

(a) Did the respondent apply that third PCP?

(b) If so, did it place the claimant at a substantial disadvantage due to his disability?

(c) If so, did the respondent fail in its duty to take such steps as it was reasonable to have to take to avoid the disadvantage? The adjustments for which the claimant contends are (i) to consider the information that the claimant provided in relation to this potential absences including that of his social worker, and/or (ii) to obtain and consider a report from the claimant's treating consultant.

(5) If any of the above complaints succeed, what is the appropriate remedy?

The Parties

3. The claimant is a 25 year old man living his parents in Bolton. His parents help him with his day-to-day care. He suffers from a hearing impairment, cystic fibrosis and QT syndrome which is a heart condition.

4. The claimant graduated from Manchester Metropolitan University with a 2:2 degree in Medicinal and Biological Chemistry in 2014.

5. The respondent is a large NHS Foundation Trust serving Bolton and surrounding areas.

The Evidence

6. The claimant gave evidence on his own behalf. The respondent called Peter Kinsella who was involved in the respondent making and subsequently withdrawing the conditional offer of employment to the claimant and Paul Henshaw, the respondent's Head of Employee Resourcing, who dealt with the grievance raised on behalf of the claimant following the decision to withdraw the offer of employment.

The Facts

7. Peter Kinsella is the respondent's Haematology Laboratory manager – Blood Sciences. There are three specialities within the department, namely haematology, blood transfusion and biochemistry. The department provides a diagnostic and testing service for the Accident and Emergency Department, both acute and non acute hospital wards and departments and for a number of local GP surgeries.

8. The respondent was recruiting a Band 3 Medical Laboratory Assistant ("MLA") which is a junior post in the department. It is not a clinically qualified role but it does require specialist skills for which training is given. The role of the MLA is to assist biomedical scientists in delivering the service. It involves pre-analytical processing, sample handling and movement, analyser loading and maintenance and post analytical processing.

9. The department works on a 24 hours per day seven days per week basis and at all times at least one MLA must be available and on duty. To ensure service delivery the department rota runs over 18 weeks and is divided into a number of different types of shift which are:

(a) Night shifts: 11 hours, 20:50 to 08:50

(b) Late shifts: 7.5 hours, 12:00 to 20:00

(c) Lab late shifts including bank holidays and lab lates with standby for nights; 7.5 hours, 12:30 to 21:00

(d) Filler late shifts; 5.5 hours 14:30 to 20:00

(e) Core and core shifts including bank holidays; 7.5 hours, 08:45 to 17:15

(f) Standby – on standby for core, late and night shifts at the weekend

10. Each whole time MLA is rostered onto the same number of the different types of shift as their colleagues. They work an average of 37.5 hours per week over the 18 week rota cycle and they do not exceed the limits on working time assuming they work to the rota. The rota allows adequate recovery time from night and weekend shifts and where additional hours are worked to cover sickness or other absences compensatory rest periods are allocated. This may result in the department being short staffed during weekday core working hours and may have a knock on effect as the person who covered a shift and takes compensatory rest may have to have their next shift covered by another colleague.

11. During questions to Mr Kinsella it became apparent that in addition to employees working on the rota there was one other employee who, for historical

reasons, worked 30 hours each week on fixed day shifts. It also became apparent that they had access to bank staff that could be used as and when necessary to ensure the provision of the service.

12. As to annual leave, it can only be taken when rostered on a weekday core shift. If other shifts were being done and time off was required then colleagues would have to swap shifts subject to approval by a manager.

13. Staff on reduced hours on the rota work half the hours, 18.75 hours a week, so that one full-time shift is split between two people.

14. The number of places on the rota, according to an email from Mr Kinsella sent on 15 April 2016, was 18 which varied up and down when they had vacancies.

15. The MLA role was advertised on the NHS jobs website with reference to it operating an out of hours service, 24 hour working, seven days a week. Flexibility to cover for absent colleagues was expected.

16. The claimant applied for the role and was one of three people invited to interview. Mr Kinsella chaired the interview panel on 15 January 2016 accompanied by two colleagues. Standard questions were asked and answered and the panel members determined at the end of the interview process that the claimant should be provisionally offered employment.

17. Mr Kinsella became aware during the interview that the claimant had cystic fibrosis. According to the claimant this came out because in one of his responses to a question at interview he explained that he had attended university and managed to balance his condition and graduated despite the challenges that his illness brought.

18. Mr Kinsella says that at the end of the interview he read out a standard form of words to each candidate to the effect that any offer of employment was subject to pre-employment checks and “medical assessment: your appointment is subject to a satisfactory medical report from the Occupational Health physician”. The claimant remembers something to this effect being stated at the end of his interview.

19. On Wednesday 20 January a letter of provisional offer was sent to the claimant. The offer was subject to the receipt of satisfactory references, a pre-employment health assessment and other matters not relevant to this Tribunal. The letter was sent with a covering email to the effect that the appointment was subject to receipt of satisfactory employment checks. He would receive an email regarding his Occupational Health clearance and as soon as all checks had been completed they would contact him to arrange a start date. They recommended he did not hand in his notice in his current employment until he was notified checks were complete. We had no reason to believe that the Trust sent anything other than its normal standard documents to the claimant.

20. On 4 February 2016 the claimant met with Dr Seed of Well Being Partners, the respondent’s occupational health advisers. He attended with his mother. According to the claimant's witness statement:

> "I explained my conditions to him and Dr Seed stated that he required more information. I suggested that he contacted my consultant and I provided him with his contact details, which Dr Seed confirmed that he would. On 24 February I had an appointment with my consultant who confirmed that he had not heard from Dr Seed."

21. Dr Seed provided a report to the respondent typed on 8 March 2016, having seen the claimant for Occupational Health pre-placement assessment in relation to the post of Medical Laboratory Assistant. Quoting from the report:

> "I can only state that Mr Patel is fit for this role if you are able to confirm whether or not you can accommodate the following as reasonable adjustments for his disabilities:
>
> (1) In relation to his hearing impairment Mr Patel might struggle conducting a telephone conversation in the laboratory if there is background noise. I understand that only a small proportion of the time of this particular MLA is spent speaking by telephone and it might be that relatively simple technical solutions can be achieved following an Access to Work assessment.
>
> (2) In relation to his chronic respiratory condition, cystic fibrosis, Mr Patel requires regular courses of treatment with intravenous antibiotics over a period of 2-3 weeks at a frequency of approximately once every three months. He would need to be away from the workplace for the entirety of those treatment periods.
>
> (3) Both the hearing impairment and the chronic respiratory condition described would almost certainly be considered disabilities according to the definition within the Equality Act."

22. In cross examination the claimant accepted that he had seen a draft of Dr Seed's report and had been provided with a form which said that if he was satisfied with the contents he need do nothing more, but if he wished to make comments or correct facts he could do so in the space provided on the form. If he did not consent to the report being sent he should say so and the report would not be sent but the manager would be informed of the decision. If the report was not questioned it would be forwarded to the department within five days.

23. According to the claimant he had been trying to chase Dr Seed but had problems contacting him. He accepted he did not complete the form to make comments on the draft report. He thought it would be easier to contact Dr Seed on the telephone. He had a conversation with the receptionist who was going to pass a message to Dr Seed. He was aware by 19 April that his message had not got to Dr Seed. He did not know why he did not fill the form in then.

24. The claimant was cross examined about his meeting with Dr Seed, in particular the reference to the need for intravenous antibiotics over a period of 2-3 weeks approximately every three months. The claimant was asked what he had said to Dr Seed and according to the claimant he actually said this was about two years ago. Two years ago he was going every three months but in holiday periods, Christmas, Easter, December, was when he would be admitted to hospital and have

treatment. Since the end of his university course he had been going to hospital less frequently. He had stated every three months in the past but since his graduation it was not as often. He told Dr Seed he had been going less often. He did say that he did not go four times a year. He said maybe once or twice a year depending on how he was feeling. He mentioned three months in the past but clearly stating this was when he was at university when he went in the holidays. He said that he had been admitted for three weeks of treatment but was discharged after two. The claimant agreed that this was not referred to in his witness statement. There were no specific dates of hospital admissions in his statement. The claimant could not remember the dates. He did not give them to Dr Seed on 4 February. As to hospital admissions he could not say with certainty when he would need to go in. He monitored his own condition and sometimes went to hospital when he needed to. It could be for a couple of weeks. He could not predict precisely when he would need time off. It was not as predictable as having to go in, for example, every three months. Admissions to hospital can be planned and they can also be unpredictable. In his case he did not think it had ever happened unpredictably. He kept his condition under control with medication.

25. Mr Kinsella received Dr Seed's report and his understanding of it was that they would not know when Mr Patel needed treatment or how long it would last. He was concerned about the impact that an absence of 2-3 weeks every three months could have on the departmental rota and service delivery. The absence could amount to 12 weeks a year and it would be unscheduled or unplanned. It would put pressure on the existing rota which would be exacerbated if any other staff were absent.

26. On 12 April Mr Kinsella asked Dr Seed if Mr Patel was fit for the role on the basis of the following further information. MLAs participate in an out of hours rota, including shifts requiring lone working at night and weekends/Bank Holidays. The night shift is 12 hours including two 30 minute unpaid breaks. Rotas usually consist of 18 places and run for a period of 18 weeks within which each participant will work seven night shifts, four weekend day shifts and core office hours and late shifts. Rotas are published in advance, at least a month prior to the end of the previous rota. The rota could not be written to accommodate for the claimant's absences as they would not know exactly when they would be and for how long. Sickness absences must be covered by colleagues creating pressure for them as they may have to cover shifts at short notice and work extra night and/or weekend shifts which could impact on the quality of the service. Gaps on the rotas would likely be filled by staff working overtime resulting in pressure on departmental budgets. Sickness absence may impact on annual leave for other staff which may not be granted due to short staffing. If absences were for three weeks every three months this would be 12 weeks a year coupled with five weeks' annual leave: he would not be in the department for up to 17 weeks not including sickness absence which may occur due to other causes. Dependent on the length of absences he may be required to go through continued retraining on his return to work. Given the Trust's attendance management policy, sickness absence trigger points would likely be reached resulting in probable rapid progressions to stage three review.

27. Dr Seed responded on 15 April telling Mr Kinsella that:

> "The regular hospital admissions…are a necessity for Mr Patel in relation to his disabling medical condition. It is your decision whether or not the predicted sickness absences can be accommodated as a reasonable adjustment. If you cannot accommodate this predicted level of absence then he is unfit for the post."

28. Mr Kinsella responded some 20 minutes later with reference to night shifts over 12 hours and was Dr Seed of the opinion that the claimant would be capable of working them? He then referred to some duties of the post of a physical nature. Dr Seed was of the opinion that there was no medical reason why the claimant would be unable to do the range of duties outlined. It was the predicted sickness absence for periodic intravenous antibiotic treatment that he was highlighting as the only issue that they would need to consider as a reasonable adjustment in relation to his cystic fibrosis.

29. Mr Kinsella met with his manager in the presence of an HR officer on 18 April and the conclusion from that meeting was that in the light of the pressures on the rota and the advice received from Dr Seed a decision to withdraw the job offer was a serious consideration. He was to meet with Mr Patel and discuss the difficulties that his projected absences would pose, and he was to ask Mr Patel if Mr Patel could suggest any other reasonable adjustments that the department could offer. A meeting was arranged between Mr Patel and Mr Kinsella on 19 April 2016.

30. According to Mr Patel he explained to Mr Kinsella at the meeting that Dr Seed had misunderstood him and that he had not had admissions into hospital recently as frequently as described in the Occupational Health report. He had been admitted to hospital only three times in the past two years. He did not agree with Dr Seed's assumption he would have such frequent absences and he had asked Dr Seed to contact his consultant who had an in depth understanding of his condition. He told Mr Kinsella he was aware Dr Seed had not contacted his consultant although he had said he would. He had chased Dr Seed and enquired with his consultant who had not received any correspondence from Dr Seed. He did say that after a 12 hour shift he would be tired as would anyone, even a person without disabilities.

31. According to Mr Kinsella at the meeting he explained to Mr Patel the difficulties they would have with the rota in trying to accommodate the absences which Dr Seed described in his report. Mr Patel said he might not need to be off work as much as Dr Seed's report suggested. In recent years he had not had to attend hospital as frequently as stated in the report but he did acknowledge he would have to be absent for about 2-3 weeks and this would be unpredictable and at short notice. He could become tired at work which may affect his health. Mr Kinsella explained that the rota included late and night shifts of 12 hours which the claimant accepted he could find tiring. He explained how unexpected or unplanned absences would affect the rota and the claimant, he says, acknowledged the difficulties they faced. When asked about reasonable adjustments the only thing the claimant could think of was to work reduced hours of about 30 per week. At this Mr Kinsella told him the rota was structured so staff would work either full-time 37.5 or part-time 18.75 hours per week. Mr Patel did not explore if he could work part-time.

32. Mr Patel told Mr Kinsella that he had long QT syndrome but Mr Kinsella did not consider this relevant as Dr Seed had not mentioned it. According to Mr Kinsella

he referred to the attendance management policy explaining to Mr Patel that his expected absences would cause him to progress through the various stages of the policy sooner than other employees would, but that was not his major concern and he was confident that could be dealt with. He was more concerned about the way absences would impact on the rota that he could not see a solution to. According, according to Mr Kinsella he told Mr Patel he was not sure the department could accommodate his absences within the rota and that the provisional offer of employment may have to be withdrawn but he would talk to the HR department.

33. Mr Patel appeared to be upset. He discussed an offer of employment he had received at the Central Manchester University Hospitals NHS Trust.

34. After leaving the meeting Mr Patel contacted his social worker, Rebecca Fallon, and told her what had happened. She said she would contact Mr Kinsella to confirm that hospital admission had not been as frequent as was set out in Dr Seed's letter and she would provide Mr Kinsella with details of his consultant so the treating clinicians could be contacted.

35. At 12:22 on 19 April Mr Kinsella emailed his manager and HR about the meeting he had had with the claimant that morning. The email records some of the matters set out above; in particular that attendances at hospital were not necessarily three months apart and recently the time between them had become longer. When working he could become tired which might affect his health and Mr Kinsella had expressed a concern that working consecutive 12 hour night shifts might exacerbate this. The claimant thought Dr Seed was going to seek a report from the consultant treating him for long QT syndrome but he did not. Mr Kinsella had told Mr Patel about the requirements of the attendance management policy and his concerns he would progress quickly through its stages.

36. Mr Kinsella than reported receiving a telephone call from Rebecca Fallon, a social worker from the Cystic Fibrosis Centre, 15 minutes after his meeting with Mr Patel. She wanted to tell him about cystic fibrosis and asked if he wanted to speak with the medical staff who treated the claimant. According to Mr Kinsella he declined and explained that he took advice from the Occupational Health physician. Ms Fallon asked if she could speak with the Occupational Health physician and he said it was up to her, and whether there was a response was up to the doctor.

37. Mr Kinsella's manager, Alex Prescott, sought an opinion from Paul Henshaw, who at 12:47 on 19 April stated his view that he agreed with Mr Kinsella's summary and it appeared that there would be significant absence each year as a result of the treatment required. In his view Mr Kinsella had rightly explained that he needed someone to cover the rota on a consistent basis and that the work coming into the department was consistent so he could not accommodate a reduction in hours or a varying work pattern. He felt the job offer should be withdrawn and he stated there was no appeal process outlined in the recruitment and selection policy.

38. Alex Prescott who received this email said that she confirmed they would not be able to offer the post to the claimant due to the shift requirements but they could keep his details on the waiting list for the next suitable vacancy. This was conveyed to Mr Kinsella who asked for advice on how he should tell the claimant. He was told:

> "A phone call from you to inform him that unfortunately we will not be able to offer this particular post due to the long shifts and his health condition but we will definitely keep his details and will contact him about any future vacancies."

39. At 15:26 on 19 April Rebecca Fallon sent an email with high importance to Dr Seed, copied to Mr Kinsella and to the claimant, in which she referred to her telephone call with Mr Kinsella. She was writing regarding Mr Patel's pre-employment assessment with some additional information and she would be grateful if he would consider it. She attached a letter for him to view at his earliest convenience.

40. Her letter came from the Manchester Adult Cystic Fibrosis Centre, a part of the University Hospital of South Manchester NHS Foundation Trust. It was to provide Dr Seed with some additional information about the claimant's cystic fibrosis. It stated that he may be more susceptible to experience chest exacerbations due to his cystic fibrosis and he had a daily treatment regime to treat his symptoms and maintain his health. When unwell Mr Patel can require hospital admission for additional treatment such as intravenous antibiotics. She referred to Dr Seed's report with the reference to 2-3 weeks every three months in hospital, but he had not recently required such frequent admissions as this. In the past 16 months from January 2015 until 2016 so far he had required only two hospital admissions of 14 and 19 days' duration. She felt this was important to highlight due to the variability of the condition and the relationship with the reasonable adjustments recommended in his report. In the light of this information could he amend his report to accurately reflect it? She went on to state that although some admissions were unexpected there are occasions when they are partially planned enabling a period of notice to employers to make necessary arrangements within the workplace. Many patients with the condition successfully maintain employment despite going into hospital when unwell. She referred to Mr Patel having successfully undertaken full-time studies at school, college and university while managing his health conditions thus highlighting his motivation and commitment. In conclusion the medical team at the Manchester Adult Cystic Fibrosis Centre would welcome the opportunity to discuss the situation further if Dr Seed would like any additional clarification.

41. According to Mr Kinsella he received that email but he did not think their decision would have to change on the basis of it. It stated that Mr Patel might require treatment less often than Dr Seed had said which Mr Patel had already made him aware of. Also the letter did not mention any of the difficulties they would face with the rota although he had discussed them with Mr Patel directly.

42. Mr Patel was spoken to later than afternoon by Mr Kinsella and told that the provisional offer of employment was withdrawn because the department's rota could not be adjusted to cope with his periods of absence.

43. Mr Kinsella does not appear to have left any time for Dr Seed to intervene before he made his call to the claimant withdrawing the offer of employment.

44. According to the claimant Mr Kinsella said his absences would be too much, that he could not do the role and that the offer would have to be withdrawn. The claimant could not believe it and was extremely shocked. He did not think that he

was being listened to. He said to Mr Kinsella he believed he had been unfairly treated and it was all because of the way they had looked at his disability.

45. Mr Kinsella wrote to the claimant on 21 April having received a call from his mother asking to clarify reasons why the offer was withdrawn. This letter to the claimant stated Mr Kinsella's understanding that his social worker had sent a letter to Dr Seed and they were awaiting the outcome of that correspondence. On the basis of the advice received from Dr Seed he confirmed that the provisional offer of employment as an MLA, including shift work, had been withdrawn but with Mr Patel's permission he would keep his details on the waiting list with a view to contacting him should a suitable vacancy become available.

46. When the claimant received that letter he spoke to Mr Kinsella by telephone and then followed it up on 25 April with an email saying he wanted a clear reason on why the offer had been withdrawn. It had not been clearly stated as to the reason for withdrawing the offer. He referred to their letter of 21 April noting that from the advice taken from Dr Seed they would withdraw the offer, yet Dr Seed's letter had deemed him fit to work dependent on reasonable adjustments being made by the Trust.

47. Mr Kinsella sought advice on how to respond. Mr Henshaw said he would be happy to provide some further information regarding the fact that they "couldn't 'reasonably' accommodate his expected periods of absence (and provide a service to the Trust at the same time!)", but they just needed to strike a balance about giving too much information. The Trust, he wrote, was under no legal obligation to offer work in these circumstances and he was comfortable they did their utmost to gather all the facts so that could make a fair and informed decision. They just needed to get that message across to the family.

48. The Trust's position was set out in a letter sent by Mr Kinsella to the claimant on 27 April in which he confirmed the circumstances leading to the decision to withdraw the provisional offer of employment as an MLA. The offer was subject to a health assessment. Following the report from the Occupational Health consultant and discussions with the claimant:

> "It became clear that your existing medical condition (cystic fibrosis) would require considerable absence from the workplace each year; therefore the Trust needed to determine whether it would be reasonable for us to make adjustments to accommodate this requirement. Unfortunately, after very careful consideration, we determined that we could not reasonably adjust the rota or working requirements of this post, and regretfully had to withdraw the offer we made to you. I do understand your upset however I hope this letter provides some assurance that the Trust did consider your circumstances and medical condition fully before reaching the decision to withdraw the offer of employment."

49. On 11 May Rebecca Fallon sent a formal grievance on behalf of the claimant. She referred to the employment offer being subject to satisfactory pre-employment checks as a result of which the claimant met with Dr Seed on 4 February. Dr Seed failed to contact the specialist Cystic Fibrosis Centre for further information despite encouragement to do so. She referred to Dr Seed's report. She raised the following grievances on behalf of Mr Patel:

- Mr Patel was verbally assured he was being offered a job over the telephone, prior to him declining a separate job offer at a different hospital.

- Dr Seed did not seek any further medical information from the Manchester Adult Cystic Fibrosis Centre before recommending the reasonable adjustment of the regular hospital admissions (which may or may not occur).

- During your meeting with Mr Patel on 19 April you expressed that you felt the job may be tiring for him and that the service may be affected if Mr Patel's condition deteriorates or if he is unwell.

- My correspondence to Dr Seed and yourself to give further information and clarity on the actual number of Mr Patel's previous hospital admissions was not acknowledged.

- Your letters to Mr Patel have since not explained why the Trust would not be able to make recommended reasonable adjustments.

50. Ms Fallon referred to discrimination arising from disability and expressed her belief that the withdrawal of the provisional offer of employment could not be objectively justified because reasonable adjustments had not yet been fully considered or implemented. She then went on to deal with the reasonable adjustments, suggesting that the adjustment which she considered they had failed to make was to allow him to have time off work for hospital admissions if unwell with cystic fibrosis. She did not believe they had considered the information provided by her that the reasonable adjustment suggested by Dr Seed was based on an assumption of hospital admission for 2-3 weeks every three months. This was not based on actual events and was a prediction of events which may or may not occur. Further, no detailed explanation or reason why such reasonable adjustment could not be made had been provided, merely a statement that they could not reasonably adjust the rota or working arrangements.

51. The claimant, she wrote, did not consider he had had a satisfactory explanation of the process taken by the respondent when reaching the decision to withdraw the job offer and he was not satisfied with the outcome. She hoped to receive a response in writing within 14 days or in accordance with the respondent's procedure.

52. According to his witness statement Mr Henshaw first became involved on 19 April when he agreed with Mr Kinsella's assessment that they could not accommodate the claimant's absences in the rota. He received a copy of Ms Fallon's letter of 11 May setting out the grievance, but in his view as the claimant was not and had never been an employee of the Trust the Trust's grievance policy did not apply. He agreed to consider the complaint under the recruitment and selection policy which makes provision for complaints. If an applicant considers that the recruitment process has been mismanaged they can complain in writing to the Head of Employee Resourcing within 28 days. A full response to any complaint will be sent within ten working days or a holding reply will be sent if this is not possible.

53. Mr Henshaw responded in writing on 13 June. No meeting appears to have taken place with the claimant before the response was sent. He apologised for the delay in responding due to the time he had taken to investigate issues and collect the information.

54. As to a verbal assurance of a job being given leading the claimant to reject another offer from a different NHS Trust, he confirmed a verbal offer was made but on a provisional basis subject to satisfactory completion of pre-employment checks. This was confirmed in writing on 20 January. He could find no evidence that the offer made was anything other than a provisional offer.

55. He then went on to deal with the matters relating to the claimant's condition and the ability of the Trust to make reasonable adjustments to the role provisionally offered. His findings were as follows:

> "(1) Due to information provided on your Occupational Health questionnaire you were asked to meet with Dr Martin Seed who is our Occupational Health Consultant to undertake a health pre-placement assessment.
>
> (2) Dr Seed produced a report letter following that assessment meeting which outlined the view that *'I can only state that Mr Patel is fit for this role if you are able to confirm whether or not you can accommodate the following as reasonable adjustments for his disabilities'.* He then went on to outline that in his opinion your hearing impairment could be reasonably accommodated within the requirements of the role you had been provisionally offered. With regards to your cystic fibrosis he outlined that: *'Mr Patel requires regular courses of treatment within intravenous antibiotics over a period of 2-3 weeks at a frequency of approximately once every three months. He would need to be away from the workplace for the entirety of those treatment periods'.* Dr Seed has confirmed that these timescales were discussed with you as part of the assessment meeting.
>
> (3) On receipt of Dr Seed's letter Mr Kinsella arranged to meet with you to discuss the report on 19 April. Mr Kinsella and yourself discussed the predicted timescales indicated on the report and you confirmed that you felt the timescales for absence indicated were correct but did confirm that frequency of hospital attendance were not always three months apart and that recently the time between attendances had become longer. You did confirm to Mr Kinsella that when you are working you could become tired which could affect your health. Mr Kinsella outlined the complexity of the rota in operation within his service and expressed his concerns of the effect of working consecutive 12 hour shifts may have had on your health. Mr Kinsella asked you for your suggestions with regard to reasonable adjustments you felt would help you undertake the duties of the role. You suggested part-time working but Mr Kinsella outlined that this would not be possible because of the rota requirements. Mr Kinsella indicated to you that if the Trust decided to withdraw our offer to you on health grounds we would consider you for any roles in the department which became

available in the future where rota working was not required and adjustment of working hours could be considered.

(4) As a result of Dr Seed's report and Mr Kinsella's meeting with you a decision was taken on 20 April to withdraw the offer of employment to you on the grounds of your ability to undertake the required duties of the role due to your health.

(5) Ms Fallon wrote to Dr Seed on 19 April to provide additional information about your condition, in that letter she explained that you had not required such frequent admissions as outlined in Dr Seed's report and confirmed that in the period Jan 2015 until 19 April 2016 you had only required two hospital admissions with durations of 14 and 19 days respectively. This letter was only received after the decision to withdraw was taken and you were notified of this decision.

Therefore, in the light of the above, the decision for me is whether the recruiting department view that reasonable adjustments could not be accommodated was correct. After reviewing the evidence my view is that the correct process was followed and the correct decision was reached."

56. Mr Henshaw then went on to give reasons which are summarised as follows:

(a) The Trust based the decision on predicted future absence from the information provided by Dr Seed and by the claimant. It was clear that absence could be expected. Ms Fallon's letter also supported the view that absence could be expected because of the cystic fibrosis.

(b) The complex requirements of the role where he went on to set out the shift pattern over an 18 week cycle.

(c) Reasonable adjustments could not be accommodated. The department needed to consider if any reasonable adjustments could be made to accommodate the medical condition and any predicted absence. The department operated an out of hours service. Working outside the rota could not be considered within the remit of the need to provide a service. He then went on to set out other rota requirements considered with regard to reasonable adjustments, such as there was only one MLA rostered onto night, weekend core and weekend late shifts. Rotas are issued around two months in advance meaning that any short/medium notice absences could not be built into the rota but this did allow staff to plan/book annual leave and perform swaps as required. Where someone was on sickness absence someone would have to step in. This may create a hole elsewhere on the shift which would involve paying overtime at risk to departmental budgets. Those covering night shifts would need rest time creating another hole in the rota. If extra hours were worked people were paid overtime or had time in lieu. The standby system was designed to cover short-term sickness absence. Other staff may have sickness absence creating more holes in the rota and the service may be at risk if they cannot cover a shift at short notice. Frequently asking other staff to move shifts and work extra out of hours' sessions would impact on their

health and wellbeing. Mr Henshaw took the view that in the light of the above it was clear that reduction in working hours, flexible working or any other adjustments of duties could not be reasonably accommodated without compromising service delivery.

(d) A duty of care involved the Trust considering the impact on the claimant's health in the light of his medical condition and the information he had provided to Mr Kinsella. The department decided that in the light of the fact that reasonable adjustments could not be accommodated the requirements of the role may have adversely affected the claimant's health.

57. In conclusion he supported the decision to withdraw the provisional offer of employment, and under Trust policy there was no further appeal to follow and his decision was final.

58. In cross examination Mr Henshaw confirmed that he had been involved in the decision made on 19 April. He had agreed with Mr Kinsella. At that stage he had not seen Dr Seed's report and Ms Fallon's letter had not yet been received. He was taken to the Trust's recruitment and selection policy, and in particular paragraph 6.1 regarding equal opportunities in employment. He thought the reference to allegations of discrimination being dealt with under the Trust's disciplinary policy, grievance procedure or dignity and respect at work policy as appropriate related to the Trust's employees and managers and not to candidates. The managers had a duty to ensure discrimination was removed from the process.

59. He confirmed no-one had gone back to Dr Seed following the letter from Ms Fallon which stated absences may be expected. He could not say Dr Seed's letter was incorrect. Dr Seed had been employed by the Trust for a long time and he did not think they should be challenging the information provided by a clinician. He was aware the MLA team had a small bank. It did not concern him that this had not been noticed. It was clear to him that Mr Kinsella had looked in depth at the rota considering whether reasonable adjustments could be made to it. He was unaware adjustments had been made for a part-time employee to work on the rota.

60. He did not meet the claimant. If he felt the information he had was not sufficient he may have considered meeting with the claimant. He did not speak to Ms Fallon either. He could not say if adjustments could have been made had he taken the opportunity to speak to either or both of them.

61. He did not sit down with the list of potential adjustments and consider what might have been done. He agreed there was no list of the things that he considered.

62. When Mr Kinsella was cross examined he was asked about the claimant's absences as set out in Ms Fallon's letter. He agreed that two admissions to hospital of 14 and 19 days in 16 months was quite different from four times a year, but what was beyond doubt in his mind was that lengthy absences were going to occur. They would be unplanned or on short notice and would impact on the working rota. That the absences were unplanned was an assumption he made based on information he had been given. It was not for him to contact the claimant's doctor; this should be done by someone with medical qualifications. Mr Kinsella relied on Occupational

Health to assess a candidate's medical status with regard to the job they applied for. The claimant had not challenged Dr Seed's report even though he had the opportunity to do so.

63. He was referred to a letter from Professor Webb (the claimant's treating physician) that was allowed in to the evidence by the Tribunal on the first morning of the hearing.

64. In a letter dated 31 January 2017 to the claimant's solicitor, Professor Kevin Webb, Clinical Director of the Manchester Adult Cystic Fibrosis Centre, wrote in answer to questions raised by the solicitor He had not been contacted by Dr Seed or the Trust with regard to providing information concerning the job Mr Patel had been appointed to. As to what he would have said about his cystic fibrosis and potential absences he would have replied that his condition was medically stable. He would have confirmed three routine admissions for intravenous antibiotics in the year 2014; one admission in 2015 and two admissions in 2016, thus concurring with what Mr Patel said that the admissions had decreased in frequency. He would also add that Mr Patel had just be commenced on groundbreaking genetic transforming drug likely to make his condition even more stable and decrease his admissions to hospital for intravenous antibiotics. He would therefore have disagreed with Dr Seed about the stated frequency of Mr Patel's required hospital admissions. The proof was said to be in the medical records that he had provided. (The Tribunal was not provided with the medical records that Professor Webb referred to). Finally, he referred to Mr Patel having already undertaken a similar role at Central Manchester with no absences and no detriment to his health. He then referred to an email with reference to a phone call from Rebecca Fallon saying she would have liked to have spoken to the medical staff regarding the medical care Mr Patel receives on the unit and this was actually refused.

65. Having looked at this letter Mr Kinsella said he took the recommendations from Dr Seed the Occupational Health physician and it would not have changed his view. He would have referred it to Occupational Health for an opinion. The hospital admissions still may have been unplanned and unpredictable. All he says is that the claimant is medically stable. For him the issue was with regard to absences which could be unplanned and with short notice. At the meeting with the claimant he went through the rota and expressed his feeling that he could not come up with an adjustment that would suit the claimant.

66. He was asked about a trial basis and said this was a possibility. He guessed he could have tried and seen if it worked. He left speaking to the claimant's treating doctors to the trust's Occupational Health physician.

67. As to a trial period, he would have to discuss with HR and his line manager as to whether or not they could do it. He would not make that decision independently. As to a period of probation, that would be difficult to assess and also to set the length of a trial. There would be a three month training period before he started on the rota and so he would need to see him on the rota after three months. If the claimant had been taken on and absences happened he would have to consider how the rota would accommodate admissions to hospital of the claimant. If the absences were 2-3 weeks and unplanned and at short notice it would put pressure on the rota and the

service. It can come down to the goodwill of existing staff doing extra shifts but this has an impact on their health and wellbeing – possibly. As to budgetary impact, they do not have a budget for overtime. A premium rate of 1.5 times the hourly rate is paid where someone works more than 37.5 hours in a week. If someone volunteered to do an extra night they would have to cover that person's late shift, creating an extra hole in the rota.

68. As to part-time work, from what he recalled the claimant wanted a full-time post. Frequency of absences was his main concern and how they would impact on the rota. He was looking at frequency, duration, unpredictability and the most difficult aspect was unpredictability.

69. In the rota there is built in a facility for a standby shift designed to deal with short-time absences. For lengthy absences standby would not work. They would be relying on goodwill of staff which would create holes in the rota and would impact on the budget. The length of absences would cause the most problem.

70. As to sickness absence there were the trigger points. In this case it could mean progressing if there were frequent absences. He mentioned it in his meeting as a statement of fact. Either way they would have dealt with it according to the requirements of the policy. There is leeway in the policy not to automatically move to the next stage.

71. In answer to questions from the Tribunal he confirmed that there was a facility to use bank staff who were paid at a grade lower than the substantive MLA role. When bank staff are employed they tend to work on days. Using bank staff was not a process he considered. They tend to come in on an ad hoc basis. They were using one member of bank staff at that time. Availability of bank staff comes and goes. In addition to the staff on the rota he confirmed that they had one member of staff working at 80%. This was a historical matter. The person concerned had health issues. They did not have any other roles that required daytime working only. The person had a disability.

The Law

72. Section 15 of the Equality Act 2010 provides as follows:

> "(1) A person (A) discriminates against a disabled person (B) if--
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

73. Sections 20 and 21 of the Equality Act 2010 provide as follows:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to –

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	Applicable Schedule
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

74. The Equality and Human Rights Commission: Code of Practice on Employment (2011) provides a detailed explanation of the equality Act 2010 to assist Tribunals when interpreting the law. Chapter 5 of the Code relates to discrimination arising from disability. It explains the duty of employers not to treat disabled people unfavourably because of something connected with their disability. The question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability. There is no need to compare a disabled

person's treatment with that of another person. Unfavourable treatment involves the disabled person having been put at a disadvantage such as being refused a job.

75. At 5.11 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a proportionate means of achieving a legitimate aim. The Code of Practice explains the objective justification test, noting that it is for the employer to justify the treatment and it is for the employer to produce evidence supporting the assertion that it is justified and not to rely on mere generalisations.

76. At 4.27 the Code states that the question of whether a provision, criterion or practice is a proportionate means of achieving a legitimate aim shall be approached in two stages:

(a) Is the aim of the provision, criterion or practice legal and non discriminatory, and one which represents a real, objective consideration?

(b) If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

77. For an aim to be legitimate it should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

78. Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

79. If the aim is found to be legitimate the means of achieving it must be proportionate. This involves a balancing exercise conducting a proper evaluation of the discriminatory effect of the PCP against the reason for applying it taking into account all relevant facts. When undertaking this role the term "proportionate" is regarded as meaning "appropriate and necessary" but "necessary" does not mean that the PCP is the only possible way of achieving the legitimate aim. It is sufficient that the same aim could not be achieved by less discriminatory means. The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular PCP. Cost can only be taken into account as part of the employer's justification for the PCP if there are other good reasons for adopting it.

80. The Code of Practice deals with the relevance of reasonable adjustments in a section between discrimination arising from disability and the duty to make reasonable adjustments. The Code says that employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified. Even where an employer has complied with a duty to make reasonable adjustments in relation to the disabled person they may still

subject a disabled person to unlawful discrimination arising from disability. This is likely to occur where, for example, the adjustment is unrelated to the particular treatment complained of.

81. Chapter 6 of the Code of Practice deals with the duty to make reasonable adjustments which is a requirement for employers to take positive steps to ensure that disabled people can access and progress in employment. It means taking additional steps to which non disabled workers and applicants are not entitled.

82. The phrase "provision, criterion or practice" is not defined but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

83. The duty to make adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. "Substantial" is more than minor or trivial. Whether such a disadvantage exists is a question of fact to be objectively assessed.

84. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question.

85. The Act does not specify any particular factor that should be taken into account when deciding what reasonable steps are. It depends on all the circumstances of the individual case. There is no onus on the disabled worker to suggest what adjustments should be made although it is good practice for employers to ask. Where the disabled person does so the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

86. The Code of Practice suggests some factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- The practicability of the step;
- The financial and other costs of making the adjustment and the extent of any disruption caused;
- The extent of the employer's financial or other resources;
- The availability to the employer of financial or other assistance to help make an adjustment;

- The type and size of the employer.

87. Ultimately the test of the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

88. The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for the employer to have to make. So, where the duty applies, it is the question of reasonableness which alone determines whether the adjustment has to be made.

89. The Code of Practice gives examples of steps it might be reasonable for employers to have to take. The first one relevant to this case is allowing the disabled worker to be absent during working hours for rehabilitation, assessment or treatment. The example is an employer allows a person who has become disabled more time off work than would be allowed to non disabled workers to enable him to have rehabilitation training. A similar adjustment may be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway. The second is allowing a disabled worker to take a period of disability leave with the example being a worker who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period.

Submissions

90. Counsel for the claimant refers us to the amended list of complaints and issues with the relevant disability being the claimant's cystic fibrosis. Although the claimant has a hearing impairment this is not a relevant factor in this case.

91. As to the claim of discrimination arising from disability there are two issues: firstly the need for an Occupational Health assessment and did it arise because of the claimant's disability? The second, was the withdrawal of the job offer justified i.e. was it a proportionate means of achieving a legitimate aim?

92. The Tribunal will need to make a determination of fact as to whether the referral of the claimant to Occupational Health arose as a result of his disability, which he flagged up in his interview, or was part of the ordinary course of the respondent’s interview and selection process. The Tribunal will then need to deal with the more substantive issue of whether the withdrawal of the job offer was capable of justification. In his submission it is incumbent on an employer to provide cogent evidence of justification, asking the Tribunal to note that the claimant is currently performing a broadly similar role and has been able to perform his tasks well (including overtime). This ought to be a matter the Tribunal is mindful of when assessing if the evidence on justification can be accepted as discharging the burden of proof upon them. Counsel refers to the justification being set out most extensively by the respondent in their letter of 13 June and continued by arguing that:

> “The material sticking point appears to be the ‘complex requirements of the role’ (or in reality the rota to work 24/7). The claimant has not seen any evidence adduced by the respondent as to any alternative means of achieving a 24/7 provision (even if the Tribunal accepts this is a legitimate aim). This ought to give

the Tribunal cause for concern as it demonstrates a lack or critical thinking about how the claimant could be accommodated into the role."

93. Counsel for the claimant points out that the respondent relies heavily upon the evidence of Dr Seed with there being no suggestion that he has any specialist understanding of cystic fibrosis. The respondent is not entitled to rely on the evidence of an Occupational Health specialist in an uncritical way. In this case the respondent was prepared to make a determination on the ability of the claimant to undertake the role on the advice of Dr Seed alone. No efforts were made to contact the claimant's treating clinician and/or social worker who could have easily arranged for a specialist opinion to be provided. Look at the considerable period of time between the withdrawal of the job offer and the outcome letter and compare this with the very short period of time between Professor Webb being asked for and producing his letter of 31 January 2017. The claimant submits the respondent could easily have obtained accurate medical information from the claimant's treating doctor to enable them to make a knowledgeable decision as to whether or not the claimant could do the role and what adjustments were required.

94. As to the alleged failure to make reasonable adjustments, the claimant submits that the first and second PCPs cannot be divorced from the failure of the respondent properly to address what impact the claimant's disability would have had on his ability to manage the work rota. The claimant argues that the Tribunal needs to determine if the respondent did take reasonable steps, including understanding the likely sickness absence the claimant would need to take. Further, the respondent asserts that the rota is complicated and could not be adjusted to meet the claimant's requirements. In her submission it is not sufficient for the respondent to maintain this position without there being genuine reasons why the rota had to be organised in the way it was, especially as it was conceded that the impact was discriminatory. The failure by the respondent to obtain further evidence as to the claimant's disability and its impact put him at a clear disadvantage. The respondent made an active decision not to seek additional medical opinion to get a proper understanding of the disability. The claimant was placed at a clear disadvantage, having the job offer withdrawn in circumstances where he would have been able to fulfil the role, as evidenced by his subsequent performance in employment with Central Manchester.

95. The preceding submissions were counsel's opening skeleton argument. At the end of the case Ms Ibrahim made further oral observations. This was a claimant with a disability who wanted to work and was willing to work but did the respondent take the appropriate steps to enable him to perform the role? It is not for the claimant to provide compelling evidence as to reasonable adjustments.

96. She referred to the Code of Practice on Employment (2011) at paragraph 18.18 – employers should ensure that all workers understand the equality policy, how it affects them and the plans for putting it into practice. The best way to achieve this is by providing regular training. Mr Kinsella did not appear to follow through the respondent's policy on regular training. The Tribunal can take into account matters set out in the Code and whether or not the respondent had complied with them. Mr Kinsella's lack of up-to-date training was relevant to this.

97. As to the respondent's rota, she said there could have been adjustments to it and the respondent did not readily consider adjustments which was not a great help. In her submission Mr Kinsella did not think about it. There would, however, always be absences that needed to be adjusted for. One member of staff had an exception made and there might be a bank worker. The burden was on the respondent. Did the respondent apply its mind properly on 19 April? She referred to the question of reasonable steps in the Code of Practice as set out already above. She reminds us that there is no onus on the disabled worker to suggest what adjustments should be made.

98. The Code of Practice at 6.35 – in some cases, a reasonable adjustment will not succeed without the cooperation of other workers. Colleagues as well as managers may therefore have an important role in helping ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act to argue that an adjustment was unreasonable because staff were obstructive or unhelpful when the employer tried to implement it. An employer would at least need to be able to show that they took such behaviour seriously and dealt with it appropriately. Employers will be more likely to be able to do this if they establish and implement the type of policies and practices described in chapter 18.

99. In this case, the claimant submits, the Tribunal has not been shown any attempt on the part of the respondent to get the goodwill of the people on the team.

100. As to the length of time the claimant might be absent 2-3 weeks every three months, up to 12 weeks, is a considerable period, but there is a great difference between the view of Dr Seed and the information provided by Rebecca Fallon – a less bleak picture. Mr Kinsella seemed to be of the view that there was no difference between them. Again on Dr Seed's report the claimant had a meeting with Mr Kinsella and was able to tell him that it was not correct. As to any further information from Dr Seed, there was no response at all so it cannot be inferred whether or not he had considered it.

101. As to the absences, Dr Seed has not corrected his report. Mr Kinsella relied on Dr Seed. Dr Seed nowhere deals with the information provided by Ms Fallon.

102. As to matters considered by Mr Kinsella related to the absences – frequency, duration and unpredictability. Until the respondent formed a view as to which was the most important of these it was impossible for them to know what they needed to adjust to.

103. The respondent produced a written skeleton argument and then supplemented it orally. After setting out the facts Ms Eeley moved on to section 15 with the respondent accepting that the withdrawal of the job offer was unfavourable treatment and it was because of something arising from the claimant's disability, namely his anticipated unavailability. The need for an Occupational Health assessment was not causally relevant and did not arise from the disability. The respondent asserts that the unfavourable treatment was a proportionate means of achieving a legitimate aim, which was managing the rota so as to ensure proper service delivery. As to the rota, it had been designed so as not to compromise patient safety and to facilitate effective and prompt diagnosis and treatment. The

respondent had to achieve this, operating under budgetary constraints and to ensure that adequate rest breaks were given to all staff on the rota. There was very little give in the rota. Every change would have a knock on effect in relation to ensuring staff covering absences had compensatory leave and adequate rest breaks before their next shift. There may need to be additional overtime costs. There was a need to plan the rota as far in advance as possible and stick to it as far as possible.

104. The respondent's decision should, it is submitted, be assessed and judged against the background of the known information at the time the decision was made and not with the benefit of hindsight. The claimant's subsequent levels of absence could not be relevant.

105. As to Dr Seed's report, this was based on information provided by the claimant as to the level of absences. The claimant subsequently suggested in discussion that the absences were less frequent but nonetheless he accepted they were unpredictable and relatively lengthy. It was these factors which were the key ones making them so difficult to manage on the rota. Whether they were once every three months or less frequently they would still be unpredictable and would last 2-3 weeks. Such absences would not be reasonably practicable to manage within the current rota system hence the respondent could rely on the evidence it had obtained from the claimant and Dr Seed to make its decision. In her submission the respondent was not required to consult with the claimant's treating doctor as well. There is no suggestion he would have said at the time that the absences would be shorter and crucially entirely predictable. The respondent is entitled to rely on the evidence of its own Occupational Health physician. It is important for the respondent to have an impartial medical opinion with all candidates being assessed against the impartial medical standard. If the Occupational Health doctor requires further information it is for him to say so before providing an opinion. Dr Seed did not indicate he required further information before reaching his conclusion. The respondent was entitled to rely on this.

106. As to the claimant's current employment, the fact that the current employer has managed to accommodate the claimant is not relevant. What the Tribunal must consider is the respondent's legitimate aim set against the respondent's circumstances. In any event there is a lack of evidence as to the comparable position of the two Trusts.

107. As to the statutory defence, see the guidance provided by the Court of Appeal in **Hardy & Hansons PLC v Lax [2005] ICR 1565**. The Court of Appeal held that when determining whether an indirectly discriminatory practice was objectively justified under the Sex Discrimination Act an Employment Tribunal was required to make its own judgment as to whether, on a fair and detailed analysis of the working practices and business considerations involved, the practice was reasonably necessary and not whether it came within a range of reasonable responses. The appellate courts had to consider critically whether the Employment Tribunal had understood and applied the evidence and had assessed fairly the employer's attempts at justification. She went on to refer to **Hensman v Ministry of Defence UKEAT/0067/14 DM**, a decision of Mr Justice Singh sitting alone. Paragraph 44 – *"I accept the submission that the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business*

considerations involved. In particular it must have regard to the business needs of the employer. This is particularly reinforced in a case such as the present where the Employment Tribunal had already found…that the respondent had legitimate aims to be served. Furthermore, in this context I accept Mr Tunley's submission, based on paragraph 33 of Pill LJ's judgment which I will now quote so far as material, 'this is an appraisal requiring considerable skill and insight. As this court has recognised in ***Allonby*** *and in* ***Cadman*** *a critical evaluation is required and is required to be demonstrated in the reasoning of the Tribunal'. As Pill LJ then said towards the end of the same paragraph '…the statutory task is such that, just as the Employment Tribunal must consider a critical evaluation of the scheme in question so must the appellate court consider critically whether the Employment Tribunal has understood and applied the evidence and has assessed the employer's attempt at justification'. It is important to remind oneself, as I was reminded by Mr Nicholls, that in the intervening passage in paragraph 33 there is this important statement by Pill LJ, 'In considering whether the Employment has adequately performed its duty, appellate courts must keep in mind…the respect due to the conclusions of the fact finding Tribunal and the importance of not overturning a sound decision because there are imperfections in presentation'. Mr Nicholls also reminded me that the burden of proof in respect of showing justification in this context lies upon a respondent. Nevertheless I accept Mr Tunley's criticisms of paragraph 116 of the Tribunal's judgment. In particular, it does seem to me that the Tribunal failed to assess, the balancing exercise which it had to perform, the particular considerations which were weighing upon the respondent's mind in the present case. Those considerations were not simply confined to the fact of a criminal conviction having been admitted by the claimant. They related, in particular, to questions of breach of trust and convert conduct on the part of the claimant. Although the Tribunal was entitled to, and had to, come to its own objective assessment of proportionality, as it sought to do at paragraph 116 of its judgment, it does not seem to me that it erred in its approach because it simply did not refer, let alone analyse in the balancing exercise, those business needs of the employer in this context".*

108. The respondent contends that its aim was legitimate and the mean deployed to achieve it were proportionate in all the circumstances. It would be disproportionate to require the respondent to redesign the whole rota system to accommodate the claimant and disproportionate to require the respondent to take on the claimant as an employee knowing there will be periodic absences which cause significant disruption to the rota and to its existing employees with accompanying requirements for compensatory leave, adequate rest breaks and potential additional financial cost in terms of overtime payments. The respondent owed a duty of care to its patients and existing employees and had to be mindful of the impact on budgets.

109. As to reasonable adjustments, the respondent accepts that the first PCP was applied – a requirement that a candidate for employment be available to meet the requirements of the respondent's rota. The respondent does not accept that the second PCP – a practice of not employing someone whose sickness absence level is anticipated to exceed the trigger point under the respondent's sickness absence policy – was applied. Sickness absence was not a factor in this case. The first PCP was applied and because of that the issue of exceeding sickness trigger points did not come into question. In any event it was largely the unpredictability of the absences which was the problem because of the impact it had on the rota and the

fact that the respondent would not be able to make adjustments in advance and avoid the knock on effects of last minute changes. In her submission if the claimant's absences had been predicted to be of the same length (2-3 weeks at a time) and likely to trigger the sickness points but were predictable in advance, it was unlikely to have caused a problem in withdrawing the offer. The respondent would have had the opportunity to consider whether to adjust the trigger points if it became an issue but the issue never arose. There is no evidence to show that if applied to the claimant the PCP was a general application to disabled and non-disabled candidates alike.

110. The respondent does not accept that the third PCP which related to obtaining further information was applied. The respondent took into account the intimation from Dr Seed in his initial report and his response to the request for clarification. It also took into account the claimant's evidence given both to Dr Seed and to Mr Kinsella and the correspondence from Rebecca Fallon. Had the information provided triggered any requirements to consider further information or reports then the respondent would have obtained them but what was available gave the necessary information to the respondent which it considered in the round. Further medical opinion would not have changed the unpredictability of the claimant's condition. Further, there is no evidence that if this PCP was applied to the claimant it was applied generally to other disabled and non-disabled candidates.

111. If the Tribunal finds that PCPs one and two have been applied and placed the claimant at a substantial disadvantage due to his disability, the claimant contends for two reasonable adjustments. The respondent contends that it could not make the first reasonable adjustment and tolerate the absences and arrange for the claimant's role to be covered by others on the rota. It relies upon the factual and evidential considerations placed before the Tribunal. Such an adjustment would not be reasonable or feasible within the respondent's organisation and the service it was attempting to deliver. The Tribunal must consider the circumstances of this respondent and not those of other employers. Even if the Tribunal were to conclude such an adjustment would have been physically possible that is not the same as concluding that the adjustment would be reasonable, which is the legal test.

112. The respondent accepts that the second adjustment contended for related to a higher level of sickness absence before triggering matters under the sickness absence policy would have been reasonable but as the second PCP was not applied the need for adjustment did not arise.

113. The respondent does not accept that the third PCP concerning further information if applied placed the claimant at a substantial disadvantage. Further information could be just as necessary in the case of someone with a condition which did not constitute a disability. The absence of such information could be just as detrimental to a non-disabled comparator's chances of being employed by the claimant as to the claimant's chances.

114. If the third PCP was applied and it did put the claimant at the requisite disadvantage it is not accepted that the reasonable adjustment claim succeeds. Consideration of further information about absences would have made no difference to the respondent's decision as none of the information indicated the claimant's absences were predictable and could be planned and scheduled in advance. In

effect it is submitted the adjustment contended for is a duty to consult the claimant. This is not a reasonable adjustment in itself – see **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664**. There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustment might be made. The only question is, objectively, whether the employer has complied with his obligations or not. (Even though it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so, because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments). If the employer does what is required of him then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance but that is enough. Conversely, if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

115. The requirement to obtain and consider a report from the claimant's treating consultant would not, in the submission of the respondent, be a reasonable adjustment. It would not alter the fact that the absences could not be pre-scheduled and would be lengthy when they took place. It would not be reasonable to require the respondent to go behind the advice of the Occupational Health adviser in circumstances where the doctor knows of the condition and the option to consult the treating clinician but has not in his professional opinion concluded any further information is required before he can give his opinion. The respondent, it is submitted, is entitled to rely on the professionalism of its Occupational Health provider. Candidates should be approached with a degree of consistency utilising an impartial Occupational Health expert who can assess the medical condition against the backdrop of the requirements of the job in question. This will be undermined if some candidates were able to rely on their own doctors and others were not. Flexibility is provided by the Occupational Health doctor requesting further information if the doctor thinks it necessary.

116. In her oral submissions Ms Eeley said that the Occupational Health assessment was a blanket requirement. It did not arise from the disability. Mr Kinsella had not rubberstamped Dr Seed's report. He had required clarification. The letter from Ms Fallon was directed to Dr Seed and copied to Mr Kinsella. Dr Seed did not respond.

117. Dr Seed's report referred to quarterly absences. From a conversation with the claimant the frequency was reduced.

118. Looking at the report of Professor Webb it does not say what information would have been available had the request been made in April 2016. There is no evidence when the new drug was taken and how it would impact on the claimant. It is a matter of speculation. There was no requirement for the respondent to have obtained such evidence.

119. As to the section 15 claim and various factual matters, the first time the question of a trial period had been raised was in cross examination. Would the adjustment work? If applied it might prove the claimant could get through a period

without absence but would not show what would happen after. At some point the claimant would have to go to hospital.

120. As to part-time work the evidence given by the claimant was that he did not want to work less than 30 hours a week. The rota contained people who worked a full week of half a week with no provision for anything in between. There was one historical case for someone not on the rota who only did core day shifts.

121. The cases are fact sensitive. If the claimant had been employed on a 50% contract there would still be a need to fall back on the goodwill of other staff should he be off. Bank staff were for short-term ad hoc situations. The respondent should not be asked to build in bank staff as a permanent feature.

122. As to sickness absence trigger points the claimant is anticipating a case that has not crystallised. Had the claimant been in work then the matter would have been tested.

123. During the course of her submissions counsel referred to the test for justification. It was agreed that she would write to the Tribunal and the respondent who would reply in writing.

124. The respondent submits that both sections 15 and 20 & 21 of the Equality Act require an objective test as to whether the discrimination is justified or if there is a failure to make reasonable adjustments. The test does not focus on the thought processes of the respondent at the time but on the objective standard thus the respondent can rely on matters not necessarily considered at the time, no such matters being admitted. Counsel referred us to Bolton St Catherine's Academy v O'Brien in the EAT.

125. In response Ms Ibrahim submits that the Tribunal ought to take into account a range of factors whether or not they were adduced by the respondent. In particular the 30 hour employee, the bank staff being cheaper than employees covering absences, the evidence of the claimant that Dr Seed's report on absence was incorrect, the invitation to seek information from the claimant's own doctor and the assertion that adjusting the rota would have affected the goodwill of existing staff without evidence as there was no consultation with staff.

126. The case of **Georgina O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145** was the subject of a judgment of the Court of Appeal only reported after counsel had made their written submissions. Lord Justice Underhill gave the leading judgment. On the question of justification-"*The essence of the pleaded point is that in order to establish a defence of justification it is unnecessary that an employer demonstrate that it had itself carried out the necessary balancing exercise to establish whether the act complained of is proportionate; what matters is what the tribunal concludes on carrying out that exercise for itself. That is true, but the Tribunal plainly did not think otherwise…it explicitly made its own assessment. It is true that it did in the course of doing so also refer to the fact, as it found, that neither panel had properly assessed the impact of the Appellant's absence; but that was not illegitimate, since it is well recognised that a tribunal will look more narrowly at a justification which was not articulated at the time."*

Discussion and Conclusions

127. The basic facts found by the Tribunal are as follows:

(1) The respondent provides its service on a 24/7 basis. There are 18 MLAs working on a complex shift rota over an 18 week cycle in the Haematology Laboratory providing support to the whole hospital including the accident and emergency department.

(2) It may be possible for the respondent to get cover from bank staff on day shifts. A bank worker costs the respondent less than they pay the full-time staff.

(3) The claimant told Dr Seed that in relation to his chronic respiratory condition, cystic fibrosis, he required regular courses of treatment with intravenous antibiotics over a period of 2-3 weeks at a frequency of approximately every 3 months. This information was included in Dr Seed's report to the respondent. The claimant did not take advantage of the process by which he could seek to have any incorrect information in the draft report amended.

(4) The evidence of the claimant, taken from his cross examination, is that he told Dr Seed that since graduating in 2014 his absences were maybe once or twice a year but he gave no specific dates.

(5) As to the state of knowledge of Mr Kinsella in connection with the claimant's prospective absences he initially knew what Dr Seed told him in his report. After his meeting with the claimant on 19 April he became aware from the claimant that his absences were no longer as frequent as stated by Dr Seed. He had been in hospital three times in the past two years. It could be for 2-3 weeks at a time. The absence could be unpredictable and at short notice.

(6) When Ms Fallon called Mr Kinsella on 19 April shortly after the meeting with Mr Patel there was no mention of the length of his absences or their predictability. There was an offer of a chance to talk to the medical staff treating the claimant.

(7) At 12:47 on 19 April a decision was communicated by Paul Henshaw, who had considered the report of Mr Kinsella's meeting with the claimant that morning, that the offer to the claimant should be withdrawn.

(8) At 15:26 on 19 April Rebecca Fallon sent her email to Dr Seed and copied it to Mr Kinsella. This provided concrete information as to the claimant's absences which in the 16 months from January 2015 to April 2016 involved two hospital admissions with durations of 14 and 19 days respectively.

(9) Towards the end of the afternoon on 19 April Mr Kinsella spoke to the claimant and told him that the job offer was withdrawn. Mr Kinsella did not think that the information provided by Ms Fallon as to the claimant's

hospital admissions made any difference to the respondent's decision to withdraw the offer of employment.

(10) On 27 April the respondent sent a letter explaining their reasoning and then on 13 June gave further information in the appeal outcome letter.

Reasonable Adjustments

128. We propose to look at the questions relating to reasonable adjustments before looking at discrimination arising from disability, having regard to the guidance given in the Code of Practice that if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it would be very difficult for the employer to show that the treatment was objectively justified.

129. When looking at reasonable adjustments we shall aim to identify the employer's provision, criterion or practice with which we are concerned, whether or not it was applied and, if it was, the identity of the persons who are not disabled in order to compare the effect of the PCP upon them with its effect upon the claimant, and then the nature and extent of the substantial disadvantage suffered by the claimant.

130. We note that reasonable adjustments are limited to those that prevent a PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled and that any proposed reasonable adjustment must be judged against the criteria that it must prevent the PCP from placing the disabled person at the relevant substantial disadvantage. If the adjustment does not alleviate the substantial disadvantage it is not a reasonable adjustment within the meaning of the legislation.

131. The amended list of complaints and issues contains three PCPs contended for by the claimant. The first PCP that we shall consider is the third one – a practice of not seeking and/or considering further reports, information or documentation in relation to the disability and effect of the disability of a candidate, other than that of the advice and/or initial advice of Occupational Health during the recruitment process.

132. The respondent does not accept that this PCP was applied.

133. We shall first of all consider whether the PCP was applied as a matter of fact. Dr Seed prepared a report on the claimant, typed on 8 March 2016. On 12 April Mr Kinsella asked Dr Seed for a further opinion and when this was provided on 15 April Mr Kinsella sought yet further information resulting in the opinion of Dr Seed that there was no medical reason why the claimant would be unable to do the range of duties outlined. All that Dr Seed was highlighting was the predicted sickness absence. Mr Kinsella met with the claimant on 19 April and received further information about the claimant's recent hospital admissions and then before Mr Kinsella told the claimant that the conditional offer was withdrawn he had received and considered the information supplied by Rebecca Fallon in her email and letter referred to above at 39 and 40. Mr Kinsella took this into account, but considered

that it made no difference to the respondent's decision before withdrawing the conditional offer of employment from the claimant.

134. We conclude that before communicating the withdrawal decision to the claimant the respondent considered further reports and/or information supplied by Dr Seed, together with further information from the claimant and from Rebecca Fallon. In the light of this we conclude that the respondent did not apply the third PCP as contended for by the claimant.

135. In setting out the alleged reasonable adjustment applicable to the third PCP the claimant contends that the respondent might have obtained and considered a report from the claimant's treating consultant. This it did not do but had it done so by 19 April 2016 there would have been confirmation from Professor Webb of the claimant's hospital admissions which were three routine admissions for intravenous antibiotics in the year 2014, then one admission to hospital in 2015 and two in 2016 but without information as to their duration. Mr Kinsella in re-examination had said that he was concerned with the frequency, duration and unpredictability of the potential absences. The most difficult matter for him was unpredictability. In the light of this we conclude that had a report been obtained from Professor Webb in April 2016 it would not have made any difference to the decision of the respondent to withdraw the offer. It would not have alleviated the substantial disadvantage to the claimant which was the withdrawal of the offer.

136. The second PCP contended for by the claimant is a practice of not employing someone whose sickness absence level is anticipated to exceed the trigger point under the respondent's sickness absence policy. Again the respondent does not accept that this PCP was applied because its case is that anticipated sickness absence was not a factor (as opposed to the unavailability to be put on the rota).

137. Did the respondent apply the second alleged PCP?

138. We find that the respondent did have regard to its sickness absence policy in connection with the process leading to the withdrawal of the conditional offer of employment to the claimant. We have referred at paragraph 26 above to the additional information provided by Mr Kinsella to Dr Seed in respect of which he required a definitive opinion. The last item referred to was the Trust's attendance management policy involving sickness absence trigger points which would be likely to be reached resulting in probable rapid progression to stage three review, and at paragraph 35 above we refer to Mr Kinsella's email to his manager following his meeting with the claimant when Mr Kinsella expressed his concern that the claimant would progress quickly through the stages of the attendance management policy.

139. Having found that the question of trigger points under the sickness absence policy was referred to by Mr Kinsella we ask whether the respondent did apply the practice of not employing someone whose sickness absence level was anticipated to exceed the trigger point under the sickness absence policy? For the reasons which follow we conclude that the respondent did not apply such a practice. We have set out above at paragraph 37 the conclusion of Mr Henshaw that Mr Kinsella needed someone to cover the rota on a consistent basis and could not accommodate a reduction in hours or a varying work pattern. This was in our judgment the reason for

the withdrawal of the offer from the claimant with the sickness absence policy and its trigger points not figuring in this conclusion.

140. The first PCP contended for by the claimant is a requirement that a candidate for employment be available to meet the requirements of the respondent's rota. The respondent accepts that this PCP was applied and that the PCP placed the claimant at a substantial disadvantage due to his disability.

141. The list of complaints and issues does not provide the identity of the persons who are not disabled in order to compare the effect of the PCP upon them with its effect upon the claimant. Neither counsel has made any submissions on the question of a comparator. We venture to suggest that the proper comparator is a non disabled person with the same historical pattern of sickness absence as the claimant (but not for disability related sickness absence) who has the possibility of future lengthy and unpredictable periods of sickness absence working as an MLA under this respondent's particular shift system.

142. Looking at a comparison of the claimant and the hypothetical comparator and considering the reason why the offer of employment was withdrawn from the claimant - because the respondent needed someone to cover the rota on a consistent basis - we find that the claimant was not put at a substantial disadvantage as in our judgment the comparator would have been treated in the same way as the claimant for the same reason.

143. Having reached this conclusion it is not necessary for the Tribunal to give consideration to the adjustment which the claimant contended for, which would have involved the respondent making arrangements for the rota to be covered by others when the claimant was not available, but this question will be considered below in connection with the complaint of discrimination arising from disability.

144. Having considered each of the three PCPs contended for by the claimant we have concluded that the respondent did not fail to comply with a requirement to make reasonable adjustments.

<u>Discrimination arising from Disability</u>

145. We remind ourselves that section 15 of the Equality Act 2010 provides that:

> "A discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

146. From the list of complaints and issues we note that the respondent accepts that the withdrawal of the provisional offer of employment from the claimant amounted to unfavourable treatment because of something (the claimant's anticipated unavailability every three months and the need for an Occupational Health assessment) which arose in consequence of his disability. The issue between the parties is whether the respondent can show that the withdrawal of the offer was a proportionate means of achieving its legitimate aim of managing the rota so as to ensure proper service delivery.

147. The words “and the need for an Occupational Health assessment” were inserted by amendment on 19 December 2016. In simple terms we are satisfied from the evidence that each person offered employment by the respondent was subject to an Occupational Health assessment. At paragraph 18 above we have noted what was read out at the end of the claimant's interview, with the claimant remembering something to this effect being said. We have referred in paragraph 19 to the letter of provisional offer making reference to a pre-employment health assessment. We stated we had no reason to believe that the Trust sent anything other than its normal standard documents to the claimant. In these circumstances we are satisfied that the respondent’s need for an Occupational Health assessment of the claimant did not amount to unfavourable treatment of the claimant and that it did not arise in consequence of the claimant's disability.

148. Can the respondent show that the withdrawal of the offer was a proportionate means of achieving its legitimate aim of managing the rota so as to ensure proper service delivery?

149. When considering this question we remind ourselves of the decision in **Hensman** at 107 above to the effect that in assessing proportionality for the purposes of the justification defence to a claim of discrimination arising from disability contrary to section 15 of the Equality Act, the Tribunal much reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular it must have regard to the business needs of the employer.

150. We also remind ourselves of paragraph 4.27 of the Code set out at 76 above. The question of whether a PCP is a proportionate means of achieving a legitimate aim shall be approached in two stages:

(a) Is the aim of the PCP legal and non discriminatory, and one which represents a real, objective consideration?

(b) If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

151. According to the list of complaints and issues the respondent’s aim was of “managing the rota so as to ensure proper service delivery”. We have described the service and how it is delivered at paragraphs 7-9 above. It works on a 24 hours per day seven days per week basis with at least one MLA being available and on duty at all times. Given the nature of the respondent’s undertaking, an NHS Foundation Trust, and given the service provided by the haematology laboratory to the hospital and a number of local GP surgeries we find that the stated aim is legal and non discriminatory and represents a real, objective consideration. In our judgment the respondent’s stated aim of populating the rota with a team of 18 whole time equivalent employees so as to ensure proper service delivery over the 18 week period of the rota is a legitimate aim.

152. Is the means of achieving the aim involving the removal of the conditional offer of employment to the claimant proportionate - that is, appropriate and necessary in all the circumstances?

153. The haematology laboratory provides a 24/7 diagnostic and testing service for the Accident and Emergency Department, acute and non acute hospital wards and departments, and for a number of local GP surgeries. The service is provided by 18 whole time equivalent members of staff who either work full hours or half of full hours. They each work to an 18 week rota provided one or two months in advance with the varying shift times being described above at paragraph 9.

154. The shifts undertaken vary each week. Holidays are only to be taken when working weekday core shifts. Members of the team work extra hours to cover the holiday leave and sickness absences of other team members although the Tribunal has not been provided with any information as to the level of sickness absence suffered by the members of the team.

155. One or possibly two members of bank staff might be available to cover some shifts but when utilised they tend to work days only. They have to be paid in addition to the salary of the absent employee but at a lower hourly rate than that paid to a permanent employee.

156. A number of the night and weekend shifts involve lone working and can last up to 12 hours.

157. The team members receive specific training for their role but they are not clinically qualified.

158. If a member of the team covers the unexpected absence of another member of the team, presumably other than for planned holiday absence, it may have the consequences described above at paragraphs 10 and 56(c).

159. The Trust anticipated that the claimant, if employed, would at unpredictable times and for periods of 2 to 3 weeks at a time, be unable to fulfil all of his scheduled shifts on the basis of Dr Seed's medical report and information subsequently received from the claimant which was then amplified by Ms Fallon.

160. Looking at the information provided by Rebecca Fallon the claimant had required two hospital admissions from January 2015 until 19 April 2016 with durations of 14 and 19 days respectively. These periods equate to two weeks and two weeks five days.

161. The claimant's future absence could not be predicted but based upon the claimant's past absence record in our judgment the respondent reasonably anticipated that the claimant might be absent from work at little or no notice for two or more weeks at a time. How this would affect the rota would depend upon the shifts assigned to the claimant during his prospective absence but it would inevitably cause the respondent and the members of the team considerable difficulties in providing cover. We note that the team of MLAs had not been approached by management to see if they could co-operate and facilitate the claimant's employment. The respondent does not appear to have considered this but given the nature of the shift system and the difficulties that an unexpected and lengthy absence could cause we do not regard the respondent as having acted unreasonably in not approaching the team. The position with regard to consulting the

team might have been different had the claimant been an existing team member who had become disabled

162. Given the nature of the undertaking carried out by this respondent and the way in which it schedules the work of its medical laboratory assistants to provide 24/7 cover with a varying shift pattern over a period of 18 weeks fixed well in advance, we conclude that the decision of the respondent to withdraw the offer of employment from the claimant, with his particular circumstances, was a proportionate means of achieving a legitimate aim, namely managing the rota so as to ensure proper service delivery.

163. If the service in which the claimant would have been employed had not been such a critical one for the operation of the hospital, if the shift system had not been so complex, had it not needed to provide 24/7 cover sometimes with one person working alone, and had there been spare capacity within the system, then it is likely that we would have reached a different conclusion.

164. The claimant's claims under section 15 of the Equality Act 2010 are therefore dismissed.

Employment Judge Sherratt

4 April 2017

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

05 April 2017

FOR THE TRIBUNAL OFFICE