**Case No: 2301276/2016**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms T (anonymised)**

**Respondent:** **An NHS Clinical Commissioning Group**

**Heard at:** **London South (Croydon)**

**On:** **11 & 12 May 2017 and 23 May 2017 (In chambers)**

**Before: Employment Judge John Crosfill, Ms N Christofi and Dr R Fernando**

**Representation**

Claimant: In person but assisted by her Uncle

Respondent: Madeline Stanley of Counsel

# RESERVED JUDGMENT

1. The Claimant's claim that her dismissal was discriminatory contrary to Sections 15 and 39 of the Equality Act 2010 succeeds.

2. The Claimant's claim that the Respondent failed to make reasonable adjustments contrary to Sections 20 and 39 of the Equality Act 2010 is dismissed.

3. The Claimant's claim that the Respondent subjected her to direct discrimination contrary to sections 13 and 39 of the Equality Act 2010 is dismissed.

4. The Claimant's claim that the Respondent failed to pay her notice pay brought under the Employment Tribunal (Extension of Jurisdiction) Order 1994 was conceded by the Respondent and is well founded.

5. The Claimant's claim for wages for the period 1 to 19 February 2016 brought pursuant to Section 23 of the Employment Rights Act 1996 is well founded.

6. The Claimant's claim for accrued holiday pay for the period 1 to 19 was conceded by the Respondent and is well founded.

# ORDER

1. The Tribunal makes an order pursuant to rule 50 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that the identities of the Claimant and all of the witnessed heard in these proceedings and referred to in this judgment or other persons referred to in the proceedings should not be disclosed to the public whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record and this judgment has been anonymized for those purposes.

# REASONS

1. The Claimant is a Pharmacist. She applied for and was offered a job by the Respondent. Following enquiries as to her fitness to undertake that role she was not permitted to start work on the agreed date and shortly thereafter was told that she would not be allowed to do so at all. On 7 July 2016 the Claimant presented complaints to the employment tribunal relating to her treatment by the Respondent. It is those complaints which were the subject matter of the hearing before us.

2. The Claimant has been assisted in presenting her case by her uncle Mr Keating. There had been a series of case management hearings during which the issues that the tribunal needed to determine had been formulated and finally encapsulated in an agreed list of issues which was found at pages 112 -114 of the agreed bundle. We shall set out the relevant agreed issues below when considering the individual complaints.

3. At the outset of the hearing we were presented with an agreed bundle of documents running to 708 pages. The Claimant provided some additional documents which she had appended to a supplementary statement. The Respondent made no objection either to the suplementary statement to the additional documents. We proceeded to hear evidence from the Claimant and her line manager at her previous place of employment, Mrs S and then witnesses on behalf of the Respondent. These were “RS”, a Senior Commissioning Pharmacist; “TW”, a Senior Associate in the Human Resources Department of the Respondent; and Dr D, a Consultant in Occupational Health who had advised the Respondent, and “UD” the Director of Governance and Development for the Respondent.

4. The matter had originally been listed for 3 days but due to a shortage of judicial resources only two days were made available. At the conclusion of the evidence the parties made submissions and we refer to the material parts of those submissions in reaching our conclusions below. After hearing submissions there was insufficient time for deliberations and judgment and we reserved our decision. A further day in chambers was held on 23 May 2017

where we were able to reach a unanimous decision on the issues we had to decide.

Concessions made by the Respondent

5. In the course of the case management of this case and at the outset of the hearing before us the Respondent made the following concessions:

5.1. That the Claimant was at all material times a disabled person for the purposes of Section 6 of the Equality Act 2010; and

5.2. That the Claimant had been employed between 1 and 19 February 2016 and that the decision that she would not be offered work taken on 19 February 2016 amounted to a dismissal without notice. Accordingly, she was entitled to any damages arising from a failure to provide contractual notice: and

5.3. That the effect of the concession above was that the Claimant was entitled to wages and accrued but untaken annual leave for the period 1-19 February 2016.

6. The Respondent did not concede that it had any actual or constructive knowledge of the Claimant's disability. Further its concession that the Claimant had been dismissed without contractual notice was not to be taken as a concession that the Respondent recognised that this was the case. It was said that the Respondent believed that it was entitled to withdraw its offer of work.

Privacy/anonymity

7. At the outset of the hearing there was no application by either party for the hearing to be held in private. As a matter-of-fact no member of public attended the hearing. After submissions were made the parties jointly invited us to make such anonymity orders to the full extent that we had the power to do.

8. In the course of the evidence we heard about the matters that had given rise to the Claimant's disability and the effect that had on her. It is impossible to set out proper reasons for the decision that we have reached without referring to those matters. Whilst the starting point is clearly that hearings and judgments should be public, Article 6 and 10 rights under the ECHR clearly being engaged. We are required to, and do, give those rights their full weight. Those rights however have to be balanced against the Claimant's article 8 rights. Here such rights are clearly engaged as the subject matter of this case concerns details of the Claimant's mental health and the effect that has had upon her life including the facts that (1) she is the victim of sexual violence and (2) that we have heard about an incident where she had taken an

overdose of medication. We conclude that the Claimant's understandable wish that the intimate details of her private life are not publicised outweighs the article 6 and 10 rights of the wider public. We take into account that this application was supported by the Respondent. We take the view that it is sufficient to protect the Claimant's rights that this judgment is anonymized.

9. We therefore make an order under Rule 50 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that this judgment shall only be published in the anonymised form.

Structure of the judgment

10. It is necessary for the tribunal to deal with each cause of action separately. Before doing so we set out some general findings of fact as to what events actually occurred. We then set out the law in relation to each type of claim advanced by the Claimant and where appropriate the proper tests to be applied to such claims. Thereafter, under the appropriate law, each claim advanced by the Claimant is examined individually. We have where appropriate made additional findings of fact in order to determine whether each claim is made out. Our primary findings are set out under headings "factual matters". Where we have drawn inferences of reasons, other motivation or similar matters those inferences are expressed under the heading "conclusions". In examining the individual complaints, we have reminded ourselves that we should always be aware of the bigger picture and take all of the evidence into account. An apparently innocuous incident can take on a different complexion when viewed against a background of similar events.

The burden and standard of proof

11. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act and provides that where a Claimant establishes facts from which discrimination could be inferred (a prima facia case) then the burden of proving that the treatment was, in no sense whatsoever, discriminatory (or otherwise unlawful) passes to the Respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**.

12. The burden of proof provisions should not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not*

*disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"".* Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where the tribunal are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

## The Tribunal's general findings of fact

13. The Respondent, a Clinical Commissioning Group referred to before us as "the CCG", is a membership organisation made up of 44 GP practices. It is responsible for buying healthcare services for around 400,000 patients and residents of the borough. The CCG interacts with GP's, nurses, healthcare assistants, mental health providers, community health services and the local authority.

14. In September 2015 there were 5 pharmacists employed by the CCG led by RS the Senior Commissioning Pharmacist for the Medicines Optimisation and Long Term Conditions Team.

15. On 18 September 2015 the CCG had a vacancy for a Clinical Pharmacist. The main part of the job was the support of in the region of 15 GP practices. That support would take the form of practice visits, reviewing prescribing data and answering clinical queries from clinical and non-clinical staff. That part of the role would have occupied about 60/70% of the post holders time. A further aspect of the role which amounted to 10/20% of the duties was the development of prescribing guidelines to promote the best value use of medicines. The Claimant referred to this as "project work" which seemed to us to be a fair description. Finally, some 10-15% of the role involved dealing directly with patient queries by telephone, Email or face to face.

16. The Claimant completed a general science degree in 2009 before commencing a Masters Degree in Pharmacy. She graduated in 2013.

17. The Claimant was the victim of rape in 2009. The trauma of that event was compounded by the loss of a number of close friends and relatives in the years immediately following. In April 2012 the Claimant was diagnosed as suffering from PTSD which in turn had caused her to suffer symptoms of depression. She has received professional care in relation to that illness ever since. It had been conceded by the Respondent in advance of the hearing before us that the Claimant, at all material times, was suffering from a disability satisfying the conditions of Section 6 of the Equality Act 2010.

18. The Claimant's medical treatment whilst she completed her studies in Aberdeen was limited to counselling for a period of 6 months supported by medication which was withdrawn when her condition improved.

19. The Claimant obtained an internship at an NHS Hospital in 2013. This was a substantial hospital employing in the pharmacy department some 70 staff of whom around 30 were pharmacists. Having completed that internship, the Claimant obtained a full time position as a Grade 6 pharmacist. In that role she was managed by Mrs S who worked at both a nearby University and the NHS Hospital.

20. Having moved to the live near the NHS Hospital the Claimant registered with a new General Practitioner. In 2013 she self-referred to some Talking Therapies and in October 2014 she attended the Berkshire Traumatic Stress Service and was in turn referred to a Clinical Psychologist, Dr P. Dr P recommended high intensity therapy. At the same time the Claimant met Dr BB who was an Occupational Health advisor to the NHS Hospital. In the early months of 2015 the Claimant undertook the therapy recommended by Dr P and was also prescribed medication. Upon completion of that therapy on 2 November 2015, Dr P discharged her from any further care. At the same time the Claimant followed Dr BB's advice and saw a Consultant Psychiatrist Dr FL who in turn introduced her to another Consultant Dr Fi.

21. In May 2015 Dr BB had recommended that the Claimant contact the General Pharmaceutical Council (GPhC) to inform them of her condition in order that they could make an informed decision as to her fitness to practice. On 11 August 2015 the GPhC confirmed that the Claimant was fit to practice having taken into account health information from the Claimant's GP, from NP a Manager, Dr BB, Dr P and Dr FL. The reasons given for the conclusion included:

- *You have shown insight into your condition by self-referring; and*
- *You have been co-operative with the GPhC in obtaining information from your treating clinicians and employer: and*
- *You appear to be compliant with advice from your treating clinicians, including occupational health; and*
- *You appear to be well supported at work and by your treating clinicians and aware of your limitations; and*
- *We have not received evidence that you pose a risk to the public or colleagues.*

22. The letter from the GPhC reminded the Claimant that she was under a continuing duty to inform the GPhC of any changes relevant to her fitness to practice.

23. The Claimant's work at the NHS Hospital involved considerable patient contact including undertaking ward rounds where she would see up to 30 patients. Mrs S gave evidence, which we accept, that the Claimant generally coped with her work without difficulty. She described the Claimant as wearing two hats, her professional one and her "[first name] hat" and she could switch well between the two. She did not allow her personal problems to affect her job. She did not welcome talking about her condition but would let Mrs S know if she had not slept well or when she was feeling low. Mrs S gave evidence that the Claimant coped well with stressful situations and illustrated that by saying that the Claimant had undertaken her OSCE examinations including stressful practical examinations whilst working at the NHS Hospital.

24. Mrs S explained that when the Claimant was fatigued or lacked concentration she would alter her duties to cope with this. She gave a specific example as being that the Claimant would work in the pharmacy on such occasions rather than say undertaking a ward round. Mrs S made it clear that such changes were only necessary on some occasions for example following a bad night's sleep.

25. The Claimant had applied for a position as a Clinical Pharmacist with the Respondent and on 29 September 2015 she was shortlisted along with four other candidates. She sat skills test and was then interviewed. She scored the highest of all of the candidates and by letter dated 22 October 2015 she was given a conditional offer of employment subject to satisfactory references and a medical check.

26. On 24 October 2015 the Claimant completed a pre-employment medical questionnaire. That asked questions about her health. The Claimant made the following declarations about her mental health:

    26.1. She said she had: "Panic attacks – attended CBT and am able to control them"

    26.2. and; "PTSD and depression. Reviewed by GPhC in 2015 (agreed fit to practice)"

    26.3. and in an entry asking whether she suffered from stress put a question mark and wrote "PTSD related"

    26.4. In responding to a question about her sleep she said "PTSD/depression – currently controlled"

26.5. She said that she was "Discharged from specialists. Under care of GP."

26.6. She indicated that she was taking "venlafaxine"

26.7. In response to a question about whether she suffered from a disability she indicated that she did not.

27. On about 11 November 2015 Mrs S provided a reference for the Claimant in the following terms:

> *"[first name] has an underlying long term condition but she is able to continue to perform very well as a pharmacist. She has been a valuable member of the surgical team and produced some excellent pieces of project work for the surgical lead. She gets on well with all the pharmacy staff and received excellent feedback from other healthcare professionals.*

28. The reference from Mrs S also disclosed that the Claimant had had 22 days absence in the past 2 years. That aspect of the reference caused Ms BM, an associate recruitment advisor to inform RS of the absence issue. On 12 November 2015 Ms BM wrote to the Claimant asking whether her absence record meant that she needed any adjustments. The Claimant replied on the same day saying that she did not consider that she needed any adjustments other than some flexibility around her need to attend medical appointments. She gave no details of her condition in her response. In closing her e-mail she said: "*Is there is any other information you need from me regarding this"*. On the same day the Occupational Health service sent a pro-forma indicating that the Claimant was fit to undertake her duties.

29. RS asked Ms BM to contact occupational health to see whether the Claimant was correct about adjustments. Ms BM did so and was informed by a Ms G, a nurse, that no adjustments were necessary.

30. RS spoke to her own line manager and to the HR department. On 17 November 2015 she was provided with a copy of the policy relating to time off for medical appointments. On 18 November 2015, Ms BM, sent a further e-mail to RS saying *"Occ Health advised that [first name] has declared a disability but the nurse did not think adjustments were necessary"*.

31. On 26 November 2015 RS told Ms BM that she could proceed and issue an unconditional contract. An e-mail dated 28 November 2015 was then sent to the Claimant including an unconditional offer of employment. A start date was then agreed with RS for 1 February 2016.

32. At this point unknown to the Respondent the Claimant had a serious episode of her illness. On 7 November 2015 she had taken an overdose of the medicine proscribed to her and then immediately sought assistance. She was

admitted to hospital. She was discharged on 9 November 2015 but had to wait some time to see Dr BB for an assessment that she was fit to resume her duties. On 16 November 2015 Dr BB wrote to Mrs S in the following terms:

*"As you are aware [first name] has had a recurrence of symptoms, which she was seen by the specialist and was admitted for three days. However, she has been discharged and is awaiting further appointments. She is compliant with medical advice, but currently it appears that her specialists need to discuss the situation and management amongst themselves before they begin offering specific management plans to [first name].*

*Symptomatically here has not changed much since I last saw her. This could either mean that she has not improved prior to this episode, or that she remained stable. However, [first name] herself has admitted that most of the therapy so far offered to her has not made a great deal impact on her symptoms. She has preserved insight and is able to make good judgements with regards to her work.*

Occupational Health Advice

*I have offered [first name] avenues of support and will be in contact with her to see if there are options for her to be reviewed, and if I can I will expedite these appointments.*

*There is a likelihood of her moving jobs and I have her consent for me to liaise with occupational Health Department in that location. I'm not certain of how successful this would be. I would need to talk to their OH, mainly to give [first name] continued support.*

*With regards to her work: Currently, I feel she is sufficiently fit to begin doing 2 days on the ward in the 1st week and then if all remains well to do 3 days on the ward in the second week and then return to her full-time duties on the ward. During this period it would be useful to have weekly 1-1 with her in order to assess her ability to cope on the wards. In my opinion, I feel that she will cope on the wards as I am informed in past discussions with the managers that despite her symptoms [first name] a performed well on the wards."*

33. In the light of Dr BB's suggestion that she speak to her counterpart at the Respondent the Claimant contacted the Respondent's occupational health service. She arranged for Dr BB to speak with Dr D. A telephone conversation between Dr BB and Dr D took place on 19 December 2015. Dr D took no notes of what he was told. In his witness statement Dr D sets out that he was told that the Claimant had been receiving assistance from her then employer's OH Department and that she had been the subject of a review by the General Pharmaceutical Council. That much of his evidence is not contentious. He went on to say that Dr BB had suggested that the Claimant had stopped treatment that had been specifically tailored to her.

34. The Claimant's evidence before us, and substantiated by discharge letters, was that she had never abandoned any treatment and had always complied with all medical advice. We accept that evidence. It is also consistent with the letter of Dr BB which we have quoted above which describes the Claimant as "compliant". We note that when Dr D saw the Claimant there was no suggestion in his notes of 19 January 2016 that any failure to comply with treatment was recorded. Given this apparent inconsistency we are unable to accept Dr D's suggestion that Dr BB suggested that the Claimant had terminated treatment of her condition. Dr BB knew that was not the case and had only a month before that conversation described the Claimant as compliant. We consider that Dr D is simply misremembering the conversation which may have touched upon the Claimant's decision to move to London which might have been a matter of concern to Dr BB as it might impact on her established support structure, but could not have been described as being "non-compliant".

35. Following the conversation between Dr D and Dr BB, Dr D completed a "Pre-employment Management Advice". That document was then sent to the Respondent. The report repeated the view that the Claimant was fit to work but Dr D said this: *"I feel that she is likely fit for work although whether or not attendance can be maintained remains to be seen. There have been no historical issues with performance I am advised but theoretically the medical situation could affect this*". He went on to say: *"There is no health surveillance required against the job risks advised of this role".* His report indicated that the Claimant had given her consent for this information to be shared. Again the fact that this report makes no mention of the Claimant not completing treatment reinforces our finding that this had not been raised by Dr BB. Dr D set his opinion that he would be assisted by meeting the Claimant in a consultation.

36. The report from Dr D caused RS and the HR department to question why there had been a face to face appointment recommended. An HR advisor TW sent e-mail correspondence enquiring why this was the case and asking that an appointment made by the Claimant to see Dr D on 2 February 2016 be moved to a date in advance of the start date. Ultimately the appointment was moved to 19 January 2016.

37. Both the Claimant and Dr D described the consultation meeting that they had on 19 January 2016 as difficult. The Claimant felt that Dr D made an unprofessional remark about the Irish "worrying too much". Dr D said that he felt that the Claimant did not engage with him. Dr D recorded such notes as he took on a pro-forma document. He accepted in his evidence that he did not take a medical history nor did he attempt any formal diagnosis. He simply noted Dr BB's concerns as he understood them that there was a probable personality disorder. He also accepted that in the course of that consultation he did not ask any questions as to whether the Claimant had or had not been compliant with any treatment. He did record the following material matters:

    37.1. He recorded that the Claimant said that she had taken an overdose; and

37.2. That she was on anti-depressants; and

37.3. That she was currently at work; and

37.4. That she had [or said she had] good insight; and

37.5. In a box titled "impact of symptoms on role" he had written *"to be seen. Risk of absences & severe ill health"*

37.6. In a box entitled *"impact of role on symptoms"* he had written *"she reports – very positive. Again should help".*

38. In the section of his report when asked to record his opinion Dr D stated that he thought that the Claimant would be fit for work when the General Pharmaceutical Council said so. He suggested 3 monthly reviews and support. By completing a series of pro-forma tick boxes Dr D stated that he considered that the Claimant would meet the definition of disability for the purposes of the Equality Act 2010.

39. In the course of the meeting Dr D suggested to the Claimant that her recent relapse ought to be the subject of a further report to the General Pharmaceutical Council. The Claimant immediately followed up on that suggestion even though her evidence was that neither she nor Dr BB had thought that it was necessary on the basis that it was a recurrence of an illness already referred.

40. Dr D then wrote a report of his findings on 20 January 2016. The substance of that report was as follows:

*"I reviewed this lady in today's occupational health clinic. I would suggest that she is fit to undertake the role proposed with the following caveats.*

*Firstly she has extant issues to resolve with the GPhC since her review in 2015.*

*I have suggested that she contact the GphC and thereafter a fitness to practice decision is obtained. Once this is available I feel she could commence the role.*

*I understand that it is an operational decision as to what steps are taken in this circumstance.*

*I have suggested regular occupational health review, say every 3 months in the first instance and I have offered open support.*

*I feel she may benefit from mentoring in the workplace.*

*It may be that as an employer you wish to consider a probationary contract, to gauge the potential impact of her underlying condition on attendance and performance.*

*I note that the pre-employment questionnaire is slightly wrong at question F in psychological health.*

*I believe the information that should be given to any potential employer should be provisionally fit with caveats and awaiting GPhC clarification and that she has a likely condition covered by the Equality Act. I feel it likely that the condition could be described as a substantial and enduring impairment"*

41. When Dr D's letter reached RS she sent an e-mail to TW. She complained that the Claimant had not revealed that she had been reviewed by the GPhC during the application process. She was of course unaware that the Claimant has disclosed this on the medical questionnaire. On the general application form she had only been asked whether there were any conditions of practice which there were not. RS went on to note Dr D's suggestion that the medical questionnaire was "inaccurate". In fact, it was not. The question asked about self-harm and the Claimant correctly said that she had not harmed herself. The November relapse came after she filled the form in. She asks "how can we gauge the level of support and understanding when we don't know what we are dealing with". She goes on to say "*This is a really unhelpful report in my opinion – they have been fairly vague although the GPhC information has come to light".*

42. RS took up the offer made by Dr D in his report of a telephone conference. That telephone conference included RS, TW and Dr D. RS took some very rough notes of the meeting. At the outset of those notes there are three numbered points which we find were probably made in advance of the meeting. These are:

    42.1. "GPhC Review – more details"

    42.2. "Equalities Act – didn't declare"

    42.3. "Likely condition under the EAct"

43. The notes go on to record that there was a discussion about the 2015 GPhC review. There are explicit references to mental health. The notes go on to talk about whether the Claimant was disabled. The notes say "*fit under auspices of the EA but could not say 100%"*. The notes further record a tick against the word performance and a cross against attendance. We find that this is consistent with Dr D repeating the conclusions that he had set out in his report namely that there were no performance issues subject to any review by the GPhC but there might be attendance issues.

44. The conversation turned to whether the Claimant had incorrectly filled in the pre-employment medical questionnaire at question F. Dr D did not disclose why he thought that the answer was wrong. This led to RS making a note whether attributable to herself or Dr D we do not know "*might be manipulative behaviour".* That comment was not justified by the evidence at the time or before us.

45. The meeting finally turned to patient safety. There is no record of Dr D expressing any concerns about safety although he again is noted as saying that he could not guarantee attendance.

46. Following the telephone conference on 22 January 2016 TW wrote to Dr D asking him to follow up on matters raised in the telephone conference. The material parts of his e-mail read as follows:

> *"Thank you for speaking with RS and I earlier to clarify the points in the report relating to RT. During the discussion there were some important questions which you agreed to respond to.*
>
> *As the role is patient centred, involving face-to–face and telephone communication with GPs and patients as well as responding to complex GP queries we seek your advice as to whether there could be a risk to patient safety.*
>
> *The role is time pressured and can be extremely demanding in terms of short deadlines, which requires the individual to prioritise workload and adapt activity on a day-to-day basis, including dealing with frequent interruptions by telephone or emails which may lead to stressful situations. Without the knowledge of RTs medical condition we would like to understand if such stress would exacerbate her symptoms potentially leading to poor performance and attendance.*
>
> *You did advise that [Claimant] did not appear to be engaged when you met with her and would be grateful if you could advise us on how optimistic you feel that this role would be suitable for her at this time, given recent events relating to [the Claimant's] health."*

47. Dr D then responded with his final report dated 27 January 2016. He refers to the Respondent having concerns both as to fitness to practice and patient safety. We find that it was the Respondent who had raised those concerns. Dr D's earlier reports made it plain that he considered that fitness to practice was best assessed by the GPhC. The other concerns that he had expressed were tentative.

48. In respect of fitness to practice and patient safety Dr D said: *"As we discussed I cannot guarantee patient safety at the present time by virtue of the fact that I feel that there is further information to transfer to the GPhC and a decision on*

*fitness to practice may be needed….I do not necessarily feel this is inevitable but cannot exclude it."*

49. He went on to say: *"I also feel that, as noted, attendance and performance cannot be guaranteed and either a probationary period or reconsideration of the offer of employment may be necessary. …. In terms of helping you reach that decision I would suggest that the correspondence that you have been offered that states that medical problems are present and have been suitably addressed in a proactive manner is to a degree optimistic. This lady is unfortunately withdrawn and not engaging fully both in treatment and in the occupational health process. I therefore remain concerned that further problems may present."*

50. As set out above following from the consultation the Claimant had with Dr D she had made the referral he suggested to the GPhC. As part of that referral process Dr BB had written a report on 25 January 2016. The Claimant says, and we accept, that she had forwarded that report to Dr D. The material parts of that report include:

    50.1. *"Currently [first name] remains moderately symptomatic. However, her insight into her condition is preserved. She is under the care of her GP as well as her treating clinicians and is compliant with medical advice."*

    50.2. *"During her tenure at [NHS Hospital} ……There have been no issues of performance and when she feels unwell she is able to step back from duties in the interests of the patients. Her managers are quite confident that so far she has not posed a risk to her patients. In my opinion, her diagnosis and her prognosis has not yet been adequately made and she is still undergoing investigations. In her favour she appears to have good insight and is compliant with medical guidance and seeks help as soon as she is aware that she has symptoms."*

    50.3. "*Bearing that in mind she would be fit to practice with adequate supervision……"*

    50.4. *In summary, with support and adequate supervision (for health interests) I see no reason why she would not be able to continue in her role as a pharmacist. In her new role she is mainly going to have no patient contact and will be dealing with policy and guidance development. This would suit her well whilst being investigated, provided that her underlying condition is stable."*

51. When Dr D's final report was received the matter was escalated to UD. She took the view that if patient safety could not be "guaranteed" then the Claimant's job offer should be withdrawn. She did not think that a probationary period as suggested by Dr D would answer the issue of patient safety. She therefore sought further advice from TW.

52. In anticipation of taking up her new job the Claimant had had rented a flat to live in in London. She had been keeping in touch with the Respondent asking whether her start date was still effective. On 27 January 2016 TW had written to the Claimant and told her that enquiries were ongoing. Having not understood from that e-mail that she should not attend work on 1 February 2016 the Claimant arrived at work. She was told that she should not have attended and was set home.

53. On 2 February 2016 the Claimant sent an e-mail to TW enclosing the report dated 27 January from Dr BB to the GPhC. She suggested that both Dr BB and her previous employer would be happy to speak with the Respondent. These offers were not explored at all by the Respondent.

54. UD's evidence was that she decided to commission an assessment of what adjustments could be made to permit the Claimant to take up her role. That assessment was premised on the assumption that the Claimant would need constant supervision and could not be left to work alone. It is entirely unclear to the tribunal why UD thought that this was necessary. Having concluded that it was not possible to provide staff to constantly supervise the Claimant UD took the decision that the Claimant's offer of work should be withdrawn. She did not think it necessary or appropriate to discuss matters with the Claimant in advance of taking that decision and she made no further medical enquiries. She gave no apparent consideration to the fact that the Claimant was performing a similar role without apparent difficulty. Having reached her conclusions, she wrote to the Claimant to that effect on 19 February 2016.

55. The Claimant immediately sought a meeting to discuss the decision. A meeting finally took place on 29 February 2016. At that meeting the Claimant made trenchant criticisms of Dr D and his conduct of the consultation with her. It does not appear that anybody gave much thought to whether the decision to withdraw the job from the Claimant should be reversed. When the Claimant returned home on that day she received confirmation from the GPhC that it considered that she was fit to practice without any restrictions.

56. UD did take the Claimant's criticisms of Dr D sufficiently seriously to ask to speak to Dr D. Dr D simply reiterated his what he said in his report. UD wrote to the Claimant on 9 March 2016 and whilst recognizing that the Claimant did not accept Dr D's conclusions confirmed the original decision.

57. In March 2016 the Claimant obtained a locum position at a further NHS Hospital but when that position expired she returned to Ireland to live with her parents. There is no suggestion that there were any difficulties during the period she worked as a locum.

## Section 13 Claims – Direct Discrimination

58. The claims of direct discrimination were set out in the agreed list of issues as follows:

*"3. Did the Respondent subject the Claimant to the following treatment:*

*(a) Withdraw the Claimant's offer of employment by letter dated 19 February 2016 and the factors surrounding the decision to withdraw.*

*4. Was this less favourable treatment? If so was the Claimant subjected to this treatment because of her disability?"*

59. The Law

60. The legal framework

61. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

62. In order to establish less favourable treatment it is necessary to show that the Claimant has been treated less favourably than a comparator who was in the same, or not materially different, circumstances. What is meant by "circumstances" for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the Claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances.

63. The proper approach to deciding whether the treatment was afforded "because of" the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a material influence on the outcome then discrimination will be made out see – ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572**.

Additional factual findings relating to the Direct Discrimination claims

64. The decision that the Claimant would not be offered any work with the Respondent was taken by UD. She did so in response to the final report of Dr D dated 27 January 2016. We find ourselves in a position to deal with the question of motive by simply asking "what was the reason for the treatment" and assuming that the burden falls on the Respondents to establish that the fact of disability itself was in no sense whatsoever a factor in the decision.

65. We set out our findings below as to the quality of the decision that was taken. We make criticisms below of the manner in which the Claimant was treated. We took those matters into account when weighing up whether we should accept UD's evidence as to the reasons she withdrew work from the Claimant.

66. We were concerned to distinguish between a decision based upon stereotypes which would be "because of" disability and a decision based on an incorrect assessment of the degree of risk made by Dr D and then relied upon by UD. We are satisfied that if any generalisations, stereotypes or unsafe assumptions were made, then they were made by Dr D and not by UD who simply relied upon them as medical opinion.

67. We are satisfied on the evidence before us that the reasons why UD acted as she did were because she believed that, unless she could be constantly supervised, the Claimant posed a risk to patients and given that constant supervision was not feasible her work should be withdrawn.

Discussions and conclusions

68. Our finding above is that the reason for the withdrawal of work by the Respondent was UD's concerns, not about disability itself, but about the possible effects or symptoms of that disability. That finding is fatal to the Claimant's claim of direct discrimination.

69. We should make it clear that we did have some concerns whether Dr D had fallen into a trap of applying stereotypes. In his evidence he accepted that he had simply assumed that a person with a depressive disorder would be adversely affected by stress whilst he recognised that not all such persons were and that he had been told by the Claimant that she preferred a busy environment. We should make it clear that we were not asked to make any finding as to whether Dr D discriminated against the Claimant and do not do so. A finding that a person other than the decision maker may, or may not, have acted in a discriminatory manner is not part of the case we need to decide see ***CLFIS (UK) Ltd v Reynolds*** **[2015] IRLR 562**.

## The Section 15 claims

70. The list of issues agreed between the parties set out the following issues said to arise out of the Section 15 claim:

> *"5. Did the Respondent subject the Claimant to the following treatment:*
>
> *(a) Withdrawing the Claimant's offer of employment by letter dated 19 February 2016 and the factors surrounding that decision to withdraw*

*6. Did this constitute unfavourable treatment?*

*7. If so was the Claimant treated unfavourably because of something arising in consequence of the Claimant's disability?*

*The "something" arising in consequence of the Claimant's disability were issues about patient safety and the Claimant's performance, attendance and well-being.*

*8. If so, was this treatment a proportionate means of pursuing a legitimate aim?"*

The law

71. Section 15 of the Equality Act 2010 reads as follows:

71.1. *15 Discrimination arising from disability*

*(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.*

72. Extensive guidance as to the proper approach to Section 15 was given in ***Pnaiser v NHS England*** **[2016] IRLR 170, EAT**, where the President of the EAT Mrs Justice Simler said at paragraph 31:

*"In the course of submissions I was referred by counsel to a number of authorities including IPC Media Ltd v Millar [2013] IRLR 707, Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN, [2015] All ER (D) 397 (Jul) and Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, as indicating the proper approach to determining s.15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:*

*(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

*(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

*(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).*

*(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

*(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

*(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

*(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.*

*(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.*

*(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of*

*'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."*

73. Sub-section 15(2) of the Equality Act 2010 provides that an employer will not discriminate where it did not have actual or constructive knowledge that the employee was disabled. What is required is actual or constructive knowledge of the Schedule 1 facts constituting the disability ***Gallop v Newport City Council*** **[2104] IRLR 211**. The Equality and Human Rights Commission's statutory code of guidance provides that:

*5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*

*5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.*

*5.17 If an employer's agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.*

*5.18 Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.*

*5.19 Information will not be attributed ('imputed') to the employer if it is gained by a person providing services to workers independently of the employer. This is the case even if the employer has arranged for those services to be provided."*

74. To establish that a person is acting as an agent it is necessary to show that they are acting on the principles behalf and with their authority ***Kemeh v Ministry of Defence [2104] ICR 625.***

75. On the question of justification, the approach is as laid down by the Court of Appeal in **H*ardy & Hansons plc v Lax* [2005] ICR 1565**, where it was explained that:

> "*32. … It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [GmbH v Weber von Hartz] [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.*

76. In ***Buchanan v Commissioner of Police of the Metropolis*** **[2016] IRLR 918** it was held that where a particular outcome was not mandated by a policy but required individual consideration then it is the particular treatment of the individual which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

Additional findings of fact

77. The first matter which it is appropriate to deal with separately is the question of whether or not the Respondent had the knowledge required to trigger the duty under Section 15 of the Equality Act 2010.

78. It was argued on behalf of the Respondent that the knowledge of Dr D should not be imputed to the Respondent as he was an "independent subcontractor". We do not necessarily accept that argument as it seems tolerably clear that Dr D was at all times acting as an agent of the Respondent but it is unnecessary for us to decide the case on that basis.

79. We have no hesitation whatsoever in concluding that the Respondent actually knew or could reasonably be expected to know that the Claimant suffered from a disability. It had the following information:

    79.1. It knew from the reference given by Mrs S that the Claimant suffered from a long term condition.

79.2. It knew from Dr D's report of 19 December 2015 that there was a medical condition that could impact on attendance and performance and there had been a review by the GPhC in 2015.

79.3. It knew from Dr D's report of 20 January 2016 that there was an underlying medical condition persisting from 2015 at least which Dr D advised the Respondent amounted to a disability for the purposes of the Equality Act 2010

79.4. It knew from the telephone conference on 22 January 2016 that the nature of the underlying difficulty related to the Claimant's mental health. In the same telephone call Dr D said that in his opinion the condition "fell within the auspices of the EA"

80. At all times the Claimant was willing to share information about her health. She volunteered the possibility of the Respondent talking to Dr BB and to her former employer. She expressed herself willing to give any further information that was required.

81. We find that the Respondent had actual knowledge of an impairment. It had assumed that this would have an impact on the Claimant's day to day activities including her ability to concentrate. It further knew that the impairment was long term. If we are wrong about this, then it is clear that the Respondent ought reasonably to have known that the Claimant was disabled. Its own occupation health advisor had advised the Claimant is disabled and the Respondent carried out what it described as a reasonable adjustments assessment. The Respondent was plainly on notice as to the possibility that the Claimant was disabled. They relied before us on the need for medical confidentiality and yet it did not make any enquiries of her or ask her if she would waive any confidentiality in respect of what she had told others. A simple telephone call to either the Claimant or Dr BB (as the Claimant had offered) would have put the matter beyond doubt.

82. We consider that the assessment of Dr D on 19 January 2016 was inadequate in many respects. In the course of his evidence Dr D complained that his clinical competence was being questioned. He graciously accepted that the soundness or otherwise of his conclusions was a matter which we needed to explore. Dr D accepted that he had not attempted to take a full history or reach a diagnosis for himself. The failure to take a history lead to some very real prejudice to the Claimant in that Dr D indicated to the Respondent in his reports of 20 and 27 January 2016 the very serious suggestion (in the context of the treatment of mental health conditions) that the Claimant was not compliant with her treatment. In his evidence he accepted that this was not a matter that he had ever discussed with the Claimant and expressed his regret for this. It seems that he had simply misunderstood what Dr BB had told him and he failed to check the position before adversely reporting on the Claimant.

83. A further failing of Dr D was that having recorded during his consultation on 19 January 2016 that the Claimant thrived rather than suffered when busy, he went on to suggest that a busy environment might be detrimental to the Claimant and to patient safety. Again in his evidence he was gracious enough to recognise that he had allowed some possibly inappropriate degree of generalisation to inform his thinking.

84. Finally, Dr D was prepared to report that the Claimant had filled in the pre-employment questionnaire inaccurately. The Claimant completed that form on 24 October 2015 reporting at question (f) that she had never tried to harm herself. Whether or not the overdose that the Claimant took on 9 November 2015 could be classified as "harm" rather than a cry for help the incident took place after the date the form was accurately completed. Had Dr D taken an accurate history or raised this matter with the Claimant he would not have made a report which suggested to the Respondent that there had been concealment or dishonesty.

85. We consider that it was not unreasonable for Dr D to take the view that the November incident should have been reported to the GPhC. On the other hand, we accept that the Claimant was advised that, as her illness had already been the subject of a full fitness to practice review, there was no material change in circumstances. There was room for reasonable disagreement. In the event it is clear that the GPhC took the view that there was no impairment on the Claimant's fitness to practice.

86. Dr D's gave evidence that on 8 June 2016, a date which was well after the Claimant had been dismissed, Dr D telephoned Dr BB and spoke about the Claimant. In his witness statement he says that Dr BB told him that she agreed with his report. He has a note to that effect. That begs the question what Dr BB was actually agreeing to. Dr BB had written a supportive report to the GPhC in which she said that there were no reasons why the Claimant was not fit to practice. It seems most unlikely that she would have written that and subsequently told Dr D that she agreed that there was a measurable, rather than theoretical, risk to patients. Absent Dr BB's direct evidence we take very little from the assertion that she agreed with Dr D. Dr D suggests that Dr BB gave him assurances that for him meant that he did not have to take patient safety issues any further. In fact, Dr D had never made any further report about patient safety issues it is very difficult to see that as the motivation for his telephone call.

87. The Respondent led evidence to suggest that there were material differences between the Claimant's role at the NHS Hospital and the role that the Claimant would have done for the Respondent. It pointed in particular to the significant differences in staff numbers. We heard evidence from the Claimant's former line manager Mrs S. It seemed to us that she presented her evidence in a balanced way and we accept what she told us. She accepted that the NHS Hospital was a larger workplace but she did not accept that the role with the Respondent was likely to be significantly more arduous for the Claimant. She said, and we accept, that she had a good working knowledge of the sort of role that the Claimant would have been doing and considered

that whilst there were some stressful elements, that was true of her old job as well.

88. The Respondent later came to a conclusion that the Claimant could not work safely without constant supervision. When this was explored in evidence with the Claimant she explained that she habitually worked alone at the NHS Hospital and nobody had ever suggested that she needed constant supervision. She had never put a patient at risk and was well aware of when she was symptomatic and needed to step back. She was clearly affronted by the suggestion that she needed constant supervision. Ms S gave evidence of the degree of management supervision that she actually imposed. In short it appeared to us that this amounted to little more than providing support and an informed listening ear as and when the Claimant was going through a bad patch. Mrs S was at pains to stress that this was only occasionally.

89. We note that the conclusions of Dr D in his final report are couched in very theoretical terms. He says (emphasis added):

    89.1. In response to a question whether there could be a risk to patient safety he says: *"Theoretically this is a possibility. I understand that there have been no historical issues but I cannot completely exclude a risk. I feel that there is scope for better control of her circumstances"*

    89.2. In response to a question as to whether her symptoms would impact on performance and attendance he says: *"I would note that no work issues have been historically raised. However theoretically her condition may cause problems of this nature. I note that her condition could be improved and therefore have some concerns in this regard."*

    89.3. In respect of a list of job duties he says: *"I also cannot guarantee these tasks could be completed without issue"*.

90. Dr D said in evidence that as a general rule he would ordinarily defer to a body such as the GPhC when it came to issues of fitness to practice. He accepted that such a body had greater expertise than he did. He identified an exception, not said to be relevant in this case, where some material matter was not known to the professional body.

91. We note that Dr D has referred to "theoretical risks" and to not being able to "guarantee" patient safety. We consider that what is lacking in his report was any evaluation of that risk. The fact that pharmacists are human beings means that in every case, by reason of ordinary human frailty, there will be a theoretical possibility that a patient might be harmed. What was necessary in the present case was to evaluate the effect of the Claimant's condition on her work. That would involve having regard to the evidence that there was as to the degree of insight shown by the Claimant which assisted her in stepping back from risky activities on the rare occasions she felt unable to complete them. It would also require regard to be had to the Claimant's suggestion that

she preferred to be busy rather than suffered from it. Dr D recorded that suggestion but then apparently disregarded it when the Respondent raised concerns that the role might be pressurized. No evaluation of patient risk could have been sensibly undertaken without having regard to the fact that the Claimant was actually working, with no reported concerns, at a busy NHS Hospital with patient facing and prescribing responsibilities. No consideration appears to have been given as to why a large NHS institution, with a knowledge of the Claimant built up over time, did not regard her as a risk to herself or patients. Dr D did not discuss his change of position with Dr BB or the Claimant.

92. On the evidence before us we have concluded that the Claimant was at all material times fit to practice as a pharmacist. We had no evidence to suggest that she would have needed constant supervision and it is difficult to understand where UD or the Respondent based their belief that that was necessary. We understand that, where Dr BB, in her letter to the GPhC refers to supervision, she simply means ordinary line management with knowledge of the disability and the sort of support that the Claimant had enjoyed at the NHS Hospital.

93. Putting it starkly we do not find that there was any evidence before the Respondent upon which it could have concluded that there was anything more than a theoretical risk either to patients or to the Claimant herself. Indeed, Dr D does not really go much beyond that, but if he does our finding is that he was wrong. If the Respondent had taken the time to speak to the Claimant's treating practitioners or Dr BB or her former employer, or even the Claimant herself, they could only have come to the conclusion that the risks they perceived were far less than they imagined. Had they waited for the outcome of the referral to the GPhC they could have been reassured that there were no fitness to practice issues caused by the Claimant's disability.

Discussion and conclusions

94. As set out above we have found as a fact that the Respondent had actual or constructive knowledge of the Claimant's disability. It was not argued by the Respondent that the withdrawal of work, which it accepted was in law a dismissal, would not be unfavourable treatment. The issues that remain are whether the reason for the treatment was because of something arising as a consequence of the Claimant's disability and if so whether the treatment can be justified by the Respondent as a proportionate means of achieving a legitimate aim.

Was the treatment of the Claimant because of something arising as a consequence of her disability?

95. We repeat our conclusions as to the reason the Claimant was dismissed which we set out under the claim for direct discrimination. Essentially UD had concluded, based on Dr D's report, that there was a risk to patient and the

Claimant's safety of such a degree that constant supervision was required to eliminate it and as that was not feasible the offer of work would be withdrawn.

96. Ms Stanley on behalf of the Respondent essentially conceded in her Skeleton Argument that the reason for the treatment was because of something arising as a consequence of disability. Given that we have concluded that many of the Respondent's concerns, giving rise to the reason for the treatment, were either exaggerated or baseless we considered whether they could properly be said to arise as a consequence of the disability. We have concluded that they can. The base cause of the Respondent's concerns was the fact that the Claimant had a mental health condition and that had triggered the incident in November. Those actual symptoms caused Dr BB to suggest that she should speak to Dr D. That in turn had raised concerns with the Respondent who ultimately acted on what it believed Dr D was saying about the Claimant's symptoms. That in our view means that the reasons for the Claimant's treatment was because of something arising in consequence of disability albeit that the reasons concerned incorrect perceptions of the severity of symptoms rather that the real symptoms that had prompted the enquiry.

Was the treatment a proportionate means to achieve a legitimate aim?

97. Ms Stanley identified this question as being at the heart of the Respondent's case. The legitimate aim that she identified was patient safety and the well-being of the Claimant. The Claimant did not dispute that either or both of these would amount to legitimate aims and we think that that concession was rightly made.

98. The authorities we have cited above make it clear that the assessment of proportionality is an objective exercise to be carried out by the tribunal and not merely a review of the decision taken by the Respondent. That gives rise to the question of whether our assessment is confined to the information actually considered by the Respondent, the information that ought reasonably to have been available to the Respondent, or the information available to the tribunal at the date of the hearing? Ms Stanley's position was that the correct approach must be the second of those two options.

99. It is clear that an employer may advance a justification defense even if the facts supporting that defense were not considered at the time see - ***Seldon v Clarkson Wright & Jakes*** **[2012] ICR 716**. In those circumstances it is clear that neither the employer nor the tribunal could be restricted to matters known and considered at the time. That said, it has been said that greater weight might be given to a properly reasoned decision made at the time see – ***O'Brien v Ministry of Justice*** **[2013] UKSC 6** at para 48. It seems to us that, if an employer can deploy ex post facto arguments then it must be open to an employee to adduce evidence to show that those arguments are wrong. Ms Stanley fairly and properly drew attention to ***City of York Council v Grosset*** **UKEAT/0015/16** in which HHJ Eady at para 44 stated that it was permissible for a tribunal to have regard to medical evidence not before the decision maker when assessing proportionality.

100. We can see some possible hardship for employers if the reasons which they consider justify an otherwise discriminatory decision are later undermined by some fact which they could not reasonably have known. However, in the present case we consider that the matter is entirely academic. The evidence relied upon by the Tribunal to reach its conclusions was evidence which was available at the time or in the case of the GPhC conclusions was to be shortly available and it would have been reasonable for the Respondent to have considered it. In particular, the Tribunal consider that it was unreasonable not to have spoken to the Claimant about the concerns that were held. She could have explained that she had no need of constant supervision and explained how she coped with her disability in the workplace. If the reliability of the Claimant's own account was in doubt, then the Claimant's suggestion that the Respondent speak to her former employer and OH advisor should have been followed up.

101. On the evidence before us it is likely or at least possible that the Claimant would, on occasions, be unable to carry out the full range of duties of the role she had applied for. We reach this conclusion relying mainly on the evidence of Mrs S and the Claimant herself. They explained that there were occasions when the Claimant would "stand back" from duties which required high levels of concentration if she had had a bad night's sleep. We consider that she would also have a higher level of absence that a non-disabled employee. We have considered whether those difficulties could provide justification for the dismissal.

102. We consider it important to distinguish between the Claimant suffering from symptoms which affected her ability to concentrate, which she recognised and saw the need to amend her duties, and a situation where she was unaware of this and continued to plough on. All of the evidence from the Claimant, Mrs S, Dr BB and ultimately from the GPhC was to the effect that there was no real risk of the later situation. The unavailability of the Claimant to carry out all of her duties all of the time would inevitably cause some disruption. However, we do not consider that that disruption would be extensive nor cause an indirect risk to patients. The evidence we had of the Respondent's organization was that it employed a much smaller team of pharmacists than the NHS Hospital but a team none the less. In such an organization there would inevitably be the need to cover for pharmacists on holiday, struck with seasonal bugs or the vagaries of public transport. Even in a smaller team like this there would be somebody who, on the rare occasions that the Claimant might want to swap duties, could provide temporary cover for any urgent work. We note that much of the Claimant's work was visiting GPs practices and other work was policy based. There was no evidence that there would be any serious disruption if completion of these tasks was varied. In reaching this conclusion we note that the Respondent did not produce any evidence to suggest that the unavailability of the Claimant for the full range of her duties at all times would cause undue disruption. On the contrary the Respondent knew of a slightly higher than usual pattern of absences before the formal job offer and was still prepared to employ the Claimant. We infer from that that the Claimant was not going to be indispensable.

103. We consider that the past pattern of absences provides the best evidence of the potential future absences. If that is right, then perhaps up to 2-3 working weeks per year might be lost. Whilst that is not insignificant it is a moderate level of absence.

104. We must take into account the effect of the decision on the Claimant. She had her offer of work withdrawn after she had given notice at the NHS Hospital. She was left without a job. If the Respondent's position that it is proportionate to dismiss the Claimant was correct and adopted across the NHS generally then it would end the Claimant's career in the UK. Clearly the impact on her of the potentially discriminatory decision was substantial.

105. It might have been proportionate to insist that the Claimant put back her start date until the GPhC review had been completed. However, that was not the approach taken by the Respondent. They made no enquiries of the Claimant about the progress of that review despite the Claimant providing copies of correspondence. That decision was taken in the face of Dr D's suggestion that a decision be awaited. The Respondent adduced no evidence that there was any urgency about the dismissal.

106. Whilst we fully appreciate that there is an obvious and compelling need to maintain patient and employee safety, having rejected the evidence that the Claimant's disability and/or the role she was to be appointed to posed any material risk to herself or patients we weight up the remaining matters and have little hesitation in concluding that the decision to withdraw work from the Claimant was not a proportionate means to achieve the legitimate aims identified by the Respondent. The decision made was founded upon a poorly reasoned medical report, unjustified assumptions about the need for supervision, and a surprising failure to discuss matters with the Claimant and take up her offer of further information about her successful work at the NHS Hospital. It is unsurprising that the Respondent came to the wrong conclusion.

107. In those circumstances we conclude that the Respondent has discriminated against the Claimant contrary to Sections 15 and 39 of the Equality Act 2010.

**The Section 20 reasonable adjustment claims**

108. The list of issues defined set out the following description of the issues the parties wanted the tribunal to determine:

*"9. Did the Respondent apply the following criteria when deciding to withdraw the Claimant's offer of employment:*

*a) A need for regular and constant supervision;*
*b) Concerns regarding attendance;*
*c) Claimant's fitness to practice;*
*d) Claimant health; and*

*e) Patient safety.*

*10. Did these constitute a provisions, criterion or practices ("PCPs") for the purposes of section 20 of the Equality Act 2010?*

*11. If so, did these PCP(s) place the Claimant at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled?*

*12. If so, did the Respondent know, or could the Respondent have reasonably have been expected to know that the Claimant was likely to be placed at this disadvantage?*

*13. Did the Respondent make the following adjustments:*

*1. Consult with the Claimant to gain a better understanding of her illness;*
*2. Permit the Claimant to take time off work to attend medical appointments;*
*3. Assign a mentor; and*
*4. Have a probationary period for the Claimant's employment with the Respondent.*

*14. If not, would it have been reasonable to make these adjustments?"*

The law

109. The material parts of Section 20 provide as follows:

*"20 Duty to make adjustments*

*(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."*

110. Section 21 of the Equality Act 2010 makes a failure to comply with an obligation to make adjustments a species of discrimination. Schedule 8, paragraph 2(1) imposes an obligation on employers to make reasonable

adjustments for disabled employees. Section 39 of the Equality Act 2010 provides that it is unlawful to discriminate against employees in this way.

111. The proper approach for a tribunal faced with a claim that there has been a failure to make reasonable adjustments is to follow the guidance given in ***Environment Agency v Rowan*** **[2008] IRLR 20** in relation to the Disability Discrimination Act 1996. This remains relevant to a claim under Section 20 of the Equality Act 2010. In that case the Employment Appeal Tribunal said:

> *"In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to s.3A(2) of the Act by failing to comply with the s.4A duty must identify:*
>
> - *the provision, criterion or practice applied by or on behalf of an employer, or*
> - *the physical feature of premises occupied by the employer,*
> - *the identity of non-disabled comparators (where appropriate), and*
> - *the nature and extent of the substantial disadvantage suffered by the claimant.*
>
> *It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.*
>
> *In our opinion an employment tribunal cannot properly make findings of a failure to make reasonable adjustments under ss.3A(2) and 4A(1) without going through that process. Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."*

112. In ***Archibald v Fife Council*** **[2004] UKHL 32; [2004] ICR 954** it was made clear that unlike other forms of discrimination the duty to make reasonable adjustments can require an employer to provide a level playing field by treating the employee more favourably than an employee without disabilities.

113. It will not generally be a reasonable adjustment to require an employer to consult with an employee about what, if any adjustments are necessary. In

*"71. The only question is, objectively, whether the employer has complied with his obligations or not. That seems to us to be entirely in accordance with the decision of the House of Lords in Archibald v Fife Council [2004] IRLR 651. If he 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. In our view the McCaull case would have to be treated as wrongly decided if the Mid-Staffordshire case were correct, because inevitably, if the employer is unaware of his obligations under the Act and gives no thought to them, then he will perforce fail to carry out any necessary consultation.*

114. *Accordingly whilst, as we have emphasised, 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- there is no separate and distinct duty of this kind."*

115. The EqHRC code gives the following guidance:

*6.28 The following are some of the 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 (such as advice through Access to Work); and*

*the type and size of the employer.*

*6.29 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.*

116. In ***Newham Sixth Form College v Sanders*** **[2014] EWCA Civ 734** the Court of Appeal highlighted the need to have regard to the nature and degree of the disadvantage suffered by the employee in any assessment of whether an adjustment would be reasonable. It was said:

*116.1.1. "An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable."*

117. In order to establish that an adjustment might be a reasonable step to take it is not necessary to show that, by itself, it would entirely eliminate any disadvantage. It is enough to show that there was a prospect of it alleviating the disadvantage see ***Noor v Foreign and Commonwealth Office*** **[2011] ICR 695**. The greater that prospect the more likely it is that taking such a step will be reasonable.

Discussions and conclusions

118. It is possible to deal with these claims fairly shortly. Whilst the Claims were not formerly abandoned the Claimant did not pursue these claims with any enthusiasm. When asked about what aspect of the role that she had been offered she considered would place her at a disadvantage her response was that she considered that she could have taken up the role without any adjustments whatsoever.

119. In respect of the last 3 PCP's identified in the list of issues we do find that it was a policy or practice of the Respondents that they would not tolerate material risk to patient or employee safety of a situation where employees were not "fit to practice" in professional terms. However, our findings set out above in considering the Section 15 claim accord with the Claimant's own position in that as a matter of fact there was no material risk to her or any patient safety and she was at all material times fit to practice. In the circumstances there was no disadvantage to the Claimant of the PCPs as drafted and her reasonable adjustment claim cannot succeed.

120. The Respondent did not have a PCP of requiring employees or indeed the Claimant to work under constant supervision. The Respondent had erroneously concluded that that might be necessary to allow the Claimant to work safely but it was not a PCP applied to the Claimant. Accordingly, this claim cannot succeed.

121. The second PCP is expressed as a "concern about absences". It is correct that when references had first come in from the NHS Hospital attention was drawn to the Claimants historical rate of absences. That did not cause the Respondent to question the Claimant's appointment. The evidence

of the Respondent, which we accept, is that it was not concern about absences that caused it to act as it did. In those circumstances again it is impossible to see that the Claimant actually suffered any disadvantage because of any concern about absences.

122. It may have been possible for the Claimant to have framed her case on reasonable adjustments differently but it is not the role of the Tribunal to formulate a case not presented by a party.

123. In case we are wrong about any of these matters we would add that consultation and probationary periods would not ordinarily be considered reasonable adjustments, see ***Tarbuck v. Sainsbury's Supermarkets Limited***.

Notice pay

124. The Respondent conceded that the Claimant was, as a matter of law, dismissed. She had entered into a contract of employment and a start date had been agreed for 1 February 2016. The Respondent then sought unilaterally to vary that start date. There is no evidence that the Claimant agreed to this. The Respondent then informed the Claimant that she would not be employed from 19 February 2016. Again it is conceded that this is a dismissal. The contract provides that any dismissal should be upon 8 weeks notice. The dismissal was without notice and therefore the Respondent will have to pay any damages caused by that breach of contract.

125. The amount to be paid by way of damages will, if agreement has not been reached, be calculated at the remedy hearing.

Arrears of pay 1-19 February 2016

126. The Claimant was not paid for the period 1-19 February 2016. Again the Respondent has conceded that she should have been. The legal position is that the Claimant had a contractual agreement that she would start work on 1 February 2016 which the Respondent sought to unilaterally vary. They could not lawfully do so. The Claimant was ready willing and able to work and is therefore entitled to her wages.

127. The amount of wages due will, if agreement has not been reached, be calculated at the remedy hearing.

Holiday pay

128. The Respondent has conceded that in the period 1-19 February 2016 the Claimant accrued entitlement to annual leave and therefore on 19

February 2016 she is entitled to accrued holiday pay pursuant to Regulation 14 and 30 of the Working Time Regulations 1998.

129. The Respondent had not conceded and the Claimant had not abandoned a claim that she should continue to accrue holiday pay during the 8 week notice period (she was not given). She made no submissions in support of this. The fact that a dismissal is wrongful does not stop it being effective. The Claimant was not employed from 19 February 2016 and therefor did not continue to accrue entitlement to annual leave. That aspect of her claim is dismissed.

130. The amount of holiday pay due will, if agreement has not been reached, be calculated at the remedy hearing.

## Remedy hearing

131. The matter will be set down for a remedy hearing to decide all outstanding issues.

Employment Judge John Crosfill

Date: 9 July 2017