EMPLOYMENT TRIBUNALS

Claimant: **Miss L Ward**

Respondent: **University Hospitals Bristol NHS Foundation Trust**

Heard at: **Bristol** **On:** **16 & 17 February 2017**

Before: **Employment Judge Mulvaney**
Mrs G A Meehan
Mrs E Burlow

Representation
Claimant: Mr Bromige, Counsel
Respondent: Mrs J Smeaton, Counsel

RESERVED JUDGMENT

1. The claimant's claim of discrimination under s15 Equality Act was upheld.

2. The claimant's claim of discrimination under s20 Equality Act did not succeed and was dismissed.

3. The remedy hearing provisionally listed for the 2 May 2015 is postponed. Details of the new remedy hearing will follow in due course.

REASONS

1. The claimant claimed disability discrimination under ss15 and 20 Equality Act 2010 following the withdrawal of a conditional offer of employment by the respondent in March 2016.

2. The respondent is a publically funded NHS organisation providing acute health services to the city of Bristol and the surrounding area. The respondent employs over 8,000 people in more than 10 sites. The

claimant applied for a Band 3 Clinic Coordinator post at the Bristol Dental Hospital.

3. The Tribunal heard evidence from the claimant and for the respondent from: Mrs Doreen Mason, Outpatient Supervisor and Mrs Anna Blake, Assistant General Manager. A further witness for the respondent, Ms Carolann Belk submitted a sworn witness statement but was unable to attend the tribunal to give evidence. This impacted on the weight that the Tribunal attached to that evidence

4. It was accepted by the respondent that the claimant's condition of spina-bifida constituted a disability as defined in s6 Equality Act 2010 and the Tribunal so found. It was also accepted by the respondent that the respondent knew of the claimant's disability from the date of her interview with the respondent on the 29 January 2016.

5. Prior to submissions, it was conceded on behalf of the respondent that the respondent had treated the claimant unfavourably by withdrawing a job offer because of something arising as a consequence of her disability, namely sickness absences revealed in references from former employers. The respondent relied on the defence of objective justification.

The issues to be determined by the Tribunal were as follows:

S15 EQA

6. The respondent having made the concession referred to under paragraph 5 above:

   6.1. Was the withdrawal of the job offer by the respondent a proportionate means of achieving a legitimate aim?

   6.2. The respondent relies on the aim of ensuring that it has employees who can attend work consistently and ensuring appropriate staffing levels which meet its business requirements and patient needs.

S20 – 21 EQA

7. Did the respondent know or ought it reasonably to have known of the claimant's disability and the likelihood of disadvantage?

8. Was the claimant placed at a substantial disadvantage because of the disability of spina-bifida by a provision, criterion or practice? The claimant contended that the following PCPs placed her at a disadvantage:
   8.1. The physical condition of the workplace, namely working with latex to which the claimant had an allergy;
   8.2. Application of the respondent's full sickness policy;
   8.3. Requirement of the claimant not to sit in close proximity to a toilet;
   8.4. Requirement that the claimant be physically present at work every day;

8.5. Requirement that the claimant work fixed hours.

9. What was the nature of the workplace adjustments which could have accommodated the claimant in the role of clinical co-ordinator and did the respondent unreasonably fail to consider and/or make such adjustments?

10. The adjustments suggested by the claimant were:
    10.1. Moving Latex stock away from the claimant's workplace;
    10.2. Adjustments to trigger levels under the sickness absence policy
    10.3. Moving the claimant's workstation close to a toilet
    10.4. Allowing the claimant to work remotely when she has flare-ups
    10.5. Allowing the claimant to work flexibly when she has flare-ups.

The Tribunal made the following findings of fact:

11. In January 2016 the claimant applied to the respondent for the role of Clinic Coordinator. The claimant attended an interview with the respondent on the 29 January 2016. The claimant informed the respondent at the interview that she had the condition spina-bifida and that she considered herself to be disabled. In the course of the interview the claimant indicated that she had an allergy to latex when explaining the reason she had moved from a clinical to an administrative role in a previous employment at Birmingham Children's Hospital. The claimant's evidence, which we accepted, was that her latex allergy was connected to her disability; however we did not find that she explained that connection in the interview.

12. The claimant was successful at interview and she was conditionally offered the role of Clinic Coordinator by letter from the respondent dated 2 February 2016 (168 -170). The respondent's letter stated that the offer was subject to the satisfactory receipt of pre-employment checks including references and an Occupational Health questionnaire. The process for completing the Occupational Health (OH) Questionnaire was set out on the second page of the lengthy letter and gave instructions on how to complete the form online. The claimant admitted that she had not read the letter in detail and had not understood that she had to access and complete the OH form via the internet. Ms Honeywell, Recruitment Officer, chased the claimant for the form by email on two occasions, once on the 12 February 2016 and again on the 2 March 2016. The claimant responded on the 2 March to say that no form had been attached to her offer letter. No follow up communication was sent to the claimant to explain that the form had to be completed online and that the instructions on how to access it were contained in the offer letter.

13. On the 10 February 2016, the respondent received a completed reference for the claimant from North Bristol NHS Trust, the employer for whom the claimant was at that time working on a fixed term contract due to expire in May 2016 (126). The claimant was employed by North Bristol NHS Trust as a waiting list coordinator. The reference was positive in terms of the

claimant's work capability but showed that the claimant had had 63 days of sickness absence on 11 occasions between March 2015 and March 2016.

14. Mrs Mason of the respondent, who had been on the interview panel and involved in the recruitment exercise, telephoned the claimant to discuss the reference and the claimant explained that aside from her disability related absences, she had had one absence of 20 days due to stress following a poorly managed restructure and another absence related to a cold. Mrs Mason asked the claimant if she would require any adjustments and the claimant although she initially indicated that none would be required, eventually said that she would need to sit near a toilet due to problems with incontinence related to her disability.

15. The claimant followed up the call with Mrs Mason with an email to her dated 15 February 2016 (173) explaining her non-disability related absences which were the stress-related longer period and two other shorter periods. She concluded her email:

> *" Apart from a cold all other incidents have been caused by my long standing condition Spina Bifida and these I have no doubt can be reduced with some small support from you, Occupational Health and HR and this was something my current employer was uninterested in helping me with."*

16. On the basis of the information Mrs Mason had at that time both from North Bristol NHS Trust and from the claimant, it appeared that the majority of the claimant's absences had been a consequence of her disability. Mrs Mason did not attempt to obtain a breakdown of the absences from North Bristol Trust. In the course of these proceedings the claimant had obtained a breakdown of her absences from North Bristol which indicated that of 64 days absence, 23 had been disability related. We accepted the claimant's evidence that a further 5 days listed by North Bristol as 'Reaction to medication' were also disability related so that 28 days of the 64 day total were disability related, meaning that 36 days sickness absence with North Bristol were not disability related.

17. On the 16 and 18 February Mrs Mason emailed Annabel Pobjoy in HR and also Occupational Health for advice in the light of the North Bristol Trust reference and the claimant's sickness absence record. She said that the role for which she was recruiting was to support and cover absences for other coordinators and asked for advice on what options were available in the light of the claimant's condition.

18. On the 19 February 2016 a reference was received from Birmingham Children's Hospital, the claimant's employer prior to North Bristol Trust from May 2008 to March 2015(129). Although the reference was positive as to the claimant's capabilities, it indicated that the claimant had had 200 days sickness absence on 10 occasions in the last 2 years of employment. The referee had answered '*No*' to the question '*Would you re-employ Lana* (the claimant) *in a similar role*', and had given as the reason '*Due to Lana's sickness record, coupled with the fact that she has contact*

dermatitis from products within the trust we would be unable to re-employ her.' (130)

19. On the 22 February 2106, Mrs Mason emailed Jane Redfern of HR, copying in Carolann Belk, Mrs Mason's line manager, referring to the claimant's references and sickness absence record. Ms Belk responded to Mrs Mason on the 22 February stating that her *'core feeling is we should withdraw unless DAWA prevents us from doing so'*. DAWA was explained to be a reference to the Disability at Work Act, perhaps a reference to the now repealed Disability Discrimination Act. In a follow up email to Ms Redfern and Ms Belk of the 23 February 2016, Mrs Mason stated that her team had three out of seven staff with medical conditions/disability and expressed her concern that '*we would be unable to support this level of absence'.*

20. On the 24 and 26 February the claimant sent emails to Mrs Mason chasing for progress on her appointment. Mrs Mason responded to the claimant on the 26 February informing her that they had received her second reference from Birmingham Children's Hospital which had shown high levels of sickness absence. She said '*As a line manager the level of absence is such that I had to refer this to our HR Department. They have suggested that perhaps you or your nominated representative could provide a breakdown of these absences to assist in making a final decision*'. (183)

21. The claimant replied on the 29 February 2016 informing Mrs Mason that her latex allergy had meant that she had had to stop working in a clinical setting and it had led to a long period of time off (6 months) whilst Birmingham Children's Hospital tried to relocate her to an administrative role. The latex allergy was directly linked to her spina-bifida. The claimant asked to be provided with the names of the people in HR and Occupational Health to whom Mrs Mason was talking so she could chase it up. She said she felt that it was a case of discrimination. (182)

22. It was the claimant's evidence to the Tribunal that she had suffered an allergic reaction to latex whilst working in her clinical role at Birmingham which had caused her to be off sick and she had then had an extended period of absence lasting for more than 6 months whilst the hospital tried to find an alternative non-clinical position for her. She estimated that she was off for approximately 120 days on this occasion. She could not recollect the reasons for her other absences or how many were disability related. She said that Birmingham had been supportive although she had been put on stage one of the absence procedure. Mrs Mason accepted that the claimant's explanation indicated that the majority of her sickness absences referred to by Birmingham had been disability related.

23. Between the 29 February 2016 and the 2 March further discussions took place between Ms Belk, Mrs Blake and Ms Redfern following receipt of the claimant's email. On 2 March 2016 Ms Redfern emailed Mrs Mason and Ms Belk copying in Ms Blake. She stated in her email:

'Doreen, when we spoke I asked if you can get more detail about the absences listed in the reference, the reason for this was to determine how much of the sickness absence described in the reference was related to her disability.
You first have to decide if, through a robust selection process, she is absolutely the right person for the job(?)
As I see it there are two outcomes:-
1. The majority of the absences are not related to a disability that falls under the Equality Act. The advice would be that you withdraw your offer on the basis that the reference were (sic) unsatisfactory. ……
2. If the majority of the absences are related directly to her Spina Bifida then I would advise discussing this with her further. It is important that we establish if this level of absence is likely to continue and what it means for the service. It is likely we may need to consider reasonable adjustments
You should also take into account:-

- *How effective the adjustment would be in overcoming the disadvantage;*
- *How practicable it is to make the adjustment;*
- *The financial and other costs incurred and the extend of any disruption to the service;*
- *The extent of our financial and other resources as a Trust;*
- *The availability of financial and/or other assistance in making the adjustment;*
- *The size and ability of the organisation to make the adjustment.'*(187)

24. Mrs Mason had attempted to seek advice from Occupational Health but had been told by Ms Redfern of HR that Occupational Health advice would '*only be required if managers wish to proceed with the appointment and we determine that the majority of absence is related to disability'*. We found that had the claimant completed her OH assessment form and had she indicated any potential difficulties in carrying out her role, there might have been some limited involvement between the claimant and OH directly under the respondent's recruitment policy. However the option for a manager to refer a potential employee to Occupational Health fell outside of the recruitment policy and was excluded as a possibility by Ms Redfern. Mrs Mason however accepted in cross examination that she had wanted to proceed with the claimant's appointment and that the majority of her absences related to her disability, which led us to conclude that a reference to OH would have been appropriate in the circumstances.

25. Mrs Mason's evidence was that following the escalation of the question of the claimant's appointment to her line manager, Ms Belk and to Ms Blake, the Assistant General Manager, she was no longer directly involved in communicating with the claimant. No response was sent to the claimant's letter of the 29 February in which the claimant had told Mrs Mason that 6 month's absence whilst employed by Birmingham Children's Hospital had been related to her disability. The respondent did not contact Birmingham Children's Hospital to seek a breakdown of the claimant's absences. Mrs Mason's explanation for this was that HR had advised that the individual should approach the referee for further information rather than the respondent and that if the respondent were to do so it would have to

obtain the individual's permission. We found no policy or guideline that supported this HR advice and found that an approach could have been made to the previous employers for further information either with or without the claimant's express permission.

26. Ms Belk's evidence in her witness statement was that by this stage the respondent had done what Ms Redfern had advised in her letter of 2 March 2016. She stated that attempts had been made to enquire how much of the claimant's sickness absence related to her disability and that the respondent had made enquiries as to whether reasonable adjustments could be made to support her and reduce her sickness absence in the future. Ms Belk was not in attendance so she could not be cross examined on her evidence on this point. She had had no direct contact with the claimant. We found that although Mrs Mason had made some limited enquiries of the claimant about the composition of her sickness absence and about possible reasonable adjustments, the general tenor of the respondent's approach had been to go through the motions in making such enquiries of the claimant and that in Ms Belk's words, the 'core feeling was to withdraw' the offer. Ms Belk stated in her witness statement that in her view the '*claimant's levels of sickness absence were unsustainable and as such, unless her sickness absence was directly related to her disability, we should withdraw the offer as the service would be unable to support the claimant being away from work for so long.*'

27. Ms Belk's witness statement stated that she made eight attempts to contact the claimant by telephone between the 2 and 4 March 2016 to discuss her sickness absence. A call detail report provided by the respondent (197c) indicated that a number of calls had been made to the claimant's mobile number on the 2, 3 and 4 March 2016. The duration of the calls indicated that on only one occasion at 5.03pm on the 3 March might a message have been left, contradicting Ms Belk's evidence that '*numerous messages'* were left. The other calls were all brief indicating no reply from the claimant's number. The claimant's evidence was that she did not receive any calls from Ms Belk. She said that she may have received calls from a withheld number, but stated that no message had been left. There was evidence on the claimant's own phone records (197b) that she rang her voicemail number just after 5.05pm on the 3 March 2016 but the claimant's evidence was that no message was received from Ms Belk. We found the claimant's evidence to have been generally credible. She was prepared to agree to some propositions put to her in cross examination and was not evasive in her answers. Ms Belk's evidence could not be challenged in cross examination and it was not clear what her intention was in making the calls to the claimant. Ms Belk referred in an email dated 7 March 2016 to having made several attempts to 'verbally advise' that the respondent would not be proceeding with a job offer although the call records indicate only one attempt on that day, so it was not clear what the intent was behind the calls she made. On balance we accepted the claimant's evidence that she did not receive a voicemail message from Ms Belk.

28. The claimant had been prompt in responding to emails from the respondent but after the 29 February 2016 no attempt was made by the respondent to contact her by email to seek any further clarification of her sickness absences in her previous employment.

29. On the 4 March 2016 Ms Belk emailed Sue Honeywell, Recruitment Officer, to say that the claimant's application needed to be rejected and that the position should be reviewed and the letter issued on the 7 March unless Ms Blake advised otherwise. It was Ms Blake's evidence that she made the decision on Monday 7 March that the claimant's offer should be withdrawn. She believed that the claimant had become disengaged in the process and that Mrs Mason and Ms Belk had done everything she would have expected to gather further information from the claimant. Ms Belk and Mrs Mason both referred in their evidence to the claimant having failed to give her permission to the respondent to contact her referees for further information, although that permission had not been requested by the respondent. They also referred to the fact that the claimant had failed to provide a breakdown of her absences as requested, although that 'request' was relayed in the form of a 'suggestion from HR' and had been unclear. The claimant's email giving information in response to that email had not been followed up to say that it was insufficient.

30. Ms Blake's evidence was that she was concerned about the claimant's high levels of absence shown in the references and about the service's ability to sustain such high levels of absence, particularly as the post had been generated to provide additional resource in an already stretched team. She was also concerned about the comment made in the Birmingham Children's Hospital reference that they would not reemploy the claimant, which she considered to be an unusual statement for a referee to make. She said that had it been the case that all of the claimant's sickness absence related to her disability her decision would have been different and reasonable adjustments would have been made to accommodate the claimant's condition. In respect of the adjustments referred to by the claimant in the course of these proceedings, Mrs Mason's evidence in her witness statement and Ms Blake's evidence to the Tribunal was that:

- there would not be a requirement for the claimant to work with latex. The claimant had referred to rubber bands potentially causing an allergic reaction but Mrs Mason had confirmed in her evidence that ensuring that she had no contact with rubber bands would not have been a problem;

- the respondent's Attendance Policy provided for discretion to be used by managers in acting on sickness absence where the absence was caused by a disability;

- the claimant's desk could be situated close to a toilet;

- some limited provision for home working could be accommodated;

- flexible working could be accommodated.

Although it was put to the claimant in cross examination that home and flexible working would not be appropriate for the role of clinic coordinator, and the claimant accepted that those adjustments might not be appropriate for some roles, Ms Blake, in her evidence indicated that there was scope for such adjustments to be made.

31. A letter was emailed to the claimant on 7 March 2016 informing her that the respondent was unable to progress the claimant's application as one of her references was unsatisfactory. The claimant telephoned the respondent on receipt of the email and spoke to Ms Belk. She asked if the reason for the withdrawal was her sickness absence and Ms Belk told her it was not. The claimant was angered by the decision and although Ms Belk gave her a number for HR the claimant did not make any further contact with the respondent.

32. After the expiry of her fixed term contract with North Bristol on the 22 May 2016, the claimant was unemployed until she was successful in obtaining a Research Administrator role again with North Bristol Trust which started on the 18 July 2016. North Bristol Trust had made adjustments to accommodate the claimant, including flexible working hours, modification of the sickness absence procedure trigger points and allowed occasional home working. The claimant's evidence was that the adjustments had been successful and that she has a low level of sickness absence in her current employment.

Conclusions

33. In reaching its conclusions the Tribunal considered all the evidence that it heard and the documents to which it was referred and which it regarded as relevant. It also had regard to the submissions of the parties.

Discrimination because of something arising as a consequence of disability S15 EqA

34. The Tribunal considered first the claimant's claim under s15 EqA. In the light of the respondent's concession that it had treated the claimant unfavourably by withdrawing a job offer because of something arising as a consequence of her disability, namely sickness absences revealed in references from former employers, our considerations focused on whether the respondent could show that the withdrawal of the offer of employment was a proportionate means of achieving a legitimate aim.

35. The test to be applied in relation to justification is that set out in the case of ***Hampsom v DES [1989] ICR 179***. In order to be 'justifiable' an objective balance must be shown between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. In the case of ***MacCulloch v. Imperial Chemical Industries plc [2008] ICR***

1334, the EAT provided guidance on the application of the test and the manner in which tribunals should apply it:

> 10. 'The legal principles with regard to justification are not in dispute and can be summarised as follows:
> (1) The burden of proof is on the respondent to establish justification: see **Starmer v British Airways** [2005] IRLR 863 at [31].
>
> (2) The classic test was set out in **Bilka-Kaufhas GmbH v Weber Von Hartz** (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see **Rainey v Greater Glasgow Health Board (HL)** [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax** [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.
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> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax** [2005] IRLR 726, CA.

36. As indicated, the burden is on the respondent to establish the defence under s15.

37. The respondent relies on the aim of ensuring that it has employees who can attend work consistently and ensuring appropriate staffing levels which meet its business requirements and patient needs.

38. The respondent's aim of ensuring that it has employees who can attend work consistently is potentially a discriminatory aim in itself as it is more likely to disadvantage employees or applicants for employment with disabilities, whose conditions may cause them to have higher levels of sickness absence, than those without a disability. In the light of that conclusion we did not consider that this aim was a legitimate one. However, we were satisfied that it is a legitimate aim of an organisation to ensure that it has appropriate staffing levels to meet its business requirements and client needs. An NHS Trust has a real need to provide an effective service to its patients and to ensure that it has the appropriate administrative and clinical staffing levels to meet that need. The second part of the aim is a lawful one which is not discriminatory in itself. The respondent's concerns about its ability to meet the demands on the service in the light of potentially high absence levels was expressed during the period to which these proceedings relate and it was not disputed that the role for which the claimant was being recruited was an additional role created to assist an already stretched team. We were satisfied that the

respondent was likely to have been concerned when the claimant's references revealed a level of sickness absence which would, had it been replicated in the role for which she was being recruited, have adversely impacted on the clinic co-ordination team's ability to carry out its function effectively and efficiently.

39. The Tribunal therefore had to consider whether the treatment of the claimant by the respondent was a proportionate means of achieving its aim of ensuring that it has appropriate staffing levels to meet its business requirements and client needs. We had to weigh the reasonable needs of the respondent against the discriminatory effect of the employer's measure and to make our own assessment of whether the former outweighed the latter. The balancing exercise we had to conduct was to consider whether the respondent's reasonable need to ensure an appropriate level of staffing justified the denial of employment to the claimant.

40. The Tribunal heard little evidence on the importance to the respondent of the newly created role for which the claimant was being recruited. Mrs Mason had indicated in her evidence that she had identified a need for an addition to the existing clinic coordinator staffing complement which was struggling with its workload. Her evidence on this was not challenged by the claimant. We concluded that the respondent in seeking to recruit a suitable person to the new post was pursuing its legitimate aim of securing appropriate staffing levels and reflected a reasonable need on its part.

41. We asked ourselves whether it could be said, looked at objectively, that the discriminatory impact on the claimant in denying her employment corresponded to a real need of the respondent, was appropriate with a view to achieving its aim and was reasonably necessary to that end. We concluded that it could not and our reasons for so concluding were:

    41.1. the claimant had been identified at interview as the best candidate for the role;
    41.2. the withdrawal of the job offer from the claimant was based on an assumption by the respondent that the claimant's high levels of sickness absence (the majority of which were disability related) in previous employments would be replicated in her employment with the respondent. The respondent's HR Business Partner, Ms Redfern had advised on the importance, prior to taking a decision, of establishing whether the levels of absence were likely to continue and what that meant for the service. She had also identified the matters, such as the need for reasonable adjustments, to be taken into account in that exercise;
    41.3. the respondent failed to take steps to establish the likelihood of the claimant's sickness absence levels continuing by:
        - contacting the claimant's previous employers to ascertain the reasons for the claimant's sickness absence;
        - enquiring of Birmingham Children's Hospital the reason behind its indication that it would not re-employ the claimant; whether

that was based primarily on her extended absence due to her latex allergy;

- properly engaging with the claimant in a discussion about the likelihood or otherwise of there being a continuing pattern of a high level of disability related absences;
- considering with the claimant the question of whether reasonable adjustments might reduce the likelihood of disability related absences;
- involving Occupational Health in those discussions and assessments;
- assessing the effectiveness and practicability of making such adjustments;

41.4. the claimant had indicated to the respondent that the majority of her sickness absences had been disability related and that they could be reduced with some support from her employer which had not been provided in her previous employment;

41.5. the respondent did not state that, had there been no disability related absences, it would have decided to withdraw the offer of employment because of non-disability related absence levels;

41.6. it was Ms Blake's evidence for the respondent at the hearing that the reasonable adjustments identified by the claimant as measures that could reduce her disability related absences could in large part have been accommodated without significant cost or difficulty for the respondent;

41.7. the claimant's evidence at the hearing that she had been able to achieve much higher levels of attendance in her current role with North Bristol NHS Trust due to the adoption by them of reasonable adjustments of the type identified by the claimant was not challenged by the respondent;

41.8. We did not find on the evidence that the claimant's responses to Mrs Mason's emails indicated a lack of engagement with the respondent's concerns about sickness absence levels shown in her references. To the extent that there was some reluctance initially to identify to Mrs Mason difficulties caused by her condition, we considered that this was understandable in a candidate who did not want to jeopardise a job offer. She subsequently responded promptly to all email correspondence and requests for information. She had asked to be put in touch with a representative from HR or Occupational Health to discuss the issue. She had not been asked for further information when the respondent felt her responses did not fully answer their questions. She had not refused permission for the respondent to speak to her previous employers and in any event we are not aware of any prohibition on prospective employers contacting named referees for further information if required.

42. It was submitted by the respondent's representative that the claimant was taking exception to the process adopted by the respondent when it was considering whether to continue with her appointment and that the Tribunal, when applying the test of objective justification, should be focusing on the outcome rather than the process. We concluded that the respondent could not demonstrate that the outcome (withdrawing the job offer) was a proportionate means of achieving its aim without establishing that it could safely assume that the claimant's levels of sickness absence shown in her previous employments would be replicated if it proceeded with her appointment. We concluded that the respondent could not establish the safety of that assumption because it had not taken the necessary steps of enquiry. We concluded that both on the information available to it at the time and on the information subsequently available at the date of the Tribunal hearing, the respondent's assumption was unsafe. In the light of that we concluded that the respondent had not established that it was reasonably necessary for it to deny the claimant employment in a role for which she was the best candidate in order for it to achieve its aim of ensuring appropriate staffing levels which met its business requirements and patient needs.

43. We accept that some employers may not have the resources to undertake even limited enquiries of the type we have identified. However the respondent is a substantial employer and did have the resources to make further enquiries before withdrawing its offer and that would have been a proportionate step to take before denying the claimant employment for a reason related to her disability. Alternatively it could have appointed her and addressed sickness absence issues as they occurred by means of its sickness absence procedures.

44. For the reasons set out we concluded that the respondent had not established that its reasonable needs outweighed the discriminatory impact of its decision to withdraw its offer of employment to the claimant. The claimant's claim under s15 EqA therefore succeeded.

Failure to make reasonable adjustments s20 EqA

45. The claimant asserted that the respondent was under a duty to make reasonable adjustments. She asserted that the following provisions criteria and practices placed her at a substantial disadvantage in comparison with someone who was not disabled:

    45.1. The physical condition of the workplace, namely working with latex to which the claimant had an allergy;
    45.2. Application of the respondent's full sickness policy;
    45.3. Requirement of the claimant not to sit in close proximity to a toilet;
    45.4. Requirement that the claimant be physically present at work every day;
    45.5. Requirement that the claimant work fixed hours .

46. We found that these provisions were not applied by the respondent to the claimant at the time of the events to which these proceedings relate. The claimant did not contend that she was placed at a disadvantage during the interview process by the provisions. As the claimant was not invited to take up her role by the respondents and so did not attend the workplace subsequent to her interview she was not put in a position where these provisions were applied to her and placed her at a disadvantage. We therefore found that the duty to make adjustments was not triggered and the claimant's claim under s20 EqA did not succeed and was dismissed.

Remedy

47. The issue of remedy will be considered at the adjourned hearing unless the parties are able to achieve a resolution prior to that date.

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Employment Judge Mulvaney
25 April 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26 April 2017

FOR EMPLOYMENT TRIBUNALS