EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Yasin **v** **The Secretary of State for Justice**

Heard at: Birmingham **On**: 1 to 4 August 2017

Before: Employment Judge Broughton
Members: Mrs M Bradshaw
Mr J Sharma

Appearances:
For Claimant: Mr D Stephenson, counsel
For Respondent: Mr J Meichen, counsel

JUDGMENT

The unanimous judgment of this tribunal is:

The claimant's claim of discrimination under s.15 Equality Act 2010 succeeds.

In those circumstances his other claims were not pursued.

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Employment Judge Broughton

Date: 24 August 2017

Sent to the parties on: 30/08/2017

J.McPherson
For the Tribunal Office

REASONS

Findings of Fact

1. Mr Yasin suffers from ulcerative colitis, which the parties agreed constitutes a disability under the Equality Act 2010. He was first diagnosed in 2007.

2. The Employment Tribunal's Judgment dated 18 December 2015 effectively found that by 7 August 2014, the Respondent had constructive knowledge of the Claimant's disability, but not before.

3. Mr Yasin was initially a temporary agency worker registered with Brook Street (UK) Limited. On 22 April 2013 he was assigned to work for the Respondent.

4. From 5 to 20 May 2013, Mr Yasin was absent from work. He was hospitalised for investigations from 9 May and returned to work the day after he was discharged from hospital. The parties agree that this was the result of matters not related to his disability.

5. The claimant's evidence was that he gave the respondent full disclosure regarding this absence. Mr Bains, his line manager at the time, was unable to dispute this. The absence was signed off by Mr Bains on the respondent's records. There was no evidence of any return to work interview. There was also no evidence that any communication concerns were raised with the claimant either directly or indirectly (via the agency) either at the time or subsequently.

6. Around that time, Mr Yasin applied for a 2-year fixed term position with the Respondent as a caseworker/administrative assistant.

7. From 15 July 2013 to 29 August 2013, Mr Yasin had a further period of absence. He underwent a surgical procedure in that period that was again unrelated to his disability.

8. That absence was also signed off on the respondent's records. Again, there was no evidence of any return to work interview. There was also no evidence that any communication concerns were raised with the claimant directly or indirectly (via the agency) either at the time or subsequently.

9. On 20 May 2014, Mr Yasin received a conditional offer of fixed term employment from the Respondent. It was subject to pre-employment checks and a health questionnaire being satisfactorily completed. That process could take several months.

10. On 17 July 2014, Mr Yasin had an "accident" on the way to a work training course that he subsequently learnt was related to his disability. He was admitted to hospital and notified Brook Street of his admission the same day.

11. On 18 July 2014, Mr Yasin informed both Brook Street and the Respondent via Baz Bains (who for much of his engagement was the Claimant's immediate line manager) that he had been admitted to hospital. He did so via email. No specific details were provided. The claimant says that this was because he was embarrassed and that is understandable.

12. The claimant said he was unsure when he would be discharged and asked for confidentiality. The note from Brook Street suggested that they had agreed with the respondent that, in the circumstances, there would be no contact for a few days. The reply from Mr Bains to the claimant said little more than "no problem....get well soon".

13. In evidence before us the claimant appeared to suggest he may have had a telephone call with Brook Street on or around 21 July 2014. Such a conversation had not been mentioned before, was not in the claimant's witness statement, nor in Brook Street's notes. It appeared contrary to subsequent emails. Accordingly, we think the claimant must have been mistaken.

14. On 22 and 23 July 2014, the Respondent asked Brook Street for an update.

15. On 24 July 2014, seemingly before being chased, the claimant emailed the respondent and Brook Street to update them that he was still in hospital and saying that he would update them when the situation changed. No further information was provided.

16. Mr Bains, on behalf of the respondent, simply replied “thanks...get well soon”

17. Brook Street also replied the same day asking the claimant to provide a doctor’s note.

18. On 26 July 2014 the claimant replied to say that the sick note was on its way. The original note was dated 25 July 2014 and covered the claimant’s “inpatient stay” from 17 to 30 July 2014.

19. On 29 July 2014, Monique Bruce, the new line manager of Mr Bains, met with Cher of Brook Street and apparently asked for more information regarding the claimant’s absence.

20. On 31 July 2014, Brook Street emailed the claimant to confirm that his sick note had been received but, as it had expired, they also requested an update.

21. The claimant again replied the same day saying that he was still in hospital and that he had no indication of a discharge date. He said that investigations were underway to determine a definitive diagnosis.

22. Also on 31 July 2014 we saw an internal email from the respondent related to the claimant’s absence.

23. On the afternoon of Friday 1 August 2014 Brook Street emailed the claimant requesting an updated sick note. They also asked for a conversation with him to understand his progress and to discuss any possible adjustments he may require. The email also stated that the respondent wanted to know when he was likely to return to work.

24. Shortly thereafter Brook Street emailed the respondent updating them that the claimant remained in hospital with no indication of a return to work date and saying that they had proposed a telephone call.

25. On 4 August 2014, the next working day, Brook Street attempted to call the claimant. That evening the claimant emailed Brook Street to inform them that he was still in hospital and was awaiting the further sick note.

26. Before this, however, Mr Dougall, the respondent's head of operations, made the decision, in conjunction with other managers, to terminate Mr Yasin's temporary assignment and rescind the offer of a fixed term contract.

27. Ms Bruce, on behalf of the respondent, informed Brook Street of the decision to end Mr Yasin's assignment via email on 4 August 2014. She gave the reason as the claimant's absence. Her evidence was that this was what she understood the reason to be.

28. Anita Smith also sent an internal email the same day asking for the claimant's fixed term contract offer to be withdrawn. She gave the reason as the claimant's attendance.

29. On 7 August 2014, via email Mr Yasin informed Brook Street that he had been discharged from hospital. He said that he was still not fit for work and was unlikely to be fit for 2 months. He said that a further sick note was on its way.

30. He was then informed by email from Brook Street that his assignment had been terminated by the respondent.

31. Mr Yasin responded that day via email, seeking an explanation and informed Mr Bains and others that he had been diagnosed with a form of inflammatory bowel condition which was listed under the Equality Act.

32. Later that same day, 7 August 2014, Ian Dougall (the Respondent's Head of Operations) emailed Mr Yasin to say 'I will look into this matter and provide

you with a response at the earliest opportunity. Given the serious nature of the issues you raise please direct all queries or further emails to me'.

33. Mr Dougall asked Ms Bruce to provide him with a timeline of events which she provided that evening.

34. On 13 August 2014 the claimant chased Brook Street for an explanation for the ending of his assignment. He received a response stating that the reason was because he had stated that he would be absent for 2 more months. It was common ground that this could not have been the reason because it was not known to the respondent at the relevant time. How that information came to be relayed, incorrectly, to Brook Street was a mystery. Brook Street confirmed that the claimant remained employed by them.

35. On 14 August 2014 following someone at the respondent suggesting that the offer of employment could not be withdrawn, Anita Smith checked the position with Mr Dougall before confirming that the offer should be withdrawn for the original reason given, being attendance. Mr Dougall was a party to that correspondence and did not seek to correct or amend it.

36. On 18 August 2014, Mr Dougall emailed Mr Yasin to say that he had reviewed the termination of his contract and gave a list of matters that he had taken into account in conducting his review.

37. He referenced the claimant's two periods of absence the previous year. It appeared from his evidence before us that he believed they both fell within the rolling absence year when clearly the first absence did not.

38. He suggested that in relation to both absences the respondent had been given no information. We saw evidence to show that the respondent had signed off both absences and that some information had, in fact, been provided. Whilst the precise details of the absences did not appear in any of the respondent's records there was no evidence before us to suggest any

obligation on the claimant to provide the same, nor any suggestion that he had ever been asked for more.

39. Mr Dougall then raised concerns about the 2014 absence. He focussed on the length of the absence and the lack of information. He stated as follows:

"this further prolonged absence, added to the previous lengthy absence was not acceptable."

"the lack of information meant that managers had to make a decision based on the information available"

The agency assignment was, therefore, terminated immediately on 4 August 2014. He went on to say the fixed term contract offer would also be withdrawn for the same reasons.

He said it was "a reasonable decision in terms of the unacceptably high levels of absence" and

He also thought the decision was reasonable because "managers had been given no information about the nature of the illness on either occasion and were therefore left in an unsustainable position and had to make a decision in the absence of information"

40. On 20 August 2014, Mr Yasin was forwarded a letter from Amanda Cunningham (the Operational Delivery Manager of the Respondent), indicating that his dealings with the Respondent 'have not been acceptable' and 'the conditioned (sic) offer of fixed term employment is therefore withdrawn'.

41. The letter confirmed that the Respondent would not continue with the pre-employment vetting checks which were necessary for Mr Yasin's employment within the Civil Service. The letter went on to refer to Mr Yasin having failed to work in accordance with the Civil Service Code of Conduct. It was accepted

that that part of the letter was included from the respondent's standard letter template in error, although it appears to us that the respondent may well have used the wrong template altogether.

42. The claimant subsequently wrote to the respondent twice asking for more information seemingly to challenge the decision but it appears those letters were not received.

Procedural Background

The parties had helpfully agreed the following:

1. By a claim form presented to the Employment Tribunal ("ET") on 14 January 2015 the claimant claimed:

    a. Failure to make reasonable adjustments, contrary to section 20 EqA when read with section 39(1) of the Equality Act 2010 ("EqA");
    b. Discrimination arising from disability, contrary to section 15 EqA 2010; and
    c. Indirect disability discrimination, contrary to section 19 EqA 2010.

2. The claim for indirect discrimination was withdrawn at the first liability hearing before EJ Perry and was no longer pursued.

3. The Birmingham ET (EJ Perry, Mr Thaper and Mr Ellis) heard the Claimant's claim on 10, 11 and 12 September 2015.

4. By a unanimous decision sent to the parties on 18 December 2015 ("Perry ET"), the ET dismissed the Claimant's complaints of failure to make reasonable adjustments and discrimination arising from disability under sections 20,21 and 15 respectively.

5. The Perry ET found that the Respondent's withdrawal of the conditional fixed term offer of employment was not only because of the claimant's

attendance record but also because of his failure to keep the respondent informed during his absence which was such that trust and confidence had broken down.

6. The Perry ET found that the claim failed because:

    a. The suggested reasonable adjustment would have made no difference [Perry Reasons, §135] because of the breakdown in trust and confidence;
    b. Withdrawing the offer was justified in order to have effective service which was not possible given the break down in trust and confidence [Perry Reasons, §146].

7. By notice and grounds of appeal dated 28 January 2016, the claimant appealed to the EAT. His central ground concerned the fact that the Perry decision made findings of fact which went beyond the respondent's pleaded case.

8. The Respondent did not cross-appeal.

9. By his judgment handed down on 2 March 2017, HHJ Shanks allowed the Claimant's appeal and the Perry decision under sections 15 and 21 was set aside.

10. Only the issues concerning section 15(1)(b) and "reasonable adjustments" were remitted to be considered by a fresh ET [EAT judgment, §22].

11. This was confirmed when the matter came before EJ Findlay for a PH on 19 April 2017 to consider case management for the remitted hearing. The respondent made an application to amend and in consequence of the respondent's application, the claimant made an application to amend his claim

12. EJ Findlay granted both applications. The respondent was directed to file a copy of its further amended response (in accordance with its application made on 14 April 2017) by 25 April 2017.

13. The respondent filed an amended response on 25 April 2017.

14. The claimant had permission to file amended Particulars of Claim to reflect the respondent's amendments by 2 May 2017.

15. On 2 May 2017, the claimant filed the wording of his amendment to his claim in the same terms provided at the PH on 19 April 2017, and later provided an amended Particulars of Claim for ease of reference.

16. The list of issues, in so far as they could be determined, were identified by EJ Findlay at the PH on 19 April 2017. Before us the finalised list of issues was agreed as set out below.

17. It was agreed that it would be an abuse of process for either party to seek to re-open matters that had been determined and were not challenged, including by way of any cross-appeal. The material findings relevant to the remitted hearing were agreed to be as follows:

18. The Perry ET found that:

    a. until 7 August 2014 the Respondent could not reasonably have been expected to know that the Claimant was disabled.
    b. the Claimant's email of 7 August 2014 [138] should have placed the Respondent on notice that further enquiries were necessary [Perry Reasons, §114].
    c. the Respondent was seized with constructive knowledge of the Claimant's disability when it reviewed its decision on 18 August 2014 [Perry Reasons, §115 (s. 15 claim)].
    d. the absence that triggered the decision to withdraw the Claimant's conditional offer of employment was the absence during his last

hospitalisation (17 July to early August 2014), which had been caused by his disability [Perry Reasons, §121].

e. the Respondent was also seized with constructive knowledge of the fact that the claimant was placed at a substantial disadvantage [Perry Reasons, §124 (s.20 and 21 claim)].

The issues

The parties agreed that the remaining issues on remission were as follows:

Section 15 claim

19. In the first hearing of the original claims it was conceded/determined that the claimant was treated unfavourably because of something arising in consequence of his disability, namely his absence.

20. Can the Respondent show that the relevant unfavourable treatment (withdrawal of a conditional offer of employment) was a proportionate means of achieving legitimate aims?

The legitimate aims relied upon are those set out in the application to amend, that is:

a. to ensure that all prospective employees are able to provide regular, effective and efficient service;

b. to ensure that all prospective employees have, and are able to maintain, the trust and confidence of the respondent.

21 In addition, the claimant suggested that if we were satisfied that his failure to communicate with the respondent during the period he was absent on grounds of ill health and/or hospitalised was causative of the withdrawal of his offer of employment that failure was also something arising in consequence of his disability.

22 If we were satisfied in relation to that, the respondent relied upon the same justification defence.

Reasonable adjustments

23. Did the respondent apply to the claimant a provision, criterion or practice of making an offer of employment contingent on having an acceptable attendance record? This was previously agreed.

24. If so, did the PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled, namely that he was required to take time off work due to his disability and could not therefore meet the requirement of having an acceptable attendance record?

25. If so, did the respondent take such steps as it was reasonable to take to avoid the disadvantage, namely to disregard disability related absence in deciding whether the claimant's attendance record was acceptable?

26. In addition, did the respondent apply to the claimant a provision, criterion or practice of requiring staff to inform the respondent and/or keep the respondent informed of all absences and the reasons for those absences?

27. **I**f so, did the PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled, namely that his disability meant that he was required to take time off as a result of his illness and being admitted to hospital, and could therefore not fulfil the requirement of having to "communicate" with the respondent during his sickness absence?

28. **I**f so, did the respondent take such steps as it was reasonable to take to avoid the disadvantage, namely to:

i. disregard disability related absence in deciding whether the claimant's attendance record was acceptable and/or

ii. wait until the claimant was discharged from hospital before meeting with him to clarify his health and/or
iii. have proper regard to the sensitive and embarrassing nature of his disability and/or
iv. have proper regard of the fact that he was hospitalised undergoing intrusive investigations for a serious condition

before withdrawing the offer of employment?

The Law

S.15 Equality Act 2010 Claim

29. This arises where an employer treats an applicant unfavourably because of something arising in consequence of their disability and cannot show that it is a proportionate means of achieving a legitimate aim.

30. We were referred to paragraph 5.2.1 of the Employment Code of Practice. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it would be difficult to show that it was objectively justified.

31. It was, quite rightly in our view, conceded by the respondent that the claimant was treated unfavourably for a reason arising in consequence of his disability, his absence, by having his job offer withdrawn. They focused their defence on the issue of justification.

32. We were referred to the relevant authorities and that the test for justification is in two parts:

32.1. was there a legitimate aim, and

32.2. was the treatment a proportionate means of achieving that aim?

33. We were reminded that it is an objective balance between the discriminatory effect on the individual and the reasonable needs of the employer.

34. We were also reminded that it would be an error of law for us to focus on any procedural failures of the employer as a reason for rejecting a justification defence. It was further accepted on the part of the respondent that the burden of establishing this defence is on them.

35. Regarding the issue of a legitimate aim. We were reminded that the aim should be legal and not discriminatory in itself and represent a real objective consideration. We would acknowledge and accept that the pleaded aims could potentially amount to a legitimate aims provided that they were clearly specified and supported by evidence. This was not particularly in dispute.

36. We considered the test of objective justification that the employer is required to show to our satisfaction that the aim alleged to be discriminatory corresponds to a real need on the part of the employer, that the policy is appropriate to achieve that objective and that it is reasonably necessary. That reasonably necessary test is stricter than the range of reasonable responses test but that does not mean that the employer has to demonstrate that no other proposal was possible, but rather we had to make our own judgment regarding whether it was necessary.

37. With regard to proportionate means, the test is that the means have to be appropriate and reasonably necessary. Effectively we have to carry out a balancing exercise by evaluating the discriminatory effect on the individual against the employer's reasons for applying the aim, considering all relevant facts.

38. The effect here was not really in dispute, the loss of the job that had been offered provisionally to the claimant and, he argued, his prospects of a future career in public service.

39. We were reminded that the reasons put forward by the respondent should be respected, albeit not uncritically accepted, and that we should consider any non-discriminatory alternatives put forward by the claimant in the context of determining whether or not they should have been adopted. Failure to do so would mean that the justification defence may fail.

Reasonable adjustments

40. Turning then to the issue of reasonable adjustments, to some extent this is the same claim framed in a different way.

41. We considered ss.20 and 21 Equality Act 2010 which provide that where a provision criteria or practice put a disabled person at a substantial disadvantage there is a requirement to take such steps as is reasonable to avoid that disadvantage.

42. The provision criterion or practice relied on here was as set out in the issues above.

43. We considered the EAT's decision in Environment Agency v Rowan [2008] ICR 218 and the PCP applied and the nature of the disadvantage suffered by the claimant. We also considered the Employment Code of Practice guidance in relation to such matters at paragraph 6.28, including:

43.1.whether particular steps would prevent the disadvantage,

43.2.their practicability,

43.3.the financial costs,

43.4.the extent of the employer's resources,

43.5.the available assistance, and

43.6.the type and size of the employer.

44. Again it was accepted on behalf of the respondent that if the burden had shifted it was for them to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment(s) or that the adjustment was not a reasonable one to make in any event.

45. That again is an objective test. An adjustment is not reasonable if it has no prospect of removing the disadvantage but if it has a prospect that is sufficient.

46. We were rightly reminded that there is no distinct duty to consult. The question is whether the adjustment could have been made and whether it could have removed some, or all, of the disadvantage irrespective of any procedural failings along the way.

Decision

Section 15 claim

47. It was confirmed that the only issue before us was the withdrawal of the claimant's offer of a fixed term contract. The termination of his agency contract occurred before the respondent had constructive knowledge of the claimant's disability and was not, therefore, pursued.

48. Whilst the decision on the withdrawal of the claimant's fixed term contract was initially made prior to the respondent having constructive knowledge of the claimant's disability that was not communicated to him.

49. Accordingly, it was common ground that the decision to withdraw the job offer was within our scope, whether that was by virtue of a review of the original decision or because the decision had not been communicated.

50. It was clear from all the documents and evidence before us that the claimant's absence played a material part in that decision and that the "trigger"

absence was disability related. Those were matters that were not in dispute before us.

51. We note the case of Pnaiser v NHS England UKEAT/0137/15/LA which states that the "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (more than trivial) influence and amount to an effective cause of that treatment.

52. It was conceded, therefore, that in relation to the claimant's claim under s15 Equality Act 2010 the burden had shifted to the respondent to justify the withdrawal of the job offer.

53. We would accept that the respondent's desire to ensure that all prospective employees are able to provide regular, effective and efficient service is a legitimate aim.

54. We would further accept that such an aim was operative in Mr Dougall's mind when deciding to withdraw the offer.

55. However, by the time that decision was communicated Mr Dougall was aware of the claimant's disability. He had reviewed the case with that knowledge yet made no mention of the claimant's disability in his response on 18 August.

56. In the rolling year prior to that decision the claimant had only 2 absences, albeit relatively lengthy ones. The first was for a scheduled operation and there was no reason to believe that this was likely to result in any further absences. The claimant had, after all, provided almost a year of uninterrupted service thereafter.

57. The only other absence was the disability related one that triggered the withdrawal of the job offer. The respondent had little or no evidence at the relevant time regarding the likelihood of future absences arising from the claimant's disability or otherwise.

58. The consequences for the claimant of the decision to withdraw the job offer were serious. That is relevant when carrying out the balancing act required of us when considering proportionality.

59. It seems to us that when considering the absence point in isolation under s15 the means engaged by the respondent were not proportionate. On the information before them the most that could be said was that it was possible that the claimant's future attendance might fall below the required standards. Even if that were the case, should future absences be disability related the respondent may have been under a duty to adjust their attendance targets to some degree. We heard that due to the size of their operation they built in some allowance to cover staff sickness in any event.

60. The respondent made assumptions about the claimant's likely future attendance that they could not back up with evidence.

61. The appropriate response, once aware of the claimant's disability, would have been to seek more information both from the claimant and from one or more medical professionals.

62. Having not done so, we fail to see how the respondent can justify their decision. Those failings were substantial and substantive. Meeting with the claimant to clarify the position surrounding his health and to raise the respondent's communication concerns and having proper regard to the serious, sensitive and embarrassing nature of his disability would form part of that.

63. The claimant had not yet passed the respondent's pre-employment checks, let alone received a start date. There was plenty of time for further investigation with him and time to obtain a medical report. Whilst it is true that in an ideal world the respondent would have hoped that the claimant would move seamlessly from agency staff to employed status, we heard that was not always the case. Some new recruits would be completely new to the respondent's operations.

64. In this case the respondent was losing an experienced new recruit, which may have necessitated the time and cost of training a replacement. From the model they described to us they would have had to replace him as an agency worker in any event. They withdrew the offer with no clear evidence that the claimant was unlikely to be able to provide regular service in the future.

65. The respondent, in relying on assumptions about the claimant's future attendance and in not seeking appropriate further evidence has failed to satisfy us that withdrawing the claimant's job offer was a proportionate response.

66. That view is further confirmed by the respondent's failure to even mention the claimant's disability in their contemporaneous justification for the withdrawal of the job offer. We draw adverse inference from that omission. It seems to us likely that the respondent, once in possession of constructive knowledge of the claimant's disability and whether consciously or not, did not want to risk seeking further information in the hope of avoiding a potential duty to make reasonable adjustments. Mr Dougall sought to entirely justify the respondent's decision based on the information they had on 4 August. It cannot be right that an employer can wilfully or recklessly ignore information about a disability to justify a decision triggered by a disability related absence.

67. To some degree, therefore, given the fact that the unfavourable treatment arose, at least in part, due to the claimant's disability related absence, that is the end of the matter.

68. However, the respondent contended that the principal reason for the claimant's treatment was an alleged breakdown in trust and confidence and that, as a result, the outcome would have been the same notwithstanding our findings above.

69. We do not accept that proposition. It was the claimant's absence that triggered the review of his attendance.

70. The reason given to Brook Street for terminating the claimant's agency contract was his absence.

71. The reason given internally at the respondent for withdrawing the job offer was the claimant's attendance.

72. Mr Dougall felt that those communications did not fully record his reasons but the evidence of Ms Bruce was that her understanding was that the reason was the claimant's absence.

73. On our reading of his email dated 18 August even Mr Dougall focussed principally on the claimant's absence. There were, of course, references to communication failings but they were in the context of justifying the decision based on absence. There was no mention of any breakdown in trust and confidence or, indeed, any other reason for the claimant's treatment.

74. The fact that the respondent did not originally plead trust and confidence only further confirms that view.

75. Accordingly we find that the principal reason for the claimant's treatment was his absence.

76. We note that the claimant was an agency worker. He had no obligation to provide the respondent with any information regarding his absence yet he did contact them directly on more than occasion. Had there been such an obligation it could, of course, undermine the claimant's agency status.

77. He provided the agency with information upon request and whilst they wanted more and chased him in that regard there was no indication that they considered that he had breached any obligations towards them and, indeed, he remained their employee with no sanction.

78. Similarly, at no stage had the respondent given any indication to the claimant that he needed to provide them with more information in relation to any

of his absences or the potential consequences if he did not. The direct communications from Mr Bains suggested otherwise.

79. In those circumstances we do not consider that there were valid or cogent reasons for suggesting that the claimant had breached trust and confidence in any event. The argument appears to us to have been an afterthought in an attempt to distance their decision from the claimant's disability. We accept that the respondent would want prospective employees to maintain their trust and confidence and that such was a legitimate aim but it was not engaged in the circumstances of this case.

80. The failure to communicate was a subsidiary reason in the decision to withdraw the job offer because of the claimant's absence. Even if trust and confidence was potentially engaged we would have to consider the combined effect of the legitimate aims but we still do not consider that the respondent's actions were a proportionate response for the reasons already given.

81. That is not to say that the respondent's perception that the claimant had been less than forthcoming with relevant information played no part in their decision. We accept that it did.

82. Indeed, the respondent's own evidence was that if the claimant had informed them of his disability prior to 4 August there may well have been a different outcome. That, of course begs the question why they did not change course once the claimant did provide that information a few days later. It seems to show that the respondent could, and should, have done more to investigate and support the claimant and further confirms our findings on proportionality above.

83. Whilst somewhat academic in light of our findings above we will go on to briefly consider the second way in which the claimant put his amended s.15 claim as these are also relevant to our findings on the trust and confidence argument addressed above.

84. The claimant suggested that his failure to communicate with the respondent during his absence / hospitalisation arose from his disability.

85. We would accept that his hospitalisation arose from his disability and that made it more difficult, but not impossible, to communicate.

86. We would further accept that his reluctance to speak about his “accident” or symptoms arose from his disability. As he said he found the whole situation embarrassing and he understandably wanted to keep certain matters private. He confirmed the same in his first email to Mr Bains.

87. Finally, we would accept that his failure to communicate his prognosis arose from his disability. We accept his evidence, confirmed in documentation, that he was hospitalised until 5 August and he was unlikely to have known any indicative prognosis until towards the end of that period. As a result his failure to communicate more information about his prognosis also arose from his disability. We heard that he was undergoing tests and examinations throughout his hospital stay.

88. We think it unlikely, however, that the claimant would not have known that that his symptoms were likely to be related to his disability sooner, probably within a matter of days of his admission. That was information which he could have relayed to Brook Street and/or the respondent. His failure to do so perhaps contributed to the predicament in which he subsequently found himself.

89. That said, we would repeat that he was under no obligation to provide such information to the respondent, nor was he aware of any potential consequences of failing to do so.

90. So, we accept that most of the claimant’s alleged failures to communicate did arise from his disability. It was the respondent’s case that these failures did form part of their decision to withdraw the claimant’s job offer as did his failure to provide even an indicative diagnosis. In respect of the latter, however, we note that at least one sick note was provided merely referencing an inpatient

stay. We do not know why that note was so vague but it seems to us, given that it was provided by the claimant's medical team, that vagueness cannot be attributed to the claimant.

91. In those circumstances, to the extent that the respondent's decision was based on the alleged failures to communicate it still largely arose from the claimant's disability.

92. Once the respondent knew of the claimant's disability, constructively or otherwise, it was equally aware, or it ought to have been, that there may have been an explanation for some or all of the perceived communication failings. As a result, in the absence of further investigation and enquiry, it was not a proportionate response to withdraw the job offer for this reason either.

93. It was accepted on behalf of the claimant that should we find in his favour in relation to the s15 claim there was no need to proceed to consider his reasonable adjustments claim.

94. We would, therefore, simply record that it had previously been agreed that the respondent applied a practice of making offers of employment contingent on candidates having an acceptable attendance record. It seems to us that such a practice could only realistically be applied to agency workers.

95. It was previously determined, and not appealed, that this practice put disable people, including the claimant, at a substantial disadvantage due to his disability related absence.

96. Whether, and to what extent, it would have been reasonable for the respondent to then disregard disability related absences would have required the further investigations referenced above.

97. It may well be that had the respondent carried out further investigation with the claimant and medical professionals that they would still have reached a conclusion that he was unlikely to be able to provide sufficiently regular

attendance in the future which may have justified them coming to a similar conclusion. Similarly, the claimant by his actions and responses may have subsequently given them grounds to believe that they could not rely on him communicating with them regularly, openly and honestly.

98. We do not know because the respondent did not take those necessary steps. Assessing the likelihood of what may have happened had they done so will, we imagine, be addressed at any subsequent remedy hearing should the parties be unable to resolve matters between themselves.

99. The parties should seek to agree directions for such a remedy hearing, including whether or not there is a need for a medical report, and send them to the tribunal, marked for the attention of EJ Broughton, within 21 days of this judgment being sent. The case will then be listed for a 2 day remedy hearing before the same panel as soon as those directions and respective diaries permit.