Appeal No. UKEAT/0287/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 8 May 2018
Judgment handed down on 11 July 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

SOUTH WARWICKSHIRE NHS FOUNDATION TRUST — APPELLANT

(1) MRS S LEE
(2) STAFFORDSHIRE & STOKE ON TRENT PARTNERSHIP NHS TRUST
(3) MS S MASON — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MUGNI ISLAM-CHOUDHURY (of Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham B3 2AB
For the First Respondent	MR NATHANIEL CAIDEN (of Counsel) Instructed by: Royal College of Nursing Legal Services Lyndon House 58-62 Hagley Road Birmingham B16 8PE
For the Second and Third Respondents	No appearance or representation by or on behalf of the Second and Third Respondents

SUMMARY

DISABILITY DISCRIMINATION - Disability related discrimination

Disability discrimination - unfavourable treatment because of something arising in consequence of disability - section 15 ***Equality Act 2010***

Mrs Lee ("the Claimant") was employed by Staffordshire and Stoke as a Nurse Specialist for nearly five years. Mrs Mason was her line manager. She had left to take up an opportunity with a private health services provider ("Ark") but after a month decided to look for another position in the NHS and was made a conditional offer of employment by South Warwickshire. On taking up the Claimant's references, South Warwickshire was concerned by the reference from Ark, which related to a position that was similar to that for which the Claimant was applying. It was also influenced, however, by a reference from Mrs Mason (for Staffordshire and Stoke), which the ET found to have been discriminatory for the purposes of section 15 **EqA**. South Warwickshire decided that it should withdraw its offer of employment to the Claimant. In considering its reasons for this decision, the ET concluded that the Mason reference had been more than a minor influence; the burden of proof had passed to South Warwickshire to show that the withdrawal of the conditional offer had nothing whatsoever to do with the discriminatory Mason reference but it had failed to discharge that burden. Although the ET accepted that it was a legitimate aim for South Warwickshire to recruit an employee who was capable in all respects of undertaking the requirements of the role in question (in compliance with the **Health and Social Care Act 2008 (Regulated Activities) Regulations 2014**), it concluded that there were less discriminatory means of achieving that aim so far as the content of the Mason reference was concerned (the **2014 Regulations** envisaging that reasonable adjustments would be made). In the circumstances, it upheld the Claimant's claim under section 15, allowing that the precise determination as to the extent to which the Mason reference contributed to South

Warwickshire's decision would be a matter for any remedy hearing. South Warwickshire appealed.

Held: *dismissing the appeal.*

The evidence of the relevant decision-taker before the ET had been that both references had influenced her decision to withdraw the job offer. The ET had correctly asked itself the questions identified in **Pnaiser v NHS England** [2016] IRLR 170 and had concluded that, on the evidence, the burden of proof had shifted to South Warwickshire to demonstrate that the decision had nothing whatsoever to do with the discriminatory reference provided by Mrs Mason and Staffordshire and Stoke but that it had failed to discharge that burden. On the evidence, that was a permissible conclusion and disclosed no error in approach. As for the question of justification, this was not a case where it was only relevant to consider whether the policy or rule laid down by the **2014 Regulations** was justified; there was a discretion left to South Warwickshire how to implement the Regulations in individual cases and the ET had therefore properly had regard to the question of justification in the Claimant's case. Doing so, it had been entitled to find that South Warwickshire had not made good its defence.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the question of causation in a disability discrimination case brought under section 15 **Equality Act 2010** ("EqA"), where there is more than one reason that explains the treatment in issue. It also gives rise to a linked question, as to how an Employment Tribunal ("ET") is to approach the issue of justification in such a case.

2. The Appellant (referred to in this Judgment as "South Warwickshire") was the Second Respondent before the ET; Mrs Lee - the First Respondent to the appeal - was the Claimant below and continues to be referred to as such for present purposes. The Second Respondent to the appeal (referred to in this Judgment as "Staffordshire and Stoke") was the First Respondent below and Mrs Mason was then the Third Respondent, as she is on the appeal. Neither Staffordshire and Stoke nor Mrs Mason contest the appeal; accordingly, they have played no active role in the appeal proceedings and do not appear at this hearing.

3. This is the Full Hearing of South Warwickshire's appeal from a Reserved Judgment of the Birmingham Employment Tribunal (Employment Judge Woffenden, sitting with members Mr Bell and Mr Murphy, over five days in December 2016), sent to the parties on 31 March 2017. By its Judgment, the ET upheld the Claimant's claims of unfavourable treatment under section 15 of the **EqA**. The Claimant had formerly been employed by Staffordshire and Stoke and had a conditional offer of employment from South Warwickshire. Acting on behalf of Staffordshire and Stoke, Mrs Mason had provided a reference regarding the Claimant to South Warwickshire. After receiving the Claimant's references (including that from Mrs Mason), South Warwickshire withdrew its offer of employment. It is that which led the Claimant to

lodge her ET claim, relevantly including a complaint under section 15 **EqA** of disability discrimination due to unfavourable treatment because of something arising in consequence of disability.

The Relevant Background and the ET's Decision and Reasoning

4. The Claimant was an experienced Band 7 Tissue Viability Nurse Specialist and had been employed in that capacity by Staffordshire and Stoke from 6 December 2010 until 31 August 2015. As from March 2014, Mrs Mason - Staffordshire and Stoke's Clinical Lead Manager, Tissue Viability - was the Claimant's line manager.

5. In September 2010, the Claimant had been diagnosed with knee arthritis; before the ET, it was accepted that this condition made her a disabled person for the purposes of the **EqA**. During 2014 and 2015, the Claimant had experienced various issues at work, arising from her wish to reduce her hours and due to absences and difficulties in carrying out her role due to problems with her knees; these matters were the subject of various meetings and discussions between the Claimant and Mrs Mason.

6. In mid-2015, the Claimant successfully applied for a job with a private sector health care provider, Ark Home Healthcare Limited ("Ark"), as a Senior Nurse Care Manager, Complex Care - a position with greater emphasis on managerial skills than the Claimant's role with Staffordshire and Stoke, which was more clinically focussed. Mrs Mason had completed a pro forma reference for the Claimant's new role with Ark, in which she confirmed that she considered her attendance and punctuality to be "average" and ability to manage under pressure to be "good". She further praised the Claimant's knowledge about tissue viability and said she would re-employ her.

7. The Claimant started her role with Ark on 1 September 2015 but did not thrive in the new environment and soon started to look for other employment. On 29 September 2015, she applied to South Warwickshire for a post as Band 7 Professional Team Lead. The purpose of this role was to operationally manage a district nursing team based at South Warwickshire's Atherstone clinic and the duties included the management of Human Resources and recruitment issues within the team as well as general operational and leadership duties; around 50% of working time would be spent carrying out clinical duties in the community.

8. The Claimant was the only candidate for the post with South Warwickshire and was interviewed on 9 November 2015. She did not raise any health issues and explained she had been motivated to apply because she preferred working in the NHS. The interviewing panel, chaired by Ms Martin (the intended line manager for the new post-holder), concluded that the Claimant was appointable and she was offered the job, subject to references and pre-employment checks.

9. On 2 December 2015, South Warwickshire made contact with Mrs Mason to ask her to provide a reference for the Claimant. A reference was also sought from Ark, which was provided by a Ms Brown from Ark, which the ET summarised in the following terms:

> **"6.31. … It described her time keeping and attendance as 'Excellent' her 'sense of responsibility' as 'Fair' and her 'personal (transferable) skills e.g. interpersonal skills initiative/team working' as 'Good'. In the box 'reason to leave' was stated the following 'Unable to cope with complex community packages, such as family dynamics and challenging situations. Finds it hard to keep with [sic] and maintenance of staff competencies. No work life balance due to working on call and having to cover the occasional weekend shifts'. In the box 'general remarks/additional comments' was the following statement 'Sue has only been with us a few months and has found it difficult to keep up with the demands and pressure's [sic] that come with community complex cases. Sue has excellent clinical skills that would benefit any potential employer'."**

10. The reference from Ark was, however, not passed to Ms Martin until after the reference from Mrs Mason, acting on behalf of Staffordshire and Stoke, had been received. After some

chasing, Mrs Mason provided her reference for the Claimant on 7 January 2016. The ET details the content of that reference at paragraphs 6.40 to 6.45 of its Judgment; at this stage it is sufficient to record that there was a focus on the Claimant's health issues and absences from work and, as Mrs Mason accepted in cross-examination before the ET, it was a negative reference.

11. Once both references were available, they were passed to Ms Martin who first read that provided by Ark. She was extremely concerned by that reference, specifically (as the ET records):

> **"6.47. … by Victoria Brown's reference to the claimant being "unable to cope with complex community packages …" because this was exactly the kind of work undertaken by the district nursing team and the claimant would be expected to undertake clinical work herself and support and lead the rest of the team in their clinical work. …**
>
> **6.48. Debra Martin was also concerned that the Ark reference said that the claimant "Finds it hard to keep with [sic] and maintenance of staff competencies." A key component of the Professional Lead role was identifying and ensuring the training needs of staff were met, undertaking staff appraisals and supporting new starters in the team. The geographic remit of the district nursing team was wide and rural and staff spent most of their time away from base working alone. Learning and community working is a challenge for both staff and managers requiring strong and effective leadership. It concerned Mrs Martin that the claimant might not be able to lead a team, particularly in the circumstances in which the district nursing team operated.**
>
> **6.49. Debra Martin was also concerned that the Ark reference stated that the claimant had "found it difficult to keep up with the demands and pressures that come with community complex pressures" because this is related directly to the work of the Professional Lead who led a team delivering complex care packages in the community and the pressure of community work was huge; balancing demand versus capacity was a daily issue. …"**

12. Having read the Ark reference, Ms Martin decided to seek advice from Human Resources about how to proceed as she had concerns whether South Warwickshire could proceed with the appointment given the information received from Ark. She also, however, reviewed the reference provided by Mrs Mason. The ET recorded her reaction to that reference as follows:

> **"6.50. … [she] observed that the claimant had left her post because she could no longer drive or kneel for long periods of time. Although she regarded the claimant's absence history as 'significant when written down' she expected such absences after two knee operations. She had managed staff who had had knee operations and despite lengthy absences post operatively the operations had been very beneficial. The claimant had seemed well at interview and … Ark (her most recent employer) had described her time**

> **keeping and attendance as excellent … [H]er expectation was that the knee problems would have been resolved by surgery and the role itself was not a physical nursing role [although] she would have sought further advice from Occupational Health about whether the claimant was a disabled person. She was aware … of the duty to make reasonable adjustments … and had made adjustments in the past for staff and accepted that on reading the reference again she could see from its contents that it appeared she had a disability."**

13. Consistent with South Warwickshire's recruitment and selection policy, Ms Martin was advised to contact both referees for further clarification. She was able to speak to Ms Brown (the author of the reference from Ark), who made it clear she considered the Claimant had no leadership skills, had objected to delivering clinical work, found it difficult to follow processes and Clinical Commissioning Group ("CCG") contracts, and did not manage expectations. Given that the entirety of South Warwickshire's work was delivered subject to CCG contracts, this conversation gave Ms Martin further concern about the Claimant's suitability for the post.

14. Although she tried to contact her on two occasions, Ms Martin was unable to speak with Mrs Mason and reverted back to Human Resources for advice. After discussing the position and observing that "*the references along with the extra information given by [Ms Brown] are not satisfactory*", Ms Martin was advised that she had sufficient: she had "*made an effort to speak to the other referee, but the reference itself is sufficient to make a decision on*".

15. On 14 January 2016, Ms Martin wrote to the Claimant withdrawing South Warwickshire's conditional offer of employment, explaining that her references had been unsatisfactory. As for her reason for this decision, the ET recorded Ms Martin's evidence as follows:

> **"6.55. … Despite her evidence in chief that the claimant's sickness absence history was not a concern in her mind and that her concern was the comments made in the Ark reference Mrs Martin accepted under cross-examination that both references had influenced her decision to [withdraw the offer] …. She sought to resile from this when re-examined but we conclude that her evidence under cross-examination was credible and is accepted. It is unlikely that she would have attempted to seek comments from [Mrs Mason] … about the reference if its contents were of no concern whatsoever to her and her evidence was**

corroborated by the relevant contemporaneous internal correspondence which refer to the 'references' … and that they had been found by her to be unsatisfactory."

16. That said, on the evidence before it, the ET accepted that the Claimant's role with Ark had greater similarity with the position for which she was applying with South Warwickshire than that she had undertaken with Staffordshire and Stoke.

17. The ET turned to the content of the reference provided by Mrs Mason. This was, the ET concluded, unduly negative and inaccurate in a number of respects:

"30. … the overall tenor of the reference was an unnecessary (and repeated) emphasis on sickness when a reference is expected to and should provide a balanced overview of an individual's capabilities."

18. The ET was satisfied that providing such an unduly negative and inaccurate reference for a former employee, who was known to have been offered employment subject to satisfactory references was unfavourable treatment; as was South Warwickshire's withdrawal of its conditional offer of employment to the Claimant.

19. The ET further found there was a *prima facie* case that the Claimant's sickness absences and her inability to perform her physical nursing role were (consciously or unconsciously) at least part of the reason in Mrs Mason's mind for giving a reference which was unduly negative and inaccurate. Moreover, the Claimant's sickness absences and inability to perform the physical nursing role amounted to "*something arising in consequence of*" her disability. The ET found that the burden of proof had shifted to Staffordshire and Stoke and to Mrs Mason to show that there was no discrimination whatsoever in the provision of the reference but they had not discharged that burden.

20. As for South Warwickshire, the ET was satisfied that Ms Martin had constructive knowledge of the Claimant's disability and concluded that the burden of proof had passed so that South Warwickshire had to show that the withdrawal of the conditional offer had nothing whatsoever to do with the reference provided by Mrs Mason. It again found that burden had not been discharged. Specifically, referring to the guidance laid down by the EAT (Simler P presiding) in **Pnaisner v NHS England** [2016] IRLR 170, the ET explained:

> **"36. Following *Pnaiser*, as far as [South Warwickshire] … is concerned the burden of proof having passed to [it] … to show that the withdrawal of the conditional offer had nothing whatsoever [to] do with the reference provided by [Staffordshire and Stoke and Mrs Mason] … we conclude that [South Warwickshire] … has failed to discharge that burden. We have accepted [Debra] Martin's evidence under cross examination that her decision to do so was based on both references. We also conclude that [Mrs Mason's] … reference had more than a minor influence on her decision to withdraw the conditional offer to the claimant, although the extent to which it contributed having regard to the findings … [made] above will be a matter for the remedy hearing."**

21. South Warwickshire sought to argue that its decision was justified, relying on the legitimate aim of recruitment of an employee to the post who was capable in all respects of undertaking the requirements of the role, in particular, given that it was bound to comply with the **Health and Social Care Act 2008 (Regulated Activities) Regulations 2014** ("the 2014 Regulations").

22. Accepting that was a legitimate aim, the ET was, however, not satisfied that the withdrawal of the offer was a proportionate means of achieving that aim in this case, reasoning:

> **"39. … Regulation 19(1) of the 2014 Regulations makes it clear that the obligation on an NHS employer is to seek to employ people who 'after reasonable adjustments' are capable of performing tasks intrinsic to the role. Balancing the discriminatory effect of the withdrawal of the offer and [South Warwickshire's] … needs we conclude that it was not proportionate and there were other less discriminatory means to achieve that aim. These do not in our judgment include a trial period as submitted by … [the Claimant] but (as Debra Martin said she would have done) further enquiries could have been made of Occupational Health (including concerning any reasonable adjustments) and/or of [Mrs Mason] … (as she attempted to do) and/or of the claimant before deciding in the light of all the information to hand whether to withdraw the offer."**

23. On that basis, the ET concluded that the Claimant's claim against South Warwickshire was made out.

The Relevant Legal Principles

24. Section 15(1) **EqA** provides that:

> **"(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."**

25. In **City of York Council v Grosset** [2018] EWCA Civ 1105, Sales LJ identified the questions of causation raised by section 15(1)(a) as being twofold:

> **"36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability."**

26. The assessment required to answer the first question - that which is relevant to the present appeal - was further clarified by Sales LJ, as follows:

> **"37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something". …"**

27. In the case of **Pnaiser v NHS England and Anor** [2016] IRLR 170 at paragraph 31 Simler P (having considered a number of relevant authorities including **IPC Media Ltd v Millar** [2013] IRLR 707 EAT, **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** UKEAT/0397/14 and **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893 EAT) provided guidance as to the approach to determining whether there has been a *prima facie* breach of section 15, such that - absent the employer justifying the treatment under section 15(1)(b) - this form of disability discrimination would be made out. In such cases, she

explained: an ET will need to (1) identify the individual/s responsible for the treatment complained of and enquire into the reason for that treatment, undertaking this exercise as if determining the reason for conduct complained of in a direct discrimination claim; and (2) determine - applying an objective test - whether there is a connection between the disability and "the something" that provides the reason for the treatment in issue; there is no requirement that the ET determines these questions in any particular order, but the answers to the questions should be apparent from its reasoning.

28. Allowing for the possibility that there will be mixed motivations for the unfavourable treatment in issue, Simler J opined:

> **"31. …**
>
> **(b) … 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 …"**

29. In determining whether the reason for the unfavourable treatment was "the something" for section 15 purposes, the ET is bound to approach the burden of proof as provided by section 136 **EqA**, as follows:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

30. As has been made clear in the authorities (see, for example, in the guideline case of **Madarassy v Nomura** [2007] ICR 867 CA and also in **Pnaiser** itself, see paragraph 38), although it can be helpful in some cases for the ET to go through the two stages allowed by section 136 - so, determining first whether the Claimant has established a *prima facie* case such

as to shift the burden to the Respondent, and only then going on to consider whether that burden has been discharged - it is not necessarily an error of law not to do so and in many cases moving straight to the second stage will be the appropriate course. Where an ET is satisfied that the burden has shifted for the purposes of section 136 **EqA**, it will be for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of the relevant protected characteristic (and see **Igen Ltd v Wong** [2005] ICR 931 CA).

31. By section 15(1)(b) **EqA**, it is allowed that the unfavourable treatment relevantly identified for the purposes of section 15(1)(a) (here, the Claimant's dismissal) will not amount to unlawful discrimination where the Respondent is able to show that it was a proportionate means of achieving a legitimate aim (sometimes referred to as "objective justification"). Justification of such treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (see **Hensman v Ministry of Defence** UKEAT/0067/14 at paragraphs 41 to 44). The exercise required of the ET in this regard is the same as that identified in **Hardy & Hansons plc v Lax** [2005] ICR 1565 CA (albeit that case was concerned with an indirect discrimination claim brought under the then provisions of the **Sex Discrimination Act 1976**), see per Pill LJ as follows:

> **"32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. 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."**

32. As the case law emphasises, it will be for the ET to undertake a fair and detailed assessment of the working practices and business considerations involved and to have regard to the business needs of the employer (**Hensman**, paragraph 44).

33. In the present case, South Warwickshire's legitimate aim was, at least in part, couched in terms of its obligations under the **2014 Regulations**, which relevantly provide that:

> **"19.** ***Fit and proper persons employed***
>
> **(1) Persons employed for the purposes of carrying on a regulated activity must -**
>
> **(a) be of good character,**
>
> **(b) have the qualifications, competence, skills and experience which are necessary for the work to be performed by them, and**
>
> **(c) be able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the work for which they are employed.**
>
> **(2) Recruitment procedures must be established and operated effectively to ensure that persons employed meet the conditions in -**
>
> **(a) paragraph (1), …**
>
> **…**
>
> **(3) The following information must be available in relation to each such person employed -**
>
> **(a) the information specified in Schedule 3, …**
>
> **…**
>
> ***Schedule 3. Information Required in Respect of Persons Employed or Appointed for the Purposes of a Regulated Activity***
>
> **…**
>
> **4. Satisfactory evidence of conduct in previous employment concerned with the provision of services relating to -**
>
> **(a) health or social care, …**
>
> **5. Where a person (P) has been previously employed in a position whose duties involved work with children or vulnerable adults, satisfactory verification, so far as reasonably practicable, of the reason why P's employment in that position ended.**
>
> **6. In so far as it is reasonably practicable to obtain, satisfactory documentary evidence of any qualification relevant to the duties for which the person is employed or appointed to perform.**
>
> **7. A full employment history, together with a satisfactory written explanation of any gaps in employment.**
>
> **8. Satisfactory information about any physical or mental health conditions which are relevant to the person's capability, after reasonable adjustments are made, to properly perform tasks which are intrinsic to their employment or appointment for the purposes of the regulated activity."**

South Warwickshire contends that, if the policy laid down in the **2014 Regulations** was justified, that should be sufficient.

34. There will be cases where the treatment complained of is the direct result of applying a general rule or policy such that the question of justification in the individual case will depend on whether the general rule or policy is justified, see **Seldon v Clarkson Wright & Jakes** [2012] IRLR 590 SC. That said, where a general rule or policy allows for a series of responses to individual circumstances, it will be the application of the rule or policy to the individual case - the treatment of the complainant themselves - that will need to be justified, see per Elias LJ in **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 CA at paragraph 27 and per HHJ Richardson (considering the question of justification in a disability case concerned with an attendance management policy) at paragraphs 48 to 49 **Buchanan v Commissioner of Police of the Metropolis** [2016] IRLR 918 EAT.

35. In **O'Brien v Bolton St Catherine's Academy** [2017] IRLR 547 CA, Underhill LJ suggested that the question whether the treatment in issue was "proportionate" for the purposes of section 15(1)(b) **EqA** was not, in substance, markedly different from the test applicable when asking whether an employer's response was "reasonable" in the context of a claim of unfair dismissal and the question whether the decision to dismiss fell within the range of reasonable responses for the purposes of section 98(4) **Employment Rights Act 1996** (see paragraphs 51 to 55 in **O'Brien**). That said, in **Grosset** it was found that there was no consistency between the ET's rejection of the claim of unfair dismissal and yet its upholding of the complaint under section 15 **EqA** in respect of Mr Grosset's dismissal, Sales LJ observing as follows:

> **"54. … there is no inconsistency between the ET's rejection of the claimant's claim of unfair dismissal and its upholding his claim under section 15 EqA in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) EqA is an objective one, according to which the ET must make**

its own assessment: see *Hardy & Hansons plc* [2005] EWCA Civ 846; [2005] ICR 1565, [31]-[32], and *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15; [2012] ICR 704, [20] and [24]-[26] per Baroness Hale of Richmond JSC, with whom the other members of the Court agreed."

And the Court of Appeal did not accept that Underhill LJ in **O'Brien** had laid down a different approach, Sales LJ opining:

"55. … I think it is clear that Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under section 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in *O'Brien*. But generally the tests are plainly distinct, as emphasised in *Homer*."

36. In the present case, the ET took into account the fact that, pursuant to paragraph 19(1)(c) of the **2014 Regulations**, the obligation upon South Warwickshire was to seek to employ those who "*after reasonable adjustments*" were able to properly perform the role in question (see the ET at paragraph 39). The duty to make reasonable adjustments is laid down by section 20 **EqA** (relevantly) in the following terms:

"(1) …

(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.

…"

37. In **Birmingham City Council v Lawrence** [2017] UKEAT/0182/16, it was held that, given that the duty was to take steps that were reasonable to avoid the disadvantage, the question of whether, and to what extent, the step would be effective to avoid the disadvantage would always be an important one:

"18. … given the language of section 20(3) - where the steps required are those that are reasonable to avoid the disadvantage - the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one (see per HHJ David Richardson at paragraph 59 of *Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins* [2014] ICR 341 EAT). Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it; conversely, if there was a prospect - even if considerably less than 50 per cent - it could be (see per HHJ Peter Clark at paragraph 39 of *Romec Ltd v Rudham*

UKEAT/0069/07). The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage (*Noor v Foreign & Commonwealth Office* [2011] ICR 695 EAT per HHJ David Richardson at paragraph 33); a, or some, prospect of avoiding the disadvantage can be sufficient (see per HHJ McMullen QC at paragraph 50 in *Cumbria Probation Board v Collingwood* UKEAT/0079/08 and Keith J at paragraph 17 in *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10). All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness (see per Elias LJ in *Griffiths* [*v Secretary of State for Work and Pensions* [2017] ICR 160 CA] at paragraph 29 and per Mitting J at paragraph 18 in *South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley* UKEAT/0341/15)."

The Appeal

38. South Warwickshire's appeal has been pursued both on the questions of causation and justification. In respect of the former, by grounds 1, 2 and 3 it is contended that the ET erred in concluding that the influence of Mrs Mason's reference was "*more than minor*", that conclusion being based on an erroneous application of the relevant legal test or was perverse, alternatively inadequately reasoned. By ground 5, South Warwickshire further argues that the ET reached a perverse conclusion on the proportionality issue under section 15(1)(b) **EqA**. Ground 4 of the appeal was not permitted to proceed to a Full Hearing.

39. For her part, the Claimant resists the appeal, arguing it is an attempt to re-run the case below; she places reliance on the ET's reasoning and contends its conclusion should be upheld.

Submissions

The Case for South Warwickshire

40. In determining the reason for the unfavourable treatment in terms of the withdrawal of the job offer to the Claimant, South Warwickshire complains that the ET failed to apply the **Pnaiser** guidance, crucially omitting the passage cited above from paragraph 31(b) when it referred to that authority. The failure to apply the correct test was evidenced by the ET's questioning whether the revocation of the offer had "*nothing whatsoever*" to do with the Mason

reference - that was not the same as asking whether the reference from Mrs Mason had a significant (or a more than trivial) influence on the unfavourable treatment, so as to amount to an effective cause. Although, in cross-examination, Ms Martin had accepted that both references had "*influenced her*", she had clarified in re-examination that it was the Ark reference that had operated on her mind when deciding to withdraw the offer. The ET's reasoning made apparent that it was applying a test of "no influence whatsoever" rather than the "significant or more than trivial" test laid down in **Pnaiser**. Moreover, the mere fact that the Mason reference had *some* influence did not absolve the ET from considering whether it was the effective cause, but it was apparent the ET had made no finding on this, expressly leaving that question to the remedy stage, notwithstanding that it was a question that was required to be answered when determining whether the burden of proof had shifted.

41. To the extent that it was said the ET had found that the Mason reference was *a* cause of the decision to withdraw the job offer, the conclusion was perverse given the findings as to the content of the Ark reference and, significantly, the ET's acceptance that the job at South Warwickshire was more closely related to the Claimant's work at Ark than her previous role with Staffordshire and Stoke. In the alternative, the ET's conclusion was inadequately reasoned; leaving the determination of effective cause to the remedy stage meant it was impossible to understand why South Warwickshire had been found liable in these circumstances.

42. As for the second aspect of the appeal, relating to the ET's finding on proportionality, the ET had correctly referenced the **2014 Regulations**, but had failed to have regard to the requirements of those Regulations when determining proportionality. Specifically, South Warwickshire contends this was properly to be understood as a **Seldon** case: if the policy laid

down in the **2014 Regulations** was justified that would be sufficient; there was cogent and relevant evidence that the Claimant did not have the requisite competence, skills and experience to enable South Warwickshire to appoint her to the role in issue. In any event, the Mason reference had contained no information relevant to competencies, skills or experience for the role. The question for the ET was whether South Warwickshire had been able to justify the means it had adopted to achieve its legitimate aim - that is, of recruitment of an employee who was capable in all respects of undertaking the requirements of the role, in particular, given the **2014 Regulations**. Whilst the ET was entitled to ask whether the legitimate aim relied on by South Warwickshire might have been achieved by less discriminatory means, the alternatives that had been identified could have gone nowhere and if there was no prospect of the proposed step succeeding in avoiding the difficulty apparently identified then (by analogy with the approach to the duty to make reasonable adjustments under sections 20 and 21 **EqA**, see **Birmingham City Council v Lawrence**), it could not be said that there was any realistic, less discriminatory alternative. Specifically: (i) any reference to Occupational Health would have been otiose, no reasonable adjustments could have overcome the competence issues identified by the Ark reference; (ii) discussion with the Claimant would have been meaningless - the purposes of obtaining references was to find out the views of the referees as to the Claimant's competence, not to further explore the Claimant's views in this regard; and (iii) the only thing South Warwickshire could do was to try to obtain clarity from Mrs Mason, which it had already attempted to do on a number of occasions.

The Claimant's Case

43. On behalf of the Claimant it is submitted that the Respondent is seeking to re-argue the case below, failing to read the ET's reasoning as a whole; ultimately it was taking issue with the

A weight given to the evidence by the ET - specifically, its view of Ms Martin's evidence in cross-examination.

B 44. On the ET's approach to the question of causation and the **Pnaiser** guidance, it was to be noted that there was no challenge to the finding that the burden of proof had passed to South Warwickshire but it was at that stage that the ET had materially found that the Mason reference had been more than a minor influence. Having thus found the burden had shifted, the ET was C correct to require that South Warwickshire demonstrate that withdrawal of the job offer had "*nothing whatsoever [to] do with*" the Mason reference (which the ET had already found to be discriminatory). The ET's reasoning at paragraph 36 could be seen as providing its explanation D as a whole to the different questions arising under section 136 **EqA** on the burden of proof - it being entitled to view the evidence as a whole at both stages. Alternatively, paragraph 36 could be read as going to "the reason why" question, providing the ET's clear answer in that regard. E In either event, it was wrong to pick out isolated sentences from the ET's reasoning and earlier findings of fact and criticise those, out of context, as applying the wrong test. The ET having directed itself correctly on the law, the EAT should be slow to interfere with the conclusion reached, see **Retarded Children's Aid Society Ltd v Day** [1978] IRLR 128 CA.

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45. As for the argument that the ET's conclusion was perverse, South Warwickshire faced a high test to make good this ground, see **Yeboah v Crofton** [2002] IRLR 634 CA and **Piggot** G **Bros & Co Ltd v Jackson** [1991] IRLR 309 CA. The EAT would have to be satisfied that the ET's finding was almost certainly wrong, or unsupported by any evidence, not simply that it was against what South Warwickshire contended was the weight of the evidence. Similarly, the reasons challenge must also fail. The ET's reasoning had to be seen in the light of the points H

A already made in respect of the conclusions on the burden of proof, such that this could not properly found a free-standing point of challenge.

B 46. Turning to the proportionality question, reliance on the **2014 Regulations** did not provide an answer for South Warwickshire. By analogy with **Buchanan v Commissioner of Police of the Metropolis**, this was not a **Seldon** case, where the issue was whether a particular, underlying policy or procedure was itself justified. More specifically, the relevance of the Ark reference might go to remedy (it might be argued at that stage that ultimately the Claimant had lost nothing as she would not have been appointed in any event) but it did not remove the requirement for the ET to focus on the question why South Warwickshire had taken the Mason reference into account when it had determined to withdraw the job offer made to the Claimant (the unfavourable treatment in issue). Even if the Ark reference was to be seen - at the liability stage - as meaning the Claimant was ultimately not appointable, that did not absolve South Warwickshire from demonstrating that its reliance on the Mason reference as part of the decision-making process (as the ET had found) was justified. Seen in this way, the less discriminatory steps the ET had identified could be understood.

Discussion and Conclusions

47. The ET in this case was considering two acts of unfavourable treatment. The first was the act of Staffordshire and Stoke and Mrs Mason in giving an unduly negative and inaccurate reference; the second was South Warwickshire's withdrawal of the conditional offer of employment. There is no appeal against the ET's conclusion that Staffordshire and Stoke and Mrs Mason had unlawfully discriminated against the Claimant for section 15 purposes: they had treated her unfavourably by providing an unduly negative and inaccurate reference because

of something (her absences and difficulties in doing her job when working at Staffordshire and Stoke) arising in consequence of her disability.

48. Much of the ET's reasoning is focussed on the issues arising in respect of the case against Staffordshire and Stoke and Mrs Mason; that addressing the separate case against South Warwickshire is confined to a limited number of paragraphs, in particular, paragraph 6.55 (in the ET's findings of fact) and paragraphs 36 and 39 (see as cited above).

49. Concision in an ET's Judgment can be good, but the reasoning does have to show a practical application of the relevant legal test. In the present case, it should thus be possible to see that the ET had identified the relevant decision-taker (Ms Martin), enquired into the reason why she had decided on the unfavourable treatment (the withdrawal of the conditional offer) - determining this exercise as it would when determining the reason for conduct complained of in a direct discrimination claim - and determined - applying an objective test - whether there was a connection between the Claimant's disability and "the something" which provided the reason for the treatment in issue (see the guidance provided in **Pnaiser**).

50. Allowing for the shifting burden of proof, if the ET was satisfied that there were facts from which it could decide (absent any other explanation) that South Warwickshire had treated the Claimant unfavourably because of something arising in consequence of her disability, then the burden would shift so that it would be for South Warwickshire to demonstrate that its decision to withdraw the conditional offer had, in fact, nothing whatsoever to do with "the something" in issue (here, the Claimant's absence record).

51. It is apparent that the ET considered the burden had shifted to South Warwickshire; the question is why did it reach that view and then conclude that South Warwickshire had failed to discharge that burden? The reasoning provided for the findings relevant to Staffordshire and Stoke and Mrs Mason is set out very fully; that relating to South Warwickshire has to be drawn from the specific findings on the evidence recorded at paragraph 6.55 and the ET's conclusion at paragraph 36.

52. Although the reasoning is not as helpfully set out as it might have been, ultimately I am satisfied that the ET has adequately explained its approach at paragraph 36 and has made clear that it applied the correct tests when considering the reason for the treatment in issue. Having identified the relevant decision-taker within South Warwickshire to be Ms Martin, the ET went on to consider her reason for withdrawing the offer of employment. Given her evidence in cross-examination, the ET found the decision had been based on both references and was satisfied that the Mason reference had more than a minor influence on the decision. On that basis - having correctly answered the questions identified in **Pnaiser** - the ET was entitled to find that the burden had shifted to South Warwickshire, to show the withdrawal had nothing whatsoever to do with Mrs Mason's reference, and to conclude that it had failed to discharge that burden.

53. South Warwickshire objects that the ET's application of the "*nothing whatsoever to do with*" test demonstrates a failure to adopt the standard laid down in **Pnaiser** - whether the Mason reference had a "*more than trivial influence*" on the decision. That, however, is to confuse the ET's application of the relevant test once the burden of proof had shifted - the "*nothing whatsoever to do with*" test laid down in cases such as **Igen v Wong** - with its separate determination of the **Pnaiser** question, whether the Mason reference had "*more than a minor*

influence" on the decision. The way the ET's reasoning is set out at paragraph 36 may seem to address the questions raised under section 136 **EqA** in reverse order but, read as a whole, it is apparent that the ET asked itself the correct questions and applied the correct tests, reaching a conclusion that was permissible given the evidence before it.

54. Having stated that the ET's conclusion was permissible, for completeness I should address South Warwickshire's argument that this amounted to a perverse finding, given the ET's findings relating to the Ark reference and the similarities between the Claimant's position at Ark and the post for which she was applying.

55. It is apparent that the ET considered the Ark reference to have been a significant influence on Ms Martin's decision, but that did not mean that it was bound to find that the Mason reference had no material relevance. The ET was entitled to take account of Ms Martin's evidence in cross-examination (even if she sought to modify her evidence in re-examination). It was, moreover, evidence that made sense given the context: the Ark reference came from a private sector health services provider and could inevitably deal with only a couple of months of the Claimant's long employment history; the Mason reference related to a far longer time frame and was from another NHS employer - relevant given the Claimant had said she preferred working in the NHS. Although Ms Martin may have found the Ark reference very troubling, the fact is that she made her decision only after having read both references - acknowledging that both had influenced that decision - and had made efforts to try to speak to Mrs Mason even after she had spoken with Ms Brown regarding the Ark reference. In the circumstances, South Warwickshire cannot meet the high threshold to show the ET's conclusion was perverse.

56. I turn, therefore, to the ET's finding on justification. Here it is first necessary to be clear what it was that South Warwickshire had to justify.

57. Section 15(1)(b) **EqA** allows that treatment that is because of something arising in consequence of disability will not amount to discrimination if the Respondent can show that treatment was a proportionate means of achieving a legitimate aim. The treatment in this case was the withdrawal of the conditional job offer. South Warwickshire contends, however, that this was the straightforward application of the **2014 Regulations** and thus that it was required only to justify those Regulations, not the individual treatment of the Claimant.

58. That argument is predicated upon this being a **Seldon** case, where the treatment of the Claimant is the direct result of applying a general rule or policy (**Seldon** itself concerning a compulsory retirement age). I am not persuaded that is the correct characterisation of the treatment in this case. Whilst the **2014 Regulations** undoubtedly provided the context for the decision, that they permitted a number of responses to individual circumstances is apparent from South Warwickshire's actions in this case. It did not assume that it would have sufficient for the purpose of determining whether the Claimant was "fit and proper" once it had received a reference from her last employer (here, Ark); it apparently considered it relevant to also obtain a reference from Staffordshire and Stoke. That is, perhaps, unsurprising given the need under the **2014 Regulations** to obtain a "full employment history", but the means by which that was to be done was not prescribed and it was South Warwickshire's decision as to how it demonstrated compliance with this requirement. Moreover, once the two references were available, Ms Martin accepted that both had influenced her decision; on the evidence, therefore, the withdrawal of the offer was in part influenced by a discriminatory reference. Given that the **2014 Regulations** expressly envisage that reasonable adjustments will be made where relevant,

the question was why Ms Martin had allowed the Mason reference to influence her decision? South Warwickshire could not answer that question by simply pleading a straightforward application of the **2014 Regulations**; it was not. And to the extent that it relies on the relevance of the Ark reference given the requirements of the **2014 Regulations**, that fails to engage with the question why any reliance was placed (as the ET permissibly found) on the Mason reference.

59. In the alternative, South Warwickshire argues that the ET failed to properly assess proportionality on the objective basis required; the alternatives that it postulated could go nowhere given the circumstances of the case, in particular the content of the Ark reference.

60. The difficulty with this argument, however, is that it again seeks to avoid the ET's finding that the Mason reference had more than a trivial influence on the decision in issue. As the Claimant has acknowledged in argument, it may be that the ET will find that the Ark reference (notwithstanding that it could only address around two months of the Claimant's employment history) was such that ultimately South Warwickshire would have felt unable to employ her in the position in issue - a finding that might be fatal for the Claimant at the remedy stage. When considering liability, however, the ET was entitled to have regard to the evidence that the Mason reference had also influenced the decision and it was unable to see that South Warwickshire could justify that. On the ET's finding, Ms Martin had allowed the discriminatory Mason reference to taint her decision-making when she could have taken steps to address the points raised, either by considering what reasonable adjustments might be made or by making further efforts to speak with Mrs Mason or simply by discussing the content with the Claimant (potentially helpful as the Claimant had not herself disclosed the health issues referenced by Mrs Mason). The ET had found that Mrs Mason's reference was unduly negative

and inaccurate. Had Ms Martin taken the alternative steps envisaged by the ET, it seems likely that she would have felt able to discount much of the content of that reference; at that stage she would have had to decide whether the Ark reference was sufficient to make her decision.

61. The ET in this case was faced with an unusual factual matrix. Had the evidence been simply that the Ark reference was the only material consideration, it would have been bound to reach the conclusion South Warwickshire seeks to urge me to reach on this appeal. That, however, was not the evidence before the ET and it was entitled to find that the operative reasons for Ms Martin's decision were somewhat more complex. That, in turn, presented the ET with a difficulty in determining the relevance of each of the two references. It concluded that, in the particular circumstances of this case, this was a matter that ultimately went to remedy, not liability. In my judgment that was a permissible conclusion. I therefore dismiss this appeal.