



EMPLOYMENT TRIBUNALS

Claimant: Ms K Oldfield

Respondent: Birtenshaw

HELD AT: Manchester **ON:** 22 and 23 January 2018

BEFORE: Employment Judge Slater
Mr G Pennie
Ms J A Beards

REPRESENTATION:

Claimant: Mr B Henry of Counsel
Respondent: Ms L Gould of Counsel

JUDGMENT having been sent to the parties on 1 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant claimed disability discrimination. At the hearing, the respondent conceded that the claimant was disabled by reason of a mental impairment at relevant times. Disability was not conceded in relation to the back condition, so, if, the back condition was relevant, the issues in relation to disability would have been whether the claimant had a physical impairment; whether that impairment had an adverse effect on her ability to carry out normal day-to-day activities; whether the effect was substantial and whether the effect was long-term.

2. The complaint was one of discrimination arising from disability. The issues had been agreed as follows:

- (1) Whether the claimant has been treated unfavourably because of something arising in consequence of the claimant's disability contrary to section 15 of the Equality Act 2010;

- (2) The “something” arising in consequence of the claimant's disability is the respondent's contention that the claimant was not fit to undertake the role of adult support worker;
- (3) Whether the respondent knew or could reasonably have been expected to know of the claimant's disability;
- (4) The alleged unfavourable treatment complained of is the withdrawal of a job offer by the first respondent;
- (5) Whether the respondent has shown that the treatment was a proportionate means of achieving a legitimate aim pursuant to section 15(1)(b) of the Equality Act 2010;
- (6) The legitimate aim relied on by the first respondent is compliance with the Children's Homes (England) Regulations 2015.

Facts

3. The claimant had worked in the care sector on a paid basis since February 2015, having previously done voluntary work.

4. The respondent is a charity. It provides a range of services for children and young adults with special educational needs and disability; more specifically those with significant physical impairments, complex health needs, severe learning disabilities and/or autistic spectrum conditions.

5. The respondent works under a regulatory framework, which is the Children's Homes (England) Regulations 2015. Regulation 32(3) of those regulations provides, amongst other things, that the registered person, who in this case is Mr David Reid, may only employ a person to work at the children's home, or, if employed by somebody else, allow the individual to work at the home, if the individual is mentally and physically fit for the purposes of the work that the individual is to perform.

6. The claimant began working for the respondent through an agency, 247 Professional Health, from 21 November 2016. Prior to that, the claimant had met with Jennifer Greenhough of the respondent. The letter from the agency refers to the claimant having had an interview with David Reid at Birtenshaw. However, it appears that this may have been a mistake since neither the claimant nor the respondent has suggested to us that the claimant had had an interview with Mr Reid before starting her work as an agency worker. An undated letter from the agency, prior to the claimant starting work, notified her of her start date and asked her to complete a health questionnaire and a declaration and to take it with her on her first day. We accept that the claimant had also previously completed a medical questionnaire for the agency. We accept the claimant's evidence that the form that she was asked to complete and take along on the first day was in the form of that appearing at page 34 of the bundle. We accept that she completed the form correctly, including all relevant information, and took it to the respondent on her first day as an agency worker.

7. We accept the claimant's evidence that she was questioned by Jennifer Greenhough about her mental health condition before she started her temporary work. The claimant's evidence on this was not challenged in cross examination. The

claimant had referred to this in her witness statement, and, despite this having been raised, Mr Reid did not seek any information from Jennifer Greenhough about this prior to this hearing.

8. The claimant worked as an adult support worker but could be required to work with adults or children. Her duties included ensuring the safety of the young people in her care, personal care duties, daily observation and paperwork, helping the young people to achieve their monthly goals, various activities on and off site with young people, moving and handling, intensive interaction, picture exchange communication, maintaining routines and ensuring that each young person's needs were met whilst in the care of the respondent. There were no issues raised about the claimant's work during her time with the respondent, which continued until 19 February 2017.

9. During her work as an agency worker, the claimant was recommended by the adult short breaks manager of the respondent, Abbie Marron, for a permanent position. The claimant had an interview with Jennifer Greenhough and another respondent employee. There are some interview notes of the interviews. However, these are clearly not a complete and verbatim record of everything said at the interview. We accept the claimant's evidence that she discussed with Ms Greenhough again her mental health condition. The fact that there is no record of this in the interview notes does not lead us to conclude that this was not discussed. The only question where anything relating to this may have been recorded was a question "would we need to make any reasonable adjustments to enable you to carry out the duties of this role? (Are you disabled or do you have any medical condition that we need to be aware of?)". The only matter recorded against this question was the claimant's thyroid cancer condition; the claimant had informed them that she would need regular checkups because she might need her shifts altering to be able to attend the appointments.

10. We accept the claimant's evidence that she did not need adjustments for her mental health condition. We note that Mr Reid did not make any enquiries of Jennifer Greenhough after the respondent received the claimant's witness statement to find out whether anything had been discussed.

11. On 20 December 2016, the respondent sent the claimant a letter offering her the job subject to a number of conditions which included medical clearance. The claimant completed a medical questionnaire. There was then an assessment with Occupational Health on 8 February 2017 and the Occupational Health physician produced a report dated 10 February 2017. The report included reference to a history of a significant thyroid condition which the physician said would be covered by relevant disability legislation. He noted that the condition appeared to have been successfully controlled by treatment but that the claimant required three monthly medical reviews of her progress in relation to this. The physician wrote further:

"Ms Oldfield also has a history of emotional and psychological health difficulties dating back a considerable number of years. These difficulties appear to have been related to issues in her personal circumstances. Ms Oldfield is being followed up and monitored by her General Practitioner with regards to her condition and has medication to take for the condition. She also currently engages in counselling sessions and there is a possibility of group

therapy sessions in the future to try and help deal with the potential underlying cause and any trigger factors.

Ms Oldfield also reports some intermittent low back difficulties and she is mindful of these when carrying out moving and handling and lifting activities. She reports no time off in the past as a result of this issue.”

12. Under the heading “Fitness for work recommendations/Occupational Health advice” the physician wrote:

“Based on my assessment today Ms Oldfield is medically fit for the proposed position as a full-time social care worker. She has had social care working experience in the past and reports no significant sickness absence or work related difficulties in her previous role. I also understand she has been working as an agency worker on a full-time basis in her current role since November 2016 and she tells me overall she enjoys the work and no significant work related issues are currently reported.”

13. The physician continued later:

“She can still be vulnerable to emotional symptoms which appear to be related to high levels of perceived pressure and stress which would be applicable both in and out of work. Therefore if there are any work stress issues or concerns including sickness absences in relation to her emotional health and wellbeing, a referral back to Occupational Health is recommended for further advice.

In relation to her back she will need to be in date for appropriate training and moving and handling risk assessments will need to demonstrate that the risks are controlled as far as is reasonably practical. There would be no restrictions to recommend to her normal risk assessed work activities.”

14. The physician also wrote that any recommendations made regarding adjustments or modifications were recommendations only for management to consider, and it was a management responsibility to decide what is or is not a reasonable adjustment or modification to implement. The physician ended with an invitation that, if the respondent required further clarification, they should feel free to contact him.

15. The report, the application form and the interview notes were considered by Mr Reid. In what appears to be an annotation from Mr Reid on the report is written “does not meet legal criteria” with what appear to be Mr Reid’s initials and the date of 13 February. On a recruitment staff checklist there is a further note which appears to be in the same handwriting and with what appears to be Mr Reid’s initials and the date of 13 February, stating “unable to proceed due to OH report”. We will return shortly to Mr Reid’s reasons for withdrawing the offer of employment.

16. By a letter dated 14 February 2017, Jennifer Greenhough wrote to the claimant withdrawing the offer of work. She informed the claimant that they had received the outcome of the medical assessment. She referred to the requirement in the Children’s Homes (England) Regulations to ensure that all of their employees were considered “mentally and physically fit for the purposes of the work that the individual is to perform”. She wrote:

“Unfortunately as you do not fulfil this criteria we have no choice but to withdraw our offer of employment. Due to the circumstances we are willing to offer one week’s notice, therefore your work for us through the 247 temp to perm arrangement will cease with effect from Sunday 19 February 2017, you are not obliged to work during this period; however if you choose not to you will not be paid.”

17. By a letter dated 29 February 2017, the claimant's union, Unison, wrote to Kerry Sayers of the respondent asking the respondent to reconsider the decision to withdraw the conditional offer of employment. The union representative wrote that the reason for withdrawing the offer was not clear. They asked whether the respondent would consider employing Ms Oldfield for a probationary period of possibly six months to give her an opportunity to demonstrate her fitness to work.

18. Mr Reid replied to the trade union by an email dated 9 March 2017. Mr Reid wrote:

“Dr Coolican clearly states in the Occupational Health report that his comments are only for management to consider, that is, the final decision rests with us as the prospective employer. In Ms Oldfield’s case the medical assessment demonstrated in our view that she does not meet the regulatory criteria (regulation 32 of the Children’s Homes (England) Regulations – which was referred to in the letter sent to Ms Oldfield) of being medically fit for the job role. The Occupational Health report is confidential so I cannot share the contents with you, however I can say that it refers to Ms Oldfield having a number of physical health conditions as well as psychological health issues. Based on the medical information provided I took the view that Ms Oldfield did not meet the regulatory criteria of being ‘mentally and physical fit for the purpose of the work’. This decision sits within my remit as the responsible individual (the license holder) for our services. The decision to withdraw the offer of employment will therefore stand.”

19. By a letter dated 15 March 2017, the agency 247 informed the claimant that they were unable to offer her any more work.

20. By a letter dated 16 March 2017, the claimant wrote to Mr Reid complaining that she believed she had been discriminated against for reasons related to her disability. She asked him if he would reconsider his decision to withdraw the offer of employment. There was no reply to this letter. In particular, there was no response to Ms Oldfield’s suggestion that she had asked to meet up with Mr Reid to discuss his decision but that request had been refused. Mr Reid when questioned about the letter at first did not recall when he had received it and then was not sure whether he had received it. In any event, there appears to have been no further correspondence between the parties until the presentation of the claim, which was on 30 June 2017.

21. The respondent’s response explained the decision to withdraw the job offer as follows. In paragraph 11 of the grounds of resistance, the respondent referred to the Occupational Health report and noted only in relation to this that the report had concluded that the claimant had a history of emotional and psychological health difficulties dating back a considerable number of years and that she was taking medication in respect of the same. Paragraphs 12 and 13 read as follows:

“(12) The respondent considered the OH report in its entirety and noted that the claimant was still vulnerable to emotional symptoms which potentially caused a risk to users.

(13) Accordingly the first respondent took the decision to withdraw the offer of employment on the ground she was not medically fit to perform the role of adult support worker.”

22. We return now to Mr Reid’s decision to withdraw the offer of employment. We note that the information which he considered consisted of the Occupational Health form, the interview notes, the application form and the references. The only information Mr Reid had about the claimant’s mental health condition was that contained on the Occupational Health form.

23. We note in the correspondence responding to Unison’s request to clarify the reasons for the withdrawal, that Mr Reid merely re-stated the statutory provisions but did not explain his reasoning as to why the contents of the Occupational Health report led him to conclude that the claimant was not considered mentally and physically fit for the role. He referred in his letter on 9 March 2017 to a number of physical health conditions as well as psychological health conditions. There is no mention in this letter of the claimant having lied or withheld information from the respondent.

24. Mr Reid approved the response to this claim. In paragraphs 12 and 13 of that response, which we quoted above, the respondent does not explain why Mr Reid considered that the claimant was a risk to users.

25. We note an inaccuracy in paragraph 10 of Mr Reid’s witness statement; Mr Reid asserts that “the respondent has no involvement in the recruitment or screening process when a worker is sent to them from an agency”. However, in oral evidence, Mr Reid accepted that the respondent had an initial meeting with a person put forward by an agency to assess their suitability. It also appears from the correspondence that a medical questionnaire is completed in a form used by the respondent and given to them.

26. In paragraph 12 of his statement, Mr Reid refers to the questions asked as part of the recruitment process. He wrote:

“Specifically, we ask about whether there are any medical conditions we need to be aware of. The only condition Kirsty disclosed was a former diagnosis of cancer. Kirsty did not disclose any other condition, at this or at any other time prior to the OH assessment described below. For the avoidance of doubt, the previous diagnosis of cancer had no impact on the decision to withdraw employment.”

27. Mr Reid relied only on the notes of the interviews in writing the parts of his statement which related to those interviews; he did not make any further enquiries to support what he wrote in the statement.

28. In paragraph 14 of Mr Reid’s statement, he refers to the Occupational Health report prepared in February 2017. He is very selective in what he refers to from this report. He writes that the Occupational Health report concluded that:

- “(a) Kirsty had a history of emotional and psychological health difficulties dating back a considerable number of years.
- (b) Kirsty was taking medication in respect of the same.”

29. Mr Reid omits to write that the Occupational Health physician concluded that the claimant was medically fit for the proposed position as a full-time social care worker. Mr Reid gives a misleading impression of the report by his selective reliance on parts of the report and omission of the physician’s conclusion. Mr Reid does not explain adequately in his witness statement why he took a different view to the Occupational Health physician. His explanation of the withdrawal of the offer is contained at paragraph 16 of his witness statement, which reads as follows:

“Ultimately, I took the view that Kirsty was not mentally and physically fit for the purpose of the work in line with the regulations. In explaining my decision, I would like to make the following points:-

- (a) Although OH said she was fit to work, the decision is mine (as made clear in the form). I know what our work entails and I know what the regulations say. This is a stressful and difficult job. It is in no-one’s interests for people not mentally or physically capable of carrying out this role to do it. I have disregarded advice that someone is fit to work on other occasions when I have not been comfortable in their fitness to do the work;
- (b) It is disappointing that Kirsty had lied and withheld important, potentially vital information, from us. This is very significant in our setting as she would be working with disabled children and vulnerable adults;

It is not pleasant to have to make these decisions; but it is in the best interests of all concerned, including Kirsty, that they are made when necessary.”

30. Mr Reid fails in this paragraph to explain what it is about the work which he concluded the claimant was not fit to do, and why he concluded that she was not mentally or physically capable of carrying out the role to do it in the face of the Occupational Health physician’s conclusion that she was fit for the role.

31. In relation to the point made at 16(b) in Mr Reid’s witness statement, we find, on the balance of probabilities, that this was not part of his reasons for withdrawing the offer. If it had been, we consider this would have been mentioned in the respondent’s response to the claim. We would also have expected Mr Reid to speak to the interviewers before reaching such a serious conclusion that the claimant had lied; he did not.

32. In Mr Reid’s oral evidence, he referred to the claimant’s back condition which he says he read from the Occupational Health report as being an ongoing condition. He made a number of references in oral evidence to this being part of his decision making. He gave oral evidence that it was a combination of physical and psychological conditions which caused him to make his decision. When asked which physical conditions he was referring to, he referred to the thyroid condition and the back problems. However, at another point in his evidence, he said that the thyroid condition had no part in his decision. When asked about this apparent discrepancy

in his evidence, he replied that he looked at the report in its entirety, the mental and physical conditions. He gave evidence which was very unclear as to whether the thyroid condition played any part in his decision. He later said that the cancer was not relevant.

33. When asked by the Employment Judge to explain why he considered the claimant was a risk to young people, Mr Reid started his explanation with “her back condition”, saying there was a risk she could get hurt and that she would be unable to perform physical interventions when required. He then moved onto mental health, saying that there was a risk to her if she was not emotionally resilient enough to manage challenging situations.

34. Picking up on a statement in the claimant's statement of disability (which was of course not available to Mr Reid at the time he took his decision), that one of the results of anxiety attacks can be “freezing to the spot”, Mr Reid gave evidence that the claimant could be a risk to service users who could be hurt if the claimant did not intervene quickly enough because she had “frozen”.

35. Mr Reid gave evidence that he thought the claimant was a risk from day one, so a trial period would not be appropriate and there was no lesser option than to withdraw the offer immediately. However, the claimant was required to work a week's notice in order to be paid.

36. Mr Reid said he did not get any more information from Occupational Health because he had past experience in other cases of trying to get information and this not being forthcoming.

37. We found Mr Reid's explanation as to why he considered the claimant not fit to do the job to be inconsistent and not clear. We find, on a balance of probabilities, that the mental health condition was a significant, and possibly the only, factor leading to the withdrawal of the job offer. If the back condition had been a factor in Mr Reid's decision, we would have expected to see this in the response to the claim and set out clearly in the witness statement. It was not. On a balance of probabilities, we do not consider that the back condition was a significant factor in the decision to withdraw the job offer.

38. Mr Reid's evidence about the thyroid condition was inconsistent. There is no mention of this as part of the reason for withdrawal of the offer in the response and his witness statement. We would have expected to see it there if it had been a factor in his decision. On a balance of probabilities, we find that the thyroid condition was not a significant factor in Mr Reid's decision.

39. We had limited evidence about the claimant's back condition. There was some historical documentary evidence relating to problems when the claimant was a child but nothing to link those problems to the intermittent current problems. The Occupational Health report did not refer to the problems the claimant had had with her back when a child.

Submissions

40. The parties made oral submissions. Ms Gould for the respondent submitted that there was no evidence on which the Tribunal could find that the claimant was disabled by reason of the back complaint. In relation to the complaint of

discrimination arising from disability, Ms Gould submitted that the way the case was put for the claimant could not succeed as it did not identify something with a causal connection to the claimant's disability. Ms Gould submitted that there was nothing in the Occupational Health report which said that disability legislation applied to the claimant's mental health condition. She submitted that the Tribunal should find that the claimant did not mention her mental health in the interview. If this had been said, Ms Gould submitted that it would have been noted. There was no reason for Mr Reid to think that the claimant was disabled by reason of a back injury.

41. In relation to proportionality, Ms Gould submitted that she would be surprised if it was disputed that it was a legitimate aim to comply with the Children's Homes (England) Regulations. It had to be an objective assessment by the Tribunal. Mr Reid had to err on the side on the caution. There was no alternative which could satisfactorily comply with the Children's Homes (England) Regulations.

42. In relation to the back condition, the claimant's physical restrictions caused Mr Reid to doubt whether she was physically fit. There was a risk to her and to service users.

43. In relation to whether the claimant was mentally fit, medical evidence was one factor and Mr Reid had to use his knowledge of the risks. There were concerns about the claimant's reaction to certain stresses. In the Occupational Health report, it said that the claimant could still be vulnerable to emotional symptoms which appeared to be related to high levels of perceived pressure and stress. The needs of the service users needed to be balanced against concerns under the Equality Act 2010. It was is not appropriate or proportionate to allow a problem to occur then refer to Occupational Health. There was a genuine and real concern.

44. Ms Gould submitted that the respondent had demonstrated that there was no less discriminatory manner of achieving the legitimate aim.

45. Mr Henry, for the claimant, submitted that the Tribunal had to make a finding of fact as to the basis upon which Mr Reid withdrew the offer. The email of 9 March referred to physical and mental issues. At this hearing, it appeared that the physical conditions were the back and cancer, although this was not a position the respondent took previously. When the Tribunal considers whether something was arising from the disability they needed to know what disability it arose from. For a section 15 claim, the disability did not have to be the sole or principal reason for the unfavourable treatment but must be a part of it.

46. For completeness, the Tribunal needed to decide if the back condition amounted to a disability, but, if it did not, Mr Henry submitted that this did not affect the whole claim. Mr Henry submitted that the documents showed that there was a past disability which fell within the definition of disability.

47. In relation to the section 15 claim, Mr Henry submitted that it was unarguable that there was unfavourable treatment in the withdrawal of the offer. No comparator was required. Mental health issues were part of the reason for withdrawal of the offer. Mental health arose from the disability. Cancer and the back condition were possibly issues. Mr Henry submitted that the burden of proof transferred to the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

48. Mr Henry said he would not argue that to be fit at work was a legitimate aim. The regulations went no further than the position in any employment contract. A proportionate way was to ensure that someone was medically fit by first getting an Occupational Health report. This what the respondent did, and the Occupational Health report said that the claimant was medically fit. Mr Reid went against this medical evidence without having obtained anything from any other source to suggest the medical evidence was wrong. He could have gone to speak to the interviewers. There was no evidence to counter that the claimant discussed her mental health issues with the interviewers. The respondent had the opportunity to call the note taker or put this to the claimant in cross examination. The inference should be that, as there was no note, the interviewers were not concerned about this. Mr Reid could have asked the claimant. If the process had been correct, there would have been a meeting at which the claimant could have allayed Mr Reid's concerns or this could have led to further enquiries.

49. As suggested by Unison, the claimant could have been monitored during a probationary period. There was nothing to stop the claimant medically working. This would have confirmed whether she was capable of the job. Failure to take any of these steps meant that the discriminatory act could not be justified.

50. The claimant's past performance as an agency worker was a good indication of whether the claimant was fit at the time. Mr Reid made no enquiries as to how she had performed as an agency worker. The registered person has a responsibility in relation to agency workers.

51. In respect of knowledge, the evidence of the claimant, which was not challenged in cross examination and there were no witnesses to counter the evidence, was that she told her manager of her mental health issues. Before this, the Occupational Health report itself would have put any reasonable employer on notice that there were longstanding conditions. It was not open to the respondent to argue that they did not know or could not reasonably be expected to know that the claimant was disabled by reason of mental health issues.

The Law

52. Section 15 Equality Act 2010 provides:

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

53. Paragraph 5.17 of the Equality and Human Rights Commission Code of Practice on Employment states:

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

54. There are two causative steps for a section 15 claim to be made out:

- (1) That the disability had the consequence of “something”; and
- (2) That the claimant was treated unfavourably because of that “something”.

55. Disability does not have to be the only or main cause of the unfavourable treatment but it must be an effective cause. It must operate on the mind of the putative discriminator, whether consciously or subconsciously, to a significant extent. The burden is on the respondent to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

56. In accordance with the test set out by the Court of Appeal in *Hampson v Department of Education and Science [1989] ICR 179* the test of justification involves striking “an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition”.

Conclusions

57. The respondent has conceded that the claimant was disabled at relevant times by reason of her mental health condition. We do not consider it necessary to reach a conclusion as to whether the claimant was disabled by reason of a back condition given our finding of fact that this was not a significant cause of the withdrawal of the job offer. The possibility was raised by medical documents that there had been a past disability in relation to the back condition, but we heard no evidence from the claimant of the effects at the time when she had this problem on her day-to-day activities. If we had had to decide whether there was a past disability, we would have concluded that there was insufficient evidence to support such a conclusion. There was no evidence from the claimant of the current effects of the back condition on her ability to carry out normal day-to-day activities. The information from the Occupational Health report did not suggest that there was an adverse effect sufficient to meet the definition of disability currently.

58. We found that the thyroid condition was not a significant cause of the withdrawal of the job person. A person who has, or has had, cancer is deemed to be disabled by the Equality Act 2010. Although the decision as to whether someone is disabled within the meaning in the Equality Act 2010 is one for the tribunal, we note that the Occupational Health report expressed the view that the claimant was covered by the disability legislation in relation to the thyroid condition.

59. The only complaint to be considered by the Tribunal was whether there was discrimination arising from disability contrary to section 15 of the Equality Act 2010 in relation to the withdrawal of the job offer as an adult support worker.

60. We conclude that the claimant was treated unfavourably by having the job offer withdrawn. We conclude that there was a clear causal connection between the

claimant's disability of her mental health condition and the withdrawal of the job offer. Mr Reid withdrew the job offer because of his belief that the claimant was not fit to do the role because of her mental health problems. He expressed the view that she would be a risk to herself and others if she was not emotionally resilient enough to react to challenging situations. It may be that the issue identified by the claimant as being "the something arising in consequence of the claimant's disability is the respondent's contention that the claimant was not fit to undertake the role of adult support worker" could have been better framed as being the respondent's "belief" rather than "contention" that the claimant was not fit to do the role because of her mental health problems. However, it is clear to us that there was the necessary causal connection between the claimant's mental health disability and the withdrawal of the job offer which was the unfavourable treatment. The claimant was, therefore, treated unfavourably because of something arising in consequence of her disability.

61. In relation to the respondent's knowledge, the information that Mr Reid had before him was that contained in the Occupational Health report. We disagree with the respondent's submission that we should look only at the knowledge of the decision maker, Mr Reid. The EHRC Code of Practice makes it clear that knowledge of agents etc. is imputed to the respondent. If the claimant gave more information to Jennifer Greenhough, that information was part of the respondent's knowledge. We found as a matter of fact that the claimant did discuss her mental health with Jennifer Greenhough. On a balance of probabilities, we conclude that the respondent had actual knowledge of the claimant's disability or could reasonably be expected to know that she had such a disability. Even leaving aside the knowledge of Jennifer Greenhough, we conclude that Mr Reid, on the basis of the Occupational Health report alone, could reasonably be expected to know that the claimant had a disability due to a mental impairment. At the very least, he was put on enquiry by the contents of that report to see if the conditions of disability were met. The Occupational Health report referred to emotional and psychological health difficulties dating back a considerable number of years and noted that the claimant was taking medication and engaging in counselling.

62. We conclude that the respondent had a legitimate aim, being compliance with the regulations which required them to ensure that the person was fit to do the job.

63. The remaining issue, and the crux of the matter, was whether the withdrawal of the offer was a proportionate means of achieving that legitimate aim. In deciding that question, we are required to carry out an objective balancing exercise in accordance with the authority of *Hampson v Department of Education and Science*. On the one hand, the discriminatory effect of the withdrawal of the job offer on the claimant was severe. She lost a permanent position to which she would otherwise have been appointed. She lost her agency work at the respondent. She lost other agency work with the 247 agency, which it appears likely was related to the respondent's withdrawal of the offer. The withdrawal of the offer could potentially have an adverse impact on her future employment prospects. The discrimination had an adverse effect on the claimant's feelings and mental health. We will consider the extent of this further when dealing with remedy.

64. On the other hand, we consider whether the withdrawal of the job offer was reasonably necessary to achieve the legitimate aim of ensuring that the job holder was fit to do the job. The Occupational Health physician had said that the claimant was fit to do the job. We accept that Mr Reid was not obliged to accept the view of

the Occupational Health physician but we would have expected an employer acting proportionately to have clear and cogent reasons for rejecting the view of Occupational Health. We found Mr Reid's evidence as to his reasons for withdrawing the job offer to be lacking in clarity. He failed to explain his reasons properly to the claimant and to her trade union when asked, and the response to her Tribunal claim and his witness statement in these proceedings have also failed to provide clear and cogent reasons for the withdrawal of the job offer.

65. Mr Reid did not make any other enquiries before making his decision. There were a number of enquiries which could have been made which would have assisted in a more considered view being taken as to the claimant's fitness for the role. Mr Reid could have gone back to Occupational Health for further advice. The Occupational Health physician expressly invited requests for further clarification in the report. Mr Reid could have sought consent from the claimant for information to have been obtained from her GP and for the release of relevant medical records. Mr Reid could have spoken to the interviewers. He could have spoken to the claimant's line managers at the respondent in relation to the period of her agency work. He could have found out from them about situations the claimant had faced and how she had responded to these situations. The respondent had the benefit of nearly three months' work by the claimant in the role which could have been used to assess the claimant's suitability. Mr Reid could have spoken to the claimant about his concerns as, indeed, she requested.

66. The respondent could have undertaken a more rigorous assessment of the claimant's suitability. Mr Reid gave evidence that there would be a more rigorous assessment of a candidate who had not previously been engaged via an agency. He could have used such assessment tools for the claimant. The respondent could have considered a further trial period. We note that the contract, in any event, specifies a probationary period. We note that the fact that the respondent gave the claimant one week's notice, which she was required to work if she wished to be paid, does not sit well with Mr Reid's evidence that the claimant was a danger from day one.

67. Having considered these factors and carrying out the necessary balancing exercise, we conclude that the respondent has not satisfied us that withdrawing the offer, on the basis of the information considered by Mr Reid and in the face of the recommendation from the Occupational Health physician that the claimant was fit to do the role, was a proportionate means of achieving a legitimate aim. The respondent has not satisfied the Tribunal that further enquiries would have been futile and inevitably led to the withdrawal of the job offer.

68. For these reasons we conclude that the complaint of discrimination arising from disability in relation to the withdrawal of the job offer is well-founded.

Employment Judge Slater

Date: 4 May 2018

REASONS SENT TO THE PARTIES ON

4 May 2018

FOR THE TRIBUNAL OFFICE