EMPLOYMENT TRIBUNALS

Claimant: Dr E Jackson

Respondents:
1. Health Education England
2. County Durham & Darlington NHS Foundation Trust

Heard at: North Shields **On:** 5, 6, 7, 8, 9 November 2018 and submissions and deliberations: 7, 10, 11, 12, 13 December 2018 and 31 January 2019

Before: Employment Judge Morris
Members: Ms S Don
Mr K A Smith

REPRESENTATION:

Claimant: Mr M Sutton, one of Her Majesty's Counsel and Mr D Northall of Counsel
First Respondent: Mr P Gilroy, one of Her Majesty's Counsel
Second Respondent: Dr E Morgan of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's complaint that the first respondent failed to comply with its duty under section 20 of the Equality Act 2010 to make adjustments is not well-founded and is dismissed.

2. The claimant's complaint that the second respondent failed to comply with its duty under section 20 of the Equality Act 2010 to make adjustments is not well-founded and is dismissed.

3. The claimant's complaint that the first respondent unlawfully discriminated against her contrary to sections 15 and 39 of the Equality Act 2010 (her dismissal amounting to discrimination arising from disability) is not well-founded and is dismissed.

4. The claimant's claim that she terminated her contract of employment with the second respondent in circumstances in which she was entitled to terminate it without notice by reason of the conduct of the second respondent (ie. by reference to section 95(1)(c) of the Employment Rights Act 1996, she was dismissed) and that that

dismissal by the second respondent was unfair contrary to sections 94 and 98 that Act is not well-founded and is dismissed.

REASONS

Representation and Evidence

1. The claimant was represented by Mr M Sutton QC and Mr D Northall of counsel, who called Mrs Lesley K Fudge to give evidence on her behalf.

2. The first respondent was represented by Mr P Gilroy, QC, who called Professor N Kumar to give evidence on its behalf.

3. The second respondent was represented by Dr E Morgan of counsel who called Dr S Dabner to give evidence on its behalf.

4. The Tribunal also had before it in excess of 3,000 pages of documents contained in nine files, which were supplemented throughout the hearing. The numbers shown within parenthesis in these Reasons are the page numbers in those files, except that the numbers preceded by the letter "P" are page numbers in what was referred to as the Pleadings Bundle.

The Claimant's Complaints

5. The claimant's complaints are as follows:

 5.1 A failure on the part of the first respondent, contrary to section 21 of the Equality Act 2010 ("the Equality Act") to comply with the duty to make adjustments imposed upon it by section 20 of that Act.

 5.2 A failure on the part of the second respondent, contrary to section 21 of the Equality Act to comply with the duty to make adjustments imposed upon it by section 20 of that Act.

 5.3 Discrimination arising from disability as described in section 15 of the Equality Act, being dismissing her contrary to section 39(2)(d) of that Act;

 5.4 Unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996, that being a constructive dismissal as described in section 95(1)(c) of that Act.

The History of these Proceedings

6. The claimant's claims came before the Employment Tribunal held at North Shields in July and October 2016 ("the First Tribunal") when judgment was reserved. The unanimous judgment, which was promulgated on 18 November 2016 (P130) was as follows:

6.1 "The claim that the first respondent unlawfully discriminated against the claimant (section 15 of the Equality Act 1980 ("EqA") – discrimination arising from disability) is well-founded;

6.2 The claim that the first and second respondents were in breach of the duty to make reasonable adjustments (section 20 EqA) is well-founded;

6.3 The claim that the second respondent constructively unfairly dismissed the claimant is well-founded."

7. The respondents appealed. The appeals were heard by His Honour Judge Shanks in the Employment Appeal Tribunal on 30 and 31 October 2017 with judgment being handed down on 2 March 2018. The EAT decided, first, that the First Tribunal's decision on the reasonable adjustments claim involved an error of law. Amongst other things, it had imposed liability on both respondents indiscriminately without any separate consideration of their respective positions; it had decided that it would have been a reasonable adjustment on the part of both respondents to have provided training and work in a hospital which was latex free (or latex light) when the first respondent had no control over the conditions in any hospital and the second respondent had no control over any other Trust's hospital and no control over where the first respondent assigns trainees; and it had apparently decided that both respondents should have made adjustments to the anaesthetics exam and the requirement for transferring to another specialty when those two matters were within the control of the relevant Royal Colleges and the GMC, and had nothing whatever to do with the Trust.

8. Secondly, the First Tribunal's finding that the claimant had been constructively dismissed was expressly predicated on their finding that the second respondent had failed to make reasonable adjustments, and it was not disputed that if the second respondent's appeal on reasonable adjustments was upheld the finding of unfair constructive dismissal could not stand. Finally, given the conclusions on the reasonable adjustments claim, the section 15 claim would have to be remitted; not least on the basis that if the First Tribunal "was suggesting that, even if Professor Kumar had quite properly come to the view that the claimant could not complete her training in November 2014, the decision could not have been "a proportionate means of achieving a legitimate aim". That seems to me obviously wrong …". Having allowed the appeals in relation to the reasonable adjustments, section 15 and unfair dismissal claims, the EAT heard further submissions on disposal.

9. The Order of the EAT was sealed on 12 March 2018. As indicated, the above appeals were allowed on the basis of its judgment, and the matters were remitted to a differently constituted Tribunal. At paragraph 4 of the Order it is expressly recorded as follows:

"The new Tribunal should consider the following at a final hearing:

<u>Failure to make reasonable adjustments (s.20 EqA)</u>

(i) Ought either of the Respondents reasonably have taken steps to avoid the disadvantage to the Claimant identified at 6.17 of the written Reasons, specifically the *disadvantage of not being able to continue*

her work and training without the risk of suffering and adverse allergic reaction?

(ii) In determining this issue the Tribunal shall:

(a) identify those steps, if any, which it was reasonable for each of the Respondents to take; and

(b) in assessing the reasonableness of any given adjustment, have explicit regard to each Respondent's competence to deliver that adjustment.

Discrimination arising from disability (s.15 EqA)

(iii) Was the First Respondent's letter (Professor Kumar – Claimant 6 November 2014) a proportionate means of achieving a legitimate aim?

Unfair Dismissal

(iv) In light of the Tribunal's findings on discrimination, was the Claimant constructively unfairly dismissed?

Compensation

(v) In the light of the Tribunal's findings on reasonable adjustments, section 15 and unfair dismissal, what compensation (if any) is the Claimant entitled to?"

10. The EAT Order continues at paragraph 5 in the following terms:

"For the purposes of such final hearing the primary findings of fact of the earlier Tribunal shall stand and a directions hearing shall be held before an Employment Judge at the earliest reasonable opportunity to clarify what further evidence may be presented by the parties."

11. As had been ordered by the EAT, a preliminary hearing took place at North Shields on 18 April 2018 before Regional Employment Judge Robertson (sitting alone). Amongst other things is recorded the agreement reached with the parties that in deciding the issues remitted to it, as set out at paragraph 4 of the EAT's Order, the Tribunal must consider the following issues:

"a) Ought either of the respondents reasonably to have taken steps to avoid the disadvantage to the claimant identified at paragraph 6.17 of the First Tribunal's written reasons, specifically the disadvantage of not being able to continue her work and training without the risk of suffering an adverse allergic reaction?

b) In determining this issue, the Tribunal shall:

1) identify those steps, if any, which it was reasonable for the first respondent to take (the claimant having specified which of the steps or adjustments set out at paragraph 6.18 of the First Tribunal's

reasons, she contends should have been undertaken by the first respondent);

2) identify those steps, if any, which it was reasonable for the second respondent to take (the claimant having specified which of the steps or adjustments set out at paragraph 6.18 of the First Tribunal's reasons, she contends should have been undertaken by the second respondent);

3) in assessing the reasonableness of any given adjustment, have explicit regard to each respondent's competence to deliver that adjustment.

c) Was the first respondents letter (Prof Kumar to the claimant dated 6 November 2014) a proportionate means of achieving a legitimate aim?

d) In light of the Tribunal's findings on discrimination, was the claimant constructively dismissed?"

[*Note: the references in the in the EAT Order and Case Management Summary in the preliminary hearing to paragraph 6.17 of the First Tribunal's Reasons should have read paragraph 6.18.*]

12. Additionally, in the Case Management Orders arising from that preliminary hearing it is recorded as follows:

> "The parties may adduce additional documentary and/or witness evidence in accordance with the following Case Management Orders but limited to one witness per party (which in the case of the claimant may be, but is not required to be, the claimant herself) directed to the competence of either respondent to deliver any reasonable adjustments contended for by the claimant."

13. There followed further private preliminary hearings in this matter. For present purposes it is sufficient to record that at that held on 29 October 2018 it was ordered that the five-day hearing that had been listed to commence on 5 November 2018 would deal with liability only and would not deal with any aspects of remedy.

Procedural Matters

Steps to be taken by which respondent

14. As noted above, at the private preliminary hearing on 18 April 2018 the Regional Employment Judge had referred to the claimant specifying which of the steps or adjustments set out at paragraph 6.18 of the First Tribunal's Reasons she contended should have been undertaken by, respectively, the first or second respondent. As at the commencement of the hearing before this Tribunal, she had failed to do that notwithstanding requests that had been made to that effect to her representatives by the representatives of the first respondent.

15. During the course of the second day of the hearing the Tribunal asked Mr Sutton to specify such steps at the commencement of the following day, which he did. He clarified that the adjustment at the sixth of the bullet points at paragraph 6.18

of the Reasons of the First Tribunal ("Transfer to alternative vacancies … etc") was contended for against the second respondent and not the first respondent; the adjustment at the eighth bullet point in that paragraph ("Transferring to alternative specialty training….etc") was contended for against the first respondent and not the second respondent; the adjustments detailed at the remaining six bullet points were contended for against both respondents, as they were linked to the creation of a working environment where training could be undertaken to accommodate disability.

Parameters of this Hearing

16. During the course of the earlier part of the hearing, during the evidence from Professor Kumar, issues arose between the representatives as to one or other of them straying in evidence or cross examination beyond the remit of this Tribunal as described above. On the morning of the third day, this issue was raised formally. Having heard submissions and deliberated (during the course of which the Tribunal reminded itself of the decision of the Court of Appeal in Aparau v Iceland Frozen Foods Plc [2000] IRLR 196), the Tribunal gave its initial decision, which (then further clarified after the issue had again arisen during the course of that afternoon) is as set out below:

(1) In accordance with the Order of the EAT, the findings of fact of the First Tribunal must stand. This Tribunal considers, however, that it is implicit that we must examine findings of fact that

(i) relate to the remitted issues, or

(ii) are based upon the essential error of the First Tribunal of melding the various statutory bodies and various statutory responsibilities and, related to that, whether there could be interaction between them.

(2) Linked to this is whether the Tribunal is bound by the First Tribunal's findings on liability and can only consider the question of the liability of which respondent, if either, or can also consider that question of liability. Our conclusion is that if the finding of liability is predicated upon what is referred above as the melding of bodies and responsibilities, where the First Tribunal was found to have been in error, it is right that we should examine that finding too.

(3) In respect of the above, however, it is clear from the Case Management Orders of the Regional Employment Judge that any additional evidence, documentary or oral, before this Tribunal must be "directed to the competence of either respondent to deliver any reasonable adjustments contended for by the claimant", which this Tribunal would extend to include not only the competence of either respondent to deliver any reasonable adjustments but whether the relationship between the two respondents was such as to establish that one of them could have made a requirement of others to deliver any reasonable adjustments.

(4) A more general matter relates to the areas where Mr Sutton was permitted to cross-examine on the previous day and whether the other

representatives should be limited or even precluded from cross-examining or re-examining in respect of those areas. It will be recalled that at one point Mr Gilroy objected to a line of questioning to which the Employment Judge responded that that was the function of cross-examining and re-examining. The Tribunal is satisfied that it would be contrary to natural justice and generally unfair to disallow that objection by Mr Gilroy by opening the door to him re-examining then close that door having permitted the cross-examination.

17. The above parameters were agreed by the representatives. That agreement is reflected, for example, in the closing submissions of the claimant's representatives in the following terms:

> "It is respectfully submitted that the tribunal's guidance captures the essence of its exercise at the remitted hearing having regard to the remitted issues, the scope of the new evidence permitted by the EAT and the Regional Employment Judge and the need to respect the findings of fact of the first tribunal".

Findings of Fact

18. The facts as found by the First Tribunal are set out in some detail at section 3 of its Reasons (which, in accordance with the Order of the EAT must stand) and are summarised at paragraphs 8 to 23 of the EAT Judgement. Both Judgements are matters of record and the detail does not need to be revisited in these Reasons.

19. Additionally, unlike before the First Tribunal, much of the focus of the hearing before this Tribunal was on the structure within which training was provided to the claimant, the roles and responsibilities of the various organisations and post-holders within that structure and the competences of the first and/or second respondent; specifically, the extent to which one or both of them could make requirements of a Host Trust to which the claimant was assigned to work for the purposes of her training; for example to make adjustments. In this regard it is therefore appropriate to provide some context by way of confirmatory or additional findings of fact as set out below.

20. Thus, having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the respective parties, the Tribunal finds the following facts with reference to the remitted issues and the agreed parameters of the Hearing described above either as agreed between the parties or found by the Tribunal on the balance of probabilities. Additional findings on the same basis are more conveniently located within the Consideration section of these Reasons; for example, facts relating to the contractual relationships between relevant parties and the claimant's impairment.

Structure and context

20.1 The first respondent was responsible for implementing specialty training in accordance with GMC standards and approved specialty curricula, and delivering a quality management system against the GMC's standards. These standards are set out in, "A Reference Guide

for Postgraduate Specialty Training in the UK" (the "Gold Guide") (2114) and include that the duties etc of trainees must be consistent with safe patient care. The GMC also approves curricula developed by the relevant Royal College.

20.2 The second respondent was the Lead Employer Trust ("LET") for all trainees on the ACCS programme in the North East Region. It was the employer of relevant trainees and was responsible for paying them and providing HR support: for example, requests for leave and other employment issues. Thus, the claimant entered into a three-year fixed-term contract of employment with the second respondent commencing on 1 August 2012 (176).

20.3 There were eight Trusts within the Region of the first respondent (one of which was the second respondent) each of which offered training placements to junior doctors and thus had day-to-day responsibility for them as trainees while they were undergoing training, both educational and clinical, and had to ensure that trainees were given the required training opportunities. Such Trusts are referred to variously as the Host Trust, Provider Trust, Training Trust or Local Education Provider "LEP"). In interests of clarity and consistency, for the purposes of these Reasons, this Tribunal has adopted the term "Host Trust".

20.4 The claimant is qualified as a doctor and was recruited into a three year Acute Care Common Stem Anaesthetics Theme programme ("ACCS") commencing 1 August 2012. The claimant successfully completed the first year of that programme (CT1) and, for the second 12 months, she was placed at Sunderland Royal Hospital; a hospital within City Hospitals Sunderland NHS Trust ("Sunderland Trust"), which is one of the eight Host Trusts referred to above.

20.5 Professor Kumar is employed by the first respondent ("HEE") as Postgraduate Medical Dean. Amongst other things she fulfilled the statutory function of "Responsible Officer" for doctors in postgraduate training programmes.

20.6 Doctors in training were required to rotate through a number of training placements at NHS Trusts' hospitals and GP practices.

20.7 Following appointment to a training programme such as ACCS, trainees were awarded a Deanery Reference Number ("DRN"). Drs appointed to such training programmes must continue to progress. For those who do not, there is a process involving an Annual Review of Competence Progression ("ARCP") panel, which can result in the removal of the DRN.

20.8 The Gold Guide provides a procedural framework for medical specialty training. As set out in the Gold Guide, progression through training was based on the achievement of specific competencies. The ARCP process was a key method of assessment and of maintaining patient safety. Its assessments could result in recommending one of eight

outcomes for each trainee. Outcome 4 signified an ARCP panel's recommendation that the trainee was released (ie. discharged) from the training programme.

20.9 The division of responsibilities between the first respondent and the second respondent is set out in the Gold Guide and is repeated in the Service Level Agreement (SLA) between the two respondents (2245). At Recital (D) are set out the key responsibilities of the second respondent including recruitment, employment checks, contractual matters (including the requirements of employment legislation), employment issues and payroll and recharge. These responsibilities are particularised in the Specification Schedule 1 to the SLA (2264) while Schedule 4 sets out policies that will apply including a Disability Policy (116).

20.10 Each Host Trust that offers training placements to doctors entered into a Learning Development Agreement ("LDA") with the first respondent that sets out each party's obligations. An example of such an agreement, being with the Newcastle upon Tyne Hospitals NHS Foundation Trust, (the "Newcastle Trust") is at page 2293.

20.11 As found by the First Tribunal, while undergoing training the claimant was under a contractual duty to provide clinical care to patients. As explained by Professor Kumar in summary, to complete the ACCS, the claimant would have had to complete successfully all the competencies set out in the curriculum, pass the required Primary FRCA exam and rotate through the required clinical areas within the Host Trusts as set out in the curriculum. In accordance with the curriculum, trainees in ACCS training needed access to most parts of a hospital including all theatres, labour wards, accident and emergency, intensive care units, wards and clinical areas in order to achieve the competencies required of the curriculum.

21. Professor Kumar gave evidence to the First Tribunal, which made appropriate findings of fact accordingly and her additional evidence before this Tribunal has been relied upon in the above section of these findings and in the Consideration section of these Reasons particularly as to the reasonable adjustments contended for by the claimant. Neither Dr Dabner nor Mrs Fudge gave evidence to the First Tribunal, however and it is therefore appropriate that their evidence before this Tribunal should be addressed.

Dr Dabner

22. Dr Stuart Dabner gave evidence on behalf of the second respondent by which he is employed as a consultant anaesthetist. He has considerable relevant experience on which to base the evidence he has provided including previously having undertaken the role of Educational Supervisor in Anaesthetics within the second respondent for a period of fifteen years. The Tribunal found Dr Dabner to be an authoritative and impressive witness. It accepts his evidence including as to the following key matters:-

22.1 The second respondent (whether as Lead Employer or as Host Trust) had no control, power or authority in respect of the curriculum followed by an anaesthetics trainee, the assessment criteria or the manner and content of any examination.

22.2 It was not possible for the claimant who had described such wide-ranging, distressing, dangerous and life-threatening reactions to consider working in a hospital at all much less as a trainee anaesthetist.

22.3 More specifically she would be unable to avoid contact with a huge number of staff, patients and relatives and, therefore, contact with clothes and shoes potentially containing latex.

22.4 Given that the claimant experiences moderate symptoms on airborne contact it would be impossible to make adaptations that could guarantee all environments were latex-free.

22.5 The claimant could be called to all areas of a hospital to attend emergency situations with patients and their relatives and there was no way of knowing if they had or had been in contact with neoprene-containing clothing or equipment.

22.6 A trainee anaesthetist, especially out of hours when there might only be two anaesthetic doctors on site, could be called to any area of the hospital in a critically time-dependent emergency manner.

22.7 Trainees have to do transfer training, which involves transferring sick patients between hospitals in ambulances and to avoid exposure it would be necessary to ensure that the ambulances operated by the North East Ambulance Service NHS Foundation Trust were also latex-free.

22.8 Risks could also arise from furniture and soft furnishings, patients or staff having handled latex items prior to attending the hospital and from glues and paints that can often contain latex. They are often not marked.

22.9 Anaesthetists are called to all areas of the hospital at a moment's notice to attend potentially life-threatening emergencies and it was extremely difficult to see how it is possible to guarantee all these areas are latex free or that latex had not been brought onto the premises by staff, patients or relatives.

22.10 For the claimant to move around a hospital would pose a significant clinical risk. She could be required to attend any area at a moment's notice and it would simply not be possible to make a risk assessment for the possible presence of latex. Even if such an assessment was possible there are often situations, especially out of hours, when no other anaesthetist is available to attend immediately. There is therefore a risk for the claimant and also to her patients as, if she was to become

incapacitated by a reaction, there may be no one else to attend for some time.

22.11 Patient safety is absolutely paramount and the second respondent has a duty of care to its staff and to its patients and should not knowingly place staff in situations that could compromise patient safety. To require the claimant to hold the bleep and respond to emergency situations would knowingly place her in such situations.

22.12 A trainee is required as an essential minimum to train and to demonstrate competencies in each of the core specialities (including intensive treatment, obstetrics, paediatrics, pain medicine, transfer, trauma/stabilisation and perioperative medicine) to progress through their training. In all cases they must demonstrate independence. Even if the trainee could safely attend as a supernumerary or shadowing the work of a colleague in these competencies they would not have demonstrated the competence for themselves so would not be able to complete their training.

22.13 Once initial competencies have been completed a trainee (CT1) would be expected to take part in out-of-hours shifts ('on call'). One of the essential requirements being to have experience of carrying the emergency bleep, which is a competence that cannot be avoided as part of the CT training role. The fundamental requirement is that the trainee is able to demonstrate the ability to work independently in practice while under the supervision of a consultant. The supervising consultant could, however, be up to thirty minutes away.

22.14 In an emergency requiring an anaesthetist presence, seconds matter and delay could contribute to an adverse outcome for the patient and pose a significant patient safety risk.

22.15 Given that the exclusion of the presence of latex could not be guaranteed at emergencies, especially when on call, the claimant could not discharge her duties safely in respect of her own health or in respect of the safety of patients.

22.16 Of all specialities in medicine, anaesthetics is probably one of the worst in a situation like this where it is very difficult to control the environment in all areas that the individual may be expected to work, especially in emergencies where seconds literally are the difference between life and death.

22.17 Another fundamental issue is the nature of the professional and ethical obligations of all doctors. A trainee is a doctor under regulation by GMC and cannot and should not take on a role knowing that they may be called to an emergency and then find that they are unable to provide the patient with the treatment that they require because they are suddenly and seriously ill.

22.18 The claimant's acceptance that ongoing exposure to latex was inevitable was reasonable and, therefore, the consequences for both patients and the claimant could have been extremely serious in the event of an adverse reaction on her part when working as an anaesthetist in any of a very large number of essential and non-negotiable areas of her training.

22.19 The comparison with a latex allergic patient being treated in a hospital is not a good one. If the patient was to suffer a reaction that would be treated but there is a world of difference between treating an emergency that includes a reaction to latex and trying to treat a patient in an emergency when an essential part of the team is themselves having a reaction.

22.20 To qualify, a trainee must demonstrate the competencies set by the Royal College of Anaesthetists and the GMC (over which the second respondent has no say, authority or control) in accordance with the training arrangements of the first respondent, over which, once again, the second respondent has no say, authority or control.

22.21 Even if the second respondent had been able to control activities undertaken by the claimant and done so in pursuit of the safety of her and her patients, that would have kept her away from the experiences skills or competencies required of her. As a result, she would not have her competencies signed off and she would receive an Outcome 4 letter.

Mrs Fudge

23. Mrs Lesley Fudge is an Independent Healthcare Consultant. Since 2003 she has worked extensively within the NHS providing support in a number of areas including advising hospitals in relation to the use of latex in relation to which she has drafted and implemented numerous allergy policies, devised and delivered latex education programmes and advised how to undertake risk assessments and the safe management of latex allergy. She also has extensive experience as a clinical nurse manager and in NHS procurement as a clinical procurement manager from which she has gained a practical insight into the cost and logistics of implementing a latex-safe working environment. Mrs Fudge first successfully implemented a latex allergy policy over sixteen years ago when she was clinical Nurse Manager at Frenchay Hospital in Bristol, which became a model approach and benchmark for hospitals across the UK.

24. In connection with this case Mrs Fudge had no recollection of being contacted or attending a meeting on 23 July 2014 but it is clear from contemporaneous correspondence that she was being asked to advise various people on how to carry out a latex risk assessment.

25. The Tribunal accepts the evidence of Mrs Fudge that it would be impossible for any hospital or indeed any organisation that engages with the public to be 100% latex-free. It also accepts that latex-safe environments for patients and staff can be achievable (by using alternatives that eradicate or minimise the use of latex such as

latex-free syringes, non-latex mannequins and non-latex ('rubber') bands) but does so as a general principle. For the reasons expanded upon below, the Tribunal does not accept that a latex-free or latex-safe environment could be provided for a trainee such as the claimant in her chosen specialty of anaesthetics for the reasons given by Dr Dabner.

26. Further, in light of Dr Dabner's evidence, based upon his experience and qualifications, the Tribunal does not accept Mrs Fudge's evidence that she "could see no reason why she [*ie. the claimant*] could not work in a surgical or clinical environment" if she were to take basic precautions to protect herself in an operating theatre.

27. The difficulty posed by Mrs Fudge's evidence in this and other respects is that she does not address points that the Tribunal accepts from the evidence of both Dr Dabner and Professor Kumar that the claimant would not have been working as a qualified doctor but would be working as a trainee anywhere within the hospital (including transferring patients by ambulance from one site to another) and not simply, for example, working in a particular operating theatre.

28. In this regard, Mrs Fudge relied upon the e-mail from Dr Spickett (the consultant immunologist treating the claimant) of 11 March 2014 that it was perfectly possible for Trusts "to provide a safe working environment" but that does not address the position of a trainee (which, in contrast, is addressed by the consultants reporting back to Dr Hanley, Director of Medical Training at Newcastle Trust, to which the Tribunal refers below). Mrs Fudge also relied upon Dr Spickett's reference to another consultant anaesthetist and a surgeon with Type 1 hypersensitivity to latex both of whom he says manage to work satisfactorily within the NHS with necessary modifications. Clearly, however, all of Dr Spickett's references are to a working environment and people working satisfactorily as opposed to working to meet the competencies required of a trainee.

29. Mrs Fudge herself cites two individuals of whom she is aware: one an Operating Department Practitioner in anaesthetics and the other a Health Care Assistant who worked in an A&E department. The Tribunal accepts Dr Dabner's evidence, however, that there can be no comparison between either of these individuals and the responsibilities undertaken by a trainee anaesthetist in pursuit of his or her competencies, which include operating autonomously. His evidence was that it was completely erroneous for Mrs Fudge to suggest that an Operating Department Practitioner works in a similar fashion to an anaesthetist. Such a Practitioner, he said, has two years' training to NVQ or equivalent level (Dr Dabner's training had taken fifteen years) and does not assume clinical responsibility near to that of a trainee or consultant anaesthetist. In short, his assessment was that Mrs Fudge had little understanding of what an anaesthetist does and how he or she works.

30. Returning to the above point that Mrs Fudge blurs the distinction between the claimant working as a trainee rather than as a qualified doctor, at paragraph 26 of her witness statement (relying on Dr Spickett having identified other consultants with Type I hypersensitivity in the region who have been able to practice safely in theatre as the claimant had hoped to do when she qualified) Mrs Fudge's evidence is, "It appears clear, therefore, that had she been able to qualify she would have been able

to work as an anaesthetist locally." She also states that there are other parts of the country including Bristol and Nottingham, "where it would have been possible for her to work safely also". This evidence, however, misses the point by skimming over the fact the claimant would first have been required "to qualify" and that working as a trainee gave rise to the potential problems identified by Dr Dabner and others.

31. More specifically, on the evidence available to it, the Tribunal does not accept Mrs Fudge's evidence that if all hospitals operated robust latex allergy policies this would not, in itself, cause an issue; we prefer the evidence of Dr Dabner and, indeed, the claimant herself in contemporaneous documents that such policies would not protect her from reacting to items worn by or brought into hospitals by patients or visitors; and it is to be remembered in this regard that the claimant was initially seeking a latex-free environment. Likewise, the Tribunal does not accept Mrs Fudge's evidence that if it is not safe for a doctor to work it is unlikely to be safe for a patient either; we prefer the evidence of Dr Dabner regarding how a patient who does suffer from this or any other allergy would be treated, which does not equate to a member of the treating team falling seriously ill.

32. Mrs Fudge's focus was upon Dr Spickett having said that the claimant's Type 1 sensitivity is mild-to-moderate. Mrs Fudge's assessment that, therefore, the claimant's condition should be manageable and her opinion that she does not see "any reason why she could not have completed her training as an anaesthetist" stands in stark contrast to the evidence before the Tribunal particularly from Dr Dabner which the Tribunal prefers. This is particularly so given the claimant's own impact statement (P71) and her Particulars of Claim in her personal injury claim against Sunderland Trust (1784) especially in the Particulars of Injury (1790) to both of which the Tribunal returns below.

33. In this respect the Tribunal notes that the impact statement was produced by the claimant on 17 August 2015, which is some time after the initial incident in October 2013 by which time she had the benefit of appropriate medication and was taking practical measures to manage her allergy. That impact statement was provided for the purposes of these proceedings in response to an Order of this Tribunal dated 5 August 2015. It can therefore be relied upon by the Tribunal and the Tribunal does not accept Mrs Fudge's rather dismissive assessment of what the claimant herself puts forward in her impact statement on the basis that on initial diagnosis an individual can suffer a crisis of confidence brought about by a huge fear factor with a result that any such statement can be exaggerated and not reflect the actuality of a person's true situation.

34. Mrs Fudge also remarks that she could see no reason why it should be necessary for the claimant to perform any procedures on a latex mannequin when non-latex mannequins are readily available. That might be right but it misses the point that the examination was a matter for the Royal College, relevant staff within which had said that adjustments could not be made to the examination process, and neither of the respondents had the competence to control workings of the Royal College.

35. Mrs Fudge makes a comparison between the claimant and someone suffering from epilepsy or diabetes, or at risk of stroke or cardiac arrest on the basis that they also can never be completely certain that they would not suffer a reaction while

working as an anaesthetist or in the theatre. The Tribunal rejects that comparison preferring instead the oral evidence of Dr Dabner including as follows:

35.1 Although some consultants might be able to work and control their individual environment it was completely different for a trainee who could work carrying a bleep on call especially out of hours and could be summoned anywhere in the hospital; quite often as the first respondent and often working autonomously. Although it was right that a trainee was always supervised by a consultant, that could be at a distance and, out of hours, the consultant could be at home ten miles or thirty minutes away from the hospital and the trainee would be expected to manage the situation especially for the first thirty minutes.

35.2 A large part of the work of an anaesthetist is elective-routine surgery but other parts are less routine such as in obstetrics, A&E and emergencies on wards.

35.3 The work of an anaesthetist is different to that of other consultants where it might be easier to control a ward or a theatre. Nowhere is latex-free and if the claimant was having the daily responses that she suggests, that could lead to serious reaction and even to death. If she were to be called to someone who was extremely ill that would be time-sensitive and there could be seconds to save life. The risk tolerance is extremely small.

35.4 If he were to be the consultant on call with a trainee such as the claimant he could not knowingly send the trainee to that situation because he would know that he was potentially putting the patient at risk. Anaesthetists are obsessed by patient safety.

36. The Tribunal also accepts Dr Dabner's evidence rejecting Mrs Fudge's comparison with risk to patient safety being managed in the event of Dr Jackson losing consciousness in the same way as if she had a cardiac arrest, epileptic fit or fainted. Dr Jackson's allergic reaction was, he said, nothing like epilepsy. That can be treated to a level where the risk tolerance is acceptable. As to Mrs Fudge's comparison with a clinician having a stroke, that was an unknown and was unpredictable but was not frequent and one would know that one would have had a stroke. In all such cases, the circumstances of the claimant were completely different and such a correlation could not be made.

37. Mrs Fudge's concluding substantive paragraph includes that based on her experience, "if there was a collective will on the part of Health Education England and the Trusts with which it works to address the issue and create a latex safe environment in which Dr Jackson could both train and work there is no reason why this could not be achieved". That, however, falls into the essential error of the First Tribunal as identified by the EAT of failing to appreciate that each of the bodies to whom she refers are separate legal entities with separate powers and responsibilities and in respect of which (for the reasons considered further below) the respondents in this case have limited, if any, ability to compel the Host Trusts to provide environments, premises, equipment and working practices so as to achieve the adjustments contended for by the claimant in those respects.

The Law

38. The relevant law in respect of the claims brought by the claimant is comprehensively set out at Section 4 of the reasons of the First Tribunal. That is a matter of record and does not need to be restated here. Suffice is to say that this Tribunal adopts the legal analysis of the First Tribunal contained within that Section 4.

39. Additionally, it is well established, and was accepted by all the representatives that this Tribunal has no power to reopen the hearing except to the extent remitted to it by an appellate court: Aparau. In short, this Tribunal must not go beyond the issues remitted to it, as further clarified in the above section headed, “Parameters of this Hearing”.

Submissions

40. After the evidence had been concluded the Tribunal reconvened in Chambers to consider detailed written closing submissions provided by each of the representatives then, on the following day, heard oral submissions from those representatives in which they highlighted the key points in their submissions and sought to counter certain of the submissions of the other representatives. It is not necessary to set out those submissions in full as they are a matter of record and will be apparent from our decision below.

41. Suffice it to say that the claimant’s representatives focussed upon what they considered to be the central issue of whether the respondents (being respectively responsible for the training and employment of trainee doctors) could divest themselves of their statutory duty to make reasonable adjustments for a disabled trainee in circumstances where training and employment is undertaken at premises of the Host Trust, and whether either or both of the respondents had a competence to make requirements of the Host Trust to make such adjustments. In this, they relied upon the provisions of the LDA between the first respondent and the Host Trusts and the SLA between the second respondent and the Host Trusts both of which are of contractual force and contain mutual rights and obligations between the parties. It was submitted that through these contractual mechanisms the first and second respondent could discuss and, if necessary, impose their wishes on a Host Trust. By way of example, the LDA provides a contractual mechanism through which the first respondent can ensure that the environment in which training is provided complies with the Equality Act (clause 8 - page 2314) and provisions to the effect that the Host Trust shall provide and maintain in a safe condition all equipment and facilities and ensure that all premises, facilities and equipment comply with any applicable health and safety legislation etc (clauses 10.8 and 10.9 - page 2316). The SLA provides that the second respondent will comply with all relevant law and that the Host Trust will use its best endeavours to do so, and requires the parties to work together to ensure that arrangements contained in the agreement work to the standard and level agreed.

42. The focus of the submissions of Mr Gilroy on behalf of the first respondent included as follows:

42.1 As to the contractual relationship between the first respondent and the Host Trusts as exemplified at page 2293 it is expressly provided that the Host Trust shall provide its services in compliance with law and that it shall not be obliged to comply with any instructions from the first respondent which, first, do not comply with law or, secondly, will or are likely to require the Host Trust to incur additional costs (clauses 5.1.4 and 5.3 - page 2309). The Tribunal can consider the claimant's condition and, if it concludes that it was severe, these provisions are engaged. The pivotal issue is as to the powers of the respondents and their ability to deliver, compel or require a particular outcome. In light of relevant statutory provisions relied upon and set out in the first respondent's skeleton argument, neither respondent had the power to require or compel other arms of the NHS to deliver outcomes. Further, it could not require the Royal College of Anaesthetists to act in such a way as to accommodate the claimant's disability and could not reject the requirements of the Royal College that it would not be possible to provide the claimant with a latex-free environment for examination. Similarly, it could not require the GMC to act in such a way as to accommodate the requirements of the claimant's disability such as to exempt her from undergoing a competitive application process for the purposes of pursuing training as a General Practitioner.

42.2 The focus of the Tribunal should be on the eight adjustments contended for by the claimant as set out at paragraph 6.18 of the reasons of the First Tribunal that were dealt with in detail by Professor Kumar on behalf of the first respondent and Dr Dabner on behalf of the second respondent, which contrasts with the superficial evidence of Mrs Fudge on behalf of the claimant. The claimant did not spell out what the respondents should do. Her contentions were aspirational and non-specific. It was not enough to say that there is a power of a party to enforce an agreement and therefore liability is made out. Engaging with those eight adjustments there can be only one conclusion.

42.3 As to discrimination arising from disability, the letter from Professor Kumar was not a formal decision but was a requirement for the claimant to attend an ARCP panel in order for an Outcome 4 to be issued in respect of which she would have had a right to appeal. Professor Kumar considered that this was the best way forward and the least prejudicial to the claimant. Professor Kumar's action was justified within the meaning of the Equality Act in that she was giving administrative effect to the fact that the claimant was unable to complete the training programme. There is a clear nexus between the reasonable adjustments and Section 15 and reliance is placed upon the observation of the EAT that it was obviously wrong for the First Tribunal to suggest that if Professor Kumar had quite properly come to the view that the claimant could not complete her training, her decision could not have been a proportionate means of achieving a legitimate aim.

43. The focus of the submissions of Mr Morgan on behalf of the second respondent included as follows:

43.1 Contrary to submissions made on behalf of the claimant, the Tribunal is obliged to accept the impact statement produced by the claimant as a reliable indicator of the risks with which the respondents had to engage. In her claim form and witness statement the claimant had been silent about what should be done by each of the respondents to achieve the adjustments contended for, which is a fundamental question. The Section 20 duty is not abstract but is to achieve a particular outcome. The disadvantage and the steps to be taken are vested in the same entity. There is no scope for the proposition that either respondent is able to exercise environmental control over any host hospital or determine the curriculum. There is nothing in the eight adjustments contended for about compelling or requiring others to take action or on insisting or enforcing obligations of a third party.

43.2 Relying on the contracts between the parties, the claimant suggests that somehow, by some means, the respondent could require the host to deliver the obligations. The contractual regimes must be reviewed in context, the primary task of judicial construction being to identify the intention which may be attributed to the parties having regard to the meaning which the document would convey to a reasonable person: Investors Compensation Scheme v West Bromwich Building Society [1998] 1WLR. The claimant suggests that the respondents can compel or enforce, against a host, obligations to accept a trainee. That is contrary to the interests of the host because the LDA contains an indemnity, which extends to personal injury for which the host would assume liability in respect of any claim (paragraph 15.9 - page 2321). The respondent relies upon Sections 2, 4, 36 and 37 of the Health and Safety at Work etc Act 1974, which places beyond doubt that the Host Trust is required to exercise duties and responsibilities in conformity with the legislation. The Service Contract between the second respondent and a Host Trust (2726 - this document relating to Newcastle Trust) sets out the aim and scope of the contract: at clause 10, that the second respondent will use its best endeavours to comply with all relevant Acts of Parliament etc. This does not mean that the second respondent has the ability to control third parties: see Philips Petroleum Company United Kingdom v Enron Europe Limited [1998] CLC 329 to the effect that a best endeavours clause cannot impose a contractual obligation to disregard the financial effect. The clause lacks sufficient precision to be enforceable. Clause 38 provides only correlative obligations on the parties to work together to ensure the arrangements work to the standard and level agreed. This is aspirational only and does not impose additional responsibilities on the parties. In these circumstances there is nothing that allows the second respondent to force a Host Trust to accept a trainee doctor and nothing that requires the host to disregard its obligations.

43.3 If there is no breach of the duty under Section 20 of the Equality Act there can be no constructive dismissal. There is no loss of remedy under the Equality Act as it is "carved out" by Schedule 22 of that Act.

43.4 Unless the claimant can point to a legal mechanism by which the respondent could and should compel another to act, the claims have no merit and should be dismissed. In the submissions made on the claimant's behalf reference is made (paragraph 107.3) to the respondent's equality duties requiring them "to secure the cooperation of Host Trusts" but that is not enough. There was no route by which the second respondent could compel and secure outcomes. The evidence from Dr Dabner and Professor Kumar shows that it did not have the means to compel or coerce.

43.5 As a separate point, Dr Morgan relied in part upon Schedule 22 to the Equality Act. The Tribunal accepts that neither respondent can be required to make a reasonable adjustment if to do so would be contrary to any enactment (for example, the Health and Safety at Work etc Act), which proposition is driven by the safety of especially patients and staff, including the claimant herself. Clearly, it cannot be the intention of the Equality Act to require the respondents to break the law so as to accommodate the needs of the claimant. Although accepting that proposition, it is somewhat academic in this case because the Tribunal has not found that there has been a failure by either respondent to make reasonable adjustments but if it had, it is accepted that any potential liability, would have been removed by the effect of Schedule 22.

43.6 Finally in relation to the submissions of Dr Morgan, he conveniently set out in tabular form what he referred to as being a schedule of contaminated findings of fact by the First Tribunal, which schedule was adopted also by Mr Gilroy. The Tribunal has considered and addressed in these Reasons the findings of fact that it agrees relate to the essential error of the First Tribunal as identified by the EAT. There are, however, a number of factual findings put forward by Dr Morgan that this Tribunal considers to be outwith the matters that have been remitted and the parameters for the hearing as described above. By way of example, Dr Morgan refers to the finding of the First Tribunal at paragraph 3.8 and submits that there was no contractual obligation between the claimant and the second respondent "regarding the provision of care of patients"; the finding at paragraph 6.24 and submits that there was no "reason to believe the Host Trusts would have refused" to cooperate; the finding at paragraph 6.25 and submits that the "NHS is not fractured". The First Tribunal might have been in error in each of these respects and others identified by Dr Morgan but, as explained, they are not matters for this Tribunal.

Consideration

44. A preliminary point arises in relation to the findings of fact of the First Tribunal. There is no dispute that the EAT Order includes that "the primary findings of fact of

the earlier Tribunal shall stand" but that begs the question of what are the "primary" findings of fact. It is arguable (and this was the Tribunal's initial thinking) that the primary findings of fact are those contained in Section 3 of the Reasons of the First Tribunal which is headed "The Facts". Each of the representatives was clear, however, that primary findings of fact are also contained within sections 5 and 6 of those Reasons and the Tribunal has therefore approached its task on that basis, albeit keeping within the parameters for this Hearing as set out above.

45. An example of this point is at paragraph 6.26 of the Reasons of the First Tribunal. This Tribunal does not regard the final sentence as being a finding of fact or, to the extent that it could amount to a finding of fact, we are satisfied that it comes within the issues that have been remitted to us.

46. Given the focus of the claimant's case before this Tribunal and the submissions made on her behalf, which relied heavily upon the provisions of the LDA and the SLA enabling one or other of the respondents to require a Host Trust to comply with the obligations under those respective agreements, including to make adjustments for the purposes of Section 20 of the Equality Act, the Tribunal first considers those contractual relationships.

47. In respect of the LDA, Professor Kumar agreed that it gave the first respondent the opportunity to exercise control over how training is provided and the environment within which it is provided (2298 at (C)(i)) and that the LDA contains a mechanism for enforcement. The Tribunal notes, however, that those mechanisms are focussed (as in many commercial agreements) on breach, insolvency etc. As such, in the context of this case, the possibility of termination only arises if, for example, it might be said that the Host Trust is in breach of the agreement by failing to ensure the premises etc comply with applicable health and safety legislation: see, for example, clause 10.9 (2316).

48. Professor Kumar confirmed that, pursuant to the LDA, the first respondent has to ensure the provision of a safe training environment that complies with health and safety and equality standards; further, that so must the second respondent from the perspective of the employer. She also accepted that the first respondent, as training provider, and the second respondent, as employer, have a responsibility for ensuring the provision of a safe training environment and that both have reasonable adjustment responsibilities but made the point (which the Tribunal accepts) that those responsibilities apply where reasonable and possible and where a person's training could continue.

49. In these respects, Mrs Fudge gave evidence in respect of people who had successfully integrated into a hospital environment notwithstanding having an allergy to the protein contained in latex but the Tribunal accepts Professor Kumar's explanation that the situation was different in respect of the clinical areas in which the claimant had to work. Also, people within the Host Trusts had provided sustainable views on the feasibility of the claimant undertaking training within their organisations. The Tribunal also accepts Professor Kumar's evidence in respect of the feasibility of working in anaesthetics where there is a difference between working as a consultant, who could be allocated specific accommodation or operating theatre in which their allergy could be addressed, and a junior doctor undertaking training throughout the hospital.

50. The Tribunal accepts that Professor Kumar did ask the Newcastle Trust to undertake a risk assessment but then worked upon the feasibility of the claimant undertaking training at hospitals of that Trust in the circumstances where all concerned knew of the prevalence of latex in the environment within which the claimant would have to work and within which Professor Kumar had herself worked, including at Newcastle.

51. The Tribunal also brings into account Professor Kumar's evidence in relation to the SLA that the second respondent only facilitates continuity of employment and the provision of trainees to a Host Trust; that it cannot alter course content, cannot determine which Host Trusts are suitable placements and has no jurisdiction over the ARCP outcome. Similarly, there is nothing in that agreement that allows the Host Trust to be dictated to about how to determine issues of clinical governance. Finally, as between the two respondents who are party to the SLA there is a clarity of understanding of the limited role of the second respondent and the primary responsibility of the Host Trust.

52. The Tribunal further accepts Professor Kumar's evidence that it was both the training environment and the need for the claimant to sit the exam that were blocks upon her completing her training (994 and 995); hence her decision to write to the claimant regarding the Outcome 4.

53. The submissions on behalf of the claimant in respect of the competence of the two respondents are summarised above. In particular, the summary of the features of the LDA at paragraph 42 of the written submissions is accepted by the Tribunal as a reasonable interpretation of the document as a contract. For the most part, the Tribunal also accepts the summary of the key provisions of the SLA (at paragraph 50 of the written submissions) with two exceptions. The first exception is that it is submitted that clause 27 creates a right on the part of the second respondent to require a Host Trust to accept a trainee directed to it by the second respondent. The Tribunal does not accept that submission. Clause 27 provides, "The Training Trust would not normally refuse to accept any trainee directed to them by the Lead Employer Trust" (2729). Clearly, a provision that a party will not "normally" refuse permits of an interpretation that a party may refuse to accept a trainee and in that regard the Tribunal accepts the submissions on behalf of the respondents that a Host Trust cannot be forced to accept a trainee. The second point is that the claimant's representatives submitted that clause 29 requires a Host Trust to use its best endeavours to comply with employment law and that is wide enough to incorporate a duty to adjust the training environment for a disabled trainee. Broadly speaking, the Tribunal accepts that submission but it is of course limited to an extent by the fact that Section 20 of the 2010 Act imposes not an absolute duty but one to make "reasonable" adjustments.

54. The LDA provides at clause 4 that the parties agree to "co-operate in good faith with regard to their respective obligations etc" but that is not directed at securing a particular outcome and does not suggest any enforceable power on behalf of the first respondent; indeed the contrary. Clause 5.3 (building to an extent on clause 5.1.4) provides the means by which the Host Trust can avoid complying with any instructions from the first respondent (2309). Responsibility for premises, facilities and environmental factors are placed on the Host Trust by clause 10 (2315) especially at 10.9 (2316) where the Host Trust shall ensure compliance with, for

example, legal requirements; with health and safety issues being reinforced at appendix 1 paragraph 8 (2358), which apportions responsibility recognising the discrete bodies with specific competencies. As above, the Tribunal accepts that a Host Trust cannot be compelled to take a trainee, of the reasons for that being that this agreement provides for an indemnity and it would therefore be contrary to the interests of the Host Trust to do so – clause 15.9 (2321).

55. The Service Contract (2726) provides at clause 3 for the aim and at clause 4 for the scope, and at clause 10 that the second respondent will use its best endeavours. As submitted on its behalf, that does not mean the second respondent concedes an ability to control third parties; Phillips v Enron.

56. Notwithstanding the amount of time spent throughout this hearing referring to the various agreements that were before the Tribunal the claimant has failed to satisfy us that there is a legal mechanism by which either the first respondent or the second respondent respectively could compel another body, particularly a Host Trust, to act in any particular way. Provisions to the effect that there was a general acceptance of co-operation are not enough; neither does the Tribunal accept the submission made on behalf of the claimant that compliance with the respondents' equality duties requires them to secure the co-operation of Host Trusts through the contractual arrangements between each of them and the Host Trust.

57. It was submitted on behalf of the claimant that in respect of these matters the stage was never reached where coercion was called for because the respondents did not carry through the stated plan. The Tribunal accepts that, strictly, that is correct in that the intentions of the respondents to follow the advice of Mrs Fudge in respect of undertaking a risk assessment, which would then be reviewed by occupational health, were not carried through to the full extent that might have been envisaged at the outset. The Tribunal is satisfied, however, that the information provided by Dr Hanley at the Newcastle Trust (534 and 535was sufficient to enable the first respondent to decide that no purpose would be served by concluding the intended plan. The Tribunal notes that this advice was later confirmed on 23 December 2014 as part of the grievance process (857). The Tribunal accepts that nothing would be served by requiring a formalised risk assessment to be undertaken followed by a review by occupational health (as had been envisaged by Mrs Fudge and the respondents initially) the outcome of which would have been inevitable. The Tribunal has already dealt with the practical inability of the first respondent to enforce or compel a Host Trust given the import of clause 5.3 of the LDA (2309); and, had it been necessary to address the point the statutory 'exemption' contained in Schedule 8 to the Equality Act as discussed above. The Tribunal returns below to the matter of the risk assessment undertaken by the Newcastle Trust.

58. The Tribunal accepts it as plainly right that both the LDA and the SLA are contracts and therefore contain enforceable provisions. Proceeding on the basis of that generality, however, has the risk of concealing the issues before this Tribunal namely, "Ought either of the Respondents reasonably have taken steps to avoid the disadvantage to the Claimant identified at 6.17 of the written reasons" [*6.17 should read 6.18]*. Thus the focus for this Tribunal is on whether the first respondent or the second respondent had the ability to deliver the reasonable adjustments contended for by the claimant and if they could not deliver those adjustments themselves, whether they had the power to compel any of the Hosts Trusts to make those

adjustments. That is the context and the Tribunal repeats that, contrary to the submission made on behalf of the claimant, it is satisfied that neither respondent had the ability to require a Host Trust to take the claimant as a trainee. Indeed, as submitted by Mr Gilroy, a Host Trust would be entitled to reject a trainee pursuant to clause 5.3 of the LDA on the basis that any purported instruction of the first respondent that it should accept a trainee did not comply with the law (that is to say in respect of health and safety, especially regarding the safety of patients being treated) or that accepting such a trainee would or would be likely to require a Host Trust to incur additional costs. In this regard also the Tribunal accepts the submissions made by Dr Morgan on behalf of the second respondent that the issue of costs is a relevant factor in any consideration of a contractual requirement to use “best endeavours”.

59. Specifically with regard to the adjustments listed at paragraph 6.18 of the Reasons of the First Tribunal there is nothing there about compelling or requiring others to take action or about insisting or enforcing obligations on third parties. Further, the Tribunal is satisfied as indicated that if either of the respondents had sought to enforce provisions of the agreements that appear, at first sight, to assist the claimant, the Host Trust would have relied upon the “compliance with the law” provision on the basis that it did not wish to have a health and safety situation within its Trust. There is also the costs question that was addressed in Professor Kumar’s account of the evidence of Dr G Lear, Head of School of Anaesthetics, and in that regard we accept the evidence of each of the three witnesses before us that it would be impossible to achieve a latex-free environment. The Tribunal returns below to the matter of costs.

60. In conclusion of our consideration of the three agreements that were before the Tribunal, although the claimant’s representatives spent much time on their provisions, that was done in a way that highlighted the various provisions without clarifying what either of the respondents ought to have done or indeed had the competence to do to force any of the Hosts Trusts to make the changes to the environment, premises and equipment contended for by the claimant against the framework of their respective obligations under the respective agreements. Put another way how each respondent was specifically expected to address the disadvantage of the claimant and by what means that action was to be taken. Whether by reference to the claimant’s claim form, the Judgement and Reasons of the First Tribunal or the witness evidence, the claimant has not addressed what should have been done and how the adjustments that she contended for should have been achieved. We are satisfied that it was partly as a result of not addressing, specifically, that issue that led the First Tribunal into making its essential error. The duty under Section 20 is not an abstract duty but is to achieve a particular outcome.

Reasonable Adjustments

61. Clearly, the question of whether the adjustments contended for were adjustments that it was reasonable for one or the other of the respondents (as the case may be) to make in the context of Section 20 of the Equality Act is a central, if not the principal, feature of this case. Those adjustments are conveniently set out at paragraph 6.18 of the Reasons of the First Tribunal and the PCP is set out at paragraph 2.2.6 of those Reasons: “The provision or criterion requiring the claimant

to work and/or undergo her training within the facilities of City Hospitals Sunderland NHS Foundation Trust".

62. The Tribunal accepts and seeks to apply the propositions in relation to a claim of breach of duty to make reasonable adjustments as set out in paragraph 25 of the EAT judgement in this case. It also accepts the statement of the law relating to reasonable adjustments contained in the written closing submissions of the claimant's representatives including as follows:

> 62.1 the test of reasonableness is an objective one;
>
> 62.2 making a reasonable adjustment may necessarily involve treating a disabled employee more favourably than the employers non-disabled workforce;
>
> 62.3 a step encompasses any modification of or qualification to the PCP in question which would or might remove the substantial disadvantage caused by the PCP;
>
> 62.4 it can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant substantial disadvantage without there needing to be a good or real prospect, and it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety.

63. The authorities for the above propositions are set out in the written submissions made on behalf of the claimant and, being a matter of record, do not need to be repeated here. Suffice it to say that the Tribunal adopts paragraph 17 of the judgement of the EAT in South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15, which is as follows:

> "Thus the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act."

64. The Tribunal also accepts that paragraph 5 of Schedule 8 to the Equality Act provides that "If two or more persons are subject to a duty to make reasonable adjustments in relation to the same interested disabled person, each of them must comply with the duties so far as it reasonable for each of them to do so".

65. The Tribunal first makes some preliminary observations in this connection. First, it accepts the submission made on behalf of the claimant that the first stage of the burden of proof has already been discharged by the claimant before the First

Tribunal and therefore it is for the respective respondents to satisfy this Tribunal, on balance of probabilities, that it would not have been reasonable in the circumstances for it to have had to take the particular step. This will provide the answer to the first question in the issues remitted by the EAT of whether either of the respondents ought reasonably to have taken steps to avoid the disadvantage to the claimant identified at paragraph 6.18 of the Reasons of the First Tribunal. The Tribunal also accepts (as did the respondents) that each of them, generally, owed the claimant the duty to make adjustments.

66. Secondly, the parties were agreed that the undertaking of a risk assessment or any other assessment of what might be required by a disabled person does not, of itself, constitute a reasonable adjustment: Tarbuck v Sainsbury's Supermarkets [2006] IRLR 664 but that the failure to make proper enquiries might have relevance in relation to a respondent seeking to discharge the burden of proof on it at the second stage that an adjustment has no chance of being effective or there were no adjustments that it should reasonably have made.

67. In this connection the focus has come to be upon whether a risk assessment was undertaken by the Newcastle Trust prior to the decision by Dr Hanley that it could not provide a suitable training environment for the claimant. The Tribunal accepts that there was no formal risk assessment and neither of the respondents seeks to contend otherwise. The Tribunal notes that the Newcastle Trust was not at the time the Host Trust to which the claimant was assigned; that was Sunderland Trust. Newcastle Trust was, however, the only Trust that was initially willing to seek to co-operate in providing a placement for the claimant.

68. The e-mail from Dr Hanley of 23 December 2014 (857), which was written for the purposes of the grievance process, supports the earlier findings that he had reported to the first respondent (535 and 534) and are set out in the letter from Professor Kumar to the claimant of 17 October 2014 (542). In that later e-mail of 23 December 2014, Dr Hanley states that he does not think that a formal risk assessment pro-forma was used to demonstrate that Newcastle Trust would be unable to offer the type of training environment the claimant required but reflects the supportive attitude of Newcastle Trust as being, "I was anxious to make sure that if it was possible to provide a safe training environment, we should try to do it. The process involved input from HR, Occupational Health, Latex specialists, the Clinical view from the Immunologists and the Department view from the Anaesthetists. The final view was that it was not going to be possible to provide a safe training environment in the Trust. We came to that conclusion very reluctantly as there was an appreciation of the implications of that for the trainee". Even accepting that a pro-forma document was not used by the Newcastle Trust, the Tribunal finds there was a multi-disciplinary consideration. Further, even if the Tribunal were to have come to a different conclusion in that regard, the lack of a sufficient investigation by the Newcastle Trust was not a matter for either of the respondents. Dr Hanley's e-mails addressed the paramount issue of safety regardless of whether the focus was on latex-safe or latex-light. The Newcastle Trust made an evaluation of the level of risk it was prepared to accept, which it was entitled to do. There is nothing in the various agreements to which we have been referred to change the character and responsibility of that decision by Newcastle Trust to be one for which either of the respondents should be held accountable.

69. Any risk assessment must be suitable and sufficient for the purpose of identifying and assessing the risks to the individual who would undertake the role in question. In that context, although the Newcastle Trust did not undertake a comprehensive formal risk assessment the enquiries that were made produced a very clear result and the Tribunal is satisfied that it was sufficient to meet these purposes and, specifically, the requirements of regulation 3(1) of the Management of Health and Safety at Work Regulations 1999.

70. The third general point is that there was considerable argument between the representatives, both during the hearing and in their respective closing submissions, as to whether this Tribunal was limited to considering only the eight adjustments contended for by the claimant as set out in the Scott Schedule that she produced (P124) and are summarised at paragraph 6.18 of the Reasons of the First Tribunal.

71. On behalf of the claimant it was submitted, relying upon paragraph 6.24 of the Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of Practice"), that the claimant's proposals do not act as a straight-jacket to the Tribunal's analysis of the claim and that it was perfectly proper for the Tribunal to find a relevant failure in relation to an adjustment not falling within the strict confines of the claimant's proposed adjustments provided that the adjustment in question has been explored within the evidence. That proposition was rejected by the respondents' representatives who submitted that although the nature of the adjustment need not itself come from the claimant, there must be before the Tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made. Without this a respondent would be placed in the "impossible position" of having to prove a negative proposition that there was no reasonable adjustment that could have been made. In this regard, all of the representatives relied upon the decision in Project Management Institute v Latif [2007] IRLR 579 with Mr Gilroy also referring us to Newcastle City Council v Spires UK EAT/0034/10 and General Dynamics Information Technology Limited v Carranza [2015] IRLR 43.

72. While this issue might be relevant to the First Tribunal's consideration of these matters, it is not relevant to the consideration of the remitted matters by this Tribunal given that the first of those remitted issues is, "ought either of the Respondents reasonably have taken steps to avoid the disadvantage to the Claimant identified at 6.17 of the written reasons…..". As already indicated, the reference to "6.17" should read 6.18 but the fundamental point is that the remitted issue is limited to the steps "identified" at that paragraph and, therefore, whatever the approach that could have been adopted by the First Tribunal in light of the above submissions made by the representatives, this Tribunal is limited to the remitted issues and, therefore, to the eight identified steps.

73. Before addressing those steps, however, it is appropriate to set out the facts relevant to the remitted issues in the context of the parameters for this Hearing set out above (to an extent highlighting the findings of the First Tribunal) relating to the claimant's impairment and, therefore, the disadvantage that any adjustments or steps were intended to avoid.

74. The context includes that after the incident on 30 October 2013 when the claimant suffered an anaphylactic reaction, the first occupational health report of 12

December 2013 confirmed that she should not have any contact with latex or latex related products and that her working environment should be fully latex free (239). Approximately one month later, on 9 January 2014, the claimant informed Ms Modral (HR Officer of the second respondent) that she could not “work in clinical areas unless they are completely latex free” (254). Shortly thereafter, on 21 January 2014 (2244) the claimant wrote to Mrs Fudge acknowledging that even if she were to be provided with a single latex safe theatre, because of “training requirements I would constantly be required to move hospitals and theatres within a hospital”. In that e-mail the claimant also recorded reactions she had suffered while in the community without even having direct contact with latex: for example, “whilst waiting in a car garage, proximity to balloons in a restaurant and sitting in a common room with bikes stored.” Following a referral to Dr J Pranesh, Consultant Occupational Physician, he advised that risk assessments should be undertaken to ensure that the claimant’s work environment was “fully latex-free” (287). The claimant then attended a meeting with representatives of both respondents on 25 February 2014 at which she advised that her specialist immunologist, Dr G Spickett (who worked at Newcastle Trust), had said that her environment should be “latex-free” to the best of their ability albeit understanding that there would be instances where the claimant would come into contact with products having latex in them.

75. An outcome of the meeting on 24 February was that Ms Clennett (Acting Head of Human Resources at the second respondent) wrote to all Host Trusts in the region “to explore the feasibility of what measures can be taken to accommodate” the need for the claimant to work in relevant wards and departments that are latex-free. Dr Spickett responded (331) advising that he was aware of at least one consultant anaesthetist within the Newcastle Trust and a consultant surgeon working elsewhere in the Region both of whom had Type 1 hyposensitivity to latex and were managing to work satisfactorily, albeit with modifications to their working environment. He commented further that there would need to be motivation by key managers to ensure that the environment was latex-free and that the claimant could only work in hospitals that could give a positive affirmation that they could manage her latex allergy.

76. In parallel, Ms Melbourne, Specialty Training Supervisor at the Royal College of Anaesthetists made enquiries of contacts in each Region in the UK as to whether a latex-free environment could be provided for a trainee but the overall consensus had been that there was not such an environment available (335).

77. In April 2014 (358) the claimant wrote by e-mail to Ms Clennett and Ms Modral of the second respondent. Amongst other things she noted that having spoken to other people with the same allergy the point had been raised that despite best efforts to ensure a latex-free environment, ongoing exposure was inevitable. She therefore proposed General Practice as another possible adjustment (359). On 8 May 2014 the claimant’s BMA representative wrote in similar terms to Dr G Rutt, Director of Postgraduate School of Primary Care (360).

78. It was in this context that a meeting took place on 13 June 2014 (411) at which, amongst other things, the claimant reported that while helping with teaching she had had problems with the mannequins and she was concerned about the risk of exposure that could cause chronic conditions, which was why she was considering GP training. After further discussion of that and other matters the claimant stated

that she would get back to Ms Clennett with her thoughts on returning into training with anaesthetics or pursing GP training.

79. In the above context the Tribunal moves on to consider each of the eight adjustments contended for the claimant.

(i) *The provision of training and work in a latex free or latex light controlled environment such as exists in North Tyneside and other Trusts around the UK*

80. Three preliminary points are made with regard to this adjustment. First, it refers to "training and work" whereas there is no dispute between the parties that at the relevant time the claimant was employed for the purposes of training and, therefore, any reference in this adjustment to "work" must be considered in that context: ie. work for the purposes of training as opposed to any comparison with work that might be undertaken by a doctor who has completed his or her training.

81. Secondly, there is the reference to a "latex light" controlled environment. In this regard, however, as is clear from the above factual analysis in this regard, the emphasis at the earlier stages of these matters was on the former: ie. latex-free. The first occupational health report of 12 December 2013 recommended that the claimant's working environment should be fully latex-free. Understandably this was accepted by the claimant who advised Ms Modral that she had been told by occupational health that she could not work in clinical areas unless they are completely latex-free (254); she similarly wrote to a number of consultants in her Host Trust, Sunderland Trust, stating that "immunology have advised avoidance as the only management" (272). On 25 February 2014 Dr J Pranesh Consultant Occupational Physician wrote to the Educational Supervisor at the claimant's Host Trust to advise that risk assessments be made to ensure that the area in which the claimant works "is fully latex-free" (287). This requirement for a latex-free environment was carried forward into the meeting held on 25 February 2014 (299), and was the evidence that the claimant gave to the First Tribunal, and the meeting on 20 May 2014 (411) by which time Ms Clennett had written to the eight Host Trusts in the Region to explore the feasibility of taking measures to ensure that relevant wards and departments are latex-free (308) and had written to Dr Spickett seeking advice as to how latex-free the workplace would have to be to accommodate the claimant's level of sensitivity and Ms Melbourne, Specialty Training Supervisor at the Royal College had written to all Regional Advisers at the instigation of Dr Lear enquiring about the availability of a latex-free environment, the response to which had been that there was not such an environment available (335). The need for a latex-free environment was also recognised by the claimant in writing to Ms Clennett and Ms Modral in April 2014 (367) and her BMA representative, Mr Kennedy, had written on 8 May 2014 (369) recording his understanding that the claimant felt that the risks to her health would be too great if she remained within specialty training as a trainee anaesthetist. In short, the focus throughout this time was on the provision of a latex-free environment and that was the context within which the respondents were considering the possibility of making adjustments to ameliorate the disadvantage to the claimant.

82. Thirdly, the Tribunal brings into account the severity of the claimant's condition as she initially explained it (including that it was "life threatening") and as she expanded upon that in, first, the impact statement produced for the purposes of

these proceedings (P71) an extract from which is set out at paragraph 3.14 of the Reasons of the First Tribunal and, secondly, her Particulars of Claim in her civil proceedings against Sunderland Trust (1784) especially the Particulars of Injury (1790). In those Particulars, which are dated 7 September 2017, it is stated as follows:

> "The Claimant suffered symptoms of urticaria and dermatitis, shortness of breath, wheezing, rhinitis and irritation of her eyes. The Claimant will suffer further symptoms when exposed to latex in the future. The Claimant is at risk of anaphylactic shock and death. The Claimant has been removed from her work by reason of her allergy. The Claimant's social and domestic life has been significantly affected. The Claimant has developed secondary psychiatric injury. The Claimant requires daily antihistamines and steroid inhalers and carries a self-injectable adrenaline pen."

83. The medical report of Dr D Lilic, served with those Particulars, (2423) dated 6 September 2017 and, therefore, almost four years after the first reaction suffered by the claimant is informative. Notwithstanding the initial diagnosis of moderate/severe Type 1 allergy to latex it is recorded that the claimant takes daily antihistamines and steroid inhalers, carries standby steroid tablets and additional antihistamines to take immediately if a reaction is triggered and two adrenalin self-injector pens to use immediately if a more serious, potentially life-threatening reaction (anaphylaxis) begins to emerge (2431). It is also recorded that the claimant continues to have frequent episodes of allergy symptoms from mild to severe "whenever exposed to latex which is contained in numerous everyday products". The report includes the following in its summary:

- "Since the initial episode, she has had and continues to have frequent episodes of allergy symptoms from mild (itchiness, rash, mall swelling, I and nose watering, shortness of breath and wheezing ("latex-induced asthma") to severe (malaise, flushing, feeling faint and unwell, severe difficulty breathing) whenever exposed to latex which is contained in numerous everyday products.

- Her condition is most likely permanent (life-long), debilitating and can be life-threatening.

- She is on daily symptomatic treatment which at best partially alleviates symptoms. She is obliged at all times to carry standby steroid tablets and self-injector adrenaline pens in case a severe reaction should occur. There is no effective curative treatment available to date."

84. Moving on from the above three preliminary points, the Tribunal accepts the evidence of all the witnesses that latex exists in many objects commonly found in all areas of hospitals and items belonging to patients and visitors. It accepts Mrs Fudge's evidence that to provide a latex-free environment would be impossible. It also accepts Professor Kumar's evidence that Dr Lear had reported to her that the ITU manager at Sunderland had estimated costs of £100,000 to eliminate latex products from the ITU alone (although the Tribunal is not sure that that would have been a recurring cost) and that to remove latex products from an average-sized hospital would cost over £500,000.

85. In connection with the question of cost generally, the Tribunal had regard to the EHRC Code of Practice (for example, at paragraphs 6.25 and 6.28) and, in this regard it accepted the submission made on behalf of the claimant that the corresponding cost of training the claimant thus far after ten years is a matter to be brought into account. While that cost of training would clearly be significant it has not been quantified and, in the absence of such quantification the Tribunal considers it reasonable to take the view that that cost would be small in comparison with the estimated cost of removing latex products entirely from an average sized hospital.

86. In this regard the claimant's representative also submitted that Professor Kumar's evidence relying upon the costs of making adjustments should be disregarded as it amounted to an ex post facto rationalisation. The Tribunal accepts Mr Gilroy's submission, however, that that evidence can be brought into account given the decision in Seldon v Clarkson Wright and Jakes [2012] UKSC16 to the effect that ex post facto justification is permissible.

87. Even if, despite the costs, latex were to be entirely removed from a hospital, it would be difficult if not impossible to ensure that patients and/or their visitors did not bring products containing latex into a hospital; particularly in circumstances of an emergency admission. Furthermore, even with all reasonable precautions in place it would be quite possible for mistakes to be made and, therefore, impossible to guarantee a latex-free environment.

88. In response to the request Ms Clennett made of Host Trusts as to whether a latex-free environment could be provided to assist the claimant, Northumbria Hospital Trust replied that it had two sites with latex-free areas, one at Wansbeck Hospital primarily in the area of Obstetrics and Gynaecology; the other at North Tyneside Hospital, which had an antenatal clinic and a midwifery-led care unit which was latex-free (326). Those limited facilities would not, however, be enough to accommodate the claimant's training so as to meet the curriculum requirements. As can be seen from the spreadsheet at pages 2528 to 2534, the majority of curricular requirement could not be undertaken within the limited areas identified by Northumbria and even then the risk of inadvertent latex exposure referred to above (ie. from patients, visitors and mistakes) would continue to apply.

89. It did, however, appear to be conceivably possible for the claimant to continue with her training by moving from Sunderland Trust to Newcastle Trust. That had been the indication provided by Dr Spickett and the first respondent continued to liaise with Newcastle Trust to that end. Ultimately, however, Dr Hanley wrote to Ms Richards of the first respondent on 30 September 2014 (535), having seen the feedback from the anaesthetists at Newcastle Trust, to advise that the previous view of Dr Spickett that a latex-free environment could be achieved had "completely underestimated the practical logistics of implementation in all the areas the trainee would need to work in the course of training. The Anaesthetic Department information has highlighted this in detail and the conclusion is that it is not possible to provide a latex-free training environment at NUTH". In coming to this conclusion Dr Hanley had consulted with consultants within the Newcastle Trust two of whom were consultant anaesthetists who had identified, for example, "attendance at A+E is a regular event when on call, which also has a high potential for latex exposure" and "lots of ancillary equipment such as chairs etc. have latex and many patient notes are bound together by latex bands".

90. In this respect, it was submitted on behalf of the claimant that if the risk assessments and a review by occupational health had been undertaken and all eight Host Trusts had said that they could do nothing to assist the claimant, the burden upon the respondents might have been met. The Tribunal accepts that all of the Host Trusts did not say they could do nothing. The Tribunal is satisfied, however, that the position had been arrived at where even though all of the Host Trusts had not said that they could do nothing, the most likely Host Trust, the Newcastle Trust, which had a strong commitment to providing a low latex environment and well developed policies to that effect (153) and which had expressed a willingness to assist the claimant, had ultimately reported to the first respondent that it could not provide the environment required by the claimant. The only other possibility was Northumbria that had indicated that two of its sites had latex free areas: Wansbeck Hospital and North Tyneside Hospital, which possibilities Professor Kumar had pursued with Dr Lear but his advice had been that the limited facilities at these two hospitals would not be sufficient to meet the curricular requirements for her training (541). That apart, none of the other Host Trusts had responded to the question of the feasibility of providing the training, including the facilities and equipment, required by the claimant.

91. Similarly, as indicated above, the Tribunal accepts the submission that the occupational health advice envisaged by Mrs Fudge at the outset never materialised but, once more, it is satisfied that there would be no point in seeking the occupational health review, not because there would not have been a chance of the adjustments producing the desired result but because they either could not be made at all or could not be reasonably made or procured by the relevant respondent.

92. As to the provision of a latex-light controlled environment, the Tribunal considers that that is an imprecise term and prefers the description applied by Mrs Fudge of latex-safe. The Tribunal accepts the evidence that it might be possible to provide a consultant, having completed training, with accommodation such as a surgical theatre, out-patient room, or even a ward dedicated as latex-light but issues with patients and visitors and mistakes being made would continue to apply. The principal concern, however, is that such provision that could possibly be made for someone who had completed his or her training would not apply in respect of a trainee, especially an anaesthetics trainee such as the claimant who is required to attend all areas of a hospital. As the claimant stated herself at the time in her letter to Mrs Fudge of 21 January 2014 (2244), even if she were to be provided with a single latex safe theatre, because of "training requirements I would constantly be required to move hospitals and theatres within a hospital". As such, had the claimant been permitted to continue with her training, significant risks would have arisen for her health. There would also be significant risk to the health and safety of patients (which all parties agreed was a paramount consideration) if the claimant were to suffer an adverse reaction while in the course of treating a patient especially in an emergency situation and/or 'on call' out of hours.

93. With regard to that latter point, the evidence on behalf of the respondents was that it was a requirement of the curriculum for trainees to work out of hours on call. It was submitted on behalf of the claimant, however, that, "whilst the curriculum requires a specialty trainee to participate in the on-call rota, it does not require such participation to be out of hours". The Tribunal asked to be pointed towards evidence to this effect and Mr Sutton responded that there was no hard and fast requirement

in respect of training but he relied upon the fact that there could have been an alteration in working hours in accordance with the second respondent's Disability Policy (116).

94. The Tribunal rejects that submission and accepts that the curriculum does contain a requirement for trainees to work out of hours on call. This is apparent from the email exchange between Ms Modral and Dr Lear (538) and the claimant's job description (164) in which it is stated "This will include out of hours working"; albeit that the Acute Care Common Stem Core Training Programme, which sets out the Common Competences, is silent about any out of hours requirement.

95. In summary of this aspect, for the above reasons, such a latex-safe environment could possibly be provided as a general principle but the Tribunal is not satisfied that such an environment could be provided in respect of the claimant given, first, her status as a trainee in which she had to meet many competencies (2528) involving being required to work throughout the hospital rather than in a defined room or operating theatre, secondly, her choice of specialty in anaesthetics, thirdly, the requirement to work on call including out of hours and, finally, the more general considerations of contact with patients and other members of the public and the fact that whatever precautions might be taken accidents can happen.

96. In conclusion with regard to this adjustment, the Tribunal is satisfied on the evidence before it that it was impossible to provide a latex-free environment or, indeed, a latex-light controlled environment within which the claimant could have continued her training given the detailed aspects of the curriculum that she would have to address and the areas of a hospital within which she would have been required to undertake her training.

97. Fundamentally as to the first adjustment, the Tribunal accepts that neither respondent was in a position to make adjustments itself to the training and work provided to the claimant, neither did either of them have any control over or power to determine the training or work required of the claimant by a Host Trust or to compel any Host Trust to receive the claimant as a core specialty trainee.

(ii) *To reduce exposure and sensitisation to the claimant through the use of latex-free equipment*

98. This suggested adjustment is to be considered in the context of the historical narrative as set out above, the focus of which was upon the avoidance of any latex in the working environment of the claimant. It is indeed to be seen from the claimant's impact statement (P71) that her condition deteriorated even after her withdrawal from clinical training activity for over eight months.

99. Although the focus of this adjustment is upon latex-free equipment as opposed to a working environment, considerations similar to those set out in respect of the first adjustment above apply equally including the need for the claimant to satisfy all the competencies required for her training, to work throughout a hospital and the costs involved in replacing equipment.

100. The fundamental point is again that the determination of equipment and facilities was not a matter over which either the first or second respondent had any

control but remained matters for the judgment and determination of the relevant Host Trust, and neither respondent had the power or ability to demand that a Host Trust should provide a training placement within a latex-free or latex-light environment including as to the use of latex-free equipment.

(iii) *Removal of the claimant from certain duties which may increase her risk of exposure to latex*

101. The Tribunal accepts Professor's Kumar's approach to this issue to the effect that adjustments to the claimant's duties could have been considered but it was first necessary to identify an appropriate training environment for her which, as indicated, above, the Tribunal is satisfied would not have been possible.

102. Furthermore, duties could not have been removed that formed an essential part of the ACCS curriculum in respect of which the GMC's position was that having a disability did not mean that a person could be exempted from parts of the curriculum, rather there must be reasonable adjustments to enable him or her to achieve the curriculum (532). It was not, however, the claimant's performance of duties themselves which exposed her to risk of adverse reaction but the contact she might have with latex, whether direct or indirect.

103. On a point of detail in this regard the Tribunal notes that the claimant was removed from the majority of her duties for some ten months prior to her resignation in which time she first undertook some lecturing but suffered an adverse reaction to a mannequin after which she worked from home. That, of course, would not meet the curriculum and would deprive the claimant of establishing the required competencies especially in respect of autonomous practice.

104. In that regard, the fundamental point in respect of this adjustment is that the duties of the claimant as a trainee undertaking work required to obtain her qualification were not determined by either of the respondents but by the national curriculum approved by the GMC following its development by the Royal College.

(iv) *Changes to premises and working environment generally*

105. The claimant has not identified the premises or environments that she has in mind or the changes that could have been made. The reality, however, was that although there were limited latex-free environments within the Region they were not sufficient to facilitate the completion of the training the claimant required. By way of example it is repeated that only the Newcastle Trust was prepared to explore with some commitment the opportunities available to accommodate the claimant but that proved to be in vain.

106. Once more similar considerations apply as set out above. Latex is found throughout the working environment of a hospital both in medical and non-medical equipment and the costs of providing latex-free equipment would be significant; further, that even if such changes were made, the risks from patients and visitors, and the possibility of errors would continue. Also, in addition to the risks to the claimant referred to above there would remain the risks to patients as also set out above if she suffered an adverse reaction while in the course of treating a patient, especially in an emergency situation and/or 'on call' out of hours.

107. In this regard also, it is important again to recall that the claimant's position during her employment was that she required a latex-free environment and was not prepared to risk exposure to latex (see above).

(v) *Changes to working practices such as the use of latex bands on files containing medical records*

108. Again, neither the changes nor the working practices been identified by the claimant. Once more, however, similar considerations to those set out above apply and the Tribunal is not satisfied that changes to working practices, specifically the mere removal of rubber bands from around medical records, would have been sufficient to address the wide range of risks and concerns in respect of the claimant and/or the patients that she might be treating as described above.

109. Furthermore, working practices alone would not have been sufficient given the risks identified above that would be presented by other persons entering the claimant's training environment such as colleagues, patients or visitors.

110. More importantly given the remitted issues, the Tribunal accepts that neither of the respondents had the capacity, competence or entitlement to require or force a Host Trust to make changes to its working practices to reduce the possibility of exposure to latex. That was a decision for the Host Trust to make bringing into account all relevant factors such as cost, risks to patient safety, risks to the claimant and its ability to deliver an appropriate training environment for her.

111. More generally as to the above five adjustments contended for, each of them relates to aspects of the claimant's work as a trainee focussing on the environment, equipment, duties, premises and practices. The Tribunal accepts the evidence of Professor Kumar that even if steps could have been taken (which it is not satisfied they could) and the claimant could therefore have completed her ACCS training scheme with a Host Trust, that would not have overcome aspects over which neither of the respondents had any control such as that the Royal College could not provide an appropriate environment for the claimant to undertake her professional examination, which was a requirement of completing her training. In this respect, Dr Lear had agreed to investigate whether the Irish examination involved the use of a mannequin. At a meeting on 19 August 2014 attended by Professor Kumar, the claimant (who was accompanied by her BMA representative), Dr Lear and HR officers (505), Dr Lear informed the claimant that he was waiting to hear back from the Irish College about their exam and he understood that it did not use a mannequin but they needed to check that the exam situation was safe for the claimant to be in. Despite chasing this up several times, he never received a response from the Irish College.

(vi) *Transfer to alternative vacancies, including NHS non clinical and management roles with or without retraining*
[Note: this adjustment is contended for only against the second respondent.]

112. Although this adjustment is raised in these proceedings, the Tribunal accepts that Professor Kumar did discuss available options with the claimant such as GP training or a transfer to alternative Region, Nottingham (where it seems possible that

the claimant could have completed her training) but none were eventually pursued by the claimant. As Professor Kumar put it, "I did ask if there were other options".

113. Further, on the basis of the evidence before it the Tribunal is satisfied that the claimant did not mention the possibility of a non-clinical career within the wider NHS. In this respect, following their meeting on 19 August 2014, Professor Kumar arranged for the claimant to obtain careers advice (2413) but again her focus appears to have been "to concentrate on the GP opportunity initially" (2443) but she did not do so. The Tribunal further accepts that had the claimant been interested in any other training programmes she could have pursued these but, again, she does not seem to have done so.

114. That said, in any clinical role, as a trainee, the claimant would have faced many of the same issues as she faced as a trainee in anaesthetics. The claimant made this point herself when she informed Professor Kumar at their meeting on 19 August 2014 (where other possible career options such as public health were discussed) that she had considered other careers but those that interested her posed a similar risk of latex exposure except for general practice. Professor Kumar explained this to the claimant in her letter of 29 August 2014 (510).

115. The Tribunal is satisfied in any event that the second respondent did not have the legal competence to compel a Host Trust or other relevant autonomous body to accept the claimant into alternative employment; neither of the respondents did.

(vii) *Allowing supernumerary work, or work shadowing a Consultant*

116. The Tribunal is satisfied that neither of these alternatives would have overcome the risks identified by the claimant herself and of which she was advised relating to her exposure to latex. Whether working on a supernumerary basis or shadowing a consultant the claimant would still have been in the same clinical environment and, therefore, exposed to the same risks from exposure to latex.

117. Even had that not been the case such working arrangements would not have facilitated adequate training of the claimant within the ACCS programme. Additionally, if the claimant had worked on a supernumerary basis she would not have had primary responsibility for a patient and, therefore, such an arrangement would not have given her the exposure to the required competencies and would have deprived her of the opportunity to demonstrate autonomous practice. Eventually, the claimant would have been required to carry out the relevant tasks.

118. In any event, such working arrangements would have amounted to an adjustment to the curriculum and, therefore, would have been a matter for the Host Trust (perhaps in consultation with the GMC) rather than for either of the respondents.

119. A related point is that Professor Kumar did to an extent confirm that the claimant would have been accommodated on a supernumerary basis if she had shown at interview that she was suitable to become a GP as she would have been provided with a job even if below the "cut off point". This point is returned to below.

(viii) *Transferring to alternative specialty training without requiring a competitive application process or the compliance with existing application timetables, including but not limited to obstetrics and gynaecology, occupational health, public health, radiology, pathology and general practice.*
[Note this adjustment is contended for only against the first respondent.]

120. Of these alternatives, only that related to general practice was raised by the claimant as an alternative career (354), which was confirmed by her BMA representative (360). As already recorded above, the claimant had also informed Professor Kumar at a meeting on 19 August 2014 that she had considered other careers but those that interested her posed a similar risk of latex exposure except for general practice.

121. Although general practice seemed to be a possibility, Dr Rutt explained to the claimant that she would have to apply through the recruitment and selection process in order to be accepted onto the GP training programme. He would, however, guarantee that she would be given an interview and, provided she met the basic standards of 'appointability', which was likely, she would have gained a place on the programme irrespective of her ranking against other candidates, which the first respondent would have funded as an additional place if needed. Adjustments would be made to the training programme as necessary and reasonable, the claimant's previous experience could be counted and she could be allocated to posts in GP practices that could provide a latex-free work environment and remain in the same practice for twelve months. The claimant's BMA representative had raised the possibility of her being transferred to GP training outside of the normal recruitment process (449) which Dr Rutt had pursued with the Royal College of GPs and the GMC but they shared his concerns that the basic competencies required for GP training should be demonstrated through a selection process.

122. The above situation notwithstanding Professor Kumar made further enquiries with the GMC but the response continued to be that the claimant needed to be assessed through the normal recruitment and selection process to ensure that she was suitable to undertake training: ie she would need to be deemed appointable (532).

123. At the hearing there was some discussion regarding whether in respect of transferring to GP training the claimant was seeking a transfer without selection at all or without a competitive process. In that respect the Tribunal notes that at the meeting with the claimant on 19 August 2014 it was explained to her that she would have to demonstrate that she was suitable for appointment and that GP recruitment consisted of only a "written assessment of thirty minutes and three 10 minute stations, one of which included interaction with a patient" (506).

124. The Tribunal accepts that the position of the first respondent (that what the Tribunal considers to be a fairly 'light touch' process had to be followed whereby the claimant could demonstrate that she met these basic standards of being suitable for appointment) was not unreasonable given the overarching duty to patients and to the NHS generally to ensure that appropriate individuals were trained for future employment. The Tribunal is satisfied that this could not have been done without the claimant following such a process: to use a phrase used by the representatives before us, the claimant could not have been "parachuted into" the GP training. In any

event, the point is that whatever the process (or even if there were to be no process) any transfer to GP training had to be initiated by an application from the claimant, which she never made, despite encouragement from Professor Kumar.

125. Professor Kumar wrote again to the claimant to this effect on 17 October 2014 (542). She did, however, confirm that the first respondent would make reasonable adjustments to the recruitment process to ensure that the claimant was not disadvantaged by her disability. As previously offered, she would be guaranteed an interview and as long as she was assessed as being suitable for GP training she would be offered a training placement irrespective of whether she was above or below the line of doctors appointed. She advised the claimant that the next recruitment round for GP training commenced in November 2014 and she would strongly advise her to apply (542).

126. As indicated above, following the meeting on 19 August 2014, Professor Kumar had made arrangements for the claimant to meet a careers adviser to discuss future options (2413) and (2443). The Tribunal repeats that it accepts that had the claimant been interested in any other training programmes she could have pursued these but she does not seem to have done so.

127. Fundamentally, the Tribunal is satisfied that it was not within the competence of the first respondent to transfer the claimant to alternative specialty training without requiring a competitive application process. It was not a matter for the discretion of the first respondent to allow candidates to bypass the recruitment process as that was a requirement of the GMC for completion of training. Had the first respondent thought to transfer the claimant without having first been assessed there would, first, have been a potential safety risk and, secondly, her training would not have been approved by the GMC.

Conclusions on reasonable adjustments

128. Generally, in respect of the first seven of the eight adjustments the Tribunal notes and accepts the evidence of Professor Kumar in relation to the position of the second respondent as follows:

(i) The second respondent had no ability to control or direct a latex-free or latex-light environment given that such environment was a matter for the Host Trust.

(ii) The use of latex-free equipment was not under the day-to-day control of the second respondent neither could it direct the Host Trust in this regard.

(iii) The requirements of the curriculum including as to sequence and content are not within the control of the second respondent but are dictated by the regulator.

(iv) Changes to premises and working environment are under the control of the Host Trust.

(v) Changes to working practices are also under the control of the Host Trust.

(vi) The claimant never stated that her situation was such that she had abandoned hope of a medical career. She had said that she wished to pursue anaesthetics or GP training and Professor Kumar had asked if there were any other options.

(vii) Allowing the claimant to undertake supernumerary work or work shadowing a consultant would necessitate a curriculum adjustment and, therefore, was a matter for the Host Trust, and to undertake such work would not have given the claimant the experience required and would have deprived her the opportunity to demonstrate autonomous practice.

129. In these respects the Tribunal considers it notable that the only point in respect of reasonable adjustments upon which Professor Kumar was cross-examined in any detail was that relating to allowing supernumerary work or work shadowing a consultant. It was suggested to her that this could have been facilitated. In response she explained that that had been done to the extent that should the claimant become successful at becoming a GP she had been offered supernumerary appointment should that have been necessary but that shadowing a consultant was not appropriate for a person in training with a disability and, further, that shadowing could only have been provided if a suitable environment could first have been identified within which to perform such shadowing; the requirement for out of hours work some of the time would also have been brought into consideration in determining what was suitable. The Tribunal accepts Professor Kumar's evidence in these respects. The more general point, however, is that, other than this exchange, Professor Kumar's evidence (in which she worked in painstaking detail through each of the eight adjustments contended for by the claimant) went unchallenged.

130. The duty under Section 20 of the Equality Act arises only in respect of those steps that it is "reasonable" to have to take "to avoid the disadvantage" experienced by the disabled person, which has been extended by case law to include reducing or ameliorate the disadvantage. That test of reasonableness is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. An adjustment will not only be reasonable if it is shown that it would be completely effective (Noor v Foreign & Commonwealth Office [2011] EqLR 448); on the contrary, it is sufficient that there would be a prospect of the adjustment removing the disabled person's disadvantage: Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

131. That said, in Romec Ltd v Rudham [2007] UKEAT 0069/07/1307 it was held that the essential question for an employment tribunal is whether the adjustment would have removed the disadvantage experienced by the claimant. In that case, in remitting the issue to the same tribunal, the EAT instructed that if the tribunal concluded that there was no prospect of the suggested adjustment succeeding, it would not be a reasonable adjustment: if, however, the tribunal found a real prospect of the adjustment succeeding it might be reasonable to expect the employer to take that course of action. Thus, that an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take Royal Bank of Scotland v Ashton [2011] ICR 632. Similarly, the EHRC Code of Practice, at paragraph 6.28,

provides that one of the factors that might be taken into account when deciding what is a reasonable step for an employer to take is, "whether taking any particular steps would be effective in preventing the substantial disadvantage".

132. In light of the above, the following is a summary of the matters that the Tribunal has brought into account (based on the evidence before it including the primary facts as found by the First Tribunal) in considering whether the steps contended for by the claimant could be said to be reasonable in the sense that there would be a prospect that they would have removed the disadvantage to which the claimant was subject:

132.1 the rapidity with which the claimant might experience an adverse reaction, the diverse triggers that could generate such an adverse reaction and the serious and unpredictable consequences that might arise;

132.2 the health and safety obligations and other duties owed by both respondents to staff (including the claimant) and patients arising from, for example, the Health and Safety at Work etc Act and related regulations and the Care Act 2014;

132.3 the obligations imposed on both respondents by the regulatory regime of the GMC;

132.4 neither respondent could itself alter premises or working practices of a Host Trust given their separate legal personalities;

132.5 the estimated cost implications of making a hospital latex-free or even latex-safe were significant;

132.6 even if training could be provided for the claimant (which the Tribunal accepts it could not) the Royal College of Anaesthetists was not prepared to alter aspects of the examination process (eg. the use of latex mannequins) or vary the examination regime in such a way as to accommodate the claimant's disability;

132.7 the consequence of the above being that the claimant could not attain the qualification she required for onward progression within her chosen specialty in any event;

132.8 neither respondent could facilitate the claimant pursuing GP training without undergoing what the Tribunal considers to be a fairly 'light touch' competitive application process to demonstrate her suitability to become a GP.

133. The first point of the remittal to this Tribunal by the EAT in this regard is, "ought either of the Respondents reasonably have taken steps to avoid the disadvantage to the Claimant identified at 6.17 of the written reasons ….". The Tribunal has considered that question first with reference to whether either of the respondents ought reasonably have directly taken such steps themselves to avoid that disadvantage. In light of the above summary and other findings in these

Reasons, on the evidence before it, the Tribunal is not satisfied that the adjustments contended for by the claimant can be considered to be reasonable for either of the respondents themselves to have taken as the adjustments contended for relating to environment, equipment, premises and working practices were matters for the Host Trust while those relating to the anaesthetics exam and transfer to GP training were matters for the Royal College and the GMC. They were therefore not matters that either of the respondents could have addressed themselves.

134. The question arises, however, whether as neither of the respondents could make the adjustments themselves, did one or other of them have the ability to compel or direct a Host Trust or other body to make such adjustments. This question reflects one of the elements in the second point of remittal from the EAT that in determining the issue of whether either of the respondents ought reasonably have taken steps to avoid the disadvantage the Tribunal shall "(b) in assessing the reasonableness of any given adjustment, have explicit regard to each Respondent's competence to deliver that adjustment". The submission on behalf of the claimant is the respondents did have such competence.

135. As to the first respondent, it appears from the LDA (2293) that that submission is well made as it provides, for example at clause 10.9, that the Host Trust shall ensure that all premises, facilities and equipment are suitable and comply with any applicable health and safety legislation and any other applicable law etc (2316). At first sight this might suggest that the first respondent can require the Host Trust to make such adjustments but, as discussed above, this is subject to two important considerations in clause 5. The first is that at clause 5.1.4, the Host Trust is required to provide the Services (as defined, the focus being upon the "provision of practice learning experiences") "in compliance with Law" (2309). The Tribunal is satisfied that that simple provision is wide enough to require the Host Trust to ensure that the training it provides to junior doctors is such that the Host Trust discharges its requirements under health and safety legislation etc towards the junior doctor. That is a matter of simple construction, which is enforced by "Law" being defined as meaning, amongst other things, "any Act of Parliament", statutory instrument" etc. Further, the Tribunal is satisfied that for a Host Trust to provide the Services set out in the LDA in a way that would potentially expose a trainee to a reaction such as might be experienced by the claimant would not be in compliance with the law. Secondly, it is expressly provided at clause 5.3 (2309) that regardless of the other terms of the agreement the Host Trust shall not be obliged to comply with any instructions from the first respondent that either "do not comply with Law or will or are likely to require the Placement Provider [*ie. the Host Trust*] to incur additional costs" that are not recoverable. For the same reasons as just described, the Tribunal is satisfied that a Host Trust could avoid complying with instructions from the first respondent to accept the claimant into an environment that might do her harm and give rise to a risk to patient safety as that would not be in compliance with the law.

136. In this regard, the Tribunal does not accept the submission on behalf of the claimant that the respondents cannot avail themselves of clause 5.3 of the LDA as that is based upon a hypothetical context for declining training not a real one or that even if it is a factor it can only stand on the basis of a risk assessment having been undertaken.

137. Although the point has already been addressed above in relation to the reference in clause 5.3 to the issue of costs, it bears repeating that the Tribunal accepts Professor Kumar's evidence that the costs of making the environment of the Host Trusts within the North East Region latex-free or even latex-safe would be significant, subject to fairly minor qualifications: the first is that certain Hosts Trusts are likely to be more advanced in moving towards latex safety than others; the second is that certain costs referred to by Professor Kumar are unlikely to be recurring but would nevertheless be significant. As such, it is further satisfied that such costs will enable a Host Trust to avoid complying with instructions from the first respondent (including to make the adjustments contended for by the claimant, assuming for these purposes that those would be reasonable adjustments) on the grounds that to do so would or would be likely to require the Host Trust "to incur additional costs".

138. As already found above, the Tribunal is similarly satisfied that the second respondent is not able to make such adjustments itself given that the environment, equipment, duties, premises and practices are matters for the Host Trust. Against that background, the Tribunal accepts the submission made on behalf of the second respondent that the SLA (2726) is essentially a general collaborative document. Even the claimant's submission only refers to the parties undertaking to "work together", which is far from constituting an ability on the part of the second respondent to require a Host Trust to make such adjustments.

139. Also in this regard, the Tribunal accepts the submissions made on behalf of both respondents that neither of them can require any Host Trust to accept a trainee, and it is a short step from that to enable a Host Trust to reject a trainee.

140. The Tribunal has summarised above the matters that it has brought into account in considering whether the steps contended for by the claimant could be said to be reasonable in the sense that there would be a prospect that they would have removed or ameliorated the disadvantage to which the claimant was subject and, on that basis, has found that it is not satisfied that the adjustments contended for by the claimant can be considered to be reasonable for the respondents themselves to have taken. Those matters as are of relevance also to the second question of whether one or other of the respondents had the ability of competence to compel or direct a third party such as a Host Trust, the Royal College of the GMC to make such adjustments. The following further points are made in addition:

140.1 indicated above, given their separate legal personalities, neither respondent could alter premises or working practices of a Host Trust and, notwithstanding the terms of the agreements considered above, neither of them could compel a Host Trust to do so;

140.2 the Royal College of Anaesthetists was not prepared to alter aspects of the examination process (eg. the use of latex mannequins) or vary the examination regime in such a way as to accommodate the claimant's disability and neither of the respondents could compel it to do so;

140.3 neither of the respondents had the competence to require the GMC to accommodate the implications of the claimant's disability by, for

example, requiring it to exempt the claimant from undergoing a competitive application process to demonstrate her suitability as a GP.

141. For the above reasons, with regard to this second aspect of whether one or other of the respondents had the ability of competence to compel or direct a third party such as a Host Trust, the Royal College or the GMC to make such adjustments the Tribunal is once more not satisfied that the steps contended for could be said to be reasonable steps for one or other of the respondents to take as they would not have removed or ameliorated the disadvantage to which the claimant was subject.

142. With regard to each of the above elements of whether it was reasonable for the respondents, first, themselves take the steps or, secondly, to require others to do so, addressing particularly the point that it is sufficient for the claimant to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment referred to in case law including in the excerpt from Billingsley set out above, the findings of the Tribunal are not that none of the adjustments contended for by the claimant had a chance of avoiding the disadvantage; rather it is satisfied that many of the adjustments contended for by the claimant could not have been made and those that might have been made could not have reasonably have been made. This finding accords with, first, the final sentence of that excerpt from Billingsley, “If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act”, secondly, paragraph 6.28 of the EHRC Code of Practice and, thirdly, the decisions in Rudham and Ashton that, respectively, if there is no prospect of the suggested adjustment succeeding, it will not be a reasonable adjustment and an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take.

143. As noted above, the second point of remittal from the EAT is that in determining the above issue of whether either of the respondents ought reasonably have taken steps to avoid the disadvantage the Tribunal shall “(a) identify those steps, if any, which it was reasonable for each of the Respondents to take; and (b) in assessing the reasonableness of any given adjustment, have explicit regard to each Respondent’s competence to deliver that adjustment”. The Tribunal has incorporated point (b) into its findings above to the effect that neither of the respondents ought reasonably to have taken the steps referred to and it follows from the above conclusions that the issue at sub-paragraph (a) does not arise as the Tribunal is satisfied that there were no steps that it was reasonable for each of the respondents to take.

Discrimination arising from disability – Section 15 Equality Act 2010

144. The remitted issue in this respect is simply, “Was the First Respondent’s letter (Professor Kumar – Claimant 6th November 2014) a proportionate means of achieving a legitimate aim?” This being so, again applying the decision in Aparau, the Tribunal has not given further consideration to other aspects of the Section 15 claim that have been determined by the First Tribunal notwithstanding that it received submissions in those other respects; such as whether the letter amounted to unfavourable treatment or the decision to issue the letter was because of something arising in consequence of the claimant’s disability.

145. In regard to the remitted issue, on this question of justification, the Tribunal adopts the two stage approach suggested at paragraph 4.27 of the EHRC Code of Practice, (albeit there relating to the question of indirect discrimination) namely:

> "Is the aim ….. one that represents a real, objective consideration?
>
> If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?"

146. We also apply the decision in Hardys & Hansons v Lax [2005] IRLR 726 that our task is to weigh the reasonable needs of the first respondent against the discriminatory effect of its measure in order to assess whether the former outweigh the latter; that is an objective test.

147. The factual context of our task in this respect is to be found in the evidence of Professor Kumar. To recap, as set out in the Gold Guide, progression through training is based on the achievement of competencies which are annually assessed during an Annual Review of Competence Progression ("ARCP") panel meeting. In addition to being the key method of assessing a doctor's progress, the ARCP is a key method of maintaining patients' safety. The panel could recommend one of eight "outcomes" for each trainee; for example Outcome 1 denotes satisfactory progress while Outcome 4 signifies an ARCP panel's recommendation that the trainee should be released (ie discharged) from the training programme.

148. The letter in question is that sent by Professor Kumar to the claimant on 6 November 2014 (551). The Tribunal accepts Professor Kumar's evidence that by that date the first respondent had received confirmation that the Newcastle Trust would not be able to provide a suitably latex-free environment for the claimant given the severity of her symptoms and the training requirements, and the claimant had declined to seek a transfer to a different Region. Further, the Royal College had confirmed that having sought advice from the Regional Advisers, it was not aware of a suitable training environment in the UK. The Royal College had separately confirmed that it would not be able to provide the facilities for the claimant to undertake the necessary Primary FRCA Examination (416) and the Irish Royal College had not responded despite Dr Lear having chased for a response. Additionally, the GMC had confirmed that the claimant needed to be reassessed through the normal recruitment processes in order to be appointed to an approved GP training scheme and, in this connection, although the option of applying for GP training had been discussed with the claimant she had failed to apply.

149. Thus an impasse had been reached. No latex-free training environment was available locally that would allow the claimant to complete the curriculum requirements and she had stated that she was not willing to move out of the Region.

150. Given the situation described in the above paragraphs, Professor Kumar did not consider that there were any reasonable adjustments that the first respondent could have made to allow the claimant to complete the ACCS training scheme; the majority of the adjustments needed to the training work environment and to the Royal College examination were out of the first respondent's control.

151. For these reasons Professor Kumar wrote to the claimant summarising the above and advising her that that "unfortunately leads us to issuing you an Outcome 4 and withdrawing your Deanery Reference Number (DRN) as you are unable to complete the training programme". Professor Kumar further advised that the claimant would receive an invitation to attend a meeting from the School so that this is done formerly (552).

152. The Tribunal accepts Professor Kumar's evidence in the above respects (upon which she was not particularly challenged) and as to the wider context, which was that she was aware that the claimant's intention was to complete the ACCS programme and anaesthetics specialty training and that even had the claimant been able to complete the ACCS training programme (which she did not think was possible) the claimant would then have to complete five years of anaesthetics specialty training, which included even more competencies.

153. Additionally, Professor Kumar was aware that the claimant and her BMA representative had highlighted the significant risks to the claimant's health from exposure to latex and she was, of course, alert to the patient safety concerns that could be caused by the claimant working in anaesthetics. Professor Kumar had provided information and guidance on applying to GP training or alternative career routes as summarised in her letter of 6 November 2014 (552) and had arranged careers advice and offered coaching to support the claimant.

154. In this regard Professor Kumar in cross-examination emphasised that the basis of Outcome 4 was not on costs but on whether a training placement could be found for the claimant. Further, that the block on the claimant continuing her training was on both the training environment and whether she could do the examination.

155. The Tribunal is satisfied that these several factors constitute a legitimate aim, not least in seeking to provide training to the claimant that did not put at risk her health and safety or, equally importantly, that of the patients whom she would be called upon to care for during the course of her training.

156. In the above circumstances, the Tribunal is satisfied that Professor Kumar had no other realistic option but to write the letter that she did and set in train the process that would probably have led to the ARCP panel issuing of an Outcome 4 (ie. that a recommendation be made that the claimant be released from the training programme. Paraphrasing the judgement of the EAT in this case, the Tribunal is satisfied that "Professor Kumar had quite properly come to the view that Dr Jackson could not complete her training in November 2014".

157. In all of the above circumstances, therefore, the Tribunal is satisfied that Professor Kumar's letter was a proportionate means of achieving that legitimate aim, prioritising as it did the safety of the claimant and patients in the Region.

Unfair dismissal

158. The claimant's complaint in this regard is not sufficiently particularised. The only specific point of reference is at paragraph 73 of the claimant's original claim form, ET1 (P27) albeit as refined in the course of these proceedings. There, she sets out why she felt she had "no other option but to resign". She cites certain

specific matters, a number of which have been withdrawn during the case management of these proceedings leaving the following:

158.1 “my former employers and trainers have discriminated against me by not taking timely and positive steps or reasonable adjustments, and

158.2 by their actions and failure to act constructively unfairly dismissed me."

158.3 Their approach if allowed to continue would have left me with a stained academic record, difficulties in getting future employment and professional revalidation issues.

158.4 In addition or in the alternative I believe my dismissal was …. discrimination arising from my disability.”

159. In short, the claimant relies particularly upon the asserted failure of the respondents to make reasonable adjustments and the ARCP process.

160. During the course of these proceedings the above four points were further narrowed as reflected in the submissions made on her behalf:

> “The constructive dismissal of Dr Jackson will follow the Tribunal’s findings on discrimination. If she suffered discrimination by CDD, her unfair dismissal claim against CDD should succeed also.” [*CDD is, of course, the second respondent.*]

161. Perhaps more importantly in this respect, at paragraph 49 of the EAT judgement in this case, having referred to the First Tribunal’s finding that the claimant had been constructively dismissed was expressly predicated on their finding that the second respondent had failed to make reasonable adjustments, it is recorded, “The Trust (*which we take to be a reference to the second respondent*) submitted that if their appeal on reasonable adjustments was upheld, the finding of unfair constructive dismissal could not stand”, and, importantly for our consideration of these matters, “that was not disputed.”

162. In light of the above, since the only complaint of discrimination against the second respondent is that it failed to comply with its duties to make adjustments contained in Section 20 of the Equality Act it follows that if there was no such failure there can be no basis for this complaint against the second respondent of unfair dismissal. The Tribunal so finds.

163. For completeness, the Tribunal addresses other matters that can be drawn from the claimant’s claim form, ET1, in respect of delay, failure to uphold her grievance and the ARCP process, particularly the letter from Professor Kumar. In these respects, the Tribunal is satisfied as follows:

163.1 Matters did take time but given the complexity of the arrangements between the two respondents and the Host Trusts, the need to make appropriate enquires (including of the claimant’s treating consultant, Dr Spickett and, at his suggestion, involving Mrs Fudge in the process) the Tribunal is not satisfied that it can be said that any delays were

unreasonable in the circumstances or were without reasonable and proper cause.

163.2 Again it is right that there was a failure to uphold the claimant's grievance but it has not been argued before us that this was without reasonable and proper cause. Further, since all the claimant's complaints in that respect are levelled at the first respondent it cannot be said that they are related to a duty owed by the second respondent.

In regard to this question of the grievance outcome the Tribunal notes that in the submissions on behalf of the second respondent it is stated that the claimant "accepted the failure to uphold her grievance was not a breach of the implied term". As the claimant did not give evidence before us that submission was obviously not based upon evidence that we heard neither can we identify that concession in the Reasons of the First Tribunal.

163.3 The Tribunal has already found that Professor Kumar wrote her letter to the claimant initiating the Outcome 4 process when she had no other realistic option and, therefore, once more it cannot be said that the writing of that letter was without reasonable and proper cause.

164. All in all, therefore, paraphrasing Section 95(1)(c) of the Employment Rights Act 1996, the Tribunal is not satisfied that the claimant terminated her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the conduct of the second respondent.

165. As such, she was not dismissed and, therefore, her complaint that her dismissal was unfair cannot succeed.

Conclusion

166. In summary and conclusion,

166.1 the claimant's complaint that, contrary to section 21 of the Equality Act, the first respondent failed to comply with its duty under section 20 of the Equality Act to make adjustments is not well-founded and is dismissed.

166.2 The claimant's complaint that, contrary to section 21 of the Equality Act, the second respondent failed to comply with its duty under section 20 of the Equality Act to make adjustments is not well-founded and is dismissed.

166.3 The claimant's complaint that the first respondent unlawfully discriminated against her contrary to sections 15 and 39 of the Equality Act 2010 (her dismissal amounting to discrimination arising from disability) is not well-founded and is dismissed.

166.4 The claimant's claim that she terminated her contract of employment with the second respondent in circumstances in which she was entitled

to terminate it without notice by reason of the conduct of the second respondent (ie. by reference to section 95(1)(c) of the Employment Rights Act 1996, she was dismissed) and that that dismissal by the second respondent was unfair contrary to sections 94 and 98 that Act is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 1 February 2019

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