EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102580/2020 (V)

Final Hearing Held by Cloud Video Platform (CVP) at Glasgow on 23, 24 & 25 August

Employment Judge R King

Members: Dr Singh
Mrs McColl

Natalie Hughes	**Claimant** **Represented by:** **Miss Page** **Solicitor**
Greater Glasgow Health Board	**Respondent** **Represented by:** **Mr Reeve** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claims are dismissed.

REASONS

1. The claimant has presented claims for disability discrimination in which she alleges that the Respondent discriminated against her in breach of sections 13, 15, 19 and 27 of the Equality Act 2010. The respondent denies all claims.

The claimant gave evidence on her own behalf. On behalf of the respondent the Tribunal heard evidence from Debbie Burke (Administration Governance Manager), Lynn Stockey, (General Manager, Recruitment) and Elizabeth

Taylor (Business Support Manager). The Tribunal found all the witnesses to be credible and reliable in their evidence. Having heard evidence, the Tribunal made the following findings in fact.

Findings in Fact

2. The claimant is a disabled person by virtue of a long-term depressive illness and she had that disability at all material times relevant to this claim.

The claimant's job application

3. On 21 October 2019 the claimant applied for a 9-month fixed term clerical officer/receptionist role with the respondent to cover a period of maternity leave at its Glenkirk Health Centre.

4. In her application she stated that her employer since 7 February 2019 to date was Murray Opticians where she worked as an optical assistant on a zero hours contract at a pay rate of £8.21 per hour. She also stated that she had previously worked as an optical assistant at Specsavers from 14 November 2016 until 4 August 2018 and had been at college full time between 4 August 2018 and 7 February 2019. In her application she also provided the names of referees from both Murray Opticians and Specsavers.

5. The claimant's application was in response to a re-advertisement in circumstances where the previous preferred candidate for the role following its initial advertisement had accepted an alternative job offer. The ensuing delay put pressure on the respondent to recruit the correct candidate within what had then become a reduced timescale as the permanent employee was due to return from maternity leave in May 2020.

6. The claimant attended an interview with the respondent on 11 November 2019, which was conducted by Debbie Burke and an HR colleague. During the interview the claimant explained that having worked in opticians for several years she now wished to work within a role that involved more reception and administrative duties. She also declared that she had a particular interest in working with the NHS. The claimant answered all of the

interview questions clearly and to a good standard and was unaffected by any memory issues.

The offer of employment

7. Having completed all of the interviews for the post on 11 November, Miss Burke contacted the claimant by telephone that same day to inform her she had been selected as the preferred candidate and that the respondent had decided to offer her the job. Miss Burke made it clear to the claimant that the offer was conditional because it was subject to all pre-employment checks being satisfactory. She therefore also informed her that she should not submit her resignation until she had received a full unconditional offer. The claimant did not resign from her employment at Murray Opticians at that stage, although she did inform them she had been offered a new position with the respondent, which was conditional on satisfactory references.

8. Following Miss Burke's call to the claimant, on 22 November 2019 the respondent's Recruitment Services team sent an email to the claimant, which so far as material to the disputed issues, said as follows -

"… EW6621 Clerical Officer/receptionist...

Dear Candidate,

Congratulations I am writing to you to advise you have been selected as the preferred candidate for the above post. This is a conditional offer of employment and subject to the satisfactory completion of pre-employment checks. Please do not hand in your notice until we have confirmed that all checks have been satisfactorily completed and we have confirmed a start date with you.

…

References

As a minimum we will seek to obtain at least two written references covering the last three years of employment. One of your referees must be your current or most recent employer. If the references you have provided do not meet this requirement please contact me as a matter of urgency to discuss alternatives. If you have not already advised your referees that they will be contacted please do so now. Please note that all reference requests are emailed – if you have not already done so please confirm the email addresses for the referees you have provided. Your offer of employment is conditional on the references we receive being deemed of satisfactory standard by the hiring manager.

<u>Occupational Health Screening (for New Staff to NHSGCC and current Bank Staff)</u>
[internal applicants <u>may not</u> be required to complete this]

If you are not already employed by NHS Greater Glasgow and Clyde, or if a current employee the nature of duties has changed, we require you to be screened by our Occupational Health Department prior to you commencing employment. Please note that this screening process is confidential between you and the Occupational Health Team who are medical professionals. Its purpose is to determine your fitness for the role, or in line with the Equality Act 2010 if any adjustments are required to enable you to carry out your duties. The content of your screening form will not be disclosed to anyone out with the Occupational Health Department.

*Attached to this email is an Occupational Health Form, please complete this asap, **do not** return this to myself as all information on this form is highly confidential between Occupational Health and yourself.*

…

Your Offer of Employment is conditional on the Occupational Health Department passing you fit, or fit with adjustments to undertake the role."

9. The claimant completed and returned her occupational health screening form to the respondent on 26 November 2019, although the respondent initially mislaid it, causing a delay. The claimant's screening form was only ever seen by Occupational Health. It was never shown to Miss Burke or any of the other respondent employees involved in the recruitment process.

The Employment References

10. The respondent also requested and subsequently received completed references from the claimant's referees.

11. The reference form that the respondent provided to each of the referees whose details had been provided on the claimant's application was in the standard format used across the NHS in Scotland. It included, *inter alia*, the following question -

"*Can you confirm the number of days the individual was absent in the last 2 years and the numbers of occasions? "*

12. In response to this absence question the Specsavers reference dated 9 December 2019 stated: -

"8 occasions of sickness in 2 years, 9.5 days (7 occasions) and 1 occasion of 26 days between May 19th 2018 and June 24th 2018 (Sick-line).

The reference also confirmed that it had –

"Tracked sickness days through Bradford Factor and monitored, no formal disciplinary but management sickness".

13. In response to the absence question the Murray Opticians reference dated 23 November 2019 stated: -

" 3''

It also stated, wrongly, that the claimant's employment there had been from 1 November 2018 to date.

14. Both referees had, when faced with the options of *'Excellent', 'Good', 'Poor'* and *'Unable to Comment',* described the claimant's time-keeping and attendance record as *'Good'.*

15. Miss Burke reasonably concluded that the answers provided by both referees related to sickness absence days as opposed to absences for any other reason.

Miss Burke's concern about the claimant's previous absences

16. Miss Burke was immediately concerned about the claimant's previous level of absence, leaving aside the lengthy absence between 19 May and 24 June 2018. She also noted that the claimant had previously been subject to formal attendance management by Specsavers. Although no absence dates were given, the number of absences reported set off *'alarm bells'* for her as the position was a unique front facing role in a very busy clinic. Miss Burke was concerned that the claimant's past absence record might predict a repeat of that same level of absence, which would likely be disruptive in its impact on fellow team members, who would have to cover any absences, and ultimately on service users who comprised adults over 65 with mental illness and adults with disability.

17. Miss Burke was also concerned because this was a nine month fixed-term contract to cover a period of maternity leave and this was the second time this job had been advertised. As a result, time had already been lost and it was therefore important that the correct appointment was made.

18. In considering the likely impact of the claimant's attendance Miss Burke also had regard to the respondent's attendance management policy, which applies to its employees. In particular she had regard to the absence *''trigger points''*

that will in most cases involve administrative action in relation to the employee in question.

The relevant part of the respondent's policy states as follows:

"6. 'Trigger Points'

It is important that line mangers have clear 'trigger points' in place for reviewing sickness absence. These 'triggers' are:

- *four or more episodes*
- *more than eight days short term sickness absence within a 12-month period.*

On hitting a 'trigger point' line mangers must consider all the facts available and be aware of the circumstances of the particular employee's situation, prior to organising any formal hearings. However line mangers must give consideration to absences linked to certain shift patterns, known accidents or injuries sustained at work or incidents of serious illness which may have resulted in the employee requiring time off work".

19. The claimant's references did not specify her dates of absence and therefore did not provide conclusive evidence that her past absence record would definitely have hit the respondent's trigger points. However Miss Burke reasonably concluded on the basis of the number of absences within the time frames reported on the references that there was a real risk she would hit those trigger points – most likely that she would incur four or more episodes during the term of the maternity cover contract. Therefore, if recruited there was a risk that she would be subject to absence management.

20. Having shared her concern with HR and taken their advice, she decided she would speak to the claimant to obtain her comments on the reasons for her absences. She wanted to allow the claimant an opportunity to comment rather than to simply make a '*black or white'* decision based only on the

content of the references. She was advised that she should ask the claimant open questions that would allow her to open up and comment.

Miss Burke's telephone call with the claimant on 11 December 2019

21. On or around 11 December 2019, Debbie Burke telephoned the claimant and informed her that, while the Occupational Health Report had not yet been received, she had received references that had confirmed she had incurred a significant number of absences in the past. Miss Burke explained to the claimant that she needed the successful candidate to be fit and well enough to attend work regularly, which the claimant acknowledged and understood.

22. Miss Burke asked the claimant whether there were any factors that she should be aware of that may have impacted on her attendance at work during those previous employments, which she would wish the respondent to take into account as part of the recruitment process. She did not ask for reasons for the claimant's absences and she did not ask the claimant to recall the dates of those absences. The claimant did not dispute the accuracy of the numbers of absences referred to in the references. Nor did she ask Miss Burke to confirm or to find out any of the absence dates. Miss Burke did not know any of the absence dates in any event because other than the 26-day absence referred to in the Specsavers' reference neither of the referees had provided dates.

23. The claimant confirmed that her absence of 26 days had been due to an underlying health condition of mental illness – specifically low mood. She explained that she took medicine for this condition and that she was now managing it well. She advised Miss Burke that she was currently *"absolutely fine and fit for work".*

24. Miss Burke highlighted to the claimant that there were a significant number of other absences recorded in the references apart from her long term absence. The claimant explained to Miss Burke that these must have been "*coughs and colds".* She did not indicate to Miss Burke that any of those absences were

related to her underlying health condition or with any memory problems that she might have suffered as a result of it.

25. The claimant also told Miss Burke that she had had an issue with her daughter requiring her to take *'a few'* days off. She did not tell Miss Burke the actual number of days absence she had taken because of child care. She did not link any particular cause of absence to either of the employers who had provided references. She did not ask for extra time to consider her answers as to the factors that had led to her absences.

26. Following their call Miss Burke had no concerns in relation to the claimant's underlying health condition and her previous lengthy absence as she was satisfied that she was now managing her condition well. However she remained concerned about the high number of absences that the claimant had said *"must have just been coughs and colds".* Miss Burke believed that the claimant had been vague about the absences she had characterised in these terms. The impression she gained was that the claimant had *"dismissed"* those absences.

27. Miss Burke concluded that she could discount the claimant's long-term absence of 26 days because it related to an underlying health condition that she accepted was under control. However, the claimant's other numerous absences, which she had identified as being due to other causes unrelated to her long-term medical condition, were of significant concern as she had offered no mitigation for them.

28. Miss Burke remained concerned about the potential impact of such absences, if repeated, on the role. This was a short term role in a 'pivotal' first point of contact job. Any absences would directly impact on the service levels of the team as well as on service users. There would also be a financial cost to the unit to backfill any absences.

29. As a result of having to re-advertise the role there had been a period of three months when there was no permanent receptionist and the role had been covered by the remaining team members on a rota and by a redeployee who

had been able on occasion to help out. However all of this had impacted on the quality of service in circumstances where all employees normally carry out defined roles.

30. In those circumstances Miss Burke concluded that to recruit the claimant would be '*quite irresponsible'* and a failure in her duty towards the team, which had limited resources available to it to deliver an efficient and effective public service.

31. In the circumstances Miss Burke contacted her manager, Elizabeth Taylor to ask if she could withdraw the claimant's offer of employment due to these unrelated absences. Having been briefed about the situation Miss Taylor shared Miss Burke's concerns and agreed that it was now difficult to continue with the recruitment process in relation to the claimant.

The Occupational Health Report

32. Having spoken to Miss Taylor, Miss Burke then spoke to Katrina Truten in the respondent's Recruitment team about her concerns and her wish to withdraw the claimant's offer. Having been apprised of the situation, Miss Truten advised her that as the respondent was still waiting for the Occupational Health report it would be inappropriate to make a decision until that was available as it could contain relevant information that might influence the decision. Miss Burke, rightly, took that advice.

33. On 13 December 2019, Elaine Watson of the Recruitment team sent an e-mail to the claimant informing her that Occupational Health had not yet received her Occupational Health screening form. She informed the claimant that this was delaying the recruitment process. The claimant responded to Miss Watson's e-mail that same day, informing her that she had already submitted the form on 26 November 2019. She also explained that she had just spoken to Occupational Health who had informed her that they had had trouble locating the form, but they had now located it and printed it out.

34. On 16 December 2019 Occupational Health informed Recruitment that the claimant's Occupational Health clearance had been deferred, that they had

sent a letter to her dated 17 December 2019 and that they would await further contact from her.

35. On 20 December 2019 Miss Burke sent an email to the claimant in the following terms –

> *"Hi Natalie,*
>
> *Just to let you know that recruitment have advised me that you have been deferred by Occupational Health, which means they will either want you to attend an appointment with them or they may be seeking further information regarding your health from your GP. I understand they have written to you about this. I am unable to advise you whether we can proceed with formal offer of the post until this is concluded so I will be in touch again after I receive confirmation."*

36. On or around 31 December 2019, Occupational Health provided Miss Burke and the respondent's Recruitment department with the claimant's Occupational Health report. The report confirmed that the claimant had a health condition which was likely to be covered under The Equality Act 2010, although no adjustments were required at that time. It also confirmed that she was ''*considered fit for the proposed employment".*

37. Miss Burke and her colleagues in the Recruitment Team saw only the Occupational Health report dated 20 December 2019. They did not see the information that the claimant had directly provided to Occupational Health.

38. On receipt of the Occupational Health report Miss Burke, considered all the information available to her. In the first place she discounted the claimant's 26 day absence, which had been caused by her underlying health condition. However there was no indication from the claimant or in the Occupational Health report that the claimant's other absences were linked to her underlying health condition. Miss Burke therefore concluded that the other absences recorded on the references, were too numerous without reasonable mitigation and that the claimant's references were therefore unsatisfactory.

39. Miss Burke reached her conclusion that the respondent could not make the claimant an unconditional offer of employment only in relation to this particular role, standing the particular concerns she had identified about its short term duration and the impact that short term absences would likely have on the level of service in that particular business unit. She did not conclude that the claimant's absence made her unsuitable for other potential roles with the respondent.

40. While she was concerned that the claimant's likely level of absence would potentially hit the trigger points in the respondent's absence management policy, she was aware that her view did not disqualify her from consideration for other roles and that managers have a level of discretion as to what they consider an acceptable level of absence in any given situation.

41. Miss Burke's decision that the claimant would be unable to provide regular and reliable service was based on her genuine view of the likelihood that if she recruited the claimant she would repeat her earlier pattern and frequency of absence unrelated to her underlying medical condition and that this would have an adverse impact on the department and the service users who rely on it. In reaching her decision she did not take into account the claimant's disability or any likely disability related absence.

42. It was significant for Miss Burke that her previous attempt to recruit into this role had been unsuccessful and that as time was of the essence, standing the fixed term of the appointment she had to be sure that the person she appointed would be likely to provide regular and effective service. Her genuine view was that the claimant would be unlikely to provide regular and effective service because of the likelihood of an unacceptable level of non-disability related short term absence in circumstances where she accepted that the claimant's underlying health condition was being well managed.

Withdrawal of the offer

43. Miss Burke established with Katrina Truten that responsibility for communicating the respondent's decision lay with the Recruitment team.

Miss Burke therefore confirmed her decision and rationale to Miss Truten and on 31 December 2019 Miss Truten sent an email to the claimant withdrawing the conditional offer on the basis of the rationale for the decision that Miss Burke had provided to her.

44. The email was in the following terms –

''… Clerical Officer/Receptionist – Primary Care & Community Services Band 2

I write further to your recent conversations with the recruiting manager to confirm that the conditional offer for the above post has now been withdrawn.

We have received your references, and unfortunately they have been deemed unsatisfactory. I regret to advise that as we have been unable to complete all pre-employment checks satisfactorily we are withdrawing the provisional offer of the above post and will not be taking your application any further.

The withdrawal of this offer applies to this position only and would not impact on any future applications for alternative position.

I appreciate that this will be disappointing for you and I would like to take the opportunity to say thank you for the interest you have shown in NHS Greater Glasgow & Clyde''

The claimant's emails of 2 and 23 January 2020

45. The claimant was, naturally, disappointed with the respondent's decision. She had believed that if she was passed fit by Occupational Health she would be offered the job unconditionally. As a result, on 2 January 2020 she sent an email to Elaine Watson in the respondent's Recruitment Team in which she stated: -

"I would just like to take this opportunity to express my disappointment with the whole process that has taken place since receiving my conditional offer of employment.

Firstly I received a phone call to say my references had not been returned. On telephoning it turned out that one had indeed been returned and Specsavers where insisting they had not received a request for a reference. By the time these where both received four weeks had passed.

I was also emailed to say I had not returned my Health Declaration Form even though I had returned this seventeen days before. In this form I was honest about a five week period of absence due to illness. Over three weeks ago I had a conversation with Debbie Burke in which she expressed concern about absences noted by references, however as far as I am aware, there was no concern about my ability to do the prospective role. After this I received a letter from Occupational Health requesting me to call them. I did this and after a conversation with a lady there I was advised that I had been passed fit for work. This now seems to have been a complete waste of time.

In regards to the post I had applied for, it seems to be that despite having the relevant work experience, skills and qualifications to do the role and being passed fit by your Occupational Health Department I am now being rejected for the role for no other reason than previous absences from other jobs. NHS states that "no applicant will be discriminated against". It seems to me that I am being unfairly rejected for this role for no other reason than previous illness. Surely a company like NHS would have a probationary period and, if I was to start the job and then have numerous absences my contract would be terminated anyway. I have been told my references are "deemed unsatisfactory" and "non-compliant" so I would be interested to know if there is a number of previous absences stated in references that would prevent me being employed in another position within NHS. Is this company policy?

In the email I was told the "withdrawal of offer applies to this position only". I am now reluctant to apply for another similar NHS position as I do not want to find myself in this position again. I am very disappointed with this decision as I have been looking to start a new career with NHS and I now feel that is not going to be possible due to previous periods of sickness. This seems very unfair. I am also dismayed as to why it has taken a lengthy period of over seven weeks to come to this decision. It was also disappointing to receive this news by email. I would think after seven weeks a telephone call would be more sufficient"

46. On 3 January 2020 Katrina Truten replied to that email in the following terms: -

"I did try to call you on Tuesday to explain the decision to you before I issued the email but you did not answer the call, the absences noted on the references breached the trigger points in our absence policy and the Hiring Manager decided that she could not go forward with the unconditional offer.

The reason for delaying in contacting you with the decision was that we were waiting on OH clearance, we needed to wait to see if anything on the form linked to the absences but it didn't. The NHS does not have probationary periods so that was not an option for the manager".

47. On 23 January 2020 the claimant sent a further email to the respondent in which she repeated the concerns she had raised in her previous email 2 January 2020 and asserted, *inter alia*, that -

"I believe the decision not to offer me the post was as Occupational Health had passed me fit for work with a medical condition. After me declaring to Debbie Burke that I had been absent for 25 days due to depressive illness she had decided that the medical condition must be depressive illness and did not want to take the risk to employ me despite the fact I had indeed been passed fit for work. In this case I believe I have been discriminated against due to depressive illness which is a protected characteristic under the Equality Act 2010".

The respondent's response to the claimant's complaint of discrimination

48. That email was referred to Elizabeth Taylor, Business Support Manager. As the claimant was not the respondent's employee, it was not appropriate to deal with her complaint under its formal grievance procedure. Nevertheless Miss Taylor agreed to investigate and respond to the claimant's complaint that she had suffered discrimination.

49. Having obtained the comments of Miss Burke and the Recruitment team in relation to the claimant's complaint, as well as having reviewed the relevant correspondence between the parties, Miss Taylor replied to the claimant's 23 January e-mail, which so far as material was in the following terms: -

"I regret that this matter has caused you upset however would assure that as an organisation we do not discriminate during any stage of the Recruitment Process and comply with the Equality Act 2010.

As Recruiting Managers, we are supported by the Recruitment Team to ensure best practice is followed and we operate within current employment legislation.

I have fully investigated this matter in terms of process followed as well as reviewing any correspondence which relates to this matter.

I understand that there was a discussion between you and the Recruiting Manager, Debbie Burke where concerns had been raised in relation to the referencing standards, specifically the level of absences reported from the last 2 years which totalled 11 episodes. During this discussion you informed Debbie that 1 long term episode of absence had related to low mood which you had been prescribed medication and was an underlying health condition. Debbie advised that you were vague in relation to the other 10 absences which remained a concern and did not state that these related to any underlying health condition which may be covered by the Equality Act 2010.

The recruitment Team advised that Occupational Health Services had deferred candidate to obtain further information, and in compliance with the NHS GG&C Recruitment Policy, Debbie was advised only on the basis of all pre-employment checks being complete could a final decision be made.

I therefore conclude from this investigation that the decision to withdraw the provisional offer was justified on the basis that the references received were deemed unsatisfactory and is not deemed to be discriminatory.

I would like once again to take the opportunity to apologise for any upset this matter has caused you, and wish you success in your future career.

I hope this letter has taken account of the concerns you have raised. If you are not satisfied with my response we will make every effort to address any outstanding concerns you may have if you let me know what these are."

50. Miss Taylor's intention when she replied was to address the claimant's concerns and to reassure her that she had not been treated in a discriminatory way. Recognising that this was a serious and sensitive matter for the claimant her response deliberately left a door open for her in the event that she had any remaining concerns about her treatment.

51. The claimant did not make any further contact with the respondent further to that letter prior to presenting her claim to the Employment Tribunal.

52. Following the respondent's decision to withdraw the claimant's conditional offer, the post was filled by the respondent's 'admin bank' staff. Since her conditional offer was withdrawn the claimant has obtained a job as an Office Administrator with Christina's Home Care Services since 31 August 2020.

53. The claimant acted reasonably in her attempt to mitigate her loss by looking for suitable alternative employment meantime in the field – reception and administrative duties – in which she had recently undertaken a college course.

Claimant's Submissions

54. On behalf of the claimant Miss Page firstly submitted that it was not in dispute that the claimant was a disabled person. Further, the respondent knew or ought to have known that by the material date, which was 11 December 2019.

55. The claimant's belief was that the reason given by the respondent for withdrawing the claimant's conditional offer of employment, namely that her previous absences would have hit the trigger points in the respondent's absence policy, was a sham. The evidence had in fact shown that the claimant had truly only incurred 8 absences over 3 years, which would not have triggered the absence management policy. Furthermore, it was possible that some of those 8 absences had been disability related, which the respondent had not even considered. The true reason Miss Burke had withdrawn the offer was her concern about the claimant's disability and the absence and possible disruption that may flow from that. When the respondent's Occupational Health report had confirmed that the claimant had a disability, the offer was withdrawn.

56. The OH report simply confirmed what Miss Burke already knew. She would have been aware that the purpose of this report was not to make any link between the claimant's long term health condition and her previous absences. She was more concerned about managing her team's resources than treating the claimant fairly.

57. In support of the direct disability discrimination claim the claimant relied on a hypothetical comparator. The characteristics of the comparator would be *"a job applicant who is required to undergo an Occupational Health Assessment prior to achieving confirmation of appointment to a role, but whose occupational health report does not confirm a depressive illness necessitating an extended leave of absence".* Such a comparator would not have had their conditional offer withdrawn, whereas the claimant's conditional offer had been withdrawn because of her disability. The reasons provided by the respondent for the withdrawal of the offer had not stood up to scrutiny.

58. With regard to the claim of discrimination arising from disability, Miss Page submitted that the unfavourable treatment was the respondent's withdrawal of the claimant's offer of employment. The offer had been withdrawn because the potential for her to be on long-term sick leave due to her disability was higher than for those without a disability.

59. Miss Burke had described her potential absences as “disruptive” to the role due to its front facing nature. The respondent did not wish to risk having to cover the claimant’s absence by relying on bank staff who would come at a cost to the department, so it withdrew the offer of employment. If the claimant had not had a long-term absence in the past and no real prospects of another long-term absence due to her disability she would have been employed. Yet the claimant's long term condition was actually under control, which Miss Burke had accepted in her evidence.

60. This unfavourable treatment was not a proportionate means of achieving a legitimate aim. Referring to ***Homer -v- Chief Constable of West Yorkshire 2012 UK SC15*** it was submitted that the treatment in question must not only be an appropriate means of achieving a legitimate aim, but also a reasonably necessary means of doing so.

61. Miss Burke’s evidence was that her department had covered the early part of the maternity leave of the individual whose role was to be covered from within the team and that 'bank' staff were available for longer term absences. Miss Burke had in fact gone on to use bank staff to cover the remaining period of absence once they removed the offer to the claimant. An employer with the respondent's size and resource could not avoid having to manage staff absence. Withdrawing the offer of employment was therefore not a proportionate means of achieving a legitimate aim.

62. In respect of indirect disability discrimination the claimant relied on two PCP’s.

63. The first was the wording of the standard reference request, which was in the following terms:-

"*Can you confirm the number of days the individual was absent in the last two years and the numbers of occasions? ".*

64. The first PCP was an ambiguous question. It lacked precision. In particular, it did not specify whether it was a reference to the last two years of an applicant's employment or the last two years up to the date of the reference request. Nor did it specify whether the question was limited to sickness absences only or to all absences for any reason.

65. Asking such an ambiguous question meant that different referees would interpret it differently. Some would include only absences during the last two years before the date of the request and some would include absences in the last two years of employment with them. Some would include only sickness absence and some would also include non-sickness absences, such as for funerals and child care. That was likely to put someone with the same disability as the claimant at a disadvantage compared to those without that disability as those with her disability would be more likely to be absent from work. Some employers may interpret this differently which may have a different result for each candidate and would be unfavourable to some. By adding the possibility of referees referring to more absences than would provide a fair picture it would be more likely that disabled applicants would have job offers withdrawn as they would, for example, have extra absences included that would push them over the trigger points.

66. The second PCP relied on was the respondent's alleged practice of withholding from job applicants the dates of absence provided by former employers or of failing to gather such dates.

67. This PCP had meant that the claimant had been put on the spot and asked to confirm details of 11 absences over 3 years and the reasons for those. Although that may also have been hard for an individual without the claimant's disability this only aggravated her disadvantage around the time of 5-week absence. It was credible that some of the claimant's absences may have been linked to the claimant's disability but she did not have the opportunity to confirm this. This practice would therefore disadvantage any candidate who

suffers from memory issues due to a disability. The pool for comparison was all applicants eligible for the job on the basis of their qualifications.

68. The PCP's in question were not a proportionate means of achieving a legitimate aim. It would have been simple to contact the referees to confirm the dates of absence and pass these to the claimant. That would have alleviated any confusion that she felt about the dates and the reasons, particularly as her memory had been 'hazy' in the period leading up to the five week period of her lengthy absence. The respondent's witnesses had accepted that the reference to the two-year period could have been misinterpreted. As the respondent had not disclosed the absence dates to the claimant she had had to recall them in her own mind in order to try to recall the reasons. That disadvantage would be suffered by others who shared her disability. A simple change in the form to prevent that confusion would have removed the disadvantage caused by both PCPs.

69. Finally, Miss Page submitted that the claimant had suffered an act of victimisation by the respondent. Her written complaint dated 2 January 2021 in which she had complained of discrimination had been a protected act.

70. Her complaint should not have been investigated by Elizabeth Taylor who was also involved in the process complained of. She had been "*fobbed off*" and not taken seriously. The response that she had received had discredited her accusation without there having been a proper investigation by an independent manager. This resulted in her feeling low mood again. She had not been taken seriously and she felt that there was no point in pursuing her complaint any longer.

71. The claimant sought a financial remedy of compensation for her losses. She was entitled to receive payment to compensate her for the period of 9 months that the post was to last for. Her claim was for the period of the fixed-term role of 9 months up until the commencement of her new employment in August 2020 during which she in receipt of benefits.

72. She had meantime acted reasonably in mitigating her loss, applying for roles that had been suitable for her skills after undergoing a college course. She had secured employment within 8 months despite the pandemic removing many roles from that sector.

Respondent's Submissions

73. In the first place, Mr Reeve confirmed that the claimant's disability was admitted. Her claims, however, were denied. Dealing firstly with the direct discrimination clear Mr Reeve submitted that if the claimant was relying on a hypothetical comparator, the one she had identified was flawed. The correct hypothetical comparator would be a job applicant with the same references as the claimant who provided the same explanation for the absences as the claimant had provided to Debbie Burke, except that comparator would not have an underlying health condition nor would make reference to having one.

74. Miss Burke had actively discounted the long-term period of absence which the claimant indicated was related to an underlying health condition. She therefore took positive steps towards making a reasonable adjustment for the claimant's likely disability related absence. There was no evidence that Miss Burke would have treated a hypothetical comparator any better than she treated the claimant. In fact there was no indication that she would have discounted such a long period of absence for the comparator since that absence for the comparator would not have been disability related.

75. Miss Burke's decision that the claimant's references were unsatisfactory was based solely on the level of absence identified in the references which the claimant indicated were unrelated to an underlying health condition. Miss Burke would have reached the same decision for a non-disabled applicant. Miss Burke's evidence was clear that she had not withdrawn the offer because of the claimant's disability but rather because the short term absences identified in the references and not identified as disability related were considered to be too numerous and, if repeated would have had had an impact on the service and on service users. The alleged treatment had not been because of the claimant's disability.

76. The offer had been withdrawn after receipt of the OH report only because Recruitment and HR had advised Miss Burke that all recruitment checks had to be made before making a decision. There was no correlation between the OH report confirming the claimant's disability and Miss Burke's decision. She had discounted the lengthy absence due to low mood and relied only on the non-disability related short term absences, which she had already considered unsatisfactory after her phone call with the claimant on 11 December.

77. The correct test for the Tribunal was to consider Miss Burke's conscious or subconscious reason for her treatment of the claimant. That was necessarily a subjective process – ***Igen Limited & Others -v- Wong & Others 2205 IRLR 258***. Miss Burke's evidence was clear that the matters which concerned her were the ten occasions of short-term absence for which the claimant had provided some somewhat *'off-hand'* explanations, none of which were said by the claimant to relate to any underlying health condition.

78. In reaching her decision Miss Burke had regard to the Attendance Management Policy. It was not uncommon for recruiting managers to do that. The claimant had accounted for the 10 absences over and above the long term absence as a few days off for her daughter and the rest coughs and colds. The Specsavers reference indicated seven absences in under 2 years of employment. Miss Burke concluded that this presented a risk of her being in breach as that level of absence presented a *risk* of her being in breach of the Respondent's absence management trigger points over a rolling 12-month period. That had also been the evidence of Miss Taylor.

79. The Murray's Opticians reference indicated three absences in a year, which was also close to breaching a trigger point. In light of the comments provided by the claimant to Miss Burke when they discussed the references, Miss Burke had no reason to consider that the absences mentioned in the references were not due to sickness absences. All of those absences were a significant concern to her, albeit she had been advised to wait until receipt of the Occupational Health report before reaching a final decision as there was a possibility that this report would bring to light additional factors that may

have had a bearing on her final decision. It had been appropriate to wait. However, in the event, the report did not provide any further relevant information that allayed Miss Burke's concerns. Furthermore, the Occupational Health report was the only information that OH had ever provided Miss Burke and there had been no breach of her privacy.

80. Miss Burke's decision took into account that the role in question was a 9 month maternity cover role, for which 3 months had already passed, in circumstances where the job had already been rejected by another individual. Miss Burke's decision to fill the role with Bank Staff in circumstances where 3 months of the 9-month role had already passed was a reasonable non-discriminatory management decision.

81. There was no evidence of conscious or subconscious bias. Miss Burke's evidence had been convincing and credible that it was the non-disability related absences that had caused her concern. This was a *"very real identifiable"* reason for Miss Burke coming to her decision which had no relation to the claimant's underlying condition.

82. In respect of the claimant's claim for discrimination arising from disability Miss Burke's clear evidence was that she withdrew the conditional offer of employment due to the level of the claimant's previous absences which the claimant indicated were unrelated to an underlying health condition. The absence which the claimant stated was related to an underlying health condition had been actively discounted by Miss Burke. No unfavourable treatment had arisen in consequence of the claimant's disability.

83. Even though the treatment did not arise in consequence of her disability he submitted that the respondent's decision to withdraw the conditional offer was nevertheless still a proportionate means of achieving a legitimate aim, namely the respondent's aim to promote attendance at work in order to provide an efficient and cost effective public service and to ensure health and safety of patients and staff through appropriate staffing levels. It was reasonable and proportionate for Miss Burke to consider it inappropriate to recruit an individual

to this particular 9-month role having taken into account the high level of non-disability related short-term absences in the references.

84. In respect of the indirect discrimination claim Mr Reeve submitted that the first PCP referred to by the claimant, namely that the reference request form *"did not specify the precise dates from which the respondent required information regarding the claimant's absence"* had not actually been adopted. The reference request in fact asked "*can you confirm the number of days that the individual was absent in the last two years and the number of occasions*". The precise period of time *was* therefore specified in the reference request.

85. In any event the claimant was not placed at any disadvantage by the wording of that reference. It was not understood in what way further specification of the dates from which the respondent required information regarding her absence would have made any particular difference. The claimant had not seen the references at the time of the alleged discrimination. She did not ask for specification of the precise dates from which the respondent had requested information from her referees. The respondent had asked that the referees confirm the dates of the claimant's employment with them, which they had done. The claimant had not been able to show that that there would be any alleviation of the alleged detriment to her by way of the respondent specifying the period of time more precisely that it had done.

86. The second alleged PCP was the alleged "*practice of keeping the dates of absence confirmed by former employers confidential".* Again, Mr Reeve denied that such a PCP had been adopted. There was no practice of keeping the dates of absence confidential. The dates, save for the long term absence dates, had not even been provided and Miss Burke had exercised her discretion reasonably in not pursuing them - particularly as the claimant had not asked for them and had never said the number of absences referred to in the references was inaccurate. It was accepted that other managers *may* have sought out the absence dates, but it had not been discriminatory not to do so.

87. In accordance with the evidence of Miss Burke the issue was dealt with by her based on the particular circumstances of the matter at the time. It was a one-off decision specific to the facts at the time. Mr Reeve acknowledged that the Court of Appeal in ***Ishola -v- Transport for London 2020 ICR 1204*** had found that a one-off decision *could* amount to a PCP. However, not all one-off acts would do so. As the EAT had previously emphasised, for a PCP to be established there must be some form of continuum in the sense of how things generally are or will be done by the employer. No PCP would be established in relation to a one-off act in an individual case, such as this, where there was no indication that the decision would apply in future.

88. In respect of group disadvantage he submitted that the claimant's alleged group disadvantage did not make sense in relation to her claim. The claimant had not pled that her absences other than the long-term absences were in anyway related to her underlying health condition. She did not plead that some of the absences relied on by Miss Burke were *"caused by previous flare-ups of her condition".* The alleged group advantage did not relate to the claimant's claim as pled.

89. Further, it was not accepted that the claimant had provided any evidence that individuals in the alleged group would find it harder to recall absences caused by previous flare-ups than individuals with a different condition or those who were not disabled. To put in another way, individuals with a different disability or who were not disabled who were in the same circumstances as the claimant would not find it *easier* to recall dates and the reasons for absences than individuals who suffer from depression. The claimant had provided no medical evidence to support the alleged group disadvantage.

90. So far the as pool for comparison was concerned Mr Reeve submitted the correct pool would be all job applicants faced with the alleged PCP's. In relation to the first alleged PCP it was not clear how the claimant and those who shared her disability would have been disadvantaged relative to non-disabled persons within that group. Nor had she provided any evidence that

any group disadvantage would be suffered by people with a disability within that pool in respect of the second alleged PCP.

91. In her evidence in chief the claimant had given no evidence of memory problems affecting her ability to recall details of her absences. It had only been in re-examination that the claimant had mentioned the possibility that there may have been some occasions of absence in the run-up to her long-term period of absence that had been linked to her disability, but she was not sure. Her evidence in that regard had been unconvincing and unsubstantiated. There had been no credible, reliable evidence of any disadvantage or any group disadvantage.

92. Even if the Tribunal found that the claimant had suffered disadvantage and that others with her disability would suffer that disadvantage, the respondent's actions had nevertheless been objectively justified. They were reasonably necessary in order to achieve the legitimate aim of promoting effective attendance at work in order to provide an efficient and cost effective public service and to ensure health and safety of patients and staff through appropriate staffing levels, in line with recommendations from the Clothier Report.

93. It had been proportionate for the respondent to ask referees for confirmation of absences from the last two years of employment and then not to provide the claimant with the dates of the absences in circumstances where the dates were not provided (other than the long term absence referred to by Specsavers), but the claimant *was* told of the number of absences and given the opportunity to provide her comments in relation to them, which she did without asking for specification of the dates.

94. In relation to the victimisation claim the respondent accepted that the claimant's email of 23 January 2020 in relation to the withdrawal of the conditional offer in which she indicated that she believed that she had been discriminated on the ground of her disability was a protected act.

95. However Mr Reeve submitted that the respondent's handling of that complaint had not subjected her to any detriment. Specifically, it had not “discredited” her or had attempted to “draw to a close any grievances borne by the claimant and to discourage her from making further complaints as alleged.

96. In truth the complaint had been investigated and in her decision letter Miss Taylor had invited the claimant to get in touch if she was not satisfied with the response. The response had explained the respondent’s perspective on matters, apologised for any upset that the matter had caused to the claimant and had offered to look into any further issues which she still considered unresolved. A reasonable worker would not conclude that they had been disadvantaged by the respondent's response. There had been no victimisation.

97. In relation to remedy Mr Reeve submitted that the claimant had failed to mitigate her loss because she had failed to apply for Optical Assistant/Receptionist roles after her conditional offer was withdrawn. It was unreasonable for her not to do so in circumstances where that had been her background for a considerable part of her overall employment.

98. Further, she could and should also have more actively indicated to Murray Opticians that she wanted to continue to work hours for them under her zero hours contract with them.

Burden of Proof

99. The Burden of Proof in proceedings relating to contravention of The Equality Act 2010 is governed by Section 136 of that Act. The correct approach is set out in Sections 136 (2) and (3):-

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

100. The Court of Appeal has repeatedly stressed, that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for statutory language.

101. The Tribunal takes into account the well know guidance given by the Court of Appeal in ***Igen Ltd v Wong 2005 ICR 931****,* which was approved by the Supreme Court in ***Hewage v Grampian Health Board 2012 ICR 1054.***

102. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a **"***prima facie*" case of discrimination which needs to be answered. If the inference of discrimination could be drawn at the first stage of the enquiry then it must be drawn at the first stage of the enquiry because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed unless the respondent can discharge the burden of proof at the second stage. However, if the claimant fails to provide a "*prima facie"* case then is nothing for the respondent to address and nothing for the Tribunal to assess.

103. The following principles can be derived from ***Igen Ltd v Wong , Laing v Manchester City Council 2006 ICR 1519 EAT, Madarassy v Nomura International Plc 2007 ICR 867 CA and Ayodele v- Citylink Ltd 2018 ICR 748,*** which reviewed and analysed many other authorities:

104. At the first stage a Tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence produced by the respondent when deciding whether the claimant has established a prima facie case of discrimination. A respondent may, for example, produce evidence that the allegedly discriminatory acts did not occur at all or that they did not amount to less favourable treatment in which the case the Tribunal is entitled to regard to that evidence.

105. There is a vital distinction between “facts” or evidence and the respondent's “explanation”. While there is a relationship between facts and explanation, they are not be confused. It is only the respondent’s *explanation* which cannot be considered the first stage of the analysis. The respondent's explanation become relevant if and when the burden of proof passes to the respondent.

106. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic (or protected act) and a difference in treatment. That would only indicate the *possibility* of discrimination and the mere possibility is not enough. Something more is required. See paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy.***

107. However, it is not always necessarily to adopt a rigid two stage approach. It is not necessarily an error of law for a Tribunal to move straight to the second stage of its task under section 136 of The Equality Act 2010 *(see for example* ***Pnaiser -v- NHS England 2016 IRLR 170 EAT*** *paragraph 38)* but it must then proceed on the assumption the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which fails then to discharge a burden which ought not to have been on it in the first place.

108. In a similar vein, the Supreme Court in ***Hewage*** observed that it was important not to make too much of the rule of the burden of proof provisions. They required careful attention when there was room for doubt as to the facts necessary to establish discrimination but they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Discussion and Decision

Direct Discrimination

109. Section 13 of the Equality Act 2010 provides:-

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 23 of the Equality Act 2010 provides –

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

110. A claimant claiming direct discrimination must therefore show that they have been treated less favourably than a real or hypothetical comparator. The less favourable treatment must be because of a protected characteristic. This requires the Tribunal to consider the reason why the claimant was treated less favourably; what was the respondent's conscious or subconscious reason for the treatment. The Tribunal will therefore need to consider the conscious or subconscious mental processes which led A to taking a particular course of action in respect of B and to consider whether a protected characteristic played a significant part in the treatment.

111. For A to discriminate directly against B, A must treat B less favourably than it treats or would treat another person. The Tribunal must compare like with like except for the existence of the protected characteristic and so there must be no material differences between the circumstances of B and the comparator. In practice it is not always possible to identify an actual comparator and therefore it is common for a Tribunal to be invited to consider how a hypothetical comparator would have been treated.

112. Since there must be no material difference between the circumstances of B and the comparator the Tribunal must establish the relevant "circumstances" in ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285*** Lord Scott of Foscote expressed the principle in the following terms*:*

"The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

113. The Tribunal considered that in respect of the allegation of direct discrimination, where the primary facts were not in dispute, that it was able to depart from a rigid approach to the two stage test in its approach to the burden of proof. It felt able to consider the evidence as a whole, including the respondent's explanation for its admitted treatment of the claimant, in making its determination as to whether direct discrimination took place.

114. Miss Burke's evidence was that she accepted the claimant's long term health condition was being well managed. However the amount and frequency of the claimant's previous non-disability related absence, as disclosed by the references, presented a risk that employing her would result in a similar level of absence. Although she offered the claimant an opportunity to provide further information as to the reasons for those absences, she took no assurance that such a pattern of non-disability absences would not be repeated. Miss Burke acted fairly when she asked the claimant to recall factors that might have led to her high number of absences rather than asking for specific dates and reasons for particular absences.

115. Such a level of absence, if repeated, would have been operationally unsustainable for the respondent, particularly having regard to the short duration of the fixed term appointment and the need for regular effective attendance within the role in question, which involved providing a frontline service to a group of service users comprising adults over 65 with mental illness and adults with disability.

116. The Tribunal was satisfied that Miss Burke’s decision that the claimant would be unable to provide regular and reliable service was based on a genuine belief in the likelihood that if she recruited the claimant she would repeat her earlier pattern and frequency of absence unrelated to her underlying medical condition and that this would have an adverse impact on the department and the service users who rely on it.

117. It was significant for Miss Burke that her previous attempt to recruit into this role had been unsuccessful and that as time was of the essence, standing the

fixed term of the appointment she had to be sure that the person she appointed would be likely to provide regular and effective service.

118. Although she did not know the precise dates and frequency of the absences disclosed in the references, Miss Burke was also, rightly, concerned on the basis of the references that the claimant's level of absence would potentially hit the trigger points in the respondent's absence management policy.

119. The Tribunal was entirely satisfied that Miss Burke's genuine view was that the claimant would be unlikely to provide regular and effective service because of the likelihood of an unacceptable level of non-disability related short term absence. It was satisfied that in reaching her decision she did not take into account the claimant's disability or any likely disability related absence and that it was not on the proscribed ground. The Tribunal was also satisfied with the respondent's explanation that Miss Burke and her colleagues in the Recruitment Team saw only the OH report dated 20 December 2019 but did not see the information that the claimant had provided to OH.

120. The Tribunal found that on the facts of this case the appropriate comparator would have been another individual eligible for the role who was offered the role subject to occupational health and references but who was not disabled by a depressive illness. It also finds that such a hypothetical comparator would have been treated the same as the claimant was treated and that there was no direct discrimination.

Discrimination arising from disability

121. Section 15 of The Equality Act 2010 provides

" (1) A person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

In ***Basildon & Thurrock NHS Foundation Trust -v- Weerasinghe UK EAT 0397/14*** *Mr Justice* ***Langstaff*** *held that there were two distinct steps to the test to be applied by Tribunals in determining whether discrimination arising from disability has occurred:-*

(1) Did the claimant's disability cause, have the consequence of or result in "something"?

(2) Did the employer treat the claimant unfavourably because of that "something"?

In ***Pnaiser – v – NHS England and another 2016 IRLR 170****,* the EAT summarised the proper approach to claims for discrimination arising from disability as follows*: -*

I. The Tribunal must identify whether the claimant was treated unfavourably and by whom;

II. It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought process of that person, but keeping in mind that the motive of the alleged discriminator and acting as he or she did is irrelevant.

III. The Tribunal must then determine whether the reason was "*something arising in consequence of the claimant's disability"* which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

IV. The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

122. The Tribunal considered that in respect of the allegation of discrimination arising from disability, where the primary facts were not in dispute, that it was able to depart from a rigid approach to the two stage test in its approach to the burden of proof. It felt able to consider the evidence as a whole, including

the respondent's explanation for its admitted treatment of the claimant, in making its determination as to whether discrimination arising from disability took place.

123. In the first place the Tribunal finds that the respondent's withdrawal of the claimant's conditional offer *did* amount to unfavourable treatment

124. Turning to the cause of the treatment the Tribunal accepted Miss Burke's account that while she was aware of the claimant's disability at the material time her decision to withdraw the conditional offer was not because of her previous long term disability related absence or because she considered that there was a likelihood of further disability related absence.

125. The Tribunal was entirely satisfied that Miss Burke's genuine view was that the claimant would be unlikely to provide regular and effective service because of the likelihood of an unacceptable level of non-disability related short term absence and that this would have an adverse impact on the department and the service users who rely on it.

126. It also accepted that it was significant for Miss Burke that her previous attempt to recruit into this role had been unsuccessful and that as time was of the essence, standing the fixed term of the appointment she had to be sure that the person she appointed would be likely to provide regular and effective service.

127. In all the circumstances Miss Burke's reason for withdrawing the offer was not something arising in consequence of the claimant's disability, and therefore this part of the claim must also fail.

Indirect Discrimination

128. Section 19 of The Equality Act 2010 provides :-

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1) a provision criterion or practice is discriminatory in relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic;

(b) it puts, or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) it puts, or would put, B at that disadvantage and;

(d) A cannot show it to be a proportionate means of achieving a legitimate aim. "

129. The concept of a provision criterion or practice (PCP) is fairly wide and there does not need to be a formal policy in place for an employee to bring an indirect discrimination claim in respect of a management decision that affects them. The test for indirect discrimination requires the claimant to show that the PCP puts (or would put) persons with whom they share a protected characteristic at a particular disadvantage when compared with others.

130. Section 6(3) of The Equality Act 2010 provides –

"In relation to the protected characteristic of disability –

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a particular characteristic is a reference to persons who have the same disability. "

131. Therefore for indirect discrimination purposes the "*particular disadvantage"* must affect those who share the claimant's disability. Any comparative disadvantage that would be suffered by those with the claimant's particular disability as a result of the PCP must be measured against actual or hypothetical persons whose circumstances are not materially different. The disadvantage experienced by the employee and those sharing the employee's particular disability has to flow from the PCP.

132. There will be no indirect discrimination if the employer's actions are objectively justified. To establish justification, an employee will need to show that there is a legitimate aim (a real business need) and that the PCP is proportionate to that aim in the sense that it is reasonably necessary in order to achieve that aim and there are no less discriminatory means available. The employer must therefore go further than merely showing that it behaved reasonably, although it is not necessary to show that there were no other options open to it.

133. The first PCP relied upon by the claimant was the wording of the standard form reference issued by the respondent; In particular the following question –

> "*Can you confirm the number of days the individual was absent in the last two years and the number of occasions?"*

134. The Tribunal accepted that this question amounted to a PCP. This was not in any event in dispute. The respondent admitted in its evidence that this same question appears in the respondent's reference questionnaires across NHS Glasgow.

135. The claimant must however also show that there was a group who shared the same protected characteristic who are put, (or would be put) to a particular disadvantage by that PCP when compared with others. Considering those whose circumstances are materially the same (section 23(1)) but for the protected characteristic (the comparator group) the question is whether the impact of the PCP puts those sharing the claimant's protected characteristic at a particular disadvantage compared with the others in a group who do not.

136. There are thus three elements to this (which overlap to a certain extent):-

(a) Identifying the comparator group;

(b) Identifying the particular disadvantage and;

(c) Determining whether the protected group is put at a particular disadvantage.

137. Although under previous legislation claimants would firstly identify a so called *"pool for comparison"* this is no longer the required approach. (although it is still one way of approaching the question – EHRC Codes paragraphs 4.17 to 4.18).

138. It is still necessary to show some disparate adverse impact on the group sharing the claimant's protected characteristic. The choice of pool or comparator group is one of logic, not of discretion or fact finding - ***Allonby v Accrington and Rossendale College 2001 IRLR 364 CA.***

139. The ERHC Code indicates that in general the pool should consist of all of those who are potentially affected by the PCP in issue, either positively or negatively, while excluding workers who are not affected by it positively or negatively.

140. Applying that rationale in this case, the comparator group consists of all those eligible to apply for the position advertised on the basis of their qualifications. A comparison must then be made between the impact of the PCP on these without the relevant characteristic and its impact on those with – EHRC Code of Practice, paragraph 4.19.

Identifying particular disadvantage

141. The next step is to identify the particular disadvantage suffered. Disadvantage is not defined by the Act. According to the EHRC code *"it could include denial of an opportunity or choice, deterrence, rejection or exclusion"* - paragraph 4.9.

142. Here the disadvantage asserted by the claimant was that the alleged vagueness of this question, which did not specify whether it means the last two years of employment or simply the last two years, meant that disabled person who were more likely to have been absent from work would suffer disadvantage. The Tribunal's understanding of the claimant's case is that without such specification provided by a referee an individual will be called on to recall dates and reasons for absence and that the claimant and persons sharing her disability will be disadvantaged by that.

143. One way of showing disadvantage is to rely on statistics. The claimant offered no statistics but simply invited the Tribunal to accept that group disadvantage would arise in the circumstances. She also invited the Tribunal to accept that her own disadvantage was plain from the circumstances in which her offer had been withdrawn.

144. On the evidence before it, the Tribunal accepted the respondent's submission that the claimant had not provided evidence of a particular disability related disadvantage caused by that wording.

145. Her evidence was that during her telephone call with Miss Burke on 19 December 2019 she *had* been able to recall, without confusion, the reasons for the absences that had been referred to in the references. That also coincided with Miss Burke's evidence of that call.

146. Further the Tribunal was not satisfied that the claimant had established any group disadvantage in respect of the PCP identified. Indeed no evidence of group disadvantage had been presented. In the circumstances the Tribunal did not accept that this question would cause any particular disadvantage to individuals sharing the claimant's disability.

147. The burden of proof rules in indirect discrimination cases require a claimant to show a provision, criterion or practice that results in both group disadvantage and personal disadvantage to the claimant. As the claimant has failed to prove all of these elements the burden of proof has not shifted to the respondent and her claim must therefore fail.

148. Even if the Tribunal was wrong about that, the respondent has an opportunity to show that the PCP in question is *"a proportionate means of achieving a legitimate aim"*, in order to avoid liability. The test to be applied is an objective one. There are two separate elements to the test which must be considered separately; firstly the legitimate aim, then proportionality.

149. The Tribunal was satisfied that the respondent had identified a legitimate aim; namely to promote attendance at work in order to provide an efficient and cost

effective public service and to ensure health and safety of patients and staff through appropriate staffing levels.

150. The wording of the particular question sought to identify certain information about a job applicant's absence record, which is plainly relevant to its recruitment process. The question is used at the stage when a preferred candidate has already been identified. There is no suggestion that it is used to sift applicants. The wording of the question is a sufficiently clear reference to the last two years of employment with that particular referee, lest it would have little or no utility if sent to anyone other than a current employer. In all the circumstances the Tribunal was satisfied that the wording of the reference was reasonably necessary and therefore a proportionate means of pursuing the aim identified by the respondent.

151. In relation to the second PCP identified by the claimant, namely the *"practice of keeping the dates of absence confirmed by former employers confidential or failing to gather such dates"* the Tribunal firstly notes that the second element of the alleged PCP was raised only in submission and was not set out in the claimant's pleadings.

152. While accepting that a one-off decision *could* amount to a PCP, not all one-off acts would do so. As the EAT had previously emphasised, for a PCP to be established there must be some form of continuum in the sense of how things generally are or will be done by the employer. No PCP would be established in relation to a one-off act in an individual case where there was no indication that this was the way things were generally done or would be done in future.

153. On the facts of this case, the dates, save for the long term absence dates, had not even been provided to the respondent, far less kept confidential. Miss Burke had exercised her discretion reasonably in not pursuing them, particularly as the claimant had not asked for them and had never said the number of absences referred to in the references was inaccurate.

154. The Tribunal accepted that other managers may have sought out the absence dates, but that Miss Burke had been reasonably entitled to proceed as she did, in circumstances where the claimant did not have any obvious difficulty recalling the reasons for her absences and had not asked Miss Burke to seek them out.

155. There was no evidence that the respondent had *withheld* from the claimant the dates of her absence when enquiring about the reasons for the absences. Indeed there was no evidence that the respondent was even aware of the reason for the claimant's absences when Miss Burke spoke to her. In the circumstances the Tribunal concludes that no such PCP was adopted by the respondent and the burden of proof has therefore not shifted to the respondent. The claimant's claim in respect of the second PCP must therefore fail.

Victimisation

156. *Section 27.1 of The Equality Act 2010 provides: -*

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

157. In this particular case the respondent accepts that the claimant's e-mails of both 2 and 23 January 2020 made allegations of disability discrimination and were therefore both protected acts within the statutory definition.

158. The Tribunal took the definition of "detriment" from ***Shamoon v Chief Constable of the RUC 2003 ICR 337 and MOD v Jeremiah 1980*** **ICR 13.** It is an objective test focused on the perception of a reasonable worker in all the circumstances. Detriment for these purposes is treatment which a reasonable worker *would or might* regard as being at a disadvantage in all the circumstances. It is not necessary for the claimant to demonstrate some physical or economic consequences.

159. The statutory test requires that the employer must have subjected the claimant to a detriment because she has done, is believed to have done or may do a protected act. It is also well established that the protected act need not be the sole cause or even the principal cause of the detrimental treatment. If there is more than one cause all that is necessary is that the protected act should be a significant, substantial or effective cause of the detrimental treatment.

160. Although it was in brief terms, Miss Truten's response to the claimant's 2 January 2020 e-mail was sent promptly and explained the reason for the length of time it had taken the respondent to reach a decision as well as highlighting one of the main considerations that Miss Burke had taken into account, namely the likelihood that her likely absence pattern would trigger the respondent's absence management policy. It also stated that Miss Truten had attempted unsuccessfully to telephone the claimant to explain the respondent's decision before she had sent the e-mail confirming it.

161. It was also notable that Miss Taylor had investigated and issued on 3 February 2020 a response to the claimant's e-mail of 27 January 2020. In addition to its commendable promptness Miss Taylor's response was evidently reasonably detailed as to the reason for the respondent's decision, apologetic for any upset caused and also offered to address any outstanding

concerns that the claimant may have had at that time. There was no evidence that such an offer was not made in all good faith.

162. In the Tribunal's view, both Miss Truten's e-mail of 3 January 2020 and Miss Taylor's letter of 3 February 2020 dealt appropriately with the concerns raised by the claimant in her emails. It concludes that no reasonable worker would or might regard either Miss Truten's or Miss Taylor's responses as a detriment in all the circumstances. In the circumstances the burden of proof has not shifted to the respondent and this element of the claimant's claim must also fail.

163. For all the reasons above the claimant's claims are dismissed.

Employment Judge: Robert King
Date of Judgment: 15 October 2021
Entered in register: 18 October 2021
and copied to parties