RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mr Williams
Respondent:	Sheffield Teaching Hospitals NHS Foundation Trust
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mr A Ali and Ms A Brown
On:	25-26 November 2021
Representation	
Claimant:	Ms Hogben (Counsel)
Respondent:	Mr Boyd (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of direct disability discrimination under s13 Equality Act 2010 fails and is dismissed.
2. The claimant's claim of discrimination arising from disability under s15 Equality Act 2010 fails and is dismissed.
3. The claimant's claim of failure to make reasonable adjustments under s20 and s21 Equality Act 2010 fails and is dismissed.
4. The claimant's claim of indirect discrimination under s19 Equality Act 2010 fails and is dismissed.
5. The claimant's claim of harassment relating to disability under s26 Equality Act 2010 fails and is dismissed.

RESERVED JUDGMENT

INTRODUCTION

Tribunal proceedings

1. This claim was case managed by Employment Judge Lancaster at a Preliminary Hearing on 18 August 2021.
2. We considered the following evidence during the hearing:
   2.1 a joint file of documents and the additional documents referred to below;
   2.2 witness statements and oral evidence from:
      2.2.1 the claimant; and
      2.2.2 the respondents' witnesses:

Name	Role at the relevant time
1) Miss K Sutton	HR Manager
2) Dr L Kröning	Speciality Registrar in Occupational Medicine

3. We also considered the oral submissions from both representatives, together with the respondent's written submissions. The claimant was not present during the representatives' oral submissions due to a family emergency, but his representative confirmed that he was willing for that part of the hearing to proceed in his absence.

Adjustments

4. We asked the parties if they wished us to consider any adjustments to these proceedings. Neither requested any adjustments
5. We also noted that the parties and the witnesses could request additional breaks at any time.

Rule 50 orders

6. We asked if either party wished to apply for an anonymity order, a restricted reporting order or any similar orders under Rule 50, due to the sensitive nature of the information relating to the claimant's disability that would be published as part of this Judgment. The claimant and the respondent both confirmed that they did not wish to make any such applications.

CLAIMS AND ISSUES

7. The respondent accepted that the claimant is disabled for the purposes of s6 of the Equality Act 2010 and that they had knowledge of his disability at all material times.
8. The claimant brings complaints of:
   8.1 Disability discrimination:
      8.1.1 Direct disability discrimination;

8.1.2 Discrimination arising from disability;

8.1.3 Failure to make reasonable adjustments;

8.1.4 Indirect discrimination; and

8.1.5 Harassment.

ISSUES

9. Employment Judge Lancaster noted that the parties had provided a joint list of issues at the preliminary hearing.

10. We provided the parties with an amended draft list of issues at the start of this hearing. We discussed this with the parties in detail at the start of the hearing and provided them with an updated draft list of issues. The representatives' comments on the updated draft list of issues were incorporated into the agreed version of the list of issues.

11. The agreed list of issues is at Annex 1 to this Judgment.

FINDINGS OF FACT

Context

12. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

13. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the Gestmin case:

> "Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

14. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

15. The respondent is an NHS Foundation Trust, employing approximately 17,500 employees. The respondent manages five teaching hospitals and community services sites in the Sheffield area.

16. The respondent's managers and staff relevant to this claim included:

Name	Role at the relevant time
1) Miss Karrie Sutton	Medical HR Manager
2) KM	Medical HR Manager
3) SH	Assistant Medical HR Manager
4) Dr Helen Kröning	Speciality Registrar in Occupational Medicine

17. The respondent's Medical HR team is a specialist HR area, who are responsible for dealing with HR issues relating to the respondent's medical and dental staff. For example, the team dealt with:

    17.1 all day to day HR matters for medical and dental staff, such as recruitment, training, family leave, sickness management, disciplinary and grievances, payroll issues, sourcing and paying locums and associated documentation;

    17.2 medical and dental staff terms and conditions and policies, including advising on Whitley Council Terms and liaising with trade unions;

    17.3 medical and dental training programmes and career pathways, including dealing with an annual intake of around 300 new trainee doctors each August;

    17.4 acting as the lead employer in the region for around 800 junior doctors who undertake their training on a rotational between the hospitals in the South Yorkshire region, including local hospital trusts who work in partnership with the respondent; and

    17.5 regulated licences to practice and other work-related requirements.

18. The respondent's Medical HR team structure included:

    18.1 Head of Medical HR and an Assistant Head of Medical HR;

    18.2 Three Medical HR Managers and one FTE Assistant Medical HR Manager;

    18.3 4.5 FTE Medical HR Advisers (Band 5 roles); and

    18.4 4 Medical HR Assistants.

19. The respondent had experienced difficulties in recruiting and retaining staff for the Medical HR Adviser role:

    19.1 The last long term postholder (SM) left the role in March 2019. Her replacement (AW) was in post from May 2019 to August 2019, having completed her induction in July 2019;

    19.2 MD was then employed from October 2019 to November 2020 and had completed her induction by December 2019. MD had only just completed a full 12 months' rotation cycle;

    19.3 the work performed in the role was absorbed by the rest of the team in the meantime, who were very busy at the time due to the additional demands placed on the team by the Covid-19 pandemic.

20. The claimant had been working as a Band 3 Medical And Dental Recruitment (Workforce) Administrator at the Rotherham Foundation NHS Trust (the "Rotherham Trust") for around two years by October 2020. The claimant had been employed by the Rotherham Trust since 2017 and had previously worked as a HR Apprentice for a year at the Sheffield Children's Hospital. He was studying for his level 5 CIPD and ILM level 5, both of which he was due to complete in July 2021.

21. The claimant applied for the full time Band 5 role of Medical HR Adviser with the respondent on 2 October 2020, via the respondent's online portal. The salary scale for the role was £24,907 to £30,615 on a full time equivalent basis. The claimant was not asked (and did not state) on his application form that he had a disability.

22. The claimant was interviewed on 3 November 2020 by Miss Sutton, KM and SH. The respondent interviewed seven candidates as part of this recruitment exercise, of whom the claimant and two others were graded as 'appointable'. A fourth candidate was graded as potentially appointable.

23. The claimant impressed the interview panel and achieved a significantly higher score than the other candidates interviewed for the role. Miss Sutton agreed during crossexamination that the claimant was the strongest performing criteria across all of the selection criteria and stated that his performance during the interview meant that he would have been an 'excellent addition' to the team. The claimant did not inform the respondent that he had a mental health condition during his interview. However, he did inform Miss Sutton, KM and SH that he had previously had a sickness absence of 6 weeks. The claimant did not mention the cause of that absence and they did not ask him about it.

24. Miss Sutton emailed the respondent's internal recruitment team on 4 November 2020 stating:

    "We're really struggling for staff at the moment so it would be a massive help if you were able to get Felix cleared quickly so that we can confirm a start date."

25. Ms Sutton also emailed the Medical HR team on 5 November 2020 stating:

"Just wanted to let you all know that we have successfully appointed Felix Williams into our HR Adviser role. He is currently working in Medical Staffing at RDGH so some of you may already know him. I will let you know when we have a confirmed start date."

26. The respondent sent the claimant an official offer letter on 5 November 2020. The letter stated:

"I am pleased that you have accepted the Trust's offer of employment which is conditional upon completion to the satisfaction of the Trust of certain checks…"

27. The claimant's offer letter also enclosed a document headed "Summary Terms of a Conditional Offer of Employment" which stated that the offer was subject to checks including:

27.1 verification of identity;

27.2 eligibility to work in the UK;

27.3 references and employment history;

27.4 work health assessment (which required completion of an online Health and Wellbeing questionnaire).

28. The claimant completed the respondent's online occupational health questionnaire on 5 November 2020. The claimant stated on the form:

"Over 12 months ago I was diagnosed with MPD (Multiple Personality Disorder). I am receiving support via my Psychiatrist and my GP. In September last year, I was signed off work for 6 weeks due to becoming unwell with this disorder. Since my initial treatment, I have had no sickness absence in over 12 months."

29. The claimant emailed Miss Sutton later that day to say that he had disclosed his period of 6 weeks' sickness absence that they had previously discussed. Again, the claimant did not mention the reason for that absence and Miss Sutton did not ask him about it. The claimant was referred to the respondent's in-house occupational health team for an assessment.

30. Ms Sutton confirmed to the claimant by email on 19 November 2020 that she had received his reference and that everything was complete, except for his occupational health assessment. The Rotherham Trust stated in its reference for the claimant that he had taken 45 days' sickness absence during the previous two years.

Occupational health assessment – 3 December 2020

31. The claimant met with Dr Kröning (a specialty registrar within the respondent's occupational health team) at 11.45am on 3 December 2020. Dr Kröning was undertaking her second year of occupational health medicine specialty training as a junior doctor, under the supervision of an occupational health medicine consultant. She had previously completed her core surgical training before starting her training in occupational health medicine. The assessment lasted for around forty-five

minutes. Dr Kröning took some brief handwritten notes during the appointment, which were included in the hearing file. Both the claimant and Dr Kröning wore face masks during the assessment, due to the Covid-19 pandemic restrictions in place at that time.

32. The claimant and Dr Kröning discussed matters including:

    32.1 the claimant's current role with the Rotherham Trust;

    32.2 his foundation degrees in HR and leadership;

    32.3 his six week sickness absence in September 2019;

    32.4 his current diagnosis, previous history, ongoing treatment and investigations; and

    32.5 the claimant's current circumstances, including his work and his studies.

33. The claimant completed a medical consent form, stating that he was willing for Dr Kröning to contact his GP. Dr Kröning advised the claimant that she believed that he was fit to take up the role of Medical HR Adviser, subject to any information in his GP records.

34. Dr Kröning also dictated a draft report on the afternoon of 3 December 2020. This report was never provided to the claimant or to Miss Sutton, but a copy was retained by Dr Kröning. The draft report included the following statements:

    "Mr Williams explained that he is currently working at Rotherham Hospital where he has been an administrator for the past three years. He stated that he was also undertaking foundation degrees in HR and Leadership which he is hoping to continue once he starts in post at STH.

    On his pre-commencement form, Mr Williams disclosed a diagnosis of multiple personality disorder, although he has led me to believe that a review is ongoing as there is a question as to whether he might have bipolar disorder. Mr Williams denied any past medical history of significance and is currently not taking any medication…

    In relation to his mental health he stated that he had been off work for six weeks in September 2019 and following liaison with the GP was referred for a psychiatry opinion. He denied ever requiring hospitalisation and said that he had always been treated on an outpatient basis; he said he had never been prescribed any medication, and any intervention had been in the form of CBT / talking therapy via his workplace.

    On direct questioning Mr Williams stated that he had previously engaged in worrying behaviour but stated that the last time this had occurred was four years ago.

    Intermittently, he does suffer from disconcerting thoughts (the last time this occurred was September 2020), but he explained that these were fleeting and although he had occasionally made plans he had never acted on the impulses as he felt able to cope with the challenges, particularly since accessing therapy. He disclosed

> sometimes hearing or seeing things that are not there but said that this only happened on rare occasions and that it had been fully explored with the psychiatrist.
>
> On assessment there was virtually no evidence of anxiety or depression, although Mr Williams did admit to suffering from unpredictable mood swings on a daily basis.
>
> However, he denied ever experiencing any thoughts of harming anyone else or having difficulties coping with the emotional lability…
>
> ..He kindly consented to me asking for more information from his GP, but I will only update you should this be required or if the response received raises significant concerns.
>
> In the interim, there is nothing to suggest that Mr Williams would be unfit to take up his post as HR Adviser, although it would be recommended that you remain vigilant; you may wish to discuss with him once he starts in post about potential support required, as future recurrences of emotional health problems can at this point not be fully ruled out."

Claimant's complaint regarding Dr Kröning

35. The claimant spoke with Miss Sutton later that day and mentioned to her that:

    35.1 he had been provisionally cleared by occupational health, subject to obtaining further information from his GP regarding his previous period of absence;

    35.2 he referred to historic health problems but did not disclose the details of those problems, other than to state that they related to a mental health condition; and

    35.3 he commented that he did not feel that there was anything that would stop him from doing the role.

36. We accept Miss Sutton's evidence that she purposely did not ask the claimant any further questions about his health problems or condition.

37. Miss Sutton had another conversation with the claimant later that day, during which the claimant said that he was upset by the way in which Dr Kröning handled his assessment. Miss Sutton accepted during cross-examination that the claimant had referred to parts of his discussion with Dr Kröning, during which Dr Kröning said that the claimant "was not a brain surgeon". Miss Sutton did not recall the claimant referring to Dr Kröning saying that she wanted to request his GP records to check that there was 'nothing sinister' in them. Miss Sutton also did not recall the claimant stating that Dr Kröning had suggested putting his mental health into 'categories'.

38. Miss Sutton said that the claimant was quite anxious and thought that this was because he wanted to start the Medical HR Adviser role without further delay. Miss Sutton apologised that he felt upset by the assessment because she was trying to defuse the situation.

39. Miss Sutton contacted the respondent's recruitment team on 3 December to ask if the claimant was able to hand in his notice, stating: "Ideally we'd like him to start on 4th January if possible". The recruitment adviser responded, stating:

    "We would need to wait for the report from Occupational Health to come through before confirming a start date for Felix, as we need to review the report to make sure if any adjustments are required these can be accommodated."

40. Ms Sutton relayed the recruitment adviser's response to the claimant on the same day.

41. The claimant then emailed a letter of complaint to TB (Clinical Nurse Manager at the respondent) on 3 December 2020. TB forwarded the claimant's complaint letter to Dr Kröning on 9 December 2020.

42. The claimant's complaint letter stated:

    "I have been provided with your email for me to raise a complaint with the Occupational Health Pre Employment Screening assessment…I have some concerns that I have outlined below.

    …

    The doctor arrived, I believe she said her name was Dr Cronin (I may be mistaken), who took me into a room. I first noticed that the doctor's approach was very cold and there were no conversation warmers such as "how are you" etc. The first question was "Do you know why you are here?" To which I responded with "Pre-employment clearance". I felt very uncomfortable with her attitude, and I also informed her that I was anxious about this appointment to which she did not respond.

    The doctor began to question what I do currently for work, which is a Medical Workforce Administrator in HR at The Rotherham Foundation Trust. The conversation began to develop and she asked what my level of education is to which I responded that I have completed my GCSE's and currently I am completing two foundation degrees with an expected completion date of April 2022.

    This then made the doctor raise the question that the post is a full time, 37.5 hours per week and that she has concerns that I won't be able to complete my degrees. I advised I am halfway through them both and I have no concerns. She responded by stating that " well, you are not a surgeon". I fail to see how this is even relevant since I am not in the medical profession, I am an HR professional.

    On my questionnaire form, I was sent before the appointment, I disclosed that I have been diagnosed with Multiple Personality Disorder and had 6 weeks of absence over 12 months ago. I advised I am on no medication at the moment, and in fact, my mental health has significantly improved in the last year. The doctor queried who diagnosed me, which I informed that my GP was looking after me however referred me to a Psychiatrist…who diagnosed me with MPD. I did disclose, however, that the Psychiatrist is reviewing my case with a possible amendment to diagnosis to Bipolar and I am waiting to hear from them.

The doctor then gave her opinion that she doesn't think it is bipolar as my mood doesn't cycle rapidly. This was 15 or so minutes after speaking to me. I did not ask for her opinion nor did I want it.

She asked me about my symptoms which are that my moods change quickly and that on occasion I do hear and see things, all which I have informed my Psychiatrist about who doesn't seem too concerned about it, neither am I at the current moment. I also mentioned that I have Avoidant Personality Disorder, but she seemed keen to explain her rationale regarding my diagnosis.

The doctor questioned my eating habits to which I said I eat normally for someone of my age and that I have no concerns. Whilst I was speaking, she looked me up and down as if I was someone beneath her. The conversation quickly changed as she began to question if I self-harm/if I ever have which I advised yes, many years ago. I feel that the questions weren't to be supportive and get information, but asked in a way which she twisted what I said to make things sound worse than what I said or meant. I didn't get an opportunity to explain as I couldn't speak due to how I was feeling.

She then raised that I am 22 years old and that I am very young in my diagnosis and that potentially it could change. The doctor then said the reasoning I may not be on any medication is that my GP and Psychiatrist don't know my diagnosis, which couldn't be further from the truth. This is a conversation I would rather have with my GP or my Psychiatrist who knows me very well and who would be able to agree that I do not like opening up to strangers regarding my mental health and that this appointment has left me traumatised.

I feel that I have been targeted and singled out by this doctors approach and I do not feel that it is the standard the GMC and STH would expect. The doctor seemed adamant that she needed to see my medical records from my GP to ensure that there is "nothing sinister". I felt that she was covertly calling me a liar which is outrageous.

I asked for further clarity about what was happening, as I want to start my new role as soon as possible. She then said I have more "positives than negatives" - this was about my mental health. A person I have spoken to less than an hour is placing my mental health and the symptoms I have with it into categories. She then advised that she is going to write a report and send it to Karrie Sutton (my new line manager) and the recruitment Adviser. At this point, she said she will notify my new line manager of my mental health diagnosis to which I said I didn't want to happen due to the stigma attached to mental health, not to mention that I feel fine within myself. The doctor likened my diagnosis to Diabetes and Epilepsy; people may act differently and management would not know why. I felt I had no choice but to let her add this to my report otherwise I wouldn't be cleared to start my new role.

Subsequently, I rang my new manager and informed her myself of the above diagnosis as I did not want this doctor to put her spin on a diagnosis which she has no idea about.

I have felt as though I have been interrogated by the police over something small which I cannot foresee an issue with. I feel traumatised by the appointment, so much so I am considering further action.

I would be keen to know if you can clear me on the above and what notes the doctor has made without contacting my GP as this will delay my start date for weeks, potentially months. I enjoy working and currently have been in my current role for over two years working full time, and I have been employed at The Rotherham Foundation Trust for over three years.

I would appreciate if you could escalate this appropriately and give me an outcome within 14 days so I can decide if I wish to proceed with my offer of employment. I look forward to hearing from you"

Claimant's allegations regarding his assessment with Dr Kröning

43. The claimant has alleged at paragraphs 3 to 5 of his Grounds of Claim that that Dr Kröning 's conduct of his assessment on 3 December 2020 amounted to harassment. The claimant states that the basis of his allegations are that Dr Kröning :

    43.1 "displayed a rudeness and wholly negative approach to the claimant";

    43.2 "expressed unfounded concerns that he wouldn't be able to complete his degrees to which he advised her that he was already halfway through them";

    43.3 "gave her opinion that she didn't think that [the claimant's diagnosis] was bipolar as purportedly his mood doesn't cycle rapidly";

    43.4 "alleged that the claimant was very young in his diagnosis and that potentially it could change";

    43.5 "said the reason he may not be on any medication was that purportedly his GP and psychiatrist don't know his diagnosis";

    43.6 "insisted that she needed to see his GP records on the grounds that there was 'nothing sinister' in them", thereby insinuating that the claimant was being "dishonest"; and

    43.7 "said that he had more 'positives than negatives'" by reference to his mental health.

44. The claimant stated in his oral evidence that he believed that Dr Kröning had taken a dislike to him, but that he was not sure of the reason why that was so. The claimant stated during cross-examination and in response to the Tribunal panel's questions:

    44.1 "I feel Dr Kröning's approach was very cold and I'm not sure why.";

    44.2 "One of my initial concerns is that because I am openly gay – I felt that maybe Dr Kröning treated me differently because of that…", although he

noted that “she never made any homophobic remarks or anything like that at all”;

44.3 “I felt that I was treated from the offset very differently – her body language and the way she presented herself was hostile – that’s why I said it was disability discrimination”;

44.4 “I have never been treated with such contempt by a medical professional…I can’t just pick one thing – it was multiple different little things right from the offset”;

44.5 “In my opinion, I felt that because I had a complex MH diagnosis which clearly required a lot of work involved in requesting GP notes, speaking to a lot of other people – I felt that Dr Kröning treated me differently because of that”;

44.6 “If it was someone with a physical condition (such as a broken leg), it would have been clear cut. They wouldn’t have questions to ask about my family.”;

44.7 “When Dr Kröning was asking me about my qualifications…she seemed to be caught up about how old I was at the time”;

44.8 “Dr Kröning did not seem to like me for whatever reason – I’m not sure of the reason why”.

45. Dr Kröning’s evidence included that:

45.1 it is standard practice in an occupational health assessment to explore someone’s occupational and educational background to establish if there were any adjustments in place for them;

45.2 she did not say that the claimant ‘was not a surgeon’, but she may have asked for clarification as to how the claimant was managing to balance his studies with his work;

45.3 she did discuss the possibility of the claimant being bipolar, because he referred to the possibility of a bipolar disorder diagnosis;

45.4 she did not use the words ‘nothing sinister’ during the assessment. She noted that the word ‘sinister’ in medical terms might indicate a physical problem, such as a tumour;

45.5 she may have used the words ‘positives and negatives’ in describing features or examples of how he answered questions portraying an overall picture of his mental health, for example by referring to a lot of ‘encouraging factors’;

45.6 she discussed the assessment and the claimant’s complaint with her manager and recorded her thoughts in a reflection note as part of her reflective portfolio (for her own training purposes).

46. Dr Kröning recorded in her reflection note, which she recorded in the style of a response to a complaint letter:

> "Whilst I appreciate that disclosing some conditions and responding to further questions, particularly in relation to lifestyle or disconcerting thoughts and behaviour, may be difficult, it would be important for the Occupational Health Service to explore relevant details so that any opinion is formed on the basis of the full picture rather than assumptions. The purpose of enquiring about previous education and occupation is part of the assessment process, as this may reveal whether someone is likely to experience difficulties or may need adjustments / support at work. Questions relating to diagnoses, investigations, specialist opinions, GP input, medication, therapy, hospitalisations etc. would all be standard as part of obtaining medical background information with the aim of establishing factors such as severity, potential impact on work, adjustments or adaptations that might be needed, prognosis and possible impact on future attendance or ability to carry out the job role."

47. TB and senior managers (including Dr Kröning's educational supervisor) within the respondent's occupational health team considered the claimant's complaint and responded by letter of 11 December 2020. The letter stated:

> "I regret that the assessment did not go according to your expectation.
>
> Occupational Health is an impartial and independent Advisory service. Our role is to make an objective assessment of an employee and/or a prospective employee's health, to identify how their health could be affected by work and how their ability to work could be affected by the health problem that they might have.
>
> We also consider whether any adjustment may be appropriate in order to enable an employee/prospective employee to discharge their contracted duties. We provide a report to the managers with our opinion and/or recommendations. It is for the management to take a final decision.
>
> …
>
> The doctor carried out the assessment by asking question about you and your life style, such as enquiring about your degrees and other life activities.
>
> I am sorry you feel the doctor "targeted and singled you out", she was carrying out a standard questioning of your medical history."

48. The letter also enclosed a further consent form for the claimant to sign in order that the respondent could contact his GP. The claimant signed this form again and did not raise any further concerns. He said that in hindsight he should have requested an appointment with a different occupational health professional.

49. We concluded (having considered the evidence) that during the assessment on 3 December 2020, the following matters were discussed:

49.1 the first questions that Dr Kröning asked were questions to confirm claimant's date of birth and identity;

49.2 we accept that Dr Kröning did not make any small talk with the claimant at the start of the consultation. We concluded that she was focussed on the assessment itself and that she followed her normal procedure for starting an assessment;

49.3 we accept that this made the claimant uncomfortable and heightened his existing anxiety about the assessment, as he stated: "I would expect Dr Kröning to have a bit of small talk – as someone with an anxiety disorder I found this quite difficult – I am already conscious of how people with mental health disabilities are perceived…";

49.4 they explored how the claimant was managing to juggle the demands of his work and his studies. Dr Kröning did not state that the claimant would be unable to complete his degree studies, although we accept that the claimant's perception was that this was what she was suggesting by asking questions on that subject;

49.5 Dr Kröning did say words along the lines of 'well, you are not a surgeon' and the claimant was unsure as to whether it was a joke. Miss Sutton stated in her oral evidence that the claimant mentioned this comment to her during their call on 3 December 2020;

49.6 they discussed his current treatment and the fact that he was not currently taking medication. They discussed the fact that the claimant's diagnosis was under review with his psychiatrist. They also discussed bipolar disorder as a possible alternative diagnosis;

49.7 we concluded that Dr Kröning did not use the words 'nothing sinister' with respect to the claimant's GP records. We accept Dr Kröning's evidence that the word 'sinister' in medical terms would refer to a tumour or a shadow on a scan. In addition, Miss Sutton did not recall the claimant complaining about these words in their conversation. However, even if Dr Kröning had used those words, there was no implication that the claimant was being dishonest;

49.8 Dr Kröning accepted that she used the words 'positives' and 'negatives' in the context of trying to obtain an overall picture of the claimant's mental health. She described some of the examples that he gave about his condition as 'positive', rather than describing his condition itself as 'positive' or 'negative'.

50. Dr Kröning wrote to the claimant's GP, asking for further information regarding the claimant's medical condition. She stated:

"He denied any significant past medical history but led me to believe that he had been off sick for six weeks in September 2019 and required referral to Psychiatry. He

stated that he had been diagnosed with “multiple personality disorder” but said that he had never required hospitalisation or medication and had merely received CBT / talking therapy.

Nevertheless, he suggested that the psychiatrist may be revising the diagnosis as it is unclear whether he may actually have bipolar disorder. Therefore, I should appreciate if you would explore whether further psychiatry assessment is planned or whether Mr Williams may have misunderstood something.

In order to an maximise any Occupational Health input and provide an appropriate assessment of his fitness to work at Sheffield Teaching Hospitals I should be grateful for any medical details you may be able to supply. I should be particularly keen to obtain copies of any reports from the psychiatrist and treatment plans…”

Dr Kröning’s review of the claimant’s GP records

51. The claimant’s GP sent his medical records to Dr Kröning, under cover of a letter dated 21 December 2020 but which was received by the respondent’s occupational health department on 7 January 2021. The GP’s records included the following information:

51.1 referral letters from the claimant’s GP to the psychiatric Access Team, including a letter of 31 March 2020 which stated:

“He was initially referred to yourselves in September 2019…

Unfortunately he DNA'd [did not attend] two appointments with yourselves in November 2019 and has now contacted me asking for a re-referral.

He reports still struggling with his rapidly cycling mood. He is not currently taking any antidepressant medications. He described feeling more 'on edge’ and having increased frequency of visual hallucinations whilst on medication…”

51.2 the GP also sent a letter of 15 April 2020 to the psychiatric Access Team stating:

“This gentleman has been referred to you by my colleague…

He has rung me today to report that his symptoms are worsening, in particular with regard to his visual hallucinations, which he tells me and now there almost all of the time.

He describes phases where his mood can be very elated for days at a time then very, very low. At the times when he is elated he tells me that he behaves in a way that he later regrets…

He finds it very difficult to sleep during this time and describes having a “rush of thoughts". His symptoms were worse whilst he was taking and SSRI but since stopping he is struggling to cope with his mood.

I have started him on mirtazapine today in the hope it will help with his sleep and mood. I would be most grateful if you could expedite his appointment as I am concerned that his mental health is deteriorating."

51.3 the claimant met with a psychiatrist (Dr C) who provided letters dated 18 June and 17 July 2020 and suggesting that the claimant be referred to Improving Access to Psychological Therapies ("IAPT"), including the information set out below:

18 June 2020: "Felix … presents with long standing feelings of insecurity, rejection and inferiority secondary to adverse early life experiences. His perpetuating factors include his sensitivity to rejection and criticism, distrust of people and tendency to internalize his personal struggles. He also disclosed having disproportionate and somewhat exaggerated stress responses to challenging situations (for example at work), which further hamper his ability to manage stress in a healthy way. We also discussed how his struggles had impact on his self-esteem and confidence and how his presentation was in keeping with a diagnosis of anxious avoidant personality disorder."

17 July 2020: "We spent some time discussing his diagnosis. I explained that it is very much possible to have traits of more than one personality disorder and that his difficulties could very much be explained by a diagnosis of Mixed Personality Disorder with anxious-avoidant and borderline personality traits, as there was a significant overlap of symptoms between the two. I also reiterated that the mainstay of treatment for these was still through psychotherapy rather than medication alone."

51.4 however, IAPT then wrote to the claimant's GP on 2 September 2020 and said that they were unable to treat the claimant due to the nature of his condition. The letter stated:

"Following this assessment… we feel that Mr Williams is not appropriate for our service. The main factors forming our decision are "a diagnosis of Mixed Personality Disorder with anxious-avoidant and borderline personality traits" as reported within the letter by [Dr C], severe mood fluctuations, and seeing images of people (strangers) and hearing someone call out his name.

In addition to these issues, post-traumatic stress disorder (PTSD) has been indicated, following an Impact of Events (IES) disorder specific questionnaire carried out during the IAPT assessment, where Mr Williams scored a total of 56/88 (a score of 33 or over is indicative of PTSD..."

52. We accepted Dr Kröning's evidence during cross-examination that the additional information in the medical records led her to the following conclusion:

"I would say that the surprise would be the mismatch between the apparent picture created during consultation and the notes/initial report I dictated – the discrepancy apparent on reading the [GP's letter] e.g. lack of energy, motivation and feeling numb. I don't think that came across when the claimant spoke to me and engaged with me appropriately during the consultation. This painted a slightly different picture…He told me he was able to cope with emotional lability and he had been able to do so for some time…".

53. Dr Kröning also noted the following points during cross-examination, which were evidenced in the medical records that we have referred to above:

53.1 the claimant had been provided with multiple diagnoses for his condition to date and his diagnosis was still under review;

53.2 the claimant had not attended two medical appointments in November 2019 (for reasons which were not explained in the GP's correspondence with psychiatry), which she stated suggested that he may not have been accessing appropriate support at that time;

53.3 the claimant contacted his GP for re-referral to psychiatry in early 2020 and identified problems with both unpredictable mood swings and his medication, which indicated emotional lability;

53.4 the psychiatrist's letter reflected the claimant's comments to the psychiatrist during their therapeutic work together, which had a different purpose to an occupational health assessment. For example, she stated

that a psychiatrist would not need to bear in mind matters such as ability to attend work and difficulties in judging job demands; and

53.5 the difference in opinion between the claimant's psychiatrist and IAPT as to the claimant's condition suggested that there had been a change in the claimant's condition or in his situation; and

53.6 she had concluded that: "A number of factors led me to believe he was still in a state of flux: he was struggling significantly with his mental health; the feedback from his psychiatrist and IAPT suggested a degree of emotional fragility; there was a discrepancy between someone who is articulate and engaged and states that he has no difficulty at work and someone who is portrayed by his psychiatrist as someone who has unhealth stressors; the move to the respondent would be a potentially destabilising situation with a step up in responsibility".

54. Dr Kröning stated during cross-examination that she had discussed matters with her educational supervisor and concluded that: "the risk of potentially precipitating a crisis seemed to be quite substantial", given the 'potential stressors' on the claimant involved in taking up a "demanding and challenging job role". She also stated:

"I considered what could be done to provide support. During that discussion, the main suggestion regarding support would be suggesting a certain degree of stability

to allow the claimant time to continue to engage with appropriate professional support…before taking the leap into a new role".

55. We accept Dr Kröning's evidence that she discussed matters with her supervisor and that their view was that in light of the information contained in the medical records, the claimant needed a period of stability for his mental health before taking on a new role.

Dr Kröning's report of 20 January 2021

56. Dr Kröning wrote a letter dated 20 January 2021 to the respondent's recruitment team (copied to the claimant), stating that the claimant would not be fit to take up the role of Medical Adviser. The letter stated:

"From the information received it seems that Mr Williams has been struggling with his mental health for some time and that there is currently no evidence of him having achieved sustained stability; I believe he may have been referred for further professional input which is pending.

Therefore, Mr Williams would, in my opinion, not be fit to take up the proposed role at this point in time. It would be recommended that he achieve further improvement and demonstrate evidence of sustained stability for a substantial period before applying for this position.

Please do not hesitate to contact the Occupational Health Service should you require clarification."

57. Dr Kröning explained in response to the Tribunal's questions that "a period of sustained stability" would involve the following:

"I would expect a patient to be continuously engaging with appropriate follow up – either through their GP or therapeutic secondary services, that they maintained a degree of insight, that there was a minimal amount of significant crises requiring professional intervention or support from others and a minimal impact on every day function to an acceptable level."

58. Dr Kröning stated that the evidence did not suggest this had been achieved as at January 2021 because:

"The fact that there was a pending review by the psychiatrist, a degree of flux in both the diagnosis and the optimisation of treatment. Also, although the claimant led me to believe that he was coping very well, the information received from his treating professionals implied he was struggling significantly, although he had not disclosed the full nature of that to me".

59. Dr Kröning also suggested that a period of sustained stability would need to be 3-6 months, or possibly longer, given the fluctuating nature of the claimant's condition. She also noted that there may never be a complete cessation of the claimant's symptoms, but that this would not be a pre-requisite of being fit to work. She said that:

"I felt that taking a step up in terms of grade and responsibility in a significantly larger organisation – 4 times larger than Rotherham – significantly increased workload, substantial pressures, staffing shortages and challenges – I was mindful of the destabilising effect on the claimant's mental health condition and the risk of precipitating a mental health crisis…"

60. We accept that Dr Kröning concluded that the claimant was not currently fit for work in the role as a Medical HR Adviser based on the information provided by the claimant's GP, including the correspondence with his psychiatrist and IAPT. The claimant did not provide any medical evidence suggesting that Dr Kröning's conclusion were unfounded. In addition, the claimant did not raise a complaint with the respondent regarding her report of 20 January 2021 or request that the respondent obtain a second opinion from another occupational health professional.

Matters arising from the claimant's condition

61. The claimant has claimed that two things arose from his disability for the purpose of his discrimination complaints:

    61.1 his fluctuating mental health; and

    61.2 his need for continued professional mental health advice and/or therapy.

62. Dr Kröning accepted that the claimant's condition may mean that his state of mental health fluctuated. She also accepted that the claimant needed further professional mental health advice and/or therapy.

63. We concluded that Miss Sutton was also aware of both of these issues by 20 January 2021. This was because Dr Kröning's opinion dated 20 January 2021:

    63.1 stated that: "Mr Williams has been struggling with his mental health for some time and that there is currently no evidence of him having achieved sustained stability"; and

    63.2 referred to a request for his GP records and referred to there being further professional input pending (which suggested that he was still receiving continued professional mental health advice).

Respondent's withdrawal of claimant's job offer

64. The claimant called Miss Sutton on Thursday 21 January 2021 after he had read the report from Dr Kröning. Miss Sutton had not yet received the report. The claimant told Miss Sutton that occupational health had said that he was not suitable for the role of Medical HR Adviser and did not recommend any adjustments. The claimant told Miss Sutton that he had 'got a grip' on his mental health. The claimant then said that he would forward the report to Miss Sutton. Miss Sutton said that she was due to go on leave for a week and that KM would deal with this issue in her absence.

65. Miss Sutton discussed the matters with other senior HR managers, including KM. Miss Sutton said that they did not ask occupational health for clarification because Dr Kröning's opinion clearly stated that the claimant was not fit to take up the role of

Medical HR Adviser. Miss Sutton accepted that the report did not provide comprehensive information as to why Dr Kröning had reached that conclusion. However, she said that this was because the recommendation that the claimant needed to obtain a period of stability for his own health, rather than any adjustments that the respondent could make as part of his role. Miss Sutton then went on leave on Monday 25 January 2021 for a week.

66. We accept Miss Sutton's evidence that the decision not to proceed with the claimant's appointment was a joint decision, having considered advice from their recruitment colleagues. Miss Sutton and her colleagues decided that because health clearance was one of the conditions of employment the claimant's appointment could not proceed. KM called the claimant (in Miss Sutton's absence on leave) regarding the withdrawal of his job offer. The claimant asked KM if there as anything he could do to stop this from happening. KM replied 'no, unfortunately not' and she noted that the post had been withdrawn, having discussed the matter with senior HR management.

67. KM then wrote to the claimant on 28 January 2021 stating:

"Further to our recent telephone conversation. In view of the advice from Sheffield Occupational Health Service regarding health clearance for the above post which you have received a copy of, it is the decision of Sheffield Teaching Hospitals NHS Foundation Trust to withdraw the offer of employment."

68. We concluded that the respondent's senior HR managers withdrew the claimant's job offer because Dr Kröning had advised the respondent that the claimant was not fit to take up the role of Medical HR Adviser at that point in time. There was no evidence that the claimant's job offer was withdrawn because of:

68.1 his disability in and of itself;

68.2 his fluctuating mental health; and/or

68.3 his need for continued professional mental health advice and/or therapy.

69. The claimant declared his disability when he completed his Health and Wellbeing Questionnaire on 5 November 2020 and that was the reason why he was referred for an occupational health assessment. Dr Kröning initially concluded that the claimant was fit to work in the role of Medical HR Adviser, subject to any additional information in the GP records (as set out in her draft report dictated on 3 December 2020). We concluded that Dr Kröning's opinion changed when she reviewed the information provided by the GP. In addition, Dr Kröning's report did not recommend any specific adjustments that the respondent could take to enable the claimant's appointment to continue.

70. The claimant told Miss Sutton on 3 December 2020 that he had been cleared by occupational health as fit to work, subject to further information from his GP about his 6 week absence in 2019. He also told Miss Sutton that he had a mental health condition, although he did not provide any details of his condition. At that point in time, Miss Sutton remained keen to progress the claimant's appointment and

contacted the respondent's recruitment team to ask if he could hand in his notice, but was advised against this. It is clear that Miss Sutton and her colleagues decided to withdraw the claimant's offer after they received Dr Kröning's report of 20 January 2021.

Additional findings of fact relating to the alleged PCPs

71. The claimant has alleged that the respondent operated provisions, criteria or practices involving:

    71.1 requiring sustained stability for a substantial period for people conditionally appointed to Medical HR Adviser roles; and

    71.2 refusing employment in the roles of Medical HR Advisers to people whom are under the care of professional health advisers.

72. We accepted Dr Kröning's evidence during the Tribunal panel's questions that:

    72.1 she was aware of other occasions where a sustained period of stability was suggested before an individual was fit to work in a particular role;

    72.2 she had previously set out concerns about individual's potential fitness to work when that individual had applied for a new role; and

    72.3 she had assessed other individuals who were under the care of mental health professionals, including both individuals who were assessed as fit for employment and individuals who were assessed as not fit for employment. She stated that these were dealt with on a 'case by case basis'.

73. We also accepted Miss Sutton's evidence during the Tribunal panel's questions that:

    73.1 the respondent had previously employed individuals for the role of Medical HR Adviser who were under the care of mental health professionals;

    73.2 during her 14 years' experience of working in Medical HR for the respondent, occupational health have not declared any other applicants as unfit to work in a particular role; and

    73.3 she was aware that she could ask questions of occupational health, having previously sought clarification regarding occupational health reports for existing employees.

Claimant's suggested adjustments

74. The claimant has suggested during these proceedings that the respondent should have considered two potential adjustments for him:

    74.1 placing the claimant's job offer on hold whilst his mental health was reviewed and/or stabilised; and

74.2 continuing to offer the claimant the role of Mental Health Adviser, then reviewing his performance and ability to carry out that role once he was appointed.

75. The claimant also alleges that the respondent's failure to consider whether anything else could be done to prevent the withdrawal of his job offer amounts to harassment.

76. We accept Miss Sutton's evidence on these points, which included:

76.1 her evidence (referred to above) of the difficulties that the respondent had faced in recruiting and retaining staff for the Medical HR Adviser role;

76.2 that the Medical HR team were extremely busy under normal circumstances, but that they had been working and continued to work under significant additional strain due to the Covid-19 pandemic (e.g. managing Covid-related health and safety issues (including in relation to Covid policies, tests, vaccinations and test and trace notifications), dealing with additional sickness absence and additional cover for the respondent's own hospitals and the local nightingale hospital);

76.3 they appointed another candidate from the same recruitment exercise to start working in April 2021 (after their notice period had expired);

76.4 the respondent was unable to hold open the Medical HR Adviser role for the claimant for a further 3-6 months plus his one month's notice period. She said that this was because the Medical HR team's staff were already under strain and they needed someone who could start in post sooner than the claimant would have been able to;

76.5 the respondent could not have appointed the claimant on a trial or interim basis. Miss Sutton said that the claimant was a high performing candidate and that his awareness and experience of Medical HR provided a good foundation to start from. However, she pointed out that the claimant would have to move to a new organisation. She also said that the claimant's existing role with the Rotherham Trust was focused on recruitment. By way of contrast, the Medical HR Adviser role involved all of the width and

breadth of a HR role. Miss Sutton also stated that the respondent is a lead unit organisation, i.e. the Trust employs the junior doctors that work at other district general hospitals and is responsible for organising their work rotations;

76.6 the respondent would have invested a significant amount of time to take the claimant through his four week induction period and support him whilst he got to grips with the role. Miss Sutton said that it takes a 12 month period to see full cycle of role and gain the exposure necessary to be able to work independently in the role.

77. The respondent has also relied on its duty to provide a safe working environment as a potential defence to the claimant's discrimination arising from disability and indirect

discrimination complaints. We accept Dr Kröning's evidence that by 'safe working environment', the respondent was principally concerned about the claimant's welfare. She stated that the claimant would be:

"taking a step up in terms of grade and responsibility in a significantly larger organisation (the respondent is four times larger than Rotherham), a significantly increased workload and substantial pressures (such as staffing shortages and challenges). I was mindful of the destabilising effect on the claimant's mental health condition and the risk of precipitating a mental health crisis by changing job roles, locations and demands – taking lots of steps in one big leap. I thought that this may be too great a leap to take at that point in time.

…

I did not feel there was any significant risk to other people as such, other than re impaired function when he was in crisis – he may misjudge situations, may become difficulties eg having to attend disciplinaries, having difficult conversations re health professionals

It was not regarding any direct risk to others – it was more his possible risk to his own mental wellbeing."

RELEVANT LAW

78. The summary of the relevant law is set out at Annex 2 to this Judgment.

79. We have also taken into account the legal principles referred to by both parties' representatives during their helpful submissions. We have not summarised their submissions in this Judgment. However, we have considered the respondent's representatives written submissions and the oral submissions from both representatives in reaching our conclusions.

APPLICATION OF THE LAW TO THE FACTS

80. We will now apply the law to our findings of fact.

Direct discrimination

81. We have concluded that the withdrawal of the offer of the Medical HR Adviser role potentially could amount to less favourable treatment, subject to the issue of hypothetical comparators. However, we do not need to reach a conclusion on this question because we concluded that the reason for the withdrawal of the role was not due to the claimant's disability. Rather, Miss Sutton, KM and their colleagues decided to withdraw the offer of the role because the occupational health report of 20 January 2021 that stated that the claimant was not fit to perform the role at the current time. In particular, we note that:

81.1 Miss Sutton was keen to expedite the claimant's appointment, although she was aware that the claimant had a period of 6 weeks' absence from the date of his interview. She remained keen to expedite his appointment (for example, but contacting the respondent's recruitment team), after the claimant told her that he had a mental health condition; and

81.2 Miss Sutton and her colleagues decided to withdraw the claimant's offer of the role shortly after receiving the occupational health report of 20 January 2021. We accept Miss Sutton's evidence that their decision was due to the fact that the health clearance was a condition of the offer of the role, as set out in the document enclosed with the claimant's offer letter.

82. The claimant's complaint of direct discrimination therefore fails.

Discrimination arising from disability

83. We have concluded that the withdrawal of the offer of the Medical HR Adviser role did amount to unfavourable treatment for the purposes of this complaint. We also concluded that the respondent had knowledge of the 'something arising' from the claimant's disability set out in the agreed list of issues, i.e.:

83.1 the claimant's fluctuating mental health condition; and

83.2 the claimant's need for continued professional mental health advice and/or therapy.

84. We considered the question of knowledge of the 'something arising' and concluded that the respondent had knowledge of both of these matters before deciding to withdraw the offer of the Medical HR Adviser role. In particular, we found that:

84.1 Dr Kröning accepted that the claimant's condition may mean that his state of mental health fluctuated. She also accepted that the claimant needed further professional mental health advice and/or therapy.

84.2 We concluded that Miss Sutton was also aware of both of these issues by 20 January 2021. This was because Dr Kröning's opinion dated 20 January 2021:

84.2.1 stated that: "Mr Williams has been struggling with his mental health for some time and that there is currently no evidence of him having achieved sustained stability"; and

84.2.2 referred to a request for his GP records and referred to there being further professional input pending (which suggested that he was still receiving continued professional mental health advice).

85. However, we have concluded that the claimant's job offer was not withdrawn because of 'something arising' from the claimant's disability. The key reasons for our conclusion are:

85.1 the fact that the claimant's mental health condition fluctuated was not the reason why the occupational health report concluded that he was not fit to work in the role at that time. It was also not the reason why the claimant's job offer was withdrawn. The report stated that the claimant needed to "demonstrate evidence of sustained stability for a substantial period of time before applying for this position". We accepted Dr Kröning's evidence that:

85.1.1 this was likely to involve a 3-6 month period during which: "I would expect a patient to be continuously engaging with appropriate follow up – either through their GP or therapeutic secondary services, that they maintained a degree of insight, that there was a minimal amount of significant crises requiring professional intervention or support from others and a minimal impact on every day function to an acceptable level"; and

85.1.2 there may never be a complete cessation of the claimant's symptoms, but that her concern was that: "A number of factors led me to believe he was still in a state of flux: he was struggling significantly with his mental health; the feedback from his psychiatrist and IAPT suggested a degree of emotional fragility; there was a discrepancy between someone who is articulate and engaged and states that he has no difficulty at work and someone who is portrayed by his psychiatrist as someone who has unhealth stressors; the move to the respondent would be a potentially destabilising situation with a step up in responsibility".

85.2 there was no evidence that the fact that the claimant was receiving professional mental health advice and/or therapy led to the withdrawal of the claimant's job offer. In addition, Miss Sutton stated that another Medical HR Adviser had been employed whilst receiving support from professional mental health advisers.

86. However, if our conclusion is incorrect, then we have also considered whether the respondent withdrawal of the claimant's job offer was a proportionate means of achieving a legitimate aim. We note that the Tribunal must make its own assessment and apply an objective test when considering this issue, having regard to the respondent's workplace practices and organisation needs (see City of York Council v Grosset referred to in our legal summary).

87. The respondent stated that the aim on which it relied was its duty to provide a safe working environment. Dr Kröning clarified during her oral evidence that her main concern was for the claimant's health, rather than the safety of his colleagues or others. We have concluded that this was a legitimate aim.

88. We then need to consider whether the withdrawal of the claimant's job offer was a proportionate means of achieving that aim. This involves consideration of whether

any alternative measures could have been taken. We accepted in our findings of fact that Dr Kröning's conclusion that the claimant was not fit to work in the role of Medical HR Adviser at the time based on the information that was available to her at that time because: "I felt that taking a step up in terms of grade and responsibility in a significantly larger organisation – 4 times larger than Rotherham – significantly increased workload, substantial pressures, staffing shortages and challenges – I was mindful of the destabilising effect on the claimant's mental health condition and the risk of precipitating a mental health crisis…". The claimant did not provide any medical evidence suggesting that Dr Kröning's conclusion were unfounded. In addition, the claimant did not raise a complaint with the respondent regarding her report of 20 January 2021 or request a second opinion from another occupational health professional.

89. We considered whether there were any appropriate alternatives to withdrawing the claimant's job offer. The claimant suggested (as part of his reasonable adjustments complaint) that the respondent should have held his job offer open for a period of 36 months in order to allow his mental health to stabilise for a sustained period. He also suggested that the respondent could have appointed him on a 'trial' or interim basis, subject to a review. However, we concluded that neither of these suggestions were appropriate because we accepted Miss Sutton's evidence that:

89.1 the respondent had faced significant difficulties in the recent past in recruiting and retaining staff for the Medical HR Adviser role;

89.2 the Medical HR team were extremely busy under normal circumstances, but that they had been working and continued to work under significant additional strain due to the Covid-19 pandemic (e.g. in relation to managing health and safety protocols, additional sickness absence and cover);

89.3 the respondent was unable to hold open the Medical HR Adviser role for the claimant for a further 3-6 months plus his one month's notice period. She said that this was because the Medical HR team's staff were already under strain and they needed someone who could start in post sooner than the claimant would have been able to. The respondent appointed another candidate from the same recruitment exercise to start working in April 2021 (after their notice period had expired);

89.4 the respondent could not have appointed the claimant on a trial or interim basis. Miss Sutton said that the claimant was a high performing candidate and that his awareness and experience of Medical HR provided a good foundation to start from. However, she pointed out that the claimant would have to move to a new organisation. She also said that the claimant's existing role with the Rotherham Trust was focused on recruitment. By way of contrast, the Medical HR Adviser role involved all of the width and breadth of a HR role. Miss Sutton also stated that the respondent is a lead unit organisation, i.e. the Trust employs the junior doctors that work at

other district general hospitals and is responsible for organising their work rotations; and

89.5 the respondent would have invested a significant amount of time to take the claimant through his four week induction period and support him whilst he got to grips with the role. Miss Sutton said that it takes a 12 month period to see full cycle of role and gain the exposure necessary to be able to work independently in the role.

90. The claimant's complaint of discrimination arising from disability therefore fails.

Failure to make reasonable adjustments

91. We concluded that the respondent did not operate the following provisions, criteria or practices ("PCPs") alleged by the claimant:

91.1 requiring sustained stability for a substantial period for people conditionally appointed to Medical HR Adviser roles; and/or

91.2 refusing employment in the roles of Medical HR Adviser to people who are under the care of professional health advisers.

92. We accepted the respondent's evidence that:

92.1 occupational health assessed each individual on a case by case basis and there was no blanket requirement of 'sustained stability for a substantial period' for prospective employees for the Medical HR Adviser role; and

92.2 it has in fact employed another individual as a Medical HR Adviser who is under the care of professional mental health advisers.

93. However, if our conclusions on the PCPs are incorrect, we also concluded that:

93.1 the claimant was put to a substantial disadvantage and the respondent was aware of that disadvantage (as set out in the agreed list of issues);

93.2 however, there were no reasonable steps that could have been taken to avoid the disadvantage for the reasons set out in paragraph 89 above in relation to the discrimination arising from disability complaint.

94. The claimant's complaint of failure to make reasonable adjustment therefore fails.

Indirect discrimination

95. The claimant referred to the same PCPs that he has alleged in relation to his complaint of failure to make reasonable adjustments. For the reasons set out under that complaint, we concluded that the respondent did not operate the PCPs alleged by the claimant.

96. In addition, the claimant failed to provide any evidence about group disadvantage for persons with his disability. His complaint of indirect discrimination therefore fails.

Harassment

97. The claimant has complained of two incidents that he states amounted to harassment:

97.1 the discussions that took place during his assessment by Dr Kröning on 3 December 2020; and

97.2 the withdrawal of his job offer on or around 20 January 2021 and the failure to consider whether there was anything that could be done to prevent this from happening.

98. We have set out a summary of the Relevant Law at Annex 2 to this Judgment. We reminded ourselves in considering the claimant's complaints of the guidance provided by the EAT on harassment.

99. The EAT in Weeks v Newham College of Further Education (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

100. In light of this guidance, we have considered that the claimant's complaints should be considered under the part of the harassment test relating to 'violation of dignity' rather than an intimidating etc. environment. This is because there was no evidence that either of the claimant's complaints led to a state of affairs. We note that:

100.1 the claimant had been offered the Medical HR Adviser role on a conditional basis, but had not commenced working for the respondent;

100.2 the claimant was unhappy with his assessment by Dr Kröning but continued to correspond with other managers at the respondent (including Miss Sutton, TB and KM) without any complaints about their behaviour; and

100.3 the withdrawal of his job offer was a one-off act.

101. We have therefore considered the guidance provided by the EAT in Dhaliwal relating to violation of dignity. In that case, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not

to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question." 102. The EAT in Dhaliwal also stated that:

> "Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

Assessment on 3 December 2020

103. We have considered whether Dr Kröning's conduct of the occupational health assessment on 3 December 2020 amounted to unwanted conduct. We concluded that the holding of the assessment itself was not unwanted conduct. The claimant consented to attend the assessment as part of the respondent's recruitment process. He could have chosen to withdraw from the process, although that it is likely that his job offer would have been revoked. The claimant's complaint of unwanted conduct related to Dr Kröning's conduct during the assessment, which potentially may amount to unwanted conduct. In addition, the questions asked by Dr Kröning's conduct did relate to the claimant's disability because the purpose of the assessment was to determine the claimant's fitness to work.

104. We then considered the questions of purpose or effect under the legal test for harassment. We concluded that Dr Kröning did not have the purpose of violating the claimant's dignity during the assessment on 3 December 2020. Dr Kröning asked the claimant questions to determine his fitness to work in the Medical HR Adviser role. We found that Dr Kröning could approached the interview differently, for example by making more 'small talk' to help to make the claimant feel more comfortable at the start of the assessment. However, there was no evidence to suggest that Dr Kröning intended to violate the claimant's dignity during that assessment.

105. We concluded that the claimant perceived Dr Kröning's conduct during the assessment to violate his dignity. We then have to consider whether it was reasonable in all of the circumstances for Dr Kröning's conduct to have that effect. We concluded that it was not reasonable for Dr Kröning's conduct to have that effect, taking into account the following circumstances:

    105.1 the context of the assessment was that the claimant had declared a mental health condition on the respondent's health clearance form. Occupational health were therefore required to assess his fitness for work in light of that condition, which required an examination of the claimant's history, his

circumstances and his ability to cope and manage with day to day life and work demands. The claimant stated that Dr Kröning asked questions that would not have been raised if he declared a broken leg. However, it is clear from the claimant's own GP's and psychiatrist's correspondence (which considered the claimant's history, circumstances and his ability to cope and manage in detail) that these matters were relevant to an assessment of the claimant's fitness to work;

105.2 the claimant stated during his oral evidence that he believed that Dr Kröning disliked him. However, he also stated that he was unsure as to the reason for her dislike. The claimant suggested that this may be due to his disability. However, he also suggested that it may have been due to his sexual orientation or his age;

105.3 we found that the claimant wrongly perceived that Dr Kröning had suggested that he was being 'dishonest' and that he was unable to complete his degrees. We found that this was because the claimant believed that Dr Kröning disliked him, but it was not due to the words that Dr Kröning used;

105.4 the claimant's evidence was that there were "multiple different little things right from the offset" of the assessment that made him uncomfortable. We found that Dr Kröning could approached the interview differently, for example by making more 'small talk' to help to make the claimant feel more comfortable at the start of the assessment and assuage his anxiety;

105.5 Dr Kröning told the claimant at the end of the assessment that she had provisionally assessed him as fit to work and the claimant fed this back to Miss Sutton later that day; and

105.6 the claimant complained to Miss Sutton on the day of the assessment about Dr Kröning's conduct and also raised a formal written complaint that TB dealt with. However, he did not raise any further concerns after TB provided a response to the claimant's complaint and he did not request a second occupational health opinion from a different physician.

Withdrawal of job offer

106. The withdrawal of the job offer was unwanted conduct. It was also related to the claimant's disability in that the respondent withdrew the claimant's job offer because occupational health assessed him as not fit to work in the Medical HR Adviser role at that time.

107. However, we concluded that the withdrawal of the job offer did not amount to harassment. We found that the respondent regarded the claimant as a high performing candidate for the role and Miss Sutton was keen to expedite his recruitment (as demonstrated by the emails that we have referred to in our findings of fact). Miss Sutton continued to support the claimant after his assessment on 3 December 2020, as demonstrated by their discussions on that date.

108. The reason why the job offer was withdrawn was because the claimant did not receive health clearance. The claimant has alleged that the respondent failed to consider alternatives. However, the alternatives that he suggested during these proceedings were not reasonable steps for the respondent to take at that point in time for the reasons set out at paragraph 89 above in relation to the discrimination arising from disability complaint.

109. The claimant's complaints of harassment therefore fail.

CONCLUSION

110. We have concluded that all of the claimant's complaints fail and are dismissed for the reasons set out in this Judgment.

Employment Judge Deeley

Employment Judge Deeley
15 December 2021

WRITTEN REASONS SENT TO THE PARTIES ON

20 December 2021

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE

ANNEX 1 – FINAL LIST OF ISSUES Disability status and knowledge

1. The respondent accepts that the claimant is a disabled person for the purposes of s6 of the Equality Act 2010. The claimant states that he was initially diagnosed with Multiple Personality Disorder, Avoidant and Borderline Personality Disorder Traits. The claimant has since been diagnosed with Emotionally Unstable Personality Disorder.

Direct disability discrimination

2. Did the Respondent treat the Claimant less favourably than it treated (or would have treated) others by withdrawing an offer of a Medical HR Adviser role on or about 20th January 2021?

3. If so, was the reason for such treatment the Claimant's disability?

Discrimination arising from disability

4. Did the Respondent treat the Claimant unfavourably by refusing to allow him to continue in the appointment to his role as a Medical HR Adviser because of something arising in consequence of his alleged disability?

5. The claimant states that the something arising was his fluctuating mental health condition and his need for continued professional mental health advice and/or therapy.

6. If so, was this treatment a proportionate means of achieving a legitimate aim, namely the Respondent's duty to provide a safe working environment?

Failure to make reasonable adjustments

7. Did the Respondent operate either of the following provisions, criteria or practices ("PCP"):

    a. Requiring sustained stability for a substantial period for people conditionally appointed to Medical HR Adviser roles?

    b. Refusing employment in the roles of Medical HR Adviser to people who are under the care of professional health advisers?

    The respondent contends that these matters are not capable of amounting to PCPs.

8. If so, did any such PCP put the Claimant at a substantial disadvantage compared to someone without the claimant's disability? The Claimant states that the substantial disadvantage was the fluctuating nature of his mental health condition and the need to be under the care of professional health advisers.

9. The respondent does not accept the substantial disadvantage stated by the claimant. The respondent also denies knowledge of any such substantial disadvantage.

10. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    a. Holding open the Claimant's job offer whilst his mental health was reviewed and/or stabilised?
    b. Offering the Claimant the post of Medical HR Adviser and thereafter reviewing his performance and ability to do the role through the appraisal process once appointed?

11. Was it reasonable for the respondent to have taken those steps?

Indirect discrimination

12. Did the Respondent operate either of the provisions, criteria or practices referred to under the Claimant's reasonable adjustments claim ("PCP")?

13. Did the Respondent apply the PCP to the Claimant?

14. Did the Respondent apply the PCP to persons who did not have the Claimant's disability or would it have done so?

    Did the PCP put persons with the Claimant's disability at a particular disadvantage when compared with persons who did not have the Claimant's disability? The Claimant states that the particular disadvantage was the fluctuating nature of his mental health condition and the need to be under the care of professional health advisers.

15. Was any such PCP a proportionate means of achieving a legitimate aim, namely the Respondent's duty to provide a safe working environment?

16. The Tribunal will decide in particular:

    a. was the PCP an appropriate and reasonably necessary way to achieve those aims;

    b. could something less discriminatory have been done instead; and

c. how should the needs of the Claimant and the Respondent be balanced?

Harassment

17. The conduct alleged consists of:

    a. Dr Kröning ’s conduct of the occupational health appointment on 3 December 2020 in the manner alleged by the Claimant at paragraphs 3 to
    5 of his Grounds of Claim; and

    b. the respondent’s withdrawal of the offer of the Medical HR Adviser role on or around 20 January 2021 and the failure to consider whether there was anything else that could be done to prevent this from happening as set out in paragraph 7 of the Grounds of Complaint.

    The Tribunal will need to consider whether 19(a) occurred.

18. If so, were either or both of these matters unwanted conduct?

19. Did any such unwanted conduct relate to disability?

20. Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

21. If not, did it have that effect? The Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

ANNEX 2 - RELEVANT LAW

DISABILITY DISCRIMINATION CLAIMS UNDER THE EQUALITY ACT 2010 (“EQA”)

Direct discrimination (s13 EQA)

1. Section 13 of the Equality Act 2010 provides that:

   “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.”

2. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

Comparators

3. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality Act 2010 and see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285).

4. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

5. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (Anya v University of Oxford [2001] IRLR 377).

Discrimination arising from disability (s15 EQA)

6. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

<u>Something arising from disability</u>

7. The EAT in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider "two distinct causative issues"

when considering whether the 'something' alleged arose in consequence of B's disability. The EAT set out the issues as follows:

"(i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?

The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

Proportionate means of achieving a legitimate aim

8. The Tribunal must apply an objective test when considering whether there was a proportionate means of achieving a legitimate aim, having regard to the respondent's workplace practices and organisation needs (see, for example, the EAT's decision in City of York Council v Grosset (UKEAT/0015/16), as approved by the Court of Appeal ([2018] EWCA Civ 1105).

9. We note that the Tribunal must make its own assessment as to whether 'proportionate means' have been used to achieve a legitimate aim.

Failure to make reasonable adjustments (s20 and 21 EQA)

10. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

21 Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…

11. We also note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: "more than minor or trivial".

12. The Tribunal must assess whether the respondent applied a provision, criterion or practice (a "PCP") which placed the claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged.

13. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

14. We note that an employer will not be liable for a failure to make adjustments if it: "does not know, and could not reasonably be expected to know' that a PCP would be likely to place the employee at a substantial disadvantage" (paragraph 20(1)(b), Schedule 8 EQA). The employer's state of knowledge is assessed at the time of the alleged discrimination (Tesco Stores Ltd v Tennant UKEAT/0167/19/00).

15. We must therefore consider whether the respondent had knowledge of both:

    15.1 the claimant's disability; and

    15.2 the substantial disadvantage that the claimant states that they faced.

16. The burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed the claimant at a substantial disadvantage (Project Management Institute v Latif [2007] IRLR 579). The claimant must also identify the potential reasonable adjustments sufficiently to enable them to be considered as part of the evidence during the hearing. These are not limited to any adjustments that the claimant brought to the respondent's attention at the relevant time. The respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved. It is not necessary, at the time, for the claimant to have brought the proposed adjustment to the respondent's attention.

17. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis (Griffiths v Secretary of State for Work and Pensions [2017] ICR 160). In order for an adjustment to be "reasonable", it does not have to be shown that the success of the proposed step was guaranteed or certain. It is sufficient that there was a chance that it would be effective. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice.

18. The public policy behind the reasonable adjustments legislation is to enable employees to remain in employment, or to have access to employment. The Tribunal has to carry out an objective assessment to consider whether any proposed adjustment would avoid the 'substantial disadvantage' to the employee caused by the PCP (Royal Bank of Scotland v Ashton [2011] ICR 632).

19. In Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, the EAT held that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one.

20. In addition, the Tribunal needs to consider the implications of any proposed adjustments on a respondent's wider operation (Lincolnshire Police v Weaver [2008] AER 291, decided under the former Disability Discrimination Act 1995).

Indirect Discrimination

21. The provisions relating to harassment are set out at s19 of the EQA:

(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 relation to a 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.

(3) The relevant protected characteristics are - …disability…

22. Section 23(1) provides: "On a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case."

23. The Supreme Court in Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice [2017] UKSC 27 considered the law on indirect discrimination. Lady Hale identified the salient features of indirect discrimination:

"[24] The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation why a particular PCP puts one group at a disadvantage when compared with others … …

[26] A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men … …

[27] A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage … …

[28] A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence … [29] A final salient feature is that it is always open to the respondent to show that the PCP is justified – in other words, that there is a good reason for the particular … requirement … The requirement to justify a PCP should not be seen as placing an unreasonable burden on respondents. Nor should it be seen as casting some

sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question …"

Harassment

24. The provisions relating to harassment are set out at s26 of the EQA:

26 Harassment
(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of – (i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
…
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are – …disability; …

25. There are three elements to the definition of harassment:

25.1 unwanted conduct;

25.2 the specified purpose or effect (as set out in s26 EQA); and

25.3 that the conduct is related to a relevant protected characteristic: see Richmond Pharmacology v Dhaliwal [2009] IRLR 336, as updated by reference to the EQA provisions in Reverend Canon Pemberton v Right Reverend Inwood [2018] EWCA Civ 564.

26. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

27. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see Nazir v Asim & Nottinghamshire Black Partnership [2010] IRLR 336 EAT.

28. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is

reasonable for the conduct to have that effect. The Tribunal must consider whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

29. In Dhaliwal, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

> "while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

30. The EAT in Dhaliwal also stated that:

> "Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

31. The EAT in Weeks v Newham College of Further Education (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

> "…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Burden of proof

32. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof

…

(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.

…

(6) A reference to the court includes a reference to -

(a) an employment tribunal;

…

33. The Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 approved guidance given by the Court of Appeal in Igen Limited v Wong [2005] ICR 931, as refined in Madarassy v Nomura International plc [2007] ICR 867. In order for the burden of proof to shift in a case of direct disability discrimination it is not enough for a claimant to show that there is a difference in disability status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

34. Mummery LJ stated in Madarassy: "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"

35. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see Bahl v The Law Society [2004] IRLR 799). The House of Lords held in Zafar v Glasgow City Council [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

36. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

    36.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his disability); there must be "something more".

    36.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

37. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.