Case Number: 3323674/ 2019

EMPLOYMENT TRIBUNALS

Claimant: **H**

Respondent: **Partnerships in Care Ltd**

Heard at: **Cardiff** **On: 2 and 3 August 2021**

Before: **Employment Judge R Harfield**
Members **Ms Mangles**
Ms Farley

Representation:
Claimant: In person
Respondent: Mr Heard (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The claimant's complaint of discrimination arising from disability succeeds;

2. The claimant's complaint of failure to make reasonable adjustments does not succeed and is dismissed.

The successful complaint will proceed to a remedy hearing.

REASONS

Introduction

1. The claimant presented a claim form on 2 October 2019 complaining of disability discrimination relating to the withdrawal of a job offer as a healthcare assistant. The respondent disputes the claim. A case management hearing took place before Employment Judge Moore on 9 April 2020 where a decision was made to hold a preliminary hearing about whether the claim was out of time/ whether time should be extended.

Employment Judge Moore also set out a provisional list of issues for the parties to consider, noting the claimant was trying to obtain legal advice. A further case management hearing took place before EJ Ryan on 17 September 2020 where he made an anonymisation order and a restricted reporting order. The claimant was still awaiting legal advice and therefore EJ Ryan extended the time for the claimant to provide her information identifying the type of claim she was bringing.

2. The claimant then submitted a document headed "The substantive claim I am bringing" which sets out, albeit from the perspective of a litigant in person, the basis of a claim for discrimination arising from disability under section 15 of the Equality Act and/or a complaint of a failure to make reasonable adjustments.

3. On 29 September 2020, at a public preliminary hearing, EJ Vernon granted the claimant a just and equitable extension of time for bringing her claim. He listed a further preliminary hearing to determine the question of disability and also listed the final hearing. He identified the claimed impairments for the purpose of establishing disability as anxiety and ADHD. EJ Vernon extended the restricted reporting order for the duration of the litigation up to the promulgation of the final judgment. He identified the issues to be decided that we will return to shortly.

4. The preliminary hearing listed for 7 May 2021 did not take place as the respondent admitted that the claimant's impairments of ADHD and anxiety were likely to amount to a disability (responding to what had been recorded in the case management orders based on what the Tribunal understood the claimant to be saying). The claimant then raised the fact she had an additional impairment of depression. Employment Judge Jenkins declined to reinstate the preliminary hearing on the basis it would be disproportionate. It has not been suggested in this litigation that including depression as an additional impairment contributing to the claimant's overall disability would make a difference to the analysis in the case and we cannot see that it would.

5. We had a bundle of documents extending to 201 pages. We added to that two fit notes the claimant submitted over the weekend before the hearing which the respondent did not object to. The claimant also sought permission to rely on a recent inspectorate report. The respondent opposed this. We gave permission for the claimant to rely upon 3 pages (25 – 27 of the report). Oral reasons were provided at the time.

6. We received written statements from and heard oral evidence from the claimant, Mr Thomas and Ms Galazka. We heard oral closing submissions from the parties. Adjustments were made for the claimant including the

provision by the respondent of topics for cross examination in advance, access to regular breaks and to bring a friend/ support person with her.

7. The hearing took place in person other than the non-legal members who attended by video. We were able to complete our deliberations about liability issues on the second day of the hearing but there was insufficient time to deliver an oral judgment. It was therefore reserved to be delivered in writing. The original intention was that the judgment would deal with remedy as well as liability. The questioning of witnesses was also intended to cover remedy issues, principally to avoid the claimant having to give evidence twice. The questioning of witnesses therefore largely covered remedy related matters. But it came to light that that the claimant held records relating to income from a self-employed business she has started. These records were not before the respondent or the tribunal and the claimant was not able to even provide an estimate of the figures. There was a possibility of the claimant being able to retrieve the records for day two of the hearing, but it was also becoming increasingly apparent that there was going to be insufficient time to complete the case. We therefore decided that closing submissions should focus on liability issues only as would this reserved written judgment.

8. This case remains subject to an anonymity order and a restricted reporting order relating to the identification of the claimant. Currently the restricted reporting order remains in force until the promulgation of the final judgment. There has been no final judgment as remedy is outstanding. The anonymity order in terms of the Tribunal records is permanent.

The issues to be decided

9. We confirmed with the parties at the start of the case that the issues to be decided were as set out in EJ Vernon's order. The claimant asked whether a direct discrimination claim was also part of her claim, we confirmed that it was not and that EJ Vernon had used the heads of claim the claimant had set out in her own further particulars document. The claimant had already been given extensions of time to obtain advice and produce that document.

10. The issues were therefore identified as:

Discrimination arising from disability

1. *did the respondent treat the claimant unfavourably by withdrawing an offer of employment;*

2. *did any relevant things arise in consequence of the claimant's disability;*

3. *was the unfavourable treatment because of any of those things;*

4. *was the treatment a proportionate means of achieving a legitimate aim. Mr Heard confirmed the legitimate aim relied upon was "ensuring its staff are capable to undertake their role and/or ensuring the safety of patients and staff."*

5. The tribunal will decide in particular:
- was the treatment an appropriate and reasonably necessary way to achieve those aims;
- could something less discriminatory have been done instead;
- how should the needs of the claimant and the respondent be balanced?

6. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? Mr Heard confirmed no issue was in fact being taken on knowledge of disability.

Reasonable adjustments

1. *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? Again, knowledge of disability was conceded.*

2. *2. A PCP is a provision, criterion or practice. Did the respondent have the following PCPs "a policy of refusing to employ someone in the particular role with anxiety/ ADHD"*

3. *Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she had anxiety/ ADHD?*

4. *Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?*

5. what steps could have been taken to avoid the disadvantage?

6. Was it reasonable for the respondent to take those steps?

7. Did the respondent fail to take those steps.

The relevant legal principles

Duty to make reasonable adjustments

11. The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3)

> *"(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*."

12. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

13. In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

14. The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said:

> "*all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."*

> It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

15. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

16. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212.

17. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

18. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; Tarbuck v Sainsbury's Supermarkets Ltd *[*2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.

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

"18… given the language of section 20(3) – where the steps required are those that are reasonable to avoid the disadvantage – the question whether, and to what extent, the step would be effective to avoid the disadvantage, will inevitably always be an important one (see per HHJ Richardson at paragraph 59 of Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341 EAT). Thus if there was no prospect of the proposed step succeeding in avoiding the disadvantage, it would not be reasonable to have to take it, conversely if there was a prospect – even if considerably less than 50 per cent – it could be (see per HHJ Peter Clark at paragraph 39 of Romec Ltd v Rudham UKEAT/0069/07). The reasonableness of a potential adjustment need not require that it would wholly remove the disadvantage in question: an adjustment may be reasonable if it is likely to ameliorate the damage (Noor v Foreign & Commonwealth Office [2011] ICR 695 EAT per HHJ Richardson at paragraph 33); a, or some, prospect of avoiding the disadvantage can be sufficient (see per HHJ McMullen QC at paragraph 50 in Cumbria Probation Board v Collingwood UKEAT/0079/08 and Keith J at paragraph 17 in Leeds Teaching Hospital NHS Trust v Foster

UKEAT/0552/10). All that said, the uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness (see per Elias LJ in Griffiths [v Secretary of State for Work and Pensions [2017] ICR 680 CA] at paragraph 29 and per Mitting J at paragraph 18 in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15)."

20. In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the Employment Appeal Tribunal helpfully summarised the key elements of a reasonable adjustments claim as:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which they rely and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms by the time of the final hearing, the nature of the adjustment that would have avoided the disadvantage; they need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
    - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
    - The extent to which it is practicable to take the step;
    - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
    - The extent of its financial and other resources;
    - The availability to it of financial or other assistance with respect to taking the step;
    - The nature of its activities and size of its undertaking;
- If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

Discrimination arising from disability

21. Section 15 of the Equality Act states:

> *"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."*

22. As to what constitutes unfavourable treatment, in Aston v The Martlet Group Limited UKEAT/0274/18/BA it was said:

> "A*s to the law, in Williams v The Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65, [2019] IRLR 316 the Supreme Court was referred to passages in the Equality and Human Rights Commission's Code of Practice on Employment (2011), which suggest that unfavourable treatment involves putting the disabled person at a disadvantage, which would include "denial of an opportunity or choice". Lord Carnwarth (at paragraph 27, the other Justices concurring) agreed with a submission*
>
> > *"…that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she [counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."*

23. The approach to determining the other aspects of a section 15 claim were summarised by the Employment Appeal Tribunal in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely

to require an examination of the conscious or unconscious thought process of A;

- The "something" that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;

- Motives are not relevant;

- The tribunal must determine whether the reason or the cause is "something arising in consequence of B's disability";

- The expression "arising in consequence of" can describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link;

- Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavourable treatment is a consequence of the disability.

24. The respondent will successfully defend a claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavourable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer's actions fell within the band of reasonable responses. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:

- Is the aim legal and non discriminatory and one that represents a real, objective consideration?

- If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances? The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. "Necessary" here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (see Hampson v Department of Education and Science [1989 ICR 179 and Hardys & Hansons plc v Lax [2005] ICR 1565.)

25. Justification therefore requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (Hensman v Ministry of Defence UKEAT/0067/14). The Tribunal has to take into account the reasonable needs of the employer, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the treatment is reasonably necessary.

26. As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied (see Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT at paragraph 42). When the alleged discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification although the test remains an objective one (see Ministry of Justice v O'Brien [2013] UKSC 6).

27. The Tribunal drew the parties' attention to the case of Birtenshaw v Oldfield UKEAT/0288/18/LA. In that case, on its particular facts, it was held the Tribunal had not fallen into error in upholding that claimant's complaint about the withdrawal of a job offer made on medical fitness grounds. The claim had been upheld on the basis there were other steps short of withdrawal of the offer that had the potential to, or might serve, the respondent's legitimate aims. These were steps such as making further enquiries to be able to undertake a more considered view on the claimant's fitness for the role (such as going back to occupational health for further advice, or from the claimant's GP), or by speaking to the interviewers, or speaking to the claimant herself, or undertaking a more rigorous assessment of the claimant's suitability using tools available for non agency staff, or a trial period/probationary period.

28. The Employment Appeal Tribunal said the tribunal's consideration of the objective justification question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim, provided the decision maker has acted rationally and responsibly. However, it was also said that it does not follow that the tribunal has to be satisfied that any lesser measure would or might have been acceptable to the decision maker or otherwise caused them to take a different course. That approach would be at odds with the objective question which the tribunal has to determine and would give primacy to the evidence and position of the respondent's decision maker. It was also confirmed that whilst justification has to be established at the time when the unfavourable treatment was applied, the tribunal when making its objective assessment may take account of subsequent evidence.

Burden of Proof

29. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

"(2) if there are facts from which the Court (which includes a Tribunal) 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."

Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

30. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence. Furthermore, in practice if the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Findings of fact

31. The respondent is part of the Priory Group. To quote the respondent's ET3, the Priory Group:

"*provides care throughout the UK organised into three divisions: Healthcare; Adult Care; and Education and Children's Services. Together, the Group supports more than 30,000 adults and young people each year through a national network of over 400 facilities, employing more than 20,000 colleagues."*

32. The claimant was first diagnosed with, and treated for, anxiety and depression in 2000. She was first diagnosed and treated for ADHD in 2008. The claimant acknowledges that she has and will likely need to continue to receive ongoing treatment for her conditions through medication, talking therapies, regular GP reviews, psychiatrist oversight, and self-management of her condition. The claimant has had some

particularly difficult periods in her life. She was unable to take her GCSEs at 16 due to her poor mental health and ADHD. But generally as time has gone on, it appears with some ups and downs, she became better at managing her conditions. She successfully completed a Bachelors degree from Sydney University with High Distinction and a Masters Degree from Cardiff University with High Distinction. She did so with support mechanisms in place.

33. The claimant has had various types of employment over the years, often focussed on work that involves helping vulnerable people. This includes, between March 2005 and June 2006, working as Social Activities Centre Coordinator at Llanarth Court. The role involved running social activities for high-risk patients at a medium and low secure forensic psychiatric hospital. She has also, at different times, worked as a youth solutions worker in a homelessness project, has worked with young people in care and in a voluntary capacity been involved with charities concerned with the rehabilitation of young women and a anti sex trafficking charity.

34. In 2017 the claimant started working as a service delivery assistant for a national charity supporting victims of crime. She was working initially in Gloucester before transferring to Cardiff. She told us that she had had some periods of sickness absence and felt she was struggling somewhat with a long drive and it being a heavily administration-based role. On her transfer to Cardiff she moved to work part time hours of 22.5 hours a week in a volunteer coordinator role. She said that was a more hands on role. She explained she had good support from her employer who had made adjustments such as a standing desk, flexible start and end times, dual computer screens, and regular line management support. She explained this involved meeting once a month with the ability to touch base at other times if needed.

35. On 1 December 2018 the claimant applied for a job with the respondent as a bank healthcare worker at Ty Catrin. Ty Catrin is a low secure hospital providing mental illness and personality disorder services for males and females detained under the Mental Health Act and who have been diagnosed with a mental illness, personality disorder, and/or a mild learning disability. There are 45 beds provided across 5 wards and also a stepdown flat. There are also two intensive care suites for the safe management of acutely disturbed patients. Ms Galazka told us that Ty Catrin is recognised by regulators and other agencies as being one of the most challenging services in Wales and England due to the acuity of patient disorders and how this manifests itself into complex challenging behaviours and maladaptive and inappropriate coping.

36. The job description (for the generic role of Healthcare Assistant across the Priory Group) describes the job as being "*a critical member of the Ward*

team, supporting and assisting Registered Nurses in the assessment, planning and implementation of patient care. Delivering care to the patient as prescribed by the individual care plans and liaising with family members as appropriate." The responsibilities include such matters as assisting qualified staff with the assessment and implementation of care plans, monitoring the wellbeing of patients, and providing interventions as delegated by a Registered Nurse which can include de-escalation and restraint.

37. The job was as a bank worker, i.e., to be part of a pool of support workers who did not have a defined number of hours or working pattern. The respondent used bank workers to fill staffing gaps where it could in preference to relying on agency workers. The bank workers can choose their shifts depending on their own availability and availability at the site. One of the advantages of having a cadre of bank staff rather than relying purely on agency workers is staff consistency which helps to ensure patient safety and patient relationship security with staff. That point is recognised and emphasised in the inspectorate report we admitted to the bundle. Using bank workers also avoids the cost of agency fees. At the time in question there were 55 healthcare workers in the bank.

38. We find that the claimant applied for the role for a variety of reasons. It would appear from her recent work history that getting the right balance in life of the type of work she was doing, and working hours, to help manage and keep control of her conditions remained work in progress for the claimant. The claimant explained she would be able to cycle to work and this was important as she used exercise as part of her self-care. The claimant would have even greater control over her working pattern and working hours. She was also attracted by it being a practical role working with people with reduced administration work as she found heavy administration and managerial work difficult at times to manage. The claimant was also attracted to the job because she was passionate about the field of mental health care. The claimant said she was planning to work 3 shifts a week for the respondent (if available) alongside her existing part time role and she would see how it went. She said she may then have reduced her hours in her charity role. Given this would involve working over 50 hours a week, in circumstances in which the claimant had previously reduced her working hours because she was struggling and was seeking a work life balance to help her manage her conditions, we find that unlikely. We consider it likely the claimant was intending to start picking up some shifts for the respondent and would then see how it went. That could have in turn involved in due course leaving her role as volunteer coordinator.

39. The claimant had a telephone interview shortly after making her application. She then attended an interview with Mr Thomas and a staff

nurse. The claimant discussed in interview her previous experience of working with vulnerable people groups, and her experience working in a secure forensic psychiatric hospital. She spoke of her professional understanding of mental health conditions and how to support people in a psychiatric hospital setting. She also spoke of her own experience of becoming unwell as a teenager with anxiety and depression and how it was a motivating factor in wanting to assist others with poor mental health. She did not speak about her current medical conditions. The staff nurse interviewing commented on the claimant's passion for good mental health care. During the interview the claimant was given a flavour of what Ty Catrin and the role were about.

40 At the end of the interview the claimant was offered the job there and then and she accepted. During the interview the claimant was told about the different wards and that it was likely she would predominantly be based on two particular female wards. She was told there was good availability of shifts and there was a general expectation that bank workers would take a minimum of one shift per roster so that the bank worker stayed in the bank. The claimant said that she wanted to start at three ten hour shifts a week and increase to four a week as her schedule allowed. She was told there was likely to be availability for this.

41. The claimant was told there was paperwork to fill out and they would look to get the claimant on a training course as soon as possible, likely in February 2019. The claimant then received an email confirming the offer of a role as bank healthcare worker "*following your excellent application and interview."*

42. The claimant completed the paperwork and returned it. She sent several emails to individuals at the respondent including Mr Thomas chasing up the training course. On 15 January 2019 Mr Thomas emailed apologising for the delay and saying *"its been a bit manic here*." He said the next induction would be 11 February and if they got all the claimant's paperwork in on time they could get her started. He was asking for proof of the claimant's address, which she provided on 30 January. The claimant was then sent an email on 5 February 2019 welcoming her to the Priory Group, and with details of an online account to access and further forms to complete. The claimant again completed all of this paperwork, which included a medical questionnaire.

43. The claimant then did did not hear any more. She chased Mr Thomas on 28 February 2019, 11 March 2019, and 15 April 2019 but received no reply or acknowledgment. On 15 April 2019 Mr Thomas finally replied stating:

"I'm afraid we have had to withdraw your application after your medical report came back to us.

Your medical report advised that you would require an environment which reduces stress and anxiety, but due to the nature of the role it was not possible to do this effectively. After discussing it with the Hospital Director, we were worried we would not be able to fully adjust for your condition and safeguard yourself and thought it best not to pursue your application further.

I'm really sorry, I was under the impression you were informed by Head Office, but after checking with them it is the sites responsibility to let the candidate know. Thank you for taking the time to apply with us, best of luck in your future job search."

44. The claimant was very surprised and shocked to receive the email. She was confused. She was upset that it seemed the respondent had taken away the job previously offered just on the basis of medical information in which she had disclosed her disabilities. She did not understand how her questionnaire led to that or the reference to a medical report. The claimant responded to say:

"Hi there;

Thank you for your reply and explanation. I was not actually aware that a medical report had been requested/produced at this stage – was this with my GP? Do I have any grounds to request an appeal to this decision if I provided supporting evidence or letter from my GP?"

45. Mr Thomas responded on 16 April to say:

"I've had a quick discussion with the Hospital director and there isn't a process for appeal I'm afraid.

In regards to the medical report, this was not information we collected from your GP. Every candidate fills in an online questionnaire detailing their medical history as part of the Pre-Employment process, this is something that you would have completed a few months back. Based on what's disclosed there, will inform whether we wish to continue with a candidate's application or not."

46. Mr Thomas' response led the claimant to believe that she had been rejected on the basis of what she herself had written on her questionnaire. She therefore asked Mr Thomas for a copy of the online questionnaire she filled out. She did not get a response. She chased Mr Thomas' colleague, Lauren, on 14 August 2019. Another member of the "onboarding" team

responded on 15 August 2019 to say the claimant would have to request it from Medigold. The claimant asked who they were and their contact details and was simply given a phone number. Medigold are an occupational health company used by the respondent and across the Priory Group. The claimant then emailed Medigold asking for a copy of her self-assessment medical questionnaire. She was told she needed to make a data protection subject access request. The claimant completed the paperwork for that the same day, 15 August 2019.

47. The claimant chased Medigold on 12 September 2019. On 13 September 2019 Medigold told her that they did not hold any of her occupational health records. This no doubt left the claimant confused and feeling she was being given the run around. The claimant persisted. She asked Medigold who held the data. She was again told Medigold held no records for her but was asked if she was employed by the Priory Group or a subsidiary company. After further exchanges about the specifics of her situation she was finally sent records on 19 September 2019. They were not entirely legible, and a clearer copy was sent on 20 September 2019. She was only sent her medical questionnaire and not the assessment report Medigold had then prepared. She did not know the Medigold report existed at the time.

48. On her medical questionnaire the claimant had identified she was in receipt of medication for depression and ADHD. She identified that she had anxiety and depression and ADHD. She identified that she did not consider she suffered from any medical condition that she felt she would need support with in order to carry out the essential functions of the job. She did however identify that she considered she required adjustments to her work or work environment of regular line management support. She also stated that she did not feel she required adjustments in relation to a psychological condition to enable her to undertake the potential role.

49. This questionnaire was reviewed by the Medigold Health Consultancy Nursing Team on 5 February 2019. This was a paper-based review, based on the claimant's own self-assessment. The claimant was not spoken to, and no further information was obtained, for example, from treating practitioners. The assessment said:

"*We have reviewed the Placement health questionnaire for the above individual, and we can confirm the employee is fit, however they have identified a health concern and would benefit from the following…"*

The assessment then identified that the claimant had *"1) depression and anxiety on treatment 2) ADHD on treatment 3) Knee problems."* In relation to adjustments and comments it said:

- "*A workplace risk assessment is recommended*
- *Outcome Notes: 1) Assessed Fit but has an underlying psychological condition, may benefit from additional support during the induction period. A documented conversation regarding mutual concerns and an action plan to minimise identified risks should suffice. Consideration should be given that this individual may have increased vulnerability to workplace stress. A stress risk assessment may be beneficial to minimise identified risks should suffice. You may find the following reference link useful…. 2) may need support with cognitive function. The Equality Act is likely to apply. Further information for your reference [link to NHS guidance about ADHD] 3) A workplace risk assessment is recommended to identify with the employee what if any workplace risks may need to be controlled e.g., manual handling risks: A documented conversation regarding mutual concerns and an action plan to minimise identified risks should suffice. For further guidance on conducting risk assessments please see the link…."*

50. As the medical questionnaire is administered by Medigold the respondents did not actually see a copy of the claimant's questionnaire. All they saw was Medigold's subsequent written assessment, which as just stated, was not seen by the claimant at the time.

51. Mr Thomas had started working for the respondent in November 2018 in a dual role of HR administration and Support Services Manager. On a date sometime between 4 February 2019 and 20 February 2019 Mr Thomas reviewed the Medigold report. He then went to discuss it with Ms Galazka, the Hospital Director. Ms Galazka agrees that happened. Mr Thomas says he thinks that Mr Balmforth, then Director of Clinical Services was also there in his meeting with Ms Galazka. In his oral evidence he also said it was possible he spoke separately to Mr Balmforth afterwards. Ms Galazka says that Mr Balmforth was not in the meeting. We did not hear from Mr Balmforth and there are no documentary records of the conversations about the claimant's candidacy.

52. There is a further disagreement between Mr Thomas and Ms Galazka about exactly what was discussed and decided at the meeting. Mr Thomas says that all three decided the claimant's job offer should be withdrawn. Mr Thomas says they were all concerned about the safety of the claimant and patients in light of the report. He said the delay in notifying the claimant of the decision was due to confusion as to whose responsibility it was in HR. He could not account for failing to respond to the claimant's enquiries other than to say he was very busy at the time.

53. Ms Galazka has been a registered mental health nurse for 23 years and hospital director for 11 years. She has worked for the respondent for 14

years. She is responsible for managing Ty Catrin. She says that the only involvement she had was when Mr Thomas came into her office with the Medigold report. She says she expressed concern as to the claimant's vulnerability within Ty Catrin as the report suggested the claimant may have increased vulnerability to workplace stress. She says she was concerned to safeguard the claimant from undue stress which could potentially exacerbate the claimant's depression and anxiety. She said Ty Catrin is a very challenging hospital and in the role the claimant would witness extreme challenging behaviours on a daily basis such as deliberate self-harm, violence and aggression. She said the claimant would be involved in de-escalation and control and restraint procedures. She says there is high potential for assault and verbal abuse and the claimant would have to work with extremely traumatised individuals who have poor self-esteem, poor impulse control, low frustration thresholds and inappropriate coping strategies. Ms Galazka said that the environment is fast paced and intense with a high proportion of staff burn out.

54. Ms Galazka said that at the time in question the working environment at Ty Catrin was particularly difficult. She says there was a particular difficulty with a female ward, Trelai, which would normally operate under a ratio of 4 staff to 4 patients but was at that time operating at 12 staff to 4 patients to manage the risks. She said that the Trelai and Victoria wards were particularly demanding female wards at the time and would involve exposing staff to several incidents each day or night shift.

55. Ms Galazka said she had a discussion with Mr Thomas about possible reasonable adjustments, but they did not think there were adjustments that could be made beyond the usual support and wellbeing measures in place for staff. She said her concern was that she considered no adjustments could be made in respect of the work environment itself as the service user group would not change and nor would the frequency and intensity of incidents it was likely the claimant would be exposed to. Ms Galazka said she did not make a decision to withdraw the claimant's job offer. She says she told Mr Thomas to escalate their concerns to the Central Regional HR team for further advice. She says this was about "*how we could support [the claimant] considering our concerns."* She said she was also concerned about the fact Mr Thomas had said a job offer had already been made and she also advised him to discuss that with Central HR. Ms Galazka said that thereafter she was not involved again in the claimant's case.

56. Mr Thomas said he did discuss the claimant's situation with the Central HR Advisor Ms Aujla. She no longer works for the respondent, and we did not hear from her. He says, however, that the decision to withdraw the job had already been made before he discussed it with Ms Aujla. He

otherwise could not remember the detail of their discussion or what Ms Aujla may have said. There are no documentary records.

57. On 27 April 2020 the respondent (who has been legally represented throughout) responded to an order from EJ Moore to identified who decided to withdraw the claimant's job offer and when. They stated it was Mr Thomas and Ms Galazka. Ms Galazka told us that was on the basis of instructions from Mr Thomas, and it had not been checked with her.

58. It left the rather unsatisfactory position of the respondent coming to the Tribunal with its own two witnesses disagreeing about who had made the decision to withdraw the claimant's job offer, there being no contemporaneous documents, and without calling as witnesses Mr Balmforth or Ms Aujla. Whilst they no longer work for the Priory Group there was no suggestion it would have been impossible to contact them. In closing submissions Mr Heard invited us to proceed on the basis that Mr Thomas was a decision maker (even if there were others) and that ultimately whomever actually made the decision the reason for the decision was reflected in the evidence of Mr Thomas and Ms Galazka which had some commonality.

59. We find that the decision to withdraw the job offer did not relate to the claimant's ADHD. Ms Galazka said that was not a matter of concern, which we accept. We find that the decision to withdraw the job offer did relate to the claimant's anxiety and depression. We listened to and took account of Mr Thomas and Ms Galazka's accounts who said the central concern was that the claimant was identified as potentially having an increased vulnerability to workplace stress. They said, in effect, they considered steps could not be taken to mitigate against this. Mr Heard invited us to conclude that was the reason for withdrawing the job offer.

60. We did not, however, find it plausible that a decision was made to withdraw the job offer because there were no steps that could be taken to mitigate the perceived vulnerability to workplace stress in circumstances in which the respondent had undertaken no investigations to understand anything about the claimant's particular circumstances. The respondent simply knew the claimant had anxiety and depression under treatment, that the claimant may have increased vulnerability to workplace stress and there were some steps recommended by occupational health who otherwise said the claimant was fit to work. Both Mr Thomas and Ms Galazka acknowledged that different individuals experience anxiety and depression in different ways with different triggers. Ms Galazka accepted that they have workers working for them who have anxiety and depression. The respondent was not in receipt of the claimant's questionnaire. The respondent was not in receipt of any medical records or reports from treating practitioners. The respondent did not discuss the

claimant's condition with her at all to understand her clinical history, her symptoms, her treatment programme, her coping mechanisms, her work history, or her particular triggers. The respondent did not take the recommended steps of a workplace risk assessment, a conversation with the claimant, and a stress risk assessment set out on the Medigold report. We therefore do not accept that the respondent in truth genuinely reached the conclusion they would have to withdraw the job offer because they could not make adjustments for the claimant's condition when they knew none of the detail that would allow them to make that decision.

61. We consider it more likely, and find as a matter of fact, that the respondent decided not to bother to take those investigative steps and any adjustments required thereafter and decided instead to just withdraw the claimant from the process. We consider it is likely that they did so:

(a) because of the indication that the claimant had anxiety and depression on treatment.
(b) because the recommendation had been made to take further steps such as a stress assessment.
(c) They therefore thought the claimant may require some additional support and adjustments in the workplace.
(d) Because the respondent could not be bothered to undertake those assessments and potentially the adjustments thereafter. We consider that in turn this disinclination was probably contributed to by the fact that the claimant was applying to be a member of bank staff, with a bank the size of 55 workers. It is likely the respondent made less effort in respect of their HR practices for bank staff. This is demonstrated by the fact Ms Galazka said HR had told her there are no appeal processes for bank staff, even for complaints about discrimination. It is also demonstrated by Mr Thomas' failure to respond to the claimant's emails. Ms Galazka also spoke about a reluctance to make individualised adjustments to standardised bank worker processes such as whether a bank worker could be allocated to work on a specific ward, or whether their induction could be extended. Again, this suggests a "one size fits all" approach to bank worker staff.
(e) We also considered it likely that, at the point of time in question the respondent could not be bothered to undertake the assessments and potentially have to make adjustments because of the additional work that would be involved in looking after a bank worker with a mental health condition in circumstances in which the respondent, and therefore its workers, were already looking after patients with complex needs such as those with personality disorders. They wanted to focus their efforts on the patients and care of those patients with mental health conditions, and not upon the bank worker staff and perceived complications of bank worker staff with a mental health condition. We

consider it likely they did not want the perceived hassle or the perceived risk.

62. Whilst we heard substantial evidence relating to remedy matters, we have not set out here any findings of fact in that regard. It would not be appropriate to do so in circumstances in which we have not yet heard remedy submissions. The evidence we heard is therefore in effect, carried forward, to the remedy hearing and deliberations.

Discussion and Conclusions

Discrimination arising from disability

Did the respondent treat the claimant unfavourably by withdrawing an offer of employment?

63. Mr Heard submitted that the withdrawal of the job offer was not unfavourable treatment. He said it could not be unfavourable treatment when done with the intention and effect of safeguarding and protecting the claimant's mental health. He had no legal authorities that he wished to rely on in that regard.

64. We find that the withdrawal of the job offer did amount to unfavourable treatment. As above, we have *not* found as a matter of fact that the job was withdrawn because of a principal desire to protect the claimant's mental health. But even if that was the case, we would have found that it amounted to unfavourable treatment. The withdrawal of the job offer deprived the claimant of the opportunity to have her medical suitability for the role fully assessed. The job withdrawal denied the claimant an opportunity of a job that provided not only an income but was in a field of work she was passionate about. She faced detrimental financial consequences. It was therefore to her disadvantage and detriment and viewed objectively a reasonable person in her situation would view it as such.

Did any relevant things arise in consequence of the claimant's disability?

Was the unfavourable treatment because of any of those things?

65. Mr Heard said the claimant's increased vulnerability to stress (which was part of the respondent's case as to the reason for the withdrawal of the job) arose in consequence of the claimant's disability.

66. We have made different findings of fact as to the reason for the unfavourable treatment. The recommendation to take further investigative steps and the potential need to make adjustments and in turn the

respondent's unwillingness to do those things were something arising in consequence of the claimant's disability. The withdrawal of the job offer was therefore unfavourable treatment because of something arising in consequence of the claimant's disability. That the claimant's bank worker status also played a part does not affect that analysis. The "something" was an effective reason or cause of the unfavourable treatment. It played a significant part or was more than a trivial influence.

Was the treatment a proportionate means of achieving a legitimate aim?

67. The legitimate aim relied upon is "*ensuring staff are capable to undertake their role and/or ensuring the safety of patients and staff*." Mr Heard clarified that the reference to staff included the claimant. We accept these are legitimate aims.

Submissions

68. In terms of proportionality, Mr Heard addressed the Birtenshaw case. He drew our attention to factual distinctions between that case and that of the claimant's. In particular, he emphasised that in Birtenshaw the claimant had already been working for the employer for some months with no issues raised whereas here the claimant had not started the role. He emphasised Ms Galazka's evidence that the environment at Ty Catrin was an extreme one in the sense of how challenging and difficult it was to work in that environment, which he said was significantly different to the scenario in Birtenshaw. Mr Heard emphasised Ms Galazka's experience in mental health and in her position which, he said, meant she would know the likely impact of that particularly extreme working environment upon the claimant.

69. Mr Heard also submitted that Birtenshaw was wrongly decided. He said that the things that had been identified as lesser steps in that case said to still achieve the legitimate aim were not in fact lesser steps but were instead about consultation. He referred to the identified matters such as: making further enquiries with occupational health, the claimant's GP, the claimant, and the line manager; making a more rigorous assessment; and a trial period. He did, however, candidly accept that this tribunal is bound by the decision in Birtenshaw. Albeit of course it is the point of law which binds not the factual analysis.

70. Mr Heard also said that, in contrast to Birtenshaw, on the particular facts of the claimant's case, the withdrawal of the job offer was inevitable. He referred in particular to Ms Galazka's evidence that she believed the claimant would become unwell if she took up the post and her evidence that workers in the post with mental health illnesses found it difficult to cope and in general there was a high burn out rate. He again highlighted

Ms Galazka's long experience of working at Ty Catrin and her mental health experience as a mental health nurse. He said Ms Galazka's evidence was the best available evidence as to the appropriateness of withdrawing the job offer. Mr Heard emphasised that as a matter of law the tribunal can look both at the evidence of the claimant's mental health at the time and what the tribunal has learned since. Mr Heard referred us, in particular, to the claimant's own disability impact statement. Mr Heard also again emphasised the extreme working environment in Ty Catrin at the time and argued that it was different to the claimant's previous experience at Llanarth Court. He also submitted that the fact the claimant was seeking the role because she was seeking flexibility to balance her work/life commitments and her health fed into the likelihood that if the claimant were appointed there would have been a negative impact on her health.

71. Mr Heard also submitted that there was no medical evidence from the claimant's medical practitioners explaining why the job would have been suitable for her.

Analysis

72. As Mr Heard acknowledges, the ratio of Birtenshaw is binding upon us. However, we did not in any event consider that it was wrongly decided. As the Employment Appeal Tribunal identified in Birtenshaw, often the analysis of a reasonable adjustments claims and a section 15 claim overlap and often have the same outcome. However, they do not have the same legal test. They are not exact mirror images of the other.

73. In reasonable adjustments claim the core analysis is concerned with the likelihood of a step alleviating the substantial disadvantage found. Assessing that likelihood is part of assessing whether it would have been reasonable for the employer to take the step. In reasonable adjustments claim, the reason why authorities such as Tarbuck suggest that consulting with an individual may not be a reasonable adjustment (although that assessment will always be fact sensitive), is because, for example, consulting with that person will often not of itself mean that the individual could do the job in question. The consultation is just one of the first steps in identifying what the substantive adjustments are that are actually required (for example, part time working, or whatever is appropriate to the individual circumstances).

74. The justification defence in a section 15 claim is built upon a different legislative framework. The question is whether the unfavourable treatment is a proportionate means of achieving the legitimate aim. Part of that involves considering whether measures short of withdrawal of the job (or in some cases measures short of dismissal) might have served that

legitimate aim. So, for example, a reasonable adjustments claim may be assessing what steps had a chance of meaning the claimant did not have to be dismissed (alleviating the substantial disadvantage). Whereas a section 15 justification assessment is looking, in part, at what measures other than dismissal, might have served the particular aim in question. For example, an aim of ensuring the safety of patients and staff. It is asking and answering a different question from the assessment of a reasonable adjustment, albeit involving some linked factors. It is possible a measure that may not be considered a substantive adjustment under a reasonable adjustments claim could be capable of being a lesser measure that would serve the legitimate aim under section 15. It is always going to be fact sensitive and also dependent upon the legitimate aim in question.

75. Turning to the actual assessment here, the discriminatory effect upon the claimant was substantial and significant. She had a job offer, previously made to her following what was described as an excellent interview, removed and removed upon the basis of a medical report and subsequent analysis she knew nothing of and had no involvement in other than completing the questionnaire. It would be foreseeable to someone in the respondent's shoes that doing that to a job applicant in those circumstances may well cause both financial and emotional harm.

76. As already stated, it is a legitimate aim for the respondent to wish to ensure that their staff are capable of undertaking the role of bank worker healthcare assistant. However, there were lesser measures (short of withdrawing the job offer) open to the respondent that might have served that aim. In the tribunal's judgement seeking to understand more about the claimant's condition by taking steps such has having a further discussion with her, obtaining information from her treating practitioners, consulting further with occupational health, and undertaking a risk assessment and/or stress risk assessment were measures that would have served that aim. They would have understood the claimant's medical history, her work history, her symptoms, her treatment programme, and her particular triggers/likely stressors, which could then be weighed against the demands of the job, to then in turn understand whether the claimant was capable of undertaking the role (with reasonable adjustments if required). The lesser measures would therefore meet the aim of ensuring staff were capable of undertaking the role.

77. Turning to the aim of ensuring the safety of the claimant as a putative member of staff, again the tribunal considers that there were lesser measures (short of withdrawing the job offer) open to the respondent which might have served that aim. Again, seeking to understand more about the claimant's condition by taking steps such has having a further discussion with her, obtaining information from her treating practitioners, consulting further with occupational health, and undertaking a risk

assessment/stress assessment were measures that would have served that aim. The respondent would have understood the claimant's medical history, her work history, her symptoms, her treatment programme, her particular triggers/likely stressors and would have been able to then assess that information against the demands of the role, to then in turn understand whether the claimant could safely undertake the role without too great a risk of exacerbating the claimant's condition in some way, (again with some assessment of adjustments if required). We therefore again considered that the lesser measures would meet the aim of ensuring the safety of the claimant as a properly balanced and evidenced decision would then be taken.

78. We considered that this disposed of the point, and that the question of the prospect of the lesser measures ultimately leading to the claimant being able to keep on with the role became a question relevant to remedy rather than liability. However, the respondent argues that lesser measures must have a prospect of the claimant being able to safely do the role/ that the measures identified were futile and that they would inevitably have led to the withdrawal of the job offer on the basis that it was inevitable the claimant could not undertake the job role/ would be unsafe. We therefore went on to consider this point. Ms Galazka said, in evidence, this was her view. Mr Thomas, in oral evidence, resiled from an assertion in his witness statement that he believed the decision made was correct. He said he could not ethically stand by his signed statement in that regard and said he did not now know if the respondent had made the right decision as the processes they should have followed were there to help someone make the correct decision.

79. The claimant is an individual who has lived with her conditions, and has worked with and continues to work on coping strategies for them, for many years. In her responses to questioning when giving evidence, and in her own presentation of her case as a litigant in person, she demonstrated a real sense of balance, perception and self-reflection. Her own views and lived experience are not to be trivialised or marginalised and are worthy of some weight in the evaluation. We do consider, in particular, that the claimant would not have been likely to put herself forward for the job unless she genuinely thought that she would be able do it. Whilst we accept the claimant may not have had an entire understanding of day-to-day life working at Ty Catrin, we also do consider it is likely that she had, and has, some genuine understanding of what the role entailed and its demands. There had been some discussion about what the role entailed at the claimant's interview. The claimant had some experience of environments with some similarities through her own life experiences, including in her own teenage years, and through visiting friends.

80. The claimant also had her previous working experience at Llanarth Court. Whilst we accept that there are differences in the environment and working conditions between Ty Catrin and Llanarth Court, we do not accept that the claimant's time at Llanarth Court was irrelevant. Whilst she was working there as an activities coordinator she would have seen and observed the role, and the demands of the role, of a healthcare assistant at Llanarth Court. Whilst Ms Galazka may well be right to say that Ty Catrin had a greater proportion of patients (particularly female patients) with personality disorders, and that the degree and intensity of challenging incidents would be far greater at Ty Catrin, the claimant did work with and observe female patients at Llanarth Court in a medium and low security environment with the risks that entailed. Again, even with the differences, it does not mean that the claimant's experience and perception was of no relevance. We think it likely that the claimant had a better understanding of what the job was likely to entail than many other potential bank worker applicants. She knew enough to impress the respondent at interview.

81. The only measure that the claimant had identified in her questionnaire was of regular line management contact. This was something that she found helpful in her existing employment and which the respondent said in evidence there would be no difficulty in providing. The claimant also knew, from her own lived experiences, her likely potential stressors/triggers.

82. Moreover, looking beyond the claimant's own assessment, the respondent's own appointed occupational health advisors, Medigold, had said that the claimant was fit to do the job. Ms Galazka said that Medigold did not understand the demands of the job. But the Priory Group is itself a healthcare organisation. They should know what they are doing. They have chosen to appoint Medigold and to give Medigold what information they give them. The tribunal considers it was speculative to say that Medigold's assessment was not sufficiently educated. It is therefore of relevance to note that Medigold said the claimant was fit for the role and that whilst Medigold could have, for example, called the claimant in for further assessment, or obtained her medical records, or obtained a report from a treating practitioner they did not do so. Instead, they indicated that the situation was likely to be manageable if the respondent took the steps Medigold identified such as additional support through the induction period, a risk assessment, a stress risk assessment, a documented conversation regarding mutual concerns and an action plan to minimise identified risks. It is also notable that whilst Medigold identified that consideration should be given that the claimant may have increased vulnerability to workplace stress it was identified as a "may" not a "will." It is further notable that Medigold were saying that their recommended steps "should suffice."

83. We also noted what the claimant's occupational therapist said in her report of 2 November 2020:

"I supported [the claimant] as her Care Co-ordinator and Occupational Therapist from October 2017 to July 2019 when I transferred to a different team. During my time supporting [the claimant] we carried out numerous interventions including talking therapies, problem solving and practical support around her activities of daily living. These were tailored to support [the claimant] to manage her mental health and ADHD. Both of which impact significantly on her daily functioning. Although [the claimant] struggles on a daily basis to manage her mental health and ADHD conditions, she is high functioning and presents well, being able to work and study."

This paints a picture, at the relevant time, of an individual who is, with ongoing help, capable of being high functioning and to work and to study. The therapist's comments very much accord with the sense the tribunal had of the claimant. In particular, that seeking the right work/life balance and managing her symptoms through treatment and coping strategies remained work in progress for the claimant at the time of her job application, and that this was linked in part to the claimant applying for the job because of the flexibility of hours. But it is also a picture of the claimant, with the right structures and supports in place, being able to work and to be high functioning. We do not consider that evidence, or indeed that of the claimant's GP, serves to rule the claimant out from undertaking the bank worker healthcare assistant role. We are of the same view in relation to the claimant's disability impact statement. In particular, the claimant noted within that statement that the impacts of her anxiety and depression [186-187] were mostly remedied or alleviated through treatment.

84. In our deliberations we did take particular care to weigh into the equation what Ms Galazka in particular had to say about the specific demands of the working environment at Ty Catrin at the time. In particular we noted her point about the continuous high level of exposure to the most challenging kind of patient behaviour and her point that there was fundamentally no way to remove that exposure. She told us that the role in general has a high burn out rate and that with the claimant's vulnerabilities she saw it as inevitable that the claimant, whether early on or as time went on, would be harmed, in terms of her mental health, by the exposure. We bore in mind Ms Galazka's experience both as a mental health nurse and also as hospital director of Ty Catrin. However, ultimately Ms Galazka has never examined the claimant. As we understand it, she had never met the claimant until this tribunal hearing. She has never obtained the claimant's medical records and she has never had any interaction with the claimant's treating practitioners. She did not interact

with her own occupational health provider whose opinion she was disagreeing with. Ms Galazka acknowledged in evidence that each individual experiences anxiety and depression differently and that different individuals will have their own trigger points. She does not know what the claimant's triggers/stressors are or how they may potentially be ameliorated. Furthermore, whilst we would not doubt that Ms Galazka fundamentally believes what she is telling the tribunal, she is not, for example, an independently appointed medical expert. She is coming to the proceedings as hospital director seeking to defend the claim being brought against them. This has to affect the weight that is given to her views. We also noted that Ms Galazka did confirm that the respondent did have individuals working for them in a healthcare worker role who had anxiety and depression but were able to stay in employment (as well as those who found it too much, some with anxiety and depression, and some with not).

85. When balancing all the evidence and considering it objectively and with the benefit of all the evidence before us, we therefore did not consider it was inevitable that the claimant would end up in due course losing the job because of an adverse exacerbation to her health. We considered that there was a good enough chance that if proper investigations and consultations had been undertaken that the claimant would have been able to take up the role. It is possible (although difficult to fully assess as the initial stage in the process did not happen) that the claimant would have required a bespoke action plan and/or some adjustments. However, it seemed to us that there was a good enough chance that these would have been things that either the respondent was already doing or that which they could reasonably do. Again, it is difficult to definitively assess when the consultation and investigation did not happen. However, there were things the respondent could potentially do such as an action plan for identified stressors, regular supervisor support, access to the respondent's existing forums and debriefing processes, extending the period the claimant spent supernumerary on induction and, if necessary, starting the claimant in one of the less demanding wards. The latter two points Ms Galazka said the respondent would be unable to do. However, that analysis seemed to come down it either being because the Priory Group would not allow it, or they did not wish to create a precedent. Reasonable adjustments are adjustments tailored to the individual and neither of those reasons makes such an adjustment unreasonable, when assessed objectively. The claimant also had the ultimate advantage that she was applying for a bank role. That brought with it inherent flexibility. If she needed a break between shifts then it could be arranged. Much of what we have identified should have come about if the respondent had followed the recommendations of Medigold and/or if they had taken forward the claimant's request for an appeal and to be able to submit further evidence, instead of simply rejecting it outright.

86. Therefore, when looking at the discriminatory effect, the reasonable needs of the respondent and lesser measures open to the respondent, the withdrawal of the job offer was not an appropriate and reasonably necessary means of achieving a legitimate aim. The complaint of discrimination under section 15 Equality Act is well founded and is upheld. It will be a matter for the remedy hearing, when assessing financial losses, to assess the probability of the claimant maintaining the job, frequency of shifts and for how long she is likely to have worked for the respondent.

87. In reaching our decision we have given respect to the views of Ms Galazka as to what she says was reasonably necessary to achieve the identified legitimate aim and presuming that she was expressing her views rationally and responsibly from her perspective. However, as the Employment Appeal Tribunal made clear in Birtenshaw we did not have to be satisfied that any lesser measure would be acceptable to her as hospital director. That would otherwise give primary to Ms Galazka's evidence and be at odds with the requirement for us to undertake our own objective assessment.

Reasonable Adjustments

Did the respondent have the following PCP: "a policy of refusing to employ someone in the particular role with anxiety/ ADHD

88. On the evidence we heard, and bearing in mind the findings of fact made, we consider the respondent in fact was applied a practice of not employing individuals as bank healthcare workers where they considered there was a prospect they may have to provide some additional support and/or make adjustments for the worker. We also find that at that point in time the respondent would have applied such a practice to other applicants. It was not a one-off act that could only ever be applied to the claimant. It was a practice that had at least the potential to be repeated and applied to other applicants at the time. In part that is evidenced by the fact that the respondents themselves admit they have changed their practices since the claimant's experiences so that there are now bespoke discussions with the individual concerned.

Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she had anxiety/ADHD?

Did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at the disadvantage?

89. The PCP did put the claimant at a substantial disadvantage compared to someone without her disability. She faced the withdrawal of the job. If

she did not have her disability the potential for additional support/additional needs would not have arisen and the job would not have been withdrawn. The respondent knew of the disadvantage.

What steps could have been taken to avoid the disadvantage?

Was it reasonable for the respondent to take those steps?

Did the respondent fail to take those steps?

90. As we have set out above, we need to concentrate here on substantive steps that would actually address the disadvantage of having the job withdrawn. We accept that consulting with the claimant, with occupational health, with her treating medical practitioners, conducting a risk assessment, conducting a stress assessment, and engaging in the preparation of an action plan were reasonable things for the respondent to do. However, they would not by themselves remove that disadvantage. They are the preparatory steps to identifying what, if anything, is actually required by way of an adjustment to facilitate the claimant to effectively do the job.

91. The claimant's primary position is that she did not actually need adjustments. She says that she only asked for regular line management contact, but she pre-supposed the respondent would do that for staff anyway. The respondent agrees they would do so.

92. It is possible that the consultation and investigation process would have agreed with the claimant. However, it is also possible that the consultation and investigation process would have concluded that there were other arrangements and adjustments that the claimant would need. Or it is possible that the consultation and investigation process would have ultimately concluded that the risks to the claimant were too great. As we have said above, however, we do not consider that the latter outcome was inevitable.

93. We do consider there is a real chance that with proper assessment appropriate arrangements could have been made for the claimant. However, the tribunal is left in somewhat of an evidential vacuum as to what they would be. We have mooted above things such as line manager support, access to reflective practice forums, additional support in induction, additional supernumerary days and potentially temporarily limiting the wards the claimant worked on. Some of these things the respondent already did and others, in our judgment, they could reasonably do. However, what we fundamentally do not know with any sufficient degree of probability is that these are the things that the claimant would really require to be able to do the job. We have no evidence as to what, if

any, would have been likely to be the trigger points or stressors for the claimant in work. We have no medical evidence before us, for example from occupational health or a treating practitioner, to say that these are the things that would remove the disadvantage and allow the claimant to do the job. We therefore ultimately decided that for us to say that the respondent failed to take specific reasonable steps to ameliorate the disadvantage would involve too great a speculation on our part. We consider there is a good chance that there would be such steps. But we are, on the evidence before us, ultimately not able to say with sufficient certainty what those steps would be. That is not the claimant's fault as the respondent did not go through the proper consultation and investigation process. But it is our conclusion and on that basis the complaint of a failure to make reasonable adjustments therefore does not succeed and is dismissed.

94. The claimant's complaint under section 15 Equality Act is therefore upheld and will proceed to a remedy hearing. The complaint of failure to make reasonable adjustments is not successful and is dismissed.

Employment Judge R Harfield
Dated: 27 September 2021

JUDGMENT SENT TO THE PARTIES ON 28 September 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche