EMPLOYMENT TRIBUNALS

Claimant: Ms G Thomas

Respondent: St Helens & Knowsley Teaching Hospitals NHS Trust

HELD AT: Manchester **ON:** l, 2 & 3 February 2021

BEFORE: Employment Judge Holmes
Ms B Hillon
Mr M Smith

REPRESENTATION:

Claimant: Ms S Johnson, Counsel
Respondent: Mr P Loftus, Solicitor

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1.The respondent discriminated against the claimant because of something arising in consequence of her disability in withdrawing an offer of employment in the Out Patients Department, which the respondent has not shown was justified;

2.The claimant is entitled to compensation. The claimant only seeks an award for injury to feelings, which the Tribunal awards in the sum of £4,000.

3.The claimant is entitled to interest upon the award. The period of the award of interest is from 23 November 2018 to the date of this judgment, at 8%, a total of £724.16.

REASONS

1. By a claim form presented to the Tribunal 20 March 2019 the claimant brings claims of disability discrimination against her employer arising out of an offer of employment in a post as a Health Care Assistant (HCA) in the Out Patients Department at Whiston Hospital, which was withdrawn on 23 November 2018.

2. The claimant's disability , right sided hemiplegia, has been conceded to be a disability by the respondent. At a preliminary hearing on 12 July 2019 case management orders were made, and a list of issues was agreed.

3. Although originally listed for a final hearing on 12 to 14 February 2020, due to postponements, the Tribunal held this final hearing on 1 to 3 February 2021. The "Code "V" in the heading indicates that this was a remote hearing by CVP**,** to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the hearing remotely. The respondent provided the Tribunal, and all other parties with a copy of the agreed bundle, which was in two parts, a main hearing bundle, and a bundle of Occupational Health reports and information (referred to as the "OH bundle"). References to page numbers are to the main bundle, unless otherwise stated.

4. The claimant was represented by Ms Johnson of counsel, and the respondent by Mr Loftus, solicitor. The claimant gave evidence. She was accompanied at her home , whence she was appearing , by her sister, who was able to assist when the claimant , as she is prone to, suffered fitting during the hearing. These were, thankfully, brief episodes , and only occurred twice, with the claimant fully recovering within minutes on each occasion.

5. The claimant gave evidence , and called no witnesses. For the respondent Kath McGill, Eileen Noon, and Tracy McLoughlin gave evidence. Having heard the evidence, read the documents referred to in the bundle, and considered the submissions of both parties, the Tribunal finds the following relevant facts:

5.1 The Claimant is employed by the Respondent as a Health Care Assistant ("HCA") in the Out Patients department in Whiston Hospital. Prior to 4 February 2019, she worked as an HCA in the Medical Assessment Unit ("MAU") in the same hospital. The MAU is a busy department, receiving referrals from within the hospital, and from GPs. There are few appointments, and the flow of patients can vary during the working day. As an HCA the claimant's role within the MAU would involve walking to other departments within the hospital to accompany patients to wards, x – ray, ultrasound, the laboratories, or for other reasons.

5.2 The claimant has a disability of right sided hemiplegia, which she had had since birth. It causes right sided weakness, and learning difficulties. Her mobility on her right side is impaired, with limited use of her right arm.

5.3 In or about January 2015 the claimant ruptured her right Achilles tendon. She subsequently underwent surgery to repair it, and was off work from 26 June 2016 until October 2016. On 10 November 2016, the Claimant was placed onto Level 1 of the Respondent's Attendance Management Policy following sickness absence. Adjustments were made to her duties on the MAU to accommodate her limited mobility.

5.4 The claimant continued to suffer with her right foot and ankle. On 22 May 2017 her hours of work were varied by agreement with effect from 1 June 2017 to 30 hours per week (page 71 of the bundle). The claimant also changed her shifts to work early shifts. On 2 November 2017 the Claimant moved onto Level 2 of

Respondent's Attendance Management Policy following further sickness absence, some of which was not related to her disability (pages 78,79 and 82 of the bundle). The outcome of this review was that the claimant remained on Level 2 of the Policy, which meant that if her attendance did not improve sufficiently by 2 November 2018 she was at risk of being escalated to Level 3 of the process, when dismissal could be the result.

5.5 The claimant continued to suffer pain in her right foot. She was assessed by the Health, Work and Wellbeing Department ("HWWB" as it is referred to) on 5 February 2018, and a report dated 16 February 2018 was provided to the claimant's line manager, Kath McGill (pages 83 and 84 of the bundle).

5.6 The report advised that the claimant had developed a bony growth on her right foot. She had seen a specialist and was to undergo surgery , a bone scrape, in March 2018. In terms of her work, the report advised that adjustments were required as she was experiencing pain when walking patients around the hospital in her role in the MAU. The report advised how she needed regular rest breaks, and should avoid increased walking. The report recommended that it would help if she could be moved to another area, such as a clinic where she could sit down more often.

5.7 The report notes that redeployment had not been considered. A risk assessment was advised, but the claimant was fit to continue doing early shifts and nights in the MAU.

5.8 In terms of redeployment, the respondent has as part of its Attendance Management Policy (pages 187 to 230 of the bundle) at para. 6.18, a section which provides as follows:

"6.18 Redeployment

- *If Health, Work & Well Being Service advice* [sic] *that the employee is unfit to perform their current role but could possibly undertake an alternative role, the Trust will endeavour to find redeployment opportunities for them.*
- *If however, there is no immediate or imminent vacancy available consultation with the employee will commence about the termination of employment. At this point the employee will be placed on the redeployment register for the remainder of the consultation period relating to their notice period.*
- *Regular review meetings will take place during this redeployment process.*
- *If a position is found this will be e on a 4 week trial basis to be reviewed at the end of this period ,(please refer to the policy)*
- *There is no onus on the Trust to create a post for any employee."*

5.9 The claimant was aware of this Policy, and , from conversations she had held, believed that if she went on the redeployment register, she was putting her employment at risk, as if no job was found for her, her understanding was that she would be dismissed. She therefore did not seek redeployment. She began to look for other jobs within the hospital. She felt that she was now too slow in her mobility to keep up with the demands of the MAU, as she was not confident when walking, and stumbled from time to time.

5.10 The claimant underwent surgery in March 2018. She commenced sickness absence on 29 March 2018 following this surgery.

5.11 On 15 June 2018 Kath McGill referred the claimant to HWWB (pages 84C to 84 E of the bundle). The claimant was seen by Dr Shah, on 14 August 2018. Her report dated 14 August 2018 is at pages 85 to 86 of the bundle. In it she says this:

"Gemma has a history of infant cerebral palsy leaving her with a right sided weakness. She tells me that in January 2016 she sustained an injury to her right Achilles tendon and required surgery. She says that she has continued to experience weakness of the ankle and had further surgery in March 2018. She tells me that her right foot is weak resulting in deterioration of her mobility. She is having physiotherapy. She says that she is experiencing pain, but that she can cope with the symptom. Currently she can manage to walk for about 15 minutes maximum and then has to sit down for about 5 minutes before carrying on. She is also limited in the use of the right hand due to the hemiplegia.

Gemma says that she does not feel able to return to work in a substantive role. In my opinion, she is unlikely to be able to return to the substantive role in the next 2 to 3 months, that is within the foreseeable future, but possibly long-term. She is fit for work for restricted duties, namely that she is limited in her mobility and limited in the use of her right arm."

Dr Shah goes on to give her opinion that the claimant would be considered disabled under the Equality Act 2010 and that she would be grateful if her manager would consider reasonable adjustments in her post. If that was not possible then the claimant may require temporary or permanent redeployment. A risk assessment was advised.

5.12 On 17 September 2018 the Claimant applied for the HCA role in t Outpatients department. As part of her application (page 163 of the bundle) the Claimant advised that she was "looking to move forward to the next chapter" and wanted a "new challenge in [her] career". The Claimant returned to work on the MAU on 25 September 2018. She was put on restricted, non – clinical duties.

5.13. On 19 October 2018 the Claimant was interviewed for the Outpatients HCA role by Eileen Noon, and Amanda Goodison. The former recorded in her notes of the interview (page 96 of the bundle) that the claimant had explained to her that she was in a non-clinical role, following surgery, but that she believed if appointed she would meet the fitness criteria for the role. Amanda Goodison similarly (page 102 of the bundle) noted that the claimant had offered information regarding her ongoing health condition but felt that she would meet the criteria for the role. No specific health or fitness criteria were specified for the role, but after the interview Eileen Noon walked the claimant through the Out Patients department, and explained to? her what the role entailed. She explained that the claimant would have to be on her feet for between three and four hours a day. The Claimant confirmed in interview that she would be able to do this.

5.14 The claimant was successful in her application, and by letter dated 19 October 2018 was offered the job, subject to satisfactory pre-employment checks (pages 104 to 108 of the bundle).

5.15. The Claimant accepted the offer , and by letter of 20 October 2018 (page 108A of the bundle) to Kath McGill , resigned her post in the MAU , giving the requisite four weeks notice .

5.16 On 1 November 2018 the claimant received a further notification of a review of her sickness record (page 110 of the bundle). In this letter Kath McGill informed the claimant that as it was 12 months since she was placed onto the Short Term Absence Procedure, having reviewed her sickness record, provided she was not absent from work again she would be monitored at the current level of the procedure for an extended period of six months until 2 May 2019.

5.16 The claimant duly attended a Health Work and Wellbeing ("HWWB") appointment on 20 November 2018. This was with Dr Shah, who was familiar with the claimant's medical history. Two documents were then produced . One , dated 22 November 2018 entitled "Pre-placement Health Screening" (page 111 of the bundle), authored by Dr Shah, reads as follows:

"I am pleased to advise you that this applicant has been screened against the risk assessment provided and has been passed fit to commence work in the name to post with the following restrictions: fit not screened for EPP, See fit slip for restrictions.

please see report attached."

The "risk assessment" referred to was not originally before the Tribunal, but was obtained during the course of the hearing (pages 110A to 110E of the bundle). It was a very generic document, and was not specific in relation to any requirements of the particular role for which the claimant had applied.

5.17. The HWWB report produced by Dr Shah, attached to this document , dated 21 November 2018 (page 112 of the bundle) says this:

"[the claimant] is fit for restricted duties, namely that she has had a right sided hemiplegia and learning disability from birth. Her mobility is limited and she is currently able to walk for about 25 minutes at a time and then she has to sit down and rest for about 2 - 3 minutes before she can carry on. Additionally she has limited use of her right arm. A risk assessment should be performed. In my opinion with regards to the disability legislation under the Equality Act 2010, impairment is likely to be considered long-term and which has a substantial adverse effect"

5.18 The claimant had asked for and was provided with a copy of this report. She did not however see her copy until around 3.00 p.m. on 23 November 2018.

5.19 Eileen Noon received the report, but does not recall receiving the other document dated 22 November 2018. Upon receipt of the report Eileen Noon was concerned to note an apparent discrepancy between the information that the

claimant had provided to HWWB, and what she had said on the day of the interview about her ability to meet the physical requirements of the HCA role in Out Patients.

5.20 Eileen Noon accordingly sought advice from Sophie Ellis who was the HR adviser involved in this recruitment exercise. There is an email chain on 23 November 2018 which starts on page 116, then going backwards to page 113, of the bundle with Eileen Noon sending an email to Sophie Ellis at 12.29 in which she states that in view of the restrictive conditions of employment on the fit slip she felt she could no longer go ahead with employing the claimant. She went on to say that it was made clear at the interview that the post would involve being on her feet for most of the time , and what would be expected of the candidate that they employed. She had been assured that this was not a problem when unfortunately it was.

5.21 Thereafter it appears that one Sandra Cole became involved, and at 12.55 that day, in an email copied to Eileen Noon, she advised that the HWWB report stated the claimant was unable to walk for more than 25 minutes at a time. She had spoken to Eileen Noon, and the claimant would be required to complete sessions of usually three hours in duration. This would require the claimant to be standing or walking for the majority of this period. As the claimant could be the only HCA on a particular clinic there would not be another colleague to take over her duties. Further because of the arrangement of the work in the clinics with trolleys frequently in the corridor, and no nurse base to facilitate the claimant sitting down, the claimant could not be afforded what she would need. Restricting the clinics that the claimant worked on to those with a nurse base would be detrimental to the service of the Department as all staff were required to move between the clinics when the needs of the service required it. She concluded that the department was therefore unable to make the adjustments required and someone (it is unclear precisely who , as this email was addressed to Natalie O'Keefe and copied to four other people) may want to now consider the formal redeployment process as per the HWWB advice in August.

5.22 Ms Cole followed this email with a further email to Eileen Noon , at 13.08 that day (page 114 of the bundle) informing her that as the recruiting manager she would need to notify the claimant of the withdrawal of the offer which would then be followed up in writing by Sophie Ellis.

5.23 Eileen Noon rang the claimant sometime between 13.00 and 13.25 that day. The claimant was at the time on a train, and Eileen Noon informed her that the job offer was being withdrawn following receipt of the report from Dr Shah. It is unclear precisely what was said in this conversation, the claimant became upset by it. She certainly was told that the reason for the withdrawal was the report from EWWB, and Eileen Noon probably tried to give more explanation as to what the precise issues were.

5.24 This conversation clearly had taken place by 13.25 that day, as at that time Eileen Noon sent an email to Sandra Cole , copied to Sophie Ellis, recording the fact that she had rung the claimant and had informed that they were withdrawing the offer, and why , as the claimant had asked.

5.25 The claimant started crying on her train journey, on which she was alone. Her partner rang her and could hear her crying, but she was unable to say very much

other than that the job had been taken away from her. She had been advised to ring Natalie O'Keefe, and did so. She explained that the job had been withdrawn because of what was said in the report, namely that she could only walk for 25 minutes.

5.26 The claimant rang HWWB in order to speak to Dr Shah, see page OH 87, where there is an undated entry recording that there was a message to Dr Shah to ring the claimant, which it seems she did later that day. She advised the claimant to seek advice from her union or ACAS.

5.27 Confirmation that the job offer was withdrawn was sent on 23 November 2018 (page 117A of the bundle) in a letter from Vicki Darwin, the Resourcing Team Leader. She explained how the department could not provide the adjustments that the claimant needed , because of the use of trolleys in corridors, and absence of nurse bases to facilitate the claimant sitting down. She went on to say that restricting her duties to the clinics with nurse bases would have a detrimental effect on the service, as all staff are required to be able to move between clinics when the needs of the service required it. She offered the claimant the opportunity to telephone her.

5.28 The claimant , after a tearful train journey home, during which she experienced feelings that she had previously felt upon bereavement, ectopic pregnancy and surgery, returned home. She was also worried about her long term future and felt very lonely. Upon her arrival home she read Dr Shah's report, and could not understand why the job offer had been withdrawn. She felt embarrassed that she would have to tell people that her job offer had been withdrawn, and efforts of her partner daughter and family to comfort her did not assist. She felt lonely and depressed, and could not eat, feeling sick. She went to bed in tears, and her 13-year-old daughter tried to comfort her.

5.29 The claimant did not go out for the next two days, and felt stress at the uncertainty of her employment position. She is the main income earner in the household, and needed to work. She was constantly angry , making her daughter frightened to approach her. Over that weekend she felt terrible, crying and having panic attacks, which made her feel tight chested. She did not do her usual household chores.

5.29 Although not documented in the bundle, the claimant's resignation from the MAU was not actioned, and she returned to working the restricted duties there that she had been carrying out since September 2018. The claimant did return to work on 26 November 2018, but felt embarrassed in front of her colleagues , and angry about the decision to withdraw the job offer. For the rest of that week she did not help with cooking meals at home and did not help her daughter with her homework as she normally would. She found it hard to speak to her daughter , and would snap when speaking to her and her partner. She had outbursts crying panic attacks, but was able slowly to pick things up at home after a couple of weeks.

5.30 Whilst there has been some suggestion in the documentation that the claimant withdrew her application of the HCA post, she did not do so.

5.31 For reasons that are unclear, and not documented in the bundle, in December 2018 the respondent called a case conference. This was held on 17 December 2018

by Kath McGill with Dr Shah and Natalie O'Keefe. The claimant was accompanied at this meeting by a trade union representative Dave Maskell. At this meeting it appears that Dr Shah asked that a risk assessment be carried out to reassess the claimant's suitability for the HCA post in Out Patients. This resulted in an email from Natalie O'Keefe of 17 December 2018 to Sandra Cole, in which she asked for arrangements to be made for this assessment to be carried out in order for there to be further input from HWWB. Sandra Cole, in turn later that same day sent an email to Eileen Noon , in similar terms, asking for the arrangements to be made for the risk assessment (page 118 of the bundle for this email exchange).

5.32 Eileen Noon by email of 24 December 2018 wrote to the claimant asking her to make an appointment in order that a risk assessment of the post in Out Patients could be conducted (page 119AA of the bundle).

5.33 On 3 January 2019 the Claimant's trade union Branch Chair, Denise Williams submitted a grievance on her behalf in respect of the failure to conduct a risk assessment and subsequent job offer withdrawal (pages 119A – 120 of the bundle).

5.34 On 4 January 2019 the claimant met with Eileen Noon and Maria Capper In the Out Patient department to carry out a risk assessment. This was a fairly brief meeting, and resulted in the completion of a generic risk assessment form, the relevant part of which, page 1 of 5, appears at page 121 of the bundle. In the respective boxes on that page of the assessment, the potential hazard is described as being "Clinic run from corridor trolley full 4 hour session as the majority of clinics are".

5.35 The potential harm identified is the claimant standing or walking for a longer period than that of 25 minutes which had been identified in the HWWB report. In the final box headed "Suggested Safe Systems Required and Actions", the following entry was made:

"Gemma informs us she is able to stand and walk a full session which is in direct contrast to HWWB report received therefore returned to HR for review and potential further HWWB assessment."

5.36 By email later that day (page 126 of the bundle) Eileen Noon sought further advice from Sandra Cole. She informed her that a risk assessment had been carried out earlier that day , and that the difficulty that she had was that what the claimant had told her is not what was written in the HWWB report. She was unable to move forward with the post as the risk assessment with the claimant conflicted with the report. She asked if this could be clarified.

5.37 Sandra Cole by email of 7 January 2019 passed this enquiry on to HWWB (page 126 of the bundle).

5.38 The reply came from Linda Lewis who was (as can be seen from page OH 80) the Head of HWWB, on 7 January 2019 (page 127 of the bundle) and is in these terms:

"With regards to this lady I was involved with the case conference we had and I can confirm that the report completed by Dr Shah remains, however I think there may be some misunderstanding regards to interpretation, I hope the following helps to clarify:

The advice from Dr Shah is that she would be unable or unlikely to be able to walk 25 minutes, this is a consistent 25 minutes, it is our understanding that she has been working as a HCA ward based, clarity re; mobility in practical terms for risk assessment purpose can be assessed by speaking to the manager in this area to establish functionally what she has been able to do, balanced with what she is unable to do. In my opinion, from a risk assessment point of view this would be the best prediction we can make, for example, if there are activities/tasks that she can currently do on balance of probability she will be able to continue to do them in a new role."

5.39 Ms Lewis concluded by offering the manager the opportunity to speak with her directly or to require any additional support with the risk assessment.

5.40 In the meantime the claimant's union had confirmed that she wished to proceed with the grievance, and Sandra Cole by email of 11 January 2019 (page 129A of the bundle) wrote to Tracey McLoughlin , Matron of the Out Patients department, asking her to conduct and arrange a grievance meeting.

5.41 Tracey McLoughlin duly did so by letter dated 15 January 2019 (page 129C bundle) , the grievance meeting to be held on 25 January 2019.

5.42 The grievance hearing took place on 25 January 2019 claimant being represented by Dave Maskell of her trade union. Tracey McLoughlin conducted the hearing and there was a minuting secretary present. The notes of the hearing are at pages 130 and 131 of the bundle. Tracey McLoughlin concluded in the hearing that the claimant was fit enough to carry out the HCA role in Out Patients, and was happy that she started once necessary checks were complete. She did not require the claimant to carry out a trial period, and was happy to accept the claimant considered that she could carry out the role. This conclusion was announced in the meeting, and by letter of 25 January 2019 (page 132 of the bundle) Tracey McLoughlin confirmed this as the outcome of the grievance.

5.43 The claimant was duly sent an offer letter on 29 January 2019 (pages 132A to 133 of the bundle), which she duly accepted and commenced her employment in that role on 4 February 2019. She has been successfully completing that role with no adjustments in place for her disability.

6. Those, then are the relevant facts found by the Tribunal. There has not been any real dispute as to the facts, and the Tribunal does not consider for one moment that any witness has not told the truth as they saw it.

The Submissions

7. Before proceeding further, it was clarified with Ms Johnson that the claimant was making no claims prior to 23 November 2018, when the job offer was withdrawn.

The List of Issues had suggested that there were ante-dating claims arising whilst the claimant was still employed in the MAU in the period March to September 2018, but it was clarified that the claimant was not pursuing any such claims.

8. Mr Loftus for the respondent had prepared written closing submissions, which it is not intended to repeat in this judgment. Suffice it to say that his primary contention in response to the s.15 claim was that the reason that the claimant had the job offer withdrawn was the discrepancy between what she had said to Dr Shah of HWWB and what she said upon interview with Eileen Noon. The claimant had told Eileen Noon that she could manage being on her feet for 3 to 4 hours in the Out Patients department, but this was at odds with what she told Dr Shah. It was a contradiction, or was at least reasonably seen as a contradiction by the respondent. That was, he submitted, not something that arose from, or in consequence of her disability, it was a contradiction in her account of her physical capabilities. That was quite separate from her actual disability, it was the information that gave, not her condition or anything arising from it , which was the issue.

9. In the alternative, if the claimant did overcome the initial hurdle of s.15, the respondent relied upon its justification defence. The legitimate aim was (para. 30 of his submissions) that of ensuring a robust recruitment process which does not recruit applicants who have given conflicting information about their ability to carry out a role.

10. In response to the reasonable adjustment claim, redeployment into the Out Patients role was not a reasonable adjustment, because the claimant had expressly refused to go onto the redeployment register. It cannot be a reasonable adjustment to do something against the will of the disabled person.

11. For the claimant, Ms Johnson made oral submissions. She took the Tribunal through the history of the claimant's work in the MAU, the acknowledgement of her disability, and the knowledge that the respondent had from its HWWB reports of her mobility issues. The claimant was anxious not to seek redeployment, due to the risk that would pose to her continued employment. The claimant therefore sought other job opportunities, not just the one in Out Patients. She was an ideal candidate, and had been upfront about her health issues in the interview. Dr Shah's report flagged up the issues, but it also suggested that a risk assessment be undertaken. None was done until January 2019, nor was there any case conference.

12. It would have been reasonable and proportionate to carry out the risk assessment before withdrawing the job offer. The reason for the withdrawal was a direct result of the claimant's disability. The claimant challenged the information in the report as not being accurate, but the employer faced with this conflicting information did not try to reconcile it with the claimant, but withdrew the offer. This was a disproportionate response. The wheels were put in motion to withdraw, and there was no attempt to remedy the situation for a further four months.

13. She went on to discuss the grievance, and the enquiries that were made of HWWB. Linda Lewis had explained how there may have been a misunderstanding. Tracey McLoughlin had been satisfied that the claimant was up to the job, and no trial period was required. She had failed, however, in the grievance outcome to

address the issue of whether there had been discrimination. She invited the Tribunal to find both heads of claim were made out. She went on to make submissions as to appropriate award for injury to feelings.

The claims and the Issues

The Law

14. The relevant statutory provisions are set out in the Annexe hereto, and were not contentious.

15. In relation to s.15 claims, the leading cases are set out below in the discussion of the claims and the issues.

Discussion and Findings

16. As observed , the only claim before the Tribunal is that arising out of the withdrawal of the conditional offer of employment on 23 November 2018. It is put as a s.15, or, in the alternative, a s. 21 claim. As Elias LJ observed in ***Griffiths v Secretary of State for Work and Pensions[2016] IRLR 216*** it will often be the case that both claims are sustainable on the same facts.

17. We consider that the best starting point is the s.15 claim. That section, of course, introduced the concept of discrimination "because of something arising in consequence of " a person's disability. There is no argument here but that the withdrawal of the job offer was unfavourable treatment, so the first issue for the Tribunal is was that because of something arising in consequence of the claimant's disability ? What was the "something" , and how closely does it have to relate to the claimant's disability ?

18. Langstaff P in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305,*** explained the way in which the section is to be applied:

"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

19. Whilst there are two distinct stages to be addressed, much of the reported case law does express a need to show treatment 'arising from disability' (as the title of s 15 states), rather than the consequence of the disability (the wording of s 15(1)(a)), perhaps in cases where the 'something arising' was obvious and not in dispute.

20. In ***City of York Council v Grosset [2018] IRLR 746,*** Sales LJ held that *'it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in*

question that the relevant "something" arose in consequence of B's disability'. The respondent will have a defence if he did not know, and could not reasonably have been expected to know, that the claimant had the disability, or if he is able to justify the unfavourable treatment, but the former is not relied upon in this case. If he knows of the disability, he would, warns the court *'be wise to look into the matter more carefully before taking the unfavourable treatment'*. Simler P in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** held that:

*"the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (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. (See **City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746**)'.'*

21. The Tribunal in that case had fallen into error in failing to appreciate that the causal connection between the something that causes unfavourable treatment and the disability for s.15 purposes may involve several links depending on the facts of a particular case.

22. HHJ Eady QC in ***iForce Ltd v Wood UKEAT/0167/18*** stated that the cases of ***Grosset*** and ***Sheikholesami*** made it clear that the test under s. 15 was an objective test and could arise from a series of links. Nevertheless, it is important that there still has to be some connection between the 'something' and the claimant's disability. Ms Wood had osteoarthritis which she considered was made worse by cold and damp conditions. She therefore refused to obey her employer's instruction to work at benches near the loading doors as she perceived the conditions would be colder and damper. This perception was incorrect as the temperature and humidity were uniform throughout the warehouse. As the claimant's erroneous belief had not been caused by her disability, it could not be said that the 'something' – her refusal to obey the instruction – had arisen as a consequence of her disability. Her section 15 claim therefore failed.

23. The test under s.15 therefore has had the practical consequence of weakening the causal link a claimant needs to show between the treatment complained of and the disability. Laing J in ***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893***, held that section 15 did indeed loosen the causal connection required between the disability and any unfavourable treatment. Mrs Hall was dismissed after 23 years' service because her employer had a genuine, but mistaken belief that she had been working in a pub during a period of disability-related sickness absence. The ET had concluded that the disability-related absence was mere background, and the cause of the employer's action was its belief in the misconduct. The EAT set aside this decision. Inquiry into 'motivation' is not the relevant question – the looser language of s. 15 (as compared with its forerunner in the Disability Discrimination Act 1995) does not require disability to be the cause of the treatment. The EAT held (at [42]) that it is sufficient for disability to be 'a

significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment'.'

24. Simler P in ***Pnaiser v NHS England [2016] IRLR 170*** considered a case in which an employee had a significant amount of disability-related sickness absence. She was offered a job with NHS England subject to satisfactory references; after the telephone conversation between her previous line manager and prospective employer, in which her attendance record was discussed, the job offer was withdrawn. In light of the relevant authorities, at [31] the following guidance as to the correct approach to a claim under s. 15 was given:

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see ***Nagarajan v London Regional Transport [1999] IRLR 572****. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's [counsel's] submission (for example at paragraph 17 of her skeleton).*

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in ***Hall****), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

(e) For example, in ***Land Registry v Houghton UKEAT/0149/14****, a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason*

for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of ***Weerasinghe*** *as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.*

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in ***Weerasinghe****, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."*

25. In ***Robinson v Department of Work and Pensions [2020] IRLR 884*** the claimant had lodged grievances about adjustments in relation to her disability, and the employer committed errors when carrying out the grievance procedures. The Employment Tribunal determined that those errors had not arisen because of anything to do with the claimant's disability. Accordingly, held the Court of Appeal, this was not contrary to s 15 since it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability. Thus, whilst a "but – for" test is not the correct one to apply, the Tribunal is required to consider what may be regarded as the "degrees of separation" between the "something" and the disability.

26. It is appreciated that the foregoing is a fairly extensive examination of the caselaw, but the Tribunal considers it necessary to rehearse these issues to demonstrate the rather nuanced nature of the Tribunal's task when considering s.15

claims. Applying those principles to this case, Mr Loftus' primary argument is that s.15 is not engaged because the reason for the claimant's (admittedly unfavourable) treatment was not her disability, or anything arising in consequence of it. Whilst he did not cite ***iForce Ltd v Wood*** or ***Robinson v Department of Work and Pensions***, the logic of his submissions must be that the facts of this case fall on that side of the line . It was, he submits, the conflicting information that the claimant had provided to HWWB and to Eileen Noon about the effects of her disability upon her ability to carry out the duties of an HCA in Out Patients without the need for any adjustments, which caused the withdrawal of the offer. He seeks to distance the provision of this conflicting information from the claimant's disability . He contends therefore that the reason for the claimant's treatment was not anything which arose in consequence of the claimant's disability.

27. There is, with respect to Mr Loftus, a flaw in this analysis. It overlooks the reason actually given by the respondent to the claimant for her job offer being withdrawn. That was squarely set out in the letter of 23 November 2018 from Vicki Darwin at page 117A of the bundle. That makes no reference to anything that the claimant had said to Eileen Noon and Amanda Goodison at interview, merely to the contents of the HWWB report , which was to the effect that the claimant was unable to walk for more than 25 minutes without needing to rest, which gave rise to a belief that she would therefore need adjustments when working in Out Patients which could not be accommodated. Nothing is said about what the claimant had said to Eileen Noon. The alleged "conflict" between what she had said to Dr Shah of HWWB and what she had said at interview was immaterial.

28. In the Tribunal's view, if, for example, she had said the same thing to Eileen Noon and Dr Shah, the report would have said the same, and the job offer would still have been withdrawn because of the report. The job offer was withdrawn because the claimant appeared to require adjustments to be able to carry it out, which the respondent could not make. That arose from the claimant saying, as she accepted was the case, that she could not walk for more than 25 minutes without a rest. The reason she could not walk any further was her disability (Mr Loftus accepting for these purposes that her right foot and ankle conditions were linked to her disability of right sided hemiplegia, a view confirmed by the claimant's GP's letter of 27 June 2018 at page OH 75). That is clearly a close enough connection to her disability to make the withdrawal of the job offer treatment that occurred by reason of something arising in consequence of her disability.

Justification.

29. The claimant having satisfied the first two limbs of s.15, the Tribunal must now consider the respondent's alternative defence of justification. That is set in paras.28 to 30 of Mr Loftus' submission. The legitimate aim was that of "ensuring a robust recruitment process which does not recruit applicants who have given conflicting information about their ability to carry out a role". Pausing there, for the same reasons referred to above, this aim is not discernible from the evidence. Put bluntly, it would not, in our view have mattered what the claimant said in interview, its consistency with what she told HWWB was not in issue. Whether she was physically capable of carrying out the role without adjustments was the issue.

30. Rather, the Tribunal can see a far more cogent and obvious legitimate aim, namely that of not recruiting to positions applicants who were not physically capable of carrying them out , without adjustments, and, if any were required, assessing whether any such adjustments could be made. That , it seems to the Tribunal, would be a perfectly legitimate aim.

31. Whichever was correct, however, in order to succeed in this defence, the respondent has to show that the treatment, in this case the withdrawal of the job offer, at the time that it was withdrawn, was a proportionate means of achieving the legitimate aim.

32. There are several aspects of the respondent's actions which do not meet this test of proportionality. The first, and most striking aspect, is the haste with which the withdrawal was effected. The HWWB report was received by the respondent on 22 November 2018, discussed by Eileen Noon, HR and the recruitment advisers on the morning of 23 November 2018, and the decision to withdraw taken, and communicated to the claimant by 13.30 on 23 November 2018. There was no consideration given whatsoever to discussing the report with the claimant, who had not at that time seen it herself, before the decision to withdraw the offer was taken. It may have been that the claimant disputed that the information recorded in the report was accurately recorded. There was, however, no opportunity for her to have any input at all before the withdrawal was carried out. Quite what the rush to effect this withdrawal at such breakneck speed has never been explained, and is thus without any justification. It is hard to avoid the conclusion that this was a somewhat mechanical process carried out by HR and Recruitment , the Tribunal considering that Eileen Noon clearly wanted the claimant to join her department, and was only ever really acting upon the advice she received.

33. Whilst the apparent conflict in the information provided was raised , and was a legitimate concern, the claimant was given no opportunity to resolve it before the offer was withdrawn.

34. Secondly, and perhaps even more importantly, the respondent can hardly be heard to argue that this treatment was proportionate when it ignored the very HWWB advice upon which it was acting. The report clearly states that a risk assessment should be carried out. The report was thus not a red light to the claimant being employed as an HCA in Out Patients , it was an amber light. As one would expect, an occupational health assessment of an employee's fitness to carry out a particular role will be somewhat limited in its effectiveness unless the provider is provided in some considerable detail with the physical requirements of the role. HWWB was not so provided, so the advice that a risk assessment was required was the obvious, sensible and best way of evaluating the claimant's fitness for the role, and whether she would need any adjustments.

35. That such a step was an obvious and simple one to take before withdrawing the job offer is , of course, borne out by subsequent events. By mid – December 2018, before the claimant even grieved, the respondent appears to have considered that some reconsideration was required. A risk assessment was arranged, very easily. It took some 15 minutes, and from it the respondent ascertained that the claimant was in fact physically fit enough to perform the role without adjustments,

which she has been doing since her appointment on 4 February 2019. Linda Lewis from HWWB resolved the apparent conflict in her advice to the respondent. As a little deeper consideration , and some discussion with the claimant would have elicited, being unable to walk continuously for more than 25 minutes at a time, and being able to stand up for 3 to 4 hours at a time , on a shift, are not mutually inconsistent. The former involves movement, particularly joint movement, the latter does not. As the claimant's subsequent ability to carry out the role demonstrates, she has been able to carry out the latter.

36. The treatment of withdrawing the job offer on 23 November 2018 without further consultation and discussion with the claimant , and without performing the risk assessment advised by HWWB before doing so, therefore cannot be justified as a proportionate means of achieving any legitimate aim (regardless of which one the respondent would rely upon), and this defence fails,

37. The respondent is accordingly liable to the claimant under s.15. In making this finding the Tribunal does not wish to be critical, and considers that this is probably a classic instance of a systems failure. This failure was not (as was in fact put to the respondent's witnesses as if the claims were of direct discrimination) motivated by any conscious intention to treat the claimant unfavourably, it was due to inadequate thought , consideration and attention to detail being applied to the circumstances. This was, of course, recognised to some extent , and remedied by , the grievance outcome. That the outcome made no finding as to whether there had or had not been any discrimination is, with all due respect to Ms Johnson, irrelevant.

Failure to make reasonable adjustments.

38. It is, in these circumstances, academic to consider whether the claim should succeed as a failure to make reasonable adjustments claim. The respondent did, or appeared to, apply to the claimant a PCP of requiring her to be able to walk for more than 25 minutes without a rest. She could not comply with that, by reason of her disability. The respondent could not make any adjustments in the Out Patients department to reduce the disadvantage to which that PCP put her. The Tribunal has, however, not had to consider whether any adjustments in the department could reasonably have been made, as the respondent subsequently removed the PCP, and the claimant has been able to perform the role. To the extent, however, that the PCP was , for a time at least , applied to her, and her inability to comply with it led to the withdrawal of the job offer, the Tribunal would , in the alternative, have found that there was a failure to make the reasonable adjustment of adjusting or removing the PCP sooner than it did.

Remedy,

39. Fortunately the claimant suffered no financial losses as a result of not securing the post in Out Patients until February 2019. Her claim is therefore limited to an award for injury to feelings.

40. Paras. 16 to 20 of the claimant's witness statement set out the immediate effects of being informed on the telephone that her job offer had been withdrawn. The claimant was understandably upset ,and she describes how she suffered a

tearful and lonely train journey that day having learned that the job offer, upon which she set considerable store for her continued employment, had been withdrawn. She had not yet seen Dr Shah's report, so could not understand why the offer had been withdrawn. When she did, she tried to find out how to remedy the situation, but could not do so. The weekend (23 November 2018 being a Friday) was difficult for her and her family. as she describes, but she was able to go back into work at the MAU on the following Monday, and had no further time off work.

41. She did, indeed, remain in work, the respondent effectively disregarding her resignation, and allowing her to continue to carry out the non – clinical duties in the MAU that she had been carrying out upon her return to work in September 2018. She had no time off work sick following the withdrawal of the offer. Further, by mid - December 2018 the claimant was made aware, for a meeting was held with her to discuss it, that the respondent was looking again at the withdrawal of the offer. Whilst that did not produce an immediate remedy, it should, at least , have encouraged the claimant to believe that all was not lost, and there was a prospect that the offer would be reinstated

42. Whilst the claimant's witness statement does go on to suggest that she subsequently may have suffered some psychological symptoms, as late as July 2019, this was not until 8 months after the withdrawal, and there is no medical evidence before the Tribunal of any causal link between those symptoms and the withdrawal of the job offer in November the year before. Ms Johnson has sensibly not sought an award on the basis of any longer lasting effects beyond the end of January/beginning of February 2019, when the claimant's grievance was upheld, and the claimant was appointed to the role she applied for,

43. Ms Johnson did not suggest a figure, and accepted that such one – off instances of discrimination would probably only merit an award in the lowest band of ***Vento*** , whilst her solicitors had suggested that the middle band may be achievable. She did however refer the Tribunal to the EAT case of ***Bear Childrenswear Ltd v Otshudi [UKEAT/0267/18]*** as authority for the proposal that there was no rule of law that one – off acts of discrimination can only merit awards in the lowest band, it always being a matter for the Tribunal to assess whether even a one off event might be sufficiently serious in its effects upon the claimant to merit an award outside the lowest band. Mr Loftus, in his written submissions took the Tribunal to awards that had been made in the cases of ***Sarwar v West Midlands Fire and Rescue Service (Case No. 1304552/06)*** and ***Zebbiche v Veolia ES (UK) Ltd (case No. 2201863/2011)*** In the former a Tribunal made an award of £2,500 for failures to make reasonable adjustments which led to three absence warnings over a period of 5 months, leading to a final written warning hanging over the claimant's head. In the latter, the Tribunal awarded £4,000.00 for injury to feelings in respect of a dismissal which failed to consider alternatives such as a phased return to work, or a further medical report. The claimant, however, would still have been unfit to return to work.

44. To put these awards in context, at the time of ***Sarwar*** the lowest band of ***Vento*** was £500 to £5,000, and at the time of ***Zebbiche*** it was, following ***Da'Bell v Souza [UKEAT]0227/09]*** £600 to £6,000, which would itself be subject to some increase applying the Presidential Guidance. Thus the award in ***Sarwar*** was right in

the mid – range of the band at the time it was made, whilst that in ***Zebbiche*** was slightly over the mid – range.

45. Mr Loftus also invites the Tribunal to reduce any award for the claimant's contribution to her predicament by the giving of conflicting information to HWWB and Eileen Noon at interview.

46. To deal with that contention first, as a matter of legal principle, the Tribunal does not have power to reduce discrimination awards on this basis, unlike the power that it has to reduce a compensatory award for unfair dismissal under s.123(6) of the Employment Rights Act 1996. That was the view firmly expressed by Kerr J. in ***First Great Western Ltd & Linley v Waiyego [2018]UKEAT/0056/18*** when the EAT dismissed an appeal on the grounds that the Tribunal had failed to consider making any such reduction. Secondly, in any event, even if the Tribunal did have such a power, it would not exercise it in this case. Nothing in the claimant's conduct would remotely begin to approach the threshold for any such reduction. She was neither negligent nor dishonest. She provided the respondent with correct information, which it then failed adequately to investigate further for a further two months, when it then discovered that she was in fact fit to carry out the duties of the post. There would be no basis for any reduction, even if the Tribunal could make one.

47. Moving on to make the assessment of the appropriate award, the Tribunal takes into account that this was a one – off act of discrimination , with no aggravating features. Further, it was not, as often is the case, a dismissal, it was failure to be appointed to a new post. That the claimant had been offered the post, and then had it withdrawn , however, is a relevant factor, and she did suffer, initially, a quite serious degree of upset, but that soon passed. Further, the Tribunal does take into account that, whilst the claimant was not jobless following this withdrawal, she nonetheless harboured concerns about her long term future, if she could not move from the MAU, where she was effectively marking time, and needed to find a role that she could manage within her disability. That has some echoes of the situation in ***Sawar*** .

48. It must be recalled, however, that the discrimination in question took place in November 2018. The claim was presented on 31 January 2019. The relevant lowest band for claims presented between 6 April 2018 and 6 April 2019 was £900 to £8,600. Taking all the relevant factors into account the Tribunal considers that an award around the middle of this band is appropriate, and assesses the award for injury to feelings at £4,000.00

Interest.

49. The claimant is entitled to interest. The period starts with the act of discrimination, in this case 23 November 2018, to the date of calculation, which is the date of this judgment. That is a period of 826 days, which at 8% produces a figure of £724.16..

50. No representations, the Tribunal appreciates, were made as to interest. Whilst the period is a lengthy one, that is, the Tribunal considers, the fault of neither party, and whilst the respondent may have sought to argue that the period should be

shorter to reflect when the hearing should properly have been held, the delay is, in the Tribunal's view, one of the hazards of litigation, and it sees no reason to deprive the claimant of the full amount of interest to which she is entitled. Should the respondent consider that there are other arguments which it wishes to advance in respect of the award of interest, it can always seek reconsideration.

Postscript.

51.A number of matters have been brought out in the course of these proceedings which the Tribunal considers may be of benefit to the respondent to consider for the future. Whilst it is not the Tribunal's function to offer gratuitous HR advice to parties, and it has no role to provide education in how to avoid future disputes, the forensic process does sometimes throw up some hitherto unappreciated issues, which if addressed, may reduce the risk of future conflicts, and ultimately reduce the number of claims that come before Employment Tribunals. As will be clear , nothing that we remark upon here has had any direct bearing on our actual judgment, which is why it is only possible to address these matters in this way.

52.The first is the wording of, or the perception of , perhaps amongst managers as well as more junior staff, the respondent's redeployment policy under the Attendance Management Policy. Whilst, read carefully, it may not be as potentially employment threatening , had she sought it , as the claimant believed it to be, the evidence was that not only she believed that, but that others probably did too. Its effect was that it deterred the claimant from actively seeking redeployment, when arguably she should have done so. Whilst the obligation to make adjustments rests upon the employer, and a disabled employee should not have to ask for an adjustment that it would be reasonable to make, the employer's task is made much easier if , in co-operation with the employee , all options can be safely explored. To that end some re-wording of the Policy, or education and guidance as to how it is not to be applied without appropriate modification in disability cases , may be helpful

53. As a final point on this topic, and again to avoid the risk of management of any disability issues falling into any future error because of the wording of the Policy, the final bullet point of para.6.18 – *"There is no onus on the Trust to create a post for any employee"* – is not an accurate statement of the law of reasonable adjustments. The cases of ***Archibald v Fife Council [2004] IRLR 651*** and ***Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744*** are both authority for the proposition that, in certain circumstances, it may be a reasonable adjustment to do just that.

54. Our final point is to record our disappointment that it was necessary for the Tribunal to hear this claim at all. If ever a case cried out for an early settlement this was it. The claimant's claim was only ever a modest one , with no financial losses, and, once the respondent had upheld the claimant's grievance , and remedied the error that it had made in November 2018, it should have appreciated that it had some exposure in this case. That is not to criticise Mr Loftus, who has doubtless carried out his instructions , and has advanced his client's case as best he could. Given the amount at stake, and the respondent's starting position of having upheld the claimant's grievance, without , of course, conceding there had been any discrimination, it is hard to imagine any other, non – public sector , respondent

running this case all the way to a three day hearing without attempting some resolution.

55.The Tribunal, of course, does not know what, if any, attempts to compromise were made, nor should it, or will it, unless there are any applications which arise from any such negotiations. If however, there was, in fact, no attempt to compromise because of any blanket policy not to entertain any such resolution, the Tribunal can only observe that in this instance such a policy has resulted in the incurring of legal costs which will probably be at least double or treble the amount awarded (again, no reflection on Mr Loftus or his firm). Perhaps even more pertinently in these troubled times, three operational members of the nursing staff have had to give evidence instead of carrying out their duties, with one even interrupting her work of Covid – 19 vaccine administration to give evidence from a sports stadium to do so. Whilst appreciating the concerns and priorities of those seeking to guard the public purse, this case is a particularly illuminating example of when that goal can produce precisely the opposite, and indeed other undesirable, results.

Employment Judge Holmes

Dated: 25 February 2021

RESERVED JUDGMENT SENT
TO THE PARTIES ON
2 March 2021

ANNEXE

The relevant provisions of the Equality Act 2010

15 Discrimination arising from disability

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

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

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.

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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) – (13) N/a

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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2402617/2019
Miss G Thomas v St Helens & Knowsley Teaching Hospitals NHS Trust

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 2 March 2021

"the calculation day" is: 3 March 2021

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.