

THE INDUSTRIAL TRIBUNALS

CASE REF: 1559/12

CLAIMANT: Dylan Stuart Harrison
RESPONDENT: Queen's University Belfast

DECISION

The unanimous decision of the tribunal is that the claimant's claims in respect of direct disability discrimination, disability related discrimination and failure to make reasonable adjustments are dismissed.

Constitution of Tribunal:

Chairman: Mr S A Crothers

Members: Mr J Devlin
Mr P McKenna

Appearances:

The claimant appeared and represented himself.

The respondent was represented by Mr T Warnock, Barrister-at-Law, instructed by Pinsent Masons LLP, Solicitors.

THE CLAIM

1. The claimant's claim was in respect of direct disability discrimination, disability related discrimination, and failure to make reasonable adjustments, under the Disability Discrimination Act 1995 (as amended), ("the Act"). The respondent denied the claimant's claims in their entirety. The respondent accepted that the claimant had a disability within the meaning of the Act.

ISSUES BEFORE THE TRIBUNAL

2. The issues before the tribunal were as follows:-
 - (i) Whether the claimant had been treated less favourably for a reason which relates to his disability contrary to Section 3A(1)(a) of the Act by the

respondent's withdrawal of the offer of employment made to the claimant on the basis of medical reports and references.

- (ii) Whether the claimant was treated less favourably on the ground of his disability contrary to Section 3A(5) of the Act.
- (iii) Whether the Respondent can rely on any justification under Section 3A of the DDA.
- (iv) Whether the claimant had been subjected to disability discrimination, due to the respondent's failure to make reasonable adjustments as defined by Section 3A(2) and contrary to Section 4A of the Act, and in particular:
 - (a) What was the provision, criterion or practice ("PCP") which the claimant alleges was applied by the respondent?
 - (b) Did this PCP place the claimant at a particular disadvantage when compared with other persons?
 - (c) Was this disadvantage substantial?
 - (d) Who is the relevant comparator?
 - (e) What adjustments were reasonable, in all the circumstances of the case, for the respondent to have made in order to prevent the provision, criterion or practice having that effect?
 - (f) Did the respondent take reasonable steps to prevent the PCP from having that effect?
 - (g) Whether it was reasonable for the respondent to include in all the circumstances that there were no reasonable adjustments sufficient to enable the claimant to perform the role.
 - (h) Did the claimant suggest any reasonable adjustments and, if so, what reasonable adjustments did he suggest should be made?
- (v) What reasonable adjustments does the claimant assert should have been made or suggested by the respondent, if any?
- (vi) Considering the decision in *London Borough of Lewisham v Malcolm* [2008] UK HL 43 who does the claimant allege is a relevant comparator?
- (vii) Can the respondent rely on the statutory defence as set out in Section 58 of the Act?

The above issues, as amended by the tribunal, were agreed by the parties at a Case Management Discussion held on 18 October 2012.

SOURCES OF EVIDENCE

3. The tribunal heard evidence from the claimant and on his behalf, from Charles Heywood, Professor of Psychology and Head of Department of Psychology at Durham University. On behalf of the respondent, the tribunal heard evidence from Dr. Denis Todd, Senior Medical Officer and Occupational Health Physician at Queen's University Belfast, Joe Burns, Head of Networks in the Information Services Directorate, Fiona Hamilton, Personnel Officer, and Pamela McIntyre, Administration and Resources Manager for the Information Services Directorate since 1 February 2012. The tribunal received an agreed bundle of documents (duly supplemented in the course of the hearing), and took into account only the documentation referred to it in the course of the hearing. An agreed chronology is also appended to this decision.

FINDINGS OF FACT

4. Having considered the evidence insofar as same related to the issues before it, the tribunal made the following findings of fact, on the balance of probabilities:-
 - (i) The claimant was interviewed by the respondent ("the University"), for the role of Grade 7 Network Engineer in the Network and Security Support Team of the Information Services Network group within the University. The Network and Security Support Team consisted of two Network Engineers - a Grade 7 and a Grade 8 Team Leader. They provided the front-line support for the smooth running of the University's core and backbone networks, together with the University's connection to the internet via the United Kingdom's joint academic network ("JANET"), and the Northern Ireland Regional Area Network ("NIRAN"), which connects all of the Higher and Further Education Institutes in Northern Ireland via the NIRAN Point-of-Presence network facilities at the University and onward to the internet (also via the JANET network facilities at the University). The University therefore acts as the focal point for all network connectivity to Higher Education and Further Educational Institutes within Northern Ireland. The claimant accepted that the Grade 7 role was a stressful, pressurised, and critical role. It required the postholder to analyse situations calmly and effectively under pressure and to find solutions quickly. Working as part of a team was also vital to the role.
 - (ii) As part of the application process, the claimant was required to complete a separate monitoring questionnaire, which was not placed before the Interviewing Panel. Although he failed to state on that form that he suffered from a disability, there was no dispute that he was disabled for the purposes of the Act at all material times relevant to his claim before the tribunal. The tribunal was also directed to an application the claimant made for a post at Cardiff University and an accompanying monitoring form dated 29 April 2012, in which he stated that he was not disabled. In the monitoring form attached to a subsequent application for a post in Northumbria University, the claimant was asked a specific question as to whether he had a disability which fitted the definition in the Act. He again confirmed that he did not have a disability. The claimant, by way of explanation, pointed to the fact that a monitoring form was not before an interview panel. The tribunal had reservations

concerning the claimant's credibility in certain parts of his evidence, which was confirmed by his approach to the monitoring forms in the above two applications. Where conflicts of evidence arose, it preferred the evidence of the respondent's witnesses. Furthermore, when Joe Burns enquired in the course of his interview for the Grade 7 post at the University as to his reason for leaving a Sub-Librarian's post for a lower graded post the claimant did not volunteer any information regarding a disability.

- (iii) The claimant performed well at the interview held on 11 January 2012 and was placed as a reserve candidate. He was informed by Fiona Hamilton in correspondence dated 13 January 2012, that:

“... the Appointments Panel was impressed with your application and considered you suitable for an appointment. Accordingly your application will be kept on file for a maximum of twelve months and we may contact you again should a suitable vacancy arise in the near future”.

- (iv) Joe Burns informed Fiona Hamilton in January 2012 that funding had been agreed for a second Network Engineer position. She telephoned the claimant on 27 January 2012 to inform him of the situation and to confirm that as he was the reserve candidate resulting from the first interview, he was being recommended for appointment to the Grade 7 post subject to normal University requirements. A start date was proposed for 1 March 2012.

- (v) A conditional appointment letter was forwarded to the claimant on 30 January 2012 which confirmed, inter-alia, that his appointment to the post was:-

“subject to the following requirements:

- Satisfactory references – I have written to your referees requesting an urgent response.
- Satisfactory medical report – Please complete and return the enclosed Medical Questionnaire as soon as possible ...”

- (vi) By this time two references had been received, one from Dave Thornton on 10 January 2012 which was considered to be satisfactory, and a second reference from Ms Clare Powne, received on 11 January 2012 after the conclusion of the interviews, which was also satisfactory in relation to the claimant's work within the library of Durham University. The tribunal is satisfied, on the evidence before it, that at no time was Clare Powne the claimant's line manager. His line manager at the material time was Dr Hall with whom the claimant appears to have had a tense relationship. The tribunal accepts, on the balance of probabilities, that this explains why the claimant did not seek to provide a reference from his line manager Dr Hall. He criticised the adequacy of the drop down menu in the on-line application process for the post and contended that he could only have described Clare Powne as supervisor/line manager. However, it was also open to him in the drop box, to refer to her as a “work colleague”. The tribunal was satisfied on the evidence before it, that this perceived falsification of information within his

on-line application form, would not, in itself, have led to the subsequent withdrawal of the offer of employment by the University.

- (vii) On 6 February 2012 the University received the claimant's acceptance of the conditional offer which included a confidential medical questionnaire signed by him and dated 2 February 2012. In response to a question as to whether he was at present taking drugs or tablets or having any form of medical treatment, the claimant replied that he was taking 50 mg of Sertralile (SSRI) for prevention of recurrence of depression. He consented to the University obtaining an Occupational Health Service report and also gave details of his General Practitioner.
- (viii) The claimant was seen by Dr Todd on 29 February 2012. The tribunal considered Dr Todd's evidence carefully including his memorandum to Fiona Hamilton dated 29 February 2012 which states as follows:

“Further to earlier correspondence, I examined the above applicant for the position of Networking Engineer today as arranged.

He has given me consent to inform you that he has a history of depressive illness intermittently from 2008 and has been on a continuous treatment since 2009.

His previous employment was with Durham University where he held a variety of IT posts from 1999. He applied for and was appointed to a Sub Librarian post which had significant managerial responsibility which he found difficult to cope with and was off work for a period of four months between January and March 2008 as a consequence of what, in retrospect, he accepts as depressive illness.

He agreed with the University to return to work in a different role as an IT Technician but by August 2009 he became ill again and was off work being certified as unfit for work, by his GP, from August 2009 to August 2010. He advised me that at that time he had found it difficult to concentrate at work and was unable to maintain his perspective in relation to the multiple demands put on him at that time. He was started on appropriate medication and had other interventional therapies which were largely successful and returned to work having been in contact with the Occupational Health Department of the University. His condition was then considered to be a disability and some adjustments were being made to his employment such as having a quieter office in which to work when the offer of voluntary severance became available at the University. He took this opportunity in the early part of 2011. He has remained well since but in the interim he attempted to stop his antidepressant treatment but having done so briefly developed a recurrence of symptoms and resumed treatment as previously.

His depression is likely to fulfil the definition of a disability but at this stage he is not sure of what adjustments might be required, if any. It is difficult to advise on this matter because as I see it he has not been at work since August 2009 with the exception of a brief spell of work which

he described to me as three months from August 2010 to perhaps Christmas 2010 or thereabouts.

If appointed, I have arranged to review him in approximately six weeks time”.

- (ix) The tribunal is satisfied that Dr Todd did not state to the claimant that he was going to write to the University advising that he (the claimant) was fit for the post. Dr Todd’s memorandum of 29 February 2012 was received by the University on 2 March 2012 and raised concerns regarding the claimant’s fitness for the Grade 7 role.
- (x) Professor Heywood did not supply a reference until 17 February 2012. It stated as follows:

“I knew Dylan for two years in my role as Head of Department of Psychology and his line manager. He left the Department in December 2010 having unfortunately been absent through illness for a period of approximately a year.

I can chiefly comment on Dylan’s technical expertise from the standpoint of a non-expert. He routinely achieved all that was asked of him, and more. He is a very collegial work colleague and maintained extremely good relations with academic, support staff and students. I have no doubt that he comfortably fulfils the essential and desirable criteria of the job of Network Engineer. In Durham Dylan was employed as a Grade 5 technician having chosen to depart from a substantially more senior position in the University Library. His qualifications and abilities far exceeded the demands of the job to which he was appointed in my Department. He frequently showed great initiative and regularly delivered a service which was commensurate with a higher grade. However, although Dylan opted to accept the Grade 5 position which we offered, it soon became apparent that he was uncomfortable in his working environment and left under a voluntary severance scheme. I believe his disaffection was largely a result of working in close proximity with less able colleagues in senior positions. Dylan has a great deal to offer and, notwithstanding the personal difficulties that Dylan has experienced, which I believe are now reconciled, I would be happy to reappoint Dylan, albeit to a more senior appointment”.

- (xi) Due to issues raised in Professor Heywood’s reference, the University sought further clarification from him and, with his consent, Joe Burns spoke to him by telephone on 6 March 2012. The tribunal was shown contemporaneous notes made by Joe Burns during the telephone call and is satisfied that they accurately represent key phrases used by Professor Heywood during that call and that Joe Burns accurately and fairly interpreted the conversation. Fiona Hamilton had already met with the claimant on 29 February 2012 regarding issues arising from Professor Heywood’s reference and the tribunal also accepts her version of what was discussed, as reflected in her file note dated 29 February 2012.

- (xii) As the result of the concerns arising from Professor Heywood's reference and the medical input from Dr Todd, Joe Burns, Trevor Lyttle, Pamela MacIntyre and Fiona Hamilton met on 8 March 2012 and decided that Fiona Hamilton would contact Dr Todd again to seek further clarification on the claimant's absences from work in Durham University and his fitness for work. As there was also confusion regarding the nature and date of the claimant's absences in 2008, it was also agreed that Fiona Hamilton should contact Clare Powne to ascertain exactly when he had been absent from work.
- (xiii) Fiona Hamilton met with Dr Todd on 9 March 2012 for clarification of matters in his previous report, to ascertain the claimant's fitness for appointment, and whether a general practitioner report was required, Dr Todd indicated that he would write to Dr Thomas, the claimant's general practitioner, for such a report. A report from Dr Thomas dated 16 March 2012, and received by Dr Todd on 4 April 2012, states, inter alia:-

"Mr Harrison has been registered with the practice since 11.10.1999 and only attended the surgery on a sporadic basis prior to 2008.

On 8.1.2008 he was seen by Dr Huntley and was diagnosed from suffering from work stress. At that consultation he reported that he was not happy at work and that, although he had tried talking to his boss, felt that there was a personality clash. He was issued for a sick note for 1 week at that time to give him time to assess the situation. He was subsequently seen on 15.1.2008, 22.1.2008, 29.1.2008, 11.2.2008, 22.2.2008, 7.3.2008, 20.3.2008, 4.4.2008, 24.4.2008. During those consultations he was deemed to be unfit for work due to ongoing symptoms. He was receiving counselling and met with Occupational Health. Unfortunately he did not make significant progress due to the prospect of returning to the same role at work, causing ongoing stress. On 24.4.2008 he reported that he had been moved to a new job within the University and returned to work on 1.5.2008.

He did not consult again until 2.9.2009 when he was suffering from viral gastroenteritis. Unfortunately he presented again on 7.9.2009 with further symptoms of low mood and low energy. At that consultation he reported that these symptoms had been present over the previous few months and he was issued with a sick note for 2 weeks. He was reviewed on 18.9.2009 and at that consultation was started on Citalopram 20mg. Further review appointments took place on 28.9.2009, 9.10.2009, 23.10.2009, 24.11.2009, 21.12.2009, 15.1.2010, 12.2.2010, 12.3.2010, 12.4.2010, 10.5.2010, 14.6.2010, 12.7.2010, 10.8.2010 and 23.9.2010. During that period he remained unfit for work and was issued with continuous sick notes. He was referred for counselling but continued to exhibit symptoms of low mood despite taking Citalopram.

He was seen by a Clinical Psychologist in February 2010 and felt that this helped him feel a lot more positive about his situation. However he still felt unable to return to work.

In June 2010 he stopped taking Citalopram and reported that he felt "sharper". Unfortunately at his review appointment in July 2010 he found that his mood was slipping again and he was started on a trial of Sertraline 50mg per day.

On 23.9.2010 he reported that he was feeling better and expected to return to work for full time on Monday 4.10.2010. He was advised to continue taking Sertraline.

His next appointment with me was on 12.9.2011 when he reported that he had stopped taking the Sertraline tablets and had tried to take a job that had been offered to him at Southampton University. Unfortunately he could not manage to undertake the move and I suggested that he start taking Sertraline 50mg per day.

I did not see him again until 29.11.2011 which was my last contact with him. At that consultation he reported that he felt much better and did not report any significant problems.

He continues to take Sertraline 50mg per day and I hope this will continue to have a positive effect on his state of mind".

- (xiv) This report raised additional concerns for Dr Todd. He was concerned that in June 2012 the claimant had stopped taking his medication and that his mood had slipped. He was then prescribed Sertraline which was a different anti-depressant and advised to continue taking this. Dr Todd was also concerned about the claimant's insight into his illness given that he had, by his own admission, stopped taking medication prescribed by his general practitioner, on two occasions. Dr Todd was also concerned that the claimant had had work related symptoms from his role in 2008 as a sub-librarian and again in the lower grade 5 post as an IT technician within the Psychology Department of Durham University where the claimant was also still unable to cope. In his evidence, Dr Todd also expressed concern that, although Durham University had suggested adjustments to deal with the difficulties reported by the claimant, the claimant decided to take a voluntary severance package leaving Dr Todd in a position whereby he was unable to consider how the claimant had adjusted to his role in light of his medication and the adjustments which Durham University proposed to make.
- (xv) Fiona Hamilton held a telephone conversation with Clare Powne on 12 March 2013 when she confirmed that the claimant's line manager was not herself but Dr John Hall. She also confirmed that the relationship between the claimant and Dr Hall was tense and that this had contributed to the claimant not continuing in his role. Clare Powne also witnessed an altercation between Mr Harrison and Dr Hall which had affected the relationship. The tribunal assessed Fiona Hamilton as a credible witness, but is satisfied that she ought to have informed the claimant of the conversation with Clare Powne in advance of the subsequent meeting held on 2 May 2012, involving the claimant.

(xvi) Fiona Hamilton was very concerned when she received a note of the conversation between Professor Heywood and Joe Burns on 13 March 2012. She spoke further with Professor Heywood on 16 March 2012. A note of that telephone conversation, prepared by Fiona Hamilton, reads as follows:-

“Fiona Hamilton (FH) spoke to Professor C Heywood (CH), D Harrison’s (DH) line manager in the Department of Psychology, Durham University on the 16 March 2012 to clarify some of the information that had been provided to Mr J Burns (JB). Professor Heywood was reluctant to go into any specific details of the conversation which had taken place with JB. CH advised FH of the following:

- Due to the nature and senior management level of the role in the Library, DH had become disaffected and was off sick for four months;
- DH transferred from a senior post to a Grade 5 IT role in Psychology and whilst initially he settled satisfactorily into the role, problems arose in 2009 in which he went off sick for one year.
- DH returned to the University in August 2010 on a phased basis but it was apparent that he was not happy in the role and did not want to work within the Psychology department.
- DH subsequently took a severance package in December 2010.

CH advised that DH had been a good technician but it had been noticeable that there had been mental health problems at that time”.

(xvii) Following a meeting with Margaret Leonard, the University’s Personnel Manager, on 20 March 2012, Fiona Hamilton prepared a report for John Gormley, Director of Information Services, and Margaret Leonard which outlined the recruitment process and the issues which had been distilled into three as follows:-

1. The medical issue.
2. The reference issue
3. The line management issue involving Clare Powne.

By this time the University had also received an additional reference from Professor Di Martin in relation to the claimant’s time at the University of Hertfordshire between September 1996 and June 1999. This reference was satisfactory.

(xviii) Fiona Hamilton’s report dated 4 April 2012 contained a recommendation incorporating three proposed options as follows:-

“Option 1 – Appoint and closely manage Mr Harrison through the six month probation process.

Option 2 – Appoint and closely manage Mr Harrison through an extended probation process ie: twelve months instead of six;

Option 3 – Withdraw the offer on the basis that:

- the medical report is unable to confirm that Mr Harrison is fit for appointment;
- one of the references has been deemed unsatisfactory;
- false information provided on the application form in relation to one of the referees ie: Referee 2 is not the line manager of Mr Harrison as was stated on the form.

Based on the evidence there is a concern whether Mr Harrison will be able to fulfil this extremely demanding job. I propose meeting with the Chair of the Appointments Panel, Joe Burns to discuss all of this information with a recommendation to proceed with Option 3. A subsequent meeting will be arranged with Mr Harrison to discuss these issues further”.

(xix) On 5 April 2012 Dr Todd wrote to Fiona Hamilton following receipt of the claimant’s General Practitioner’s report, as follows:

“... The GP report states that he had work related stress and was unfit for work from 8.1.08 to 1.5.08, having been moved to a new post in the University, counselling support was given but no antidepressants had been prescribed then.

He had a recurrence of symptoms by 7.9.09 and was certified as unfit for work and started on medication then. He remained unfit for work until 4.10.10. In the interim he had stopped taking his medication and within one month had a recurrence of symptoms. On 4.10.10 he was advised by his GP to continue to take his medication.

His next review by his GP was 12.9.11 when he reported to his GP that he had (again) stopped his medication. He had also been offered a job in Southampton University but ‘he could not manage to undertake the move’. His GP once again advised that he resume his medication. When next reviewed on 29.11.11 he reported that he was feeling much better and did not report any significant problems.

You have advised me that Durham University put in several adjustments on his return to work in October 2010 but that there were still difficulties with his performance at work.

I would be concerned that the work we offer him would cause a recurrence of his previous symptoms and must reflect on the last occurrence of his symptoms when at work. This was for a period of 3 months from October 2010. At that time he was on medication, his post was at a lower grade than that available in Queen’s and his

employers had made adjustments to his employment. The situation seems to be similar now in that he states that he is well and is taking his medication.

I recommend that he is unlikely to be fit for the post in Queens's unless we can put in place at least similar adjustments to those put in place by his previous employer and that he fully complies with advice on taking his medication".

- (xx) A further meeting was held on 26 April 2012 involving Joe Burns, Pamela McIntyre and Fiona Hamilton to discuss the current situation including the possibility of the conditional offer being withdrawn. The tribunal is satisfied that no decision to withdraw the offer was made by the University until after a further meeting held on 2 May 2012 involving the claimant, Joe Burns, Pamela McIntyre and Fiona Hamilton. The three issues were outlined at that meeting and, at the outset, the claimant was offered the opportunity to withdraw his application but declined to do so. The tribunal was satisfied that the claimant was not put under any pressure to withdraw his application. The tribunal was shown a fulsome file note of the meeting held on 2 May 2012, and considered the oral evidence given by the claimant, Joe Burns, Pamela McIntyre and Fiona Hamilton in relation to the meeting. The tribunal considers it appropriate to reproduce Fiona Hamilton's file note as follows:-

**“Network Engineer, Information Services
Reference: 11/101859**

Filenote of the meeting that took place on Wednesday 2 May 2012 w

Mr D Harrison (DH)
Mr J Burns, Chair of Appointment Panel (JB)
Ms P McIntyre, IS Administration and Resources Manager (PM)
Mrs F Hamilton, Personnel (FH)

FH thanked DH for attending the meeting. FH explained to DH that the purpose of the meeting was to discuss the following issues which had arisen since he had received the offer of employment:

- 1) Medical Report
- 2) References
- 3) False information on application form

FH advised that based on the information provided the view of the Panel was to withdraw the offer of appointment. DH was asked to provide further clarification on the three issues. Before proceeding further with the meeting, DH was offered the opportunity to withdraw his application. DH declined this offer.

- 1) Medical Report

FH stated that the University's Occupational Health Physician had provided a medical report following DH's assessment on 29 February

2012. The report stated that DH had a condition which was likely to fulfil the definition of a disability. Following receipt of the GP's report, a further medical report stated there had been a number of episodes when DH had come off his medication contrary to medical advice and despite Durham University putting in place several adjustments on his return to work in October 2010, ie: a quieter office, there were still difficulties;

DH was advised that the report highlighted a concern that the work the University would offer him would cause a recurrence of his previous symptoms and must reflect on the last occurrence of his symptoms when at work. This was for a period of 3 months from October 2010.

The recommendation was that DH was unlikely to be fit for the post in Queen's unless similar adjustments to those put in place by his previous employer were introduced here and that he fully complies with advice on taking his medication.

DH stated that no adjustments had been made in Durham. It was an environmental issue to do with space and having somewhere quieter to work but nothing had been done. FH advised that given the business requirements of the Network Group and the nature of this post within Queen's whilst this type of adjustment had been considered, it was deemed unfeasible. PM stated that from a wellbeing perspective there was a concern on the impact of such a job on the stress levels of DH. She advised that the work was unpredictable and must be carried out quickly and accurately in the midst of many calls and e-mails demanding instant restoration of service.

2) Reference

FH advised DH that the reference that had been received from Professor C Heywood had raised concerns for the Panel in that it referred to the one year absence, his disaffection with working in an this type of environment and working with other colleagues.

DH stated that he felt the comments showed a lack of understanding of his illness. He maintained that he had a chemical problem and not a mental problem and that it was a medical condition which was not necessarily job related. He stated that his main disaffection was to do with environmental issues, ie having somewhere quiet to work and there seemed to be some reluctance by Durham to make this adjustment. He also stated that in using the term 'disaffected' Professor Heywood was giving his opinion and that it was "not a statement of fact" and that he would certainly challenge this.

In relation to working as part of a team, DH stated that there had been some ethical issues which had caused disagreements but overall he worked well in teams.

FH reiterated that the pressures of the role of a Network Engineer have increased greatly and may generate stress. DT was advised that the network was essential not only to the University's critical systems but the network team (small team of 5) provided support to the whole of the FE and HE sectors in Northern Ireland.

3) False information on application form

FH advised DH that the second reference had also raised a concern for the Panel in that it stated that Ms C Powne was his line manager when in fact she had confirmed that she was a work colleague. DH stated that the reason for this may have been as a result a mistake with the drop down system, but that in any case he had reported to her in her capacity as Deputy Librarian on occasion when the Line Manager was absent. In one instance this was for 4 months. FH responded by saying that C Powne had confirmed that whilst she had worked closely with DH she had not been his line manager.

The meeting concluded. FH thanked DH for attending the meeting and advised that a decision in relation to the offer would be made and he would be notified of this in writing forthwith. DT stated that he hoped the University had covered itself in relation to disability legislation.

Panel decision

The Panel agreed that DH had not provided any additional information to convince them that the offer of appointment should be made. They agreed that the offer had been subject to University checks which had proved to be unsatisfactory based on the information provided. The Panel agreed to proceed with the withdrawal of offer.

Although the full rationale for withdrawing the offer was outlined to DH and was based on the 3 points above and not on the Medical Report alone, on leaving the meeting DH stated: "I hope you are comfortable that you have handled this competently as regards to disability legislation".

F Hamilton
2 May 2012"

The claimant also stated during this meeting that no adjustments were needed.

- (xxi) Margaret Leonard, Personnel Manager, subsequently wrote to the claimant on 15 May 2012 withdrawing the job offer, in the following terms:-

"I refer to the meeting involving the Appointments Panel and yourself on 2 May 2012 and your email of 3 May 2012. As you are aware the offer of appointment was subject to a satisfactory medical report and satisfactory references. As explained to you unfortunately we did not receive a

satisfactory medical report and one of the references received had been deemed to be unsatisfactory.

In addition, the second reference also raised concern in that you stated that Mrs C Powne was your line manager when in fact she has confirmed that she was a work colleague. I would remind you that the declaration which you completed states that where false statements have been supplied or relevant information withheld, any offer of employment can be withdrawn.

On the basis of the above information we are unable to proceed with your appointment and must advise you that the offer of employment has been formally withdrawn”.

THE LAW

5. (1) Article 3A of the Act provides as follows:-

“Meaning of “discrimination”

3A.—(1) For the purposes of this Part, a person discriminates against a disabled person if —

- (a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and
 - (b) he cannot show that the treatment in question is justified.
- (2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.
 - (3) Treatment is justified for the purposes of sub-section (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.
 - (4) But treatment of a disabled person cannot be justified under sub-section (3) if it amounts to direct discrimination falling within sub-section (5).
 - (5) A person directly discriminates against a disabled person if, on the ground of the disabled person’s disability, he treats the disabled person less favourably than he treats or would treat a person not having a particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.
 - (6) If, in a case falling within sub-section (1), a person is under a duty to make reasonable adjustment in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be

justified under sub-section (3) unless it would have been justified even if he had complied with that duty.

Meaning of “harassment”

- 3B.—(1) For the purposes of this Part, a person subjects a disabled person to harassment where, for a reason which relates to the disabled person’s disability, he engages in unwanted conduct which has a purpose or effect of —
- (a) Violating the disabled person’s dignity, or
 - (b) Creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
- (2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of sub-section (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect”.
- (2) The tribunal found the summary on disability discrimination given by Lord Justice Hooper in the case of **O’Hanlon v Commissioners for HM Revenue and Customs [2007] EWCA Civ 283 [2007] IRLR 404**, to be of assistance. In paragraphs 20-22 of his judgment he states as follows:-
- “Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified ...
- Second, there is disability-related discrimination ...
- Third, there is the failure to make reasonable adjustments form of discrimination in sub-section (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages resulting from the disability. However, this is once he has a duty to make such adjustments. That duty arises where the employee is placed at a substantial disadvantage when compared with those who are not disabled”.
- (3) In the case of **Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664, EAT**, it was held that while it will always be good practice for the employer to consult, and it will potentially jeopardise the employer’s legal position if it does not do so, there is no separate and distinct duty on an employer to consult with a disabled worker. The only question is, objectively, whether or not the employer has complied with his obligations to make reasonable adjustments.
- (4) The decision in **Malcolm v London Borough of Lewisham (2008) UKHL 43** had the effect of eliminating the concept of disability-related discrimination as a

self-standing ground of discrimination. As Elias LJ stated at paragraph 8 of his judgement in the Court of Appeal decision of J P Morgan Europe Ltd v Chweidan “for all practical purposes it adds nothing to the concept of direct discrimination”.

- (5) The tribunal also took into account relevant sections in the Disability Code of Practice Employment and Occupation (“the Code”), being careful not to use the Code to interpret the legislative provisions. It also considered Harvey on Industrial Relations and Employment Law (“Harvey”) at L368.01ff, in so far as relevant.

(6) **Reasonable Adjustments**

- (i) The tribunal considered carefully the provisions of Sections 4A and 18B of the Act. Paragraph 5.3 of the Code states:-

“The duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with people who are not disabled. An employer has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the employer has to make a “reasonable adjustment”. Where the duty arises, an employer cannot justify a failure to make a reasonable adjustment

...5.4 It does not matter if a disabled person cannot point to an actual non disabled person compared with whom she/he is at a substantial disadvantage. The fact that a non disabled person, or even another disabled person, would not be substantially disadvantaged by the provision, criterion or practice or by the physical feature in question is irrelevant. The duty is owed specifically to the individual disabled person.

.... 5.11 The Act states that only substantial disadvantages give rise to the duty. Substantial disadvantages are those of which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact.

... 5.24 Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its costs and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice of the employer, or by a physical feature of the premises it occupies, the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled person does so the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable.”

- (ii) The tribunal also considered the types of adjustments which an employer might have to make and the factors which may have a bearing on whether it would be reasonable for an employer to make a particular adjustment. These are set out in Section 18B of the Act as follows; (in so far as may be material and relevant)

“Reasonable adjustments: supplementary

18B.—(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -

- (a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- (b) the extent to which it is practicable for him to take the step;
- (c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
- (d) the extent of his financial and other resources;
- (e) the availability to him of financial or other assistance with respect to taking the step;
- (f) the nature of his activities and the size of his undertaking;
- (g)

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments –

- (a) making adjustments to premises;
- (b) allocating some of the disabled person’s duties to another person;
- (c) transferring him to fill an existing vacancy;
- (d) altering his hours of working or training;
- (e) assigning him to a different place of work or training;
- (f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

- (g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);
- (h) acquiring or modifying equipment;
- (i) modifying instructions or reference manuals;
- (j) modifying procedures for testing or assessment;
- (k)
- (l) providing supervision or other support.

(3)

(4)

(5)

(6) A provision of this Part imposing a duty to make reasonable adjustments applies only for the purpose of determining whether a person has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.”

(iii) The tribunal also considered the guidance given to Tribunals in the Employment Appeal Tribunal case of **Environment Agency v Rowan (2008) IRLR 20** where Judge Serota states at paragraph 27 of his judgment:-

“In our opinion an employment tribunal considering a claim that his employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:-

- (a) the provision, criterion or practice applied by or on behalf of an employer, or
- (b) the physical feature of premises occupied by the employer, or
- (c) the identity of non-disabled comparators (where appropriate) and
- (d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the “provision, criterion or practice applied by or on behalf of the employer” and the “physical feature of premises”, so it would be necessary to look at the overall picture.

In our opinion, an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters we have set out above, it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage”.

The tribunal also had regard to the Code at Section 8.15 relating to managing disability or ill health and retention of disabled employees. Paragraph 8.16 states, inter alia:-

“If there are no reasonable adjustments which would enable the disabled employee to continue in his or her present job, the employer must consider whether there are suitable alternative positions to which she could be redeployed”.

BURDEN OF PROOF

6. (i) In **Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong, Chamberlains Solicitors and Another v Emokpae**; and **Brunel University v Webster [2006] IRLR 258**, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. This guidance is now set out at Annex to the judgment in the **Igen** case. The guidance is not reproduced but has been taken fully into account.
- (ii) The tribunal also considered the following authorities, **McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA**, **Madarassy v Nomur International Plc [2007] IRLR 246 (“Madarassy”)**, **Laing v Manchester City Council [2006] IRLR 748** and **Mohmed v West Coast trains Ltd [2006] UK EAT 0682053008**. It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer’s explanation for the treatment. As Lord Justice Mummery stated in **Madarassy** at paragraphs 56 and 57:-

“The Court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal “could conclude” that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

“Could conclude” in s.63A(2) must mean that “a reasonable Tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory “absence of an adequate explanation” at this stage, the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complaint were of like with like as required by s5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.”

- (iii) The tribunal received valuable assistance from Mr Justice Elias’ judgement in the case of ***London Borough of Islington v Ladele & Liberty (EAT) [2009] IRLR 154***, at paragraphs 40 and 41. These paragraphs as set out in full to give the full context of this part of his judgment.

“Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

- (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572, 575 – ‘this is the crucial question’. He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator.
- (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p.576) as explained by Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37.
- (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*. That

case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:-

'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer.'

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal *must* find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference *must* be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in *King v The Great Britain-China Centre* [1991] IRLR 513.)

- (4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in *Zafar v Glasgow City Council* [1997] IRLR 229:-

'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of

discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discrimination explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

- (5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC* [2007] IRLR 259 paragraphs 28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.
- (6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford* [2001] IRLR 377 esp paragraph 10.
- (7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan* [2008] IRLR 243, a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):-

‘36. The discrimination ... is defined ... as treating someone on racial grounds “less favourably than he treats or would treat other persons”.

The meaning of these apparently simple words was considered by the House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:-

- (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the “statutory comparator”) actual or hypothetical, who is not of the same sex or racial group, as the case may be.
- (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant ...
- (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in *Shamoon* at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the “evidential comparator”) to those of the complainant and all the other evidence in the case.

37. It is probably uncommon to find a real person who qualifies ... as a statutory comparator. Lord Rodger’s example at paragraph 139 of *Shamoon* of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are “materially different” is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and

having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.'

The logic of Lord Hoffmann's analysis is that if the tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then again it is unnecessary to determine what are the characteristics of the statutory comparator. This chimes with Lord Nicholls' observations in **Shamoon** to the effect that the question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:-

"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was' (paragraph 10).

This approach is also consistent with the proposition in point (5) above. The construction of the statutory comparator has to be identified at the first stage of the *Igen* principles. But it may not be necessary to engage with the first stage at all".

- (iv) The tribunal also received considerable assistance from the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision in **Stephen William Nelson v Newry and Mourne District Council [2009] NICA 24**. Referring to the **Madarassy** decision (supra) he states at paragraph 24 of his judgment:-

"This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In *Curley v Chief Constable [2009] NICA 8 Coghlin LJ* emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".

Again, at paragraph 28 he states in the context of the facts of that particular case, as follows:-

“The question in the present case however is not one to be determined by reference to the principles of *Wednesbury* unreasonableness but by reference to the question of whether one could properly infer that the Council was motivated by a sexually discriminatory intention. Even if an employer could rationally reach the decision which it did in this case, it would nevertheless be liable for unlawful sex discrimination if it was truly motivated by a discriminatory intention. However, having regard to the Council’s margin of appreciation of the circumstances the fact that the decision-making could not be found to be irrational or perverse must be very relevant in deciding whether there was evidence from which it could properly be inferred that the decision making in this instance was motivated by an improper sexually discriminatory intent. The differences between the cases of Mr Nelson and Ms O’Donnell were such that the employer Council could rationally and sensibly have concluded that they were not in a comparable position demanding equality of disciplinary measures. That is a strong factor tending to point away from a sexually discriminatory intent. Once one recognises that there were sufficient differences between the two cases that could sensibly lead to a difference of treatment it is not possible to conclude in the absence of other evidence pointing to gender based decision-making that an inference or presumption of sexual discrimination should be drawn because of the disparate treatment of Ms O’Donnell and Mr Nelson”.

- (v) In the case of **J P Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648**, Lord Justice Elias states as follows:-

- “5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant’s disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focussing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: See the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 paragraphs 8-12. This is how the tribunal approached the issue of direct discrimination in this case.
6. In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie, if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the

unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason: See Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37”.

- (vi) Regarding the duty to make reasonable adjustments the tribunal considered the case of **Latif v Project Management Institute [2007] IRLR 579**. In that case the EAT held that a claimant must prove both that the duty has arisen, and that there are facts from which it could reasonably be inferred, absent explanation, that it has been breached before the burden will shift and require the respondent to prove it complied with the duty. There is no requirement for claimants to suggest any specific reasonable adjustments at the time of the alleged failure to comply with the duty. It is permissible (subject to the tribunal exercising appropriate control to avoid injustice) for claimants to propose reasonable adjustments on which they wished to rely at any time up to and including the tribunal hearing itself.

SUBMISSIONS

7. The tribunal carefully considered the written submissions submitted by both parties which are annexed to this decision (with the relevant up-to-date legislative provisions annexed to the respondent’s written submissions). The tribunal also carefully considered the oral submissions made before it on 15 March 2013.

CONCLUSIONS

8. The tribunal, having carefully considered the evidence together with the submissions and having applied the principles of law to the findings of fact, concludes as follows:-
- (1) The tribunal is satisfied that the claimant has proved, (as the University conceded), that a duty to make reasonable adjustments had arisen. However the tribunal is not satisfied that the claimant has proved facts from which it could reasonably be inferred, absent explanation, that the duty has been breached, and, therefore, the burden of proof does not shift to the University so as to require it to prove that it complied with the duty.
 - (2) In relation to the claim of direct disability discrimination, the tribunal is not satisfied that the claimant, who had to rely on a hypothetical comparator, has proved facts from which the tribunal could conclude in the absence of an adequate explanation that the claimant had been treated less favourably on the ground of disability, and therefore the burden does not shift to the University to prove on the balance of probabilities that the alleged detriment was not on the prohibited ground of disability. It is clear to the tribunal that the reason for the claimant’s treatment was due to its consideration of the three issues identified in the facts as found by the tribunal leading to the withdrawal of the conditional job offer. Furthermore, any hypothetical comparator has to be in the same or not materially different circumstances as the

claimant. There was no evidence before the tribunal that a non-disabled hypothetical comparator who had work-related stress issues would have been treated differently from the claimant in the circumstances which presented themselves to the respondent.

- (3) The concept of disability-related discrimination adds nothing to a claim of direct discrimination. The test is essentially the same in that if a non-disabled comparator would have received the same treatment, the claim will fail.
- (4) The claimant's claims are therefore dismissed in their entirety against the University.

Chairman:

Date and place of hearing: 11-14 March 2013, Belfast.

Date decision recorded in register and issued to parties:

IN THE INDUSTRIAL TRIBUNAL AND THE FAIR EMPLOYMENT TRIBUNAL

Case Number: 1559/12

BETWEEN:

DYLAND STUART HARRISON

Claimant

- and -

QUEEN'S UNIVERSITY BELFAST

Respondent

AGREED CHRONOLOGY

DATE:

14 November 2011	Job Advertisement
Undated	Claimant's Application Form
16 December 2011	Short listing for Interviews
20 December 2011	Invite to Interview
09 January 2012	References sought from three named referees; Clare Powne, Dave Thornton and Professor Heywood
10 January 2012	Reference received from Dave Thornton
11 January 2012	Claimant's interview
11 January 2012	Reference received from Clare Powne (following conclusion of the interview)
13 January 2012	Rejection letter sent to Claimant
Undated	Agreement to have second post
27 January 2012	Claimant conditionally offered second post
30 January 2012	Appointment letter issued to Claimant
06 February 2012	Claimant returns medical questionnaire which references a history of depression
08 February 2012	Claimant's medical questionnaire sent to occupational health department
14 February 2012	Occupational health conform that the Claimant should attend an occupational health appointment

15 February 2012	Claimant informed of appointment with Dr Todd
17 February 2012	Reference received from Professor Heywood
28 February 2012	Clarification email from Fiona Hamilton to Professor Heywood
29 February 2012	Claimant attends medical appointment with Dr Todd
29 February 2012	Meeting with Claimant and Fiona Hamilton
29 February 2012	Dr Todd provides report to Fiona Hamilton
06 March 2012	Telephone call between Joe Burns and Professor Heywood
08 March 2012	Meeting with Joe Burns, Fiona Hamilton, Trevor Lyttle and Pamela McIntyre
09 March 2012	Letter from Dr Todd to Claimant's GP
12 March 2012	Telephone call between Fiona Hamilton and Clare Powne for reference on Claimant
14 March 2012	Reference received from Professor Di Martin for Claimant
16 March 2012	Telephone call between Professor Heywood and Fiona Hamilton
20 March 2012	Fiona Hamilton 'Meeting with Mgt : DHarrison'
04 April 2012	Report prepared by Fiona Hamilton for Mr John Gormley and Margaret Leonard
04 April 2012	Dr Todd receives medical report from Claimant's GP
05 April 2012	Email from Dr Todd to Fiona Hamilton regarding the Claimant's GP report
26 April 2012	Meeting with Joe Burns, Fiona Hamilton and Pam McIntyre
02 May 2012	Meeting with the Claimant, Joe Burns, Fiona Hamilton and Pam McIntyre
15 May 2012	Confirmation of withdrawal of offer of appointment

CASE REF NUMBER: 1559/12
IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL
BETWEEN:
DYLAN STUART HARRISON
CLAIMANT
AND
QUEEN'S UNIVERSITY BELFAST
RESPONDENT

SUBMISSIONS

PARTY PROVIDING THE SUBMISSIONS: THE CLAIMANT

The respondent claims that the creation of a quiet working environment was considered and deemed unfeasible. You will see that I consistently maintained both in my witness statement (page 11 halfway down) "I had discussed finding a quieter workspace away from adjoining mechanical workshop for completing detailed programming work" and in my oral evidence to the tribunal, that this requirement was specifically for the occasions, typical in most jobs of a professional level, when there is a need to complete detailed work. You heard me describe that the role in Psychology was a mixture of duties from portering, to 'crank the handle' servicing of computers with workshop radio for accompaniment, through to designing detailed electronics and programming work to interface with MRI brain scanners. You heard confirmation from Professor Heywood in his oral evidence that he recognized the need for "a quieter place to write C++ programs way above his grade".

In my role as Senior Networking Consultant for Durham University I would on occasion take myself off to the nearby University Library and work on network designs etc alongside students, fully contactable by my team on mobile phone in silent mode in case of need. There are simple ways and means around these issues if you are minded to address them. In the discussion around reasonable adjustments at the meeting on the 2nd May 2012 I stated that I considered no adjustments would be necessary, in the absence of a tour of the workplace, I assumed the position would have some kind of base in a normal office building, perhaps the McClay Library, but was very unlikely to be directly adjacent to a mechanical workshop as in Psychology in Durham. It was almost

impossible to have a meaningful discussion at this meeting as the respondent was determined to starve me of information see P217A "provide some brief info and ask him Dylan if anything you wish to say".

I accept the role comes with the normal pressures of providing continuous network services to a sizeable institution. I am very familiar with this kind of role. I held a very similar role at Durham University for three years. This role was Senior Networking Consultant in a team of three responsible for the entire University network and outbound connection to JaNET, and was a grade higher (at Grade 8) than the one at Queen's.

We heard from Joe Burns that Queen's have in place, as is standard practice, formal Change Management Processes and Backup Strategies to reduce such pressures to manageable levels. Joe Burns' witness statement that "every time a change to core systems is contemplated by these individuals, the possibility of ensuing disaster loom large" exaggerates the difficulty, in my experience.

We heard JB accept that the words 'pressure' and 'stressful' were nowhere listed in the job description or person specification. Despite coming repeatedly in to play from the meeting of the 8th March onwards, following discovery of DH's medical condition P150B 29th February 2012.

It is clear that the respondent made the decision to withdraw the offer at their internal meeting on 26th April 12

P217A "conditional offer **will** be withdrawn"

It is clear that there was no intention by the respondent to hold a meaningful discussion with the claimant at the final meeting on 2nd May 2012:

- On the medical issue (Dr Todd was not even invited)
- On reasonable adjustments there was severe information rationing 'provide some brief info and ask him Dylan if anything you wish to say' P217A and no description, sight or tour of the workplace
- On the false information issue. Fiona Hamilton kept her concerns concealed from the claimant from 12th March 2012 until the actual meeting on 2nd May 2012 despite admitting being in email contact with him in the intervening period. In fact, she admitted she failed to inform the Chair of the Appointment Panel Joe Burns of this issue until her memo to managers dated 4th April 2012. If there was the intention to hold a constructive discussion in order to identify reasonable adjustments, this issue would have been disclosed in advance to allow claimant (and referee) to clarify.
- The meeting was clearly staged. We heard from Pamela McIntyre that she planned to interrupt Fiona Hamilton at the meeting and also recorded in her notes P219B

"Interrupt Fiona to ask if Dylan H. has the opportunity to withdraw acceptance of offer – does he have the option? Is it too late?"

-The claimant feels he was ambushed with the false information accusation then pressurised to withdraw his acceptance of the offer in order that he would not remain on Queen's files; that this would not prejudice any future job applications he may wish to make to Queen's. See P219B Pamela McIntyre's notes "Doesn't want to withdraw acceptance of offer. Doesn't mind having on file QUB W/D offer". This is unreasonable pressure. The claimant should not have been pressurized to withdraw from an employment opportunity in order to have a fair chance at a future putative one.

Contrast this opacity on the side of the respondent with the transparency of the claimant. Full open disclosure of medical condition on medical questionnaire including medication, dosage, reason for treatment. The claimant granted Queen's Occupation Health full un-intermediated access to his GP medical record P165 "you will note that he does not wish to have access to it before it is provided".

We heard Joe Burns confirm that he did say at the meeting on 5th May 2012 what he had planned to say in his hand written notes P219A "We are here because.....require strong individual".

We heard the claimant challenge Mr. Burns that in doing so he had confused illness with character.

We heard Joe Burns confirm that this requirement for a "strong individual" was not listed in the job description or person specification but was "implied".

The respondent claims Professor Heywood provided an unsatisfactory reference.

We heard from Joe Burns that he telephoned Professor Heywood on 6th March 2012.

We heard Joe Burns concede that he had to 'add words of my own' to his jottings 'to make them in to sentences' some one week later on 13th March. This contradicts his witness statement in which he states he 'did not introduce ideas of my own' and 'I confirm these were the exact terms used by Professor Heywood'

We heard Joe Burns describe the (as Professor Heywood described them 'embellishments') extensions to Professor Heywood's written reference and telephone conversation, through gateway phrases "i.e." and "this told me" and "what this told me was that" and "this implied" as his (Mr. Burns') **interpretations** of what had been written and said.

On Tuesday, the respondent's representative claimed that Joe Burns was not aware of DH's medical condition prior to telephone call of 6th March. His point was that the information in the transcript (the example cited being the phrase 'work -related stress') could only have come from Professor Heywood because Joe Burns was unaware of DH's sickness absence at the time of the phone call.

However, the document lodged by the respondent in P150B of the bundle and entitled "Handwritten Notes – Joe Burns – Conversation with F Hamilton 29 February 2012" in the index contains Joe Burns' handwritten notes and **clearly shows that Joe Burns did know about DH's medical condition by 29th February** including the very phrase used as example by Mr. Warnock "work-related stress".

I believe Mr. Warnock may have misled the tribunal at this point, and this casts some doubt on the disputed transcript of telephone call of 6th March and upon which much of respondent's reasons are based.

Mr. Warnock was granted an adjournment to see further instruction from the respondents on whether the advice referred to by Dr Todd in his email report dated 05 April 2012 "You have advised me that Durham University put in place several adjustments on his return to work in October 2010 but that there were still difficulties with his performance at work" was indeed based on Mr. Burn's transcript of his telephone call with Professor Heywood on 6th March, communicated to Dr Todd via Fiona Hamilton.

You will recall that Mr Warnock returned from the adjournment and advised the tribunal that this indeed was the case.

Dr Todd produced his final report on the basis of this advice and then had no further input in to the matter.

Dr Todd wrote P202 'I would be concerned that the work we offer him would cause a recurrence of his previous symptoms and must reflect on the last occurrence of his symptoms at work. This was for a period of 3 months from October 2010.'

However it is straightforward to see from the medical report from P200 of the bundle DH's GP dated 16th March 2012 that DH did not present with symptoms in that period, **in fact he did not consult his GP at all for almost a year:**

"On 23.09.2010 he reported that he was feeling better and expected to return to work for full time on Monday 4.10.2010. He was advised to continue taking Sertraline. His next appointment with me was 12.9.2011."

Fiona Hamilton and Joe Burns then use Dr Todd's advice as a reason to withdraw the job offer.

I don't know how this is described legally. In computer programming we call it recursion; where the output of a program is consumed by the same program as the input. All I can say is that the respondent's argument is circular; it is built on unsafe foundations.

Medical expert Dr Todd's medical advice has been tainted and as such the respondent failed to seek appropriate medical advice.

We heard Joe Burns stand by paragraph 64 (page9) of his witness statement "I accepted the opinion of Dr Todd which told me that Mr. Harrison's medical condition was **incompatible** with the nature of the Grade 7 Network Engineer post..."

We heard Joe Burns confirm that Dr Todd had not used the term incompatible but that was his own **interpretation** of Dr Todd's advice.

Joe Burns the Chair of the Appointment panel had allowed himself to form the view that the claimant's medical condition (depression) was incompatible with the nature of the post. This telescopes a lot further than Dr Todd's advice which properly includes the consideration of reasonable adjustments.

Professor Heywood under cross examination said that there had not been a problem with DH's performance at work but that it was very noticeable that he was **unhappy**. There is clear evidence in the form of Professor Heywood's witness statement and answers tendered under cross examination that DH was, in Professor Heywood's opinion, noticeably less happy in his role than when he started work for the Psychology department and, in his words, he was 'shocked' to see this change in DH.

This is entirely consistent with the symptoms of depression.

However there is no evidence to suggest that there were problems with DH's performance at work.

The role offered and withdrawn was not for a breezy disc jockey on Radio Ulster nor was it for a children's entertainer. It is a mistake to confuse happiness with performance.

Dr Todd's first medical report dated 29 February 2012 says that 'by August 2009 he became ill again and was off work certified as unfit for work by his GP from August 2009 to August 2010. He advised me that at that time he had found it difficult to concentrate at work and was unable to maintain his perspective in relation to the multiple demands placed on him at that time. He was started on appropriate medication and had other interventional therapies'.

It is clear that Dr Todd is referring to the time **leading up to August 2009**, when DH was undiagnosed and untreated, because he immediately goes on to say DH was 'started on appropriate medication' and from the GP's report dated 16th March 2012 it is straightforward to see that DH started on medication (Citalopram) on 18.09.2009

JB accepted that the 'pressure' to which he repeatedly referred after 8th March was not atmospheric or physical pressure and while he would not be drawn that it was psychological pressure he explained that it was 'Pressure. Normal pressure that builds up in the minds of an employee'.

There is no conceivable circumstance in which the respondent would have stressed the pressures of the role to a candidate with similar absence record to claimant but related to physical health issue as opposed to a mental health issue. The respondent treated the claimant differently because the health issue was above the neck, within the mind.

We heard Pamela McIntyre admit that she had told the claimant it would be better for his well being to withdraw the offer. In doing so she has admitted to treating the claimant differently than she would a candidate with similar absence record to claimant but related to physical health issue as opposed to a mental health issue.

The respondent claims claimant was perceived to have made a misrepresentation in his application form.

We heard Pamela McIntyre state that "in my opinion I doubt the reference type issue on its own would have led to withdrawal of the offer".

Dylan Harrison
14th March 2013

CASE REF NUMBER: 1559/12

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

DYLAN STUART HARRISON

CLAIMANT

AND

QUEEN'S UNIVERSITY BELFAST

RESPONDENT

SUBMISSIONS

PARTY PROVIDING THE SUBMISSIONS: THE RESPONDENT
COUNSEL FOR THE RESPONDENT: TIMOTHY WARNOCK
SOLICITORS FOR THE RESPONDENT: PINSENT MASONS

Introduction

1. The Claimant appears to advance the case that he has been discriminated against by the Respondent by reason of:
 - (i) Direct disability discrimination;
 - (ii) Disability related discrimination
 - (iii) Failure to make reasonable adjustments.
2. The Respondent resists the Claimant's claims in their entirety and submits that the Claimant's claims are not well founded.

The Evidence

3. The Tribunal is asked to accept the Respondent's evidence as set out in the Respondent's witness statements and as given in oral evidence on the balance of probabilities and where there is a conflict of evidence between the parties, the Tribunal is asked to prefer the evidence of the Respondent. The Tribunal is also referred to the agreed chronology.

4. The Tribunal is asked to note in particular that

(a) The Claimant's job offer as Grade 7 Network Engineer was conditional upon, *inter alia*, satisfactory references and satisfactory medical assessment.

(b) Dr. Todd assessed the Claimant as being unfit for appointment unless (i) adjustments could be put in place similar those at Durham University and (ii) he continued taking his medication.

(c) After appropriate discussion, it was determined that the adjustments of creating a quiet working environment and ensuing there were no interruptions were not feasible given the nature of the role of Network Engineer which involved working within a team; constantly moving between University buildings; constantly interacting with staff and students and constantly having to deal with problems arising in relation to the network on a rapid response basis.

(d) The Claimant himself asserted to the Respondent that no adjustments were necessary. See page 219B. This was conceded in open Tribunal.

(e) The Claimant accepted that he came off his medication twice of his own volition without medical supervision. This caused Dr. Todd particular concern. The Claimant was unable to take up a post with Southampton University after leaving Durham University during a period of time he had stopped taking his medication and during which his anxiety symptoms had returned, see the evidence of Dr. Todd and see pages 151A, 200 and 201 of the bundle.

(f) The Claimant accepted that the role for which he applied was a highly pressurised and stressful role and indeed further accepted that the role was a critical role for the University and involved having to deal with problems arising in relation to the core University network on a rapid response basis.

(g) Professor Heywood provided an unsatisfactory reference to the Respondent and confirmed the reference in a telephone conversation with Mr. Burns on 6th March 2012. See page 145 and pages 157 to 158A of the bundle and also see the evidence of Professor Heywood who confirmed the generality of the notes of the conversation and stood over his reference.

(h) Claire Powne indicated that she was not the Claimant's Line Manager/Supervisor and that he had a tense relationship with his Library Line Manager Dr. John Hall. See page 169 of the bundle.

(i) The Respondent followed a careful and unrushed process prior to the meeting of 2nd May 2012 involving several meetings, appropriate investigation and proper consideration of the evidence and the potential for adjustments.

(j) Although the Respondent came to the view that on the basis of the information received by 26th April 2012 the offer should be withdrawn, the final decision was not made at this time and was subject to meeting the Claimant and hearing what he had to say on the relevant issues.

(k) The Respondent outlined all the options to the Claimant in terms of outcome at the beginning of the meeting on 2nd May 2012 including the option to withdraw his application if he wished. This option was given to afford the Claimant all relevant options prior to the panel coming to a final decision and in view of the information which had been received by the University.

(l) The Respondent made no final decision on the withdrawal of the offer until after the meeting of 2nd May 2012 and until after listening to what the Claimant had to say, see Respondent's evidence and page 219 and 197A of the bundle.

Statutory Background: The Disability Discrimination Act 1995

5. Direct disability discrimination is governed by section 3A(5) of the Disability Discrimination 1995 Act. According to the 1995 Act, a person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as or not materially different from, those of the disabled person.
6. Section 3A(1) of the 1995 Act provides that disability related discrimination occurs when a person, for a reason which relates to the disabled person's disability, treats that disabled person less favourably than he treats or would treat others to whom that reason does not or would not apply and he cannot show that the treatment in question is justified.
7. According to section 3A(3) treatment is justified only if the reason for it is both material to the circumstances of the particular case and substantial.

8. Pursuant to section 3A(2) of the 1995 Act, a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.
9. Section 4A(1) makes it clear that where a "provision, criterion or practice" applied by an employer places the disabled person at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice having that effect.
10. Section 18B(1) of the 1995 Act sets out matters to consider when considering the reasonableness of adjustments and also provides examples reasonable adjustments.

Direct Disability Discrimination

11. In order to be successful in a claim for direct disability discrimination the Tribunal must be satisfied that the Claimant was less favourably treated on the grounds of his disability. This is the fundamental nature of a direct disability discrimination claim.
12. In *Glasgow City Council v Zafar* [1998] IRLR 36, [1998] ICR 120 at 123, Lord Browne-Wilkinson asserted that the analysis in discrimination cases:

"...requires an answer to be given to a single question (viz has the complainant been treated less favourably than others on [the ground of that protected characteristic]?) ... it is convenient for the purposes of analysis to split that question into two parts—(a) less favourable treatment; and (b) [on grounds of that protected characteristic]."
13. Where discrimination is alleged to be direct disability discrimination then the relevant comparator is someone who does not have the particular disability of the disabled person, whose relevant circumstances are the same as, or not materially different from, those of the disabled person, *High Quality Lifestyles Ltd v Watts* [2006] IRLR 850.
14. In *Stockton on Tees Borough Council v Aylott* [2010] EWCA Civ 910, [2010] IRLR 994, CA, Mummery LJ however clarified that there is not an obligation to construct a hypothetical comparator in every case and

the failure to do so does not necessarily lead to an error of law in the Tribunal's findings.

15. In *Igen v Wong* [2005] IRLR 258 (CA) considered the 2 stage test in discrimination cases flowing from the burden of proof regulations. The first stage requires the Claimant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the Respondents have committed, or are to be treated as having committed, the relevant unlawful act or acts of discrimination against the complainant. The answer to this question will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The second stage requires the Respondents to prove that it did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld. If there is detriment the reason or reasons for the detriment must be non-discriminatory.
16. The Northern Ireland Court of Appeal in *McDonagh & Others v Samuel John Hamilton Thom t/a The Royal Hotel Dungannon* [2007] NICA 3 stated that when considering claims of discrimination, tribunals ought to have regard to the Annex to the decision of the English Court of Appeal in *Igen v Wong*.
17. The Northern Ireland Court of Appeal re-visited the issue in the case of *Nelson v Newry & Mourne District Council* [2009] NICA -3 April 2009. The court considered the post *Igen* caselaw and in particular the case of *Madarassy v Nomura International PLC* [2007] IRLR 247. The Court of Appeal asserted that *Madarassy*:

"provided further clarification of the Tribunal's task in deciding whether the tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the Igen approach, the Madarassy decision is in fact an important gloss on Igen. The court stated:-

'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it".

18. The Court of Appeal went on to hold that:

[T]he decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.

19. The Court of Appeal also considered the case of *Curley v Chief Constable of the Police Service of Northern Ireland* [2009] NICA 8, in which Coghlin LJ emphasised the need for a tribunal to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The Court asserted that:

"the need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".

20. Whilst in direct discrimination cases, courts have often asked firstly whether there was less favourable treatment and secondly to ask whether it was on the grounds of a prohibited reason, it was however pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] UKHL 11, [2003] IRLR 285 at paras 7–12, that sometimes it will not be possible to decide whether there is less favourable treatment without deciding 'the reason why'.

21. This is particularly so when a hypothetical comparator is being used because in order to ascertain how a hypothetical comparator would have been treated one needs to know what the reason for the treatment of the Claimant was. If the complainant was treated in the manner they were because of the characteristic in question then it is likely that a hypothetical comparator without that characteristic would have been treated differently.

22. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572, 575 the reason why question 'is the crucial question'.

23. In the English Court of Appeal case of *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (the Christian Registrar's case) it was asserted that:

"[An].....error of law in the ET's approach, which applies to virtually every allegation of direct discrimination, was identified by the EAT, and was expressed by Elias J in paragraph 59 in these terms: "Even if ... there is sufficient evidence from which an inference of discrimination could be made, [the allegation] requires consideration of the explanation given by the employer for the less favourable treatment", as, if the ET had been "satisfied that the reason is non-discriminatory (even if in other respects the conduct is unreasonable) then no discrimination has occurred."

24. The Court of Appeal in *Ladele* upheld the following reasoning of the EAT that:

"The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one."

25. It is therefore clear that even if the Respondent have in any way acted unreasonably (which is denied) this is not sufficient to justify making the finding of discrimination.

Analysis of the Claimant's Claim of Direct Discrimination

26. First of all, it is submitted that the Claimant has not passed the first hurdle in that is he has not proven facts from which the Tribunal could reasonably conclude that there has been discrimination on the grounds of disability, even in the absence of explanation from the Respondent.

27. There is no named comparator in this case and so the Claimant can only rely upon a hypothetical comparator. It is not for the Respondent to construct a hypothetical comparator for the Claimant however it is trite to indicate that any hypothetical comparator (if identified) has to be in the same or not materially different circumstances as the Claimant. This is of course a hammer blow to the Claimant's case because the reality is that a hypothetical comparator would have been treated the same as the Claimant and there is no evidence to suggest otherwise.

28. This is because the hypothetical comparator would have the same characteristics and circumstances of the Claimant and in particular be a person who was subject of the same three issues which caused the

withdrawal of the conditional job offer, namely being medically unfit for the job, having an unsatisfactory reference and making the same Line/Manager representation in the application process. These are the reasons for the withdrawal of the job offer and further the suitability assessment process was informed by these issues.

29. Furthermore any comparator would also have had work related stress issues (albeit they would not be disabled) and as result any treatment of the comparator in relation to the stress issues in the process would have been the same.
30. The Respondent submits that process that was followed was fair, appropriate and reasonable. However, even if the Tribunal find that any aspect or aspects of the process were unreasonable this is not by itself enough to shift the burden.
31. Even if the burden of proof is passed to the Respondent or if the Tribunal moves to ask the "reason why" as part of a global consideration of the case or as part of constructing the hypothetical comparator, it is clear that the Claimant's claim of direct disability discrimination must fail. The reality of the situation is that the Claimant was not treated as he was treated as a result of being a disabled person but because:
- (i) Professor Heywood had provided an unsatisfactory reference;
 - (ii) The Claimant was not medically fit for the role and there were no relevant reasonable adjustments which could be made to change that position;
 - (iii) He was perceived to have made a misrepresentation in his application form.
32. Any treatment prior to withdrawal was not because the Claimant was a disabled person and the whole play out of the process was a result of the above issues which arose throughout the suitability assessment.
33. This is not a case in which the Respondent's actions were tainted by discrimination on the grounds of disability or otherwise. The rationale for the withdrawal of the job offer is clear and is as set out above and as confirmed by the Respondent's evidence. The Respondent denies that the Claimant was treated inappropriately in the circumstances and denies that there has been any discrimination in and about the Claimant's treatment by the University throughout the appointment process.

Disability Related Discrimination

34. After the decision of the House of Lords in *London Borough of Lewisham v Malcolm* [2008] UKHL 43, [2008] IRLR 700 the concept of disability related discrimination in fact adds nothing to that of direct discrimination. The test is essentially the same and if a non-disabled comparator would have received the same treatment, both heads of claim will fail.
35. In *Malcolm* it was made clear that in assessing the comparator for a disability related discrimination case one must take away the disability itself but crucially NOT the reason or reasons for the treatment in question.
36. Therefore, as in a claim for direct discrimination, there is only unlawful discrimination if a non-disabled person would be treated more favourably in a situation in which the same reason or reasons for the treatment of the Claimant apply to that non-disabled person.
37. The Court of Appeal in England and Wales in *Stockton on Tees Borough Council v Aylott* [2010] EWCA Civ 910, [2010] IRLR 994 confirmed *Malcolm* as binding and confirmed that disability-related discrimination is now in reality almost impossible to prove.
38. In *JP Morgan Europe Ltd v Chweidan* [2011] IRLR 673 the Court of Appeal in England and Wales again expressed the view that there is in reality nothing added to a direct discrimination claim by a claim for disability related discrimination.
39. Therefore for the same reasons that the direct discrimination claim must fail so must the claim for disability related discrimination.

Reasonable Adjustments

40. The duty to make reasonable adjustments is found within section 4A of the 1995 Act. The duty applies where the disabled person is placed at a substantial disadvantage, compared to persons who are not disabled, by a 'provision, criterion or practice applied by or on behalf of an employer' (s 4A(1)(a)) or by 'any physical feature of premises occupied by the employer' (s 4A(1)(b)). The s 4A duty arises only when the 'disabled person concerned' is placed at a substantial disadvantage.
41. In *Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218, the EAT restated guidance on how an employment tribunal should act

when considering a claim for failure to make reasonable adjustments. The Tribunal should identify

- (a) the provision, criterion or practice applied by or on behalf of an employer, or;
- (b) the physical feature of premises occupied by the employer;
- (c) the identity of non-disabled comparators (where appropriate); and
- (d) the nature and extent of the substantial disadvantage suffered by the claimant.

42. In terms of the need to consult, in the case of *Tarback v Sainsbury Supermarkets Ltd* [2006] IRLR 664, the EAT made it clear that the duty to consult is not of itself imposed by the duty to make reasonable adjustments. Elias J held at para 71 that:

'[t]he only question is, objectively, whether the employer has complied with his obligations or not',

43. In term of comparators the Court of Appeal, in *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220, [2006] IRLR 41, [2006] ICR 524 made it clear that there would be a limited comparison group in light of *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954. The proper comparator can be identified only by reference to the disadvantage caused by the arrangements that are questioned.

44. The EAT in *Project Management Institute v Latif* [2007] IRLR 579 in terms of the burden of proof, asserted that there must at least be before the tribunal facts from which, absent any innocent explanation, it could be inferred that a particular adjustment could have been made. Otherwise, the Respondent would be placed in the "impossible position" of having to prove the negative proposition that there was no reasonable adjustment that could have been made.

45. Further in *Newcastle City Council v Spires* [2011] All ER (D) 60 (May) the EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them.

Analysis of the Claimant's Claim for Failure to Make Reasonable Adjustments

46. The Claimant has not identified:

- (i) The relevant provision, criterion or practice applied by or on behalf of the employer;
- (ii) The identity of his non-disabled comparators;
- (iii) The nature and extent of the substantial disadvantage suffered.

47. The Claimant has failed to lead evidence of or challenge the Respondent's witnesses on any suggested reasonable adjustments.

48. The burden does not pass in this case based on the principles in *Project Management Institute v Latif* [2007] IRLR 579, see paragraph 36 above.

49. Regardless, in any event:

- (i) The Claimant himself told the Respondent that no adjustments were necessary.
- (ii) Further after appropriate discussion, and with input from Dr. Todd, it was determined that the adjustments of creating a quiet working environment and ensuring there were no interruptions were not feasible given the nature of the role of Network Engineer which involved constantly moving between University buildings; constantly interacting with staff and students and constantly having to deal with problems arising in relation to the network on a rapid response basis. No other adjustments were necessary.

50. The Claimant's claim is not made out in the circumstances.

Conclusion

51. For the reasons as set out herein and for the reasons to be offered, the Tribunal is asked to dismiss the Claimant's claims in their entirety.

Timothy Warnock
Bar Library

13th March 2013