



EMPLOYMENT TRIBUNALS

Claimant: AB

Respondent: Nottingham City Council

FINAL HEARING

Heard at: Midlands (East) (in public; by CVP) **On:** 13 to 16 & (deliberations in private) 17 September 2021

Before: Employment Judge Camp **Members:** Mr J Purkis
Ms F French

Appearances

For the claimant: Miss R Owusu-Agyei, counsel

For the respondent: Ms C Jennings, counsel

RESTRICTED REPORTING ORDER

- (1) Pursuant to rule 50 of the Employment Tribunals Rules of Procedure, it is ORDERED that it is **prohibited** directly or indirectly to publish in any document entered on the Register or to which any members of the public in Great Britain could lawfully have access (including electronic documents, such as posts on social media or posts/messages on WhatsApp groups, and including posts on private social media groups) and from any audio or video or electronic broadcast to which any members of the public in Great Britain could lawfully have access (again including any such posted on social media, including WhatsApp groups and private social media groups):

anything identifying the names or addresses of the claimant, of his current and former employers (other than the respondent), or of the two individuals from his current employer who provided witness statements in support of his claim.

- (2) The above Order does not limit or prohibit publication of any part of the Reserved Judgment & Order and Reasons set out below.
- (3) The above Order remains in force at least until both liability and remedy have been determined in the proceedings, unless revoked earlier.
- (4) **Publication contrary to the above Order is a criminal offence.** Any person guilty of such an offence shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

- (5) The reasons for making the above Order are those set out in the claimant's written application dated 15 September 2021.
- (6) Within these proceedings, in any document to which the public in Great Britain could lawfully have access (including the Register) the claimant will be referred to as "AB".

RESERVED JUDGMENT & ORDER

- (7) The respondent subjected the claimant to disability discrimination under section 15 of the Equality Act 2010 by withdrawing an offer of employment on or about 5 February 2020.
- (8) The sole reason this was unlawful discrimination was that the respondent failed, when deciding to withdraw the offer of employment, to take into account a document previously provided on the claimant's behalf.
- (9) Any compensation for lost earnings or similar:
 - a. shall be assessed on the basis that had that document been taken into account and had the offer of employment ultimately been confirmed, the claimant would have started work for the respondent on 1 June 2020;
 - b. shall be reduced by 50 percent to reflect the possibility that had that document been taken into account, the offer of employment would still have been withdrawn or the claimant would not have taken up the offer.
- (10) The claimant's other complaints fail and are dismissed.
- (11) **ORDER:** by **6 January 2022**, the claimant and respondent must write to the Tribunal with either –
 - a. confirmation that they have entered into a binding settlement agreement as to compensation and any other remedy;
 - b. agreed proposals for case management orders for a remedy hearing, including a realistic time estimate and dates of unavailability for the next 6 months.

REASONS

Introduction

1. The claimant is a man in his 40s. He has extensive experience working with children and young people. He is also a father. In addition, he has Asperger's syndrome and for that reason, as the respondent accepts, has a disability in accordance with the Equality Act 2010 ("EQA").
2. Between April and June 2019, the claimant applied for the role of Short Breaks Links Worker with the respondent, was interviewed, and was offered the job, subject to

various conditions, including “*medical clearance as to your suitability for employment in this post*”. A Short Breaks Links Worker provides care and support to disabled children and young people during evenings, weekends and school holidays in the community and their homes. Essentially: medical clearance was never forthcoming and the offer was withdrawn; that is what this case is about. The claimant alleges it was withdrawn twice and, whatever the respondent’s case on paper, that is in practice correct and not in dispute. He was told it was being withdrawn at a meeting on 17 September 2019; at the same meeting that withdrawal was itself withdrawn and a process with Employee Wellbeing and Occupational Health restarted; it was eventually and finally withdrawn by a letter of 5 February 2020.

3. The claimant alleges that what happened involved disability discrimination – direct, section 15 and one or more breaches of the duty to make reasonable adjustments – and victimisation. The alleged discriminators and victimisers – in so far as they have been identified – are Mr A Bhatti, HR Consultant and Mrs N Davies, Short Breaks Coordinator. He went through early conciliation from 14 December 2019 to 14 January 2020 and presented his claim form on 13 February 2020.

Issues

4. Subject to one or two amendments, a draft List of Issues prepared by the claimant’s representatives in July 2020 was endorsed by Employment Judge Adkinson at a preliminary hearing for case management on 13 July 2020. We refer to it – the “List of Issues” or “List”; it should be deemed to be incorporated into these Reasons.
5. There are small changes to the List.
6. At the start of this hearing, the Employment Judge flagged up the fact that, potentially, at least one complaint – a complaint about “*delaying the processing of pre-appointment checks*” following the claimant’s acceptance of the respondent’s conditional offer of employment – had been presented outside of the primary limit in EQA section 123. In the event, neither side dealt with the point in closing submissions on day 4 of this hearing and there was no relevant evidence from the claimant on it.
7. On day 3 of the hearing, it was confirmed:
 - 7.1 by counsel for the claimant that only one provision criterion or practice (“PCP”) was relied on for the purposes of the claimant’s reasonable adjustments claim, namely, “*An approach of requiring any adjustments to be finalised prior to the commencement of work*”;
 - 7.2 by counsel for the respondent that of the alleged protected acts relied on for the victimisation claim, three of them – the chronologically first and last of them and one dated 14 April 2016 – were indeed protected acts and that the primary alleged victimiser, Mr Bhatti, was fully aware of the first of them and, in relation to the last of them, was aware, at least, that the claimant was making some kind of complaint in relation to which reasonable adjustments were relevant.
8. There is some further complication relating to the protected acts, explained below when setting out the facts.

The law

9. We refer to the relevant parts of the EQA, in particular sections 13, 15, 20 & 21, 23, 27, and 136. There does not seem to be any dispute as to the law we have to apply, which is reflected in the wording of the List of Issues. Claimant's counsel made almost no submissions on the law; there is nothing in respondent's counsel's written submissions on the law with which she expressed disagreement, or with which we disagree to any significant extent.
10. Our starting point in the case law is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.
11. In relation to the direct discrimination claim, the claimant must show that he was treated less favourably than the respondent treats or would treat others – one or more 'comparators' – in circumstances that are not materially different. Merely proving, without more, that the respondent treated him badly is insufficient. See Ahmed v The Cardinal Hume Academies [2019] UKEAT 0096_18_2102, in particular paragraphs 59 to 61 of the decision.
12. So far as concerns the burden of proof, a succinct summary of how [the predecessor to] EQA section 136 operates is provided by Elias J [as he then was] in Islington Borough Council v Ladele [2009] ICR 387 EAT at paragraph 40(3), which we adopt. We are looking, first, for "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination or victimisation has taken place. Although the threshold to cross before the burden of proof passes from the claimant to the respondent is a relatively low one – "*facts from which the court could decide*" – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status¹ and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, EQA section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.
13. Generally, in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.

¹ i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. has no disability or does not have the same one, or, in relation to a victimisation complaint, did not do a protected act.

14. In relation to the EQA section 15 and reasonable adjustments claims, we have not needed to look beyond Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 in terms of the case law relevant to liability.

The facts

15. We shall start by going through the relevant facts.
16. Most of what happened is not materially in dispute, and, as we have already mentioned in relation to one issue, the parties' accounts of events are not as far away from each other in practice as in theory. Much of the claimant's case is built on speculation as to what might have been going on behind the scenes and, in particular, as to what might have been going on in the minds of Mrs Davies and Mr Bhatti, rather than on things he himself has knowledge of.
17. The only 'live' witness evidence we had was from the claimant himself and from Mrs Davies and Mr Bhatti. The claimant also relied on evidence from three witnesses: a Ms R Robbins, who at the relevant time was an independent advocate with Autistic Nottingham; the claimant's manager and the Service Director of the claimant's current employer, which we shall refer to in these Reasons as the "Claimant's Employer". The respondent, through counsel, stated that they did not want to ask any questions of these last three individuals and did not object to their evidence being taken as read, as if they had attended the Tribunal and confirmed the contents of their statements were true on oath or affirmation and had then been asked no questions; that is how we took it.
18. By way of background, see the Chronology and Cast List.
19. It is agreed that the claimant worked for the respondent, several times, in various different roles and over a number of years, before the period of prospective employment with which these proceedings are concerned.
20. The earliest relevant events are the alleged protected acts and we shall start with them.
21. On 30 April 2013, the claimant wrote to the respondent complaining about various things to do with a recruitment process he had been involved in where he had been unsuccessful. Mr Bhatti replied to him by a letter of 14 May 2013, to which we refer. As between the claimant and Mr Bhatti, nothing further came of this, so far as we are aware. As mentioned above, the claimant's letter dated 30 April 2013 is admitted to be a protected act, in that the claimant alleges breaches of the EQA in it.
22. So far as concerns the second alleged protected act set out in the List of Issues, the claimant now relies on two separate things.
23. The first is an email of 7 October 2015 from the claimant to a Ms M Devlin at the respondent. There is no obvious reference to the EQA or to discrimination within it. The claimant argues that it is a protected act because: it includes a complaint about failure to follow "*clear guidance in the report from Employee Wellbeing*"; that complaint is a reference to an Occupational Health ("OH") report prepared on the claimant dated 9 July 2015; that report has a section labelled "*Specific Questions*", which begins "*Are any adjustments required?*", in which various adjustments that need to be made are set out. The claimant's argument is that the email therefore includes a complaint about the duty to make reasonable adjustments.

24. We reject that argument. Below the “*Specific Questions*” and “*Are any adjustments required?*” section in the 2015 OH report, separately, there is a section labelled, “*Disclosure of information within this report*”. The latter section contains advice to the effect that the claimant’s diagnosis of Asperger’s syndrome is not to be disclosed to anyone else without his informed prior consent. That advice is not put forward as a reasonable adjustment for the claimant’s disability, but as guidance about disclosure of information. It is that guidance which the claimant’s email of 7 October 2015 is referring to. It follows that when the claimant is complaining about that guidance not being followed, he is not implicitly complaining about a breach of the duty to make reasonable adjustments. In those circumstances, in the absence of any other direct or indirect reference to the EQA or the duty to make reasonable adjustments or discrimination, we do not think the email was a protected act.
25. The second part of the second protected act identified in the List of Issues is a complaint made by telephone to Ms Devlin on or about 24 September 2015.
26. The best evidence we have as to the contents of that complaint comes from an email which Ms Devlin sent on 24 September 2015 to various people (not including Mr Bhatti or Mrs Davies). Within it is a statement that the claimant was not prepared to sign a “*Casual Workers Agreement*” that the respondent was at that time using, and that this was because it was not, “*a true, accurate and exhaustive record of the terms on which we have agreed*”. There is nothing in Ms Devlin’s email, nor in other emails we have from around that time, mentioning the EQA or discrimination or anything of that kind. The basis upon which it is argued on the claimant’s behalf that it is nevertheless a protected act is that one of the adjustments set out in the July 2015 OH report was that “*if procedures and time scales are written out in a policy, the claimant will expect these to be adhered to*”. However, the nature of the claimant’s complaints, as they appear from the contemporaneous documents, are not about timescales nor are they about procedures. They are about, broadly, inaccuracies in a contract summary. The complaint seems to us to have had nothing whatsoever to do with the EQA. On that basis it was not a protected act.
27. The next alleged protected act identified in the List of Issues is a complaint about a pay issue addressed in an email from respondent’s Mr Brettel to the claimant dated 10 November 2015. The argument that this is a protected act is (quoting from counsel’s closing submissions), “*the claimant has given evidence that the pay issues arose because of his delay in agreeing the inaccurate casual worker agreement, because of the failure to abide by the reasonable adjustments*”. It is right to say that the claimant had complained that his pay was delayed because he had raised issues with the casual workers agreement. But the issues he had raised with it had nothing to do with the EQA, nor, in any way that it is evident to us, with the reasonable adjustments previously agreed. Certainly, there is nothing here amounting to an allegation, however indirect, that the EQA had been contravened.
28. The next alleged protected act is a complaint made by the claimant on 14 April 2016 to the respondent’s Miss Boulton. It is conceded that that included an allegation that the respondent breached the duty to make reasonable adjustments and was therefore a protected act.
29. The final alleged protected act dates from around January 2017. The alleged protected act itself was made, as we understand it, by telephone, by the claimant, in January

2017, to the respondent's 'Have Your Say' team. It was transcribed by that team on 1 February 2017. It includes complaints about the failure to comply with the duty to make reasonable adjustments and is conceded, rightly, to be a protected act. Unlike any of the other protected acts other than the first one, Mr Bhatti did have some involvement with this. The extent of his involvement was corresponding by email with the claimant and directing the claimant to make his complaint to the Have Your Say team. The extent of his knowledge of the complaint was that the claimant was making a complaint of some kind and that it had some connection with reasonable adjustments.

30. Mrs Davies had no direct or indirect connection with any of the alleged or actual protected acts.
31. In the course of explaining what the alleged protected acts are, we have already mentioned the OH report of July 2015. We have also explained that the report consisted of a list of adjustments which, on the face of the report, the claimant required in order to be fit for work.
32. The report was prepared in an idiosyncratic way, without any apparent involvement of any medical practitioner. The name at the bottom of it is of a Ms Armand who is, so far as we can tell, a Human Resources professional with no medical expertise.
33. In his witness evidence, the claimant explained to us that in 2014 he had got together with someone called Ms Knee from a 'Fit for Work' service that assisted disabled people to get back into employment. They had prepared what the claimant describes as "*some generic adjustments*".
34. In 2015, the claimant applied to the respondent to be a Link Worker on a casual basis. The July 2015 OH report was put together as part of that application process. The claimant provided the adjustments document that he and Ms Knee had prepared to Ms Armand from Employee Wellbeing at the respondent. It is clear from the claimant's witness statement that he believes they were provided by Ms Armand to an OH doctor called Dr Muir to form the basis of the report. However, the report itself (which we don't think the claimant had a copy of at the time he prepared his witness statement) doesn't mention Dr Muir or any other medical professional. A draft of the report was sent to the claimant and he suggested changes to it. He then started working in the role without, so far as we can tell, any manager or anyone from HR confirming to him that the adjustments were agreed or saying anything else about them.
35. On the basis of the claimant's own evidence and the contemporaneous documentary evidence, such as it is, it appears to us that:
 - 35.1 the adjustments appearing in the July 2015 OH report were largely or entirely put together by the claimant in conjunction with Ms Knee in 2014;
 - 35.2 there was no substantial medical input into the report;
 - 35.3 there was not substantial input into the reasonable adjustments from the respondent – the claimant put forward his proposals and they were 'rubber-stamped';
 - 35.4 all changes to the report the claimant wanted the respondent to make were in fact made.

36. We are, to say the least, surprised that the process of assessing what adjustments were needed in order for the claimant to carry out this role was done in this way. It was not the way the respondent should have gone about it and it would have been quite wrong for everything to have been done in the same way in 2019, i.e. with the claimant simply being inserted into a role without anyone, seemingly, thinking about what adjustments were being requested and whether they were compatible with the role the claimant was going to do.
37. We note that the following phrase appears in the report: “*please note, some of these adjustments may not be relevant to the post at this time*”. As part of his Tribunal claim, the claimant has sought to suggest that what that phrase meant was, in effect, that some of those adjustments did not apply to him at all. We note that the phrase, as used in the 2015 report and in a subsequent near-identical report in 2019 (which we shall come on to later in these Reasons), was inserted into it by the claimant himself. When asking for it to be inserted, he explained why he was asking for this by reference to the fact that there was an adjustment to do with breaks and that, in fact, the claimant didn’t take breaks and therefore it wouldn’t apply. In other words, what was meant by that phrase was that there might be adjustments in the list which were there to cope with situations that would not arise in practice. It was not meant to mean anything like, “Some of these adjustments do not need to be made at all and can be ignored, even if the very situation the adjustment envisages arises.”
38. The claimant’s last period of work for the respondent before his job application to which these proceedings relate was as a Casual Link Worker. He worked with a single child, between September 2015 and January/February 2016. There were, we note, significant differences between the role that the claimant was performing then and the role that he was applying for in 2019. In particular:
- 38.1 the 2019 role was a permanent role whereas the 2015/2016 role was a ‘casual’ one. What that meant, amongst other things, was that as a casual worker he had been able to choose which child or young person he wanted to work with, whereas there was very little scope for making such choices if he was to be a permanent member of staff;
- 38.2 secondly, the respondent had ceased to provide these services to children and young people with a lower level of needs and by 2019 only provided them to children and young people with high level, complex needs.
39. The claimant applied for the role of Short Breaks Link Worker on 7 April 2019. He was short-listed for an interview by a panel of three which included Mrs Davies and someone from HR. Mrs Davies was aware, from short-listing onwards, of the claimant’s diagnosis. She interviewed him with the other members of the panel, and they decided that he should be offered the job.
40. Mrs Davies phoned the claimant up either on the day of the interview – 20 May 2019 – or the following day. She and the claimant had a discussion about a requirement to work at weekends. The outcome of that discussion was that the claimant was offered a contract working 9.25 hours each week, but only having to be available either for Saturdays or for Sundays but not both. He accepted that offer on 8 May 2019. It was, as explained in the introductory paragraph of these Reasons, a conditional offer, subject to medical clearance.

41. Nothing then happened in relation to the claimant's application until 10 June 2019. Mrs Davies puts that delay down entirely to her own oversight. There is no good reason in the evidence before us as to put it down to anything else. In particular, the suggestion that seems to be being made on the claimant's behalf that it was to do with his diagnosis or to do with stereotypical assumptions that she on the basis of that diagnosis makes no sense. If Mrs Davies had felt (consciously or unconsciously) that the claimant was not suitable for the role because he was diagnosed with Asperger's syndrome or because of something that she believed arose from it, why would she have offered him the job in the first place?
42. On 10 June 2019, the claimant phoned into the respondent. The best evidence we have as to the contents of the conversations is a contemporaneous written record prepared by somebody from Human Resources contained in the bundle of documents before us at pages 391 to 392. From that document, we can see that the claimant had a medical questionnaire that needed to be filled in at that point. In his own oral evidence, the claimant conceded that the reason for the delay between 10 June 2019 and the completed questionnaire being submitted was down to him. He submitted it to the respondent on or about 2 July 2019. He was then offered an OH appointment in August 2019, which the respondent cancelled for practical reasons. He was offered an alternative date for an appointment in July 2019, but that was not convenient for him. He was then told that the next alternative dates were in September 2019.
43. The claimant was keen to start work and was not keen to wait and there was then a conversation between him and Employee Wellbeing. The way forward agreed between them was that the adjustments on file – in other words those in the OH report of July 2015 – would be re-used. Before they were re-used, a draft report containing them was provided to the claimant and he made suggestions for changes to it, all of which were accepted.
44. When considering the draft report, the claimant commented, on 17 July 2019, "*I have read the report and need a bit of time to think about it. I think some of the content could be better if updated or reworded in some way, perhaps, so if it's okay I will confirm tomorrow*". He actually provided his comments on 23 July 2019 and they were accepted almost immediately.
45. We find the way in which the OH report of July 2019 was prepared decidedly odd. It purports to be the professional opinion of Dr Muir. In fact, so far as we can tell, Dr Muir had no input into its contents whatsoever, other than to put his name to it. We don't believe he saw or spoke to the claimant, or considered any medical notes relating to the claimant, and we do not understand how any medical professional could feel it was appropriate to sign a report which purports to contain their professional opinion in circumstances where they can have no idea whether the views expressed in the report are correct or not.
46. Moreover, the report is dated as having been signed on 17 July 2019. However, it incorporates changes suggested by the claimant on 23 July 2019. We can't be sure, but what seems to have happened is that the original report was indeed signed on 17 July 2019 by Dr Muir, and then, without going back to Dr Muir and getting him to agree the changes and re-sign it, the changes were simply inserted into the report by Employee Wellbeing. If this is indeed what happened, we are astonished that Occupational Health and Human Resources in a local authority would act in this way.

47. We note that the changes that the claimant made to the draft report did not include anything to the effect that the adjustments were required and applied only to interactions with colleagues and with the office and did not apply directly to his work with children and young people, which formed the bulk of his role. It also did not include any changes to the following paragraph: *“Asperger’s syndrome affects a person’s ability to think flexibly around situations, resulting in literal understanding of what is being said and rigid routine behaviours. These symptoms can become exacerbated when a person is anxious or exposed to stressful situations or circumstances”*.
48. There was then a delay from late July until early September 2019. Part of that was because the person who had been dealing with it from HR/Employee Wellbeing was on annual leave. It should have been progressed in her absence but wasn’t. There is no reason in the evidence to put that delay down to anything more complicated than the fact it was August and that the respondent is a large bureaucratic organisation which takes a long time to do anything at all.
49. In September 2019, there was a flurry of emails between the claimant and various people at the respondent. This led to a meeting on 17 September 2019 being arranged between the claimant and Mrs Davies and Mr Bhatti. The claimant was given permission to, and did, bring a companion to that meeting, namely Ms Robbins.
50. Prior to the meeting, Mrs Davies and Mr Bhatti had discussed the claimant’s application and the [2019] OH report. They did not know, and had no reason at this stage to suspect, that there had been no real medical input into the report. They assumed, as they were entitled to, that there had been a conventional meeting between an OH doctor and the claimant that resulted in the recommended adjustments; and that those adjustments were medically recommended – in other words that there had been a professional medical assessment that they were necessary in order for the claimant to be fit for work.
51. Mrs Davies and Mr Bhatti cross-referenced the adjustments in the OH report with the job role. They carried out an analysis and reached the conclusion that the claimant was not suitable. This was on the basis that the adjustments were incompatible with certain aspects of the role and in particular, lone working with children and young people with high level special needs.
52. It was not put to Mrs Davies that she did not go through such an analysis, nor that she acted in bad faith in this specific respect, nor that she did not genuinely hold the views expressed in the document that she and Mr Bhatti produced which explained their analysis and conclusions. That document, which we shall refer to as the “Adjustments Analysis”, speaks for itself. It is well-written and argued and appears to reflect a careful thought process. We shall return to whether it reflected stereotypical assumptions about the claimant based on his diagnosis later in these Reasons.
53. The meeting duly took place on 17 September 2019. There are not, in fact, very many significant differences between the parties as to what occurred. The claimant emailed Mr Bhatti about it shortly afterwards, on 27 September 2019. We also note Ms Robbins’s evidence about it in her witness statement, which is substantially consistent with Mr Bhatti’s and Mrs Davies witness evidence about it.
54. To an extent, the meeting has been caricatured on the claimant’s behalf as an instance of Mr Bhatti and Mrs Davies, without letting the claimant or Ms Robbins get a word in

edgeways, brutally telling the claimant that the job offer was withdrawn, with no possibility of appeal. That caricature is inaccurate. In accordance with Ms Robbins's evidence, the meeting started off in a friendly manner. Mrs Davies led the meeting, and she and Mr Bhatti started to go through the adjustments recommended in the July 2019 medical report, with the intention of having a dialogue with the claimant and Ms Robbins about it. However, very quickly, the claimant and Ms Robbins insisted on being told whether the decision was to withdraw the offer or to confirm it. Ms Robbins in her statement says that, "*Mrs Davies and Mr Bhatti seemed a little surprised by this*". That again conforms with their evidence. Nevertheless, Mrs Davies did, as requested, tell the claimant that the decision was that the offer would be withdrawn. The claimant then asked whether he could appeal, and that was why he was told by Mr Bhatti that he couldn't, and that the decision was final.

55. We note that what was said about the decision being final and of there being no right of appeal appears to us to have been the correct position in accordance with the respondent's practices and procedures.
56. At that point in the conversation, the claimant revealed that the adjustments in the July 2019 OH report had been based on those drawn up in 2015 for a different role. He did not say that they were inapplicable or wrong, merely that they needed updating. He also did not say or suggest that he had never seen Dr Muir at any time.
57. In light of that information from the claimant, the agreed way forward was, in effect, to restart the Employee Wellbeing and OH process. The claimant left the meeting knowing that the withdrawal of the offer of employment had been rescinded and that the process was not at an end. He also (this appears from his own email of 27 September 2019) left the meeting with a copy of the Adjustments Analysis.
58. In Ms Robbins's statement, she said there was no opportunity to discuss a particular point. We don't think that was the case. Mrs Davies explained to us, and we accept, that the claimant and Ms Robbins were given opportunities to discuss things between themselves and that there were breaks. There is no suggestion that they were prevented from saying whatever they wanted to say. It has been said on the claimant's behalf that if he did not engage or found it difficult to do so, that was a product of his condition. That may well have been so, but that was why he had an advocate with him.
59. The claimant was a job applicant and not an employee. In our experience, it is unusual for a prospective employer to meet with someone in the position of the claimant in September 2019 to communicate a decision that a job offer was being withdrawn. That there was a face to face meeting at which the claimant was allowed an advocate as a reasonable adjustment shows to us that the respondent's intention was to have a dialogue with the claimant and not merely to tell him that job offer was withdrawn, something that could just have been done by letter.
60. Another suggestion about the meeting – this one made in the claimant's witness statement – is that, "*I explained that the adjustments I had requested had incorrectly been applied to the direct work with young people when it was the office environment and administrative tasks that I required adjustments for. I said no adjustment in respect of lone working was necessary as my employment history demonstrated my ability to work alone and with challenging behaviour and I referred to my success with the 13-year-old child I had worked with in 2015*". However, in cross examination, when first

asked about this, he said he couldn't remember saying anything to this effect. We also note that there is no reference to any of this in his email of 27 September 2019, nor in Ms Robbins's witness statement. The first time the claimant articulated anything along these lines in a document was in January 2020, when, in conjunction with his trade union representative, he provided a written commentary on the Adjustments Analysis. He evidently struggled to articulate the fact that he needed the adjustments in the office environment and with administrative tasks, but not when directly working with children and young people, when he had an OH consultation in December 2019 (as we shall explain shortly). Even before us, at this hearing, he found it difficult to explain where he needed and where he did not need adjustments – although what he was saying was clear by the end of his evidence.

61. Mr Bhatti's and Mrs Davies's evidence was clear and was to the effect that the claimant did not mention at the meeting in September 2019 that the adjustments set out in the July 2019 OH report did not apply directly to working with children and young people but only in connection with administrative / office work.
62. We think the claimant is mistaken in this part of his evidence. We don't for a moment suspect him of deliberately not telling us the truth, but human memory is unreliable and we all have a tendency to recall what we think would or should have happened, which is often not what actually did happen.
63. On 18 September 2019, Mr Bhatti sent an email to the claimant attaching a pre-employment medical questionnaire. Mr Bhatti told the claimant that he was required to complete it and to provide the respondent, "*with all relevant information in regards to your condition for which you may require reasonable adjustments in respect of the Short Breaks Link Worker role that you are offered on a conditional offer basis ... In the attached questionnaire please work your way through each section and respond accordingly. Under the section headed 'General Medical' ... you can provide us with all relevant information in regards to your condition. You may also, if you wish, provide a separate written document with relevant information to inform us of details of your condition that you believe we should take into consideration when making our assessment*".
64. The respondent has been criticised for this email. In particular, it is said on the claimant's behalf that the only thing it asked him to do was to give evidence about his condition. In his oral evidence, the claimant said something to the effect that the only relevant information about his condition was his diagnosis and that hadn't changed. However, particularly given that the claimant had already been provided with the respondent's Adjustments Analysis document, the email was clear in terms of what was expected of the claimant: to tell the respondent what aspects of his condition he might need reasonable adjustments for in the Short Break Link Workers role. It was an open invitation to the claimant to address the respondent's Adjustments Analysis and OH advice and to explain what was incorrect or out of date. The claimant knew from what had been discussed at the meeting that this was so that all this information could be put before Employee Wellbeing, with a view to obtaining up to date advice from OH. The claimant did not take that opportunity up until after he had seen OH, in December 2019.
65. It is clear from emails we have from September 2019 that the claimant was genuinely confused about what was happening. However, he was at that stage in contact with Ms

Robbins and a trade union representative. We don't know what he discussed with his trade union representative, of course, but if the two of them had sat down together at that stage and talked through Mr Bhatti's email of 18 September 2019 and the Adjustments Analysis and the OH report and medical questionnaire, we are sure the claimant would have been told what was expected of him. We are not here criticising the claimant, but we think it is unfair of the claimant to criticise the respondent in relation to this.

66. We have already mentioned that on 27 September 2019 the claimant sent his account of the meeting to Mr Bhatti by email, which Mr Bhatti accepted virtually unchallenged, and that there is no mention in that email of the claimant's main point about reasonable adjustments – the point that is central to these proceedings – that most of the adjustments listed in the OH report of July 2019 did not apply to the majority of his role i.e. the parts of the role where he was directly dealing with children and young people.
67. The claimant sent in the medical review questionnaire on 2 October 2019. He did not provide any details of his condition that would be relevant to the assessment of what reasonable adjustments he needed. In the covering email, the only adjustment he mentioned (which, as we already highlighted, was not an adjustment when it appeared in the 2015 report, although it potentially became one in the 2019 report, but only because the claimant asked for the relevant passage to be moved to the part of the report where adjustments were recommended and the respondent's Employee Wellbeing team simply accepted that) was about communicating his diagnosis. He did not mention that he had never in fact seen Dr Muir² and, strikingly to us, he did not suggest that almost all of the adjustments were unnecessary for most of the role.
68. Following some dialogue with the claimant, OH told Employee Wellbeing that they wanted evidence from the claimant's specialist. As the claimant did not have a specialist, his GP was written to. We don't, unfortunately, have the letter that was written, but what we do have is information provided by Mrs Davies to Mr Bhatti and Employee Wellbeing about the role that we assume was used as the basis for the letter of instruction to the claimant's GP. The claimant's GP was also seemingly provided with the adjustments recommended in Dr Muir's report of July 2019.
69. The GP, Dr Lloyd, provided her report on 7 November 2019, to which we refer. It included:

Having considered the adjustments in your letter and the context of my knowledge of [the claimant's] needs, I would first say they were formulated for an office environment and not this role involving contact with disabled children. He knows to expect inconsistencies and for routines to change when working with disabled children and this does not overload him or to cause him anxiety. He works as a lead play worker at [the Claimant's Employer] currently at several open access play sessions to children age 5 to 13. These are attended by up to 40 children and young people, he manages a team of staff and volunteers within community centres, parks and open spaces and this requires consideration for members of the public and taking into account unpredictable external factors. The sessions are

² Although in an email of 9 October 2019, he did tell Employee Wellbeing that in 2015 that he and Ms Knee had drafted the adjustments and that there was no input from a medical professional in 2015.

not booked in advance, and the children have special educational needs and display “challenging” behaviour. This demonstrates that [the claimant] is able to tolerate unpredictable situations and take a lead role when caring for children with special needs, without becoming overloaded or anxious.

70. The respondent received that report on 12 November 2019. An appointment with an OH doctor – a Dr Jackson – was scheduled for 25 November 2019. It was cancelled by the claimant due to his work commitments. He eventually saw Dr Jackson on 13 December 2019.
71. We have scant evidence about exactly what occurred on 13 December 2019, but on any view, there was a miscommunication between Dr Jackson and the claimant. In his witness statement the claimant says that he was, “*asked what adjustments I needed, and I referred to the GP report*”. However, the GP report does not really provide any details in terms of what adjustments are needed. The only specific positive recommendation made in the GP report is that the claimant’s colleagues should not be told of his diagnosis without his consent. We think that to describe that as a recommended adjustment is a mischaracterisation. What the GP actually wrote was, “*I feel it is not appropriate that any co-workers are told of [the claimant’s] diagnosis prior to his commencing a job [as] this would encourage assumptions to be made about him that are not accurate or helpful*”. That is not medical advice, but a suggestion of a way to avoid colleagues making inaccurate and unhelpful assumptions. It is, moreover, not a general recommendation about whether the diagnosis should be communicated after the claimant had started work.
72. It appears to us that the claimant did not want to engage with the reasonable adjustments apparently recommended in July 2019 that Dr Jackson had before him and that, understandably, Dr Jackson saw as the starting point for discussions with the claimant. We do not think the claimant can have explained to Dr Jackson that the previous adjustments were appropriate for him in the prospective role with the respondent but only for a small part of it. We assume that Dr Jackson is a competent professional and that had this been explained to him the outcome of the consultation would likely have been different. Being able to understand what the claimant was saying in this respect would not have required particular autism awareness training or particular specialist knowledge of the claimant’s needs as a person with a diagnosis of Asperger’s syndrome.
73. From the claimant’s own evidence and his witness statement, what seems to have derailed things during the consultation with Dr Jackson was the claimant’s focus on his desire for his diagnosis not to be shared beyond his line manager, team leader and a named HR officer – something which was peripheral to the respondent’s concerns that had led to the job offer being withdrawn and to the question of what reasonable adjustments were needed in order for him to be able to perform the role. Discussions around that led to the claimant asking Dr Jackson whether he had had autism awareness training, something which Dr Jackson may well have seen as an attack on his professional capabilities.
74. To cut a long story short, Dr Jackson ultimately produced a report which said nothing of substance that would have been any use to the respondent in terms of assessing

what reasonable adjustments the claimant did and did not need in order to be able to perform the role. All the report has to say about adjustments is this:

I attempted to discuss [the] adjustments ... with [the claimant] but made little progress with drafting further amendments that he would find acceptable. Instead, [the claimant] would prefer the submitted report from his own GP dated 07.11.19 to be the basis of discussing appropriate adjustments. As with previous OH clearance, I would regard [the claimant] as fit for the proposed role if agreed adjustments are reasonable and sustainable.

75. The claimant subsequently, through a trade union representative called Mr Jones, wrote to the respondent requesting another OH review meeting with Mr Jones present. He was told, not unreasonably in the circumstances, that that was not going to happen and that the options were (with his consent) the release of his GP's report to Mrs Davies and Dr Jackson's report either being released if he consented, or not if he didn't (and he didn't), and that Mrs Davies would make a decision on the basis of whatever material had been released to her.
76. Around the same time, the claimant met with Mr Jones and together, they produced a document commenting on the Adjustments Analysis. We will call that document the "Claimant's Commentary". This was provided by Mr Jones to Mr Bhatti on 10 January 2020 and they had an exchange of emails about it. The claimant also emailed Employee Wellbeing about it on 16 January 2020, although he did not send a copy of it to Employee Wellbeing. Mr Bhatti appears essentially to have ignored it. His focus was on the fact that Mr Jones was a Nottingham City Council Trade Union representative, that he was representing somebody who was not a Nottingham City Council employee, and that that was not appropriate. Mr Bhatti accepted when asked this question by the Tribunal at this hearing that Mr Jones would have expected him to have passed the Claimant's Commentary on to Mrs Davies, and that he did not do so. When asked by the Employment Judge why he hadn't passed it on to Mrs Davies he said he could not answer that question.
77. On or around 4 February 2020, Mr Bhatti and Mrs Davies discussed the claimant's application and what to do about it. Mrs Davies's decision was essentially that nothing of substance had changed since September 2019, that the factors that had led her to conclude the job offer should be withdrawn in September 2019 still applied, and that the GP letter did not override what was in the 2019 OH report. She communicated her decision to the claimant in a letter of 5 February 2020.

Decision on the issues – direct discrimination

78. The claimant's direct discrimination claim is to the effect the Mrs Davies (aided and abetted in some unspecified way by Mr Bhatti) thought that the claimant was incapable of performing this role and and/or that she did not want him to do it because of prejudice against him and/or stereotypical assumptions she made about him because of his diagnosis. As we pointed out above, if that was so, it would be bizarre of her to have short-listed him for interview and then offered him the job.
79. Mrs Davies went from the position where she thought the claimant was suitable for the role in May 2019 to the point in September 2019 where she thought he was not. What changed between May and September 2019 was not the state of her knowledge of the claimant's diagnosis. She knew of that all along. What changed was that she received

the OH report. On the face of it, that report is what she based her decision on. She says that is what she based her decision on. Logic points to that being what she based her decision on. All the evidence points to that being what she based her decision on. And we have no good reason to doubt that was indeed what she based her decision on.

80. The first direct discrimination complaint is about “*delaying the processing of pre-employment checks*”.
81. This complaint is baseless. We have explained the chronology. At every stage, the reason why there was delay was something other than the claimant’s disability. We think respondent’s counsel is right to say that the claimant’s case in reality is to the effect that ‘but for’ him being disabled the pre-employment checks would have taken less time. That is probably so, but does not make the ‘reason for the treatment’ the claimant’s disability. There is a distinction between, on the one hand, the background circumstances without which (or ‘but for’ which) the facts giving rise to the complaint would not have occurred – what used to be known as a ‘*causa sine qua non*’ – and the true, effective or activating cause of the treatment being complained about. It is clear, settled law that such a distinction must be drawn in appropriate cases: see Seide v Gillette Industries Ltd [1980] IRLR 427, EAT; Warby v Wunda Group plc EAT 0434/11 (27 January 2012).
82. The second direct discrimination complaint is about “*making an adverse assessment of [the claimant’s] abilities (based on a stereotyped view of his disability)*”.
83. The respondent did make an adverse assessment of the claimant’s abilities, but this was based on the OH report of July 2019. Counsel sought to argue that basing the decision on that report was tantamount to basing it on a stereotypical view of the claimant’s disability. That argument was, in turn, based on the following sentences from the report: “*Asperger’s syndrome affects a person’s ability to think flexibly around situations, resulting in literal understanding of what has been said and rigid routines and behaviours. These symptoms can become exacerbated when a person is anxious or exposed to stressful situations or circumstances*”. It was submitted: that that is the only sentence in the reasonable adjustments section of the report that does not mention the claimant by name; that it is a general comment about people with Asperger’s syndrome rather than a comment that was intended to be applicable to the claimant; that Mrs Davies and Mr Bhatti should have realised as much and should, for all intents and purposes, have ignored it.
84. That was a hopeless submission to make given that:
 - 84.1 these sentences appears in a report which is in terms about the claimant. If they did not apply to him, what were they doing there?
 - 84.2 it appears from the evidence that the claimant and Mrs Knee wrote those sentences and included them in the suggested reasonable adjustments document provided to the respondent in 2015. If they were irrelevant to the claimant, why would they do this?
 - 84.3 the sentences appear in the report after the phrase, “*The claimant is fit for work with the following adjustments*”. The natural reading of them in the context is that they were part of the adjustments that needed to be made in order for the claimant to be fit for work;

- 84.4 the comment in the report in brackets “please note some of these adjustments may not be relevant to the post at this time”, is, as already mentioned, about particular aspects of the role. It does not mean that some of the adjustments may not be applicable to the claimant at all. And it would be bizarre for something to that effect to be included in what was, on the face of it, a medical report about the claimant;
- 84.5 the claimant had twice agreed to those sentences being in an OH report about him, and at no stage prior to January 2020 had he suggested to the respondent that they did not apply to him;
- 84.6 we think that any reasonable person reading the OH report, even in the knowledge that it was potentially out of date, would assume that those sentences applied to the claimant.
85. We should add that in our view the way in which Mrs Davies cross-referenced the adjustments with the job description and aspects of the role in the Adjustments Analysis was entirely reasonable. It was not a case of twisting or exaggerating something the 2019 OH report to create a potential problem with the claimant performing role that was not there, or anything of that kind. Mrs Davies was entitled to assume that the report, out of date or not, was based on a professional assessment of the claimant made by an OH doctor. The claimant was well aware that it wasn't; Mrs Davies was not; and the claimant did not tell her.
86. The next direct discrimination complaint is about “*declaring that members of the Short Breaks Team would need to be notified of the claimant's medical diagnosis (rather than just the details of his needs)*”.
87. The reason that this ‘declaration’ or decision was made was not because of the protected characteristic of disability (as it would have to be in order for this direct discrimination complaint to succeed). It would be a non sequitur to say that the respondent decided that certain people needed to be notified of the claimant's diagnosis because (effectively) of that diagnosis. The decision was made because Mrs Davies, rightly or wrongly, took the view that it would be helpful for those who were supervising the claimant day-to-day – the Short Breaks Workers – to provide appropriate support.
88. In Mrs Davies's view, things might happen connected with the claimant's condition that were not covered by whatever adjustments were made; and knowledge of the claimant's condition might help the Short Breaks Workers know what the most appropriate thing to do was. We have some sympathy with this view. We can envisage situations that might arise where it might be helpful – both to the claimant and the respondent – for the Short Breaks Workers to know of his diagnosis. For example, the claimant might interact with the Short Break Workers in a way that, if they did not know his diagnosis, they would consider inappropriate and this could lead to conflict. We note that everyone involved in this team – including Mrs Davies – had autism awareness training (understandably so, given that a number of the autistic service users). If any group of people was unlikely to make stereotypical assumptions about someone based on a diagnosis of Asperger's syndrome or autism, it was this group of people.
89. We have also asked ourselves whether there was less favourable treatment here in accordance with section 13 and section 23 of the EQA. We think the comparator that

would be appropriate here would be someone with some other condition that led to a need to make reasonable adjustments, for example epilepsy (which is sometimes, we note, a condition about which there is stigma). We think the respondent would have felt the need to inform support workers not just of any adjustments that were needed for such an individual, but also of their diagnosis.

90. There was therefore no less favourable treatment; and any less favourable treatment was not because of disability.
91. The next direct discrimination complaint is about, "*making an assessment that lone working constituted a risk for the claimant and any young person he was working with*".
92. Mrs Davies made this assessment based on the OH report, rather than because of the protected characteristic of disability, or because of a stereotypical view of the claimant's disability. It was a reasonable assessment for her to make on that basis given the information available to her. We shall explain later in these Reasons why we think it was reasonable for her to decide that the views expressed in the GP report did not override what was in the OH report.
93. The next complaint is, "*on 17 September 2019, withdrawing the offer of employment*".
94. Once again, the reason for this was the contents of the OH report, which were not themselves unlawfully discriminatory.
95. The next complaint is about "*failing to appointment an OH provider who had relevant training in autism to assess the claimant's ability to perform the role*".
96. The complaint about this is made as a direct discrimination claim. In relation to a direct discrimination claim, it is not a question of whether what was done was reasonable or unreasonable; and in the present case it is not a question of whether it was reasonable or unreasonable for the respondent to appoint an OH provider who did not (so far as we know) have autism awareness training).
97. Pausing there, Dr Jackson was an OH specialist doctor. It is his expertise in occupational health medicine that was relevant; he did not have to have particular expertise in autism in order to assess the claimant, any more than expertise in any other particular condition.
98. The claimant's reliance on the Autism Act 2009 in this respect, and on Guidance issued under it, is misplaced. Nothing in that Act or in the Guidance requires or recommends that OH doctors should have autism awareness training. The part of the Guidance the claimant relies on relates to frontline staff, i.e. those who deal with members of the public, not to those who deal just with employees and job applicants like OH personnel.
99. For direct discrimination, there must be less favourable treatment. Bearing that in mind, this complaint becomes a nonsensical one to the effect that if the claimant was not on the autistic spectrum, he would have been referred to an OH provider "*who had relevant training in autism*". The claimant was treated exactly the same as any other job applicant in this respect. What he is really arguing is that he should have been treated differently. Such an argument might give rise to a different type of disability discrimination claim, but not to a direct discrimination claim. The essence of direct discrimination is that the claimant was treated differently from others and should have

been treated the same, not that he was treated the same as others and should have been treated differently.

100. The next complaint is about *“failing to heed the advice given by the claimant’s longstanding GP”*.
101. Did Mrs Davies *“fail to heed”* that advice because of a stereotypical assumption about the claimant because of his diagnosis? That appears to be the allegation which is being made here. Our answer to that question is: no, she did not.
102. We note the relatively limited nature of the advice that the GP, Dr Lloyd, gave. We have already explained that her letter, on our reading of it, did not advise non-disclosure of the claimant’s condition as a reasonable adjustment, or as medical advice of any kind; and we have already explained why Mrs Davies felt that limited disclosure was necessary. We have also already noted that Dr Lloyd does not positively advise that particular reasonable adjustments should be made, merely making a general comment that *“they”* (the adjustments) *“were formulated for an office environment and not this role involving with contact with disabled children”*. She did not say whether she meant every single one of the recommended adjustments, nor did she explain why, if they were not relevant to this role, they had been put forward in the first place – presumably because she didn’t know.
103. Dr Lloyd is not, we assume, an expert on what the role the claimant applied for entailed, nor on OH medicine. Moreover, on the face of her letter, she based her assessment that the claimant was *“able to tolerate unpredictable situations and to take a lead role when caring for children with special needs without becoming overloaded or anxious”* on the fact that he was working at the Claimant’s Employer. We take this view because she began the sentence in which she referred to the claimant’s ability *“to tolerate ... [etc]”* with, *“This demonstrates”*; and in the context, *“This”* referred to that work at the Claimant’s Employer.
104. In contrast with Dr Lloyd, Mrs Davies had personal experience and knowledge of what doing the kind of work the claimant was doing for the Claimant’s Employer entails. It is evidently significantly different from the role of Short Breaks Links Worker. In particular, Short Breaks Links Worker roles involve working completely alone, with potentially no one else at all in the vicinity, for four hours at a time, one-to-one, with a child or young person with complex special needs. Mrs Davies’s conclusion that the two were not comparable was reasoned and reasonable. Moreover, a job applicant’s assessment of their own abilities, both to do the job they are doing and of their proficiency in that role and previous roles, which is what Dr Lloyd’s opinion would necessarily have been based on, is not something that the prospective employer ought simply to accept without question, particularly not when, as here, there appears to be an OH assessment saying something different.
105. The next and last direct discrimination complaint is about *“on 5 February 2020, confirming the withdrawal of the offer of employment”*.
106. As we have already explained, the reason for this decision was the contents of the 2019 OH report.
107. We note that in closing submissions, claimant’s counsel argued that the reason Mr Bhatti failed to pass on the Claimant’s Commentary to Mrs Davies was the protected

characteristic of disability. That allegation was not put to Mr Bhatti. In addition, there is no complaint before the Tribunal specifically about that failure. There is, moreover, no evidence whatsoever to support the assertion that the reason was the protected characteristic disability.

108. There is some evidence, which we shall consider below in relation to the victimisation claim, that Mr Bhatti may have had something against the claimant. But even if we accepted that Mr Bhatti did indeed 'have it in' for the claimant, that would provide no basis for us to conclude that the reason he had it in for the claimant and failed to provide the Claimant's Commentary to Mrs Davies was that the claimant has a diagnosis of Asperger's syndrome; we can't infer from the fact that there was unfavourable or less favourable treatment what the reason for it was, whether as a matter of logic or of law.
109. Finally in relation to this, what is before the Tribunal is a complaint about the withdrawal of the offer of employment on 5 February 2020. We are entirely satisfied that that was Mrs Davies's decision and hers alone. There is no proper basis in the evidence we have heard: for us to decide that Mr Bhatti manipulated or influenced Mrs Davies into making the decision that she made; for us to think that in relation to that decision, his role was anything other than that of a conventional HR advisor to a decision maker.

Victimisation

110. In paragraphs 21 to 30 above we explained that there were only three protected acts and that Mr Bhatti had full knowledge only of the first of them, no knowledge of the second, and limited knowledge of the third. There is no reason at all in the evidence to doubt Mrs Davies's word that she was not aware of any of them – she was not in post at the time; nor Mr Bhatti's word that he was not aware of more than he has accepted he was aware of – he was not in the part of the respondent's Human Resources department that dealt with case work at the time of the second of them (April 2016) and given the size of the respondent we wouldn't expect him to have been aware of it.
111. The only victimisation complaint is about the withdrawal of the offer of employment. As Mrs Davies made the decision that resulted in it being withdrawn, and as she did not know the claimant had done any protected acts, the only way this victimisation claim could succeed would be if we were persuaded that: Mr Bhatti manipulated or persuaded or otherwise caused her to make that decision; his motivation was that the claimant had done a protected act.
112. There are two parts of the evidence that we think might potentially have caused us to conclude that Mr Bhatti had something against the claimant. One is his failure to pass on the Claimant's Commentary. We shall return to this. The other is a sentence from an email he sent internally on 19 September 2019. The passage in the email in which the sentence appears, with the sentence underlined, is:

To confirm:

- *[The claimant] was provided with a copy of the report we completed with the adjustments recommended and we sought he consent to release this to management.*
- *He requested a couple of changes which we agreed to do.*

- [The claimant] *did not mention any changes in his condition since we last advised NCC on adjustments.*

This is the bit that he seems to be contesting, he told me that he only agreed to this because he wanted to get the pre-employment checking process completed so he could start work. In a sense, alluding that it may not be fully accurate. He has a certain degree of culpability in agreeing to this and what I want to do is present him with the opportunity to give us current information to assess. It could be that nothing at all has changed and the OH would be the same, but then he will no longer be able to use this to challenge the decision to withdraw the offer of employment.

113. The sentence is badly phrased. However, it is a single sentence in a longer document, and it has to be read in context. It is understandable that the claimant reads it and gives it the most negative interpretation possible for the purposes of this claim. We think, though, that all that Mr Bhatti was doing was explaining why the unusual step of making another referral to OH was being taken. He was saying, in terms, “*what I want to do is to present him with the opportunity to give us current information to assess*”, and was explaining that if it turned out that nothing had changed then that would be the end of the matter. What could have come out of this “*opportunity*” was OH/medical evidence that all the respondent’s concerns were misplaced. Mr Bhatti would have been well aware of that. In conclusion, we don’t think this email shows that Mr Bhatti was prejudiced against the claimant, let alone that he was prejudiced against him because of a complaint of the claimant’s in 2013 which Mr Bhatti had responded to and which had had no other apparent impact on Mr Bhatti (or a complaint of early 2017 in which he had had the most peripheral involvement and with which he had not himself had to deal at all).
114. We turn, then, to whether Mr Bhatti failing to pass on the Claimant’s Commentary to Mrs Davies shows that he was ill-disposed towards the claimant; and, if so, whether this is evidence from which we could conclude that victimisation had taken place in accordance with EQA section 136.
115. This is the part of the case which we probably spent most time on during our deliberations. After considerable discussion, our unanimous view is that he did not have a particular animus against the claimant and that the burden of proof in relation to this complaint does not shift onto the respondent.
- 115.1 Sometimes there is no particular reason for someone having done something. Sometimes people do inexplicable things for no reason at all that they or anyone else can understand or discern.
- 115.2 In the course of the email exchange between Mr Bhatti and Mr Jones about the Claimant’s Commentary (see paragraph 76 above), Mr Bhatti’s focus and concern was the fact that Mr Jones ought not, in his view, to have been writing to Mr Bhatti at all about the claimant. From Mr Bhatti’s final email to Mr Jones about this, it is evident to us that Mr Bhatti was at least slightly annoyed about the fact that Mr Jones was getting involved in something that was not – in Mr Bhatti’s view – his business and that was already being dealt with via another process. We think this is the most likely explanation for why Mr Bhatti did not do anything with the Claimant’s Commentary. It should not have been sent to him by Mr Jones at all, in his view.

115.3 We do not, however, think that Mr Bhatti's motivation was to sabotage the claimant's application. Mr Bhatti would have had no idea that the Claimant's Commentary was only going to be sent to him. Moreover, if he had read the Claimant's Commentary (which he said he hadn't), there was nothing in it that, if he had wanted to ensure that the application was rejected, would have prevented him persuading Mrs Davies to withdraw the job offer. The Claimant's Commentary was nothing more than the claimant's own views on the reasonable adjustments. As we have already said, a prospective employer cannot simply accept uncritically what a prospective employee says about their own capabilities, particularly in circumstances when there is OH evidence saying something different.

115.4 When it came to the meeting between Mr Bhatti and Mrs Davies on 4 February 2020, we can't believe that Mr Bhatti just forgot about the email exchange he had had less than a month earlier with Mr Jones. Mr Bhatti himself in his evidence told us that he had never previously encountered an employee trade union representative purporting to represent a job applicant and that he had had to take advice from his own line manager about it. He would surely have remembered, at least, that he had recently been sent a document on the claimant's behalf potentially relevant to Mrs Davies's decision-making.

115.5 We accept that Mr Bhatti did not mention the Claimant's Commentary to Mrs Davies. We do have reservations about parts of his evidence, but none about any of hers. We note in this respect her straightforward answers to the Employment Judge to questions about what she would have done had she received that document. She did not say what someone who had a closed mind and/or who was keen to frustrate the claimant's claim would have said, namely that it would definitely have made no difference. Instead, clearly thinking carefully about the question for the first time when giving evidence, she said it would have made a difference, in that she would have referred the matter back to Dr Muir of OH.

115.6 We think the most likely reason Mr Bhatti mentioned nothing to Mrs Davies about it on 4 February 2020 was that it would have complicated things and made his job marginally harder and would have inconvenienced him to some extent. The easy thing to do was not to mention it; and that was why he didn't mention it.

115.7 Even if we had concluded that Mr Bhatti had deliberately sought to frustrate the claimant's job application, there is no basis in the evidence to connect that with the claimant's protected acts. It is anyway inherently unlikely that someone in Mr Bhatti's position would hold a grudge against the claimant because of what happened in 2013, or the brief email interaction he had with the claimant in 2016/2017.

116. In conclusion, the offer of employment was not withdrawn in 2019 or 2020 because the claimant did a protected act, nor is there any basis for saying it was because the respondent thought the claimant had done or might do a protected act.

Reasonable adjustments

117. The only PCP ultimately relied on by the claimant in his reasonable adjustments claim is "*an approach of requiring any adjustments to be finalised prior to commencement of work*".

118. A question we had for the claimant, which we posed to claimant's counsel a number of times, is: what is the "*substantial disadvantage*" relied on? In her closing submissions, claimant's counsel told us that substantial disadvantage arose because disabled people might require adjustments that could not be finalised, meaning that they could not start work; and that that would not apply to non-disabled people, who would not need any adjustments at all.
119. It seems to us that the argument that this alleged PCP caused substantial disadvantage to disabled people is almost tantamount to arguing that complying with the duty to make reasonable adjustments causes substantial disadvantage. That can't be right.
120. In any event, the PCP the respondent actually had was to put in place the adjustments they considered to be reasonably necessary to ensure the wellbeing both of the prospective employee and colleagues and service users before the employee could start work. It might in certain circumstances have meant that there was a delay in the disabled job applicant starting work, or that they were unable to start work at all, and we accept that that could constitute substantial disadvantage. However, to avoid that disadvantage – the only way to do so – would have been to permit the claimant to start work without having in place the adjustments that the respondent considered to be reasonably necessary. The proposition that that was a reasonable step for the respondent to have to take only has to be stated to demonstrate its absurdity.
121. We would add that none of the adjustments proposed set out in the List of Issues would avoid this disadvantage. They are potential adjustments that would only have come into play once the claimant was allowed to start work and would be relevant to other PCPs, if relevant at all. They are moreover mostly not reasonable. For example, it is a wholly unrealistic suggestion that the claimant could learn on the job / be observed and/or assisted by a more experienced worker, given the resources constraints on the respondent and the fact that the essence of this job was, from the get-go, to work one-to-one with the most vulnerable children and young people.
122. In summary in relation to reasonable adjustments, although the duty to make reasonable adjustments was engaged (albeit not by the PCP relied on by the claimant), at the relevant time there were no steps that it was reasonable for the respondent to have to take that would have avoided the disadvantage, i.e. that could well have alleviated the disadvantage the claimant was put to. The disadvantage in question was an unfortunate but necessary by-product of the respondent complying with that duty.

Section 15

123. The complaints under EQA section 15 rely as the unfavourable treatment on the decisions in September 2019 and in February 2020 to withdraw the job offer. Earlier in these Reasons, we rejected the respondent's suggestions that Mrs Davies acted in bad faith or made her decision for any reason other than those she gave. This makes the only remaining relevant issue in dispute one to do with justification – with whether these decisions were a proportionate means of achieving a legitimate aim. Specifically, given that the aim of being "*reasonably assured of the safety of the children that the claimant would be required to work with and of the claimant himself*" is manifestly legitimate, the issue is the question of proportionality.
124. In relation to the quickly rescinded decision of September 2019, we think that that was a reasonable and proportionate decision for the respondent to take at the time, based

on the material then available to it. Conventionally, there wouldn't even be a meeting between prospective employer and prospective employee. The respondent's intention was to have a dialogue before communicating a firm decision. It was the claimant's and Ms Robbins's insistence on being told at the outset what the decision was which led to there being no such dialogue. Mrs Davies and Mr Bhatti had no reason to think the information they had was wrong or out of date or incomplete at the time when they communicated the decision. As soon as they were told that that might be the case, they rescinded it. In the particular circumstances that pertained at the meeting on 17 September 2019, there was no less discriminatory thing that the respondent could reasonably have done when they subjected the claimant to the unfavourable treatment complained about. The justification defence is made out.

125. Looking at the situation in February 2020, we don't think that what happened with OH or with the GP report materially changed things. We have largely dismissed the claimant's criticisms of Dr Jackson in paragraphs 71 to 74 and 97 to 98 above and discussed the GP report and its significance at some length, in particular in paragraphs 101 and 104 above. Had it not been for the existence of the Claimant's Commentary, the decision taken in February 2020 would, too, have been justified.
126. However, through Mr Bhatti's actions, Mrs Davies based her decision on incomplete evidence. The respondent accepts that the Claimant's Commentary was relevant. Mr Bhatti accepted that Mr Jones would have expected him to have passed it on to Mrs Davies. And Mrs Davies volunteered that it would have made a difference had it been passed on to her, in that it would have caused her to refer the matter back to Dr Muir and OH. The failure to provide the Claimant's Commentary to Mrs Davies was, then, more than a mere technical procedural defect, but went, to some extent, to the substance of her decision-making. In those circumstances, withdrawing the offer on 5 February 2020 was not proportionate. To look at it another way, the obvious less discriminatory thing that could have been done instead was, as Mrs Davies said she would have done, to have referred the matter back to OH.
127. The section 15 complaint therefore succeeds.

Remedy

128. Everyone agreed that we should deal at this stage, rather than at a separate remedy hearing, with particular aspects of remedy. The main reason for doing this from the Tribunal's point of view is that doing so will hopefully help the parties to reach settlement, avoiding the need for any remedy hearing at all.
129. We start with the so-called 'Polkey' issue (see Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; Chagger v Abbey National plc [2009] EWCA Civ 1202). In order to assess compensation fairly, we have to consider what we think would have happened had Mr Bhatti passed on the Claimant's Commentary to Mrs Davies.
130. We see no reason to go behind Mrs Davies's evidence. What would have happened was that she would have gone back to OH and Dr Muir. What would have happened then is more difficult for us to assess, but we think that in all probability, the respondent would quickly have realised there had been no substantive medical input into the OH report of July 2019, that report would have been completely disregarded, and the whole

process would have started again, without preconceptions about what adjustments should have been made.

131. It is – bluntly – impossible for us to say what would have happened next. However, we have to have some basis for assessing compensation. We think it would be wrong for us, as claimant’s counsel urged us to do, simply to assume that the claimant’s job offer would have been confirmed; equally so for us to assume in the respondent’s favour that it would have been withdrawn in any event. It is obvious to us that there is a significant chance both of it being confirmed and of the claimant working in the role, and of it being withdrawn come what may or of the claimant never actually working in the role for some other reason.

132. On the one hand:

132.1 Mrs Davies did not have a closed mind and was not of the view that a diagnosis of Asperger’s syndrome was a bar to someone working in this role;

132.2 the claimant has, apparently, since the events with which this case is concerned, made further job applications to the respondent. In other words, this experience has not caused him to completely lose faith in the respondent and to refuse to work for them;

132.3 the respondent had previously been willing to accept uncritically reasonable adjustments put forward by the claimant – in other words simply to accept the claimant’s own say-so about how his condition affected him – in both 2015 and 2019;

132.4 the claimant has a long history of working with children and young people with special needs without close supervision. Although most of what he has done in the past is not directly comparable to what he would have been doing in this role, Mrs Davies did during cross-examination say that some of the things that the claimant told us about in his oral evidence that he had done in the past were comparable;

132.5 the claimant was diagnosed with Asperger’s in his mid-30s and had prior to his diagnosis worked in this sector. There is no evidence before us of him having any significant difficulties when working with special needs children and young people in the past.

133. On the other hand:

133.1 there is no evidence from an OH expert with knowledge of this role and what it entailed and who had seen the claimant as to his suitability for it;

133.2 the claimant had twice – in 2015 and 2019 – endorsed OH reports which suggest that he needed various adjustments to be made, with no suggestion that they did not apply to him when he was working directly with children and young people. He only said that he didn’t need those adjustments to be made when told they meant the offer of employment would be withdrawn. This is something that we think would – rightly – have weighed heavily with Mrs Davies when making any decision following receipt of further OH advice;

- 133.3 the thing that we think was more important to the claimant than anything else was that his diagnosis should not be disclosed. It is equally clear to us that Mrs Davies felt very strongly, for what seemed to us to be perfectly sensible reasons, that limited disclosure of his diagnosis should be made. There has to be a possibility that, whatever else happened, the claimant and the respondent would have reached an impasse about this resulting in the claimant not taking up the role even if the job offer was confirmed.
134. We cannot say on the evidence that it is more likely that the claimant would ultimately have been offered and have accepted the role, nor or more likely that it would have been withdrawn or that he would have not taken it up. In all the circumstances, although we know it is less than ideal for us to decide this issue in this way, we think the right decision is to award compensation for any financial losses on the basis that there is a 50/50 chance of the role being confirmed and of the claimant taking it up.
135. The final question for us is when, if the offer had been confirmed and been taken up, the claimant would have started work.
136. We are asking ourselves what would have happened as a matter of fact, not what should have happened in a better world. We bear in mind the fact that, which appears from the history and the chronology, the respondent never moved quickly when dealing with anything. We think that had Mr Bhatti passed the Claimant's Commentary on to Mrs Davies, there would still have been a meeting between them on 4 February 2020 and that at the meeting the decision would have been made to refer the matter back to OH. Following that, what would have to have happened would be: for OH to look at the matter; for Dr Muir to deal with Mrs Davies's queries; for a decision to be made to abandon his report and his assessment; for a fresh OH referral to be done; for the claimant to see an OH doctor; for a new OH report to be prepared; for that report to be put to the claimant for his comments; possibly for amendments to it to be made; for him to agree to it being disclosed to Mrs Davies; for Mrs Davies then to consider, make and communicate her decision; and finally for all the other parts of the 'onboarding' process to be completed. We think that, bearing in mind the respondent's glacial pace, it would have taken about four months to get through all of that.
137. In conclusion, doing the best we can in circumstances where we are, necessarily, in the realms of speculation and where precision is impossible, we think that compensation should be assessed on the basis that there was a 50 percent chance of the claimant starting in post on 1 June 2020.

Employment Judge Camp

29 November 2021