Appeal No. UKEAT/0288/18/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 April 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

BIRTENSHAW — APPELLANT

MS K OLDFIELD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA GOULD (of Counsel) Instructed by: Browne Jacobson LLP Victoria Square House Victoria Square Birmingham B2 4BU
For the Respondent	MR BRUCE HENRY (of Counsel) Instructed by: Thompsons Solicitors 55 King Street Manchester M2 4LQ

SUMMARY

DISABILITY DISCRIMINATION – Disability related discrimination

The Claimant was employed by the Respondent, a provider of services for adults and children with special needs, as a care worker on a temporary basis. She applied for and was granted a permanent position, but subject to medical clearance. Following receipt of a medical report, the Respondent withdrew the offer. Her claim of discrimination arising from disabilities (s.15 of the **Equality Act 2010**) was upheld by the Employment Tribunal. In particular, it held that the withdrawal of the offer was not a proportionate means of achieving the legitimate aim of compliance with the Respondent's Duty under **Regulation 32(3)** of the **The Children's Homes (England) Regulations 2015**.

The Respondent challenged the decision on proportionality, in particular contending that the ET failed to ask itself whether the lesser steps which it had identified would be likely to have resulted in a different response from the Respondent's decision maker; and that on the evidence, the job offer would still have been withdrawn.

The EAT dismissed the appeal, in particular holding that, in considering the issue of proportionality, the ET did not have to be satisfied that the identified and proportionate lesser measures would or might have been acceptable to the decision maker or otherwise caused him to take a different course. To do so would be at odds with the objective question which it had to determine; and would give primacy to the evidence and position of the decision maker.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Respondent charity against the Decision of the Employment Tribunal at Manchester (Employment Judge Slater and members) sent to the parties on 4 May 2018, whereby it upheld the Claimant's complaint pursuant to s.15 of the **Equality Act 2010** ("**EqA**") of discrimination arising from disability.

2. Section 15(1) provides:

> **"A person (A) discriminates against a disabled person (B) if—**
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> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
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> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

3. Following the Rule 3(10) hearing before HHJ Tucker the appeal is confined to two amended grounds of challenge to the Tribunal's conclusion on s.15(1)(b) that the Respondent had failed to establish the defence of justification. The Respondent is a charity providing a range of services for children and young adults with special educational needs and disability; and more specifically for those with significant physical impairments, complex health needs, severe learning abilities and autistic spectrum conditions.

4. The Respondent is subject to the duties imposed by **The Children's Homes (England) Regulations 2015** and in particular **Regulation 32(3)** which includes the requirement that the registered person may only employ a person to work at the children's home if the individual is mentally and physically fit for the purposes of the work to be performed. There is of course no dispute that compliance with that obligation is a legitimate aim within the meaning of the subsection. The registered person was the Respondent's Mr David Reid.

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5. I start with the Tribunal's relevant findings of fact. The Claimant had worked in the care sector on a paid basis since February 2015 having previously done voluntary work. On 21 November 2016 she began work for the Respondent on a temporary basis and through an agency. She worked as an adult support worker but could be required to work with children. Her duties included ensuring the safety of the young people in her care.

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6. Before she started this work, the Claimant had completed a health questionnaire and been interviewed by the Respondent's Ms Jennifer Greenhough. During that interview Ms Greenhough questioned her about her mental health condition, although this was not recorded in the notes of the interview. This work continued until 19 February 2017.

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7. No issues were raised about her work during this time. She was recommended by the Respondent's adult short breaks manager Abbie Marron for a permanent position. This led to a further interview with Ms Greenhough. She again discussed her mental health condition; and also, a thyroid cancer condition.

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8. On 20 December 2016 the Respondent sent the Claimant a letter offering her the permanent post subject to conditions which included medical clearance. She completed a medical questionnaire and was referred to the Occupational Health physician Dr Michael Coolican. His report dated 10 February 2017 included reference to a history of emotional and psychological health difficulties dating back a considerable number of years. He observed that these difficulties appeared to have been related to issues in her personal circumstances. She was being monitored by her GP, had medication and was currently engaged in counselling sessions with the possibility of therapy sessions in the future. He also reported intermittent lower back difficulties, but these had not caused any time off work in the past.

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9. The Judgment cited the following extracts from Dr Allen's report:

> **"12. Based on my assessment today Ms Oldfield is medically fit for the proposed position as a full-time social care worker. She has had social care working experience in the past and reports no significant sickness absence or work related difficulties in her previous role. I also understand she has been working as an agency worker on a full-time basis in her current role since November 2016 and she tells me overall she enjoys the work and no significant work related issues are currently reported.**
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> **…**
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> **13. She can still be vulnerable to emotional symptoms which appear to be related to high levels of perceived pressure and stress which would be applicable both in and out of work. Therefore if there are any work stress issues or concerns including sickness absences in relation to her emotional health and wellbeing, a referral back to Occupational Health is recommended for further advice.**
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> **In relation to her back she will need to be in date for appropriate training and moving and handling risk assessments will need to demonstrate that the risks are controlled as far as is reasonably practical. There would be no restrictions to recommend to her normal risk assessed work activities."**

He added that any recommendations made regarding adjustments or modifications were recommendations only for management to consider. He concluded "If you require any further clarification, please feel free to contact me."

10. Having received and considered that report, the application form and the interview notes, Mr Reid concluded that the offer of employment must be withdrawn. He annotated the report "does not meet legal criteria" and on a recruitment staff checklist "unable to proceed due to OH report." By letter to the Claimant dated 14 February 2017 Ms Greenhough withdrew the offer in terms which referred to the requirement of the Regulations that all employees must be mentally and physically fit for their work. The letter also offered one week's notice. During that week she could continue to work, but if she did not she would not be paid.

11. By letter dated 29 February 2017 the Claimant's union Unison asked the Respondent to reconsider the decision and in particular to consider employing her for a probationary period of possibly six months to give her an opportunity to demonstrate her fitness to work. By response dated 9 March 2017 Mr Reid stood by the decision. He did not reply to a further letter from the

Claimant dated 16 March. At the same time the agency informed the Claimant that they were unable to offer her any more work.

12. On 30 June 2017, the Claimant presented her complaint to the Tribunal. The ET3 response approved by Mr Reid included the contentions which are contained in paragraph 21 of the Judgment:

> **"(12) The respondent considered the OH report in its entirety and noted that the claimant was still vulnerable to emotional symptoms which potentially caused a risk to users.**
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> **(13) Accordingly, the first respondent took the decision to withdraw the offer of employment on the ground she was not medically fit to perform the role of adult support worker."**

The Tribunal noted that this response did not explain why Mr Reid considered the Claimant to be a potential risk to users.

13. The Tribunal was critical of Mr Reid's evidence in a number of respects. It observed that his witness statement references to the content of the OH report were very selective, omitting the physician's conclusion that the Claimant was medically fit for the permanent post and failing adequately to explain why he took a different view. It did not accept that one of the reasons for his decision was that the Claimant had "lied and withheld important potentially vital information" from the Respondent, nor indeed that she had done so.

14. In re-examination, Mr Reid had been asked about the Claimant's statement of disability prepared for the purpose of the case. This included evidence of anxiety attacks causing her to be "freezing to the spot." The Judgment recorded his response that in such circumstances the Claimant could be a risk to service users.

15. The Judgment recorded Mr Reid's evidence that the Claimant "was a risk from day one", so that a trial period would not be appropriate and there was no lesser option than to

withdraw the offer immediately. By contrast, it noted that the Claimant was required to work a week's notice in order to be paid. It then noted Mr Reid's evidence that he did not get more information from OH because his previous experience was that it would not be forthcoming.

16. The Tribunal concluded:

> **"37. We found Mr Reid's explanation as to why he considered the claimant not fit to do the job to be inconsistent and not clear. We find, on a balance of probabilities, that the mental health condition was a significant, and possibly the only, factor leading to the withdrawal of the job offer. If the back condition had been a factor in Mr Reid's decision, we would have expected to see this in the response to the claim and set out clearly in the witness statement. It was not. On a balance of probabilities, we do not consider that the back condition was a significant factor in the decision to withdraw the job offer.**
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> **38. Mr Reid's evidence about the thyroid condition was inconsistent. There is no mention of this as part of the reason for withdrawal of the offer in the response and his witness statement. We would have expected to see it there if it had been a factor in his decision. On a balance of probabilities, we find that the thyroid condition was not a significant factor in Mr Reid's decision.**
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> **39. We had limited evidence about the claimant's back condition. There was some historical documentary evidence relating to problems when the claimant was a child but nothing to link those problems to the intermittent current problems. The Occupational Health report did not refer to the problems the claimant had had with her back when a child."**

17. The Respondent conceded that the Claimant was disabled at the relevant time by reason of her mental health condition. The Tribunal concluded that the Claimant was treated unfavourably by having the job offer withdrawn and that there was a clear causal connection between her disability and this treatment. There being no issue that compliance with the Regulation was a legitimate aim, the Tribunal turned to the remaining issue – "the crux of the matter" – whether the withdrawal of the offer was a proportionate means of achieving that aim.

18. The Tribunal directed itself to the authority of **Hampson v Department of Education and Science** [1989] ICR 179 and the objective balancing exercise "between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition": see pp. 191F, 196A and 207D. As to the discriminatory effect, it described this as "severe" noting the Claimant's loss of a permanent position, the temporary position and her work from the agency;

and the potential adverse effect of all this on her employment prospects, feelings and mental health.

19. As to the reasonable needs of the Respondent, it noted the opinion of the OH physician that she was fit to do the job. It accepted that Mr Reid was not obliged to accept that opinion but "…we would have expected an employer acting proportionately to have clear and cogent reasons for rejecting the view of OH." It found Mr Reid's evidence of the reasons for withdrawing the job offer to be lacking in clarity. He had failed to explain his reasons properly to the Claimant and her trade union and the ET3 response on his witness statement had failed to provide such clear and cogent reasons.

20. The concluding three substantive paragraphs of the Judgment are the particular subject to this appeal. They set out the Tribunal's conclusion on the lesser steps which the Respondent could have taken and that the withdrawal of the job offer was disproportionate. Thus:

> **"65. Mr Reid did not make any other enquiries before making his decision. There were a number of enquiries which could have been made which would have assisted in a more considered view being taken as to the claimant's fitness for the role. Mr Reid could have gone back to Occupational Health for further advice. The Occupational Health physician expressly invited requests for further clarification in the report. Mr Reid could have sought consent from the claimant for information to have been obtained from her GP and for the release of relevant medical records. Mr Reid could have spoken to the interviewers. He could have spoken to the claimant's line managers at the respondent in relation to the period of her agency work. He could have found out from them about situations the claimant had faced and how she had responded to these situations. The respondent had the benefit of nearly three months' work by the claimant in the role which could have been used to assess the claimant's suitability. Mr Reid could have spoken to the claimant about his concerns as, indeed, she requested.**
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> **66. The respondent could have undertaken a more rigorous assessment of the claimant's suitability. Mr Reid gave evidence that there would be a more rigorous assessment of a candidate who had not previously been engaged via an agency. He could have used such assessment tools for the claimant. The respondent could have considered a further trial period. We note that the contract, in any event, specifies a probationary period. We note that the fact that the respondent gave the claimant one week's notice, which she was required to work if she wished to be paid, does not sit well with Mr Reid's evidence that the claimant was a danger from day one.**
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> **67. Having considered these factors and carrying out the necessary balancing exercise, we conclude that the respondent has not satisfied us that withdrawing the offer, on the basis of the information considered by Mr Reid and in the face of the recommendation from the Occupational Health physician that the claimant was fit to do the role, was a proportionate means of achieving a legitimate aim. The respondent has not satisfied the Tribunal that further enquiries would have been futile and inevitably led to the withdrawal of the job offer."**

A The two grounds of appeal particularly focus on the final sentence of paragraph 67.

21. The first ground of appeal is that:

> **"The Employment Tribunal (hereafter " the Tribunal") erred because, when addressing the question of proportionality, it failed to ask itself what would have been likely to be the result of the further steps that it considered Mr Reid ought to have taken, as set out in paragraph 65 of its Judgment and thereafter, whether following those further steps being taken, the Respondent would have been justified in withdrawing the job offer made to the Claimant as being a proportionate means of achieving a legitimate aim. Instead it found at paragraph 67 that "*The respondent has not satisfied the Tribunal that further enquiries would have been futile and inevitably led to the withdrawal of the job offer*."**

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22. The second ground is:

> **"The Tribunal reached a perverse decision, when it found at paragraph 67 that "*The respondent has not satisfied the Tribunal that further enquiries would have been futile and inevitably led to the withdrawal of the job offer.*" This was a perverse finding, as the evidence of Mr Reid, Chief Executive of Birtenshow in re-examination was that Ms Olfield's disability impact statement had not caused him to revisit his view, but had instead consolidated his view that he had absolutely made the right decision in withdrawing the conditional job offer to comply with the legitimate aim of the Children's Homes (England) Regulations 2015."**

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23. On the first ground, Counsel for the Respondent Ms Laura Gould developed her arguments as follows. First, there is a close connection between s.15 claims and claims for reasonable adjustments under s.20 and 21 of the **EqA**. Thus Elias LJ stated in **Griffiths v The Secretary for Work & Pensions** [2017] ICR 160:

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> **"…An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."**

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24. Furthermore, the EHRC Employment code states at paragraph 5.21 that "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

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25. Secondly, that in a reasonable adjustment claim a Tribunal should consider whether the adjustment could be effective in removing any substantial disadvantage. Thus, in **South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley** UKEAT/0341/15, Mitting J, citing both **Griffiths** and **Paulley v FirstGroup plc** [2015] 1 WLR 3384, summarised the law as follows:

> **"17. Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under section 15(1) of the 2010 Act."**

See also **Tameside Hospital NHS Foundation Trust v Mylott** UKEAT/0352/09 per Underhill P, as he then was, at paragraph 50.

26. This was a task with which Tribunals are familiar. Although in oral submissions Ms Gould drew back from this as an analogy, she gave as a further example a **Polkey** argument in which a Tribunal would have to consider the chances of dismissal if a fair procedure had been followed: see **Software 2000 Ltd v Andrews & Ors** [2007] IRLR 568 per Elias J, as he then was, at paragraph 54.

27. Thirdly, in the closely related circumstance of a s.15 claim and the balancing exercise on the defence of justification, it was likewise necessary for the Tribunal to consider the impact and effectiveness of any alternative course. In support of this proposition Ms Gould cited **Ali v Torrosian and Ors** UKEAT/0029/18. In that case the Claimant's doctor had long-term absence from work because of sickness. The ET dismissed his s.15 claim on the issue of justification. The EAT (HHJ Eady QC) remitted that issue on the grounds that the Tribunal had failed to consider the possibility of part-time working as an alternative and less discriminatory

means of achieving the Respondent's legitimate aim of providing the best possible patient care: see paragraphs 28 and 33.

28. Fourthly, in the present case this required the Tribunal to consider the likely or possible consequences of the lesser steps which it had identified; and in particular to make an assessment of the likely response of Mr Reid if the Respondent had taken the proposed alternative course of making further enquiries. The importance of Mr Reid's likely response was underlined by the decision of the Court of Appeal in **O'Brien v Bolton's St Catherine's Academy** [2017] ICR 737 where Underhill LJ stated at paragraph 53:

> **"…it is well-established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship."**

29. Fifthly, the Tribunal had failed to take that further necessary step in its analysis. The mere existence of other options was insufficient to lead to the conclusion that the actual step taken was disproportionate. If the Tribunal had taken that further step it must have concluded that the result would have been the same, i.e. that Mr Reid would have withdrawn the job offer. This was demonstrated by his evidence in re-examination that, if further enquiries had produced the information contained in the Claimant's disability statement prepared for the case, he would have taken the very same course of withdrawing the offer. This evidence was not referred to in the Judgment, cf. the more limited reference in paragraph 34 concerning his response to the Claimant's account in the disability statement of "freezing to the spot."

30. The disability statement recorded anxiety attacks, a history of self-harm, mental impairment causing her to have little regard for personal safety "and as such I have been known to put myself in risky or dangerous situations to protect others"; and concludes with references

to erratic mood changes and overwhelming feelings. Ms Gould also referred to the Claimant's acceptance in cross-examination that the physical and mental health effects of her anxiety "could potentially" present a risk to service users; and that she could be vulnerable to the symptoms of her anxiety in the workplace.

31. Thus, if the necessary further question had been asked and answered the Tribunal could not have concluded that the decision to withdraw the job offer was disproportionate. Mr Reid's response to the contents of the disability statement demonstrated that there was no lesser measure which would or might have had any different result. The Tribunal thus could not have reached the conclusion in the final sentence of paragraph 67.

32. The second ground of appeal is a perversity challenge, but raises the same essential point in a different form. The high hurdle of such a challenge is duly acknowledged: see **Yeboah v Croft** in [2002] IRLR 634. However, the ground is again focused on the effect of Mr Reid's evidence in re-examination; and the contrast with the final sentence in paragraph 67 of the Judgment.

33. In the light of the evidence from Mr Reid on his response to the information in the disability impact statement, no reasonable tribunal could have concluded that the Respondent had acted disproportionately in withdrawing the conditional job offer or could have concluded that "further inquiries would have been futile and inevitably led to the withdrawal of the job offer." Although not a point is taken in the ground of appeal, Ms Gould also pointed again to the Claimant's evidence in cross-examination.

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34. For the reasons advanced by Mr Bruce Henry on behalf of the Respondent, I am not persuaded by either ground of appeal.

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35. As to the first ground, there is evidently a potential overlap between conclusions on the reasonableness of adjustments (ss.20 and 21) and the justification defence in s.15: see **Griffiths** already cited; also, **City of York Council v Grosset** [2018] ICR 1492 at paragraph 57. However, the distinct statutory language of each provision must be kept firmly in mind; and in any event there was no s.20 claim in the present case.

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36. Under s.20 the duty comprised in each of the three requirements is to take such steps as it is reasonable to have to take in order to achieve an objective, i.e. to avoid the identified disadvantage (ss.20(3) and (4)) or to provide the auxiliary aid (s.20(5)). In consequence the chance of success in achieving the objective is one of the factors to weigh up when assessing the question of reasonableness: see **South Staffordshire** and the cited authorities.

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37. Under s.15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. As summarised by HHJ Eady QC in **Ali,** the authorities on this objective balancing exercise show that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: see paragraphs 16 and 17. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so: see paragraph 27.

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38. The tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly: see **O'Brien**. However it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or otherwise caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the Respondent's decision-maker: see the example in **Grosset** at paragraph 58. Thus there is indeed no analogy with the assessment to be made under **Polkey**.

39. Whilst justification under s.15(1)(b) has to be established at the time when the unfavourable treatment was applied (see **Ali** at paragraph 20), the tribunal when making its objective assessment may take account of subsequent evidence. Thus in **Grosset** the Court of Appeal noted, without apparent disapproval, that the ET had taken account of material not available at the time of the dismissal, such as the Claimant's evidence to the Tribunal and subsequent medical evidence: see paragraph 29.

40. With these principles in mind, I am satisfied that the Tribunal did not fall into error. In conducting the necessary objective balancing exercise, the Tribunal was not required to ask itself whether Mr Reid would or might have made a different decision in the light of the identified further enquiries. Nor therefore was his evidence in re-examination (or otherwise) determinative.

41. In carrying out the objective balancing exercise, the Tribunal identified a number of steps, short of withdrawal of the job offer, which in its judgment had the potential to serve the

A Respondent's legitimate aim of compliance with the Regulations. That objective judgment, made in the light of all the evidence, was reflected in the final sentence of paragraph 67.

B 42. That evidence had properly included Mr Reid's account of his reasons for withdrawing the offer and his response to the Claimant's disability statement. However the Tribunal was clearly not impressed by his evidence in these or any respects; and thus did not give it any significant weight in the particular circumstances of this case.

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43. In my judgment, the second ground of appeal fares no better. The Tribunal identified ample reasons for its objective judgment that withdrawal of a job offer was disproportionate

D and that the identified lesser and proportionate measures might achieve the legitimate aim. The supporting evidence included the conclusion of the OH report that the Claimant was fit to work without restrictions or adjustments; Dr Coolican's offer to provide further clarification if required and the absence of any such request; the failure to speak to the interviewer Ms

E Greenhough; the fact the Claimant had worked without incident for almost three months; and the option she was given to work out her notice. The Tribunal weighed Mr Reid's evidence in the balance, including his response to the disability statement, but was unimpressed.

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44. The material contained in the Claimant's evidence in the hearing does not fall within the ambit of the amended grounds of appeal, but in any event, provides no basis to surmount the

G high hurdle of a perversity challenge. The Respondent had the further difficulty that it had failed to carry out any objective assessment of proportionality at the time of Mr Reid's decision to withdraw the job offer.

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45. In all these circumstances of the objective balancing exercise to be carried out by the Tribunal and its dissatisfaction with the evidence of Mr Reid, I am satisfied that there was no perversity in its conclusion, whether in the final sentence of paragraph 67 or otherwise. On the contrary, the Tribunal's conclusion reflected a careful and measured analysis of all the evidence.

46. For all these reasons, the appeal must be dismissed.