Appeal No. UKEAT/0308/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 May 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER

MR C EDWARDS

MR J MALLENDER

MR OCTAVE DOMINIQUE — APPELLANT

TOLL GLOBAL FORWARDING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR A PERFECT (of Counsel) Instructed by: DAS Law Solicitors Ltd North Quay Temple Back Bristol BS1 6FL
For the Respondent	MR R REES (Representative) Peninsula Business Services The Peninsula 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

DISABILITY DISCRIMINATION

Disability

Disability related discrimination

Direct disability discrimination

Reasonable adjustments

Justification

The appeal raised issues about the Tribunal's findings that (i) there was no direct disability discrimination (ii) there was no failure to make reasonable adjustments; and (iii) the Respondent had justified any indirect and disability-related discrimination. Only (iii) was arguable but to a limited extent only. In concluding that an adjustment to the scoring of criteria for selection for redundancy would not have avoided dismissal in any event, the reasonable adjustments duty should not have been limited to avoiding dismissal, but should have extended to avoiding detriment flowing from disadvantage, and the hurt feelings that would have resulted. Since the Tribunal failed to consider this, the case would be remitted for consideration of that limited point and on that narrow basis only.

THE HONOURABLE MRS JUSTICE SIMLER

1. This is the unanimous judgment of this Appeal Tribunal. This is an appeal against the judgment and Reasons of the Employment Tribunal comprised of Judge Foxwell, sitting with Mr Boyd and Mr Ross at Colchester Hearing Centre and promulgated on 15 March 2013. By that judgment the Employment Tribunal rejected the Claimant's claims of unfair dismissal and unlawful disability discrimination in the following shortly described circumstances.

2. The Claimant, Mr Dominique, was a long-serving employee, who commenced employment with the predecessor company in 1979 but suffered a stroke in 2003 and was off work for some time. Following his return to work, he worked in the charging department, which calculates and raises invoices for billing purposes. In 2005 his employer was acquired by WT Sea and Air Ltd, and he continued to work in the charging department. There was another acquisition in 2010 when Toll Global Forwarding Ltd acquired his employer company and another freight forwarding company at the same time. These companies remained separate entities and a process of integration was embarked upon leading to a number of redundancies. It was in this context that Mr Dominique came to be dismissed on 28 February 2011.

3. In his originating application to the Tribunal he alleged that he had been unfairly selected for redundancy and that his dismissal was an act of direct discrimination because of disability. He also asserted claims of indirect disability discrimination and, by amendment, disability-related discrimination and claimed that there had been a failure to make reasonable adjustments in his case. The condition he relied on to establish disability discrimination was his stroke, which caused both physical and mental impairments affecting mobility and cognitive skills. It was admitted by the Respondent that he was disabled because of a physical impairment arising from his stroke but denied that he had any cognitive impairment flowing from that condition.

The Tribunal heard evidence on that question and ruled against the Respondent on this point. It found that the Respondent knew or ought to have known of the cognitive deficit it found existed and, in particular, the fact that Mr Dominique made frequent errors and struggled to cope with a computer system that had been in place for some time. Nevertheless, as already indicated, and having described those findings, the Tribunal dismissed the Claimant's claims.

4. Against that dismissal the Claimant appeals with permission of Mr Recorder Luba QC, given at an appellant only preliminary hearing. Following that hearing, the Notice of Appeal was amended and three grounds of appeal were pursued in writing. The first concerns direct disability discrimination, the second involves a challenge to the Tribunal's approach to the question of reasonable adjustments, and the third raises the question whether the Tribunal conducted any or any adequate analysis of the proportionality and justification of the potential indirect and disability-related discrimination that the Tribunal found to have existed.

5. We shall refer to the parties as "the Claimant" and "the Respondent", as they were before the Employment Tribunal. The Claimant was represented by Mr Andrew Perfect, counsel before the Tribunal and he has appeared before us on this appeal. The Respondent was represented by employment consultants, Mr Joshi at the Tribunal and the Mr Richard Rees on this appeal. We are grateful to both of them for their concise and helpful submissions made both orally and in writing.

The facts

6. The relevant background facts appear in more detail in the Tribunal's judgment, which is a careful and detailed one. For present purposes, the relevant facts can be summarised as follows. The Claimant was a member of the charging team based at the Mountnessing office. Other members of that team were Bob Jackson, Shani Shelvey and Julie Cox. The manager,

Steve Fitzgerald, was instructed to reduce head count at this site by three. He decided to do so by removing one post from reception, one from the front desk, and one from the charging team. On 18 January 2011 he met staff in the charging department to inform them that one role would be removed. At that meeting he told them that, in addition to their number, Carol Hassan, who worked from home checking invoices, reporting directly to Greg Hassan, a member of senior management and her husband, would be considered in their pool for selection. Following that meeting the Claimant received a letter confirming that outcome. He was told there would be a further consultation meeting on 24 January 2011, at which staff would have the opportunity to put forward alternative proposals and suggestions, with the aim of avoiding dismissal. He was also notified of the right to be accompanied at the meeting.

7. The meeting of 24 January 2011 took place, but no suggestions to avoid redundancy were made. Mr Fitzgerald explained that selection criteria would be established, that the process would involve a person's immediate line manager, and those managers with whom he or she had a direct working relationship, and the selection criteria would be discussed at the next consultation meeting on 31 January 2011.

8. Before the next meeting Mr Fitzgerald sent an e-mail setting out proposed selection criteria to affected staff. The e-mail identified each of the criteria to be considered but did not identify what relative weight was to be given to such criteria. Those criteria fell under headings as follows: length of service and absence, skill-set, productivity, which included ability to handle allocated and error mistake levels, flexibility, and discretionary effort. The criteria were further discussed and explained at the consultation meeting on 31 January 2011, and Mr Fitzgerald said that he explained the weightings at that meeting. It was common ground before the Tribunal that the Claimant did not ask any questions about the criteria, whether at that meeting or outside it, nor did he suggest to anyone that he might be disadvantaged or even

particularly disadvantaged by the criteria because of his disability. The process and the timetable were also discussed and explained at that meeting.

9. The scoring once the selection criteria had been identified was to be done in two stages. The first stage involved the affected employees' immediate line manager. The second stage of the scoring process was done by four managers, who had had dealings with the charging team. This wider group of managers scored the following criteria only: product knowledge, company knowledge, error/mistake level, communicative skill-set, flexibility to colleagues' needs, to change and to help colleagues. Since Carol Hassan was not known to this wider group of managers, she was not marked by them but was marked only by her immediate line manager.

10. At the first stage of the scoring process, the Claimant had the lowest score, 162.5. The next lowest was Bob Jackson at 180, Julie Cox had the highest score with 207. Carol Hassan scored 203 and Shani Shelvey scored 200.5. The Claimant scored particularly badly in two categories: first, ability to handle allocated; and secondly, error/mistake level, both of which carried heavy weightings. At the second stage, the Claimant was awarded a further 127.5 marks, bringing his total to 290. His score was the lowest awarded at this stage. However, since Carol Hassan was not scored at all on the second stage, on the face of it she had the lowest score. To achieve consistency, she was equivalent to the lowest of the four who had been marked at the second stage, namely the Claimant. This meant that her total score was higher than his total score once that notional amount was added to it. The affected employees were notified of the outcome of the scoring at meeting on 15 February 2011, and they had the opportunity to be accompanied.

11. The Claimant met with Mr Fitzgerald at 11.00 that morning and was told that he had scored the lowest, and was therefore being selected for redundancy. He was - not unnaturally -

shocked by that outcome, and could not understand how he had been marked so low. He was notified that his termination date would be 28 February 2011 and was told of his right of appeal.

12. By letter dated 22 February 2011 the Claimant appealed the decision on the grounds, firstly, that the score-sheet he had been shown showed one person with a lower score than his. This was Carol Hassan, and the sheet had been provided to him without including her notional additional score. The other grounds of appeal related to the scoring criteria and marking scheme that had not been shared with him and he said he was therefore unable to make any informed judgment about their accuracy and fairness. Among other things, in addition, he was concerned that others could not fulfil the full range of tasks that he did, and he complained that the weighting system skewed selection in favour of three or four of the categories.

13. By a further letter dated 24 February 2011 he alleged that there had been a failure within the redundancy process to make any reasonable adjustments for his disability, and he referred to the fact he had taken legal advice but did not state what adjustments he believed ought to have been made. His appeal was dealt with by Mr O'Rourke, who met him and his wife on 2 March 2011. In addition to the general criticisms the Claimant made about the selection criteria and the scoring process, he said that allowance should have been made for the fact that he could not work as quickly as others due to physical restrictions in his arms and legs. He made no reference to any cognitive impairment. Mr O'Rourke wished to follow up on points raised by him by interviewing scoring managers, and the appeal was effectively adjourned to enable Mr O'Rouke to do so.

14. At paragraphs 79-84 of the Tribunal's Reasons, it set out the outcome of those investigations. By letter dated 10 March 2011, following interviews with the scoring managers, Mr O'Rourke rejected the Claimant's appeal. He concluded that the selection criteria had been

adequately explained, that there was a fair mix of objective and subjective criteria, that a number of assessors had been used in order to minimise prejudice or personal preference, and he explained, finally, the process so far as Carol Hassan was concerned and, in particular, the addition of a notional score in her case. He concluded that the assessment had not been prejudiced by the Claimant's disability, noting in particular that the Claimant had scored highly on attendance. In those areas where the Claimant's score was low, he said there was no evidence of disability contributing to this. The Claimant's employment thereafter terminated on 28 February 2011 and he was paid a statutory redundancy payment and pay in lieu of notice.

The Tribunal's Reasons and conclusions

15. The Tribunal set out the substantive issues agreed by the parties as arising from the Claimant's claim at paragraph 31. No criticism is made of the issues and questions identified there and, as we have indicated, these were described as having been agreed. At paragraphs 32-35 the Tribunal directed itself on the legal principles applicable to questions of unfair dismissal in a redundancy context. Again, no criticism is made of those paragraphs. At paragraphs 36-58 inclusive the Tribunal directed itself on the legal principles applicable to questions of disability discrimination and, in particular, direct discrimination, indirect discrimination, discrimination arising from disability and failure to make reasonable adjustments. It dealt with the burden of proof and the approach to the drawing of inferences, and it touched upon time limits. Once again, no criticism is - quite properly - made of these paragraphs on this appeal.

16. Against those legal directions and in light of its findings of fact, the Tribunal reached conclusions on the substantive issues as follows. First, the Tribunal found that there was nothing inherently unfair in the manner in which the pool of affected workers for redundancy purposes was constructed, namely all members of the charging team including Carol Hassan, and the Claimant's allegations of discrimination were not found to touch on this issue

(paragraph 90). At paragraph 91, so far as the selection criteria themselves were concerned, the Tribunal recognised their importance in relation to fairness and their centrality to the discrimination claims. It recorded that there were two aspects of the Claimant's complaints about the selection criteria: the criteria themselves and the way in which individuals scored him against those criteria.

17. Focusing first on the selection criteria. So far as the criteria themselves were concerned, the Tribunal accepted that they were fair to the pool of affected workers as a whole, notwithstanding the large subjective element for individual managers when carrying out their scoring. The reason for this is explained at paragraph 92 where the Tribunal found that the selection criteria:

> **"...fairly reflect genuine business considerations and to this extent therefore we accept that it fell within the band of reasonable approaches of an employee to adopt such criteria. What is clear, however, is that the Respondent had no recorded data under any of these headings: the only recorded data it had related to length of service and absence. This is because the Respondent's predecessors had not carried out appraisals, nor had they measured performance in any other way; this is not uncommon in smaller family based companies. Given these circumstances we also accept that it was reasonable for the Respondent to implement the two-stage marking process adopted here in which a wide range of views on the criteria were obtained from managers to smooth out the risk of bias when assessing individual performance. We cannot think of any fairer alternative approach given the circumstances and the nature of the work the affected employees did. We accept, therefore, that the selection criteria were fair to the pool of affected workers as a whole, notwithstanding the large subjective element for individual managers when scoring."**

18. The Tribunal considered the weightings applied to each particular criteria and identified business reasons for such weightings, concluding that the weighting was fair to the employees but the effect of such weightings would have to be evaluated further in the context of the disability discrimination claims (at paragraph 93).

19. In the context of the discrimination claims the Tribunal found, first, in relation to direct discrimination that it was satisfied that the selection criteria and their weightings were devised by Mr Fitzgerald with assistance from Human Resources, who put together the criteria he felt

best served the company. They were unaffected by considerations of disability and so did not amount to less favourable treatment of the Claimant because of disability.

20. Secondly, in relation to indirect discrimination, the Tribunal found that the selection criteria as a whole amounted to a PCP, applied to the whole pool, but so far as ability to handle allocated and error/mistake level, employees with the claimant's disability and the Claimant himself were at a particular disadvantage in having to be scored by reference to these two criteria so that the elements of indirect discrimination were present subject only to questions of justification. So far as the remaining criteria were concerned, the Tribunal found that the application of these to the Claimant or the hypothetical application of these to persons with the Claimant's disability did not place him or them at a particular disadvantage because of disability (paragraph 97).

21. Thirdly, in relation to discrimination arising from disability, the Tribunal found that the Claimant was treated unfavourably by the inclusion of and the weightings applied to the two specific criteria we have just referred to since his impairment affected both. Although Mr Fitzgerald was aware that at least part of the Claimant's lower productivity was due to his physical impairment, which made him a slower worker, he did not know of his cognitive impairment affecting the accuracy of his work. However, since other employees including Greg Hassan, were aware of this, the Tribunal found that Mr Fitzgerald could reasonably have been expected to know of this latter aspect of the Claimant's impairment. Accordingly it found that the inclusion of the two criteria amounted to discrimination arising from disability subject only to the defence of justification (paragraph 98).

22. The question of justification in relation to the selection criteria themselves and their weighting was therefore a live question in relation to indirect discrimination and discrimination

arising from disability, and that question of justification was dealt with by the Tribunal at paragraph 99.

23. The Tribunal's reasoning on justification was compressed. The Tribunal found that the Respondent had the legitimate aim of devising criteria which could be applied consistently across a pool of people and which emphasised genuine business requirements. Further, it found that it was proportionate to include criteria assessing productivity and accuracy within the selection criteria for redundancy. In fact, it held, it would have been surprising if these factors were not taken into account when assessing workers involved in invoicing and billing of clients. In the circumstances, whilst finding that the two criteria, ability to handle allocated and error/mistake level, indirectly discriminated against the Claimant and constituted discrimination arising from disability, the Tribunal was nevertheless satisfied that these criteria and their weightings were nevertheless proportionate and justified. We return to the Tribunal's conclusions on this question further below.

24. At paragraphs 100-103 the Employment Tribunal dealt with the question of reasonable adjustments and the failure to make reasonable adjustments in this case. We quote those paragraphs in full:

> **"We find in context that the relevant PCP was the use of selection criteria which included an assessment of productivity under the heading 'ability to handle allocated' and accuracy under the heading 'error/mistake level'. Mr Dominique compares himself to the other members of the pool of affected workers in respect of this claim and, as we have noted in another context, his marks under these headings are lower than the others; in the case of accuracy, markedly so. We accept, therefore, that including and weighting these productivity and accuracy criteria had a substantial adverse effect on him. We are satisfied too on the evidence that Mr Fitzgerald knew of the likely effect of Mr Dominique's physical impairment on productivity. Mr Fitzgerald did not actually know of Mr Dominique's cognitive impairment but he ought reasonably to have known of this and would have done so had Greg Hassan told him. In these circumstances we accept that the duty to make reasonable adjustments arose in this case.**
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> **101. Mr Dominique did not suggest what specific adjustment should have been made either during the redundancy process itself or at the Hearing before us. We infer that the adjustment he seeks is a scoring system which would not have led to his dismissal: we have attempted to judge this objectively on the evidence before us.**

102. As have found that the selection criteria were fair in broad terms, the obvious adjustment would have been to increase Mr Dominique's score under the headings where he was at a particular disadvantage, 'ability to handle allocated' and 'error/mistake level'. We have considered the possible adjustments which could have been made. Each scorer marked on a scale 1 to 5 and the raw scores were then marked and aggregated. The obvious point for making an adjustment was at the initial scoring stage. It would have been possible to add an amount for Mr Dominique's scores under these headings to take account of this disadvantage. It is possible that the same approach may also have needed to be taken with the other disabled employee in the pool, Mr Jackson, but we do not have specific evidence on this. Returning to Mr Dominique's case, we have asked ourselves what additional score could reasonably have been given to the two relevant criteria to remove the apparent disadvantage to him. In our judgment an extra point (a 20% uplift) is most likely to have been reasonable. Two extra points (a 40% uplift) would have been disproportionate in our view. In practical terms, however, had Mr Dominique been awarded an extra point by the scorers under the headings 'ability to handle allocated' and 'error/mistake level', he would still have scored the least. A different outcome would only have arisen by the addition of two extra points; this would then have placed Mr Dominique ahead of Mr Jackson (subject to any adjustments made in Mr Jackson's favour) but behind the other three in the pool. As we have stated, however, we do not find it to be a reasonable adjustment to increase Mr Dominique's score under these specific criteria by a factor of 40%.

103. As the adjustment to Mr Dominique's scoring under the selection criteria which we would otherwise have found to be reasonable would not have prevented the discriminatory effect in relation to which the duty is imposed (avoiding dismissal), we cannot in fact find that it was a reasonable adjustment to make in this case (see *Lancaster v TBWA Manchester* [2011] EAT 0460/10."

25. It is clear, therefore, that so far as the failure to make reasonable adjustments was concerned, the Tribunal accepted that the use of productivity and accuracy criteria with weightings was a PCP applied to the Claimant which had a substantial adverse effect on him and was known or ought reasonably to have been known by the Respondent. The duty to make adjustments arose in this case in the context of those particular criteria and their weightings.

26. The Tribunal identified as an obvious adjustment, in the context of selection criteria that were fair in broad terms, an increase in points awarded to the Claimant under these headings. In this regard the Tribunal considered possible adjustments against findings that each scorer marked on a scale of 1-5 and that the raw scores were then weighted and aggregated. The Tribunal found that the obvious point at which an adjustment ought to have been made was at the initial scoring stage and that it would have been possible to add an amount to the Claimant's score under these two criteria to take account of the particular disadvantage. In identifying what that additional score should be, the Tribunal determined that one extra point or a 20% uplift was most likely to have been reasonable. By contrast, it concluded that two extra points

or a 40% uplift would have been disproportionate. However, even applying this approach to the facts, the Tribunal found that the Claimant would still have scored the lowest marks in the pool and that a different outcome would only have arisen by the addition of two extra points, which would have placed the Claimant ahead of Mr Jackson subject to any adjustments that would have been necessary in Mr Jackson's case by reason of his different disability.

27. Accordingly, since the adjustment which the Tribunal would otherwise have found to be reasonable would not have prevented the discriminatory effect in relation to which the duty was imposed, and here the duty was imposed as the Tribunal found in order to avoid dismissal, the Tribunal concluded that this would not have been a reasonable adjustment to make in the particular circumstances so that this claim failed. The Tribunal relied on the case of **Lancaster v TBWA Manchester** [2011] EAT 0460/10, a decision in a similar context concerning redundancy where a similar conclusion was reached by a different Tribunal and upheld by the EAT on this basis.

28. Turning to the question of the scoring process, the Tribunal adopted the same approach to scoring and, in particular, looked at the different causes of action under this heading. It found no evidence of unfairness in terms of capricious or irrational scoring of individuals in the pool and accepted that it was reasonable to ascribe a notional score to Carol Hassan at the second stage. It reached no final conclusion on unfairness until after it had reached conclusions on discrimination. So far as direct discrimination is concerned, the Tribunal found no evidence of less favourable treatment because of disability when it came to the scores received by the Claimant. The correct inference, in the Tribunal's judgment, was that each scorer gave the Claimant the score that he or she believed he deserved and that reflected the manager's assessment of the Claimant. Since the scores may have reflected the manager's assessment taking account of the effect of his disability, the Tribunal recognised that this might potentially

be discrimination arising from disability, but that was not sufficient, in the Tribunal's judgment, to lead to an inference that the scorers would have treated a non-disabled person with similar characteristics to the Claimant more favourably. At paragraph 110 the Tribunal make clear that it paid close attention to the comments of the scorers in the notes in the bundle, for example, Andy Eve commented that he had marked the Claimant down on helping colleagues as Mr Eve thought that the Claimant was not physically capable of doing this. The Tribunal concluded that that statement indicated treatment by Mr Eve because of disability but could not conclude that this was less favourable treatment than that which Mr Eve would have given to a similar employee who was restricted physically for reasons unconnected with disability.

29. A similar approach was adopted in relation to comments made by Mr Hassan. In those circumstances the claim of direct discrimination failed in relation to the scoring. So far as indirect discrimination was concerned, at paragraph 112, the Tribunal identified as the relevant PCP the requirement that scorers scored against the identified criteria. So far as the two specific criteria already referred to were concerned, the Tribunal accepted that scoring by reference to these placed individuals with physical and cognitive impairments at a substantial disadvantage and that the Claimant suffered this disadvantage in the circumstances. The ingredients of indirect discrimination were established subject only to the defence of justification.

30. In relation to disability-related discrimination, the Tribunal stated that it had found that the scorers scored the Claimant in accordance with their genuine views of his abilities but that these views were affected by the consequences of his disability. Some of the scorers said as much when interviewed by Mr O'Rourke, in particular Andy Eve. Subject only to justification this claim would have been successfully established.

31. The Tribunal then dealt with justification in relation to these two causes of action at paragraph 114. Again, the Tribunal's reasoning was compressed, even more so than at paragraph 99. The Tribunal found that the scorers had the legitimate aim of presenting a genuine personal assessment of each individual in the pool of affected employees. The method they adopted, giving the score they believed to be correct, was, in the Tribunal's judgment, a proportionate means of achieving this aim. Accordingly the Tribunal found that the defence of justification was made out.

32. So far as the question of reasonable adjustments was concerned, in the context of the scoring, at paragraph 115 the Tribunal found that there was a relevant PCP, namely a requirement to score against each criteria in the selection matrix in accordance with the published scoring scheme. The Claimant reasonably compared himself with the rest of the pool of affected employees, and the Tribunal accepted that he was at a significant disadvantage because of the inclusion of the two criteria we have referred to but not in relation to the remaining criteria against which he was, together with others, scored. At paragraph 116 the Tribunal held:

> **"Judged objectively, we find that a reasonable adjustment for the scorers to have made would have been to add one point (20%) to [the Claimant's] basic score for these two criteria. Sadly for him this adjustment would not have affected the outcome."**

33. Accordingly the Tribunal found that this would not have been a reasonable adjustment in the circumstances.

34. Against that summary of the Tribunal's reasoning and its conclusions, we turn to consider the grounds of appeal advanced on the Claimant's behalf.

Ground 1: direct discrimination

35. Although identified in the amended grounds of appeal, the challenge to the Tribunal's judgment on direct disability discrimination in relation to the way the scorers marked the Claimant against the selection criteria was not pursued orally by Mr Perfect. We consider that he was correct not to do so. The findings made by the Tribunal in relation to each scorer who marked affected employees were findings that were open to the Tribunal on the evidence, as is clear from a careful reading of paragraphs 79-84. The evidence and the findings of the Tribunal in these paragraphs was that all the scorers, apart from Andy Eve, marked the Claimant in respect of his actual ability and performance as observed by the particular manager in question and, to the extent that his disability was taken into account, it was taken into account in his favour. In other words, he would have received a lower score had no account been taken of it. So far as Andy Eve was concerned, contrary to Mr Perfect's written argument, the Tribunal did not find that Mr Eve marked the Claimant down because of his disability per se; rather the finding, however it was expressed, was that the Claimant was marked down on helping colleagues because it was physically impossible to do so as a consequence of his disability. Mr Eve also considered that the Claimant had a greater error level than others.

36. Direct discrimination involves less favourable treatment because of disability itself, and the Tribunal correctly held, in our judgment, that to succeed in a claim of direct discrimination based on the actual scores given by managers, the evidence would have to show the scorers either consciously or unconsciously gave the Claimant a lower score than he merited because of his disability. The Tribunal concluded that the evidence and findings made did not support a conclusion that the Claimant was treated less favourably than any of these managers would have treated him on grounds of or because of his disability when it came to the scoring process. That was a conclusion open to the Tribunal in light of the findings made by it in the paragraphs we have identified. The fact that the scoring may have taken account of the effect of the

Claimant's disability is not the same as treating a disabled person less favourably because of the disability itself. The proposition can be tested by considering whether a non-disabled person with the same or similar characteristics as the Claimant would have been treated more favourably. The Tribunal considered this at paragraph 109 but was unable to infer this on the evidence and findings. The Tribunal's approach here cannot, in our judgment, be impugned.

Ground 2: reasonable adjustments

37. Mr Perfect accepted that the Claimant did not identify any specific adjustment during the course of the redundancy process and was unable to say whether or not any specific criteria were identified as particularly disadvantaging the Claimant, beyond those identified by the Tribunal. Of course it is not mandatory, nor is there any duty on the Claimant to identify specific adjustments, but it is a matter that is capable of consideration.

38. Nevertheless Mr Perfect argued that the Tribunal adopted an unduly narrow approach to the adjustments that ought to have been made in this case, and erred in its finding as to the reasonable adjustments, both in respect of the selection criteria and the scoring against those criteria. His principal argument, advanced under this heading, is that the Tribunal wrongly confined the duty to adjust to just two criteria within the redundancy matrix whereas they could and should have considered the nature and extent of the Claimant's disadvantage including the cumulative effect of the various ways in which he was disadvantaged and that would have resulted in a more extensive approach to the reasonable adjustments required and, in particular, to a finding that either (1) the selection criteria were too vague and subjective and ought to have been replaced in their entirety; or alternatively (2) that the scorers should have had guidance as to the scoring under each criteria including for example as to what constituted an error and how it should have been scored and that steps should have been taken to ensure that all scorers knew

of the Claimant's cognitive impairments and accounted for this in both a meaningful and a consistent way.

39. We cannot accept this argument. The starting point is the fact that the Claimant did not during the course of the redundancy process identify any adjustments he said ought to have been made. Whilst we do not criticise the Claimant on that basis, as we have indicated, that is a matter that must be factored into any consideration of the Tribunal's approach. In his originating application at paragraph 40, the Claimant identified criteria under the heading "failure to make reasonable adjustments" which he said should have been adjusted so as not to put him at a substantial disadvantage as compared to his colleagues in the selection pool. These were: ability to handle, in relation to which he claimed that his physical disability put him at a substantial disadvantage; and errors/mistakes and communicative skill-set, which together, it was alleged, failed to take account the Claimant's cognitive impairments regarding memory and understanding, thus placing him at a substantial disadvantage as compared with his colleagues. At paragraph 31, as we have already indicated, the Tribunal identified the substantive issues in the claim as agreed by the parties. It is clear that the selection criteria adopted and the scoring against those criteria were at the heart of the complaint under each heading and, in particular, at the heart of the complaint of indirect discrimination, reasonable adjustments and disability-related discrimination.

40. At paragraph 92 of its decision, the Tribunal specifically considered the subjective nature of those criteria and the lack of objective data available to this Respondent because performance appraisals had not been conducted by the predecessor companies and there was no other recorded date available. The Tribunal found that the criteria nevertheless reflected genuine business considerations and were reasonable. Given the absence of data, it found that the use of a wide range of scorers smoothed out the risk of bias when assessing individual

performance. In light of these findings, which we cannot go behind, we cannot see any arguable basis for the adjustment identified by way of Mr Perfect's first argument.

41. Moreover the Tribunal expressly dealt with the question whether other particular criteria beyond ability to handle allocated and error/mistakes level placed or would have placed employees with the Claimant's disability or the Claimant himself at any particular or substantial disadvantage and concluded that they did not and would not have done so (see paragraphs 97 and 115). In those circumstances we cannot accept that the Tribunal erred in failing to decide that the selection criteria were too vague and subjective and ought to have been replaced in their entirety.

42. So far as the alternative argument is concerned under this heading, that is to say that the scorers should have been given guidance and training in the respects identified by Mr Perfect, we cannot read this broad and more nebulous adjustment into the issues agreed by the parties and reflected at paragraph 31. Had this been an agreed issue, we would have expected to have seen it reflected more clearly, both at paragraph 40 of the originating application and, if not there, certainly at paragraph 31 of the decision. Absent that, we are entirely satisfied that the Tribunal was entitled to proceed as it did by identifying those aspects of the process that substantially disadvantaged the Claimant and then identifying what adjustments could have been made to address those disadvantages. This was the approach adopted by the Tribunal. It accords both with common sense and with the way in which the claim was pleaded and the issues were agreed. Again, in our judgment, it discloses no error of law in approach or outcome. Accordingly this ground falls to be dismissed.

Ground 3: justification

43. Two principal points are raised in relation to the Tribunal's approach to and conclusions on justification. First, the Tribunal is criticised by Mr Perfect, both in relation to indirect discrimination and disability-related discrimination for an asserted failure to carry out any or adequate analysis of the issues of legitimacy and proportionality as they applied to the criteria or the way in which they were scored. Insofar as there was an analysis of these issues, it is said that the Tribunal wrongly conflated the two separate issues. Secondly, it is argued that the Tribunal failed to take into account an asserted failure to comply with the duty to make reasonable adjustments and therefore its conclusions on indirect and disability-related discrimination cannot stand. Particular reliance is placed on the observations of this Tribunal in **Eagle Place** decision at paragraph 88.

44. So far as the first argument is concerned, in light of our conclusions on the first two grounds, the argument advanced in relation to justification is inevitably a narrower one than the argument advanced by Mr Perfect on this appeal and must focus on the two criteria identified as putting people with the Claimant's disability at a disadvantage. In our judgment, the challenge on this more limited basis fails in the circumstances of this case and on the Tribunal's findings. Although briefly expressed, the paragraphs dealing with justification must be read in light of the earlier findings and conclusions of this Tribunal and cannot be treated as standalone paragraphs. The Tribunal was obviously entitled to find, as it did, that the Respondent employer had a legitimate aim of devising a redundancy matrix with a number of business-focused criteria that could be applied consistently across a pool of people for the purposes of selecting for redundancy those least suited to the genuine business requirements of the employer; and that the scorers themselves had the legitimate aim of presenting a genuine assessment of each affected employee against the selection criteria so adopted. The need for the matrix to be applied consistently carried with it a need for a scheme that was transparent

and applied equally to all subject to any question of reasonable adjustments. Accordingly a selection matrix that was fixed and did not vary with the individual circumstances of a particular affected employee was readily justifiable. This was not a case where the Tribunal had found that direct discrimination was reflected in the redundancy matrix or the scoring itself. Rather, the Tribunal's finding was that the inclusion of two specific criteria and the scoring of those criteria amounted to indirect discrimination and discrimination arising from disability subject only to questions of justification. Moreover, so far as avoiding dismissal was concerned, the Tribunal found in relation to the adjustments that might otherwise have been regarded as reasonable that adjustments to those particular criteria would not have avoided dismissal.

45. At paragraph 99, the Tribunal dealt with its conclusions on proportionality, finding that it was proportionate to include the two criteria within the matrix and that in fact it would have been surprising if these factors were not taken into account when assessing workers involved in invoicing and billing. Given that these criteria focused on questions of productivity and accuracy, in the context of employees responsible for invoicing, it is difficult to criticise the rationality of this conclusion. Moreover the Tribunal were satisfied that there was business justification for the weightings applied to each of the relevant criteria. Accordingly, when weighing the potential discriminatory effect of including these selection criteria, which disadvantaged the disabled Claimant but which, even with adjustment, would not have avoided the outcome of dismissal, against the means adopted to achieve the Respondent's legitimate aims, it is easy to see how the Tribunal came to conclude that this treatment was justified. We are satisfied that, whilst briefly expressed and somewhat compressed, these Reasons adequately explain, in the light of the other findings and conclusions, why this was so. So far as the managers carrying out the scoring process were concerned, the Tribunal had already found, as we have indicated, that the Respondent had no recorded data under the selection criteria

headings, save for length of service and absence and that this was because the Respondent's predecessor organisations had not carried out appraisals nor measured performance in any way (paragraph 92). Given these circumstances, the Tribunal accepted that it was reasonable to implement a two-stage marking process in which a wide range of views on the criteria were obtained from as many managers as had dealings with employees. The Tribunal found that this smoothed out the risk of bias when assessing individual performance, as we have already indicated, and could not think of a fairer alternative approach in the circumstances, given the nature of the work the affected employees did.

46. In light of those findings and conclusions, in our judgment the Tribunal's conclusions at paragraph 114 were also open on the evidence and were adequately explained.

47. So far as Mr Perfect's additional or alternative argument is concerned, it is now conceded that Mr Rees is correct to point out that the provisions of the **Equality Act 2010** relating to disability-related discrimination are different to those referred to in the 1995 Act at section 3A(6) and that were relied on in the EAT decision in **Eagle Place** at paragraph 88.

48. Whereas Section 3A of the **Disability Discrimination Act 1995** defines discrimination as follows:

> **"1) For the purposes of this Part, an employer discriminates against a disabled person if --**
>
> **(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and**
>
> **(b) he cannot show that the treatment in question is justified.**
>
> **...**
>
> **(6) If, in a case falling within subsection (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with that duty."**

49. On the basis of the 1995 Act and the provisions we have just identified, at paragraph 88 in **Eagle Place Services Ltd v Rudd** [2010] IRLR 497, the EAT said this:

> **"It follows that there is an additional reason why the Respondent cannot succeed in this appeal; disability related discrimination can only be justified if the duty to make reasonable adjustments has been complied with; see s3A(6) which we set out earlier in this judgment. The Respondent cannot justify its discriminatory conduct because it has failed to comply with its duty to make reasonable adjustments. ..."**

50. The 2010 Act has separated into discrete statutory provisions the two concepts of disability-related discrimination on the one hand and discrimination flowing from a failure to comply with a duty to make reasonable adjustments, on the other. No provision equivalent to s.3A(6) appears in the 2010 Act nor in the relevant regulations so far as our researches have indicated. It is common ground as between the parties that no such equivalent provision remains in the 2010 Act accordingly. Nevertheless Mr Perfect contends that, as a matter of law, the Tribunal was required to consider the extent of any failure to comply with reasonable adjustments that caused the disadvantage being considered in the context both of indirect discrimination and disability-related discrimination before considering questions of justification. If he is wrong about that question of timing, he submits that the question of any relevant failure to comply with reasonable adjustment duties must be considered at some stage in the justification reasoning.

51. We cannot accept that there is a legal requirement to consider questions of failure to comply with reasonable adjustments before considering questions of justification of indirect or disability-related discrimination, as Mr Perfect submits. The statute does not require this and, absent a provision equivalent to section 3A(6), we cannot see any basis for reading such a requirement into the 2010 Act. Nevertheless we agree with Mr Perfect that, where there is a link between the reasonable adjustments said to be required and the disadvantages or detriments

being considered in the context of indirect discrimination and disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified.

52. In this case the Tribunal found, at paragraph 100, that a duty to make reasonable adjustments in the Claimant's case arose. It found that a possible adjustment would have been an additional point at the initial scoring stage. Two points would have been unreasonable and disproportionate. It then found that, as a matter of fact in this case, given the other scores, this would not have affected the outcome of dismissal. This led the Tribunal to conclude at paragraph 103:

> **"As the adjustment to Mr Dominique's scoring under the selection criteria which we would otherwise have found to be reasonable would not have prevented the discriminatory effect in relation to which the duty is imposed (avoiding dismissal), we cannot in fact find that it was a reasonable adjustment to make in this case..."**

53. As Mr Perfect submits, however, whilst that conclusion might be correct in the context of a duty imposed to avoid dismissal, the duty was not limited to avoiding dismissal, and Mr Perfect has directed some criticism at paragraph 101 of the Tribunal's decision in this regard. In that paragraph the Tribunal said that:

> **"Mr Dominique did not suggest what specific adjustment should have been made either during the redundancy process itself or at the Hearing before us. We infer that the adjustment he seeks is a scoring system which would not have led to his dismissal: we have attempted to judge this objectively on the evidence before us."**

54. Mr Perfect submits, and we agree, that whilst in an ideal world a complainant in a disability discrimination case or any discrimination case may seek to avoid a scoring process or

a redundancy process that leads to his dismissal, there are lesser detriments that he or she might seek to avoid and, in particular, the detriment of being placed at a disadvantage as a consequence of unlawful or potentially unlawful discrimination.

55. The originating application in this case complained of detriment or disadvantage more generally and of hurt feelings as a result of disadvantageous or detrimental treatment in addition to questions of dismissal. The duty to make reasonable adjustments therefore extended to avoiding unlawful discrimination by subjecting the Claimant to a non-adjusted criterion that placed him at a substantial disadvantage because of his disability and was therefore detrimental in addition to a duty to avoid dismissal. Had the Employment Tribunal recognised this, its findings indicate that it would have found a failure to comply with the reasonable adjustments duty on this basis. When it came to consider questions of justification of discriminatory treatment falling short of dismissal, that failure to comply with the reasonable adjustments duty ought to have been factored into the justification question but was not. In this limited respect, we accept that this Tribunal erred in law.

56. We cannot carry out this balancing exercise but we observe that the discriminatory effect being weighed in the balance on this basis is a much lesser discriminatory effect than dismissal would be. Against that would have to be weighed a finding of a failure to comply with a duty to make reasonable adjustments. If the Tribunal concluded that disability-related discrimination and/or indirect discrimination on this narrower basis could not have been justified, an award for injury to feelings is the likely outcome and most likely at the lowest **Vento** level on this basis.

57. We have offered this indication in the hope that the parties will reflect on it and the matter might be capable of resolution without recourse to a further hearing before the

Employment Tribunal. In the event that this is not possible we remit this case to the same Tribunal for it to address only the question of justification of indirect and disability-related discrimination on the footing that there was a failure to comply with the reasonable adjustment duty in relation to the two unadjusted criteria that placed the Claimant at a substantial disadvantage but that would not have prevented his dismissal.

58. It follows that this case should now be remitted to the same Tribunal to consider the question identified above and any compensatory award that might follow in the light of the principles we have set out. Apart from the limited error we have identified, the Tribunal's decision was an impressively clear and careful analysis of the issues in the case. We would leave it to the Tribunal to determine whether it thinks it appropriate to hear further evidence or not, but we anticipate that it will want to hear further submissions.