EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Mr N O'Sullivan	London Borough of Islington

REASONS FOR THE RESERVED JUDGMENT
SENT TO THE PARTIES ON 28 JUNE 2017

Introduction

1 The Respondents are a local authority. They employ over 3,000 people.

2 The Claimant, Mr Niall O'Sullivan, who was born on 14 October 1975, was continuously employed for some 14 years by the London Borough of Ealing ('Ealing') in caretaking positions, latterly as a Senior Caretaker, until his retirement on medical grounds in September 2012. The illness which precipitated his retirement was ankylosing spondylitis, an inflammatory arthritic condition, which itself resulted from haemochromatosis, a genetic disorder of the iron metabolism. Fortunately, medical treatment proved effective and he recovered sufficiently to feel able to return to the job market. It is, however, common ground that he was at all material times, and remains, disabled by these conditions.

3 On 15 September 2013 the Claimant applied to the Respondents for a job as a mobile relief caretaker. Following an interview he received a conditional offer, but the offer was later withdrawn. As a result he brought Employment Tribunal proceedings under case no. 2200489/2014. The claim was resisted but, by a judgment dated 11 September 2014, his complaint of discrimination arising from disability was upheld (other disability discrimination claims failed) and he was awarded over £18,000 in compensation. The Tribunal based its decision on a finding that the withdrawal of the offer was at least materially influenced by his disability-related sickness absence record when working for Ealing.

4 In April 2016 the Claimant submitted an application to the Respondents in response to an advertisement for three vacancies for part-time Estate Operative positions. He was short-listed and interviewed but not ultimately selected.

5 By his claim form in the instant proceedings, presented on 28 August 2016, the Claimant complained in respect of the conduct and outcome of the 2016 competition of (a) disability discrimination under four heads: direct discrimination, discrimination arising from disability, indirect discrimination, and failure to make

reasonable adjustments, and (b) victimisation, relying on the prior claim as the 'protected act'.

6 In their response form the Respondents admitted that the Claimant was disabled at the material time by the conditions relied upon but denied discrimination and victimisation, however put. The Grounds of Resistance included:

> **6. The Claimant mentioned his previous successful Claim against the Respondent in detail in his application form. The Respondent believes [the Claimant's] intention in doing so was partly or mainly to facilitate or assist his present claim, and/or to pressure the Respondent into giving the Claimant a position.**
>
> **...**
>
> **41. The Respondent believes that the Claimant applied for the position with the Respondent with the sole intention of seeking compensation …**

These allegations were subsequently withdrawn.

7 Pursuant to a case management direction, the parties delivered to the Tribunal an agreed list of issues dated 11 November 2015, a copy of which is appended hereto.

8 The final hearing of the matter came before us on 26 April this year, with two sitting days allocated. The Claimant was represented by Mr Christopher Milsom, counsel, and the Respondents by Ms Hannah Slarks, counsel. The case was a pleasure to hear, not only for the skill and economy of the advocacy on both sides but also for the co-operative and good-natured spirit in which it was conducted.

9 Time was lost on day two owing to some late disclosure from the Respondents. That made it necessary for us to meet in chambers on 2 June to complete our deliberations.

The Relevant Law

10 By the 2010 Act, s13, direct discrimination is defined thus:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A would treat others.**

11 By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

12 The concept of discrimination arising from disability is defined by the 2010 Act, s15 in these terms:

> **(1) A person (A) discriminates against a disabled person (B) if –**

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

13 The 2010 Act, s19, is concerned with indirect discrimination. So far as material, it provides:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> **(c) it puts, or would put, B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

14 The failure to make reasonable adjustments claim is based on the 2010 Act, s20, the material part of which is in these terms:

> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

In every case it is for the claimant to demonstrate that the Respondents were under a duty to make adjustments. That involves two things. First, he must identify the relevant provision, criterion or practice ('PCP'). Secondly, he must demonstrate substantial disadvantage. If a duty is shown, the Tribunal must then consider the third element of the test, namely whether any step (*ie* adjustment) contended for was one which it would have been reasonable for the Respondents to have to take in order to avoid the disadvantage.

15 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(1) An employer (A) must not discriminate against a person (B) –**
>
> **(a) in the arrangements A makes for deciding to whom to offer employment;**
> **…**
> **(c) by not offering B employment.**

16 The 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

17 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions. Giving the only substantial judgment in the Supreme Court, he said this (para 32):

> **[The burden of proof provisions] will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.**

In other words, our task in the ordinary case is simply to confront the 'reason-why' question[1] and decide it by reference to all the relevant evidence placed before us. But if and in so far as recourse must be had to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King-v-Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl-v-Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

18 By the 2010 Act, s60, it is provided (so far as material) that:

> **(1) A person (A) to whom an application for work is made must not ask about the health of the applicant (B)—**
> **(a) before offering work to B, or**
> **(b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.**
>
> **(2) A contravention of subsection (1) (or a contravention of section 111 or 112 that relates to a contravention of subsection (1)) is enforceable as an unlawful act under Part 1 of the Equality Act 2006 (and, by virtue of section 120(8), is enforceable only by the Commission under that Part).**
>
> **(3) A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision.**

[1] See eg *Nagarajan-v-London Regional Transport* [1999] IRLR 572 HL

(4) Subsection (5) applies if B brings proceedings before an employment tribunal on a complaint that A's conduct in reliance on information given in response to a question about B's health is a contravention of a relevant disability provision.

(5) In the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision.

(6) This section does not apply to a question that A asks in so far as asking the question is necessary for the purpose of—
…
(b) establishing whether B will be able to carry out a function that is intrinsic to the work concerned,
…

(7) In subsection (6)(b), where A reasonably believes that a duty to make reasonable adjustments would be imposed on A in relation to B in connection with the work, the reference to a function that is intrinsic to the work is to be read as a reference to a function that would be intrinsic to the work once A complied with the duty.

…

(11) The following, so far as relating to discrimination within section 13 because of disability, are relevant disability provisions—
(a) section 39(1)(a) or (c);
…
(j) …

(12) An assessment is an interview or other process designed to give an indication of a person's suitability for the work concerned.

(13) For the purposes of this section, whether or not a person has a disability is to be regarded as an aspect of that person's health.

19 Counsel disagreed as to the proper interpretation of s60. Mr Milsom submitted that the effect of s60(3) was that, save in the case of a claim for direct discrimination, a complaint of disability discrimination can be based purely upon the fact of the employer asking a question about the candidate's health. That is the effect of s60(11). Moreover, even in the case of direct discrimination, the section should be read as permitting a claim to be based on the act of asking a s60(1) question *simpliciter*. To interpret the legislation otherwise would be to accord it a "regressive" effect. The word "merely" is designed to prevent any *de minimis* infringement of s60(1) from being actionable but, subject to that qualification, the offending question may found a claim without the need for reliance to be placed upon the answer.

20 Ms Slarks replied that the statutory language is against Mr Milsom. It is plain from subsections (2) and (3) that no claim can be mounted on the simple act of asking a question about a candidate's health, but where such a question is asked and reliance placed on the answer, claims under ss 13, 15, 19 and 20-21 may be brought. All are 'relevant disability provisions' (and in this respect the *Claimant's* reading of the legislation is unduly restrictive). If his interpretation were right, the extra assistance for claimants (where the burden of proof provisions are in play) would be confined to direct discrimination claims only.

21 It seems to us that the section should be construed broadly having regard to its purpose of strengthening the established statutory protection of disabled persons. By the same token, any exception should be construed narrowly. Those things having been said, on the points which divide the parties, we prefer the submissions of Ms Slarks. It seems to us that Parliament's clear intention was to confine enforcement of the prohibition under s60(1) to the EHRC and to permit claims under the 2010 Act only where reliance is placed on any answer to an offending question. We cannot read subsections (2) and (3) in any other way. Nor can we interpret s60(11) as saying that 'relevant disability provisions' are confined to s13. We see no rational basis for restricting the scope of the section in that way. Moreover, if that had been the intention the subsection would surely have stated that, for the purposes of s60, 'relevant disability provisions' meant the protections against direct discrimination (only) enacted by the provisions listed in subparagraphs (a) to (j). The words "so far as relating to discrimination within section 13" demonstrate clearly that 'relevant disability provisions' extend also to those governing other forms of discrimination.

Oral Evidence and Documents

22 We heard oral evidence from the Claimant and, on behalf of the Respondents, Mr Christopher Bright, Estate Services Manager. Both gave evidence by means of witness statements.

23 In addition to the testimony of witnesses we read the documents to which we were referred in the agreed bundle. Separately, the Respondents produced a schedule of loss and a chronology. Finally, we had the benefit of the written submissions and supplementary submissions of Mr Milsom and the opening note, closing submissions and supplementary submissions of Ms Slarks.

The Facts

24 We have had regard to all the evidence placed before us. The facts which it is necessary for us to record, either agreed or proved on the balance of probabilities, we find as follows.

25 The Respondents advertised the Estate Operative vacancies on their website. The advertisement included:

> **We are looking for motivated and customer focused people with an interest in housing, to help us deliver excellent housing services and take forward our challenging improvement plan.**
>
> **Reporting to the Estate Service Co-ordinator, you will perform a variety of tasks in our estates. These will include picking up litter, assisting caretakers with cleaning duties, giving residents information and reporting any repairs needed.**
>
> **Ideally you will have previous caretaking or cleaning experience, a good level of physical fitness and a good understanding of customer care. It is also important that you are able to work on your own initiative and as part of the team. …**

26 Accompanying the advertisement were a job description and a person specification. The former outlined the primary job function in these terms:

> **To regularly identify, safely pick up, bag and properly dispose of all types of litter from environmental spaces within estate communal areas.**
>
> **To undertake general cleaning and litter collection from shrub beds and communal areas within estates.**
>
> **Remove weeds from paths and other hard standing areas.**

27 The person specification listed 17 'Requirements' under four separate headings: 'Education and Experience', 'Knowledge, Skills and Ability', 'Commitment to Equal Opportunities' and 'Special Requirements'. Each Requirement was described as 'Essential'. Candidates were advised to set out in their application forms how they met each Requirement. A column containing entries 'A', 'I' or 'A/I' specified in respect of each Requirement whether it would be assessed on the application form, at interview or by reference to both. The second Requirement, for assessment on the application form and at interview, read as follows:

> **The experience and the ability to work outside in all weathers all day whilst carrying, bending, lifting, pushing and pulling**

The third Requirement, for assessment on the application form alone, was:

> **The ability to walk long distances and remain on your feet all day**

28 The Claimant made his application (for one of the 23-hours-per-week vacancies) online. In the section dealing with his most recent employment and the termination thereof, he stated:

> **I have ankylosing spondylitis and haemochromatosis and I was retired on the ground of ill-health; disability-related; I have a disability within the meaning of the Equality Act 2010. The effect of a new treatment has resulted in an improvement to my physical capability and has facilitated the ability to return to employment.**

29 Under 'Supporting Information' the Claimant addressed the 17 Requirements in turn. He included the following:

> **E2: I have the experience and the ability to work outside in all weathers all day whilst carrying, bending, lifting, pushing and pulling e.g. wearing wet weather issued PPE [personal protection equipment] e.g. a rain jacket whilst working in the rain. Whilst moving a euro bin or a paladin I would minimise the pulling of the load by pushing as much [as] practical, following manual handling guidelines at all times e.g. when lifting a refuse sack I bend my knees and not my back. I always wear safety boots when on site and other appropriate PPE for the task in hand.**
>
> **When litter picking, as a reasonable adjustment for my disability, I would require a long handled litter pickup. I would also require other long handled equipment, which would be dependent upon the nature of the general cleaning tasks in the job description.**
>
> **E3: I have the ability to walk long distances and remain on my feet all day. I may require at times of a flare up of my disability increased brief breaks as a reasonable adjustment. I would also require time off for disability-related hospital treatments and appointments as a reasonable adjustment.**

Addressing the single equal opportunities Requirement, the Claimant wrote this:

> **E16: I can demonstrate an ability to support and promote the Council's Dignity for All Policy e.g. in the Employment Tribunals matter of Mr N O'Sullivan v London Borough of Islington (Case No. 2200489/2014), I acted as a litigant in person at court, the Tribunals found that I had been discriminated against as a disabled person by the London Borough of Islington; and as such I have a proven commitment to the provisions of Equality Act 2010; which ultimately is encompassed both implicitly and explicitly within the meaning and text of the Council's Dignity for All Policy.**

He went on to explain that equality was important to him, offering some other examples.

30 Short-listing of the candidates was undertaken by Mr Bright (a witness before us) together with Mr Savvas Savva, Estate Services Co-ordinator, who is no longer employed by the Respondents. It was common ground that Mr Bright was the 'lead' manager for the purposes of this recruitment exercise. Mr Bright scored the Claimant's application 22/26 whereas Mr Savva awarded a score of 25/26. The difference between them was in the marks awarded in respect of Requirements 1-5, directed to 'Education and Experience': out of a possible total of 16, Mr Bright's figure was 12 and Mr Savva's 15. Mr Milsom observed that, from the limited disclosure of short-listing scores, the figures in the Claimant's case appeared to signal an exception to a general pattern of Mr Bright awarding higher scores at the short-listing stage than Mr Savva. He also made the point that in the case of one candidate, while the short-listing scores were tied at 21 each, Mr Bright arrived at a lower figure against the 'Education and Experience' Requirements and entered on the record a note that that candidate's knee problem might present a difficulty. The general trend of Mr Milsom's argument (in relation to the short-listing and interview stages) was that the evidence pointed to Mr Bright (but not Mr Savva) marking the Claimant down and doing so because of his disability.

31 Be that as it may, it was common ground that, wherever there was a difference, the higher short-listing score prevailed. The Claimant was ranked in fifth place among the 16 candidates invited to interview.

32 Mr Bright told us that a set of interview questions was prepared and sent to Mr Savva before the interviews. No disclosure has been given to support that evidence.

33 The interviews were held on 24 February 2016. They were conducted jointly by Mr Bright and Mr Savva. The candidates were asked nine set questions and were scored out of five against each. Both interviewers scored each question. Where their scores on any question differed, again the higher figure was taken. The questions and the scores awarded to the Claimant were as follows.

No.	Question	Score
1	Can you let me know your experience in carrying out litter-picking/cleaning duties?	5
2	What experience do you have with doing physical work out of doors? What might you need to assist you with during the course of the year?	5
3	You will need to walk long distances every day do this job. What evidence can you give us that you would be able to do this?	3
4	Can you let me know your experience with reporting H&S issues and give us an example of what is required for wearing uniform and PPE?	3
5	What would you do if you found a used syringe?	4
6	Can you give an example of good service as a cleaner/caretaker/litter-picker?	4
7	What might give you cause for concern regarding the well-being of a child who met while at work? What would you do about your concerns?	4
8	Have you used a smart phone for work or at home? What applications do you use?	4
9	Are you able to work evenings and weekends if necessary?	4
TOTAL		36

34 The Claimant's score of 36 placed him fifth in the cohort. It seems that one of the four above him chose not to pursue the application. Offers were made to the other three and accepted. The lowest score awarded to a successful candidate was 39.

35 There was an issue between the parties as to whether the Claimant was pressed for information about his disabilities (as he claimed) or (as Mr Bright maintained) he volunteered such information. On balance we prefer the evidence of Mr Bright. We think it unlikely that the interviewers would have wandered into dangerous territory in the manner alleged. The Claimant's willingness to volunteer information relating to his disability (arguably more information than was required) is apparent from his job application. It was also a feature of his evidence before us, as was a tendency to deliver answers which expanded beyond the scope of the questions to which he was responding.

36 In addition to the set questions, the Claimant was briefly asked some further questions which sought to test the genuineness of his application. Mr Bright did not deny before us that, although the pleaded allegations of bad faith were abandoned, he continued to regard the application as "odd". He pointed out that the Claimant was "overqualified" (by experience and NVQs) for the "entry level" jobs applied for and that, as a resident of Hanwell, West London, he would have had to invest what might be seen as a disproportionate amount of time and money in travelling to and from poorly-paid part-time work in Islington, for an organisation which had recently been found to have subjected him to unlawful discrimination.

37 The Claimant, while complaining that he was subjected to inappropriate questions in addition to the nine set questions, also maintained that the entire interview was completed in about 10 minutes. We do not accept that estimate. We do, however, accept that the interview was quite brief and was conducted at a brisk pace. But there is no evidence that his treatment was different from that of any other candidate. We also accept Mr Bright's evidence that the Claimant appeared somewhat "prickly" at interview and that he was, for the most part, rather unforthcoming (except when volunteering information concerning his condition). Moreover, we suspect that, not unnaturally, he approached the interview with a degree of reticence and suspicion, given his prior experience of suffering unlawful treatment in an application to the same organisation. Since, as Mr Bright explained, and we accept, the approach of the panel was to leave it to candidates to answer questions without prompting and probing[2], the mindset with which the Claimant approached the interview may have contributed to its relatively brief duration.

38 Further, the Claimant alleged that he was "knocked off course" by being asked health-related questions (he put questions 2 and 3 into that category). We do not accept that assertion. As can be seen, he scored full marks on question 2 and it was no part of his case to deny that he gave an entirely satisfactory answer to it. We see no reason why he should have regarded question 3 as discomfiting any more than question 2: both were directed to his fitness to undertake a demanding physical role. Moreover, the scores themselves do not point to him having "gone to pieces" or anything of the kind. He scored strongly (4/5) throughout the remainder of the interview, save for the disappointing 3/5 on question 4. We do not accept that he lost his way in attempting to answer that question. He simply gave a rather weak answer which attracted an appropriate score.

39 The Claimant also complained about questions 8 and 9 which were, on his case, at least partly disability-related. We find nothing in the questions themselves, or the manner in which they were presented, which can be linked to his disability or to disability in general. On question 8 his score of 4/5 was the same as two of the three successful candidates.[3] On question 9 the three successful candidates scored 5 to his 4. Asked how it is possible to score what appears to be a simple yes/no answer on a scale from 0-5, Mr Bright told us that top marks went to those who expressed enthusiasm for undertaking extra hours in the evenings or at weekends.

40 In addition, the Claimant asserted that the interviewers, or perhaps just Mr Bright, lost interest after question 3 and stopped listening. In particular, he made the point that his answer to question 4 included a reference to reporting a smashed window, as was noted by Mr Savva, but Mr Bright when giving written feedback, did not acknowledge that part of the answer and it did not appear in his contemporary note. We do not accept that this omission demonstrates that either

[2] Although, as we will explain, their Recruitment Policy appears to advocate probing

[3] It is right to point out that (like question 3 in this respect) question 8 was not apt for the interview stage as, according to the recruitment scheme, its subject-matter was for assessment on the written application only.

member of the panel stopped listening. We would add that the Claimant was not disadvantaged by Mr Bright's oversight on question 4 because it was Mr Savva's score (3/5), being higher than Mr Bright's 2/5, that was adopted.

41 Mr Bright awarded the Claimant a total score of 32. Mr Savva was more generous by four marks, which explains the moderated total of 36.

42 Mr Bright told us that he thought that at the time of interview he did not have in his mind the fact that the Claimant had brought a claim against the Respondents before. We do not find it necessary to decide if that evidence is correct. We would, however, observe that if the written applications of the short-listed candidates were not re-read by the panel before the interviews, that would be in keeping with the somewhat slipshod way in which this recruitment exercise as a whole was conducted.

43 On 19 May 2016 the Claimant requested feedback. Mr Bright responded the same day. His email included this:

> **Your interview was very good in fact and you're high on the reserve list … The appointed candidates were all doing similar work at the moment, so were probably able to give more detailed and in-depth answers to some of the questions.**

44 More detailed feedback followed six days later. In relation to question 3, Mr Bright observed:

> **Your answer here was a little weaker, saying you believed you could do it and that you were reasonably fit & healthy. Higher scoring candidates were able to refer to gym attendance, sports participation or doing a similar job at present - the job does involve walking around 5-6 miles a day so this is a key question.**

45 Mr Milsom drew attention to the Respondents' Recruitment Policy. In Appendix 7 the requirement for consistent treatment of applicants is stressed. Interviewing panels are advised that they should:

- **Ask the same initial questions of each candidate**
- **Supplement their understanding of the candidates' responses by follow-up questions as appropriate**
- **Start off with open questions … and only use closed questions to confirm or check information**
- **…**
- **Not allow any discriminatory questions …**

Secondary Findings and Conclusions

Applicability of s60

46 The first issue here is whether any of the interview questions asked fell within the prohibition under s60(1). It seems to us that, applying a broad interpretation to the section, we should see question 3 as a question "about" the health of the candidates. As to question 2, seems to us that, in the context of a candidate with a physical disability it is at least eminently arguable that the same conclusion should apply. For present purposes we will assume in the Claimant's

favour that it does. We are quite satisfied that none of the remaining seven questions can be seen as falling within the reach of the subsection.

47 We are clear that it was not 'necessary' to ask question 3 at interview (see s60(6)(b)). Its subject-matter had been assessed at the short-listing stage on the basis of the written application, precisely as the recruitment scheme envisaged. A return to the subject of the Claimant's ability to walk long distances was entirely unnecessary.

48 Was it 'necessary" to ask question 2? On balance, we think that it was not. It was a question which went to the very essence of the role and was marked on the recruitment scheme as for assessment both on the application form and at interview. The question was not unfair, intrusive or offensive. It was directed specifically to establishing the candidates' ability to cope with the physical demands of the job. Nonetheless, we do not regard the question as necessary. Its subject-matter could have been assessed through the application form alone. But, given our interpretation of s60, this does not avail the Claimant. A claim based on question 2 is untenable because the Claimant suffered no adverse consequence resulting from the Respondents' reliance on his answer to question 2. This is self-evident, since his answer to that question attracted full marks. There was no detrimental, or less favourable, treatment (for the purposes of the direct discrimination claim), no unfavourable treatment (for the purposes of the discrimination arising from disability claim) and no disadvantage (for the purposes of the indirect discrimination and failure to make reasonable adjustments claims).

49 What, if any, is the consequence of the applicability of the prohibition enacted by s60 in the case of question 3? Our reasoning will be developed as we consider each of the claims in turn.

Direct discrimination

50 Mr Milsom submitted that, by operation of s60(5), the burden of proof had been shifted to the Respondents and that they could not discharge it. We reject that argument. This is, like most cases, one in which the burden of proof provisions have nothing to offer. Mr Milsom skilfully marshalled a number of factors which, he said, tended to support an inference of unlawful discrimination (submissions, para 37). The fundamental difficulty with the direct discrimination claim is that there is no plausible ground for the theory that a non-disabled individual whose circumstances were otherwise the same as the Claimant's, would have been treated more favourably. On all questions other than question 3, we find no basis for the theory that the Claimant was disadvantaged in any way. At the heart of his case was the charge that Mr Bright was determined to defeat his application but, to the extent that Mr Bright awarded a lower mark than Mr Savva, Mr Savva's mark prevailed. There was no suggestion that Mr Savva sought to manipulate his own scores to the disadvantage of the Claimant (or anyone else). Nor could there be. Having reviewed the paperwork with care, we detect nothing objectionable or dubious in the scores awarded to the Claimant and to the successful candidates under questions 1, 2 and 4-9 inclusive. In the case of question 3 we see no possible basis for supposing that a non-disabled comparator answering the question as the Claimant did would have received more favourable

treatment. Such a candidate, not being able to point to high levels of physical fitness and activity, would have received precisely the same score as the Claimant did. Accordingly, while the Respondents did, of course, place reliance on the Claimant's answer to question 3, that fact does not assist him in relation to direct discrimination. As we will shortly explain, it does assist in respect to the other categories of disability discrimination claim.

51 The less favourable treatment relied upon was summarised (list of issues, para 11) as:

> **i The adoption of disability-related questions;**
> **ii The tone of the interview …**
> **iii Not selecting the Claimant for any of the three roles despite his considerable experience and skills**

52 The first of these is not capable *per se* of sustaining a claim (see above). In so far as the employer places reliance on the answer it can in principle sustain a claim but, for the reasons we have given, the Claimant was not thereby treated less favourably than any hypothetical comparator would have been. The second allegation fails on our primary findings: The interviewers did not adopt a hostile tone towards the Claimant or treat him less sympathetically than any other candidate. It was permissible to inquire briefly what it was that attracted the Claimant to the job and he suffered no detriment by being asked questions on that subject. The third allegation also fails. As we have found, the Claimant was not marked down 'because of' his disability and, in any event, his non-selection was not attributable to the scores on question 3 since even with full marks on that question his total would have been lower than those of the winning candidates and there is nothing to suggest that, in themselves, the scores awarded to the winning candidates (5 in each case) were over-generous.[4]

Discrimination arising from disability

53 Was the Claimant treated unfavourably? Undoubtedly, he was. Because, quite inappropriately, he was required to answer question 3, he dropped two marks and lost way against the leading candidates. But he suffered no other unfavourable treatment. It was because the Respondents placed reliance upon the information elicited by question 3 that he suffered that unfavourable treatment. Was the unfavourable treatment 'because of something arising in consequence of' his disability? In our judgment it plainly was. Although the Claimant does his best to keep himself fit and mobile, his disability has put limits on the extent to which he can engage in sports and other physical activities. Accordingly, he was not in a position to achieve a better than average score on question 3. Other candidates deploying gym memberships or sporting hobbies such as cycling were able to register higher scores. Can the Respondents justify the treatment complained of as a proportionate means of achieving a legitimate aim? Plainly, in our view, the answer to that question is no. There was no need to ask question 3 at all (see

[4] Those selected for appointment had scores of 43, 41 and 39, so that the claim for substantial compensation is really about whether, absent any material defect, the Claimant might have tied with, or overhauled, the third-placed candidate.

above). The question of mobility could and should have been assessed in accordance with the recruitment scheme, on the paper application alone.

54 It follows that the Claimant is entitled to succeed under s15, but only in respect of question 3. In the list of issues, para 2, the unfavourable treatment complained of was set out as follows:

> **i The inherent indignity of health-related questions (ie questions 2 and 3);**
> **ii The knock-on effect of asking those questions … ;**
> **iii The lower scoring in relation to questions 3, 8 and/or 9;**
> **iv Not being offered one of the three roles.**

55 The first matter is not actionable (see above). In any event, notwithstanding our view that question 3 should not have been asked, we agree with Ms Slarks that neither that question nor question 2 undermined the Claimant's dignity. The second allegation is merely an assertion of a consequence said to have resulted from the first matter. It fails in any event on our primary findings above: there was no adverse 'knock-on effect'. The third succeeds but, as we have said, only in relation to question 3. The fourth fails for the reason already given in relation to direct discrimination: the discrimination did not affect the outcome of the selection exercise.

Indirect discrimination

56 What was the relevant 'provision criterion or practice' (PCP)? According to the list of issues, para 6, the following PCPs were applied:

> **i The assessment of mobility and/or the working of additional hours in general and/or on a qualitative basis;**
> **ii The preference for appointing those who were recently within the workplace;**
> **iii An expectation that the successful candidates would walk extended distances**

57 We reject the second item. We are satisfied that the selection panel was not actuated by the 'preference' alleged. The assertion is based on an unfair reading of Mr Bright's written feedback to the Claimant, in which he merely remarked that those already in work might have been better placed to give convincing answers to some questions than those not in work. The first and third matters can be taken together. The job required mobility and the Respondents sought to assess mobility in the selection process. They applied the criterion of mobility. That was in principle unobjectionable but their method of doing so involved including question 3 among the interview questions. Did doing so place those with whom the Claimant shared his characteristic of disability at a particular disadvantage when compared with those who did not share that characteristic? In our judgment, it self-evidently did because such persons were less likely to be able to deliver top-scoring answers than candidates with no disability. Did it place the Claimant at that disadvantage? For the reasons already stated, it certainly did. His capacity to score strongly, relative to the competition, was diminished. Was the PCP justified as a proportionate means of achieving a legitimate aim? It was not, for the reasons already developed in relation to the s15 claim.

58 Accordingly, the indirect discrimination claim based on the requirement for the candidates to answer question 3 is well-founded. But the 'principal disadvantage' relied upon, namely non-selection for the post (list of issues, para 7(c)), is not made out since, had question 3 been omitted, the result of the competition would have been the same.

59 The Respondents did also apply a criterion of willingness to work additional hours (question 9) but doing so did not cause disadvantage to those sharing the Claimant's protected characteristic of disability and did not put him at any disadvantage.

Failure to make reasonable adjustments

60 Our first instinct was that this claim was inapplicable but we are now clear that our initial view was wrong. The right answer is to be found by carefully applying the statutory language. We have identified the PCPs (they are those relied on for the s19 claim). We have found that the PCP of applying a criterion of mobility at the interview stage put the Claimant at a substantial disadvantage. In those circumstances, the duty to make adjustments arose. What was a reasonable step in the circumstances? Here it is no answer to say that question 3 should not have been asked at all. The fact that it *was* asked is what gives rise to the duty. So what is the appropriate adjustment? Mr Milsom suggested that the Claimant should be credited with a score of 5. We do not quite agree, but our approach produces the same net result. There is, we think, no good reason to invent a score. It seems to us that the right way to avoid the disadvantage is to delete the question 3 scores of all candidates. Since the question should not have been asked, it is fair and reasonable simply to disregard all scores, whether favourable, unfavourable or neutral. That would leave the successful candidates on scores of 38, 36 and 34 and the Claimant one adrift, on 33. Mr Milsom's solution would boost the Claimant's score to 38 but still leave him one short of the third-placed candidate.

61 Accordingly, the failure to make reasonable adjustments claim succeeds but only to the extent stated (which adopts a variant on adjustment iv in the list of issues, para 10). The other adjustments are inapplicable. In particular, adjustment v (offering the Claimant the role subject to medical clearance) in not appropriate because, as already explained, once the scores are adjusted as required, it is apparent that the winning candidates are still ahead of him.

Victimisation

62 Here the Claimant relies on the same detriments as for direct discrimination. Our analysis above is repeated. The only sustainable detriments are asking question 3 and relying on the answer it elicited and not selecting him for appointment. Did the Respondents ask question 3 and rely on the answer or decline to select him 'because' he had brought the earlier proceedings and/or referred to them in his job application? Plainly, the protected acts did not bring about, or materially influence, the decision to appoint the successful candidates in preference to the Claimant. To repeat, that decision was based on the total scores and would have been the same had question 3 not featured in the interview. Was

the decision to include question 3 and the act of relying on the answer materially influenced by the fact that the Claimant had brought the earlier claim and/or referred to it in his written application? We think it highly unlikely that it was. We agree with Ms Slarks that the evidence does not substantiate the theory of "unusually malicious intention" on which the claim depends. Whether or not by the time when the interview questions were settled Mr Bright (or Mr Savva) had ceased to have in mind the reference to the prior litigation in the application, it is not credible to us that question 3 was included as a means of penalising the Claimant for the earlier claim. There would have been many much simpler devices to employ if that had been the objective. There is nothing pointing to a pattern of adverse treatment linked to the protected acts. The simple counter-theory, that the inclusion of question 3 and the natural corollary of relying on the answer were the result of a slip or error is, to our minds, much more plausible. As we have held in relation to direct discrimination, the complaint about the 'tone' of the interview is not made out on the evidence. There was no detriment in that respect. And the non-selection of the Claimant was because he scored lower than the three successful candidates, a fact which is not attributable in whole or in material part to the protected acts. Accordingly, the victimisation claim fails.

Outcome

63 For the reasons stated, the claims under ss 15, 19 and 20-21 succeed in respect of question 3 only. They would have succeeded without s60. The other claims fail.

64 The result leaves the Claimant with a narrow range of modest remedies. It is hoped that the parties will now work together to agree what is left in this case. If the Tribunal is not informed within 28 days that they have done so, steps will be taken to fix a remedies hearing.

65 The Respondents should be concerned to have been found twice within a short period to have discriminated against the Claimant in respect of recruitment exercises. We greatly hope that, if they have not already done so, they will now seek advice urgently on how their recruitment practices should be improved in order to ensure that all future candidates are treated fairly and in accordance with their legal rights.

EMPLOYMENT JUDGE SNELSON
28 June 2017

Claim No: 2207632/2016

In the London Central Employment Tribunal

BETWEEN:-

Mr Niall O'Sullivan

Claimant

- and -

London Borough of Islington

Respondent

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List of Issues

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Disability s6 EqA 2010

1. It is accepted that the Claimant is disabled for the purposes of s6 EqA 2010 by reason of haemochromatosis and anklylosing spondylitis whether individually or cumulatively.

Section 15 EqA 2010

2. Was the Claimant subject to the following instances of unfavourable treatment:-
   i. The inherent indignity of health-related questions (i.e. questions 2 and 3);
   ii. The knock-on effect on asking those questions in that the Claimant was knocked off course and his confidence at interview was undermined;
   iii. The lower scoring in relation to questions 3, 8 and/or 9;
   iv. Not being offered one of the three roles.

3. If so, was this unfavourable treatment because of something arising in consequence of his disability? The Claimant relies upon the following:-
   i. Limits (whether actual or as perceived by the Respondent) to the Claimant's mobility;
   ii. The Claimant's extended absence from the workplace following his ill-health retirement;
   iii. A perception on the Respondent's part that the Claimant was less able to work additional or flexible hours.

4. If the Claimant was so treated, what is the aim for that treatment?

5. Insofar as there is a legitimate aim, was the treatment necessarily proportionate to the same?

Indirect Discrimination s19 EqA 2010

6. Was the Claimant subject to the following PCPs:-
   i. The assessment of mobility and/or the working of additional hours in general and/or on a qualitative basis;
   ii. The preference for appointing those who were recently within the workplace;
   iii. An expectation that the successful candidates would walk extended distances?

7. If so, are these valid PCPs for the purposes of s19(2) EqA 2010:-
   (a) Were they applied/would they be applies to persons who do not have the Claimant's disability?
   (b) Did they (or would they) put persons with whom the Claimant shares the protected characteristic at a particular disadvantage?

(c) Did they put the Claimant at that disadvantage? The principal disadvantage on what the Claimant relies is the non-selection of the post.

8. If the Claimant was disadvantaged, what is the aim for that treatment?

9. Insofar as there is a legitimate aim, was the treatment necessarily proportionate to the same?

Failure to Make Reasonable Adjustments ss20-21 EqA 2010

10. By reference to the PCPs cited above were the following adjustments reasonable in the circumstances:-
    i. Assessing mobility and flexible working on the basis of the written application alone;
    ii. Not asking the questions in issue and/or not subjecting them to a maximum of five points each;
    iii. Asking questions based upon potential rather than recent work history;
    iv. Raising the scores to take into account any deficiencies which were disability-related; and/or
    v. Offering the Claimant a role subject to medical clearance.

Direct Discrimination s13 EqA 2010

11. Was the Claimant subject to the following treatment? If so, was this at least in part because of his disability:-
    i. The adoption of disability-related questions;
    ii. The tone of the interview: see [13] ET1;
    iii. Not selecting the Claimant for any of the three roles despite his considerable experience and skills?

Victimisation s27 EqA 2010

12. Did the following constitute a protected act for the purposes of s27(2) EqA 2010:-

    i. The presentation and/or pursuit of the Claimant's earlier claim 2200489/2014;

    ii. The contents of the Claimant's job application?

13. If so, was the treatment cited at [11] above (if established) motivated at least in part by one or more of the Claimant's protected acts?

Remedy

14. The Claimant seeks the following by way of remedy:-

    i. Suitable declarations;

    ii. Suitable recommendations (to be identified);

    iii. An award for injury to feelings and exemplary damages;

    iv. A compensatory award to reflect the fact that but for the discrimination his application would have been successful;

    v. Interest

11 November 2016