Appeal No. UKEAT/0124/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 October 2017

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR T TOY — APPELLANT

CHIEF CONSTABLE OF LEICESTERSHIRE POLICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ANISA NIAZ-DICKINSON (of Counsel) Instructed by: Slater & Gordon (UK) LLP Landore Court 51 Charles Street Cardiff CF10 2GD
For the Respondent	MR MARK LEY-MORGAN (of Counsel) Instructed by: East Midlands Legal Services Derbyshire Constabulary Headquarters Butterley Hall Ripley Derbyshire DE5 3RS

SUMMARY

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Reasonable adjustments

An Employment Tribunal was entitled to find that a Chief Constable, considering whether the Claimant's services as a probationary Police Constable should be dispensed with under Regulation 13 of the **Police Regulations 2003**, did not know and could not reasonably have been expected to know that the Claimant suffered from dyslexia, when the *possibility* of dyslexia was raised only in the course of the termination process.

The Employment Tribunal was also entitled, on the evidence, to hold that the Claimant was not at a substantial disadvantage by virtue of his dyslexia, and that making reasonable adjustments would not have prevented such disadvantages as he faced.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment I will, for convenience, refer to the parties by the terms used in the Decision of the Employment Tribunal. This is an appeal by the Claimant against the Judgment of an ET, chaired by Employment Judge Ahmed sitting in Leicester, which took place between 3 and 15 June 2016; some eleven days having been spent hearing evidence and submissions, and three days considering its Decision, which was sent to the parties on 23 August 2016.

2. I have had the benefit of skeleton arguments and having heard oral submissions today from Ms Niaz-Dickinson on behalf of the Claimant and from Mr Ley-Morgan for the Respondent, each of them appeared below. I am grateful to them both for the skeleton arguments and the helpful oral submissions that they made today. It is in the interest of the parties that I give an extempore judgment at the end of this one day hearing and I hope counsel will forgive me for not setting out their arguments in any great detail.

The Background

3. The Claimant is of Turkish nationality. Turkish is his first language, his second language is German and his third language is English. He has lived in the United Kingdom for more than 20 years. In 2006 he began to work for Leicestershire Police as a Police Community Support Officer, known as a "PCSO". He was appointed as a probationer Police Officer on 11 November 2013.

4. His training began at De Montfort University in November 2013 and, after an initial academic module lasting 20 weeks which he completed satisfactorily, he moved to what is known as "in company" training, that is on the job training under the guidance of a more

experienced Police Officer, known as a tutor Constable. That is supposed to last for 12 weeks during which a probationer is required to demonstrate 37 different skills set out in a police action checklist (abbreviated and referred to as "PAC"). The final stage of a Constable's probation is a period of independent patrol lasting 67 weeks.

5. The Claimant was assigned to Police Constable Gill on 7 May 2014. She had not met the Claimant before and he was the first probationer that she had tutored. As with a number of witnesses listed at paragraph 5 of the ET's Judgment, PC Gill was not required to attend for cross-examination and her witness statement was considered by the ET. I will set out some of the relevant factual findings of the ET in due course, but suffice it to say by way of introduction that PC Gill had serious concerns about the Claimant's performance in a number of areas. PC Gill had a meeting with PC Sam Flynn of the Professional Development Unit on 23 May 2014, by which time the Claimant had not completed any of his PACs. This was unusual.

6. After five weeks with PC Gill, the Claimant was transferred to be tutored by PC Gavin Grey who was briefed by PC Flynn as to concerns which had been raised. In the period that followed, PC Grey had considerable misgivings about the Claimant's performance and his inability to sign off the PACs. The Claimant had, PC Grey thought, failed to take the lead in incident handling and appeared unable to handle instructions. Following an incident which came to the ears of Inspector Iceton, it was concluded by that Inspector that the Claimant was being taken through the process too quickly for his abilities and an enhanced support plan was put in place.

7. A professional development review took place in late June 2014 following which a new tutor Constable was assigned, PC Street. PC Street wrote a detailed report on 7 September 2014. He concluded:

> **"At this time I am not happy that PC TOY is ready to be signed [off] as fit for independent patrol and a lot more work is required.**
>
> **PC TOY still [has] over half of his PACs to sign off and despite attending a lot of incidents, needs to show a higher level of skill. I feel that if PC TOY was to go out on his own he would be a risk to himself, possibly getting injured and a risk to the public by making a wrong [decision] or mistakes." (Taken from the ET's Judgment, paragraph 37)**

8. Under Regulation 13 of the **Police Regulations 2003**, a Chief Constable may dispense with a probationer's services if he considers that the probationer is not fit to perform the duties of his office or that he is not likely to become an efficient or well conducted Constable. The Force has a written policy setting out a three-stage procedure to be followed when it is considering dispensing with the services of a probationer Constable. The first stage is called a management guidance meeting, "MGM"; the second, a Regulation 13 meeting; and finally, there is a meeting with the Chief Constable.

9. The MGM took place on 25 September 2014 and was held by a Chief Inspector. That Officer did not consider that any of the options open to him (set out at paragraph 39 of the Judgment) were viable in the light of the material before him. He therefore referred the Claimant to a Regulation 13 Hearing. That hearing took place on 5 November 2014 before a panel of two. The Claimant was represented by a Police Federation representative, DC Mills. Tutor Constables who had worked with the Claimant attended and gave evidence as to the shortcomings they believed the Claimant had.

10. At the end of that meeting, mention was made as to the possibility that the Claimant might be suffering from dyslexia. This was the first time that such a possibility had ever been

raised. No suggestion of dyslexia had been raised during the Claimant's years of service as a PCSO nor would it seem in earlier employment, he being a man of around 52 years of age at this time. Neither had the problem been raised during the academic phase of training, despite there being some sort of screening designed to detect the potential of dyslexia at the outset.

11. The ET records that the comment made by DC Mills was in the context of difficulties noted with the Claimant's clerical skills and what the ET recorded him saying at paragraph 42 was this:

> **"42. At the very end of the submissions, DC Mills opined that in respect of clerical skills, there was a possibility that the Claimant may be suffering from dyslexia. He asked the panel to take this into consideration in their deliberations. No evidence was presented in support of the suggestion that the Claimant was or might be dyslexic."**

12. At paragraph 67.1 the ET said this:

> **"67.1. The Claimant himself was not clear or certain that he was dyslexic. The highest he ever put it in the Regulation 13 meeting was that it was *possible* that he may be dyslexic. …" (Original emphasis)**

13. It is common ground that the ET's reference to this is not on all fours with the evidence and this forms part of the grounds of appeal. From a transcript of the Regulation 13 Hearing which the ET had before them, it is evident that DC Mills informed the panel that he had asked the Claimant to complete a dyslexia test, the result being that he had the potential to be dyslexic. At the same hearing the Claimant informed the panel that he had a strong belief that he was suffering from dyslexia.

14. The ET records at paragraph 43 of its Judgment the reasoning given by the Regulation 13 panel (the reference at the start of that paragraph to this being the MGM panel is clearly a typographical error):

> **"43. The MGM panel [sic] rejected the argument that there should be a further extension. They took the view that the Claimant had a total of 23 weeks in-company which was the**

> **equivalent of the usual in company period with two extensions. Accordingly, the Claimant had not been disadvantaged. They also noted that despite the extra time given to him, the Claimant had only completed one-third of the necessary PACs. They took into account the development opportunities that the Claimant which had been offered to the claimant [sic] and the fact that there were three different tutors all of whom appeared to have concerns about the Claimant. In her long experience, Mrs Naylor could not remember any other student officer in a Regulation 13 meeting where such a high number of officers had stated that they did not feel that the student officer was safe when deployed. Generally, a student officer would complete all 37 PACs in 11 weeks. The Claimant had been in company for 23 weeks but had only completed 13 of the 37 PAC competencies. They considered that there was a breadth of issues which went well beyond difficulties with completing forms or communicating with others and did not consider that dyslexia, even if was established [sic], provided an explanation for the Claimant's poor performance. The Claimant's failure to complete the outstanding PACs seemed to include a wide band of competencies which went well beyond clerical issues that DC Mills had referred to. The panel recommended that the Claimant's service be dispensed with."**

15. There then followed on 2 December 2014 a meeting with the Chief Constable. The issue of dyslexia was raised again at this stage:

> **"44. The meeting with the Chief Constable (inappropriately referred to as an 'appeal' hearing during the course of proceedings and in the paperwork) took place on 2 December 2014. The Chief Constable's evidence to this tribunal was that he takes matters in relation to diversity and disability very seriously and was very disappointed to have to lose the claimant's services particularly from a demographic in which the city is underrepresented. In relation to dyslexia he gave evidence that dyslexia is a subject close to him as he has a family member who suffers from the condition and thus whilst not an expert he recognises the disabling effect of the condition.**
>
> **45. The Chief Constable concedes that he was skeptical about the Claimant being dyslexic. He expected to see something on the claimant's file indicating that the Claimant was or might be dyslexic. Mr Toy had got to a stage where the condition would usually have been identified. He was surprised that it was being raised at this late stage and even then without any evidence in support. His primary concern in deciding whether Mr Toy's career as an officer ought to continue was whether he felt that the claimant could be trusted to protect those who were vulnerable and who could provide safety to the public, to his colleagues and to himself. He did consider whether dyslexia may have had relevance as to aspects of the Claimant's performance but discounted that as the reason for the levels of performance. His decision was that the Claimant would be dismissed. There is no right of appeal against that decision."**

16. The ET dismissed the claim of direct race discrimination and direct disability discrimination. Those findings are not appealed. It also dismissed the claims of discrimination arising from disability and failure to comply with the duty to make adjustments. In relation to those latter findings, the Claimant appealed to this EAT.

17. The Hon Mr Justice Supperstone considered the appeal under Rule 3(7) of the **EAT Rules** on 15 November 2016 and took the view that it disclosed no reasonable grounds for bringing the appeal. However, HHJ Richardson allowed the matter to go to a Full Hearing

following a Rule 3(10) Hearing, for Reasons set out at page 68 of the bundle. It is trite law to say that at a Rule 3(10) Hearing a Judge hears only from the Appellant in a case and decides merely whether a point is arguable. At this Full Hearing I hear from both sides.

18. The grounds of appeal are lengthy and I hope when I summarise them I do not do so unfairly.

19. Ground 1 asserts that the ET fell into error at paragraphs 65 to 68 of its Judgment by wrongly considering paragraph 20 of Schedule 8 to the **Equality Act 2010** on reasonable adjustments in relation to the Respondent's knowledge under section 15 of the **Equality Act**. As such, it has incorrectly brought into consideration the issue of substantial disadvantage despite substantial disadvantage not being required under section 15 of the **Act**.

20. The second ground is that by reason of its findings at paragraphs 76 to 78 of the Judgment, the ET failed objectively to consider the difficulties suffered by the Claimant as a result of his dyslexia and the question whether the PCP put the Claimant at a substantial disadvantage. As such, it is submitted, the ET misinterpreted section 20(3) of the **Equality Act**.

21. Ground 3 concerns the transcription errors in relation to the Regulation 13 Hearing as to the Claimant's belief in his possibly suffering from dyslexia. I have already dealt with that.

22. Ground 4 alleges perversity in relation to the ET's findings and asserts that it failed to consider two expert reports which were before the ET and which are also in my bundle. It is submitted that the ET could not have reached certain conclusions set out at paragraphs 68.3 to

68.5 and 69.1 and 69.2 had it properly considered the expert reports. The ET's conclusions at paragraph 79 regarding difficulties in paperwork are also attacked as is mention of the Claimant's inability to make an arrest. The ET it is said having failed to have regard to the fact that, as a former Police Community Support Officer, the Claimant did not have the power of arrest.

23. Ground 5 also complains that the ET's alternative findings at paragraph 68 of the Judgment include as a reason that PC Grey, who had worked with at least one other dyslexic Officer, did not consider that the Claimant's problems were to do with dyslexia. Complaint is also made of the finding at paragraph 68.6, the ET holding that a number of Officers who tutored the Claimant were of the view that he was not up to the demands of being a Police Officer. It is said that the views of those colleagues and the honesty with which they were held, as the ET held, were irrelevant to whether claims should be dismissed.

24. Before I turn to the grounds of appeal separately I will set out the law, adopting the law as set out at paragraphs 46 to 52 of the ET's Judgment - that exposition not being disputed:

> **"46. Section 13 of the Equality Act 2010 ("EA 2010") defines direct discrimination (whether race or disability) as follows:**
>
> > **"(1) A person (A) discriminated against another (B) if, because of a protected characteristic, A treats B less favourably than A treats would treat others."**
>
> **47. Section 15 deals with discrimination arising from disability and is as follows:**
>
> > **"(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.**
> >
> > **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**
>
> **48. Section 20 EA 2010 deals with the duty to make adjustments and the relevant part of that section states:**
>
> > **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**

(2) The duty comprises the following three requirements.

(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."

[the remainder of the section is not relevant]

49. Section 23 EA 2010 deals with comparators and is as follows:

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

50. Section 39 EA 2010 prohibits discrimination and the material part of it states

"(2) An employer (A) must not discriminate against an employee of A's

(B) -

(c) by dismissing B;

(d) by subjecting B to any other detriment."

51. Section 136(2) EA 2010 deals with the burden of proof and is as follows:

"(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."

52. Schedule 8, regulation 20(1) to EA 2010, so far as is relevant, states:

"A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

- in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.["] "

25. Ground 1 of the appeal is concerned with paragraphs 65 to 70:

"65. In relation to the issue of knowledge the documents and tests all relate to that issue. Knowledge as to disability is dealt with specifically at Schedule 8, Paragraph 20(1)(a) and (b) of the EA 2010. Although paragraph 20 does not include the word 'substantial', it is perhaps appropriate to read substantial into the schedule because paragraph 20(1)(b) refers to the first, second or third requirements under Section 20 EA 2010 where the word substantial is used. In any event nothing turns on that.

66. Paragraph 20(b) has two elements. The first is that the Claimant has a disability and secondly that the Respondent knows, or could reasonably have been expected to know, that a worker was likely to be placed at the disadvantage referred to in the first, second or third requirement.

67. In the circumstances, we conclude that the Respondent did not and could not reasonably have had the relevant knowledge of disability for the following reasons:

67.1. The Claimant himself was not clear or certain that he was dyslexic. The highest he ever put it in the Regulation 13 meeting was that it was *possible* that he may be dyslexic. In circumstances where the Claimant himself does not know, nor is certain of the condition, in our judgement it is unreasonable to expect that the Respondent ought to know. Of course it is quite conceivable that there may be conditions (such as depression, for example) where an

employee does not recognise he has a disability but others might but this case is not one of them. The Claimant believed that his difficulties in relation to communication, and those elements of the job which involved communication, were down to his language difficulties and the fact that English was his third language. Whether or not the Claimant's belief that his problems were down to language difficulties is reasonable or not is irrelevant. The issue is the reasonableness of the Respondent's belief, not that of the Claimant.

67.2. The Respondent not unreasonably believed that the Claimant had undertaken work as a PCSO for several years without difficulty which included paperwork, without experiencing or identifying any difficulty.

67.3. The Respondent not unreasonably believed that the Claimant had undergone a screening process at De Montfort University which ought to have established dyslexia as part of the training. The Claimant had completed a questionnaire which dealt with dyslexia issues but that did not flag up the possibility of dyslexia. We assume from that that the answers were not indicative of dyslexia. We can see no reason why, if the form had suggested any hint of dyslexia, the claimant would not then have gone on to complete the more detailed assessment. The Respondent appears to have believed that the claimant had undertaken a specific test on dyslexia. That belief now appears to be mistaken but nevertheless it was a reasonable belief.

67.4. The Respondent was conscious of the fact that the Claimant had spent several years as a PCSO without any issues being raised, he had passed all national selection procedures, that he had undertaken a period of 20 weeks academic study at De Montfort University where no issue had been raised by him or the academic staff of his inabilities or difficulty to undertake any duties as a result of dyslexia. The Claimant had a history of academic achievements before joining the police. In those circumstances we are satisfied that the respondent's absence of knowledge of dyslexia was reasonable.

68. The absence of relevant knowledge of disability must mean that both the complaints of discrimination arising from disability and failure to make reasonable adjustments must be dismissed. If we are wrong in that respect, we would have dismissed the complaints for the following reasons:

68.1. Whilst we accept that dismissal or a refusal to grant a further extension of the in company period, amounts to unfavourable treatment we are satisfied that this did not arise from the Claimant's disability. It arose from a belief that the Claimant was not a fit and proper person to hold the position of a police officer. In that respect there is ample evidence as to the Claimant's failings which have nothing to do with his dyslexia condition. Absent the issues in relation to paperwork, which we will deal with in a moment, the Claimant was clearly not performing to a standard expected of him.

68.2. In coming to our decision, we have read carefully the witness statements of all of the witnesses in our deliberations, not least because some of the witnesses whose evidence was highly relevant were not required for cross-examination. In those circumstances, it is easy to overlook what their evidence was but it paints an alarming picture of someone who was seen as unsuited to the role.

68.3. We took into account the evidence contained in the witness statement of PC Gill. There are a number of matters in her statement which refer to the Clamant guessing information in crime reports when the Claimant did not know the answer. They also included writing matters into statements which had not been said which could have severe ramifications. The Claimant had failed to use the PEACE model for conducting interviews. He failed to communicate reasons for arrests. None of these matters were or could remotely be concerned with the Claimant's disability.

68.4. PC Grey was someone who was seen by the Claimant as being supportive, yet PC Grey was only able to sign off a small fraction of the PACs which the Claimant should have satisfactorily completed in the time he spent with him. PC Grey is someone who has dealt with at least one other officer who was dyslexic but there was nothing to suggest to him that in the Claimant's case the problems were related to or could possibly be related to dyslexia.

68.5. We take into account the evidence of PC Street who generally got on well with the Claimant and has good experience of tutoring student officers. PC Street found a number of disturbing issues in relation to the Claimant's work which had nothing to do with the claimant being dyslexia [sic]. PC Street does say he found the Claimant's paperwork to be poor but significantly it was the *content* of the paperwork that was of concern. In particular, the Claimant failed to address the relevant legal points that were necessary to prove an offence.

That was an issue of content rather than form. It was reasonable to conclude on the part of the Force that this was simply the Claimant failing to undertake the process competently. When the Claimant was provided with cue cards (which were not provided with the intention of being a reasonable adjustment though they might have served that purpose) he failed to use them. That again was a performance issue unrelated to dyslexia.

68.6. There are a number of officers who tutored the Claimant during his in company period but were of the view that the Claimant was simply up to the demands of being a police officer [sic]. We have set out the email of PC Tom Irving which tellingly highlights a number of the Claimant's deficiencies. We consider that email to be important because the claimant relied on that email in support of his own case during the internal processes. We have no reason to believe that the opinions of PC Irving (and others) were anything other than honest and genuinely held beliefs.

69. Was the analysis of the Claimant's competence and ability as a consequence of a failure to deal with matters which could be affected by his condition? We do not consider that was so for the following reasons:

69.1. The Claimant's difficulties went far beyond matters related to paperwork, communication and behaviour. Insofar as they related to paperwork, and specifically issues of concentration and memory, there was nothing to suggest that the deficiencies were because of the condition. The Claimant himself gave a number of different explanations as to the reasons for his poor performance. The Claimant's evidence was that it was only when his second wife, who is Turkish, said that he made the same mistakes in Turkish as he did in English, that he wondered whether the reason for his difficulties might be something other than the fact that English was his third language, which he had always believed was the reason. However, that does not detract from the fact that the Claimant had himself given explanations other than possibly dyslexia for his difficulties. The respondent was entitled to take his explanations at face value.

69.2. The Claimant's difficulties with paperwork often involved a failure to understand the legal aspects of the job, a failure to accurate consistently and a failure to follow instructions. This had nothing to do with dyslexia.

70. If we are wrong in respect of the reason for the treatment, and if the unfavourable treatment arose from the disability, we would be satisfied that dismissal was a proportionate means of achieving a legitimate aim. The justification was safety of the Claimant himself, his colleagues and the public." (Original emphasis)

26. It is quite correct that when setting out the applicable test at paragraphs 65 and 66, the ET made reference to a provision which is irrelevant to the question of knowledge of disabilities for the purposes of section 15 of the **Act**. The question for me is whether that gives rise to an error of law such as to vitiate the relevant finding.

27. The issue for the ET when dealing with a section 15 point was whether the Chief Constable did not know and could not reasonably be expected to know that the Claimant was dyslexic. Under paragraph 20 of Schedule 8, no duty to make reasonable adjustments arises if a person does not know and could not reasonably be expected to know that a person is under a

A disability and is likely to be placed at a substantial disadvantage. That is also of course section 20 of the **Act**, read together with the matters I have just read.

B 28. Although at paragraph 65 the ET does appear at first blush to conflate the tests, when setting out the relevant issues at paragraphs 54.8 to paragraph 54.14 they plainly distinguished the two legal tests in their correct context and it is clear, therefore, that they were aware of the difference:

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> **"54.8. Did the Respondent apply a PCP of requiring police officers to be fit for the job they are employed to do, namely carrying out the full range of police duties without adjustment or restriction?**
>
> **54.9. Did the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?**
>
> **54.10. Has the Respondent proved that he did not know or could not reasonably have been expected to know that the Claimant had the disability and was likely to be placed at a substantial disadvantage?**
>
> **54.11. Did the Respondent fail to take reasonable steps to avoid that disadvantage?**
>
> **54.12. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability, i.e. the effects of his dyslexia on his progress as a student police officer?**
>
> **54.13. Has the Respondent shown that the treatment was a proportionate means of achieving the legitimate aim of ensuring that all police officers achieve an appropriate standard and are safe when out on independent patrol?**
>
> **54.14. Has the Respondent shown that he did not know, and could not reasonably have been expected to know from 5 November 2014 that the claimant was disabled by virtue of dyslexia?"**

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29. Paragraph 67 of the Judgment clearly shows that, despite the earlier recital of the two-stage section 20 test, when then applying the facts to the law they had no regard to the second limb when looking at the question under section 15. The words "*we conclude that the Respondent did not and could not reasonably have had the relevant knowledge of disability for the following reasons*", in my judgment, unarguably demonstrate that they applied the correct test. The reference to the section 20 test at paragraphs 65 and 66 maybe explain the words at paragraph 68 which show that the ET considered both the question of section 15 discrimination and a failure to comply with section 20.

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30. It is well established that one should not subject an ET's Judgment to minute scrutiny. If, as here, the ET has set out the law (paragraphs 46 to 52), then set out the issues and apply the law to it (see paragraphs 54.8 to paragraphs 54.14), it is not arguable, in my judgment, that just a few paragraphs later when setting out their reasons they have forgotten what went almost immediately before. If I am wrong in that conclusion and the ET did somehow confuse the tests, it seems to me that there is only one possible conclusion to draw from the evidence. The distinction between the Claimant having a "*strong belief*" that he had dyslexia and the ET's wording that he was "*not clear or certain that he was dyslexic*" is, in my judgment, a distinction without a difference. The same applies to his representative's view which referred to the "*potential*" for dyslexia. The ET could not have found, in my judgment, other than that the Chief Constable did not and could not reasonably have known of the disability.

31. I turn now to ground 2. I will set out first the paragraphs of the Judgment which are criticised and the two preceding paragraphs to put them in context:

> **"74. In relation to the failure to make reasonable adjustments, the leading authority is *Environment Agency v Rowan* [2008] ICR 218. In that case, the EAT held that in a reasonable adjustment case the tribunal must consider:**
>
> > **• the provision, criterion or practice (PCP) applied by or on behalf of the employer, or the relevant physical features of the premises occupied by the employer;**
> >
> > **• the identity of the non-disabled comparators (where appropriate), and**
> >
> > **• the nature and extent of the substantial disadvantage suffered by the claimant.**
>
> **75. The relevant PCP is the requirement that police officers must be fit for the job that they are employed to do, namely carrying out the full range of police duties.**
>
> **76. What was the nature and extent of the substantial disadvantage suffered by the Claimant? Firstly, we note that the Claimant failed to identify any substantial disadvantage at both the Regulation 13 and Chief Constable hearings. Primarily, his focus was on obtaining either a further extension or an adjournment of the process until the Force's Equality Unit were involved and a more detailed assessment of the condition could be undertaken, rather than on focusing on what substantial disadvantage was. As a consequence, the case that he put before the Regulation 13 meeting and the Chief Constable is very different to the case that he puts before this tribunal. At both of those meetings, the Claimant's representative (who was not called to give evidence despite an indication at an earlier preliminary hearing that he would be doing so) failed to identify how the dyslexia had put the Claimant at a substantial disadvantage.**
>
> **77. We do not find any substantial disadvantage caused by reason of the disability. It had not been suggested until this hearing that the claimant's problems were in any way connected with dyslexia. That was entirely consistent with the fact that no formal diagnosis of dyslexia had**

ever been made during his service, that the Claimant himself was not sure whether he was dyslexic and no report had ever been obtained by him which could easily have been done."

32. The law is as set out above. It bears repetition that section 20(3) imposes a requirement "*where a [PCP] 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*". The PCP identified by the ET was, as per paragraph 75, "*the requirement that police officers must be fit for the job that they are employed to do, namely carrying out the full range of police duties*". The Claimant had initially argued below that the words "without adjustment or restriction" should be added. It seems to me that those words add nothing and Ms Niaz-Dickinson agreed with me today.

33. At the Rule 3(10) Hearing, HHJ Richardson noted that the reasoning at paragraphs 76 to 78 appears to be directed to the question whether the PCP placed the Claimant at a significant disadvantage and, if so, missed the point. It was, he said, for the ET to decide whether the PCP placed the Claimant at the requisite significant disadvantage and he also made mention of the expert evidence that was before the ET. I accept these points entirely. However the paragraphs complained of are in the alternative to the primary finding at paragraph 68; namely that the absence of relevant knowledge of disability meant that both the complaints of discrimination arising from disability and failure to make reasonable adjustments must be dismissed.

34. In the light of my finding on ground 1, this ground too must fail. However, in case I am wrong in that conclusion, I would say that taken in the round the ET's findings disclose no error of law. It is correct that there were two expert reports before the ET. They were referred to in the final paragraphs of the Claimant's witness statements and in written closing submissions but neither expert attended, perhaps unsurprising, as disability had been conceded. Although the

reports made clear that the Claimant suffers from dyslexia and sets out in some detail the effect that this can have, there is no mention as to whether this put the Claimant at a substantial disadvantage. More significant, in my judgment, is the absence of any attempt by the authors of the reports to grapple with the issue of reasonable adjustments relating to the Claimant's day to day job. That there are numerous police officers with dyslexia who are able to do their job is unquestioned.

35. A possible criticism of the ET's Judgment, and it is not a strong one, is that some findings of fact appear at the outset of the Reasons, others are given only when the ET's findings of fact and/or law are made clear. However, the concerns which the ET had about the Claimant's issues whilst under training go well beyond those which could have been impacted by any of the issues set out in the expert reports. By way of example only - as I do not wish to rehearse the Reasons as a whole - paragraphs 16 to 19 of the Judgment highlight issues which include a failure to follow instructions, safety issues, and radio communications not being properly understood. In the course of a planned arrest the Claimant struggled to communicate the reason for the arrest and began to cite the caution. On another occasion he misunderstood the definition of a domestic incident believing that it applied only to persons living together. Other examples were given of the Claimant taking part in a search but then being found subsequently, having gone miles beyond his search area and not using his radio to communicate. He showed a reluctance to take the lead in operational situations where his tutor Constables wanted him to take the lead to check how he handled a situation.

36. It seems to me legitimate to infer that these matters, each of which is set out in the Judgment, were in the minds of the ET when they considered the questions which they set for themselves. It seems to me that they were entitled to find on the whole that the Claimant was

not at a substantial disadvantage by virtue of his dyslexia and that making reasonable adjustments of the sort proposed would not have prevented such disadvantage as he faced by reason of his dyslexia.

37. Ground 3 has already been covered. I have described the difference between the form of words used by the ET and in the transcripts of the meetings as being a distinction without a difference. It comes nowhere near to the level required to say that there was perversity.

38. As to ground 4, whilst it is true that the ET made very limited use of the reports that were provided to it, I do not find that the ET acted perversely in reaching the conclusion set out at paragraphs 68.3 to 68.5 and paragraphs 69.1 and 69.2. I have already commented on the fact that the relevant facts are peppered throughout the Reasons, but one must look at the Reasons as a whole.

39. Paragraph 67 and its subparagraphs deal with the reason for the finding that the employer did not have knowledge of disability. Paragraph 68 and its subparagraphs are in the alternative to that finding and find that the unfavourable treatment - namely termination of the Claimant's services as a probationary Constable - did not arise from his disability but were explained by what they described as "*an alarming picture of someone who was seen as unsuited to the role*" (paragraph 68.2).

40. Paragraph 70 sets out a further alternative and assumes that the treatment was for a reason arising out of disability and assumes that if the treatment was for a reason arising out of disability then it was a proportionate means of achieving a legitimate aim. I regard it as impermissible other than to take all of the ET's findings of fact into account when considering

the question whether there was anything wrong in their analysis. They were given little meaningful assistance as to the use they could make of the expert reports, the conclusions of which, as I have already said, did not seek to match the findings to the reality of a Police Constable's daily duties. It seems to me that there was ample evidence for the ET to conclude that there were manifest failings which had nothing to do with dyslexia.

41. I disagree with the statement or with the proposition that the Judgment was not "Meek compliant" - it is clear how and why the ET reached the decision as it did. The high hurdle before perversity is made out is not nearly crossed.

42. The fact that, as a Police Community Support Officer, the Claimant did not have the power of arrest is a tiny point when set against the overall weight of evidence. As was said in an email which the Claimant had solicited from PC Thomas Irving - the whole of which is set out at paragraph 38 of the Reasons - "*I hate to be the bearer of bad news but I really do not think that being a PC is a role that you are suited to*".

43. Ground 5 concerns the justification that the ET found. The test is plainly objective but that means simply that the ET must look at the evidence as a whole and draw conclusions from it. I reject the submission that the ET's conclusions in this regard which, in my judgment, span paragraphs 68 to 73, are other than objective. Inevitably they will draw conclusions from evidence which they find to be accurate or unchallenged. There are many findings in the Judgment relating to failings in basic competences displayed by the Claimant to no fewer than three different tutor Constables over an already lengthened in company period. On no view can these failings be linked to the broad definitions of dyslexia contained in the report.

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44. The ET's job was to look at the evidence as a whole, I do not consider that it is arguable that it failed in that task. For all those reasons, this appeal fails.

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