



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Conrad Tokarczyk

v

Nuffield Health

Heard at: Watford

On: 25-30 October 2018

Before: Employment Judge Henry
Mrs S Goldthorpe
Mr C Surrey

Representation

For the Claimant: Ms S Gilani, Solicitor
For the Respondent: Mr P Bownes, Solicitor

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the claimant:

1. Has not been less favourably treated than a comparator because of the protected characteristic of disability.
2. Has not been unfavourably treated because of something arising in consequence of his disability.
3. Has not been put at a disadvantage for which the respondent has failed to make reasonable adjustments.

The claimant's claims are dismissed.

REASONS

1. The claimant by a claim form presented to the tribunal on the 8 November 2016, amended on the 14 February 2017, presents claims for discrimination on the protected characteristic of disability by way of; direct discrimination, a failure to make reasonable adjustments and discrimination arising from disability, in respect of unsuccessful applications for employment with the respondent.

The issues

2. The issues for the tribunal's determination was set out by Order of the Tribunal sent to the parties on 15 February 2017, which were agreed at the outset of the hearing with the parties and are as follows:
 - 2.1 Did the claimant become, by any material date, that is by 26 April 2016 or later, a disabled person? That requires the tribunal to determine whether:
 - 2.1.1 The claimant's cerebral palsy has a substantial adverse effect upon the claimant's ability to carry out normal day-to-day activities; and
 - 2.1.2 Whether those effects are long term. That is: whether they had, by any material date, already lasted at least 12 months or were likely to do so?
 - 2.2 Has the respondent subjected the claimant to the following treatment; (has the claimant established the substance of his allegations, or any of them, in so far as they are disputed?)
 - 2.2.1 that in the claimant's case, the respondent followed a different procedure from its normal procedure in relation to the claimant's application for the physiology post on 20 April, by asking him to attend a meeting with Justin Jones and Jay Brewer;
 - 2.2.2 That the claimant was denied the opportunity to apply for posts of Physiologist and Personal Trainer continuously between May and June 2016, by the respondent not notifying him of the existence of such posts in spite of his having signed up with the respondent to receive information about such posts;
 - 2.2.3 That the claimant was deterred from making an application for the position of Physiologist and from attending an assessment day;
 - 2.2.4 That the claimant was asked at an assessment on 1 August 2016 to perform a physical activity, namely to carry an object while walking, as part of the assessment for the post of Physical Trainer;
 - 2.2.5 That the claimant was not offered employment on two occasions: the first on 8 June 2016 in relation to the position of Physiologist, and the second on 2 September 2016, in relation to the position of Personal Trainer.
 - 2.3 All of the above claims are pursued as complaints of direct disability discrimination. As to the fourth complaint, the claimant wishes to pursue it not only as a complaint of direct disability discrimination but

also as a complaint of failure to make reasonable adjustments, and as a complaint of discrimination arising from disability.

- 2.4 In relation to matters alleged to amount to direct disability discrimination, was the claimant treated less favourably than a comparator was or would have been treated?
- 2.5 If so, are there facts from which the Tribunal could properly conclude that the claimant was subjected to that treatment, at least in part, because of his disability?
- 2.6 If so, has the respondent shown that the claimant's disability was in no sense the reason for his treatment?
- 2.7 As regards the complaint referred to at paragraph 2.2.4 above, in requiring the claimant to undertake a physical activity, (if that is proved), did the respondent subject the claimant to a provision criterion or practice (PCP) which it would apply to all applicants for the position for which the claimant applied?
- 2.8 If so, did the application of that PCP to the claimant put him at a substantial disadvantage compared with persons who are not disabled?
- 2.9 If so, would it have been reasonable for the respondent to alter its requirements by not requiring the claimant to carry out that activity?
- 2.10 With further reference to the complaint referred to at paragraph 2.2.4 above, did the requirement to carry out the physical activity amount to unfavourable treatment of the claimant?
- 2.11 If so, are there facts from which the tribunal could properly conclude that the requirement was made because of something arising in consequence of the claimant's disability?
- 2.12 If so, has the respondent shown that it was not because of such a matter?
- 2.13 If not, can the respondent justify the requirement as a proportionate means of achieving a legitimate aim?
- 2.14 In relation to any agreed act or failure to act which occurred on or before 3 July 2016, was that matter, when considered with events occurring after that date, conduct extending over a period ending after that date?
- 2.15 If not, is it just and equitable for the tribunal to hear and consider any complaint in respect of which the claim was submitted out of time?
- 2.16 If the claimant succeeds, he will be entitled to a declaration and/or compensation.

Evidence

3. The tribunal heard evidence from the claimant and from Mrs Elaine Mayler – the claimant’s mother, on his behalf, and from the following on behalf of the respondent;
 - Mr Nick Green – Head of Apprenticeships (previously Head of Healthy Start Programme)
 - Nicole Swaby – Apprenticeship Quality and Reporting Manager (Project Manager for Community Access Programmes at the material time)

 - Mr Justin Jones – Professional Head of Physiology

 - Mr Ashley Pizan – Fitness and Wellbeing Manager
4. The witnesses’ evidence was received by written statements upon which they were then cross examined. The tribunal also received in evidence the written statement of Mr Robert Anderson on behalf of the claimant, but who did not attend the tribunal to give live evidence.
5. The tribunal had before it a bundle of documents, Exhibit R1. From the documents seen and the evidence heard, the tribunal finds the following material facts.

The facts

6. The respondent is engaged in the health and fitness sector, providing services within a network of hospitals, medical clinics, fitness and wellbeing clubs and diagnostic units across the United Kingdom, and operates fitness and wellbeing facilities for business and their employees.
7. The respondent has developed a Community Programme by which it has introduced a number of initiatives being: a Traineeship Scheme; an Apprenticeship Scheme; an Intern Programme; and a Work Experience Scheme.
8. The Traineeship Scheme was a scheme to upskill and improve the employability of candidates, and was set up in 2015; the first programme running from September to December 2015.
9. The respondent, partnering with the organisation Instructability, sought to progress candidates from their achieving Level 2 Personal Trainers (PT) NVQ to a Level 3. Successful candidates on a programme run by Instructability, obtaining an NVQ Level 2 pass, were then nominated to the respondent’s programme, called “Healthy Start”, to undergo training and support to attain NVQ Level 3 PT.
10. It is here noted that, the programmes run by Instructability and the respondent’s Healthy Start Programme, were two separate and distinct programmes run by two separate and individual bodies, the nexus between

them being a channel through which candidates were nominated on to the respondent's Healthy Start Programme.

11. The claimant suffers with cerebral palsy, a condition he has had from birth, being a physical impairment which affects his mobility, and in respect of which he walks with the aid of a walking stick, and walks at a slow pace. For longer distances the claimant uses a wheelchair.
12. In 2015, the claimant, through Instructability, gained a place on the respondent's Healthy Start Programme which he successfully completed in December 2015. The claimant does not make complaint about the programme to this extent, and for which the tribunal merely acknowledges the fact of his successful completion.
13. Having completed the programme, which was structured for the attainment of a NVQ Level 3 in Personal Training, on the claimant having made known his interest in physiology, Mr Green, the Head of the Healthy Start Programme forwarded the claimant's CV to a colleague, Mr Feely, Recruitment Partner Wellbeing, within the wider Nuffield Health Organisation, although not part of the Healthy Start Programme, advising him of the claimant's interest in a physiology role.
14. Mr Feely, then forwarded the claimant's CV on to Mr Dymond, Head of Regional Clinical Leads, for review.
15. It is the claimant's evidence that, he had thereby made application for a role in physiology by sending his CV to Mr Green. The tribunal has not however been directed to any specific role in physiology for which an application was being made.
16. With regards employment and employment opportunities, the tribunal was informed by Mrs Swaby, the Project Manager for the Healthy Start Programme, that, the Programme being delivered by a third party company; *Timeline Training Company*, did not offer any guarantees for employment, or otherwise facilities into employment, the programme being to secure the NVQ Level 3 PT Qualification, albeit that, having built up a rapport with the candidates on the Programme, the Programme morphed into providing assistance and support for the candidate's employment ambitions, this being personal to the candidates, with assistance and support being offered where the Healthy Start staff were able, but that this was beyond the remit of the programme.
17. In January 2016, Mrs Swaby made enquiries as to any progress in the claimant's ambition for employment, for which it was noted that the claimant had not made any application in respect of personal training roles.
18. Discussions were also had by Mrs Swaby as to Mr Feely running a mock Assessment Day for the Healthy Start Programme candidates.

19. On 1 February 2016, Ms Anna Francis, sought to book a PT Assessment Day for the claimant, pursuant to Mrs Swaby's request for a mock assessment for the Healthy Start Programme candidates.
20. On 17 February 2016, the claimant was written to being invited to an Assessment Day under the subject "Healthy Start Recruitment Assessment Day". The correspondence stating:

"I have been passed your details by Nicole Swaby with regards your recent work experience placement with us at Nuffield Health as part of the Aspire/Healthy Start PT Programme.

In order to explore possible employment opportunities at Nuffield Health for the participants of the programme that ran last year Nicole has asked me to get in touch with you to discuss the opportunity for you to come in for a Personal Trainer (PT) assessment day. As you may recall Anna Francis, who visited you on one of your days at Barclays explained, this is the process that any candidate who is interested in working as a PT with Nuffield Health has to attend. It will give us the opportunity to review you in some exercises against the competencies of the roles. Your personal outcomes of the assessment day will then form the basis of any further conversations with my team and potential sites with regard to employment opportunities.

Please note, further to Nick Green's email I am also considering your CV for Academy Physiology Role and will provide you with an update next week on our call.

I am aware that you might not have attended an assessment day before, so we will be looking to give you as much detail as possible prior to day (sic) and also support you through the day.

Please let me know, by return email by Midday Monday 22 February, if you are interested in attending, below would be the timeline involved and how we will support you.

Timeline

Tuesday 23rd Feb – I will call you to discuss the process and next steps

24th Feb – 26th Feb – Nikki Marsden (Recruitment Advisor) – will call you to discuss the format of the assessment day, this will help you prepare prior to the day.

Wednesday 1st March – Assessment day in Epsom (Full details will be sent to you)

What we need from you?

- Submit an updated CV to me by Midday Monday 22nd February (I will get one of my team to review and provide feedback prior to the assessment day)
 - Be prepared – Nikki will discuss the format prior to the day and will be able to support with any questions you have
 - Be available to attend on the 1st March
- ..."

21. The claimant was not able to attend the scheduled assessment day on 1 March with his colleague Healthy Start candidates, for which the claimant was invited to a further assessment day by correspondence of 10 March 2016, by Ms Nikki Marsden, Recruitment Adviser, copied to Mrs Swaby under the heading "Wellbeing Personal Trainer – Assessment Centre". The correspondence stated:

“Thank you for your interest in joining the Nuffield Health team

We are delighted to advise that we would like to invite you to an assessment event. The day will consist of a number of team and individual exercises, and will provide you with a great opportunity to learn more about the role, the company, the working environment as well as meet some of the team.

Details of the day are as follows:

Location: Nuffield Health Support Centre, Epsom Gateway, ...

Arrival Time: 10am

On arrival please report to reception, and ask for Nicole Swaby...

... In order to comply with the regulations laid down in the Immigration, Asylum and Nationality Act 2006 we require you to produce proof of official documentation showing your eligibility to work in the UK. Please see the attached list of documents and bring along a document / combination of documents that applies to your status.

As a healthcare organisation, we are required by law to undertake thorough pre-employment checks. Therefore, if successful in your application you will be required to undergo a Basic/Standard/Enhanced*DBS check or PCG check* and will need to provide the relevant documentation to facilitate this.

Spaces are limited for this event so please confirm your attendance by contacting us via e-mail at careers@nuffieldhealth.com to enable us to book you a place.

We are passionate about our people and supporting you with your career progression so if you have any queries or questions in the meantime, please do not hesitate to contact us.

We look forward to meeting you soon.”

22. The claimant duly attended the assessment event on 1 April 2016.
23. It is the claimant’s evidence to the tribunal that, he had emailed Mr Feely on 4 April 2016, asking about his CV being reviewed, and whether he needed to submit a further CV, for which he states Mr Feely emailed him to invite him to the next Physiology Assessment Day, and advised that he would contact him to discuss the role and procedure on the date in depth. The tribunal has not seen any document in relation hereto. The respondent does not accept these events.
24. With regard to the claimant’s CV as submitted to Mr Feely by Mr Green, and referred to Mr Dymond for review, as referred infra, on 17 February Mr Dymond having reviewed the claimant’s CV, reported back, stating:

“I am also going to say no for Conrad. His experience is good but his CV doesn’t paint a good picture of his professionalism and attention to detail, two things I hold in high regard. Also, unsure if you know but what is an ‘Ordinary Degree-pass’ and how does this differ from a ‘normal degree classification?’” “

25. The claimant challenges this account as being force, stating that he had not been informed that his CV had been rejected. The tribunal on the evidence that it has heard, and refers to *infra*, accepts the account of the respondent as to Mr Dymond's feedback, on his review of the claimant's CV.
26. Following the Assessment Day, Ms Marsden wrote to Mrs Swaby, copy to Mr Feely, advising:
- “Hope your [sic] well, just a quick update.
I am going to call all the healthy start candidates and advise them of the outcome of the assessment day with us last week.
- Looking at the scores all look to have scored well enough to pass the assessment centre and be moved on to the next stage in the process which would be an interview at site. I would agree that Jen would be more suited to a corp site and following on from her email yesterday it seems she is not looking for something full time.
- Conrad didn't score so well at the assessment day, I will pick up any areas of development (conscious there could be some confusion with the role play brief) so will be keen to explore and understand his thoughts on that a little more. However, from the assessment day you can see he is a knowledgeable person and was very keen to impress.
- Once I have spoken with each of them today I will pass them back over to Kevin for him to explore the potential opportunities we have.”
27. It is the claimant's evidence that he was subsequently called by Ms Marsden, who congratulated him on having passed the assessment and advised that he could *“Now apply for vacancies within the organisation and that there would be no need for any subsequent assessment”*. The respondent challenges this account.
28. The tribunal does not accept the claimant's account. The tribunal finds that on the Healthy Start candidates being invited to the Assessment Day on the basis of Mrs Swaby asking for Healthy Start candidates to get experience of an Assessment Day, the correspondence of Ms Marsden above referred, appears to be addressing that cause, in that, it refers to “scores” looking to have *“Scored well enough to pass the Assessment Centre”*. This is not the same as stating that the candidates had passed the Assessment Centre, which would have been the case had the Healthy Start candidates been considered as genuine Assessment Centre Candidates, where they would have been informed that they had or had not passed the Assessment Centre.
29. The tribunal also notes the reservations expressed, as regards the claimant's performance and picking up errors for development, which would not have been necessary where the candidate had successfully passed the Assessment Centre, entitling them to move forward in the process.
30. Despite this, the tribunal accepts the claimant's evidence that on being called by Ms Marsden, she had informed him of his successful assessment, albeit not in the precise words advanced by the claimant, but words to that effect, as accepted by the claimant, which would appear to be supported by

Ms Marsden's final paragraph, of passing the candidate back to Mr Feely to explore the potential opportunities. The tribunal does not however, find that she advised the claimant that there would be no need for any subsequent assessment, which would have been a redundant statement to make, where passing the assessment was the end product as far as the Assessment Centre was concerned; once passed for personal trainers, it was then passed for all purposes as advanced by the claimant.

31. In parallel to the above, in or around April 2016, on Mr Green becoming aware of the claimant's application for the Physiologist role not being successful, on the claimant's CV being rejected, Mr Green contacted Mr Jones, the then National Manager for Physiology, asking him to meet with the claimant to see if there was anything he (Mr Jones) could do to help progress the claimant's application, as he (Mr Green) felt that the claimant had the highest potential of the candidates on the Healthy Start Programme, and felt that the claimant would be a good fit within the organization, seeking to gain for the claimant, a more thorough understanding of the role and the selection process.
32. The tribunal pauses here, as the claimant challenges the evidence of Mr Green of his having knowledge of his (the claimant's) failed application for the Physiologist role, on his CV not passing the shift process, which failure the claimant maintains was only raised months later in September 2016, when it was brought to his attention at a meeting between himself, Mr Green and Mrs Swaby, and raises the lack of documentary evidence recording the same, as support for his submission.
33. The tribunal accepts the account of Mr Green, in that, save for him learning of the claimant's application being unsuccessful, there then would have been no cause for Mr Green to take the steps he had in contacting Mr Jones, for his intervention in respect of the claimant pursuing a role in Physiology, which would not have been the case had the claimant's application been live. The tribunal accepts the respondent's evidence that on review of the claimant's CV, which had been carried out by Mr Dymond, the claimant's CV was rejected by Mr Dymond on or around 17 February 2016.
34. On Mr Jones being approached by Mr Green, Mr Jones made enquiries of his team as to why the claimant had been unsuccessful, being advised the claimant by his CV had not met the criteria for the role. In accordance with Mr Green's request, Mr Jones wrote to the claimant arranging to meet with him, the correspondence providing:

"I understand that you are interested in finding out more about the role of a Health and Wellbeing Physiologist. Would a meeting on the morning of Tuesday 26 April 2016 suit you?"
35. The claimant responded accepting the offer to meet, asking:

"Is there any preparatory work I should do ahead of the meeting?"

36. Mr Jones responded, advising that there was no preparation needed and that it would just be a good opportunity for them to discuss the role and whether it was something the claimant was interested in.
37. The meeting was subsequently moved to 25 April to accommodate the attendance of Mr Jay Brewer, Mr Jones' Line Manager. On the meeting being held, the claimant was questioned as to why he wished to work in the Physiology Department and advised of the monotonous nature of the role.
38. The claimant here maintains that, the conduct of the meeting was on lines of seeking to dissuade him from applying for the role, downplaying the company and the role and further emphasizing the difficulties of the exam for the role, and in respect of discussions about the role being monotonous, the claimant states that this was a misunderstanding of what he had said, but that he had repeatedly informed both Mr Jones and Mr Brewer, that they had misunderstood what he had said and that he did not mind the monotonous nature of the role but of which they took no notice, and that he had been bullied and harassed thereby, for which the claimant has referred the tribunal to a text message sent by his mother, on collecting him from the meeting that day that:

“Con very emotional he shouldn't have had to go through Wat (sic) he did were trying to talk him out of it but he smashed it!!”
39. It was Mr Jones' evidence to the tribunal that, at the point of meeting the claimant, the claimant did not have a place on the Assessment Day, therefore there was nothing to dissuade the claimant from, and that on addressing the demanding circumstance of the assessment, this had been to inform and prepare the claimant for the process as requested by Mr Green, and that the decision whether to put the claimant forward for the assessment was his, which he had exercised in the claimant's favour, in circumstances where he was not then compelled so to do, but instead he had done something that he had never previously done, namely, overruling the decision of his deputy, on rejecting an applicant's CV and then putting the claimant forward for assessment, thereby bypassing the requirement for the claimant to undergo a telephone interview as was normal practice, following a candidate being accepted at CV stage before progressing to the assessment stage. Accordingly, it is Mr Jones' evidence that, he would have had no reason to dissuade the claimant in any respect and had he been minded not to have the claimant progress in respect of his application, he then would have had to do nothing, and the claimant's application would have progressed no further.
40. It is further Mr Jones' evidence to the tribunal, which is not challenged, that, at the end of the meeting they shook hands and he stated that he would try to help where he could.
41. The tribunal on a balance of probabilities, prefers the evidence of Mr Jones, in that, he had not sought to dissuade the claimant in his application, although it is not to say that the claimant did not find the meeting demanding, where the claimant was facing two senior managers, where Mr

Jones and Mr Brewer sought to give the claimant as honest an insight into the process as they could, being the purpose for their arranging the meeting with the claimant, a process outside the recruitment procedure. A fact which is echoed by the following contact between the claimant and Mr Jones, and Mr Jones and his wider team in respect of the claimant progressing in respect of the Physiologist role immediately after the meeting; Mr Jones writing to his team, Mrs Swaby and Mr Feely, advising:

“Jay and I met with Conrad today to discuss Physiology as a career option. Personally, I am not convinced that Physiology will give him the answers he seeks in terms of a future career, but I would like to invite him to attend our next assessment day – Lucy, could you please arrange this? However, I must make it clear that should he fail to pass the assessment centre then unfortunately he will be unsuccessful in gaining employment within Physiology at this moment in time. However, we will provide him with detailed feedback on areas of improvement as per all candidates. He has a friend who recently left our Physiology team in Rob Anderson so I expect him to be well versed. I fully appreciate the ideology of the Healthy Start programme but must uphold standards within Physiology, hence my stance.

Conrad appears a bright and passionate chap, however he has many frustrations with his current role and unfortunately these frustrations are only like (sic) to be reignited as a Health and Wellbeing Physiologist. Namely admin and monotony of the role. I will be asking Chris Foster to meet with Conrad as a back-up should he be unsuccessful with us and partly because I feel his skillset is more suited to that of a Health Mentor.

I have agreed to invite him to shadow a health assessment, on the premise that HR okay his DBS (which he should have sent to you Nick). Mike, perhaps one of the clinical sign-offs would be appropriate?
...”

42. The claimant also, immediately following the meeting at 2.12pm, wrote to Mr Jones thanking him for the meeting, stating:

“I have forwarded the documentation you requested to Nick Green.

Once again, thank you for taking time out of your busy schedule to meet with me today.

I also appreciate your honest and frank comments about the Assessment Day being a challenge. I have always held the view that if something is easily attainable, then it is probably not worth having.

I will do my utmost to ensure that I am prepared as best I can for the assessment, and give it 110% on the day.”

43. Mr Jones replied, expressing his pleasure in having met the claimant and wishing him well for the Assessment Day, advising that the Recruitment Team would be in touch with him.
44. Later that day, Mr Green responded to Mr Jones and his Team, thanking him for seeing the claimant, further stating;

“... absolutely appreciate he needs to reach a certain minimum level of competency and its great he’s been given a chance to learn more about the role and identify his drive and ambition to deliver in the role. As you know we’re keen to give these guys an opportunity as be “sic” great to prove that we can have diversity in the role as may inspire others to apply who may not necessarily feel the role is achievable. Whatever you feel is right at the end is fine, as long as we continue to leave him with a positive impression. We’re happy to help on any feedback.”

45. In line with Mr Jones’ suggestion, on 26 April 2016, Mr Jones wrote to Mr Foster, advising:

“Jay and I met with one of the Healthy Start guys yesterday as he was interested in a role in Physiology. Obviously the Healthy Start programme is important and the company are keen to get as many of them into employment as possible. The candidate in question is currently working as a personal trainer and I feel it would be useful for him to talk to someone in Fitness to allow him to make an informed decision about where he wants to go with his career as he seems passionate about working for Nuffield Health but we are not sure whether or not Physiology is the best fit for him.

Would you be interested in meeting with him?”

46. On 26 April 2016, the claimant also wrote to Mr Feely advising of his meeting with Mr Jones and Mr Brewer on 25 April, and of it being agreed that he should attend the next Assessment Day, asking for the date. Mr Feely responded the next day, advising of the date of 20 May 2016 to which the claimant confirmed his availability by return correspondence.
47. On 28 April 2016, Mr Foster wrote to the claimant offering to meet with him, advising:

“...Justine Jones...Suggested it would be good if we had a chat. I know we’ve met a couple of times already but am more than happy to either meet face-to-face if the opportunity presents itself, or over the phone which is perhaps easier considering I’m based in the Midlands and don’t have a fixed schedule week-by-week.

When would be good for you to have a chat.”

48. In respect of this exchange, the claimant has raised issue before the tribunal of the reference in Mr Jones’ correspondence to the phrase “one of the Healthy Start guys” referencing the claimant, the claimant stating:

“I infer that he was seeing me as one of the guys of the Disability Scheme and he was not judging me by my individual merits. I found this reference derogatory....In this email, Justin seemed clear that I was interested in a role in Physiology, yet he emailed Chris Foster (head of Fitness) to suggest he talk to me about fitness. He said, “We are not sure whether or not physiology is the best fit for him”. The timing and the content of this email suggests he had already dismissed my application, as the Assessment Day was three weeks away.”

49. From a perusal of the relevant correspondence, it is clear that the claimant has misinterpreted the passage referred, which in context, clearly shows the

high regard being had for the programme and the desire to assist in finding a position within the organisation for candidates from the Healthy Start Programme and more particularly, the claimant.

50. The tribunal also here notes that, the correspondence of Mr Jones and of which the claimant references, this was as between Mr Jones and Mr Foster, in which Mr Jones' team were not privy, such that what Mr Jones says in this correspondence would have had no bearing on the physiologist role as the claimant alleges of dismissing his application, and for which the assessment had by then been arranged for 20 May 2016, and in to which Mr Jones had no involvement, a state of affairs not challenged by the claimant. Accordingly, there was no circumstance for Mr Jones to influence the process as the claimant contends. The tribunal finds no substance to the claimant's assertions in this regard.

51. On 28 April 2016, the claimant wrote to Mr Jones advising that he had received correspondence from Mr Foster, and that he was happy to meet with him, stating that he was still keen to attend the Physiology Assessment Day, advising;

“I appreciate and respect your professional opinion that I may not be the best person for the role. Perhaps we could discuss some of the issues together in order to determine whether or not they are insurmountable?”

52. The claimant then sought to attend an exam stage of the assessment on the Wednesday of that week, stating that whilst it was not normal practice, it may assist in helping to determine whether he was or was not suited for the role. After some delay, on 16 May, Mr Jones responded, apologizing for the delay of his reply, advising that:

“It is not a case of you not being the right person, but our concerns were more that the role may not be right for you based on what you were telling us you enjoyed and did not enjoy about your current role.

Let me know how you find the Assessment Day, best of luck and regardless of the outcome keep in touch. If you pass with flying colours then great, if you don't then not to worry as many come back after feedback stronger and more ready for the role.”

53. On 20 May 2016, the claimant attended the Physiology Assessment Day in Epsom, for which the claimant states there was a more positive portrayal of the role with no mention of a high attrition rate or the monotonous nature of the role, and that he performed well on the day with encouraging signs from the assessors.

54. The tribunal pauses here, as it is the respondent's evidence in respect of the monotonous nature of the role and the high attrition rate that, discussions thereon were had with applicants during the telephone interview stage, which stage was excused for the claimant and that further, at any stage where perspective applicants had sought to find out further about the role and had contacted Mr Jones, it was his practice then to address these

issues, which issues were not then matters addressed at the Assessment Day. Mr Jones has not been challenged on this evidence.

55. On 1 June 2016, the claimant made enquiry of Mr Green as to whether he had received any feedback regarding the Assessment Day, for which he subsequently informed Mr Green, that:

“Literally a couple of hours after I emailed you this morning I received feedback.

Unfortunately, my application was unsuccessful.

Be good to catch up with you at some point and discuss any other potential opportunities.”

56. Mr Green responded, advising:

“I have heard the news and although it sounds like it went well at many levels, it sounds like a bit more is needs (sic) in terms of experience and application of client experience to get you considered for the Physiology roles.
....”

57. Mr Green then sought to arrange a meeting with the claimant, further enquiring whether the claimant had been contacted by Mr Feely

58. On 8 June 2016, the claimant wrote to Mr Green giving an update, advising that he had not heard from Mr Feely, stating that he had requested details and personalised feedback, advising:

“I’ve seen Health Mentor jobs in and around the London area being advertised on the Nuffield careers website. Perhaps this role might provide me with an opportunity...”

59. The claimant then advised of his availability to meet with Mr Green.

60. Also on 8 June 2016, the claimant received detailed feedback from the Regional Clinical Lead Physiologist, Ms Joyce, who after acknowledging the claimant’s strong performance in the clinical exam, clinical interview and operational interview and of his having come across with confidence in his interview, she then addressed the claimant’s weaknesses, stating:

“The weakest elements of your assessment day included the group task with 56% and role play which scored 33%. The feedback from these interviews suggests that you have a very good clinical understanding but lacked correct application of it within a behaviour change setting. The role play you delivered was very directive and not geared around goal setting and action points that were agreed by the client. This interview was looking for evidence of motivational interviewing, coaching models and client focused goal setting.

Should you reapply for this role we recommend developing your skills in this particular area. Consider development in behavioural change skills and motivational interviewing, and to consider clients readiness and confidence levels to change their lifestyle when embarking on coaching sessions.”

61. The claimant thereon apprised Mr Green and Mrs Swaby, stating:

“I have received my feedback from Laura. I find this very helpful.

I am very frustrated with myself, but I will try hard to improve on the areas highlighted.

Hopefully I will get a chance to speak with Kevin soon.”

62. Mr Green responded on 9 June 2016, acknowledging the claimant having received specific feedback and advised that they would keep *“close to any developments in the fitness area and will keep in contact with Kevin on how things are progressing”*.

63. The claimant also on 9 June 2016, wrote to Mr Green advising of his having problems logging in to his online account, stating:

“I have having [sic] problems logging into my online account. It’s asking me to provide password 3- and it’s mppg providing a clue. I have made a few unsuccessful log in attempts. Is there an IT support who could help me? I have seen some vacancies local to me.”

64. Mr Feely also on 9 June 2016, contacted the claimant asking whether he would be free for a call the following Wednesday, owing to his interviewing commitments and then having a period of annual leave booked, the claimant responding affirming his availability for Wednesday, thereon advising:

“I am having difficulties accessing my online account. Is there IT support I can contact?”

65. Mr Feely responded by return, proposing a time for the meeting on Wednesday, and further enquired whether the claimant was looking to apply for a role. The claimant responded advising that he was looking at a mentoring role, stating:

“I see there are some vacancies in London and Greater London. It’s the log in section to manage your CV and apply for roles that I’m having difficulty accessing.”

66. Mr Feely thereon made enquiries as to whether the closing date for the role was before the date of their meeting. The claimant responded that, he would get back to Mr Feely. The tribunal has received no further evidence of the claimant further advising Mr Feely thereon.

67. In respect of the claimant’s correspondence to Mr Green, Mr Green responded, asking whether the account of which the claimant referred, was a recruitment online account. The claimant responded, advising:

“It’s the online account that allows you to upload your CV, view vacancies and submit an application. Its asking me for an answer to security question 4, but its not providing me with the question.”

68. On 15 June 2016, the claimant had his meeting with Mr Feely, via telephone, for which the claimant states in evidence to the tribunal, that:

“I emailed Nick Green to advise that I’d had a conversation with Kevin Feely and that he would put my CV forward for the health mentoring positions. This role would give me the opportunity to develop the area that was highlighted as lacking in experience.

69. On 30 June 2016, the claimant chased Mr Feely as to the mentor role, asking as to whether there was an Assessment Day. Mr Feely responded advising that the positions had been filled internally, further enquiring whether he would be prepared to enter into the organisation as a Personal Trainer.
70. The claimant here submits that Mr Feely advised him of a new role having become available in Chingford, to which the claimant expressed his interest and for which Mr Feely advised that he would follow it up. The claimant complains that Mr Feely did not then do so. The respondent challenges these events as not taking place. In cross examination, the claimant acknowledged that he had no evidence of this event or of the post referred to, and there is no evidence of the claimant chasing Mr Feely up thereon, which is without keeping to the claimant’s normal practice of chasing up action from parties where they have undertaken to do something, such that the tribunal, on a balance of probabilities, does not find this to have been a proposal of Mr Feely as the claimant contends.
71. The tribunal further pauses here, as the claimant has presented a claim that the respondent has sought to thwart his efforts of applying for roles, by tampering with the IT systems. In cross examination, the claimant accepted that there was no evidence of the system having been tampered with and that he could not challenge the respondent’s evidence that tampering with the IT systems as alleged by the claimant was not technically possible. The tribunal accordingly accepts the respondent’s evidence on this point that, there had been no tampering with the IT system.
72. For completeness, the tribunal also here records that the claimant raised in the tribunal, his having a meeting with Mr Green at Epsom, at which the claimant’s strengths in physiology was discussed and of his considering a role in administration in a supporting role. This was not an issue for the tribunal’s determination, which the tribunal here does not consider further, otherwise than to note the same.
73. It is also here noted that the claimant having raised complaint that he had been interested in a number of positions and been unable to submit his application as above referred, and that the respondent had thereby thwarted his efforts, the tribunal accepts the respondent’s evidence which has not been challenged by the claimant that, in the instances where the claimant informed the respondent of his difficulties, the respondent ensured that his application was forwarded to the appropriate department for consideration.
74. With regards the claimant having difficulties submitting applications, on 1 August 2016, Mr Foster, Professional Head of Fitness, on behalf of the claimant contacted Mr Pizan, Fitness and Wellbeing Manager, stating:

“I understand that you’re recruiting for a WPT vacancy at Stoke Poges? I have attached a CV from Conrad Tokarczyk who I have met on a couple of occasions in the past, most recently when he was completing his L3 PT qualification under our guidance via the Healthy Start programme.

Conrad lives close to the club and as such is very interested in applying, but has been having some issues with the website.

Please could you pick up with Conrad and perhaps arrange to meet him at the club?

Conrad has previously completed (passed) a PT assessment centre which you can discuss with him when you meet. I’m sure he could be a great addition to your team, but will let you pick up from here.”

75. The claimant was advised of the above and advised to contact Mr Pizan directly.

76. On Mr Green having been copied into correspondence from the claimant as to his difficulties in applying for a post at Stoke poges, Mr Green on 2 August 2016, made enquiries of the claimant as to exactly which post he had been interested in, the claimant advising that it was a Part-time Wellbeing PT role to which Mr Green responded to the claimant, copy Mrs Swaby and Ms Dickenson, Recruitment Administrator, stating:

“The only issue is accessibility. I hear there is stairs but no lift up to the gym. It may be you need to go there and look at access and work arounds, but wanted to give you a heads-up.

Lucy, are you able to advise on accessibility round the gym/site?”

77. Ms Dickenson responded, writing to Mr Green and the claimant, copying Mrs Swaby, and advised that she had not been to the site and that having checked with Nikky Marsden in her office, she could not recall the accessibility. They asked whether they needed her to call the GM.

78. The claimant responded advising that he was able to manage stairs if a handrail was present, further advising that the gym where he currently worked had two flights of stairs.

79. The claimant has here submitted that, by the respondent raising issue about accessibility, this was further evidence of the respondent trying to dissuade him from pursuing and gaining employment within the respondent’s establishment.

80. From a perusal of the correspondence, it is evident that the respondent was addressing issues to facilitate the claimant’s successful engagement and not as the claimant advances seeking to thwart his efforts.

81. Arrangements were subsequently made for the claimant to meet Mr Pizan. Mr Pizan advised on 3 August 2016, that he was available on the morning of 4 August for a “sit down”, for which a meeting for 9am was agreed. Mr Pizan then advised;

“Please come in gym kit, all black preferably.

We will sit down do a formal interview and if we have time go up to the gym, for some practical work.”

82. The sit down duly took place on 4 August, at which there is no issue arising; it not being in dispute that discussion was had as to the role, that the claimant had passed the Nuffield PT Assessment Day, and had come through the Healthy Start Programme and in respect of which, on running out of time, arrangements were made for the claimant to further meet Mr Pizan. The email chain in respect thereof as presented to the tribunal, being under the title “*Practical*” referencing the practical stage to the recruitment process. The meeting was arranged for 18 August 2016.
83. At the further meeting, it is the claimant's case that:

“I met Ashley Pizan for the second time for a practical assessment. I thought at the time that this wouldn't have been necessary as I had already passed the practical on 11 April 2016, four months earlier. During this assessment Ashley Pizan asked me to carry a piece of gym equipment, an attachable metal platform 40cm by 40cm, across the gym floor.... Ashley could see that I was using a walking stick so to ask me to do this was inappropriate and I felt humiliated as I had to say that I didn't feel safe doing that.... Mr Pizan pointed at the item and said “Can you carry that over here” and he walked off towards a machine, expecting me to follow him with the item... I believe the fact that I was using a walking stick would make it very clear that carrying a large heavy object simultaneously would be difficult.”
84. And for which he claims discrimination on grounds of disability.
85. It is Mr Pizan's account of the meeting that, on the claimant attending for the practical, he had asked the claimant to demonstrate how he (the claimant) would teach a squat, for which he states the claimant then went and picked up a fixed barbell, which he had not requested of the claimant, accepting that the claimant had presented with mobility difficulties, albeit he had not had a walking stick, but had attended the site on crutches, which he had left downstairs, for which Mr Pizan states the claimant stated, he was able to function without them. Mr Pizan was clear as to the events that day, being a standard procedure he used on these occasions.
86. On a balance of probabilities, the tribunal prefers the evidence of Mr Pizan, as there are a number of unexplained circumstance that the claimant, and the tribunal on a careful examination, have been unable to explain or rationalize, were the claimant's evidence here to be preferred.
87. On the item that the claimant states he was directed to lift being a specialist attachment, that only functions on its specialist parent equipment, which would not require its movement therefrom, and awkward to carry away from the parent equipment, it questions Mr Pizan's motive, it then being a maneuver that would not present itself in the normal functioning of the gym. Equally, had the request been made of the claimant, and on the claimant not able so to do, why then was this inability to perform the task, not then featured as a reason for the claimant not passing the onsite interview, which

was not the case. Further, where Mr Pizan held a practice which he followed on the practical element of these interviews, why would he deviate therefrom as the claimant alleges. In the circumstances of this case, the tribunal does not find the claimant's claims as to the conduct of the practical interview plausible.

88. On 1 September 2016, the claimant not having had a response from his interview, he contacted Mr Foster who directed him to contact Mr Pizan directly. The claimant wrote to Mr Pizan on 2 September, stating:

“Following on from our meeting exactly a fortnight ago, I was wondering if there has been any developments? “

89. Mr Pizan responded later that day, informing the claimant that he had not been offered a position, advising that:

“Today I completed my interviews.

After careful consideration, unfortunately we will not be offering you a position at this time.

We felt other candidates has [sic] more experience in the Personal Training area.

Feedback

I thought you came across great, you also have a fantastic personality.

Skill wise the area which I feel you need to develop is the Personal Training consultation. This is a key area in finding out a client's needs and goals.

I've attached a basis consultation document for you to review. I hope you can go away and work on this area and wish you all the success in the future.”

90. The claimant thereon raised issue with Ms Farmiloe, from Instructability, advising of his dissatisfaction with Mr Pizan's response, challenging Mr Pizan's reasoning for his rejection, further stating:

“...

3. I am dissatisfied that I only got a response from Ashley due to chasing him. He was also slow to respond to Chris Fosters initial email. I do not believe that he was going to contact me today on his own accord – that's just another lie.

Combined with the very bad experience I encountered with the physiology dept, this does not show Nuffield health in a good light. Changing or modifying the recruitment process to discourage or intimidate a job applicant is not acceptable from a moral or legal standpoint.

You also do not expect employees of Nuffield to send flippant and derogatory emails. I'm sure the likes of Barclays, HSBC and Bank of America would not want to associate themselves with this kind of conduct.

With regards to the awards ceremony, I strongly object to Nuffield Health receiving an 'inclusion award' at this moment in time.

I appreciate that this is a strongly worded email, but I'm feeling emotional this evening.

I am very grateful to the InstructAbility program, particularly yourself and Candice. My frustrations are directed entirely towards Nuffield Health”

91. Ms Farmiloe referred the claimant's concerns to Mrs Swaby, who then held a telephone conversation with the claimant on 16 September 2016, which the claimant recorded, a transcript of which is at R1 page 158A to 158U.
92. A further meeting was then held between the claimant, Mrs Swaby and Mr Green on 27 September 2016, which the claimant again recorded, the transcript of which is at R1 page 158V to 158AJ.
93. The tribunal mentions the above for completeness, however they are not material to the findings of fact above made by the tribunal, or relevant to the issues for the tribunal's determination.
94. It was the claimant's evidence to the tribunal that, after seeing the full picture:

“... I was dissuaded from the first job, then turned down for it, then my account was blocked so I could not apply for other jobs, then, when I applied for a second job that I was supposed to be suitable for, I was made to go through a second assessment, I was asked to carry heavy equipment despite my disability, and then I was rejected for the second job for inadequate reasons, I realized that the respondent did not want to recruit me and the most obvious reason was my disability. They deviated from the recruitment process, two senior managers spoke to me unnecessarily before I applied for a role, I was palmed off to another department before I had even sat the assessment. In an email dated 25 April 2016, ... ;Justin Jones says “I fully appreciate the ideology of the Healthy Start Programme but must uphold standards within physiology...” I felt that they had already dismissed me for the position without me having even undergone the assessment. It only dawned on me that I was discriminated against for the physiology role after the respondent's subsequent actions. ...”

95. The claimant presented his complaint to the tribunal on 8 November 2016.

Submissions

96. The parties presented oral submissions and referred the tribunal to the following authorities:
 1. Tyagi v BBC World Service [2001] EWCA Civ 549
 2. Okoro and another v Taylor Woodrow Construction Limited and others [2012]EWCA Civ 1590
 3. British Coal Corporation v Keeble and others [1997] IRLR 336
 4. Robertson v Bexley Community Centre [2003] EWCA Civ 375
 5. Aziz v FDA [2010] EWCA Civ 304
 6. Igen Limited and others v Wong [2005] EWCA Civ 143
 7. Laing v Manchester City Council and others [2006] IRLR 748
 8. Madarassy v Nomura International Plc [2007] EWCA Civ 33
 9. Grant v H M Land Registry [2011] EWCA Civ 769

10. Transport for London and McGill v Aderemi UK EAT/0006/11/SM

11. Hewage v Grampian Health Board [2012] UK SC 37

97. The submissions and the authorities have been duly considered.

The relevant law

98. The protection from disability discrimination afforded by the Equality Act 2010, only applies in respect of such persons who fall within the Act's definition of a disabled person.

99. For the purposes of the Equality Act, a disabled person is a person who has a disability (s.6(2)). A person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities (S.6(1)). The burden of proof is on the claimant to show that he satisfies this definition.

100. In determining how the effects of impairment may or may not manifest itself as having a substantial and long-term adverse effect on an individual's ability to carry out normal day to day activities, recourse is to be had to the Code of practice on Employment (2011) and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)".

101. In determining whether a person has a disability, this is provided for by Part 1 of Schedule 1 to the Equality Act 2010.

102. The time when disability is to be assessed, namely whether there is an impairment which has a substantial adverse effect on normal day to day activities, is the date when the alleged discrimination act occurs. See *Cruikshank v VAW Motor Cars Limited* [2002] ICR 729, EAT.

103. Whether a person may or may not come within a definition of disability using another statute does not affect whether that person satisfies the definition of disability as contained in s.6(1) of the Equality Act 2010. (See *McDougall v Richmond Adult Community Services* [2007] ICR 1567, EAT).

104. What amounts to a physical or mental impairment, the tribunal is aided by the authority of *McNicol v Balfour Beatty Rail Maintenance Limited*; and *Ruthamere v Sony Music Entertainment UK Limited* [2002] ICR 381, EAT, that, the definition of physical and mental impairment under the Disability Discrimination Act was ... "some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition." *McNichol v Balfour Beatty Rail Maintenance Limited* [2002] holding that "impairment" in this context bears:

"Its ordinary and natural meaning ... it is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects."

105. It is fair to say that the degree to which a person is affected by a particular impairment will, in most cases, determine whether that person is afforded the protection of the Equality Act. Accordingly, a person suffering from diabetes does not automatically get protection and it is for them to show that they are affected by the condition to an extent that brings them within the ambit of the Act.
106. By Appendix 1 paragraph 7 to the Equality and Human Rights Commission's code of practice on Employment (2011):
- “There is no need to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.”
107. A person who has a progressive condition, the result of which is that they have an impairment that has (or had) some effect on their ability to carry out normal day to day activities, but the effect is not (or was not) substantial, will be taken to have an impairment which has a substantial adverse effect, if the condition is likely to result in such an impairment. In this regard “likely” means “could well happen” (see *SCA Packaging v Boyle* [2009] ICR 1056, HL, and paragraphs 8(1) and (2) of Schedule 1 of the Equality Act.)
108. By s.212(1) of the Equality Act, “substantial” is defined as meaning “more than minor or trivial”.
109. By Appendix 1, paragraphs 8 and 9 of the Equality and Human Rights Commissions Employment Code, guidance as to the meaning of “substantial” provides:
- “The requirement that an effect must be substantial reflects the general understanding of disability as a limit going beyond the normal differences and ability which might exist among people. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; because of a loss of energy or motivation.”
110. By the guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), at D4, it provides that:
- “The term “normal day to day activities” is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether activity is a normal day to day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, “normal” should be given its ordinary everyday meaning.
111. On a claim of unlawful direct discrimination on the protected characteristic of disability, it needs to be established that, there was less favourable treatment and that the reason or an effective reason was that protected characteristic. Sometimes a claimant is able to point to someone else in the respondent's employment who has been treated differently in the same

circumstances. Indeed, it is a requirement that a comparison must be on the basis of someone else who is in the same or not materially different circumstances.

112. Where there is no person who actually fulfils the requirement of the statutory comparator, it is necessary to construct an imaginary or hypothetical comparator, a non-existent person who, had they existed and had the same circumstances as the claimant, would have been treated more favourably.
113. It then becomes incumbent on the claimant to show that such comparator, whether actual or imaginary, would have been treated less favourably. At this point the test of comparison starts to merge with the test of motivation. The answer to the question “what is there to show that the actual/hypothetical comparator would have been treated differently?” becomes almost the same as the answer to the question “what was the reason for the treatment?” Indeed, it is sometimes easier to go straight to the question of what was the motivation for the treatment rather than take it in the logical order, because if the answer to the question of motivation is answered in favour of the claimant, it becomes relatively easy to find that there has been different treatment.
114. Proving unlawful discrimination is a difficult task for a claimant. No employer will admit to it and indeed discrimination is often operating at an unconscious level. S.136 of the Equality Act 2010, assists the claimant in this regard. Where the tribunal finds facts from which the tribunal could decide in the absence of any other explanation that a respondent had unlawfully discriminated, the tribunal must hold that the contravention of the Act occurred, unless the respondent shows that it did not contravene the Act. In this regard, it is for the claimant to show facts from which the tribunal might infer unlawful discrimination. Those facts may emerge either from the claimant’s own evidence or from the evidence of the respondent, and is for the tribunal to infer from a consideration of all the facts in the case. If this is not established, the claim fails at that point. If there are such facts, the onus is on the respondent to show that the protected characteristic was not part of their motivation.
115. The claimant may not be able to point to a comparator whose circumstances are not materially different from his own, the statutory comparator, but may point to cases where there are similarities, and if he shows differential treatment it may help him move the burden onto the respondent.
116. Normally speaking, the fact that the respondent has acted unreasonably in a particular regard, does not in itself amount to facts that would raise the inference of unlawful discrimination. It is necessary to remark further that it is simply not enough to show that the claimant was treated in a particular way, and that he is of a particular protected characteristic. There are two stages to the test, not only must there be shown less favourable treatment, but it must be shown that the treatment was because of the protected characteristic, or that it can be so implied and upon which the burden, as above stated, shifts to the respondent.

117. With regards recruitment, by the Equality and Human Rights Commission, Code of Practice on Employment (2011) paragraph 16, it is unlawful for an employer to discriminate in any of the arrangements made to fill a vacancy, in terms of employment that is offered or in any decision to refuse someone a job, and must make reasonable adjustments for disabled candidates, where appropriate.
118. By virtue of S.20 of the Equality Act 2010, an employer is under a duty to make reasonable adjustments where any provision, criterion or practice (PCP) that they apply, or any physical feature of premises that they occupy, places a disabled person at a substantial disadvantage in comparison with those who are not disabled. Once the duty is engaged, the employer must take such steps as it is reasonable for them to take to prevent the PCP or physical feature having the disadvantageous effect. Failure to comply amounts to discrimination against the disabled employee.
119. Paragraph 6.10 of the 'Code of Practice on Employment provides guidance on the meaning of 'provision, criterion or practice'. It states that the term is to be construed widely, to include:
- “formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.”
120. The disabled person must be placed at a substantial disadvantage compared with people who are not disabled before the duty to make reasonable adjustments will arise, and according to para 6.14 of the Code of Practice on Employment:
- “whether the disadvantage exists in a particular case is a question of fact and is assessed on an objective basis.
121. On a complaint for discrimination arising from disability, it is necessary to show that the claimant has suffered unfavourable treatment because of something connected with their disability, where the employer cannot show that the treatment was a proportionate means of achieving a legitimate aim. It is however a defence for the employer to show that they did not know or could not reasonably be expected to know that the person has the disability.
122. Unlike a complaint for direct discrimination it is not necessary that the less favourable treatment complained of, is because of the disability itself the question being whether the disabled person has been treated unfavourably because of something arising in consequence of their disability
123. Equally, unlike indirect discrimination which occurs where a disabled person is or would be disadvantaged by an unfavourable provision criterion or practice (PCP) which apply to everyone, which puts, or would put, people sharing the disabled person's disability at a particular disadvantage compared to others, and puts, or would put, the disabled person at that disadvantage, for discrimination arising from disability, it is only necessary for the disabled person to show that they have experienced unfavourable

treatment because of something connected with their disability. There is no necessity for a comparison of the disabled persons treatment with another person. There only needs to be demonstrated unfavourable treatment because of something arising as a consequence of the disability.

124. As to what amounts to unfavourable treatment, paragraph 5.7 of the code of practice on employment (2011) gives guidance, that:

“for discrimination arising from disability to occur, a disabled person must have been treated unfavourably. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interest of a disabled person, they may still treat that person unfavourably.

125. As to what amounts to something arising in consequence of disability, paragraph 5.8 to 5.10 of the code of practice on employment (2011) provides:

The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

So long as the unfavourable treatment is because of something arising in consequence of the disability it will be unlawful unless it can be objectively justified or unless the employer did not know or could not reasonably have been expected to know that the person was disabled.

126. With regards knowledge, it is not enough for the employer to show that they did not know that the disabled person had the disability, they must also show that they could not reasonably have been expected to know about it; an employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers are to consider issues of dignity and privacy and ensure that personal information is dealt with confidentially

127. An employer will be assumed to know of the disability where an employer's agent or employee (such as an occupational health advisor or a HR officer) knows, in that capacity, of a worker's or applicants or potential applicant's disability, in which circumstance the employer will not normally be able to claim that they did not know of the disability. An employer will not however be imputed with knowledge, where information is gained by a person providing services to workers independently of the employer, and will be the case even if the employer has arranged for those services to be provided, see paragraphs 7.17 to 5.19 of the code of practice on employment (2011)

Conclusions

Is the claimant a disabled person pursuant to s6 of the Equality Act 2010?

128. The respondent has conceded that the claimant was a disabled person for the purposes of s.6 of the Equality Act 2010 suffering with cerebral palsy. The tribunal finds accordingly.

Did the respondent followed a different procedure from its normal procedure in relation to the claimant's application for the physiology post on 20 April, by asking him to attend a meeting with Justin Jones and Jay Brewer

129. The tribunal finds that there had been a change in procedure in relation to the claimant's application for the physiology post on 20 April. This had been at the request of Mr Green on the claimant's CV being rejected, Mr Green asking for the change to accommodate the claimant's application in circumstances where the claimant was not then a candidate for the role of Physiologist. The tribunal cannot however, find any basis on which to found the claimant's claim, where the change of procedure was to the claimant's benefit, and where there was then no procedure to account for the special circumstance of the request from Mr Green, promoting a candidate from the Healthy Start Programme.

130. The tribunal can find no evidence of the claimant being less favourably treated thereby, than candidates who were not disabled, and whose CV was not approved so as to pass the CV sift stage, and whose application was rejected, and which application was not then processed further.

131. The tribunal can find no less favourable treatment of the claimant, to base a claim for direct discrimination on the protected characteristic of disability.

Was the claimant denied the opportunity to apply for posts of Physiologist and Personal Trainer continuously between May and June 2016 by the respondent not notifying him of the existence of such posts in spite of him having signed up with the respondent to receive information about such posts.

132. The tribunal has found no evidence of the claimant being denied the opportunity to apply for posts of Physiologist or Personal Trainer between May and June 2016, by a lack of notification of the existence of such posts.

The claimant has failed to identify any such posts that he says was in existence that he was not then notified of, but to the contrary, the tribunal finds in respect of all the posts the claimant informed the respondent of, as having an interest in, these were acted on and applications made on his behalf where he had been unable so to do himself.

133. The tribunal finds no substance to the claimant's claim in this respect.

Was the claimant deterred from making application for the position of Physiologist and from attending an assessment day.

134. As set out at paragraphs 41,43 and 50 above, the tribunal does not find the circumstance to be that as contended by the claimant. The tribunal finds no substance to the claimant's contention in this regard.

Was the claimant asked at an assessment on 1 August 2016, to perform a physical activity, namely to carry an object while walking as part of the assessment for the post of Physical Trainer.

135. As set out at paragraphs 85 - 87 above, the event complained of being that on 18 August, and not 1 August, the tribunal prefers the evidence of Mr Pizan. Having so found, the tribunal does not find facts upon which to found the claimant's contention for direct discrimination or of there having been a failure to make reasonable adjustments or otherwise of discrimination arising from disability, on Mr Pizan asking the claimant to demonstrate how he would teach a squat, without further instruction as to the use of equipment.

136. The tribunal does not find evidence support the claimant's factual assertions. The tribunal finds no substance to the claimant's contention.

Was the claimant not offered employment on two occasions: the first on 8 June 2016 in relation to the position of Physiologist, and the second on 2 September 2016, in relation to the position of Personal Trainer.

137. It is not in dispute that the claimant was not offered employment in relation to the position of Physiologist on 8 June 2016, or that of Personal Trainer on 2 September 2016. However, the tribunal has found no evidence to suggest that disability was a consideration.

138. On the claimant's application in respect of the Physiologist role having failed, owing to factors of his performance in client role play, evidencing motivational interviewing coaching models, and focused goal setting deficiencies, and personal training consultations relevant to finding out client needs and goals in respect of the Personal Trainer position, where the claimant's disability of cerebral palsy did not then impact on his performance in respect of these matters, and in which there is otherwise no evidence to suggest that considerations of disability were then at play. It is also relevant here to note the evidence of the respondent of engaging persons with

disabilities in physiology and as a Personal Trainers, which evidence was not challenged by the claimant, such that the tribunal equally finds this evidence to militate against the claimant's contentions.

139. For the reasons above stated, the tribunal finds no evidence from which to conclude or otherwise draw any inferences from, that considerations of disability were at play in respect of the events of which the claimant complains, so as to base a claim for discrimination on the protected characteristic of disability.
140. Having considered each of the events of which the claimant complains, the tribunal does not find the claimant to have suffered discrimination on the protected characteristic of disability. The claimant's claims are accordingly dismissed.

Employment Judge Henry

Date: 21/01/2019.....

Sent to the parties on: .22/01/2019..

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For the Tribunal Office