EMPLOYMENT TRIBUNALS

Claimant: **Ms J Mears**

Respondent: **The University of South Wales**

Heard at: **Cardiff** **On:18th, 19th, 20th and 21st March and on 6th August 2019**

Before: **Employment Judge A Frazer**
Members:
Ms M Walters
Mrs K George

Representation:
Claimant: Miss C Ibbotson (Counsel)

Respondent: Mr A Joseph (Counsel)

JUDGMENT

1. The unanimous decision of the Tribunal is that the claimant's claims for failure to make reasonable adjustments and discrimination arising from disability are well-founded. Her claim for direct discrimination is dismissed.

REASONS

Introduction

1. The claimant brings claims for a failure to make reasonable adjustments, discrimination arising from disability and direct discrimination arising out of a restructuring of the respondent's Print Services department in 2017, the consequent redundancy of her post and the selection process for the new role that she applied for in the restructure.

2. The Tribunal was provided with an Agreed List of Issues at the start of the hearing. Mr Joseph added that knowledge was also an issue. The issues for the Tribunal to determine are as follows:

Reasonable Adjustments s.20 Eq Act 2010

i) Whether the requirement to take part in an interview selection process was a PCP;
ii) Whether the PCP put the Claimant at a substantial disadvantage compared to persons who were not disabled;
iii) Whether the Respondent took reasonable steps to avoid the disadvantage, specifically giving the Claimant the time to read the questions and formulate answers before going into the interview and taking into account the Claimant's past experience and performance rather than solely basing the decision on performance at interview.

Discrimination arising from disability s.15 Eq Act 2010

iv) Whether the Claimant had a reduced ability to perform at interview;
v) If so, was it something that arose in consequence of her disability?;
vi) Whether the decision not to appoint the Claimant without going through a competitive selection process; the decision not to select her for the role of Print Production Supervisor and the failure to consider her for the role of MDF Fleet Supervisor was unfavourable treatment;
vii) Whether the unfavourable treatment arose in consequence of the Claimant's reduced ability to perform at interview or in consequence of her extended sickness absence;
viii) Was the Respondent able to prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim, namely undertaking a fair and reasonable redundancy selection process?

Direct Discrimination s.13 Eq Act 2010

ix) Has the Claimant established facts from which the Tribunal could infer that she was treated less favourably than an actual or hypothetical comparator. The hypothetical comparator would have the characteristics of a non-disabled employee who was at risk of redundancy and the actual comparator would be the non-disabled employee appointed to the role, namely James Oldfield.

The Hearing

3. There had been a preliminary hearing on the question as to whether the Claimant was disabled on 22nd August 2018. Employment Judge Emery determined that the Claimant was disabled as defined by the Equality Act 2010 for the period of the Respondent's redundancy exercise, from June to August 2017. At paragraph 20 of his judgment he concluded, *'I accepted that throughout 2017 the claimant's impairment caused substantial adverse effects on her cognitive abilities – i.e. difficulties*

concentrating and memory issues because of the continuing effects of the brain aneurism and surgery – and that this constituted a disability. I also concluded that the physical impairments – the weakness with her hand and legs, including difficulties bending, lifting and carrying, difficulties walking, were substantial impairments on her ability to lift, carry and walk and also constituted a disability'.

4. The Tribunal heard evidence from the Claimant and from Peter Davey, Tony Evans and Julie Lindsay for the respondent. Christopher Sutton's witness statement dealt with the claimant's appeal against the decision not to select her for the new role. He was not present at the tribunal but upon Miss Ibbotson indicating that she would have only had a few questions for him and upon his witness statement appearing to be uncontentious, it was taken into consideration. The Tribunal had a documents bundle running to 244 pages. After hearing evidence and submissions from both counsel the decision was reserved.

5. During deliberations it came to the Tribunal's attention that within 'The Issues' section at paragraph 1 of the Preliminary Hearing Judgment Employment Judge Emery had stated; 'The issue to be determined at this hearing is whether the claimant was disabled ….At the outset of the hearing Mr James for the Respondent clarified that the only issue in dispute on the issue of disability was whether the condition was 'substantial' as defined by the Equality Act 2010. Mr James stated that the Respondent **was on actual knowledge of her condition (**writer's emphasis in bold) and he also stated that the respondent was no longer challenging that her condition was long term'. The Tribunal considered that this was somewhat ambiguous and invited the parties in to make submissions on whether this was a concession as to knowledge by the Respondent which would bind it and the extent to which knowledge was an issue in the case (i.e. for which claims). Both counsel attended on 6th August to give oral submissions, having both filed skeleton arguments. The Claimant's representative's case was that this was a concession but that her note was that the issue as to knowledge was only in relation to the s.20 claim and not the s.15 claim. The Respondent's representative's case was that this was not a concession and that the issue as to knowledge was in relation to both the s.20 and s.15 claims. Having heard argument, the Tribunal determined by a majority that the statement was not a concession. It would have been illogical for the Respondent to have disputed disability yet at the outset conceded knowledge. We found that the wording 'actual knowledge of condition' was not broad or definitive enough to be a concession as to knowledge of disability. We also found that if the respondent had conceded disability that would have been entirely inconsistent with the way in which the case was subsequently defended. What the Respondent had effectively conceded was that it knew that the Claimant had a brain aneurism but not that she was a disabled person. We also noted our notes in relation to knowledge. The note that we had was that the Respondent's defence related to knowledge in relation to adjustments. This was in line with the Claimant's

Counsel's note on her List of Issues. Mr Joseph did not have his notes with him.

Findings of Fact

6. The Claimant was employed by the Respondent as a Print Room Supervisor at its Treforest branch. On 1st January 2017 she suffered a life-threatening brain injury in the form of a subarachnoid haemorrhage caused by an aneurism on an artery. She was placed in an induced coma and had major surgery on 2nd January 2018 for insertion of a right frontal EVD. She had a further four operations including the insertion of an IVC filter on 27th January 2017 as she had also suffered a pulmonary embolism. She was discharged on 10th February 2017. On 14th February 2017 she had her IVC filter removed and started anticoagulant therapy and injections to the stomach to prevent any further blood clots. On 8th March 2017 she attended hospital A and E after suffering further headaches and was readmitted for a lumbar puncture and further tests.

7. During the first four or so months of 2017 the Claimant was in touch with Peter Davey, line manager, who was also a family friend. The communication between the Respondent and the Claimant in the early stages of her recovery was informal and tended to go between the Claimant's fiancée and family and Mr Davey's wife. There are no formal records of sickness absence or other minutes of conversations about the claimant's health during this time period. Notably there was no occupational health input.

8. In February and March 2017 a collective consultation process took place with recognised trade unions and representatives in relation to the proposed restructure of the University's Print Services department. Once the collective consultation process had concluded a meeting was arranged for 31st March 2017 with the Print Services employees to provide them with further details and to discuss the next steps. Mr Davey telephoned the claimant on 30th March to inform her that the meeting was taking place and to ask how she would prefer to receive information about the meeting and in relation to the restructure going forwards. This was the first time that the Claimant had had any contact with her employer directly since she had been off sick. Mr Evans emailed the Claimant and other members of staff on 7th April attaching details of the proposals (p.56). On 24th April 2017 he emailed staff again with some alternative models for consideration, welcoming people's views.

9. The background to the restructure was that the overall volume of work processed by the Print Services Department was reducing significantly, resulting in the department operating at a loss, particularly in the Cardiff campus. The proposed change was that there would be a single role in Treforest, namely that of Print Production Supervisor, rather than a role in each campus. The Claimant's role was affected.

10. It was Mr Evans' evidence, reflected by the email conversation that he had with Julie Lindsay on 25th May, that the new role encompassed 100% of the Claimant's old role whereas only 50% of Alison Parsons' role was included. The evidence that we heard was that it was Julie Lindsay's decision to pool the Claimant and Alison Parsons and to require them to undergo a competitive selection process. Under cross-examination Mrs Lindsay stated that there was a policy that if a person's job was a 50% match for a role they ought to be pooled. She stated that this was not a written policy but it was something that had been agreed with the unions as part of the consultation. She stated that the policy was that in order for a person to be slotted in, there had to be a 70% match but if there was more than one person with a 50% match, that rule would not apply. The policy was not mentioned in Mrs Lindsay's witness statement and we were not taken to any documentation in the bundle where it was written down.

11. We heard evidence that Mrs Lindsay had advised Peter Davey and Tony Evans to score the candidates using an objective scoring process but that they had decided to base their decision entirely on how the candidates performed in interview. The rationale was that there was no need to use a scoring matrix if there were just two candidates.

12. In late May 2017 there was some discussion between Tony Evans and Julie Lindsay regarding pooling. There were three employees that were identified for pooling for the new centralised role: one employee who sadly died on 13th May 2017; Alison Parsons and the Claimant.

13. The claimant saw the email from Mr Evans and asked to discuss things with him. A telephone consultation then took place with her on 26th April 2017. The claimant agreed with the proposal that combining the university's print and design services into one role at the Treforest site. During that conversation Mr Evans discussed with the claimant whether she required occupational health input. She indicated that she did not feel ready to return to work but that she would attend an interview. In her evidence to us, which we accepted, the claimant said that she felt that she had to get back to work because her sick pay was coming to an end and that she felt some pressure to attend an interview. She said that she needed to return to work for financial reasons.

14. On 26th April 2017 Julie Lindsay emailed Tony Evans enquiring whether he had offered the Claimant the opportunity to meet with Occupational Health for additional support. Mr Evans replied that he had spoken to the Claimant that morning regarding whether occupational health should be involved. He said that the view that he shared was that while she was under the Consultant there was not much that they could do. He suggested that when she returned to work there was value in occupational health assessing what they needed to consider for any return. Julie Lindsay agreed with that course of action.

15. On 18th May 2017 the Claimant indicated that she was going to return to work on 3rd July. This prompted a referral to occupational health on 23rd May and the Claimant was written to, enclosing a copy of the referral form. The Claimant stated, which we accept, that she never received the referral form but was only aware of the referral when occupational health contacted her to arrange the appointment. Julie Lindsay sent the form to Mr Davey on 23rd May. He filled it in and sent in back to Julie on 1st June 2017. On 6th June Julie added some additional questions that she wanted occupational health to look at. Peter Davey confirmed that he was happy with those additional questions and the referral was sent off that day.

16. The specific questions identified by Ms Lindsay on the referral are as follows: '*Jeanette plans to return to work on Monday 3rd July following her long-term absence and due to the nature of the absence would need a phased return'*…. and….. '*Jeanette is due to be asked to go through a selection process for a role following a restructure exercise. We will be looking to make adjustments to the selection process. Any specific recommendations in this regard would be appreciated.'* On the referral form it is stated that the reason stated on the medical certificate on 1st January 2017 was 'cranial vascular aneurism'.

17. The occupational health referral form was a pro forma document with tick boxes alongside a number of questions that the employer could ask occupational health in relation to the fitness of a particular employee. We noted that none of the specific requests for questions to be answered at p.81 were ticked and the only information that formed the basis for the referral was that the claimant planned to return to work on a phased basis and that she was going to be asked to go through a selection process and make adjustments and any specific recommendations were appreciated. We find that there were no specific questions about whether the claimant had any mental or physical impairment, what the substantial adverse effect of that might be and whether that was long term. The referral and therefore the Respondent's enquiry of occupational health was limited.

18. The Claimant was written to on 23rd May 2017 but the she did not receive that letter. However, she was contacted by occupational health and the appointment was arranged, which she attended on 15th June 2017.

19. The Claimant attended occupational health on 15th June 2017. We accept the claimant's evidence that the nurse had not had any prior information about her illness and that she appeared surprised about what had happened to the claimant. This chimes with our reading of the report, which was that '*Jeanette advised me that she had a subarachnoid haemorrhage due to an aneurism on 1st January 2017*…'

20. The relevant contents of the occupational health report are as follows:

'….Thank you for your referral and information supplied. Jeanette advised me that she had a subarachnoid haemorrhage due to an aneurysm on 1st January 2017. She was in intensive care for 1 week and in hospital for a total of 7 weeks. Jeanette was reviewed by the neurologist on 13th June 2017 and was advised that she is happy with her recovery and that it is unlikely that this will occur again. Jeanette has pain in her neck and back and has 4 operations when in hospital. She now has a stent insitu and has found that bending and lifting causes headaches.

The neurologist also advised Jeanette that she is fit to drive. However it will take a number of weeks to arrange this via the DVLA. She advised me that has to send completed forms to them and check when her details have been added to their database and she will be able to drive again while they investigate her case. Jeanette stated that her friend recently passed away and I suggest that she is therefore grieving at this time. I advised her that if she requires support during this time that she could contact cruise bereavement as the university no longer provides this support.

1. *Short term adjustments – unable to lift or carry at present and I'm unsure how long this is likely to last.*
2. *What adjustments and how long they should continue – passed return to work over 6 weeks. Work station assessment may be beneficial and regular breaks due to pain in her neck and back and to rest her eyes from the computer screen every half an hour as per DSE guidelines.*
3. *Permanent adjustments – unclear at this stage.*
4. *Recovery and return to work – Jeanette has recovered well overall and plans to return to work on 3rd July 2017, which I support.*
5. *Further medical support or intervention – Review by neurologist and regular blood pressure checks by GP.*
6. *Recurrence- Jeanette has been advised by the neurologist that it is unlikely.*
7. *Equalities Act 2010-Although the criteria for disability within the Equalities Act 2010 is a legally based decision based upon health and not by a medical professional, in my opinion, Jeanette's medical condition is likely to be applicable under the equalities Act. She also has another medical condition which is likely to be applicable under the Act.*
8. *Any adjustments due to selection process- It is unclear what impact an interview will have on her as this is a stressful process. Jeanette stated that she has an interview the week after next.*

21. The occupational health adviser went on to advise that the Claimant was fit to return to work on 3rd July 2017 on a phased basis over 6 weeks and that she return to occupational health for assessment in 3 to 4 weeks' time.

22. Peter Davey received the occupational health report on or around 15th June 2017. Ms Lindsay did not see the occupational health report before the selection interview on 21st June but Mr Davey read the contents to her over the telephone prior to the selection interview. The claimant received the occupational health report on 15th June but she was unable to access it because it was password protected and occupational health did not send her the password. In our finding the claimant did not in fact receive the occupational health report until 30th June when Julie Lindsay gave her a hard copy at the consultation meeting. This is what the claimant says in her appeal submission dated 19th July and we accept that.

23. The Claimant was invited to a selection interview for the new role, which took place on 21st June. The claimant was offered a change of venue beforehand but other than that no other adjustments were suggested.

24. We heard from the Respondent's witnesses that the Claimant did not request any adjustments to the selection process beforehand and that when asked whether she was happy to proceed, she said yes. The claimant's evidence was that there was a conversation between herself and the panel before the interview started and she was asked how she was feeling. She stated in evidence to the Tribunal that she had told the selection panel that she forgot words, that she had cognitive issues and that she could not remember simple words. We find it more likely than not that she said something along the lines of forgetting words in the context of an informal conversation that took place between herself and the panel before the interview started. We accept the evidence of Mr Evans that she was happy to proceed and that the interview proceeded on that basis.

25. There is a pro forma record of the claimant's interview in the bundle with manuscript notes inserted. Mr Evans compiled an interview summary, which is at page 182. His view, as documented, was that the panel believed that the claimant was appointable but that she did not sell herself as well and needed prompting to expand her answers.

26. In terms of the Claimant's presentation at interview, the claimant in evidence stated that although she was very nervous she had performed to the best of her ability. The claimant's position was that she had assumed that the panel would be aware that she was in recovery from a serious condition. When it was put to Mr Davey that the claimant may have performed less well in interview given her memory problems, he said the panel did not know that the claimant had problems at the time and that she had not presented herself in that way. Mr Evans' evidence was that the claimant did not display any visible difficulties, that she answered all the questions and that she was coherent and engaging. He stated that she did need prompting for some of the answers. He also stated that the claimant did not perform as well as expected mainly because her answers were not sufficiently tailored towards what was required in the role going forwards into the future.

27. When it was put to her that she had not said what her difficulties were in respect of the interview she said that it had been difficult to pinpoint what her difficulties were; that the interview records showed that she had a vast experience in the role and that the panel had to prompt her to say things. The Claimant accepted that she was given the opportunity to say things by way of prompting. She stated that she didn't think that she would have needed the prompting before having been off with the aneurism.

28. The Claimant was informed that day that she was unsuccessful at interview and she was sent a letter dated 22nd June 2017, which is at page 101 of the bundle. She was invited to a consultation meeting on 30th June 2017. An informal meeting took place between the claimant and Jon Frost (Executive Director of Finance and Infrastructure Services) on 28th June 2017 where she expressed concerns.

29. There was then an individual consultation meeting on 30th June, which the Claimant attended with her union representative. Following the meeting the Respondent provided the claimant with formal notice of the termination of her employment on grounds of redundancy. She was then placed in the redeployment pool and she subsequently secured employment in another department albeit that this was at a lower grade and on a part time basis. On 19th July 2017 she presented an appeal against the notice of termination to the board of governors on the basis that the interview process had been unfair. The appeal was held on 9th August 2017 and the Claimant's appeal was not upheld.

30. There was email correspondence between HR and occupational health which took place between 3rd August and 1st September which demonstrated that the Respondent regarded the occupational health report dated 15th June as inadequate. Julie Lindsay of HR had not received the occupational health report prior to the selection interview but had had it read out to her over the telephone. The email from Kim Morgan to Julie Lindsay and Tracey Owen states *'…as discussed with Tracey I have not dealt with a case asking for this information and assumed that you had policies and procedures regarding this. It would have been beneficial with the benefit of hindsight and following my conversation with Tracey this morning it would have been both beneficial for me to have asked what exactly was meant by adjustments to the selection process and or an appointment booked to discuss the matter prior to the consultation taking place on 15th June 2017.'*

The Law

31. Under s.20(3) of the Equality Act 2010 an employer is under a duty to make reasonable adjustments where a provision, criterion or practice of the employer puts the employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Under s.21(1) of the Equality Act 2010 a failure to comply with s.20(3) is a failure to comply with a duty to make reasonable adjustments. Under Schedule 8 Part 3 of the Act the employer is not subject to a duty to make reasonable adjustments if he does not know or could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage referred to. Therefore knowledge can be actual or constructive.

32. In **Gallop v Newport City Council the Court of Appeal [2013] EWCA Civ 1583** held that the relevant knowledge, whether actual or constructive, is knowledge of the facts that will establish whether an employee has a disability as defined in the legislation (i.e. whether the person has a physical or mental impairment and b) whether the impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities). The employer is to form its own judgment and not simply 'rubber stamp' occupational

health advice. At paragraph 44 it Rimer LJ stated, *'this case illustrates the need for the employer, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability. The answers to such questions will then provide real assistance to the employer in forming his judgment as to whether the criteria for disability are satisfied'*.

33. Under s.15 of the Equality Act 2010 an employer discriminates against a disabled person if it treats him or her unfavourably because of something arising in consequence of his or her disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. The section does not apply where the employer shows that he did not know or could not reasonably have expected to know that the employee had the disability.

34. Under section 13 of the Equality Act 2010 a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

Submissions

35. On behalf of the Respondent Mr Joseph submitted that there was little point in the Respondent involving occupational health in the April time. The Respondent did everything that they reasonably could to assist the Claimant to get back to work. It made sense for Mr Davey to be the point of contact as he was the godfather of the Claimant's son. The Respondent considered whether the Claimant ought to be slotted in or pooled. There was nothing unreasonable in terms of the decision to pool Alison Parsons with the Claimant and the 50% rule had been discussed with the unions. The Claimant was not disadvantaged by not being at the consultation meetings as there were very few people who attended the open form meetings. She had a conversation with Tony Evans directly. It was accepted that the requirement to attend an interview was a PCP. The Claimant did not put forward anything to do with her memory at the interview. It was not clear how the Claimant would be disadvantaged. There was no suggestion that she was unable to answer the questions. The prompting was not necessarily because of her disability. The absence of scoring did not put her at a disadvantage as there were only two candidates. The Claimant did not make the Respondent aware of any symptoms. Had the Respondent made enquiries of the medical position they would have come across the letter from the Claimant's neurosurgeon at p.100 which said that there were no concerns with her memory or concentration but that she struggled to find the odd word. There was no evidence that the Claimant's extended sickness absence operated either consciously or unconsciously on the decision not to appoint the Claimant. The Claimant had had an opportunity to put forward any symptoms to the Occupational Health Adviser but she failed to do so. The reason for the rejection of the

Claimant was because Alison Parsons gave fuller answers as to what was required going forwards in the role. The Claimant was not pooled for James Oldfield's role because her existing role only matched by 5%.

36. On behalf of the Appellant it was submitted that because she was not at work during the restructuring process she did not have the opportunity to get on top of the issues surrounding the redundancy. The Respondent ought reasonably to have known that she would have been placed at a substantial disadvantage by the interview process owing to her cognitive impairment. The OH Report stated that it was unclear as to what impact the interview would have had on the Claimant. The Respondent ought to have made enquiries about what this meant. The Claimant stated that she often forgot the odd word: the reference to her fiancé saying that this was the case before the injury was made in jest. She was not well but wanted to return to work for financial reasons. The Claimant was required to respond to questions at interview on the spot and that put her at a disadvantage. This would be remedied if she were able to go into the interview fully prepared. It would have cost the Respondent nothing to give her the questions in advance in order to remedy the disadvantage. The Respondent could reasonably have taken into account past experience and performance. The onus was on the Respondent to adjust. The Claimant had not been disabled before and wanted to get back to work. She required prompting and did not perform to the standard expected of her. There was an abdication of responsibility for the appointment by the witnesses which established an inference that the Claimant was not appointed because of her sickness absence. The Claimant was more suitable because she had greater experience, supervisory experience and an unblemished performance record. The Respondent took the decision not to appoint the Claimant on the basis that she had been off sick for a long time and therefore, it required her to compete with someone who was less suitable. This must have been because she was disabled. The Claimant was not considered for the role of MDF Fleet Supervisor when her role mirrored it by 50%. There was inconsistency of treatment.

Conclusions

37. Applying the law to our findings of fact we make the following conclusions. We found that the Respondent's lack of proper enquiry as to the Claimant's medical position was highly relevant to our conclusions. There was a lack of formal contact with the Claimant after she had gone on sickness absence. In our finding if an employer had acted reasonably it would have wished to inform itself of the full medical position of the Claimant and whether she was a disabled person at the time the consultation was going on and at the time when her post was identified as at risk in the new structure (i.e. at the end of March 2017). The Respondent knew at that stage that the Claimant had suffered a very serious brain aneurism and had been off sick for several months. It would have been incumbent on it to inform itself of whether she was a disabled person at that stage in our finding. An employer acting reasonably would have put a number of questions addressing each facet

of whether the Claimant was disabled to the Occupational Health advisor at this time. We note that the questions that were put to the advisor in June 2017 were in general terms and were not focused on whether the Claimant's symptoms met the definition of disability under the Act. The instructions were limited and therefore the report was limited.

38. The Respondent discussed a referral to occupational health in April with the Claimant and the Claimant advised that there was little point as she was under the Consultant. It was not the Claimant's decision or duty to refer to Occupational Health. The obligation fell on the Respondent and we find, that this obligation crystallised when there were some real changes going on in the workplace which would affect the Claimant's job.

39. We find that had the Respondent made full and proper enquiries of the Claimant's position at an earlier stage and certainly by the March/April time it would have been likely to have been appraised of the Claimant's cognitive symptoms which constituted her impairment as found. The Claimant's evidence, which we accepted, was that she remained unwell but that she wanted to get back to work because her sick pay was expiring. We did not attach much weight to the letter of the neurosurgeon at p.100 that she had no problems with memory or concentration. We accepted the Claimant's evidence that it was sometimes difficult for her to pinpoint what her difficulties were. This did not mean that she did not have those difficulties. She was aware of some memory issues as she had mentioned them at the start of her interview. We noted that at paragraph 20 Judge Emery had found that throughout 2017 the Claimant's impairment caused substantial effects on her cognitive abilities. If the Respondent had made a thorough enquiry at an earlier stage this would have been the information that would have been revealed. We find therefore that the Respondent had constructive knowledge of the Claimant's disability.

40. Following on from that and given the agreement that the PCP was the requirement for the Claimant to attend a competitive selection process, we find that this did in fact put the Claimant at a substantial disadvantage compared to non-disabled employees. The evidence was that she required prompting. She alluded to memory problems at the start of the interview. She was required to give answers based on on-the-spot recall of information, to process the questions and then provide complete answers. We find that the interview process put the Claimant at a substantial disadvantage compared to persons who are non-disabled and the Respondent was therefore under a duty to make adjustments.

41. However, dealing with the issues at hand, we find that it would have been reasonable for the Respondent to have given the Claimant questions to the interviews beforehand so that she was able to fully prepare herself. We also find that a reasonable adjustment would have been to score both candidates on more objective and non-disability related criteria such as previous supervisory or managerial experience;

experience insofar as it related to the duties concerned and conduct record.

42. We find that the Respondent was therefore under a duty to adjust under s.21 of the Equality Act 2010 and that it discriminated against the claimant by failing to do so.

43. Having regard to s.15 of the Equality Act 2010, we find that the decision not to appoint the Claimant without going through a competitive selection process and the decision not to select her for the role of Print Production Supervisor was unfavourable treatment. We found that the unfavourable treatment was because of something that arose in consequence of the Claimant's disability, namely her memory and concentration issues. The Respondent was under a duty to adjust and failed to do so. Moreover, had the Respondent informed itself of the Claimant's full medical position and disability in the March/April time it would have slotted her into the new post. Her former role was a 100% match for the job. We did not see any written agreement regarding the 50% rule that was referred to by Mrs Lindsay but even if there was such a rule or policy, owing to the positive obligations on employers in relation to the duty to make reasonable adjustments it would have been necessary for the Respondent to have slotted the Claimant in. We do not consider that there is any justification as the Respondent did not make reasonable enquiries as to the Claimant's health position in the first place.

44. In terms of the issue surrounding the post of MDF Fleet Supervisor, we considered that this was something of a red herring in terms of what the real issues in this case were. The evidence was that the Respondent had used the restructure to effectively give James Oldfield a promotion. There was a dispute about the extent to which the Claimant's duties were assimilated into the post. We find that in substance this was a different post, which was not particularly similar to what the Claimant had been doing before, whereas it was a match for James Oldfield. We do not find that the Respondent failed to consider her for this post because of something arising in consequence of her disability, namely her sickness absence. We did not consider that the Claimant raised a prima facie case in this regard.

45. We also dismiss the s.13 direct discrimination claim. We did not consider that James Oldfield was a mirror image comparator owing to the differences in his job description and the circumstances in which his pooling was considered. We also find that the Respondent would have treated a non-disabled hypothetical comparator in the same way as the Respondent treated the Claimant as it would have required him or her to undergo a competitive selection interview as well. The claim for direct discrimination is therefore dismissed.

Employment Judge A Frazer
Dated: 13th August 2019

REASONS SENT TO THE PARTIES ON

……17 August 2019……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS