Case No: 1401145/2012
1401557/2012

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Muzi-Mabaso	**v**	Commissioner for HM Revenue & Customs

Heard at: **Bristol** **On:** **3 and 4 August (in chambers) 2020**

Before: **Employment Judge Livesey**
Mrs C Monaghan
Mr E Beese

Appearances
For the Claimant: In person
For the Respondent: Mr Allsop, counsel

JUDGMENT

On the matters remitted from the Employment Appeal Tribunal, the Employment Tribunal reaches the following further determinations;

1. The remitted complaint of indirect discrimination is dismissed, the Respondent having demonstrated the defence of justification.

2. The remitted complaint of failing to make reasonable adjustments is also dismissed.

3. The Respondent's application for costs succeeds. Paragraphs 3 and 4 of the Judgment of 6 November 2013 are reinstated.

REASONS

1. Procedural background

1.1. The claims had a long and somewhat complicated history.

1.2. The first claim (1401145/2012) was issued on 13 June 2012. A second claim was issued in August 2012 (1401557/2012) and, on 3 October 2012, a direction was made for them to have been heard together.

1.3. At a hearing which took place on 5 November 2012, Employment Judge Gill made deposit orders in respect of both claims. They were then subsequently struck out, but were reinstated on 2 April 2013 by Regional Employment Judge Parkin, who also reinstated the deposit orders.

1.4. The claims came on the hearing on 4, 5 and 6 November 2013 before this Tribunal. They were dismissed and a costs award was made in the sum of £5,000 against the Claimant under rules 39 and 76.

1.5. The Claimant's application for reconsideration of that Judgment was refused on 26 November 2013. He then appealed and the Employment Appeal Tribunal ('EAT') considered the case in June and September 2015 and handed down its judgment on 13 November 2015 (Her Honour Judge Eady QC, as she was then); the appeal was allowed in part and the costs order was set aside. As was clear from the Summary to the Judgment of the EAT, the successful elements of the appeal concerned the complaints of indirect discrimination under s. 19 and the reasonable adjustments claim under ss. 20 and 21, both relating to the requirement for the Claimant to have taken an online test as part of an internal recruitment/promotion process.

1.6. Further consideration was given to the method of disposal and, by a further order dated 18 December 2015, those matters were remitted by the EAT to this Tribunal.

1.7. The EAT gave permission for the Claimant to pursue an appeal to the Court of Appeal in respect of the unsuccessful elements of the appeal. That appeal failed, as did a subsequent application to the Supreme Court.

2. Remitted hearing of 17 and 18 October 2019

2.1 Following a case management hearing on 15 July 2019, the issues remitted by the EAT were listed for hearing before this Tribunal on 18 and 19 October 2019. At that hearing, we were informed that the parties had been able to settle the outstanding matters. The hearing was adjourned to enable the parties to put those terms into effect.

2.2 Sadly, for reasons which we did not need to know, they were not then capable of finalising their agreement and this hearing was re-listed.

3. The issues

3.1. The issues which had to be determined had been identified by the EAT in its Summary (see further below).

3.2. There was also an issue of costs to consider. At the Case Management Preliminary Hearing which was conducted on 15 July 2019, the Claimant sought the return of his deposit. The original costs order had been set aside

by the EAT when it determined the appeal but, in paragraph 1 of its Judgment, it stated that any further application would be a matter for us (see paragraph 9 of the Case Management Summary of 15 July 2019).

4. The evidence

4.1. At the Preliminary Hearing which was held on 15 July 2019, the Respondent applied for permission to call further evidence at this hearing. The Judge expressed the view that the task allotted to the Tribunal by the EAT was not one which required it to hear further evidence from the Respondent, but he was not prepared to take that decision without his members' input and the Respondent was given permission to file further evidence on the basis that the decision whether to admit it would be considered at the start of the hearing. The Claimant was obviously given the same permission, although he did not think that it ought to have been granted (see paragraphs 8 of the Case Management Summary and 2 of the Order).

4.2. As it turned out, neither party called further evidence at the hearing. The Tribunal was referred to the hearing bundle which it had received at the original hearing (R1) and Mr Allsop relied upon a written Skeleton Argument (R3) and a number of authorities. The Tribunal also reminded itself of the salient parts of its Reasons, the witness statements, parts of the oral evidence and documents within the hearing bundle.

4.3. Again, page references cited in square brackets within these Reasons are to pages within the original hearing bundle, R1, unless otherwise stated.

5. The case before the Employment Tribunal and its decision

5.1. The full factual detail of the claims could only be properly understood by reading the Judgment and Reasons of 26 November 2013, but the basic facts which were relevant to the issues which had been remitted were as follows (a summary taken from the contents of paragraph 4 of the Reasons).

5.2. The Claimant had commenced employment with the Respondent in 2004. He started at 'AA' Grade (Administrative Assistant).

5.3. The Claimant was disabled by virtue of depression. That had been accepted. He also claimed to have suffered from dyslexia, although it had not been specifically identified as a relevant disability. It was only indirectly relevant and we did not have to make specific findings in relation to that disability, as explained in paragraph 3.4 of the Reasons.

5.4. In 2010, he commenced a two year Business Driven Development Programme ('BDDP'), which was an intensive and complex tax course for which he was temporarily promoted to Grade O. As part of the initial selection process for the programme, he had been required to complete an online application with certain situational questions [375-384]. The Claimant had been moved to the Capital Gains and Compliance Team in Bristol for the duration of the course but then failed the second of its four modules, despite resits. He was regraded and returned to AA on 28 November 2011.

There were, however, no AA Grade posts in Bristol and an alternative role had to be found for him.

5.5. In July 2012, an announcement was made about promotion opportunities to O Grade, amongst other things [284-288]. Candidates had to apply before 8 August and complete an online test by the 10th, a Civil Service Initial Sift Test ('CSIST') which we concluded was different from that which he had completed in 2010.

5.6. The Claimant had indicated that he wanted to apply for one of the roles but he informed his manager, Mr Stanford, that he could not take the online test because he was too stressed. He emailed the Respondent's recruitment department, CSR, in similar terms. He was offered the chance to apply for more time to take the test, but he declined on the basis that he did not want to expose himself to the psychological 'trigger' of completing it. He subsequently informed Mr Stanford that he could not take the test even in a written form, but that he also felt that it was not essential. CSR stated that the Claimant would need to obtain reports from his psychological therapist before his position was considered further. The Claimant provided reports in late August, neither of which stated that he should not have been required to take online test. CSR took the view that the evidence did not provide sufficient information or guidance on adjustments in relation to the taking of the test and, despite a further letter from his GP, the position did not change (see paragraphs 4.27 to 4.39 of the Tribunal's Reasons in particular).

5.7. The Claimant put forward complaints of indirect discrimination (s. 19) and a failure to make reasonable adjustments (s. 20). Parts of both complaints did not need to be considered because the appeals in respect of them failed.

5.8. The appeals which *did* succeed concerned the requirement for the Claimant to have taken the online test for promotion into one of the Grade O roles in August 2012. The Claimant's case was that the requirement was a provision, criterion or practice ('PCP') under ss. 19 and 20 which had caused him 'particular' (s. 19) and 'substantial' (s. 20) disadvantages. He alleged that it was not capable of having been justified under s. 19 and that the PCP ought to have been adjusted under s. 20 such that, amongst other things, he ought to have been allowed to proceed to the next stage of the recruitment process without having passed the on line test.

5.9. All of his claims failed. Under s. 19, we concluded that the Claimant had demonstrated the group disadvantage and the particular, personal disadvantage, but that the Respondent had made out its defence of justification. Under s. 20, we concluded that the Claimant had not, however, demonstrated that he had suffered a substantial disadvantage but, in any event, that the adjustments contended for were not reasonable.

6. Decision of the Employment Appeal Tribunal

6.1. In relation to the issue of justification under s. 19, the EAT criticised the Tribunal in its failure to engage with the balancing exercise that was necessary at the second stage of the analysis of the defence; whether the

step that was taken was proportionate, taking into account the discriminatory impact of the PCP (see paragraphs 81 and 82).

6.2. Further, in relation to the complaint under s. 20, the EAT believed that the Tribunal had set the bar too high in relation to the Claimant's need to establish a '*substantial disadvantage*'. The Judge made it clear that, although it would not have been impossible for different conclusions to have been reached in relation to whether a '*particular*' or a '*substantial*' disadvantage had been proved, the reasoning was not sufficiently clear (paragraph 74).

6.3. Finally, the EAT was critical of the Tribunal's reasoning in respect of the adjustment relating to the slotting of the Claimant into a band O role (paragraphs 83 and 84).

7. Legal principles

Section 19 (2)(d)

7.1. In relation to s. 19 (2)(d), we had cited and considered the statutory test in our Reasons (paragraph 5.1). There was no issue in relation to the legitimacy of the aim. The focus was on the proportionality of the means which had been adopted to achieve it.

7.2. Proportionality in this context meant 'reasonably necessary and appropriate'. The issue required us to objectively balance the measure that was taken against the needs of the Respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3 and paragraph 59 of the EAT's Judgment in this case and paragraph 10 (4) of the decision in *MacCulloch-v-ICI* [2008] IRLR 846, referred to in paragraph 12 of the Respondent's Skeleton Argument, R3). It was important to remember that justification had to be considered in light of the PCP's impact upon the business generally, not just the individual employee (*City of Oxford Bus Services Ltd-v-Harvey* UKEAT/0171/18/JOJ).

7.3. Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). It was not normally for a tribunal to come up with less discriminatory alternatives. It was suggested in *Naeem-v-Secretary of State for Justice* [2014] IRLR 520, EAT that the tribunal might be expected to consider alternatives which were obvious or 'manifest', but the comments were *obiter*.

7.4. The analysis required us to consider both the quantitative and the qualitative effects of the discrimination; how many people within the Claimant's group suffered as a consequence of the PCP and how seriously (*Bradley-v-London School of English and Foreign Languages Ltd* UKEAT/0011/18/LA).

Section 20; '*substantial disadvantage'*

7.5. In relation to the issue of the '*substantial disadvantage*' within s. 20, we pointed out that that was a different test from that contained within s. 19, which created a low threshold (paragraph 5.9 of the Reasons). We referred to the Equality and Human Rights Commission's Code of Practice from 2011 which equated '*disadvantage*' with '*detriment*', as something that "*a reasonable person would complain about*" (paragraph 4.9).

7.6. The word '*particular*' in s. 19 referred to the particular person who suffered it not the level of disadvantage suffered (*Chez Razpredelenie Bulgaria AD-v-Komisia za Zashtita ot Diskriminatsia* C-83/14 and *Zyske Finans A/S-v-Ligebehandlingsnaevnet* [2017] IRLR 665, ECJ). The word '*substantial',* however, was an adjective which described the nature of the disadvantage.

7.7. As to the substantiality of the disadvantage required within s. 20, the test was also a relatively low one. '*Substantial'* meant '*more than minor or trivial*' (s. 212 (1), but it was comparative; it needed to have been one which was substantial when viewed objectively and in comparison with persons who were not disabled (*Copal Castings-v-Hinton [2005] UKEAT 0903/04*).

7.8. The more recent case of *Sheikholeslami-v-University of Edinburgh* [2018] IRLR 1090 submitted to us by the Respondent also;

> "*Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability*."

7.9. There was also the issue of causation to consider, expressed in the EHRC *Code of Conduct* (2011) as follows;

> "*The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice* [etc..] *disadvantages the disabled person in question.*"

Section 20; reasonableness of the adjustment

7.10. In terms of the adjustments themselves, the EAT set out the task for the Tribunal within paragraph 58 of its Judgment (at G and following). An adjustment needed to have been reasonable and to have operated so as to have avoided the disadvantage (*Salford Primary Care Trust-v-Smith* [2011] EqLR 1119). There did not have to have been a certainty that the disadvantage would have been removed or alleviated; a real prospect would have been sufficient (*Romec-v-Rudham* UKEAT/0067/07 and *Leeds Teaching Hospital NHS Trust-v-Foster* [2011] EqLR 1075). It was not generally considered reasonable to have required an employer to make an adjustment which might have caused a drop in standards of competence (*Hart-v-Chief Constable of Derbyshire* UKEAT/0403/07/ZT).

8. Conclusions

Section 19 (2)(d)

8.1. Before coming to the second limb of the test (the proportionate means), it was worth revisiting the legitimate aim that the Respondent was attempting to meet. The EAT referred to it as having been "*a fair and objective means of carrying out the initial sift*" (paragraph 81). It no doubt had the numbers involved in the process in mind; a reduction from 4,468 applicants to 3,588 through the online test (see paragraph 4.41 of our Reasons). But there was a second aim, more particularly captured in paragraph (1) (b) of the EAT's Summary; the use of the test as a "*method of ensuring that candidates met basic competency requirements*". It was not, therefore, just about quantity. Had it been, a random selection might have sufficed. It was about quality too. The combined aim was to ensure a smaller number of the better candidates proceeded to the next round (see paragraph 10 (1)(a) of the Respondent's Skeleton Argument, R3).

8.2. In relation to the proportionality of the use of the online test, we determined that it was proportionate in isolation in that it was 'reasonably necessary and appropriate' and we gave our reasons for having reached that view (paragraph 5.12). What we did *not* do was to balance the suggested reasonableness of the PCP against the discriminatory effect that it had (see paragraphs 81-2 of the EAT's Judgment).

8.3. The EAT rightly pointed out that we had accepted that there would have been, "*at least hypothetically, a disadvantage*" suffered by candidates with stress or depression by requiring them to take the online test (paragraph 81 of its Judgment and 5.8 of our Reasons), but was the requirement nevertheless a reasonably necessary means of achieving the combined aim referred to above?

8.4. Although the Claimant too suffered the 'particular' disadvantage referred to within paragraph 5.8 of our Reasons, we had no information as to how many others might have fallen into that category. Common sense suggested that the proportion of the 4,468 internal candidates was likely to have been low (the quantitative question). Even then, if a number of candidates had been caused a disadvantage by the PCP, it was unclear how severe or significant any disadvantage might have been (the qualitative question). It was not as simple as saying that *all* blind people could not undertake a visual test. Some who suffered with depression may have struggled with the test. Some may not have. Some may have had different experiences at different times; the Claimant himself had passed the BDDP online test in 2010. There was no suggestion that the PCP had a wider discriminatory effect (see *Harvey* above).

8.5. As to whether the application of the online test was reasonably necessary and appropriate, it was not up to the Tribunal to come up with alternatives to the CSIST test unless they were obvious or 'manifest' (see above). An alternative PCP under s. 19 was not the same as an adjustment to it under s. 20; under s. 19, an alternative PCP would have been applied widely

whereas an adjustment to it under s. 20 would have been personal to the Claimant.

8.6. We had previously pointed out that we had experience of similar online psychometric testing having been used in a broad range of workplace recruitment processes, particularly in the early stages (paragraph 5.12 of our Reasons). The practical business considerations of handling 4,468 applications in order for a smaller number of the better candidates to have been identified had, in our judgment, justified the adoption of the well known and frequently used preliminary filter test in the form adopted by the Respondent. That remained our view.

8.7. Accordingly, in the absence of an identified or obvious alternative to the PCP and in the absence of evidence that there was a widespread quantitative and/or qualitative disadvantage suffered as a result of its application yet, on the other hand, appreciating its widespread validity as a recruitment tool and its effectiveness in this case, having undertaken the balancing exercise urged upon us by the EAT, we remained of the view that the use of the CSIST test was a proportionate means of achieving the legitimate aims.

Section 20; '*substantial disadvantage*'

8.8. The word 'particular' in s. 19 did not import a level of severity or seriousness in terms of the disadvantage suffered by a claimant. The word 'substantial', however, did (see paragraph 7.6 above).

8.9. Before revisiting this area of the claim, it was necessary to re-visit paragraph 3.4 of the previous Reasons (see paragraph 5.3 above). The disability relied upon here was depression and not dyslexia. Although we accepted that depression and/or stress may have magnified the effects of that condition, we were never invited to make findings in relation to it *as* a disability. We had no idea of its severity or effects in terms of day-to-day activities or, specifically, the completion of a CSIST test.

8.10. In terms of the actual disability that was relied upon, we were conscious of the fact that the Claimant had a significant history of depression. He was absent for three discreet periods in 2009 and then for a six-month period in 2009/10 for reasons associated with his condition [146], which was immediately before he undertook the BDDP online test in 2010.

8.11. In assessing the substantiality of the disadvantage suffered by the Claimant because of his disability, we re-visited the evidence which was available leading up to and around the date of the CSIST test in August 2012;

8.11.1. The OH report of 19 January 2012 [173-5] referred to the Claimant's history of depression, but stated that he wanted to, and was fit to, return to work to undertake compliance work, but not the *less* demanding, menial administration work that his AA Grade qualified him for at that point. No opinion was expressed about the Claimant's ability to undertake timed online tests;

8.11.2. The Claimant's letter of 27 April 2012 (paragraph 14 of Mr Stanford's witness statement) referred to his depression and the possibility, having recovered from a period of illness, of being exposed to another one as a result of being put through the redeployment process [217];

8.11.3. The Reasonable Adjustments Passport and Risk Assessment of 4 May 2012 [222-9] indicated that he required "*assistance with job application process*". Certain difficulties were expressed within the Risk Assessment in relation to the demands of the Claimant's job, but they were of a somewhat general nature ("*lack of concentration*"…etc.);

8.11.4. The ATOS OH report of 11 May 2012 which indicated that the Claimant felt that it was pointless for him to have applied for work at that stage because of his lack of confidence, not because of an inability, real or otherwise, to complete an online test [231-3]. The report also stated that, "*under stress, dyslexic difficulties can be more pronounced*" but it was not tailored to the Claimant in that respect and the adjustments suggested were accommodated by the Respondent in any event (see further below);

8.11.5. The Claimant voiced similar concerns to Mr Stanford at their meeting on 15 June 2012 in which he stated that the thought of making such an application "*was stressful to him*" [251-2];

8.11.6. The Psychological Therapist's report of 17 July 2012 reiterated the fact of his depression and anxiety but was silent about his capabilities in respect of any recruitment process [345];

8.11.7. The Claimant asserted that he was suffering from stress at the time of the test (see, for example, the email of 10 August [307] in which he claimed that he was "*too stressed to do the online test*");

8.11.8. In the Senior Occupational Psychologist's email of 20 September 2012, she confirmed that no informational guidance had been provided in respect of the Claimant's ability to take the online test [355-6];

8.11.9. Dr Black's letter of 4 October 2012, read as follows [367];

"*This gentleman has suffered with anxiety since 1993 and depression since 2002. He also has a history of back pain. He struggles with doing exams and tests and would benefit from being exempt from these if possible.*"

8.11.10. In the Claimant's witness statement, he stated that he "*cannot participate on* [sic] *any tests at the time because of my dyslexia and state of mind*". He accepted, during his oral evidence at the final hearing, that none of the documentary evidence indicated that that he *could* not do the test.

8.12. When considering whether the Claimant suffered a 'substantial disadvantage' by being required to undertake the CSIST, we did not consider that a lack of confidence that he was said to have had in relation to the application process was sufficient. The Claimant *did* apply (see paragraph 4.29 of our Reasons, [285], [302] and paragraphs 22 and 23 of Mr Stanford's evidence).

8.13. Similarly, as stated above, we were not considering the discrete problem of dyslexia. Adjustments were offered in that respect in any event, as suggested by ATOS; more time in which to take the test, sitting with him and explaining the questions, providing him with a separate room and PC or a paper exercise (see paragraphs 4.32-4.34 and 4.36 of our Reasons). However, in his submissions before us during this remitted hearing, the Claimant consistently referred to that condition as the reason why he was unable to participate in the test; 'the reasons I could not do the test', he said, 'was my dyslexia'.

8.14. We were required to focus upon evidence which demonstrated that the disability relied upon by the Claimant, depression, caused him a substantial disadvantage in completing the online test. Dr Black's letter was broadly supportive in that respect but, in our judgment, it contained self-report, was rather woolly and poorly explained. It also post-dated the material events by several months. The Claimant had needed to demonstrate that the substantial disadvantage was suffered at the point when the PCP was applied.

8.15. The best evidence which the Claimant had was his own self-reported difficulties with the test. In our judgment, however, they had to be considered against the background of the fact that he had been claiming an entitlement to Grade AO or O status through the redeployment process for months earlier. He had taken an online test in 2010 when the objective evidence suggested that his health had been poor and the further OH evidence in 2012 gave no indication that he was likely to have suffered the specific difficulty complained of. The difficulty which was identified was his lack of confidence in the process and/or his own abilities which thwarted his willingness to apply, but he *did* apply. Once he had applied, the difficulties then appeared to have been related to his dyslexia. Whilst we accepted that the interplay between his depression and dyslexia made it indirectly relevant, he still had to prove a substantial disadvantage because of the disability and had not done so.

8.16. Despite our finding in that respect, we nevertheless went on to consider the remitted issue in respect of the adjustment contended for.

Section 20; the adjustment

8.17. The adjustments which we had initially considered were those set out in paragraph 3.10 of the Reasons; an alternative test (paper test or direct work observation) or exemption from the test.

8.18. The EAT's Judgment appeared to introduce an issue which had not been aired before us during the hearing in connection with that PCP; the

possibility of slotting the Claimant into a higher grade vacancy as an adjustment to the second PCP, the requirement for him to take an online test (see paragraph (2)(d) of the Summary). There appeared to have been a confusion between the adjustments contended for in relation to the first PCP (counselling and/or slotting in; paragraph 3.9 of the Reasons) and those in relation to the second PCP (different and/or no online test; paragraph 3.10).

8.19. The error did not appear in the body of the Judgment itself (see paragraphs 83, 84 and 87) and it might have been said that we did not need to address it, but we nevertheless did.

8.20. There were two rather obvious points which made the adjustment of slotting in unreasonable in respect of the second PCP;

8.20.1. Not only would slotting the Claimant into a higher grade role have avoided the initial CSIST test, but every hurdle beyond it. In other words, it would have been far more generous than the adjustments actually contended for. In our judgment, it would have been much *less* reasonable than those which we had initially rejected;

8.20.2. The Claimant had told us that he was not disadvantaged by the other elements of the recruitment process (a paper assessment and interview [286]); see paragraph 19 of his witness statement which he confirmed during submissions. There would have been no substantial disadvantages caused by the two parts of the process and no reason, therefore, to have adjusted them.

8.21. The issue that was left for us, however, was whether a reasonable adjustment to the PCP of the online test was having allowed the Claimant to have bypassed it and jumped to the next stage.

8.22. The EAT rightly pointed out that we found that the Claimant had not made good his contention that he was suitably qualified for a Grade O job at that point (paragraph 5.20 of our Reasons). Mr Stanford had seen the potential for him to have achieved Grade O or AO status, but we did not consider that that was saying a great deal. Did he demonstrate sufficient potential in order to have made the adjustment reasonable *then*?

8.23. The problem for the Respondent, and for similar, large employers within the public sector and elsewhere, was that of precedent. Once an exception was made for one candidate for a particular reason, it was reasonable to expect that others would have asked for the same treatment. The example of an exemption having been made for blind applicants was considered by the EAT in paragraph 84 of its Judgment. The Respondent had suggested that it was not helpful because those who were un*able* to take the test due to blindness had not been un*willing* to do it, as the Claimant had. The EAT suggested that that required further thought; was the Claimant, possibly, unwilling because of his disability? He certainly suggested as much but, for the reasons set out above, we did not accept the inability claimed.

8.24. Accordingly, even if a substantial disadvantage had been established, the adjustment remained unreasonable. It would not have removed the problem

which was claimed (either a lack of confidence to apply or problems caused by dyslexia). The adjustments which were discussed and offered were flatly rejected; he would not take the test in any format. The Respondent was unable to offer an alternative test to blind candidates in Braille (paragraph 84 of the EAT's Judgment) but it *had* been able to offer alternatives to the Claimant. We were unclear why those adjustments would not have alleviated or removed any substantial disadvantage, even if present.

8.25. We should not leave this part of our Judgment without referring to those cases from which the Claimant sought to draw parallels, *GLS-v-Brookes* UKEAT/0302/16/RN and *Paterson-v-Commissioner of Police for the Metropolis* UKEAT/0635/06/LA in particular. Those decisions concerned different factual scenarios, different disabilities and different substantial disadvantages. We did not find the comparisons helpful.

9. Costs

9.1. Our decision on costs was set out within paragraph 7 of our Reasons of 26 November 2013. It was based upon the fact that the Claimant's claims had failed following the making of two Deposit Orders by Employment Judge Gill on 15 November 2012. The EAT did not fault the reasoning within that paragraph, but it was a consequence of her decision, she said, that HHJ Eady QC set the costs award aside. Within paragraph 1 of its Reasons for its Order of 18 December 2015, the EAT further stated that, "*should there be a further costs application at the conclusion of the remitted hearing in this matter, that will be a matter for the ET to consider afresh at that stage.*"

9.2. It was important to note that the EAT's Judgment had the effect of upholding our decision in respect of the Claimant's first claim (No. 1401145/2012). That claim had focused upon the redeployment pool issues and had been made the subject of half of the deposit order by Employment Judge Gill, the separate sum of £500. That appeared to have been overlooked by the EAT.

9.3. As a result of the Reasons set out above, we were in the same position that we had been in November 2013, with all of the Claimant's claims having been dismissed. It did not follow that the original costs award had to be reinstated as it had been set aside on appeal and had not been remitted. Nevertheless, we could and did, entertain a fresh costs application on the same basis, as the EAT had indicated would have been possible.

9.4. Mr Allsop effectively asked for the same orders on costs that were made in 2013. The arguments were the same as they had been then and the reasons for our last orders had not be impugned on appeal. We agreed and we repeat again now the contents of paragraph 7 of our original Reasons. To have reached a different conclusion in the same circumstances would have been illogical.

9.5. The Claimant argued against the imposition of a costs award. He alleged that the intervening period had demonstrated that there had been some merit to his claim because he had been partially successful in the EAT. His appeals had not overturned our original decision, however, and our decision

had now been confirmed. Whilst we accepted that he ought not to have been in any *worse* position, we also considered that his position was not improved.

9.6. Because it was a fresh application, however, we were entitled to re-visit the issue of the Claimant's means had either party wished us to do so. The Claimant was asked, did not wish us to and the Respondent had nothing to add.

Employment Judge Livesey

Date 5 August 2020

Judgment sent to parties 17 August 2020

FOR THE TRIBUNAL OFFICE