Case No. 2400235/2020
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr S Mutangadura

Respondent: AO Retail Limited

Heard at: Manchester (by CVP) **On:** 22-24 March 2021

Before: Employment Judge McDonald
Mr D Mockford
Ms B Hillon

REPRESENTATION:

Claimant: In person
Respondent: Mr T Gilbart of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The correct name of the respondent is AO Retail Limited

2. The claimant was not a disabled person as defined by s.6 of the Equality Act 2010.

3. The claimant's claim that the respondent treated him unfavourably contrary to sections 15(1) and 39(1) of the Equality Act 2010 by not offering him an interview and/or not recruiting him because of his work history from 2015 to August 2019 fails.

4. The claimant's claim that the respondent treated him unfavourably contrary to sections 15(1) and 39(1) of the Equality Act 2010 by not replying to his 21 August 2019 and 28 August 2019 emails to the respondent until 30 September 2019 because of his work history from 2015 to August 2019 fails.

5. The claimant's claim that the respondent treated him unfavourably contrary to sections 15(1) and 39(1) of the Equality Act 2010 by not replying to his 1 October 2019 email because of his work history from 2015 to August 2019 fails.

6. The claimant's claim that the respondent treated him unfavourably contrary to sections 15(1) and 39(1) of the Equality Act 2010 by not replying to the voicemail which he left the respondent on 15 October 2019 because of his work history from 2015 to August 2019 fails.

7. The claimant's claim that the respondent treated him unfavourably contrary to sections 15(1) and 39(1) of the Equality Act 2010 because Claire Burton did not try to contact him again after she tried to contact him on 15 October 2019 because of his work history from 2015 to August 2019 fails.

8. The claimant's claim that the respondent breached its duty to make reasonable adjustments contrary to sections 20, 21 and 39(5) of the Equality Act 2010 by failing to conduct a telephone and/or face-to-face interview with the claimant despite his work history, fails.

REASONS

Introduction

1. The claimant says that he was subject to disability discrimination when he applied for employment with the respondent in August 2019.

2. The Code V at the start of this Judgment indicates this hearing was held by remote video link using the CVP platform. All parties and the Tribunal members attended remotely.

Preliminary Matters

3. We heard evidence from the claimant and, for the respondent, from Claire Burton, a specialist recruiter at the respondent ("Ms Burton") and Melissa Alam-Taylor, a recruitment Team Manager at the respondent ("Ms Alam-Taylor"). We finished the evidence on the second day and the claimant and Mr Gilbart provided written submissions for the morning of the third day of the hearing. After reading them we heard brief oral submissions, deliberated in chambers and gave oral judgment. The claimant requested the reasons for our judgment in writing.

4. The claimant represented himself and the respondent was represented by Mr T Gilbart of counsel.

5. The hearing bundle consisted of pages numbered 1-411. Because the numbering of some documents was subdivided the electronic version of the bundle consisted of 432 pages. In this Judgment it is referred to as the "the Bundle". Page references in this Judgment are to pages in the Bundle as numbered in the bottom right hand corner of each page.

6. On 19 March 2021 the claimant wrote to the Tribunal asking for a further document to be added to the Bundle. The respondent did not think the document was relevant but raised no objection to its inclusion. It is a two-page email exchange between the claimant and the respondent's solicitor, Mr Dempsey, dated between 11 and 16 March 2021. It was added to the Bundle.

7. The proceedings had been brought against AO World PLC. Mr Gilbart confirmed that had the claimant been employed he would have been employed by AO Retail Limited. We therefore ordered by consent that the respondent's name in this case be amended to AO Retail Limited. Mr Gilbart confirmed that the respondent took no issue with who the correct respondent was to the case.

8. At the start of the hearing the claimant applied to amend his claim. The application was made by way of additions to the List of Issues in the case set out in the Case Management Order made by Employment Judge Shotter on 6 April 2020 (pp.35-48) and by his letter dated 19 March 2021. We refused that application and gave our reasons orally. Those reasons are at Annex B to this Judgment.

9. Although not included in the List of Issues, Mr Gilbart for the respondent confirmed that it was part of the respondent's case that it did not have knowledge of the claimant being a disabled person (nor could it reasonably have been expected to know that), nor did it know that the PCP claimed as part of the reasonable adjustments claim would cause the claimant a substantial disadvantage.

Issues

10. Since we rejected the claimant's application to amend the issues in the case, the issues to be decided remained those set out in Employment Judge Shotter's Case Management Order dated 6 April 2020. They were set out in paragraphs 1-13 of the List of Issues at page 50.2/50.3 of the Bundle. For ease of reference, that List of Issues is at Annex A to this Judgment.

Findings of Fact

11. Before we set out our findings of fact we deal with the credibility of the witnesses and the reliability of their evidence.

Credibility

12. Although we found the claimant a credible witness and his evidence reliable when it comes to factual events we found his evidence less reliable when it came to interpreting those factual events. We found he had a tendency to lack perspective in relation to events that happened to him and to lack insight about the reasons why things happened. The most obvious example is his stated belief in his Schedule of Loss (p.31) that if he had had an interview the respondent there would have been a 75% chance of his achieving the role and an 80% chance that he would have stayed in the role until 2024 despite his recent work history suggesting that he could not cope with the sort of face paced environment and pressurised work the Inbound Sales Executive Role entailed. At times the claimant also seemed to have difficulty seeing matters from the perspective of others, e.g. how matters looked from the perspective of Ms Burton's given the demands on her of dealing with a large number of applications of which his was just one.

13. We found Ms Burton to be a credible witness. She was willing to say if she did not remember matters and we found her evidence reliable.

14. We found Miss Alam-Taylor to be a credible witness. She gave clear and cogent evidence and we found her evidence reliable.

Background facts

15. The respondent sells domestic appliances and other goods online mainly to consumers. AO Retail Limited is a subsidiary of AO World PLC.

16. The claimant's case relates to his application for a role as an Inbound Sales Executive (pp.125-126). "Inbound" means the role was dealing with customers who had contacted the respondent rather than a role proactively "cold-calling" potential customers. The role had a basic salary of £20,000 with an uncapped commission structure. The job description suggested the realistic earning over a year would be £36,000 with "top earners" having take home pay in excess of £50,000. The role involved selling additional products (such as product care insurance) to customers buying goods from the respondent.

17. The claimant had experience of such "upselling" sales roles in the past and the evidence in the Bundle showed he had been successful at it (for example being top performer at his then work in terms of sales in July 2014). However, since around 2015-2016 the claimant had worked in non-sales roles. His work history since April 2016 showed a succession of short-lived employments in less high-powered sales roles and data entry or administrative roles. The claimant's longest period of employment from 2016 was as a Recruitment Agent for Sainsburys for whom he worked from February 2018 until September 2019.

18. It was agreed that the claimant's work history since 2016 would not have ordinarily met the Respondent's criteria for a telephone interview for the Inbound Sales Executive Role which the claimant applied for. Ms Burton in her evidence agreed, however, that if the work history since 2016 was disregarded, the claimant's earlier work history was of a kind which would potentially justify proceeding to a telephone interview for the role.

Findings about the respondent's recruitment processes

19. The respondent is constantly recruiting for sales roles. Ms Burton's evidence was that she is generally tasked with starting 20 new vacancies every month on a rolling basis. There are three ways into the recruitment process. The most usual is via the AO jobs website. When candidates apply online via that website they are automatically directed into the Avature candidate management system. That system generates an email for a recruiter like Ms Burton to tell her that she needs to review an application that has been received. If the application does not pass the first sift then Ms Burton moves it into the "declined" part of the system which automatically generates an email declining the application. If the application is not rejected at that sift, Avature will prompt further tasks and carry out a number of tasks automatically based on the data already inputted.

20. For example, if a candidate is accepted then there is an automated process where the candidates selected are sent a bookings communication which enables them to choose a time for a telephone interview. Avature is connected to Outlook which means that once the candidate has selected a time for a telephone interview

that generates an Outlook entry so that Ms Burton knows to call them at that time and date. To the extent that Avature is mechanised and automated, Ms Burton's role in relation to it is primarily reactive.

21. Because the vast majority of applications come via the AO jobs website, the vast majority of them go straight into the Avature system. Of the remainder, about 25% of applications are those generated by what is called "direct sourcing" or "headhunting". These are candidates which Ms Burton has identified as being potentially suitable for roles by filtering LinkedIn profiles to identify those working for comparable companies or those who have been identified as being in sales roles through a word search of profiles. Once a filter at that level has been carried out Ms Burton will go through the remaining profiles and select those potential candidates to whom she wants to send a direct message on LinkedIn. If they respond on LinkedIn then Ms Burton will contact them to set up a telephone interview. Only at that point when there is a telephone interview set up will those candidates be entered into the Avature system. The claimant's application never reached that point and so was never entered into the Avature system.

22. Ms Burton confirmed that in the case of direct source candidates she would usually chase if she does not get a response to the initial direct message. She said she would only chase once, however, because she will assume that if there is no response to that initial chase the candidate is not interested. Direct sourcing accounts for about 25% of candidates.

23. Direct email applications (which is the route followed by the claimant) account for about 5% of applications. Ms Burton's evidence was the majority of those who contact by email are people who have for one reason or another been unable to submit an application through the main website. That can be because they have had technical difficulties with the jobs website or, for example, because they have a CV or other supporting information of a format or of a size which the website will not accept. If they are suitable then they will generally be fed into the Avature process. 5% of applications by email convert into about three or four per month.

24. Ms Burton's evidence, which was not challenged, was that she will seek advice about an application from HR (which she would do via her manager, Miss Alam-Taylor) very rarely perhaps once or twice a year.

<u>Findings about the application process in the claimant's case</u>

25. On 15 August 2019 the claimant sent an email to the respondent's career's inbox (careers@ao.com) (p.127). His email was headed "Reasonable Adjustments". In it he explained that he was writing to apply for the position of Inbound Sales Executive (Fixed Late Shift) which had been advertised on the AO jobs website. At the start of the email (the second sentence) he says, "As I would require reasonable adjustments in the application process for this role, I thought it would be best to make you aware of this".

26. In the second paragraph of his email the claimant explained that he had extensive target based sales experience and was happy to provide evidence of that. He then went on to say:

> "I have a disability which is primarily due to anxiety. Due to the disability, there were periods of time where I was off work, periods of time in which I was not working in sales and periods of time where I had multiple jobs. As I had been through treatment and I have many coping mechanisms in place, the disability is well managed. I take part in normal day-to-day activities."

27. He went on to explain he was currently employed with Sainsbury's and had been since February 2018 but was now eager to return to a sales role.

28. In the third paragraph of the email the claimant asked that as an adjustment in the recruitment process the respondent disregard the time when he was off work, the times when he was not working in sales and the high number of jobs which he had had since he was diagnosed with low mood and anxiety in 2015. He concluded by saying that he was happy to send the respondent a copy of his CV and Portfolio outlining his sales experience.

29. On 16 August 2019 the careers inbox forwarded that email to Ms Burton (page 128).

30. Ms Burton's evidence was that the claimant's application was unusual because of its reference to his disability, the need for reasonable adjustments and because he had not worked in sales recently. Because she had not had any experience of dealing with that sort of request before she decided it would be sensible to get advice on how to handle it. She spoke to Miss Alam-Taylor who in turn spoke to Ailsa Charnock, the respondent's Head of HR. Ailsa Charnock advised Miss Alam-Taylor that they should obtain a copy of the claimant's CV to see whether it substantiated the sales experience that he had set out in his letter. Miss Alam-Taylor asked Ms Burton to do so and sent her an email on 20 August 2019 (page 130), headed "Reasonable Adjustments" and the message "CV and book me in" to remind Ms Burton to implement those tasks.

31. As a result of those initial internal discussions Ms Burton emailed the claimant on 20 August 2019 at 5.30pm (page 131). She thanked him for his email and taking the time to explain the situation. She said that "the first thing I'm going to need from you is a CV if that's ok, and then we can get a call booked in to discuss your application further". She asked the claimant to send his CV to her directly and "we can go from there". She concluded with a smiley face emoji and "look forward from [sic] hearing back from you".

32. The claimant responded on 21 August 2019 (the email is timed at 1.11am) sending his CV and portfolio and saying that he was looking forward to speaking to her (page 132). The claimant's CV was at pages 133-137 in the Bundle and the portfolio (which was tailored to the AO role and specifically addressed to Ms Burton) was at pages 138-140.

33. Ms Burton showed the CV and the portfolio to Miss Alam-Taylor on her laptop screen. They agreed that because the claimant's CV did not show recent sales experience and there was some indication that he was not good at staying in jobs for long periods of time, they would not ordinarily consider the application for a telephone interview. However, because of the email which the claimant had sent requesting reasonable adjustments Miss Alam-Taylor sought further advice from the

respondent's Head of HR, Ailsa Charnock. Miss Alam-Taylor explained to Ms Charnock what her and Ms Burton's preliminary view was Ms Charnock told her to leave it with her. She was working at home at that point. Miss Alam-Taylor did not send her a copy of the CV or the initial letter. In evidence she explained that it was not the practice of the company to send CVs and personal details by email and where possible to avoid that.

34. On 28 August 2019 the claimant emailed Ms Burton again. It was a short chasing email "to see if you had the chance to review my CV and portfolio. I'm still eager to speak to you about the Inbound Sales Executive role". The email was friendly in tone, starting with "I hope this email finds you having a good day" and a smiley emoji (page 141).

35. Ms Burton did not respond to the claimant's email. Although we find it a little surprising that Ms Burton did not even acknowledge the claimant's email we accept her evidence that at this point the matter was "with" Miss Alam-Taylor as far as she was concerned and that she did not want to take any further steps until she had her instructions.

36. Ms Burton chased Miss Alam-Taylor for an update in the week commencing 31 August 2019, and Miss Alam-Taylor in turn chased Ailsa Charnock for an update. Miss Alam-Taylor was on leave from 17 September until 28 September 2019 and chased Ailsa Charnock again before she went on leave.

37. When asked why she did not chase Ailsa Charnock more regularly, Miss Alam-Taylor explained that she was more senior than her and so Miss Alam-Taylor's view was that when she had escalated the matter to Ailsa Charnock it was not appropriate for her to chase Ms Charnock.

38. Miss Alam-Taylor returned to the office after leave on 30 September 2019. Ailsa Charnock, Ms Burton and Miss Alam-Taylor were all in the office on that day, and Ailsa Charnock told them the outcome of her consideration, which was that they should proceed to a telephone interview but that the interview should be conducted by Miss Alam-Taylor because she was more experienced than Ms Burton. She also advised that at the interview for the sake of transparency Miss Alam-Taylor should make it clear to the claimant what the job involved, and in particular that it was fast paced and demanding one. Ms Burton was tasked with setting up the telephone interview.

39. At 10.44am on 30 September 2019 Ms Burton emailed the claimant, apologising for the delay in coming back to him and asking whether he was free for a call "this week" regarding his application (page 142).

40. On the following day, 1 October 2019, the claimant emailed back accepting Ms Burton's apology and thanking her for getting back to him. He said he was available that week to discuss the application and suggested the afternoon of Thursday 3 October (page 143). Because Ms Burton did not respond, he sent her a chasing email on 14 October at around 5.00pm (page 144). He hoped that she had had a good weekend and said that he was still looking forward to speaking to her about the Inbound Sales Executive role. He repeated that he thought he had the relevant experience which could be illustrated at an interview. He repeated that he

would "kindly request that AO makes the reasonable adjustment for me of reasonably changing the criteria which it would normally apply in determining which applicants are invited for interview and are subsequently offered positions for the Inbound Sales Executive role".

41. On 15 October at 12.10pm Ms Burton phoned the claimant and left a message on his voicemail. The transcript of that message was at page 151. The respondent agreed it was accurate. Ms Burton asked the claimant to give her a call back as soon as he could regarding his application (page 151).

42. Ms Burton was not able to give an explanation why she did not respond to the claimant sooner. However, from her evidence and that of Miss Alam-Taylor what is clear is that the workload at this time was particularly heavy. Ms Burton was one of five recruiters and would be dealing with 40-50 telephone interviews per week. She told us, and we accept, that it was not her general practice to chase up candidates other than those who had been initially contacted by the respondent by way of being headhunted. Even for those candidates she would usually only chase up once.

43. It is clear that the claimant's case was not brought up by Miss Alam-Taylor in the weekly one-to-ones or team stand up meetings which would have involved her and Ms Burton. We find that as far as Miss Alam-Taylor was concerned she was waiting for Ms Burton to set up the telephone interview. Miss Alam-Taylor and Ms Burton both referred to the respondent's priding itself on providing an excellent experience for candidates. However, we also find that the nature of their roles meant that they expected candidates (other than direct sourced ones) to be proactive in chasing them rather than the other way around.

44. At 14:28 on 15 October the claimant rang Ms Burton back and left her a voicemail. He said he was returning her call and asked her to give him a ring when she had the chance. He left her his telephone number (which in any event she clearly had because she had left a message for him).

45. It is accepted that Ms Burton never responded to that call.

46. Ms Burton was also unable to explain why she did not pick up the claimant's voicemail of 15 October 2019. She did not deny the claimant left a message but we find that she was genuine in her evidence that she had not actually received it. Her evidence was that she gets about 25 calls a day on her mobile phone because it is her main working tool which she also uses for emails, texts and WhatsApp messages. She accepted that from time to time she would miss messages but generally would find that if someone really wanted to speak to her they would call her again.

47. The claimant did not take any steps to chase up Ms Burton after 15 October 2019.

48. His next contact with the respondent was on 23 December 2019 when he emailed their Human Resources email address with an email headed "Discrimination Complaint" (page 153). He addressed the email "to whom it may concern" and said that when he applied for the Inbound Sales Executive role "I experienced discrimination". He asked them to advise him of "the contact details of someone at

AO who I and ACAS can communicate with in regards to this complaint". The claimant's explanation for not following up with Claire Burton was that he had by that point decided that he was no longer interested in the job because of the treatment he had received. He did not want to go back to Ms Burton because he felt that she had discriminated against him.

49. On 23 December Callum Murphy, one of the respondent's HR advisers, emailed the claimant back (page 154). He requested the claimant send further information so that he could identify who was best placed to resolve the matter. Alternatively, he asked that the claimant provide a contact number if he would prefer someone to speak to him regarding the matter.

50. On 26 December the claimant responded to Mr Murphy. He explained that he had applied for the role and had explained in the email about the need for a reasonable adjustment to "remove the disadvantage which the disability caused". He referred to having communicated with Ms Burton regarding the application process but that even though he "had very good sales experience" he did not get "a face to face interview for the application". He said that after not receiving a response from the voicemail which he had sent to Ms Burton in October 2019 "I decided not to continue with the very stressful recruitment process". He said that the respondent "did not make the necessary reasonable adjustments I required in the recruitment process". He said he had a document which he would like to send to the respondent describing his discrimination claim in greater detail (page 155).

51. On 27 December Mr Murphy responded to the claimant, thanking him for his email. He copied his response to Chris Piercy, the respondent's Talent Acquisition Manager, and said that he would look into the matter for the claimant. In the meantime, he asked the claimant to send through the document regarding discrimination which he had referred to in his previous email (page 156).

52. In early 2020 Mr Piercy told Miss Alam-Taylor about the claimant's complaint that he had experienced discrimination. Mr Piercy also told her that the claimant said that his last contact with the respondent was to leave a voicemail with Ms Burton on 15 October 2019, which she had failed to return. Miss Alam-Taylor spoke to Ms Burton about this and Ms Burton's explanation was that the end result of the exchanges with the claimant was that she had left a message for him on 15 October but had not heard back. We accept that she genuinely understood that to be the position. Miss Alam-Taylor's view was that as they were willing to give the claimant a telephone interview in October 2019 there was no reason why they should not do the same at this point. She therefore emailed the claimant on 23 January 2020 (pages 157/158) suggesting a number of times on 27 January or 30 January 2020 when they could have a telephone interview.

53. On 4 February the claimant responded. He did not directly accept or reject the offer of the telephone interview. Instead he said that he had a "very unpleasant experience during the recruitment process for the Inbound Sales Executive role" and that his experience of the process had made him concerned that the respondent may not have been accommodating of his situation if he became an employee. He described the process as "a rather stressful recruitment experience considering that the adjustments which I requested seemed easy to make and very reasonable". He

closed the email by asking Miss Alam-Taylor to explain why Ms Burton only called him on 15 October, nearly two months after he sent her an email on 21 August illustrating his interest in the role. We note that his email does not mention the fact that there had been communications between himself and Ms Burton between August and 15 October. Miss Alam-Taylor pointed that out in her response on 5 February 2020 (page 160). She said that “the delay resulted from a combination of factors – Claire was extremely busy in that period; your application had been outside the usual channel (i.e. it was not made online through AOJobs.com); and she had to take internal advice on your request for adjustments”. She then asked him to please let her know if he did want a telephone interview.

54. The claimant did not respond to that email.

55. It is part of the claimant's case that that offer was only made because he had issued these Tribunal proceedings. In terms of timing, he issued his claim form on 12 January 2020 and on 21 January it was served on the respondent. Miss Alam-Taylor’s evidence, which we accept, was that she did not know that Tribunal proceedings had been issued until a long time after the exchange of correspondence in January 2020. At the point when she wrote in January to offer the telephone interview she did know that the claimant had raised a complaint that he had experienced discrimination in the recruitment process. She also said that when she heard nothing further from the claimant in response to her email of 5 February 2020 she asked her manager what had happened and was told the claimant was taking legal advice. We find at the time the offers of interviews were made in January and February 2020 they were genuine offers.

<u>The claimant's evidence in relation to disability</u>

56. The claimant's disability impact statement set out what he said the effect of his anxiety was on his normal day-to-day activities. His evidence is that anxiety and depression was due to a negative incident of workplace bullying on 14 April 2010 involving his then line manager.

57. The medical evidence in this case was relatively limited. There was no expert’s report.

GP Records and other medical evidence

58. The claimant's GP records were in the bundle. They show that on 23 June 2015 the claimant attended his GP and a “stress related problem” was identified. The claimant told the GP about having low mood and depression: he does not refer to anxiety. His blood pressure was found to be dangerously high. The GP prescribed citalopram for stress and depression and amlodipine for the high blood pressure. The claimant was also referred for guided self-help for depression. The claimant underwent a seven-week course of CBT. He reported to the GP on 18 November 2015 that he was finding that helpful and that he had low days and some good days. At a telephone review with his GP on 8 March 2016 the claimant confirmed that the CBT was helping and that he was “ok and stable at present”.

59. The first mention of anxiety in the GP records is on 12 March 2016. The claimant was reporting about the job that he was in and that he was not making

enough sales. He reported palpitations, stammering, tension in his neck and panicky feelings.

60. By 6 May 2016 the claimant reported to his GP that he "feels well" and that he was currently seeking self-help. He also reported he had changed jobs and was suing his previous employer.

61. On 12 July 2016 there is a reference to anxiety states and the fact that the claimant was still taking citalopram but no detail is recorded. The next substantive GP record is from 2 May 2017 when the claimant reported that his mood and anxiety was much better than in 2015 and that he was in a decent mood. He was managing to motivate to go to work and socialise regularly, sleep well and going to the gym 4-5 times a week. He had stopped taking the citalopram in February 2017 due to its side effects.

62. On 29 June 2018 the claimant attended his GP for a medical review. He reported feeling anxious. This was linked to his application to the Home Office for a job. He reported his sleep was broken. There was an issue with the vetting process for the job which caused him stress, so the claimant decided not to apply for it.

63. In September 2019 during a medication review the claimant referred to anxiety due to losing his job with Sainsbury's.

64. On 9 October 2019 the claimant reported to his GP that he could not work due to low mood and anxiety.

65. In a report by Health Management, an Occupational Health company carrying out pre-screening for the Home Office role dated 28 November 2017 (p.118-119), the claimant reported that overall "his mood was well and that he is functioning at a normal level in terms of everyday activity".

The claimant's disability impact statement

66. In his disability impact statement, the claimant said that because of the incidents in 2010 being called into a manager's office would cause him anxiety. He would often think that something bad was going to happen when a manager came in his direction, and as a result at a number of the workplaces he has worked at he had requested a reasonable adjustment that when a manager approached him they should do so in a manner which would not make him think something bad was about to happen. He said he also sometimes has issues with trust.

67. In terms of specific examples of the effect of the anxiety on him, the claimant referred in his disability impact statement to being very upset at a meeting when he was employed in 2015 when there was a discussion of employment law and the talk turned to workplace bullying. His manager asked him to stay in the meeting after the break and asked him whether he had been bullied because he had noticed the claimant was nervous and the questions he was asking the barrister suggested he had been bullied. The claimant told his manager and the barrister running the meeting that he had been bullied. That was a reference to what happened in April 2010. The manager reassured him that there was no bullying at the company. We

note that the claimant did not on this occasion feel so anxious that he was not able to report the bullying that had happened to him in 2010 to his then manager.

68. In January 2006 the claimant decided to join a martial arts club. He says that he became anxious after just one session because he was tense and making a lot of mistakes. He said that people were watching him in the room and that made him feel uncomfortable. Some people made comments about the way he was training. Again, we note that while this shows a degree of anxiety it might be said that it was no greater than anybody would feel who was self-conscious whilst being watched undertaking martial arts and making a lot of mistakes.

69. Between April 2016 and September 2019, the claimant was in full-time employment. He says that counselling from the self-help service treatment for the anxiety and low mood, taking part in various helpful activities and avoiding stressful sales jobs helped with that. We must disregard measures taken to treat or correct the anxiety but none the less find the claimant did work full-time during that whole period.

70. In terms of his employment, the claimant worked for AQA in April 2016 but resigned in July 2016 because he had been offered a permanent role with HMRC. He took on that role but resigned in October 2016 because it involved people not paying VAT and having those discussions would often cause him anxiety. He resigned from that role and started to work for BT in a retention role, but he resigned from that role in February 2017 because a significant number of the calls he was dealing with involved speaking to irate customers; a lot of the calls were tough and the commute to work was often two hours each way.

71. In February 2017 the claimant started to work for Serco in an inbound sales role. He passed his probation and carried on working until he resigned in July 2017. The role with Serco was more of a fulfilment role because it was people calling knowing what they wanted to buy. There was a customer service element to the role and this sometimes involved goods not received calls, which were calls where the callers were irate because they had not received their orders. After that resignation the claimant went on to work in a number of administration roles before he applied and got a job starting work with Sainsbury's in February 2018.

72. The claimant says that because of anxiety he has often avoided confrontation which in turn has an adverse effect on his ability to carry out day-to-day activities. He gave specific examples. In 2017 someone was sat in his seat which he had reserved on a train: to avoid confrontation he sat somewhere else. In 2017 he was on a bus and the windows were closed and someone came onto the bus and opened them. The claimant wanted the windows closed because he was cold, but rather than closing them he did not do so and was hurt because he did not stand up for himself. In 2017 while on a training session a colleague made a joke which the claimant hated and he did not tell him off for that. In 2019 at a work function a colleague from another office jumped the queue right in front of him while they were waiting in line for food: the claimant did not say anything. The incident bothered him so he did bring up the issue with that colleague after the meal. We note that in this case the claimant was not inhibited from bringing up the incident with the colleague, although not immediately. The claimant says that since 2015 there have been many

other situations where he did not speak out when he should have done because his anxiety prevented him from doing so.

73. Another adverse effect the claimant refers to what he called “email anxiety”, which means that he often feels anxiety and physical discomfort during the process of checking emails. At times his evidence was that he would avoid checking emails due to the fear of there being bad news in the emails. He said that during the process of opening emails he would frequently pray as he would be anxious of what the bad news could be.

74. The claimant also said that dating and relationships is another area of his life which has been adversely affected by anxiety. He said that “approaching women scares me” and that he believes his anxiety would cause him to act in ways which would make him come across as fearful and not confident. He says that before 2015 he would at times feel nervous starting a conversation with someone, but after the diagnosis dating had become far worse and “disastrous”. It is clear from his evidence, however, that he has formed friendships with women at work. He gave as an example an employment from which he resigned because he thought he had made a female colleague embarrassed. It turned out afterwards that he had misunderstood the situation: she was not at all embarrassed by the gifts he had given her. He ended up asking the woman in question out via social media but she politely declined. The claimant says that his interactions with that particular woman, referred to as “A” in his statement, indicated the effect of anxiety on his normal day-to-day activities. Mr Gilbart put it to him that these were no more than the ordinary anxieties that the vast majority of people feel when it comes to matters such as dating, relationships and confrontation: we think there is a lot in that submission.

75. The claimant did refer in his disability impact statement to having panic attacks. One was in 2018 because he thought of speaking to a woman who seemed to be lost and seemed to need directions to get somewhere. The claimant said he wanted to introduce himself to her but started feeling a pain in his stomach and was very anxious and miserable and in the end just walked away.

76. The claimant referred to another incident in 2019 where he had met a “very nice person” who was sitting to his left in church and they had a quick conversation. He wanted to get her contact details so that he could get to know her more and there was an opportunity to do so but due to his anxiety he was too scared to ask her for her contact details. What we take from that is that the claimant had no difficulty in striking up a conversation with a person he had just met but was too shy to ask for the details. Although only examples, we do note that the examples given in the Secretary of State’s Guidance on disability says that it would not usually be reasonable to see shyness and timidity as something amounting to a substantial adverse effect on normal day-to-day activities.

77. The claimant referred to having several panic attacks at Sainsbury’s: some were as a result of being approached by a manager and others as a result of interactions with colleagues. He said that in 2018 he had a panic attack after a complicated call came through which he did not know how to deal with, and because there were no available managers to ask he took the caller’s details and let them go so that he could ask a manager for help. Soon afterwards a panic attack occurred.

There were non work-related things which had been bothering the claimant and he had not had much sleep the night before so that added to the problems he had with the call. He was taken off the phones for the rest of the day.

78. The other examples given do seem to us to be examples of the kind of ordinary stressful incidents that a number of people would find difficult. For example, coming into work to find that someone else was sitting at the desk allocated to you.

79. The claimant refers to spending more time than normal completing assignments at work because of being anxious and re-checking. He refers to being anxious when he receives parcels he is not expecting, when people sit directly behind him on the bus and when he is walking alone. What we note that while the anxiety clearly does impinge on the claimant's life it does not prevent him from carrying out all these activities i.e. going on a bus, going to the grocery store, going for walks.

80. When it comes to social anxiety the claimant referred to sometimes getting uncomfortable when people observe him and being unhappy that his manager at Sainsbury’s had asked a new starter to sit observing him after he had been told that he was having to lose his job. He initially went on a comfort break to avoid the manager sitting one of the new starters next to him, and later in the day did politely ask if he could decline the new starter sitting next to him to which the manager agreed. The claimant said that was an uncomfortable encounter for him. It seems to us it might well have been for a number of people.

81. The claimant says that in 2019 his anxiety still had an impact on his day-to-day activities, such as interacting with people. He says that going to church, prayer, being part of a supportive men’s fellowship group at church, undergoing certain breathing techniques, attending the gym often and attending mindful meditation sessions at Sainsbury’s all help with the anxiety. He says that despite these activities the anxiety had a particularly negative effect on his concentration at work, his thought process and his ability to work on emails and communicate with people, and that all these led to him not being fast enough and to his Sainsbury’s contract not being renewed. What we do note is that although we must disregard the effect of any treatment such as CBT, the claimant's evidence again shows that he does actively participate in activities such as church groups and going to the gym. This is not a case therefore where the claimant's anxiety is such that he was not able to carry out activities such as these.

82. The claimant's evidence is that on 20 September 2019 when his Sainsbury’s employment came to an end he thought about going back on medication because of his low mood. That was as a result of losing his job, which meant that the savings he had accumulated would start running out. He says that he applied for more than 20 jobs without getting an interview, and that unemployment led to his anxiety and depression getting worse. He says that he is discouraged from applying for jobs when he sees things like “fast paced” or “must be able to work under pressure”. That is contradicted, however, by the fact that he did apply for the AO job which has exactly those characteristics.

83. The claimant summarises his mental health by saying that in 2015 the impairments were extremely serious but due to the treatment he felt better towards

the end of 2015/16. In 2017 overall his mental health was much better though he was not anxiety or low mood free. We note the Occupational Health report we refer to in November 2017 reports functioning at a normal day-to-day activity and reports no particular problems. The claimant says that the anxiety had a substantial adverse effect on his ability to carry out his role at Sainsbury's as late as 2018/19 and that he was considering re-contacting the self-help for counselling in 2018 but he did not because of concerns about the possible work repercussions of taking time off. He was also concerned about the side effects of medication and so did not go down that route.

<u>Knowledge of Disability</u>

84. The claimant's first email to the respondent on 15 August 2019 said he had a "disability which is primarily due to anxiety" and referred to a diagnosis of low mood and anxiety in 2015. It did not give specific details of the effect of anxiety on his normal day-to-day activities. It did say that the disability had had an impact on his work history but that due to treatments and coping mechanisms the disability was well managed and he took part in normal day-to-day activities.

85. The CV in the portfolio the claimant sent Ms Burton on 21 August made no mention of his disability or any adverse effect on his day-to-day activities, focussing understandably on the claimant's abilities and achievements and aspirations were he to obtain the inbound sales adviser role. The subsequent email and voice messages between the claimant and Ms Burton did not provide any additional information about the claimant's disability and its adverse effect.

Law

<u>The Meaning of "disability" in the 2010 Act</u>

86. Section 6 of the 2010 Act, so far as is relevant, provides:

> **"(1) A person (P) has a disability if –**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) The impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities.**
>
> **…"**

87. Section 212(2) of the 2010 Act provides that an effect is "substantial" if it is more than minor or trivial.

88. Paragraph 2 of Schedule 1 to the 2010 Act defines "long-term" in this context. It provides:

> **"(1) The effect of an impairment is long-term if –**
>
> **(a) it has lasted for at least 12 months,**

(b) it is likely to last for at least 12 months,

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur…"

89. For paragraph 1(a) of Schedule 1 to the 2010 Act to apply, the effect of an impairment must have lasted for at least 12 months at the time when the alleged discriminatory act (or acts) took place (**Tesco Stores v Tennant UKEAT/0167/19**).

90. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the 2010 Act is to be assessed as at the time of the alleged discriminatory act (or acts) took place: see (**McDougall v Richmond Adult Community College [2008] ICR 431, Court of Appeal)**.

91. In cases to which paragraph (1)(b) of Schedule 1 of the 2010 Act applies the correct question for the Tribunal is whether viewed at the time and without the benefit of hindsight, the substantial adverse effects of the impairment were likely to last at least 12 months. That is a decision to be reached having regard to all the contemporaneous evidence, not just that before the employer. In reaching that decision the Tribunal is not concerned with the actual or constructive knowledge of the employer (**Lawson v Virgin Atlantic Airways Limited UKEAT/0192/19/VP**).

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92. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the 2010 Act**.**

93. "Likely" in this context means something that "could well happen", and is not synonymous with an event that is probable: (**SCA Packaging Ltd v Boyle [2009] ICR 1056, Supreme Court)**.

94. The Secretary of State's Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf gives guidance to help a Tribunal decide whether an impairment has a substantial effect on normal day to day activities. At paragraph D.2 and D.3 of the Guidance it explains what "normal day to day activities" means:

"D.2**. The Act does not define what is to be regarded as a 'normal day-to-day activity'**. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D.3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a

conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."

95. When assessing whether the effect of the impairment is substantial the Tribunal has to bear in mind the words of section 212(1) of the 2010 Act which confirm that it means more than minor or trivial. The 2010 Act does not create a spectrum running smoothly from those matters that are clearly of substantial effect to those matters that are clearly trivial. Unless a matter can be classed as within the heading "trivial" or "insubstantial" it must be treated as substantial (**Aderemi v London and South-Eastern Railway Ltd [2013] ICR 591**)**.**

Relevant evidence and correct approach

96. The burden of proving disability is on the claimant.

97. The definition of disability requires a Tribunal to decide four questions (**Goodwin v Patent Office [1999] ICR 302**)**:**

a. Does the claimant have an impairment which is either mental or physical?

b. Does the impairment affect the claimant's ability to carry out normal day-to-day activities?

c. Is that adverse effect substantial?

d. Is the adverse effect long-term?

98. These four questions should be posed sequentially and not together – (**Wigginton v Cowie and ors t/a Baxter International (A Partnership) EAT 0322/09)**.

99. It is good practice for Tribunals to state their conclusions separately on each of the questions. However, in reaching those conclusions, Tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings. (**J v DLA Piper UK LLP [2010] ICR 1052, EAT)**.

Discrimination arising from disability ("a s.15 claim")

100. Section 15 of the 2010 Act states:

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

101. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability, i.e. (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in the 2010 Act (Gallop v Newport City Council [2014] I.R.L.R. 211).

102. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

- the disability had the consequence of 'something';
- the claimant was treated unfavourably because of that 'something'.

In **Basildon** the EAT said it does not matter in which order the tribunal approaches these two steps.

103. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, the EAT summarised the proper approach to establishing causation under S.15:

- First, the tribunal has to identify whether the claimant was treated unfavourably and by whom.
- It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.
- The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

104. "Unfavourable treatment" is not defined in the 2010 Act. Paragraph 5.7 of the EHRC Code explains that it means "the disabled person 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 interests of a disabled person, they may still treat that person unfavourably."

105. For a s.15 claim to succeed the 'something arising in consequence of the disability' must be part of the employer's reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent (**T-Systems Ltd v Lewis EAT 0042/15**).

106. A claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. In **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT** the EAT confirmed that a s.15 claim can succeed where the disability has a significant influence on, or was an effective cause of, the unfavourable treatment.

107. A s.15 claim will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is objectively justified as a proportionate means of achieving a legitimate aim.

108. The Equality and Human Rights Commission's Code of Practice on Employment ("the Code"). sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

109. A failure to make a reasonable adjustment will make it very difficult for the employer to argue that unfavourable treatment was nonetheless justified. The converse is not necessarily true. Just because an employer has implemented reasonable adjustments does not guarantee that unfavourable treatment of the claimant will be justified, e.g. if the particular adjustment is unrelated to the unfavourable treatment complained of or only goes part way towards dealing with the matter.

110. The burden of proof provisions apply to s.15 claims. Based on **Pnaiser**, in the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment

- that he or she is disabled and that the employer had actual or constructive knowledge of this
- a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
- some evidence from which it could be inferred that the 'something' was the reason for the treatment.

111. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or
- that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

112. Section 39(5) of the 2010 Act provides that a duty to make reasonable adjustments applies to an employer.

113. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3)

114. Section 20(3) provides as follows:-

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

115. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632** (approved by the Court of Appeal in **Newham Sixth Form College v Sanders [2014]**). A Tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the

'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.

The EAT added that although it will not always be necessary to identify all four of the above, (a) and (d) must certainly be identified in every case.

116. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the EHRC Code provides considerable assistance. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards

117. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) of the 2010 Act defines "substantial" as being "more than minor or trivial".

118. The duty does not apply if the respondent did not (nor could reasonably be expected to know) both that the disabled person has a disability and that they are likely to be placed at a substantial disadvantage by the provision, criterion or practice (Schedule 9 Para 20 of the 2010 Act).

Discussion and Conclusion

The Claimant's Disability

During the period 15 August 2019 to 15 October 2019 (or such other date on which the claimant abandoned his job application submitted to the respondent) did the claimant have a disability within the meaning of section 6 of, and schedule 1 to, the Equality Act 2010 – namely a physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day to day activities?

119. We find that the limited medical records do support the claimant feeling anxious about certain life events. In terms of evidence of adverse effect on normal day-to-day activities our conclusion is that the anxiety he experiences does not have the substantial impact on normal day-to-day activities contended for.

120. Our findings about the reliability of the claimant's evidence are relevant here. We accept that he finds certain situations difficult, specifically confrontations, asking people out in a dating or relationship context, and opening and dealing with stressful work emails. However, we do not think that that goes further than the anxieties which a number of people experience when faced with those difficult life situations. The claimant's case is that the anxiety and its effects fluctuate. Even taken at its high points, however, it seems to us that it does not have the substantial adverse effect on his normal day-to-day activities required to meet the definition in section 6. While we must focus on what the claimant says he cannot do, we take into account that his own evidence is that he has been in employment for the vast majority of the last few years, has been active socially and engaged with others and used public

transport. We do not accept the evidence that he gave shows he faced a particular difficulty in doing any of the things that he says are particularly affected by his anxiety. He can communicate with others, can function in employment: his main issue, it appears to us, is that he cannot function in employment at a level he feels he should be able to. That does not seem to us to translate into his anxiety having a substantial effect on his normal day-to-day activities.

121. On that basis we find that the claimant was not a disabled person for the purposes of section 6 of the Equality Act 2010.

122. We have gone on, however, to make findings in relation to the other issues in the case.

If so, (in other words, had we found the claimant was disabled) was the respondent aware (or ought it reasonably to have been expected to know) of the claimant's disability?

123. Based on our findings of fact we find that by the latest by 20 August 2019 the respondent in the persons of Ms Burton and Miss Alam-Taylor, knew that the claimant asserted that he was disabled due to anxiety and that that had an impact on his work history, including leading to times out of work. They did not know the adverse effect of any of the anxiety on his normal day-to-day activities, indeed the claimant's email suggested that he was engaging in normal day-to-day activities albeit as a result of successful coping mechanisms. There was no indication of what the impact might be on his day-to-day activities absent those coping mechanisms. We find therefore the respondent did not have knowledge of the facts about the adverse effect of the anxiety on the claimant's day-to-day activities nor whether they were long-term so did not have actual or constructive knowledge of his disability. The respondent might well have gone on to make further enquiries and found out those facts had the telephone interview gone ahead. On the basis of their knowledge as at 20 August 2019, up to and including October 2019, there was no such knowledge, constructive or actual.

If the claimant had a disability, did the claimant's work history from May 2015 to August 2019 (comprising a lack of longevity in roles since and a lack of continuous sales experience sales in that period) arise in consequence of that disability?

124. Had we found that the claimant was disabled, we would have found that the claimant's work history (comprising a lack of longevity in roles since and a lack of continuous sales experience sales in that period) did arise in consequence of his disability.

<u>The claim of discrimination arising from disability</u>

125. Again, we make these findings out of courtesy to the parties given that we have heard evidence and argument about them. Because the claimant is not a disabled person these claims must of necessity fail. Dealing briefly then with the issues:

If the claimant had a disability, did the respondent treat the claimant unfavourably by not offering him an interview and/or not recruiting him because of his work history

from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

126. Our finding is no. On the facts the claimant was offered an interview by the respondent by Ms Burton's phone message on 15 October 2019. There was no unfavourable treatment consisting of refusal of an interview. His work history did not prevent that interview being offered. If the claimant's case is that the respondent in some sense withdrew that offer of interview by Ms Burton failing to respond to the 15 October voicemail, we do not accept that. We find that she did not respond because she genuinely, albeit mistakenly, failed to pick up his voicemail, and in accordance with her usual practice, except in directly sourced cases, did not proactively follow up a candidate who appeared not to have responded to an offer of a telephone interview.

If the claimant had a disability, did the respondent treat the claimant unfavourably by not replying to his 21 August 2019 and 28 August 2019 emails to the respondent on 30 September 2019 because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

127. We take this to be unfavourable treatment by not replying to the claimant's emails until 30 September because the respondent did reply on that date. We find that there was unfavourable treatment. There was a delay of some six weeks between the claimant's email of 21 August and any response to it. We do find that was a disadvantage in terms of delaying the claimant's application for employment and therefore potentially his start date in employment. It was arguably also a disadvantage in terms of the discourtesy to the claimant and the justified sense of grievance that would evoke in him.

128. Our findings of fact were that the delay was due to two factors. The first factor was Ms Burton taking the view that the claimant's case was "with" Miss Alam-Taylor, Ms Burton having escalated to her, which meant that Ms Burton did not feel it appropriate to respond to him until she had heard back from Miss Alam-Taylor. The second factor was the delay in Miss Alam-Taylor obtaining advice from the respondent's Head of HR, Ailsa Charnock. We find that delay was due in part (from 17 September 2019 to 28 September 2019) to Miss Alam-Taylor's absence from the office on leave. For the period from 26 August 2019 when Miss Alam-Taylor referred the matter to the Head of HR to 17 September 2019 the delay we find was attributable to the competing demands on Ms Charnock's time. Her limited HR team was dealing with most HR aspects of the respondent's 3,000 employees. In one sense the delay was linked to the claimant's work history - had he not had the work history he had Ms Burton would not have had to seek advice. However, in deciding whether the unfavourable treatment was because of something arising what we need to do is focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of the person but keeping in mind the actual motive of the alleged discriminator is irrelevant (**Pnaiser**).

129. Having heard Ms Burton's evidence and that of Miss Alam-Taylor we are satisfied that in neither case was the reason for the delay in responding to the

claimant's August emails his work history. In Ms Burton's case she was clearly genuinely of the view that the matter was with Miss Alam-Taylor and not for her to progress until she had heard otherwise; for Miss Alam-Taylor, she was waiting to hear from the Head of HR, and in neither case has the claimant provided evidence from which we could find that the delay was because of his work history. Indeed it could be argued that to some extent the delay was an aspect of the respondent treating the claimant more favourably. The result of the HR advice was that the claimant was offered a telephone interview despite his work history. In other words, what we find is that the claimant has failed to prove the "something else" required by **Madarassy** to pass the burden of proof to the respondent when it comes to this claim.

If the claimant had a disability, did the respondent treat the claimant unfavourably by not replying to his 1 October 2019 email because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

130. We accept the respondent not replying to the claimant's email of 1 October was unfavourable treatment. It put him at a disadvantage at the very least of having to expend energy and some time in chasing up the response, and it also delayed the progress of his application for employment.

131. However, on the facts we find the unfavourable treatment was not because of his work history. The respondent had decided to disregard his work history and proceed to a telephone interview with Miss Alam-Taylor. We find that Ms Burton simply overlooked the claimant's email of 1 October 2019 and that the likely reason for that was a combination of her workload and the fact that the claimant's application, proceedings outside the Avature candidate management system, did not generate a prompt to respond to him.

132. We are satisfied the delay was not a deliberate one on Ms Burton's part in the sense that she consciously or subconsciously decided to ignore the claimant's application because of his work history. As she said at that point, she was merely acting as the messenger to set up a telephone interview between the claimant and Miss Alam-Taylor. There was no reason why his work history would cause her to delay in doing so, and we are satisfied that it was not in her mind, consciously or subconsciously.

133. We do not for a moment suggest it was good practice or in line with the respondent's aspiration for an excellent candidate experience for the claimant's email to go unanswered, however poor practice and lack of explanation for the delay does not mean it was because of the claimant's work history or in any way linked back to his disability. It is for the claimant to prove facts from which we could conclude the reason for the delay was his work history and he has failed to do so. This allegation therefore fails because the unfavourable treatment was not because of something arising from the claimant's disability i.e. his work history.

If the claimant had a disability, did the respondent treat the claimant unfavourably by not replying to the voicemail which he left the respondent on 15 October 2019 because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

134. Our conclusions on this allegation are the same as for the previous allegation. We are satisfied there was unfavourable treatment in the failure to respond to the claimant's voicemail. That failure meant his interview did not take place and his recruitment did not progress. However, we are not satisfied that the delay was because of his work history.

135. As with the previous allegations, we find that Ms Burton did not pick up the claimant's voicemail and the reason for that was a combination of her workload and the fact the claimant's application proceeding outside the Avature candidate management system did not generate a prompt to respond to him. We find that had the claimant chased her again by email or text she would have responded to him. The same point applies here as it does to the email of 1 October: there was no reason for Ms Burton not to respond since she was simply setting up a call between the claimant and Miss Alam-Taylor. The claimant's work history was not a relevant factor because that had already been disregarded in deciding the call should be set up. This allegation therefore fails because the unfavourable treatment was not because of something arising from the claimant's disability i.e. the claimant's work history.

136. Those same reasons apply to our decision on the next issue, which is:

> *If the claimant had a disability, did the respondent treat the claimant unfavourably because Claire Burton did not try to contact him again after she tried to contact him on 15 October 2019 because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?*

If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim?

137. That issue does not arise because we have found that had the claimant been disabled the unfavourable treatment where it occurred was not because of something arising from the claimant's work history.

The claim of failure to make reasonable adjustments

138. Moving on to the claim of failure to make reasonable adjustments, the first two issues are:

If the claimant had a disability, did the respondent have a requirement as to prospective applicants' work histories which amounted to a provision, criteria or practice (PCP") of the respondent within the meaning of section 20(3) of the Equality Act 2010?

If so, what was that PCP? Was it that an applicant had to demonstrate work history and sales experience of a certain subjective or objective standard?

139. It is more convenient to take these two issues together. The respondent has accepted it applied the PCP contended for. That fits with the evidence we heard,

which was clear that with the claimant's work history as set out in his CV he would not ordinarily have received an interview because the respondent looked for current sales experience and evidence of longevity in roles.

If so, did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled?

140. We find the PCP did have that effect. If the claimant had have been disabled, we find that his disability was what led to a work history that both lacked recent target driven sales roles and lacked longevity in his recent roles, the longest recent role being the Sainsbury's one.

141. We are satisfied the disadvantage was substantial. Ms Burton's clear evidence was that had he not written in asking for a reasonable adjustment the claimant's application would have been rejected because of its lack of recent sales experience and longevity in recent jobs.

If so, did the respondent fail to take such steps as were reasonable to avoid the disadvantage by conducting a telephone and/or face-to-face interview with the claimant despite his work history, contrary to sections 21 and 39(5) of the Equality Act 2010?

142. Our finding is it did not. The respondent did in fact offer a telephone interview despite the claimant's work history. It made exactly the reasonable adjustment which the claimant asked for, which was to disregard his recent work history. We accept there were delays in communication and because Ms Burton failed to respond to the claimant's voicemail on 15 October the interview did not go ahead. That was not however because of the claimant's work history. That had already been set aside by the decision to grant him a telephone interview.

143. The claimant's claim that there was a failure to make reasonable adjustments to the PCP relating to the work history therefore fails.

Employment Judge McDonald
Date: 14 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 May 2021

FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX A
List of Issues

<u>The Claimant's Disability</u>

1. During the period 15 August 2019 to 15 October 2019 (or such other date on which the claimant abandoned his job application submitted to the respondent) did the claimant have a disability within the meaning of section 6 of, and schedule 1 to, the Equality Act 2010 – namely a physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day to day activities?

2. If so, was the respondent aware (or ought reasonably to have been expected to know) of the claimant's disability?

3. If the claimant had a disability, did the claimant's work history from May 2015 to August 2019 (comprising a lack of longevity in roles since and a lack of continuous sales experience sales in that period) arise in consequence of that disability?

<u>The claim of discrimination arising from disability</u>

4. If the claimant had a disability, did the respondent treat the claimant unfavourably by not offering him an interview and/or not recruiting him because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

5. If the claimant had a disability, did the respondent treat the claimant unfavourably by not replying to his 21 August 2019 and 28 August 2019 emails to the Respondent on 30 September 2019 because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

6. If the claimant had a disability, did the respondent treat the claimant unfavourably by not replying to his 1 October 2019 email because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

7. If the claimant had a disability, did the respondent treat the claimant unfavourably by not replying to the voicemail which he left the respondent on 15 October 2019 because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

8. If the claimant had a disability, did the respondent treat the claimant unfavourably because Claire Burton did not try to contact him again after she tried to contact him on 15 October 2019 because of his work history from 2015 to August 2019 contrary to sections 15(1) and 39(1) of the Equality Act 2010?

9. If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim?

<u>The claim of failure to make reasonable adjustments</u>

10. If the claimant had a disability, did the respondent have a requirement as to prospective applicants' work histories which amounted to a provision, criteria or practice (PCP") of the respondent within the meaning of section 20(3) of the Equality Act 2010?

11. If so, what was that PCP? Was it that an applicant had to demonstrate work history and sales experience of a certain subjective or objective standard?

12. If so, did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled?

13. If so, did the respondent fail to take such steps as were reasonable to avoid the disadvantage by conducting a telephone and/or face-to-face interview with the claimant despite his work history, contrary to sections 21 and 39(5) of the Equality Act 2010?

ANNEX B
Reasons for refusing claimant's application to amend

1. This is the first morning of the three day final hearing of this case. The claimant applies to amend his claim.

2. In brief, the claimant says that the respondent failed to respond promptly to emails and voicemails which he sent or left with them as part of the recruitment process. His claim already includes a claim under section 15 of the Equality Act 2010, that that behaviour was unfavourable treatment because of something arising from disability. The "something" in this case being the claimant's interrupted work history from 2015 to August 2019. The application in essence is to add a claim that that behaviour was also a failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010.

3. In terms of the relevant law, the principles that we are applying are set out primarily in the case of **Selkent Bus Company Limited v Moore [1996] ICR 836**. **Selkent** makes it clear that the central issue is that Tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The factors which are usually relevant in assessing that injustice and hardship balance are the nature of the amendment, the applicability of time limits and the timing and manner of the application. In the more recent case of **Vaughan v Modality Partnership UKEAT0147/20 BA** the Employment Appeal Tribunal reminded parties and Tribunals that the core test requires consideration of the specific practical consequences of allowing or refusing the amendment.

The Application to amend

4. Dealing first with the nature of the amendments and the timing of them, this case has been ongoing for some time. There was a case management hearing in April 2020 which resulted in a Case Management Order sent to the parties on 20 April 2020. It included a summary of the issues in the case and the standard paragraph (in this case at paragraph 15) requiring a party to notify the Tribunal and the other parties promptly if the List of Issues was in any way incorrect or inaccurate. On 27 June 2020 the claimant did write to the Tribunal to suggest an amendment to the PCP on which his reasonable adjustment claim was based.

5. In terms of the List of Issues and any proposed amendments, nothing then happened until 12 March 2021, less than two weeks before the hearing. At that point, as we understand it, the respondent sent the List of Issues to be included in the Tribunal Bundle to the claimant. It was based on the list in the Case Management Order made in April 2020. The claimant at that point added some text in red which in essence adds or seeks to add a further reasonable adjustment claim.

6. Having considered the text in red added to the draft List of Issues (paragraphs 14 and 17) at page 50.3 of the Bundle it is not at all clear what PCP is being contended for. It is clear that what the claimant is aiming at is saying that the

respondent should have made a reasonable adjustment by responding faster to his emails and voicemails. He does not, however, in those red amendments set out specifically what PCP is contended for. He did do so in a letter to the Tribunal which was sent on 19 March 2019, that is on the last working day before this Tribunal hearing started. The way he puts the PCP in that letter is:

> "Was there a PCP that applicants who had demonstrated that they had the desired work history and sales experience of a certain subjective or objective standard were communicated with more favourably compared to those who did not demonstrate the desired work history and sales experience of a certain subjective or objective standard."

7. The first finding we make is that the application to amend in this case was made extremely late in the day. We have taken into account the fact that the claimant was a litigant in person, and also his submission that the amendment was triggered by the respondent sending him the draft List of Issues for inclusion in the Bundle in March 2021. We do not think that that provides sufficient explanation for the delay in applying to amend. Even where a litigant is in person, there is an onus on that claimant to ensure that the List of Issues is clarified at the earliest possible stage. That was made clear in the Case Management Order dated 20 April 2020 and, as we have said, the claimant did indeed respond to that Case Management Order in June 2020 to clarify the PCP in the reasonable adjustment claim already included in that list. There is no real explanation that we can find for the failure to apply to amend to add the new claim of a failure to make reasonable adjustments at an earlier date.

8. In terms of the scope and nature of the amendment, it is to a large extent a re-labelling exercise. The claimant does not seek to add new facts. Mr Gilbart for the respondent submitted however that despite not adding new facts the scope of enquiry was widened by the proposed amendment. Because the amendment would require examination of whether there was a PCP it would necessarily require an enquiry into how other cases were treated to establish whether indeed there was such a PCP. The claimant's witnesses had not come prepared to deal with that issue and there would need to be evidence not within the scope of the Bundle or those witnesses' statements about how others were treated.

9. In terms of the balance of prejudice overall Mr Gilbart also submitted that the claimant's case would not be significantly prejudiced by refusing the amendment.

10. We accept that the way that the PCP is put in the claimant's letter of 19 March 2021 comes very close to just being the flip side of his section 15 claim, i.e. claiming that those with good work histories were treated more favourably whereas the section 15 claim is that he was treated unfavourably because of his poor work history.

11. Taking all those factors in the round what we have decided is that the application to amend should be refused. We accept that there is no introduction of significant new facts, and we think that while there is a broadening of enquiry it is not that substantial. However, it is clearly the case that there is some broadening of enquiry, that witnesses would be asked questions which their witness statements do not cover and which they had not been prepared to deal with. Taking into account

also the lack of a cogent reason for the application not being made earlier, our view is that the balance of hardship and injustice in this case means that the application to amend to add a further claim of a failure to make reasonable adjustments should be refused.