EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111592/2019 (A)

Held remotely on 9, 10 and 11 June 2021

Employment Judge W A Meiklejohn
Tribunal Member Mrs E Hossack
Tribunal Member Mrs D Massie

Mr M McGilvray — **Claimant**
Represented by:
Ms R Page – Solicitor

Beam Suntory UK Ltd — **Respondent**
Represented by:
Ms G Watson – Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's complaints brought under section 13 (**Direct discrimination**), section 15 (**Discrimination arising from disability**), sections 20/21 (**Duty to make adjustments/Failure to comply with duty**) and section 26 (**Harassment**) of the Equality Act 2010 ("EqA") do not succeed and are dismissed. The Tribunal's Judgment is unanimous except in relation to the complaint under sections 20/21 EqA where it is, in part, a majority decision as detailed below.

REASONS

1. This case came before us for a final hearing, conducted remotely by means of the Cloud Video Platform. Ms Page represented the claimant and Ms Watson represented the respondent.

Procedural history

2. There had been a number of previous hearings. The first of these was a preliminary hearing (before Employment Judge Hendry) for the purpose of case management on 11 December 2019. The claimant did not participate. The outcome was a direction that the claimant should lodge Further and Better Particulars.

3. The second preliminary hearing (again before EJ Hendry) took place on 10 February 2020. The outcome was an Order that the claimant should submit (a) a Schedule of Loss and (b) written further particulars in relation to the complaint of disability discrimination.

4. The third preliminary hearing (again before EJ Hendry) took place on 13 July 2020. The outcome was an Order, expressed in more detailed terms than previously, requiring the claimant to submit written further particulars in relation to his compliant of disability discrimination.

5. On 22 September 2020 EJ Hendry issued an Unless Order replicating the terms of the Order he made following the preliminary hearing on 13 July 2020.

6. Following a hearing on 2 November 2020 on the respondent's application for a strike out order, reflecting late compliance with the Unless Order, EJ Hendry refused to strike out the claim and the case proceeded to a final hearing. This was originally listed for dates in March 2021, and eventually came before us as detailed above.

Pleadings, as amended

7. The claimant provided further written particulars of his complaints of disability discrimination on 8 October 2020 (52-57). These made clear that the claimant was relying on the following provisions of EqA –

- Section 13 (**Direct discrimination**)
- Section 15 (**Discrimination arising from disability**)
- Section 20 (**Duty to make adjustments**)
- Section 26 (**Harassment**)
- Section 39 (**Employees and applicants**)
- Section 40 (**Employees and applicants: harassment**)
- Schedule 8 (**Work: reasonable adjustments**)

8. The claimant's further written particulars also made clear that the claims being advanced were –

1. Direct discrimination
2. Discrimination arising from disability
3. Failure to make reasonable adjustments
4. Harassment

9. The respondent lodged a response to the claimant's further written particulars (65-67).

List of issues

10. While the claimant's further written particulars and the respondent's response gave adequate notice of the complaints brought and the answers to these, a list of issues was not agreed until the stage of submissions. We record the agreed list here:

1 Direct discrimination – section 13 EqA

1.1 Did the decision to move straight to a capability hearing following receipt of the Occupational Health report amount to less favourable treatment compared to the treatment a hypothetical comparator would have received?

1.2 If so, was the less favourable treatment because of the claimant's disability?

2 Discrimination arising from disability – section 15 EqA

2.1 Did the respondent treat the claimant unfavourably by (a) changing the scope of his duties following becoming aware of his disability on 23 May 2019 and/or (b) deciding to dismiss the claimant on 16 July 2019?

2.2 If so, was the unfavourable treatment because of something arising in consequence of the claimant's disability?

2.3 If so, was the treatment a proportionate means of achieving a legitimate aim?

3 Failure to make reasonable adjustments – section 20 and Schedule 8 EqA

3.1 Has the claimant identified a provision, criterion or practice of the respondent that placed him at a substantial disadvantage?

3.2 Did the respondent take reasonable steps to avoid the disadvantage? In particular would it have been reasonable for the employer to have

made the adjustments specified in the claimant's Further and Better Particulars [**page 57 of the bundle**], specifically:

3.2.1 Allowing the claimant additional time to develop his skills;

3.2.2 Provision of additional training;

3.2.3 Consulting with an individual with experience of Asperger's Syndrome to identify what type of training and additional adjustments would have been appropriate;

3.2.4 Allowing the claimant to meet with Occupational Health in person.

4 Harassment – section 26 EqA

4.1 Did the events set out in the claimant's Further and Better Particulars [**at pages 56-57 of the bundle under the heading "harassment"**] occur as alleged?

4.2 If so, was the conduct unwanted conduct and did it have the purpose or effect of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment?

4.3 If so, was it reasonable for the conduct to have had that effect?

Evidence

11. For the claimant we heard evidence from –

- The claimant himself
- Mrs P McGilvray, the claimant's mother

- Mr I McGilvray, the claimant's father

- Mr D Mitchell, a family friend

12. For the respondent we heard evidence from –

- Ms F Sanderson, Brand Experience Manager (formerly Visitor Centre Manager)

- Ms J Niven, HR Manager

- Mr G Paul, Visitor Centre Operations Manager

13. The evidence in chief of the witnesses was contained in written witness statements. These were taken as read in accordance with Rule 43 of the Employment Tribunal Rules of Procedure 2013. We had a joint bundle of documents extending to 130 pages to which we refer above and below by page number.

Findings in fact

14. The respondent is part of a global organisation which produces and markets a range of alcoholic spirits. It operates the Glen Garioch Distillery in Oldmeldrum. This operation includes a visitor centre of which, at the relevant time for the purpose of these proceedings, Ms Sanderson was the manager and Ms F Marshall was assistant manager.

15. The claimant was 18 years of age at the relevant time. He applied for and secured employment with the respondent as a visitor centre assistant. This was his first job after leaving school. He hoped to pursue a career in the whisky industry. Shortly before his employment commenced, the claimant started to work on a voluntary basis at the Gordon Highlanders Museum in Aberdeen. This entailed giving guided tours of the museum to small groups of visitors.

16. The claimant was diagnosed with Asperger's Syndrome ("AS") when he was 10 years of age. He did not disclose this to the respondent at interview, nor when he started work at the Glen Garioch visitor centre on 23 April 2019. The claimant worked 12 hours per week spread over 2 days according to a rota. His normal hours of work were from 9.45am to 4.30pm. His work involved serving customers in the visitor centre shop, dealing with telephone calls and was intended to include visitor tours of the distillery. These tours would typically involve a group of up to 20 visitors. The respondent provided a script for tour guides to follow. We did not have a copy of the claimant's contract of employment but we understood that there was a probationary period of 3 months.

17. The effects on the claimant of his AS were described in the Occupational Health ("OH") report to which we make further reference below as follows –

"People with Asperger's syndrome have normal to above average intelligence, however, their main difficulties appear to be related to their social interaction and difficulty with the subtleties of language and interpretation of language or body language and with preforming multiple tasks at the same time. Mr McGilvray gives a history of having had difficulties with social interaction and meeting new people all his life and most recently in his job, these affecting his ability to deal with large groups of people or multi-tasking, as his role requires.

….Due to the features specific to his Asperger's syndrome, he may display behaviour which may not always be understood by the customers/clients and which could be interpreted as verbal aggression or rudeness, when instead, these are only specific manifestations of his Asperger's syndrome."

18. The claimant also described having difficulty using the phone. He stated –

"I am very anxious on the phone due to my disability. I don't know why but I always feel incredibly anxious on the phone."

19. The claimant accepted that there was an induction process when he started to work for the respondent. The respondent produced a training matrix (84). The claimant saw this for the first time at his appeal against dismissal. The only element of formal training he recalled was licence training for selling

alcohol. It was apparent that the respondent's training process at the visitor centre, at least as applied to the claimant, was very much *"on the job"* training including observing and shadowing visitor tours, which the claimant did on 4 or 5 occasions.

20. He was also invited to participate in a *"role play"* exercise. Ms Marshall asked him to do a tour with her acting as a customer. He was not willing to do this, telling Ms Marshall that he did not like hypothetical situations. It was not clear when this occurred but it seemed to us likely that it was before the claimant disclosed his AS.

Claimant discloses disability

21. On 14 May 2019 the claimant had a problem at work. A large group of visitors came into the centre while he was on a phone call and he struggled to deal with the call. This was witnessed by colleagues including Ms Marshall. The claimant's evidence was that he then had a meeting with Ms Sanderson and Ms Marshall in the course of which he disclosed his AS. He also said that he was immediately taken off client facing duties.

22. Ms Sanderson's evidence was that the meeting at which the claimant disclosed his AS took place on 23 May 2019, with Ms Marshall also in attendance. This was supported by Ms Niven's evidence that Ms Sanderson had contacted her on that date following a meeting which she and Ms Marshall had with the claimant. This was confirmed by Ms Sanderson's email to Ms Niven dated 23 May 2019 (82).

23. However, in the minutes (taken by Ms Niven) of the claimant's capability hearing which took place on 16 July 2019 (93-97), with Ms Marshall attending as the claimant's companion, Ms Sanderson is recorded as saying –

"*This hearing forms part of the formal capability process and has been arranged following our discussions in relation to your performance including those on Monday, 20th May 2019. These conversations have surrounded my concerns about your capability in your role and you informed me on Monday, 20th May that you suffer from Asperger syndrome during one of our discussions."*

24. Ms Sanderson told us that Ms Marshall had been noting incidents of unsatisfactory performance on the part of the claimant. She had complied a document (80-81) listing these. Ms Sanderson said that during their meeting with the claimant, Ms Marshall had gone through this list (which ran to 24 items). Ms Sanderson also said that this meeting had lasted around half an hour. Following the meeting Ms Sanderson said that spoke with Ms Niven, and then sent her email of 23 May 2019 to Ms Niven (82).

25. As the claimant normally started work at 9.45am and Ms Sanderson's email (which contained 6 main paragraphs) was sent just before 10.19am, it seemed to us highly improbable that the meeting to which Ms Sanderson referred took place on 23 May 2019. There was simply not enough time between 9.45 and 10.19am for a half hour meeting, a phonecall between Ms Sanderson and Ms Niven and the typing of a fairly long email.

26. While Ms Sanderson said that the reference to 20 May 2019 in the minutes of the capability meeting was a *"typo"*, we considered it was more likely that the meeting at which the claimant's performance was discussed, and Ms Marshall went through her list, took place on 20 May 2019. It also seemed to us probable that a discussion about the claimant's performance would include the topic of his AS. We believed that the claimant might well have mentioned his AS when he spoke with Ms Marshall after the phonecall incident on 14 May 2019. It would be logical for him to do so to explain his dislike of using the phone.

Claimant's duties amended

27. Following the meeting at which his AS was discussed, Ms Sanderson decided to move the claimant away from the customer facing part of his job and put on what Ms Sanderson described as *"housekeeping tasks".* Ms Niven's evidence was that the claimant had effectively placed himself on lighter duties but we preferred the evidence of Ms Sanderson and the claimant that this

was done by Ms Sanderson. The claimant did not at the time complain about the change to his duties.

28. The claimant alleged that his managers' attitude towards him changed after he disclosed his AS. Ms Sanderson denied this. The claimant alleged that "*they became very negative, very short and harsh".* He was however unable to give any examples. We considered that this was a matter of the claimant's perception rather than any specific behaviour towards him on the part of the respondent. We noted that when the claimant was asked about this at his appeal against dismissal, he referred to there being a *"shift in attitude"* when people find out that he has AS, and he attributed this to *"unconscious bias".*

Referral to OH

29. It was clear from the terms of Ms Sanderson's email to Ms Niven on 23 May 2019 that referring the claimant to OH had been discussed during their call. A referral was duly made to Medigold Health ("Medigold"). Medigold wrote to the claimant on 31 May 2019 to advise that a telephone assessment had been arranged for 11 June 2019.

30. The claimant said that he spoke to Ms Sanderson after he received the Medigold letter. He told her that he was not comfortable with a telephone consultation and would rather have it in person. According to the claimant, Ms Sanderson indicated that it was not possible to do it in person. Ms Sanderson's evidence was that the claimant did not ask for the meeting to be in person.

31. Mrs McGilvray's evidence was that the claimant asked Ms Sanderson and Ms Marshall for a face-to-face consultation. She routinely collected the claimant from work and it was credible that they would have discussed this. Mrs McGilvray then telephoned Medigold and asked for the appointment to be face-to-face. She said that Medigold told her this was not possible as the respondent had asked for a telephone appointment.

32. We preferred the evidence of the claimant to that of Ms Sanderson on this point. Given the claimant's dislike of using the phone it was credible that he would want the consultation to be in person and had asked for this. Further, the fact that Mrs McGilvray had called Medigold was consistent with the claimant having asked unsuccessfully for an in person consultation. Ms Sanderson told us that she understood Medigold had no record of contact from Mrs McGilvray but we found Mrs McGilvray's evidence to be credible.

OH report

33. The claimant's OH consultation took place by telephone on 11 June 2019 with Dr L Constantinescu of Medigold. Dr Constantinescu issued a report dated 18 June 2019 (87-89). After the passages quoted at paragraph 17 above, the report continued as follows –

"*I understand that Mr McGilvray's employer has considered and discussed with him redeployment in the future, mainly in a position within the store area, where he would benefit from working alone and where he would not be required to face customers and interact with them (in the production department). I understand that he is required to drive to and from work, however, he reports that he would not be able to drive long distances. Therefore, when considering redeployment, his employer may wish to consider that his workplace would need to be within a reasonable driving distance from his home.*

Overall, in my opinion, Mr McGilvray is not medically fit for his current role and, as mentioned above, he would need to be redeployed into another, less challenging role for him in the future."

Capability policy

34. The respondent had a Capability policy (68-76). This stated (at section 5.3) as follows –

"*No employee will be dismissed for poor performance due to incapability without being first provided with reasonable opportunity to address the issues."*

35. The policy had an informal stage which contemplated an informal discussion between the employee and their manager and, if appropriate, a Performance Action Plan. It also had a formal stage which comprised Stage 1 – Written

Warning (with provision, where appropriate, for a Performance Improvement Plan) , Stage 2 – Final Written Warning and Stage 3 – Dismissal. The policy stated that the respondent –

"….*reserves the right to initiate the procedure at any stage (including dismissal), or to jump stages, depending on the circumstances of the issue".*

36. The policy said nothing about whether or not it was applicable during an employee's probationary period. However, we were satisfied that the respondent would not have invoked the capability policy in the case of a non-disabled employee still in his or her probationary period.

Capability hearing

37. The respondent decided to invite the claimant to a capability hearing. Ms Niven wrote to him on 12 July 2019 (90-91). Her letter stated –

"*The purpose of the hearing is to consider concerns about your general capability in your role of Visitor Centre Assistant, but particularly in relation to your progress against the reasonable alternative duties we have provided to you and the report which we received from Occupational Health following your consultation on 11 June 2019."*

38. Ms Niven's latter also stated –

"*If your capability is found to be below expectations we may decide to issue a sanction on the grounds of capability, up to and including dismissal with notice or pay in lieu of notice."*

39. The letter bore to enclose the Capability policy and the OH report. The claimant said that there were no enclosures with the letter. That seemed to us improbable. In any event by the time of the capability hearing the claimant had copies of both documents.

40. Ms Niven's letter advised the claimant of his right to be accompanied at the hearing by a work colleague or trade union representative. When Ms

Sanderson and Ms Marshall spoke with the claimant on 15 July 2019 he had not arranged to be accompanied and it was agreed that Ms Marshall would attend with him.

41. The capability hearing took place on 16 July 2019. Ms Sanderson chaired the meeting and Ms Niven acted as minute taker. Ms Marshall attended as the claimant's representative. We were provided with the minutes (93-97) and we were satisfied that these were an accurate record of the meeting.

42. Ms Sanderson asked the claimant if he agreed with the OH report. The claimant confirmed that he did and commented that it was –

"*Clear and to the point, best report I have seen about me in relation to my asperger's syndrome."*

43. Ms Sanderson asked the claimant if he agreed that the Visitor Centre Assistant role was not right for him. The claimant agreed that it was "*not the right role for me at this point".* Ms Sanderson asked the claimant if he could identify any support the respondent could give him and he replied "*I really don't know".* When asked if he could identify any other roles in which he would be interested, the claimant indicated something with less involvement with customers, perhaps in production, with less face to face interaction. Ms Sanderson asked the claimant if there were any changes the respondent could make to his role to make it a better fit for him. The claimant's response was "*Not sure that there is anything that could be changed and don't know how you would do this".*

44. We pause to observe that the claimant had a positive view of the OH report which we believed he regarded as supportive. He also had a positive view in advance of the capability hearing. Despite the reference to dismissal in the letter inviting him to the hearing, the claimant did not recognise that his employment was at risk. The claimant was a school leaver, new to the workplace and we were not convinced that he really grasped the formal process into which he was drawn.

45. The claimant was critical of Ms Marshall. His evidence was that –

"….*during the hearing she never said anything. She did not help me in any way."*

It was true that Ms Marshall said very little at the hearing, but we felt the claimant's criticism was a little unfair. The claimant is articulate and, based on the minutes, was able to answer the questions put to him. His evidence was that he had felt *"intimidated"* at the hearing but our assessment was that this would not necessarily have been apparent to Ms Marshall.

Claimant is dismissed

46. The outcome of the capability hearing was communicated by Ms Sanderson to the claimant when he was at work on 24 July 2019. The claimant was shocked. He had not expected to be dismissed. He was upset. He left the visitor centre. Ms Sanderson and Ms Marshall became concerned for his welfare and went to look for him. They found him beside a nearby quarry and brought him back to the centre.

47. The claimant alleged that Ms Sanderson had handed him his P45 when she told him that he was dismissed. Ms Sanderson denied this, indicating that his P45 was posted out after his dismissal. Mrs McGilvray confirmed that the claimant's P45 had arrived by post.

48. The claimant alleged that Ms Sanderson had said "*I don't know what else you were expecting"* after his dismissal. Ms Sanderson denied this. Our view was that the claimant had been distressed to be dismissed and might have picked up Ms Sanderson's words incorrectly. There was an implication that Ms Sanderson had behaved unkindly towards the claimant at the time of his dismissal and we did not believe that to be the case.

49. Ms Sanderson confirmed the claimant's dismissal by her letter dated 23 July 2019 (98-99). This advised the claimant of his right of appeal. The letter also told the claimant that Ms Sanderson had been unable to identify any suitable

alternative role for him. We were satisfied that the respondent had looked for a role into which the claimant might be redeployed but (a) jobs on the production side required experience and/or qualifications which the claimant did not possess and (b) the only potentially suitable position identified was in Islay which, given that the claimant did not drive, would have been too remote.

Claimant appeals

50. The claimant exercised his right of appeal in terms of his letter to Ms Niven dated 26 July 2019 (100). His grounds of appeal were expressed as follows –

"1. No reasonable adjustments were made to help me within my role as visitor centre assistant.

2. What metric was in place to measure my progression regarding "reasonable alternative duties" as noted in termination letter dated 23/07/19, noted as "lighter duties" in other documents.

3. No training or support was offered to me to help address areas of concern. (Reference – Capability Policy, section 3 Aims and Principles, sub section 3.1 and 3.2. Attention should be draw (sic) to Section 5 Operation of the capability procedure, sub section 5.3 No employee will be dismissed for poor performance due to incapability without first being provided with reasonable opportunity to address the issues)."

51. Mr Paul was appointed as the appeal manager with HR support from Ms K Boyle. The appeal hearing took place on 12 August 2019. The claimant was accompanied by Mr Mitchell. Minutes were produced (104–110), the accuracy of which we found no reason to doubt.

52. Mr Paul wrote to the claimant on 21 August 2019 (111-113) to advise that he was upholding the decision to dismiss. He set out his reasons. Before coming to his decision Mr Paul spoke to Ms Sanderson about various aspects of the claimant's employment. When asked about this in the course of her evidence Ms Sanderson initially said that she *"had no involvement whatsoever"* in the appeal process. After being told about Mr Paul's evidence (per his witness statement) Ms Sanderson said that she did not recall

speaking to Mr Paul after the appeal, but she did recall speaking to Mr Paul about the claimant's training matrix.

Impact on claimant

53. The claimant had been optimistic about the outcome of his appeal and finding that the decision was not as he had hoped had a significant impact on him. His parents described him as "*suicidal"* and *"in extreme distress".* He consulted regularly with his GP for some months. He said that it was only recently that he had started to feel better. He had secured fresh employment with a start date of 7 June 2021. Prior to that he had been in receipt of Universal Credit.

Comments on evidence

54. It is not the function of the Tribunal to record every piece of evidence presented to us and we have not attempted to do so. We have focussed on those parts of the evidence which we considered to have the closest bearing upon the issues we had to decide.

55. All of the witnesses were credible and gave their evidence to the best of their recollection. Where we resolved conflicts in the evidence, this was on the basis of the balance of probability and/or the availability of other evidence which pointed one way or the other (for example Mrs McGilvray's confirmation that the claimant's P45 arrived by post rather than being handed to him).

56. Ms Sanderson was a confident witness but there were lapses in her recollection, such as her involvement in the appeal process. To her credit, she accepted that she did not have experience of dealing with a disabled employee, she did some online research to learn more about AS and she recognised the need for HR (and OH) input when difficulties arose with the claimant's employment.

Submissions

57. Both Ms Page and Ms Watson provided written submissions which were supplemented by oral submissions on 11 June 2021. As those written submissions are available in the case file, we will deal briefly with them and the oral submissions made to us.

58. Ms Page criticised the respondent for not fully implementing their own capability policy but instead skipping stages and going straight to dismissal. She highlighted that in her evidence Ms Sanderson had said initially that she believed the capability policy was not applicable because the claimant was in his probationary period but later changed her position to say that she had implemented the policy to the best of her ability.

59. Ms Page also criticised the respondent for failing to provide the claimant with adequate training, and instead placing him on lighter duties as soon as he disclosed his AS. Due to his inexperience he was not in a position to suggest reasonable adjustments at the capability hearing. He was better placed to do so at the appeal hearing, and Mr Paul had acknowledged that training would be seen as a reasonable adjustment.

60. In relation to the claimant's direct discrimination complaint, Ms Page argued that the burden of proof had shifted to the respondent. In relation to his discrimination arising from disability complaint, Ms Page submitted that the "*something arising*" from the claimant's disability was his difficulty in handling phone calls and responding to training at fast pace. The unfavourable treatment was his dismissal. Ms Page argued that the respondent had not shown that this was a proportionate means of achieving a legitimate aim.

61. In relation to the claimant's complaint of failure to make reasonable adjustments, Ms Page accepted that the claimant had not suggested any adjustments until the appeal hearing but argued that the duty rested on the respondent. They should have given the claimant further training and assistance to improve his performance. It was not necessary for the claimant to show that the adjustment would be completely effective to avoid the

disadvantage. It was sufficient to show that there was a chance it would do so. Further, the respondent was a substantial organisation well able to afford to give the claimant further training or a permanent move to lighter duties. Ms Page invited us to find that the claimant had asked for his OH consultation to be face-to-face and that this would have been a reasonable adjustment.

62. In relation to the claimant's complaint of harassment, Ms Page argued that the claimant had felt degraded by his removal from customer facing tasks and by the list of issues (such as accidentally taking home a key), of which he was not previously aware, referred to at his appeal hearing.

63. Ms Page referred to the following cases –

Igen v Wong [2005] ICR 931
Hewage v Grampian Health Board [2012] UKSC 37
Ayodele v Citylink Ltd [2017] EWCA Civ 1913
South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15
Cordell v Foreign & Commonwealth Office UKEAT/0016/11
Komeng v Creative Support Ltd UKEAT/0275/19

64. Ms Watson submitted that the appropriate comparator for the purpose of the claimant's direct discrimination complaint was a person unable to fulfil the requirements of the role for reasons unconnected to AS. Such a person who was within their probationary period would have been dismissed without any prior process. By taking him to a capability hearing, the respondent had treated the claimant more favourably, and not less favourably, than his hypothetical comparator.

65. Turning to the claimant's complaint of discrimination arising from disability, Ms Watson argued that the change to the claimant's duties did not amount to unfavourable treatment. The claimant found the customer facing parts of his role difficult and, to support him, the respondent told him that he did not have to carry out those duties. The change was not unfavourable.

66. Ms Watson accepted that the claimant's dismissal was unfavourable treatment. She accepted that the claimant was dismissed as a result of his incapability to carry out his role, and that his incapability arose in consequence of his disability. She argued that the treatment was a proportionate means of achieving a legitimate aim. The legitimate aim was to ensure that employees could fulfil the role they were employed to carry out. In the absence of alternative employment for the claimant, the respondent acted proportionately in deciding to dismiss him.

67. In relation to failure to make reasonable adjustments, Ms Watson said that the claimant was asserting that the respondent should have made the following adjustments –

- Further time to develop his skills
- Additional training
- Consulting with an individual with experience of AS to identify what type of training and additional adjustments would have been appropriate
- Arranging an in person meeting with OH

68. Ms Watson referred to the Employment and Human Rights Commission: Code of Practice on Employment (2011) (the "Code"). The test of reasonableness of any step an employer might have to take was objective and depended on the circumstances of the case. The Code identified (at paragraph 6.28) some of the factors which might be taken into account when determining whether an adjustment was reasonable.

69. In this case, Ms Watson argued, there were no adjustments which could have been made to the claimant's role which would have ameliorated the disadvantage. The OH report did not identify any such adjustments apart from redeployment. The respondent did consider this but no suitable alternative role was available. When the claimant put forward suggested adjustments at the appeal hearing Mr Paul duly considered these.

70. Ms Watson submitted that none of the asserted instances of harassment met the statutory definition in section 26 EqA. The claimant provided no examples of the alleged change in attitude towards him after he disclosed his AS. His evidence about how he was treated at the time of dismissal was unreliable. The claimant's scope of work was changed because the customer facing duties were causing him anxiety. The alleged failure of Ms Marshall to assist the claimant during the capability hearing was not *"unwanted conduct".* The same argument applied to the documentation produced at the appeal hearing. It was reasonable for the training matrix to be produced when one of the claimant's grounds of appeal was that he should have been provided with further training.

Applicable law

71. Section 13 EqA (**Direct discrimination**) provides as follows –

"*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others…."*

72. Section 15 EqA (**Discrimination arising from disability**) provides as follows –

"(1) A person (A) discriminates against a disabled person (B) if –

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

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

73. Sections 20/21 EqA (**Duty to make adjustments/Failure to comply with duty**) provide, so far as relevant, as follows –

"***20 Duty to make adjustments***

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule

apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments…."

74. Section 26 EqA (**Harassment**) provides, so far as relevant, as follows –

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect…."

75. Paragraph 6.28 of the Code identifies the following as some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take –

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *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;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work);*
- *the type and size of the employer.*

Discussion and disposal

76. We reviewed the evidence relating to the issue of when the claimant disclosed his AS to the respondent before coming to the conclusions recorded at paragraphs 24 and 25 above. While we believed that, on the balance of probability, our conclusions reflected what happened, we did not regard the exact date of the claimant disclosing his AS to be critical. That was because the claimant made no specific allegations of discriminatory treatment which would have pre-dated his disclosure of his AS had we reached a different conclusion.

77. While not material for the purpose of the issues we had to decide, we considered that the claimant had displayed some behaviour which frustrated Ms Sanderson and Ms Marshall, and which they interpreted as a lack of interest in learning what his role as visitor centre assistant required. The claimant acknowledged that having his hands in his pockets was a bad habit, and explained that it was a feature of his AS that he found bad habits difficult to break. Without being aware of the reason, Ms Sanderson and Ms Marshall

would have had difficulty in understanding why the claimant was reluctant to deal with phonecalls.

78. We approached our deliberations by working through the list of issues.

1 Direct discrimination – section 13 EqA

1.1 Did the decision to move straight to a capability hearing following receipt of the Occupational Health report amount to less favourable treatment compared to the treatment a hypothetical comparator would have received?

1.2 If so, was the less favourable treatment because of the claimant's disability?

79. While the respondent's capability policy was silent on the point, we found that the respondent would not have used that policy in the case of the claimant's hypothetical comparator – a person unable to fulfil the requirements of the role for reasons unconnected to AS – if that person was still in his or her probationary period. Such a person would simply have been dismissed.

80. We agreed with Ms Watson that, by dealing the claimant under the capability policy, the respondent was treating him more favourably than his hypothetical comparator. We were satisfied that the respondent was open to redeploying the claimant if a suitable role had been identified. The capability hearing and the subsequent appeal were not a sham. That was sufficient to allow us to decide that there had been no direct discrimination.

81. For the sake of completeness we should add that as we found the difference of treatment was not unfavourable to the claimant, we did not consider that section 136 EqA (**Burden of proof**) was engaged.

2 Discrimination arising from disability – section 15 EqA

2.1 Did the respondent treat the claimant unfavourable by (a) changing the scope of his duties following becoming aware of his disability on 23 May 2019 and/or (b) deciding to dismiss the claimant on 16 July 2019?

2.2 If so, was the unfavourable treatment because of something arising in consequence of the claimant's disability?

2.3 If so, was the treatment a proportionate means of achieving a legitimate aim?

82. We noted that, having heard the evidence, there were a couple of areas where issue 2.1 needed to be slightly refined. Firstly, we found that, on the balance of probability, the respondent became aware of the claimant's AS on 20 May 2019 rather than 23 May 2019. Secondly, we had no evidence that the decision to dismiss the claimant had actually been taken on the date of the capability hearing (which was 16 July 2019). We did not regard either of these points as material.

83. We found that the respondent had changed the scope of the claimant's duties upon becoming aware of his AS. We did not however find that this was unfavourable treatment. It was in our view a reasonable adjustment made by the respondent. The provision, criterion or practice ("PCP") of the respondent was the requirement to ensure that employees were able to perform the duties of their role. The substantial disadvantage was that the claimant was having difficulty dealing with large groups and unfamiliar faces. The reasonable adjustment – moving the claimant to lighter duties – was made to address this.

84. The respondent accepted that the decision to dismiss the claimant was unfavourable treatment. The legitimate aim contended for was much the same as the PCP referred to in the preceding paragraph. In asserting that dismissal had been a proportionate means of achieving that aim, the respondent relied on the OH report. That told the respondent that the claimant was "*not medically fit for his current role"* and recommended redeployment.

85. The respondent did consider redeployment by (a) looking at whether an alternative post was available and (b) considering whether the claimant could continue on lighter duties. As we have stated above, this was not a sham.

Unfortunately for the claimant, in the absence of an alternative role, dismissal became the only means by which the respondent could achieve the legitimate aim of ensuring that employees were able to perform the duties of their role. We therefore found that the respondent's treatment of the claimant (by dismissing him) was a proportionate way of achieving the legitimate aim and was not unlawful discrimination under section 15 EqA.

3 Failure to make reasonable adjustments – section 20 and Schedule 8 EqA

3.1 Has the claimant identified a provision, criterion or practice of the respondent that placed him at a substantial disadvantage?

3.2 Did the respondent take reasonable steps to avoid the disadvantage? In particular would it have been reasonable for the employer to have made the adjustments specified in the claimant's Further and Better Particulars, specifically:

3.2.1 Allowing the claimant additional time to develop his skills;

3.2.2 Provision of additional training;

3.2.3 Consulting with an individual with experience of Asperger's Syndrome to identify what type of training and additional adjustments would have been appropriate;

3.2.4 Allowing the claimant to meet with Occupational Health in person.

86. We were satisfied that the PCP applied by the respondent was the requirement to ensure that employees were able to perform the duties of their role. The substantial disadvantage to the claimant in comparison with people who are not disabled was that, because of his AS, he found it difficult to act as a tour guide, perform his shop duties and deal with telephone calls. These customer facing aspects of the claimant's role involved social interaction which, as noted in the OH report, was an area of difficulty for people with AS. The claimant had a particular difficulty with using the phone, as confirmed in his parents' evidence as well as his own. We found that the duty to make reasonable adjustments was triggered, and we proceeded to consider the specific adjustments contended for.

87. We believed that the adjustments of allowing the claimant additional time to develop his skills and the provision of additional training involved similar considerations. The question in essence was whether the respondent should have done more. We were unable to reach a unanimous conclusion on this.

88. The view of the majority of the Tribunal was that the OH report was clear and the respondent was entitled to place reliance on this. The report stated that the claimant was not medically fit for the role of visitor centre assistant. The only adjustment suggested in the report was redeployment, and the respondent had considered this but had found no suitable alternative role.

89. We took into account that the claimant was still performing his voluntary role at the Gordon Highlanders Museum, and that there were similarities between that role and his job with the respondent as a visitor centre assistant. However, there were also differences. There the claimant gave tours to smaller groups. There was less of a requirement for social interaction of the type with which the claimant had difficulty. As a visitor centre assistant the claimant had a broader range of tasks and a greater need for multitasking.

90. Based on their observation of the claimant's performance (per the document prepared by Ms Marshall) and on the terms of the OH report, the respondent was entitled to form the view that giving the claimant more time and/or more training would not have been reasonable steps to take.

91. The dissenting member (Mrs Massie) focussed on the respondent's failure to follow the steps set out in their Capability policy. The policy did not state that it was inapplicable to an employee within their probationary period. Under section 5.3 of the policy, the claimant should have been given a reasonable opportunity to address his performance issues. If the respondent had gone through the steps set out in the policy, the claimant would have been allowed additional time to develop his skills and, in all probability, would have been provided with additional training. The respondent could have sought further advice from OH on how to manage these issues.

92. We next considered the question of whether the respondent should have consulted someone with experience of AS to identify what type of training and additional adjustments would have been appropriate. We believed that it had been reasonable for the respondent to refer the claimant to OH and to place reliance on the advice they received. That advice did not include consulting someone with specialised knowledge of AS. We felt it was a step too far to expect the respondent, having considered the OH report, to seek specialist advice relating to AS. Accordingly, we did not find that this would have been a reasonable adjustment.

93. We considered finally the matter of the claimant's request to meet face-to-face with OH. We noted that the claimant had signed a consent form on 6 June 2019 (122). He had been happy with the report (see paragraph 42 above). He made no complaint at either the capability hearing nor at the appeal hearing about the format of the OH consultation. It was not one of his grounds of appeal.

94. We suspected that there might have been a failure of communication in relation to the claimant's request for a face-to-face consultation. Ms Niven was clear in her evidence that such a request would normally be facilitated by the respondent. Looking at matters in the round, we were satisfied that the claimant had not been disadvantaged by having a telephone, as opposed to face-to-face, consultation with OH.

4 Harassment – section 26 EqA

4.1 Did the events set out in the claimant's Further and Better Particulars (under the heading of "harassment") occur as alleged?

4.2 If so, was the conduct unwanted conduct and did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

4.3 If so, was it reasonable for the conduct to have had that effect?

95. Under the heading "Harassment" in his further and better particulars, the claimant complained about four matters. The first of these related to (a) the respondent's manner and tone towards him changing after he disclosed his AS and (b) Ms Sanderson saying to him at the time of his dismissal "*I don't know what else you were expecting".* The claimant provided no examples of how the respondent's manner and tone towards him had changed and we found this general assertion, without more, was too vague to amount to *"unwanted conduct".* We were not satisfied that Ms Sanderson had used the words about which the claimant was complaining (see paragraph 48 above).

96. The second matter related to the claimant's change of duties after he disclosed his AS. Our view was that the change of duties was a reasonable response by the respondent to the difficulty the claimant was experiencing with the customer facing aspects of his role. We did not consider this to have been *"unwanted conduct".* It did not have the purpose of creating the proscribed environment for the claimant. On the contrary, the change was made to assist the claimant.

97. We also did not consider that the change of duties had the proscribed effect. The claimant did not complain about the change of duties during the capability hearing. He was recorded as saying "*Lighter duties role now temporarily is less challenging, and I am enjoying it".* In these circumstances, it was unnecessary for us to consider whether it was reasonable for the conduct to have the proscribed effect.

98. The third matter was the allegation that Ms Marshall had not assisted the claimant at the capability hearing. In view of what we have said above (at paragraph 45) we did not regard this as *"unwanted conduct"*. We believed that Ms Marshall did not speak during the capability hearing because, as the minutes record, the claimant was able to answer the questions put to him.

99. The fourth matter was the production of the list of incidents and the training matrix at the appeal hearing. We considered that this had been unwanted so far as the claimant was concerned. However, it was not done for the proscribed purpose, but to assist Mr Paul to deal with the claimant's appeal. The claimant had referenced "*areas of concern"* in his grounds of appeal and it was reasonable for the respondent to provide details of these. The claimant had also referenced "*no training or support"* and it was reasonable to make Mr Paul aware of what training the claimant had received.

100. If the claimant found that the production of the list of incidents and the training matrix did have the proscribed effect, causing him to be intimidated or to find it offensive, that did not come across in the appeal minutes. Mr Mitchell's evidence included "*I believe Mac did himself proud and I was surprised by how eloquent he came across".* There was a comprehensive discussion between Mr Paul and the claimant at the appeal with little need for Mr Mitchell to interject. It seemed to us that Mr Paul had treated the claimant with courtesy and respect. If the production of the list of incidents and the training matrix did cause the proscribed effect, it was not in our view reasonable for it to have had that effect. It was relevant material notwithstanding how the claimant might have perceived it.

101. As we have determined all of the issues against the claimant, his complaints under sections 13, 15, 20/21 and 26 EqA require to be dismissed.

W A Meiklejohn

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Employment Judge

21 June 2021

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Dated

21 June 2021

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Date sent to parties