



EMPLOYMENT TRIBUNALS

Claimant: Mr C Mallon

Respondent: AECOM Limited

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 3 November 2021 (with the parties); 2 March 2022
(in chambers)

Before: Employment Judge Gardiner

Members: Mr J Quinlan
Mr J Webb

Representation

Claimant: In person
Respondent: Miss Talia Barsam, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's complaint of failure to make reasonable adjustments under Sections 20 and 21 Equality Act 2010 succeeds.
2. A Remedy Hearing will be listed to determine the remedy due to the Claimant.

REASONS

1. In August 2018, the Claimant attempted to apply for a role with the Respondent. He was unable to proceed with his application because he had to complete an online application form. He complains in these proceedings that this was disability discrimination, on the basis that the Respondent failed to make reasonable adjustments given the difficulties he experienced with an online application form.

2. This Final Hearing took place over the course of a single day, on 4 November 2021. The complaint had previously been struck out by Employment Judge Burgher at a Preliminary Hearing. The basis for the strike out was his conclusion that the Claimant's case was one that had no realistic prospect of success. The Claimant's appeal against that decision was successful. HHJ Tayler remitted the case to a different Judge.
3. At this Final Hearing, the Claimant has represented himself. The Respondent was represented by Ms Talia Barsam of Counsel. Ms Barsam had represented the Respondent at the previous hearing before Employment Judge Burgher, and on appeal in front of HHJ Tayler. Live witness evidence was given by the Claimant and by Mrs Sarah Parker on behalf of the Respondent. In addition, the Claimant relied on witness statements from his partner, Ms Jane Newport, and his careers coach, Sarah Musique. The Respondent indicated that it did not want to question either of these two witnesses. As a result, their statements were admitted as unchallenged evidence.
4. The documents for use at the hearing were in five separate bundles. In addition a further supplementary bundle was prepared numbered from pages 1-34. Despite the volume of documents being in the region of 2000 pages, the Tribunal was referred only to a small percentage of these total documents. In addition, Ms Barsam had prepared a nine-page Skeleton Argument to which the Tribunal was directed. The Claimant had prepared several emails which were sent to the Tribunal either on 3 November or on 4 November containing points he wanted the Tribunal to take into account when considering the case.
5. At the conclusion of the evidence both sides made oral closing submissions. The case finished at around 5.20pm. There was insufficient time for the Tribunal to deliberate and give its decision. The parties were told that Judgment would be reserved and would be sent to the parties with written reasons.

Findings of fact

6. The Claimant had been diagnosed with dyspraxia in around 2015. This is the disability on which he relies as the foundation for this disability discrimination claim. Although he was subsequently diagnosed with autism, that diagnosis was only made in January 2021. As a result, it was not a current diagnosis at the time of the events giving rise to this claim.
7. The nature of the Claimant's symptoms as a result of his dyspraxia are detailed in the Claimant's statement dated 17 April 2020 and his disability impact statement dated 17 May 2021. It was also covered in detail during oral evidence in answer to questions raised in cross examination. The contents of the statement of Ms Musique, dated 16 October 2021, are also relevant when considering the nature and extent of his symptoms. Ms Musique was a work coach helping the Claimant to access employment opportunities. She was not involved in helping the Claimant at the time of his application to the Respondent which is the subject of these

proceedings. We note that we have not been provided with any medical evidence from a doctor or expert in dyspraxia identifying the particular difficulties.

8. So far as is relevant to the issues in these proceedings, these symptoms at the relevant time can be summarised as follows:
 - (1) The Claimant finds it difficult to organise his thoughts clearly in written communications. He much prefers to communicate orally either in a face to face meeting or by telephone.
 - (2) This difficulty in organising his thoughts in writing extends to difficulty in creating and repeating the same password if the password is expected to include both letters and special characters such as punctuation signs. This is a particular problem where the password is not visible when typed because each element of the password is replaced by a star symbol to preserve confidentiality.
 - (3) The difficulties presented by the need to create an account by choosing a particular password were so stark for the Claimant that he tended not to even attempt this process, because he found it too stressful.
9. Between 10 April 2017 and 18 December 2017, the Claimant had been employed by the Respondent at its Birmingham office. He was recruited to this role with the help of recruitment consultants. This meant that he did not need to complete an online application form. This role was within commuting distance of the Claimant's home in Cannock. At the outset of this employment, the Claimant had submitted an online form, titled Candidate Information Form [210]. Unbeknown to the Respondent, the Claimant had had assistance from his partner in completing the form. In this role, he needed to input a username and password to access his computer on a daily basis. He had help in this task from secretaries working in the same office.
10. The Claimant's evidence, which we accept, is that he enjoyed this role. It was subject to a six-month probationary period. Towards the end of the original probationary period, there were concerns about the standard of the Claimant's performance. As a result, it was decided that his probationary period should be extended by three months. The Respondent's concerns had not been addressed to the Respondent's satisfaction during this further period. As a result, the Claimant was dismissed. His last date in the role was on 18 December 2017.
11. There was a subsequent dispute between the Claimant and the Respondent as to the basis on which the Claimant's employment had been terminated. The Claimant issued employment tribunal proceedings alleging he had suffered disability discrimination. Those proceedings were settled without any admission of liability on the Respondent's part, with a settlement sum being paid to the Claimant. The Claimant sought a specific assurance that he was not precluded from applying for

future roles with the Respondent. He was told that there was no restriction on his ability to apply for other roles.

12. In early August 2018, the Claimant noted that the Respondent was recruiting for a consultant to join the Research & Development Team in London. The candidate would be involved in delivering R&D claims and help develop the Respondent's Fiscal Incentives R&D service capacity. This was a similar role to the role he had previously performed with the Respondent, albeit based in the London office rather than the Birmingham office.
13. The standard process for applying for this role was by completing an online application form. In order to access the form, candidates had to create a personal profile. This required them to input their email address as a username and provide a password. The password needed to be at least eight digits long, including a special character (such as a punctuation mark). In order to ensure the accuracy of the password, it needed to be typed twice. It was possible, by clicking on an eye symbol, to see the characters in the password as it was entered.
14. Once the profile had been created, it was then possible to access the application form. The application form contained a series of questions to which answers were required to be entered on screen. The answers could be entered manually in response to each question. Alternatively, the answers could be populated by clicking on a button headed "Social Media". This would import the relevant fields from a candidate's LinkedIn profile. The total number of questions which were required to be answered ran to around six or seven pages. The screen stated that it would take around 8-11 minutes to complete the form, which we take to be the time required if the information needed to be inputted manually.
15. When the Claimant noted the job vacancy, he clicked on the relevant part of the screen to start his job application. He was asked to "create a new account", which required him to input his email address and create a password. The Tribunal finds that the Claimant chose not to undertake this particular step. He saw the reference to the need for a "special character" and considered it would be too complex for him to be able to create an account. This is because in the past he tended to include random letters in his proposed password and then would not be able to remember the same sequence of random letters to replicate the password when prompted to do so. For him, this was a stressful and onerous requirement.
16. On 7 August 2018, the Claimant emailed the Respondent's HR Department in the following terms:

"Hello HR,
I have seen this role in London that I would like to apply for and please find my CV attached for your role, please let me know the next phase.
Thanks Christian"

17. He cut and pasted part of the job advertisement into the email to identify the job for which he was applying. On the first page of his CV, he included the following text in bold and in capitals under the heading "Employment History":

“PLEASE NOTE THAT BECAUSE OF MY DISABILITY, I REQUEST REASONABLE ADJUSTMENTS TO BE MADE IN MY APPLICATION BY DOING AN ORAL APPLICATION THIS WOULD BE A 5 TO 10 MIN PHONECALL TO TALK ABOUT MY EXPERIENCE AND CAN THIS BE ARRANGED BY EMAIL PLEASE DRCMALLON@GMAIL.COM AND I WILL SUPPLY A TELEPHONE NUMBER (More technical information about my medical condition is at the end of this CV).”

18. It was not clear from the wording or the context whether the reference to “talk about my experience” was a reference to his experience of dyspraxia or a reference to his experience relevant to the job for which he wanted to apply. Someone reading this CV would only appreciate that the Claimant identified his disability as dyspraxia from the last section of the CV which specifically named this condition.
19. This section started with the Claimant’s heading, in bold: **“MORE technical info about my medical condition”**. This was then followed by numerous bullet points over two pages of the sorts of general problems experienced by people with dyspraxia. The first bullet point was worded as follows:

“People who have dyspraxia often find the routine tasks of daily life, such as driving, household chores, cooking and grooming difficult. They can also find coping at work is hard. People with dyspraxia usually have a combination of problems including”

20. It is clear from that opening point that the list was a non-exhaustive general list which was not specific to his particular condition. This section of the CV then contained 53 different bullet points listing different features of dyspraxia. The final bullet point made it clear that the bullets were general rather than specific to his particular situation:

“Many of these characteristics are not unique to people with dyspraxia and not even the most severe case will have all the above characteristics. But adults with dyspraxia will tend to have more than their fair share of co-ordination and perceptual difficulties”.

21. There was no means of the Respondent knowing, from the Claimant’s CV alone, which of the bullet points applied to the Claimant and to what extent.
22. In evidence, the Claimant identified the following bullet points as being particularly pertinent to his own condition, as applicable to the issues in this case:

- Tracking. Tendency to lose the place while reading.
- Poor visual perception.

- Inadequate sense of direction.
 - Learning, thought and memory
 - Difficulty in planning and organising thought
 - Poor memory, especially short-term memory. May forget and lose things
 - Slow to finish a task.
 - Tendency to take things literally.
 - Tendency to be erratic ie have 'good days and bad days'
 - Prone to low self-esteem
23. We accept the Claimant's evidence as to the particular manifestations of his dyspraxia in these respects.
24. On 13 August 2018, Mrs Sarah Parker, Senior HR Manager, responded to the Claimant's email as follows:
- "We are in receipt of your request to apply for a position at AECOM via oral applications as a reasonable accommodation. At this time, the application process requires that you submit your CV along with submitting an online form for entry into our database. As you have sent your CV to AECOM via this email, all that remains is to fill out the online application form associated with the position of interest. If you have concerns about filling out an online application form, please let us know. Please note that you may receive assistance in submitting the form if necessary."
25. On the same day, within minutes, the Claimant responded: "Happy to do your form over the phone". He then added his phone number.
26. Just over an hour later, there was the following response from Mrs Parker: "Please follow our usual processes and complete the form through our recruitment system. If there are particular parts of the form that you find it difficult to complete, please let us know which parts and we will provide assistance."
27. A further swift response from the Claimant stated: "I would prefer to make an oral application as stated in my CV. When can this be arranged?". Taken together, the two responses from the Claimant indicated that he did have concerns about filling out an online application form, although these responses were not specific about the nature of the concerns.
28. Mrs Parker responded at 7:18pm on 13 August 2018. Her email was worded as follows "As stated in my email below, please follow our usual recruitment process by completing your application through our website. Once you have applied online the Talent Acquisition team will review your CV and application and will advise you of next steps".
29. On the same day, she emailed Juliette Tew in the Talent Acquisition Team as follows "Just a heads up, Christian Mallon (a former employee) is interested in applying for the Research and Development role in London. I have advised him to apply online as per our usual process. We may need to provide assistance if he

struggles with any aspect of the form or process". This was a recognition that the Claimant may struggle with aspects of completing the online form and, if so, that it would be necessary for the Respondent to provide assistance.

30. Each of the emails from Mrs Parker contained Mrs Parker's mobile number in the footer. There was also a link to the UK&I HR Team Contact Page providing more information on who to contact in HR. The Claimant accepted that he did not phone Mrs Parker to explain his difficulties. He explained in evidence that this was a consequence of phoning a previous potential employer about an online job application form, where he was laughed at for not being able to complete the online form. Mrs Parker accepted that she did not telephone the Claimant to find out the Claimant's difficulties. She stated that, with hindsight, that would have been a sensible step. She was influenced in her decision not to telephone the Claimant by the Claimant's previous unsuccessful employment with the Respondent, and by the fact that it was not her direct responsibility to be involved in the recruitment process – this was the responsibility of the Talent Acquisition Team.
31. The email exchanges continued in a remarkably similar vein. At 7:51 on 13 August 2018, the Claimant replied: "please read my CV and my request for reasonable adjustments that is stated on my CV, when can I have my oral application?".
32. Mrs Parker responded at 5:15pm on 14 August 2018:

"This is the last time I will state the same thing. You need to complete the online process through our website. You have already completed your CV, therefore all that remains is to fill out the online form associated with the position of interest. Please note that you may receive assistance in submitting the form if necessary, therefore if there are elements of the form you find it difficult to complete please let us know what parts and we will provide assistance. We are aware that you have successfully completed forms in the past so do not see why you cannot do it to apply for this role."
33. The Claimant responded at 5:22pm on 14 August 2018: "What forms have I already completed? As every form is different, I wish to make an oral application for your form so when can this be arranged? I wish a fair recruitment process under the equality act and I have asked for reasonable adjustments please read my CV and my request, when can we do this oral application?".
34. By 8:35pm the following day, 15 August 2018, there had been no further response. As a result, the Claimant sent the following further email:

"When will this oral application happen? I cannot help my disability and this is listed clearly on my cv and I do not want to miss out on this role that is advertised.

And I was told that I could apply for any role and I wish to have this oral application asap."

35. He then quoted from an earlier email he had received from the Respondent, sent after the end of his previous employment with the Respondent: "Of course you are free to apply for any roles within AECOM in the future and we would treat any application you make no differently from any other application we receive".

36. The following week, on 23 August 2018, he followed up with a further email:

"Hello

Can I ask when my oral application will happen? I cannot help my disability and I believe I am entitled to reasonable adjustments in the application process.

Please reply when this oral application will happen?"

37. On 28 August 2018, he emailed again: "What is happening with my oral application?" and followed this up with a further email on the same day: "Why is my application being delayed? I do not want to be discriminated against and have asked for reasonable adjustments, so when will this oral application happen?"

38. On 29 August at 11.30am, the Claimant received a response to his recent emails from Julie Butcher, who was an Employee Relations Advisor in Human Resources. She wrote:

"Dear Christian

I understand that Sarah has already advised that you need to have the online application process completed through our website. You have already completed your CV, therefore all that remains is to fill out the online form associated with the position of interest. This form can be completed by you, or by someone acting on your behalf with your approval.

If you require assistance in submitting the form, we can accommodate this. Please advise which elements of the form you are finding difficult to complete to enable us to assist you.

In answer to your query, examples of forms you have completed in the past are the Candidate Information Form and a reimbursement form for your relocation expense."

39. The Claimant's response, sent within a couple of hours, was "As I have not filled in this form before, I request reasonable adjustments as I am home alone and I wish to progress my application. So when can my oral application for your form happen? I can speak today or on Friday this week. So when can someone call me to help complete your form?". He then followed this up with a further email worded as follows "as you already have my CV you know about my medical condition so there is no excuse for this reasonable adjustment being refused as I cannot help my medical condition, so when will this adjustment be made? As surely all my info will

be the same as I already worked for AECOM". He then cut and pasted information on the symptoms of dyspraxia.

40. On 11 September 2018, the Claimant emailed again: "Can someone contact me to help me make this oral application for your form? I do not understand the delay and why my application is not wanted? Is this because I am disabled? By law I am entitled to a fair application process how can this be fair if the application form is not complete? Please help or I will be forced to take this further and down the legal route".

41. On 17 September 2018, the Claimant received a further email from Julie Butcher. The email stated:

"Dear Christian,

As you have previously been advised and again in my last email of 29 August 2018 in order to submit your application for a post, the online process needs to be completed through our website. You have also been advised that someone could act on your behalf with your approval. To reiterate for a final time: if you require assistance in submitting the form we can accommodate this – please advise which elements of the form you are finding it difficult to complete to enable us to assist you.

We have made our position clear and will not continue to respond to these messages"

42. The Claimant was being asked to advise on the specific elements of the form that he was finding it difficult to complete. The Claimant chose not to answer that particular question specifically. Instead, he responded, "As you know I have problems filling in your forms and have asked for an oral application as a reasonable adjustment. Can this be done this week? I can do last think on weds or thurs in the day. I have a medical condition which means I find forms difficult to fill in, I cannot help my disability. Will someone be calling me this week?". This the closest that the Claimant came to identifying the particular problem he was experiencing with the online application form. He did not explain how the Respondent would have known that the Claimant had problems filling in its forms.

43. On Monday 17 September 2019, the Claimant started a role with Baldwins on an annual salary of £50,000 at their offices in the West Midlands. The Claimant continued in this role until 3 May 2019, when he chose to resign. The Claimant has chosen not to disclose any documents in these proceedings confirming when he first applied for this role or when he was accepted for the role. He explains this as a step taken because his gmail email inbox was full. The Respondent argues that the timing of the Claimant's start in this role shows he was not serious in his intention to secure a role with the Respondent. The Claimant argues that there were several reasons why he would have much preferred to work with the Respondent than with Baldwins – he believes that the salary would have been higher, and the work would have been more interesting and for better clients.

44. On 20 September 2018, Mrs Parker told the Claimant that the role that he wished to apply for was no longer available and was in the process of being removed from the website. The Claimant alleged that he had suffered disability discrimination, to which Mrs Parker further responded:

“I can confirm that because you did not submit an application for the role, despite our repeated offers to assist in the application process to accommodate your needs, you were not considered for the position. We cannot comment on whether or not the successful candidate has a disability as this is confidential information. I can confirm, however, that we do not take into account whether or not a candidate has a disability when recruiting or when making hiring decisions. As this vacancy is now closed we will not correspond any further on this matter or respond to any future emails regarding the position”

45. The Claimant sent two further emails on 25 September 2018 maintaining his position that he had suffered disability discrimination. On the same day, he contacted ACAS to initiate Early Conciliation. In his ET1, the Claimant did not identify the specific disadvantage that he faced as a result of the online application form process. His complaint was that he had asked for reasonable adjustments as a result of his disability. He had asked for an oral application, but the company had never called him or arranged anything.
46. The successful candidate for the role was based in the Birmingham area, despite the position advertised as London based. As a result, the position which was filled following this recruitment exercise was based in the Birmingham office. The potential for the successful candidate to be based in Birmingham was not apparent at the time of the Claimant’s application.
47. In evidence, Mrs Parker accepted that the Respondent would have been able to provide whatever assistance the Claimant required in completing the online application form. If the Claimant was struggling with generating a password, the Respondent could have created a password for him and emailed it to him or sent him the password in the post. If the Claimant was struggling with populating the fields required on the online application form, then the Claimant could have given his answers to those questions over the telephone. The Respondent would then have been able to input the answers and submit the application on the Claimant’s behalf. The Respondent’s stance was essentially that it did not know the nature and extent of the Claimant’s difficulties at the time, because the Claimant was not being clear about the extent of those difficulties. He had had multiple opportunities to be specific about the nature of the difficulties but had refused to provide that information.
48. The Claimant’s position was that it was unnecessary for him to provide specific details by email. Had the Respondent phoned him he would have provided the specific details on the phone. He had previously identified his difficulties when applying for a role in 2015. On 3 November 2015, he had emailed Annette Holland

in the following terms “I have a learning disability and cannot use your website, I have asked for reasonable adjustments to be made in my application”.

49. The Claimant had made a further application to the Respondent for a job role in 2019, after the events with which this claim is concerned. When applying at that stage, he had also asked to be permitted to make an oral application. On that occasion, his request was granted. As Mrs Parker was on maternity leave at the time, she was unable to explain in her evidence to the Tribunal why the standard process was adjusted to allow the Claimant to provide his information orally on that occasion.
50. At the present time, the Claimant’s main source of income is revenue generate from selling items over eBay. The Claimant’s evidence was that he sold only five different items, although the same items were often described in multiple different ways. After expenses, this business generates income of around £185 per week. The Claimant’s evidence was that he was able to interact with the eBay website in order to run this business with assistance from the eBay support team where necessary. He had been provided with two days training. He runs his business through a limited company for which he needs to file records on an annual basis. He is able to complete the necessary paperwork and upload it to the Company’s House website, using an access code. In previous roles, he has been able to prepare multiple claims for submission to HMRC. However, he had not actually made the submission himself as he was not tax qualified.
51. This claim was not the first claim that the Claimant has issued in the Employment Tribunal. It is one of about 60 claims that the Claimant has made against recruiters or potential employers relating to the recruitment process they have followed in the Claimant’s case. The Claimant explained he was able to include an accurate ACAS Early Conciliation Number on each ET1 Claim Form by cutting and pasting the Number from the ACAS Early Conciliation Certificate.
52. We were taken to the Response in one such claim suggesting that the Claimant had successfully completed an online application form. We were also taken to comments that were made by Judges in some of those cases. *In Mallon v Ginger Recruitment Services Limited*, Employment Judge Sharkett concluded that the Claimant had made an unrealistic job application so he would be rejected and this would open the door for him to bring a tribunal claim. He dismissed the Claimant’s disability discrimination claim. Deliberately making an unrealistic application made it unreasonable for him to bring an employment tribunal claim in that case. As a result, the Judge made a costs order against the Claimant. In *Mallon v Ela8 Limited* Employment Judge Goodman recorded a strong suspicion that the Claimant was making vexatious claims given the long sequence of claims which had been brought and then withdrawn. In *Mallon v Electus Recruitment Solutions Limited*, part of the Claimant’s case was struck out. The judge noted that he shared the concerns with other judges “over the claimant’s motives for this large number of claims”. The Respondent argues that the comments made in those cases are

relevant to the decision that we have to make as to whether there has been disability discrimination in the respects alleged.

Issues to be determined

53. The Respondent accepts that the Claimant was a disabled person at the relevant time by reason of his dyspraxia.
54. The issues to be determined in these proceedings are as follows:
- (1) Did the Respondent apply a provision, criterion or practice (PCP) in relation to the Claimant's job application?
 - (2) Did that PCP put the Claimant at a substantial disadvantage in comparison with those not sharing the Claimant's disability? This itself requires the Tribunal to decide:
 - i. Was the Claimant genuinely applying for the advertised role?
 - ii. Did the Claimant's symptoms put him at a substantial disadvantage, given the PCP adopted by the Claimant?
 - (3) Did the Respondent know that the Claimant had a disability and was by reason of that disability liable to be at a substantial disadvantage?
 - (4) Ought the Respondent to have known that the Claimant had a disability and was by reason of that disability liable to be at a substantial disadvantage?
 - (5) What reasonable steps ought the Respondent to have taken to avoid the disadvantage?
 - (6) Did the Respondent fail to take the reasonable adjustments that it should have taken?
55. When this case was considered in the EAT, HHJ Tayler raised the potential relevance of an alternative way of framing a case of failure to make reasonable adjustments, namely a failure to provide an auxiliary aid, by way of providing assistance in completing an online form. This formulation of the case was not addressed by either party in closing submissions. Given our Judgment finding in favour of the Claimant in relation to the first requirement, it is not necessary for us to analyse whether there has been a failure to provide an auxiliary aid. We note that HHJ Tayler said at paragraph 33 that it probably does not make much difference in the present case whether it is analysed as an auxiliary service case rather than a PCP case.

Relevant legal principles

56. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to

those employees not sharing her disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

57. In order for the disadvantage suffered by the employee to be “substantial” it must be more than minor or trivial: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 21.
58. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows:

An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know ... that the employee has a disability and is likely to be placed at a disadvantage.
59. The burden of proof is on the Claimant to establish the existence of the provision, criterion or practice and to show that it placed her at a substantial disadvantage - see *Project Management Institute v Latif* [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.
60. Thereafter the onus remains on the Claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. At the point where the duty to make reasonable adjustments has been engaged, and the Claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – *Latif* at paragraphs 53-54.
61. In *Newham Sixth Form College v Saunders* [2014] EWCA Civ 734 at [14] Laws LJ confirmed:

“These three aspects of the case – nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments – necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable.”
62. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 73.
63. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice. The

Tribunal is required to have regard to this Code when considering disability discrimination claims.

Conclusions

Did the Respondent apply a provision, criterion or practice (PCP) in relation to the Claimant's job application?

64. The provision, criterion or practice applied by the Respondent was a requirement that candidates for job vacancies were expected to apply on an online form. This had two dimensions. The first was that candidates were expected to create an account, by providing a username and password, in order to access the online form. The second was that candidates were expected to answer the questions raised by inserting his information and answers on the online application form in the spaces provided.

Did that PCP put the Claimant at a substantial disadvantage in comparison with those not sharing the Claimant's disability? This itself requires the Tribunal to decide:

- (1) ***Was the Claimant genuinely applying for the advertised role?***
- (2) ***Did the Claimant's symptoms put him at a substantial disadvantage, given the PCP adopted by the Claimant?***

65. We have concluded that the Claimant was a genuine applicant for the advertised role. Our reasons are as follows:

- (1) He had the necessary qualifications to perform the role for which he was applying;
- (2) He had performed a similar role for the Respondent in the past, which he had enjoyed in terms of the nature of the work and the calibre of the clients;
- (3) He was out of work at the time and needed to find paid employment to provide financially for his wife and son. He was also applying for other roles at this time, including a role with Baldwins, where his application was successful;
- (4) When his previous role at the Respondent had ended, he had specifically sought an assurance that he could reapply for a role with the Respondent in the future;
- (5) He was applying to work in a different office, the London office, and therefore in a different team from where he had worked previously when employed by the Respondent, namely the Birmingham office. It was therefore potentially a fresh start, despite the circumstances in which his previous employment with the Respondent had ended;

- (6) Although other applicants may have chosen not to apply to the same employer where they had previously failed their probationary period, our assessment of the Claimant's character is that he would not have regarded this as an inevitable impediment to succeeding with his application;
- (7) The geographical distance between the Claimant's home and the London office did not make such a commute impossible. The Claimant's evidence was that, back in 2018, there was a 6am train from Stafford station which arrived in London before 7.15am. In addition, the Claimant had previously been prepared to work a substantial distance from home during the week and commute on a weekly basis. He did this by continuing with his role in Aberdeen even though the family home moved to Cannock.
- (8) Whilst we note the multiplicity of Employment Tribunal claims for other jobs with other employers, and the comments of the two Judges in the cases detailed above, we do not consider it is necessary to infer from those cases and comments that the Claimant was not serious about making this application. The unique or almost unique feature here is that the Claimant was applying for a similar role to that he had previously performed with an employer for whom he had enjoyed working.

66. We accept the Claimant's evidence as to the nature and the extent of the substantial disadvantage caused to him by being required by the Respondent to fill in an online form. By the time he came to apply to the Respondent in August 2018 he found the task too stressful to undertake, given his particular difficulties in expressing his thoughts in writing in the context of previous difficulties he had experienced with online forms. Therefore, although all applicants would be able to opt to see the characters in their chosen password before retyping the same characters, this was a task that the Claimant did not undertake. He was too anxious about the process of completing an online form that he did not embark on the first stage of the process.

67. We do not consider that the Claimant's evidence on this point is undermined by the various documents referred to in the evidence that he had previously completed. He had previously completed the Candidate Information Form with assistance from his partner. He had been able to complete the Early Conciliation aspect of Employment Tribunal Claim Forms by copying and pasting the ACAS Early Conciliation Numbers from the EC Certificates. He gave convincing explanations for why he was able to submit documents at Company's House and sell items through eBay.

Did the Respondent know that the Claimant had a disability and was by reason of that disability liable to be at a substantial disadvantage?

68. The Respondent knew that the Claimant had dyspraxia. It knew this from his previous employment with the Respondent. It also knew this because the Claimant

had referred to it in his CV which had been forwarded at the time of registering his interest in the role.

69. It also knew that as a result of his dyspraxia, he had a difficulty in filling in the online application form. This was a point that the Claimant had made repeatedly during the protracted email exchanges by requesting, by way of alternative, that he be permitted to make an oral application. He had not identified the specific reasons why completing an online application form was a particular difficulty.

Ought the Respondent to have known that the Claimant had a disability and was by reason of that disability liable to be at a substantial disadvantage?

70. If the Respondent wanted further clarification of the reasons why the Claimant found it difficult to complete the online application form, given his dyspraxia, it could ask him to provide more detail by telephone. On one view of the capitalised and bold section of his CV, the Claimant was volunteering to have such a discussion with the Respondent.
71. The caselaw requires employers to make enquiries as to the extent of the difficulties that a disabled person may face, at least in circumstances where the general difficulty has been raised by the Claimant. The onus is on the employer to seek the information rather than on the employee to provide the information. Given his difficulties with written communication, it was not reasonable to expect the Claimant to explain these matters in an email. The Claimant had provided his phone number and suggested convenient times when he could be contacted. As Mrs Parker accepted in the course of oral evidence, with hindsight she should have telephoned the Claimant to find out further information. She had not been directly involved in his previous application or his previous employment to fairly conclude that such a conversation would have been futile.
72. There was no good reason given as to why someone in the HR department or the Talent Recruitment Team could not have spoken to him to find out the particular difficulty he was experiencing with the online application that for whatever reason he may have been reluctant or unable to explain in an email.

What reasonable steps ought the Respondent to have taken to avoid the disadvantage?

73. The Respondent ought to have taken one of two alternative courses of action. Either it ought to have emailed him a log in and a password so he could create an account. At that point he is likely to have been able to populate some of the other boxes on the online application by importing the information from his LinkedIn profile. Alternatively, it ought to have phoned him in order to carry out an oral application, recording his answers on the application form and then sending the completed form to him for him to check. Mrs Parker accepted in her evidence that both steps could have been taken. Indeed she had suggested at the time in her internal email to Ms Tew that the Claimant may need to be give assistance in

completing the application form. When the Claimant applied for a third time in 2019, the Claimant was permitted to make an oral application. There is no evidence that such a step would have been unduly onerous for the Respondent to take.

74. The Respondent has argued that this was not a reasonable adjustment, because the Claimant could have sought assistance from his wife or from some other person with completing the form. The Tribunal notes the views expressed by HHJ Tayler when this case was considered in the EAT (at paragraph 22):

“If an employer, would otherwise be under a duty to make an adjustment, care should be taken before it is assumed that the adjustment is not reasonably required because someone else can make the adjustment. Friends and family may be prepared to help a disabled person, but they should not be expected to step in and make a reasonable adjustment for an employer, or potential employer, to save it from the trouble of having to make the adjustment itself. Similarly, great care should be taken before concluding that a PCP does not place a disabled person at a disadvantage because someone other than the employer, or potential employer, can provide the help that would otherwise have been required as a reasonable adjustment.”

75. We accept the Claimant’s evidence that his wife had agreed to help him with those applications that led to an interview. She had not agreed to help him write his initial applications. As the Claimant said, his wife was not his carer. She had her own responsibilities. Therefore, we do not accept that the possibility that the Claimant could have obtained assistance from others in completing the online application form removes the duty on the Respondent to make reasonable adjustments in these respects.

Did the Respondent fail to take the reasonable adjustments that it should have taken?

76. In its emails, the Respondent did offer to provide the Claimant with assistance in completing the online application form. Such an offer was conditional on the Claimant identifying the specific problems he was experiencing. It did not amount to an unconditional offer to conduct an oral application. The stance adopted by the Respondent in its email correspondence did not amount to taking the required reasonable adjustments.

Conclusion

77. We note the extent to which the Claimant has brought other Tribunal claims where job applications have been unsuccessful. We note too the conclusions which have been reached by Judges in those cases that have reached a Final Hearing.
78. However, we have concluded in this case that the Claimant was genuinely applying for a role he considered he was capable of doing, in circumstances where he had previously been successful in applying for a similar role with the same employer.
79. Therefore, this particular case was not a case where the claim was scandalous or vexatious by the end of the proceedings. In any event, given our conclusions, the

claim has sufficient merit to succeed, and any strike out application must be dismissed.

80. A Remedy Hearing should be listed to consider the remedy the Claimant should be awarded for the discrimination he has established in these proceedings. This will be an award of injury to feelings for not being able to pursue this application, and an assessment of the lost chance of securing the role.

**Employment Judge Gardiner
Dated: 5 March 2022**