



EMPLOYMENT TRIBUNALS

Claimant: Ms O Andrusenko

Respondent: The Phoenix Partnership (Leeds) Ltd

Heard at: Leeds by CVP video link **On:** 7 and 8 July 2022

Before: Employment Judge Shepherd

Members: Mr. M. Taj
Mr. R. Webb

Appearances:

For the claimant: In person

For the respondent: Mr. T. Croxford, QC

Judgment having been given on 8 July 2022 and the written judgment having been sent to the parties on 13 July 2022. Written reasons have been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant represented herself and the respondent was represented by Mr Croxford. The Tribunal heard evidence from:

Olga Andrusenko, the claimant;
Charlotte Knowles, Managing Director.

2. The Tribunal had sight of a bundle of documents which consisted of 154 pages together with some unredacted documents. The Tribunal considered those documents to which it was referred by parties.

3. The issues were identified at a Preliminary Hearing before Employment Judge Deeley on 10 January 2022 subject to some further clarification with regard to the disability and the objective justification.

1. **Disability status**

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Did either of the claimant's conditions of ADHD and Asperger's amount to a physical or mental impairment?

The claimant confirmed that she was not relying on Asperger's as a disability and the respondent accepted that the claimant's ADHD was a disability but it did not have knowledge of that disability.

1.1.2 If so, did either of such conditions have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?

1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4 Would the impairment have had a substantial adverse effect on the claimant's ability to carry out day-to-day activities without the treatment or other measures?

1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2

1.1.5.3 if not, were they likely to recur?

The respondent was not informed of the claimant's ADHD at any time during the process but has now accepted that the claimant was a disabled person by reason of ADHD.

2. **Indirect discrimination (Equality Act 2010 section 19)**

2.1 A "PCP" is a provision, criterion or practice. Did the respondent have any of the following PCPs:

2.1.1 providing incomplete and/or inaccurate information regarding the format of its test for job applicants;

2.1.2 requiring the test for job applicants to be completed within a specific timeframe, unless additional time was requested by the applicant in advance; and/or

2.1.3 requiring the responses to the test to be handwritten.

- 2.2 Did the respondent apply the PCPs to the claimant?
- 2.3 Did the respondent apply the PCP to persons who do not have ADHD or would it have done so?
- 2.4 Did the PCP put persons with ADHD at a particular disadvantage when compared with persons with ADHD in that the claimant states that persons with those conditions:
 - 2.4.1 would find it more difficult to request adjustments to the time or format of the test, given that the claimant states that the respondent provided incomplete and/or inaccurate information provided regarding the format of the test; and/or
 - 2.4.2 would find it more difficult to handwrite their responses to the test, rather than type their responses to the test.
- 2.5 Did the PCP put the claimant at that disadvantage?
- 2.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
 - (a) Operating a practical and cost-effective process; and
 - (b) Testing the skills and capabilities that would be necessary to fulfil the role
- 2.7 The Tribunal will decide in particular:
 - 2.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
 - 2.7.2 could something less discriminatory have been done instead;
 - 2.7.3 how should the needs of the claimant and the respondent be balanced?

4. The respondent is a healthcare technology company and is responsible for more than 50 million electronic patient medical records for the NHS.

5. The claimant applied for a Communications and Marketing role through the respondent's careers' website. The online application was submitted on 17 August 2021. The claimant completed an online form in which she indicated that the University she had studied at was University College London. On the form the degree

subject was completed as English. In response to the section for Degree classification (achieved or predicted) the claimant completed the form as "1st".

6. The answers the claimant gave when providing evidence to the Tribunal were evasive and unclear. She said that she had a degree in English, Humanities and Law. She then said her degree was in Humanities and that she had a 2:1 from a correspondence course from a Ukrainian University.

7. She then said that she was studying for a Master's degree at UCL. She then said that she was doing a pre-Master's or foundation course. The claimant then said that she had obtained a 2:2 in her Master's degree and she didn't have any prediction at the time she completed the form. In her submissions, the claimant referred to having a 2:1 Bachelor's degree in Business Management.

8. The role the claimant applied for carries a salary of £50,000. It is aimed at those with little or no experience, possibly prior to graduation. It is clearly a relatively high salary in those circumstances.

9. The respondent's procedure is that it sets a logic and reasoning test which is carried out in person by the candidate followed by a written assessment.

10. The respondent's website includes Frequently Asked Questions. It is provided that the test cannot be done remotely and that it takes place under controlled conditions to ensure a fair experience for all applicants.

11. It is also provided in the Frequently Asked Questions that the logic and reasoning test is "60 minutes long, however if you require extra time please send an email to..[An address that is identified] advising the date and time of the test you are booked onto and advise how much extra time you require so this can be passed on to the invigilator"

12. The respondent does allow more time for anyone who makes a request. The Tribunal had sight of a number of examples where applicants have been provided with extra time.

13. Requests for extra time to take the test have been provided when the request is made before the applicant sits the assessment. The instructions given to invigilators state that if an applicant makes the invigilator aware on the day extra time will be allowed due to special needs.

14. The claimant attended the respondent's Leeds office for the assessment on 17 September 2021. There were 24 logic and reasoning questions and two writing tasks.

15. The claimant correctly answered 14 of the 24 questions

16. She did not have enough time to finish both the written assignments. She ran out of time. The claimant failed the test and, after the test had been marked, the claimant said that she asked the invigilator for permission to complete the test verbally but was informed that this was not an option. She hadn't finished on time and that was it.

17. The respondent has investigated the allegation that the claimant was refused a request to complete the test verbally but has been unable to identify the person that

the claimant said she spoke to. Photographs of the invigilators at that time have been sent to the claimant but she was unable to identify the invigilator. Charlotte Knowles said that she received no such request but, if she had, she would have allowed the claimant to complete the test verbally even though request was made after the test had been marked.

17 The claimant, in her witness statement, said that being in a hyper-focused state, her ADHD brain needed a few minutes to properly tune in to the creative writing part of the test, the two writing assessments.

18. Charlotte Knowles said that the ability to switch between tasks is an important part of the Communications and Marketing role. The role can be very fast paced and requires someone to be able to move between different tasks quickly whilst working with a range of highly skilled people.

19. The claimant failed the assessment and did not proceed to an interview.

20. The respondent said that the claimant did not contact them after completing the test assessment to ask if she could repeat it. If the claimant had requested to repeat the assessment or had requested more time because she had realised that she needed more time Charlotte Knowles said that she believed this would have been granted as similar requests have been granted before. Charlotte Knowles' evidence was clear, consistent and credible.

21. The claimant said that she was denied feedback or clarification as to whether it was simply non-completion of the second writing assignment that meant she failed. She said that she was politely told that it would not be possible to speak to anyone and that she should hand over her visitor's pass and leave.

22. The respondent does not provide feedback. The recruitment is on a rolling basis which means that applicants can apply for roles at any time. For all available roles in 2021 the respondent received 22,611 applications, 1,104 applicants passed the test, 3,223 applicants failed the test, and 64 job offers were made.

23. With regard to the Communications and Marketing role, the respondent received 3,531 applications, 227 passed the test and written assessment, 561 applicants failed the test, and 4 job offers were made.

24. The respondent no longer provides feedback to unsuccessful candidates as it contends that to contact over 20,000 unsuccessful applicants each year to provide feedback would be too heavy a burden.

The Law

Indirect Discrimination

25. Section 19 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

[Section 23](#) states:

Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Burden of Proof

26. Section 136 of the Equality Act 2010 states:

“(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal.”

27. In the case of **Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27** the Supreme Court stated that the purpose behind indirect discrimination legislation is to protect people with a protected characteristic from suffering disadvantage where an apparently neutral PCP is applied. It is about achieving a level playing field and removing hidden barriers.

28. There is no obligation on the employee to explain the reason why the PCP put the group at a disadvantage when compared to others: it is enough simply to show that there is disadvantage. However, the requirement to justify PCP should not be seen as placing an unreasonable burden on employers.

29. In **Chief Constable of West Midlands Police v Harold [2015] IRLR 790**, the EAT emphasised that justification is an objective evaluation. Further what has to be justified is the outcome, not the process followed. In **Allonby v Accrington and Rossendale College and others [2001] IRLR 364** the Court of Appeal made it clear that:

“once an employment tribunal has concluded that the [PCP] has a disparate impact on a protected group it must carry out a critical evaluation of whether the reasons demonstrate a real need to take the action in question. This should include consideration of whether there was another way to achieve the aim in question.”

30. The EAT emphasised in **Rajaratnam v Care UK Clinical Services Ltd (UKEAT/0435/14)** that it is the rule that needs to be justified and not its application to the individual concerned.

31. The Supreme Court held, in **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** that to be proportionate, a measure must be an appropriate and necessary means of meeting the legitimate aim. Actions will not be proportionate if less discriminatory means to achieve the result were available.

32. The burden of proving objective justification is on the employer. The employer needs to produce cogent evidence that the justification defence is made out. However, the claimant has to show some evidence of disparate impact before the burden of proof placed on the employer.

Submissions

33. The Tribunal has considered the submissions provided by, or on behalf of, each party. The submissions are not set out in detail, but the parties should be assured that the Tribunal has considered all the submissions and the authorities referred to.

Conclusions

34. The Tribunal has considered the identified issues carefully and has reached the following conclusions

Disability status

35. The respondent conceded that the claimant was a disabled person by reason of the condition of ADHD.

36. The medical evidence from the consultant psychiatrist set out that, as a child, the claimant was restless and hyperactive. She was easily distracted, struggled with being structured and organised but could hyperfocus on things she enjoyed. She procrastinates and is easily bored and distracted.

Indirect discrimination (Equality Act 2010 section 19).

37. The PCPs identified at Preliminary Hearing before Employment Judge Deeley were:

Providing incomplete and/or inaccurate information regarding the format of its test for job applicants.

38. The respondent was interested in appointing exceptional candidates and it was necessary for a test to be taken should be difficult for the applicants.

39. The Tribunal does not accept that there was incomplete or inaccurate information regarding the format of the test for job applicants.

48. The job applicants were informed that there would be a logic and reasoning test and a written assessment. Some examples of the logic and reasoning test were provided on the website. It would not be a meaningful test if the candidates will to the questions in advance.

Requiring the test for job applicants to be completed within a specific timeframe, unless additional time was requested by the applicant in advance.

49. In the Frequently Asked Questions it was made clear that if additional time was requested it would be provided. The respondent would provide additional time without inquiring into the reasons.

50. All tests must be completed within a specific timeframe. The timeframe could be extended if the applicant requested that extension in advance without providing a reason or evidence.

51. The claimant did not have enough time to complete the written assignment.

52. The requirement for the test to be completed within a specific timeframe was a PCP applied to the claimant and persons who did not have ADHD.

53. It was designed to be a difficult test and the respondent was seeking to find the best candidates. The claimant said that, after the test had been marked and she was told that she had failed, she requested to complete it verbally.

54. Charlotte Knowles gave clear and credible evidence that requests for extra time will be accommodated without requiring the reason or evidence.

Requiring the responses to the test to be handwritten.

55. There was a requirement that the test be carried out in person and handwritten answers be provided.

56. The Tribunal heard no credible evidence that the PCP would put those with ADHD or the claimant at a particular disadvantage. The Tribunal finds that it was not established that the PCP would have had this effect.

57 In her closing submission to the Tribunal claimant said that:

“ As far as the Test itself, there was no need to jeopardize the chances of neurodiverse applicants, because the alleged aim could be achieved by dividing the Test into two separate ones (L&R and Writing) where the invigilator collects the first part and then provides the applicant with the second part. The difficulty of the tasks could still be increased, but this would not be accompanied by forcible split of focus and the applicant who is neurodiverse would not be nearly as overwhelmed by the competing objectives.”

58. There was no evidence provided to the Tribunal with regard to a particular disadvantage of being overwhelmed by competing objectives and it was not put to the respondent's witness that consideration should be given to dividing the test into two separate parts.

59. The claimant's handwriting was legible and there was no evidence that there was a particular disadvantage to ADHD sufferers. Also, those who did have difficulties with handwriting were given the opportunity to complete the assessment using a laptop.

60. Charlotte Knowles gave clear and credible evidence that an applicant's handwriting is not something that is considered as part of the application.

61. The respondent emphasised that the written assessment and test were difficult, and they were looking for truly exceptional applicants to consider for the roles. The role the claimant applied for required high level written communication skills. There were a large number of applicants and it was necessary for the respondent to provide a difficult test.

62. The logic and reasoning test and handwritten assessments were designed to be challenging to all candidates and there was no evidence that the claimant's disability meant that the claimant was put at a particular disadvantage.

63. The Tribunal is satisfied that the PCPs applied were appropriate and reasonably necessary to achieve the aims of operating a practical and cost-

effective recruitment process and testing the skills and capabilities necessary to fulfil the role.

64. The test was a difficult test in order to recruit those with the skills the respondent required for the role. There was a large number of applicants and the respondent provided a suitable test to reduce the numbers invited to interview. It allows candidates to ask for accommodations which would cover a large range of disabilities. If more time is asked for or a request made to complete the written assessment on a laptop rather than in handwriting it would be allowed.

65. There was no credible evidence that any PCP placed those with ADHD at a particular disadvantage. Indeed, it was submitted on behalf of the respondent that the evidence before the Tribunal was that ADHD sufferers work with extreme focus and, typically, at the last minute and would be, if anything, advantaged.

66. If there had been any disadvantage to the claimant or others with ADHD then the balance would be in the respondent's favour. It was necessary to provide a difficult test.

67. The respondent received a large number of applications for a very high starting salary for which there was strong competition. Approximately 1 in 1,000 applicants and 1 in 200 of those who sat the test received an offer.

68. The respondent had the legitimate aims of operating a practical and cost-effective recruitment process and testing the skills and capabilities necessary to fulfil the role. It carried out the recruiting exercise in an open way and was willing to make adjustments for every candidate who requested them without reasons or evidence being required.

69. There was no particular disadvantage shown in respect of ADHD sufferers or the claimant. The respondent has a built-in adjustment to cover all those who require them. It has done what it reasonably could whilst operating a recruitment process that was necessary to recruit high level applicants. The Tribunal is satisfied that there was a proportionate means of achieving the legitimate aim.

70. In the circumstances, the unanimous judgment of the Tribunal is that the claim of indirect discrimination is not well-founded and is dismissed.

Employment Judge Shepherd
15 August 2022